

SEP 21 2020

IN THE SUPREME COURT OF THE STATE OF UTAH

YVONNE MARTIN,

Petitioner,

v.

FRANK O. KRISTENSEN,

Respondent.

Appellate Case No. 20190797-SC

REPLY BRIEF OF PETITIONER

Pursuant to Utah Rule of Appellate Procedure 51, Petitioner Yvonne Martin (“Martin”) hereby submits her reply brief in support of her petition to 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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INTRODUCTION

When the district court in the Divorce Proceeding granted Yvonne temporary possession of Quicksilver, it transformed her possession of Quicksilver from unlawful to lawful. As a result, the temporary orders also terminated Yvonne’s liability for unlawful detainer because Yvonne was no longer an at-will tenant who remained in possession after receiving a notice to vacate. Instead, Yvonne was a tenant in lawful possession pursuant to the terms of the temporary orders. And once Yvonne became a tenant in lawful possession, damages resulting from unlawful detainer could not continue to accrue. For this reason, the Court of Appeal’s decision affirming the award of treble damages during the time that Yvonne was in possession pursuant to the court orders must be reversed.

ARGUMENT

I. THE ISSUES RAISED BY YVONNE’S BRIEF ARE ENCOMPASSED BY THE GRANT OF CERTIORARI.

The issues argued in Yvonne’s opening brief fall within the scope of this Court’s order granting certiorari. This Court granted certiorari on the issue of “[w]hether 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.” 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 affect 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. In her opening brief, Yvonne addressed all four of the Court of Appeals' reasons for affirming the district court.

However, in Respondent's Brief, Frank argues that the issues of whether the order in the Divorce Proceeding was binding on Frank and whether the order in the Divorce Proceeding could affect the remedy available in the Unlawful Detainer Proceeding are outside the scope of this Court's review. Frank provides no explanation for why he believes these two issues are not subsumed by the overarching issue on which the Court granted certiorari. However, if these issues are not within the scope of review, this Court can hold that the Court of Appeals erred in affirming unlawful detainer damages regardless of whether the district court in the Divorce Proceeding had the authority to adjudicate Frank's rights or the Divorce Proceeding and the Unlawful Detainer Proceeding were separate court proceedings. In other words, Frank argues that these two sub-issues should be ignored by this Court in determining whether the Court of Appeals erred. Yvonne has no objection to this Court holding that these issues are outside of the scope of its certiorari so long as it is still able to determine that the Court of Appeals erred in awarding unlawful detainer damages during the time Yvonne was in possession of Quicksilver pursuant to court order. However, Yvonne suspects that the Court cannot reverse the Court of Appeals without addressing all of the arguments set forth in the Court of Appeals decision. As a result, all of the issues raised in Yvonne's opening brief were authorize by the grant of certiorari.

II. THE TEMPORARY COURT ORDERS TRANSFORMED YVONNE'S POSSESSION OF QUICKSILVER TO A LAWFUL POSSESSION AND THUS TERMINATED UNLAWFUL DETAINER DAMAGES.

A. *Yvonne's Argument Does Not Rely on the 2009 Amendment to the Unlawful Detainer Statute.*

The termination of unlawful detainer damages once Yvonne obtained lawful possession of Quicksilver is supported by this Court's prior case law on unlawful detainer, not the legislature's amendment of the unlawful detainer statute in 2009. In Respondents' Brief, Frank argues that the definition of unlawful detainer as the "unlawful possession" of property by a tenant had not yet been adopted at the time Frank filed the Unlawful Detainer Proceeding and is therefore inapplicable. See Respondent's Br. at 12-14. However, Yvonne's argument that the lawful possession of real property pursuant to a court order cannot be an unlawful detention is not a statutory argument. Instead, this argument is based on Utah's historic definition of unlawful detention.

