UTAH STATE BAR

2022 ANNUAL REAL PROPERTY SECTION MEETING

Summary of Recent Utah Court of Appeals Opinions

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Boundary by Acquiescence

Hansen v. Kurry Jensen Properties LLC, 2021 UT App 54 (May, 2021)

Importance: Clarifies the standards for two of the four elements of proving boundary by acquiescence—1) whether there are sufficient markers to delineate the boundary and 2) whether there was mutual acquiescence to the boundary. The other two criteria are 1) a visible line marked by monuments, fences, buildings or natural features treated as a boundary and 2) a period of at least twenty years. The court indicates that the standard for acquiescence is "an objective determination based solely on the parties' access in relation to each other and to the line serving as the boundary." "A party's subjective belief will be considered evidence of mutual acquiescence only to the extent that such understanding is based on the objective actions of the landowners."

Facts: A neighboring landowner claimed boundary by acquiescence to 10 feet of property beyond the deeded description. The court used a series of markers to determine the disputed boundary—a tree stump, a carport, a garage, shed, and chain link fence. The court did not focus on the contention that one party thought the prior fence had been constructed to contain livestock, but on how the parties subsequently treated the boundary area.

Lundahl Farms LLC v. Nielsen

Importance: Confirms that boundary by acquiescence claims are "highly fact dependent" and thus decision of the trial court must be given special weight. The case also discusses 1) relationship of subjective to objective acknowledgement, 2) evidence of permission to occupy, and 3) evidence of co-occupation of the disputed area. The court noted that although "a party's subjective intent has no bearing on the existence of mutual acquiescence, a party's subjective belief may have some relevance to mutual acquiescence, as long as the belief is supported or created by the objective actions of the parties." The court also noted that "Utah precedent suggests that permission from the owner allowing the claimant's use defeats a claim that the parties mutually acquiesced to the asserted boundary." In this case, the landowner defending against boundary by acquiescence had never required compensation, rent, permission for land use, or permission to establish a fence or use the corral." The court further noted that "Even uses that are seemingly minimal compared to the claimants' activities can be inconsistent with acquiescence."

Facts: A family farm which was once owned by a single ancestor was split into two parcels and transferred. The cattle operations on the farm continued as under the common ancestor, with a shed, equipment, and vehicles of one owner located on the property of the other owner. After Lundahl became aware of where the deeded boundary actually was, he sent the other owner, Neilsen, a demand letter to remove its personal property including "outbuildings and/or permanent fixtures." The property was not removed, Lundahl filed suit for eviction, and Nielsen asserted counterclaims for boundary by acquiescence, adverse possession, prescriptive easement, and ttitle acquiisiton by virture of the

occupying claimant's statute. The trial court ruled that there was a boundary by acquiescence. The appeals court vacated the trial court's decision and remanded.

Huck v. Ken's House LLC, 2022 WL 1493982 (May 12, 2022)

Importance: Discusses the requirement that, to establish boundary by acquiescence, the disputed property must be occupied so as to give a reasonable landowner notice that the claimant is using the line as a boundary. There must be use along the entire boundary, and such use must be proven by clear and convincing evidence.

Facts: A fence, which was several feet from the deeded boundary line between two properties, fell into disrepair. One landowner removed the fence and built a garage on part of the disputed property. The other landowner claimed he had acquired that property by boundary by acquiescence. The court heard the evidence and determined that there was not clear and convincing evidence that the disputed property had been used in a way to put the other landowner on notice of a boundary by acquiescence claim. The party claiming boundary by acquiescence recited mainly passive or temporary uses—"safety," temporarily storing equipment, and accessing the side of the building for maintenance. The witnesses were vague as to exactly where the activities had taken place, and the activities only took place along part of the disputed boundary.

Prescriptive Easements

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

Importance: Clarifies the "continuous use" requirement for prescriptive easements. The court held that, "A prescriptive easement claimant who has used more than one distinct path across a servient estate is not disqualified from meeting the second element of the prescriptive easement test—continuity—merely because it used multiple paths." The four elements for prescriptive easements are that the claimant's use of another's land must be 1) open and notorious; 2) continuous; and 3) adverse 4) for a period of twenty years. The court noted that this was a case of first impression in Utah. The court noted that the paths had been used throughout the 20 year period. The court distinguished a Utah case in which one path was used for part of the 20 year period and another for the rest of the 20 year period.

