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<p>COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203</p> <p>JOHN P. DOERNER CLERK COURT OF APPEALS</p>	<p>SEP 26 P 4: 03</p> <p>▲ ▲</p> <p>COURT USE ONLY</p>
<p>Appeal from Custer County District Court, Case No.03 CR 24, Hon. Julie Marshall, Judge</p> <p>Plaintiff-Appellee: People of the State of Colorado,</p> <p>vs.</p> <p>Defendant-Appellant: Linda Z. Cary</p>	
<p>Paul Grant 6053 South Quebec Street, # 101 Centennial, Colorado 80111 303-771-1908 Reg. # 26073 Counsel for Ms. Cary</p>	<p>Case Number: 04 CA 2235</p>
<p>OPENING BRIEF</p>	

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ISSUES PRESENTED

- I.A. Whether the trial court denied the defendant her right to present her defense, and due process, and the right to confront her accusers, when the trial court refused to allow defense witness Saint Amour to testify as to threats and offers of rewards he had received from alleged victim (and accuser) Dave Nequette, threats if Saint Amour's testimony didn't support Nequette's accusations, and rewards to Saint Amour if the case turned out "right" for Nequette - i.e., if defendant Linda Cary was convicted. The trial court ruled such threats and promises of rewards were "irrelevant" to the case against Ms. Cary.
- I.B. Whether the trial court erred when denying Ms. Cary the opportunity to introduce opinion evidence as to accuser Nequette's character for untruthfulness.
- II. Whether the trial court erred when it allowed evidence of "other bad acts" from a civil case in Arizona, where the defendant had been accused of fraud.

STATEMENT OF THE CASE

Ms. Cary appeals from her conviction on multiple counts of theft and forgery, a conviction resulting from her jury's verdict rendered August 13, 2004. On October 1, 2004, Ms. Cary was sentenced by the Custer County District Court to 10 years of probation plus 450 days of jail as a condition of probation. See the Mittimus at V. 3, pp. 470-481. She was also sentenced to pay restitution in the amount of \$99313.00. V. 3 at 548.

Ms. Cary has now completed her jail sentence and is serving a term of probation.

Ms. Cary was originally charged with six counts of theft and 29 counts of forgery for allegedly using her position as company bookkeeper to steal money from her employer, Nequette Drilling & Excavating, Inc., a company owned by Dave Nequette. See the Information at V. 1 at 54 - 64. The prosecution later sought to add an additional count of theft. V. 1 at 158.

At the trial, the prosecution presented its case primarily through testimony from Dave Nequette, owner of Nequette Drilling; Debi Williams, girlfriend of Dave Nequette and office employee of Nequette Drilling; Robert Saint Amour, a Nequette employee paid to examine company records and compile a report on

defendant Linda Cary's alleged thefts and forgeries committed while she was the bookkeeper for Nequette Drilling; and David Dauenhauer, an investigator from the Colorado Bureau of Investigation who had investigated the case.

Nequette and Williams accused defendant Cary of having paid herself and her daughter, who was also a Nequette employee, unauthorized sums of money, of having forged William's names to company checks, and of having made unauthorized use of a company credit card. Nequette and Williams testified Linda Cary had acted without their knowledge or authorization.

Nequette told employee Saint Amour what to look for in Saint Amour's review of company financial records, and he told Saint Amour what was authorized and what was not authorized. Saint Amour's report of Linda Cary's alleged thefts and forgeries was based upon guidance received from Dave Nequette, as to what was authorized and what was standard company policy, and what was not.

If Nequette lied to Saint Amour, it would be reasonable to infer that he did so to get Saint Amour to prepare a report which could then be used to dishonestly accuse Linda Cary of theft and forgery.

The key issue at trial was the credibility of the accusers - i.e., whether Nequette and Williams were lying, and whether they knew what Linda Cary was doing and whether they had authorized it.

The trial court would not allow the defense to present evidence that Nequette had misled Saint Amour in preparing his report on Linda Cary, or that Nequette had subsequently threatened Saint Amour if Saint Amour were to contradict or undermine Nequette's accusations, or that Nequette had offered rewards to Saint Amour if Linda Cary's trial turned out right for Nequette.

The trial court also allowed evidence of a civil case against the defendant from Arizona, a case in which Ms. Cary had been accused of fraud, as evidence of a prior bad act based on a common theme or plan or design. V. 12 at 119. The trial court had ruled that the Arizona civil fraud case was very similar to the Colorado criminal case (V. 8 at 27); that the Arizona case would negate the defendant's theory of consent (V. 8 at 27); that there was no risk of jury confusion (V. 8 at 27); that the Arizona acts showed modus operandi and common plan, and, because the Arizona case was so similar, that probative value outweighed the risk of unfair prejudice (V. 8 at 28).

