SNOW CHRISTENSEN & MARTINEAU

UTAH DESK REFERENCE

TORT AND INSURANCE MANUAL

2022 Supplement

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ABOUT THIS SUPPLEMENT

This pamphlet is intended to supplement the 2021 Utah Desk Reference, and includes changes in the tort and insurance legal fields in Utah from October 1, 2021 to October 1, 2022, as well as edits or other additions to the 2021 Utah Desk Reference. It is not intended as a source for comprehensive analysis of all recent changes in the law.

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UTAH DESK REFERENCE

I. TORT LAW OVERVIEW

SECTION 1 – NEGLIGENCE

1.4 Standard of Care, Duty, and Proximate Cause

In *Donovan v. Sutton*, 2021 UT 58, 498 P.3d 382, a skier brought a claim of negligence against a child and the child's father, who was teaching her to ski when she collided with the skier. The court held that a person has a duty to exercise reasonable care while skiing and that a minor child is held to the standard of care of a child of the same age. *Id*. at ¶ 41. The court declined to adopt Restatement (Second) of Torts § 316 in this context as the skier failed to show that the child's actions were intentional or posed an unreasonable risk of bodily harm. *Id*. at ¶ 36. The court ultimately determined that neither the child nor the father breached a duty of care to the skier. *Id*. at ¶ 41.

SECTION 2 – LANDOWNER LIABILITY

2.3 Liability of Landlord to Tenant

In *Zazzetti v. Prestige Senior Living Center LLC*, 2022 UT App. 42, 509 P.3d 776, a tenant of a senior living complex, who was injured when she slipped and fell on a snowy sidewalk leading to the complex, sued the landlord and snow removal company hired by the landlord. The court held that the "open and obvious" rule may apply in the residential landlord-tenant context. *Id*. at ¶ 34. The court further found that the "open and obvious" rule still allows plaintiffs to recover from the defendant in proportion to the defendant's fault. *Id*. at ¶ 35-36.

2.4 Landlord's Duty to Furnish Fit Premises

In 2021, the Utah legislature amended Section 4 of the Utah Fit Premises Act. The amended section imposes additional requirements on owners, including but not limited to allowing the renter to inspect the premises. However, failure to comply with the new subsections does not give rise to a cause of action. *U.C.A.* § 57-22-4(9)(b).

2.7 Open and Obvious Dangers

See Section 2.3, supra.

2.8 Limitation of Landowner Liability – Recreational Use

As of May 5, 2021, *U.C.A.* § 57-14-202(2)(a)-(b) now reads as follows:

> (2) The limitations of liability provided in this part apply to the owner of land designated as a migratory bird production area under Title 23, Chapter 28, Migratory Bird Production Area, that is owned and operated for any purpose allowed under Title 23, Chapter 28, Migratory Bird Production Area, if:
>
> (a) the owner allows a guest of the owner or, if the owner has shareholders, members, or partners, a guest of a shareholder, member, or partner of the owner to engage in an activity with a recreational purpose on that land; and
>
> (b) the guest is not charged.

SECTION 4 – PRODUCTS LIABILITY

4.5 Products Liability in General

In *Feasel v. Tracker Marine LLC*, 2021 UT 47, 496 P.3d 95, the Utah Supreme Court modified the standard for adequacy of warnings in this case involving a boat passenger who was ejected from a bass boat and repeatedly struck by the boat propeller as he was not wearing the stop switch lanyard at the time of ejection. *Id*. at ¶ 1. The court stated that a "warning must (1) be designed so it can reasonably be expected to catch the attention of the consumer; (2) be comprehensible and give a fair indication of the specific risks involved with the product; and (3) be of an intensity justified by the magnitude of the risk." *Id*. at ¶ 23. The court further found that a boat manufacturer or supplier owes a duty to adequately warn boat passengers of dangers associated with the vessel. *Id*. at ¶ 33.

SECTION 8 – IMMUNITY

8.2 Infants/Family Immunity

In *Nielsen ex rel. C.N. v. Bell ex rel. B.B.*, 2016 UT 14, ¶ 1, 370 P.3d 925, the Utah Supreme Court held that "children under the age of five, as a matter of law, may not be held liable for negligence." In this case, the Court adopted the Restatement (Third) of Torts cut-off age and rejected the argument that a four-year-old child could be liable for negligence when he threw a toy and blinded his babysitter. *See* Rest. (3d) Torts: Phys. & Emot. Harm (2010) § 10(b).

In *Bol v. Campbell*, 2016 UT App 58, ¶ 9, 370 P.3d 397, the court reiterated that a child owes the level of care ordinarily expected of a similarly situated child. In *Bol*, the court affirmed a jury verdict finding that a 12-year-old wearing dark clothes and riding an unlit bicycle at night was 80% responsible for his injuries sustained after a car struck him.

