

Utah Bar[®] JOURNAL

Volume 32 No. 1
Jan/Feb 2019



Spring Convention registration inside.

Appellate Highlights

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Editor's Note: *The following appellate cases of interest were recently decided by the Utah Supreme Court, Utah Court of Appeals, and United States Tenth Circuit Court of Appeals. The following summaries have been prepared by the authoring attorneys listed above, who are solely responsible for their content.*

UTAH SUPREME COURT

MacDonald v. MacDonald, 2018 UT 48 (Sept. 5, 2018)

This appeal arose from a former husband's petition to modify his former wife's alimony award. The district court denied the petition, applying a standard set forth in a line of cases from the court of appeals that allows a modification of an alimony order only if there is a substantial change in circumstances that was not contemplated in the original decree of divorce. The court of appeals affirmed this decision, but under a different standard. It repudiated the "contemplated in the decree" standard set forth in prior case law and concluded that Utah Code § 30-3-5(8)(i) allows for a modification of alimony only where there is a "substantial change in circumstances not foreseeable at the time of the divorce." On certiorari, the supreme court affirmed the court of appeals and further clarified that the foreseeability inquiry must be based on evidence that was in the record of the trial court that entered the decree.

State v. Fullerton, 2018 UT 49 (Sept. 11, 2018)

In this case involving an appeal from the denial of a motion to suppress statements the criminal defendant made during an interview with the police, the Utah Supreme Court addressed the proper standard for evaluating whether a person is involved in a "custodial interrogation" such that **Miranda warnings are required**. In light of the evolution of United States Supreme Court precedent on this issue, the four factors articulated in *Salt Lake City v. Carner*, 664 P.2d 1168 (Utah 1983) cannot be considered exclusively. Rather, proper use of

the *Carner* factors requires "considering them in conjunction with all other relevant circumstances." Each factor "should be considered when relevant, ignored when not, and given appropriate weight according to the circumstances."

GeoMetWatch v. Hall, 2018 UT 50 (Sept. 12, 2018)

This case came before the court as a certified question from the United States District Court of the District of Utah. At issue was whether certain Utah State University foundations were entitled to immunity under Utah's Governmental Immunity Act as instrumentalities of the state. Although the Utah Supreme Court declined to answer the ultimate question it was presented in this case, it did provide a framework for determining whether an entity acts as an instrumentality of the state: **The determination of whether an entity is an instrumentality of the state requires a comparison of the proposed entity with those entities enumerated by the statute. Specifically the court must decide "whether the entity is a branch of the state that carries out state functions," and if so whether those functions are "of the same general kind, class, character, or nature as those enumerated terms."**

Reperex, Inc. v. Coldwell Banker Commercial, 2018 UT 51 (Sept. 18, 2018)

This case involved a breach of fiduciary duty claim based on a misrepresentation that the seller earned \$310,000 in a single year, even though the figure was \$74,000. The district court granted summary judgment based on the absence of expert testimony and the court of appeals affirmed. Reversing, the supreme court held **expert testimony was not necessary, based on the particular facts of the case, where a lay person could understand the materiality of the misrepresentation without an expert's technical input.**

Case summaries for Appellate Highlights are authored by members of the Appellate Practice Group of Snow Christensen & Martineau.

Bryner v. Cardon Outreach, LLC, 2018 UT 52 (Sept. 24, 2018)

Plaintiffs filed a class action lawsuit against a group of hospitals arguing that the Hospital Lien Statute, Utah Code § 38-7-1, requires a hospital to pay its proportional share of an injured person's attorney fees and costs when a hospital lien is paid due to the efforts of the injured person's attorney. The court **affirmed the district court's grant of summary judgment to the hospital defendants, concluding that the hospital lien statute is unambiguous and that it creates a priority for the distribution of the proceeds in third-party liability cases.**

UDOT v. Kmart Corp., 2018 UT 54 (Sept. 25, 2018)

UDOT appealed a condemnation award arguing that Kmart's leasehold interest had no value because the lease contained a clause that terminated the lease upon condemnation of the subject property. The Utah Supreme Court agreed with UDOT and adopted the termination clause rule from other jurisdictions. **This rule provides that when a lease agreement provides a termination upon condemnation clause, the lessee is not entitled to a condemnation award.** Utah's constitutional guarantee of just compensation is only triggered if the party shows a protectable property interest, and in this case, a lessee has no protectable property interest.

