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**IN THE UTAH SUPREME COURT**

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YVONNE MARTIN,

Appellant,

vs.

PETTER KRISTENSEN AND FRANK  
O. KRISTENSEN,

Appellees.

**BRIEF OF APPELLEES PETTER  
KRISTENSEN AND FRANK O.  
KRISTENSEN**

Case No. 20190797-SC

District Court Case No. 084902378

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**APPEAL FROM DECISION OF THE UTAH COURT OF APPEALS**

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**LIST OF PARTIES TO THE PROCEEDINGS**  
**BEFORE THE DISTRICT COURT**

**Divorce Case (Civil No. 084902378)**

Petitioner                                Yvonne Martin (“Yvonne”)

Respondent                                Petter Kristensen (“Petter”)

**Unlawful Detainer Case (Civil No. 080915565)**

Plaintiff                                    Frank Kristensen (“Frank”)

Defendant                                Yvonne

**Quiet Title Case (Civil No. 090908199)**

Plaintiff                                    Yvonne

Defendants                                Frank  
    Petter

**Fraudulent Transfer Case (Civil No. 120900834)**

Plaintiff                                    Yvonne

Defendants                                Petter  
    Frank  
    Kimberly Stevens



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## **I. INTRODUCTION.**

This action arises out of a dispute between Petter Kristensen (“Petter”) and Yvonne Martin (“Yvonne”), who were formerly married, and between Yvonne and Petter’s father, Frank Kristensen (“Frank”).<sup>1</sup> Four separate actions were filed between them in the district court, which were ultimately consolidated. Prior to consolidation, in the Divorce Action, Judge Kennedy awarded temporary possession of the family home (the “Property”) to Yvonne, who remained in the home for approximately seven years. The residence was owned by Frank. Frank commenced the Unlawful Detainer Action against Yvonne to evict her and to regain possession. Although he was ultimately successful in regaining possession, it took approximately seven years. The district court awarded unlawful detainer damages against Yvonne, which were trebled pursuant to Utah Code § 78B-6-811(3) (2008). Yvonne appealed from that award. The Utah court of appeals affirmed. *Martin v. Kristensen*, 2019 UT App 127, 450 P.3d 66 (“*Martin*”).

This court granted certiorari on a single 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.

The court of appeals’ ruling on this issue should be affirmed. The temporary orders in the Divorce Action awarding temporary possession to Yvonne did not excuse her from paying unlawful detainer damages in the event she was eventually evicted from the

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<sup>1</sup> To distinguish between parties with the same last name, Petter Kristensen and Frank Kristensen are referred to in this brief by their first names. In addition, since Yvonne referred to herself by her first name in her brief, that convention is continued in this brief. No disrespect is intended by the apparent informality.

property under the unlawful detainer statute. Because she failed to vacate the Property within five days after receiving Frank's notice to vacate, she was in unlawful detainer under Utah Code § 78B-6-802(1)(b)(ii) (2008). Although the district court in the Divorce Action allowed her to remain in the Property, she did so under the risk that she would eventually be evicted and required to pay treble damages. Because unlawful detainer damages must be trebled under Utah Code § 78B-6-811(3) (2008), the district court in the Unlawful Detainer Action had no discretion not to treble the damage award.

The court of appeals analyzed the statutory framework and the public policy underlying the unlawful detainer statute and affirmed the district court's ruling. Yvonne has not met her burden in her brief to this court of showing that the court of appeals erred. This court should affirm the decision of the court of appeals.

## **II. ISSUES PRESENTED FOR REVIEW**

In its order dated December 6, 2019, granting Martin's petition for writ of certiorari, the Court granted the petition only with respect to 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.

Standard of Review: The issue of whether a party is liable for unlawful detainer presents a mixed question of law and fact. *See Aris Vision Institute, Inc. v. Wasatch Property Management, Inc.*, 2005 UT App 326, ¶ 16, 121 P.3d 24. "Matters of statutory construction are questions of law that are reviewed for correctness." *Id.* (internal citation omitted). "Questions of fact are reviewed under the clearly erroneous standard, with deference given to the trial court." *Id.* (internal citation omitted).

### **III. STATEMENT OF THE CASE**

#### **A. STATEMENT OF FACTS.**

##### **The Purchase and Transfer of the Property to Frank**

Yvonne Martin (“Yvonne”) and Petter Kristensen (“Petter”) were married in 1995. [R. 17]. They resided in a home located at 7668 Quicksilver Drive (the “Property” or the “Quicksilver home”), which was purchased in 1999 and titled in Yvonne’s name. [2nd Supp. R. 2425, Tr. 44:3–10]. Petter’s father, Frank Kristensen, contributed \$58,000 to the purchase of the Property. [2nd Supp. R. 2425, Tr. 43:3–4]. Ruth Anderson (Petter’s grandmother) contributed \$30,000, and Petter contributed approximately \$11,000–\$12,000 to the purchase. [2nd Supp. R. 2425, Tr. 258:1–261:5]. Yvonne did not contribute any cash to the purchase of the Property. [See 2nd Supp. R. 2425, Tr. 258:1–261:5]. Yvonne obtained a mortgage of \$210,000 to cover the rest of the purchase price. [2nd Supp. R. 2425, Tr. 44:11–22]. Considering his contribution to the purchase, Yvonne agreed to give Frank half the proceeds of any subsequent sale of the Property. [2nd Supp. R. 2425, Tr. 113:21–114:24].

From the time of the Property’s purchase through 2003, Petter made monthly payments to Yvonne to cover the mortgage on the Property. [2nd Supp. R. 2425, Tr. 267:17–25]. During this time, the mortgage on the Property was reduced to approximately \$170,000. [2nd Supp. R. 2425, Tr. 46:15–47:20]. In 2003, Yvonne re-financed the Property without informing Petter or Frank. [2nd Supp. R. 2425, Tr. 280:3–281:13]. Yvonne received over \$80,000 from the re-finance, which she kept for herself. [2nd Supp. R. 2425, Tr. 48:8–25]. As a result of the re-finance, the mortgage on the

Property increased to \$260,000. [2nd Supp. R. 2425, Tr. 49:1–3].

In early 2004, Petter proposed a solution to the Property’s financing issues to Yvonne. [2nd Supp. R. 2425, Tr. 293:19–295:9]. Frank would pay off the \$260,000 mortgage, Yvonne would transfer ownership of the Property to Frank, and Yvonne would be able to keep the \$80,000 she received from the re-finance. *Id.* Yvonne accepted the proposal and executed a quitclaim deed of the Property to Frank. [2nd Supp. R. 2425, Tr. 155:17–156:2].

In 2008, Yvonne filed for divorce. [R. 1–5]. Thereafter, Frank served a notice to vacate the Property on Yvonne. [2nd Supp. R. 4]. Yvonne refused to vacate and retained possession of the Property until October 2015. [R. 12583–85]. The district court in the divorce case issued a temporary restraining order and, later, a preliminary injunction, allowing Yvonne to remain in the Property. [R. 5336–37, 5968–73]. Yvonne paid no rent to Frank. [R. 14323:14–18].

**B. THE PROCEDURAL HISTORY OF THE CASE AND DISPOSITION BELOW.**

This case involves four different lawsuits between Yvonne, Petter, and Frank, described below. These facts are also summarized in the opinion of the Utah court of appeals in this case, *Martin*, 2019 UT App 127, ¶¶ 3–24.

**The Divorce Action**

On May 30, 2008, Yvonne filed a petition for divorce against Petter. [R. 1–5], Case No. 084902378 (the “Divorce Action”). Yvonne subsequently amended her petition to name Frank—her father-in-law—as a party because Frank had filed separate proceedings to evict Yvonne from the martial home located at 7668 Quicksilver Drive

(the “Property”), which Frank owned based on the quitclaim deed by which Yvonne conveyed the Property to him. [R. 16–22]. Default was initially entered against Frank. [R. 96–98]. On February 18, 2009, Frank’s counsel entered an appearance in the Divorce Action. [R. 590–91]. On May 7, 2009, the default entered against Frank was set aside and the commissioner recommended that Frank be dismissed from the case. [R. 895–96]. Thereafter, the parties proceeded as if Frank was not a party to the divorce case. [See 2nd Supp. R. 673, 2426, Tr. 252:16–253:2]. In its ruling at the conclusion of the bench trial held on May 31, 2012, the court stated, “Frank Kristensen is not a party to the divorce case, as everyone agrees. In fact, the whole reason this case is in front of me is because Frank Kristensen could not be made a party to the divorce case....” [R. 2426, Tr. 267:25–268:4].

On April 29 and July 16, 2009, the court entered orders awarding Yvonne’s temporary use and possession of the Property (“temporary orders”). [R. 771–73, 1007–10]. Frank was not identified as a party in the caption nor was he mentioned in either order. He was not served with either order. [R. 771–73, 1007–10]. Additionally, the record reflects that after the commissioner recommended that Frank be dismissed from the case, the commissioner excused Frank’s counsel from the hearing related to the July 16, 2009 order prior to the court hearing argument regarding possession of the Property. [R. 896].

On June 4, 2012, after Yvonne lost at trial in the unlawful detainer case (the “Unlawful Detainer Action”), Yvonne filed a motion for a temporary restraining order and preliminary injunction in the Divorce Action to prevent her eviction from the

Property. [R. 5304–31]. On June 5, 2012, Judge Kennedy stayed enforcement of the eviction order. [R. 5336–37]. Thereafter, Judge Kennedy entered a preliminary injunction in the divorce case enjoining Petter from interfering with Yvonne’s possession of the Property. [R. 5968–73].

### **The Unlawful Detainer Action and Quiet Title Action**

On July 1, 2008, Frank served a notice to vacate the Property on Yvonne. Yvonne failed to vacate the Property after receiving the notice. [2nd Supp. R. 2]. On August 1, 2008, Frank filed the Unlawful Detainer Action against Yvonne, Case No. 080915565. [2nd Supp. R. 1–6]. On February 17, 2009, Frank requested an expedited bench trial. [2nd Supp. R. 21]. On May 7, 2009, Frank made another request for an expedited bench trial. [2nd Supp. R. 83–85]. Neither request was granted.

On May 13, 2009, Yvonne filed the Quiet Title Action, claiming that she had executed the quit-claim deed of the Property to Frank under duress. [2nd Supp. R. 109–15]. On May 26, 2009, Yvonne filed a motion to stay or consolidate the Unlawful Detainer Action with her quiet title action. [2nd Supp. R. 88–91]. The district court consolidated the two actions. [2nd Supp. R. 242–44]. On July 13, 2010, Yvonne’s quiet title action was set for a jury trial on December 7–9, 2010. [2nd Supp. R. 600–04]. A bench trial for the Unlawful Detainer Action was scheduled to immediately follow the quiet title trial. *Id.*

On November 1, 2010, Yvonne requested that the trial dates be continued. [2nd Supp. R. 676–78]. The district court granted Yvonne’s request. [2nd Supp. R. 739–43]. Trial was rescheduled to begin on August 31, 2011. [2nd Supp. R. 1352–53]. On August

1, 2011, Yvonne again requested that the trial dates be continued. [2nd Supp. R. 1381–96]. The court granted Yvonne’s request. [2nd Supp. R. 1432–35]. The court then rescheduled trial for February 13–15, 2012. [2nd Supp. R. 1488–89]. Yvonne requested that the trial dates be continued a third time. [2nd Supp. R. 1530–33]. The court was required to reschedule trial due to a calendar conflict, and trial was ultimately held on May 29–31, 2012. [2nd Supp. R. 1575–77, 2087–88, 2116, 2148–49].