Facts: MNV and its employees crossed a parking lot owned by 200 South LLC to reach MNV's own parking lot for over 20 years. There were three different paths used by MNV across the parking lot, depending on which road MNV employees used in approaching the parking lot.

Foreclosures

Daniels v. Deutsche Bank National Trust, 2021 UT App 105 (Oct. 2021)

Importance: Clarifies how to calculate statutes of limitation and tolling events for a foreclosure action. The statute of limitations for an obligation secured by a trust deed is six years (UCA 70A-3-118). Prior to May 2016, Utah law required that one of two actions be taken prior to expiration of the 6 year period: 1) completion of a trustees sale or 2) filing of an action to foreclose a trust deed (UCA 57-1-34). (Now, under UCA 57-1-34, for nonjudicial foreclosures, the filing of a notice of default, rather than completion of a trustees sale—must happen within the limitations period). Since neither of these actions had taken place in the Daniels case, the court then considered when the six-year period began to run on enforcing the debt. Under the May 2019 version of UCA 78B-2-309(20), the statute of limitations for a credit agreement begins on the later of when 1) the debt arose, 2) the debtor made a written

acknowledgment of the debt or promise to pay the debt, or 3) the debtor or a third party made a payment on the debt.

Facts: Daniels defaulted in 2007 but made erratic payments through 2009. The bank recorded a Notice of Default in September 2008, but did not proceed to sale. The Daniels took out bankruptcy in September 2009 and the bank debt was discharged in April 2010. The homeowners wrote multiple letters asking to modify the debt or assume a new mortgage and keep their house, but the court found that they never acknowledged the debt. In 2016 Daniels filed suit, seeking a declaratory judgment that the six-year statute of limitations had run on the bank's right to foreclose, as well as a decree quieting title to the property in their favor. The appeals court ruled in their favor.

Bradsen v. Shellpoint Mortgage Services, 2022 UT App 10 (Jan. 2022)

Importance: Clarifies how to calculate statutes of limitation, including distinguishing Daniels case as to what constitutes a "written acknowledgement of a debt." The case also discusses what legal methods can and cannot be used to remedy a defect in a lender's chain of title. The Bradsen court determined that the six-year statute of limitations for enforcing the loan began in 2009, when the lender accelerated the debt. The court determined that the statute of limitations was restarted in 2015, because the letters from Bradsen to the lender were an acknowledgment of the debt which were "clear, distinct, direct, unqualified, and intentional," which was the Daniels court standard. In determining that the lender did not have a clear chain of title, the court ruled that listing the wrong assignor on an assignment was not a "scriveners error" which could be corrected by affidavit. It also could not be retroactively corrected under the doctrine of relation back. The court ruled that the error could be corrected by rescission.

Facts: In 2007 Bradsen refinanced her home. In 2009, she stopped making payments and, for more than a decade, worked to forestall collection and prevent foreclosure. In March 2009, the lender accelerated the note and filed a Notice of Default, but did not proceed with foreclosure. In December 2017, it canceled the Notice of Default. In 2014, Bradsen wrote letters to the lender, referencing the existing mortgage loan, recognizing her late payments, and asking for "a loan modification" to lower her payments. She identified her "original loan amount." She also submitted a Uniform Borrower Assistance Form to the lender in which she referred to "[her] loan." There were a series of assignments of the loan from one lender to another. In one of the assignments, the wrong lender was stated as assigning the trust deed. Bradsen claimed that this created a break in the chain of title which resulted in the wrong lender attempting to foreclose the loan. In September 2017, the lender which was erroneously listed on the assignment of the loan filed a "Rescission of Assignment of Deed of Trust", which declared that the 2007 Assignment was "withdrawn, canceled, and declared of no force or effect." The lender also attempted to correct the mistake by affidavit. The trial court granted summary judgment for the lender, holding that the lender had standing to foreclose on the property because it held good title and that the collection and foreclosure were not time-barred. The appeals court agreed that the claim was time-barred, but remanded for a consideration of the lender's chain of title.

