Agenda
Advisory Committee on Rules of Civil Procedure

September 28, 2011
4: 00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Approval of minutes	Tab 1	Fran Wikstrom
Disqualification of collaborative lawyers	Tab 2	Brian Florence Steve Johnson
Rule 83. Vexatious litigants.	Tab 3	Judge Derek Pullan Judge Todd Shaughnessy Judge Randall Skanchy Leslie Slaugh
Comments to Rules Rule 4. Process. Rule 65C. Post-conviction relief.	Tab 4	Judge Kate Toomey
Allen v Moyer (¶17). Claim preclusion of small claims judgments	Tab 5	Frank Carney
Committee notes to discovery rules	Tab 6	Fran Wikstrom

Committee Web Page: http://www.utcourts.gov/committees/civproc/

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

October 26, 2011
November 16, 2011
January 25, 2012
February 22, 2012
March 28, 2012
April 25, 2012
May 23, 2012
September 26, 2012
October 24, 2012
November 28, 2012

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE
OF THE RULES OF CIVIL PROCEDURE

Wednesday August 3, 2011
Administrative Office of the Courts

PRESENT:	Francis M. Wikstrom, Chair, W. Cullen Battle, Terrie T. McIntosh, Janet H. Smith, Barbara L. Townsend, Honorable Kate Toomey, James T. Blanch, Robert J. Shelby, Honorable Derek P. Pullan, Honorable John Baxter, David Moore, Honorable Todd W. Shaughnessy, Trystan B. Smith, Leslie W. Slaugh, Lincoln L. Davies, David W. Scofield, Jonathan O. Hafen, Steve Marsden
EXCUSED:	Honorable David O. Nuffer
TELEPHONE:	Lori Woffinden, Honorable Lyle R. Anderson
STAFF:	Timothy M. Shea, Sammi V. Anderson, Diane Abegglen

I. WELCOME TO JUDGE JOHN BAXTER.

Mr. Wikstrom called the meeting to order at 4:00 p.m. and welcomed Justice Court Judge John Baxter to the committee. Judge Baxter introduced himself. He has been a justice court judge for nine years. The committee welcomes Judge Baxter and looks forward to serving with him.

II. CONGRATULATIONS TO JUDGE SHAUGHNESSY.

Mr. Wikstrom expressed the committee's warmest congratulations to the Honorable Todd W. Shaughnessy for his appointment to the Third District Court. The committee looks forward to Judge Shaughnessy's continued membership and valued participation.

III. APPROVAL OF MINUTES.

Mr. Wikstrom next entertained comments from the committee concerning the May 25, 2011 minutes. The committee unanimously approved the minutes.

IV. SIMPLIFIED RULES OF DISCOVERY.

In a discussion guided by Mr. Wikstrom, the committee reviewed and resolved outstanding issues and comments from the bar and judiciary on a rule-by-rule basis.

Rule 1. Mr. Wikstrom discussed comments received regarding cases already in the system and whether the new rules would apply to existing cases. Mr. Wikstrom proposed that the rules apply only to cases filed after the effective date. The committee discussed whether the Supreme Court's enacting order could instruct that the new rules are prospective only, rather than completely changing Rule 1 (most amendments typically do apply to all cases immediately). Mr. Blanch suggested making the new rules prospective only for the sake of clarity. Judge Shaughnessy pointed out the complexity of having dual rule systems in place for some period of time. Ms. Smith moved to allow the new rules' application to existing cases where the parties so stipulate or the court orders. The motion was seconded. Judge Pullan amended the motion to include that this change would be part of the Supreme Court's recommended enacting order. The motion was seconded and unanimously approved.

Rule 8. The committee discussed comments regarding the tension between notice pleading and requiring the pleading of additional facts. Judge Shaughnessy suggested that the note adequately addresses this concern. The committee agreed.

Rule 9. The committee discussed a suggestion that 9(k) be amended to include the words "or motion", ie, the renewal of judgment by motion, rather than filing a new complaint. Ms. Smith moved to add this language to Rule 9(k). The motion failed.

Rule 16. The committee discussed whether to include an express definition of alternative dispute resolution processes, ie, when should the mediation occur if needed? The committee declined to address this issue because the rule is clear as drafted. Grammatical issues in Rule 16 were addressed.

Rule 26.

Summary of Expected Testimony - Comments indicate concerns over whether the rule requires an affirmative obligation to interview every witness (friendly or unfriendly) and ultimately to disclose work product. Judge Pullan suggested that the note adequately addresses these concerns but raised some concerns about a witness that counsel doesn't know what they will say. Mr. Blanch reminded the committee that this topic was discussed at length previously and the committee essentially reached the conclusion that parties need to do their best to disclose what they know. Mr. Shelby raised the issue of what to do when counsel calls a hostile witness, including the other party, in their case in chief. Mr. Shelby noted that counsel shouldn't have to disclose work product, ie, content of cross-examination, as part of disclosures under Rule 26. The committee discussed the adverse party issue at length. Mr. Wikstrom suggested possibly changing language to say identify the subjects of information "to the extent reasonably available". Judge Pullan advocated that no wiggle room be given on such an important principle. Judge Shaughnessy noted that the whole purpose is to help the other side figure out who they need to depose because depositions will now be limited. Parties already know to depose the other party. Judge Pullan argued for a carve-out for adverse parties. Mr. Hafen agreed and also advocated to add language to the advisory note indicating that with respect to a corporation or entity, the word "party" includes management-level employees. Mr. Hafen's

motion was seconded and approved by the committee.

Tier System - In general, the committee believes the tier system is adequately addressed in the rules and note(s) as drafted. Interrogatories under the tier system were, however, revisited. As to interrogatories under Tier 1, the committee generally believes that specialized segments of the bar should prepare specialty rules for interrogatories. The committee went on to discuss allowing interrogatories in Tier 1. Mr. Wikstrom suggested 3 interrogatories. 10 members of the committee were in favor of a small number of interrogatories in Tier 1. 8 members were opposed and in favor of offering a specialty rule based on specialized segments of the bar. Ms. Townsend moved to include 3 interrogatories in Tier 1 practice. That motion carried. However, later in the meeting, a motion was made to strike 3 interrogatories from the Tier I system. That motion also carried. There will be no interrogatories for Tier I practice. Judge Shaughnessy reiterated that the personal injury bar and other specialty bars should be invited to propose specialty disclosure rules for their sections.

Experts - Time Requirements & Content of Expert Reports. Mr. Shelby suggested that Rule 26(a)(3) as drafted addresses the concern regarding *Rimmasch* challenges. Ms. McIntosh suggested that the Committee consider giving more time for expert discovery. Judge Shaughnessy explained that the concerns expressed in the comments seem to be coming from expert-intensive cases where each side has multiple experts. He suggested those concerns could be resolved by stipulation among the parties. The committee discussed the problem of extending the time period beyond 90 days because expert discovery would then last longer than fact discovery. The committee noted that if there is one expert on each side of the case, counsel should be able to complete expert discovery in 90 days. Mr. Battle raised the issue of the due date for the written summary for non-retained experts. The committee discussed timing and what the summary should contain. Mr. Blanch noted that this distinction has now been adopted in the federal rules.

Damage Limitations based on Tier System - The committee discussed the issue of damage limitations based on pleading into a specific tier. If a party pleads as a Tier 1 case, that party is limited to Tier 1 damages, unless the party moves to amend their complaint under the rules and the other party is allowed additional discovery as warranted. Mr. Schofield noted that Rule 54(c) is currently inconsistent with that notion. The committee discussed ways to reconcile the current version of Rule 54(c) with the notion of damage limits under the new tier system. Mr. Blanch pointed out that the whole tier system falls apart if parties are not estopped from requesting and receiving damages above the amount plead in complaint, absent amendment. The committee discussed amendments to Rule 26 and Rule 54(c). Messrs. Carney, Blanch and Wikstrom proposed language to address the issue. Messrs. Blanch and Shelby suggested that any amendment should go into Rule 8(a)(3). The committee approved amendment to Rule 8(a)(3). A motion was made to strike the language "but not including punitive damages" from Rule 26(c)(4), "Definition of Damages." That motion was seconded and approved. The committee also approved amendment of Rule 54(c) to refer back to Rule 8(a)(3) as an exception.

Rule 29. The committee agreed that parties can stipulate to additional time for discovery

without certifying proportionality or discovery budgets. A court order is not required unless a trial date has been set.

Rule 30(b)(5). The committee discussed amending the rule to state that the deposition takes place where the party is located. So moved and motion carried.

Rule 30(b)(6). The committee agreed to reinsert language that was inadvertently removed during revision process.

Rule 35. The committee had no changes.

Rule 36. The committee discussed whether requests for admission should be allowed after the discovery cut off for laying foundation, authenticating documents, etc. The committee agreed that this can be handled through the pre-trial order processes.

At the conclusion of the rule-by-rule discussion, Mr. Wikstrom noted his belief that all critical items had been discussed and resolved and invited additional items of discussion from the committee. Judge Pullan raised the issue of the 3rd party plaintiff and whether they count as a "side" of discovery such that they are entitled to their own set of discovery limits. Judge Pullan noted the same issue with respect to cross claims. It boils down to how one "side" of the case is defined. Mr. Wikstrom proposed that these claims be resolved on a case by case basis by the judge and observed that the committee cannot craft a rule to deal with every contingency.