After a three-day trial, the jury found that Yvonne did not execute the quitclaim deed of the Property to Frank under duress. [2nd Supp. R. 2144–45]. Based on the jury’s finding, the court held that Frank was the owner of the Property and held Yvonne guilty of unlawful detainer from July 6, 2008. [2nd Supp. R. 2426, Tr. 266:19–267:4]. On July 5, 2012, the district court entered judgment on the quiet title verdict. [2nd Supp. R. 2405–09]. On July 10, 2012, the court entered an amended order of restitution. [2nd Supp. R. 2410].

### **The Fraudulent Transfer Proceedings**

On February 2, 2012, Yvonne filed a fraudulent transfer action against Petter and Frank, Case No. 120900834 (the “Fraudulent Transfer Action”) [Supp. R. 1–29].

### **The Consolidated Case Proceedings**

On March 1, 2013, Judge Kennedy consolidated the Fraudulent Transfer Action and Unlawful Detainer Action into the Divorce Action. [Supp. R. 698–702]. On June 26, 2013, Yvonne filed a motion for a new trial in the unlawful detainer/quiet title actions. [R. 6796–99]. On October 2, 2013, Judge Kennedy granted Yvonne’s motion. [R. 7437–41]. On December 23, 2014, the court ordered that “no one may interfere with

Yvonne Martin’s right to stay in the Quicksilver home during the pendency of the suit.” [R. 8864–69].

In January 2015, the case was reassigned to Judge Harris. [See R. 8898–99]. On June 19, 2015, Frank and Petter filed a motion to vacate Judge Kennedy’s order granting a new trial in the unlawful detainer/quiet title actions. [R. 10029–44]. On August 4, 2015, Frank and Petter filed motions for summary judgment related to Yvonne’s claims raised in the fraudulent transfer case. [R. 11155–73, 11257–63]. On August 19, 2015, Judge Harris recused himself, and the case was reassigned to Judge Shaughnessy. [R. 12115–17, 12151–52].

In October 2015, Judge Shaughnessy partially vacated Judge Kennedy’s order granting a new trial in the unlawful detainer/quiet title actions and ordered that a new trial on damages be held. [R. 12622–26]. The court entered a new order of restitution and judgment of quiet title. [R. 12583–85), 12642–45]. Additionally, the court granted summary judgment on most of the claims and issues related to Yvonne’s fraudulent transfer action. [R. 12632–37].

On December 3, 2015, a bench trial was held regarding damages in the Unlawful Detainer Action. [R. 14283–326]. The court entered a judgment of \$900,663.26 against Yvonne in favor of Frank. [R. 13383–85]. On January 20, 2016, the court held a bench trial on the remaining unresolved issues. [R. 13369]. Pursuant to their postnuptial agreement, the court found that Yvonne was entitled to ongoing support payments of \$1,000 per month from Petter. [R. 13373]. Thereafter, Yvonne filed a motion for attorneys’ fees, which was denied. [R. 13160–96, 13262–65].



On March 16, 2016, the court entered a divorce decree and judgment of \$140,285.54 in Yvonne's favor against Petter. [R. 13380]. Frank assigned part of his Unlawful Detainer Action against Yvonne to Petter, which was used to offset Yvonne's judgment against Petter. [R. 13439, 13571–73]. Yvonne filed her notice of appeal on April 5, 2016, and her amended notice on April 27, 2016. [R. 13458–59, 13567–68].

#### **IV. SUMMARY OF ARGUMENT**

1. Yvonne seeks relief from the Court that goes beyond the single issue that this court identified in its order granting certiorari. Issues Two and Three in Yvonne's brief go beyond the scope of that issue should not be considered by this court.

2. The court of appeals was correct in affirming Yvonne's liability to Frank for an award of treble damages for the period of time during which Yvonne was in possession of the Property after she had received Frank's notice to vacate. First, the statute on which Yvonne relies was not in force when the Unlawful Detainer Action was filed. Second, the unlawful detainer statute defines what constitutes unlawful detainer in cases of tenancies at will as a tenant remaining in possession of the premises after the expiration of a notice of not less than five calendar days. The statute and interpreting case law require an award of treble damages during the period of unlawful detainer. Third, Yvonne's public policy arguments are inconsistent with the purpose of the unlawful detainer statute. Public policy supports the court of appeals' interpretation of the statute.

3. Frank was not bound by the temporary orders because he was not a party to the Divorce Action and did not have notice and an opportunity to respond to the request

for a temporary possession order. Even if he was a party, however, the treble damage award was not precluded by the temporary orders awarding possession to Yvonne.

4. The court in the Unlawful Detainer Action was not bound by the temporary orders issued by the court in the Divorce Action. The temporary orders did not address Yvonne's liability for damages but focused only on possession. Even if Judge Shaughnessy's order could be seen as changing the temporary orders entered by Judge Kennedy, he was entitled to do so under Utah R. Civ. P. 54(b).

5. The court of appeals properly affirmed the district court's award of treble damages to Frank. The statute is not ambiguous, but even if it were ambiguous the public policy underlying the unlawful detainer statute supports the interpretation by the court of appeals.

### **ARGUMENT**

#### **I. YVONNE SEEKS RELIEF THAT GOES BEYOND THE SCOPE OF THE ORDER GRANTING CERTIORARI.**

As an initial matter, this court should reject Yvonne's attempt to seek review on issues not identified by this court in the order granting certiorari. "Issues not presented in the petition for certiorari, or if presented, not included in the order granting certiorari or fairly encompassed within such issues, are not properly before this Court on the merits." *DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995); *see also* Utah R. App. P. 49(a)(4) ("Only the questions set forth in the petition or fairly included therein will be considered by the Supreme Court."). The issues identified by Yvonne in her brief to this court go beyond the issue identified by this court in its order granting certiorari. The court should disregard Yvonne's argument with respect to issues that go beyond the scope set forth in

this court's order dated December 6, 2019, which granted certiorari as to the 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."

Yvonne's Issue Two addresses whether an order is binding on a non-party and her Issue Three addresses whether an order by one court is binding on the proceedings of another court. Yvonne Brief at 4–5. These issues go beyond the scope identified by the Court, which deals exclusively with unlawful detainer damages. *See DeBry*, 889 P.2d at 443.

## **II. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING YVONNE'S LIABILITY TO FRANK FOR UNLAWFUL DETAINER DAMAGES.**

The court should deny Yvonne's appeal because the court of appeals correctly held that Yvonne was liable for unlawful detainer, including for the period of time during which she possessed the Property after the court in the Divorce Action entered the orders granting Yvonne temporary possession of the Property. The statute in force at the time the Unlawful Detainer Action was filed was Utah Code § 78B-6-802 (2008). The court of appeals properly applied the version of the code in effect at the time the unlawful detainer complaint was filed. *Martin*, 2019 UT App 127, ¶ 33 n.7. That statute provided that a tenant at will is "guilty of an unlawful detainer if the tenant . . . remains in possession of the premises after the expiration of a notice [to quit the premises] of not less than five calendar days." *Martin*, 2019 UT App 127, ¶ 33 (quoting Utah Code § 78B-6-802(1)(b)(ii) (2008)). The district court found that Frank was the owner of the

Property since June 23, 2004, and that he served Yvonne with a five-day notice to quit the premises on July 1, 2008. Yvonne, however, remained in possession beyond the expiration of the five days. The court of appeals stated that, 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. “Therefore,” the court concluded, “Yvonne is liable for damages during the time of her unlawful detainer, including treble damages for Frank’s lost rental value.” *Martin*, 2019 UT App 127, ¶ 35 (citing Utah Code § 78B-6-811(3) (2008)); Order on Damages re: Unlawful Detainer ¶¶ 4, 7, 8 [R. 12832–34] (Add. F). The court affirmed the award of unlawful detainer damages, which were trebled under the statute. *Martin*, 2019 UT App 127, ¶ 42; [R. 12832–34].

Yvonne argues that the court of appeals erred in affirming the district court’s award of treble damages. She asserts that the court improperly failed to consider the statutory definition of “unlawful detainer” and that public policy supports a statutory interpretation that would allow a tenant to avoid a treble damage award by remaining in possession where a court has authorized her to retain possession. As shown below, these arguments do not adequately address the reasoning of the court of appeals.

**A. The statute on which Yvonne relies was not in force when the Unlawful Detainer Action was filed.**

Yvonne argues that, 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.” Yvonne Brief at 17 (quoting Utah

Code § 78B-6-801(7)).<sup>2</sup> This provision, however, was not in force when Frank filed the Unlawful Detainer Action against Yvonne in 2008. It was added to the unlawful detainer statute in 2009. *See* 2009 Utah Laws Ch. 184 (H.B. 299). In her brief, Yvonne did not inform this court that the statute was subsequently adopted by the legislature nor did she identify the year of the statute. In her petition for certiorari, however, she cited the statute as Utah Code § 78B-6-801(7) (2012).

The 2009 definition of “unlawful detainer” found in Utah Code § 78B-6-801(7) (2009) does not apply retroactively to the Unlawful Detainer Action that Frank filed in 2008. Under Utah law, “retroactive application of statutes ‘is not favored in the law.’” *Warne v. Warne*, 2012 UT 13, ¶ 25, 275 P.3d 238 (quoting *Goebel v. Salt Lake City S.R.R. Co.*, 2004 UT 80, ¶ 39, 104 P.3d 1185). “Thus, absent clear legislative intent to the contrary, we generally presume that a statute applies only prospectively.” *Id.* “This presumption has been codified by the legislature.” *Id.* (citing Utah Code § 68-3-3) (“A provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive.”). In light of this presumption, “when adjudicating a dispute we apply the version of the statute that was in effect at the time of the events giving rise to the suit.” *Harvey v. Cedar Hills City*, 2010 UT 12, ¶ 12, 227 P.3d 256 (citation, internal quotation marks, and brackets omitted).

