

1993

# Julia Lee Askew v. Paul Hardman : Petition for Rehearing

Utah Court of Appeals

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930537 CA

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IN THE UTAH COURT OF APPEALS

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JULIA LEE ASKEW,	:	
	:	Appeal No. 930537-CA
Plaintiff and Appellant,	:	
	:	Priority No. 15
vs.	:	
	:	
PAUL HARDMAN,	:	
	:	
Defendant and Appellee.	:	

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PETITION FOR REHEARING

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**FILED**  
Utah Court of Appeals

OCT 25 1994

Marilyn M. Branch  
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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JULIA LEE ASKEW,

Plaintiff and Appellant,

vs.

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## TABLE OF CONTENTS

ARGUMENT	1
I.    THIS COURT MISAPPREHENDED THE STANDARD OF REVIEW AND OVERLOOKED THE UTAH SUPREME COURT’S DECISION IN <u>STATE V. PENA</u> , 869 P.2d 932 (Utah 1994)	1
II.   THIS COURT MISAPPREHENDED THE SUPREME COURT’S DECISION IN <u>GOLD STANDARD V. AMERICAN RESOURCES</u> , 805 P.2d 164 (Utah 1990)	4
III.  THE COURT OVERLOOKED THE FACTS RELIED UPON BY THE TRIAL COURT IN RULING THAT THE CLAIMS FILE WAS PRO- TECTED AS PREPARED IN ANTICIPATION OF LITIGATION.	5
IV.  THE COURT MISAPPREHENDED THE LAW BY FAILING TO CONSIDER WHETHER DOCUMENTS CONTAINING MENTAL IMPRESSIONS OF INSURANCE ADJUSTERS AND DOCUMENTS CREATED AFTER THE DATE THE CLAIM WAS MADE SHOULD ALSO BE PRODUCED	8
V.   THIS COURT MISAPPREHENDED THE BURDEN OF PROVING HARMLESS ERROR	9
VI.  THE COURT MISAPPREHENDED THE IMPACT OF ITS DECI- SION UPON INSURANCE CLAIMS PRACTICES	12
CONCLUSION	15

## TABLE OF AUTHORITIES

### CASE AUTHORITY

<u>Campbell v. State Farm Mut. Auto. Ins. Co.</u> , 840 P.2d 130 (Utah App. 1992) . . . . .	13
<u>Crookston v. Fire Ins. Exch.</u> , 817 P.2d 789 (Utah 1991) . . . . .	12
<u>Dawkins v. Redd Pest Control Co.</u> , 607 So.2d 1232 (Miss. 1992) . . . . .	11, 12
<u>Gold Standard v. American Resources</u> , 805 P.2d 164 (Utah 1990) . . . . .	4, 5, 7, 14
<u>Heidebrink v. Moriwaki</u> , 706 P.2d 212 (Wash. 1985) . . . . .	7
<u>Janicker v. George Washington Univ.</u> , 94 F.R.D. 648 (D.D.C. 1982) . . . . .	14
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994) . . . . .	1-3
<u>Thomas Organ Co. v. Jadranska Slobodna Plovida</u> , 54 F.R.D. 367 (N.D. Ill. 1972) . . . . .	4, 5
<u>Weakee v. Norton</u> , 621 F.2d 1080 (10th Cir. 1980) . . . . .	12
<u>Weitzman v. Blazing Pedals, Inc.</u> , 151 F.R.D. 125 (D. Colo. 1993) . . . . .	15

Defendant Paul Hardman, by and through his counsel of record, respectfully submits the following Petition for Rehearing:

## ARGUMENT

### **I. THIS COURT MISAPPREHENDED THE STANDARD OF REVIEW AND OVERLOOKED THE UTAH SUPREME COURT'S DECISION IN STATE V. PENA, 869 P.2d 932 (Utah 1994) (SEE EXHIBIT "A").**

Defendant respectfully submits that this Court overlooked the Utah Supreme Court's decision in State v. Pena, 869 P.2d 932 (Utah 1994), (which was decided after the briefing in this case), in rendering its opinion and thus misapprehended the appropriate standard of review. In Pena, Chief Justice Zimmerman, writing for a unanimous Court, examined the standard of review to be applied when the trial court has applied a legal principle to the facts before it:

Although the universe of questions presented for review has often been characterized as consisting only of mutually exclusive questions of fact and law, there is really a third category--the application of law to fact or, stated more fully, the determination of whether a given set of facts comes within the reach of a given rule of law. It is **this** determination that is at the heart of the dispute between the parties over the appropriate standard of review for reasonable-suspicion determinations. [In this case Rule 26(b)(3) "anticipation of litigation" vs. ordinary course of business determination].

Id. at 936 (emphasis in original). The Court concluded that in determining the proper standard of appellate review, the Court must consider how much discretion is vested with the trial court:

At this point, we must attempt to determine when the articulated legal rule to be applied to the set of facts--a rule that we establish without deference to the

trial courts--embodies a de facto grant of discretion which permits the trial court to reach one of several possible conclusions about the legal effect of a particular set of facts without risking reversal.

Id. at 937. The extent of discretion varies from a little, requiring a "de novo" review of the trial court's conclusion, to a lot, requiring "broad discretion." The Court compared the spectrum of discretion to a pasture:

The helpful metaphor Professor Rosenberg uses in describing these degrees of discretion is that of a pasture. To the extent that a trial judge's pasture is small because he or she is fenced in closely by the appellate courts and given little room to roam in applying a stated legal principle to facts, the operative standard of review approximates what can be described as "de novo." That is, the appellate court closely and regularly redetermines the legal effect of specific facts. But to the extent that the pasture is large, the trial judge has considerable freedom in applying a legal principle to the facts, freedom to make decisions which appellate judges might not make themselves *ab initio* but will not reverse--in effect, creating the freedom to be wrong without incurring reversal. Only when the trial judge crosses an existing fence or when the appellate court feels comfortable in more closely defining the law by fencing off a part of the pasture previously available does the trial judge's decision exceed the broad discretion granted.

As can be imagined, the real amount of pasture permitted a trial judge will vary depending on the legal issue, although the terminology we use to describe the operative standard of review does not begin to reflect the many shades of this variance. The best we can do is to recognize that such a spectrum of discretion exists and that the closeness of appellate review of the application of law to fact actually runs the entire length of this spectrum.

Pena, 869 P.2d at 937-38. In order to determine the "size of the pasture," the Court set forth three factors for granting trial judges discretion on legal questions:

(i) when the facts to which the legal rule is to be applied are so complex and varying that no rule adequately addressing the relevance of all those facts can be spelled out; (ii) when the situation to which the legal principle is to be

applied is sufficiently new to the courts that appellate judges are unable to anticipate and articulate definitively what factors should be outcome determinative; and (iii) when the trial judge has observed "facts," such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts.

Id. at 938-39.

Such a determination is crucial to this case. If the appropriate standard of review vests broad discretion in the trial court to determine whether a particular document was prepared "in anticipation of litigation," the ruling may be affirmed although the appellate court found error. Pena, 869 P.2d at 937-38. Such "broad discretion" may, as the Court stated, be presumed: "[U]ntil the appellate court has fenced off a particular area of pasture, that is, determined that a particular fact situation does or does not create reasonable suspicion as a matter of law--the trial court has discretion to venture into that area--in other words, to determine whether a given set of facts satisfies the legal standard of reasonable suspicion."

Id. at 940, n.5.

In this case, the Utah Court of Appeals did not state the standard by which it reviewed the trial court's ruling, but the opinion suggests that this Court applied a "de novo" standard of review which provided no discretion to the trial court. In other words, this Court failed to determine whether the rules governing discovery "permit the trial court to reach one of several possible conclusions about the legal effect of a particular set of facts without risking reversal." Id. at 937. Defendant respectfully requests a rehearing to address these issues.



**II. THIS COURT MISAPPREHENDED THE SUPREME COURT'S DECISION IN GOLD STANDARD V. AMERICAN RESOURCES, 805 P.2d 164 (Utah 1990).**

This Court looked for guidance in resolving this case to Gold Standard v. American Resources, 805 P.2d 164 (Utah 1990) (which did not involve a insurer claim file), where the Utah Supreme Court reviewed the decisions of other jurisdictions before setting forth factors to be examined in determining whether a document was created in "anticipation of litigation." The Court considered the "strict approach" that any document "which has not been requested by nor prepared for an attorney nor which otherwise reflects the employment of an attorney's legal expertise must be conclusively presumed to have been made in the ordinary course of business and thus not within the purview of the limited privilege of new Rule 26(b)(3)." Thomas Organ Co. v. Jadranska Slobodna Plovida, 54 F.R.D. 367, 372 (N.D. Ill. 1972) (emphasis added).

However, the Utah Supreme Court rejected this approach and instead created a test in which "attorney involvement is only one factor to be weighed in determining the applicability of the work-product privilege." Gold Standard, 805 P.2d at 169. Rather than focus exclusively upon attorney involvement, the Court counselled that a determination of "whether a document was prepared in anticipation of litigation should focus on the 'primary motivating purpose behind the creation of the document.'" Id.

In its decision, this Court focused solely upon whether an attorney was involved in reaching its conclusions, although, as set forth below, there were additional factors which

were considered by the trial court which were overlooked by this Court. Thus, while this Court concludes that "Utah has only slightly modified the rigid Thomas Organ approach," the decision suggests a return to the "strict approach" of Thomas Organ in which attorney involvement is the sole and exclusive measure of "anticipation of litigation." Defendant respectfully submits that this Court misapprehended and did not follow the Utah Supreme Court's decision in Gold Standard.

**III. THE COURT OVERLOOKED THE FACTS RELIED UPON BY THE TRIAL COURT IN RULING THAT THE CLAIMS FILE WAS PROTECTED AS PREPARED IN ANTICIPATION OF LITIGATION.**

In its decision, the Utah Court of Appeals stated as follows:

Defendant argues only that, in 1986, Utah Farm Bureau's attorney sent a letter instructing its claims agents on how to prepare claim reports in the event of litigation. This fact does not support defendant's argument that the particular documents prepared in this case were prepared at the request of an attorney.

(Opinion, p. 7). In Defendant's brief, and before the trial court, Defendant presented other facts which were overlooked by this Court in rendering its opinion. For example, Defendant presented the testimony of Officer Jerry Monson, who in his report prepared on the morning after the accident stated:

Action Taken: RP [Reporting Party/Hardman] wanted to show R/D [Reporting Deputy] the fence because he's afraid of being suied [sic] for having his horse cause an accident. [Emphasis added]

R. 311. (Utah County Offense Report, attached as Exhibit "F" to Brief and Exhibit "B" to this Petition). It was shortly after meeting with Officer Monson and telling him he was afraid of being sued that Defendant met with insurance adjuster Robert Harmon from Utah Farm Bureau. The reason Defendant met with Officer Monson and adjuster Harmon the morning after the accident was to show them that his fences had been knocked down by trespassers. The officer prepared a report, which was used at trial, evidencing that trespassers knocked down his fence. His insurance adjuster obtained a statement and took photographs. (The photographs were provided based on "substantial need" and used at trial.) Defendant wanted proof that his horse being on the road was not his fault. Why did he need proof? Because he anticipated litigation and was "afraid of being sued [sic]."

Rule 26(b)(3) provides that documents "prepared in anticipation of litigation or for trial **by or for another party or by or for that other party's representative**" are protected. Here, the Court of Appeals concluded that Utah Farm Bureau prepared its file in "the ordinary course of business" while overlooking the fact that the "party," Paul Hardman, did anticipate litigation, as evidenced by his statement to the sheriff (which was before his statement to insurance adjuster Harmon).

Moreover, it is uncontroverted that the Plaintiff was seriously injured in the accident and, at the time the statement to Harmon was given, she was still in a coma. Since Mr. Hardman's horse was on the road, both he and his insurance company anticipated litigation and they were correct in anticipating that Hardman would be sued.

The Court also overlooked the affidavit of Utah Farm Bureau's adjuster, Greg Johnson, and the following concept as set forth by the Supreme Court of Washington:

An insured is contractually obligated to cooperate with the insurance company. Such an obligation creates a reasonable expectation that the contents of statements made by the insured will not be revealed to the opposing party. The insurer, on the other hand, has a contractual obligation to act as the insured's agent and secure an attorney. The insured cannot choose the attorney but can expect the agent to transmit the statement to the attorney so selected. Without an expectation of confidentiality, an insured may be hesitant to disclose everything known. Such non-disclosure could hinder representation by its selected attorney.

Heidebrink v. Moriwaki, 706 P.2d 212, 216 (Wash. 1985).

In Gold Standard, the Utah Supreme Court counselled that courts should look to the "'primary motivating purpose behind the creation of the document.'" Gold Standard, 805 P.2d at 169. As indicated above, the primary purpose behind Mr. Hardman's call to both the Utah County Sheriff and Utah Farm Bureau was that he anticipated being sued as a result of his horses escaping and being involved in a serious accident. Utah Farm Bureau acted upon this fear and prepared its claim file. Defendant respectfully submits that had this Court considered these facts, instead of focusing solely upon attorney involvement, it could have concluded, as both trial judges did, that the statement was given in anticipation of litigation.

**IV. THE COURT MISAPPREHENDED THE LAW BY FAILING TO CONSIDER WHETHER DOCUMENTS CONTAINING MENTAL IMPRESSIONS OF INSURANCE ADJUSTERS AND DOCUMENTS CREATED AFTER THE DATE THE CLAIM WAS MADE SHOULD ALSO BE PRODUCED.**

In its decision, this Court ruled that:

[T]he trial court erred in holding that adjuster Harmon's investigative file was prepared in anticipation of litigation and therefore protected by the work-product doctrine.

