

IN THE SUPREME COURT OF THE STATE OF UTAH

YVONNE MARTIN,

Petitioner,

v.

FRANK O. KRISTENSEN,

Respondent.

Appellate Case No. 20190797-SC

BRIEF OF PETITIONER

Pursuant to Utah Rule of Appellate Procedure 51, Petitioner Yvonne Martin (“Martin”) hereby petitions the Utah Supreme Court for reversal of the July 26, 2019 Decision of the Utah Court of Appeals affirming the March 15, 2015 final Judgment entered by the Honorable Todd M. Shaugnessy, Third Judicial District Court, in and for Salt Lake County, State of Utah on the unlawful detainer/quiet title portion of Consolidated Case No. 080915565.

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LIST OF PARTIES TO UNDERLYING CASE

Parties to this Appellate Proceeding

Yvonne Martin (“Yvonne”), *Defendant/Appellant/Petitioner*

Frank O. Kristensen (“Frank”), *Plaintiff/Appellee/Respondent*

Not Party to this Appellate Proceeding

Peter Kristensen (“Peter”), *Defendant/Appellee*

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INTRODUCTION

In 2016, after eight years of litigation, a judgment of \$900,663.26 for unlawful detainer was entered against Yvonne Martin (“Yvonne”).¹ The majority of those damages accrued while Yvonne was in possession of the premises pursuant to multiple court orders. Nonetheless, the district court and the Court of Appeals ruled that the orders did not affect Yvonne’s liability or the period for which treble damages were assessed. Yvonne now petitions this Court for a writ of certiorari reversing the judgment against her. The basis for Yvonne’s petition is that, by operation of law, the orders authorizing Yvonne to remain in the premises for the pendency of the litigation made her possession lawful. Therefore, because unlawful detainer damages are awarded for the period of time that a tenant remains in unlawful possession of the premises, treble damages should not have accrued while Yvonne had court-ordered possession.

STATEMENT OF THE ISSUES

Prior to 2008, Yvonne Martin (“Yvonne”) and Petter Kristensen (“Petter”) were married and living in a home located on Quicksilver Drive in Cottonwood Heights, Utah (“Quicksilver”). In 2008, Yvonne filed for a divorce (the “Divorce Proceeding”). Shortly afterwards, Petter’s father, Frank Kristensen (“Frank”), to whom Yvonne had transferred title to Quicksilver in 2004, sought to evict Yvonne and filed an unlawful detainer action (the “Unlawful Detainer Proceeding”). In her defense, Yvonne claimed that the transfer of

¹ The judgment is particularly tragic because the unlawful detainer statute most likely does not apply to the circumstances of Yvonne’s case. Yvonne was living, rent-free and without any lease agreement, in a house that was titled to her then father-in-law, Frank Kristensen. As a result, Yvonne was not a tenant who “**leased** real property for an indefinite time with monthly or other periodic **rent** reserved.” UTAH CODE § 78B-6-802(1)(b)(ii) (emphasis added).

title had been made under duress and sought to quiet title in Quicksilver in her name. In the Divorce Proceeding, Yvonne also argued that Quicksilver was marital property subject to equitable division. As a result, the district court in the Divorce Proceeding entered a temporary order granting Yvonne possession of Quicksilver. The Divorce and Unlawful Detainer Proceedings proceeded in parallel until approximately May 2012, when a trial was held in the Unlawful Detainer Proceeding. At the conclusion of the trial, title was quieted in Frank, Yvonne was found to be in unlawful detainer, and the court issued an order of restitution evicting Yvonne from Quicksilver. However, before Yvonne could be evicted from Quicksilver, the district court in the Divorce Proceeding stayed enforcement of the order of restitution in the Unlawful Detainer Proceeding and ordered that Yvonne remain in possession of Quicksilver. Ultimately, the Divorce Proceeding, the Unlawful Detainer Proceeding, and a subsequent lawsuit brought by Yvonne alleging that Petter had fraudulently transferred assets to Frank, were consolidated. After consolidation, the district court granted a new trial in the Unlawful Detainer Proceeding based on errors in the initial trial. However, after the judge presiding over the case changed, Frank and Petter sought and received an order vacating the order for a new trial and reinstating Frank's judgment against Yvonne. Pursuant to a new order of restitution issued by the district court, Yvonne relinquished possession of Quicksilver. The district court also granted a new trial on damages in the Unlawful Detainer Proceeding in which Frank was allowed to present a new expert who cured the deficiencies in the previous expert's testimony. In granting treble damages, the district court included the entire period that Yvonne had possession of Quicksilver after the Unlawful Detainer Proceeding had been filed, including those times when Yvonne had maintained possession pursuant to the court orders.

Yvonne appealed the decision of the district court to the Court of Appeals, arguing that unlawful detainer damages should not have been awarded for the time period that she had been in possession of Quicksilver pursuant to the court orders entered in the Divorce Proceeding. The Court of Appeals affirmed the judgment for unlawful detainer against

Yvonne based on four stated reasons: 1) it held that the order in the Divorce Proceeding could not transform Yvonne's possession into a lawful one because it had been entered after the Unlawful Detainer Proceeding had been filed; 2) it held that the orders in the Divorce Proceeding had not "definitively adjudicated Frank's rights relative to the Property" because Frank was not a proper party to the Divorce Proceeding; 3) it held that the orders in the Divorce Proceeding could not effect the relief that Frank was entitled to in the Unlawful Detainer Proceeding; and 4) it interpreted the Utah Unlawful Detainer Statute as authorizing a party to collect treble damages even if temporary possession had been granted pursuant to a court order. See Martin v. Kristensen, 2019 UT App 127, ¶¶ 32-42.²

Yvonne then petitioned this Court for a Writ of Certiorari. On December 6, 2019, this Court granted the Petition on the following issue:

Whether the Court of Appeals erred in affirming the district court's determination that Petitioner was liable for damages for unlawful detainer for the full period of time she remained in possession of the property Respondent had demanded she vacate.

See December 6, 2019 Order. The issue as set forth by the Court comprises the following subsidiary questions, which were expressly stated in Yvonne's Petition:

ISSUE ONE

Whether the Court of Appeals erred in holding that, despite the orders in the Divorce Proceeding expressly authorizing Yvonne to remain in lawful possession of Quicksilver during the pendency of that lawsuit, Yvonne was liable for unlawful detainer of Quicksilver for the full time she remained in possession because the orders in the Divorce Proceeding were entered after the unlawful detainer cause of action had accrued?

² A copy of the Court of Appeal's decision is attached as Exhibit A to the Appendix.

Standard of Review

On certiorari, this Court reviews the decision of the Court of Appeals, not the decision of the trial court. State v. Harmon, 910 P.2d 1196, 1199 (Utah 1995). However, in doing so, this court adopts the same standard of review used by the Court of Appeals: questions of law are reviewed for correctness, and the trial court's factual findings are reversed only if clearly erroneous. Id. Yvonne's first issue – whether Yvonne remained liable for the entire period of time she remained in possession of Quicksilver based on the timing of the order in the Divorce Proceeding – is a question of law that is reviewed for correctness. See Aris Vision Institute, Inc. v. Wasatch Property Management, Inc., 2005 UT App 326, ¶ 16 (holding that “[m]atters of statutory construction are questions of law that are reviewed for correctness”).

Preservation

This issue was preserved for the record in Yvonne's Petition. See September 25, 2019 Petition for Writ of Certiorari at 2, 16.

ISSUE TWO

Whether the Court of Appeals erred in holding that Frank was not a party bound by the orders entered in the Divorce Proceeding when a written order of dismissal was never entered in the Divorce Proceeding, Frank acted as if he continued to be a party by filing a petition for emergency relief to the Court of Appeals asking that the order allowing Yvonne to remain in possession of Quicksilver be vacated, and Frank never sought enforcement of the initial order of restitution issued in the Unlawful Detainer Proceeding?

Standard of Review

On certiorari, this Court reviews the decision of the Court of Appeals under same standard of review used by the Court of Appeals. State v. Harmon, 910 P.2d 1196, 1199 (Utah 1995). Yvonne's second issue – whether Frank was bound by the orders entered in the Divorce Proceeding – is a question of law that is reviewed for correctness. See State Dep't of Soc. Servs. v. Vijil, 784 P.2d 1130, 1132 (Utah 1989) (holding that the propriety of a jurisdictional determination is a question of law).

Preservation

This issue was preserved for the record in Yvonne's Petition. See September 25, 2019 Petition for Writ of Certiorari at 3, 17.

ISSUE THREE

Whether the Court of Appeals erred in holding that, even if Frank were bound by the orders entered in the Divorce Proceedings, those orders would not have excused Yvonne from liability for unlawful detainer damages because an order granting temporary possession in one action cannot affect the relief another party can receive in a different proceeding?

Standard of Review

On certiorari, this Court reviews the decision of the Court of Appeals under same standard of review used by the Court of Appeals. State v. Harmon, 910 P.2d 1196, 1199 (Utah 1995). Yvonne's third issue – whether the orders in the Divorce Proceeding could affect the relief available in the Unlawful Detainer Proceeding – is a question of law that is reviewed for correctness. See Kunz & Co. v. State, 913 P.2d 765, 768-770 (Utah 1989) (holding that the effect of an order is a question of law reviewed for correctness).

Preservation

This issue was preserved for the record in Yvonne's Petition. See September 25, 2019 Petition for Writ of Certiorari at 3, 17-18.

ISSUE FOUR

Whether the Court of Appeals erred in interpreting Utah's unlawful detainer statute as expressly permitting an award of treble damages for unlawful detainer for the period during which the tenant was granted temporary possession by the court when the statute is silent on the issue and such an interpretation contrary to public policy and equity?

Standard of Review

On certiorari, this Court reviews the decision of the Court of Appeals under same standard of review used by the Court of Appeals. State v. Harmon, 910 P.2d 1196, 1199 (Utah 1995). Yvonne's fourth issue – regarding the proper interpretation of Utah's unlawful detainer statute – is a question of law that is reviewed for correctness. See Aris Vision Institute, Inc. v. Wasatch Property Management, Inc., 2005 UT App 326, ¶ 16 (holding that “[m]atters of statutory construction are questions of law that are reviewed for correctness”).

Preservation

This issue was preserved for the record in Yvonne's Petition. See September 25, 2019 Petition for Writ of Certiorari at 3, 15-16.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

In 1994, Yvonne and Petter Kristensen entered into a premarital agreement that identified Yvonne's separate property and expressly provided that Yvonne's separate property would remain hers if the parties divorced. (R. 331-52). In 1999, after they were married, Yvonne and Petter amended the agreement to specify that a home located on Quicksilver Drive in Cottonwood Heights, Utah ("Quicksilver") was Yvonne's separate property. Initially, title to Quicksilver was solely in Yvonne's name. (2nd Supp. R. 2424:243- 44). However, Frank was given a one-half contingent monetary interest in Quicksilver. (2nd Supp. R. 2424:226-42). Specifically, Yvonne agreed that Frank was entitled to half the proceeds if and when the home was sold. Id. In 2003, Yvonne refinanced Quicksilver for 80% of its equity. (2nd Supp. R. 2425:46-49). She used the money from the refinance to pay off the existing loan and kept the remainder for her own personal use. Id. However, when Petter learned of the refinance, he became angry and confrontational, claiming that it was "my house" and "my money." (2nd Supp. R. 2424:255-60). Over the ensuing months, this behavior escalated into harassment and threats. (2nd Supp. R. 2424:260-70).

In January 2004, Petter filed liens against the Quicksilver and another property owned by Yvonne, claiming that he was entitled to an ownership interest by virtue of being her husband and having paid a portion of the purchase price for the property. (2nd Supp. R. 2424:270-75). Petter told Yvonne that he would not release the liens unless she transferred title to Quicksilver to him. (2nd Supp. R. 2424:276). Finally, in June 2004, Petter violently grabbed Yvonne by the arm, forced her into his car, drove her to the bank, and stood over her until she signed a deed to Quicksilver that transferred it into Frank's name. (2nd Supp. R. 2425:34-39, 257). That same day Petter released his liens. (2nd Supp. R. 2425:37). Approximately two weeks later, Petter had Frank sign a deed for the Marital

Home that created a joint tenancy with Petter. (2nd Supp. R. 1067). However, the second deed was never recorded.

Approximately a month after Yvonne filed for divorce in 2008, she received a notice from Frank demanding that she vacate Quicksilver. (2nd Supp. R. 4). However, Yvonne continued to occupy Quicksilver as her principal residence pursuant to orders entered in the Divorce Proceeding. (2nd Supp. R. 2426:238.)

B. PROCEDURAL HISTORY

This appeal comes from four cases, litigated over the course of eight years, that were consolidated into the single case on appeal. For the sake of brevity, only the procedural history relevant to the issues on appeal will be set forth in this section.

i. The Divorce Proceeding

On May 30, 2008, Yvonne filed her petition in the Divorce Proceeding against Petter, Case No. 084902378. (R. 1-5). Yvonne subsequently amended her petition to add Frank as a party. (R. 16-22). On October 3, 2008, a certificate of default was entered against Frank. (R. 165-67). On April 29, 2009 and July 16, 2009, the district court entered temporary orders in the Divorce Proceeding awarding possession of Quicksilver to Yvonne and requiring Petter to make support payments to Yvonne pursuant to the parties' marital agreements. (R. 771-72, 1007-10).³

Frank subsequently entered an appearance in the Divorce Proceeding on February 20, 2009 and the default was set aside on May 7, 2009. (R. 590-91). Although the commissioner in the Divorce Proceedings recommended that Frank be dismissed as a party, no written order dismissing Frank was ever entered by the district court. (R. 895-96).