Judge Pullan then moved that the revised rules as amended be approved and submitted to the Supreme Court for approval. Judge Shaughnessy seconded and the committee approved.

The committee suggested an effective date of November 1, 2011.

V. ADJOURNMENT.

The meeting adjourned at 6:48 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday September 28, 2011.

Tab 2

STEVEN G. JOHNSON
Attorney at Law
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December 7, 2010

Honorable Christine M. Durham
Chief Justice, Utah Supreme Court
450 South State Street
P. O. Box 140210
Salt Lake City, UT 84114-0210

Re: Advisory Committee on the Rules of Professional Conduct

Dear Chief Justice Durham:

At the request of the Administrative Office of the Courts, the Court's Advisory Committee on the Rules of Professional Conduct considered whether those Rules should be amended to include a provision regarding disqualification of collaborative attorneys in certain cases. After review of the issue, it was the unanimous vote of the committee that hard and fast disqualification rules do not fit well in the ethical rules of the Rules of Professional Conduct. For this reason, it is felt that the Rules of Professional Conduct should *not* be amended to provide for the disqualification of collaborative attorneys.

Such disqualification provisions are more procedural than ethical and perhaps are better placed in a body of rules which provide for disqualification of attorneys before a tribunal.

The committee also considered the issue of whether the ABA Model Rules for Client Trust Account Records should be adopted in Utah. After discussion of the Model Rules and OPC's history with client trust account problems, it was felt by the committee that the current Utah Rules of Professional Conduct are adequate. They not only give guidance to attorneys as to how they should care for client properties in their control or possession, but also provide protections for clients regarding their funds which are in the possession of their attorneys. It was also felt that the Model Rules would be a significant burden on solo and small firm attorneys. For these reasons we do not feel that the ABA Model Rules for Client Trust Account Records should be adopted by the Court at this time.

Sincerely,

Steven G. Johnson

(Excerpt)

MINUTES OF THE SUPREME COURT'S ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Law and Justice Center
645 South 200 East
Salt Lake City, UT
December 6, 2010
5:00 pm

ATTENDEES		EXCUSED	ABSENT
Steve Johnson, Chair	Gary Sackett	Gary Chrystler	Judge Mark May
Diane Abegglen	Stuart Schultz	John Soltis	
Nayer Honarvar	Paula Smith	Leslie Van Frank	
Judge Paul Maughan	Paul Veasy		
Trent Nelson	Billy Walker		
Kent Roche	Earl Wunderli		
Judge Stephen Roth			

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3. SUBCOMMITTEE REPORT: DISQUALIFICATION OF COLLABORATIVE LAWYERS UNDER THE UTAH UNIFORM COLLABORATIVE LAW ACT

Mr. Johnson introduced the topic to committee members. During the 2010 legislative session, the Utah Uniform Collaborative Law Act ("the Act") was passed. Prior to its enactment, a procedural provision of the Act concerning disqualification of collaborative lawyers and their law firms under certain circumstances was removed at the recommendation of the Administrative Office of the Courts.

Specifically, the following language was removed from the Act prior to its passage:

> 78B-19-109. Disqualification of collaborative lawyer and lawyers in associated law firm.
> (1) Except as otherwise provided in Subsection (3) a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.
> (2) Except as otherwise provided in Subsection (3) and Sections 78B-19-110 and 78B-19-111, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under Subsection (1).
> (3) A collaborative lawyer or a lawyer in a law firm with which the collaborative

lawyer is associated may represent a party:
(a) to ask a tribunal to approve an agreement resulting from the collaborative law process; or
(b) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or designated household member if a successor lawyer is not immediately available to represent that person. In that event, Subsections (1) and (2) apply when the party, or designated household member is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of that person.

In October 2010, the Supreme Court asked this committee to consider whether the Rules of Professional Conduct should be amended to include similar language (possibly as a new subsection to Rule of Professional Conduct 1.16). Mr. Johnson appointed a subcommittee, consisting of Stuart Schultz, Trent Nelson and Earl Wunderli, to consider the question and report back to the committee as a whole.

Mr. Schultz reported that the subcommittee debated whether the proposed language belongs in the Rules of Professional Conduct or some other body of rules. The subcommittee concluded that, in light of the reference in the statute to the Rules of Professional Conduct, an addition to existing Rule 1.16 was appropriate. After review of the issue, the full committee determined that the proposed disqualification rules do not fit well in the Rules of Professional Conduct and may be better placed in a body of rules which provides for disqualification of attorneys before a tribunal.

Gary Sackett made a motion that the committee recommend to the Court that the Rules of Professional Conduct not be amended to provide for disqualification of collaborative lawyers, and that disqualification rules may be better placed in a body of rules which provides for disqualification of attorneys before a tribunal. Judge Maughan seconded the motion and it passed unanimously. Mr. Johnson will prepare a letter advising the Supreme Court of the committee's recommendation.

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Presenter: Brian R. Florence, President Collaborative Family Lawyers

www.collaborativefamilylawofutah.com

http://www.collaborativefamilylawofutah.com/agreement.html

The Collaborative Law Process

Collaborative Law is a cooperative, voluntary conflict resolution process. Both attorneys and both parties acknowledge that the essence of Collaborative Law is the shared belief that it is in the best interest of the parties and their families to avoid adversarial proceedings, to commit themselves to resolving their differences with minimum conflict and to work together to create shared solutions to the issues. This process relies on an atmosphere of honesty, cooperation, integrity and professionalism geared toward the future well-being of the parties and their children.

The goal of Collaborative Law is to maximize the settlement options to both parties, to increase the abilities of the parties to communicate in a post-divorce relationship and to minimize, if not eliminate, the negative economic, social and emotional consequences to families of litigation.

In choosing Collaborative Law, we commit ourselves to resolving differences justly and equitably.

No Court or Other Intervention

By electing to employ a Collaborative Law process, we commit ourselves to settle this case without adversarial court involvement. We agree to give full, honest and open disclosure of all information, whether requested or not, and to engage in informal discussions and conferences to settle all issues. We agree to provide whatever releases are necessary to obtain information from accountants, pension and profit sharing plans and about financial assets and income.

We agree that the subpoena power may be necessary to obtain information neither has in his or her possession or control or which cannot be obtained by releases. This process anticipates the preparation and filing of the necessary court pleadings to effectuate the provisions of our agreements and complete the divorce.

Cautions

We understand that there is no guarantee of success. We further understand that the process cannot eliminate concerns about the disharmony, distrust and irreconcilable differences that have led to the current conflict.

It is consistent with the Collaborative Law process that the parties act in their own best interest and a party's attorney will assist him or her in asserting his or her interests. Cooperation does not mean that a party must put the interests of the other party ahead of his or her best interests.

Participation with Integrity

We will work to protect the privacy and dignity of all involved in this process, including parties, attorneys and experts. Each participant will maintain a high standard of integrity; specifically participants shall not take advantage of the other participants, nor of the miscalculations, misperceptions or mistakes of others, but shall point them out and correct them.

Experts and Consultants

If we determine that the help of outside experts such as accountants, appraisers and mental health professionals are needed, those experts will be retained jointly, unless we otherwise agree. All such experts retained in this Collaborative Law process will be directed to work in a cooperative effort to resolve issues, and shall provide all their conclusions and results to all parties equally.

Mentoring

We understand that our attorneys may suggest the involvement of another collaborative attorney to act as a mentor. Mentoring would only occur if our attorneys recommend it and we mutually agree to that attorney's participation. It would only occur to assist us and our attorneys in overcoming issues of apparent impasse and to provide suggestions as to how all of us could more effectively reach settlement. We understand that all collaborative attorneys are committed to this process and in most instances will agree to participate as a mentor without charge but in the event a proposed mentor requires compensation and we otherwise agree, the compensation will be shared as we may agree. The mentor will be bound by the same principles of participation and confidentiality as all of us.

Issues Concerning Children

In resolving issues about sharing the enjoyment of and responsibility for children, the parties, attorneys and experts shall make every effort to reach amicable solutions that promote the children's best interest. We agree to act quickly to resolve differences related to the children and to promote a caring, loving and involved relationship between the children and both parents.

We agree to attend the "Divorce Education for Parents" class as quickly as possible.

We will insulate the children from our disputes. We will refrain from any negative comments about the other parent and will maintain an attitude of respect and cooperation toward the other.

Negotiations in Good Faith

We understand that the process, even with full and honest disclosure, will involve vigorous good-faith negotiation. Each of us will be expected to take reasoned positions in all disputes and where such positions differ, each of us will be encouraged to use our best efforts to create proposals that meet the fundamental needs of both of the parties and if necessary, to compromise to reach settlement of all issues.

Although we may discuss the likely outcome of a litigated result and should be informed of that, none of us will use threats of going to court as a way to force capitulation and settlement by the other.

Attorneys' Role

Each party is entitled to select the attorney of his or her choice, and the parties understand their attorneys are entitled to reasonable compensation. The allocation of marital assets to compensate attorneys will be resolved in this collaborative process.

The attorneys' role is to provide an organized framework that will assist the parties in reaching agreements. The attorneys will help the parties communicate with each other, identify issues, collect and help interpret data, locate experts, ask questions, make observations, suggest options, help parties express their needs, goals and feelings, check the workability of the proposed solutions and prepare and file all written paperwork for the court. Each attorney is independent from the other attorney and has been retained by only one party in the Collaborative Process.