Kelly v. Timber Lakes, 2022 UT App 23 (Feb. 2022)

Importance: Confirms that failing to wait the statutory three months between filing a Notice of Default and posting a Notice of Sale does not void a trustee sale. The court discussed the standard for a deed to be void or voidable. A deed is void ab initio if it violates public policy, which requires that 1) it violates legislative statements of public policy, or 2) it harmed the public as a whole. A deed is voidable when "the interests of the debtor were sacrificed or there was some attendant fraud or unfair dealing." Unless the debtor challenges the sale before title passes into the hands of a bona fie purchaser, the only remedy left to a debtor under a voidable deed is damages from the party causing the injury. If a deed

"results from only inconsequential errors that do not affect the validity of the sale, i.e. errors that do not prejudice the debtor, the deed is valid and may not be set aside." In this case, the court found that early recordation of the Notice of Trustee's Sale did not violate public policy and that the plaintiff did not take the proper remedy, which was an injunction prior to the sale. In response to the plaintiff raising additional foreclosure claims on appeal, the court ruled that the claims could not be considered under the "plain error" rule because the plain error rule does not apply to civil cases, other than as expressly authorized by rule, such as by Utah R. Evid. 103(e) or Utah R. Civ. P. 51 (f).

Facts: An HOA foreclosed a unit nonjudicially for the owner's failure to pay assessments. It did not wait for three months between filing a Notice of Default and posting a Notice of Sale. The owner raised various defenses to the sale by phone calls to the HOA and its attorneys before the sale was held, but he did not either attend the sale or have an attorney attempt to enjoin it. He then sued to set aside the sale. The trial court ruled for the HOA and the appeals court affirmed.

Arbitration Clauses in Construction Contracts

Willowcreek Associates of Grantsville LLC v.. Hy Barr Incorporated, 2021 UT App 116 (Nov. 2021)

Importance: Clarifies the scope of arbitration clauses in contracts, including construction contracts. The court ruled that arbitration clauses are broadly construed, and that courts may dismiss claims that are not first submitted to arbitration, when the contact requires that be done.

Facts: A contractor entered into a contract to remodel an owner's apartment complex. The contract required that all claims "arising out of or relating to" the contract be submitted to arbitration. The owner failed to submit some claims to arbitration. The trial court dismissed those claims and refused to consider them, even though the arbitrator later asserted that it was not capable of resolving them.

Real Estate Contracts—Economic Loss Rule

Thorp v. Charlwood, 2021 UT App 118 (Nov. 2021)

Importance: Clarifies the operation of the economic loss rule, as applied to real estate contracts. The case also confirms that the Seller's Property Condition Disclosure required by the form REPC does not create a separate ground for recovery, other than the REPC. The court held that the economic loss rule barred the plaintiff's claims for negligent construction, negligent misrepresentation and fraudulent misrepresentation because they were "not premised upon any independent duty that exists apart from the REPC." The economic loss rule is a judicially created doctrine that prevents recovery of economic damages under a theory of tort liability when a contract covers the subject matter of the dispute. The court pointed out that the defendant might have had enhanced duties as the developer or original builder of the home, but that was not pled in the complaint.

Facts: The defendant, a professional real estate developer, purchased a house, remodeled it, and sold it to the plaintiff. Ten years later, the plaintiff discovered that the deck was structurally failing, as well as other defects. The plaintiff also found that there had never been a building permit for the project or a certificate of substantial completion or certificate of occupancy. The plaintiff sued the defendant, claiming defective construction, negligent misrepresentation, and fraudulent misrepresentation. The trial court dismissed the complaint on grounds that the economic loss rule barred the plaintiff's claim. The appeals court affirmed.

Liability of Landowners—Open and Obvious Danger Rule

Downhamv. Arbuckle, 2021 UT App 121 (Nov. 2021)

Importance: Discusses the application of the "open and obvious danger" rule, which shields land possessors from liability for injuries that were sustained on their property, if those injuries were caused by open and obvious dangers. The court clarified that, "when there is an open and obvious danger, the land possessor may still be liable if, under the circumstances, he should anticipate that the invitee will be harmed by the dangerous condition. The land possessor still owes a duty of reasonable care for the invitee's protection, and may be required to warn or take other action in dealing with the danger.