However, the Court did not address in its opinion whether certain materials containing the mental impressions of Mr. Harmon and other adjusters must also be produced. The Utah Supreme Court stated in Gold Standard: "[I]f the documents convey the mental impressions, conclusions, opinions or legal theories of an attorney or party, the documents will be afforded heightened protection as 'opinion work product.'" Gold Standard, 805 P.2d at 168. Moreover, the claim file contains sixty documents which were prepared from the date of the accident until six months after suit was filed. The Court's opinion contains no decision regarding where along that time continuum the documents ceased being prepared in the ordinary course of business and began being prepared in anticipation of litigation.

Attached as Exhibit "A" to the Brief and Exhibit "C" to this Petition is the Privileged Log of the Utah Farm Bureau File. There are several examples of documents which contain the mental impressions of the adjuster, including status reports, (entries 16-19 and 22), and Reserve Sheets (entries 11 and 14). As indicated in the initial brief, the Reserve Sheets contain the adjuster's estimate of what the claim could potentially be worth. The status

reports contain the mental impressions of the adjuster as to the respective liability of the parties. Obviously, Defendant submits that it would be patently unfair for the Plaintiff to have the benefit of the insurer's mental impressions regarding the case when the Defendant has no equivalent benefit. Such is contrary to what Rule 26(b)(3) was intended to protect.

Moreover, on January 17, 1991, Mark James, counsel for Plaintiff wrote a letter to Utah Farm Bureau advising it of his representation and the claim he was making on behalf of his client. Certainly, at that time, Utah Farm Bureau had cause to anticipate litigation and any documents provided after that period were produced in anticipation of litigation. However, the Court's opinion fails to address these issues or provide guidance to the trial court in ruling which of the sixty documents contained in the insurer claim file should be produced. The decision only refers to the "investigative file" and thus, does not resolve all issues presented for appeal.

**V. THIS COURT MISAPPREHENDED THE BURDEN OF PROVING HARMLESS ERROR.**

In its decision, the Court departed from general principles of "harmless error" and held that:

[T]he burden of demonstrating that the erroneous denial of a discovery request was not prejudicial must therefore rest with the party resisting discovery. Id.

However, at the same time, the Court states:

[I]n some cases, a trial court might examine documents in camera to determine the import of their contents. However, this approach is unsatisfactory in this context. We are concerned not only with whether the requested information on its face might change the outcome of the trial, but also with what impact discovery of that information might have had on trial counsel's overall preparation and conduct in the trial. Only in the most clear-cut cases could any judge, without the benefit of counsel's thinking and strategy, make a determination as to whether information in the documents could aid the requesting party.

(Opinion, p. 8, n.1).

Thus, while on the one hand, the Court has placed the burden of demonstrating that the error was harmless upon the party resisting discovery, the Court on the other hand has eliminated any means of meeting that burden by stating that a Court cannot presume "counsel's thinking and strategy." In other words, the Court has imposed a burden upon Defendant but removed any means of meeting that burden, in effect ruling that any erroneous denial of a discovery request is reversible error per se.

Moreover, Defendant was not aware nor advised that this Court viewed him as having the burden of proving "harmless error" until the Court of Appeals ruled in this case. The Plaintiff did not dispute in her memorandum that she maintained the burden of proving harmless error, and there is no Utah case authority suggesting that the party resisting discovery has the burden of proving harmless error.

Defendant respectfully requests a rehearing so that he may have the opportunity to meet this burden. Towards that end, Defendant has attached as Exhibit "D" a copy of his

statement to his insurance adjuster Harmon which this Court ordered produced. Attached as Exhibit "E" is a copy of a chart comparing what Mr. Hardman said in the statement with Mr. Hardman's trial and deposition testimony. A comparison of Mr. Hardman's statement to his deposition and trial testimony reflects that it is, in all material respects, the same. Hence, a failure to produce it was harmless error.

Arguably, this Court has acted as a finder of fact in ruling with respect to the contents of the unproduced statement. As the finder of fact, this Court should: (1) review the statement to determine if the trial court's error was harmless; and (2) invite Plaintiff's counsel to file a response to this Petition outlining how the contents of the statement constitute prejudicial error and how production of this statement at an earlier time would have altered his trial strategy or preparation. On the other hand, if this trial court is not the finder of fact, and if fairness and justice are given full consideration, this Court should remand this matter to the trial court for a determination as to whether or not the contents of the statement would have made a difference in the jury verdict before a ten day trial is ordered.

In its final footnote, this Court rejected an approach which would renew remanding the case to the district court for a determination of whether prejudice resulted, suggesting there was a lack of authority for such a procedure. However, this approach was used by the Supreme Court of Mississippi in Dawkins v. Redd Pest Control Co., 607 So.2d 1232 (Miss. 1992), wherein the Court held:



We conclude that the trial court abused its discretion in failing to compel an answer to the Dawkinses' Interrogatory Number 4. As noted by another court in another jurisdiction:

Erroneous denial of a discovery is ordinarily prejudicial in the absence of circumstances showing it is harmless. Here, since we cannot determine from the record whether the requested documents might have changed the result in this trial, we cannot say the error was harmless.

Weakee v. Norton, 621 F.2d 1080, 1083 (10th Cir. 1980). Accordingly, we reverse and remand for further proceedings during which the Dawkinses may have the discovery requested. **We are, of course, not in a position to determine whether the information to be developed will warrant a new trial as to the issues of fraud, gross negligence, and punitive damages, and we, therefore, leave that determination to the sound discretion of the trial court in accordance with our rules of civil procedure.**

Id. at 1236 (emphasis added). This is consistent with the sound rule developed in this jurisdiction which provides that the trial court exercises discretion in determining whether an error is prejudicial, thereby warranting a new trial. Crookston v. Fire Ins. Exch., 817 P.2d 789, 799 (Utah 1991). Defendant respectfully submits that the appropriate procedure would remand this matter to the trial court for a factual determination of whether the error was harmless.

## **VI. THE COURT MISAPPREHENDED THE IMPACT OF ITS DECISION UPON INSURANCE CLAIMS PRACTICES.**

Defendant respectfully contends that this Court misapprehended the impact its decision would have upon the insurance industry and claim procedures. This Court (in a

panel composed of Judge Orme, Judge Bench, and Judge Greenwood) has imposed upon insurers in "third party" cases such as this a "fiduciary duty to its insured to protect the insured's interest as zealously as it would its own." Campbell v. State Farm Mut. Auto. Ins. Co., 840 P.2d 130, 138 (Utah App. 1992). This Court has also held that "an insurer acts an agent for the insured with respect to the disputed claim" because "the insured is wholly dependent upon the insurer to see that the insured's interests are protected." Id. at 138.

However, with this decision, this Court holds that despite this fiduciary obligation, the insurer has a duty to produce its claim file. This creates a fundamental inconsistency whereby, on the one hand, the insurer has a duty to zealously investigate the claim to fulfill its fiduciary obligation, but on the other hand it must do so with the full knowledge that any investigation conducted by the "agent" (in this case, Utah Farm Bureau) will be given to and used by the opposition for the express purpose of destroying the "principal" (in this case, Hardman). This Court's decision makes the "fiduciary" (Utah Farm Bureau) the instrument or "agent" of the plaintiff (Askew).

The drafters of Rule 26(b)(3) recognized this fiduciary duty in protecting documents prepared by or for a party's representative "including his attorney, consultant, surety, indemnitor, **insurer**, or agent)." The 1970 revisions to this Rule, which added this language, reflected this Court's own holdings that an insurer has duties similar to that of an attorney--both are "fiduciaries" whose duty it is to "zealously defend the interests of the" client or insured. However, this Court denies to the insurer the same benefits which it provides to the

attorney as a matter of right. If an attorney "fiduciary" takes a statement to protect his client or prepare his case, it is conclusively presumed under Gold Standard and this Court's decision to be taken in "anticipation of litigation." However, if an insurer "fiduciary" takes the identical statement, it is not.

These considerations were not addressed in Gold Standard because that case dealt with an "in house" investigative report rather than an insurer's claim file. However, a case relied upon by the Court in Gold Standard examined the distinction between in-house files and the role of the insurer. Janicker v. George Washington Univ., 94 F.R.D. 648 (D.D.C. 1982). There, the Court held that an in-house memorandum prepared regarding an accident was not protected because it was prepared in the ordinary course of business. However, "the investigative file of the Hartford Insurance Company would appear to have been prepared in anticipation of claims, which if denied, would have clearly led to suits and litigation." Id. at 651.

After the briefing in this case, the District Court of Colorado considered whether a claim file prepared with respect to a third-party claim (liability insurance) was protected. The Court noted that "liability insurance is nothing more than litigation insurance" and held as follows:

For this reason, it is logical to conclude that, while claims generated in relation to first party claims are made in the ordinary course of business and are discoverable, files generated during the investigation of third party claims are made in anticipation of litigation and are not discoverable.

Weitzman v. Blazing Pedals, Inc., 151 F.R.D. 125, 126 (D. Colo. 1993).

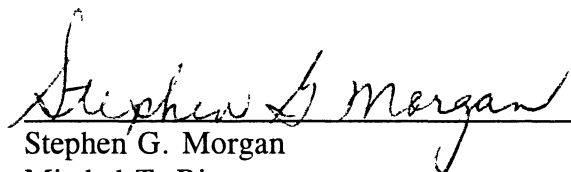
Defendant respectfully requests that this Court reconsider its decision in light of the impact which such a holding will have upon insurance claim practices and the duties owed by an insurer to an insured. The impact of this Court's decision is already beginning to be realized. Attached as Exhibit "F" is a copy of a Request for Production of Documents served in a civil case pending in the Third Circuit Court for Salt Lake County. This Court's decision will create a similar situation in almost all civil cases, but this Court's decision provides little analysis which would allow the trial court to resolve such a discovery request.

### CONCLUSION

On the basis of the foregoing, Defendant respectfully requests a rehearing.

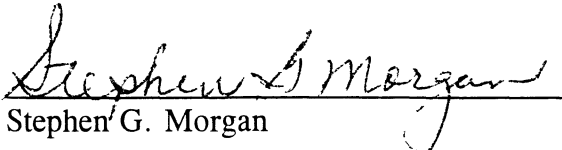
DATED this 25 day of October, 1994.

MORGAN & HANSEN


  
\_\_\_\_\_  
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**CERTIFICATE OF COUNSEL FOR PETITIONER**

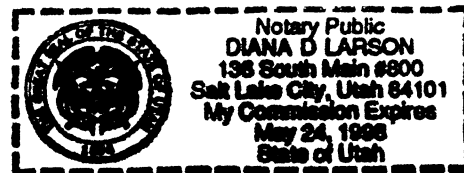
I, Stephen G. Morgan, hereby certify that the foregoing Petition for Rehearing is presented in good faith and is not filed for delay.

  
Stephen G. Morgan

Subscribed and sworn to before me this 25 day of October, 1994.

  
NOTARY PUBLIC

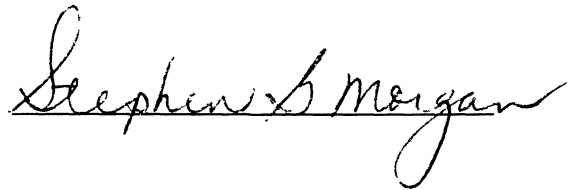
Residing at: SLC, UT  
My Commission Expires: 5/24/98



CERTIFICATE OF MAILING

I certify that on this 25 day of October, 1994, I caused a true and correct copy of the foregoing PETITION FOR REHEARING to be mailed via first-class mail, postage prepaid, to the following:

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Gary A. Dodge  
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Handwritten signature of Stephen B. Morgan in cursive script.

Tab A

Affirmed as to B & B; reversed and remanded as to Curtis.

HALL, C.J., HOWE, Associate C.J., and DURHAM and ZIMMERMAN, JJ., concur.



STATE of Utah, Plaintiff and Appellee,

v.

Jose Carlos PENA, Defendant  
and Appellant.

No. 930101.

Supreme Court of Utah.

Feb. 15, 1994.

Defendant conditionally pled guilty in the Third District Court, Salt Lake County, Homer F. Wilkinson, J., to attempted unlawful possession of controlled substance, after denial of his motions to suppress evidence. Defendant appealed. The Court of Appeals certified case to the Supreme Court. The Supreme Court, Zimmerman, C.J., held that: (1) police stop of automobile in which defendant was passenger was supported by reasonable suspicion, despite fact that police had not beforehand interviewed store clerk who reported robbery to assure that crime had taken place; (2) defendant effectively waived his rights when police read *Miranda* warnings to him; and (3) strip search of defendant at jail after his arrest was supported by reasonable suspicion that defendant was carrying drugs.

Affirmed.

Howe, J., concurred in result.

#### 1. Criminal Law Ⓒ1158(1)

For purposes of determining appellate court's standard of review of trial court ruling, "factual questions" are generally regarded as entailing the empirical, such as things,

events, actions, or conditions happening, existing, or taking place, as well as the subjective, such as state of mind.

See publication Words and Phrases for other judicial constructions and definitions.

#### 2. Criminal Law Ⓒ1134(3)

For purposes of determining appellate court's standard of review of trial court ruling, "legal determinations" are defined as those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances.

