Calls for Legislative Action

2019-2020 Utah Supreme Court and Utah Court of Appeals Decisions

Office of Legislative Research and General Counsel

Judiciary Interim Committee

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Why?

- **Courts are trying to "call the attention of the legislature to statutes in need of clarification or modification." *In re Estate of Hannifin*, 311 P.3d 1016, 1025 (Utah 2013) (Durham, J., dissenting).**
- **Looking for court decisions from the past 12 months for language asking, inviting, or implying that the Legislature should address an issue.**
  - Why only Utah appellate courts?
    - Opinions from Utah appellate courts are accessible to the public.
    - Opinions from federal courts don't seem to be engaging this type of dialogue.

Options for Responding to a Call

1) **Legislative action**
   a) Open a committee bill file with instructions
   b) Study the issue in committee
   c) Refer the issue to another committee
2) **No legislative action**

Cases

Utah Supreme Court

- Rutherford v. Talisker Canyons Finance, Co., LLC
- Utah Office of Consumer Services v. Public Service Commission of Utah
- State v. Newton
- State v. Bridgewaters

Utah Court of Appeals

- State v. Bowden
- Waterfall v. Retirement Board

Rutherford v. Talisker Canyons Finance, Co., LLC

2019 UT 27, 445 P.3d 474

- **Facts:**
  - While skiing at Canyons Ski Resort, a minor crashed into machine-made snow and was injured.
  - Parents sued Canyons Ski Resort.
- **Inherent Risks of Skiing Act ("the Act"):**
  - A skier cannot make a claim or recover from an injury that results from an inherent risk of skiing. Utah Code § 78B-4-403.
  - "Inherent risk of skiing means the dangers or conditions that are an integral part of the sport of recreational, competitive, or professional skiing." Utah Code § 78B-4-402(1).
    - Definition of "inherent risk of skiing" includes a list of risks.

Rutherford v. Talisker Canyons Finance, Co., LLC

2019 UT 27, 445 P.3d 474

- **Lower Court's Decision:**
  - Canyons Ski Resort argued that the Act barred Parents' claims under a risk listed in the Act regarding machine-made snow.
  - The district court refused to dismiss Parents' claims, relying on the Utah Supreme Court's decision in *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

- **Issue:**
  - Should the Utah Supreme Court overturn *Clover?*

Rutherford v. Talisker Canyons Finance, Co., LLC

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Clover Decision:

- The Utah Supreme Court rejected the notion that the Act categorically barred recovery for injuries caused by risks listed in the definition of “inherent risk” under the Act.
- Two-step inquiry:
  1) Was the injury the result of a risk that the skier wished to confront?
  2) And if not an injury the skier wished to confront, was the danger something that the ski resort could have remedied with the exercise of reasonable care?
- Essentially, there is a case-by-case analysis using this two-step inquiry.
- This has been the interpretation of the Act for 30 years.

Rutherford v. Talisker Canyons Finance, Co., LLC

2019 UT 27, 445 P.3d 474

- **Rutherford Decision:**
  - **The Utah Supreme Court clarified Clover, holding there is a one-step inquiry:**
    - Did the skier reasonably expect to encounter the risk when skiing?
    - If so, the risk is an integral part of the sport of skiing and therefore an inherent risk.
  - **What about listed risks in the Act?**
    - "[T]hose risks are inherent risks of skiing only to the extent that that a skier could reasonably expect to encounter them."

- **Justice Thomas Lee dissented:**
  - **Majority fails to identify a clear standard for the lower courts and *Clover* is not compatible with the Act.**
    - "I dissent. I would credit the text of the Inherent Risks of Skiing Act. I would overrule *Clover*, and in so doing affirm that our job is to interpret statutes, not rewrite them."

Rutherford v. Talisker Canyons Finance, Co., LLC

2019 UT 27, 445 P.3d 474

- **Call for Legislative Action:**
  - Majority Opinion:
    - "The legislature, of course, retains the power to amend the Act and overrule our interpretation, which it has thus far declined to do. To the extent our current holding is not in line with the legislature's actual intent, 'we [continue to] invite the Utah Legislature to revisit the [Act] to provide clarity in this area.'"

- **General Session 2020, S.B. 228:**
  - Bill amended the Act to address liability waivers.
  - Bill amended the Act to provide a cap on general damages.

