

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

***McCloud v. State* | 2021 UT 14 (May 20, 2021)**

In this Post-Conviction Remedies Act case, the supreme court repudiated the prior standard set forth in *Lafferty v. State*, 2007 UT 73, and held that the Strickland standard applies to ineffective assistance of counsel claims against appellate counsel.

***1600 Barberrry Lane 8 LLC v. Cottonwood Residential O.P. LP* | 2021 UT 15 (May 27, 2021)**

The supreme court held, as a matter of first impression, that for the purposes of determining choice of law, an award of contractual attorney fees is substantive, rather than procedural, which in turn resulted in applying the choice of law provision in the contract to the underlying dispute.

***Martin v. Kristensen* | 2021 UT 17 (May 27, 2021)**

A divorce court entered a temporary order granting the wife possession of a home owned by her father-in-law during the pendency of the divorce proceedings. The father-in-law filed a lawsuit to evict the wife and obtained an unlawful detainer judgment against her. On appeal, the wife argued that the father-in-law had no right to seek unlawful detainer remedies because her possession of the home was lawful under the possession order. The court affirmed the unlawful detainer judgment, holding that the temporary possession order in the divorce functioned like a temporary possession order in an unlawful detainer proceeding, but did not affect the availability of statutory remedies for unlawful detainer.

***Williams v. Kingdom Hall* | 2021 UT 18 (June 3, 2021)**

On certiorari, the Utah Supreme Court vacated the district court's dismissal of an intentional infliction of emotional distress claim which was based on the manner in which Elders of the Kingdom Hall Jehovah's Witnesses conducted a disciplinary proceeding. The district court had applied the test established in *Lemon v. Kurtzman* to hold that the IIED claim would violate the Establishment Clause. The supreme court remanded and instructed the district court to take into account the United States Supreme Court's recent departure from *Lemon* and application of a "more modest approach" under which courts "should eschew a rigid formula in evaluating Establishment Clause cases."

***In re G.D.* | 2021 UT 19 (June 10, 2021)**

In this case involving an appeal from a termination of parent rights based upon years of dysfunctionality, substance abuse, and criminal conduct, the appellant asserted error based upon the district court failing to apply a "beyond a reasonable doubt" standard of proof. The supreme court noted that "[a]lthough the U.S. Supreme Court has opened the door for states to adopt an evidentiary standard higher than 'clear and convincing' for termination proceedings," the Utah court declined to adopt the heightened standard.

***Shree Ganesh, LLC v. Weston Logan, Inc.* | 2021 UT 21 (June 17, 2021)**

The Utah Supreme Court clarified the common-law duty owed by sellers of real property to "fairly and accurately" disclose "the material elements of property sold when such elements are not easily ascertainable by the buyer and materially affect the value of the property." The court explained that "a 'material element' of property is not limited to physical defects or conditions on the land," but "encompasses any matter or information that would have been an important factor in the buyer's decision to purchase the real estate."

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

***In re Estate of D.A. Osguthorpe*
2021 UT 23 (July 1, 2021)**

In this estate dispute, the district court granted a motion to dismiss appellant’s claim for intentional interference with inheritance finding that **Utah law did not recognize that claim. In reversing the order, the supreme court held that Utah law recognizes a claim for intentional interference with inheritance and adopted the elements in Section 19 of the Third Restatement of Torts: Liability for Economic Harm.** Such a claim, however, “is not available to a plaintiff who had the right to seek a remedy for the same claim under Utah’s Probate Code.”

***doTERRA Int’l, LLC v. Kruger* | 2021 UT 24 (July 1, 2021)**

In this personal injury action, the district court concluded that Utah law does not permit waiver of punitive damages prior to the injury. Affirming under a different rationale, the supreme court held that, **as a matter of first impression, even if Utah law recognized a preinjury waiver of punitive damages, such a waiver must be clear and unequivocal to be effective.** In a separate concurrence, joined by Justice Peterson, Justice Himonas expressed his conclusion that such a waiver was contrary to public policy and unenforceable.

