1st Quarter 2013

A Newsletter of the Litigation Section of the Utah State Bar

The Zealous Advocate

President's Message

By
Ryan B. Frazier

Expanding the Reach of Legal Services

We all likely know someone, if not many people, who would not be able to afford an attorney's assistance if a legal need arose. The number of pro se litigants is increasing. As a result, the Utah State Bar and the Utah Courts have launched various programs designed to increase legal representation for these individuals. This quarter I have decided to spotlight three of these programs and encourage your participation in at least one.

Lend a Learned Hand Pro Bono Program

Most attorneys are familiar with Rule 6.1 of the Utah Rules of Professional Conduct that encourages lawyers to "provide legal services to those unable to pay." It states: "A lawyer should aspire to render at least 50 hours of pro bono public legal services per year." R. Prof'l. Conduct 6.1. However, many lawyers are not aware that the Utah State Bar can assist them in contacting individuals who are in need of free legal services.

The Utah State Bar has announced the creation of the Pro Bono Commission ("PBC"), a state wide body tasked with improving and increasing the provision of pro bono services throughout Utah. The PBC matches the legal needs of low income individuals to the expertise and experience of volunteer pro bono attorneys. District pro bono committees are being formed to develop local pro bono programs. These local committees will strive to ensure that participating attorneys are matched with individuals only in the geographic areas in which the attorneys have agreed to participate.

Since the PBC was created in 2012, PBC has used the slogan "Lend a 'Learned Hand.'" Judges Michele M. Christiansen and Royal I. Hansen, co-chairs of the PBC, explained, "This slogan, we believe, captures a spirit that we hope you will embrace by volunteering to provide legal services to our most needy Utahns." ("Check Yes" to Lend a "Learned Hand," Judges M. Christiansen and R. Hansen, Utah Bar Journal, http://webster.utahbar.org/barjournal/2012/05/

The program is entirely voluntary and does not have an hour requirement. Further, the PBC is committed to supporting participating attorneys in these pro bono efforts. The Utah State Bar has hired Michelle Harvey, an attorney, to serve as the Bar's Pro Bono Coordinator. Ms. Harvey is available to provide attorneys the support that they need and to respond to attorneys' questions. More information about the program can be found at http://www.utahbar.org/probono/.

President's Message

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I strongly encourage you to sign up for and participate in this important and worthwhile program. Get involved by checking "Yes" on the Bar's License Renewal Form or by contacting Ms. Harvey at the Bar's Access to Justice Department at (801) 297 7027. Volunteers will take a brief electronic survey inquiring into areas of interest, experience, and location. The PBC will use this information to match attorneys with those in need of pro bono services.

Private Guardian ad Litem Program

Another opportunity that the Bar is promoting is the opportunity to become a private guardian ad litem ("PGAL"). This is an extremely worthy program. The PGAL program is designed to help at-risk children have the best possible chance of success in childhood in life.

In cases involving child abuse or neglect or where custody is an issue, minor children often need to have their interests heard. Utah Code Section 78A-2-228 authorizes the court to appoint a PGAL "to represent the best interests of [a] minor child" in certain district court actions where the child's interests may not be adequately represented. Essentially, a Guardian ad Litem is to stand in the shoes of the child and act as the child's representative. See *J.W.F. v. Schoolcraft*, 763 P.2d 1217, 1222 (Utah Ct. App. 1988).

Recent legislation has accelerated the need for more eligible PGALs throughout Utah. Most of this work is pro bono, but in rare cases a court may order other parties (usually divorcing parents) to pay the PGAL's fees.

Any attorney having an interest is standing up for the rights and interests of children is encouraged to apply to participate in this program. The Office of the Guardian ad Litem will train and certify attorneys to work in the PGAL program. An application and training materials can be found at http://www.utcourts.gov/specproj/casa/pgal/. After an attorney is determined to be eligible to serve as a PGAL, district court appointments will be assigned. For more information on the PGAL Program, see page 7.

"Any attorney having an interest is standing up for the rights and interests of children is encouraged to apply to participate in this program."

Modest Means Lawyer Referral Program

Not all individuals who are unable to afford an attorney live below the poverty level; it includes a sizable portion of the middle class. These individuals typically cannot afford an attorney's assistance at market rates and feel compelled to navigate a complex and intimidating legal system alone. They attempt to resolve their legal programs without the advice, expertise, and confidence an attorney can provide. Recently, Utah State Bar President Lori Nelson stated: "Programs and services like public defenders, Utah Legal Services, Legal Aid of Utah, the Disability Law Center, and legal clinics throughout the state admirably provide limited legal representation for the poorest members of our community but, for a large segment of the middle class, obtaining affordable legal services is more difficult." (Message from Pres. Lori W. Nelson, e.Bulletin for February 2013.)

