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**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

MARTIN J. MACNEILL,

Defendant.

**MEMORANDUM IN OPPOSITION TO
STATE'S MOTION IN LIMINE TO
PRECLUDE IMPEACHMENT BY
SPECIFIC INSTANCES OF CONDUCT
AND EXTRINSIC EVIDENCE**

CASE NO. 121402323

JUDGE SAMUEL D. MCVEY

Defendant, MARTIN MACNEILL, by and through his counsel, RANDALL K.
SPENCER and SUSANNE GUSTIN, submits the following MEMORANDUM IN
OPPOSITION TO THE STATE'S MOTION IN LIMINE TO PRECLUDE the Defense from

QUESTIONING ALEXIS SOMERS ABOUT SPECIFIC INSTANCES OF CONDUCT and
from INTRODUCING EVIDENCE OF SPECIFIC INSTANCES OF CONDUCT.

STATEMENT OF FACTS

1. Martin MacNeill (hereinafter “MacNeill”) is charged with murder of his wife, Michele MacNeill (hereinafter “Michele”).
2. After investigation, the Defense has discovered evidence and testimony key to MacNeill’s defense.
3. In August of 2007, MacNeill’s daughter, Alexis Somers (hereinafter “Alexis”), was fighting MacNeill for custody of her younger sisters, which Alexis did not want to be raised by MacNeill’s girlfriend, Gypsy Willis.
4. Alexis and MacNeill exchanged numerous text messages and had many phone conversations--some of which Alexis recorded.
5. In late August of 2007, Alexis and her sister, Rachel, contacted MacNeill’s employer in an effort to get MacNeill fired and alleged that MacNeill had sexually abused Alexis and had killed Michele.
6. In September of 2007, Alexis contacted the Pleasant Grove Police Department and again alleged that MacNeill had sexually abused her and had killed Michele.
7. In the course of communication with the Pleasant Grove Police Department, Alexis provided some text messages exchanged with MacNeill in the middle of August, before Alexis had gone to MacNeill’s employer, wherein MacNeill threatened to go to Alexis’s medical school Dean and report that she had cheated to get in. Alexis intentionally concealed the truth that she

had cheated to be eligible for medical school.

8. In January of 2009 MacNeill was arrested on federal charges and his phone was seized. Subsequently, the phone was forensically examined by Utah County Attorney's Office (hereinafter "UCAO) investigators or investigators working in conjunction with them. Text messages from August of 2007 were recovered.

9. Review of the forensically recovered messages revealed that Alexis had not turned over all of the relevant text messages, but only the messages that reflected poorly on her father and made her look like a victim. Specifically, MacNeill told Alexis not only that he would go to her Dean but that he would tell the Dean the truth about her Master's thesis (which MacNeill wrote) and about organic chemistry (a class that MacNeill taught at Salt Lake Community College only to help Alexis). Alexis never attended organic chemistry, and she still claimed full credit.

10. Alexis has made numerous other false statements in relation to MacNeill and the investigation of MacNeill that MacNeill's counsel does intend to query Alexis about during cross-examination.

ARGUMENT

Questioning Alexis about prior false statements relating to the investigation or her motive to misrepresent allegations against MacNeill is permitted under the Utah Rules of Evidence. MacNeill is charged with murder of his wife, Michelle; MacNeill denies all allegations and contends that Alexis is fabricating facts to harm him. On January 24, 2013, the UCAO filed a Motion in Limine, requesting the Court to issue a pretrial order precluding the Defense from attempting to impeach Alexis by questioning her about acts of misconduct and from introducing

evidence in support of this impeachment. TheUCAO bases its motion upon the assumption that questioning Alexis on acts of misconduct do not go to the trait of truthfulness and that the introduction of evidence is extrinsic and not admissible. However, such questioning and introduction of evidence is admissible and is necessary to show an essential element of MacNeill’s defense: motive and Alexis character for untruthfulness.

Rule 608 applies to the examination of a witness; whereas, Rule 404(b) relates to the admissibility of evidence whether the witness testifies or not. Finally, Rule 405(b) applies to instances where a witness’s character or trait is “an essential element of a charge, claim, or defense...” Utah R. Evid. 405(b).

I. QUESTIONING ALEXIS REGARDING FALSE STATEMENTS IS PERMITTED UNDER RULE 608 OF THE UTAH RULES OF EVIDENCE

TheUCAO seeks to prohibit MacNeill from questioning Alexis regarding her prior false statements pursuant to Rule 608 of the Utah Rules of Evidence. However, Rule 608 allows MacNeill to question Alexis about specific instances of conduct that are probative of her character for truthfulness. Rule 608(b) states: “the court may, on cross-examination, allow [specific instances of conduct] to be inquired into if they are probative of the character for truthfulness or untruthfulness of the witness...” Utah R. Evid. (2011).

MacNeill seeks to question Alexis using specific instances regarding false statements she has made prior to and throughout the investigation of MacNeill that relate to facts she has reported to investigators or to her motive to falsely accuse her father. Alexis, being an important witness for theUCAO, will certainly testify at trial. When she testifies, MacNeill may question

her about such instances on cross-examination. Specific instances of false statements are probative of Alexis's character for truthfulness. For example, Alexis claims to have written a "big chunk of the [Master's] thesis" herself. See PHT, 835. Alexis does concede that MacNeill wrote a lot of it. See PHT, at 836. The truth is that MacNeill researched the thesis from books checked out from libraries in Utah while Alexis was in England, and wrote the entire thesis, and Alexis submitted it as if it were her own work. Simply put, the most significant portion of the work necessary to obtain her Master's degree, Alexis did not complete. She knew that her father could expose her, and she chose to attack him first. Even if Alexis wrote as much as a "big chunk" of her Master's thesis, she cheated. Questioning Alexis about her false statements and deceitful conduct is relevant to her character for truthfulness and is admissible pursuant to rule 608(b).