EnerVest, Ltd. v. Utah State Engineer, 2018 UT 55 (Sept. 27, 2018)

The Utah Supreme Court addressed two jurisdictional issues in this appeal from the district court's rulings on competing motions for summary judgment in an expedited proceeding under Utah Code § 73-4-24(1) within a water rights general adjudication. The court first held **the district court's summary judgment rulings were not properly certified under Rule 54(b) because the district court did not articulate why it determined there was no just reason for delay;** the denial of two of the parties' motions for summary judgment was not a final order that would be appealable but for the fact other claims or parties remained in the action; and, due to the nature of general adjudications, there cannot be "complete finality of any water rights until the entire general adjudication has been completed." The court then held that the only appellant lacked appellate standing because it was not "aggrieved" by the district court's rulings, given that it had not objected to the State Engineer's proposed determination with respect to the particular water right at issue. The Court's discussion on these issues may have far-reaching implications in the Utah Lake/Jordan River general adjudication currently underway.

Bank of America v. Sundquist, 2018 UT 58 (Oct. 5, 2018)

The court reevaluated its own prior interlocutory holding in the same case regarding the meaning of "located" in the National Bank Act, which permits a national bank to act as fiduciaries in any state if the law of the state where the bank is "located" permits it to do so. In its prior ruling, the court held that the term "located" unambiguously meant the state where the national bank acts as a fiduciary. On appeal from the subsequent judgment, the court rejected its own prior holding as "clearly erroneous," determining instead that the term "located" in the Act was ambiguous. The court then **applied Chevron deference to conclude that the Department of the Treasury's interpretation of the term "located" as the place where primary fiduciary actions and decisions are undertaken by the national bank was reasonable.** The case was remanded for a determination of which state law applied to the fiduciary appointment at issue in light of the Treasury's interpretation.

Utah State Tax Comm'n v. See's Candies, Inc., 2018 UT 57 (Oct. 5, 2018)

The court held that section 59-7-113 of the Utah Tax Code is ambiguous regarding when it is "necessary" for the Tax Commission to allocate deductions between related entities to clearly reflect income. The court **relied on federal case law**

interpreting a similar provision in the Internal Revenue Code to conclude that allocation is “necessary” in circumstances when related companies enter into transactions that do not resemble what unrelated companies dealing at arm’s length would agree to do.

Applying this standard, the court concluded that See’s was entitled to deduct royalty payments it made to a sister company.

UTAH COURT OF APPEALS

Armendariz v. Armendariz, 2018 UT App 175 (Sept. 7, 2018)

In this appeal of a denial of a motion to modify a divorce decree to terminate the alimony award to the wife in light of the husband’s recent retirement, Judge Harris concurred in the affirmance. **He wrote separately in part to “urge family law practitioners and district judges, when negotiating and drafting alimony provisions in decrees of divorce, to make a practice of taking into account the parties’ likely future retirement, and making appropriate ex ante adjustments to the payor spouse’s future payment obligations to account for significant foreseeable post-retirement changes in the parties’ financial situation.”**

Chaparro v. Torero, 2018 UT App 181 (Sept. 20, 2018)

Analyzing the scope of revisions to Rule 4(b) of the Utah Rules of Appellate Procedure, the court of appeals held that the **appellant could not appeal as of right from the divorce decree under Rule 4, because the decree contemplated additional determination of the amount of attorney fees.**

However, because the district court modified custody as a sanction without considering the best interests of the minor child, the court of appeals concluded that it presented an extraordinary case where it would be appropriate to exercise jurisdiction under Rule 5.

State v. King, 2018 UT App 190 (Oct. 4, 2018)

Vacating a \$400 restitution order, the court of appeals held **defendant was deprived of effective assistance of counsel, because counsel failed to object to a restitution request after filing a notice of withdrawal.** In doing so, the court noted that proper withdrawal in a criminal case requires approval of the court. See Utah R. Crim. P. 36.