- **Questions?**

Utah Office of Consumer Services v. Public Service Commission of Utah

2019 UT 26, 445 P.3d 464

Facts:

- **The Public Service Commission ("Commission") sets rates for public utilities, including PacifiCorp.**
- **General Rate Process (Utah Code § 54-7-12):**
  - A base rate in a general case is established by estimating the cost of providing the utility to customers.
    - Estimated net costs are included as a part of the base rate.
  - Actual net costs can vary from estimated net costs.
- **Energy Balancing Account Process (Utah Code § 54-7-13.5):**
  - In 2009, the Legislature created "energy balancing accounts" (EBA) to account for the differences in costs.
  - An EBA only becomes effective when there is a finding that the EBA:
    - is in the public's interest;
    - is for prudently incurred costs; and
    - is implemented at the conclusion of a general rate case.
  - Each year, an electrical corporation with an EBA has to file a report that reconciles the differences in costs and, for the electrical corporation to recover costs, the electrical corporation bears the burden of showing that the costs are prudently incurred.
  - The Division of Public Utilities conducts an audit based on the annual report to determine whether a refund or recovery is appropriate.

Utah Office of Consumer Services v. Public Service Commission of Utah

2019 UT 26, 445 P.3d 464

- **What happened?**
  - PacifiCorp was granted an EBA, but as part of the EBA process, the Commission allowed for the use of an "interim rate" procedure.
  - After PacifiCorp filed its annual EBA report, this procedure allowed PacifiCorp to propose an interim rate based on the difference between estimated and actual costs.
  - If an interim rate was approved by the Commission, the interim rate would go into effect while the Division was completing a full audit of PacifiCorp's annual EBA report to determine if the costs were prudently incurred.

- **Issue:**
  - **Whether the Public Service Commission has the authority to impose "interim" rates as an element of the energy balancing account procedures described in Utah Code section 54-7-13.5.**

Utah Office of Consumer Services v. Public Service Commission of Utah

2019 UT 26, 445 P.3d 464

The Utah Supreme Court's Decision:

- **The Commission lacked statutory authority to impose the interim rate process in the EBA process.**
  - Statutory provisions referring to interim rates are for general cases, not the EBA process. *See* Utah Code § 54-7-12.
  - The Commission could not impose rates without requiring PacifiCorp to prove by substantial evidence that costs were prudently incurred.
- **Because the Commission allowed PacifiCorp to recover costs before demonstrating that the costs were prudently incurred, the Commission altered the statutory burden of proof for recovering costs.**
  - The Commission authorized $2.8 million in recovery during the interim rate process.

Utah Office of Consumer Services v. Public Service Commission of Utah

2019 UT 26, 445 P.3d 464

- **Call for Legislative Action:**
  - "We decide only that the current statutory scheme does not condone the interim rate process as it now stands. And we leave it to the legislature, if it so chooses, to reopen the governing statutes to expressly authorize an interim rate procedure as an element of the EBA process."

- **Questions?**

State v. Newton

2020 UT 24, –– P.3d ––

- **Facts:**
  - Defendant was charged with rape.
  - At trial, the District Court gave the following instruction to the jury:
    - "Rape as defined in the law means the actor knowingly, intentionally, or recklessly has sexual intercourse with another without that person's consent."
  - Defendant's counsel did not object to this jury instruction.

- **Issue:**
  - Did Defendant's counsel make a mistake in not objecting to the jury instruction?
  - Defendant argued that his counsel failed to make sure the jury was accurately instructed about consent.

State v. Newton

2020 UT 24, –– P.3d ––

- **The Court of Appeals' Decision:**
  - Jury instruction on rape accurately identified each element of rape and correctly stated the required mental state.

- **The Utah Supreme Court's Decision:**
  - Jury instruction on rape is not as clear as the Court of Appeals thinks.
    - The mental state for victim nonconsent was ambiguous.
    - This ambiguity could be addressed by using Model Jury Instruction:
      - DEFENDANT'S NAME) is charged [in Count__] with committing Rape [on or about DATE]. You cannot convict [him][her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:
        1) (DEFENDANT'S NAME);
        2) Intentionally, knowingly, or recklessly had sexual intercourse with (VICTIM'S NAME);
        3) Without (VICTIM'S NAME)'s consent; and
        4) (DEFENDANT'S NAME) acted with intent, knowledge or recklessness that (VICTIM'S NAME) did not consent.
  - The Court upheld Defendant's conviction because Defendant failed to demonstrate that the jury would have acquitted him because of the jury instruction.