SECTION 9 – INDEMNITY

9.1 In General

In *Cunningham v. Weber County*, 2022 UT 8, ¶ 23, 506 P.3d 575, the Utah Supreme Court refused to enforce a pre-injury release form because its language did not "clearly and unmistakably release" a county SWAT training team from liability when an explosive used in training severely injured a trainee.

Similarly, in *doTerra Int'l, LLC v. Kruger*, 2021 UT 24, ¶¶ 18-32, 491 P.3d 939, the Court applied a "clear and unequivocal" test to assess a pre-injury release from punitive damages. The Court did not directly opine on the general question of whether Utah law permits a party to "waive a claim for punitive damages prior to injury." *Id.* ¶ 20. However, the Court "start[ed] from the presumption against an intention to waive punitive damages," and looked to whether the injured party clearly and unmistakably waived a right to claim punitive damages. *Id.* ¶ 26.

SECTION 10 – AGENCY AND EMPLOYER'S LIABILITY

10.1 Vicarious Liability

In *Drew v. Pacific Life Ins. Co.* 2021 UT 55, 496 P.3d 201, the Utah Supreme Court addressed the vicarious liability of an insurer for the conduct of its appointed licensee, a financial advisor who had made negligent and intentional misrepresentations to induce the insureds to purchase life insurance. Specifically, the Court addressed "whether or to what extent" *U.C.A.* 31A-23a-405 made the insurer liable for the conduct of its appointed licensee. *Id.* ¶ 33. In so doing, the court rejected the injection of *respondeat superior* principles into its interpretation of Section 31A-23a-405. *Id.* ¶¶ 51-72. Instead, the relevant test for appointed licensees is whether they acted with "actual or apparent authority". *U.C.A.* 31A-23a-405. In *Drew*, the Court vacated the court of appeals holding that the financial advisor was the agent of the insurer, and held instead that he was the appointed licensee and that the insureds were entitled to summary judgment on the question of apparent or actual authority. *Id.* ¶¶113-14.

10.2 Employee Status

In *Boynton v. Kennecott Utah Copper, LLC*, 2021 UT 67, 500 P.3d 847, the Utah Supreme Court held, as a matter of first impression, that defendants had a duty to exercise reasonable care to prevent "take-home exposure" to asbestos. *Id.* ¶ 27. An employee's wife had died of mesothelioma, but the trial court granted summary judgment to two mine operators on the grounds that there was no duty to prevent take-home asbestos exposure. *Id.* ¶ 1. The Supreme Court reversed, holding that "premises operators" owe a duty of care to a worker's co-habitants to prevent take-home exposure to asbestos. *Id.*

In *Jensen Tech Services v. Labor Commission*, 2022 UT App 18, 506 P.3d 616, the Court of Appeals applied the "right-to-control test" to determine whether an individual was an employee for the purposes of the Workers' Compensation Act. *Id.* ¶ 14. The focus of the inquiry is "whether

the employer had the right to control the worker while keeping in mind that the degree of control actually asserted is not essential." *Id.* (quoting *Utah Home Fire Ins. Co. v. Manning*, 1999 UT 77, ¶ 10, 985 P.2d 243, cleaned up). In *Jensen*, the Court articulated four factors of the right-to-control test, directing the Labor Commission on remand to consider: (1) the agreements or contracts between the employer and employee, (2) the employer's right to hire or fire, (3) the method of payment, and (4) the employer' furnishing of equipment. *Id.*

10.9 Retaliatory Discharge

In *Porter v. Staples the Office Superstore, LLC*, 521 F.Supp.3d. 1154 (D. Utah 2021), the plaintiff-employee brought a retaliation claim against Staples under the Family and Medical Leave Act (FMLA). With respect to the retaliation claim, the District Court of Utah denied Staples' Rule 12(b)(6) motion to dismiss because the plaintiff adequately alleged a causal connection between her protected employment activity and the employer's adverse action. "[T]he temporal proximity in this case is sufficiently close to establish a causal connection." *Id.* at 1161.

SECTION 11 – DEATH

11.1 Wrongful Death

In *Feldman v. Salt Lake City Corp.*, 2021 UT 4, 484 P.3d 1134, the Utah Supreme Court held that the statute barring claims for personal injury against landowners where the injured party was participating in an activity with a recreational purpose on the land (*U.C.A.* § 57-14-401) applied to wrongful death actions, and such application does not violate the Wrongful Death Clause of the Utah Constitution (Utah Const. art. XVI, § 5).

