

2012

Douglas Bates v. Utah Association of Realtors;  
Christopher Kyler; Charles Smalley; Salt Lake  
Board of Realtors; Northern Wasatch Association  
of Realtors; Wasatch Front Regional MLS; Bryan  
R. Kohler; Michael J. Ostermiller; Jillinda Bowers;  
Brady Long dba Equity Real Estate; Thomas  
Johnson; Randall Wall; Sandra Hoover; and DOES  
1-60 inclusive : Reply Brief of Defendant/Appellee  
Jillinda Bowers

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IN THE UTAH COURT OF APPEALS

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DOUGLAS BATES,

Plaintiff/Appellant,

vs.

UTAH ASSOCIATION OF REALTORS;  
CHRISTOPHER KYLER; CHARLES  
SMALLEY; SALT LAKE BOARD OF  
REALTORS; NORTHERN WASATCH  
ASSOCIATION OF REALTORS;  
WASATCH FRONT REGIONAL MLS;  
BRYAN R. KOHLER; MICHAEL J.  
OSTERMILLER; JILLINDA BOWERS;  
BRADY LONG dba EQUITY REAL  
ESTATE; THOMAS JOHNSON;  
RANDALL WALL; SANDRA  
HOOVER; and DOES 1-60,

Defendants/Appellees.

Appellate Case No. 20120067-CA

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**BRIEF OF DEFENDANT/APPELLEE JILLINDA BOWERS**

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Appeal from a Final Order of the Third Judicial District Court  
for Salt Lake County, State of Utah, the Honorable John Paul Kennedy Presiding

---

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**FILED**  
**UTAH APPELLATE COURTS**

**JUL 16 2012**

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**IN THE UTAH COURT OF APPEALS**

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DOUGLAS BATES,

Plaintiff/Appellant,

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UTAH ASSOCIATION OF REALTORS;  
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**TABLE OF CONTENTS**

JURISDICTIONAL STATEMENT.....1

ISSUES, STANDARDS OF REVIEW, AND PRESERVATION.....1-2

DETERMINATIVE PROVISIONS.....2-3

STATEMENT OF THE CASE.....3

    I. Nature of the Case, Course of Proceedings, and Disposition Below.....3

    II. Statement of Facts Relevant to Bowers.....3

SUMMARY OF THE ARGUMENT.....4

ARGUMENT.....4-6

CONCLUSION.....7

**TABLE OF AUTHORITIES**

**Cases**

*Evans v. Philadelphia Newspapers, Inc.*, 601 A.2d 330 (Pa. Super. Ct. 1991).....5

*Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).....5

*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535.....1

*Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325.....1, 4-6

*Oakwood Vill. L.L.C. v. Albertsons, Inc.*, 2004 UT 101, 104 P.3d 1226.....1

*O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214.....2

*Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992).....5

*Taylor v. Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers*, 968  
P.2d 685 (Kan. Ct. App. 1998).....5

**Constitutional Provisions**

U.S. Const. amend. 1.....1-2, 5

**Rules**

Utah R. Civ. P. 12(b)(6).....1

**Statutes**

Utah Code § 78A-4-103.....1

Utah Code § 78B-2-101, *et seq.*.....6

Utah Code § 78B-2-302.....2-3, 4, 6

Utah Code § 78B-2-307.....6

## JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction pursuant to Utah Code section 78A-4-103(2)(j).

### ISSUES, STANDARDS OF REVIEW, AND PRESERVATION

A comprehensive statement of the issues on appeal is set forth in the Brief of Defendants/Appellees Utah Association of Realtors and Christopher Kyler, which statement Defendant/Appellee Jillinda Bowers (“Bowers”) hereby joins in and adopts by reference. For the reasons discussed below, the only issue on appeal relevant to Bowers is:

Issue 1: Whether the district court correctly concluded that, under *Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325, claims that are based on the same operative facts that would support a defamation claim are subject to Utah’s one-year limitations period for defamation.

Standard of Review: A district court’s grant of a motion to dismiss under Rule 12(b)(6) of the *Utah Rules of Civil Procedure* presents a question of law that this Court reviews for correctness. *Oakwood Vill. L.L.C. v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226. Significantly, however, due to the First Amendment interests at stake when allegedly defamatory conduct is at issue, this Court applies a unique standard of review under which, unlike a normal motion to dismiss, the nonmoving party is not entitled to any inferences in his favor. *Jacob v. Bezzant*, 2009 UT 37, ¶ 18, 212 P.3d 535 (“To accommodate the respect we accord its protections of speech, the First Amendment’s presence merits altering our customary rules of review by denying a nonmoving party the

benefit of a favorable interpretation of factual inferences.’” (quoting *O’Connor v. Burningham*, 2007 UT 58, ¶ 27, 165 P.3d 1214)).