Prosecution witness Mary Morton Smith testified about the Arizona case, testifying Cary had worked for her husband's law firm and had stolen money from the firm by her unauthorized use of the checkbook, that Cary had forged checks, that Cary's alleged employment contract had been found to be a forgery, and that the court awarded a monetary judgment against Linda Cary and her husband. See V. 11 at 20-27.

The trial court advised the jury to consider the Arizona case as evidence of a common plan, scheme, or design, but not for any other purpose. V. 11 at 28.

In order to avoid further confusion of the jury over the Arizona case, the defense chose not to have a trial within a trial, even though Linda Cary could have shown: that the deceased lawyer had been in the process of divorcing Mary Morton Smith (whom he had married less than a year before), when he died; that her husband had obtained a restraining order against her forbidding her from coming near him or his office; that she had violated that restraining order and was charged with that and domestic violence harassment before her husband died (after which that case was dismissed), that she had blamed Linda Cary and Cary's daughter for her husband's attitude against her; that she sued her husband's estate and his eleven-year-old daughter upon his death, being dissatisfied with his will,

in which he had left everything to his daughter; and that Linda Cary's civil lawyer was inexperienced and dropped the ball during the civil case, making inadequate disclosures and getting fined more than \$18,000 and held in contempt of court, depriving Cary of the opportunity to introduce important evidence - professional negligence or incompetence which led to the negative civil trial outcome.

Statement of Facts

The defense attempted to have Robert Saint Amour testify that after he had prepared his report for Nequette on Linda Cary's financial transactions, he had come to believe (based on information he learned from other Nequette employees and from what he saw in the office) that what he had been told by Dave Nequette (the information as to what was company policy and what was authorized or not) was false and that Nequette was pursuing a personal vendetta against Linda Cary. V. 12 at 8; Appendix A (excerpts of Saint Amour's proffered, but court-rejected, testimony). Saint Amour also would have testified that Dave Nequette had threatened his life if he did not support Nequette's accusations at trial, and that he was promised rewards if the trial turned out right - *i.e.*, with a conviction of Linda Cary. V. 12 at 9-10.

The trial court ruled that Nequette's threats and offers of reward to Saint Amour were irrelevant to the case against Ms. Cary, and disallowed the testimony. V. 12 at 10.

The defense sought to introduce opinion evidence from Jennie Moore (f/k/a Jennie Marron) as to Dave Nequette's character for untruthfulness, testimony based on her personal knowledge of Nequette, but the trial court disallowed that testimony. V. 11 at 188.

Dave Nequette

Dave Nequette testified that Linda Cary had no authority to use a company credit card (V. 10 at 148); that he never knew of or authorized her use of the company credit card (V. 10 at 148); that he never saw the monthly company credit card bills which itemized use of the company card, he just paid the bill (146, 150); that he never authorized Cary to use the company credit card and reimburse him later (157); that Cary opened company mail and he didn't see it (140); that Cary was not authorized to sign Debi Williams' name but forged it on company checks (212); and that Cary had paid herself large sums she was not entitled to; that only full-time employees received company health benefits (158); that he never authorized health benefits for the defendant's daughter, Jennie Moore, who was a

part-time employee (158-159); that none of Linda Cary's "extra checks" were authorized (163); that he told Robert Saint Amour that Cary's use of the company credit card was unauthorized (172); and that he had never been reimbursed by Linda Cary for her use of the company credit card (201-203) (despite cancelled check evidence that he had received a check of \$6500 from Robert Cary, see Exhibit G, and despite evidence that Robert Cary also directly wired \$2926.27 to Nequette's credit card company, V. 11 at 134 -136, Exhibit H).