To make attorneys more affordable and accessible to this group, the Utah State Bar Commission is starting the Modest Means Lawyer Referral Program. This program is designed to assist individuals who earn too much to qualify for free legal services, but who cannot afford the attorney fees typically charged by attorneys. The Modest Means program makes an affordable attorney available to these individuals. Modest Means refers these individuals to attorneys who have signed up for the program and agreed to be paid at a reduced rate. Like the "Lend a 'Learned Hand'" pro bono program, Modest Means matches a

potential client's needs with the experience, expertise, and location of a participating attorney. Each participating attorney designates the areas of law in which the attorney will accept cases and the counties in which the attorney is willing to appear.

Attorneys participating in the Modest Means program do not render legal services for free. Rather, the participating attorneys agree to render legal services for these individuals at a discounted rate. This program is perfect for individuals attempting to establish a practice, develop a clientele, or gain experience in a legal area.

You can find more information about the Modest Means program at http://www.utahbar.org/modestmeans/. Watch for more information to be forthcoming about this new program and for a kickoff event that will occur in the near future. If this program is suited to your practice or may assist you in launching your career, I encourage you to get involved with this program.

Rise & Shine CLE

By
Heather Thuet

Mandatory. This is a word that grabs the attention of attorneys. Debra Moore, the District Court Administrator with the Administrative Office of the Courts, kept the attention of the packed house at the Litigation Section February Rise & Shine as she spoke about E-Filing in State Courts. Those in attendance received valuable information and advice about electronic filing which is mandatory April 1, 2013.

Debra Moore

Although the date falls on April Fool's day, it's no joke. If you try to file paper documents on April 1, 2013 in the district court, they will not be accepted for filing. The Board of District Court Judges has decided that no grace period or other exceptions to the mandatory e-filing rule will be allowed. The rule will be strictly enforced on the effective date. Documents left in a night drop box or received in the mail that are time-stamped or postmarked after 11:59 p.m. on March 31 may be destroyed.

Practitioner Profile

Clark R. Nielsen

By
Keith Call

Committed To Service

Clark Nielsen accepted one of his first "private guardian ad litem" cases in 2005. His client was a 5-year-old boy who lived with his mother and whose father was in prison. The child's maternal grandfather had petitioned the Court to allow the grandfather to adopt the child. If granted, the adoption would have resulted in the child having two parents with a father/daughter relationship to each other.

With the child's imprisoned father uninterested in the proceeding, there was no opposition to the unusual petition and no one to speak out on behalf of the child. Faced with this concern, the Court appointed a private guardian ad litem to represent the child's interests in the case. After completing his investigation, including consultation with expert child psychologists, Clark made his recommendations, which were adopted by the Court and accepted by the petitioners.

This case is a great example of the need for private guardians ad litem in Utah. And it is one of many examples of how Clark Nielsen has used his legal training to step up and serve.

Why Law School?

Clark grew up on a five-acre "farm" in Salt Lake City, one of ten children of Arthur and Vera Nielsen. The "farm" kept Clark busy through most of his youth, taught him the value of hard work, gave him an affinity for the land and animals. Later, he and his wife raised their own six children there.

Clark's first ambition was to become a Montana cowboy. But after deciding it would be tough to make a living that way, Clark chose the law. Clark's father was a prominent Salt Lake attorney for many years, and one of the founders of what became the Nielsen & Senior law firm. Clark admired his father and the service he had given to clients and community.

It also helped that Clark was recruited to be part of BYU's highly-touted charter class of 1976 by none other than Dean Rex Lee. Clark enjoyed law school and has maintained many good friendships from those days.

Law Practice and Professional Service

"Some of Clark's most rewarding professional and personal experiences have been mentoring teenage children who were his guardian ad litem clients"

Clark began his legal career at Nielsen, Conder, Hansen and Henriod. As an associate, he ended up writing numerous briefs, and naturally developed an expertise in appellate brief writing and appellate advocacy.

In 1985 the Utah Supreme decided to hire a new staff attorney. Clark applied and got the job. When the Utah Court of Appeals was first formed in 1987, the Chief Justice asked Clark to help the new appeals court get off the ground as a staff attorney for that Court.

Clark re-joined some of his dearest friends and mentors, Joe Henriod and Stephen Henriod in private practice in 1992 when they formed a new firm of Henriod and Nielsen. Clark continued his appellate work and, under Joe Henriod's mentorship, also took up a family law practice. Clark's decision to take up family law was driven in large measure by his desire to serve a part of the community that he felt was underserved.

Practitioner Profile

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Although he has found family law work is stressful from time to time, he knows his clients appreciate his service. "I had never received a thank you card from my corporate clients," he notes, obviously implying that his family law clients occasionally express their thanks for Clark's valuable help in difficult circumstances.