Preservation: This issue was preserved by written motion and memoranda, [R. 447, 453-55], and by oral argument [R. 1560, at 6:18-8:7; 104:23-107:1], and was noted by the district court’s final Memorandum Decision and Order. [R. 1523-32.]

### **DETERMINATIVE PROVISIONS**

- The First Amendment to the United States Constitution provides that:  
  
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
  
- Utah Code section 78B-2-302 provides that:  
  
An action may be brought within one year:  
  
(1) for liability created by the statutes of a foreign state;  
  
(2) upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation;  
  
(3) upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state;  
  
(4) for libel, slander, false imprisonment, or seduction;  
  
(5) against a sheriff or other officer for the escape of a prisoner arrested or imprisoned upon either civil or criminal process;  
  
(6) against a municipal corporation for damages or injuries to property caused by a mob or riot;  
  
(7) except as otherwise expressly provided by statute, against a county legislative body or a county executive to challenge a decision of the county legislative body or county executive, respectively; or

(8) on a claim for relief or a cause of action under Title 63L, Chapter 5, Utah Religious Land Use Act.

## STATEMENT OF THE CASE

### **I. Nature of the Case, Course of Proceedings, and Disposition Below.**

A statement of the Nature of the Case, the Course of Proceedings, and the Disposition Below is set forth in the Brief of Defendants/Appellees Utah Association of Realtors and Christopher Kyler, which statement Bowers hereby joins in and adopts by reference.

### **II. Statement of Facts Relevant to Bowers.**

The only specific allegations in the Second Amended Complaint concerning conduct by Bowers are the following:

- In a December 10, 2008 interview with a KSL television reporter, Bowers stated that “[w]e hold our people to a higher standard, an ethical standard and that’s why it’s important that we have ethical and well trained people.” [R. 274, ¶ 71; R. 287, ¶ 172; R. 301, ¶ 240.]
- During the same interview, Bowers told the reporter that “AllPro did not follow the procedures and whatnot outlined by our association,” but stated that she could not say why Bates had been expelled from the Salt Lake Board of Realtors. [R. 274, ¶ 72; R. 275, ¶ 74; R. 287, ¶ 173; R. 301, ¶ 241; R. 310, ¶ 296.]

Bates’s initial Complaint in this case was not filed until January 24, 2011, more than two years after these alleged statements were made. [R. 1.]



## SUMMARY OF THE ARGUMENT

The sole issue on appeal relating to Bowers is whether Utah’s one-year statute of limitations for defamation governs claims based on the same operative facts that would support a defamation action. Because that is exactly what the Utah Supreme Court held in *Jensen v. Sawyers*, 2005 UT 81, ¶ 53, 130 P.3d 325, the district court’s decision was correct and should be affirmed.

## ARGUMENT

Bates never disputed below, and has not appealed, the district court’s ruling that the only allegations in the Second Amended Complaint regarding Bowers are based on two allegedly defamatory statements she made to a KSL reporter. [R. 960-63; R. 1524, 1532; R. 1560, at 56-103, 118-20; Brief of Appellant at 1-2, 13-15.] Nor has Bates appealed the dismissal of his four defamation-based claims as time-barred under Utah’s one-year statute of limitations for defamation claims. *See* Utah Code § 78B-2-302(4); [R. 1523-25; Brief of Appellant at 1-2, 13.] As a result, the only issue left relating to Bowers is a narrow, legal one—whether Bates’s remaining claims, which, with respect to Bowers, must necessarily be based on the same operative facts that would support a defamation claim, are subject to Utah’s one-year limitations period for defamation.<sup>1</sup>

This issue is controlled by *Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325. In that case, the Utah Supreme Court, noting that courts “pay little heed to the labels placed on a particular claim” when assessing which statute of limitations applies, favoring instead “an

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<sup>1</sup> It is not at all clear whether four of these remaining claims (causes of action six through nine) are even asserted against Bowers, as she is nowhere mentioned in those claims. [R. 314-29, ¶¶ 315-403.]

evaluation based on the essence and substance of the claim,” *id.* ¶ 34, unequivocally held that “the statute of limitations for defamation governs claims based on the same operative facts that would support a defamation action.” *Id.* ¶ 53. The Court explained the purpose of broadly applying the one-year limitations period to claims based on speech as follows:

Defamation claims always reside in the shadow of the First Amendment.... A shorter limitations period for defamation can be explained and justified as an acknowledgement of importance of the free speech interests with which defamation collides. A shorter defamation period reflects the importance placed on freedom of speech by restricting the time those making statements are exposed to legal challenges, thereby reducing the chilling effect on speech that may accompany the prospect of defending statements well beyond their shelf lives.

