UMAA 2017 case update

Utah Supreme Court, Utah Court of Appeals, Tenth Circuit and Supreme Court cases
April 2016-April 2017

Brought to you by South Jordan City

ClearOne v. Revolabs, 2016 UT 16 (2016) – Specific and general personal jurisdiction – ClearOne claimed that Revolabs interfered with its contractual relationship with an employee by recruiting and hiring the employee while he was still employed with ClearOne. ClearOne asserted claims of intentional interference with contractual relationship, predatory hiring, and aiding/abetting a breach of fiduciary duty. Revolabs is incorporated in Delaware with principal place of business in Massachusetts, and has no Utah employees. The ClearOne employee signed a Utah contract, but worked and lived in Texas. Trial court granted Revolabs's motion to dismiss for lack of specific and general personal jurisdiction; UT SCT reviewed recent U.S. Supreme Court decision in ***Walden v. Fiore*, 134 S.Ct. 1115 (2014)** as well as former Utah decisions, and affirmed that Revolabs has insufficient contacts with Utah to subject it to jurisdiction.

Utah Republican Party v. Cox, 2016 UT 17 (2016) – questions of statutory interpretation of election code certified by federal court – Court examined the definition of "qualified political party" (§ 20A-101(12)(d)) and held if the Republican Party wants to be a QPP, it must allow members to seek nomination for office by either or both the convention method and the signature process.

Nichols v. Jacobsen Construction Co., 2016 UT 19 (2016) – Nichols worked for a subcontractor of Jacobsen when he was seriously injured on the jobsite. Jacobsen required its subcontractors to participate in a contractor-controlled insurance program where Jacobsen purchased a single insurance policy from a single insurer that covered all subcontractors. Subcontractors could purchase their own workers' comp insurance, but the CCIP was supposed to be the primary source of coverage. Jacobsen paid for Nichols's medical expenses but it was disputed as to whether they paid right away. Nichols filed a negligence action against Jacobsen; Jacobsen claimed that it was immune under the "eligible employer" statute. Utah Supremes granted cert on the issue of whether there is a timing requirement for payment of benefits and on the issue of the proper interpretation of the word "work." Examining the exclusive remedy provision, the Court found that Jacobsen procured "work" from the subcontractor and secured payment of WC benefits for Nichols. Whether or when those benefits were paid is not the requirement under the statute. Jacobsen qualified for the exclusive remedy provision and is immune from the negligence action.

Sandy City v. Lawless, 2016 UT App 63 (2016) – Lawless was cited for violating Sandy ordinance for performing as an escort without first obtaining a SOB license from Sandy. She moved to dismiss, arguing that the Utah Code § 10-8-41.5 violated her rights under the 1st and 14th Amendments to the U.S. Const. She later abandoned this argument and asked the district

court to review the Sandy ordinance for violating her constitutional rights. The court found that the ordinance was constitutional, and she was convicted.
On appeal, she went back to challenging the constitutionality of the state statute. The Ct of Appeals found that she failed to preserve this question in the district court so they could not review it.

Hollenbach v. Salt Lake City Corp., 2016 UT App 64 (2016) – Question was whether the SLC Civil Service Comm'n erred when it decided it lacked jurisdiction to review Hollenbach's appeal of his termination from the PD after it received his notice of appeal in the mail one day after the deadline. Hollenbach was fired on Nov. 8, 2013, and had 5 business days to appeal. He mailed his notice of appeal on Nov. 11, but the CSC did not receive it until Nov. 19, one day late. Hollenbach submitted proof that he mailed the appeal days before the deadline, the CSC concluded it had no jurisdiction to consider the appeal b/c of timeliness. On appeal, Hollenbach argued that the CSC erred when it determined it didn't have jurisdiction; City argued he didn't preserve this at the CSC. Court holds that the CSC clearly had the opportunity to rule on the timeliness issue and decided it, so the issue was preserved. Court then examines the definition of "filed" under the CSC's rules, and concludes that it is on the date shown by the post office cancellation mark. Remanded to CSC for consideration on the merits.

Needle v. Dep't of Workforce Services, 2016 UT App 85 (2016) – Needle is a software company that developed a customer engagement software platform that online retailers use to "chat" in real-time with customers. Needle helps the retailer find "advocates" but the retailer makes the final hiring decision. The advocates sign up as contractors with Needle. Advocates use their own computers, set their own hours, work wherever they want, and don't have quotas. Most work very part-time and are not expected to work exclusively for Needle or Needle's clients. They get paid on a per chat basis by Needle and get a 1099 at the end of the year. Needle doesn't control the content of chats but does have some ability to route more calls to advocates who score well based on retailer criteria. DWS determined that Needle was not an independent contractor for purposes of unemployment compensation; an ALJ and the Board subsequently affirmed, and Needle appealed. Court analyzed independent contractor factors and affirmed the Board's decision.