³ Copies of the temporary orders are attached as Exhibits B and C to the Appendix.

Instead, on November 5, 2010, apparently acknowledging that the temporary order granting Yvonne possession bound Frank, Petter filed a motion seeking “an order granting Frank Kristensen the right to determine the use and occupancy of his property on a temporary basis.” (R. 1435-38). However, on April 15, 2011, the motion was denied. (R. 3516-18).

As Divorce Proceedings continued, Petter failed to pay Yvonne court ordered support and a final judgment, certified under Rule 54(b), for the unpaid support was entered against him. (R. 1255-57; R. 1287-1289; R. 4752-54). On March 1, 2013, the district court entered an order to show cause against both Petter and Frank. (R. R. 6333-34). The district court subsequently found Petter in contempt for failing to answer questions and disobeying the court’s orders. The court sentenced Petter to 30 days in jail and imposed a fine of \$1,000 in the event Petter failed to begin making support payments to Yvonne. (R. 7363-64; R. 7435-37). When Petter still failed to make the support payments, he was sent to jail and the fine imposed. (R. 7500).

After Yvonne lost at trial in the Unlawful Detainer Proceeding in 2012, the district court presiding over the Divorce Proceeding entered a temporary restraining order staying an order of eviction entered in the Unlawful Detainer Proceeding. (R. 5336-37).⁴ Frank then appeared in the Divorce Proceeding and joined Petter in filing a petition for extraordinary and emergency relief to the Court of Appeals asking that the temporary restraining order be vacated. (R. 5395, 5431-87). In denying the petition in an order entered in Appellate Case No. 20120515-CA, the Court of Appeals noted that “[a]lthough Frank Kristensen states that he has no remedy because he is not a party to the divorce case, he has entered a limited appearance in that case for purposes of addressing the collateral attack on his judgment and order of restitution ... Claims regarding the divorce court’s lack of authority to enter orders affecting ... possession of the Quicksilver residence ... must be

⁴ A copy of the temporary restraining order is attached as Exhibit D to the Appendix.

raised in the proceedings [below].” (R. 5723-25). The district court subsequently entered a preliminary injunction preventing Petter from enforcing the order of restitution entered in the Unlawful Detainer Proceeding and requiring him to indemnify Yvonne for the judgment entered against her in the Unlawful Detainer Proceeding. (R. 5968-73).⁵ Frank did not appeal or dispute the entry of the preliminary injunction and made no effort to enforce the order of restitution.

Finally, in an effort to reconcile the orders in the Divorce Proceeding and the Unlawful Detainer Proceeding, the district court consolidated the two cases on March 1, 2013. (R. 6326-30).

ii. The Unlawful Detainer Proceeding.

On August 1, 2008, Frank filed the Unlawful Detainer Proceeding against Yvonne, Case No. 080915565. (2nd Supp. R. 1-6). On May 13, 2009, Yvonne filed a quiet title action against Frank and Petter. (2nd Supp. R. 109-15). The quiet title action was consolidated into the Unlawful Detainer Proceeding on August 26, 2009. (2nd Supp. R. 242-43). The district court bifurcated the two portions of the case for trial. (2nd Supp. R. 600-01). The quiet title portion was tried to a jury on May 29-31, 2012. (2nd Supp. R. 2424-2426). The unlawful detainer portion was tried to the bench on May 31, 2012. (2nd Supp. R. 2426:235-69). Following trial, the jury returned a verdict in favor of Frank. (2nd Supp. R. 2426:230-31.) The district court then entered an order of restitution and a judgment on the verdict. (2nd Supp. R. 2152; 2nd Supp. R. 2405-09). However, Frank never sought to enforce the order of restitution.

During the Unlawful Detainer Proceedings, all of the district court judges recognized the temporary orders from the Divorce Proceeding authorizing Yvonne to remain in possession of Quicksilver. Judge Medley stated that, “I had the understanding

⁵ A copy of the preliminary injunction is attached at Exhibit E to the Appendix.

that, in the divorce case, that your client was awarded temporary possession of the property that is the subject of the case that's assigned to me.” (2nd Supp. R. 2418:7.). Similarly, at a hearing on Frank's request for emergency access to Quicksilver, Judge Faust noted that “[h]e may be the title holder, but I understand it has been awarded, temporarily, to some other people ... regardless, [Yvonne] got possession and he wants the Court to interfere with that. So, that's the problem I've got with it.” (2nd Supp. R. 2419:17). And Judge Shaughnessy echoed these observations: “This case is unusual in the sense that I would be issuing an order of occupancy that would, arguably, conflict with an order that was entered by a judge in the divorce case.” (2nd Supp. R. 2426:264).

iii. The Consolidated Proceedings.

On October 14, 2013, after the cases had been consolidated, the district court vacated the judgment in the Unlawful Detainer Proceeding and ordered a new trial. (R. 7432-41). It also reaffirmed Yvonne's right to remain in Quicksilver. (R. 8864-67). However, the proceedings took a strange twist when Judge Kennedy, the judge presiding over the Divorce Proceeding, was replaced by Judge Harris in January 2015. (R. 8896- 99). Frank and Petter requested that the Divorce Proceedings be re-assigned to Judge Shaughnessy, the judge who had presided over the Unlawful Detainer Proceeding prior to consolidation. (R. 8905-07). Frank and Petter then tried to engage in ex-parte communications with the district court regarding reassignment to Judge Shaughnessy. (R. 9007).

On May 19, 2015, Judge Harris granted partial summary judgment in favor of Frank and Petter regarding whether Petter had an ownership interest in Quicksilver. (R. 9526-32). Then, on June 19, 2015, Petter and Frank filed a motion to vacate Judge Kennedy's order granting a new trial on the quiet title and unlawful detainer issues or, in the alternative, clarification of the errors justifying a new trial or remand of the quiet title and unlawful detainer portion of the case to Judge Shaughnessy. (R. 10029-593). However, while

reviewing the pleadings, Judge Harris became aware of an issue that required his disqualification and therefore recused himself. (R. 12115-17). This prompted another letter from Frank and Petter requesting that the case be reassigned to Judge Shaugnessy. (R. 12118-120). And, when Yvonne objected, Frank and Petter filed a reply in support of reassignment. (R. 12127-28; R. 12131-32). This time, the case was reassigned to Judge Shaugnessy and Yvonne's subsequent motion to disqualify Judge Shaugnessy was denied. (R. 12151-52; R. 12418-535).

On September 28, 2015, the same day Yvonne's motion to disqualify was denied, Judge Shaugnessy vacated the decision to order a new trial and reinstated the judgment in the Unlawful Detainer Proceeding. (R. 12536-39; R. 12622-1241; R. 14255-282). The district court also granted a new trial on Frank's unlawful detainer damages. Id. Lastly, the district court entered a new order of restitution on October 14, 2015, and a judgment of quiet title on October 26, 2015. (R.12583-85; R. 12642-45).

A bench trial on the unlawful detainer damages was held on December 3, 2015, in which Frank presented a new damages expert. (R. 12703-04; R. 14283-332). At the conclusion of the trial, the district court entered a damage award of \$673,602.30, plus attorney fees, based on the fair market rental value of Quicksilver from July 2008 through October 2015. (R. 12831-36). On March 16, 2016, the district court entered a Judgment in favor of Frank awarding him \$900,663.26. (R. 13377-85). Yvonne timely filed her Notice of Appeal and Amended Notice of Appeal on April 5, 2016 and April 27, 2016. (R. 13458-59; R. 13567-68). In the meantime, Frank's judgment against Yvonne was used to offset Yvonne's judgment against Petter in the Divorce Proceedings. (R. 13571-73).

The Court of Appeals issued its decision on July 26, 2019, without holding oral argument. See Martin v. Kristensen, 2019 UT App 127. In its decision, the Court of Appeals affirmed the Judgment in favor of Frank for four reasons.

First, the Court of Appeals held that the orders granting Yvonne temporary possession of Quicksilver could not have made her possession of Quicksilver lawful

because they were entered after the Frank had filed the Unlawful Detainer Proceeding. Martin, 2019 UT App 127 at ¶ 37. According to a footnote in Martin, this holding was based on Ute-Cal Land Development v. Intermountain Stock Exchange, 628 P.2d 1278 (Utah 1981), in which this Court held that a writ of attachment prohibiting a lessee from leaving the premises did not excuse the lessee from treble damages when the writ of attachment was served after the lessor's notice to quit. Id. at ¶ 37 n.8. The Court of Appeals reasoned that “[i]f the lessee in Ute-Cal was guilty of unlawful detainer, Yvonne must be as well.”

Second, the Court of Appeals held that, despite not being formally dismissed as a party from the Divorce Proceeding, it was not persuaded that Frank was bound by the orders in the Divorce Proceeding because, in the district court, Yvonne had not asserted that Frank was still party. Martin at ¶ 38 n. 9. Therefore while “Yvonne’s possession during the divorce proceedings may have been lawful vis-à-vis her husband ... that does not mean she lawfully possessed as between herself (a tenant) and Frank (the landowner).” Id. at ¶ 38.

Third, the Court of Appeals found that, even if Frank was bound by the orders in the Divorce Proceeding, “this does not answer how an order granting temporary possession of property in one action affects the relief another party may receive in a different proceeding.” Id. at ¶ 39.

Fourth, the Court of Appeals interpreted the unlawful detainer statute as permitting treble damages to be maintained against a person granted temporary occupancy if the person was “ultimately deemed to be without rights to the property.” Id. at ¶ 40. In support of this reason, the Court of Appeals cited those provisions of the unlawful detainer statute allowing for an evidentiary hearing to determine temporary possession, requiring an expedited trial, and awarding treble damages. Id. at ¶¶ 40-41. In a footnote, the Court of Appeals also stated that its ruling was consistent with the recovery of damages from a wrongfully issued preliminary injunction. Id. at ¶ 41 n. 10.

Yvonne filed a motion to extend the deadline for filing her petition for a writ of certiorari on August 26, 2019. On September 4, 2019, the Supreme Court granted the motion and extended the deadline for filing of the petition through September 25, 2019. Yvonne filed her Petition for a writ of certiorari on September 25, 2019. On December 6, 2019, this Court granted the Petition.

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals should be reversed and the unlawful detainer judgment against Yvonne should be vacated. Unlawful detainer liability is premised on a tenant having unlawful possession of a premises. However, in this case, Yvonne's possession of Quicksilver was authorized by court orders entered in the Divorce Proceedings. Because court orders have the effect of law, the orders resulted in Yvonne holding lawful possession of Quicksilver. As a result, Yvonne cannot be liable for unlawful detainer damages during time she had a court order granting her possession of Quicksilver. While the Court of Appeals held that the court orders could not convert Yvonne's possession into a lawful one, the Court of Appeals' interpretation of the law was incorrect.

First, the Court of Appeals' claim that a court order entered after an unlawful detainer cause of action has accrued cannot affect liability has no legal basis. In reaching its decision, the Court of Appeals extrapolated from a previous case in which this Court held that a writ of attachment preventing a tenant from removing property could not shield the tenant from unlawful detainer liability. However, this case law relied on by the Court of Appeals is easily distinguished. The writ of attachment did not award, or even address, possession of the premises by the tenant. Instead, as this Court noted, the writ was for the benefit of the landlord's recovery of damages. Furthermore, holding that a tenant is still liable for unlawful detainer even if they are awarded temporary possession is contrary to

public policy and equity. Most, if not all, tenants would vacate the premises rather than risk the severe penalty of treble damages if they lose at trial. They would do so even if they had a meritorious defense. And, once they vacate the premises, tenants are unlikely to seek return of possession or continue to defend the case. Unlawful detainer actions could also be misused as a means to offset support payments or create leverage in contentious divorce proceedings. As a result, this Court should hold that a court order awarding temporary possession of the premises creates a safe harbor from treble damages.

Second, the Court of Appeals argument that Yvonne remained in unlawful detainer because Frank was not bound by the orders in the Divorce Proceeding is incorrect. Although the commissioner in the Divorce Proceeding recommended that Frank be dismissed, an order formally dismissing Frank was ever entered. And it is undisputed that Frank was a party when the Divorce Proceedings and Unlawful Detainer Proceeding were consolidated. In addition, Frank acted as if he was bound by the orders in the Divorce Proceeding. After the initial temporary orders were entered in the Divorce Proceeding, Petter filed a motion seeking “an order granting Frank Kristensen the right to determine the use and occupancy of his property on a temporary basis. And, when the court in the Divorce Proceeding entered a temporary restraining order staying the order of eviction entered in the Unlawful Detainer Proceeding, Frank and Petter filed a joint petition for extraordinary and emergency relief to the Court of Appeals asking that the temporary restraining order be vacated. When the petition was denied, Frank did not contest the preliminary injunction and did not enforce the order of restitution from the Unlawful Detainer Proceeding. Alternatively, because unlawful detainer is dependent on whether the tenant’s possession was lawful, the orders rendered Yvonne’s possession lawful irrespective of whether Frank was bound by them.