SECTION 12 – VARIOUS TORTS

12.1 Intentional Infliction of Emotional Distress

In *Williams v. Kingdom Hall of Jehovah's Witnesses*, 2021 UT 18, 491 P.3d 852, the Utah Supreme Court addressed a claim of intentional infliction of emotional distress (IIED) in the context of the Establishment Clause of the First Amendment. The Plaintiff had brought an IIED claim on the basis of the Church's handling of disciplinary hearings related to a sexual assault she suffered. *Id.* ¶¶ 2-5. The trial court dismissed the claim, and the Utah Court of Appeals affirmed, both reasoning that the Establishment Clause barred the adjudication of the intentional tort against the church. *Id.* ¶ 1. However, the Utah Supreme Court vacated the holding and remanded the matter, "because recent changes in the Supreme Court's Establishment Clause jurisprudence require further development of the facts and legal arguments presented in this case." *Id.*

12.4 Loss of Consortium

In *Cunningham v. Weber County*, 2022 UT 8, 506 P.3d 575, the Utah Supreme Court held, as a matter of first impression, that the Governmental Immunity Act waives immunity for loss of

consortium claims related to injuries for which governmental immunity is waived. There, a trainee and class participant in a SWAT training exercise was injured after he was instructed to stand next to an explosive and it went off. *Id.* ¶ 1. The Utah loss of consortium statute, and specifically *U.C.A.* § 30-2-11(8), "confirms that the Legislature anticipated that a governmental entity might need to pay damages for a loss of consortium claim." *Id.* ¶ 34.

12.5 Fraud

In *11500 Space Center LLC v. Private Capital Group Inc.*, 2022 UT App 92, ¶¶ 54- 60, 2022 WL 3008917, the Utah Court of Appeals affirmed the dismissal of the plaintiff's fraud claims because the claims as pled did not meet the particularity requirement of *U.R.C.P.* 9(c). Here, the fraud claim was deficient because the plaintiff failed to identify who made the purportedly fraudulent representations and failed to identify with particularity the recipients of the representations. *Id.* ¶ 60.

12.7 Intentional Interference with Contract Rights or Prospective Economic Relations

In *Matter of the Estate of Osguthorpe*, 2021 UT 23, ¶ 101, 491 P.3d 894, the Utah Supreme Court recognized for the first time "a claim at common law for intentional interference with inheritance, consistent with the elements of the RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 19." However, the Court also barred tort for plaintiffs "who had the right to seek a remedy for the same claim under Utah's Probate Code." *Id.* ¶ 102 (citing Rest. (3d) Torts: Liab. for Econ. Harm § 19(2)). Under Section 19(1), liability for intentional interference with inheritance occurs when: (a) the plaintiff had a reasonable expectation of receiving an inheritance or gift; (b) the defendant committed an intentional and independent legal wrong; (c) the defendant's purpose was to interfere with the plaintiff's expectancy; (d) the defendant's conduct caused the expectancy to fail; and (e) the plaintiff suffered economic loss as a result. *Id.* ¶ 101.

12.11 False Imprisonment

In *Shell v. Intermountain Health Services, Inc.*, 2022 UT App 70, ¶¶ 18, 24, 513 P.3d 104, the Utah Court of Appeals reversed the dismissal of a plaintiff's claim for *inter alia* false imprisonment. The Plaintiff had suffered a mental health crisis and was allegedly held against his will by health care workers at a behavioral health center. *Id.* ¶¶ 2-7. The district court dismissed plaintiff's complaint on Rule 12(b)(5) grounds, reasoning that the plaintiff "did not comply with the pre-litigation requirements of the Utah Health Care Malpractice Act." *Id.* ¶ 1. The Court of Appeals reversed, holding that the pre-litigation requirements of Utah's Malpractice Act did not apply because the plaintiff had not received any medical care from Intermountain. *Id.* ¶¶ 18, 24.

12.13 Defamation

In *Pingree v. University of Utah*, 2022 WL 1307902, *1, Case No. 2:20-cv-00724-JNP-CMR (D. Utah 2022), the District Court of Utah dismissed the plaintiffs defamation claim because under the Utah Governmental Immunity Act (UGIA), although there is a general waiver of immunity for negligence of a government employee, "*U.C.A.* § 63G-7-201(4) provides a series of exceptions to the general negligence immunity waiver," including for injuries resulting from libel or slander. *Pingree v. University of Utah*, 2022 WL 1307902, at *4.

SECTION 13 – DAMAGES

13.2 Special Damages – Medical Expenses

In *Sheppard v. Geneva Rock*, 2021 UT 31, ¶ 39, 493 P.3d 632, 639-640, the Utah Supreme Court held that a motor vehicle accident victim is not required to offer an expert medical opinion on causation in order to claim special damages as a jury was able to determine that resulting back pain from an accident could last and require additional treatment.