Debi (Debra) Williams

Debi (Debra) Williams testified that she had worked for Nequette Drilling while Linda Cary worked there (V. 10 at 35); she worked in the office as an assistant and Linda Cary worked there as bookkeeper (36); that she (Debra Williams) was the "significant other" to Dave Nequette (36); that she and Linda Cary were authorized to sign company checks where two signatures were required, but Dave Nequette could sign by himself (41-42); that she had written a letter verifying that Cary's daughter, Jennie Moore (43) was getting health insurance benefits through Nequette Drilling; that she had written the letter because Cary told her that Nequette had authorized health insurance benefits for Moore, even though Cary should have written the letter since she was the office manager (44);

that Linda Cary opened the company mail and Dave Nequette never did (49, 50); that, on occasion, she, Debi Williams, would sign blank checks for Cary because she and Nequette were going to be out of the office on vacation (66); that she did not know how company employee Bob Makin was paid (67); that she never authorized Linda Cary to sign her name on company checks (70); that she had once cashed a check made out to herself and paid Bob Makin the money (97); that Makin was a Canadian citizen working for the company (99); that Dave Nequette had once deliberately destroyed his own computerized financial records while going through a divorce (114); that Dave Nequette would not enter cash business transactions into the Quick Books computer program (115); that she, Debi Williams, had probably opened company mail for a few weeks while Linda Cary was out (116); then the parties stipulated that company checks in Exhibits 6-34 displayed the purported signature of Debra Williams but Linda Cary actually signed Williams' name on those checks (127-128).

Jennie Moore f/k/a Jennie Marron

Jennie Moore f/k/a/ Jennie Marron (daughter of Linda Cary) testified that she at first worked part-time in the office for Nequette Drilling, but that later turned into full-time employment, 40 hours per week, in early 2001 (V. 11 at 164);

that Dave Nequette and Debi Williams explained the company health insurance benefits to her and Nequette knew she was receiving those benefits (167-168); that Debi Williams brought her the health insurance application and later explained her coverage to her (168-169); that her paycheck stubs - Exhibit Q - showed the deduction for health insurance (170-171); that Dave Nequette personally opened all of his office mail, routinely (176-178); that Dave Nequette and Debi Williams both told Linda Cary she could sign Williams' name on company checks while Nequette and Williams were on vacations (179); that Shirley Makin and Bob Makin were both paid through checks made out to Jennie Moore, checks which were cashed and the cash then given to Nequette or to Williams (180-182) to pass on to the Makins; that Debi Williams and Linda Cary also cashed checks for the Makins (182); that Linda Cary did other work for Dave Nequette, outside of office hours, and she was paid extra for that (182-183).

Dave Nequette

Dave Nequette did admit that "the girls" [Williams and Cary] took care of paying a friend [Bob Makin] he met in Mexico, a Canadian citizen, in cash and off the books, for maintenance work performed for Nequette and that involved making checks payable to Linda Cary so she could cash them and hand the money

to that employee, and that Nequette filed no 1099 on that employee (V. 12 at 223, 225). Nequette also testified he never looked at his bank statements in three years. (V. 12 at 229).

Linda Cary

Linda Cary testified that Dave Nequette introduced her to the Quick Books accounting software (V. 12 at 27), which she had never seen before; that she learned how to use the software from Nequette and from a manual (27); that she was paid separately for her paralegal and out-of-office work, including work assisting Nequette with his divorce (27); that she received “extra checks” for extra work on his divorce (28); that Exhibit W was a 1099 for extra work she had performed for Nequette (28); that Nequette offered her some help as to how he wanted the Quick Books accounts set up, but Nequette would not authorize training for Cary and Debi Williams (30); Nequette understood Quick Books and what he wanted (31); there were times when Cary was left in the office alone for 6-8 weeks as Nequette and Williams and Dave Mishler were all on vacation (33); that checks needed to be signed and Debi Williams gave permission to Cary to sign her name on company checks (34); that Cary performed all kinds of research for Nequette, including numerous things unrelated to Nequette Drilling (35); that

Dave Nequette was not computer illiterate, as he testified, he knows how to create computer spreadsheets, understands how to use Quick Books, knew how to manipulate Quick Books to hide cash employees during audits, knows all the programs on the office computer (37); that Dave Nequette personally authorized a company credit card for her (39); that she purchased some personal items for Nequette on her company credit card to hide them from Nequette's wife (41); that she would go over the credit card bills with Nequette and point out which items were personal items (41-42); that she often repaid Nequette in cash, but sometimes with a check or money order (42); that Nequette reviewed the quarterly company credit card statement (Exhibits B1 and B2 and B3) with her, and he saw all of her charges (46-47); that she made substantial reimbursements to Nequette for personal credit card use through a wire transfer from her husband, through a wire transfer from her daughter in Arizona, and through a check from her husband (49); that she sometimes personally purchased items for Nequette (Exhibit J), for which she was later reimbursed (57); that she made deposits (Exhibits K1 and K3) into Nequette's bank account to pay for her family health insurance (58-62); that Nequette instructed Williams and Cary to write checks to themselves which would be cashed to pay the Makins and other off-the-books employees, two non-citizens

and one who was subject to garnishment (69-71); that Cary reimbursed Nequette for her credit card use in the approximate amount of \$12,500 (79-81); that she was then paid up in full with Nequette for her personal credit card use and she cut up all of her credit cards at that time (81); Dave Nequette opened all of his own mail (87-88); and it was a common and authorized practice for her to sign Debi Williams' name on company checks, along with her own (97-98).