***Alarm Protection Technology, LLC v. Bradburn*
2021 UT 25 (July 1, 2021)
and**

***Alarm Protection Technology LLC v. Crandall*
2021 UT 26 (July 1, 2021)**

In these two related cases, former sales representatives of Alarm Protection Technology LLC appealed the denial of several motions challenging various aspects of APT’s execution of their claims against APT for unpaid commissions and extinguishing those claims before they could be adjudicated. In both cases, the former sales representatives had signed confessions of judgment when they received advances against future compensation. After leaving APT, both sued for unpaid commissions. APT then filed the confessions of judgment and obtained judgments against each former sales representative. APT then moved for writs of execution, identifying the claims against it as the property it wanted to seize. The claims were sold at auction, at which APT purchased the claims for credit bids of less than the judgments owed. It then substituted itself as the plaintiffs and dismissed each of the suits against it. In both appeals, the court affirmed the district court’s denials of the sales representatives’ motions for return of excess proceeds as both procedurally barred and substantively meritless. And, in Crandall, the court additionally affirmed the denial of a motion to vacate the judgment and quash the writ of execution as procedurally foreclosed. **Justice Petersen issued a concurring opinion raising the question of whether the Utah Rules of Civil Procedure should permit judgment creditors to execute against claims in which they are defendants and then extinguish those claims, noting that the rules currently do allow for this practice. Justices Durrant and Himonas joined in the concurrence.** Justice Lee, authoring the majority opinion, commended Justice Peterson for her “careful consideration and analysis of an important issue” but declined to express views on the matter in advance, instead deferring to the rule amendment process. He was joined by Justice Pearce.

UTAH COURT OF APPEALS

***Fuja v. Adams* | 2021 UT App 55 (May 27, 2021)**

This appeal arose from a property dispute between neighbors, where the plaintiff obtained a preliminary injunction halting the defendant’s construction of a new home. After a bench trial, the district court held that the injunction had been improvidently granted, but it denied the defendant’s post-trial application for damages caused by the injunction which were not raised in the pleadings or sought earlier in the proceeding. As a matter of first impression, the court of appeals held that **a party may seek damages for a wrongful injunction under Rule 65A(c) by motion in the same case in which the injunction was imposed, and that the claim may be stated for the first time after a court has declared the injunction wrongful.**

***Halversen v. Allstate Prop. & Cas. Ins. Co.*
2021 UT App 59 (June 4, 2021)**

The court held that **Utah’s underinsured motorist statute, Utah Code § 31A-22-305.3, allows either party, within 20 days of service of the arbitration award, to request a trial de novo for any reason.** The court rejected the insurance company’s argument that a trial de novo could only be granted when an arbitration award was procured by corruption, fraud, or other undue means, which was based upon the legislature’s deletion of a connecting conjunction in a revision to the statute in 2011.

***Nakkina v. Mahanthi* | 2021 UT App 63 (June 17, 2021)**

In this appeal from a divorce decree, the court of appeals held the district court abused its discretion in not awarding parent time equally between the mother and father, erred in its personal property determination, and that its attorney fee award was not supported by sufficient findings. With respect to the personal property determination, the court had awarded the wife jewelry valued at approximately \$15,000 on the basis the husband had gifted it to her during the marriage. The court of appeals held the district court applied the wrong legal standard in determining the jewelry was not marital property subject to division. **The rule that gifts to an individual spouse are treated as separate property “applies only to gifts received during the marriage from an outside source. It does not apply when one spouse uses marital funds to purchase property, regardless of whether those purchases are designated as a ‘gift’ from one spouse to another.”**

***Knight Adjustment Bureau v. Funaro*
2021 UT App 65 (June 24, 2021)**

After the court set aside a default judgment based upon defective service, the creditor filed a notice of voluntary dismissal, and the debtor filed a motion for attorney fees. The district court denied the motion, reasoning it lacked jurisdiction. Reversing, the court of appeals clarified that deficient service went to personal jurisdiction, not subject matter jurisdiction, and held that **the absence of personal jurisdiction due to deficient service over the defendant did not deprive the district court of jurisdiction to consider an award of attorney’s fees against the plaintiff.**

***Diversified Concepts LLC v. Koford*
2021 UT App 71 (July 1, 2021)**

The plaintiffs sued a construction company for allegedly installing defective retaining walls on their property, but they hired other contractors to completely dismantle and replace the walls before

filing suit. The district court denied the construction company’s motion to dismiss the lawsuit outright as a sanction for spoliation, noting that Utah law on spoliation was undeveloped. On interlocutory appeal, the court of appeals **articulated a new framework and provided a detailed outline for how district courts should analyze spoliation claims. Where there is an allegation of spoliation, the district court should first determine whether the custodial party violated its duty to preserve the evidence at issue. If the duty was not violated, then sanctions may not be imposed. But if the duty was violated, the court should then assess what type of sanction should be imposed.**

***Rain Int’l LLC v. Drockton*
2021 UT App 68 (July 1, 2021)**

The district court entered an order requiring the appellant to pay attorney’s fees as a discovery sanction, and it granted the appellant’s motion to certify that order as a final judgment under Rule 54(b). The court of appeals **dismissed the appeal for lack of jurisdiction on its own motion for summary disposition, holding that the attorney’s fee sanction was not a “claim” that could be certified as final under Rule 54(b).**