Significantly, the definition of unlawful detainer set forth in the 2009 amendment of the unlawful detainer statute is simply a codification of the status quo, not a material change to the law. The 2009 amendment itself was adopted to prevent a previous owner, mortgagor, or trustor who remained in possession after a foreclosure from claiming to be an at-will tenant subject to the notice provisions of the unlawful detainer statute. See Recordings of Utah House Floor Debates, H.B. 299, 58th Leg., Gen. Sess. (March 12, 2009 at Recording 2, 0:27); Recordings of Utah Senate Floor Debates, H.B. 299, 58th Leg., Gen. Sess. (March 11, 2009 at Recording 2, 3:52).¹ The amendment was not intended to affect any other provision of the unlawful detainer statute or change the law applicable to non-owner tenants. Id. As a result, the added definition simply clarified the already existing law applicable to non-owner tenants. In fact, the bedrock legal principal that liability for unlawful detainer requires "unlawful possession" has been enshrined in Utah law since at

¹ <https://le.utah.gov/av/floorArchive.jsp?markerID=62242>;
<https://le.utah.gov/av/floorArchive.jsp?markerID=6208>.

least 1944. Thus, in Carstensen v. Hansen, this Court held that “[t]he basis of a suit in unlawful detainer is unlawful possession, and a tenant ... is not holding unlawfully until he fails to comply with the demands of a notice which has been properly served on him.” 152 P.2d 954 (Utah 1944).² As a result, it is irrelevant that the definition of unlawful detainer was included as part of the 2009 amendment to the unlawful detainer statute because that definition is not novel. Instead, the definition and the resulting holding that a lawful possessor cannot be liable for unlawful detainer was adopted by Utah courts more than fifty years before being codified into the unlawful detainer statute.

B. The Temporary Orders Transformed Yvonne’s Possession.

Yvonne could not have been unlawful detainer after the district court granted her lawful possession of Quicksilver because her lawful possession terminated her unlawful detainer. Frank argues that once Yvonne remained at Quicksilver after receiving the notice to vacate, she became liable for unlawful detainer and resulting damages continued to accrue so long as she was in possession of Quicksilver. See Respondent’s Br. at 14-17. Frank claims this is so because the only way to terminate unlawful detainer liability under the statute is to relinquish possession. Id. However, while there is no dispute that damages continue to accrue so long as a tenant is in unlawful detainer, the unlawful detainer statute is silent as to whether relinquishment of possession is a way to end unlawful detainer liability, let alone whether relinquishment is the sole way to end unlawful detainer liability. Instead, one must harmonize the statute to infer when damages resulting from unlawful detainer terminate.

² It should also be noted that unlawful detainer is a continuing tort. A tenant remains in unlawful detainer so long as they remain on the premises unlawfully. Therefore, while a substantive amendment to the unlawful detainer statute would not apply retroactively to past liability, it would apply to a tenant’s continuing liability. See State v. Clark, 2011 UT 23, ¶ 13, 251 p.3d 829 (holding that “we apply the law as it exists at the time of the event regulated by the law in question”).

Frank relies almost entirely on his interpretation of the unlawful detainer statute in arguing that the order in the Divorce Proceeding did not terminate Yvonne's unlawful detainer liability. In other words, Frank does not argue that the court order in the Divorce Proceeding could not transform Yvonne's possession into a lawful one. Instead, he argues that even if Yvonne's possession was lawful, unlawful detainer liability continued because Yvonne remained in possession after receiving a notice to vacate. Looking at Frank's argument this way is reasonable because there can be little dispute that the court orders from the Divorce Proceeding bore the force of law. And as a logical corollary, there can be little dispute that Yvonne's possession of Quicksilver pursuant to those court orders was lawful. Therefore, Frank's true argument is that, once Yvonne became liable for unlawful detainer, her liability could not be extinguished and damages continued to accrue until possession of Quicksilver was relinquished, irrespective of whether Yvonne subsequently came into lawful possession.