Because the definition of “unlawful detainer” in subsection 78B-6-801(7) had not been adopted when the Unlawful Detainer Action was filed, the court of appeals did not

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<sup>2</sup> This provision has since been renumbered and is currently found at Utah Code § 78B-6-801(9).

consider it in its analysis. *See Martin*, 2019 UT App 127, ¶ 33 n.7 (stating that the court applied the version of the code that was in effect at the time the unlawful detainer complaint was filed). In her petition for certiorari, Yvonne did not challenge the court of appeals’ failure to consider the legal effect of subsection 78B-6-801(7) nor does she address that issue in her brief to this court. She simply cites to the definition of “unlawful detainer” in that provision as though it were binding with respect to the Unlawful Detainer Action filed in 2008.

In addition, Yvonne does not show that she preserved this argument before the district court. *See Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828 (“An issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on [it].” (alteration in original) (citation and internal quotation marks omitted)).

Because Yvonne failed to explain why the statute is applicable to a case filed before it became effect and why it should have been considered by the district court and the court of appeals, this court should disregard her argument regarding the statutory definition of “unlawful detainer” in Utah Code § 78B-6-801(7). *See Yvonne Brief* at 17. This court should also disregard her argument for lack of preservation.

**B. The court of appeals correctly ruled that Yvonne was in unlawful detainer.**

Yvonne argues that, since she had been permitted to stay in possession of the Property by the temporary order issued in the Divorce Action, she was not in unlawful detainer. Citing *Osguthorpe v. Wolf Mountain Resorts, LC*, 2010 UT 29, ¶ 24, 232 P.3d 999, she asserts that “the touchstone of availability of unlawful detainer proceedings is

the unlawful possession of property.” Yvonne Brief at 17. *Osguthorpe*, however, did not hold that a tenant at will—like Yvonne—who had received a proper notice to vacate the premises could avoid the risk of being in unlawful detainer by obtaining a temporary order allowing her to remain. In other words, a tenant at will is in unlawful detainer—and her detention of the premises is thereby “unlawful”—if she remains in possession after receiving a proper notice to quit. By definition, her possession is “unlawful.”

This was how the court of appeals analyzed the issue. That court focused on the statutory definition of unlawful detainer. A tenant at will, the court stated, is “guilty of an unlawful detainer if the tenant ... remains in possession of the premises after the expiration of a notice [to quit the premises] of not less than five calendar days.” *Martin*, 2019 UT App 127, ¶ 33 (quoting Utah Code § 78B-6-802(1)(b)(ii) (2008)) (alteration in original)). Yvonne does not explain why the court of appeals erred in focusing on this definition of unlawful detainer nor does she analyze the language of that provision.

Yvonne makes the same arguments to this court that she made to the court of appeals, but this does not satisfy her burden in the present appeal. Instead of merely repeating the arguments that she made to the court of appeals, she must show that the court of appeals erred. *See Dowling v. Bullen*, 2004 UT 50, ¶ 7, 94 P.3d 915 (“On certiorari, we review the decision of the court of appeals, not the decision of the trial court.”). This requires an analysis of the court of appeals’ opinion, not only of the district court’s ruling.

Yvonne failed to show that the court of appeals was wrong in its interpretation of Utah Code § 78B-6-802(1)(b)(ii) (2008). The court of appeals’ interpretation of that code section is consistent with this court’s statement in *Osguthorpe*, 2010 UT 29, ¶ 21, that

“[t]o be guilty of unlawful detainer, a party must be a tenant in possession of real property and must have violated a term of the lease, committed waste, remained on the property beyond the legal term of the lease, or engaged in any such acts enumerated in Utah Code section 78B-6-802(1)(a)–(h) (2008).” Instead of arguing over the definition of “unlawful” by relying on a not-yet-adopted statute (Utah Code § 78B-6-801(7) (2009)), Yvonne should have focused on the plain language of subsection 78B-6-802(1)(b)(ii) (2008) in order to meet her burden of showing that the court of appeals erred.

This court has held that “when faced with a question of statutory interpretation, our primary goal is to evince the true intent and purpose of the Legislature.” *Marion Energy, Inc. v. KFJ Ranch Partnership*, 2011 UT 50, ¶ 14, 267 P.3d 863 (citation and internal quotation marks omitted). Courts will first look to “the plain language of the statute itself.” *State v. Miller*, 2008 UT 61, ¶ 18, 193 P.3d 92. The court will also assume that each term in the statute was used advisedly. *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 1208 (citing *Biddle v. Wash. Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875).

Application of these interpretive principles supports the court of appeals’ holding that “the divorce court’s orders granting Yvonne temporary possession of the Property [did not] transform[] her possession from unlawful to lawful.” *Martin*, 2019 UT App 127, ¶ 37. The court of appeals’ holding derives from the plain language of the statute and is consistent with the underlying purpose of the statute, which “is to provide a speedy resolution of the issue of possession.” *Id.* ¶ 34 (quoting *Osguthorpe*, 2010 UT 29, ¶ 23).



The unlawful detainer statute provides an expedited process designed to put the appropriate party back in possession of the property. It does this in part through the “‘severe remedy’ of treble damages.” *Id.* (quoting *Osguthorpe*, 2010 UT 29, ¶ 23, and Utah Code § 78B-6-811(3)(2008)). The treble damages provision “is evidence of a strong desire by the legislature to create a mechanism pursuant to which owners can be restored to possession of their property.” *Id.* (quoting *Osguthorpe*, 2010 UT 29, ¶ 23). Yvonne did not show that this analysis of the court of appeals was in error. Nor could she, since the court was relying on the plain language of the unlawful detainer statute as interpreted by this court in *Osguthorpe*.

The statute specifies with some precision exactly when a tenant is guilty of unlawful detainer. A tenant is guilty of unlawful detainer when the tenant, “in cases of tenancies at will, remains in possession of the premises after the expiration of a notice of not less than five calendar days.” Utah Code § 78B-6-802(1)(b)(ii) (2008). By definition, then, Yvonne was in unlawful detainer, as both the district court and the court of appeals held, when she received the notice from Frank and refused to vacate the Property within five days. The statute contains no exceptions, nor does it excuse her liability for treble damages even though the divorce court allowed her to remain in possession after she received the unlawful detainer notice. If a tenant is guilty of unlawful detainer, the statute mandates that rents, treble damages and attorney fees be awarded to the landowner. *See* Utah Code § 78B-6-811(3) (2008) (“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.”). All

damages “directly and proximately resulting from [unlawful detainer] are subject to the requirement that they be trebled.” *Martin*, 2019 UT App 127, ¶ 33 (quoting *Aris Vision Inst., Inc.*, 2006 UT 45 at ¶ 23 (construing the forcible detainer provisions of the statute) (alteration in original). As the court of appeals correctly ruled, Utah courts have long held that such damages “include lost rental value.” *Martin*, 2019 UT App 127 at ¶ 33 (citing *Forrester v. Cook*, 77 Utah 137, 292 P. 206, 214 (1930), *overruled on other grounds as recognized by P.H. Inv. v. Oliver*, 818 P.2d 1018, 1020 (Utah 1991). “The statute’s mandatory language prohibits the trial court from declining to award treble damages.” *Red Cliffs Corner, LLC v. J.J. Hunan, Inc.*, 2009 UT App 240, ¶ 42, 219 P.3d 619. If a tenant elects to remain in possession of property after receiving the statutory notice, the court is required to “expedite the proceedings” and “begin the trial within 60 days after the day on which the complaint is served.” Utah Code § 78B-6-810(1)(a)–(b) (2008).

Yvonne has not shown that the court of appeals erred in applying the statute and the case law to the facts in this case. As confirmed by a jury, Frank was the owner of the Property not Yvonne. *Martin*, 2019 UT App 127, ¶ 12; [2nd Supp. R. 2144–45; R. 13383].<sup>3</sup> Prior to July 1, 2008, Yvonne was permitted to live in the Property as a tenant at will. A tenant at will “holds possession with the landlord’s consent but without fixed terms (as for duration or rent) ....” *Black’s Law Dictionary* at 1604 (9th ed. 2009). See *Red Cliffs Corner, LLC*, 2009 UT App 240 at ¶¶ 28–29 (holding that a tenant became a

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<sup>3</sup> The facts recited in this brief are taken from the court of appeals’ opinion in *Martin*, 2019 UT App 127. Yvonne has not challenged any of the facts set forth in the opinion, which must be accepted as accurate for the purposes of the present appeal.

tenant at will when lease terminated). On July 1, 2008, Frank gave Yvonne notice to vacate the Property by July 6, 2008. Yvonne failed to do so. *Martin*, 2019 UT App 127, ¶ 35; [2nd Supp. R. 2426, Tr. 238:5–25]. Because she remained in possession of the Property after receiving the notice to quit, Yvonne unlawfully detained the Property under the plain terms of Section 78B-6-802(1)(b)(ii) (2008). Frank was entitled to treble damages, including the fair rental value of the Property, during the time that Yvonne possessed it, and attorney fees, as mandated by the Statute. *See* Utah Code § 78B-6-811(3) (2008).

Despite this, Yvonne chose to retain the Property for over seven years after receiving Frank’s notice to vacate. Yvonne could have vacated the Property and still pursued her quiet title claims against Frank, or she could have requested expedited proceedings under the statute to limit her exposure to damages. Yvonne did neither. Instead, she retained possession of the Property without paying any rent, worked to lengthen and complicate the proceedings, and gambled that she would be able undo her 2004 conveyance of the Property to Frank. The large damages award resulted from Yvonne’s litigation strategy. In response to Frank’s Unlawful Detainer Action, she tried to bring Frank into the divorce proceeding [R.9–15], moved to consolidate the unlawful detainer proceeding with her subsequent quiet title action [2nd Supp. R.33–42], and requested multiple continuances of the trial.<sup>4</sup> [2nd Supp. R.676–78, 1381–96, 1530–33]. After a trial was finally held in the Unlawful Detainer Action, Yvonne worked to

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<sup>4</sup> During this time, Frank unsuccessfully sought to expedite the unlawful detainer proceedings on several occasions. [2nd Supp. R.58–77, 83–85, 245–48].

collaterally attack and delay her eviction from the Property through seeking relief in the divorce case. [See, e.g., R.5304–31]. Yvonne’s efforts were largely successful and deprived Frank of possession of the Property for over seven years.

In response to Yvonne’s argument that the district court’s reading of the statute was unfair, the court of appeals responded that it was not unfair and that “the facts of this case illustrate why.” *Martin*, 2019 UT App 127, ¶ 41. The court explained that, as recognized by the district court, the 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.’” *Martin*, 2019 UT App 172, ¶ 41 (quoting Utah Code Ann. § 78B-6-810(1)). The court summarized Yvonne’s efforts to delay the unlawful detainer case:

Yvonne, however, made no attempt to resolve the 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.* [Utah Code Ann. § 78B-6-810(1)], 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.