Abuse of the Collaborative Process

We understand that our collaborative attorney will withdraw from this case as soon as possible upon learning that either of us has withheld or misrepresented information and failed to immediately correct the problem, or otherwise acted to undermine or take unfair advantage of the Collaborative Law process. Examples of such actions include secret disposition of property, failure to disclose assets, debts or income, abuse of the minor children or planning to flee with the children.

Disqualification of Attorney and Experts as a Result of Court Intervention

The attorneys representation of the parties is limited to the Collaborative Law process. No attorney representing a party in the Collaborative Law process can represent that party in court in a proceeding against the other party.

In the event the parties desire to proceed adversarially in court, both attorneys are disqualified from representing the parties and shall immediately file a notice of withdrawal. In the event that the Collaborative Law process terminates, all experts will be disqualified as witnesses and their work product will be inadmissible as evidence unless the parties agree otherwise in writing.

We understand that if the collaborative process is terminated, we will likely incur additional retainers for new counsel and our matter may be delayed while new attorneys become familiar with our case.

Withdrawal of Attorney

We agree that our attorney may withdraw at any time during the process for any reason. The withdrawal of an attorney does not necessarily terminate the Collaborative Law process. If the attorney for either of us withdraws, either of us may continue in the

collaborative process without an attorney or retain a new attorney who will agree in writing to be bound by this agreement.

Whether an attorney withdraws as a matter of right or because of disqualification because of court intervention, the attorneys agree that they will cooperate with new attorneys, and provide them with the file and all documents and information to facilitate the transfer to successor counsel.

Temporary Agreements

In order to provide each of us with a feeling of safety and security, without which full commitment to the Collaborative Law process is impossible, we understand that some temporary agreements may be necessary and which may include mutual restraining agreements. We will work in the collaborative process to reach those agreements to allow us both to proceed with safety and security while permanent agreements are negotiated.

If either of us feels it necessary, we agree that temporary agreements may be entered as temporary court orders.

Confidentiality

All discussions among the parties and counsel are deemed settlement discussions and may not be offered as evidence in any subsequent proceedings between the parties. We understand, however, that any statement indicating an intent to endanger the safety of the other person or the children or which constitutes a claim of child sexual abuse, is not privileged.

Any documents provided by one party to the other during the Collaborative Law process may not be introduced in litigation in the divorce action or other litigation between the parties, without the written agreement of both parties.

Information provided by one attorney to the other attorney or the other party during the Collaborative Law process shall not be deemed a waiver of any privilege in subsequent divorce litigation or litigation between the parties.

Termination of Collaborative Law Process

Either party may unilaterally and without cause terminate the Collaborative Law process by giving written notice of such election to the other party and attorneys.

The parties do not waive the right to seek the assistance of the Court. However, any resort to adversarial court action automatically terminates the Collaborative Law process.

AGREEMENT

The undersigned parties and attorneys hereby agree to treat this matter as a Collaborative Law case, and to be bound by the foregoing PRINCIPLES OF COLLABORATIVE LAW.

Dated this _____ day of _____, 2001.

UNIFORM COLLABORATIVE LAW ACT

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Lorie D. Fowlke

Senate Sponsor: Lyle W. Hillyard

LONG TITLE

General Description:

This bill creates the Utah Uniform Collaborative Law Act.

Highlighted Provisions:

This bill:

- establishes minimum requirements for collaborative law participation agreements, including written agreements, description of the matter submitted to a collaborative law process, and designation of collaborative lawyers;
- requires that the collaborative law process be voluntary;
- specifies when and how a collaborative law process begins and is terminated;
- creates a stay of proceedings when parties sign a participation agreement to attempt to resolve a matter related to a proceeding pending before a tribunal while allowing the tribunal to ask for periodic status reports;
- creates an exception to the stay of proceedings for a collaborative law process for emergency orders to protect health, safety, welfare, or interests of a party, a family member, or a dependent;
- authorizes courts to approve settlements arising out of a collaborative law process;
- codifies the disqualification requirement of collaborative lawyers if a collaborative law process terminates;
- defines the scope of the disqualification requirement to both the matter specified in the collaborative law participation agreement and to matters related to the collaborative matter;
- extends the disqualification requirement to lawyers in a law firm with which the

collaborative lawyer is associated;

- requires parties to a collaborative law participation agreement to voluntarily disclose relevant information during the collaborative law process without formal discovery requests and update information previously disclosed that has materially changed;
- acknowledges that standards of professional responsibility and child abuse reporting for lawyers and other professionals are not changed by their participation in a collaborative law process;
- requires that lawyers disclose and discuss the material risks and benefits of a collaborative law process to help insure parties enter into collaborative law participation agreements with informed consent;
- creates an obligation on collaborative lawyers to screen clients for domestic violence and, if present, to participate in a collaborative law process only if the victim consents and the lawyer is reasonably confident that the victim will be safe; and
- authorizes parties to reach an agreement on the scope of confidentiality of their collaborative law communications.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

ENACTS:

78B-19-101, Utah Code Annotated 1953

78B-19-102, Utah Code Annotated 1953

78B-19-103, Utah Code Annotated 1953

78B-19-104, Utah Code Annotated 1953

78B-19-105, Utah Code Annotated 1953

78B-19-106, Utah Code Annotated 1953

78B-19-107, Utah Code Annotated 1953

78B-19-108, Utah Code Annotated 1953

78B-19-109, Utah Code Annotated 1953

78B-19-110, Utah Code Annotated 1953

78B-19-111, Utah Code Annotated 1953

78B-19-112, Utah Code Annotated 1953

78B-19-113, Utah Code Annotated 1953

78B-19-114, Utah Code Annotated 1953

78B-19-115, Utah Code Annotated 1953

78B-19-116, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78B-19-101** is enacted to read:

CHAPTER 19. UTAH UNIFORM COLLABORATIVE LAW ACT

78B-19-101. Title.

This chapter may be cited as the "Utah Uniform Collaborative Law Act."

Section 2. Section **78B-19-102** is enacted to read:

78B-19-102. Definitions.

In this chapter:

(1) "Collaborative law communication" means a statement, whether oral or in a record, or verbal or nonverbal, that:

(a) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

(b) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

(2) "Collaborative law participation agreement" means an agreement by persons to participate in a collaborative law process.

(3) "Collaborative law process" means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons:

(a) sign a collaborative law participation agreement; and

(b) are represented by collaborative lawyers.

(4) "Collaborative lawyer" means a lawyer who represents a party in a collaborative law process.

(5) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution described in a collaborative law participation agreement.

(6) "Law firm" means:

(a) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association;

(b) lawyers employed in a legal services organization;

(c) the legal department of a corporation or other organization; or

(d) the legal department of a government or governmental subdivision, agency, or instrumentality.

(7) "Nonparty participant" means a person, other than a party and the party's collaborative lawyer, that participates in a collaborative law process.

(8) "Party" means a person that signs a collaborative law participation agreement and whose consent is necessary to resolve a collaborative matter.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(10) "Proceeding" means:

(a) a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related pre-hearing and post-hearing motions, conferences, and discovery; or

(b) a legislative hearing or similar process.

(11) "Prospective party" means a person that discusses with a prospective collaborative lawyer the possibility of signing a collaborative law participation agreement.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Related to a collaborative matter" means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

(14) "Sign" means, with present intent to authenticate or adopt a record:

(a) to execute or adopt a tangible symbol; or

(b) to attach to or logically associate with the record an electronic symbol, sound, or process.

(15) "Tribunal" means:

(a) a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter; or

(b) a legislative body conducting a hearing or similar process.

Section 3. Section **78B-19-103** is enacted to read:

78B-19-103. Applicability.

This chapter applies to a collaborative law participation agreement that meets the requirements of Section 78B-19-104 signed on or after May 11, 2010.

Section 4. Section **78B-19-104** is enacted to read:

78B-19-104. Collaborative law participation agreement -- Requirements.

(1) A collaborative law participation agreement must:

(a) be in a record;

(b) be signed by the parties;

(c) state the parties' intention to resolve a collaborative matter through a collaborative law process under this chapter;

(d) describe the nature and scope of the matter;

(e) identify the collaborative lawyer who represents each party in the process; and

(f) contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative law process.

(2) Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with this chapter.

Section 5. Section **78B-19-105** is enacted to read:

78B-19-105. Beginning and concluding a collaborative law process.

(1) A collaborative law process begins when the parties sign a collaborative law participation agreement.

(2) A tribunal may not order a party to participate in a collaborative law process over that party's objection.

(3) A collaborative law process is concluded by a:

(a) resolution of a collaborative matter as evidenced by a signed record;

(b) resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

(c) termination of the process.

(4) A collaborative law process terminates:

(a) when a party gives notice to other parties in a record that the process is ended; or

(b) when a party:

(i) begins a proceeding related to a collaborative matter without the agreement of all parties; or

(ii) in a pending proceeding related to the matter:

(A) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;

(B) requests that the proceeding be put on the tribunal's calendar; or

(C) takes similar action requiring notice to be sent to the parties; or

(c) except as otherwise provided by Subsection (5), when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

(5) A party's collaborative lawyer shall give prompt notice to all other parties of a discharge or withdrawal, in accordance with the Rules of Civil Procedure.