10TH CIRCUIT

In re Samsung Top-Load Washing Mach. Mktg., Sales Pracs. & Prod. Liab. Litig.
997 F.3d 1077 (10th Cir. May 7, 2021)

This appeal arose from multi-district class action litigation brought by consumers owning Samsung brand top-load washing machines. Class counsel and the defendants negotiated a settlement agreement which included both a “kicker” (an agreement that allowed fees not awarded to class counsel to revert to defendants) and a “clear-sailing” agreement (an agreement that the defendants would not object to an award of attorney’s fees). **As a matter of first impression, the Tenth Circuit held that the district court must apply heightened scrutiny when analyzing a class settlement containing these provisions, in order to assure that the class members receive fair and reasonable compensation.** Applying this standard, the court held that the district court applied sufficient scrutiny and that it did not abuse its discretion by granting final approval of the settlement.

United States v. Crooks
997 F.3d 1273 (10th Cir. May 18, 2021)

Crooks was convicted of possessing 567 grams of crack cocaine with intent to distribute, which resulted in a 360 month-to-life prison term based, in part, on a career criminal enhancement and the offense level associated with possessing 50 grams or more of crack. The district court denied his petition under the First Step Act to reduce his sentence to time served, which was 260 months, finding that Crooks was ineligible for a reduction, and even if he was eligible, reduction was not warranted due to Crooks’ designation as a career offender. In a case of first impression in this circuit, the Tenth Circuit reversed holding that **for purposes of Section 404(a) of the First Step Act “a defendant’s federal offense of conviction, not his underlying conduct, determines First Step Act eligibility,”** which is the same outcome as every other circuit that has addressed the issue. Because “[t]he First Sentencing Act increased the threshold quantity of crack cocaine... from 50 to 280 grams or more,” Crooks was eligible for review.

United States v. Suggs
998 F.3d 1125 (10th Cir. June 2, 2021)

On appeal from denial of his motion to suppress, Suggs argued that evidence linking him to road-rage shooting was obtained through unconstitutionally broad search warrants. The Tenth Circuit agreed, reversing the district court’s denial of the motion to suppress and remanding for further proceedings. The evidence at issue was obtained under the warrants’ catch-all clauses, which permitted police to look for and seize “[a]ny item identified as being involved in a crime[.]” **The Tenth Circuit concluded that**

this expansive language lacked the particularity mandated by the Fourth Amendment to the U.S. Constitution. Although a supporting affidavit was physically attached to the warrant, the warrant itself did not incorporate the affidavit by reference and, therefore, the information in the affidavit could not be relied upon to cure the warrant’s lack of particularity.

Ohlsen v. United States
998 F.3d 1143 (10th Cir. June 3, 2021)

Under a Cooperative Funds and Deposits Act (“CFDA”) agreement with the Isleta Pueblo Indian tribe, the United States Forest Service worked to thin and masticate forestland in the Manzano Mountains of New Mexico. During these wildfire-reduction efforts, however, a substantial wildfire broke out, destroying numerous nearby homes and structures. Insurers and homeowners affected by the fire sued under the Federal Tort Claims Act (“FTCA”), claiming that the Forest Service was vicariously liable for any negligence committed by Isleta Pueblo crewmembers in the runup to the fire. On appeal from dismissal of those claims, the Tenth Circuit affirmed, holding as a matter of first impression that **parties working with the federal government pursuant to the CFDA are not necessarily federal employees for purposes of FTCA claims. Instead, courts must apply traditional principles, including the factors set out in *Lilly v. Fieldstone*, 876 F.2d 857 (10th Cir. 1989), to determine whether those parties are legally government employees or simply independent contractors.** In this case, the Isleta Pueblo crewmembers were held to be independent contractors in light of the plain language of the CFDA agreement and the Forest Service’s limited control over the manner and means of the crewmembers’ forest thinning efforts.

Schell v. Chief Justice & Justices of the Oklahoma Supreme Court
—F.4th—, 2021 WL 2657106 (10th Cir. June 29, 2021)

An Oklahoma attorney brought suit against the Oklahoma Supreme Court justices and Oklahoma Bar Association officials, claiming mandatory bar dues violated his First Amendment rights to free speech and association. In particular, the attorney objected to the Bar’s use of mandatory dues to publish “political and ideological speech” and to support or oppose particular legislation. **The Tenth Circuit affirmed dismissal of his claims under established U.S. Supreme Court precedent upholding the imposition of mandatory bar dues despite the First Amendment’s prohibition on compelled speech. Nevertheless, the Tenth Circuit also acknowledged that the Court’s recent decision in *Janus v. American Federation of State, County, & Municipal Employees Council 31*, 138 S. Ct. 2448 (2018), has made that precedent “vulnerable to reversal.”**