Third, there is no basis for the Court of Appeal’s holding that an order in one proceeding cannot affect the remedy available in another proceeding. Under this Court’s precedent, district courts respect rulings from sister courts as binding. And allowing a

ruling in one case to affect the ruling in another case makes sense, both in terms of judicial efficiency and to prevent conflicting decisions.

Fourth, the unlawful detainer statute is silent as to whether treble damages continue to accrue after a tenant is granted temporary possession. The damages provision of the unlawful detainer statute distinguishes between rent and damages resulting from “unlawful detainer” but does not expressly authorize the accrual of treble damages after a tenant has been awarded temporary possession. As a result, public policy and equity favor interpreting the statute as shielding a party granted temporary possession from treble damages. Given the severe penalty of treble damages, holding otherwise would discourage tenants with meritorious defenses from trying to retain possession during the pendency of the lawsuit.

ARGUMENT

This Court should reverse the decision of the Court of Appeals and hold that Yvonne cannot be held liable for treble damages during the period that she had court-ordered possession of Quicksilver. Awarding treble damages for the entire time that Yvonne retained possession of Quicksilver been disastrous for Yvonne. Not only has Yvonne been burdened by an enormous judgment, but Petter has used that judgment to offset the judgment for support entered against him and his support obligations. The judgment is particularly unjust because Yvonne was never warned by the court – in either the Divorce Proceeding, the Unlawful Detainer Proceeding, or the consolidated proceedings – that her possession of Quicksilver pursuant to the temporary orders still exposed her to treble damages if she failed to ultimately prove that Quicksilver was marital property.

I. YVONNE WAS NOT IN UNLAWFUL DETAINER DURING THE TIME PERIOD WHEN SHE WAS IN POSSESSION OF QUICKSILVER PURSUANT TO COURT ORDER.

Yvonne was not in unlawful detainer after the district court authorized her to remain in possession of Quicksilver during the pendency of the lawsuit. Under Utah law, “unlawful detainer” is defined as “*unlawfully* remaining in possession of property after receiving a notice to quit, served as required by this chapter, and failing to comply with that notice.” UTAH CODE § 78B-6-801(7) (emphasis added). Therefore “the touchstone of availability of unlawful detainer proceedings is the unlawful possession of property.” Osguthorpe v. Wolf Mountain Resorts, LC, 2010 UT 29, ¶ 24, 232 P.3d 999 (Utah 2010).

Utah appellate courts have not addressed whether “unlawful possession” extends to a tenant who remains in pursuant to a court order. However, as a matter of law, an occupant must be in lawful possession – and not in unlawful detention – after a court has authorized her possession. Conduct is “lawful” when it is permitted, or not forbidden, by the law.⁶ And court orders are treated as having the force of law. This Court has previously noted “[t]he orderly and expeditious administration of justice by the courts requires that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.” Iota LLC v. Davco Mgmt. Co., 2016 UT App 231, ¶16 (quoting Maness v. Meyers, 419 U.S. 449, 459 (1975)) (quotations omitted). This is the case even if the order is later determined to be erroneous. Id. at ¶ 17. Instead, “[i]t is for the court of first instance to determine the question of the validity of the law, and its decision are to be respected.” Id. Therefore, an order granting an occupant possession operates as legal authorization for the occupant to remain in possession of the premises. By logical corollary, an order that legally permits a tenant to retain possession makes their possession lawful. See also Bichler v. DEI Systems Inc.,

⁶ See, e.g., Black's Law Dictionary 902 (8th ed. 2004) (“[n]ot contrary to law; permitted by law”); A Dictionary of Modern Legal Usage 515 (2d ed. 1995) (“established, permitted, or not forbidden by law”); American Heritage Dictionary 993 (4th ed. 2006) (“[b]eing within the law; allowed by law”).

2009 UT 63, ¶ 41, 220 P.3d 1203 (noting, in a concurrence, that Section 810 of the Unlawful Detainer Act “provides a mechanism for the court to determine which party may remain in lawful possession of the premises for the pendency of the litigation”).

In this case, the district court in the Divorce Proceeding awarded temporary possession of Quicksilver to Yvonne. And, when Yvonne lost at trial in the Unlawful Detainer Proceeding, the district court in the Divorce Proceeding entered a temporary restraining order and preliminary injunction staying the order of restitution and allowing Yvonne to remain in possession. As a result of these orders, Yvonne was granted lawful possession of Quicksilver from the date she was awarded temporary possession in the Divorce Proceeding through the date that the court in the consolidated proceeding issued a new order of restitution granting possession to Frank.

In holding that the orders in the Divorce Proceedings could not transform Yvonne’s possession into a lawful one, the Court of Appeals cited to the timing of the orders. The Court of Appeals held that an order granting possession could never result in lawful possession if it was entered after the unlawful detainer cause of action had accrued. See Martin at ¶ 37. In reaching this holding, the Court of Appeals relied on Ute-Cal Land Development v. Intermountain Stock Exchange, 628 P.2d 1278, 1282-83 (Utah 1981). In Ute-Cal, the defendant was a month-to-month tenant who was served a notice to quit after refusing to accept the terms of a lease proposed by the landlord. Id. at 1279. One of the tenant’s arguments on appeal was that “by reason of a writ of attachment served on him on March 31, 1980, he was prohibited from vacating the premises and hence should not be held liable for damages after the date.” Id. at 1282. In rejecting the tenant’s argument, this Court held that “[i]n light of [tenant’s] refusal to vacate from when the notice to quit was first served up until the time the writ of attachment was served, [tenant] cannot now successfully claim that he was prohibited from vacating.” Id. at 1282-83. The Court of Appeals found Ute-Cal to be instructive because “[s]imilarly, the court orders here, which Yvonne claims excuse her from paying damages, were entered after Frank’s notice to quit.

Though Yvonne was given temporary possession of the Property, she was free to vacate at any time.” Martin at ¶ 37 n.8. The Court of Appeals therefore concluded that “[i]f the lessee in Ute-Cal was guilty of unlawful detainer, Yvonne must be as well.” Id.

However, the Court of Appeals did not explain why Ute-Cal’s holding with respect to a writ of attachment should be extrapolated to an order granting Yvonne temporary possession of Quicksilver. A writ of attachment “is available to seize property in the possession or under the control of the defendant.” UTAH R. CIV. P. 64C(a). It does not grant a tenant continued possession of a leased premises. And while a writ of attachment may prevent a tenant from removing his personal property from the premises, it does not prevent the tenant from relinquishing possession of the premises. Indeed, in Ute-Cal, this Court recognized that “[t]he primary intent of the writ of attachment was not to restrain [the tenant], but to protect [the landlord].” 628 P.2d at 1283. As a result, the holding of Ute-Cal has no bearing on whether an order expressly granting Yvonne possession of Quicksilver converted her occupancy from an unlawful detainer to a lawful possession.

There are important policy reasons for why an order granting possession should result in lawful possession and prevent the accrual of treble damages for unlawful detainer. Orders of temporary possession are not limited to cases like this one, where a divorce court grants temporary possession while an unlawful detainer case is proceeding in parallel. They are also granted to tenants after an evidentiary hearing held pursuant to the unlawful detainer statute. See UTAH CODE § 78B-6-810(2). In both these situations, the effect of the order on treble damages is critical to whether the tenant decides to remain in possession during the pendency of the lawsuit. An award of treble damages for unlawful detainer is “a severe remedy” intended to prompt the tenant into quickly returning possession to the owner. See Osguthorpe, 2010 UT 29 at ¶ 22. If a tenant remains subject to unlawful detainer liability despite remaining in possession pursuant to a court order, the benefits of obtaining a court order would be negligible. Irrespective of whether she was granted temporary possession, it would still be advisable for the tenant to relinquish possession

rather than risk treble damages if she ultimately lost the case. In other words, despite having a claim or defense sufficiently meritorious to result in a court order awarding temporary possession, most tenants would relinquish possession rather than risk the devastating sanction of treble damages. And, once a tenant chooses to move out and find alternative accommodations, she is unlikely to try to regain possession at the conclusion of the lawsuit and may even settle or abandon her defense since the landlord has already gained possession of the premises. As a result, the utility of evidentiary hearings to determine temporary possession in unlawful detainer actions would be dramatically reduced for tenants. Even if a tenant won temporary possession at such a hearing, it would confer little benefit if her continued possession merely increased the amount of treble damages if she lost at trial.

Allowing treble damages despite an order of temporary possession would also encourage the tactic of filing parallel unlawful detainer actions in contentious divorces. In situations where one spouse is the title holder of real property, there would be no downside to filing an unlawful detainer action. If the title-holding spouse ultimately retained title to the property, he would be able to claim treble damages and use those damages to offset the amount of alimony or other property settlement he owed. And the non-title holding spouse would most likely relinquish possession of the premises rather than risk incurring an astronomical unlawful detainer liability. This case is an example of how unlawful detainer could undermine a divorce proceeding. Yvonne ultimately lost her case. If she was still going to be held liable for treble damages despite the orders giving her possession, there was no reason for Yvonne to have sought the court orders in the first place. Yvonne's liability increased as a result of her following the court orders rather than vacating the premises. In fact, had Yvonne known that she continued to incur treble damage liability despite the court orders, Yvonne would almost certainly have relinquished possession. In order for a court order granting possession to provide any real benefit to a tenant, the order must shield her from unlawful detainer liability.

Divorce cases like this one also raise the issue of conflicting decisions if temporary orders do not provide a safe harbor from unlawful detainer damages. The determination of whether a home is marital property subject to equitable division is a decision that must be made in a divorce proceeding, not an unlawful detainer proceeding. In the divorce proceeding, the district court may have good reason to believe that the home is marital property subject to equitable division and that the spouse whose name is not on the title should remain in possession during the pendency of the divorce. However, if the divorce court's temporary order does not shield that spouse from unlawful detainer liability or make her possession lawful, she would still be subject to treble damages – or eviction – in the unlawful detainer proceeding. The spouse would be better off relinquishing possession to avoid the potential of a “severe” judgment in the unlawful detainer action if the home is ultimately found not to be marital property. In other words, even if the spouse had a strong case for equitable ownership and the unlawful detainer action had been brought out of spite or for leverage, the benefits of remaining in the home would be outweighed by the severity of the potential unlawful detainer damages. Absent the power to shield the tenant from unlawful detainer liability, the district court in a divorce proceeding would lack the means to ensure that spouses were treated in a fair and equitable manner during the pendency of the proceeding. Accordingly, both equity and public policy favor this Court holding an order granting temporary possession results in lawful possession and shields the occupant from treble damages.

II. THE ORDERS IN THE DIVORCE PROCEEDINGS WERE BINDING ON FRANK.

The orders in the Divorce Proceedings were binding on Frank because he remained a party to the Divorce Proceedings and treated the orders as if they were binding. Not only was Frank named as a party to the Divorce Proceeding, a default was entered against him. (R. 9-15; R. 165-67). And Frank subsequently entered an appearance in the Divorce

Proceeding to contest the default. (R. 590-91). As a result, the district court had jurisdiction over Frank when it entered the temporary orders in the Divorce Proceeding. (R. 771-72, 1007-10). And while the commissioner in the Divorce Proceeding recommended that Frank be dismissed as a party, an order dismissing Frank was never actually entered by the court. (R. 895-96). Indeed, it was Frank's responsibility, under Utah Rule of Civil Procedure 7, to submit a proposed written order. As a result, because no written order dismissing him was entered by the court, Frank remained a party to the Divorce Proceeding.

In addition, after the district court entered a temporary restraining order staying the order of restitution in the Unlawful Detainer Case, Frank appeared in the Divorce Proceeding to contest the temporary restraining order and subsequent preliminary injunction. (R. 5968-73). And, once the Divorce Proceedings and the Unlawful Detainer Proceedings were consolidated, it is undisputed that Frank was bound by the orders entered in the consolidated case. After the cases had been consolidated, the district court in the consolidated case not only vacated the judgment in the Unlawful Detainer Proceeding and ordered a new trial, it also reaffirmed Yvonne's right to remain in Quicksilver. (R. 7432-41; R. 8864-67). As a result, the orders granting Yvonne temporary possession of Quicksilver were binding on Frank.

Moreover, Frank treated the orders in the Divorce Proceeding as binding. On November 5, 2010, Petter filed a motion seeking "an order granting Frank Kristensen the right to determine the use and occupancy of his property on a temporary basis." (R. 1435). And, when the court in the Divorce Proceeding entered a temporary restraining order staying the order of eviction entered in the Unlawful Detainer Proceeding, Frank and Petter filed a joint petition for emergency relief to the Court of Appeals asking that the temporary restraining order be vacated. (R. 5395, 5431-87). In denying the petition, the Court of Appeals noted that "[a]lthough Frank Kristensen states the he has no remedy because he is not a party to the divorce case, he has entered a limited appearance in that case for purposes

of addressing the collateral attack on his judgment and order of restitution ... Claims regarding the divorce court's lack of authority to enter orders affecting ... possession of the Quicksilver residence ... must be raised in the proceedings [below]." (R. 5723-25). However, as the case proceeded, Frank did not contest the court's authority and made no effort to enforce the order of restitution.