(6) A party may terminate a collaborative law process with or without cause.

(7) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by Subsection (4)(c) is sent to the parties:

(a) the unrepresented party engages a successor collaborative lawyer; and

(b) in a signed record:

(i) the parties consent to continue the process by reaffirming the collaborative law participation agreement;

(ii) the agreement is amended to identify the successor collaborative lawyer; and

(iii) the successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative process.

(8) A collaborative law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative matter or any part thereof as evidenced by a signed record.

(9) A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.

Section 6. Section **78B-19-106** is enacted to read:

78B-19-106. Proceedings pending before tribunal -- Status report.

(1) Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. Parties shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to Subsection (3) and Sections 78B-19-107 and 78B-19-108, the filing shall include a request for a stay of the proceeding.

(2) Parties shall file promptly with the tribunal notice in a record when a collaborative law process concludes and request the stay to be lifted. The notice may not specify any reason for termination of the process.

(3) A tribunal in which a proceeding is stayed under Subsection (1) may require

parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

(4) A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative process is filed based on delay or failure to prosecute.

Section 7. Section **78B-19-107** is enacted to read:

78B-19-107. Emergency orders.

During a collaborative law process, a court may issue emergency orders, including protective orders in accordance with Title 78B, Chapter 7, Part 1, Cohabitant Abuse Act, or Part 2, Child Protective Orders, to protect the health, safety, welfare, or interest of a party or member of a party's household.

Section 8. Section **78B-19-108** is enacted to read:

78B-19-108. Approval of agreement by tribunal.

A court may approve an agreement resulting from a collaborative law process.

Section 9. Section **78B-19-109** is enacted to read:

78B-19-109. Disclosure of information.

Except as provided by law other than this chapter, during the collaborative law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. Parties may define the scope of disclosure during the collaborative law process.

Section 10. Section **78B-19-110** is enacted to read:

78B-19-110. Standards of professional responsibility and mandatory reporting not affected.

This chapter does not affect:

(1) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or

(2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the law of this state.

Section 11. Section **78B-19-111** is enacted to read:

78B-19-111. Appropriateness of collaborative law process.

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

(1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;

(2) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

(3) advise the prospective party that:

(a) after signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;

(b) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and

(c) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by the Rules of Professional Conduct.

Section 12. Section **78B-19-112** is enacted to read:

78B-19-112. Coercive or violent relationship.

(1) Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party

has a history of a coercive or violent relationship with another prospective party.

(2) Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

(3) If a collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer may not begin or continue a collaborative law process unless:

(a) the party or the prospective party requests to begin or to continue a process; and

(b) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a process.

Section 13. Section **78B-19-113** is enacted to read:

78B-19-113. Confidentiality of collaborative law communication.

A collaborative law communication is confidential to the extent agreed by the parties in a signed record or as provided by law of this state other than this chapter.

Section 14. Section **78B-19-114** is enacted to read:

78B-19-114. Authority of tribunal in case of noncompliance.

(1) If an agreement fails to meet the requirements of Section 78B-19-104, or a lawyer fails to comply with Section 78B-19-111 or 78B-19-112, a tribunal may nonetheless find that the parties intended to enter into a collaborative law participation agreement if they:

(a) signed a record indicating an intention to enter into a collaborative law participation agreement; and

(b) reasonably believed they were participating in a collaborative law process.

(2) If a court makes the findings specified in Subsection (1), and the interests of justice require, the court may:

(a) enforce an agreement evidenced by a record resulting from the process in which the parties participated;

(b) apply the disqualification provisions of Sections 78B-19-105 and 78B-19-106; and

(c) apply the privileges in the Utah Rules of Evidence.

Section 15. Section **78B-19-115** is enacted to read:

78B-19-115. Uniformity of application and construction.

In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 16. Section **78B-19-116** is enacted to read:

78B-19-116. Relation to Electronic Signatures in Global and National Commerce Act.

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. Sec. 7001 et seq. (2009), but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C.A. Sec. 7001(c), or authorize electronic delivery of any of the notices described in Sec. 103(b) of that act, 15 U.S.C.A. Sec. 7003(b).

Tab 3

Rule 83. Vexatious litigants.

(a)(1) "Vexatious litigant" means a person, including an attorney acting pro se, who, without legal representation, does any of the following.

(a)(1)(A) In the immediately preceding seven years, the person has filed at least five claims for relief, other than small claims actions, that have been finally determined against the person.

(a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

(a)(1)(D) The person purports to represent or to use the procedures of a court other than a court of the United States, a court created by the Constitution of the United States or by Congress under the authority of the Constitution of the United States, a tribal court recognized by the United States, a court created by a state or territory of the United States, or a court created by a foreign nation recognized by the United States.

(a)(1)(E) The person has been found to be a vexatious litigant within the preceding seven years.

(a)(2) “Claim” and “claim for relief” mean a petition, complaint, counterclaim, cross claim or third-party complaint.

(b) Vexatious litigant orders. The court may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to:

(b)(1) furnish security to assure payment of the moving party's reasonable expenses, costs and, if authorized, attorney fees incurred in a pending action;

(b)(2) obtain legal counsel before proceeding in a pending action;

(b)(3) obtain legal counsel before filing any future claim for relief;

(b)(4) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any paper, pleading, or motion in a pending action;

(b)(5) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any future claim for relief; or

(b)(6) take any other action reasonably necessary to curb the vexatious litigant's abusive conduct.

(c) Necessary findings and security.

(c)(1) Before entering an order under subparagraph (b), the court must find by clear and convincing evidence that:

(c)(1)(A) the party subject to the order is a vexatious litigant; and

(c)(1)(B) there is no reasonable probability that the vexatious litigant will prevail on the claim.

(c)(2) A preliminary finding that there is no reasonable probability that the vexatious litigant will prevail is not a decision on the ultimate merits of the vexatious litigant's claim.

(c)(3) The court shall identify the amount of the security and the time within which it is to be furnished. If the security is not furnished as ordered, the court shall dismiss the vexatious litigants claim with prejudice.

(d) Prefiling orders in a pending action.

(d)(1) If a vexatious litigant is subject to a prefiling order in a pending action requiring leave of the court to file any paper, pleading, or motion, the vexatious litigant shall submit any proposed paper, pleading, or motion to the judge assigned to the case and must:

(d)(1)(A) demonstrate that the paper, pleading, or motion is based on a good faith dispute of the facts;

(d)(1)(B) demonstrate that the paper, pleading, or motion is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(d)(1)(C) include an oath, affirmation or declaration under criminal penalty that the proposed paper, pleading or motion is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(d)(2) A prefiling order in a pending action shall be effective until a final determination of the action on appeal, unless otherwise ordered by the court.

(d)(3) After a prefiling order has been effective in a pending action for one year, the person subject to the prefiling order may move to have the order vacated. The motion shall be decided by the judge to whom the pending action is assigned. In granting the motion, the judge may impose any other vexatious litigant orders permitted in paragraph (b).

(d)(4) All papers, pleadings, and motions filed by a vexatious litigant subject to a prefiling order under this paragraph (d) shall include a judicial order authorizing the filing and any required security. If the order or security is not included, the clerk or court shall reject the paper, pleading, or motion.

(e) Prefiling orders as to future claims.

(e)(1) A vexatious litigant subject to a prefiling order restricting the filing of future claims shall, before filing, obtain an order authorizing the vexatious litigant to file the claim. The presiding judge of the judicial district in which the claim is to be filed shall decide the application. In granting an application, the presiding judge may impose in the pending action any of the vexatious litigant orders permitted under paragraph (b).

(e)(2) To obtain an order under paragraph (e)(1), the vexatious litigant's application must:

(e)(2)(A) demonstrate that the claim is based on a good faith dispute of the facts;

(e)(2)(B) demonstrate that the claim is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(e)(2)(C) include an oath, affirmation, or declaration under criminal penalty that the proposed claim is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(e)(2)(D) include a copy of the proposed petition, complaint, counterclaim, cross-claim, or third party complaint; and

(e)(2)(E) include the court name and case number of all claims that the applicant has filed against each party within the preceding seven years and the disposition of each claim.

(e)(3) A prefiling order limiting the filing of future claims is effective indefinitely unless the court orders a shorter period.

(e)(4) After five years a person subject to a pre-filing order limiting the filing of future claims may file a motion to vacate the order. The motion shall be filed in the same judicial district from which the order entered and be decided by the presiding judge of that district.

(e)(5) A claim filed by a vexatious litigant subject to a prefiling order under this paragraph (e) shall include an order authorizing the filing and any required security. If the order or security is not included, the clerk of court shall reject the filing.

(f) Notice of vexatious litigant orders.

(f)(1) The clerks of court shall notify the Judicial Council that a pre-filing order has been entered or vacated.

(f)(2) The Judicial Council shall disseminate to the clerks of court a list of vexatious litigants subject to a prefiling order.

(g) Statute of limitations or time for filing tolled. Any applicable statute of limitations or time in which the person is required to take any action is tolled until 7 days after notice of the decision on the motion or application for authorization to file.

(h) Contempt sanctions. Disobedience by a vexatious litigant of a pre-filing order may be punished as contempt of court.

(i) Other authority. This rule does not affect the authority of the court under other statutes and rules or the inherent authority of the court.