*Martin*, 2019 UT App 127, ¶ 41. Yvonne has not challenged the court of appeals’ factual summary of her efforts to delay the Unlawful Detainer Action, which must be accepted as accurate. In its summary, the court of appeals specifically referred to this ruling by the

district court:

The unlawful detainer statute itself contemplates that a court may enter an order allowing a person to remain in possession of property, *see id.* § 78B-6-810(2)(b)(i), 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, *see id.* § 78B-6-811(3). (I have previously found that Ms. Martin was in unlawful detainer of the Property and issued an order restoring the premises to Frank Kristensen.) I acknowledge that there is a significant statutory safety valve that is designed to protect against excessive damages for unlawful detainer, and that is the provision that allows a person to request a hearing or trial within 60 days and/or otherwise provides for expedited proceedings. *See id.* § 78B-6-810. That should have happened here but did not. Had it happened, a huge amount of these damages would have been avoided. I think it's essentially beyond question that this case has been unreasonably delayed. With respect to timing, based on my experience of the case and my review of the file, the summary that Mr. Anderson provided about the procedural history and the machinations of this case appear to be accurate. It is this unreasonable delay in the resolution of this case that takes a relatively manageable amount of damages to an enormous amount of damages. That said, I believe the statute requires me to award treble damages. *See id.* § 78B-6-811(3).

Order on Damages re: Unlawful Detainer, ¶ 7, R. 12833–34 (Add. F). Yvonne failed to address this finding by the district court, which it included in its ruling awarding treble damages to Frank for Yvonne's unlawful detainer.

Yvonne should not be rescued from the consequences of her own choices, especially where the statute was drafted with the intent to expedite the restoration of possession of property to owners like Frank and to assess severe remedies against tenants like Yvonne. The court of appeals correctly affirmed the district court's decision to award Frank treble damages and attorney fees for Yvonne's unlawful detainer of the Property from July 6, 2008 to the date she relinquished possession in October 2015.

Yvonne claims that as “as a matter of law, an occupant must be in lawful possession—and not in unlawful detention—after a court has authorized her possession,”

and that such an order should prevent application of treble damages under the statute. Yvonne Brief at 17. *See also id.* at 27. This argument is inconsistent with the statute which, as noted above, provides that a tenant is “guilty of an unlawful detainer” if the tenant, “in cases of tenancies at will, remains in possession of the premises after the expiration of a notice of not less than five calendar days.” Utah Code § 78B-6-802(1)(b)(ii) (2008). Yvonne failed to discuss this provision in her brief. She cites it only once, in footnote 1 to her Introduction. Yvonne Brief at 1 n.1. In that footnote she argues that “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,” she concludes, “Yvonne was not a tenant who “leased real property for an indefinite time with monthly or other periodic rent reserved.” Yvonne Brief 1 n.1 (quoting Utah Code § 78B-6-802(1)(b)(ii)) (emphasis in original). Yvonne ignored the court of appeals definition of a tenancy at will as a “tenancy in which the tenant holds possession with the landlord’s consent but without fixed terms (as for duration or rent).” *Martin*, 2019 UT App 127, ¶ 33 n.6 (quoting *Tenancy at will*, Black’s Law Dictionary (10th ed. 2014)). Yvonne further ignored the court of appeals’ statement that “[s]uch a tenancy may be terminated by either party upon fair notice.” *Id.*

The statutory provisions for treble damages (Utah Code § 78B-6-811(3) (2008) (“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.”) leaves no discretion to the court, but mandates the trebling of

damages. Although the court of appeals affirmed the award of treble damages under this provision, Yvonne does not discuss or analyze it in her brief. That provision does not provide any exception for tenants who remain in possession of property pursuant to temporary court orders entered in a separate divorce case. The statute does, however, specifically address situations where a court may enter an order temporarily granting possession to the tenant after the unlawful detainer proceedings have been initiated. *See, e.g.*, Utah Code § 78B-6-808(4)(b) (2008) (providing a procedure by which a tenant may post a bond and remain in possession of the property during the pendency of the unlawful detainer action); *id.* § 78B-6-810(2)(b)(i) (2008) (providing a procedure by which a court can determine “who has the right of occupancy during the litigation’s pendency”).

Even though the unlawful detainer statute allows the court to grant temporary occupancy of a contested property, it does not identify court-ordered possession of the premises as lawful possession, nor does it carve out an exception for recovery of rent and treble damages for such temporary court-ordered possession. Where the statute fails to provide that such court ordered temporary possessions and occupancies constitute an exception to the provisions governing treble damages, the court must treat such omissions as purposeful. *See Carrier*, 2004 UT 98 at ¶ 30.<sup>5</sup>

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<sup>5</sup> Yvonne argues that under Section 78B-6-810(2)(b)(i), an order determining possession during the pendency of litigation can only be issued after the court holds an evidentiary hearing. Yvonne Brief at 19. This argument misses the point. Subsection 810(2)(b)(i) allows the court to determine possession during the pendency of the litigation. If possession were granted to the tenant, it would not excuse the tenant’s obligation to pay treble damages if damages were awarded. Also, Yvonne’s argument cuts against her position since the temporary orders issued in her favor prior to Judge Shaughnessy’s finding of unlawful detainer and the temporary restraining order issued by

Yvonne cites several cases, which she also argued to the court of appeals and which court of appeals distinguished. She cites *Iota LLC v. Davco Mgmt. Co. LC*, 2016 UT App 231, 391 P.3d 239. Yvonne Brief at 17. That case is not an unlawful detainer case and does not address whether a temporary order of possession can preclude a finding of unlawful detainer under the Statute’s terms. *Iota* involved the collateral bar, which holds that “a party may not challenge a court’s order by violating it.” *Id.* ¶ 16 (internal citation omitted). There is no argument here that anyone violated the temporary orders issued in the Divorce Action. The court of appeals addressed *Iota*, stating that it “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.” According to the court of appeals, “*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.” The court concluded that “*Iota* does not help Yvonne.” *Martin*, 2019 UT App 127, ¶ 39. She does not explain in her present brief why the court of appeals’ discussion of *Iota* was in error but merely repeats the argument about that case that she made to the court of appeals.

Yvonne cites Justice Nehring’s concurrence in *Bichler v. DEI Systems, Inc.*, 2009 UT 63, ¶ 41, 220 P.3d 1203. Yvonne Brief at 17, 27. That opinion, however, provides no support for Yvonne’s arguments. The statute that Justice Nehring interpreted only authorizes evidentiary hearings “where the [unlawful detainer] claim is for nonpayment

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Judge Kennedy after the unlawful detainer trial were not issued after an evidentiary hearing. [R. 771–73, 1007–10, 5336–37].



of rent.” Utah Code § 78B-6-810(2)(a) (2008); *see Bichler*, 2009 UT 63, ¶ 41. Since Frank’s unlawful detainer claim was not for nonpayment of rent, the Statute’s provision regarding evidentiary hearings—and Justice Nehring’s interpretations of that provision—are not applicable. Moreover, the temporary orders at issue here were not issued as a result of an evidentiary hearing. As the court of appeals noted, “*Bichler* is silent about whether a party given temporary possession can ultimately be held liable for unlawful detainer damages.” *Martin*, 2019 UT App 127, ¶ 40. Yvonne fails to explain why the court of appeals was in error.

The court of appeals stated that it was “not persuaded that the divorce court’s orders granting Yvonne temporary possession of the Property transformed her possession from unlawful to lawful.” *Martin*, 2019 UT App 127, ¶ 37. The court considered the timing of the order granting temporary possession as compared with her unlawful detainer. The court noted that “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.”” *Id.* “Thus,” the court of appeals concluded, “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.” *Id.* (emphasis in original). The court stated, “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.” *Martin*, 2019 UT App 127, ¶ 37.

Yvonne’s brief to this court similarly fails to account for the long period of time that elapsed between the filing of the Unlawful Detainer Action and the temporary order granting her possession.

In support, the court of appeals referred to *Ute-Cal Land Development v. Intermountain Stock Exchange*, 628 P.2d 1278 (Utah 1981). *Martin*, 2019 UT App 127, ¶ 37 n.8. Yvonne attempts to distinguish *Ute-Cal*, arguing that there was no temporary order of possession in that case. Yvonne Brief at 18–19. In *Ute-Cal* the tenant was served with a notice to quit and refused to vacate. *Ute-Cal*, 628 P.2d at 1279. Five months later, a writ of attachment<sup>6</sup> was served on the tenant which prohibited him from vacating the premises. *Id.* at 1282. Even though the tenant was not only permitted to remain at the property, but was prohibited from leaving, this court determined that it was nonetheless liable for unlawful damages that included the time period during which he was prohibited from leaving. *Id.* The court’s rationale for this decision was that the tenant had had the chance to vacate when served with the notice to quit. *Id.*

As the court of appeals noted, *Ute-Cal* is meaningful to the present case. As in *Ute-Cal*, Yvonne, as tenant, was served with a notice to vacate by Frank, the landlord, on July 1, 2008. *Martin*, 2019 UT App 127, ¶ 35. She refused to comply with the notice to vacate. *Id.* Approximately ten months later, the district court in the Divorce Action

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<sup>6</sup> Defining a writ of attachment, Yvonne suggests that the writ of attachment at issue in *Ute-Cal* did not give the tenant continued possession of the leased premises. Yvonne Brief at 19. However, in that case, even though the Court stated that the “primary intent” of the writ of attachment was not to restrain the tenant, but to protect the landlord, it acknowledged that the effect of the writ of attachment was to prohibit the tenant from vacating once it was served. *Ute-Cal*, 628 P.2d at 1282.

entered temporary orders awarding temporary possession of the Property to Yvonne. [R. 771–72, 1007–10]. As in *Ute-Cal*, Yvonne could have vacated the Property at any time and avoided the treble damages for which she was ultimately held liable. Unlike the tenant from *Ute-Cal*, she was not prohibited from leaving the Property after the temporary orders were entered, making her position less compelling than the tenant’s in *Ute-Cal*. The court of appeals was correct in stating that “[i]f the lessee in *Ute-Cal* was guilty of unlawful detainer, Yvonne must be as well.” *Martin*, 2019 UT App 127, ¶ 37 n.8.

**C. Yvonne’s public policy arguments are inconsistent with the unlawful detainer statute.**

Yvonne incorrectly argues on policy grounds that this court should ignore the plain language of the unlawful detainer statute and determine that Frank is not entitled to treble damages for the many years that Yvonne possessed the Property based on the temporary orders. Yvonne Brief at 19, 27–28. Yvonne complains that if the court of appeals were affirmed, “the utility of evidentiary hearings to determine temporary possession in unlawful detainer actions would be dramatically reduced for tenants” due to fear of incurring sizeable treble damages. Yvonne Brief at 20. As an initial matter, Yvonne’s policy argument is inapplicable here. The temporary orders were not entered as a result of an evidentiary hearing. [R. 771–73, 1007–10, 5336–37]. The decision on this matter will have no bearing on the utility of evidentiary hearings in future cases. Regardless, Yvonne fails to identify what “utility” an evidentiary hearing conducted pursuant to subsection 78B-6-810(2) may have other than to provide a tenant with the opportunity to gain temporary possession of the property at issue pending the resolution

of the unlawful detention proceedings.

