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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 SUPREME COURT

In the Matter of the Sex Changes of Gray and Rice
2021 UT 13 (May 6, 2021)

The district court denied appellants' petition to change their legal sex designations pursuant to Utah Code section 42-1-1, which governs name and sex change petitions, reasoning that because Utah does not have a statute setting forth the standards or procedures for changing one's legal sex designation, it was a nonjusticiable political question. In reversing the district court and over Justice Lee's dissent, **the Utah Supreme Court held that one "has a common-law right to change facets of their personal legal status, including sex," and section 42-1-1's plain language is a statutory declaration that one can have a "sex change approved by an order of a Utah district court."**

Widdison v. Utah Bd. of Pardons & Parole
2021 UT 12 (Apr. 29, 2021)

An inmate filed a petition for extraordinary relief arguing that the parole board violated her constitutional rights by rescinding her parole. The court dismissed the petition as moot because the parole board reinstated the inmate's parole after the appeal was filed, and the court held that the public interest exception to mootness did not apply because the issue was not likely to evade review. The majority held that **an issue can be likely to evade review in two situations: when it is inherently short in duration, or because of a party's likely actions.** The concurring opinion argued that an issue can be likely to evade review only when it is inherently short in duration.

State v. Biel
2021 UT 8 (Apr. 1, 2021)

This appeal arose from a criminal trial where the defendant filed a motion *in limine* challenging the State's ability to call two witnesses in order to impeach each with prior inconsistent statements, and the prior statements coming into evidence. In reversing the district court's grant of the motion, the supreme court held that **nothing in the text of Utah R. Evid. 607 and 801(d)(1)(A) prevents the State, or any party, from calling a witness they know will contradict a prior statement solely to get the prior statement into evidence.**

UTAH COURT OF APPEALS

Ackley v. Labor Commission
2021 UT App 42 (Apr. 15, 2021)

In this appeal from the Labor Commission's denial of worker's compensation benefits, the court of appeals set aside the Commission's decision and instructed it to revisit the claim under the idiopathic fall doctrine. **In holding that the idiopathic fall doctrine applies to the plaintiff's fall, the court evaluated and explained the different legal causation standards for workplace falls that apply depending on the cause of the fall.**

Kodiak America LLC v. Summit Cty.
2021 UT App 47 (Apr. 15, 2021)

This appeal arose from Kodiak America LLC's challenge to a land-use determination by Summit County. The county argued that Kodiak's challenge was barred by res judicata, citing a prior proceeding addressing the same land-use determination in which Kodiak was denied intervention because the county adequately represented Kodiak's interests. The county insisted that the determination of adequate representation in the prior proceeding meant that the county and Kodiak were also in

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

privity for purposes of res judicata. The Utah Court of Appeals rejected this equivalency, reasoning that **privity requires two parties to have "the same legal right or legal interest," while intervention under Utah R. Civ. P. 24(a) requires only a shared "interest in the same outcome of litigation regardless of motivation or their respective legal rights."**

Bohman Aggregates LLC v. Gilbert
2021 UT App 35 (Apr. 1, 2021)

In the district court, the jury returned a verdict to an attorney representing himself after he presented his case "riddled with first-person narrative and personal opinions," vouching for himself throughout, and putting into evidence his own testimony that was not admitted during the trial. On appeal of the district court mistrial order, the Court of Apppeals **held that Utah Rule of Professional Conduct 3.4 applies to pro se attorney litigants.**

Brimhall v. Ditech Financial, LLC
2021 UT App 34 (Apr. 1, 2021)

After defaulting on their mortgage loan and their property being sold at a trustee's sale, the plaintiffs sued the defendant, claiming they had submitted a complete application for mortgage relief and were negotiating foreclosure relief, which precluded the foreclosure sale. The court of appeals **rejected the plaintiffs' "serial-application reading" of Utah Code section 57-1-25(1) that would "allow a borrower in default to submit multiple applications for foreclosure relief, each time retriggering the statutory notice requirements** and potentially preventing a servicer from scheduling a trustee's sale due to the pending application for foreclosure relief."

Lehi City v. Rickabaugh
2021 UT App 36 (Apr. 1, 2021)

A jury found the defendant guilty of electronic harassment based on a barrage of angry messages sent via Facebook. The trial court rejected his challenge to the constitutionality of the electronic communications statute. Affirming, the court of appeals held **(a) Utah Code section 76-9-201(2)(b), which prohibits certain communications that insult, taunt, or challenge in a manner likely to provoke a violent or disorderly response, was not facially overbroad, and (b) the as-applied challenge failed where the defendant essentially repeated the facial challenge and failed to explain how the statute unconstitutionally applied to him.** The court also rejected defendant's vagueness argument.

TENTH CIRCUIT

United States v. Carter
995 F.3d 1214 (10th Cir. May 4, 2021)

United States v. Carter
995 F.3d 1222 (10th Cir. May 4, 2021)

These related appeals presented interesting questions about appellate standing, jurisdiction, and ripeness. Both arose from a criminal case in which the district court learned after charges were filed that a prosecutor had obtained recordings of conversations between detainees and their attorneys. This led to a lengthy investigation, with the district court appointing a special master who conducted the investigation in three phases.