In its decision, the Court of Appeals held that, when the district court in the Divorce Proceedings orally held that Frank was not a party, it lost jurisdiction over him, despite the fact that the district court did not enter a written order dismissing Frank and Frank acted as if he was bound by the order in the Divorce Proceeding. See Martin at ¶ 38. While this Court has held that compliance with Utah Rule of Civil Procedure 7 is required for "ascribing finality to an interlocutory decision" for purposes of appeal, it has not addressed the effect of non-compliance with Rule 7 on the district court's authority over party who a magistrate judge recommended be dismissed. See Butler v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints, 2014 UT 41, ¶ 18, 337 P.3d 280. However, other decisions indicate that an oral ruling that is never reduced to a written order remains an interlocutory, non-final order. See e.g. Brigham Young University v. Tremco Consultants, Inc., 2005 UT 19, ¶ 45, 110 P.3d 678 (holding that Court lacked jurisdiction to review a supplemental order when the district court's oral ruling was not documented in a written order prior to filing of the notice of appeal); C.f. State v. Norris, 2002 UT App. 305, ¶ 8, 57 P.2d 238 (holding that "[w]here there is no final written order disposing of a motion, and no appeal could otherwise ensue, a judgment inconsistent with the motion can dispose of the motion by necessary implication for purposes of granting this court jurisdiction"). In this case, because no final order of dismissal was entered for Frank, the recommendation for his dismissal was never finalized. And even if the recommendation could be treated as an interlocutory dismissal, it was effectively reversed when Frank made a second appearance in the Divorce Proceeding and/or the cases were consolidated. As a result, Frank always remained a party to the Divorce Proceedings.

Alternatively, whether the orders in the Divorce Proceeding were binding on Frank is not material to whether Yvonne was in lawful possession of Quicksilver. Unlawful detainer is premised on the unlawful possession of the premises by the **tenant**. And the orders entered in the Divorce Proceeding had the effect of making Yvonne's possession lawful. Whether the orders were binding on Frank is not relevant because the temporary orders did not purport to adjudicate Frank's rights in the unlawful detainer cause of action. Instead, without addressing their effect on the Unlawful Detainer Proceeding, the orders authorized Yvonne to remain in possession of Quicksilver. Given that the court in the Divorce Proceeding was aware of the Unlawful Detainer Proceeding, claiming that the orders could not create a lawful possession because Frank was not bound by them would either render the order was meaningless or would create an irreconcilable conflict. This would especially be the case if Yvonne had prevailed on her argument that Quicksilver was marital property. Under such a scenario, Yvonne could be both entitled to ownership of Quicksilver in an equitable division awhile still liable for unlawful detainer. The courts in both proceedings, as well as the parties, clearly did not interpret the orders as ineffective or irreconcilable. Instead, they treated the orders as allowing Yvonne to lawfully remain in possession of Quicksilver.

III. AN ORDER ENTERED IN THE DIVORCE PROCEEDING COULD AFFECT THE REMEDY AVAILABLE IN THE UNLAWFUL DETAINER PROCEEDING.

As a matter of comity and judicial efficiency, an order entered in one proceeding may affect the relief available in a different proceeding. In its decision, the Court of Appeals questioned "how an order granting temporary possession of property in one action affects the relief another party may receive in a different proceeding." See Martin at ¶ 39. However, an order in one court proceeding is generally binding in a different proceeding. Under current precedent, a district court respects an order issued in another proceeding because, "[a]lthough it is not impossible, under some circumstances, for one district judge

to vacate the orders of his colleagues, — ordinarily this cannot be done. To accomplish this feat would require such a procedure as appeal, or an unusual, independent procedure of some kind.” Peterson v. Peterson, 530 P.2d 821, 823 (Utah 1974). See also Johnson v. Johnson, 560 P.2d 1132, 1134 (Utah 1977) (holding that “[i]t is likewise the law that the judge of one division of the same court cannot act as an appellate court and overrule another judge). This is especially the case when the order of the first case affects an underlying issue in the second case. For example, an order quieting title in one case would affect whether the remedy available in a second case seeking to specific performance of a real estate transaction. If a party lost title to the property in the quiet title act, the remedy of specific performance would no longer be available.

In this case, the court in the Unlawful Detainer Proceeding recognized that the proceeding was affected by the orders in the Divorce Proceeding. Judge Medley stated that, “I had the understanding that, in the divorce case, that your client was awarded temporary possession of the property that is the subject of the case that’s assigned to me. (Second Supp. R. 2418:7.). Similarly, at a hearing on Frank’s request for emergency access to Quicksilver, Judge Faust noted that “[h]e may be the title holder, but I understand it has been awarded, temporarily, to some other people ... regardless, [Yvonne] got possession and he wants the Court to interfere with that. So, that’s the problem I’ve got with it.” (Second Supp. R. 2419:17). And Judge Shaughnessy echoed these observations: “This case is unusual in the sense that I would be issuing an order of occupancy that would, arguably, conflict with an order that was entered by a judge in the divorce case.” (R. 2426:264). When confronted with the temporary restraining order, the court in the Unlawful Detainer Proceeding did not enforce the initial order of restitution and recognized that doing so would conflict with the order from the Divorce Proceeding.

Requiring courts to recognize and respect orders from parallel proceedings also makes sense from a public policy perspective. When courts recognize orders from other proceedings, they avoid wasting judicial resources on an issue that has already been

decided. Just as importantly, if an order in one proceeding affects the remedy or another material issue in a second proceeding, ignoring the order would result in conflicting rulings and confusion. As a result, the Court of Appeals' holding that an order in the Divorce Proceeding granting Yvonne lawful possession of Quicksilver could not affect Yvonne's liability in the Unlawful Detainer Proceeding lacks both a legal and policy basis.

IV. THE UNLAWFUL DETAINER STATUTE DOES NOT AUTHORIZE TREBLE DAMAGES DURING THE PERIOD OF COURT ORDERED TEMPORARY POSSESSION.

The unlawful detainer statute does not contain any language authorizing treble damages during a period of court-authorized possession. In its decision, the Utah Court of Appeals interpreted the statute as authorizing treble damages for unlawful detainer even after a tenant was granted temporary possession. See Martin, 2019 UT App 127 at ¶ 40 (citing UTAH CODE §§ 78B-6-810(2)(b)(i), 78B-6-811(3)). However, in reaching this conclusion, the Court of Appeals provided minimal analysis of the statute. Id. More importantly, the provisions cited by the Court of Appeals are silent on whether treble damages continue to accrue during the period of temporary possession. The provision authorizing temporary possession during the pendency of lawsuit merely states that “[a]t the evidentiary hearing held in accordance with Subsection (2)(a) ...the court shall determine who has the right of occupancy during the litigation’s pendency.” UTAH CODE § 78B-6-810(2)(b)(i) (2012). Similarly, the provision of the statute providing for treble damages does not state that unlawful detainer damages include the period for which the tenant has been granted temporary possession. It simply states that “[t]he judgment shall be entered against the defendant for **the rent**, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(e) [which includes damages for unlawful detainer], and for reasonable attorney fees.” Id. at § 78B-6-811(3) (2012) (emphasis added). It does not clarify whether, during the period of temporary possession, the tenant is liable for ordinary rent (which would not be subject to treble damages) or unlawful

detainer damages (which are subject to treble damages). However, at least one interpretation of the statute infers that a defendant would not be in unlawful detainer if he maintained possession pursuant to a court order. In a concurrence in Bichler v. DEI Systems Inc., Justice Nehring noted that Section 810 “provides a mechanism for the court to determine which party may remain in **lawful possession** of the premises for the pendency of the litigation,” thus implying that the defendant could not be in unlawful detainer (or incur treble damages) if she retained possession pursuant to such an order. 2009 UT 63, ¶ 41, 220 P.3d 1203 (emphasis added).

Furthermore, the absence of provisions addressing the effect of a temporary order on damages in the text of the unlawful detainer statute does not mean that the statute must be interpreted as authorizing treble damages regardless of such an order. Instead, given the ambiguity in the statute’s language, this Court should hold that a tenant cannot be held liable for unlawful detainer damages if he is granted lawful possession pursuant to a court order **unless** the court order expressly states that tenant remains subject to such liability. The Court should make such a holding based on public policy and equity.

First, if a tenant remains subject to unlawful detainer liability despite being given possession by a court order, the benefit of obtaining a court order would be negligible. As noted in Osguthorpe, the award of treble damages is a “severe remedy,” intended to prompt the tenant into quickly returning possession to the owner. 2010 UT 29 at ¶ 23. Absent a court-ordered “safe harbor,” a tenant would still suffer this harsh penalty if she failed to relinquish possession, even if she had a claim or defense so meritorious that it convinced the district court to award temporary possession. The risk of treble damages would far outweigh any benefit to remaining in possession. No tenant would remain in possession under such circumstances and there would be little benefit to the tenant of holding an evidentiary hearing or obtaining a court order granting temporary possession.

Second, allowing a tenant to avoid liability by obtaining a court order allows the district court safeguard the status quo and ensure both the parties are treated fairly. The

adage “possession is ninth-tenths of the law” is particularly applicable to unlawful detainer actions. Once a tenant relinquishes possession and has paid the expenses of moving out and finding a new location, they are unlikely to ever return. Nor does the unlawful detainer statute allow a tenant to recover expenses for moving out and back into the premises if she ultimately prevails. As a result, allowing a tenant with a potentially meritorious claim to be shielded from treble damages by court order is the only way to ensure fairness to the tenant and safeguard against abuse of the unlawful detainer process. Absent a means for the tenant to remain in possession during the pendency of the lawsuit, landlords can force tenants who would otherwise prevail at trial to relinquish possession of the premises using the threat of accruing treble damages. Once the tenant has left and the landlord has regained possession of the premises, the lawsuit is essentially over. And while the statute requires a trial to be held within two months of the complaint being filed, a timely trial does not always happen. Even if the trial were held within the two months period, the tenant could still be liable for a large sum – up to a half year of rent – if they lost.

Third, a court order granting temporary possession should provide the tenant with notice of their continued liability for treble damages. Given that the court order has the force of law, it is not unreasonable for a tenant to interpret an order granting temporary custody as shielding them from treble damages, as Yvonne did here. Contentious divorce proceedings can take years to resolve. If Yvonne had been given notice that the divorce court’s temporary orders did not shield her from unlawful detainer liability, she would have relinquished possession to avoid the risk of the “severe” judgment that was ultimately granted in this case. Accordingly, public policy and equity require that this Court interpret the unlawful detainer statute as not granting treble damages for the period during which a tenant has court authorized possession unless the court holds, and provides notice, that the temporary possession is subject to continued treble damages liability.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals' July 26, 2019 Decision and hold that Yvonne cannot be liable for treble damages during the period she was awarded temporary possession of Quicksilver.

RESPECTFULLY SUBMITTED this 22nd day of April, 2020.

Nadesan Beck P.C.

/s/ Karthik Nadesan

Karthik Nadesan
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that the word count of this brief (1) complies with the 14,000-word limit set forth in Utah Rule of Appellate Procedure Rule 24(g) for a principal brief and (2) complies with Utah Rule of Appellate Procedure 21(g) because it does not contain any non-public information.

/s/ Karthik Nadesan

Karthik Nadesan
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2020, a true and correct copy of the foregoing was emailed to the following:

R. Stephen Marshall
Kevin M. Paulsen
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APPENDIX

Exhibit A: Martin v. Kristensen, 2019 UT App 127

Exhibit B: Order on Respondent's Motion for Temporary Orders

Exhibit C: Order and Judgment on Petitioner's Motion for Temporary
Orders

Exhibit D: Minutes for Temporary Restraining Order

Exhibit E: Preliminary Injunction

EXHIBIT A

2019 UT App 127

JUL 26 2019

THE UTAH COURT OF APPEALS

YVONNE MARTIN,
Appellant,

v.

PETTER KRISTENSEN AND FRANK O. KRISTENSEN,
Appellees.

Opinion
No. 20160265-CA
Filed July 26, 2019

Third District Court, Salt Lake Department
The Honorable Todd M. Shaughnessy
No. 084902378

Karthik Nadesan, Attorney for Appellant
R. Stephen Marshall, Cameron J. Cutler, and Kevin
M. Paulsen, Attorneys for Appellees

JUDGE JILL M. POHLMAN authored this Opinion, in which
JUDGES DAVID N. MORTENSEN and DIANA HAGEN concurred.

POHLMAN, Judge:

¶1 After lengthy court battles on multiple fronts, Yvonne Martin was awarded \$140,285.54 in support payments from her ex-husband, Petter Kristensen, but was ordered to pay Petter's¹ father, Frank Kristensen, \$900,663.26 for unlawful detainer. Yvonne appeals from a number of the trial court's decisions. We affirm.

1. Because two of the parties share a surname, we refer to each party by his or her first name, as is our practice in such situations. No disrespect is intended by the apparent informality.

BACKGROUND

¶2 This appeal stems from a consolidation of four cases: a divorce case between Yvonne and Petter; an unlawful detainer case by Frank against Yvonne; a quiet title case by Yvonne against Frank and Petter; and a fraudulent transfer case by Yvonne against Frank and Petter. The facts and procedural history relevant to each are given below.