Yvonne also incorrectly suggests that it would be unfair to allow treble damages to accrue for the time period a tenant is in possession of the disputed property subject to a temporary possession order because such incurred damages would deter tenants from seeking a temporary possession order and staying in the property. Yvonne Brief at 27–28. Section 78B-6-810, however, specifically resolves her concern by providing the court with the power to determine all of the issues between the parties based on an evidentiary hearing if it is able to do so,<sup>7</sup> and if not, to ensure that a trial on the unlawful detainer be held within 60 days of the date the complaint is served so that possession can be resolved without the risk of either party incurring sizeable damages. Utah Code § 78B-6-810(1–2) (2008). Yvonne retorts that trials are not always speedy, but the statute is specifically designed so that a trial takes place promptly. There would have been no concern of protracted litigation on the unlawful detainer issue had Yvonne not taken express actions to delay and postpone the resolution of the Unlawful Detainer Action. But, regardless of whether Yvonne caused the delay, the fact that delay occurred does not negate the availability of treble damages.

Additionally, the public policy underlying the unlawful detainer statute is intended to motivate a tenant by the risk of treble damages. The Statute was purposely designed to be strictly complied with and to provide “severe remedy.” *Osguthorpe*, 2010 UT 29, ¶ 23 (citation and internal quotation marks omitted). The availability of treble damages

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<sup>7</sup> If a tenant is so confident that her defenses are meritorious, the evidentiary hearing option provides the balance of allowing the tenant to challenge the landlord on possession without the fear of a long, protracted proceeding.

against a tenant is “evidence of a strong desire by the legislature to create a mechanism pursuant to which owners can be restored to possession of their property.” *Id.* The statute was not designed, as Yvonne suggests, to provide a “safe harbor” from treble damages where a tenant believes she has a meritorious defense. Yvonne Brief at 15, 21, 27. The statute reflects “a legislative intent to create a mechanism for quickly and clearly resolving conflicts over lawful possession of property between landowners and tenants.” *Id.* at ¶ 22. This severe remedy is necessary to make up for depriving the landlord of use and enjoyment of its property. *See Lincoln Fin. Corp. v. Ferrier*, 567 P.2d 1102, 1104–05 (Utah 1977) (“If the landlord cannot enforce the terms of his lease and proceed under the express provisions of our statutory law to reclaim his property, what has happened to his property rights? He should be accorded the unimpaired enjoyment of all of the rights and privileges therein.”).

Yvonne also complains that the court of appeals interpretation will encourage parties in divorce cases to file parallel unlawful detainer actions to obtain treble damages and offset alimony orders. She argues that, a “title-holding spouse” might be able to claim unlawful detainer damages against a spouse in possession of a marital home. Yvonne Brief at 20. This concern is baseless. If the marital home were owned by either of the spouses to a divorce action, it would properly be subject to the court’s equitable jurisdiction in the divorce proceeding. *See Utah Code* § 30-3-5(1) (“When a decree of divorce is rendered, the court may include in the decree of divorce equitable orders relating to the children, property, debts or obligations, and parties.”). *See Porenta v. Porenta*, 2017 UT 78, ¶ 19, 416 P.3d 487 (“Once the parties file for divorce, the divorce

court has the power to enter ‘equitable orders relating to the ... property’ belonging to the marital estate.”) (quoting Utah Code § 30-3-5(1)). *See also Dahl v. Dahl*, 2015 UT 79, ¶ 25, \_\_\_ P.3d \_\_\_ (“Thus, by legislative enactment and our long-standing precedent, Utah has an interest in ensuring that marital assets are fairly and equitably distributed during divorce and that divorcing spouses both retain sufficient assets to avoid becoming a public charge.”). The risk of a “title-holding spouse” taking advantage of the other spouse in a divorce case is minimized by divorce law, under which the court has jurisdiction over all marital assets and can make appropriate orders.

There is a risk, of course, if the husband and wife are only leasing property from a third-party landlord. The ruling sought by Yvonne would prevent a third-party landlord from obtaining the remedies available under the landlord-tenant statutes if a judge were to allow one of the tenants to remain on the premises. The landlord would then be required to allow the tenant to remain, but that order should not curtail the landlord’s right to treble damages in the event that it successfully prevailed in an unlawful detainer action. This was the situation in the present case. Frank filed the Unlawful Detainer Action because he owned the Property. Affirming the court of appeals will not present any risk of the tactic Yvonne identifies.

Yvonne’s fears that, 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.” Yvonne Brief at 19. This argument is not persuasive. The interpretation of the statute should not depend on whether, from the tenant’s view, the benefits of a temporary order are seen as “negligible.” A tenant who has been served

with a proper notice to vacate has the choice whether to remain or vacate. That choice should be exercised based on consideration of the risks and benefits of retaining possession versus vacating. It is the same analysis that any tenant should go through who seeks to retain possession during the pendency of an unlawful detainer case. Yvonne argues that, “[i]rrespective 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.” Yvonne Brief at 19–20. While it may be true that a tenant may find it advisable to relinquish possession rather than risk treble damages, this concern from the perspective of a tenant is not a basis for interpreting the unlawful detainer statute in a manner that is inconsistent with its plain language or with the purpose of the statute, which is to provide the landlord with speedy recovery of his property. The court of appeals stated that “the unlawful detainer statute operates as ‘a mechanism for quickly and clearly resolving conflicts over lawful possession of property between landowners and tenants.’” *Martin*, 2019 UT App 127, ¶ 34 (quoting *Osguthorpe*, 2010 UT 29, ¶ 22, and citing *Bichler*, 2009 UT 63, ¶ 29 (stating that “one of the primary purposes of the unlawful detainer statute is to provide a speedy resolution on the issue of possession”)). This court should interpret the statute as it is written and not based on assumptions about whether the tenant should or would want to remain in possession as authorized by a temporary order in a divorce case.

Yvonne further complains that she should have been provided notice that she could be subject to treble damages if she chose to remain at the Property subject to the temporary orders and that she was justified in believing she was shielded from treble

damages. Yvonne Brief at 28. Yvonne had notice of the risk of treble damages from the Statute itself, as well as the case law that interprets the Statute. She was served with the unlawful detainer notice and, later, with a complaint that requested treble damages.<sup>8</sup> She was also represented by counsel. She cannot claim ignorance of the treble damage risk now that she lost the Unlawful Detainer Action and has to pay for the seven years during which she chose to deprive Frank of his Property.

Unlike the unfounded “public policy risks” and “unfairness” noted by Yvonne, real public policy risks exist if this court reverses the court of appeals and the district court. Overturning those decisions would undermine the well-established legislative intent of providing a speedy resolution regarding the possession of property. By eliminating the severe remedy designed by the legislature for unlawful detainer simply because a party is able to obtain a temporary possession order during the pendency of unlawful detainer proceedings, tenants could be emboldened to engage in efforts to delay unlawful detainer proceedings in the same manner that Yvonne did. If a tenant is not subject to any risk of treble damages, he or she would be incentivized to use any tactic available to stretch out the litigation and obtain rent free possession of the property at issue. This is not what the legislature intended. This court should affirm the court of appeals’ decision.

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<sup>8</sup> *Martin*, 2019 UT App 127, ¶ 5 (“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].’”) (quoting complaint filed on August 1, 2008, [2nd Supp. R. 2]).



### **III. YVONNE FAILED TO PRESERVE HER ARGUMENT THAT THE ORDERS IN THE DIVORCE ACTION WERE BINDING ON FRANK.**

As the court of appeals stated, the district court ruled 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 objection, that ‘everyone agrees’ that he was not actually a party.” *Martin*, 2019 UT App 127, ¶ 38 (quoting R. 2426, Tr. 267:25-268:4). The court of appeals was “unpersuaded that the temporary orders in the divorce case definitively adjudicated Frank's rights relative to the Property.” *Id.* The court specifically stated that Yvonne failed to preserve this argument in the district court. *Id.* ¶ 38 n.9. Whether this ruling was correct is Issue Two in Yvonne’s petition for certiorari. As argued in Point I above, this court did not grant certiorari with respect to that issue. This court should further refuse to consider that issue because Yvonne failed to preserve that argument in the district court and failed to identify any error by the court of appeals in holding that Yvonne failed to preserve that issue. *State v. Johnson*, 2017 UT 76, ¶ 15, 416 P.3d 443 (“An issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on it.”) (citation, internal quotation marks, and brackets omitted).

The court of appeals’ statement that this issue was not preserved is consistent with the record in the district court. It shows that Frank was dismissed from the Divorce Action. [R. 895–96]. Yvonne acknowledged Frank’s dismissal from the Divorce Action. [2nd Supp. R. 2426, Tr. 252:4–253:11]. The district court relied on this fact in its ruling.

[2nd Supp. R. 2426, Tr. 267:21–268:7]. Yvonne did not object or correct the district court’s ruling. As a result, Yvonne did not preserve the argument that Frank was a party to the divorce case and was not in a position to rely upon the argument in the proceedings below. The court of appeals correctly held that Yvonne had failed to preserve this argument. *Martin*, 2019 UT App 127 at ¶ 38 n.9.

Regardless, however, even if Yvonne could show that she had actually preserved that issue on appeal, her argument that the temporary orders are binding on Frank fails on its merits. As demonstrated above, Frank was dismissed from the Divorce Action prior to entry of the temporary orders, a fact acknowledged by Yvonne and the district court. Further, the temporary orders issued before the unlawful detainer trial do not identify Frank as a party in the caption, mention or reference Frank in any way, or indicate that the possession order applies to Frank. [R. 771–73, 1007–10]. Neither order was served on Frank. *Id.* Moreover, the record reflects that Frank’s counsel was excused from the hearing regarding the second temporary order prior to the court hearing argument regarding possession of the Property. [R. 896]. In light of these circumstances, the court of appeals was correct in holding that the temporary orders were not binding on Frank.

Yvonne incorrectly argues that these temporary orders were binding on Frank notwithstanding his dismissal from the Divorce Action because Frank’s dismissal was never reduced to a final, signed, written order, and because Frank later entered a limited appearance in the action. While it is true that an oral order that is not reduced to a signed writing is not final for purposes of appellate jurisdiction, as Yvonne points out, that principle does not support a conclusion that a bench ruling is not operative or effective

unless reduced to a signed, written order. Utah courts have regularly acknowledged the binding nature of oral orders.<sup>9</sup>

Yvonne alternatively argues that whether the temporary orders were binding on Frank is not material to whether Yvonne was in lawful possession of the Property because the orders did not “adjudicate Frank’s rights in the unlawful detainer cause of action,” but only “authorized Yvonne to remain in possession of” the Property. Yvonne Brief at 24. Constitutionally, however, an order regarding the possession of the Property could not have been decided without Frank’s involvement. “Due process prevents the state from extinguishing a citizen’s property rights without notice and an opportunity to be heard.” *Jordan v. Jensen*, 2017 UT 1, ¶ 20, 391 P.3d 183. “[E]very significant deprivation, *whether permanent or temporary*, of an interest, which is qualified as ‘property’ under the due process clause must be preceded by notice and opportunity for hearing appropriate to the nature of case.” *Worrall v. Ogden City Fire Dep’t*, 616 P.2d 598, 601 (Utah 1980) (emphasis added).