II. INSURANCE LAW OVERVIEW

SECTION 1 – POLICIES IN GENERAL

1.1 Construction and Interpretation of Policies

Relevant Statutes:

In 2021, the Utah Legislature amended *U.C.A.* § 31A-21-101. The amendment, effective May 5, 2021, adds § 31A-21-101(3)(c) which reads: "Inland marine insurance that includes accident and health insurance is subject to Chapter 22, Contracts in Specific Lines." Further, the amendment clarified language under subsection 4 to clearly distinguish between group insurance policies and blanket insurance policies.

Notable Law:

In *Cincinnati Specialty Underwriters Ins. v. Red Rock 4 Wheelers*, 576 F.Supp.3d 905 (D. Utah 2021), the Court ruled that the insurer had a duty to defend the insured against a negligence claim brought by a third party who was struck by a vehicle during an off-road race event hosted by the insured. The Court applied the "eight-corners rule," that is, the rule that the "analysis of a duty to defend claim is typically limited to two documents: the insurance policy and the complaint in the underlying action." *Id.* at 913. Under the terms of the policy and the allegations of the complaint, the Insurer had a duty to defend, and the off-road vehicle and participant exclusions did not eliminate that duty. *Id.* at 915.

In *Owners Ins. Co. v. Dockstader*, 861 Fed. Appx. 210 (10th Cir. 2021), the Tenth Circuit affirmed the District Court of Utah's grant of summary judgment to the insurer, holding that the insurer owed no duty to accept settlement offers within policy limits when defending the insured against third-party claim because the policy did not cover insured's conduct toward the third party plaintiff.

In *Derma Pen, LLC v. Sentinel Ins. Co., Ltd.*, 545 F.Supp.3d 1177 (D. Utah 2021), the Court granted summary judgment to the insurer.

1.2 Fraud and Misrepresentation

In *Muir v. Cincinnati Ins. Co.*, 2022 UT App 80, 514 P.3d 586 (2022), the Court of Appeals affirmed summary judgment in favor of an insurer, enforcing the Police's "fraud exclusion" which denied coverage to persons who had "engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought." *Id.* ¶5. There, the insured had falsely stated that he was not working due to injuries sustained in the accident, though he was in fact a self-employed truck driver who continued to work. *Id.* ¶ 4. The Court declined to accept as reasonable the insured's interpretation of the fraud exclusion, by which only the type of coverage excluded would be the type for which fraudulent means were used. *Id.* ¶ 12.

1.3 Waiver & Estoppel

In *UMIA Ins., Inc. v. Saltz*, 2022 UT 21, 2022 WL 2070450, the Utah Supreme Court heard cross-appeals from an insurer and the insured regarding the surgeon-insured's claims for promissory estoppel and waiver after the insurer denied coverage for surgeon's release to a news outlet of patient photographs. The Supreme Court affirmed the lower courts' denial of the insurer's motion for judgment as a matter of law as to the plaintiff's promissory estoppel claim. Here, the surgeon had provided evidence that he was prejudiced by the insurer's delay in reserving rights, which deprived him of opportunities to settle claims.

The Court also held that the district court erred in dismissing Saltz's waiver claim because "[p]rejudice is irrelevant to a claim of waiver" (quoting *Mounteer Enters., Inc. v. Homeowner Ass'n for the Colony at White Pine Canyon*, 2018 UT 23, 422 P.3d 809). However, this issue was not remanded because Saltz successfully established coverage under the promissory estoppel theory.

1.12 Brokers and Agents

In *Drew v. Pacific Life Ins. Co.* 2021 UT 55, 496 P.3d 201, the Utah Supreme Court interpreted "appointed licensee" in *U.C.A.* § 31A-23a-405(2) as "a person or entity with whom an insurer 'has a contract as an insurance producer, limited line producer, or managing general agent' and who the insurer has 'appoint[ed]' in filings to the state insurance commissioner 'to act on the insurer's behalf.'" 2021 UT 55, ¶ 47 (quoting *U.C.A.* § 31A-23a-115(1)).

SECTION 12 – BAD FAITH CLAIMS AGAINST INSURERS

12.2 Bad Faith

Under *U.C.A.* § 78B-5-825, effective May 4, 2022, the court may award reasonable attorneys' fees to a prevailing party if the court determines that a claim or defense was without merit and was not brought or asserted in good faith. In *Banner Bank v. Smith*, 30 F.4th 1232, 1239 (10th Cir. 2022), the 10th Circuit reviewed this statute to determine its application in diversity. The court determined that the statute is not applicable in federal diversity cases as it is procedural in nature and, thus, federal rules apply. *Id*. at 1239.