The first appeal was brought by four AUSAs who testified as fact witnesses in the third phase of the investigation. Their appeal argued that statements the district court made at the close of the proceeding that reflected negatively on them deprived them of due process. The Tenth Circuit held the four AUSAs – non-parties to the case – lacked appellate standing. **The court evaluated its attorney-standing doctrine, and held the AUSAs did not have standing under that doctrine because the district court's statements did not "directly aggrieve the four AUSAs because they had acted only as fact witnesses and the district court had not found any misconduct."**

The United States Attorney's Office brought the second appeal, challenging statements the district court made in its order dismissing the indictment against the remaining defendant that were adverse to the USAO and its finding of contempt based partly on the failure to preserve evidence. Following the investigation, over a hundred prisoners filed post-conviction motions, challenging their convictions or sentences based on alleged Sixth Amendment violations. **The Tenth Circuit held that the USAO had not established a "stake in the appeal" sufficient for it to appeal from an adverse ruling collateral to the judgment on the merits, such that the court lacked jurisdiction.** It alternatively held that even if it had jurisdiction, the appeal would be prudentially unripe because the "statements about the Sixth Amendment lack any legal effect unless the district court applies them in the post-conviction cases."

United States v. Guillen
995 F.3d 1095 (10th Cir. Apr. 27, 2021)

This appeal from the denial of a motion to dismiss addressed the constitutionality of mid-stream *Miranda* warnings. Confronted with a splintered Supreme Court decision on the issue, the **Tenth Circuit adopted, as a matter of first impression, the standard set forth in Justice Kennedy's concurrence for mid-stream *Miranda* warnings in *Missouri v. Seibert*, 542 U.S. 600 (2004).** In doing so, the Tenth Circuit reaffirmed that its approach to a splintered decision would be to adopt the concurring opinion that reflects the narrowest grounds for the decision.

Minemyer v. Comm'r of Internal Revenue
995 F.3d 781 (10th Cir. Apr. 22, 2021)

The Tenth Circuit joined the Third, Fifth, Seventh, and Ninth Circuits to hold that **a tax court order disposing of some, but not all, claims arising from the same proceeding is not immediately appealable under 26 U.S.C. § 7482(a)(1) unless the tax court "expressly determines that the order is final and there is no just reason for delay, similar to Rule 54(b) certification by a district court."** Although the procedural rules applicable to tax courts do not contain a counterpart to Fed. R. Civ. P. 54(b), the appellate court concluded that application of that rule's requirements would promote "consistency and clarif[y] the time for taking an appeal" in tax court proceedings.

Petersen v. Raymond Corp.
994 F.3d 1224 (10th Cir. Apr. 22, 2021)

The Tenth Circuit affirmed summary judgment to the defendant forklift manufacturer in this products liability case, based on the plaintiff's failure to provide admissible expert testimony showing that a safer, feasible alternative design existed at the time of his injury. The court held that **the district court properly excluded expert testimony proffered by the plaintiff where the expert provided only generalized opinions that the forklift would have been safer if it had a door on it, but did not provide details about a feasible design alternative.**

United States v. Perrault
995 F.3d 748 (10th Cir. Apr. 21, 2021)

A well-known priest in the community appealed his conviction on seven counts of sexual abuse, arguing that the jury pre-determined his guilt and the trial court abused its discretion in allowing so many former victims to testify. Affirming, **the Tenth Circuit provided a detailed analysis of the standards governing a claim of presumed or actual jury prejudice in a criminal case.** The Tenth Circuit also held that district court did not abuse its discretion when it permitted multiple witnesses, who were minors when the events occurred approximately twenty years earlier, to testify about uncharged conduct under Federal Rule of Evidence 414.

Frasier v. Evans
992 F.3d 1003 (10th Cir. Mar. 29, 2021)

This Section 1983 case involved the police allegedly retaliating against a citizen filming another's interactions with the police resulting in the police grabbing the plaintiff's tablet out of his hand and searching it. The district court denied the officers' qualified immunity summary judgment because the officers' training instructed officers to not violate First Amendment rights. In reversing, the Tenth Circuit held that **"judicial decisions are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received concerning the nature of…First Amendment rights was irrelevant to the clearly-established law inquiry."**

Frank v. Crawley Petroleum Corp.
992 F.3d 987 (10th Cir. Mar. 29, 2021)

The plaintiffs in this putative class action filed a motion for voluntary dismissal of the complaint without prejudice. The district court granted the motion but included a provision in the order saying that the plaintiffs' lawyer could not file similar putative class action claims against the defendant on behalf of other plaintiffs. The lawyer challenged the order on appeal. The Tenth Circuit held **the lawyer had standing to appeal because he was referenced in the order and bound by it, and that the filing restriction against the lawyer was improper because the dismissal did not cause any legal prejudice to the defendant.**

United States v. McGee
992 F.3d 1035 (10th Cir. Mar. 29, 2021)

Enacted in 2018, the First Step Act, Pub. L. 115-391, §§ 101 et seq., 132 Stat. 5194, reduced the mandatory life sentence required for certain drug crimes under 18 U.S.C. 841. The Act also provides a separate mechanism for "compassionate release" based on "extraordinary and compelling reasons." In this appeal, the Tenth Circuit determined that a district court considering a petition for compassionate release under the Act is not bound by the United States Sentencing Commission's policy statements limiting the definition of "extraordinary and compelling reasons." Instead, **the district court must independently assess whether the reasons offered by the petitioner qualify as "extraordinary and compelling." Furthermore, the Act's reduction of certain mandatory life sentences under Section 841 may be considered an "extraordinary and compelling" reason for early release of a petitioner who does not otherwise qualify for the reduction.**

Awuku-Asare v. Garland
991 F.3d 1123 (10th Cir. Mar. 16, 2021)

In this immigration appeal, plaintiff was in the United States on a nonimmigrant F-1 visa, which required him to maintain a full course of study. He, however, was incarcerated for 13 months on a charge that he was ultimately acquitted of. In rejecting the plaintiff's argument that the failure to maintain active enrollment must be the nonimmigrant's fault, **the Tenth Circuit held that section 1227(a)(1)(C)(i) is unambiguous and "contains no requirement that such failure to be the fault of the visa holder or the result of some affirmative action taken by the visa holder."**