Tab 4

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: September 22, 2011
Re: Rules for final action

The comment period for the following rules has closed, and they are ready for your final recommendations.

(1) Rule Summary

URCP 004. Process. Amend. Deletes the requirement that a summons published in a newspaper must be in an English language newspaper.

URCP 065C. Post-conviction relief. Amend. Adds appointment of pro bono counsel in accordance with Sections 78B-9-109 and -202..

(2) Comments

On appointment of pro-bono counsel under Rule 65C: The proposed rule should be amended to require counsel's consent before the Court may appoint him or her as pro-bono counsel. There are cases in other states indicating there may be a constitutional problem with making counsel represent a party without compensation in civil cases.

Posted by Samuel D. McVey

Encl. Draft Rules

Rule 4. Process.

(a) **Signing of summons**. The summons shall be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and served.

(b)(i) **Time of service**. In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative.

(b)(ii) In any action brought against two or more defendants on which service has been timely obtained upon one of them,

(b)(ii)(A) the plaintiff may proceed against those served, and

(b)(ii)(B) the others may be served or appear at any time prior to trial.

(c) **Contents of summons**.

(c)(1) The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 13 days after service to determine if the complaint has been filed.

(c)(3) If service is made by publication, the summons shall briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

(d) **Method of service**. Unless waived in writing, service of the summons and complaint shall be by one of the following methods:

(d)(1) **Personal service**. The summons and complaint may be served in any state or judicial district of the United States by the sheriff or constable or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by any other person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof. Personal service shall be made as follows:

(d)(1)(A) Upon any individual other than one covered by subparagraphs (B), (C) or (D) below, by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process;

(d)(1)(B) Upon an infant (being a person under 14 years) by delivering a copy of the summons and the complaint to the infant and also to the infant's father, mother or guardian or, if none can be found within the state, then to any person having the care and control of the infant, or with whom the infant resides, or in whose service the infant is employed;

(d)(1)(C) Upon an individual judicially declared to be of unsound mind or incapable of conducting the person's own affairs, by delivering a copy of the summons and the complaint to the person and to the person's legal representative if one has been appointed and in the absence of such representative, to the individual, if any, who has care, custody or control of the person;

(d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy of the summons and the complaint to the person who has the care, custody, or control of the individual to be served, or to that person's designee or to the guardian or conservator of the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served;

(d)(1)(E) Upon any corporation not herein otherwise provided for, upon a partnership or upon an unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and the complaint to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy of the summons and the complaint to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, an office or place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of such office or place of business;

(d)(1)(F) Upon an incorporated city or town, by delivering a copy of the summons and the complaint to the recorder;

(d)(1)(G) Upon a county, by delivering a copy of the summons and the complaint to the county clerk of such county;

(d)(1)(H) Upon a school district or board of education, by delivering a copy of the summons and the complaint to the superintendent or business administrator of the board;

(d)(1)(I) Upon an irrigation or drainage district, by delivering a copy of the summons and the complaint to the president or secretary of its board;

(d)(1)(J) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy of the summons and the complaint to the attorney general and any other person or agency required by statute to be served; and

(d)(1)(K) Upon a department or agency of the state of Utah, or upon any public board, commission or body, subject to suit, by delivering a copy of the summons and the complaint to any member of its governing board, or to its executive employee or secretary.

(d)(2) **Service by mail or commercial courier service**.

(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt.

(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of the United States provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this rule.

(d)(3) **Service in a foreign country**. Service in a foreign country shall be made as follows:

(d)(3)(A) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(d)(3)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(d)(3)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(3)(B)(ii) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(d)(3)(B)(iii) unless prohibited by the law of the foreign country, by delivery to the individual personally of a copy of the summons and the complaint or by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(d)(3)(C) by other means not prohibited by international agreement as may be directed by the court.

(d)(4) **Other service**.

(d)(4)(A) Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means. The supporting affidavit shall

set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties.

(d)(4)(B) If the motion is granted, the court shall order service of process by ~~publication or by other~~ means~~, provided that the means of notice employed shall be~~ reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. Unless service is by publication, a copy of the court's order shall be served upon the defendant with the process specified by the court.

(d)(4)(C) In any proceeding where summons is required to be published, the court shall, upon the request of the party applying for publication, designate the newspaper in which publication shall be made. The newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made~~ and shall be published in the English language~~.

(e) **Proof of service**.

(e)(1) If service is not waived, the person effecting service shall file proof with the court. The proof of service must state the date, place, and manner of service. Proof of service made pursuant to paragraph (d)(2) shall include a receipt signed by the defendant or defendant's agent authorized by appointment or by law to receive service of process. If service is made by a person other than by an attorney, the sheriff or constable, or by the deputy of either, by a United States Marshal or by the marshal's deputy, the proof of service shall be made by affidavit.

(e)(2) Proof of service in a foreign country shall be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court. When service is made pursuant to paragraph (d)(3)(C), proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(e)(3) Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(f) **Waiver of service; Payment of costs for refusing to waive**.

(f)(1) A plaintiff may request a defendant subject to service under paragraph (d) to waive service of a summons. The request shall be mailed or delivered to the person upon whom service is authorized under paragraph (d). It shall include a copy of the complaint, shall allow the defendant at least 20 days from the date on which the request is sent to return the waiver, or 30 days if addressed to a defendant outside of the United States, and shall be substantially in the form of the Notice of Lawsuit and Request for Waiver of Service of Summons set forth in the Appendix of Forms attached to these rules.

(f)(2) A defendant who timely returns a waiver is not required to respond to the complaint until 45 days after the date on which the request for waiver of service was mailed or delivered to the defendant, or 60 days after that date if addressed to a defendant outside of the United States.

(f)(3) A defendant who waives service of a summons does not thereby waive any objection to venue or to the jurisdiction of the court over the defendant.

(f)(4) If a defendant refuses a request for waiver of service submitted in accordance with this rule, the court shall impose upon the defendant the costs subsequently incurred in effecting service.

Advisory Committee Notes

Rule 65C. Post-conviction relief.

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

(c) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(d)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(d)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(d)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(d)(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(d)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of

those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(d)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(e)(1) affidavits, copies of records and other evidence in support of the allegations;

(e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(e)(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h)(1) Summary dismissal of claims. The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(h)(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(h)(2)(B) the claim has no arguable basis in fact; or

(h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(h)(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.

(h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of counsel. The court may appoint counsel under Section 78B-9-109 or Section 78B-9-202.

~~(j)~~ (k) Answer or other response. Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

~~(k)~~ (l) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

~~(k)(1)~~ (l)(1) consider the formation and simplification of issues;

~~(k)(2)~~ (l)(2) require the parties to identify witnesses and documents; and

~~(k)(3)~~ (l)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

~~(l)~~ (m) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

~~(m)~~ (n) Discovery; records. Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

~~(n)~~ (o) Orders; stay.

~~(n)(1)~~ (o)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

~~(n)(2)~~ (o)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

~~(n)(3)~~ (o)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

~~(o)~~ (p) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court

may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

~~(p)~~ (q) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Advisory Committee Notes

Tab 5

This opinion is subject to revision before final publication in the Pacific Reporter

2011 UT 44

IN THE

SUPREME COURT OF THE STATE OF UTAH

ANDREW T. ALLEN,
Plaintiff and Appellant,

v.

MELISSA MOYER,
Defendant and Appellee.

No. 20090841
July 29, 2011

Third District, Salt Lake
The Honorable Tyrone E. Medley
No. 090901453

Attorneys:

Daniel L. Wilson, Scott G. Nance, Ogden, for plaintiff

Kent R. Holmberg, Salt Lake City, for defendant

ASSOCIATE CHIEF JUSTICE DURRANT, opinion of the Court:

INTRODUCTION

¶1 In this case, we are asked to determine whether the doctrine of claim preclusion applies to small claims judgments. We conclude that claim preclusion is applicable to small claims judgments because application of the doctrine will promote finality, judicial economy, and consistent judgments.

BACKGROUND

¶2 The facts in this case are undisputed. In 2008, Andrew T. Allen and Melissa Moyer were involved in an automobile accident (the Accident) on Interstate 15 near Murray, Utah. Approximately two weeks later, Mr. Allen filed a complaint against Ms. Moyer in small claims court for property damage arising out of the Accident. The small claims court held a bench trial on Mr. Allen's claim and awarded him a judgment of $4,831.50 for the damage to his car.

¶3 Approximately six months after Ms. Moyer paid the judgment amount, Mr. Allen filed a separate action against Ms.

Moyer in the Third District Court for personal injuries arising out of the Accident. Ms. Moyer responded by filing a motion for summary judgment, arguing that Mr. Allen's personal injury claim was barred by the doctrine of claim preclusion. In opposition to Ms. Moyer's motion, Mr. Allen contended that under Utah case law and the Utah Rules of Small Claims Procedure, the doctrine of claim preclusion does not apply to small claims judgments. To resolve the issue, the district court turned to the Utah Court of Appeals' opinion in *Dennis v. Vasquez*, in which the court of appeals applied claim preclusion to a small claims judgment.[1] Finding *Dennis* to be on point, the district court applied claim preclusion to Mr. Allen's personal injury claim and held that his claim was barred. Accordingly, the district court granted summary judgment in favor of Ms. Moyer.

