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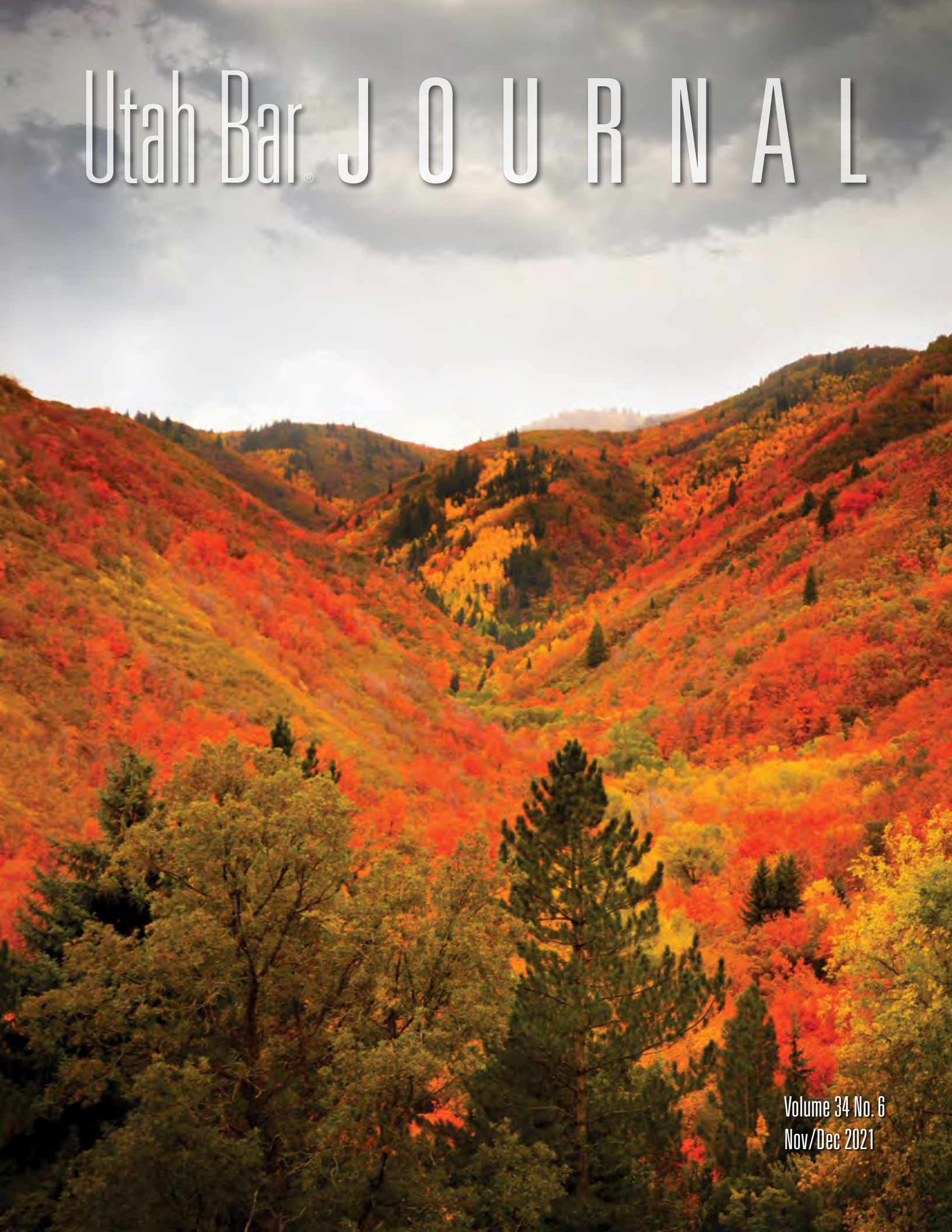

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Appellate Highlights

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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

Scott v. Wingate Wilderness Therapy
2021 UT 28 (July 9, 2021)

In the context of an injury suffered during a wilderness therapy program, the supreme court held that **an injury "relat[es] to or aris[es] out of" health care under the Utah Health Care Malpractice Act, Utah Code §§ 78B-3-401 et seq. if it "originate[s] from or [is] connected to something a health care provider did or should have done in the course of providing health care to th[e] patient."** The court concluded that the claims against the wilderness therapy program were governed by the Act because the program provided "health care" in the form of wilderness therapy and the injured patient's claims originated from his participation in that therapy.