Injured Workers Association of Utah v. State, 2016 UT 21 (2016) – attorneys who represent injured workers in WC claims collect fees out of the compensation awarded to the worker. Utah statute delegates the authority to regulate these fees to the Utah Labor Commission, which created a sliding-scale fee schedule and cap on fees. IWA challenged the statue and the fee schedule as unconstitutional, arguing that under the Utah constitution, the Utah Supreme Court has exclusive authority to regulate the practice of law, including regulating attorneys' fees. Court agrees and holds that the fee schedule and authorizing statute are unconstitutional. In doing so, Court clarifies the its inherent authority following 1985 revision of the constitution. Court also declines to adopt a fee schedule, finding that the state has not produced evidence showing that the fee schedule protects workers and in fact it appears to harm workers by

reducing the quantity and quality of attorneys willing to do WC cases. Going forward, WC attorneys are permitted to negotiate appropriate fees with their clients and remain bound by the same rules of professional conduct.

Anderson v. Fautin, 2016 UT 22 (2016) – Does the occupation element in the boundary by acquiescence doctrine require a claimant to prove that both owners of adjoining land occupied their respective parcels up to a visible line? Anderson failed to visit or inspect his vacant property for 26 years, while Fautin occupied her property up to a fence line dividing it from Anderson's. A survey showed that the fence encroached into Anderson's lot. Anderson sought to quiet title to the disputed strip, Fautin claimed title by acquiescence. District court granted SJ in favor of Fautin, concluding that occupancy is immaterial to the element of occupation. Court of Appeals affirmed, as did Utah Supremes after clarifying doctrines on boundary by acquiescence, boundary by agreement, and adverse possession.

UDOT v. Boggess-Draper Co., 2016 UT App 93 (2016) – Boggess-Draper owns serveral parcels of property in South Jordan. In 2001, UDOT wanted to condemn a portion. The parties negotiated an agreement and the district court entered a final judgment in 2005. In 2010, UDOT filed another condemnation against another portion of Boggess-Draper's property, prompting Boggess-Draper to retain an expert witness to offer opinions on the value of the taking, including severance damages. The expert concluded that the taking caused a loss of access, view, and exposure to the remainder of the property and severance damages were in order. UDOT argued that in the 2005 agreement, it had already acquired all rights appurtenant and should not now face severance damages. Boggess-Draper argued that UDOT forfeited that argument by not raising it at the outset of its condemnation proceeding. District court held hearing to resolve dispute over meaning of the 2005 judgment and over the forfeiture argument, and found in favor of UDOT. Boggess-Draper appealed on the timeliness of UDOT's raising of the rights appurtenant argument and on the court's granting of the motion in limine. Appeals court found that UDOT did not forfeit the argument as it raised it in accordance with the scheduling order in the original litigation, but that the court did err in declining to consider relevant extrinsic evidence in determining whether the 2005 judgment was ambiguous. Court analyzes when reviewing extrinsic evidence is appropriate, depending on facial/latent ambiguities.

State v. Wager, 2016 UT App 97 (2016) – Wager contends that the trial court erred by admitting without authentication, a prejudicial photo purporting to be him using drugs in his bathroom. A detective had not actually witnessed the event, but knew it had been given to him by an informant and that it depicted Wager and his bathroom. He also had talked to Wager in person, searched Wager's residence, and taken his own photo of the bathroom. No witness at trial saw the event depicted in the photo. But the Court of Appeals concluded that no additional eyewitness testimony was necessary for proper authentication, and upheld the trial court.

Olsen v. Park City and Valley of Love LLC, 2016 UT App 106 (2016) – Valley of Love (VOL) owns three adjacent parcels on Empire Ave in PC. In 2009, they sought a proposed ordinance to

combine the three parcels into a single platted lot of record. PC enacted Ordinance 10-8, combining the lots. VOL then received a conditional use permit allowing it to build a multi-unit dwelling on the lot. Appellants own property near the VOL lot and challenged 10-8 in district court, asserting that PC violated various provisions of PC code by adopting it. Parties filed cross motions for SJ, and the court determined that 10-8 did not violate code. Appellants argued that the total buildable amount should have been limited to the amount allowed on the largest of VOL's parcels. Because 10-8 expanded the buildable square footage, appellants argue it violated the code. Appellants also argued that the increase in buildable square footage violated the purposes of the code to prevent overcrowding and allow circulation of traffic, and violated PC's General. Court examines the code, density ratios, and General Plan and upholds district court.

Norton v. Hess, 2016 UT App 108 (2016) – Norton sued Hess for negligence days before his 4-year statute of limitations ran. He failed to serve her within 120 days and the case was dismissed w/o prejudice. Pursuant to the savings statute, he refiled but failed to serve her again within 120 days. His case was again dismissed, but it was unclear whether it was with or without prejudice. He filed suit again after being granted a motion for relief under Rule 60(b)(6) and timely served Hess. Hess filed a MTD arguing that the second dismissal had to be with prejudice because Norton could only refile his complaint once under the savings statute. Trial court found that the second dismissal had to be with prejudice, because "78B-2-11 did not intend or was not passed with the intent that Rule 60(b) would be able to circumvent the limitations put specifically into that section." On appeal, Norton argued that trial judge incorrectly interpreted the savings statute by concluding that the dismissal was with prejudice, and that trial judge abused discretion by finding the 60(b)(6) motion was improperly granted. Appeals court found that savings statute clearly allows that an action only be refiled once and Rule 60(b) cannot be used to override the savings statute or skirt the statute of limitations.