¶4 On appeal, Mr. Allen raises three arguments challenging the district court's conclusion that claim preclusion applies to small claims judgments.[2] First, he contends that claim preclusion cannot be applied to small claims judgments because the doctrine has not been incorporated into the Utah Rules of Small Claims Procedure. Second, he argues that this court held in *Faux v. Mickelsen*[3] that claim preclusion does not apply to small claims judgments. Finally, he contends that even if we have not held that claim preclusion is inapplicable to small claims judgments, we should adopt such a rule for personal injury and property damage claims arising out of an automobile accident in light of the unique aspects of small claims courts; that is, their simplified rules and their objective of dispensing speedy justice between the parties. We have jurisdiction to hear this appeal pursuant to section 78A-3-102(3)(j) of the Utah Code.

STANDARD OF REVIEW

¶5 "We review a district court's decision to grant summary judgment for correctness, granting no deference to the district court's conclusions . . . ."[4] Similarly, "[w]hether res judicata, and

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[1] 2003 UT App 168, ¶¶ 5–7, 72 P.3d 135.

[2] Mr. Allen does not challenge the district court's conclusion that his personal injury claim met the claim preclusion test that is applied in other contexts. Thus, we will address only Mr. Allen's arguments that claim preclusion is inapplicable to small claims judgments.

[3] 725 P.2d 1372 (Utah 1986) (per curiam).

[4] *City of Grantsville v. Redevelopment Agency*, 2010 UT 38, ¶ 8, 233 (continued...)

more specifically claim preclusion, 'bars an action presents a question of law' that we review for correctness."[5]

ANALYSIS

¶6 Claim preclusion is one of two branches of the judicially created doctrine known as res judicata.[6] "Claim preclusion is premised on the principle that a controversy should be adjudicated only once."[7] To promote this principle, claim preclusion bars a party from bringing in a subsequent lawsuit a related claim that has already been fully litigated.[8] In determining whether claim preclusion bars a litigant from asserting a related claim in a subsequent action, courts impose a three-part test:

> "First, both [suits] must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or be one that could and should have been raised in the first action [because it arose from the same transaction or the same operative facts]. Third, the first suit must have resulted in a final judgment on the merits."[9]

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[4] (...continued)
P.3d 461 (internal quotation marks omitted).

[5] *Mack v. Utah State Dep't of Commerce*, 2009 UT 47, ¶ 26, 221 P.3d 194 (quoting *Macris & Assocs., Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 17, 16 P.3d 1214).

[6] *See id.* ¶ 29; *see also* 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403 (2d ed. 2002) (discussing res judicata as a judicial creation). Specifically, res judicata encompasses the doctrine of claim preclusion and issue preclusion. *See Mack*, 2009 UT 47, ¶ 29. "'[C]laim preclusion corresponds to causes of action[;] issue preclusion corresponds to the facts and issues underlying causes of action.'" *Id.* (alterations in original) (quoting *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 31, 194 P.3d 956).

[7] *Mack*, 2009 UT 47, ¶ 29 (internal quotation marks omitted).

[8] *See id.*

[9] *Id.* (quoting *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 34, 73 P.3d 325); *see also id.* ¶ 30 (stating that "[c]laims or causes of action are the same as those brought or that could have been brought in the first (continued...)

¶7 By barring claims that satisfy this three-part test, claim preclusion advances three important purposes. First, it ensures finality and "'protect[s] litigants from harassment by vexatious litigation.'"[10] Second, it "promot[es] judicial economy by preventing previously litigated [claims] from being relitigated."[11] Finally, claim preclusion "preserv[es] the integrity of the judicial system by preventing inconsistent judicial outcomes."[12]

¶8 Although the doctrine was initially developed with respect to judgments of courts of general jurisdiction, courts have since applied claim preclusion in other contexts when the application will promote finality, judicial economy, and consistent judgments.[13] For instance, to encourage finality and judicial economy, we have applied claim preclusion to administrative agency determinations.[14]

¶9 As to the issue before us, all of the reasons that support claim preclusion's application in other contexts weigh in favor of applying the doctrine to small claims judgments. Specifically, applying claim preclusion to small claims judgments will (1) ensure

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[9] (...continued)
action if they arise from the same operative facts, or in other words from the same transaction").

[10] *Gudmundson v. Del Ozone*, 2010 UT 33, ¶ 30, 232 P.3d 1059 (quoting *Buckner v. Kennard*, 2004 UT 78, ¶ 14, 99 P.3d 842).

[11] *Id.* (internal quotation marks omitted).

[12] *Id.* (internal quotation marks omitted).

[13] *See, e.g.*, *Salt Lake Citizens Cong. v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1251 (Utah 1992) (noting that claim preclusion's "same basic policies, including the need for finality in administrative decisions, support application of the doctrine . . . to administrative agency determinations"); *see also Buckner*, 2004 UT 78, ¶¶ 14, 22–30 (holding that the issue preclusion branch of res judicata does not apply to certain arbitration proceedings because such application would not promote judicial economy, consistent judicial outcomes, or finality).

[14] *See Utah Dep't of Admin. Servs. v. Public Serv. Comm'n*, 658 P.2d 601, 621 (Utah 1983); *see also Salt Lake Citizens Cong.*, 846 P.2d at 1251 (recognizing that because claim preclusion's purposes are advanced, Utah courts have applied the doctrine to administrative agency determinations since at least 1950).

finality and protect litigants from vexatious litigation, (2) promote judicial economy by preventing related claims from being relitigated, and (3) preserve the integrity of the judicial system by preventing inconsistent judgments.

¶10 First, applying claim preclusion to small claims judgments will promote finality and protect litigants by ensuring that parties will have to litigate a controversy only once. Indeed, if claim preclusion were not applied to small claims judgments, parties could be forced to relitigate identical claims in the district court months or years after a small claims judgment is issued. Additionally, without claim preclusion, parties would be free to use small claims proceedings as a testing ground to explore the strength of their case or the sufficiency of their evidence before filing a claim in the district court.[15] As a result, parties could be repeatedly dragged into court to litigate the same factual dispute. Such repetitive litigation would undermine the importance of finality in our judicial system and would be financially and emotionally burdensome to litigants.

¶11 Second, applying claim preclusion to small claims judgments will advance judicial economy by requiring that plaintiffs assert all of their related claims in one proceeding.[16] Resolving a dispute in one action protects judicial resources from being burdened by the need to address identical claims in multiple forums.[17] In addition, resolving a dispute in one action ensures that judicial resources are expended on binding determinations.

¶12 Finally, applying claim preclusion to small claims judgments will preserve the integrity of the judicial system by preventing inconsistent judgments. Inconsistent judgments may occur when multiple courts examine the same evidence to make the same factual determinations. Indeed, it is possible that in a case such as

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[15] *See, e.g.*, *Hindmarsh v. Mock*, 57 P.3d 803, 806 (Idaho 2002) (recognizing that without claim preclusion, "plaintiffs in small claims cases will not feel obligated to present all of their claims or all of their evidence . . . and they can simply file again . . . if need be").

[16] *See id.* ("[J]udicial economy is not served by encouraging resolution of property claims in small claims court and other claims in district court. This creates two lawsuits, rather than one.").

[17] *See id.* In this respect, the judicial interest in avoiding the burden of repetitious litigation is allied with a party's interest in finality and preventing vexatious lawsuits.

this—where a property damage claim arising out of an automobile accident is litigated in small claims court and a personal injury claim arising out of the same accident is later asserted in the district court—the two courts might reach opposite conclusions regarding the fault of a particular driver. These inconsistent results would not only create problems of liability and a general confusion about fault, but would also undermine public confidence in the judicial process.

¶13 In concluding that the doctrine of claim preclusion applies to small claims judgments, we find it highly relevant that parties have broad discretion in deciding whether to bring their claims in small claims court or district court.[18] When plaintiffs choose to take advantage of the benefits of a particular forum, they should not be permitted to save future related claims for later proceedings. Instead, they should be bound by the consequences of choosing that forum.

¶14 Furthermore, we are not persuaded by Mr. Allen's three arguments against applying claim preclusion to small claims judgments. First, he argues that claim preclusion cannot apply to small claims judgments because the doctrine has not been incorporated into the Utah Rules of Small Claims Procedure. But nothing in our claim preclusion jurisprudence suggests that the doctrine must be incorporated into a procedural rule before it can be applied to other judicial proceedings. This is because our procedural rules do not purport to set forth every available legal doctrine from our case law. Instead, the rules of procedure govern only the process by which a cause of action moves through the judicial system. And claim preclusion is a judicially created doctrine, "not a mere matter of practice or procedure."[19] Because claim preclusion is a judicially created doctrine, it is the role of this court to determine whether the doctrine applies to a particular type of final judgment. Accordingly, the application of claim preclusion is not dependent upon incorporation into a procedural rule.

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[18] *See Faux v. Mickelsen*, 725 P.2d 1372, 1374 (Utah 1986) (per curiam) (noting that the jurisdiction of small claims court is not exclusive).

[19] *Nipper v. Douglas*, 2004 UT App 118, ¶ 13, 90 P.3d 649 (internal quotation marks omitted).