When Stephen Henriod became a Third District Court Judge and Joe Henriod slowed down his practice toward retirement, Clark practiced on his own for a few years and eventually joined Smith Hartvigsen in 2005, where he now practices appellate and family law, property and general litigation. Service and mentoring continue to be hallmarks of Clark's work, as well as hallmarks of Smith Hartvigsen. "I feel a little like a duck out of the water," he says, "in a water law firm." He has served on the Utah Supreme Court Appellate Rules Committee, Utah Supreme Court Disciplinary Rules Committee, the Utah Supreme Court Disciplinary Panel Committee and as the Utah Bar Appellate Section Chair.

Clark R. Nielsen

Mentee and Mentor

Clark recognizes the important role great mentors have played in his life. He credits his father for teaching him to work hard, love the law and love others. He speaks fondly of his partner and mentor, Joe Henriod, and the important role Joe played in his career development. Stephen Henriod and many other contemporaries have served as important sounding boards, examples and trusted friends.

Clark is returning the favor to many others. In addition to mentoring numerous young lawyers, some of Clark's most rewarding professional and personal experiences have been mentoring teenage children who were his guardian ad litem clients. He speaks fondly of visiting his youth clients at athletic events and practices, and even reading to them at school. Clark even watched two youth clients face each other in the state football playoffs. "It is very rewarding to see these clients do well and achieve some success in life, despite the challenges of broken homes," he says.

Clark Nielsen is a great example of someone who enjoys using his legal skills to serve others, including clients, the Bar and the community.

Saving Our Communtity's Children–You Can Help

The Litigation Section is proud to announce a new initiative to help save at-risk children in our community.

Every year, thousands of Utah children find themselves caught up in social and judicial systems they do not understand and cannot control. Such children are often caught in the middle of difficult family problems, including divorce, custody and protective order proceedings.

Occasionally, a guardian *ad litem* is appointed to represent the interests of the child in domestic and other types of cases. These guardians *ad litem* play a critical role in helping children navigate the judicial process, and to make sure their interests and voices are heard and considered by the courts. Children in these dire situations are sometimes represented by the Utah Office of Guardian Ad Litem. However, because of recent funding cuts, the need for help from private attorneys has become critical.

The Litigation Section is out to help recruit and train attorneys to become private guardians *ad litem* for Utah District Courts. Because of funding cuts, as of July 1, 2013 through June 30, 2014, the Office of Guardian ad Litem will only be appointed to protective-order cases and cases in which the parties allege abuse or neglect and are determined by the court to be indigent. There are hundreds of other cases where children desperately need good representation, such as cases involving issues of custody and parent-time. As of July 1, 2014 (assuming funding is not reinstated by the Legislature), the Office of Guardian ad Litem will not represent *any* children in *any* District Court cases, including even protective order and abuse or neglect cases. Children in these cases will be unrepresented unless private guardians *ad litem* step up. That is where you can make a huge difference in the life of a child.

By registering to serve as a private guardian *ad litem*, you can be appointed to represent the interests of children in District Court cases. The Court can order the parents to pay fees for your services. You may also be asked to serve pro bono as needed. And, provided you perform in such capacity within the scope of your statutory and ethical duties, you are immune from civil liability that could result from your service.

Guardian *ad litem* work is not complicated and is well suited to litigators, even if you do not have experience in this area of law. Training is provided for all who participate. To access the program, go to http://www.utcourts.gov/specproj/casa/pgal. Also, watch for Litigation Section CLE programs in April that will give you information and a head start on becoming a private guardian *ad litem*. You can direct specific questions to Emily Brown at emilyb@utcourts.gov or Keith Call at kcall@scmlaw.com.

Utah's children need you. Please help us step up and build a better future for the children of our State!

UTAH STATE BAR - LITIGATION SECTION

INTERMEDIATE LEVEL COURSE

Saving Utah's Children - Becoming a Private Guardian ad Litem

Date:	Tuesday, April 16, 2013
Time:	12:00pm - 1:00pm
Location:	Kirton McConkie 60 E. South Temple, 16th Floor Parking: Validations provided for City Creek East Lot (enter from State Street)
Presenters:	Hon. Kate A. Toomey, Third District Court Craig M. Bunnell, Office of Guardian ad Litem
Cost:	**Free for Litigation Section members** $20 for others Lunch is included.
CLE Credit(s):	1 Hr. CLE
RSVP:	TO REGISTER: Register ONLINE or email RSVP to sections@utahbar.org. You can also register by faxing 801-531-0660 by April 13th. Please include your name and bar number on all registrations.

Quarterly Luncheon

"What I Wish The Other Side Understood Regarding Mediation"

On January 14, 2013, members of the Bar were able to enjoy some lunch and obtain CLE credit while learning from a combined 110 years of legal experience. At the Litigation Section's quarterly luncheon, attendees listened to a panel discussion from three lions of the Bar; Judge William Bohling, Gregory J. Sanders of Kipp and Christian, and Jeffery Eisenberg of Eisenberg, Gilchrist & Cutt, moderated by Patrick C. Burt of Kipp and Christian.