Wood v. Salt Lake City, 2016 UT App 112 (2016) – Wood sued SLC when he seriously injured his arm from tripping on a pothole. Wood presented evidence that the pothole had been there for about 4 months and that city workers (sanitation, street sweepers) had been on the street multiple times during those 4 months. City presented evidence that it has web and phone-based reporting system and that policy is once a pothole is actually reported it is repaired within 24 hours. Trial court found that city exercised reasonable care to maintain its streets and that the City was not negligent. Wood appealed, arguing that the city had constructive notice and that the court's decision was incorrect as a matter of law for not finding that employees had a duty to report the condition. However, appeals court found that whether any employee actually did have notice is a question of fact that Wood failed to challenge, and that the city was not negligent in failing to repair the pothole.

Fort Pierce Indus. Park Phases II, III & IV Owners Ass'n v. Shakespeare, 2016 UT 28 (2016) – The Board of Trustees of an Industrial Park Owners Association denied an application to construct a cell phone tower in the Industrial Park. Despite the denial, the Shakespeare's proceeded to construct the cell phone tower. The Association then sued for breach of the CC&Rs because the Shakespeare's constructed the cell phone tower without permission from

the Board. The district court found a breach of the CC&R's but applied a presumption that "restrictive covenants are not favored in the law and are strictly construed in favor of the free and unrestricted use of property" and held that the Board did not have the right to limit the number of cell phone towers in the industrial park. Utah Supreme court held that the district court erred in strictly construing the CC&Rs rather than applying neutral principles of contract construction. They reversed the district court's holding and held that the Board had sufficient authority under the CC&Rs to deny that application

Salt Lake City Corp. v. Gallegos, 2016 UT App 122 – Salt Lake City Corporation petitioned for judicial review of the Salt Lake City Civil Service Commission's decision reversing the termination of Officer Thomas Gallegos's employment with the Salt Lake City Police Department. The Commission was directed to reconsider their decision because they applied an incorrect legal standard. The Commission applied the wrong standard of review to its analysis because the question before the Commission was not whether there was substantial evidence to justify exonerating the officer, but rather, whether there was substantial evidence to support the police chief's conclusion that the officer engaged in the conduct (theft) for which he was terminated.

Stellia Ltd. v. Yknot Global Ltd., 2016 UT App 133 - This appeal arose from a business dispute between two companies, Yknot Global Limited (a foreign company) and Stellia Limited. Yknot filed a case in federal and a case in state court. Yknot voluntarily dismissed its federal complaint without court involvement due to jurisdictional concerns. This was the first dismissal. Yknot also dismissed its state complaint without judicial involvement to see arbitration in a foreign country. This was the second dismissal. Yknot argued that the district court erred by dismissing its counterclaims under the two-dismissal rule of rule 41(a) of the Utah Rules of Civil Procedure. District Court held that the plain meaning of the rule applied and that regardless of the weighing of relative equities (such as Yknot dismissing the federal case for jurisdiction grounds and dismissing the state case to pursue arbitration in a foreign country), the rule means exactly what it says. A dismissal of a federal case counts as a dismissal for purposes of URCP 41. The Utah Supreme Court affirmed.

McTee v. Weber Ctr. Condo. Ass'n, 2016 UT App 134 - McTee, and IRS employee, worked in an office that the IRS rented in the Weber Center building located in Ogden. Connected to the east side of the Weber Center was a parking structure for tenants and their guests. McTee took a break from work to smoke a cigarette. Following her break, McTee began to walk back to the building, but while still in the parking structure, she tripped and fell in a pothole located near a support pillar. As a result of falling, McTee alleges she suffered injuries. District Court found her notice of claim against appellant county was timely under Utah Code Ann. § 63G-7-402 (2014), although given more than one year after her injury, because the circumstances did not put a reasonable person on immediate inquiry notice that a governmental entity owned or maintained the location of the injury. The sign in front of the building identified only a private business and the building's actual connection to a governmental entity was obscure. It was not

unreasonable for a month to pass before she became aware of a possible claim against a governmental entity and the identity of the entity involved. She met the requirement of reasonable diligence so her notice of claim was timely. Appellate Court affirmed.

W. Valley City v. Coyle, 2016 UT App 149 - Following an investigation into allegations of misconduct, Lieutenant John Coyle was disciplined by the West Valley City Police Department, being demoted two steps, from lieutenant to patrol officer. Coyle sought the West Valley City Civil Service Commission's review of the disciplinary decision. The Commission determined that the discipline was disproportionate to the violations in question and reinstated Coyle as a lieutenant. West Valley City sought review of the Commission's decision. The appellate court found the commission did not abuse its discretion in concluding the lieutenant's conduct did not warrant a two-step demotion (where the failure to follow the policy on property handling did not undermine morale, negatively impact the department's effectiveness, or damage public confidence) and his only prior discipline was a letter of reprimand after he was at fault in a traffic accident. The commission did not abuse its discretion in concluding that the lieutenant's discipline was not consistent with previous discipline where he was punished significantly more severely than the detectives and a sergeant who were disciplined for the same conduct. Accordingly, the court declined to disturb the Commission's decision.