Moreover, pursuant to Rule 608(c) evidence of "bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by *other evidence*." Utah R. Evid. Other instances of conduct "relevant to a witness' bias or motive" are "not subject to exclusion under Rule 608(b)" but are admissible pursuant to Rule 608(c). State v. Hackford, 737 P.2d 200, 203 (Utah 1987). The Utah Supreme Court held that the trial court, in Hackford, erred by not permitting the defendant to cross-examine the "prosecution's key witness" to show bias and motive to lie. Id. at 201 & 203. "Evidence of bias or motive is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" Id. at 203 (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974)).

Evidence of Alexis's false statements and/or cheating regarding her schooling, which

MacNeill threatened to disclose to her medical school Dean, are probative of Alexis's motive to fabricate facts against MacNeill to harm him and destroy his credibility. For example, Alexis only brought the allegations of murder and sexual abuse after MacNeill threatened to reveal incriminating information to her Dean. Like Hackford where the trial court should have permitted the defendant to cross-examine a witness to show bias and motive, this Court should permit MacNeill to cross-examine Alexis to show her motive to discredit and hurt him. Further, like Hackford where the Utah Supreme Court, quoting the U.S. Supreme Court, held that evidence of motive is always relevant to impeach a witness's testimony, evidence of Alexis's acts of conduct showing motive to fabricate facts against MacNeill is relevant to impeaching her testimony.

II. INTRODUCING EVIDENCE OF ALEXIS'S CRIMES, WRONGS OR OTHER ACTS IS PERMITTED UNDER RULE 404(b) OF THE UTAH RULES OF EVIDENCE

The UCAO, in a sentence or two, attempts to suggest that rule 404 of the Utah Rules of Evidence prohibits MacNeill from questioning Alexis concerning her false statements. However, Rule 404(b) allows MacNeill to question Alexis about specific instances of crimes, wrongs or other acts for a non-character purpose. Such evidence is admissible if it is "relevant for a non-character purpose" and not barred by rules 402 and 403. State v. Houskeeper, 62 P.3d 444, 451 (Utah 2002) (citing Utah R. Evid. 404 advisory committee note). Rule 404(b) states: "evidence [of crimes, wrongs, or other acts] may be admissible for [a non-character] purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Utah R. Evid.

MacNeill seeks to introduce evidence of wrongs or other acts regarding false statements and deceitful conduct of Alexis. Alexis's wrongs or other acts establish her motive to fabricate facts against MacNeill. For example, MacNeill contends that Alexis fabricated allegations against him because of a custody fight they were having. In an attempt to dissuade Alexis from taking his four younger daughters away, MacNeill threatened to get Alexis kicked out of medical school by revealing how Alexis had cheated in classes MacNeill taught and how MacNeill wrote Alexis's Master's thesis. Alexis claims to have written a "big chunk of the [Master's] thesis" herself while admitting that MacNeill wrote a lot of it. See PHT, 835 & 836. However, MacNeill wrote the entire thesis and did all of the research and citations in Utah while Alexis was in England. Introducing evidence of Alexis's deceitful conduct and dishonest character will establish Alexis's motive to lie concerning allegations against her father and is expressly admissible pursuant to rule 404(b).

III. QUESTIONING ALEXIS REGARDING FALSE STATEMENTS IS PERMITTED UNDER RULE 405 OF THE UTAH RULES OF EVIDENCE

Rule 405 of the Utah Rules of Evidence allows for evidence of and inquiry into specific instances of conduct. Rule 405(b) states: "When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct." Utah R. Evid

Pursuant to rule 405 of the Utah Rules of Evidence, MacNeill may question Alexis about specific conduct, on cross-examination, to not only prove her character but also to demonstrate her bias against her father and motive to misrepresent. State v. Martin, 44 P.3d 805, 813 (Utah

2002).

IV. CONCLUSION

MacNeill's investigation into Alexis's deceitful conduct is continuing, and the example of her cheating to get her Master's degree referenced above is only one example of her deceitful conduct. She also conspired to deceive IHC to obtain her Mother's medical records in violation of HIPPA. She has given inconsistent stories about the identity of her co-conspirator—she told the UCAO that it was a physician friend who helped her, and she told MacNeill's counsel in a written response to a subpoena that she did not have a physician help her. Alexis testified before this Court on June 26, 2013, that she had a physician, Dr. Faiz Hussain, from California, help her get her medical records from the IHC hospital in Utah. MacNeill expects to inquire at trial about additional dishonest acts of Alexis that are currently known and yet to be discovered through his ongoing investigation.

For all the reasons set forth above, this Court should dismiss the UCAO's Motion in Limine and permit the introduction of evidence and cross-examination of specific acts of conduct to establish motive for Alexis to incriminate MacNeill, to demonstrate her character for untruthfulness, and to impeach her credibility.

Submitted this 3 day of July, 2013.



Randall K. Spencer
Fillmore Spencer LLC

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered by Email and Mail, the forgoing document(s) to:

CHAD GRUNANDER
SAM PEAD
JARED PERKINS
Deputy Utah County Attorney
100 East Center, Suite 2100
Provo, Utah 84606
Email: ucadm.Dcourt@state.ut.us

Dated this 3rd day of July, 2013.