The discussion theme was "What I Wish The Other Side Understood Regarding Mediation." Mr. Sanders explained what plaintiffs do wrong at mediation, Mr. Eisenberg explained what defendants do wrong and Judge Bohling explained what all attorneys do wrong.

Among the great advice given, Judge Bohling exhorted attorneys to take more time looking at their case from 10,000 feet. Attorneys should always enter a mediation having considered their case from start to finish and have a firm grasp not only on issues of liability, but on the true amount of damages at issue.

Mr. Sanders cautioned that attorneys should never bring new, higher settlement numbers or new legal theories to a mediation. By the mediation, the parties have already evaluated the case and come in with a set range of settlement amounts. New numbers or theories start the mediation off heading in the wrong direction.

Mr. Eisenberg suggested that counsel communicate before a mediation so that they can hit the ground running once mediation begins. Counsel should exchange demands, legal theories and defenses ahead of time to make the mediation move more smoothly. Those that attended the panel discussion benefitted from over a century's worth of legal experience. If you missed it, please plan on participating in the next Litigation Section CLE.

Upcoming Events

Section sponsored CLE at the Kick Off Event for Modest Means Program (details to follow)	**April 11, 2013 at 3:00pm-4:00pm**
Rise & Shine-Beyond the Boiler Plate: Effective Written Discovery Under the New Rules	**Wednesday, April 24th, 2013 at 8:00 am.**
Becoming a Guardian ad Litem in District Court, Craig M. Bunnell and Judge Kate A. Toomey	**April 16, 2013 12:00pm-1:00pm**
First Biennial Litigation Section Trial Academy	**Thursday, May 16th and Friday May 17th, 2013**
Summer Convention, Snowmass, Colorado	**July 17-20, 2013**

Opinion Watch

Compiled By Heather Sneddon

The Utah Supreme Court and Court of Appeals have recently addressed boundary disputes, exceptions to the Governmental Immunity Act, appellate procedure and preservation, and potential liability for the actions of independent contractors on business premises. Opinion Watch would like to thank Zimmerman Jones Booher and Parsons Behle & Latimer for their summaries of those decisions set forth below. If you would like to submit your own summary of an important Utah state or federal case for publication in *The Zealous Advocate*, please email Heather Sneddon at hsneddon@aklawfirm.com.

Vandermeide v. Young: Do Good Fences Really Make Good Neighbors?

Filed February 7, 2013

Summary by Noella Sudbury of Zimmerman Jones Booher LLC

***Vandermeide v. Young*, 2013 UT App 31**, arises out of a boundary dispute over a six-foot fence between two neighbors. *Id.* ¶ 1. The Vandermeides built the fence. *Id.* ¶ 2. They determined the location for the fence based on a conversation with a neighbor who had recently surveyed his property and on a metal post cemented into the ground. *Id.* At first, the Youngs said nothing about the fence, but later they decided to hire a surveyor to determine the boundary line. *Id.* Strangely, the surveyor determined that the fence was not on either the Vandermeides' property or the Youngs' property, but was instead in the middle of the properties in an area he called "no-man's land." *Id.* ¶ 3.

A couple of years later, Mr. Young tore through the fence with a tractor and a sledge hammer because he believed the fence was wrongly situated on property belonging to his mother. *Id.* ¶ 5. The Vandermeides sued Mr. Young under a variety of theories, including trespass to chattels. *Id.* ¶ 6.The Vandermeides prevailed in the trial court on the trespass to chattels claim. The Youngs appealed, asserting nine claims of error. *Id.* ¶¶ 1, 6.

The court of appeals concluded that eight of the Youngs' claims on appeal were based upon factual findings entitled to deference under the "clearly erroneous" standard of review or were otherwise procedurally barred due to lack of preservation, inadequate briefing, failure to marshal, or failure to identify and confront the trial court's reasoning. *Id.* ¶¶ 7-10, 22-39. This left only one claim [1] for the court of appeals to address on the merits—the reformation of deed claim.

Mr. Young asked the trial court to reform his deed because he claimed that the grantors in his chain of title intended to convey him the disputed property. *Id.* ¶ 11. "Reformation of a deed is appropriate where the terms of the written instrument are mistaken in that they do not show the true intent of the agreement between the parties." *Id.* ¶ 12 (quoting *RHN Corp. v. Veibell*, 2004 UT 60, ¶ 36, 96 P.3d 935). A deed may be reformed based on a "mutual mistake of the parties" or upon a showing of "ignorance or mistake by one party, coupled with fraud by the other party." The proponent of the reformation theory has the burden to prove by "clear and convincing evidence" that the deed was premised on a mutual mistake of fact. *Id.*

The trial court found that the Youngs "failed to prove fraud or mutual mistake by the parties to any of the deeds in their chain of title" because they failed to show any evidence supporting their theory that the grantors intended to convey the property in a way contrary to the language of the deed. *Id.* ¶ 14. The court of appeals concluded that this finding was a factual one and the Youngs failed to meet their burden on appeal to show that it was "clearly erroneous." *Id.* ¶ 19.