Cary also testified that she had an incident with Nequette where she told him she would no longer assist him in altering his books (V. 12 at 129); that he told her she would do exactly as she was told, and that, if not, she would go to jail; that he was very explosive (which testimony the trial court disallowed, 129) (the trial court had just ruled that Cary would not be allowed to testify that Nequette kicked the door off the hinges and that - if she said anything about his illegal practices - he would put her away and he would put her family away, and he threatened her 11-year old son (proffered testimony at V. 12, pp. 116-118, see pages 118-121, the judge's ruling limiting the testimony as to which of Nequette's threats were "relevant" to issues in the case). The trial judge ruled as irrelevant testimony about Nequette's explosive behavior, including his ripping a door off the hinges when angered by Cary, and also ruling irrelevant Nequette's threats

against Cary and her family and her son, and his purchase of a gun. V. 12 at 118-119. The trial judge ruled *irrelevant* those threats and acts that no one else had mentioned! V. 12 at 118-119.

Ms. Cary presented her post-trial motion for a new trial, raising the issue of the trial court not allowing Saint Amour to testify about the threats and offers of rewards from Nequette. V. III at 303. That motion was argued and then denied at the sentencing hearing. V. 14 at 21.

SUMMARY OF ARGUMENT

The motives of a witness in testifying, and that witness's bias and interest in the outcome of the trial, are always relevant to the credibility of that witness. The credibility of Dave Nequette and of Debi Williams were key to the prosecution's case against Linda Cary. If Nequette and Williams were aware that Linda Cary was using the company credit card, then Nequette's claims of theft were most likely lies. If Nequette routinely opened and read company mail (he and Williams testified he never did, Moore and Cary testified that he always did), then he had to know what items Linda Cary was billing to the company credit card, he did see his bank statements, he did know he was being reimbursed by Cary for her personal use of the company credit card, etc. - so his claims of ignorance were lies. If he

was lying about those issues, then the jury could infer he was likely lying about other matters, too.

Since Debi Williams backed up Nequette's testimony, if he was lying, then so was she. Williams testified Nequette never opened or read the mail, that she never authorized Linda Cary to sign her name on company checks, that Nequette did not know that Linda Cary's daughter was receiving health care benefits from the company, and that Cary was not authorized a company credit card. Since Williams was sometimes gone with Nequette for weeks at a time, and since she had to know that Linda Cary was signing her name to pay legitimate company bills during those times, her testimony was already weak.

If Nequette and Williams were lying about these issues, then the entire case against Linda Cary collapses.

Evidence that Nequette had misled Saint Amour in telling him what was authorized and what was standard company policy, and that Nequette was threatening the life and the economic well-being of a witness (Saint Amour) if that witness contradicted Nequette at trial, and evidence that Nequette offered a financial reward (bribe) to Saint Amour if Cary was convicted at trial, certainly

casts doubt on the credibility of Nequette. Honest men don't threaten or offer bribes to witnesses.

Jennie Moore's character evidence testimony, that Nequette was in her opinion an untruthful person, would have been proper character evidence concerning the lack of credibility of the key prosecution witness. There was no legal basis for the trial court prohibiting that testimony. The trial court simply didn't want to hear it.

Evidence that Nequette physically threatened Linda Cary and her family and her son, and that he threatened to see her sent to jail, if she did not continue to go along with his bookkeeping scams, was relevant to Nequette's revenge and vengeance motives in accusing Cary of theft and forgery. The relationship between Nequette and Linda Cary was relevant to the credibility of each as a witness. The trial court improperly protected Nequette from relevant evidence directly involving his work relationship with Cary, thus denying Cary's right to challenge his credibility.

The trial court disallowed much proper evidence from the defense, so much so that Ms. Cary was denied her defense, her opportunity to confront and challenge the credibility of her accusers, and a fair trial.

The trial court also erroneously allowed evidence to be presented that Ms. Cary had been sued for defrauding a prior employer, the trial court ruling that the prior episode was sufficiently similar to be allowed under CRE 404(b).

ARGUMENT

I.A. The trial court erroneously excluded impeachment evidence from Robert Saint Amour, evidence that Nequette had lied to Saint Amour in order to influence his report, evidence that Nequette had threatened Saint Amour if Saint Amour's testimony did not support Nequette, and evidence that Nequette offered rewards to Saint Amour if he testified correctly and the case turned out right.