State v. Newton

2020 UT 24, –– P.3d ––

- **Justice Paige Petersen, concurring:**
  - **Intent as a mental state for victim nonconsent does not make sense.**
    - No mental state specified for rape, so mental state is intent, knowledge, and recklessness. *See* Utah Code § 76-2-102.
    - Prosecution has to prove that the victim did not consent and that defendant was *aware* that victim did not consent.
  - **While the definitions of knowledge and recklessness relate to a person's awareness of the circumstances surrounding his or her conduct, the definition of intent does not.**

- **Call for Legislative Action:**
  - **Justice Petersen:**
    - "I agree with the committee that "intent" is incompatible with the mens rea for the victim's nonconsent. However, I concur with the majority opinion on this point because I conclude that Utah Code section 76-2-103(2) does not give us the freedom to exclude "intent" of our own accord in element four. I write separately to raise this issue, however, for possible refinement by the legislature if it so chooses."

- **Questions?**

State v. Bridgewaters

2020 UT 32, --- P.3d ---

- **Facts:**
  - Defendant was charged with violating a protective order.
  - The district court bound Defendant over for trial on the charges.
  - Defendant filed a motion to overturn the district court's decision, arguing that he had not been properly served with the protective order.
    - Protective order had been mailed to Defendant's last known address, which was the victim's address.

- **Issue:**
  - Was Defendant properly served with the protective order?

- **The Utah Supreme Court's Decision:**
  - Under the Cohabitant Abuse Act, the Legislature references Rule 4 of the Utah Rules of Civil Procedure by use of the phrase, "service of process."
  - Protective order was not served in accordance with Rule 4.
  - However, Defendant violated an ex parte protective order that was in effect, which had been personally served.

State v. Bridgewaters

2020 UT 32, -- P.3d --

- **Procedural Issues:**
  - **The Court explains that the Utah Rules of Civil Procedure govern service of process, pleadings, and papers in civil cases, but the Cohabitant Abuse Act contains its own unique procedures.**
    - Example: Rather than a summons and complaint, an individual files a petition for an order of protection and the court may issue an ex parte order.
  - **Utah Code Subsection 78B-7-106(13):**
    - "Insofar as the provisions of this chapter are more specific than the Utah Rules of Civil Procedure, regarding protective orders, the provisions of this chapter govern."

- **Judicial Rulemaking:**
  - **In a footnote, the Utah Supreme Court cites to Article VIII, Section 4, of the Utah Constitution, which provides that:**
    - the Utah Supreme Court has the authority to adopt rules of procedure and evidence; and
    - the Legislature has the authority to amend rules of procedure and evidence by 2/3rds vote of both houses.
  - **"When the Legislature enacts procedure, this provision contemplates that it must do so by amending our rules."**
  - **The Court states that the Cohabitant Abuse Act "contains unique procedural rules that purport to supersede the Utah Rules of Civil Procedure where applicable, the Legislature did not enact those procedural provisions in a joint resolution that amended the corresponding rule of civil procedure."**

State v. Bridgewaters

2020 UT 32, -- P.3d --

- **Call for Legislative Action:**
  - "In protective order proceedings, litigants and courts are faced with two sets of procedural rules running on parallel tracks and are required to make judgment calls about which rule should apply in a given circumstance. Aside from any constitutional concerns, the Legislature could increase clarity for the bar and the bench if it were to enact rule changes through joint resolutions that specifically amend the relevant rule of procedure."

- **General Session 2020, HB 403, Protective Order and Stalking Injunction Amendments:**
  - **Modifications to the Cohabitant Abuse Act:**
    - Subsection 78B-7-106(13) was repealed.
    - Newly enacted 78B-7-118:
      - "To the extent the provisions of this part are more specific than the Utah Rules of Civil Procedure regarding a civil protective order the provisions of this chapter govern."

- **Questions?**

State v. Bowden

2019 UT App 167, 452 P.3d 503

- **Facts:**
  - Defendant fired six shots at a police officer and one shot hit the officer.
  - Defendant moved at trial to have his five felony discharge-of-a-firearm convictions merged with his attempted aggravated murder conviction.
  - The district court only merged one felony discharge-of-a-firearm conviction with the attempted aggravated murder conviction.

- **Issue:**
  - Should the district court have merged the other four felony discharge-of-a-firearm convictions with the aggravated murder conviction?

State v. Bowden

2019 UT App 167, 452 P.3d 503

- **Utah's Merger Statute – Two Tests:**
  - Single Act:
    - If the same act within a single criminal episode can be punished in different ways under different provisions of the Utah Code, the act can only be punished under one provision.
  - Lesser-included Offense:
    - If the offense is a lesser-included offense of another offense for which the defendant is charged, the defendant cannot be charged for both the offense and the lesser-included offense.