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Upcoming Events

Beyond the Boiler Plate: Written Discovery Under the New Rules

As tempting as it is, using cut and paste "boiler plate" written discovery may not advance your case. After the new rules it is even more important to retool your discovery, especially if you are handling a Tier II case in which you are greatly limited in the number of interrogatories. In this one-hour CLE, we will hear from the plaintiff's side, defense side, and even from the judiciary as to what makes good discovery and how you can use the new rules to your benefit.

Wednesday, April 24th, 8:00 am. Breakfast will be served. More details to come in our mailer.

First Biennial Litigation Section Trial Academy: Thursday, May 16th and Friday May 17th

The Litigation Section is proud to sponsor the First Biennial Litigation Section Trial Academy this May at the Bar and Justice Center. This intensive two-day event is ideal for those new to litigation or for younger lawyers. Using NITA techniques, lectures, demonstrations by the experts, and hands-on experiential learning by participants on Thursday, attorneys will learn the basics of trial practice. Thursday's session is limited and will introduce attorneys to direct and cross examination, objections, foundation, and admitting evidence at trial. Thursday will feature hands-on workshops in the afternoon with local experts and members of the judiciary offering advice and assessing participants. The day will close with a special networking reception with our faculty and other participants.

Friday will feature lectures and demonstrations by faculty on openings, jury selection, expert examination, closings, and jury instructions. This day will be open to more participants.

The Section hopes to sponsor this event every two years, with a smaller trial skills workshop on alternating Fall Forums.

Cost for this event will be announced shortly; folks can register for one or both days. Advanced reading materials will be provided. Be sure not to miss this special event!

By
Nicholas Caine

On February 19, 2013, Professor Robert Adler was appointed Interim Dean of the University of Utah S.J. Quinney College of Law. Professor Adler, the College's James I. Farr Chair, joined the faculty in 1994 and has served in numerous roles, including Associate Dean for Academic Affairs and chair of the new building committee. Adler's appointment will become effective July 1, 2013, contingent upon approval from the U's board of trustees. He succeeds Hiram Chodosh, who is leaving to become president of Claremont McKenna College.

The University of Utah College of Law ranked among the top 18% of U.S. law schools according to new rankings compiled by The National Jurist. The magazine's February issue includes a story, "Building a Better Ranking," that focuses on four categories—postgraduate success, student satisfaction, affordability and diversity--to assess the nation's best law schools. The College of Law was ranked 29th among the 157 law schools included in the list. The College of Law did particularly well in the areas of employment and the Super Lawyers grade. It also excelled in the Rate My Prof category, in the areas of Professor Availability and Affordability.

"The University of Utah S.J. Quinney College of Law is among the nation's most innovative law schools, according to a National Jurist article."

Jess Hofberger, 2004 alum, is the new director of the Professional Development Office. He returns to the college with a varied legal background including time with Meuleman Mollerup in Boise, an 18-month deployment with the U.S. Army, a year clerking for Justice Ronald Nehring at the Utah Supreme Court, several years practicing commercial litigation with Anderson and Karrenberg in Salt Lake City and just over three years as a Department of the Army civilian attorney in Grafenwoehr, Germany.

Utah OnLaw, a new online companion to the Utah Law Review, is accepting manuscript submissions. In the Fall of 2012, Utah Law Review launched OnLaw, an online-only publication designed to promote dialogue regarding current legal topics by publishing pieces that are shorter and less-footnoted than those typically found in our print journal. Articles may be submitted in any field of legal scholarship, preferably articles with a Utah focus and may be submitted by professors, practitioners, recent graduates and law students. They encourage the following types of submissions (preferably between 3,000 – 8,000 words):

- Stand-alone articles, shorter and more focused than traditional submissions,
- Responses to already published articles, whether in Utah Law Review or elsewhere;
- Updates or recent developments to already published articles; and
- Blog post-type commentaries.

To submit a manuscript, please email Karina Sargsian (Karina.Sargsian@law.utah.edu), the Executive Online Editor, with the following information:

- A cover letter with your contact information;
- A resume or curriculum vitae; and
- A copy of the manuscript in Microsoft Word format.