The right of confrontation guaranteed by the Sixth Amendment includes the right to discredit the witness. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974) (one way to discredit the witness is to introduce evidence of a prior criminal conviction of that witness). The partiality [or bias] of a witness is always relevant as discrediting the witness and affecting the weight of his testimony. *Id.*

Another way to discredit the testimony of a witness is to introduce character evidence of that witness' character for untruthfulness. *See Alford v. United States*, 282 U.S. 687, 691 (1931) (requiring a witness to disclose his address is

permissible because, among other reasons, the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood).

Impeachment is a technique used to attack the truth-telling capacity of a witness and may be accomplished by demonstrating the witness' bias, self-contradiction, poor character, defect in perceptive capacity, prior convictions or bad acts, or by contradicting the witness on specific facts in her testimony. *See People v. Trujillo*, 49 P.3d 316, 319-320 (Colo. 2002) (internal citation omitted).

Impeachment evidence in the form of evidence of bias can be elicited either by cross-examination of the witness or through the presentation of extrinsic evidence. Extrinsic evidence of the bias of Dave Nequette (truthful people don't usually threaten or bribe witnesses) was erroneously excluded by the trial court: "Prohibition against extrinsic evidence does not apply to extrinsic evidence of bias." *People v. Hall*, 107 P.2d 1073, 1077 (Colo.App. 2004).

This case involves constitutional error which occurred "during the presentation of the case to the jury and . . . may therefore be quantitatively assessed in the context of other evidence presented . . ." *See Trujillo* at 320. An appellate court must assess such constitutional error in light of the other evidence

in the case "to determine whether [the erroneous] admission [of evidence] is harmless beyond a reasonable doubt." *Id.*

If there is a reasonable probability that Ms. Cary could have been prejudiced by the error, then it is not harmless. *See Id.* There are several factors that this appellate court should consider in determining whether the error was harmless beyond a reasonable doubt: the importance of Nequette's and Saint Amour's statements to the prosecution's case, the overall strength of the prosecution's case, whether the probative value of the statements was cumulative, and the presence or absence of corroborating or contradictory evidence on the facts asserted in the statements. *See Id.*

In Ms. Cary's case, the prosecution's case relied upon the accusations from Nequette, accusations supported by his girlfriend, Debi Williams, and by the report prepared by Saint Amour, who relied on Nequette's explanation as to what Cary was authorized to do, and what she was not authorized to do. If Nequette and Williams lied about whether Cary was authorized to use the company credit card; and about whether Nequette knew Cary was using the company credit card; and if Nequette and Williams lied about whether Cary was authorized to sign Williams' name on company checks, and about whether they knew she was

signing Williams' name; and if Nequette and Williams lied about whether Cary was writing checks to herself and to other employees, for the purpose of cashing these checks and paying certain employees "off-the-books, for Nequette's benefit; then there was no case against Linda Cary. Discredit Nequette and you discredit Debi Williams. That would have destroyed the prosecutor's case.

If Nequette threatened Robert Saint Amour in order to get Saint Amour to support Nequette's story at trial, that act of witness intimidation suggests a man afraid of the truth. Ms. Cary's jury should have heard that evidence of Nequette's bias. The claim of bias was one which Ms. Cary was entitled to present to her jury. *See Davis v. Alaska*, 415 U.S. at 317-318 (where truthfulness of accuser was a key element in the state's case, defendant entitled to present to the jury evidence from which bias could be inferred). It would have blown the case right out of court.

The Sixth Amendment guarantees the right of the accused in a criminal case to a fair trial and to confront adverse witnesses, so the right to cross examination - and of introducing extrinsic impeachment evidence - is of constitutional significance. *See People v. Cobb*, 962 P.2d 944, 950 (Colo. 1998); *Davis, supra*. A trial court has the authority to impose some limits on impeachment evidence,

but where the limits imposed prevent a criminal defendant from exploring the bias or prejudice of a witness against her, the requirements of the Sixth Amendment are not met. *See Id.*

In order to obtain a new trial, Cary need not show that the limits on presenting impeachment evidence would have changed the outcome, but rather that the ruling[s] preventing her from challenging Nequette’s credibility was not harmless beyond a reasonable doubt. *See Id.*

I.B. The trial court erroneously excluded character of untruthfulness evidence that Jennie Moore would have provided against key prosecution witness Nequette.