Ciardi v. Office of Prof'l Conduct, 2016 UT 36 – John Ciardi was cited for disorderly conduct and refusing a lawful order after an incident at the Fifth District Court. The district court ruled he violated the Utah R. Prof. Conduct and disbarred him because of aggravating factors. The Supreme Court affirmed the district court's holdings that Mr. Ciardi violated the Rules, but vacated the disbarment order and instead suspended him because aggravating factors cited by the district court did not justify a departure from the presumptive sanction of suspension.

State v. Gailey, 2016 UT 35 – Defendant was charged with several crimes, and during one day, she appeared in district court, pled guilty, and was sentenced. Without withdrawing her plea, defendant filed an appeal challenging her plea as unknowing and involuntary. Defendant argued the Plea Withdrawal Statute (Utah Code § 77-13-6) allows her to directly appeal or pursue post-conviction relief. The Supreme Court held that the Plea Withdrawal Statute bars direct appeals after sentencing.

Benda v. Roman Catholic Bishop of Salt Lake City, 2016 UT 37 – A Juan Diego Catholic High School student was seriously injured when a lift the student was using to replace light bulbs in the school's auditorium tipped over. His parents filed a lawsuit, which included a personal claim for loss of filial consortium. The district court dismissed the loss of filial consortium claim. The Supreme Court vacated the dismissal and adopted a cause of action for loss of filial consortium to allow parents to recover for loss of filial consortium due to a minor child's injury if the injury meets Utah Code § 30-2-11 (spousal consortium).

Craig v. Provo City, 2016 UT 40 – Plaintiffs filed a tort suit against Provo City under the Governmental Immunity Act (the "Act"). The district court dismissed the complaint because plaintiffs did not submit an undertaking or bond required by Utah Code § 63G-7-601(2). Plaintiffs then filed a second complaint with the required bond, but the complaint was untimely under the Act. Provo City moved to dismiss. In response, Plaintiffs invoked the so-called Savings Statute, a provision outside the Act that generally extends the statute of limitations when a complaint is dismissed other than "upon the merits." The district court granted the motion to dismiss. The court of appeals reversed, concluding the Act was complementary to other laws, and the Savings Statue was therefore applicable. The Supreme Court reversed, holding that the Act forecloses the applicability of the Savings Statute.

Federated Capital Corp. v. Libby, 2016 UT 41 – An enforceable forum selection clause in a contract that specified that Utah procedural and substantive law govern disputes required the application of all Utah laws, including its borrowing statute.

Cannon v. Holmes, 2016 UT 42 – Where a judge dismisses a case for failure to prosecute, the presumption is that the case was dismissed with prejudice, including if the judge does not specify that the case was dismissed with prejudice or if the judge does not specifically rely on Utah Rule of Civil Procedure 41(b).

State v. Rackham, 2016 UT App 167 – Although evidence of defendant's similar inappropriate touching of young female relatives was offered for a proper non-character purpose under Utah R. Evid. 404(b), evidence relating to one relative was not relevant under Utah R. Evid. 401, and the probative value of evidence relating to other relatives was substantially outweighed by the danger of unfair prejudice under Utah R. Evid. 403. Thus, the evidence was improperly admitted to prove knowledge on defendant's part. The trial court did not exceed its discretion by concluding that the evidence was not sufficiently independent to be admissible for the purpose of rebutting a fabrication defense under the doctrine of chances. The Court of Appeals vacated defendant's conviction and remanded for a new trial.

Utah DOT v. Coalt Inc., 2016 UT App 169 – UDOT's condemnation of property as part of its Legacy Highway project was a proper exercise of eminent domain under Utah Code § 72-5-102(2) and Utah Code §§ 72-5-102(12) and 72-5-103(1). The property, which was acquired for a nature preserve and as mitigation credits for future area projects as required by a settlement agreement, was properly condemned for a public transportation purpose. The Court remanded to redetermine the compensation because the district court did not consider the effect the highway had on the valuation of Coalt's property.

State v. Garner, 2016 UT App 186 – The State was not required to provide defendant the names of two confidential informants who provided written statements at his preliminary hearing because Utah Const. art. I, § 12, does not provide an absolute right to discovery at the preliminary hearing stage, and under Utah R. Evid. 505(d)(2) only the physical, in-court appearance of a confidential informants triggers a requirement to disclose their identifies.