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<sup>9</sup> See, e.g., *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 2012 UT 66, ¶ 22 n.10, 289 P.3d 502 (“An oral dismissal from the bench could be preclusive if it were on the merits, just as a written decision would not qualify as preclusive if it were not on the merits.”); *Foreman v. Foreman*, 111 Utah 72, 176 P.2d 144, 149 (1946) (a minute entry “was a valid, lawful order” and “it follows that the plaintiff’s disobedience is a contempt of court.”); *State v. C.H.*, 2008 UT App 404, 2008 WL 4817192, \*1 (holding, in determining whether there was evidence to support a conviction of criminal contempt of an oral order that “so long as Mother knew what was required, we see no significance that the trial court’s oral order had not yet been formalized in a written order.”); *Envirotech Corp. v. Callahan*, 872 P.2d 487, 498 (Utah Ct. App. 1994) (holding that the trial court did not abuse its discretion by finding defendant in contempt of the court’s oral injunction order).

Based on these constitutional rules, the issue of possession could not have been adjudicated without adjudicating rights of the owner. If the temporary orders resulted in the temporary deprivation of Frank's Property, the court in the Divorce Action was required to provide Frank with notice and an opportunity to be heard as owner of the Property. Because he received no such notice, the temporary orders were not binding on Frank. This is certainly relevant to whether Yvonne had the right to lawfully possess the Property and whether the temporary orders had any bearing on her unlawful detainer of the Property. The district court in the Unlawful Detainer Action correctly ruled that Frank was not a party to that case and that Yvonne was obligated to pay treble damages to him. The court of appeals correctly affirmed that ruling.

#### **IV. THE TEMPORARY ORDERS HAD NO IMPACT ON THE RELIEF AVAILABLE TO FRANK UNDER THE UNLAWFUL DETAINER STATUTE.**

The court of appeals held that even had Frank been bound by the temporary orders entered in the Divorce Action, those orders did not insulate Yvonne from liability for treble damages in the Unlawful Detainer Action. The court of appeals stated that whether Frank was bound by the temporary orders was immaterial to the question of her liability for treble damages in the Unlawful Detainer Action. The court stated that, "even if the temporary orders bound Frank, Yvonne does not explain how that would excuse her from liability for damages for unlawful detainer." *Martin*, 2019 UT App 127, ¶ 39. In her brief to this court, Yvonne similarly does not explain why she was excused from paying treble damages even assuming that Frank was a party to the Divorce Action and was bound by the temporary orders.

By analogy, a court in an unlawful detainer case can allow a tenant to continue to occupy disputed premises while a lawsuit is pending. *See* Utah Code § 78B-6-810(2)(b)(i). If the landlord posts a possession bond, the tenant may also retain possession by posting a counter bond. *Id.* § 78B-6-808(4)(b). If a tenant is allowed to retain possession under these provisions, the tenant's liability for treble damages under subsection 78B-6-811(3) is unaffected. Having notice of an order allowing temporary possession in an unlawful detainer case does not relieve a tenant of the risk of treble damages. Similarly, even had Frank been a party to the Divorce Action, the issuance of the temporary orders in that case allowing Yvonne to retain possession would not excuse her liability for treble damages in the Unlawful Detainer Action. Although both the court of appeals and the district court made this point, Yvonne has not shown that this reasoning was in error. *Martin*, 2019 UT App 127, ¶ 40.

Yvonne incorrectly argues that the temporary orders were somehow binding on the court in the Unlawful Detainer Action and prohibited that court from entering an order for rent and treble damages during the period that Yvonne possessed the Property pursuant to the temporary orders. Yvonne Brief at 24–25. She relies on *Peterson v. Peterson*, 530 P.2d 821 (Utah 1974) and *Johnson v. Johnson*, 560 P.2d 1132 (Utah 1977), both of which stated that one judge cannot overrule the decision by another judge entered in the same case. But that is not what happened here. The temporary orders entered in the Divorce Action said nothing about Yvonne's liability for damages, including treble damages, in the Unlawful Detainer Case. The temporary orders gave her possession but did not excuse her from liability for damages to Frank as the owner of the Property.

Neither *Peterson* nor *Johnson* supports her argument that the temporary orders in the Divorce Action barred her liability for damages in the Unlawful Detainer Action.

The rule in those cases that a district court judge cannot overrule another district court judge in the same case was rejected by this court in *Build, Inc. v. Utah Department of Transportation*, 2018 UT 34, 428 P.3d 995. In *Build*, this court affirmed “the broad discretion of any judge (whether initially assigned to the case or stepping in as a successor to another) to revisit any nonfinal decision entered previously.” *Id.* ¶ 27. Utah R. Civ. P., 54(b) states that a nonfinal order “may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” *See Brady v. Park*, 2019 UT 16, ¶ 44, 445 P.3d 395 (“While a case remains pending before the district court prior to any appeal, the parties are bound by the court’s prior decision, but the court remains free to reconsider that decision.”) (quoting *Mid-America Pipeline Co. v. Four-Four, Inc.*, 2009 UT 43, ¶ 12, 216 P.3d 352). *Peterson* and *Johnson* did not prohibit Judge Shaughnessy from ruling that Yvonne was liable for treble damages. Even if the temporary orders in the Divorce Action giving Yvonne temporary possession were binding on Frank, they were not binding on him in the Unlawful Detainer Action and did not bar her liability for damages in that case.

Yvonne argues that “[w]hen courts recognize orders from other proceedings, they avoiding [sic] wasting judicial resources on an issue that has already been decided.” Yvonne Brief at 25–26. As argued above, the issue in the Divorce Action, which pertained to temporary possession of the Property as between Petter and Yvonne, was not

the same issue<sup>10</sup> decided by the court in the Unlawful Detainer Action, which was the extent of damages to Frank resulting from Yvonne's continued possession of his Property.

Yvonne also argues that "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." Yvonne Brief at 26. Here there was no order in the Divorce Action that affected the remedy or another material issue in the Unlawful Detainer Action. The temporary orders in the Divorce Action dealt with possession. The judgment in the Unlawful Detainer Action dealt with damages. There was no conflict between the temporary orders and the Unlawful Detainer Judgment, nor is there any confusion. The Court should deny Yvonne's appeal on this ground.

**V. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S AWARD OF TREBLE DAMAGES TO FRANK.**

Yvonne argues that, although the unlawful detainer statute entitled the court to award possession to a tenant while the litigation is pending,<sup>11</sup> the statute is "silent on whether treble damages continue to accrue during the period of temporary possession." Yvonne Brief at 26. The question, however, is not whether *treble* damages can be awarded, but whether *any* damages can be awarded. If damages can be awarded during temporary possession, then those damages *must* be trebled. Utah Code § 78B-6-811(3)

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<sup>10</sup> Yvonne likewise concedes that the issues dealt with by these two courts were different: "[T]he temporary orders did not purport to adjudicate Frank's rights in the unlawful detainer cause of action." Yvonne Brief at 24.

<sup>11</sup> Citing Utah Code § 78B-6-810(2)(b)(i) (2012).

(2008) (“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).”) (emphasis added). The word “shall” is mandatory. See *Mind & Motion Utah Investments, LLC v. Celtic Bank Corp.*, 2016 UT 6, ¶ 27, 367 P.3d 994 (“We have also held that the legislature’s use of the word ‘shall’ in statutes creates mandatory obligations.”). The court had no discretion to do anything other than treble Frank’s damages under this statute.

It is inaccurate for Yvonne to say that the statute is “silent” on whether treble damages accrue during the period of temporary possession. Yvonne Brief at 26–27. The statute is specific in this regard. Under Utah Code § 78B-6-802(1)(b)(ii) (2008), Yvonne was “guilty of unlawful detainer” when she failed to vacate the Property within five days after being served with notice. Under subsection 78B-6-811(2)(b), the court was required to assess damages resulting to Frank for “unlawful detainer.” Under subsection 78B-6-811(3) the court was required to enter a judgment against her for “three times the amount of the damages assessed under Subsections (2)(a) through (2)(e).” Since each of these provisions uses the word “shall,” the district court had no discretion not to award treble damages for Yvonne’s unlawful detainer. Her temporary possession of the Property, as allowed by the court in the Divorce Action, did not stop damages from accruing under the statute. Although Yvonne characterizes this as an “ambiguity in the statute’s language,” Yvonne Brief at 27, there is no ambiguity. Allowing a tenant to retain possession of leased premises does not remove the tenant from the condition of being in unlawful detainer. Being guilty of unlawful detainer is defined in subsection 78B-6-802(1)(b)(ii).



If a court were to allow a tenant to continue in possession, whether under subsections 78B-6-808(4)(b) or 78B-6-810(2)(b)(i), that tenant would still be liable for damages, which must be trebled. If 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.” There is nothing in the statute that a tenant who is allowed to remain in possession by a court order is exempt from “actual damages.”

The statutory scheme is not ambiguous. It is not susceptible to two interpretations. *See Anderson v. Utah County*, 13 Utah 2d 99, 368 P.2d 912, 913 n.3 (1962) (stating that a statute is ambiguous if it is “fairly susceptible of two constructions”). Even if it were ambiguous, however, this court should interpret it in a way that requires the district court to award treble damages against a tenant who retains possession of leased premises regardless of whether that possession was allowed by the court. That interpretation is consistent with the purpose of the unlawful detainer statute, which is “to provide a speedy resolution on the issue of possession.” *Osguthorpe*, 2010 UT 29, ¶ 23. The availability of treble damages is “evidence of a strong desire by the legislature to create a mechanism pursuant to which owners can be restored to possession of their property.” *Id.* If this court determines that the statute is ambiguous, it should favor the interpretation that supports these policies. Yvonne’s interpretation of the statute would allow her to retain possession for seven years after she was guilty of unlawful detainer. As this court noted in *Rutherford v. Talisker Canyons Finance, Co., LLC*, 2019 UT 27, 445 P.3d 474, “it is a common sense and long-standing canon of construction in Utah that, as between competing interpretations of an ambiguity in a statute, the one that avoids such

nonsensical outcomes is generally preferred.” *Id.* ¶ 41 (citations omitted). The result urged by Yvonne would be nonsensical since it is contrary to the purpose of the statute and would allow her to remain in possession for years without being required to pay Frank the treble damages to which he is entitled.