¶15 Second, Mr. Allen contends that this court held in *Faux v. Mickelsen*[20] that claim preclusion does not apply to small claims proceedings. But contrary to Mr. Allen's assertion, our holding in that case was not so broad as to make claim preclusion inapplicable to all small claims judgments. Instead, in *Faux* we addressed only the narrow issue of how to treat counterclaims that would ordinarily be compulsory under rule 13(a) of the Utah Rules of Civil Procedure, but which are not raised in a small claims proceeding.[21] To resolve this issue, we examined the plain language of Utah Code section 78-6-2.5 and concluded that under the statute, such counterclaims were to be treated as permissive.[22] Because the statute allowed defendants to assert compulsory counterclaims outside of the small claims action, we held that claim preclusion would not apply to this limited category of counterclaims.[23] The fact that we declined to extend claim preclusion to compulsory counterclaims did not mean that we made claim preclusion categorically inapplicable to small claims judgments. Indeed, nothing in our holding stated or implied such a broad pronouncement. Accordingly, our holding in *Faux* should not be interpreted to exempt claim preclusion from all small claims judgments.

¶16 Finally, Mr. Allen argues that we should exempt claim preclusion from small claims judgments regarding property damage claims arising out of an automobile accident because of the unique aspects of small claims courts. Specifically, Mr. Allen asserts that in light of small claims courts' simplified rules and objective of "dispensing speedy justice,"[24] parties involved in an automobile accident should be allowed to split their property and personal injury claims and resolve the property damage claim quickly in small claims court. Then, after the speedy resolution of the property damage claim, parties should be allowed to assert any personal injury claim in the district court when the full extent of the injury is realized. Mr. Allen advocates this position because "[t]he value of

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[20] 725 P.2d 1372 (Utah 1986) (per curiam).

[21] *See id.* at 1374–75.

[22] *See id.*

[23] *See id.* at 1375.

[24] UTAH CODE ANN. § 78A-8-104(1) (2008) ("The hearing in a small claims action has the sole object of dispensing speedy justice between the parties.").

damage to a vehicle is ascertainable immediately after the collision . . . [but] injuries to the person may not be known for months or even years" after an accident. In rejecting this argument, we note that Mr. Allen's position conflicts with our clear precedent that "a single act causing simultaneous injury to the physical person and property of one individual . . . give[s] rise to only one cause of action, and not to separate causes based . . . on the personal injury, and . . . the property loss."[25] Furthermore, while we recognize that the speedy and informal nature of small claims proceedings may make litigants want to bring their property damage claim quickly in small claims court and later file a personal injury claim in district court, we believe the policy reasons discussed above outweigh the potential desire of litigants to split their property and personal injury claims.

¶17 For the foregoing reasons, we hold that claim preclusion applies to small claims judgments.[26] To ensure that future plaintiffs

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[25] *Raymer v. Hi-Line Transp., Inc.*, 394 P.2d 383, 384 (Utah 1964) (internal quotation marks omitted).

[26] While agreeing with the analysis in this opinion, Chief Justice Durham argues that we should not apply this holding to Mr. Allen, but should apply our holding prospectively only. We decline to do so. At the time Mr. Allen filed his two actions, the operative law on this issue was set forth in *Dennis v. Vasquez*, a case directly on point. 2003 UT App 168, ¶¶ 5–7, 72 P.3d 135. And until we overrule a court of appeals decision, it stands as the controlling law. Accordingly, when Mr. Allen filed his two suits, the operative law was that claim preclusion applied to small claims judgments.

In addition, although Chief Justice Durham also expresses concern about our holding's fairness to Mr. Allen, we note that fairness to Ms. Moyer must also bear on our decision of whether to apply our holding prospectively only. And because *Dennis* set forth the operative law at the time the suits were filed, Ms. Moyer may have justifiably relied on it in her defense against Mr. Allen's property damage claim.

Furthermore, our holding in *Turner v. Hi-Country Homeowners Association*, 910 P.2d 1223 (Utah 1996), does not suggest that claim preclusion would not apply to small claims judgments. In *Turner*, we did not apply issue preclusion to a particular small claims judgment because the lack of a record made it impossible to evaluate an element of that doctrine, specifically whether an issue had been fully

(continued...)

are aware of this conclusion, we instruct the Supreme Court Advisory Committee on the Utah Rules of Civil Procedure, which oversees small claims courts, to provide small claims litigants with express notice that claim preclusion applies to small claims judgments.[27]

CONCLUSION

¶18 We hold that the doctrine of claim preclusion applies to small claims judgments because application of the doctrine will promote finality, judicial economy, and consistent judgments. Therefore, we affirm the district court's grant of summary judgment in favor of Ms. Moyer.

¶19 Justice Nehring and Justice Lee concur in Associate Chief Justice Durrant's opinion.

CHIEF JUSTICE DURHAM, concurring and dissenting:

¶20 I concur with the majority's analysis on the applicability of claim preclusion to small claims judgments. On grounds of fairness

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[26] (...continued)
litigated. 910 P.2d at 1226–27. But claim preclusion does not involve this same element. Therefore, applying claim preclusion to small claims judgments does not present the same logistical problems as those identified in *Turner*. In fact, a court is capable of evaluating the three-part claim preclusion test without the need for a small claims record. Thus, our holding in *Turner* cannot reasonably serve as a basis for expecting that claim preclusion would not apply to small claims judgments.

We also disagree with the assertion that the small claims court instructions available to Mr. Allen were misleading. While the instructions could have been more clear, they do not evidence a misrepresentation about the applicability of claim preclusion to small claims judgments.

[27] Such express notice might be accomplished by including a statement on the small claims affidavit—which takes the place of a complaint—stating that "all of plaintiff's claims arising out of the same facts, occurrence, or transaction, must be raised in a single action."

and equity, however, I would apply the rule announced today only prospectively.

¶21 First, the rationale we apply today was not a foregone conclusion to anyone reviewing our holding in *Faux v. Mickelsen*, in which we observed the following:

> The general purpose . . . of the [Small Claims] Act is to dispose of minor money disputes by dispensing speedy justice between the parties. . . . Faux and Nacey's counterclaim consisted of several causes of action and alleged damages in excess of the small claims court's jurisdiction. Under Mickelsen's interpretation of the statute, they were compelled to bring their counterclaim and to remove the entire case to the circuit court for trial and adjudication. We believe that such a procedure would have the effect of defeating the purpose of the Act to dispense speedy justice to Mickelsen on a simple money judgment.

725 P.2d 1372, 1375 (Utah 1986) (per curiam). It is true that, as the majority opinion points out, we were not dealing with the issues of splitting claims and claim preclusion in *Faux*, but certainly someone reading the above language from that opinion might have reasonably predicted that other rules resembling those governing compulsory counterclaims might be suspended in the context of the specialized purposes of small claims proceedings.[1] Furthermore, we had previously refused to apply issue preclusion (the other branch of res judicata) to small claims judgments due to "the absence of a court record or other specific evidence concerning the scope of the prior proceeding." *Turner v. Hi-Country Homeowners Ass'n*, 910 P.2d 1223, 1226–27 (Utah 1996); *see also id.* at 1227 ("In particular, we cannot determine whether the issue in the prior case was identical

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[1] In this regard, the court of appeals' decision in *Dennis v. Vasquez* does not resolve the issue before us. In *Dennis*, the court of appeals applied claim preclusion to a small claims judgment. 2003 UT App 168, ¶ 10, 72 P.3d 135. The majority opinion, however, correctly treats this as an issue of first impression for our court. Furthermore, someone reading the language from *Faux* could have reasonably concluded that this court would not impose claim preclusion on small claims judgments. And any purported reliance on *Dennis* as controlling law is undermined greatly by the misleading instructions given to small claims plaintiffs. *See infra* ¶ 22 & n.2.

to the present issue and whether the issue was fully, fairly, and competently litigated.").

¶22 Second, the instructions available to the small claims plaintiff in this case were misleading: they explained that claims worth more than the jurisdictional limits could not be filed in the small claims court without *also* explaining that any such claims arising from the same incident at issue would be lost if not pled. Under similar circumstances, we afforded relief to the affected party on reliance and fairness grounds in *Kawamoto v. Fratto*, 2000 UT 6, ¶ 13, 994 P.2d 187. Given that small claims court procedures are designed to permit and encourage parties to represent themselves, instructions that lead parties into mistakenly forgoing their rights or claims should be accounted for in the application of this rule. This is particularly so when our court had never addressed the application of the rule to small claims cases and even attorneys might have had grounds for believing that we would go another direction based on our language in *Faux* and *Turner*.[2]

¶23 Although the majority is correct that "fairness to Ms. Moyer must also bear on our decision," *supra* ¶ 17 n.26, on balance I believe that the potential unfairness to Mr. Allen outweighs any unfairness to Ms. Moyer. For the foregoing reasons, I would apply the rule announced by the majority opinion only prospectively and would permit this claimant to pursue his personal injury claim in district court.

¶24 Justice Parrish concurs in Chief Justice Durham's opinion.

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[2] Furthermore, one attorney has asserted that "it is common practice for small claims judges to advise litigants securing $10,000 judgments capped only by the jurisdictional limit that *res judicata* does not prevent litigants from seeking the damages exceeding the jurisdictional limit in subsequent actions in district court." Steven Rinehart, *Small Claims Courts: Getting More Bang for Fewer Bucks*, 23 UTAH BAR J. 32, 33–34 (2010).