Ramon v. Nebo Sch. Dist.
2021 UT 30 (July 15, 2021)

The district court dismissed a claim for negligent supervision as superfluous, where the defendant school district had admitted it was vicariously liable for the actions of the bus driver who was involved in an accident. The supreme court reversed, declining to adopt the majority rule followed in other jurisdictions, and holding that **a claim for negligent supervision is not superfluous when vicarious liability is admitted.** The court held that concerns about double recovery and prejudice to the defendants can be addressed through other means.

Wyatt v. State
2021 UT 32 (July 15, 2021)

Rule 17(k) of the Utah Rules of Criminal Procedure does not automatically bar testimonial exhibits from going back with the jury, but instead allows the trial court to exercise its broad discretion on whether to allow the jury to have such exhibits during its deliberations. Here, the district court did not abuse its discretion when permitting a recording of a police interview to go back with the jury, where the exhibit was directed at the defendant's credibility and used to illustrate his capacity for lying.

Gillman v. Gillman
2021 UT 33 (July 22, 2021)

On interlocutory appeal from the district court's order setting aside a default certificate under Utah R. Civ. 55(c), the supreme court rejected the argument that a showing of "good cause" under Rule 55(c) demands some reason for the default beyond the defaulting party's own inaction. Emphasizing instead that "[v]acatur of a default is an equitable remedy," the court held that **a showing of "good cause" under "Rule 55(c) requires only that a movant make a showing that is sufficient to persuade the district court that the default should be set aside."**

Fitzgerald v. Spearhead Investments
2021 UT 34 (July 22, 2021)

In this interlocutory appeal, the supreme court held that **equitable estoppel may be invoked as a stand-alone basis for tolling a statute of limitations.** It explained this is a doctrine distinct from equitable tolling. "[E]quitable estoppel is invoked in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused him to delay in bringing suit, and equitable discovery is invoked in cases where the plaintiff is ignorant of his cause of action because of the defendant's fraudulent concealment."

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

State v. Jok
2021 UT 35 (July 22, 2021)

The court affirmed the court of appeals' determination that the victim's testimony was not inherently improbable, and held that **the issue of inherent improbability is a challenge to the sufficiency of evidence which is automatically preserved on appeal in cases like this arising from a bench trial**, both under Utah R. Civ. P. 52(e), and by the nature of a bench trial, where the judge acts as the fact-finder and has a duty to examine and make a finding on the sufficiency of the evidence.

Kirk v. Anderson
2021 UT 41 (Aug. 5, 2021)

The defendant doctor performed an IME on plaintiff during a worker's compensation case. Claiming that the doctor's report delayed him from receiving his compensation he was owed, plaintiff sued the doctor alleging negligence and reckless conduct. The district court dismissed the case on the grounds that a doctor in that scenario would not owe the plaintiff a duty, and the supreme court affirmed finding that **no doctor/patient relationship existed in the IME context presented and that public policy considerations militated against finding a duty** based upon the doctor's affirmative acts and alleged injuries flowing from a delay in prior proceedings.

State v. Eyre
2021 UT 45 (Aug. 12, 2021)

The supreme court reversed the court of appeals, vacated the defendant's conviction, and remanded for a new trial because the jury instruction that was given on accomplice liability to robbery did not accurately instruct the jury on the dual mens rea requirement for that crime. **Accomplice liability requires a showing that the defendant had at least two culpable mental states – one to commit the underlying offense, and one to intentionally aid another person to commit it.**

Feasel v. Tracker Marine LLC
2021 UT 47 (Aug. 12, 2021)

In this products liability case, the supreme court modified the failure to warn factors first adopted in *House v. Amour of America, Inc.*, 929 P.2d 340 (Utah 1996), clarifying that **the adequacy of a warning turns on both its intensity and the level of specificity, both of which are determined by the magnitude of the risk.** The court also adopted section 2(c) of section 333 of the Third Restatement of Torts, which governs a supplier's duty to issue warnings for products supplied for use through intermediaries, and expanded the scope of the learned intermediary rule.