In interpreting the statute, the court should consider the context of the provisions relating to damages. *See Bright v. Sorensen*, 2020 UT 18, ¶ 59, \_\_\_\_ P.3d \_\_\_\_ (“[A]ll but one of the meanings is ordinarily eliminated by context.”) (citation and internal quotation marks omitted); *Kimball Condominiums Owners Ass’n v. Cty. Bd. of Equalization*, 943 P.2d 642, 648 (Utah 1997) (“When construing a statute, we look first to the plain meaning of the words used and their statutory context.”). The primary purpose of the statute is to provide “a speedy resolution on the issue of possession.” *Osguthorpe*, 2010 UT 29, ¶ 23. In this context, the interpretation by the court of appeals is the one that is most consistent with the context of the statute.

Yvonne asks “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.” Yvonne Brief at 28. She is essentially asking this court to rewrite the unlawful detainer statute to require that notice be provided to a tenant regarding the risks of treble damages. Amending a statute, however, is a function that belongs to the legislature, not the court. *See Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994) (“A cardinal rule of statutory construction is that courts are not to infer substantive terms into the text that are not already there. Rather, the interpretation must

be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed.”) If Yvonne believes the statute should be rewritten to require notice to a tenant of the risk of treble damages, she should seek that relief from the legislature, not this court.

### **CONCLUSION**

Yvonne has not met her burden of showing that the court of appeals erred in affirming the judgment of the district court awarding treble damages to Frank in the Unlawful Detainer Action. This court should affirm the decision of the court of appeals in all respects.

DATED this 22nd day of June, 2020.

### **MARSHALL OLSON & HULL**

By: /s/ R. Stephen Marshall  
R. Stephen Marshall  
Kevin M. Paulsen

*Attorneys for Appellees Petter Kristensen and Frank  
O. Kristensen*

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with word limitation of Rule 24(g)(1) of the Utah Rules of Appellate Procedure. I have relied on the word count function of Microsoft Office Word, which has calculated that the total words in this brief, exclusive of table of contents, table of authorities, addenda, and certificates of counsel is 12,801. I further certify that this brief complies with Rule 21(g) of the Utah Rules of Appellate Procedure and that it does not contain non-public information.

DATED this 22nd day of June, 2020.

**MARSHALL OLSON & HULL**

By: /s/ R. Stephen Marshall  
R. Stephen Marshall  
Kevin M. Paulsen

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of June, 2020, I caused a true and correct electronic copy of the foregoing BRIEF OF APPELLEES PETTER KRISTENSEN AND FRANK O. KRISTENSEN to be served by email to the following:

Karthik Nadesan  
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/s/ Kevin M. Paulsen  
Kevin M. Paulsen

## **ADDENDA**

- A.** Utah Code § 78B-6-801 (2008).
- B.** Utah Code § 78B-6-802 (2008).
- C.** Utah Code § 78B-6-808 (2008).
- D.** Utah Code § 78B-6-810 (2008).
- E.** Utah Code § 78B-6-811 (2008).
- F.** Order on Damages re: Unlawful Detainer, entered on January 7, 2016 [R. 12832–34].

# **ADDENDUM A**

**Utah Code § 78B-6-801 (2008)**

## Utah Code Annotated - 2008

U.C.A. 1953 § 78B-6-801

West's Utah Code Annotated

Title 78B. Judicial Code

Chapter 6. Particular Proceedings

Part 8. Forcible Entry and Detainer

### **§ 78B-6-801. Definitions**

(1) "Commercial tenant" means any tenant who may be a body politic and corporate, partnership, association, or company.

(2) "Forcible detainer" means:

(a) holding and keeping by force, or by menaces and threats of violence, the possession of any real property, whether acquired peaceably or otherwise; or

(b) unlawfully entering real property during the absence of the occupants or at night, and, after demand is made for the surrender of the property, refusing for a period of three days to surrender the property to the former occupant.

(3) "Forcible entry" means:

(a) entering any real property by:

(i) breaking open doors, windows, or other parts of a house;

(ii) fraud, intimidation, or stealth; or

(iii) any kind of violence or circumstances of terror; or

(b) after entering peaceably upon real property, turning out by force, threats, or menacing conduct the party in actual possession.

(4) "Occupant of real property" means one who within five days preceding an unlawful entry was in the peaceable and undisturbed possession of the property.

(5) "Owner:"



- (a) means the actual owner of the premises;
  - (b) has the same meaning as landlord under common law and the statutes of this state; and
  - (c) includes the owner's designated agent or successor to the estate.
- (6) "Tenant" means any natural person and any individual other than a commercial tenant.
- (7) "Willful exclusion" means preventing the tenant from entering into the premises with intent to deprive the tenant of entry.

CREDIT(S)

Laws 2008, c. 3, § 981, eff. Feb. 7, 2008.

Current through 2008 Second Special Session, including results from the November 2008 General Election.

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# **ADDENDUM B**

**Utah Code § 78B-6-802 (2008)**

Utah Code Annotated - 2008

U.C.A. 1953 § 78B-6-802

West's Utah Code Annotated

Title 78B. Judicial Code

Chapter 6. Particular Proceedings

Part 8. Forcible Entry and Detainer

**§ 78B-6-802. Unlawful detainer by tenant for term less than life**

Formerly cited as UT ST § 78-36-3

(1) A tenant holding real property for a term less than life, is guilty of an unlawful detainer if the tenant:

(a) continues in possession, in person or by subtenant, of the property or any part of it, after the expiration of the specified term or period for which it is let to him, which specified term or period, whether established by express or implied contract, or whether written or parol, shall be terminated without notice at the expiration of the specified term or period;

(b) having leased real property for an indefinite time with monthly or other periodic rent reserved:

(i) continues in possession of it in person or by subtenant after the end of any month or period, in cases where the owner, the owner's designated agent, or any successor in estate of the owner, 15 calendar days or more prior to the end of that month or period, has served notice requiring the tenant to quit the premises at the expiration of that month or period;

or

(ii) in cases of tenancies at will, remains in possession of the premises after the expiration of a notice of not less than five calendar days;

(c) continues in possession, in person or by subtenant, after default in the payment of any rent or other amounts due and after a notice in writing requiring in the alternative the payment of the rent and other amounts due or the surrender of the detained premises, has remained uncomplied with for a period of three calendar days after service, which notice may be served at any time after the rent becomes due;

(d) assigns or sublets the leased premises contrary to the covenants of the lease, or commits or permits waste on the premises;

(e) sets up or carries on any unlawful business on or in the premises;

(f) suffers, permits, or maintains on or about the premises any nuisance, including nuisance as defined in Section 78B-6-1107;

- (g) commits a criminal act on the premises and remains in possession after service of a three calendar days' notice to quit; or
- (h) continues in possession, in person or by subtenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those previously mentioned, and after notice in writing requiring in the alternative the performance of the conditions or covenant or the surrender of the property, served upon the tenant and upon any subtenant in actual occupation of the premises remains uncomplied with for three calendar days after service.
- (2) Within three calendar days after the service of the notice, the tenant, any subtenant in actual occupation of the premises, any mortgagee of the term, or other person interested in its continuance may perform the condition or covenant and thereby save the lease from forfeiture, except that if the covenants and conditions of the lease violated by the lessee cannot afterwards be performed, or the violation cannot be brought into compliance, the notice provided for in Subsections (1)(d) through (g) may be given.
- (3) Unlawful detainer by an owner resident of a mobile home is determined under Title 57, Chapter 16, Mobile Home Park Residency Act.
- (4) The notice provisions for nuisance in Subsections (1)(d) through (g) do not apply to nuisance actions provided in Sections 78B-6-1107 through 78B-6-1114.

CREDIT(S)

Laws 2008, c. 3, § 982, eff. Feb. 7, 2008.

# **ADDENDUM C**

**Utah Code § 78B-6-808 (2008)**

Utah Code Annotated - 2008

U.C.A. 1953 § 78B-6-808

West's Utah Code Annotated

Title 78B. Judicial Code

Chapter 6. Particular Proceedings

Part 8. Forcible Entry and Detainer

**§ 78B-6-808. Possession bond of plaintiff—Alternative remedies**

Formerly cited as UT ST § 78-36-8.5

(1) At any time between the filing of the complaint and the entry of final judgment, the plaintiff may execute and file a possession bond. The bond may be in the form of a corporate bond, a cash bond, certified funds, or a property bond executed by two persons who own real property in the state and who are not parties to the action.

(2) The court shall approve the bond in an amount which is the probable amount of costs of suit and damages which may result to the defendant if the suit has been improperly instituted. The bond shall be payable to the clerk of the court for the benefit of the defendant for all costs and damages actually adjudged against the plaintiff.

(3) The plaintiff shall notify the defendant of the possession bond. This notice shall be served in the same manner as service of summons and shall inform the defendant of all of the alternative remedies and procedures under Subsection (4).

(4) The following are alternative remedies and procedures applicable to an action if the plaintiff files a possession bond under Subsections (1) through (3):

(a) With respect to an unlawful detainer action based solely upon nonpayment of rent or other amounts due, the existing contract shall remain in force and the complaint shall be dismissed if the defendant, within three calendar days of the service of the notice of the possession bond, pays accrued rent, all other amounts due, and other costs, including attorney fees, as provided in the rental agreement.

(b)(i) The defendant may remain in possession if he executes and files a counter bond in the form of a corporate bond, a cash bond, certified funds, or a property bond executed by two persons who own real property in the state and who are not parties to the action.

- (ii) The form of the bond is at the defendant's option.
  - (iii) The bond shall be payable to the clerk of the court.
  - (iv) The defendant shall file the bond prior to the later of the expiration of three business days from the date he is served with notice of the filing of plaintiff's possession bond or within 24 hours after the court sets the bond amount.
  - (v) Notwithstanding Subsection (4)(b)(iv), the court may allow a period of up to 72 hours for the posting of the counter bond.
  - (vi) The court shall approve the bond in an amount which is the probable amount of costs of suit, including attorney fees and actual damages which may result to the plaintiff if the defendant has improperly withheld possession.
  - (vii) The court shall consider prepaid rent to the owner as a portion of the defendant's total bond.
  - (c) If the defendant demands, within three days of being served with notice of the filing of plaintiff's possession bond, the defendant shall be granted a hearing within three days of the defendant's demand.
- (5) If the defendant does not elect and comply with a remedy under Subsection (4) within the required time, the plaintiff, upon ex parte motion, shall be granted an order of restitution. A constable or the sheriff of the county where the property is situated shall return possession of the property to the plaintiff promptly.
- (6) If the defendant demands a hearing under Subsection (4)(c), and if the court rules after the hearing that the plaintiff is entitled to possession of the property, the constable or sheriff shall promptly return possession of the property to the plaintiff. If at the hearing the court allows the defendant to remain in possession and further issues remain to be adjudicated between the parties, the court shall require the defendant to post a bond as required in Subsection (4)(b) and shall expedite all further proceedings, including beginning the trial no later than 30 days from the posting of the plaintiff's bond, unless the parties otherwise agree.
- (7) If at the hearing the court rules that all issues between the parties can be adjudicated without further court proceedings, the court shall, upon adjudicating those issues, enter judgment on the merits.