For more information about the S.J. Quinney College of Law please visit: http://today.law.utah.edu/

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Despite this determination, the court of appeals concluded that reversal and remand was appropriate because the trial court's ruling was "internally inconsistent." *Id.* ¶ 20. The trial court refused to reform any deeds in the Youngs' chain of title, leaving the title to the property "as it appears in their deed." *Id.* The court of appeals concluded that this ruling would seem to leave title to the property in a woman named Viola Squires—the last person in the chain of title whose deed included the disputed strip. *Id.*

The problem with this determination is that earlier in the litigation, the trial court dismissed Ms. Squires from the case after finding that she had sold the parcel and no longer had any "right, title, interest, or estate" in it. *Id.* Thus, the trial court's ruling left "title to the property in limbo." *Id.* In other words, the trial court's conclusion at the end of the case supported a finding that Ms. Squires owned the property, but at the beginning of the case, the trial court concluded that she did not. *Id.* ¶ 21. Based on this inconsistency, the court of appeals remanded the case to the trial court to reconcile its findings "and to take whatever additional action the court deems necessary to that end." *Id.*

Practice Pointer: This case reaffirms the court of appeals' commitment to the application of procedural bars and emphasizes the importance of adequately addressing the reasoning of the trial court's decision. Advocates should carefully read Utah Rule of Appellate Procedure 24(a)(9) before filing their briefs to ensure compliance with the rule. This burden includes citing to the record, confronting the trial court's ruling and analysis, marshaling the evidence that supports the challenged factual findings, and citing to legal authority with adequate argument and analysis to support the claims on appeal.

http://www.utcourts.gov/opinions/appopin/vandermeide020713.pdf

http://www.utahappellateblog.com/2013/02/18/vandermeide-v-young-do-good-fences-really-make-good-neighbors/

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[1] The Youngs also argued on appeal that the Vandermeides were not entitled to an award of damages for the Youngs' destruction of the fence because the Vandermeides did not own the property and an "essential element of a claim for trespass is invasion of the plaintiffs property." *Id.* ¶ 23. Although the court of appeals concluded that like many of the other claims, the Youngs failed to address the trial court's ruling on the issue, the court of appeals also concluded that in any event, the claim lacked merit because the trespass to chattels claim was based on the Vandermeides' ownership of the fence, not the strip of land on which it stood. *Id.*

Glaittli v. State: The Natural Condition Exception to the Governmental Immunity Act.

Filed January 10, 2013

Summary by Joe Stultz of Parsons Behle & Latimer

In *Glaittli v. State*, 2013 UT App 10, the Utah Court of Appeals affirmed the trial court's dismissal of a negligence action against the State of Utah, agreeing with the trial court that the State was immune from suit under the "natural condition" exception to the waiver of immunity provided in the Governmental Immunity Act of Utah ("GIAU"). In the case, Glaittli was injured as he was trying to lengthen the lines on his boat that was docked at a marina at the Jordanelle Reservoir to prevent damage to his boat. Glaittli alleged that the State caused his injuries by its negligent failure to adjust the dock level with the water levels by turning the winch handles; failure to warn him of an unsafe condition at the docks; and failure to properly secure the docks on the day of the accident. Glaittli also alleged that the State negligently allowed a hazardous condition to continue to exist by failing and refusing to construct a breakwater in the area of the marina where Glaittli's boat was docked.

The State responded with a motion to dismiss for failure to state a claim based on the GIAU, arguing that Glaittli's injuries fell within the "natural condition" exception to the waiver of immunity. *See* Utah Code Ann. § 63G-7-301(5)(k) (governmental immunity not waived when the "injury arises out of, in connection with, or results from . . . any natural condition on publicly owned or controlled lands"). The trial court agreed that the "natural condition" exception applied and dismissed the case.

In affirming the trial court's ruling, the appeals court first rejected Glaittli's argument that the natural condition exception was inapplicable to an injury caused as a result of a defective public improvement because once manmade structures are built on natural land or water, they become "public improvements," and are no longer "natural conditions." The court ruled that such a reading would misconstrue a plain reading of section 63G-7-301(5)(k) because that section states that it is applicable to subsections (3) and (4) and subsection (3) includes a reference to man-made structures.

Glaittli also argued that the wind that caused the waves was an atmospheric condition and not a natural condition and thus the natural condition exception did not apply. In rejecting this argument, the court of appeals recognized that the Utah Supreme Court held that a gust of wind was not a natural condition and found that the natural condition exception did not apply in *Grappendorf v. Pleasant Grove City*, 2007 UT 84. In the *Grappendorf* case, a "violent gust of wind" ripped Pleasant Grove City's moveable pitching mound weighing several hundred pounds from the strap tethering it to a chain link fence, and propelled it through the air, striking and killing a passerby. The court distinguished *Grappendorf* from the case at hand, holding that it was the water and not the wind that caused the injuries in this case: "[W]e hold that the water upon which the wind acted was a natural condition." Finding thusly, the court then ruled that the trial court correctly dismissed the complaint as barred by governmental immunity.

http://www.utcourts.gov/opinions/appopin/glaittli011013.pdf

Prinsburg State Bank v. Abundo: Preservation vs. Estoppel

Filed December 28, 2012

Summary by Clemens A. Landau of Zimmerman Jones Booher LLC

In ***Prinsburg State Bank v. Abundo*, 2012 UT 94**, the Utah Supreme Court affirmed the Utah Court of Appeals holding that the stipulations entered into between the parties precluded appellate review. The Court of Appeals dispensed of the case on preservation grounds. The Supreme Court affirmed on an alternate ground—that Prinsburg State Bank was estopped from challenging the district court's resolution of the case based upon the parties' stipulations. *Id.* ¶¶ 17-19.