However, by arguing that the only way to terminate liability is by relinquishing possession, Frank advocates adoption of an unreasonable and inequitable interpretation of unlawful detainer liability. There are any number of events that should terminate continuing damages for unlawful detainer. For example, an at-will tenant may initially become liable for unlawful detainer because they remain in possession after receiving a notice to vacate. However, if that tenant were to subsequently enter into a lease agreement with the property owner that allowed him to stay in the property, the lease should transform his possession to a lawful one and terminate his unlawful detainer liability. And if the term of the new lease started retroactively – prior to the tenant receiving the notice to vacate – his unlawful detainer liability should be eliminated completely. Or if the lease term started after he was in unlawful detainer, the tenant should only be liable for unlawful detainer damages from when the unlawful detainer started until the new lease term began. Alternatively, the property owner could change their mind and withdraw their notice to vacate and authorize the tenant to remain in possession. Such an action would restore the

tenant to lawful possession and should render the tenant's initial unlawful detainer liability void ab initio. But, under Frank's proffered interpretation of the statute, whether the tenant later gained lawful possession – through the lease agreement or withdrawal of the notice to vacate – is irrelevant. Instead, once in unlawful detainer, the tenant would continue to accrue damages so long as he remained in possession. Such a result is both unjust and nonsensical.

Instead, it is more reasonable to interpret the unlawful detainer statute as limiting unlawful detainer damages to the period of time when the tenant is unlawfully possessed of the property. Once the tenant's possession transforms from unlawful to lawful or the tenant relinquishes the unlawful possession, their liability for unlawful detainer terminates. This is because, in both circumstances, the elements for liability under the unlawful detention statute are no longer met. Once an at-will tenant who holds over after a notice to vacate enters into a lease, the tenant is no longer an at-will. Instead, he is a tenant pursuant to the terms of the lease agreement. And those provisions of the unlawful detainer statute imposing unlawful detainer liability on at-will or hold over tenants are no longer applicable. Similarly, if the notice to vacate is withdrawn by the landlord, the requirement that the at-will tenant remain in possession after service of a notice to vacate can no longer be met. In Yvonne's case, once she was granted possession pursuant to a court order, the nature of Yvonne's possession transformed. Yvonne was no longer an at-will tenant who had remained in possession after service of a notice to vacate. Instead, Yvonne was a tenant in possession pursuant to the terms of the court order. And, just as liability for unlawful detainer can be terminated through contractual agreement, revocation (or even waiver), Yvonne's continuing liability for unlawful detainer ended once the temporary orders made her possession lawful.

Yvonne's interpretation better harmonizes this Court's holding in Ute-Cal Land Development v. Intermountain Stock Exchange, 628 P.2d 1278 (Utah 1981). In Ute-Cal, there was no transformation of the tenant's possession from unlawful to lawful. 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). Therefore, while the tenant in Ute-Cal was prohibited from removing their personal property from the premises by a writ of attachment, the writ did not grant the tenant the right to remain in possession of the premises or otherwise transform their unlawful possession into a lawful one. In other words, it was not the timing of the writ of attachment in Ute-Cal that was important, but whether the writ granted the tenant the right to lawful possession. Even if the writ prohibited the tenant in Ute-Cal from removing personal property because it was subject to execution after judgment, the tenant still met the elements for unlawful detainer liability. Nor did the writ prevent the tenant from relinquishing possession of the premises, with the tenant’s personal property still inside, to the property owner.

In addition, one of Frank’s own arguments supports Yvonne’s interpretation of the unlawful detainer statute. In her opening brief, Yvonne pointed out that a property-owning spouse could abuse the unlawful detainer statute and try to hold the non-owning spouse in unlawful detainer as leverage in the divorce proceedings. In his brief, Frank claims this is not possible because the property would be subject to the district court’s equitable jurisdiction in the divorce proceedings. See Respondent Br. at 29. However, there is no express exception in the unlawful detainer statute for an at-will tenant to avoid unlawful possession based on the equitable jurisdiction of the district court in separate divorce proceedings. Instead, under Frank’s interpretation of the statute, if the non-owner spouse, who Frank claims is a tenant at-will, refused to relinquish possession after receiving a notice to vacate, she would be in unlawful detainer. And even if the district court in the divorce proceeding exercised its equitable discretion and granted the non-owner spouse temporary possession, that spouse would continue to accrue unlawful detainer damages until she gave up possession. The only way to avoid this would be to interpret the equitable order from the divorce proceedings as granting the non-owner spouse temporary lawful

possession and therefore terminating the spouse's unlawful detainer. Which is exactly what Yvonne is asking this Court to do.