McKitrick v. Gibson
2021 UT 48 (Aug. 19, 2021)

Gibson, a former county commissioner, petitioned for judicial review of Ogden City's decision to publicly release records of an investigation into his alleged official misconduct. Though he lacked standing under GRAMA to challenge the decision, the district court permitted Gibson's petition to go forward because he had a privacy interest in the records and therefore had traditional standing to seek review of the decision. As a matter of first impression, the Utah Supreme Court reversed the district court and remanded for dismissal of Gibson's petition, holding that a "**statutory claimant must have statutory standing, and the presence of traditional or alternative standing will not cure a statutory standing deficiency.**"

Woods v. United Parcel Service, Inc.
2021 UT 49 (Aug. 19, 2021)

The plaintiff asserted a negligence claim against UPS based on an injury he suffered when a vinyl curtain at his place of employment fell and struck him. The vinyl curtain had been jarred loose when a UPS truck allegedly hit the loading dock at the warehouse. The warehouse owner (and plaintiff's employer) was aware the vinyl curtain had been jarred loose and attempted to repair it by tightening the remining bolts. The court of appeals had affirmed on the basis UPS owed no duty to the plaintiff. The supreme court instead affirmed on the alternative ground that UPS's collision with the loading dock was not the proximate cause of the plaintiff's injury; the warehouse owner's negligence in not adequately repairing the curtain was a superseding cause.

State v. Richins
2021 UT 50 (Aug. 19, 2021)

The supreme court reversed the court of appeals, vacated the defendant's conviction for lewdness, and remanded for a new trial where the state was allowed to admit evidence of prior instances of lewd behavior under the doctrine of chances, over a Rule 403(b) objection. The court held that **the doctrine of chances can potentially apply to admit evidence of prior conduct to rebut a claim of the victim fabricating an event, but in order to prevent an end run around Rule 404(b), the court must evaluate whether the other acts evidence is material to a disputed issue; must properly evaluate the frequency of the other acts based on data, not intuition; and must consider whether Rule 403 requires exclusion of the evidence.**

Patterson v. State
2021 UT 52 (Aug. 25, 2021)

Analyzing a range of issues in this appeal of a post-conviction proceeding, **the supreme court recognized that it possesses constitutional authority to issue post-conviction extraordinary writs independent of the Post-Conviction Remedies Act and clarified the relationship between the writ authority and the PCRA.** The court further clarified the standards applicable to seeking relief based upon a purported violation of constitutional rights, which the petitioner failed to meet.

OPC v. Bowen
2021 UT 53 (Sept. 2, 2021)

Attorney used upfront flat fee agreements with clients that declared the fee was "earned upon payment," and deposited the retainers directly into his operating account. OPC sued attorney claiming the agreements violated Utah Rule of Professional Conduct 1.15(c), which requires fees paid in advance to be held in a trust account until earned. Attorney argued that the Rules of Professional Conduct "provide[] a safe harbor…to lawyers whose actions are 'in compliance' with an ethics opinion that has not been 'withdrawn.'" While a previous case had not expressly withdrawn the ethics opinion Bowen relied upon, the court explained that "it does not seem to be that big a lift to ask attorneys who have a question about a rule of professional conduct to review [the court's] case law to see if [the court] ha[s] spoken about the rule" and if the supreme court's "interpretation clashes with…an ethics advisory opinion," the court's "interpretation controls."