Colosimo v. Gateway Cmty. Church, 2016 UT App 195* -- A boy and his friends bypassed a lock on a ladder that they climbed to reach the top of the Gateway Community Church in Draper. The church knew of at least two prior cases where trespassers had accessed the roof of the building in the same way. While climbing back down the ladder, the boy was electrocuted by a sign on the building that the parties later agreed was defectively wired. Ten days later, the boy died. The district court ruled that church owed no duty of care to the trespassing boy. The Court of Appeal upheld the district court's decision because there are no exceptions to the general rule that a possessor of land is not liable to trespassers for physical harm caused by the trespasser's failure to exercise reasonable care. Also, a city's sign ordinance does not create a duty of care to a trespasser.
**Supreme Court granted certiorari January 7, 2017.*

Earl v. LaVerkin City, 2016 UT App 169 – In 2006, LaVerkin constructed a road next to the plaintiffs' driveway that ended up being significantly higher than the driveway. The city deposited gravel at the end of the driveway, increasing its pitch. In 2007, the plaintiffs and other people filed affidavits with the City complaining of the construction and alleging people had slipped and fallen due to the steep incline of the driveway. The city agreed to reconstruct the road, but never finished the project. One plaintiff slipped and feel on the driveway in 2010, and the other in 2011. They each filed a notice of claim with the city. The plaintiffs then sued LaVerkin in 2012 for negligence. The trial court agreed with the city that the plaintiffs had not timely filed their notices of claim. The Court of Appeals, however, reversed and remanded the decision concluding that plaintiffs' claims were timely under Utah Code § 63G-7-402, and that plaintiffs' cause of action was based on actual injuries suffered in 2010 and 2011, not the earlier falls.

Wash. Townhomes, LLC v. Wash. Cnty. Water Conservancy Dist., 2016 UT 43 (2016) –Class action lawsuit challenging the legality of certain impact fees. Property owners paying the fees claimed the fees conflicted with the Impact Fees Act (UCA 11-36a-201 to 205) and are a taking. Water Conservancy District asserted the fees were based on a "level of service" standard adopted by the Utah Division of Drinking Water, which the District is required to follow. The District argued that adopting the standard was a "legislative" judgement that survives constitutional takings provisions.
District Court granted a motion for partial summary judgement and held "that the Level of Service adopted by and for the… Fee Analysis based upon a standard established by DDW was legal and reasonable as a matter of law". District Court also certified the case for immediate appeal under URCP 54(b). Supreme Court dismissed on jurisdictional grounds as not properly certified under 54(b) because it did not finally dispose of any claim and did not finally adjudicate the interests of a party, rather, it decided a threshold issue of possible relevance to the ultimate disposition of the property owners' claims against a water conservancy district. Court declined to exercise discretion to grant interlocutory review.

Logue v. Court of Appeals, 2016 UT 44 (2016) – Danny Logue was convicted of aggravated murder, possession of a dangerous weapon by restricted person, and obstruction of justice. While his appeal was pending a witness for the prosecution walked into a police station and confessed to an unrelated twenty-year-old murder. The Court did not overturn the jury's assessment of witness creditability as the jury had heard evidence of Mr. Wright's lengthy criminal record, including his prior gang affiliation. Mr. Logue failed to carry his burden of showing that the newly discovered impeachment evidence against a witness justified granting extraordinary relief (directing the District Court to entertain a motion for a new trial).

Little Cottonwood Tanner Ditch Co. v. Sandy City, 2016 UT 45 (2016) - In 1910, the district court issued a decree which established water rights for the Little Cottonwood Creek. The decree provides that the water may be diverted and used so long as monthly payments of seventy-five dollars are made to the owners of the water rights. In 2013, several parties bound the decree filed a post judgment motion asking the district court to modify the decree to increase the amount of the monthly payment to account for inflation and the increased value of the water. The district court denied the motion, ruling that it did not have the authority to reopen the one-hundred-year-old case to modify the final judgment. Supreme Court affirmed

Brierley v. Layton City, 2016 UT 46 (2016) – Two police officers investigating a hit-and-run accident entered a private residence with neither permission nor a warrant. The Supreme Court concluded that city failed to meet its burden of proving that the inevitable-discovery exception to the exclusionary rule applied. The city did not establish that the evidence against defendant would have inevitably been discovered had the officers obtained a warrant because it did not establish that the officers would have sought and obtained a warrant absent the unlawful entry and, that such a warrant would have revealed the same evidence against defendant. The Court found the city's evidence was too speculative to establish inevitable discovery, and that the court of appeals erred by concluding that the inevitable discovery exception applied.

Bagley v. Bagley, 2016 UT 48 (2016) -The wrongful death statute, Utah Code Ann. § 78B-3-106, and the survival action statute, Utah Code Ann. § 78B-3-107, permitted Ms. Bagley acting in the legal capacity of an heir or personal representative to sue herself in an individual capacity for negligently causing her husband's death because the plain language of both statutes permitted such a lawsuit. The literal terms of the statutes did not lead to an absurd result that required the appellate court to modify the statutory text, and absent a statutory gap, the appellate court refused to venture beyond the plain language of the statutes to rewrite them based upon public policy. The Supreme Court affirmed.

Anderson v. Provo City, 2016 UT 50 (2016) - Petitioners want a referendum placed on the November 2017 ballot. Despite the fact that Petitioners met the signature threshold needed to put a referendum before the voters, Provo refused because the resolution could not be referred to the voters as a matter of law. Petitioners filed their petitions in accordance with a provision of the Utah Election Code that provides that "[i]f the local clerk refuses to accept and file any referendum petition, any voter may apply to the Supreme Court for an extraordinary writ to

compel the local clerk to do so . . . ." Utah Code § 20A-7-607(4)(a). Utah Rule of Appellate Procedure 19(b)(5) requires a party seeking extraordinary relief to explain "why it is impractical or inappropriate to file the petition for a writ in the district court." Petitioners have failed to carry this burden. Utah Code section 20A-7-607(4) does not require Petitioners to file in this court nor does it relieve Petitioners of the need to meet the requirements of Utah Rule of Appellate Procedure 19(b)(4)-(5). Petitioners have not shouldered their burden of establishing that it would be impractical or inappropriate for them to file their petitions in the district court. We, therefore, deny these petitions without prejudice.