For the Sixth Amendment-based reasons offered above, the court erroneously excluded the testimony of Jennie Moore, who would have testified that, based on her knowledge and in her opinion, Dave Nequette was not a truthful person. See V. 11 at 187; Appendix B; and see C.R.E. 608(a)(1), which expressly provides for just such evidence as the district court excluded.

II. The trial court erroneously allowed evidence of “other bad acts” from a civil case in Arizona, where the defendant had been accused of fraud.

CRE 404(b) prohibits the introduction of evidence to prove that a person acted in conformity with a character trait. CRE 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The Colorado Supreme Court developed a four-part test in *People v. Spoto*, 795 P.2d 1314 (Colo. 1990), to determine the admissibility of "other acts" evidence in a criminal action. *Hock v. New York Life Insurance Co.*, 876 P.2d 1242, 1250 (Colo. 1994). Under *Spoto*, such evidence is admissible only if (1) the evidence relates to a material fact; (2) the evidence has logical relevance in that the evidence adds to the probability that the material fact is true; (3) the logical relevance of the evidence does not depend on an intermediate inference that the litigant has a bad character, which would be employed to support a further inference that the litigant acted in conformity with his bad character; and (4) the probative value of the evidence is not substantially outweighed by the evidence's prejudicial impact. *Id.*

Where "other acts" are admitted to show a common plan, scheme, or design, the evidence is admissible where it involves a similar transaction. *Id.* ("evidence is not admissible which shows or tends to show that the accused has committed a crime wholly independent of [the] offense for which he is on trial"). The Tenth Circuit has observed that "there must be a clear and logical connection between the alleged earlier offense or misconduct and the case being tried." *United States v. Biswell*, 700 F.2d 1310, 1317-18 (10th Cir. 1983) (cited approvingly in *Hock*).

In addressing the court of appeals' holding that "Abdelsamed's misrepresentations made on other disability insurance applications could lend support to the defendant's theory that Abdelsamed had a plan to defraud his insurers," we recognize that ***the conduct at issue in the trial must be part of a single scheme of which the earlier wrongful acts are evidence.*** *Hock* at 1250 (emphasis added). "The allegations of fraudulent misstatements made on the application form to Mutual Benefit and the claim form to Royal Globe do not suggest an intent or plan by Abdelsamed to fraudulently obtain disability benefits from NYL by exaggerating his income or concealing his other insurance coverage." *Id.* at 1251. The prior insurance transactions involved different

insurers with different requirements for disclosure on the applications, thus the evidence was properly excluded. *Id.*

The Supreme Court found that the trial court acted correctly when it also excluded the "other acts" evidence under CRE 403 on the grounds that, even if such evidence were relevant, such an inquiry "would interject undue confusion and would create a collateral issue [to be tried]." *Id.*, at 1251.

The Supreme Court held that the trial court did not abuse its discretion in deciding that the admission of alleged fraudulent misrepresentation claims involving different insurers would cause undue confusion of the issues, interject collateral issues of minimal probative value, and confuse the jury. *Id.* The *Hock* court further explained the dangers of creating a trial within a trial:

The district court did not abuse its discretion by ruling that the "other acts" evidence created a substantial danger of unfair prejudice under CRE 403 since the repeated allegations of prior fraud could have unjustly influenced the jury to create an inference that Abdelsamed had a bad character. Further, to open the courtroom to a flood of collateral allegations would have necessitated a trial within a trial concerning Abdelsamed's alleged misrepresentations prior to, and independent of, the insurance policy at issue in this case. In effect, the admission of the "other acts" evidence would lead to trying two other insurers claims of fraud-insurers who were not even parties to this case. Such a trial "would have consumed a great deal of trial time and would have had slight probative value."

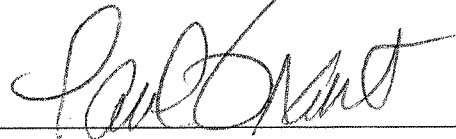
Hock v. New York Life Insurance Co., 876 P.2d 1242, 1251 (Colo. 1994)(internal citations omitted).

Given the trial court's unfortunate decision to allow in evidence of the Arizona civil case, which had nothing at all to do with the alleged incidents in Colorado, Ms. Cary chose to avoid the trial-within-a-trial, to avoid further confusion of the jury. (See Statement of the Case at 5-6). Nevertheless, she was severely prejudiced by the improper admission of evidence regarding the Arizona civil case.

CONCLUSION

Ms. Cary was denied the right to confront her accusers, due process, and a fair trial and is, therefore, entitled to a new trial.