UTAH COURT OF APPEALS

MNV Holdings v. 200 South
2021 UT App 76 (July 9, 2021)

This case involved whether a plaintiff could use different routes across the defendant's land to prove a prescriptive easement claim. The plaintiff argued that it used three routes continuously during that time, but the district court held that the plaintiff failed to show use of any one particular route for the requisite 20 years. The court of appeals reversed, explaining: **"under Utah law, a claimant's use of multiple distinct routes over the servient estate does not, by itself, operate to defeat the claimant's ability to meet the 'continuous'**

element of the prescriptive easement test. In such a situation, the court should analyze each claimed route on its own merits, and if the claimant can establish continuous use of at least one route for the requisite prescriptive period, then the continuity element will have been met for at least that route."

Thurston v. Block United LLC
2021 UT App 80 (July 22, 2021)

The court affirmed the district court's ruling enforcing a settlement agreement and dismissing the plaintiffs' amended complaint. The plaintiff had alleged that the settlement agreement was void due to fraudulent misrepresentation, but the court held that **the plaintiff waived the right to rescind the settlement agreement because he retained the settlement payment.**

State v. Ruiz
2021 UT App 94 (Sept. 2, 2021)

Odin, a drug detection K-9, leapt through a partially open window into the car during a drug sniff of the exterior of the car. Applying the test articulated by the Tenth Circuit, the court held Odin's entry was lawful. Under that test, **K-9s' entries into cars during an exterior sniff have been held lawful where "(1) the dog's leap into the car was instinctual rather than orchestrated and (2) the officers did not ask the driver to open the point of entry, such as a hatchback or window, used by the dog."**

Vanlaningham v. Hart
2021 UT App 95 (Sept. 2, 2021)

The district court excluded plaintiff's special damages-related evidence from trial because her initial disclosure of a "specific sum" of $130,000 in special damages failed to provide "a mathematical computation" or the "methodology" behind the amount. On an interlocutory appeal, the court of appeals affirmed, holding that **a plaintiff disclosing a specific sum, without more, does "not provide a computation as required by rule 26(a)(1)(C)."** "Defendants were left to guess at the components of and how [plaintiff] calculated her $130,000 special damages claim."

10TH CIRCUIT

North Mill Street, LLC v. City of Aspen
6 F.4th 1216 (10th Cir. July 27, 2021)

In this regulatory taking case, the Tenth Circuit clarified that **the requirement that a claimant receive a final decision regarding application of the challenged regulation is strictly prudential.** That ripeness requirement, articulated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), does not affect a federal district court's Article III jurisdiction over the claim.

Finlayson v. State
6 F.4th 1235 (10th Cir. July 28, 2021)

Joining sister circuits, the Tenth Circuit held that **dismissal for lack of prosecution under Utah Rule of Civil Procedure 41(b) of federal claims in state court qualified as a default under an independent and adequate state procedural rule,** thereby barring habeas review in federal court.

Hetronic International v. Hetronic Germany GmbH
10 F.4th 1016 (10th Cir. Aug. 24, 2021)

This case involved a Lanham Act claim with plaintiff asserting that defendant, a former distributor in Europe, was selling plaintiff's exact radio remote controls used to operate heavy-duty construction equipment. A jury awarded plaintiff $100 million in damages and the district court entered a worldwide injunction pursuant to the Lanham Act. In a case of first impression in the circuit, the Tenth Circuit held that **when the Lanham Act claim involves an American citizen, and "defendant's conduct has a substantial effect on U.S. commerce," the Lanham Act can apply to extraterritorially conduct** if applying the Act "would [not] create a conflict with trademark rights established under the relevant foreign law."

United States v. Koerber
10 F.4th 1083 (10th Cir. Aug. 26, 2021)

The Tenth Circuit affirmed the criminal conviction of the defendant on several charges over numerous challenges. Among other things, the court held as a matter of first impression that **when an indictment is dismissed with prejudice by the district court and the prejudice determination is reversed on appeal and remanded to the district court for a final determination, and the indictment is then dismissed without prejudice, the six-month rather than sixty-day provision of the savings statute, 18 U.S.C. § 3288, applies.** Interpreting that statute, the court held, "When the appellate court is responsible for a final dismissal of a case, the sixty-day limitation period applies; when the district court is responsible for a final dismissal of a case, the six-month provision applies."