C. Public Policy Favors Yvonne's Interpretation.

Contrary to Frank's arguments, public policy favors terminating unlawful detainer damages once a tenant's possession becomes lawful. In his brief, Frank argues that it would be contrary to public policy for court-ordered temporary possession to provide a "safe harbor" from unlawful detainer liability because treble damages are "severe remedy ... necessary to make up for depriving the landlord of use and enjoyment of its property." See Respondent Br. at 29. Yet the harshness of treble damages is exactly why court-ordered possession must be interpreted as creating a safe harbor – to prevent abuse of the unlawful detainer statute by landlords. Absent such a safe harbor, a landlord who wanted to evict a tenant, despite having no legal right to do so, could follow the procedures of the unlawful detainer statute, knowing that the most tenants would vacate rather than risk treble damages. Even a tenant with an objectively meritorious defense – one that would almost certainly prevail at trial – would still likely relinquish possession than risk the severe remedy of treble damages in the unlikely event they lost at trial. And, once a tenant vacates and finds a new residence, he is unlikely to spend the legal fees needed to regain possession of the property he just vacated. However, the tenant's risk calculus changes if he obtains an order of temporary possession from the district court, based on the district court's own evaluation of the merits of the tenant's defense, and the order shields the tenant from accrual of treble damages pending trial. With a "safe harbor" order, if the tenant prevailed at trial, he would not be liable for any damages. And if he lost at trial, despite the district court's initial evaluation that he would prevail, he would only be liable for rent from the date of the temporary possession order and treble damages from the date he first became

in unlawful detainer through the date of court-ordered temporary possession. His potential damages would be far more limited.

Furthermore, because a district court would only order temporary possession if it believed that the tenant was likely to prevail on the objective merits (as was the case in the Divorce Proceeding), allowing such an order would not encourage tenants to delay or undermine the landlord's ability to obtain a speedy remedy. If a tenant did not have an objectively meritorious defense, the district court would not grant the tenant temporary possession in the first place and the tenant would continue to accrue unlawful detainer damages until trial. And if the tenant had an objectively meritorious defense, he would have little reason to fear trial or seek trial.

III. 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. In his brief, Frank argues that Yvonne failed to preserve this argument. This is not correct. It is undisputed that while the commissioner in the Divorce Proceedings recommended that Frank be dismissed, no order of dismissal was prepared by Frank (as requested by the commissioner) or entered. And, when the district court in the Divorce Proceeding awarded Yvonne temporary possession, Frank appeared in the Divorce Proceeding and joined Petter in filing a petition for extraordinary and emergency relief asking that the temporary restraining order be vacated. (R. 5395, 5431-87). When the petition was denied by the Court of Appeal because “[c]laims regarding the divorce court’s lack of authority to enter orders affecting ... possession of the Quicksilver residence ... must be raised in the proceedings [below],” Frank did nothing. (R. 5723-25). And when the district court subsequently entered a preliminary injunction preventing enforcement of the order of restitution entered in the Unlawful Detainer Proceeding, Frank abided by the preliminary

injunction and did not seek to enforce the order of restitution. (R. 5968-73). In other words, Frank acted as if he were bound by the orders from the Divorce Proceeding. And, 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). Therefore, even if Frank had, in fact, been dismissed as a party to the Divorce Proceeding, there is no dispute that he was a party to the consolidated proceeding and therefore bound by all orders entered after consolidation.

Just as importantly, neither the district court in the Unlawful Detainer Proceeding nor the district court in the Divorce Proceeding ruled that Frank was not bound by the orders granting Yvonne temporary possession. To the contrary, the judges in both cases believed that Frank was, in fact, bound by the orders in the Divorce Proceeding. (R. 5336-37; 2nd Supp. R. 2418:7; 2nd Supp. R. 2419:1; 2nd Supp. R. 2426:264). Therefore, contrary to Frank's argument, there was nothing for Yvonne to preserve. All of the district courts acted as if Frank was bound by the temporary orders. The burden was on Frank to ensure that he was properly dismissed from the Divorce Proceeding and to preserve any argument that the temporary orders did not bind him. Frank failed to do so.