Kalashnikov v. Salt Lake City, 2016 UT App 213 - Kalashnikov filed a complaint against various parties claiming that security officials accosted him at the Salt Lake City Main Library. Kalashnikov also brought claims against Salt Lake City Corporation and the Salt Lake City Public Library System. Kalashnikov never filed notices of claim pursuant to the Governmental Immunity Act. Claims against a governmental entity are barred "unless notice of claim is filed . . . within one year after the claim arises." Because Kalashnikov failed to file a notice of claim with the governmental defendants, the district court correctly dismissed the claims because it lacked jurisdiction over them.

Nielsen v. State, 2016 UT 52 (2016) - A criminal case, where the State claimed a privilege under rule 505 of the Utah Rules of Evidence to refuse to disclose the identity of a confidential informant. Rule 505 provides that if the State exercises this privilege in a case where the district court determines that there is a reasonable probability that the informant can give testimony necessary to a fair determination of the issue of the defendant's guilt or innocence, the court must dismiss the charges associated with this testimony. Relying upon an opinion of this court that applied a prior version of the current rule 505, the district court used a three-factor balancing test. Supreme Court reversed and remanded so the court could apply the plain language of rule 505 which required the district court to consider only the necessity of the confidential informant's likely testimony in determining the defendant's guilt or innocence.

Brown v. Cox, et al., 2017 UT 3 (2017) – Melvin Brown lost his Republican primary election for the Utah House by 9 votes, and challenged the result under Utah Code, claiming he would have prevailed had disqualified ballots been counted. Brown filed a verified complaint with the Utah Supreme Court as directed in statute. Court holds that the Code § 20A-4-403(2)(a)(ii), giving the Supreme Court original jurisdiction over multi-county election contests, is unconstitutional expansion of the court's original jurisdiction. The Legislature can create appellate jurisdiction, but doesn't have authority to alter the Supreme Court's original jurisdiction.

State v. Isaacson, 2017 UT App 1 (2017) – Draper City police got a call from the local library reporting that Isaacson was carrying a concealed weapon without a permit. Police apprehended him and he allowed an officer to remove the unholstered, fully loaded gun from his jacket. He was charged and convicted on a class A misdemeanor after trial. At trial, he testified that he didn't believe he needed a permit because of his 2nd Amendment rights, and asked to call two reputation/character witnesses; the State objected on relevancy. On appeal, he argued that the

court erred when it didn't permit him to call the two witnesses who would have testified about his character for truthfulness because the prosecution had cross-examined him on his finances and how he had to economize to purchase his gun, take the concealed carry class, etc. Court upheld the trial court, finding that the prosecution did not attack the Defendant's reputation for truthfulness and therefor the court did not err in excluding the witness testimony.

State v. Cook, 2017 UT App 8 (2017) – Cook was convicted of drunk driving with an underage passenger. She was on an ATV traveling at a high rate of speed on a snow-covered road with a 10-year child in front of her and an 18-year old in back of her. The officer testified that she had a beer can in one hand and was holding the handlebars with the other. On appeal, Cook argued that she was not "in actual physical control of a vehicle" b/c the 10-year-old was actually driving. There was no question that she was drunk. Examining the totality of the circumstances, the appeals court found that she was in "actual physical control" even if the child was also driving or steering the ATV.

South Jordan City v. Summerhays, 2017 UT App 18 (2017) – Summerhays was charged with class B misdemeanors for violating a protective order for contacting his wife via text message. The prosecutor filed the information in SJC justice court. Summerhays pleaded guilty to one count and began serving a 10-day jail sentence. He immediately appealed to district court, moving to dismiss because under the code, violating a protective order is a class A misdemeanor, and justice courts do not have jurisdiction over anything above a class B. District court agreed and vacated the conviction after Summerhays had served 7 days in jail. SJC then filed a new information, charging class A misdemeanors in district court. Summerhays then moved to dismiss, arguing that the Double Jeopardy clause prevented him from being charged again for the same crime. The district court ruled that jeopardy didn't attach in the first case because the justice court never had proper jurisdiction. On interlocutory appeal, the court of appeals affirmed, finding that jeopardy did not attach during Summerhays's initial prosecution in justice court. However, the court clarifies that the double jeopardy clause would entitle Summerhays to credit for time served on any sentence imposed from another conviction.