Wasatch County v. Utility Facility Review Bd., 2018 UT App 191 (Oct. 4, 2018)

Wasatch County appealed a decision by the Utility Facility Review Board ordering the County to issue a conditional use permit to Rocky Mountain Power for construction of transmission towers and lines, but the County failed to seek a stay of the decision or construction with the appeals court. By the time the parties had briefed and argued the issues on appeal, the permit was issued and the towers and lines were constructed and in use. **Because the County failed to seek a stay of construction during the pendency of the appeal process, the court held that the issues on appeal were moot and dismissed the appeal.**

Dole v. Dole, 2018 UT App 195 (Oct. 12, 2018)

In this appeal of a judgment arising from a divorce proceeding, the court held that it **lacked jurisdiction to address appellant’s argument that the lower court erroneously denied his post-trial motion because he filed his notice of appeal before the post-trial motion was decided and failed to amend the notice of appeal after the decision was rendered.**

***Warrick v. Property Reserve*, 2018 UT App 197 (Oct. 12, 2018)**

In affirming the summary judgment dismissal of a slip and fall claim, the court of appeals held that **constructive notice of a dangerous condition should not be imputed when conjecture and speculation are the only ways to determine the length of time the condition existed.** Here, in order to demonstrate that a store owner had constructive notice of an icy sidewalk, the plaintiff had an affirmative duty to present evidence of approximately when the ice formed. Because plaintiff had presented no evidence demonstrating when the ice had formed, such as temperatures on the preceding days or nights or how long ice takes to form, summary judgment was appropriate.

***Bodell Constr. Co. v. First Interstate Fin. LLC*, 2018 UT App 199 (Oct. 18, 2018)**

A jury found that the defendants defrauded the plaintiff by misrepresenting a real estate investment. On appeal, the defendants argued that they were entitled to a new trial because the court admitted prejudicial testimony regarding the details of a different fraud lawsuit against them. The court **refused to consider this argument because the defendants made no contemporaneous objection or other motion regarding the evidence at trial on which the trial court could rule, and therefore failed to preserve the issue for appeal.** The court of appeals affirmed the judgment, concluding that defendants failed to establish any error in the district court's rulings, and failed to show a significant risk that the jury improperly based its punitive damages award on harm allegedly caused to a non-party.

***State v. Hamilton*, 2018 UT App 202 (Oct. 25, 2018)**

In this securities fraud case, the State and defendant stipulated to \$38,000 in restitution and a recommendation of no time in jail, based largely on defendant's cooperation. The district court ordered defendant to serve jail time and pay restitution in the amount of \$382,085. Affirming, the court of appeals held **the parties'**

stipulation regarding restitution was not binding on the district court, and that the district court did not exceed its discretion in ordering restitution in excess of the parties' stipulation, where the district court relied the presentence report to determine the appropriate amount and applied relevant statutory factors.

***Pioneer Builders Company v. KDA Corporation*, 2018 UT App 206 (Nov. 1, 2018)**

At issue in this appeal was whether a broad provision that terminated and extinguished the rights of a subordinate trust deed holder included a waiver of the statutory right of redemption. In reversing the district court, the court of appeals held that, **because the right of redemption was statutorily guaranteed, the broad language of the provision was not sufficient to clearly and unmistakably waive this statutory right because it did not mention redemption rights nor did it refer to the statutory provision.**

TENTH CIRCUIT***Payan v. United Parcel Service*, 905 F.3d 1162 (10th Cir. Oct. 4, 2018)**

The plaintiff sued his former employer under Title VII and 42 U.S.C. § 1981, claiming racial discrimination and retaliation. After the plaintiff reported the discrimination to human resources, he was placed on an employee improvement plan, among other measures. On appeal from summary judgment in favor of the employer, the Tenth Circuit rejected the plaintiff's argument that these measures constituted materially adverse employment actions under Title VII, **joining the Seventh Circuit and four other circuit courts of appeal to hold instead that placement of an employee on an improvement plan alone does not constitute a materially adverse employment action.**