See publication Words and Phrases for other judicial constructions and definitions.

#### 3. Criminal Law Ⓒ1158(1)

Trial courts are given primary responsibility for making determinations of fact.

#### 4. Criminal Law Ⓒ1158(1)

Findings of fact are reviewed by appellate court under clearly erroneous standard.

#### 5. Criminal Law Ⓒ1158(1)

For reviewing court to find clear error in trial court's findings of fact, it must decide that findings are not adequately supported by record, resolving all disputes in evidence in light most favorable to trial court's determination.

#### 6. Criminal Law Ⓒ1159.4(2)

Trial judge is considered to be in best position to assess credibility of witnesses and to derive sense of proceeding as a whole, something appellate court cannot hope to garner from cold record.

#### 7. Criminal Law Ⓒ1134(3)

Appellate review of trial court's determination of law is usually characterized by term "correctness."

#### 8. Criminal Law Ⓒ1134(3)

For purposes of appellate review of trial court's determination of law, "correctness" means that appellate court decides matter for itself and does not defer in any degree to trial judge's determination of law.

See publication Words and Phrases for other judicial constructions and definitions.



9. Criminal Law ⇨1134(3)

In the abstract, effect of given set of facts is question of law and, thus, one on which appellate court owes no deference to trial court's determination.

10. Criminal Law ⇨1134(3)

Proper standard of review to be applied to trial court determination of whether specific set of facts gives rise to reasonable suspicion so as to support police stop is determination of law and is reviewable nondeferentially for correctness, as opposed to being fact determination reviewable for clear error. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14.

11. Criminal Law ⇨1134(3)

Legal standard for reasonable suspicion to support police stop is standard that conveys measure of discretion to trial judge when applying standard to given set of facts. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14.

12. Criminal Law ⇨1134(3)

Sufficiently careful appellate review of trial court's application of standard of reasonable suspicion to support police stop is necessary to assure that purposes of reasonable suspicion requirement are served. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14.

13. Arrest ⇨63.5(6)

Police stop of automobile in which defendant was passenger was supported by reasonable suspicion, despite fact that police had not beforehand interviewed store clerk who reported robbery to assure that crime had taken place, where dispatched report gave officer sufficient information for him to form reasonable suspicion that defendant or driver of automobile had committed crime. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14.

14. Criminal Law ⇨412.2(5)

Defendant effectively waived his rights when police read *Miranda* warnings to him, despite defendant's contention that he did not fully understand English, as trial court found that defendant had no problem understanding English.

15. Criminal Law ⇨412.2(5)

Waiver of *Miranda* rights may be inferred from defendant's actions and words, and is based on totality of the circumstances.

16. Criminal Law ⇨1134(3)

Supreme Court reviews for correctness trial court's legal conclusion of defendant's valid waiver of rights upon being read *Miranda* warnings.

17. Criminal Law ⇨1134(3)

Standard of appellate review of trial court's legal conclusion of defendant's valid waiver of rights upon being read *Miranda* warnings grants measure of discretion to trial court because of variability of factual settings.

18. Arrest ⇨63.4(15)

Police officers had probable cause to arrest defendant for giving false personal information to police officer; upon valid police stop of automobile in which defendant was passenger, defendant gave name as his own that he was unable to spell on two occasions, and no arrest record was found by dispatcher under name given by defendant, despite officer's recollection that defendant had recently been arrested. U.C.A.1953, 76-8-507; U.S.C.A. Const.Amend. 4.

19. Arrest ⇨71.1(9)

Strip search of defendant at jail after his arrest for giving false personal information to police officer was supported by reasonable suspicion that defendant was carrying drugs and, thus, search did not violate Fourth Amendment; police officer knew that defendant had previously been arrested for drug offense, and officer had observed defendant with his handcuffed hands in back of his pants as though attempting to conceal something. U.C.A.1953, 76-8-507; U.S.C.A. Const.Amend. 4.

20. Criminal Law ⇨1031(1)

Because he failed to raise it at suppression hearing prior to his conditional guilty plea, defendant was precluded from arguing on appeal that arresting officers exceeded permissible scope of interference.

R. Paul Van Dam, Atty. Gen. and David B. Thompson, Asst. Atty. Gen., Salt Lake City, for plaintiff.

Lisa J. Remal and Ronald S. Fujino, Salt Lake City, for defendant.

ZIMMERMAN, Chief Justice:

Jose Carlos Pena appeals the trial court's denial of several motions to suppress evidence prior to his guilty plea for attempted unlawful possession of a controlled substance, a class A misdemeanor. Utah Code Ann. § 58-37-8(2)(a)(i), (7). Pena raises four claims of error regarding the trial court's evidentiary rulings: (i) The initial stop by police was not supported by reasonable suspicion; (ii) Pena did not voluntarily waive his *Miranda* rights; (iii) the misdemeanor arrest was a pretext for the strip search; and (iv) the strip search that produced the critical evidence was unlawful. This case was certified to this court by the Utah Court of Appeals under rule 43 of the Utah Rules of Appellate Procedure. We affirm.

On April 10, 1991, the Salt Lake City Police Department received a call from a 7-Eleven clerk reporting a theft of prophylactics by a Hispanic male. A description of the suspect and the vehicle in which he was riding, including the license number, was broadcast. Shortly thereafter, Officer Dale Bench sighted the suspect vehicle and pulled it over. The vehicle contained the driver and one passenger. The passenger was later identified as defendant Pena.

A second officer, Officer Buckholts, arrived to assist Officer Bench, and the suspects were then asked to step out of the car. Pena apparently matched the description of the theft suspect. A third officer, Officer Stevens, arrived and recognized Pena as having recently been arrested for a drug offense. Officer Stevens could not remember Pena's name. Pena, who had no identification, told police his name was Marcello Flores. However, on two occasions, he was unable to spell the last name correctly, giving police the spelling M-a-r-c-e-l-l-o F-o-s-e-s.

1. Salt Lake City Police Department policy allows officers to issue citations for certain misdemeanors. However, identification or some other

Pena's inability to spell "Flores" led police to suspect that he was lying about his identity. Officer Buckholts, who knew that the prior drug arrest would be entered on the police computer, requested that a dispatcher search the records for the arrest under the name Marcello Flores. No record was found. The officers then arrested Pena for giving false personal information to an officer, a misdemeanor.<sup>1</sup> See Utah Code Ann. § 76-8-507.

While transporting Pena to jail, Officer Buckholts saw Pena "moving around quite a bit in the seat, . . . putting his [handcuffed] hands down the back of his pants . . . , [and] trying to move them around to the front." These actions led Buckholts to believe that Pena was concealing narcotics. When they arrived at the jail, Buckholts requested that Pena be strip searched. During that search, jail personnel discovered cocaine.

Pena was charged with unlawful possession of a controlled substance, a third degree felony under section 58-37-8(2)(a)(i), and with giving false personal information to a peace officer, a class C misdemeanor under section 76-8-507. Pena moved to suppress statements he made prior to the arrest as well as to suppress the cocaine. He argued that the police violated his rights under the Fourth and Fifth Amendments to the United States Constitution and article 1, sections 12 and 14 of the Utah Constitution. The trial court denied the motions. Pena then entered, and the court accepted, a conditional guilty plea to the lesser offense of attempted unlawful possession of a controlled substance, a class A misdemeanor. The conditional plea preserved Pena's right to appeal the suppression ruling. He appealed to the Utah Court of Appeals, and the matter was argued to a panel of the court. That court certified the case to us before decision, pursuant to rule 43 of the Utah Rules of Appellate Procedure.

We first address the proper standard of review for determinations of reasonable suspicion, which appears to be the reason for the

means of determining an individual's name and birth date is required before a citation may be issued.

court of appeals' certification of this case.<sup>2</sup> The State argues that we should apply the clearly erroneous standard because reasonable-suspicion determinations are fact intensive and clearly erroneous is the standard that we have suggested is appropriate for fact questions. Pena, on the other hand, argues that the standard of review should be correctness because reasonable suspicion is a legal conclusion. Both parties find support for their contentions in various of our opinions and those of the court of appeals.

We recognize that this court and the court of appeals have created some confusion with regard to standards of review, perhaps in part because this court has not focused much attention on the articulation of those standards until recently, when they assumed an increased level of importance. See *State v. Thurman*, 846 P.2d 1256, 1268-69 (Utah 1993). In *State v. Mendoza*, we reviewed a reasonable-suspicion determination regarding an investigatory stop under a clearly erroneous standard, upholding the trial court's ruling. 748 P.2d 181, 183 (Utah 1987). However, in *State v. Ramirez*, we suggested that all applications of law to findings of fact that produce conclusions of law are reviewed under a nondeferential standard, i.e., for correctness. 817 P.2d 774, 781-32 (Utah 1991). Until recently, the court of appeals tended to follow the language we used in *Mendoza*, concluding that the issue was one of fact, because the deferential standard of review had been used.<sup>3</sup> See *State v. Leonard*, 825 P.2d 664, 667-68 (Utah Ct.App. 1991), *cert. denied*, 843 P.2d 1042 (Utah 1992); *State v. Robinson*, 797 P.2d 431, 435 (Utah Ct.App.1990); *State v. Talbot*, 792 P.2d

489, 493 (Utah Ct.App.1990); *State v. Sery*, 758 P.2d 935, 941-42 (Utah Ct.App.1988). In *State v. Munsen*, however, the court of appeals applied a correction-of-error standard in reviewing a reasonable-suspicion determination. 821 P.2d 13, 14-15 (Utah Ct.App. 1991), *cert. denied*, 843 P.2d 516 (Utah 1992). We endeavored to clarify this matter generally in *Thurman*, but did not specifically address the standard of review for reasonable suspicion in that case. 846 P.2d at 1270 n. 11.

[1, 2] Determination of the proper standard of review requires a brief discussion which we hope will bring some clarity to discussions of the issue. At the most basic level, two different types of questions are presented to a trial court: questions of law and questions of fact. Factual questions are generally regarded as entailing the empirical, such as things, events, actions, or conditions happening, existing, or taking place, as well as the subjective, such as state of mind. See Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 Marq.L.Rev. 231, 236 (1991) [hereinafter Hofer]. Legal determinations, on the other hand, are defined as those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances. *Id.*

[3-6] Trial courts are given primary responsibility for making determinations of fact. Findings of fact are reviewed by an appellate court under the clearly erroneous standard. For a reviewing court to find clear error, it must decide that the factual

. Counsel for both parties tell us that when this case was argued before the court of appeals, the standard of review issue was the subject of much discussion. From that fact and from the fact that the case seems otherwise unexceptional, we assume that the standard of review is the reason for the certification. For that reason, we treat the issue in some depth, although how it is decided may not be outcome determinative.

In the future, it would be of assistance to this court if, when the court of appeals certifies a case to us under rule 43, it would include a statement of reasons so that we can be sure we address the issues it deems important.

In retrospect, it is not clear whether *Mendoza* meant that the reasonable-suspicion determina-

tion was one of fact, which would clearly be wrong, or whether it meant that this issue is an application of law to fact upon which a trial court should be given some discretion and the "clearly erroneous" language was used to suggest that fact. Such a use of the term "clearly erroneous" to refer to a standard of review for the application of law to fact, although technically incorrect and potentially quite confusing, is not uncommon. See Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S.Cal.L.Rev. 235, 236-37 (1991). In any event, the result in *Mendoza* would not have been different if a de novo standard had been applied.

findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination. See *Wessel v. Erickson Landscaping Co.*, 711 P.2d 250, 252 (Utah 1985); see also *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). This standard is highly deferential to the trial court because it is before that court that the witnesses and parties appear and the evidence is adduced. The judge of that court is therefore considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record. *In re J. Children*, 664 P.2d 1158, 1161 (Utah 1983).

[7,8] 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. Deli*, 861 P.2d 431, 433 (Utah 1993); see *Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1383 (Utah 1993). This is because appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction. Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn.L.Rev. 751, 779 (1957); see *Thurman*, 846 P.2d at 1266. In other words, one can visualize the traditional standard-of-review scheme as a continuum of deference anchored at either end by the clearly erroneous and correction-of-error standards, which correspond with whether the issue is characterized as one of fact or of law.

The parties here have characterized the standard-of-review question before us in terms of this fact/law distinction and argue the issue as though the options were metaphorically black and white—one option being "clearly erroneous" and the other "correct-

ness," with the first requiring very broad deference to the trial court and the second none. It is common for parties to characterize the standard-of-review debate in such a polarized manner. Steven A. Childress, *A Standards of Review Primer: Federal Civil Appeals*, 125 F.R.D. 319, 328 (1989); see Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S.Cal.L.Rev. 235, 239–45 (1991). However, we think that these distinctions tend to obscure the real issues. Although the universe of questions presented for review has often been characterized as consisting only of mutually exclusive questions of fact or law, there is really a third category—the application of law to fact or, stated more fully, the determination of whether a given set of facts comes within the reach of a given rule of law. It is *this* determination that is at the heart of the dispute between the parties over the appropriate standard of review for reasonable-suspicion determinations. And it is a dispute with real consequences.

Although implicitly recognizing this fact-to-law category of issues, the parties act as though there are only two possible standards of review—correctness and clearly erroneous. The State would like us to defer to a trial judge's determination that on a particular set of facts reasonable suspicion was present, thus raising a very substantial hurdle to one challenging such a trial court determination. On the other hand, Pena would like the opportunity to convince an appellate court that the trial judge's factual findings do not satisfy the legal standard for reasonable suspicion. He wants us to make this decision without deferring at all to the trial judge on the application of the legal standard to the facts: in other words, to address the matter entirely *de novo* under a correctness standard.