Judd v. Bowden, 2017 UT App. 56 – In the early 1900's two close friends built cabins next to one another at the top of Big Cottonwood Canyon. The two properties were and continue to be accessible by a narrow circular driveway. The majority of the driveway is on the Bowden property with only a sliver of the driveway on the Judd property. Over the years both parties used the driveway for access to and from their respective cabins and for parking. The original builders and their predecessors accommodated each with respect to access and parking for a hundred years. All that changed one day in 2008 when Bowden asked one of the Judd's to move his car off the driveway and Judd refused. Demands, blockades, lawyers and a four day trial ensued. The trial court held the Judds had acquired a prescriptive easement on the Bowden property for the purposes of reasonable access and parking associated with the Judd's use of their property. Bowden appealed. The court of appeals affirmed easement with respect to the access to the property based on the open, continuous and adverse use of the Bowden property. However, the court reversed the trial court's finding that the Judd's had acquired an easement

for parking purposes. Relying heavily on the distinction between prescriptive easement and adverse possession, the court concluded that parking, in the context of the present case, intruded too far into the Bowden's property interests to fit within the confines of a prescriptive easement.

Strand v. Nupetco Associates, LLC., 2017 UT 55 – This case helps clarify when, and under what circumstance a party to a civil action may be declared a "vexatious litigant" under U.R.C.P 83. Utah Rule of Civil Procedure authorizes a court to declare a pro se litigant "vexatious" if, the litigant, three or more times, "files unmeritorious pleadings or papers." U.R.C.P. 83(a)(1)(c)(i). The trial court interpreted this provision only to apply to pleadings and papers filed in the present action. The Utah Court of Appeals disagreed holding that in determining whether a litigant is "vexatious" the court may consider whether the litigant committed proscribed conduct in the present and previous actions.

The Amer Texas Trust v. Brazell, 2017 UT App. 35 – Plaintiffs filed suit against defendants alleging fraud, conspiracy and violation of the Utah Uniform Securities Act. Before defendants answered, plaintiffs filed an amended complaint. With leave of the court, the plaintiffs filed a second amended complaint. The parties stipulated to a date certain to file amended pleadings. Thereafter, plaintiff filed a third and fourth amended complaints. Defendants then filed a 12(b) motion to dismiss arguing, in part, the plaintiffs failed to plead their fraud claims with the requisite particularity. Plaintiffs responded by seeking to file a fifth amended complaint. The trial court denied the motion to amend and granted defendants' motion to dismiss. Plaintiffs appealed. The Court of appeals affirmed. Relying on U.R.C.P 15(a) the court held that the motion to amend was, 1) untimely, 2) unjustified, and 3) prejudicial and, therefore, properly denied. Concerning the motion to dismiss for lack of particularity under U.R.C.P 9(c), the court held, "Because the Appellants do little more than insist that their amended complaint meets the requirements under rule 9(c), without addressing the basis of the district court's decision, we reject this challenge."

RJW Media Inc., v. Heath, 2017 UT App. 34 – Defendant built a house with a detached building. The detached building consisted of a below grade garage with an office on top. Defendant's neighbor sued to have the building torn down on the basis that the detached building constituted a second residence on the property in violation of the subdivision CC&R's and the county building codes. Whether the structure was a second residence turned on whether the structure was fitted for cooking. Four days before a bench trial defendant designated a non-retained expert under U.R.C.P 26. Plaintiff objected to both the timing and substance of the disclosure. The trial court allowed the witness to testify. On appeal the Court of appeal found the disclosure inadequate on the basis that broad, conclusory statements are insufficient to give sufficient notice of the substance of a non-retained expert's expected testimony. However, the court found the error harmless given the additional evidence offered at trial.

Mike's Smoke, Cigar and Gifts v. St. George, 2017 UT App. 20 – Mike's is a retail store that is licensed by St. George to sell cigarettes and related products. The Washington County Drug Task Force suspected Mike's of selling synthetic marijuana. Acting on that suspicion the Task force set up and executed several undercover buys. The products that were purchased during these buys were tested and found to be unlawful synthetic marijuana. Based on that information the City revoked Mike's business license. Mike's appealed to the City Council who affirmed the revocation. Mike's then petitioned the District Court for judicial review. Following a remand, the District affirmed the Council's decision. On appeal Mike's argued the District Court misinterpreted the Controlled Substance Analog Statute by reading the controlled substance definition to be read in the conjunctive, i.e. A, B and C, as opposed to the disjunctive, requiring A, B, or C. The Court of Appeals agreed with the District Court finding that a "controlled substance," as defined in the Controlled Substance Analog Act, is any substance that meets the definition under Utah Code Ann. 58-37-2(1)(g)(i)(A, B or C).

Selected federal cases

Zia Shadows v. City of Las Cruces, 829 F.3d 1232 (10th Cir. 2016).
For purposes of a due process claim, a claimant has no constitutionally protected property interest in a special use permit that a city has the right to amend or revoke through subsequent zoning amendments. Government employment alone does not bar a prospective juror from serving in a case involving her government employer.

Bird v. West Valley City, 832 F.3d 1188 (10th Cir. 2016).
Former animal shelter manager brought claims under Title VII and § 1983 against WVC and her immediate supervisor. Temporal proximity between a worker's complaint and her termination is relevant to a sex discrimination pretext claim, but not alone sufficient to establish pretext.

Adair v. City of Muskogee, 823 F.3d1297 (10th Cir. 2016) – In a case where an employee has sought worker's compensation benefits based upon a physical impairment, his employer has a legitimate business interest in determining whether the employee can perform the essential functions of his job. Requiring him to undergo a medical test to determine this does not violate the ADA.