Respectfully submitted,



Paul Grant

Counsel for Ms. Cary

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the OPENING BRIEF on this 26th day of September, 2005, by placing the same into the United States Mail, postage paid (or as otherwise indicated) and addressed to:

Colorado Court of Appeals (original plus five copies hand-delivered)
2 East 14th Street, 3rd Floor
Denver, Colorado 80203

Attorney General's Office
Appellate Division
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Marina Sidorova

Marina Sidorova

APPENDIX

Appendix A

Excerpts of Saint Amour

Appendix B

Excerpts of Jennie Moore

1 has nothing to do with this case.

2 Call Mr. Saint-Amour. Ask him the question.

3 We'll see where we go from there.

4 If you would ask Mr. Saint-Amour to come in.

5 MR. KOIVUHALME: This will be in front of the
6 jury, right, Your Honor?

7 THE COURT: No. I said we were going to do this
8 and see what he says, and then we'll decide where we go from
9 there.

10 Mr. Saint-Amour, if you would just come around to
11 the lectern there. Raise your right hand.

12 ROBERT SAINT-AMOUR

13 called as a witness on behalf of the Defendant, having been
14 first duly sworn, was examined and testified as follows:

15 THE COURT: Why don't you have a seat up here.

16 DIRECT EXAMINATION

17 BY MR. KOIVUHALME:

18 Q. Good morning, Mr. Saint-Amour.

19 A. Good morning.

20 Q. Have you recently made the statement to anyone
21 that I, John Koivuhalmé, as attorney for Linda Cary, am
22 missing something in this case? Have you made that
23 statement?

24 A. I have.

25 Q. Would you explain to the Judge what you mean by

1 what I am missing. She is now going to listen to you.

2 MR. KOIVUHALME: Could I close the door, Your
3 Honor?

4 THE COURT: Sure.

5 MR. KOIVUHALME: Could you close that door. Just
6 wait until they door is close.

7 THE COURT: I can hear him.

8 MR. KOIVUHALME: I'm concerned if you can hear.
9 It's very important.

10 THE COURT: It's all important, Mr. Koivuhalmé.
11 Go ahead.

12 A. I believe that we have all been led down a trail
13 by Dave Nequette and Debra Williams on this matter. And that
14 my position has been used to perpetuate a personal vendetta
15 and acts of revenge against Linda Cary. My investigation has
16 revealed some of that information.

17 There is evidence in that office to contradict
18 Dave Nequette's position of not knowing anything that's going
19 on in that office.

20 After I was asked to, after I was done with this,
21 I was asked to use my investigative skills to further acts of
22 revenge against other past employees and clients of Dave
23 Nequette. When I refused, my pay was immediately cut by 20
24 percent. I have been intimidated. I have been shot at. I
25 am almost sick to my stomach right now.

1 you to hear that.

2 THE COURT: Mr. Koivuhalmé, the issue here is
3 whether or not Mr. Saint-Amour has told the truth in this
4 courtroom. I understood you to say yesterday that you had.
5 Is that correct?

6 THE WITNESS: Yes, ma'am.

7 THE COURT: Have you said anything in this
8 courtroom that has not been completely accurate, to the best
9 of your knowledge and belief?

10 THE WITNESS: No, ma'am.

11 THE COURT: Then the rest of it, Mr. Koivuhalmé,
12 relates to a charge that may or may not be filed against
13 Mr. Nequette. It doesn't relate to whether or not Ms. Cary
14 is guilty. As far as the threats, whether they've occurred,
15 whether they haven't occurred, that simply doesn't relate.
16 It's not relevant to whether Ms. Cary is guilty or not
17 guilty.

18 If you have some evidence that Ms. Cary is not
19 guilty that you want to elicit from Mr. Saint-Amour, I'd be
20 happy to hear about that. But this relates to a case that
21 may or may not be filed against Mr. Nequette, not to whether
22 or not Ms. Cary is guilty.

23 MR. KOIVUHALME: Can I ask him if he has evidence
24 of her innocence?

25 THE COURT: Certainly.

1 MR. KOIVUHALME: This is my direct. My case in
2 chief.

3 THE COURT: It has to be relevant. It can't just
4 be trying to trash the victim unless that somehow or other
5 relates to whether or not your client is guilty or innocent.
6 If you want to ask him if he has evidence that she is
7 innocent and what that is, I would be happy to consider it
8 and I'll allow you to present that to the jury.

9 Q. (BY MR KOIVUHALME) Mr. Saint-Amour, I believe
10 you just testified that you are aware of items, documents,
11 whatever it is, back in the office or somewhere. Do you have
12 any evidence that you're aware of that shows that either Dave
13 Nequette is lying or that my client is innocent? Do you have
14 something like that, are you aware of it?