[9] This third category of determinations raises thorny issues. In the abstract, the effect of a given set of facts is a question of law and, therefore, one on which an appellate court owes no deference to a trial court's determination. In recognition of this fact, the standard of review for such determinations is termed one of "correctness." This is

the message in *Ramirez*, 817 P.2d at 781–82, and in *Thurman*, 846 P.2d at 1270 n. 11, and it contradicts the State's claim that a clearly erroneous standard of review is appropriate here. To this degree, Pena is correct as to the stated standard of review.

Nonetheless, the critical question, and one of some subtlety, arises only after we have said that an issue is a question of law and no deference is owed the trial court. At this point, we must attempt to determine when the articulated legal rule to be applied to a set of facts—a rule that we establish without deference to the trial courts—embodies a de facto grant of discretion which permits the trial court to reach one of several possible conclusions about the legal effect of a particular set of facts without risking reversal. This is really the point of the debate before us. Put in terms of this case, does the legal standard of reasonable suspicion grant any discretion to the trial judge in applying that standard to a set of facts? We think it does. How much? Any answer requires a brief discussion of the discretion that may be given trial judges to determine the application of stated legal principles to facts.

As stated earlier, it is our role as an appellate court to define what the law is, and we never defer to any degree to a trial court on that count. That statement does not, however, tell us much about how closely we should scrutinize the application of a statement of legal principle to a specific set of facts. Yet this is a critical question, for at bottom, what a legal principle means in reality can often be determined only by considering how its general terms are given sharp definition through their application to a series of specific fact situations. See Hofer at 14. Determining what the law is actually involves an inductive process as much as a deductive one. The governing legal standard is often derived by abstraction from specific applications as it is defined in the abstract and then applied to specific situations. But while we generally consider de novo a trial court's statement of the legal rule, we often review with far less rigor the court's determination of the legal consequences of facts. The question before us today is whether we can derive any principles to de-

termine when such scrutiny should be close and when it should not and what those principles tell us about reviewing a finding of reasonable suspicion.

We find much useful analysis on the rather arcane topic of the degree of discretion to be accorded a trial court's application of legal propositions to facts in an excellent article by Professor Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 Syracuse L.Rev. 635 (1971) [hereinafter Rosenberg]. Professor Rosenberg describes the spectrum of discretion that may be granted to a trial judge on questions of law as running from "correctness" to "abuse of discretion." However, we decline to use this terminology because in Utah, we have used the term "correctness" to refer to the concept that an appellate court need not defer to a trial court in the determination of what the law is, including the legal consequences of a particular set of facts, and we think that the term "abuse of discretion" has no tight meaning. Compare *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991) (applying abuse-of-discretion standard for judgment notwithstanding the verdict) with *State v. Hamilton*, 827 P.2d 232, 239–40 (Utah 1992) (abuse-of-discretion standard for rule 403 rulings). But if the terminology is altered to fit our conceptual framework by labeling the spectrum of discretion in functional terms, running from "de novo" on the one hand to "broad discretion" on the other, Professor Rosenberg's discussion is directly pertinent to the questions before us.

The helpful metaphor Professor Rosenberg uses in describing these degrees of discretion is that of a pasture. To the extent that a trial judge's pasture is small because he or she is fenced in closely by the appellate courts and given little room to roam in applying a stated legal principle to facts, the operative standard of review approximates what can be described as "de novo." That is, the appellate court closely and regularly redetermines the legal effect of specific facts. But to the extent that the pasture is large, the trial judge has considerable freedom in applying a legal principle to the facts, freedom to make decisions which appellate judges might not make themselves ab initio but will

not reverse—in effect, creating the freedom to be wrong without incurring reversal. Only when the trial judge crosses an existing fence or when the appellate court feels comfortable in more closely defining the law by fencing off a part of the pasture previously available does the trial judge's decision exceed the broad discretion granted.

As can be imagined, the real amount of pasture permitted a trial judge will vary depending on the legal issue, although the terminology we use to describe the operative standard of review does not begin to reflect the many shades of this variance. The best we can do is to recognize that such a spectrum of discretion exists and that the closeness of appellate review of the application of law to fact actually runs the entire length of this spectrum.

Our case law provides some examples of legal issues that can be placed at points along this spectrum of discretion, although we have never spoken of what we are doing in quite these terms. At the extreme end of the discretion spectrum would be a decision by the trial court to grant or deny a new trial based on insufficiency of the evidence. *See Hansen v. Stewart*, 761 P.2d 14 (Utah 1988); *see also* Utah R.Civ.P. 50(d). In reviewing this sort of decision, we give the trial court a great deal of pasture. *See Crookston*, 817 P.2d at 799; *Hansen*, 761 P.2d at 17. Also toward the broad end of the spectrum is the decision to admit or exclude evidence under Utah Rule of Evidence 403. *See Hamilton*, 827 P.2d at 239–40. Other rulings on the admission of evidence also generally entail a good deal of discretion. *See, e.g., Russell v. Russell*, 212 Utah 12, 852 P.2d 997, 999 (1993); *State v. Archuleta*, 850 P.2d 1232, 1241 (Utah), *cert. denied*, — U.S. —, 114 S.Ct. 476, 126 L.Ed.2d 427 (1993).

On the other hand, there are situations in which we narrow the pasture considerably for policy reasons. One such example involves consent to a search that would otherwise violate the Fourth Amendment. *See Thurman*, 846 P.2d at 1269–71. Finally, at the de novo end of the spectrum are issues such as whether a “municipal function” has been delegated to a state commission in violation of article VI, section 28 of the Utah

Constitution. *See Utah Assoc. Mun. Power Sys. v. Public Serv. Comm'n*, 789 P.2d 298, 301–02 (Utah 1990); *City of West Jordan v. State Retirement Bd.*, 767 P.2d 530, 533 (Utah 1988).

Occasionally, we expand or contract the size of the pasture in response to things we learn over time. A recent example is evidenced by our decision in *Soter's, Inc. v. Deseret Federal Savings & Loan Ass'n*, 857 P.2d 935 (Utah 1993). In a series of earlier cases, we had ruled that waiver was or was not present as a matter of law on the specific facts of those cases. This entailed fairly close scrutiny of the application of the general stated waiver principles to particular fact situations. In the course of those decisions, we attempted to incorporate into the statement of the law of waiver those facts that led us to decide each of those cases as we did. *See Hunter v. Hunter*, 669 P.2d 430, 432 (Utah 1983). Over time, we appeared to have developed hopelessly inconsistent elaborations on the basic statement of waiver principles. In *Soter's*, we acknowledged that fact, as well as the futility of attempting such elaborations. 857 P.2d at 939. We then stripped the statement of the law back to its most basic form and told the trial courts to apply it. *Id.* at 942. The net effect was to say that waiver is a highly fact-dependent question, one that we cannot profitably review de novo in every case because we cannot hope to work out a coherent statement of the law through a course of such decisions. In terms of our present discussion, *Soter's* increased the size of the trial court's pasture because we found ourselves unable to describe the shape of the smaller one with adequate clarity.

All the foregoing helps in understanding the reality that underlies the rather wooden characterization of standards of review which we often use when discussing the application of law to facts. And that reality suggests criteria for determining when some degree of deference may be given a trial court's application of a particular principle of law to specific facts. A number of reasons usually given for granting trial judges discretion on legal questions are canvassed by Professor Rosenberg. He finds three reasons that are

useful in discerning when some degree of discretion ought to be left to a trial court: (i) when the facts to which the legal rule is to be applied are so complex and varying that no rule adequately addressing the relevance of all these facts can be spelled out; (ii) when the situation to which the legal principle is to be applied is sufficiently new to the courts that appellate judges are unable to anticipate and articulate definitively what factors should be outcome determinative; and (iii) when the trial judge has observed "facts," such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts. Rosenberg at 662-63.

Of course, there are countervailing policy reasons for not granting broad discretion to a trial court. For example, in *Thurman*, we found that while there were varying fact patterns that would be relevant to determinations of voluntariness of consent, they were not so unmanageable in their variety as to outweigh the interest in having uniform

legal rules regarding consent to search, given the substantial Fourth Amendment interests lost as a result of such consents. *Thurman*, 846 P.2d at 1271.

[10-12] With these considerations in mind, we move on to the question of the standard of review appropriate to reasonable-suspicion determinations. We conclude that the proper standard of review to be applied to a trial court determination of whether a specific set of facts gives rise to reasonable suspicion is a determination of law and is reviewable nondeferentially for correctness, as opposed to being a fact determination reviewable for clear error.<sup>4</sup> We further conclude that the reasonable-suspicion legal standard is one that conveys a measure of discretion to the trial judge when applying that standard to a given set of facts. Precisely how much discretion we cannot say, but we would not anticipate a close, de novo review. On the other hand, a sufficiently careful review is necessary to assure that the purposes of the reasonable-suspicion requirement are served.<sup>5</sup>

4. We reiterate that "[w]e review the factual findings underlying the trial court's decision to grant or deny a motion to suppress evidence using a clearly erroneous standard." *State v. Brown*, 853 P.2d 851, 855 (Utah 1992). It is not within the appellate court's authority to review de novo the factual underpinnings of a motion to suppress.

Some may take issue with the our decision not to use the term "clearly erroneous" in the context of reasonable-suspicion determinations, because that term is already in common usage. The change is necessary, however, in light of our new analytical perspective. As noted before, we use the term "clearly erroneous" to describe the standard by which we review purely factual determinations. This standard represents a fixed allocation of power and responsibility between the trial and appellate courts that is grounded in our distinct and unchanging institutional competencies regarding questions of fact. Because there is no inherent policy component in fact determinations, it will never be appropriate for an appellate court to overturn a trial court's factual determinations when they have substantial record support. Given this grounding, we decline to utilize the term "clearly erroneous" to describe the standard used to review determinations that are not forever beyond the power or responsibility of the appellate court to substitute its judgment, but have only been placed temporarily beyond the reach of de novo review as a matter of appellate court forbearance for institutional policy reasons. We think that clarity of

thought is promoted by using a different term to convey that reasonable suspicion is ultimately a legal question, and thus the appellate court does have the ultimate authority to define, as it deems appropriate, the contours of the disputed term.

Admittedly, this lexical change may engender some confusion in the short term as appellate judges and counsel become accustomed to it. In the long run, however, it should prevent the development of two somewhat divergent and likely confused lines of precedent, both purporting to apply to the same standard of review. If we failed to make this change, "clearly erroneous" would refer to situations in which the trial court has fixed discretion and the appellate court has a permanently limited role—the review of factual determinations—and would also refer to situations in which the trial court's discretion is a matter of appellate court grace and the appellate court's role is reviewable over time and circumstances—the application of fact to law. We believe it is better to change terms now than to attempt to construct and maintain two different legal edifices, both of which rest upon the same phrase.

5. Returning to our earlier metaphor, the appellate court reviews for correctness the placement of the legal fences which delimit the pasture of trial court discretion to determine what constitutes reasonable suspicion. The decision when to create and where to place these fences is an issue of law, and no deference is accorded to the trial court. Not every case that reaches an ap-

Our decision to characterize the review as something less than *de novo*<sup>6</sup> is largely due to the first factor spelled out by Professor Rosenberg: Reasonable-suspicion determinations are highly fact dependent, and the fact patterns are quite variable.<sup>7</sup> It would be impractical for an appellate court to review every reasonable-suspicion determination *de novo* and then pronounce whether each unique factual setting rises to the level of reasonable suspicion as a matter of law. If we were to try, it is likely that the resulting case law would be confusing and inconsistent. Our recent experience with the law of waiver, discussed in *Soter's*, shows that this concern is not fanciful. On the other hand, we are not precluding this court or the court of appeals from effectively fencing off parts of the discretionary pasture from trial judges once the reviewing courts have enough experience with certain recurring fact patterns that the legal effect of those patterns can be settled with comfort. However, except in those situations in which appellate courts feel comfortable in developing the law in such a manner, trial courts should be permitted some rein to grapple with the multitude of fact patterns that may constitute a reasonable-suspicion determination. See *Childress*, 125 F.R.D. at 338.

[13] With this concept of reasonable suspicion in mind, we now address Pena's claims. Pena first argues that the trial court erred in finding that the stop by police was supported by reasonable suspicion. He claims that the police did not have reasonable suspicion because they had not interviewed the 7-Eleven clerk beforehand to assure that a crime had taken place. In response, the

appellate court, however, must result in the establishment of a fence. Until the appellate court has fenced off a particular area of the pasture—that is, determined that a particular fact situation does or does not create reasonable suspicion as a matter of law—the trial court has discretion to venture into that area—in other words, to determine whether a given set of facts satisfies the legal standard of reasonable suspicion.

6. We recognize that this "some discretion" standard is less than precise, but so are many legal standards. It is difficult to describe more exactly without the benefit of concrete factual scenarios. We anticipate that developing case law will further illuminate the appropriate level of review.

State maintains that the dispatched report was sufficient for the stop.