The Marital Property and Divorce Petition

¶3 Yvonne and Petter were married in 1995. Both before and during the marriage, they signed marital agreements (the Marital Agreements) identifying their separate property and detailing how assets would be divided in the event of a divorce. As relevant here, the Marital Agreements provide that Yvonne and Petter did “not intend to share together in the ownership of any property.”

¶4 Yvonne and Petter lived in a house purchased by Yvonne in 1999 (the Property). Frank contributed \$58,000 to the purchase price and, in exchange, received an “undivided one-half interest” in the Property from Yvonne. In 2003, Yvonne refinanced the Property, without informing Frank, for approximately \$80,000. When Petter learned of the refinance, he was concerned because it increased the mortgage on the Property and eliminated the equity in the home to which he believed Frank was entitled. So in early 2004, Petter proposed a solution: Frank would pay off the now-\$260,000 mortgage in exchange for full ownership of the Property, and Yvonne would keep the \$80,000 she received from the refinance. Yvonne accepted the proposal and executed a quitclaim deed in favor of Frank, though Yvonne and Petter continued to live in the Property. In 2008, approximately four years later, Yvonne petitioned for divorce.

The Unlawful Detainer and Quiet Title Proceedings

¶5 Around one month after filing for divorce, Yvonne was served with a notice to vacate the Property. After Yvonne failed to do so, Frank sued for unlawful detainer. The complaint requested treble damages “from and including the 7th day of July, 2008, until possession of the rented premises is restored to [Frank].” In response, Yvonne filed a quiet title action against Frank and Petter, contending that “she was improperly coerced into executing [the] quitclaim deed to Frank” and that the deed was therefore void. The unlawful detainer and quiet title actions were then consolidated.²

The Temporary Orders

¶6 In April and July 2009, Judge Faust, the trial judge presiding over the divorce proceedings, entered orders stating that Yvonne was “to have temporary use and possession” of the Property. Yvonne had earlier attempted to add Frank as a party in the divorce case, and Frank himself entered a limited appearance in the case to protect his interests in the Property. The domestic relations commissioner assigned to the case, however, recommended that Frank be dismissed as a party. When the court entered its orders granting temporary possession of the Property to Yvonne, Frank was not listed in the caption or served with the orders.

The Unlawful Detainer Trial

¶7 In May 2012, Yvonne was still living in the Property, and the unlawful detainer and quiet title actions proceeded to

2. Unless otherwise specified, these combined actions are referred to in this opinion as “unlawful detainer.”

trial before Judge Shaughnessy.³ The quiet title portion was tried to a jury, while the unlawful detainer portion was tried to the bench.

¶8 At trial, Yvonne objected to or sought to admit, as relevant here, three types of evidence or argument. First, Yvonne objected to argument and testimony that allegedly conflicted with the terms of the Marital Agreements. For example, in his opening statement, Frank stated that Yvonne was trying to get “something for nothing.” Yvonne moved for a mistrial, asserting that the “opening statements that were given directly contradict what the pre-marital agreement says.” The court denied the motion because “statements made by counsel in openings are not evidence.” Later, during cross-examination of Yvonne, Yvonne’s counsel objected to a line of questioning regarding whether Petter ever paid money into Yvonne’s account so that she could make mortgage payments. Yvonne testified that under the Marital Agreements, “everything [that] comes out of [her] account[] is [her] money and whatever he puts in there is [her] money.” Her counsel objected, arguing that the “whole line of questioning [was] irrelevant” because “the agreement says that what goes into her account is hers.” The court overruled the objection.

¶9 Second, Yvonne objected to alleged hearsay statements concerning conversations between Petter and Frank. Among other statements, Petter testified that he “asked [his] dad for help” in paying off the mortgage on the Property. Yvonne moved to strike this testimony as hearsay, but the court overruled, saying that “the declarant is in Court now talking about a statement that he made.”

3. The cases were originally set for trial in December 2010. But after three requests for a continuance, each made by Yvonne, trial was not held until May 2012.

¶10 Finally, Yvonne sought to introduce evidence concerning a second deed between Frank and Petter executed a few weeks after Yvonne quitclaimed the Property to Frank. Frank objected, arguing that the deed was an estate-planning mechanism and not a transfer of the Property. The court was concerned about “the risk of confusion to the jury” on “a collateral issue” and sustained the objection.

¶11 Yvonne also objected to a jury instruction requested by Frank and Petter on ratification. That instruction provided,

The power of a party to avoid a quit claim deed for duress is lost if, after the circumstances that made the contract voidable have ceased to exist, she manifests to the other party her intention to affirm it or acts with respect to anything that she has received in a manner inconsistent with disaffirmance.

In ratification cases where undue influence tainted the execution of a . . . contract, it is presumed that the undue influence also tainted the ratification if the causative elements giving rise to the initial undue influence are such that the undue influence was likely to have continued. If the undue influence has once been exerted it will be presumed to follow and taint every transaction between the parties thereafter.

Yvonne objected to the instruction because it did not specify “who bears the burden of proof,” ratification was not “pleaded as an affirmative defense,” and there was “no Utah case law authority for” the instruction. The trial court overruled the objection and agreed to give the instruction.

¶12 After deliberations, the jury returned a verdict for Frank, finding that Yvonne did not “execute the quitclaim deed in favor of Frank Kristensen while under duress.”

¶13 Trial then turned to the unlawful detainer portion of the case. To prove his damages, Frank called an expert witness (First Expert) to testify on the rental value of the Property. Yvonne objected because First Expert was “not timely disclosed” and did not provide a “report or anything to accompany or suggest the foundation for his expertise.” The trial court, however, allowed First Expert to testify. First Expert testified that he compared “rental information” in the area on similar houses to estimate “a fair rental value” of the Property. Based on his comparison, he evaluated the Property’s rental value as \$2,200 to \$2,400 a month. On cross-examination, Yvonne elicited that First Expert’s evaluation was based only on 2012 rental figures; he did not “do an analysis of rental value as of” 2008 through 2011. Yvonne did not call her own expert witness.

¶14 At the close of trial, and based on the jury’s finding that Yvonne had not executed the quitclaim deed under duress, the court concluded that Frank was the owner of the Property and that Yvonne had been in unlawful detainer since July 2008. The court accepted the “low end of what [First Expert] . . . offered, in terms of the fair market value” and found it to be \$2,200 a month, or \$72.32 a day. The court then found that Yvonne had been in unlawful detainer for 1,425 days and, after trebling the damages under the unlawful detainer statute, computed damages of \$309,168. The court also ordered costs and attorney fees, as allowed under the statute.

The Preliminary Injunction

¶15 After losing at trial, Yvonne sought, and received, a preliminary injunction in the divorce proceedings—now presided over by Judge Kennedy—enjoining Petter, as power of

attorney for Frank, from “interfering with [Yvonne’s] right to remain in the [Property].”

The Fraudulent Transfer Proceedings

¶16 While Yvonne continued to live in the Property, she initiated a new lawsuit against Petter and Frank for, among other things, fraudulent transfer. In her complaint, she alleged that Petter owed her money from support orders entered in the divorce proceedings and that, in order to avoid his obligations, Petter “transferred funds and assets belonging to him to other individuals, without receiving any equivalent value in exchange for the transfers.” She then detailed several alleged transfers.

¶17 The case proceeded, and Frank and Petter moved for summary judgment. They argued that in each of the three transfers from Petter to Frank identified by Yvonne, “Frank provided a reasonably equivalent value in exchange.”

¶18 In opposition to their motion, Yvonne argued that there was a factual dispute over “whether Petter received value for the transfers.” She asserted that Frank and Petter had not provided sufficient proof to that effect and that a trial was “necessary to enable the Court to conduct proper credibility determinations.”

¶19 The court concluded, however, that Yvonne bore the burden of proof on her claim and that Frank and Petter only had to “come forward with some evidence” to support their motion. The court then went through each fact in the motion and found that “what remain[ed]” after Yvonne’s objections were “nearly forty paragraphs of largely undisputed facts.” The court agreed with Frank and Petter that there were only three “potentially fraudulent conveyances” concerning Frank and Petter, and it stated that the “undisputed facts show[ed] that there was reasonably equivalent value exchanged.” It therefore granted the motion for summary judgment, concluding that Yvonne “failed

to provide evidence to support or sustain her fraudulent conveyance claim[.]”

The Consolidated Cases

¶20 In March 2013—before Judge Shaughnessy had ruled on the summary judgment motion on fraudulent transfer—the divorce, unlawful detainer, and fraudulent transfer cases were consolidated. Judge Kennedy now presided over the actions, and Yvonne filed a motion for a new trial in the unlawful detainer portion of the consolidated cases. Yvonne argued that at trial the court “ruled erroneously on evidentiary matters” and “improperly instructed the jury on ratification.” She also argued that the court “incorrectly concluded that Yvonne unlawfully detained [the Property], as she was in lawful possession pursuant to court order.” Finally, she asserted that the court “improperly allowed expert evidence of rental value, as Frank’s expert was not timely disclosed and did not provide an expert report.” The trial court granted the motion in full.

¶21 The consolidated cases, however, were subsequently reassigned to Judge Shaughnessy, who had previously presided over the unlawful detainer trial.⁴ Frank and Petter then filed a motion to vacate the order granting Yvonne a new trial, and the court partially granted the motion to vacate. The court upheld its earlier decisions regarding the evidentiary matters and ratification instruction—vacating Judge Kennedy’s order granting Yvonne’s motion for a new trial based on errors related to those matters—but it granted a new trial on the issue of damages. In doing so, the court stated that it wanted “to make sure that . . . there is not an issue on appeal when this case goes

4. Judge Shaughnessy also ruled on Frank and Petter’s motion for summary judgment in the fraudulent transfer case after it had been consolidated. *See supra* ¶ 19.

up with respect to the disclosure of any expert testimony.” It then ordered Frank and Yvonne, if she so chose to have an expert, to “serve a disclosure (1) identifying [the] expert, (2) providing a copy of the expert’s CV, (3) [providing] a brief summary of [the expert’s] anticipated testimony and (4) [providing] the basis for that testimony.” Yvonne was also given the opportunity to “informally interview” Frank’s expert or “depone the expert.”

¶22 At the new trial on damages, Frank called a new expert (Second Expert) to testify regarding the Property’s fair rental value. Second Expert testified concerning the relevant rental values of the Property from 2008 through 2015, which ranged from \$2,100 to \$3,200 per month.⁵ Those rental figures for the relevant time period amounted to \$224,534.10. Because Yvonne did not provide “an alternative basis for determining” the rental value, the court found that Second Expert’s figures were “the most reasonable determinations of fair market rental value.” After trebling the amount of damages to \$673,602.30, and adding costs of \$5,810.21 and attorney fees of \$221,250.75, the court ordered Yvonne to pay Frank a total of \$900,663.26.

Attorney Fees

¶23 In March 2016, after nearly eight years of litigation in the above matters, the trial court entered a decree of divorce and determined that Yvonne was entitled to \$140,285.54 in support payments under the Marital Agreements.

¶24 Based on that award, Yvonne sought her attorney fees in defending her rights under the Marital Agreements, which contain an attorney fees provision. The court denied Yvonne her attorney fees on three grounds. First, the court concluded that

5. Yvonne ultimately remained in possession of the Property until October 2015.

“the terms of the attorneys’ fee provision in the [Marital Agreements] do not obviously apply to the dispute in this case.” It reasoned that “both parties relied on the terms of the [Marital Agreements] to advance their respective positions,” not to “invalidate [a] portion or all of” the agreements. (Cleaned up.) Second, the court concluded that even if the provision applied, Yvonne did not prevail in defending her rights. Although she was awarded \$1,000 a month under the Marital Agreements, the court noted that Yvonne sought “substantially” more than that and therefore “lost on [her] claim.” Finally, the court stated that “the issues in the divorce portion of this case were simple and straightforward” and that “Yvonne represented herself at [the divorce] trial.” And though Yvonne was represented by counsel “over collateral issues,” the court stated that “Yvonne and her attorneys made no serious effort to bring to conclusion the few, simple issues that needed to be decided.” So, the court reasoned, “even if Yvonne was entitled to any attorneys’ fees, it would only be for the trial and time spent by attorneys preparing for the issues tried.” The court could not “identify any meaningful time spent by counsel on the issues that ultimately were tried” and therefore concluded that “an award of fees would be inappropriate.”

¶25 Yvonne appeals.

ISSUES AND STANDARDS OF REVIEW

¶26 Yvonne raises six issues on appeal. First, she contends that she cannot be liable for unlawful detainer when temporary orders entered in the divorce proceedings expressly authorized her to remain in possession of the Property during the pendency of those proceedings. This contention presents mixed questions of law and fact. *Bonnie & Hyde, Inc. v. Lynch*, 2013 UT App 153, ¶ 14, 305 P.3d 196. “Matters of statutory construction are questions of law that are reviewed for correctness,” while “questions of fact are reviewed under the clearly erroneous

standard, with deference given to the trial court.” *Id.* (cleaned up). “The trial court’s application of law to the facts is reviewed for abuse of discretion.” *Id.* (cleaned up).

¶27 Second, Yvonne contends that the trial court erred in granting a new trial on damages in the unlawful detainer action. “It is well settled that, as a general matter, the trial court has broad discretion to grant or deny a motion for a new trial,” including granting a new trial on the issue of damages. *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064 (cleaned up). We will reverse the trial court’s decision “only if there is no reasonable basis for the decision.” *Id.* (cleaned up).