15 A. I believe I do.

16 Q. Can you explain to the Judge what you're talking
17 about.

18 A. Yes. In the course of my investigation, I was
19 told by Dave Nequette that he had no knowledge of anything
20 that was going on in that office and that the procedures that
21 I was witnessing at the time that I was in the office was a
22 new procedure that was implemented after Linda Cary left.

23 I came to find evidence in that office that
24 directly contradicts that position.

25 THE COURT: The question is what.

1 Q. What? What evidence are you talking about? Be
2 more specific.

3 A. I have talked to two employees that were working
4 there before Linda Cary was working there that told me that
5 this is exactly the way it has always been there. I found
6 documents that were stamped as received and dated in the
7 office that shows that has been a normal course of action in
8 that office for years before Linda Cary ever worked in that
9 office.

10 THE COURT: Anything else?

11 Q. Is there anything else you can tell the Judge
12 about that?

13 A. Not that I recall.

14 THE COURT: He is not going to be allowed to
15 testify as to what other people told him. That's clearly
16 hearsay. As far as whether items are date stamped or not,
17 that hasn't been a fact in controversy. In fact, the
18 testimony was that was the process that was used. Things
19 were date stamped. I'm not seeing how any of that is
20 relevant.

21 I suppose I'm just not seeing it, Mr. Koivuhalmes.

22 MR. KOIVUHALME: That's on the record. I did my
23 best. He has objected. You sustained it.

24 THE COURT: Any inquiry you care to make outside
25 the presence of the jury?

1 MR. COOLING: No, Judge.

2 THE COURT: Anything you want to put on the
3 record?

4 MR. COOLING: No.

5 MR. KOIVUHALME: There is nothing that I can ask
6 him before the jury then?

7 THE COURT: You did ask him a couple questions.
8 Are you going to have any cross-examination?

9 MR. COOLING: Probably not based on what I heard.

10 THE COURT: I have the jury. I'll recess on this
11 and try to take care of these matters even though they're not
12 set until 9:30. Are you ready to proceed, Mr. Donovan?

13 MR. DONOVAN: They called me a few minutes ago.

14 THE COURT: You can step down. I'm going to take
15 care of these two matters. Then we'll call the jury in.
16 We'll proceed from there.

17 MR. KOIVUHALME: I can say he can be excused.
18 There is nothing.

19 THE COURT: We'll have to do that in front of the
20 jury.

21 MR. KOIVUHALME: All right.

22 (Short recess).

23 MR. COOLING: Judge, could I give your clerk a
24 duplicate of a couple of exhibits. 185 and 186 were
25 admitted.

1 Q. In your opinion, she was doing it with
2 authorization?

3 A. Yes.

4 MR. COOLING: Objection.

5 THE COURT: Sustained.

6 Q. Do you know if she had authority to do that?

7 A. Yes.

8 MR. COOLING: Objection. Foundation.

9 THE COURT: Sustained.

10 Q. You worked for Dave Nequette all those months and
11 you said you were in five days a week at least, right?

12 A. Yes.

13 Q. Would you see him every day?

14 A. Yes.

15 Q. In your opinion, do you believe you got to know
16 him well?

17 A. Yes.

18 Q. Did you get to see him in social situations
19 outside of the office?

20 A. Yes.

21 Q. Tell us about that.

22 A. We had lunch. We would go out.

23 Q. Would he buy your lunch?

24 A. Yes.

25 Q. How often would that occur?

1 A. Maybe twice a week.

2 Q. And every day at the shop for months?

3 A. Yes.

4 Q. Do you believe you got to know him very well?

5 A. Yes.

6 Q. Have you formed an opinion as to his
7 truthfulness?

8 A. Yes.

9 Q. What is that opinion.

10 MR. COOLING: Objection.

11 THE COURT: I'll sustain the objection. You're
12 not allowed to answer.

13 Q. Who did the payroll if Linda Cary was gone?

14 A. Debi Williams.

15 Q. Who got the mail was Debi was gone?

16 A. (No response).

17 Q. When there were times that Linda was gone, who
18 would get the mail?

19 A. Debi.

20 MR. KOIVUHALME: Thank you.

21 THE COURT: I think we'll go ahead and take a
22 break before the cross-examination. Why don't you take about
23 10 minutes to about four o'clock. During this recess, if you
24 would take your notebooks back. Don't discuss the case with
25 each other or anyone else until it's submitted to you. Try