IV. THE ORDER ENTERED IN THE DIVORCE PROCEEDING AFFECTED THE REMEDY AVAILABLE IN THE UNLAWFUL DETAINER PROCEEDING.

Because it transformed Yvonne's possession from unlawful to lawful, the temporary orders in the Divorce Proceeding affected the availability of unlawful detainer damages in the Unlawful Detainer Proceeding. As Yvonne has explained *supra*, once her possession of Quicksilver became lawful, she was no longer in unlawful detention. Nonetheless, Frank argues that "[t]he temporary orders gave her possession but did not excuse her from liability for damages to Frank as the owner of the Property." See Respondent Br. at 37. But this is exactly what happened. Once Yvonne was granted lawful possession of

Quicksilver in the Divorce Proceeding, the availability of unlawful detainer damages in the Unlawful Detainer Proceeding was curtailed. And significantly, the judges in the Unlawful Detainer deferred to the orders from the Divorce Proceedings in deciding whether an order of restitution could be enforced. (2nd Supp. R. 2418:7; 2nd Supp. R. 2419:1; 2nd Supp. R. 2426:264). As a result, the order granting lawful possession also affected whether Yvonne remained in unlawful detainer and the types of damages available in the Unlawful Detainer case. Nor is this unusual, under principals of comity and issue preclusion, a ruling in one case can affect underlying facts in another case. For example, an order quieting title in one case would affect whether specific performance (transfer of the real property involved in the first case) was available in a second case. If a party lost title to the property in the quiet title act, the remedy of specific performance would no longer be available.

V. THE UNLAWFUL DETAINER STATUTE DOES NOT AUTHORIZE TREBLE DAMAGES DURING COURT-ORDERED TEMPORARY POSSESSION.

The unlawful detainer statute does not authorize treble damages during court-ordered temporary possession. Both Frank, the district court, and the Court of Appeals assumed that unlawful detainer damages continue accruing while a tenant has court-ordered temporary possession. But the unlawful detainer statute contains no language to this effect. Instead, the statute differentiates between different types of damages – rent, reasonable attorney fees, and damages recoverable under Subsections 78B-6-811(2)(a) through (e). See UTAH CODE § 78B-6-811(3). And those subsections expressly identify damages resulting from unlawful detainer as a distinct and separate category of damages. Id. at § 78B-6-811(2)(b). Only the category of damages available under Subsection (2), as opposed to ordinary rent, are trebled. Id. at § 78B-6-811(3). Therefore, contrary to Frank’s argument, the question is not “whether any damages can be awarded.” See Respondent’s Br. at 39. Instead, the question is whether damages resulting from unlawful detainer can accrue when a tenant is in lawful possession pursuant to a court order.

And Frank’s own examples show that treble damages for unlawful detainer are not available when a tenant is awarded temporary lawful possession. Section 78B-6-808 specifies “alternate remedies and procedures” applicable to an action if the plaintiff files a possession bond. Id. at § 78B-6-808(4). Specifically, Frank points out that “[i]f the tenant remains in possession through posting a bond, under subsection 78B-6-808(4)(b)(vi), the bond must be sufficient to cover “actual damages.” See Respondent’s Br. at 41. However, “actual damages” are not treble damages. Similarly, the alternate remedies include dismissal of the complaint if the tenant “pays accrued rent, all other amounts due, and other costs, including attorney fees, **as provided in the rental agreement.**” Id. at § 78B-6-808(4)(a). Again, this alternate remedy does not provide for treble damages. Therefore, once Section 808 is harmonized with the entirety of the statute, including the alternate remedies, it becomes clear that there is no statutory basis for the Court of Appeal’s inference that unlawful detainer damages continue to accrue during the period of court-ordered temporary possession. To the contrary, as with possession pursuant to bond or payment of rent, the only damages that accrue during court-ordered possession is rent.

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 21st day of September, 2020.

Nadesan Beck P.C.

/s/ Karthik Nadesan

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Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that the word count of this brief (1) complies with the 7,000-word limit set forth in Utah Rule of Appellate Procedure Rule 24(g) for a reply brief and (2) complies with Utah Rule of Appellate Procedure 21 because it does not contain any non-public information.

/s/ Karthik Nadesan

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2020, a true and correct copy of the foregoing was emailed to the following:

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