

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.

Karthik Nadesan
NADESAN BECK P.C.
Attorney for Petitioner
8 East Broadway, Suite 625
Salt Lake City, Utah 84111

R. Stephen Marshall
Kevin M. Paulsen
MARSHALL OLSON & HULL
*Attorneys for Appellees Petter
Kristensen and Frank O. Kristensen*
10 Exchange Place, Suite 350
Salt Lake City, Utah 84111

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*

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 7

A. FACTUAL BACKGROUND 7

B. PROCEDURAL HISTORY 8

SUMMARY OF THE ARGUMENT 14

ARGUMENT 16

I. YVONNE WAS NOT IN UNLAWFUL DETAINER DURING THE TIME PERIOD WHEN SHE WAS IN POSSESSION OF QUICKSILVER PURSUANT TO COURT ORDER 17

II. THE ORDERS IN THE DIVORCE PROCEEDINGS WERE BINDING ON FRANK 21

III. AN ORDER ENTERED IN THE DIVORCE PROCEEDING COULD AFFECT THE REMEDY AVAILABLE IN THE UNLAWFUL DETAINER PROCEEDING 24

IV. THE UNLAWFUL DETAINER STATUTE DOES NOT AUTHORIZE TREBLE DAMAGES DURING THE PERIOD OF COURT ORDERED TEMPORARY POSSESSION 26

CONCLUSION 29

CERTIFICATE OF COMPLIANCE 29

CERTIFICATE OF SERVICE 30

APPENDIX 31

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

TABLE OF AUTHORITIES

CASES

<u>Aris Vision Institute, Inc. v. Wasatch Property Management, Inc.</u> , 2005 UT App 326	4, 6
<u>Bichler v. DEI Systems Inc.</u> , 2009 UT 63, 220 P.3d 1203	17, 27
<u>Brigham Young University v. Tremco Consultants, Inc.</u> , 2005 UT 19, 110 P.3d 678	23
<u>Butler v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints</u> , 2014 UT 41, 337 P.3d 280	23
<u>Dep't of Soc. Servs. v. Vijil</u> , 784 P.2d 1130 (Utah 1989)	5
<u>Iota LLC v. Davco Mgmt. Co.</u> , 2016 UT App 231	17
<u>Johnson v. Johnson</u> , 560 P.2d 1132 (Utah 1977)	25
<u>Kunz & Co. v. State</u> , 913 P.2d 765, 768-770 (Utah 1989)	5
<u>Maness v. Meyers</u> , 419 U.S. 449 (1975)	17
<u>Martin v. Kristensen</u> , 2019 UT App 127	3, 12, 13, 19, 23, 24, 26
<u>Osguthorpe v. Wolf Mountain Resorts, LC</u> , 2010 UT 29, 232 P.3d 999 (Utah 2010)	17, 19, 27
<u>Peterson v. Peterson</u> , 530 P.2d 821 (Utah 1974)	25
<u>State v. Harmon</u> , 910 P.2d 1196 (Utah 1995)	4, 5, 6
<u>State v. Norris</u> , 2002 UT App. 305, 7 P.2d 238	23
<u>Ute-Cal Land Development v. Intermountain Stock Exchange</u> , 628 P.2d 1278 (Utah 1981)	13, 18, 19

STATUTES AND RULES

UTAH CODE § 78B-6-801 17

UTAH CODE §78B-6-802 1

UTAH CODE § 78B-6-810 19, 26

UTAH CODE § 78B-6-811 26

UTAH R. CIV. P. 64C 19

OTHER AUTHORITIES

A Dictionary of Modern Legal Usage (2d ed. 1995) 17

American Heritage Dictionary (4th ed. 2006) 17

Black's Law Dictionary (8th ed. 2004)..... 17

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 is would most likely relinquish possession of the premises rather 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 avoiding 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
MARSHALL OLSON & HULL
Attorneys for Appellee Frank O. Kristensen
10 Exchange Place, Suite 350
Salt Lake City, Utah 84111

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