CREDIT(S)

Laws 2008, c. 3, § 988, eff. Feb. 7, 2008.

# **ADDENDUM D**

**Utah Code § 78B-6-810 (2008)**



Utah Code Annotated - 2008

U.C.A. 1953 § 78B-6-810

West's Utah Code Annotated

Title 78B. Judicial Code

Chapter 6. Particular Proceedings

Part 8. Forcible Entry and Detainer

**§ 78B-6-810. Court procedures**

Formerly cited as UT ST § 78-36-9.5

(1) In an action under this chapter in which the tenant remains in possession of the property:

- (a) the court shall expedite the proceedings, including the resolution of motions and trial;
- (b) the court shall begin the trial within 60 days after the day on which the complaint is served, unless the parties agree otherwise; and
- (c) if this chapter requires a hearing to be held within a specified time, the time may be extended to the first date thereafter on which a judge is available to hear the case in a jurisdiction in which a judge is not always available.

(2)(a) In an action for unlawful detainer where the claim is for nonpayment of rent, the court shall hold an evidentiary hearing, upon request of either party, within ten days after the day on which the defendant files the defendant's answer.

(b) At the evidentiary hearing held in accordance with Subsection (2)(a):

- (i) the court shall determine who has the right of occupancy during the litigation's pendency; and
- (ii) if the court determines that all issues between the parties can be adjudicated without further proceedings, the court shall adjudicate those issues and enter judgment on the merits.

(3)(a) In an action for unlawful detainer in which the claim is for nuisance and alleges an act that would be considered criminal under the laws of this state, the court shall hold an evidentiary hearing within ten days after the day on which the complaint is filed to determine whether the alleged act occurred.

(b) The hearing required by Subsection (3)(a) shall be set at the time the complaint is filed and notice of the hearing shall be served upon the defendant with the summons at least

three calendar days before the scheduled time of the hearing.

(c) If the court, at an evidentiary hearing held in accordance with Subsection (3)(a), determines that it is more likely than not that the alleged act occurred, the court shall issue an order of restitution.

(d) If an order of restitution is issued in accordance with Subsection (3)(c), a constable or the sheriff of the county where the property is situated shall return possession of the property to the plaintiff immediately.

(e) The court may allow a period of up to 72 hours before restitution may be made under Subsection (3)(d) if the court determines the time is appropriate under the circumstances.

(f) At the evidentiary hearing held in accordance with Subsection (3)(a), if the court determines that all issues between the parties can be adjudicated without further proceedings, the court shall adjudicate those issues and enter judgment on the merits.

(g) “An act that would be considered criminal under the laws of this state” under Subsection (3)(a) includes only the following:

(i) an act that would be considered a felony under the laws of this state;

(ii) an act that would be considered criminal affecting the health or safety of a tenant, the landlord, the landlord’s agent, or other person on the landlord’s property;

(iii) an act that would be considered criminal that causes damage or loss to any tenant’s property or the landlord’s property;

(iv) a drug- or gang-related act that would be considered criminal;

(v) an act or threat of violence against any tenant or other person on the premises, or against the landlord or the landlord’s agent; and

(vi) any other act that would be considered criminal that the court determines directly impacts the peaceful enjoyment of the premises by any tenant.

(4)(a) At any hearing held in accordance with this chapter in which the tenant after receiving notice fails to appear, the court shall issue an order of restitution.

(b) If an order of restitution is issued in accordance with Subsection (4)(a), a constable or the sheriff of the county where the property is situated shall return possession of the property to the plaintiff immediately.

(5) A court adjudicating matters under this chapter may make other orders as are appropriate and proper.

CREDIT(S)

Laws 2008, c. 3, § 990, eff. Feb. 7, 2008.

# **ADDENDUM E**

**Utah Code § 78B-6-811 (2008)**

Utah Code Annotated - 2008

U.C.A. 1953 § 78B-6-811

West's Utah Code Annotated

Title 78B. Judicial Code

Chapter 6. Particular Proceedings

Part 8. Forcible Entry and Detainer

**§ 78B-6-811. Judgment for restitution, damages, and rent —Immediate enforcement—Treble damages**

Formerly cited as UT ST § 78-36-10

- (1)(a) A judgment may be entered upon the merits or upon default.
- (b) A judgment entered in favor of the plaintiff shall include an order for the restitution of the premises as provided in Section 78B-6-812.
- (c) If the proceeding is for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease or agreement.
- (d)(i) A forfeiture under Subsection (1)(c) does not release a defendant from any obligation for payments on a lease for the remainder of the lease's term.
- (ii) Subsection (1)(d)(i) does not change any obligation on either party to mitigate damages.
- (2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:
- (a) forcible entry;
  - (b) forcible or unlawful detainer;
  - (c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial;
  - (d) the amounts due under the contract, if the alleged unlawful detainer is after default in the payment of amounts due under the contract; and
  - (e) the abatement of the nuisance by eviction as provided in Sections 78B-6-1107 through 78B-6-1114.
- (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.

(4)(a) If the proceeding is for unlawful detainer, execution upon the judgment shall be issued immediately after the entry of the judgment.

(b) In all cases, the judgment may be issued and enforced immediately.

CREDIT(S)

Laws 2008, c. 3, § 991, eff. Feb. 7, 2008.

## **ADDENDUM F**

**Order on Damages re: Unlawful  
Detainer, entered on January 7, 2016  
[R. 12832–34]**

**The Order of the Court is stated below:**

**Dated:** January 07, 2016  
03:27:52 PM

/s/ TODD M SHAUGHNESSY  
District Court Judge



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

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YVONNE MARTIN,  
Petitioner,

v.

PETTER KRISTENSEN,  
Respondent.

**ORDER ON DAMAGES RE: UNLAWFUL  
DETAINER**

Case No. 084902378

Judge Todd M. Shaughnessy

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On December 3, 2015, an evidentiary hearing/trial was held before me, Judge Shaughnessy, in this consolidated case, on the unlawful detainer damages claimed by Frank Kristensen. James H. Deans and John W. Anderson appeared on behalf of Frank Kristensen. Robert B. Sykes appeared on behalf of Yvonne Martin, who was present. Based upon the papers filed, evidence presented, and arguments of counsel, I now find and order as follows:

012831

1. This hearing/trial was to determine damages. I am not going to revisit my rulings on liability for unlawful detainer.
2. I find that the fair rental value of the subject property at 7668 Quicksilver Drive, Cottonwood Heights, UT 84121 (the Property), is in the amounts that were provided through the testimony of Mr. Jerry Webber. Specifically, I find that the fair market rental value of the Property to be as follows:
  - a. In 2008, \$2,100 per month (\$68.8524590163 per day, given 366 days)
  - b. In 2009, \$2,200 per month
  - c. In 2010, \$2,300 per month
  - d. In 2011, \$2,400 per month
  - e. In 2012, \$2,500 per month
  - f. In 2013, \$2,800 per month
  - g. In 2014, \$3,000 per month
  - h. In 2015, \$3,200 per month (\$105.205479452 per day, given 365 days)
3. Based on the evidence presented, these amounts are the most reasonable determinations of fair market rental value. Ms. Martin did not provide an alternative basis for determining these amounts. Ms. Martin's concerns about the number of bedrooms or deferred maintenance do not justify a change in those values based on the evidence presented.
4. Accordingly, I find that the fair market rental value of the Property from July 6,



2008 through October 12, 2015 is \$224,534.10. This number is reached by adding the following sums: (a) an amount in 2008 obtained by multiplying the applicable daily rate times 178 days; (b) an amount in 2009–2014 by multiplying the applicable monthly rate times twelve months each year; and (c) an amount in 2015 obtained by multiplying the applicable daily rate times 284 days. Plaintiff agreed on the record that damages should be awarded from July 6, 2008, and not from July 1, 2008. (These calculations differ slightly from those the Court made on the record, but accurately reflect the amounts awarded based on the Court’s findings.)

5. I find under any circumstances, damages owing for remaining in the Property, when a jury issued a decision against Ms. Martin on her claims that she was the rightful owner of the Property, are at a minimum this amount.
6. Frank Kristensen is also statutorily entitled to an award of attorney fees. Utah Code Ann. § 78B-6-811(3). Mr. Kristensen shall submit an affidavit/declaration of attorney fees.
7. The unlawful detainer statute itself contemplates that a court may enter an order allowing a person to remain in possession of property, *see id.* § 78B-6-810(2)(b) (i), 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, *see id.* § 78B-6-811(3). (I have previously found that Ms. Martin was in unlawful detainer of the Property and issued an order restoring the premises to Frank Kristensen.) I acknowledge that there is a significant statutory safety valve that is

designed to protect against excessive damages for unlawful detainer, and that is the provision that allows a person to request a hearing or trial within 60 days and/or otherwise provides for expedited proceedings. *See id.* § 78B-6-810. That should have happened here but did not. Had it happened, a huge amount of these damages would have been avoided. I think it's essentially beyond question that this case has been unreasonably delayed. With respect to timing, based on my experience of the case and my review of the file, the summary that Mr. Anderson provided about the procedural history and the machinations of this case appear to be accurate. It is this unreasonable delay in the resolution of this case that takes a relatively manageable amount of damages to an enormous amount of damages. That said, I believe the statute requires me to award treble damages. *See id.* § 78B-6-811(3).

8. Accordingly, the total amount awarded to Frank Kristensen is \$673,602.30, plus attorney fees in an amount to be determined.
9. Based on Ms. Martin's request, the hearing/trial scheduled for January 7, 2016, to hear other matters in this consolidated case, is continued to Wednesday, January 20, 2016, to begin at 8:30 am. All previously set pretrial disclosure dates/deadlines shall remain as established.
10. Upon entry of this order, Robert B. Sykes, counsel for Yvonne Martin, shall be permitted to withdraw from his limited appearance.

It is so ordered.

THE COURT'S SIGNATURE IS AT THE TOP OF THE FIRST PAGE

Approved as to form:

SYKES MCALLISTER LAW OFFICES, PLLC

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Robert B. Sykes  
*Counsel for Yvonne Martin (limited  
appearance)*

**RULE 7(f)(2) NOTICE**

Please take notice that the foregoing order will be submitted to the Court for entry seven days after service upon you. Any objections must be filed within that time. *See* Utah R. Civ. P. 7(f)(2).

ANDERSON | HINKINS

/s/ John W. Anderson  
\_\_\_\_\_  
John W. Anderson  
*Counsel for Frank Kristensen*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of December, 2015, I caused a true and correct copy of the foregoing document(s) to be served upon the following persons in the following manner:

Robert B. Sykes  
Sykes McAllister Law Offices, PLLC  
311 S State Street, Ste 240  
Salt Lake City, UT 84111

Email: bob@sykesmcallisterlaw.com  
Efiling (as appropriate)

Yvonne Martin  
(address unknown)

Email: happy.blueskies@yahoo.com

/s/ John W. Anderson

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