¶28 Third, Yvonne contends that the trial court erred in instructing the jury on ratification in the unlawful detainer and quiet title proceedings. “Claims of erroneous jury instructions present questions of law that we review for correctness.” *Miller v. Utah Dep’t of Transp.*, 2012 UT 54, ¶ 42, 285 P.3d 1208 (cleaned up). But an error in the jury instructions will result in reversal only if “the error is harmful and prejudicial.” *Gorostieta v. Parkinson*, 2000 UT 99, ¶ 15, 17 P.3d 1110.

¶29 Fourth, Yvonne contends that the trial court committed cumulative error in the unlawful detainer proceedings by allowing and excluding certain evidence. “We review the trial court’s resolution of the legal questions underlying the admissibility of evidence for correctness and the trial court’s decision to admit or exclude evidence for an abuse of discretion.” *Beckman v. Cybertary Franchising LLC*, 2018 UT App 47, ¶ 22, 424 P.3d 1016. To apply the cumulative error doctrine, we “must determine that (1) an error occurred, (2) the error, standing alone, has a conceivable potential for harm, and (3) the cumulative effect of all the potentially harmful errors undermines [our] confidence in the outcome.” *State v. Martinez-Castellanos*, 2018 UT 46, ¶ 42, 428 P.3d 1038.

¶30 Fifth, Yvonne contends that the trial court incorrectly granted summary judgment to Frank and Petter on Yvonne's fraudulent transfer claim. We review the trial court's "ultimate grant or denial of summary judgment for correctness" and view "the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (cleaned up).

¶31 Finally, Yvonne contends that she was entitled to attorney fees in the divorce proceedings under the Marital Agreements. "Whether attorney fees are recoverable in an action is a question of law, which we review for correctness." *Express Recovery Services Inc. v. Olson*, 2017 UT App 71, ¶ 5, 397 P.3d 792 (cleaned up). "We review the trial court's determination as to who was the prevailing party under an abuse of discretion standard." *Id.* (cleaned up).

ANALYSIS

I. Unlawful Detainer

¶32 We first consider whether Yvonne is guilty of unlawful detainer when, approximately ten months after the unlawful detainer action was filed, the court in the divorce proceedings ordered that she could possess the Property while the divorce was pending. We therefore examine how the unlawful detainer statute operates and then address Yvonne's arguments in light of the statute.

¶33 Under Utah's unlawful detainer statute, a tenant at will⁶ is "guilty of an unlawful detainer if the tenant . . . remains in

6. A tenancy at will is a "tenancy in which the tenant holds possession with the landlord's consent but without fixed terms (as for duration or rent)." *Tenancy at will*, Black's Law Dictionary (continued...)

possession of the premises after the expiration of a notice [to quit the premises] of not less than five calendar days.” Utah Code Ann. § 78B-6-802(1)(b)(ii) (LexisNexis 2008).⁷ Once a defendant is found to be in unlawful detainer, the “jury or the court . . . shall also assess the damages resulting to the plaintiff from” the unlawful detainer. *Id.* § 78B-6-811(2)(b). Subsection (3) of section 78B-6-811 requires that such damages be trebled. *Id.* § 78B-6-811(3) (“The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(e), and for reasonable attorney fees.”); see also *Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt., Inc.*, 2006 UT 45, ¶ 23, 143 P.3d 278 (“[W]e hold that all damages directly and proximately resulting from [unlawful detainer] are subject to the requirement that they be trebled.”). Damages for unlawful detainer include lost rental value. *Forrester v. Cook*, 292 P. 206, 214 (Utah 1930), *overruled on other grounds as recognized by P.H. Inv. v. Oliver*, 818 P.2d 1018, 1020 (Utah 1991).

¶34 As our supreme court has explained, the unlawful detainer statute operates as “a mechanism for quickly and clearly resolving conflicts over lawful possession of property between landowners and tenants.” *Osguthorpe v. Wolf Mountain Resorts, LC*, 2010 UT 29, ¶ 22, 232 P.3d 999; see also *Bichler v. DEI Sys., Inc.*, 2009 UT 63, ¶ 29, 220 P.3d 1203 (stating that “one of the primary purposes of the unlawful detainer statute is to provide a

(...continued)

(10th ed. 2014). “Such a tenancy may be terminated by either party upon fair notice.” *Id.*

7. We apply the version of the code that was in effect at the time the unlawful detainer complaint was filed. The code has since been amended, though the provisions we cite are substantially the same.

speedy resolution on the issue of possession”). It does this in part through the “severe remedy” of treble damages, *see Osguthorpe*, 2010 UT 29, ¶ 23 (cleaned up); *see also* Utah Code Ann. § 78B-6-811(3), but also through expedited proceedings, *see id.* § 78B-6-810. These provisions are “evidence of a strong desire by the legislature to create a mechanism pursuant to which owners can be restored to possession of their property.” *Osguthorpe*, 2010 UT 29, ¶ 23.

¶35 Here, the court found that Frank has been the titled owner of the Property since June 23, 2004. He served Yvonne with a notice to quit the premises on July 1, 2008, giving her five days to vacate. But Yvonne, claiming that she was the owner of the Property, remained in possession until October 2015. That is, she “remain[ed] in possession of the premises after the expiration of a notice [to quit] of not less than five calendar days.” *See* Utah Code Ann. § 78B-6-802(1)(b)(ii). And because Frank, not Yvonne, was the true owner, Yvonne was “guilty of an unlawful detainer” beginning on July 6, 2008, under the plain terms of the statute. *See id.* Therefore, Yvonne is liable for damages during the time of her unlawful detainer, including treble damages for Frank’s lost rental value. *See id.* § 78B-6-811(3).

¶36 To resist this conclusion, Yvonne asserts that, “[a]s a matter of law, an occupant of real property cannot be considered to be in unlawful detention of property when she is there pursuant to court order.” And because the court in the divorce proceedings “had entered an order authorizing her to remain in possession of [the Property] during the pendency of [those proceedings],” she contends that she was not detaining property unlawfully. We disagree for three reasons.

¶37 First, we are not persuaded that the divorce court’s orders granting Yvonne temporary possession of the Property transformed her possession from unlawful to lawful. Yvonne did

not obtain an order granting her temporary possession until the end of April 2009. Frank sued for unlawful detainer, however, in August 2008 and requested treble damages “from and including the 7th day of July, 2008 until possession of the rented premises is restored.” Thus, the orders on which Yvonne’s arguments depend did not even exist until *after* she had unlawfully remained on the Property for nearly ten months. But Yvonne does not account for that time or explain how the temporary orders she acquired from the divorce court, which did not purport to adjudicate or alter her unlawful detainer status, both retroactively and prospectively excused her unlawful possession.⁸

¶38 Second, we are unpersuaded that the temporary orders in the divorce case definitively adjudicated Frank’s rights relative to the Property. Yvonne argues that the temporary orders were binding on Frank and that she is therefore excused from paying him damages for unlawful detainer. But the court in the unlawful detainer trial found that Frank was “not a party to the divorce case” and, in fact, “could not be made a party to the divorce case.” The court also noted, without

8. In *Ute-Cal Land Development v. Intermountain Stock Exchange*, 628 P.2d 1278 (Utah 1981), the supreme court held that a writ of attachment, which prohibited the lessee from leaving the premises, did not excuse the lessee from paying treble damages when the writ of attachment was served *after* the lessor’s notice to quit. *Id.* at 1282–83. There, the lessee was found guilty of unlawful detainer because the lessee could have vacated “when the notice to quit was first served” but did not. *Id.* at 1282. Similarly, the court orders here, which Yvonne claims excuse her from paying damages, were entered after Frank’s notice to quit. Though Yvonne was given temporary possession of the Property, she was free to vacate at any time. If the lessee in *Ute-Cal* was guilty of unlawful detainer, Yvonne must be as well.

objection, that “everyone agrees” that he was not actually a party.⁹ Thus, Yvonne’s possession during the divorce proceedings may have been lawful vis-à-vis her husband, but that does not mean she lawfully possessed as between herself (a tenant) and Frank (the landowner). See *Osguthorpe*, 2010 UT 29, ¶ 22.

¶39 And even if the temporary orders bound Frank, Yvonne does not explain how that would excuse her from liability for damages for unlawful detainer. Yvonne cites *Iota LLC v. Davco Management Co.*, 2016 UT App 231, 391 P.3d 239, in which the court held that “the orderly and expeditious administration of justice by the courts requires that an order issued by a court with jurisdiction over the subject matter and person *must be obeyed by the parties* until it is reversed by orderly and proper proceedings.” *Id.* ¶ 16 (emphasis added) (cleaned up). But this does not answer how an order granting temporary possession of property in one action affects the relief another party may receive in a different proceeding. The court in *Iota* spoke only in terms of compliance with an order, and here, Petter (and Frank for that matter) complied with the divorce court’s orders granting Yvonne temporary possession of the Property. Therefore, *Iota* does not help Yvonne.

9. Until this appeal, Yvonne did not contend that Frank was a party to the temporary orders. Even in her motion for a new trial, Yvonne asserted that “Frank was added as a party” to the divorce proceedings but “was subsequently removed as a party.” Thus, the argument that Yvonne is not liable for unlawful detainer because Frank was bound by the temporary orders was not preserved for appeal. See *Blanch v. Farrell*, 2018 UT App 172, ¶ 17, 436 P.3d 285 (“To preserve an issue, the appellant must present it to the district court in such a way that the court has an opportunity to rule on it.” (cleaned up)).

¶40 Third, as recognized by the trial court, the “unlawful detainer statute itself contemplates that a court may enter an order allowing a person to remain in possession of property, but notwithstanding such an order, the statute still provides for treble damages against that person if that person is ultimately found to be in unlawful detainer.” (Citing Utah Code Ann. §§ 78B-6-810(2)(b)(i), 78B-6-811(3).) In other words, the statute allows for a determination of a right to possess; it does not purport to eliminate damages if the person given temporary occupancy is ultimately deemed to be without rights to the property. Yvonne relies on a concurrence in *Bichler v. DEI Systems, Inc.*, 2009 UT 63, 220 P.3d 1203, to argue otherwise, but *Bichler* is silent about whether a party given temporary possession can ultimately be held liable for unlawful detainer damages.¹⁰ See *id.* ¶ 41 (Nehring, J., concurring).

¶41 Yvonne argues that this reading of the statute is unfair. It is not, and the facts of this case illustrate why. As the trial court recognized, the unlawful detainer statute contains a “significant statutory safety valve that is designed to protect against excessive damages.” Specifically, the statute requires that “the court shall expedite the proceedings” and “shall begin the trial within 60 days after the day on which the complaint is served, unless the parties agree otherwise.” Utah Code Ann. § 78B-6-810(1). Yvonne, however, made no attempt to resolve the

10. Our reading of the statute is consistent with the use of preliminary injunctions. When a court preliminarily enjoins a party from taking an action, it does not purport to immunize the protected party from paying any damages that may occur if the injunction was wrongfully entered. See *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1262 (Utah 1984) (“An injunction is wrongfully issued and recovery on the bond is permissible if it is finally determined that the applicant was not entitled to the injunction.”).

issue of possession expeditiously. Yvonne was entitled under the statute to a hearing within 60 days of being served with Frank's complaint, *see id.*, but instead chose to move for three continuances, which pushed the date for trial from December 2010 to May 2012. Even after being found liable for unlawful detainer, Yvonne continued to reside at the Property for another three years, more than doubling the amount of damages. The trial court considered the "procedural history and the machinations of this case" to find an "unreasonable delay in the resolution of this case that takes a relatively manageable amount of damages," i.e., approximately 60 days of rental value, "to an enormous amount of damages," i.e., approximately 2,653 days of rental value. We see no error in that conclusion.

¶42 In sum, Yvonne proceeded at her own risk when she gambled a treble damage award on winning her quiet title action and subsequently on vacating the trial court's decision in the unlawful detainer action. We affirm the trial court's award of unlawful detainer damages to Frank.

II. New Trial on Damages

¶43 A trial court may grant a new trial "to any party on any issue" if, among other reasons, there was an "irregularity in the proceedings" or an "error in law." Utah R. Civ. P. 59(a)(1), (7). Yvonne contends that the trial court abused its discretion when it "permitted [First Expert] to testify" and "compounded this error by *sua sponte* granting a new trial on damages that permitted Frank to not only disclose a new expert but rectify the deficiencies in his previous expert's testimony." We reject this contention.

¶44 For starters, the trial court did not "*sua sponte* grant[] a new trial on damages." Yvonne moved for a new trial, including on damages, after being found liable for unlawful detainer, and she requested that the court "hold such further proceedings as are necessary to accomplish substantial justice in this case." The

trial court granted Yvonne's motion in its entirety, and Frank and Petter later succeeded in narrowing the new trial's scope to the issue of damages. Thus, the court did not order a new trial on its own motion; it ordered the new trial, and defined its scope, based on the parties' motions.

