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## 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 COURT OF APPEALS

#### ***State v. Wilkerson*** **2020 UT App 160 (Nov. 27, 2020)**

In this appeal from a restitution order requiring the criminal defendant to pay roughly \$2,000 to Utah County for his pre-plea detention in the Utah County Jail, the Utah Court of Appeals held **that the Pay-to-Stay Statute, Utah Code § 76-3-201(6), applies even if the incarceration was served prior to conviction or prior to sentencing.**

#### ***State v. Gallegos*** **2020 UT App 162 (Dec. 10, 2020)**

After a shank was found in the cell he shared with another prisoner, Gallegos was tried and convicted for felony possession of a dangerous weapon. On appeal, Gallegos challenged the admission of evidence showing he previously possessed a nearly identical shank as forbidden propensity evidence under Utah R. Evid. 404(b)(1). Despite a line of Utah cases suggesting that evidence of prior possession of similar contraband by the defendant is a relevant factor indicating constructive possession, the court of appeals agreed with Gallegos and reversed. The court held that **evidence of prior possession of similar contraband by the defendant is admissible to show constructive possession only if the proponent can offer some non-propensity purpose under Rule 404(b)(2).**

#### ***UDAK Properties LLC v. Canyon Creek Commercial Center LLC*** **2020 UT App 163 (Dec. 10, 2020)**

#### ***UDAK Properties LLC v. Spanish Fork, UT Realty LLC*** **2020 UT App 164 (Dec. 10, 2020)**

The court affirmed the district court's grant of declaratory relief and attorney fees to UDAK in these two related appeals, concluding that UDAK unambiguously qualified as a "Responsible Owner" as

that term is used in restrictive covenants binding owners of parcels in a shopping center. The court held that **the defendants' objections to the award of attorney fees were unpreserved because they failed to file an objection to UDAK's affidavit of fees within seven days as required by Utah R. Civ. P. 73(d).** The court further held that **a defendant's filing of a photocopy of a check that it never delivered was not a valid tender of money judgment under Utah Code § 78B-5-802 because it was not an "actual production" of the money.**

#### ***Medina v. Jeff Dumas Concrete Construction LLC*** **2020 UT App 166 (Dec. 17, 2020)**

The plaintiff asserted that his former employer wrongfully terminated him in violation of public policy for asserting a workers' compensation claim. The district court granted summary judgment in favor of the employer. As a matter of first impression, the court of appeals addressed the standard for the substantial factor prong under the wrongful termination burden-shifting framework and held that **an employer's direction to leave the job site if injured, evidence that the employer believed that the employee fabricated his injuries, and the fact the termination occurred during the employee's deposition in the workers' compensation case were sufficient circumstantial evidence to survive summary judgment under the substantial-factor test.** The court of appeals also rejected the employer's argument that a temporal disconnect severed the causal connection.

#### ***Zion Village Resort LLC v. Pro Curb U.S.A. LLC*** **2020 UT App 167 (Dec. 17, 2020)**

In a combined appeal involving petitions to nullify two sets of construction liens on a condominium project, the court of appeals reversed the district court's decision granting a petition to nullify one lien and affirmed the other. On an issue of first

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impression, the court held that **in an expedited proceeding to nullify a construction lien, if the district court does not hear live testimony, the applicable standard of review is correctness with no deference afforded to the district court's decision.**

***R4 Constructors LLC v. Inbalance Yoga Corp.***

**2020 UT App 169 (Dec. 24, 2020)**

The court held that the nonrecovery provision of Utah Code § 58-55-604 (which limits a non-licensed contractor's ability to sue) **1) creates an affirmative obligation of the plaintiff which is not a waivable affirmative defense; and 2) allows unlicensed contractors to sue even if they are out of compliance with the statute, so long as they can demonstrate that a common law exception to the statute applies.** The court also affirmed the district court's denial of a motion to extend expert discovery deadlines, holding that it would presume that the court had a reasonable basis for its decision because the appellant failed to include a transcript of the hearing in the record on appeal.

***Miller v. Miller***

**2020 UT App 171 (Dec. 24, 2020)**

In this divorce, the district court dismissed a petition to modify for both failure to state a claim and failure to employ dispute resolution procedures. The court of appeals reversed the Rule 12(b)(6) dismissal on the basis that the lower court abused its discretion by weighing change-in-circumstance evidence. Additionally, the court of appeals held that the district court erred in dismissing the petition for failure to engage in the dispute resolution process, where the issue was raised sua sponte by the court during a hearing without notice or an adequate opportunity to prepare for or brief the issue.

**TENTH CIRCUIT**

***Schreiber v. Cuccinelli***

**981 F.3d 766 (10th Cir. Nov. 24, 2020)**

In this case, the Tenth Circuit addressed the issue of whether an adopted child could be a "legitimated" child under § 101(b)(1)(C) of the Immigration and Nationality Act. The Act expressly applies to children "adopted while under the age of sixteen years," but the child here was adopted at seventeen. The petitioner argued that Kansas law considered adopted children "legitimated." The Tenth Circuit held that while state law may

apply in determining how a parent may legitimate a child, the Board of Immigration Appeals did not err in interpreting the Act's unambiguous plain language to mean that state law is inapplicable to determining whom a parent may legitimate, ultimately holding that § 101(b)(1)(C) does not apply to adopted children.

***United States v. Silva***

**981 F.3d 794 (10th Cir. Nov. 24, 2020)**

On appeal from his sentencing for possession of a firearm by a restricted person, Silva challenged the trial court's reliance on a twelve-year-old assault conviction to treat him as a "career offender" and substantially enhance his sentence. On plain-error review, the Tenth Circuit reversed and remanded for resentencing, holding that the assault conviction could not form the basis of a "career offender" sentencing enhancement because it was too old to merit consideration under the federal sentencing guidelines independently.

***Crowson v. Washington County***

**983 F.3d 1166 (10th Cir. Dec. 29, 2020)**

In this interlocutory appeal, the Tenth Circuit addressed the scope of pendent appellate jurisdiction and the circumstances in which a claim under 42 U.S.C. § 1983 can be maintained against a municipality without establishing a violation of the plaintiff's constitutional rights by an employee of the municipality. The Tenth Circuit clarified that in most cases, "the question of whether a municipality is liable [is] dependent on whether a specific municipal officer violated an individual's constitutional rights," but that there is an exception where "the municipal policy devolves responsibility across multiple officers" and "the sum of multiple officers' actions taken pursuant to municipal policy results in a constitutional violation."

***Hooks v. Atoki***

**983 F.3d 1193 (10th Cir. Dec. 29, 2020)**

In this civil rights lawsuit, an inmate alleged that the defendant police officers used excessive force during his arrest and that correction officers were deliberately indifferent to a jail-house beating he suffered. The court applied a subjective intent standard to the deliberate indifference claim, holding that no reasonable jury could conclude that the officers acted unreasonably in responding to the attack within twenty-eight seconds.