The United States Supreme Court has held that an officer may stop and question a person "when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." *United States v. Place*, 462 U.S. 696, 702–03, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983). In determining whether such reasonable suspicion exists, we have indicated that under certain circumstances, police officers can rely on a dispatched report in making an investigatory stop. *State v. Bruce*, 779 P.2d 646, 650–51 (Utah 1989). Here, we think that the dispatcher gave Officer Bench sufficient information for him to form a reasonable suspicion that Pena or the driver had committed a crime, justifying the stop of the car in which Pena was a passenger. We cannot agree that Officer Bench was required to allow a suspect who matched the detailed description given by the store clerk to continue until another officer had the opportunity to go to the 7-Eleven store and interview the clerk. We therefore conclude that the trial court did not err in finding that the dispatched report contained articulable facts to support a finding of reasonable suspicion.

[14–17] Second, Pena argues that when the police finally read the *Miranda* warnings to him, he did not effectively waive his rights because he did not fully understand English. A waiver of *Miranda* rights may be inferred from a defendant's "actions and words," *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979), and is based on the "totality of the circum-

7. The multitude of variable fact patterns is easily demonstrated. See *State v. Ramirez*, 817 P.2d 774, 787–88 (Utah 1991) (no reasonable suspicion when a man seen walking near defendant ran away); *State v. Carpena* 714 P.2d 674, 675 (Utah 1986) (vehicle moving at slow speed in previously burglarized neighborhood at 3 a.m. did not provide articulable facts on which to formulate reasonable suspicion); *State v. Munsen*, 821 P.2d 13, 16 (Utah Ct.App.1991) (woman's vague and suspicious responses did not provide basis to suspect that she had committed or was about to commit crime).



stances." *State v. Strain*, 779 P.2d 221, 224 (Utah 1989) (citing *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979)). We review the trial court's legal conclusion of a valid waiver for correctness. *State v. Sampson*, 808 P.2d 1100, 1111 (Utah Ct.App.1990), *cert. denied*, 817 P.2d 327 (Utah 1991), *cert. denied*. — U.S. —, 112 S.Ct. 1282, 117 L.Ed.2d 507 (1992). However, this standard of review grants a measure of discretion to the trial court because of the variability of the factual settings. See, e.g., *State v. Bishop*, 753 P.2d 439, 466–67 (Utah 1988). Here, the trial court found that Pena had no problem understanding English. Based on that factual determination, we find no error in the conclusion that Pena validly waived his rights.<sup>8</sup>

[18] Pena next claims that his arrest for giving false information to a police officer was a pretext for the strip search and consequently was illegal. This contention is based on the assumption that the arrest was improper. Because we find that the officers had probable cause to arrest Pena, we do not consider his pretext argument. *Archuleta*, 850 P.2d at 1237–38.

[19] Finally, Pena claims that the strip search at the jail was unnecessary and intrusive and violated his Fourth Amendment rights. Specifically, he argues that the misdemeanor arrest could not give rise to a valid concern that he was carrying contraband or weapons into the jail facility and, therefore, the strip search was unjustified.

In response, the State argues that under federal law, strip searches are justifiable under circumstances amounting to less than probable cause when the need to prevent introduction of narcotics or contraband into a holding cell outweighs the invasion of personal rights. In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the United States Supreme Court considered the consti-

tutionality of strip searches following an arrest. The Court stated:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

*Id.* at 559, 99 S.Ct. at 1884.

In this case, the trial court found that the strip search was supported by a reasonable suspicion that Pena was carrying drugs. Officer Buckholts knew that Pena had been arrested for a drug offense, and he had observed Pena with his handcuffed hands in the back of his pants as though attempting to conceal something. On that factual basis, we cannot say that the trial court erred in concluding that a strip search was justified.

[20] We have considered Pena's other arguments and find them to be without merit.<sup>9</sup> We affirm the trial court's denial of Pena's motions to suppress.

STEWART, Associate C.J., and HALL and DURHAM, JJ., concur.

HOWE, J., concurs in the result.

HALL, J., acted on this case prior to his retirement.



8. Pena also argues that once the vehicle was stopped and he was asked to exit the car, he was in custody or was "arrested" and therefore the police were required to read him the *Miranda* warnings before ever asking his name. Because the argument was not raised below, we do not consider it.

9. Pena also argues that the officers "exceeded the permissible scope of the interference," but he is precluded from making this argument because he did not raise it at the suppression hearing. *State v. Carter*, 707 P.2d 656, 660 (Utah 1985) ("[W]here a defendant fails to assert a particular ground for suppressing unlawfully obtained evidence in the trial court, an appellate court will not consider that ground on appeal.").

Tab B

STAR COUNTY  
OFFENSE REPORT

PRINTED: 12/18/89

\*\*\*\*\*  
ASSIFICATION: CRIM MISCH  
CLASS: MISDEMEANOR

\*\*\*\*\*  
REPORT NO: 0020180

DRESS OF OCCUR: 9971 N SR68  
STRICT: N BEAT: 11

GRID: 0500

CITY: 01 RM/AFT:

TE REPORTED: 11/21/89 TIME REPORTED: 0818  
TE OCCURED: TIME OCCURED:

MAGED PROP AMT: \$200

STOLEN PROP AMT:

PREMISE:

MPL/BUSN: HARDMAN, PAUL  
DR: 9971 N SR 68

DOB:  
CTY: 01

SEX: M RACE: W  
ST: UT

PORTING OFFICER: MONSON, JERRY

INITIAL INVESTG UNIT: PATROL

MMENTS: VANDALISM TO FENCE, RP WOULD LIKE EX PATROL FOR TRESPASSING AND SPOT  
LIGHTING. 10400 N BETWEEN SR 68 AND 10400 W

\*\*\*\*\*  
INCIDENT NAMES  
\*\*\*\*\*

RDMAN, PAUL  
DR: 9971 N SR 68  
NO:  
N/SCHOOL:

RPTG  
MISC ID:

DOB:  
CTY: 01

REPORT NO: 0020180-01  
SEX: M RACE: W  
ST: UT  
RES PHONE: 768-3889  
BUSN PHONE:

\*\*\*\*\*  
OFFENSE NARRATIVE  
\*\*\*\*\*

REPORT NO: 0020180

NOPSIS:

RP REPORTS HUNTERS KNOCKING DOWN HIS FENCE, CAUSING HIS HORSES TO GET  
T ON THE HIGHWAY. NO SUSPECTS.

ITIAL CONTACT:

ON 11-21-89 AT 0845 HRS. R/D MET WITH THE RP PAUL HARDMAN AT HIS HOME.  
ADVISED ONE OF HIS HORSES HAD BEEN HIT ON THE HIGHWAY LAST NIGHT 11-20-89  
USING A SERIOUS TRAFFIC ACCIDENT. THE NEXT MORNING 11-21-89 THE RP  
ECKED THE FENCE AROUND HIS PASTURE TO SEE HOW THE HORSE GOT OUT AND  
SERVED A SECTION OF FENCE THAT HAD BEEN KNOCKED DOWN ON THE NORTH SIDE OF  
S PASTURE NEAR CAMP WILLIAMS. THE RP SAID HE HAS PUT THAT SECTION OF  
NCE UP THREE TIMES SINCE THE DEER HUNT, BUT THE HUNTERS KEEP KNOCKING IT  
WN.

SERVATION:

R/D RESPONDED TO SCENE WITH THE RP AND OBSERVED WHERE THE FENCE WAS  
WN. IT APPEARED SOMEONE HAD KNOCKED THE FENCE DOWN WITH A FULL SIZE PICK-  
TRUCK, AS THERE WAS OLD TIRE TRACKS NEAR THE FENCE. ALSO R/D OBSERVED

THEY WERE THE RECENTLY SAW FORCED, ON THE RP'S E. PERTY.

TION TAKEN:

RP WANTED TO SHOW R/D THE FENCE BECAUSE HE IS AFRAID OF BEING SUIED  
HAVEING HIS HORSE CAUSE AN ACCIDENT. ALSO RP'S HORSE WAS KILLED IN AUTO  
IDENT. R/D ADVISED RP THAT HE WOULD PUT HIS PROPERTY ON THE EXTRA PATROL  
ST SO OTHER DEPUTYS WOULD BE AWARE OF THE PROBLEM AND WATCH FOR TRESPASS-  
G AND VANDALISM IN THE AREA. NO FURTHER ACTION TAKEN.

\*\*\*\*\*

CASE MANAGEMENT

\*\*\*\*\*

REPORTING OFFICER:	MONSON, JERRY	REPORT NO: 0020180
FOLLOWUP INVESTIGATOR:		INITIAL REPORTING UNIT: PATROL
STATUS/DISPO:	CLR EXCEPTN	FOLLOWUP INVESTG UNIT:
		STATUS/DISPOSITION DATE: 11/21/89
		FOLLOWUP RECOMMENDATION:

\*\*\*\*\*

END OF REPORT

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Tab C

Askew v. Hardman

PRIVILEGED LOG OF UTAH FARM BUREAU FILE

	1.	COMPUTER PRINTOUT ON POLICY INFORMATION
11/21/89	2.	REPORT OF CLAIM
11/21/89	3.	RESUME OF TAPED INTERVIEW OF PAUL HARDMAN
11/21/89	4.	TRANSCRIBED STATEMENT OF PAUL HARDMAN
12/06/89	5.	INTEROFFICE CORRESPONDENCE
	6.	INVESTIGATING OFFICER'S REPORT
	7.	INTEROFFICE CORRESPONDENCE - PHOTOGRAPHS
12/06/89	8.	COPY OF CHECK
	9.	COPY OF 41-6-38
	10.	COPY OF UTAH FARM & RANCH LAW - ANIMALS ON HIGHWAY
12/11/89	11.	CLAIMS CODING SHEET - RESERVES
	12.	HANDWRITTEN NOTE ON HORSE WITH CERTIFICATE OF REGISTRATION ON HORSE
01/23/90	13.	INTEROFFICE CORRESPONDENCE
01/23/90	14.	COPY OF CHECK
01/24/90	15.	CLAIMS CODING SHEET - RESERVES
03/19/90	16.	STATUS REPORT
03/19/90	17.	STATUS REPORT
06/25/90	18.	STATUS REPORT
06/25/90	19.	STATUS REPORT
11/01/90	20.	INTEROFFICE CORRESPONDENCE
12/18/90	21.	INTEROFFICE CORRESPONDENCE
12/26/90	22.	STATUS REPORT
01/17/91	23.	LETTER FROM MARK JAMES, PLAINTIFF'S COUNSEL, TO BOB HARMON
02/11/91	24.	INTEROFFICE CORRESPONDENCE
02/20/91	25.	CLAIMS CODING SHEET - RESERVES
02/20/91	26.	INTEROFFICE CORRESPONDENCE
03/28/91	27.	LETTER FROM STEVE MORGAN TO PAUL HARDMAN
04/19/91	28.	INTEROFFICE CORRESPONDENCE
06/05/91	29.	BILL FROM MORGAN & HANSEN TO UTAH FARM BUREAU
06/07/91	30.	CLAIMS CODING SHEET - RESERVES
02/06/91	31.	LETTER FROM MARK JAMES TO BOB HARMON OF UTAH FARM BUREAU

03/08/91 32. LETTER FROM GREG JOHNSON, UTAH FARM BUREAU, TO STEVE MORGAN

04/05/91 33. LETTER FROM STEVE MORGAN TO GREG JOHNSON

06/12/91 34. LETTER FROM STEVE MORGAN TO PAUL HARDMAN

06/10/91 35. LETTER FROM MARK JAMES TO STEVE MORGAN WITH A COPY OF THE COMPLAINT

06/12/91 36. LETTER FROM STEVE MORGAN TO GREG JOHNSON

37. HANDWRITTEN NOTES REGARDING CONVERSATION BETWEEN GREG JOHNSON AND STEVE MORGAN

06/14/91 38. SPEED MEMO FROM GREG JOHNSON TO BOB BURNS OF HOME OFFICE

06/24/91 39. LETTER FROM STEVE MORGAN TO MARK JAMES

07/02/91 40. LETTER FROM MARK JAMES TO STEVE MORGAN WITH COPY OF LETTER FROM MARK JAMES TO BOB HARMON DATED 2/6/91.

07/05/91 41. LETTER FROM STEVE MORGAN TO GREG JOHNSON

07/08/91 42. SPEED MEMO FROM GREG JOHNSON TO BOB BURNS

07/19/91 43. CLAIMS CODING SHEET - RESERVES

07/12/91 44. LETTER FROM STEVE MORGAN TO MARK JAMES

07/11/91 45. LETTER FROM EARL PECK TO STEVE MORGAN

09/18/91 46. LETTER FROM MARK JAMES TO STEVE MORGAN WITH COPY OF COMPLAINT AND ACCEPTANCE OF SERVICE

09/20/91 47. LETTER FROM STEVE MORGAN TO MARK JAMES

09/20/91 48. LETTER FROM STEVE MORGAN TO PAUL HARDMAN

09/20/91 49. LETTER FROM STEVE MORGAN TO GREG JOHNSON

50. SUIT MEMO

09/23/91 51. SPEED MEMO FROM GREG JOHNSON TO BOB BURNS

09/30/91 52. LETTER FROM JAMES PUGH TO STEVE MORGAN

09/30/91 53. LETTER FROM JAMES PUGH TO PAUL HARDMAN

54. RETURN RECEIPT

10/10/91 55. LETTER FROM STEVE MORGAN TO PAUL HARDMAN WITH ANSWER

10/10/91 56. LETTER FROM STEVE MORGAN TO GREG JOHNSON

11/18/91 57. MEMO FROM BOB BURNS TO GREG JOHNSON AND REPLY

11/26/91 58. LETTER FROM STEVE MORGAN TO PAUL HARDMAN WITH ANSWERS TO INTERROGATORIES

12/02/91 59. SPEED MEMO FROM BOB HARMON TO GREG JOHNSON WITH COPIES OF SUBPOENA AND NOTICE OF DEPOSITION

12/03/91 60. SPEED MEMO FROM GREG JOHNSON TO STEVE MORGAN WITH POLICY

Tab D



### TRANSCRIPTION STATEMENT

Okay, this is Bob Harmon. I am in, I am near Lehi and it's the 21st of November, 1989. I'm talking to Paul Hardman and I'm recording our conversation, I want to make sure that's alright with you, could you say

A. yes, that fine

Q. Okay, I'm going to turn the recorder off. Okay, I got the recorder back on, ah, getting some background information on ah, a horse car accident that happened last night ah, on Redwood Road right near your house, is that right?