¶45 Further, Yvonne's argument concerning First Expert's ability to testify at the original trial despite not being disclosed misses the mark. In granting a new trial on damages, the court stated that it was "going to make sure that . . . there is not an issue on appeal when this case goes up with respect to the disclosure of any expert testimony." It specifically required Frank to disclose his expert and provide a summary of the expert's opinion. The court also ensured that Yvonne would be given the opportunity to "informally interview" or "depose" Second Expert. Thus, by granting a new trial, the trial court attempted to resolve Yvonne's objections to First Expert's testimony in the original trial by giving her the ability to interview Second Expert and the opportunity to call an expert of her own. "It is well settled that . . . the trial court has broad discretion to grant or deny a motion for a new trial," and we see no abuse of that broad discretion here. *See Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064 (cleaned up).

III. Ratification Instruction

¶46 A trial court's ruling on a jury instruction, though reviewed for correctness, "does not constitute reversible error . . . unless the error is harmful and prejudicial." *Gorostieta v. Parkinson*, 2000 UT 99, ¶ 15, 17 P.3d 1110. Yvonne contends that the trial court erroneously instructed the jury on ratification in the unlawful detainer trial, but she makes only conclusory statements regarding the alleged error's harmfulness. For example, she asserts that she "was not given the opportunity to take countermeasures" against the instruction and that she was

“substantially prejudiced by the untimely submission of the jury instruction.”

¶47 A court “must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” Utah R. Civ. P. 61. “[A]n error is harmful,” thus requiring reversal, “only if the likelihood of a different outcome is sufficiently high as to undermine our confidence in the verdict.” See *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 796 (Utah 1991). It is the appellant’s burden to demonstrate that an error affected the outcome. *Steffensen v. Smith’s Mgmt. Corp.*, 820 P.2d 482, 489 (Utah Ct. App. 1991), *aff’d*, 862 P.2d 1342 (Utah 1993); see also *Avalos v. TL Custom, LLC*, 2014 UT App 156, ¶ 24, 330 P.3d 727. And in determining whether an error is harmful, we consider, in context, “the totality of the evidence and proceedings.” *Avalos*, 2014 UT App 156, ¶ 24.

¶48 Without addressing the merits of the ratification instruction, we conclude that Yvonne has not shown prejudice from the instruction. She has not demonstrated, in light of the entire evidentiary landscape, how a different instruction would have changed the outcome of the trial. Besides conclusory statements that she was “substantially prejudiced,” she does not describe how the jury instruction affected her theory of the case. She argues that she “was not given the opportunity to take countermeasures” but never explains what those countermeasures would have been or how they would have been successful. She instead asserts that “it cannot be known” whether the jury improperly relied on the ratification instruction. But it is her burden to tip the scale toward a “reasonable likelihood” of a different result, and she has not met that burden. See *Steffensen*, 820 P.2d at 489 (cleaned up).

IV. Cumulative Error

¶49 We also conclude that Yvonne has not demonstrated cumulative error in relation to the court’s handling of certain

evidentiary matters. She argues on appeal, as she did in her motion for a new trial, that the court improperly allowed evidence and argument undermining the Marital Agreements, improperly allowed hearsay testimony from Petter, and erroneously excluded evidence of a second deed between Frank and Petter. These errors, in Yvonne's view, constitute cumulative error requiring reversal.

¶50 We have recognized that a trial court “has broad discretion to admit or exclude evidence.” *Anderson v. Larry H. Miller Commc’ns Corp.*, 2015 UT App 134, ¶ 30, 351 P.3d 832 (cleaned up). And as noted above, an appellant “must shoulder the burden of demonstrating both error by the district court and prejudice, i.e., that there is a reasonable likelihood that a different result would have been reached absent the error.” *Id.* (cleaned up). Sometimes, an appellant may show prejudice “when a single error may not constitute grounds for reversal, but many errors, when taken collectively, do.” *State v. Martinez-Castellanos*, 2018 UT 46, ¶ 39, 428 P.3d 1038 (cleaned up). But under the cumulative error doctrine, not “all errors accumulate.” *Id.* ¶ 40. Rather, “the doctrine will not be applied when claims are found on appeal to not constitute error, or the errors are found to be so minor as to result in no harm.” *Id.* (cleaned up).

¶51 Yvonne has not shown that the trial court's evidentiary decisions adversely impacted the outcome of the case. She asserts that “while the district court instructed the jury not to consider the fairness of the [Marital Agreements], this instruction was not sufficient to cure the prejudice.” (Citing *Loofbourow v. Utah Light & Ry.*, 94 P. 981, 983 (Utah 1908).) But she does not explain how the testimony and argument she identifies harmed her case or why the jury instruction was insufficient to remedy any harm. See *Avalos v. TL Custom, LLC*, 2014 UT App 156, ¶ 25, 330 P.3d 727 (“In some instances, jury instructions may cure any error resulting from the improper admission of certain evidence.”). The primary issue at trial was

whether Yvonne executed the quitclaim deed under duress; the jury was not tasked with interpreting the Marital Agreements or determining who owned the funds placed in Yvonne's bank account. Thus, we are not convinced that the alleged error in allowing evidence to undermine the Marital Agreements negatively affected the proceedings.

¶52 As to the other alleged errors, Yvonne does not meaningfully address the trial court's decision. The court already determined that, even assuming there were errors, there was no prejudice flowing from its evidentiary decisions. In vacating the previous order granting Yvonne a new trial, the court observed that the alleged hearsay testimony was "peripheral and did not have any meaningful effect on the jury's verdict." As for the second deed between Frank and Petter, the court found that it was "a collateral issue" and that "the risk of confusion to the jury [was] too great." By not even challenging those findings, Yvonne has given us no reason to doubt the trial court's evidentiary decisions. See *Utah Physicians for a Healthy Env't v. Executive Dir. of the Utah Dep't of Envtl. Quality*, 2016 UT 49, ¶¶ 18–19, 391 P.3d 148 (discussing an appellant's burden of persuasion to "actually address the alleged errors" in the lower court's decision).

¶53 Thus, without individually identifying harm resulting from these alleged errors, Yvonne cannot show that the errors accumulate for purposes of the cumulative error doctrine. See *Martinez-Castellanos*, 2018 UT 46, ¶ 40. We therefore will not reverse on that basis.

V. Summary Judgment on Fraudulent Transfer

¶54 Summary judgment is appropriate "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). To successfully oppose a motion for summary judgment, the nonmovant has the duty "to analyze the

evidence” and “show that it create[s] a genuine issue for trial.” *Stichting Mayflower Mountain Fonds v. United Park City Mines Co.*, 2017 UT 42, ¶ 42, 424 P.3d 72. A court is not obligated “to look beyond [the nonmovant’s] bald statements to identify supporting evidence buried somewhere in the record.” *Id.* ¶ 43. The trial court here determined there were only three “potentially fraudulent conveyances” and concluded that the “undisputed facts show[ed] that there was reasonably equivalent value exchanged,” which defeated Yvonne’s fraudulent transfer claim.

¶55 Yvonne contends that “the district court erred in granting summary judgment on [her] fraudulent transfer” claim against Frank and Petter. But Yvonne does not engage with the elements of a fraudulent transfer claim or with the court’s specific determination that there were no fraudulent transfers because the undisputed facts show that reasonably equivalent value was exchanged for the only potentially fraudulent conveyances she identified.

¶56 Rule 24 of the Utah Rules of Appellate Procedure requires a party to “explain, with reasoned analysis supported by citations to legal authority and the record, why the party should prevail on appeal.” Utah R. App. P. 24(a)(8). “An issue is inadequately briefed if the argument merely contains bald citations to authority without development of that authority and reasoned analysis based on that authority.” *Bank of Am. v. Adamson*, 2017 UT 2, ¶ 11, 391 P.3d 196 (cleaned up). The duty to develop an argument belongs to the party; it “may not simply point toward a pile of sand and expect the court to build a castle.” *See Salt Lake City v. Kidd*, 2019 UT 4, ¶ 35, 435 P.3d 248. There is no “bright-line rule determining when a brief is inadequate,” but “an appellant who fails to adequately brief an issue will almost certainly fail to carry its burden of persuasion on appeal.” *Adamson*, 2017 UT 2, ¶ 12 (cleaned up).

¶57 Yvonne cites no authority in the portion of her opening brief alleging error in the trial court’s summary judgment decision. She does not engage with her burden under rule 56 of the Utah Rules of Civil Procedure or the elements of a fraudulent transfer claim. She instead insists that “when all reasonable inferences are viewed in the light most favorable to [her],” there is sufficient evidence to create a disputed issue of fact on the merits of her claim. But without explaining the substantive law, Yvonne cannot show that her alleged factual disputes are material. *See* Utah R. Civ. P. 56(a) (requiring no genuine dispute as to “any *material* fact” (emphasis added)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“As to materiality, the substantive law will identify which facts are material.”). Thus, Yvonne has not met her burden of persuasion. *Adamson*, 2017 UT 2, ¶ 12.

VI. Attorney Fees

¶58 Attorney fees are generally recoverable only if authorized by statute or contract. *Gregory & Swapp, PLLC v. Kranendonk*, 2018 UT 36, ¶ 47, 424 P.3d 897. Yvonne contends that she is entitled to attorney fees under the Marital Agreements and that the trial court erred in not awarding them to her. She does not, however, address all the bases for the trial court’s decision to deny her fees.

¶59 “Our rules of appellate procedure place the burden on the appellant to identify and brief any asserted grounds for reversal of the decision below.” *Kendall v. Olsen*, 2017 UT 38, ¶ 12, 424 P.3d 12. Accordingly, “we will not reverse a ruling of the district court that rests on independent alternative grounds where the appellant challenges [less than all] those grounds.” *Id.* (cleaned up).

¶60 The trial court gave three reasons for its decision denying Yvonne her attorney fees. First, it concluded that “the terms of the attorneys’ fee provision in the [Marital Agreements] do not

obviously apply to the dispute in this case.” Second, it concluded that Yvonne was not a prevailing party. Third, it concluded that Yvonne was not entitled to attorney fees because she had represented herself at trial. *See Total Restoration, Inc. v. Merritt*, 2014 UT App 258, ¶ 16 n.1, 338 P.3d 836 (explaining that pro se litigants are not entitled to attorney fees). Yvonne only briefly addresses the first two reasons; she does not address the third reason until her reply brief.

¶61 Yvonne’s failure to engage with the court’s reasoning until the reply brief is fatal. *Kendall*, 2017 UT 38, ¶ 13. Both the supreme court and this court “have consistently held that issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered.” *Id.* (cleaned up); *see Blanch v. Farrell*, 2018 UT App 172, ¶ 31 n.6, 436 P.3d 285. Because Yvonne did not challenge *all* the independent bases for the trial court’s decision to deny attorney fees in her opening brief, we will not reverse the trial court on this issue. *See Kendall*, 2017 UT 38, ¶¶ 12–13.

CONCLUSION

¶62 We conclude that none of the asserted errors Yvonne identifies require reversal. First, nothing in the unlawful detainer statute excuses Yvonne from paying damages to Frank based on the temporary orders issued approximately ten months after she was asked to quit the premises. Second, the trial court did not abuse its discretion in granting a new trial on damages in response to the parties’ briefing. Third, Yvonne has not shown prejudice from the trial court’s decision to give a ratification instruction. Fourth, Yvonne has not shown cumulative error in the trial court’s handling of certain evidentiary matters because none of the individual errors she points to conceivably affected the outcome of the unlawful detainer trial. Fifth, Yvonne has not met her burden of persuasion on her claim that the trial court mistakenly granted summary judgment on her fraudulent

transfer claim. Finally, Yvonne has not addressed all the bases for the trial court's denial of her motion for attorney fees and has accordingly placed that issue beyond appellate review. We therefore affirm.

CERTIFICATE OF MAILING

I hereby certify that on the 26th day of July, 2019, a true and correct copy of the attached OPINION was sent by standard or electronic mail to be delivered to:

KARTHIK NADESAN
NADESAN BECK PC
KARTHIK@NADESANBECK.COM

CAMERON J CUTLER
MCKAY BURTON & THURMAN
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R. STEPHEN MARSHALL
KEVIN PAULSEN
MARSHALL OLSON & HULL PC
smarshall@mohtrial.com
KPAULSEN@MOHTRIAL.COM

HONORABLE TODD M. SHAUGHNESSY
THIRD DISTRICT, SALT LAKE

THIRD DISTRICT, SALT LAKE
ATTN: JULIE RIGBY AND CHERYL AIONO
cheryla@utcourts.gov; julier@utcourts.gov

A handwritten signature in blue ink, appearing to read "Cheryl Aiono", is written over a horizontal line.

Judicial Secretary

TRIAL COURT: THIRD DISTRICT, SALT LAKE, 084902378
APPEALS CASE NO.: 20160265-CA

EXHIBIT B

FILED DISTRICT COURT
Third Judicial District

APR 29 2009

SALT LAKE COUNTY
BY _____ Deputy Clerk
DEPUTY CLERK

ST

Matthew A. Steward (#7637)
Sarah L. Campbell (#12052)
CLYDE SNOW & SESSIONS
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, Utah 84111-2216
Telephone (801) 322-2516
Facsimile (801) 521-6280

Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

YVONNE MARTIN,

Petitioner,

v.

PETTER KRISTENSEN,

Respondent.

**ORDER ON RESPONDENT'S
MOTION FOR TEMPORARY
ORDERS**

Civil No. 084902378

Judge: Robert Faust

Commissioner: Thomas N. Arnett, Jr.