Foster v. Mountain Coal, 830 F.3d 1178 (10th Cir. 2016) – In an ADA retaliation case, a plaintiff may rely solely upon temporal proximity to show causation during *the prima facie* stage of a *McDonnell Douglas* analysis, when his protected activity is followed closely by an adverse employment action.

Levorsen v. Octapharma, 828 F.3d 1227 (10th Cir. 2016) – A plasma center is a "service establishment" and therefore a public accommodation under Title III of the ADA, because it is an establishment and provides a service.

J. V. ex rel. C.V. v Albuquerque Pub. Sch., 813 F.3d 1289 (10th Cir., 2016) – Handcuffing a disruptive autistic student to his chair did not violate the ADA. Any temporary educational interference stemming from the handcuffing was due to the student's conduct, not his disability, even if the former was a manifestation of the latter.

A.M. ex rel. F.M. v. Holmes, 830 F.3d 1123 (10th Cir. 2016) – Reasonable suspicion that a student is carrying contraband justifies the search of his outer clothing, but a higher degree of justification is necessary to conduct a search that exposes his intimate areas.

Mayfield v. Bethards, 826 F.3d 1252 (10th Cir. 2016) – Pet dogs are subject to Fourth Amendment protection from police seizure.

Perea v. Baca, 817 F.3d 1198 (10th Cir. 2016) – Police officers who Tazed a suspect ten times in less than two minutes after they forced him off his bicycle, without first telling him why they were trying to seize him, were denied qualified immunity on his estate's later excessive force claim.

Schaffer v. Salt Lake City, 814 F.3d 1151 (10th Cir. 2016) – Parking enforcement officers were not acting under color of state law when they, while on duty as city employees, allegedly lied to the police by stating that the plaintiff hit their city vehicle and tried to hit them with her vehicle. Plaintiff's § 1983 and constitutional claims against the city based upon conduct that is outside the scope of the city employees' conduct must fail.

U.S. v. Carloss, 818 F.3d 988 (10th Cir. 2016) – A "no trespassing" sign does not revoke the implied license that an officer or any member of the public has to approach the front door of a residence and knock. Police officers did not violate the 4th Amendment by attempting a knock and talk discussion.

Gutierrez v. Luna County, et al., 841 F.3d 895 (10th Cir. 2016) – Plaintiff ran a stop sign and when the deputy attempted to make a traffic stop, she sped up instead of slowing down. She drove to her mother's apartment and got out of her vehicle, at which point the deputy managed to Taze her; a scuffle ensued. The plaintiff's mother came out of her apartment and pleaded with the deputy to stop hitting her daughter, at which point the deputy Tazed the mother, resulting in several injuries including fractured ribs. The deputy was granted qualified immunity at the district and circuit courts. Plaintiff's attorney failed to raise any legal argument to rebut qualified immunity, and because plaintiffs did not provide any clearly established authority that the mother was seized.

Clark ex rel. Estate of Burkinshaw v. Bowcutt (10th Cir. 2017) – Box Elder County officer initiates traffic stop, Burkinshaw appears to be intoxicated and flees, chase ensues and ends up in residential area. Bowcutt exits patrol truck, draws service weapon and orders Burkinshaw to get out of the car. Instead, Burkinshaw drives toward Bowcutt coming within inches; Bowcutt shoots and kills him. Considering whether officer should be granted qualified immunity, Court

determines his actions were reasonable based on the imminent threat to his safety, and overturns district court to grant QI.

Rife v. Oklahoma Dep't of Public Safety, 846 F.3d 1119 (10th Cir. 2017) – A trooper discovered Rife sitting on his motorcycle by the side of the road, unable to recall the date, time, or what he had been doing in the town where he just was. The trooper concluded he was under the influence of pain meds and had been in an accident; the trooper arrested him. Later it was discovered that Rife was not intoxicated but had suffered a head injury. On the way to jail, Rife complained of pain in his head and chest, but was put in a holding cell and not provided any medical care. Rife sued under § 1983 for deliberate indifference to his serious medical needs, among other claims. Tenth Circuit concluded that the evidence could reasonably support a finding that the trooper knew of a substantial risk to Rife's health and consciously disregarded it. Court remanded to the district court to consider whether Rife's underlying constitutional right to medical care was clearly established.

White v. Pauly, 137 S. Ct. 548 (2017) – Complainants call 911 to report a drunk driver on a New Mexico highway. They followed him with their brights on and he pulled over and confronted them. He drove away to a secluded home where he lived with his brother. Police showed up, announced themselves, and yelled for the brothers to come out. Brothers apparently only heard "we're coming in" and didn't know it was the police, so they armed themselves, yelled "we have guns" and shot an officer though the backdoor. A third officer, late to the scene, shot one of the men after seeing him fire at another officer. Trial court and 10th Cir denied QI to this third officer; Supreme Court overturned finding that the officer did not violate clearly established law. Nothing required the third officer to second-guess what the officers had already done or shout a warning to the guys in the house before shooting, so he did not violate any clearly established law.