A. yes, it was

Q. Okay, and it involved, I guess the animal involved was your horse, is that correct?

A. yes, it was

Q. Now you were going to give me some background information on this so why don't you just go ahead.

A. Ever since ah, ever since deer season we've had a lot of problems with hunters coming in over here on this north pasture which is just east of Camp Williams and I put a new fence up on the north side and UNCLEAR pulling the other fence down so they can drive in down to the river and go deer hunting, after that accident, after the accident last night which by the way they pulled down three times during the deer season, I of course rebuilt the fence each time, so this morning, early this morning I came over and I still had three horse were out and so I came over and put them in and this canal where were going along now they came along this canal road UNCLEAR followed them along here as you get over here you'll see I found a fresh deer kill where someone poached a deer, and this, this will be, it'll be fairly close to the fence which they tore down also and then when we get on down here will find where they've taken the wire off of the corner post, lifted up over the top of the corner post, let the fence down so that they can get in on the property and do whatever they were going to do, well, that fence was up last Thursday, which was 4 days ago UNCLEAR time I was over here plowing and see this UNCLEAR

✓ plowing on, I was over here plowing and checked the fence on Thursday and then of course they got out now. I don't know if you want to take a picture of whats left here of this deer kill or not, maybe we ought to.

Q. Well, we'll go take a look at it.

A. I had the officer come and look at it and he didn't really do much with it.

Q. Okay,

A. there is not a lot left, a match box here, you can see the bloods still fresh here, ah, this morning there was a lot of UNCLEAR right here and that bonch is all thats left now UNCLEAR I had the county sheriff come out this morning and brought him over and showed him this kill and UNCLEAR went on down UNCLEAR

Q. Okay, now you say ah, you were here last Thursday plowing this field and the wire, fence was up that day, that was just the previous Thursday, this being Tuesday and the accident happened Monday night okay.

A. so it would have been three days prior

Q. Okay, now he has mentioned that ever since the deer hunting season opened you have had problems with people taking these strands of wire on this fence down.

A. yeah, when we get over there I will show you, they drive through there with there 4 wheelers and they can't get through since I put that fence up to fence off.

Q. When did you put that fence up?

A. well, its been up for years but it was an electric fence and deer kept knocking the fence down and so this year I put up the barbed wire fence because of the deer knocking the electric fence down and then I had no fence, so I put the barbed wire fence up this year and then they, they've actually twice they took their undone the fence on the corner and I assume that's what it looked like, and hooked it on their four wheeler on their trailer hitch and just pulled the fence as far as they could pull it and pull the whole fence down.

Q. Oh, wow.

A. and then once, and then the third time they left the fence on but they bent all the posts down right even with the ground just bent them all the metal posts, and now this time they disconnected it again and left, and just dropped it down the ground so they

could come in and ah, the officer asked me, well are you sure that the horses didn't do it, well we know that as I showed him because the fence was on the inside of the pasture UNCLEAR were along the inside when the horses went out you know would have pushed it the other way and also if the horses would have done it, its brand new barbed wire big barbs on it, it would have, for them to do that it would have just cut the heck out of them, whoever did it and no of the horses have cuts, yeah, so someone had to let it down.

Q. So how many of your horses got out this last night?

A. well, let see I got, some of them are my dads but all total what was there ah, let see there were three up there and there were, probably eight, eight or nine got out last night, some of them stayed in I think eight or nine got out.

Q. How about going back further, have you ever had any of your ah, do you just have horses is that the only animals?

A. yeah, well I've got one cow and a few sheep but thats

Q. Have you ever had any of your animals, horses, sheep or cattle hit in the past, before last night?

A. I had two lambs hit, quite a few years ago, up at the house

Q. At the house, did they get out of a pen or something or how were they hit?

A. they ah, as I recall, they crawled through a hole, or went under the UNCLEAR fence or yeah, it was

Q. Okay, in this field where you are going to take me where these horses got out, had you ever had any of those horses get out and get hit?

A. no, never had

Q. Okay, and how long have you had horses in this field that your going to take me and show me?

A. well, I change them, I have a pasture below the house and I run them all summer and then I bring them over here in the fall usually in September ah, cause they've eaten the other pasture off and so I bring them over here and run there from September til the snow gets deep, okay, then after that I take them up to the house.

Q. I see, now you mention that you have had trouble with apparently hunters, poachers and hunters knocking down your fence.

A. this fall

Q. This fall and ah, ah, when they knocked it down previously had you ever had your horses get out then?

A. yeah, they got out about every time they knocked it, in fact I would come home from work and I would see they would be out, usually they would be feeding in this stuble field, we can see right here, and so I would come over and put them in and after I would put them in I would drive along the fence and that's how I you know found out that it was down. Now Camp Williams, all this area here is closed. Camp Williams is you know, we came through the metal gates and there is another one down on this road, the only way possible for those people to get in is up through Camp Williams and we have had, they've had alot of problems this fall, he was telling me this morning.

Q. Who was telling you?

A. Major Huff at Camp Williams was telling me that the last two weeks they've had one truck stolen, a bunch of tools stolen the ah, officer's quarters, or the officers club, they broke in there and vandalized the officers club and plus alot of other vandalism in the last two weeks plus about I guess it was during the deer hunt right in there the large metal gate we just came through, there is another one right down here on this lower UNCLEAR and they cam in and the pulled those and you can see how big the gates were but they hooked onto those and pulled them over and just tore the gates apart with upright the support post bent them right over to the ground and totally destroyed them, they had to put new, they just put those in a week ago, replaced those gates, but all the problem we have had is not people coming in from the south but the people coming in from the north, everything seems to you know somebody coming in from the north, whether they come through, well, they got to come through Camp Williams thats all I can visualize, otherwise they wouldn't have pulled the gate in from, from inside out.

Q. Okay, now once, how many times then has your fenced been pulled down this fall?

A. this is four times

Q. This is the fourth time.

A. fourth time

Q. Okay, and each time you have put it back up?

A. each time I have rebuilt the fence, I have called Major Huff, ah, ah, he can verify all the problems that we've been having and tearing my fences down.

Q. Did you strengthen your fence at any time, any of these times that you've built it up?

A. well last time I put some corner braces in on a corner post because when tne pulled it down they loosened up the corner post so I put some braces

Q. Are the metal posts set in concrete?

A. no, no their driven in

Q. Driven into the ground, okay, is there anyplace else where you could have kept your horses instead of down here?

A. not that I wouldn't had to feed them, no, I feed them hay

Q. Yeah, during the winter you have to do that?

A. yeah, but you know that's why I save this for the fall so that you know I can get along without feeding hay as long as I can, cause there running, there must be 120 acres, 130 acres that they've got there to run in so.

Q. Okay, let me go ahead and turn the recorder off again.

Q. Now when was the last time previous to this incident last night when your horses got out?

A. well after the deer hunt was over, I've not had any problems with the horses getting out, the fence has been left up and they just stayed in.

Q. So the three previous times this fall that you fence was torn down was during the deer hunting season?

A. correct, also, perhaps and I'll show you some posts or corner posts over here on a gate, where they took a shot gun and shot the post right off, you can't UNCLEAR the post was cut off at ground level and left the gate down and the horses got out the fence and they shot a bunch of holes in the adjoining post which was a big power pole and we can see the holes that go through the posts but they didn't quite cut that one off, so its time now if the horses were out ah, two days ago they were out and I came over and someone had UNCLEAR fence up the two barbs top and bottom together so they could crawl through the fence and there was only about three horses out then, baby horses the big horses couldn't crawl through the hole but the babies did.

Q. I see, so ah, so you had some younger horses out then just a couple days before this accident?

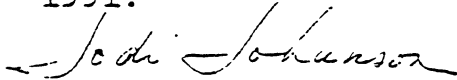
A. yes

Q. Same area then?

A. yeah, same, I'll show you there within 50 yards from where they took the fence down.

Q. Okay, I'm going to go ahead and shut the recorder off again.

I certify that this is a correct transcription, typed on March 5, 1991.

A handwritten signature in cursive script that reads "Jodi Johanson". The signature is written in dark ink and is positioned to the left of the printed name.

Jodi Johanson

Tab E

**Julia Lee Askew v. Paul Hardman**

In the Utah Court of Appeals

Appellate No. 930537-CA

**CHART COMPARING STATEMENT, DEPOSITION TRANSCRIPT,  
AND TRIAL TRANSCRIPT OF PAUL HARDMAN  
REGARDING ISSUES OF LIABILITY**

SUBJECT	DEPOSITION TRANSCRIPT OF PAUL HARDMAN
<b>Paul Hardman's Testimony Is Consistent with Recorded Statement</b>	<p>"Q. Now you say as you recall, do you have a clear recollection of your conversations with Mr. Harmon? . . . Do you remember what you told him?</p> <p>A. The same as I told you, as I recall." (Deposition of Paul Hardman, Vol. I, pp. 130, 131)</p> <p>"Q. Tell me specifically what you said to Mr. Harmon regarding trespassing, poaching problems?</p> <p>A. Basically the same thing I've told you, that in the springtime, we had problems with fishermen letting the fences down or tearing the fences down, pushing the gate over because they didn't want to walk down to the river to fish. And in the fall time, we had problems with the hunters, mourning dove hunters, rolling up fences. Or hunters don't know how to crawl through fences. They have to roll the wires or push the fence over to get in. The same thing I've said before." (Deposition of Paul Hardman, Vol. I, p. 135)</p> <p>"Q. What else did you say to the sheriff, this representative, during that morning?</p> <p>A. Nothing that I recall. I mentioned the problems we had with trespassers and, again, with the poachers. And he made a comment that he would make a note of that and they would put extra patrols on out there.</p> <p>Q. So you told the sheriff's representative you'd had problems with trespassers and poachers?</p> <p>. . .</p> <p>A. Yes. He and Bob Harmon, about the same I told them, you know. I don't recall saying one thing different to one than to the other." (Deposition of Paul Hardman, Vol. I, pp. 145-146)</p>



SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<p><b>Condition of the Fence on the Day Following the Accident</b></p>	<p>"Q. Now you were going to give me some background information on this so why don't you just go ahead.</p> <p>A. . . . they've taken the wire off of the corner post, lifted up over the top of the corner post, let the fence down so that they can get in on the property and do whatever they were going to do . . . .</p> <p>. . .</p> <p>. . . they disconnected it again and left, and just dropped it down the ground so they could come in . . . .</p> <p>. . .</p> <p>. . . the officer asked me, well are you sure that the horses didn't do it, well we know that as I showed him because the fence was on the inside of the pasture <b>UNCLEAR</b> were along the inside when the horses went out you know would have pushed it the other way and also if the horses would have done it, it's brand new barbed wire big barbs on it, it would have, for them to do that it would have just cut the heck out of them, whoever did it and no of the horses have cuts, yeah, so someone had to let it down." (Statement, pp. 1-3)</p>	<p>"Q. So the next morning you went down to the pasture?</p> <p>A. Yes. . . . the wire of the fence was on the inside of the pasture, that it had been taken off from the post, it wasn't cut, it wasn't broken. It had been taken off from the corner post and was on the inside of the pasture." (Deposition of Paul Hardman, Vol. I, p. 101, 106)</p> <p>"Q. How many wires had been taken off the corner post?</p> <p>A. Two.</p> <p>. . .</p> <p>Q. . . . How much of the fence had been taken down?</p> <p>A. . . . from the corner, probably three steel poles. It was all drooping. But I mean, you know, laying on the ground, as I recall, there were maybe three poles." (Deposition of Paul Hardman, Vol. I, pp. 108-109)</p> <p>"Q. And was there a reason that you thought the horses would stay in the pasture given the fence was down?</p> <p>A. . . . My biggest concern was the fact that the fence was down and that the wires were on the inside of the fence. . . . I knew that someone had let the fence down because if the horses had got out because they pushed the fence over, the wires would have been on the north side of the fence rather than on the inside, or they would have been on the outside. . . . I know I'm not liable because the wires had been taken off from the corner posts and the wires were on the inside of the pasture on the winter pasture." (Deposition of Paul Hardman, Vol. I, pp. 112-113)</p>	<p>"Q. While you're in that vicinity, can you point out for the jury where, on the morning of November 21st, you observed your fence being down on the ground?</p> <p>A. Up on the northwest corner in this area right here." (Testimony of Paul Hardman, p. 7)</p> <p>"Q. And the corner post has orange painted on it; is that correct?</p> <p>A. Yes.</p> <p>Q. Was it from that corner that you observed the fence having been let down?</p> <p>A. Yes.</p> <p>Q. And the fence, as you observed it that morning, was let down from that post?</p> <p>A. Yes.</p> <p>Q. And then back two or three poles from there; is that right?</p> <p>A. Yes." (Testimony of Paul Hardman, pp. 15-16)</p>

SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<p><b>Observations of Deer Kill on the Day Following the Accident</b></p>	<p>"Q. Now you were going to give me some background information on this so why don't you just go ahead.</p> <p>A. . . . I found a fresh deer kill where someone poached a deer, and this, this will be, it'll be fairly close to the fence which they tore down also . . . . I don't know if you want to take a picture of what's left here of this deer kill or not, maybe we ought to. . . . you can see the blood still fresh here, ah, this morning there was a lot of <b>UNCLEAR</b> right here and that ponch is all that's left now <b>UNCLEAR</b> I had the county sheriff come out this morning and brought him over and showed him this kill . . . ." (Statement, pp. 1-2)</p>	<p>"Q. And the horses then were grazing in that area?</p> <p>A. Horses were grazing here . . . . And as I was coming along the canal, I noticed some magpies . . . . So the magpies, as I got over there, there had been a deer killed there. There was entrails, deer entrails, and they were almost gone. They had eaten a good share of them." (Deposition of Paul Hardman, Vol. I, pp. 106-107)</p>	<p>Paul Hardman was not asked at trial about his observations of the deer kill. Officer Jerry Monson, the Utah County Sheriff officer called to the scene on the morning following the occurrence, testified as follows at trial:</p> <p>"Q. Let me ask you, Mr. Monson, what your report states under 'observation.' I believe that's what Mr. Morgan just referred to.</p> <p>A. Do you want me to read it?</p> <p>Q. Sure. Please.</p> <p>A. 'Reporting deputy responds to scene with the R.P.' -- with the reporting party -- 'and observed where the fence was down. It appeared someone had knocked the fence down with a full-size pickup truck as there were old tire tracks near the fence. Also reporting deputy observed where a deer had recently been poached on the reporting party's property.'</p> <p>Q. You reference in your report that a deer had recently been poached. How could you tell a deer had recently been poached?</p> <p>A. That was an assumption I made. I saw a pile of entrails or innards in the vicinity of where the fence was down." (Testimony of Jerry Monson, p. 10)</p>

SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<p><b>Construction and Maintenance of the Fence Before Horses Were Moved into the Winter Pasture</b></p>	<p>"Q. Now you were going to give me some background information on this so why don't you just go ahead.</p> <p>A. . . . I put a new fence up on the north side . . . ." (Statement, p. 1)</p> <p>"Q. When did you put that fence up?</p> <p>A. . . . I put up the barbed wire fence because of the deer knocking the electric fence down and then I had no fence, so I put the barbed wire fence up this year. . . ." (Statement, p. 2)</p>	<p>"Q. And had you replaced all the wire around the pasture a year earlier than November 21, '89?</p> <p>A. No, just the north. . . . it was electric fence, so I took the electric fence down and put in barbed wire.</p> <p>. . .</p> <p>Q. Why did you determine not to use an electric fence on the north side of the fence anymore?</p> <p>A. Maintenance. . . . I didn't have to worry about weeds growing up or getting under anything like that." (Deposition of Paul Hardman, Vol. I, pp. 147-149)</p> <p>"Q. Now I believe you have alleged during the context of this lawsuit that you hired two gentlemen to repair all or part of the fence surrounding the winter pasture in 1989; is that correct?</p> <p>A. Yes. . . . I just told them to repair the fence as needed, put new wire up if needed, new posts, whatever it needs." (Deposition of Paul Hardman, Vol. II, pp. 178, 185)</p>	<p>"Q. . . . up until the summer of 1989 you had an electric fence along this north fence line; is that right?</p> <p>A. . . . the deer would come along the bottom of the river where the fence drops over the hill . . . . An electric fence -- if they hit that fence, it was very easy to knock over because it's not tied to the post substantially. Plus it's a much smaller wire, so they could break the wire. And I was concerned about the deer knocking the fence over . . . . So I changed the fence to a two-strand barbed wire fence on the north fence." (Testimony of Paul Hardman, pp. 58-59)</p> <p>"Q. Now, how do you know that the distance between the poles and the height of the wire is closer to being accurate . . . than the estimates . . . you were asked to give at the time your deposition was taken?</p> <p>A. So this fall, after I did my annual fall maintenance on the fence, which I always do before I put the horses in after the wire was stretched and the fence was prepared to put the horses in, I made the diagram." (Testimony of Paul Hardman, pp. 96-97)</p> <p>"Q. Did Doug Smith repair your fence about four weeks before, three or four weeks before the accident?</p> <p>A. Yes, he did." (Rebuttal Testimony of Paul Hardman, p. 24)</p>

SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<p><b>Prior Occurrences of Fence Being Torn Down</b></p>	<p>"Q. Now you were going to give me some background information on this so why don't you just go ahead. A. . . . after the accident last night which by the way they pulled down three times during the deer season, I of course rebuilt the fence each time . . . ." (Statement, p. 1)</p> <p>"Q. When did you put that fence up? A. . . . so I put the barbed wire fence up this year and then they, they've actually twice they took their undone the fence on the corner and I assume that's what it looked like, and hooked it on their four wheeler on their trailer hitch and just pulled the fence as far as they could pull it and pull the whole fence down. . . . and then once, and then the third time they left the fence on but they bent all the posts down right even with the ground just bent them all the metal posts . . . ." (Statement, p. 2)</p> <p>"Q. Okay, now once, how many times then has your fenced been pulled down this fall? A. This is four times." (Statement, p. 4)</p> <p>"Q. Now when was the last time previous to this incident last night when your horses got out? A. . . . well after the deer hunt was over, I've not had any problems with the horses getting out, the fence has been left up and they just stayed in." (Statement, p. 5)</p>	<p>"Q. . . . Again, we're talking a time two weeks before November 20, '89. . . . And how did you come to understand that someone had pulled the fence down? A. Because all the posts were bent over and the wire was stretched out just to the north of the pasture just as far as it could go. Q. The wires had been taken off the posts? A. Yes. . . . I think they took the wires off from the posts, hooked them on their trailer hitch, took off with the four-wheelers and it bent all the metal posts. . . ." (Deposition of Paul Hardman, Vol. I, p. 73)</p> <p>"Q. . . . I'm curious to understand the basis for your understanding that it was trespassers or poachers in your belief that had allowed the horses to get out. A. We seem to have two seasons out there of people that come in. In the spring, fishermen, they come. They let the fences down. . . . They'll tear the fences totally out, do whatever they can to drive down to the river to go fishing. Now there are no horses in there in the spring, but the fact of the matter is that it is trespassers and mostly fishermen that are tearing the fences. We have a lot of problems with them tearing the fences down. . . . So when something happens, you know, in my mind, I automatically go to trespassers, fishermen, or hunters." (Deposition of Paul Hardman, Vol. I, pp. 82-83)</p>	<p>"Q. . . . is it not true that you have had to put the fence up many times even when the horses weren't in as a result of trespassing? A. Over the years that's a true statement." (Rebuttal Testimony of Paul Hardman, p. 3)</p> <p>"Q. When you talked to Deputy Sheriff Monson you told him that trespassers had knocked your fences down several times since the deer hunt; is that right? A. When I talked to Deputy Sheriff Monson, I was referring to three incidents prior to the accident, including the accident." (Rebuttal Testimony of Paul Hardman, p. 9)</p> <p>"Q. . . . we're referring now to Deputy Monson's report, where it says the RP, which meant reporting party, said 'He has put that section of fence up three times since the deer hunt but the hunters keep knocking it down.' Did you say that? A. Yes. . . . . Q. 'Was that an accurate statement?' And your answer was, 'Could have been two times rather than three.' Is that right? A. Yes." (Rebuttal Testimony of Paul Hardman, pp. 10-11)</p> <p>"Q. The report you gave to Mr. Monson is that the fence had been torn down by hunters two or three times since the deer hunt, was what, the day after the accident? A. Day after the accident." (Rebuttal Testimony of Paul Hardman, p. 13)</p>

SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<p><b>The Repair of the Fence During the Fall Hunting Season</b></p>	<p>"Q. Now you were going to give me some background information on this so why don't you just go ahead.</p> <p>A. . . . after the accident last night which by the way they pulled down three times during the deer season, I of course rebuilt the fence each time . . . ." (Statement, p. 1)</p> <p>"Q. Okay, now once, how many times then has your fenced been pulled down this fall?</p> <p>A. This is four times.</p> <p>. . .</p> <p>Q. Okay, and each time you have put it back up?</p> <p>A. . . . each time I have rebuilt the fence . . . ." (Statement, p. 4)</p> <p>"Q. Did you strengthen your fence at any time, any of these times that you've built it up?</p> <p>A. . . . well last time I put some corner braces in on a corner post because when the pulled it down they loosened up the corner post so I put some braces." (Statement, p. 5)</p>	<p>"Q. How did you go about fixing the fence [when it was torn down approximately two weeks before the incident]?</p> <p>A. Bent the posts back up straight, stretched the wire back to the corner posts, tied it on, then secured the barbed wire back to . . . the metal post." (Deposition of Paul Hardman, Vol. I, pp. 75-76)</p> <p>"Q. If I could refer you to the last sentence of that section [of the Utah County Offense Report printed 12/18/89] where it says the RP said he has put that section of fence up three times since the deer hunt, but the hunters keep knocking it down. Do you see that?</p> <p>A. Yes.</p> <p>Q. Do you recall having made that statement to the officer?</p> <p>A. Yes.</p> <p>Q. Was that an accurate statement?</p> <p>A. Could have been two times rather than three.</p> <p>Q. You recall having put the fence up at least two times?</p> <p>A. Yes.</p> <p>Q. And perhaps three?</p> <p>A. Yes.</p> <p>Q. Would that be prior to the occasion on November 20, 1989, when the fence was knocked down?</p> <p>A. Yes, yes." (Deposition of Paul Hardman, Vol. II, pp. 195-196)</p>	<p>"Q. If you'll turn to page 195 in your deposition, that's your second deposition. Are you there?</p> <p>Bottom of page 195, line 22 the question is, if I could refer you to the last sentence of that section, we're referring now to Deputy Monson's report, where it says the RP, which meant reporting party, said, 'He has put that section of fence up three times since the deer hunt but the hunters keep knocking it down.' Did you say that?</p> <p>A. Yes." (Rebuttal Testimony of Paul Hardman, pp. 9-10)</p> <p>"Q. If you'll turn to page 198 of your deposition, beginning on line 10, the question was, 'Do you recall whether on the two or three times prior to November 20, 1989 that the fence had been knocked down?'</p> <p>Now, I'm referencing the period of the deer hunt of 1989 up through November 20, 1989. 'Do you recall on any of those occasions whether Mr. Smith or Mr. Allred fixed the fence after it had been knock down?' Your answer was, 'No, they did not.' Question, 'You fixed the fence?' The answer, 'Yes'; is that correct?</p> <p>A. That's what I said." (Rebuttal Testimony of Paul Hardman, p. 15)</p>

SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<p><b>The Repair of the Fence During the Fall Hunting Season (cont'd)</b></p>			<p>"Q. . . . The question was, 'And since between the time of the ten days after, I take it, the third Saturday of October of '89 and November 20 of 1989 you had put the fence up at least two and maybe three times because of it having been knocked down by someone; is that accurate?'</p> <p>Answer, 'It could have included the time period of the deer hunt from --' Question, 'Of the October '89 deer hunt?' Answer, 'Yes.'" (Rebuttal Testimony of Paul Hardman, p. 21)</p>

SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<p><b>Prior Occurrences of Horses Escaping from Pasture</b></p>	<p>"Q. This fall and ah, ah, when they knocked it down previously had you ever had your horses get out then?</p> <p>A. . . . yeah, they got out about every time they knocked it, in fact I would come home from work and I would see they would be out, usually they would be feeding in this stuble field, we can see right here, and so I would come over and put them in and after I would put them in I would drive along the fence and that's how I you know found out that it was down." (Statement, p. 4)</p> <p>"Q. Now when was the last time previous to this incident last night when your horses got out?</p> <p>A. . . . well after the deer hunt was over, I've not had any problems with the horses getting out, the fence has been left up and they just stayed in." (Statement, p. 5)</p> <p>"Q. So the three previous times this fall that your fence was torn down was during the deer hunting season?</p> <p>. . . two days ago they were out and I came over and someone had <b>UNCLEAR</b> fence up the two barbs top and bottom together so they could crawl through the fence and there was only about three horses out then, baby horses the big horses couldn't crawl through the hole but the babies did." (Statement, p. 5)</p>	<p>"Q. Now with respect to any of the two or three times that you've described, did horses escape on any of those occasions?</p> <p>A. Yes.</p> <p>Q. How many of those occasions did horses escape?</p> <p>A. Maybe all two or three. I'm not sure. . . .</p> <p>Q. Do you recall on any of those two or three occasions when the horses escaped where they went?</p> <p>. . .</p> <p>A. . . . Not all of them had escaped at one time. Some were out. The time I can remember, there were three or four that were out, and the rest were still in the pasture. And they stayed right there at the pasture. They didn't go anywhere." (Deposition of Paul Hardman, Vol. II, pp. 199-200)</p> <p>"Q. Other than this occasion in 1988 and the occasion in 1989 on November 20, are you aware of any other occasion when horses escaped from the winter pasture?</p> <p>A. . . . After I put the horses in in October of '89, towards the end or during the deer hunting period, the fence had been taken down and the horses had gotten out during that period. . . .</p> <p>Q. Do you recall how many days or weeks prior to the evening of the accident that occurred?</p> <p>A. Approximately maybe two weeks, a week to two weeks." (Deposition of Paul Hardman, Vol. I, p. 71)</p>	<p>"Q. Have your horses ever pushed through a barbed wire fence?</p> <p>A. I've never known my horses to push through a barbed wire fence, no." (Testimony of Paul Hardman, p. 112)</p> <p>"Q. Now with respect to any of the two or three times that you described, did horses escape on any of those occasions and your answer was yes. 'How many of those occasions did horses escape?' Your answer?</p> <p>A. 'Maybe all two or three. I'm not sure.'" (Rebuttal testimony of Paul Hardman, pp. 11-12)</p> <p>"Q. . . . Question, 'Is your recollection such that you can deny that they escaped other than on the one occasion?' Your answer, 'No, not all of them had escaped at one time. Some were out. The time I can remember there were three or four that were out and the rest were still in the pasture and they stayed right there in the pasture. They didn't go anywhere.' Did I read that accurately?</p> <p>A. That's right and I think that clarifies the question previous, that the time that they had escaped, I said three, and refers to the one time, and it also refers on one of those other questions that I couldn't recall exactly how many times. And again, Counselor, this is three years after the fact and it's difficult to remember specific times and days." (Rebuttal Testimony of Paul Hardman, pp. 12-13)</p>

SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<p><b>Prior Occurrences of Horses Escaping from Pasture (cont'd)</b></p>	<p>"Q. Okay, in this field where you are going to take me where these horses got out, had you ever had any of those horses get out and get hit?</p> <p>A. No, never had." (Statement, p. 3)</p>	<p>"Q. And do recall how it was that you came to know that the horses escaped? . . .</p> <p>A. . . . when I came down to plow, I saw they were out. They were eating over in that alfalfa field. So I went over to see why, I mean, to see why they were out. And I noticed that someone pulled the fence down." (Deposition of Paul Hardman, Vol. I, p. 73)</p> <p>"Q. Other than the occasions we've discussed, . . . are you aware of any other occasion when horses owned by you escaped from the summer pasture or the winter pasture?</p> <p>A. I can't tell you a year or a day. I mean, I can't even recall them being out. But there may be times when they got out in that period of time. That's a long time ago." (Deposition of Paul Hardman, Vol. I, p. 78)</p> <p>"Q. Why did you assume in making that statement that the horses had escaped because of trespassers or poachers?</p> <p>A. Because the only time that the horses were out was because of trespassers or poachers. (Deposition of Paul Hardman, Vol. I, p. 82)</p>	<p>"Q. . . . with regard to putting the fence up, did horses get out of the pasture on any one of those occasions when you put the fence back up other than the one time two weeks before the accident and the date of the accident?</p> <p>A. The horses had only been out the one time." (Rebuttal Testimony of Paul Hardman, p. 24)</p>



SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<p><b>Checking Fence Before the Occurrence</b></p>	<p>"Q. Now you were going to give me some background information on this so why don't you just go ahead.</p> <p>A. . . . that fence was up last Thursday, which was 4 days ago <b>UNCLEAR</b> time I was over here plowing and see this <b>UNCLEAR</b> plowing on, I was over here plowing and checked the fence on Thursday and then of course they got out now." (Statement, pp. 1-2)</p> <p>"Q. Okay, now you say ah, you were here last Thursday plowing this field and the wire, fence was up that day, that was just the previous Thursday, this being Tuesday and the accident happened Monday night okay.</p> <p>A. So it would have been three days prior." (Statement, p. 2)*</p> <p>*Paul Hardman was not asked during the taking of his statement about his practice for checking the fence that surrounds the winter pasture. He was also not asked if he checked the fences on the day of the occurrence.</p>	<p>"Q. Do you recall the time you got off work?</p> <p>A. Somewhere around 4:00. . . . The day of the accident, I left Geneva, I drove down to the pasture, drove along the road, and just observed the fences from the vehicle when I drove down, looked at them." (Deposition of Paul Hardman, Vol. I, p. 86)</p> <p>"Q. And you drove along that road the afternoon of the 20th at approximately 4:30?</p> <p>A. Yes.</p> <p>Q. And you specifically observed that the fence was up?</p> <p>A. Yes." (Deposition of Paul Hardman, Vol. I, p. 88)</p> <p>"Q. Is that something that you had ever done before?</p> <p>A. . . . When I get up in the mornings, one of the first things I do is walk over to the window and look in my binoculars to see what's going on out there. . . . I look out there many times a day if I'm any time in the bedroom . . . . And the other way that I would check those fences is I'd physically drive over there two, three times a week to check. Well, plus I'm farming over there . . . and so I'm in that vicinity anyway." (Deposition of Paul Hardman, Vol. I, pp. 95-96)</p>	<p>"Q. And you had been there at 4:30 p.m. on the evening of -- afternoon of November 20, 1989; is that correct?</p> <p>A. Yes, I was.</p> <p>Q. And at that time did you make a visual personal observation of the fence line on the north end?</p> <p>A. Yes, I did.</p> <p>. . .</p> <p>Q. And did you daily check your fences the two weeks prior to the accident on November 20?</p> <p>A. Yes, I did." (Testimony of Paul Hardman, p. 150)</p> <p>"Q. You said that three times a week you would inspect this fence immediately preceding the accident; is that correct?</p> <p>A. I said every day.</p> <p>Q. Oh. Every day, then?</p> <p>A. We're talking about two to three weeks before the accident, yes." (Testimony of Paul Hardman, p. 152)</p>

SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<p>Checking Fence Before the Occurrence (cont'd)</p>		<p>"Q. And those daily driveby observations occurred in the fall of 1989? A. Yes. Q. On a daily basis? A. Average three times a week. There may be a day during the week that I didn't go over there." (Deposition of Paul Hardman, Vol. II, pp. 278-279)</p> <p>"Q. Now you refer to daily field glass checks from house? A. Yes. Q. Were those daily field glass checks conducted during November of '89? A. Yes. Q. Who conducted those checks? A. I usually always check. And many times my wife would check also, so sometimes they'd get checked twice." (Deposition of Paul Hardman, Vol. II, p. 279)</p>	<p>"Q. On November 20, 1989 at 4:30, tell us where you were and what observations you made. A. I came along this road here observing the fence line right next to the road . . . . . . Q. Were the posts and wires in place on November 20, 1989 at 4:30 p.m. when you last saw it prior to the accident. A. Yes, sir." (Sur Rebuttal Testimony of Paul Hardman, pp. 2, 4)</p>
<p>Prior Incidents of Trespassing</p>	<p>"Q. Now you were going to give me some background information on this so why don't you just go ahead. A. Ever since deer season we've had a lot of problems with hunters coming in over here on this north pasture which is just east of Camp Williams . . . pulling the other fence down so they can drive in down to the river and go deer hunting . . . ." (Statement, p. 1)</p>	<p>"Q. Tell me approximately how many instances of trespassing . . . you experienced in the spring with respect to the winter pasture in the five years prior to November of 1989. A. Instances where the fences have been pushed over or gates let down, possibly maybe five, six times a summer during the summer. Q. How about in the fall, the same time? A. Maybe one or two times." (Deposition of Paul Hardman, Vol. I, p. 84)</p>	<p>"Q. You had never previously had two or three incidents of trespassing in that short of time at that place in the north pasture; isn't that true? A. That's true." (Rebuttal Testimony of Paul Hardman, p. 14)</p>

SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<p><b>Prior Incidents of Trespassing (cont'd)</b></p>	<p>"Q. This fall and ah, ah, when they knocked it down previously had you ever had your horses get out then?</p> <p>A. . . . the only way possible for those people to get in is up through Camp Williams and we have had, they've had a lot of problems this fall, he was telling me this morning." (Statement, p. 4)</p> <p>"Q. Now when was the last time previous to this incident last night when your horses got out?</p> <p>A. . . . well after the deer hunt was over, I've not had any problems with the horses getting out, the fence has been left up and they just stayed in." (Statement, p. 5)</p>	<p>"Q. Were you aware of poaching problems in the vicinity of the winter pasture prior to November 20, 1989?</p> <p>A. Yes. . . . This is a popular area for people to poach because of the deer population down there." (Deposition of Paul Hardman, Vol. I, p. 89)</p> <p>"Q. And so in part, the reason you checked it so often was because of the trespassing problems?</p> <p>A. Some, yes." (Deposition of Paul Hardman, Vol. I, pp. 96-97)</p> <p>"Q. Do you recall 1989 being any different than years before that with respect to the number of incidences of trespass in the vicinity of the winter pasture?</p> <p>A. The instances where the north fence line had been taken down two or three times within a month, month and a half period, I've not had that problem prior to that." (Deposition of Paul Hardman, Vol. II, p. 223)</p> <p>"Q. Would it be fair to characterize the trespass problems in the area of the winter pasture as being much more severe or significantly more severe than in the area of the summer pasture?</p> <p>A. Yes." (Deposition of Paul Hardman, Vol. II, pp. 224-225)</p>	<p>"Q. Then if you could turn in your second deposition to page 223, the question was asked at line 10, 'Do you recall 1989 being any different than years before that with respect to the number of incidences of trespass in the vicinity of the winter pasture?'</p> <p>A. 'The incidences for the north fence line have been taken down two or three times within a month, month and a half. I have not had that problem prior to that.'</p> <p>Q. Was that your testimony?</p> <p>A. Yes." (Rebuttal Testimony of Paul Hardman, p. 28)</p> <p>"Q. You've had problems with hunters coming over there, is that right?</p> <p>A. Yes, that was prior to when we put the locked gates up, which was approximately seven or eight years prior to the accident." (Rebuttal Testimony of Paul Hardman, p. 4)</p> <p>"Q. 'Were you aware of poaching problems in the vicinity of the winter pasture prior to November 20, 1989?'</p> <p>A. 'No. Trespassers, yes. Not poaching.'</p> <p>Q. Question, 'And what awareness did you have regarding poaching problems prior to November 20, 1989?'</p> <p>A. 'People down in there spotlighting.'"</p> <p>(Rebuttal Testimony of Paul Hardman, p. 23)</p>

SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<p><b>Reports to Camp Williams</b></p>	<p>"Q. Okay, and each time you have put it back up?</p> <p>A. . . . each time I have rebuilt the fence, I have called Major Huff, ah, ah, he can verify all the problems that we've been having and tearing my fences down." (Statement, p. 4)</p>	<p>"Q. Did you have any agreement with the guard service at Camp Williams that no one was to enter the winter pasture area without your written permission?</p> <p>A. . . . a number of times, we mentioned to Camp Williams that people were not to go onto our property without permission, written permission. And we told the guards at the gate." (Deposition of Paul Hardman, Vol. I, p. 22)</p> <p>"Q. And could you tell me approximately how many conversations you recall having or that you are aware of that were had with Camp Williams and the guard service regarding access or entry to your pasture?</p> <p>. . . .</p> <p>A. If we had found trespassers down on our property, . . . I'd go up or call up at Camp Williams and just reemphasize the fact that we didn't want trespassers on our property." (Deposition of Paul Hardman, Vol. I, pp. 23-24)</p> <p>"Q. Do you recall anyone in particular that you spoke with at Camp Williams about this matter?</p> <p>A. I have talked to Major Huff . . . ." (Deposition of Paul Hardman, Vol. I, p. 25)</p>	<p>"Q. The two or three incidents immediately prior to the accident, you didn't report any of those to the Sheriff's Office, did you?</p> <p>A. Reported them to the guard service but did not call the police." (Rebuttal Testimony of Paul Hardman, p. 14)</p>

SUBJECT	RECORDED STATEMENT OF PAUL HARDMAN	DEPOSITION TRANSCRIPT OF PAUL HARDMAN	TRIAL TRANSCRIPT OF PAUL HARDMAN
<b>Reports to Camp Williams (cont'd)</b>		<p>"Q. Did you have any discussions with Camp Williams regarding any of those occasions when the fence had been knocked down?</p> <p>A. It's very possible that I did.</p> <p>Q. Do you have a specific recollection of any conversation?</p> <p>A. No. I talked to Camp Williams occasionally or the guard gate if there had been problems, but I don't remember exactly when they were." (Deposition of Paul Hardman, Vol. II, p. 199)</p>	

Tab F

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IN THE THIRD CIRCUIT COURT MURRAY DEPARTMENT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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ELDA M. SCOTT,	:	PLAINTIFF'S SECOND REQUEST
	:	FOR PRODUCTION OF DOCUMENTS
Plaintiff,	:	
	:	
vs.	:	
ALBERTSONS INC.,	:	Civil No. 930010891
Defendant.	:	Judge Michael K. Burton

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**REQUEST FOR PRODUCTION**

1. Please provide a copy of any statements taken from any individual by defendant's insurance company, its agents, its adjusters, or its investigators.

Please see Askew v. Hardman, 249 UAR 22 (October 11, 1994).

Dated this 25 day of Oct, 1994.

  
Glen A. Cook

MAILING CERTIFICATE

I hereby certify that on the 25 day of October,  
1994, I caused a true and correct copy of the foregoing PLAINTIFF'S  
SECOND REQUEST FOR PRODUCTION OF DOCUMENTS to be <sup>hand delivered</sup> ~~mailed~~, postage  
~~prepaid~~, to the following:

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136 South Main Street  
Salt Lake City, Utah 84101

Alan A. Cant