Respondent's Motion for Temporary Orders came on regularly for hearing before Commissioner Thomas N. Arnett, Jr. on January 27, 2009. Petitioner Yvonne Martin was present and represented by Matthew A. Steward and Sarah L. Campbell. Respondent was present and represented by Lori W. Nelson. The Court considered the Motion, the papers filed in support and opposition to the Motion and the arguments of counsel. Based thereon it is hereby ordered, adjudged, and decreed as follows:

1. That Petitioner is to have temporary use and possession of the marital residence.

000771

2. That Petitioner is to attempt to locate Respondent's green card and passport and, if she can locate the same, they are to be returned through counsel.

3. That the parties shall exchange agreed upon personal property through counsel.

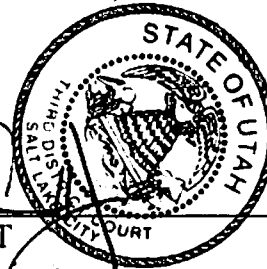
4. That the parties shall mediate the contested personal property. If the parties are unable to reach an agreement regarding the contested personal property then the issue is reserved for trial.

5. That both parties are restrained from harassing, harming, threatening, or bothering the other.

DATED this 28 day of April, 2009.

BY THE COURT:

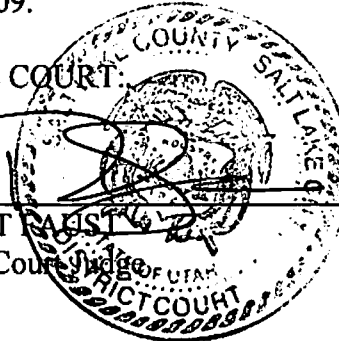

THOMAS N. ARNETT
District Court Commissioner



DATED this 29 day of April, 2009.

BY THE COURT:


ROBERT FAUST
District Court Judge



APPROVED as to form this ____ day of April 2009.

LORI W. NELSON
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April 2009, I caused a true and correct copy of the foregoing **ORDER ON MOTION FOR TEMPORARY ORDERS** to be hand-delivered to the following:

Lori W. Nelson
Jones Waldo Holbrook & McDonough
170 S. Main St., Suite 1500
Salt Lake City, UT 84101

Attorneys for Respondent

Kari J Peek

EXHIBIT C

FILED DISTRICT COURT
Third Judicial District

JUL 16 2009

SALT LAKE COUNTY

By SS Deputy Clerk

Matthew A. Steward (#7637)
Sarah L. Campbell (#12052)
CLYDE SNOW & SESSIONS
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, Utah 84111-2216
Telephone (801) 322-2516
Facsimile (801) 521-6280

Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

YVONNE MARTIN,

Petitioner,

v.

PETTER KRISTENSEN,

Respondent.

**ORDER AND JUDGMENT ON
PETITIONER'S MOTION FOR
TEMPORARY ORDERS**

Civil No. 084902378

Judge: Robert Faust

Commissioner: Thomas N. Arnett, Jr.

Petitioner's Motion for Temporary Orders came on regularly for hearing before Commissioner Thomas N. Arnett, Jr. on May 7, 2009. Petitioner Yvonne Martin was present and represented by Matthew A. Steward and Sarah L. Campbell. Respondent was present and represented by Lori W. Nelson. The Court heard argument and then took the matter under advisement. On June 19, 2009 the Court issued its Minute Entry Ruling. For the reasons set forth in the Court's Minute Entry Ruling the Court makes the following Order and Judgment.

001007

1. Alimony. The Respondent is ordered to pay the Petitioner temporary alimony in the amount of \$7,291 per month commencing May 1, 2009. The Respondent's obligation to pay Petitioner support prior to May 1, 2009 is a past due debt that is hereby reserved for the ultimate property distribution to be determined at the time of trial.

2. Use of Quicksilver Drive Residence. The Petitioner shall be entitled to the continued temporary use, occupancy and possession of the residence during the pendency of this action.

3. Attorney's Fees. The Petitioner is awarded her reasonable attorney's fees incurred in defending against the Respondent's Motion for Summary Judgment. The Petitioner's counsel shall submit an Affidavit of Attorney's Fees and separate order to the Court.

DATED this 13 day of July, 2009.

BY THE COURT:

Thomas N. Arnett

THOMAS N. ARNETT
District Court Commissioner

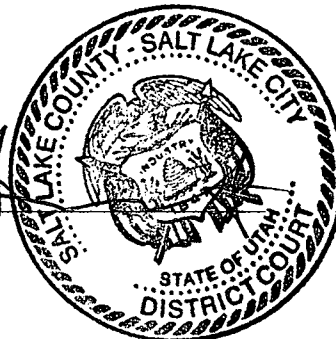


DATED this 16 day of July, 2009.

BY THE COURT:

Robert Faust

ROBERT FAUST
District Court Judge



APPROVED as to form this ____ day of July, 2009.

LORI W. NELSON
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June 2009, I caused a true and correct copy of the foregoing **ORDER AND JUDGMENT ON PETITIONER'S MOTION FOR TEMPORARY ORDERS** to be hand-delivered to the following:

Lori W. Nelson
Jones Waldo Holbrook & McDonough
170 S. Main St., Suite 1500
Salt Lake City, UT 84101

Attorneys for Respondent

Kari f Peck

EXHIBIT D

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

YVONNE MARTIN,	:	MINUTES
Petitioner,	:	TEMP RESTRAIN ORDER
	:	
vs.	:	Case No: 084902378 DA
PETTER KRISTENSEN,	:	Judge: JOHN PAUL KENNEDY
Respondent.	:	Date: June 5, 2012

Clerk: melbar

PRESENT

Petitioner's Attorney: STEPHEN K CHRISTIANSEN

Other Parties: JOHN W ANDERSON

Respondent(s): PETTER KRISTENSEN

Video

Tape Number: W-42 1:07 Tape Count: 2:03

HEARING

TIME: 1:09 PM On Record The Court, after hearing statements of counsel, and having read the documents as submitted, orders Respondent provide for the judgment entered on the unlawful detainer action, that Respondent make arrangements for comperable housing for the Pet

itioner, that Respondent provide unrestricted stock be changed, as stated on the record, that the eviction order be stayed until further order of the Court, and that counsel submit to the Court information regarding power of attorney for Defendant. Mr.

Christiansen is requested to prepare the order. Preliminary Injunction hearing is set on JUNE 13, 2012 at 2:00 P.M.

PRELIM INJUNCTION is scheduled.

Date: 06/13/2012

Time: 02:00 p.m.

Location: Fourth Floor - W42

THIRD DISTRICT COURT

450 SOUTH STATE

005336

Case No: 084902378 Date: Jun 05, 2012

SLC, UT 84114-1860


Before Judge: JOHN PAUL KENNEDY

005337

EXHIBIT E

FILED DISTRICT COURT
Third Judicial District

SEP 25 2012

SALT LAKE COUNTY
By 
Deputy Clerk

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE CITY DEPARTMENT

YVONNE MARTIN,

Petitioner,

vs.

PETTER KRISTENSEN,

Respondent.

**ORDER GRANTING PRELIMINARY
INJUNCTION**

Case No. 084902378

Judge John Paul Kennedy

THIS MATTER is before the Court on Petitioner Yvonne Martin's (Yvonne) Motion for Preliminary Injunction and Respondent Petter Kristensen's (Petter) Motion to Vacate Temporary Restraining Order and Dismiss Motion for Preliminary Injunction. The Parties have briefed the issues and the Court conducted an evidentiary hearing on August 1-2, 2012, before taking the motions under advisement. Having reviewed the evidence and considering the arguments of counsel, the Court issues the following Order.

By way of background, the present case is a divorce proceeding between Yvonne and Petter, who lived in a home (the Home) that they owned together. In 2004, Yvonne conveyed her interest in the Home to Petter's father Frank Kristensen (Frank). Yvonne and Petter continued to live in the Home.

005968

In May 2008, Yvonne initiated the instant divorce proceeding. Soon thereafter, in July 2008, Petter's father, Frank Kristensen (Frank), brought an eviction action against Yvonne.¹ In response, Yvonne filed a quiet title action against both Petter and Frank, alleging that Petter had coerced her into conveying her interest in the Home to Frank.

In July 2009, Judge Faust entered an order (the First Order) in the instant action before any decisions were rendered in the property actions. In the First Order, Judge Faust ruled, *inter alia*, that Yvonne is entitled to stay in the Home during the pendency of the divorce proceedings.

After the First Order was issued, a jury found in the quiet title action that Yvonne was not coerced by Petter into conveying her interest in the Home to Frank. Following the jury verdict, Judge Shaughnessy conducted a bench trial in the eviction action. Judge Shaughnessy determined that Frank was the rightful owner of the Home and that Yvonne had lived in the Home unlawfully since July 2008. Judge Shaughnessy entered an order (the Second Order) requiring Yvonne to vacate the Home by June 7, 2012, and to pay restitution plus attorney's fees to Frank.

On June 5, 2012, this Court granted Yvonne a temporary restraining order (the TRO) that allowed Yvonne to stay in the Home until the Court could determine how to

¹ Frank lives overseas. Petter has a power of attorney to act on behalf of Frank in the United States. Yvonne suspects that Petter initiated the eviction action under Frank's name as a way to retaliate against her.

deal with the apparently inconsistent orders. The TRO also made Petter responsible for the judgment entered in the eviction action.

On June 13, 2012, this Court entered another order staying the eviction until further order. Also on June 13, 2012, Judge Shaughnessy entered an order that would allow Yvonne to stay in the Home only if she secured a bond in the amount of \$125,000 by 5:00 p.m. that day.

The eviction action is now up on appeal. And pending before this Court are cross motions regarding Yvonne's request for a preliminary injunction.

At the hearing, Yvonne presented evidence that Petter is using the power of attorney purportedly signed by Frank to exercise unlimited control over Frank's assets in the United States, including signing checks in Frank's name on Frank's checking account to provide funds for Petter's own benefit. Evidence indicated that Frank is now largely incapacitated and incapable of making his own financial decisions. Yvonne presented evidence that Petter uses the power of attorney to spend Frank's money when it suits him, but hides behind his own proclaimed indigence when creditors come calling.

It is undisputed that Petter has not paid any marital support since it was ordered in the First Order. Moreover, the evidence showed and this Court found that Petter has violated the TRO by arranging for Yvonne's eviction from the Home. Because of this, Yvonne faces the prospect of being homeless and without the financial support from Petter that was ordered in the First Order.

Rule 65A(e) of the Utah Rules of Civil Procedure sets forth the elements required for a preliminary injunction to issue:

- (1) The applicant will suffer irreparable harm unless the order or injunction issues;
- (2) The threshold injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined.
- (3) The order or injunction, if issued, would not be adverse to the public interest; and
- (4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

Utah R. Civ. P. 65A(e); *Water & Energy Sys. Tech., Inc. v. Keil*, 1999 UT 16, ¶ 7, 974 P.2d 821.

The Court determines that, based on the factors set forth above, Yvonne is entitled to a preliminary injunction enjoining Petter from interfering with her right to remain in the Home pursuant to the First Order. If Yvonne is removed from the Home, Petter must provide a suitable replacement accommodation. Petter is enjoined from taking any action – pursuant to the power of attorney or otherwise – to collect on the judgment entered in the eviction action. Further, if anyone else attempts to collect on the judgment in the eviction action, and because Petter has failed to pay the \$7,291 per month in temporary alimony and because Petter has the discretion and power to pay even his own personal debts from

his father's funds, Petter must pay the judgment for Yvonne.² Petter remains obligated to provide Yvonne with marital support during the pendency of the divorce proceeding. Until his prior support obligations are paid, Petter is also enjoined from approving the sale or transfer of any stock in Steel Resources. The preliminary injunction will remain in effect until further order of this Court.

After the appeal in the eviction action is resolved, and depending on the outcome, the Court will consider consolidating the eviction action with the divorce action. At that time, the Court may also consider any post-judgment motions (e.g., Utah R. Civ. P. 60(b) or Utah R. Civ. P. 59) that the Parties may want to file in the consolidated case.

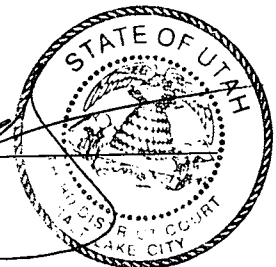
Based on the foregoing, Yvonne's Motion for Preliminary Injunction is GRANTED and Petter's Motion to Vacate Temporary Restraining Order and Dismiss Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

DATED this 25 day of September, 2012.

BY THE COURT:


John Paul Kennedy
DISTRICT JUDGE



² The judgment accrued because Petter failed to meet his obligations under the First Order. It would be inequitable for Petter to ignore the First Order and, at the same time, allow him to collect on a debt that his actions allowed to accrue.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 084902378 by the method and on the date specified.

MAIL: JOHN W ANDERSON 881 W BAXTER DR SOUTH JORDAN, UT 84095

MAIL: STEPHEN K CHRISTIANSEN 36 S STATE ST STE 1900 SALT LAKE
CITY UT 84111-1478

Date: 09/25/2012 _____

/s/ MELBA T ROBERTS _____

Deputy Court Clerk