The case involved a dispute between Prinsburg and various individuals ("Guarantors") who had executed personal guarantees for two failed loans. *Id.* ¶ 2. On cross-motions for summary judgment, the trial court ruled in favor of the Guarantors on all but one issue: whether the sale conducted by Prinsburg was commercially reasonable. *Id.* ¶ 5. The parties thereafter entered into an agreement entitled "Stipulated Findings of Fact and Conclusions of Law" ("Stipulations") that purported to resolve the entirety of the case. *Id.* ¶ 6. The parties filed the Stipulations, and the district court entered final judgment. *Id.* Prinsburg appealed, reasserting its merits arguments.

The Court of Appeals refused to address any of the issues presented on appeal on preservation grounds because "Prinsburg stipulated to the complete resolution of this matter and failed to seek relief from the resulting judgment in the district court." 2011 UT App 239, ¶ 11, 262 P.3d 454. Central to the Court of Appeals' ruling was that issues regarding the intended scope of the stipulation agreement were questions of fact that should have been directed to the trial court in the first instance. *Id.* at ¶¶ 7, 9 ("If Prinsburg believed that the judgment of complete dismissal exceeded the scope of the parties' agreement, it should have sought relief from the judgment in the district court on that basis.").

The Utah Supreme Court essentially agreed with this aspect of the Court of Appeals' analysis, holding that "[t]he Stipulations are binding on the parties and the court unless Prinsburg shows that 'certain conditions' exist under which the Stipulations may be set aside." 2012 UT 94, ¶ 16. Further, the court agreed that "Prinsburg cannot make this showing because it never filed a motion in the district court seeking relief from the Stipulations." *Id.*; *see also id.* ¶ 14 ("[T]he party seeking relief from the stipulation must request it by motion from the trial court.").

But the court disagreed with the language of the Court of Appeals' opinion that could be read as standing for the proposition that all of the merits issues were unpreserved. The court held that only the single issue the trial court did not have an opportunity to rule on was unpreserved. *Id.* ¶ 18. The remaining issues were preserved because the trial court did have the opportunity to rule on them. *Id.* ¶ 19. But even though the remaining issues were preserved, the court held that the Stipulations estopped Prinsburg from raising those issues on appeal.

Both courts seemed to agree that the ultimate reason the Stipulations were binding (and could therefore serve as a basis for estoppel) was Prinsburg's failure to raise fact issues regarding the intended scope of the Stipulations by motion in the trial court. *Compare* 2011 UT App 239, ¶¶ 7, 9-10, *with* 2012 UT 94, ¶¶ 14, 16. Therefore, although it is certainly true that "a postjudgment motion is not a necessary prerequisite to filing an appeal" in most instances, *see* 2012 UT App 239, ¶ 17 n.27 (citing *Sittner v. Schriever*, 2000 UT 45, ¶ 16, 2 P.3d 442), it seems equally true that in this circumstance, where a district court enters a final judgment based upon a stipulation by the parties, the party challenging that judgment on appeal *does* have to file a motion (which is necessarily postjudgment) in order to preserve the argument that it should not be estopped by the stipulation on appeal.

In any event, the court concluded that the distinction between its view (Prinsburg is estopped from presenting preserved issues because it failed to seek relief from the stipulation below) and the Court of Appeals' view (Prinsburg failed to preserve its arguments because it failed to seek relief from the stipulation below) was one worth making. This may indicate a desire to chart a less expansive role for preservation, or a desire to reemphasize that ordinarily, once a trial court has had the opportunity to rule, no other motions (postjudgment or otherwise) are required for preservation purposes.

The court also reemphasized the importance of two other procedural principles. First, the court refused to consider Prinsburg's other arguments because Prinsburg failed to include them in the petition for writ of certiorari. 2012 UT 94, ¶¶ 9, 17 n.26. Second, the court refused to consider arguments from both parties on the ground that the Court of Appeals failed to address them and no motions for rehearing had been filed. *Id.* ¶¶ 17 n.26, 21. As a result, Guarantors lost the right to fees and costs incurred while the case was before the Court of Appeals. *Id.* ¶ 21 ("[B]ecause the Guarantors did not challenge the court of appeals' failure to rule on the issue, there is no basis for revisiting it on certiorari.").

http://www.utcourts.gov/opinions/supopin/Prinsburg

1294122812.pdf

http://www.utahappellateblog.com/2013/01/19/prinsburg-state-bank-v-abundo-2012-ut-94-preservation-vs-estoppel/

Berrett v. Albertsons Inc.: Liability for Independent Contractor's Actions on Business Premises.