*Id.* ¶¶ 50, 55. Under *Jensen*, these constitutional limitations on speech-based claims cannot “be circumvented by artful pleading.” *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 695 (9th Cir. 1998).<sup>2</sup>

The district court correctly applied this governing precedent. Finding that “the Second Amended Complaint is reasonably specific that the sole allegations against [Bowers and co-defendant Thomas Johnson] are based on allegedly defamatory

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<sup>2</sup> Utah is not alone in this regard. Many other courts have agreed that “the one year statute of limitation for defamation cannot be circumvented by cloaking such a cause of action in other legal raiment.” *Evans v. Philadelphia Newspapers, Inc.*, 601 A.2d 330, 334 (Pa. Super. Ct. 1991); *see also Taylor v. Int’l Union of Elec., Elec., Salaried, Mach. & Furniture Workers*, 968 P.2d 685, 690-92 (Kan. Ct. App. 1998) (plaintiff “will not be permitted to escape the bar of the statute of limitations by calling a defamation action a tortious action for interference with business advantage”); *id.* at 691 (applying same rule to claim of “unfair competition,” which was really a “business libel action”); *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 906 (Utah 1992) (noting authority applying one-year limitations period for defamation to claim for intentional infliction of emotional distress); *cf. Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999) (barring claims for breach of duty of loyalty and trespass where based on speech as “an end-run around First Amendment strictures”).

statements they made to a KSL news reporter on December 10, 2008,” [R. 1524], the district court concluded that Bates’s remaining claims against Bowers were therefore time-barred:

Bates’s four defamation-related claims, as well as his remaining claims [causes of action five through nine] to the extent they are based on the same operative facts as his defamation-related claims, are time-barred under Utah Code Ann. § 78B-2-302(4) and must be dismissed. For Defendants Johnson and Bowers, because the sole allegations against them are based on allegedly defamatory conduct, this conclusion means that all claims against those Defendants are time-barred and hereby dismissed.

[R. 1524-25, 1532.]

Bates’s only substantive argument on this point is that his remaining claims have statutes of limitations provided by statute, and that applying the one-year limitations period for defamation to those claims would therefore be “legislat[ing] from the bench.” [Brief of Appellant at 14.] This novel assertion is found nowhere in *Jensen* and runs directly contrary to *Jensen*’s holding. Nearly all claims have limitations periods provided by statute (hence the term “statute of limitations”), see Utah Code § 78B-2-101, *et seq.*, including the false light claim at issue in *Jensen*, see Utah Code § 78B-2-307(3); *Jensen*, 2005 UT 81, ¶ 31, but that does not rob the courts of the ability to apply the proper statutory limitations period despite “the labels placed on a particular claim.” *Jensen*, 2005 UT 81, ¶ 34.

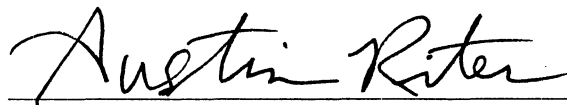
Because the district court’s ruling exactly tracks the rule set forth in *Jensen*, the district court’s decision was correct and should be affirmed.

CONCLUSION

For all of the foregoing reasons, Bowers respectfully requests that this Court affirm the district court's dismissal of Bates's causes of action five through nine against Bowers with prejudice and on the merits.

RESPECTFULLY SUBMITTED this 16th day of July 2012.

PARR BROWN GEE & LOVELESS

A handwritten signature in cursive script that reads "Austin Riter". The signature is written in black ink and is positioned above a horizontal line.

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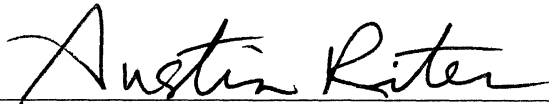
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**CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)**

As required by Rule 24(f)(1)(C) of the *Utah Rules of Appellate Procedure*, I certify that this brief contains 2,190 words, exclusive of the Table of Contents and the Table of Authorities. I relied on my word processing program, Microsoft Word 2007, to obtain the word count. I certify that, to the best of my knowledge and belief, the information contained in this certification of compliance is true and correct.

DATED this 16th day of July 2012.

PARR BROWN GEE & LOVELESS

A handwritten signature in cursive script that reads "Austin Riter". The signature is written in black ink and is positioned above a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of July 2012, eight true and correct hard copies and one true and correct, searchable-PDF electronic copy of the foregoing **BRIEF OF DEFENDANT/APPELLEE JILLINDA BOWERS** were filed with the Clerk of the Court of Appeals, and two true and correct hard copies and one true and correct, searchable-PDF electronic copy were served on each of the following:

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