- **The Court of Appeal's Decision:**
  - Defendant argued that his convictions merged because they were the same act in a single criminal episode.
  - The Court of Appeals stated that the language of the aggravated murder statute does not prevent merger of a felony discharge-of-a-firearm conviction with the aggravated murder conviction.
  - Therefore, the Court held that the district court should have merged the convictions.

State v. Bowden

2019 UT App 167, 452 P.3d 503

- **Judge Ryan Harris, concurring:**
  - **The Court of Appeals came to a different conclusion in *State v. Martinez*, 2019 UT App 166, 452 P.3d 496.**
    - Defendant's murder and discharge convictions did not merge under the murder statute.
  - **Why?**
    - "These seemingly-disparate outcomes are dictated by the very language our legislature chose to employ in the two statutes."
      - Aggravated murder statute does not allow for merger <u>when the defendant was previously convicted of felony discharge</u>.
      - Murder statute does not allow for merger of felony discharge.
  - **Therefore, it is easier for a defendant charged with aggravated murder and felony discharge of a firearm to obtain a ruling from a court that allows merger.**

State v. Bowden

2019 UT App 167, 452 P.3d 503

- **Call for Legislative Action:**
  - **Judge Ryan Harris concurring:**
    - "I wonder whether the legislature truly intended this result. In the event that it did not, the legislature may wish to consider amending these statutes in a future legislative session."

- **Questions?**

Waterfall v. Retirement Board

2019 UT App 88, 443 P.3d 1274

- **Facts**
  - **Waterfall was employed as a justice court judge for South Ogden City.**
  - **In 2012, he stopped working for the City and the City's director of finance reported to the Utah Retirement System that Waterfall was a part-time employee during his time with the City.**
  - **Waterfall disputed the part-time certification with a letter from the city manager, and after a hearing, the Utah State Retirement Board determined he was a part-time employee.**
  - **In 2016, Waterfall retired.**
    - He gave URS letters from the city manager stating that he had been a full-time employee for the City.
    - URS contacted the city attorney and the city attorney said that Waterfall had been a part-time employee.
  - **URS determined that Waterfall was certified as a part-time employee based on the earlier determination by the Board and the city attorney's response.**
    - Waterfall filed a petition to challenge this determination and the Board dismissed it.

Waterfall v. Retirement Board

2019 UT App 88, 443 P.3d 1274

- **Issue:**
  - **Whether the Board had the authority to change a certification of an employee's part-time or full-time status.**
    - Waterfall argued that the City certified him as a full-time employee and URS couldn't change that certification.

- **The Utah Court of Appeal's Decision:**
  - **URS has authority to fix errors and resolve disputes even after an employee has retired.**
    - URS could resolve a dispute over Waterfall's status and did so by contacting the City over the conflicting reports.
  - **The Court of Appeals upheld the Board's decision to dismiss Waterfall's petition.**

Waterfall v. Retirement Board

2019 UT App 88, 443 P.3d 1274

- **Who reports to URS?**
  - "A justice court judge who has service of more than one participating employer shall be considered full-time by the office for a period of service in which the judge is certified as full-time by: (i) a participating employer; or (ii) the Administrative Office of the Courts . . . ." Utah Code § 49-13-406(3)(a).

- **Call for Legislative Action:**
  - "The statute does not make clear who is authorized to speak for the judge's "employer." It also does not articulate guidelines for what constitutes full-time and part-time employment. It may be advisable for the legislature to specify exactly who is authorized to speak for a justice court judge's municipal employer in this context, and to set out clear guidelines for what constitutes full-time and part-time employment."

- **Questions?**

Options for Responding

1) **Rutherford v. Talisker Canyons Finance, Co.**
   a) No legislative action
   b) Open a committee bill
   c) Study the issue in committee
2) **Utah Office of Consumer Services v. Public Service Commission of Utah**
   a) No legislative action
   b) Refer to Public Utilities, Energy, and Technology Interim Committee
3) **State v. Newton**
   a) No legislative action
   b) Refer to the Law Enforcement and Criminal Justice Interim Committee
   c) Open a committee bill
   d) Study the issue in committee
4) **State v. Bridgewaters**
   a) No legislative action
   b) Open a committee bill
   c) Study the issue in committee
5) **State v. Bowden**
   1) No legislative action
   2) Refer to the Law Enforcement and Criminal Justice Interim Committee
   3) Open a committee bill
   4) Study the issue in committee
6) **Waterfall v. Retirement Board**
   1) No legislative action
   2) Refer to Retirement and Independent Entities Interim Committee

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