From the Webpage: **http://www.utcourts.gov/howto/smallclaims/**

Limits on small claims

Small claims cases are to recover money, and claims cannot exceed the jurisdictional limit. That limit is set by the Legislature in Utah Code Section 78A-8-102. The defendant must owe the debt to the plaintiff or, on a counter affidavit, vice-versa. Small claims cases cannot be used to sue a government entity, to sue for possession of property, to evict a tenant or to recover an assigned claim.

If the claim does not satisfy these limitations, the plaintiff must file a civil complaint in the district court under the Utah Rules of Civil Procedure.

IMPORTANT NOTICE—You must file all claims arising out of the same event or transaction in one lawsuit, whether that is in small claims court or in the district court. For example, if you have had an auto accident, and are seeking to recover money for property damage (such as the cost of repairing your car), and also for personal injuries, you must file all of your claims in one lawsuit. You may file in small claims court or in district court, but you cannot "split" your claims into two separate lawsuits. If you file in small claims court, your total recovery cannot exceed the jurisdictional limit. See Allen v. Moyer, 2011 UT 44.

My Name

Address

City, State, Zip

Phone

Email

I am the ☐ Plaintiff
☐ Attorney for the Plaintiff and my Utah Bar number is _____

In the Justice Court of Utah

_____ Judicial District _____ County

Court Address _____

_____ Plaintiff v. _____ Defendant And _____ Defendant	**Affidavit and Summons** Case Number _____ Judge _____

I swear that the following is true.

(1) Defendant owes me $ _____ for the claim described in paragraph (2).

plus the filing fee of $ _____

plus an estimated service fee of $ _____

plus estimated attorney fees of $ _____ (Attach statute or contract showing you are authorized to claim attorney fees.)

for a total of: $ _____

plus prejudgment interest, if qualified for prejudgment interest.

(2) The events happened on _____ (date). My claim is based on the following facts.

_____

_____

_____

_____

_____

_____

_____

_____

(3) ☐ Defendant resides within the jurisdiction of the court.
☐ The events happened within the jurisdiction of the court.

(4) ☐ I am not suing a government entity. I am not suing a government employee for the employee's on-the-job conduct.

(5) ☐ I am not suing on a claim that has been assigned to me.

(6) ☐ I am filing this affidavit in the First District Court for Cache County because the defendant resides in unincorporated Cache County or in a municipality within Cache County that does not have a justice court and the cause of action arose in unincorporated Cache County or in a municipality within Cache County that does not have a justice court.

(7) ☐ All of my claims arising out of the event or transaction are being raised in this single action.

I have not included any non-public information in this document.

_____ Sign here ► _____
Date

Typed or Printed Name _____

I certify that _____, who is known to me or who presented satisfactory identification, has, while in my presence and while under oath or affirmation, voluntarily signed this document and declared that it is true.

_____ Sign here ► _____
Date

Typed or printed name (Court Clerk or Notary Public) _____

Notary Seal

Summons

The State of Utah to the Defendant(s):

_____

Defendant Name and Address

_____

Defendant Name and Address

You are summoned to appear at trial to answer the above claim. The trial will be held at the court address shown above. **If you fail to appear, judgment may be entered against you for the total amount claimed**.

Date _____ Time ____ : ____ ☐ a.m. ☐ p.m.

Room _____

Notice to the Defendant. A small claims case has been filed against you. This imposes upon you certain rights and responsibilities. You may obtain small claims information and instructions at www.utcourts.gov/howto/

Disability Accommodations. If you need accommodation of a disability, contact a judicial service assistant at least 3 days before the hearing.

Date: _____ Sign here ► _____

Court Clerk _____

Checklist for Affidavit and Summons

Keep a copy of all documents for your records.

Attend all court hearings.

(1) Affidavit and Summons

- IMPORTANT NOTICE—You must file all claims arising out of the same event or transaction in one lawsuit, whether that is in small claims court or in the district court. For example, if you have had an auto accident, and are seeking to recover money for property damage (such as the cost of repairing your car), and also for personal injuries, you must file all of your claims in one lawsuit. You may file in small claims court or in district court, but you cannot "split" your claims into two separate lawsuits. If you file in small claims court, your total recovery cannot exceed the jurisdictional limit. See Allen v. Moyer, 2011 UT 44.

☐ Print your name and contact information at the top of the first page. Check whether you are the plaintiff or the attorney for the plaintiff.

☐ Print the county and judicial district. Print the court address.

☐ The plaintiff's name. If you are suing in your personal capacity use your name. If you are representing a business with a trade name, including a corporation, partnership or solely owned business, use the business' trade name.

☐ The defendant's name. If you are suing a natural person, use the person's name. If you are suing a business with a trade name, including a corporation, partnership or solely owned business, use the business' trade name. Contact the Department of Commerce to obtain a corporation's name and the name of its registered agent.

☐ Case number. Leave blank. The court clerk assigns the case number.

☐ Paragraph (1): Enter the amounts claimed in the spaces provided. Include in the principal amount any interest accrued to the date of filing. Do not file an amended Affidavit to claim interest between the filing date and the judgment date. If the court grants judgment, the court will include prejudgment interest in the judgment if you qualify for it.

☐ Paragraph (2): Enter the date on which the events happened. Describe the facts.

☐ Paragraph (3): Check either or both boxes that apply.

☐ Paragraph (4): Check the box. You cannot sue in small claims a governmental entity or governmental employee for on-the-job conduct.

☐ Paragraph (5): Check the box. You cannot sue in small claims if the claim has been assigned to you.

☐ Paragraph (6):

☐ Omit any private or protected information. When filed, this document is a public record. Code of Judicial Administration Rule 4-202.09(9) requires that you omit

from a public record any information that is not itself public information. For a list of records, data and information classified as public, private, and protected, see Rule 4-202.02.

☐ Signature. Sign the Affidavit under oath before a notary or a court clerk.

☐ Summons. Leave blank. The court clerk will schedule a trial date and complete the Summons, but you must arrange for serving it.

(2) To file the Affidavit and Summons

☐ A small claims case must be filed in the court where the defendant resides or where the claim arose (where the events happened). Depending on the circumstances this may be the justice court or the district court.

☐ If the defendant resides or the claim arose within a municipality and if the municipality has a justice court, file the case in the municipal justice court. If the municipality has no justice court, file the case in the county justice court. If the defendant resides or the claim arose in the unincorporated county, file the case in the county justice court.

- If there is no municipal or county justice court, file the case in the district court. Cache County is the only county that does not have a county justice court, so filing in district court should occur only in cases from unincorporated Cache County and from municipalities in Cache County that do not have a justice court.

(3) To serve the Affidavit and Summons

The court clerk will give you a copy of the Affidavit and Summons to serve on the defendant. The Affidavit and Summons must be served on the defendant by one of the following methods at least 30 days before the trial date. If the defendant cannot be served by one of these methods, the plaintiff must refile the case as a civil complaint and obtain alternative service under Utah Rule of Civil Procedure 4.

☐ (a) Mail a copy of the Affidavit and Summons to the defendant by any method that requires the defendant to acknowledge receipt with a signature. (Examples are registered or certified mail with return receipt signed by addressee only or a commercial courier service that will return a receipt signed by the addressee only.) The date of service is the date the defendant signs the receipt. Note that this method of service is effective only if the defendant is willing to sign the receipt. If not, the plaintiff must deliver the Affidavit to a professional process server under (b).

OR

☐ (b) Deliver the Affidavit to one of the officials authorized by Utah Code Section 78B-8-302, who will serve it on the defendant and file a Proof of Service with the court.

(4) Proof of Service of Affidavit and Summons

☐ If a sheriff, constable or private process server serves the Affidavit and Summons on the defendant, that person will complete and file a Proof of Service.

- ☐ If you serve the Affidavit and Summons on the defendant by mail or commercial courier, you must complete and file the Proof of Service form and attach the original signed receipt.
- ☐ Print your name and contact information at the top of the first page. Check whether you are the plaintiff or the attorney for the plaintiff.
- ☐ Complete the heading exactly as it appears in the Affidavit.
- ☐ Print the name and address of each person served.
- ☐ Check whether service was by mail or a commercial courier.
- ☐ Print the date that the defendant signed the receipt.
- ☐ Attach the original receipt.
- ☐ Date and sign the form.
- ☐ File the form and receipt within 10 days after service. If the form is not filed and the other party fails to appear at trial, the judge will not grant a default judgment.

Tab 6

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: September 22, 2011
Re: Committee notes to discovery rules

The committee did not talk about what to do with the existing committee notes to the rules, and I need to tell the publishers how to proceed. Here are my recommendations. Several are to delete the existing notes, since they have only a general reference to the 1999 amendments, and the committee did not write new notes. Where the committee did write a new note, Rules 1, 16, 26, 35 and 37, the old note is no longer relevant, except in Rule 1. There are no existing notes for Rules 8 and 26.1

- Rule 1: Add new note to existing.
- Rule 8: New note.
- Rule 16: Replace current note with new note.
- Rule 26: Replace current note with new note.
- Rule 26.1. New note.
- Rule 29: Delete current note.
- Rule 30: Delete current note.
- Rule 31: Delete current note.
- Rule 33: Delete current note.
- Rule 34: Delete current note.
- Rule 35: Replace current note with new note.
- Rule 36: Delete current note.
- Rule 37: Replace current note with new note.

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