Facts: The plaintiff rented a home from the defendant. Outside of one of the back doors was a wooden pallet that served as the back step. After the wooden step broke one day, injuring the plaintiff, the plaintiff sued for negligence. The defendant moved for summary judgment, asserting that the back step was an open and obvious danger. The trial court granted summary judgment but the appeals court reversed and remanded for the trial court to consider whether the defendant should have anticipated that the plaintiff would use the step even though it was an open and obvious danger. The appeals court noted that an invitee may "forget the danger," "become distracted from it," or "reasonably encounter the danger despite the risk."

Zazzetti v. Prestige Senior Living Center LLC, 2022 UT App 42 (March 2022)

Importance: Determines that the open and obvious danger rule can apply in residential landlord-tenant context, at least where the accident occurs in a common area open to invitees. The open and obvious danger rule is not inconsistent with Utah's statutory comparative fault scheme. The rule does not absolutely bar a party from recovering for injuries sustained from an open and obvious danger in all circumstances, because it "does not so strictly define a landowner's duty as to eliminate any duty to protect or warn his invitees of obvious dangers." The court relies on the prior Downham case for its analysis of the open and obvious danger rule.

Facts: The resident of a senior living center slipped and fell on a patch of ice at her apartment complex. She sued the owner of the complex, notwithstanding a provision in her rental agreement that said that all tenants were responsible for keeping snow off stairs and walks in the winter. During trial, the complex owner denied that it intended to enforce that provision. The jury found that the owner was not at fault for the resident's injuries, and the appeals court affirmed. Much of the case revolves around the appropriateness of jury instructions.

Mechanics Liens

Vineyard Properties of Utah LLC v. RLS Construction LLC, 2021 UT App 144 (Dec. 2021)

Importance: Clarifies the extent to which a lien for work requested by a tenant attaches to the landlord's interest in the property. The court determined that, under 2011 and 2012 amendments to the mechanics lien statute, landowners became responsible for mechanics liens filed for tenant improvements, even if the landowners did not sign the contracts. Before 2011, 38-1-3 specified, "This lien shall attach only to such interest as the owner may have in the property." The legislature removed that language and also expanded definitions. "Owner" was defined as the person who owns the Project, and "Project" was defined as "the real property on which or for which…construction work is or will be provided."

Facts: A commercial tenant hired a contractor to work on improvements to leased property, but the tenant failed to pay for the work performed. The contractor filed a mechanics lien and the

landlord/owner sued to remove the lien, asserting that the lien could attach only to the tenant's leasehold interest and not to the landlord's fee interest in the property. The trial court entered judgment for the contractor and the appeals court affirmed.

Remedies—Spoliation of Evidence

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

Importance: Discusses spoliation of evidence under Rule 37 of the Utah Rules of Civil Procedure and applies it to construction cases. Spoliation of evidence occurs when a litigant destroys evidence in violation of a duty. A duty to preserve evidence begins when litigation is pending or reasonably foreseeable. In certain circumstances, a party may reasonably need to destroy material that it is presumptively duty-bound to preserve. If it does so, it must provide advance notice to the noncustodial party that allows for a full and fair opportunity to inspect that evidence, with the burden of proof on the custodial party. The notice must include: the anticipated claim; the factual and legal basis for the claim; the evidence relevant to that claim which will be destroyed; the reason the evidence needs to be destroyed; the date on which the evidence will be destroyed; and that the noncustodial party may inspect the evidence prior to and contemporaneous with its destruction. Notice must be given far enough in advance to give the noncustodial party a reasonable opportunity to protect its interests.

Facts: Homeowners entered into design and construction contracts for landscaping, including construction of rock retaining walls. The homeowners discovered that the walls were starting to fall apart before the project was finished. Both sides hired counsel and exchanged demand letters. Before filing a lawsuit, the homeowners hired other contractors to completely dismantle the walls and rebuild them. The design firm and contractor moved to dismiss the lawsuit as a sanction for spoliation. They claimed that, without an opportunity to inspect and observe the demolition of the walls, their ability to defend the case had been irreparably compromised. The trial court dismissed. The appeals court vacated and remanded to apply its new framework for evaluating sanctions for spoliation.