Filed December 28, 2012

Summary by Joe Stultz of Parsons Behle & Latimer

In ***Berrett v. Albertsons Inc.*, 2012 UT App 371**, the Utah Court of Appeals reversed the trial court's grant of summary judgment in favor of Albertsons. The case involved a personal injury claim originally brought by Irene Berrett and her husband, and later continued by the husband, Irene Berrett's heirs, and her estate after Irene Berrett died. Irene Berrett was injured when she fell twenty feet into an open manhole while walking to her car in an Albertsons parking lot. The manhole was open because A-1 Septic Tank Services was servicing a grease trap located approximately twenty feet below the surface of the parking lot. At completion of discovery, Albertsons moved for summary judgment on the ground that it owed Irene Berrett no duty and the trial court granted the motion, concluding that Albertsons was not vicariously liable for the acts of A-1.

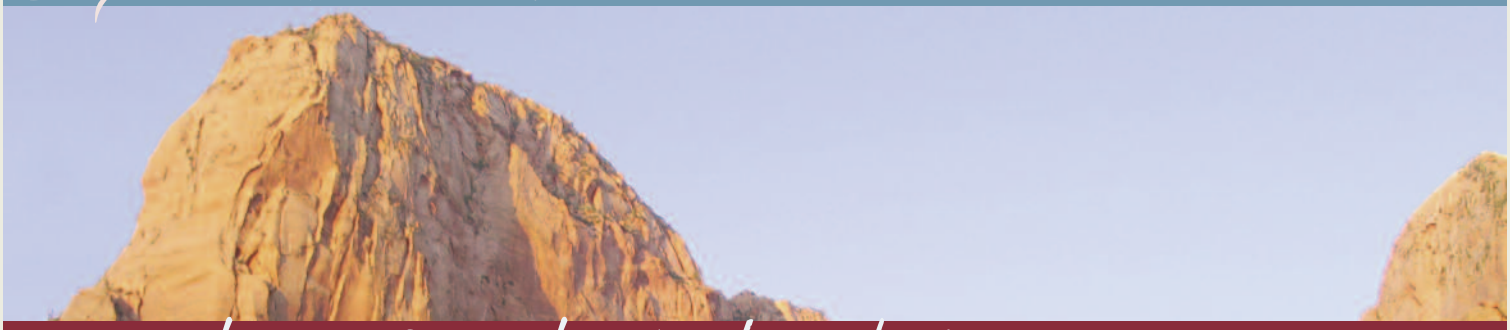
The Court of Appeals reversed the trial court's ruling, first finding that a jury could conclude that Albertson's knew or was on notice of a hazard to its business invitees. In making this ruling, the court stated that an employer is generally not vicariously liable for the acts and omissions of its independent contractors, but that a business owner has a non-delegable duty to keep the premises reasonably safe for business invitees. Under the temporary unsafe condition theory of liability, the court concluded that the Berretts had alleged sufficient facts to show that Albertsons was on actual or constructive notice of the temporary hazard created by the open manhole and had sufficient time to remedy it.

In its decision, the Court of Appeals also held that Section 413 of the Restatement (Second) of Torts applies as part of the common law in Utah, and potentially applied to the case. Under Section 413, one who employs an independent contractor to do work which should be recognized as creating a peculiar unreasonable risk unless special precautions are taken may be liable if the employer: (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions. The court ruled that the question of whether the present case involved a risk requiring only "routine precautions," of a kind which any careful contractor could reasonably be expected to take, or a risk that posed a special danger to those in the vicinity, arising out of the particular situation created, thus implicating Section 413, was to be resolved by the jury rather than the court.

The Court of Appeals also held that the version of the survival statute in effect at the time of the injury rather than at the time of Irene Berrett's death controlled. This was important because the latter version permitted the recovery of general damages while the former did not.

http://www.utcourts.gov/opinions/appopin/berrett122812.pdf

Sixth Annual



Southern Utah Federal Law Symposium

Please join us at this year's annual Southern Utah Federal Law Symposium, which will be held at the beautiful Courtyard Marriott in sunny St. George on May 9-11, 2013.

This year's speakers will include many of Utah's Federal Judges, including Chief Judge Stewart, Judge Nuffer, Judge Waddoups, Judge Kimball, Judge Benson, Judge Thurman, and others. The conference will include a Thursday evening reception at Tuacahn, including musical entertainment, food and an ethics presentation by nationally renowned (and incredibly funny) speaker Sean Carter.

On Friday, we will have a full day of CLE, primarily featuring Utah's Federal Judges. Judge Thomas Griffith of the DC Circuit Court of Appeals will be our Friday lunch keynote speaker.

For you golfers, on Saturday, May 11th, there will be a scramble golf tournament at the beautiful Coral Canyon Golf Course. You are free to arrange your own foursomes, or we will match people up. Prizes will be awarded.
Registration information will soon be available.
We hope to see you in St. George!

Message from the Editor

Editor
Nicole G. Farrell

Do you have ideas, questions or comments about this newsletter? We want to hear from you, our members. Please send your questions or comments to editor Nicole Farrell at nfarrell@parsonsbehle.com.

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