

2017

## **Labor Commission Plaintiff-Appellant, v. Derek Price, Defendant-Appellee : Brief of Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LABOR COMMISSION

*Plaintiff-Appellant,*

v.

No. 20170734-CA

DEREK PRICE,

*Defendant-Appellee.*

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OPENING BRIEF OF APPELLANT LABOR COMMISSION

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Appeal from the Final Order of the Third Judicial District Court in  
and for Salt Lake County, Honorable Su J. Chon  
No. 126918635

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## **LIST OF ALL PARTIES**

Utah State Labor Commission  
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Plaintiff/Appellant

Derek Price  
Mark D. Tolman (10793)  
Jessica P. Wilde (11801)

Defendant/Appellee

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## **INTRODUCTION**

This action was commenced by the Labor Commission (Commission) filing an abstract of judgment with the district court. It dealt with a wage payment claim brought by Marc Cummings against Derek Price and others. The abstract set out the holdings of the Commission's Default and Order to Pay decision. The decision was a final agency action.

The Commission, among other actions, filed a writ of garnishment in this action. Mr. Price challenged the validity of the writ of garnishment by challenging the Commission's decision.

No appeal has been taken from the final agency action. Instead, Mr. Price asked the district court, in the garnishment proceeding, to overturn the Labor Commission's decision and final agency action.

## **STATEMENT OF ISSUES ON APPEAL**

1. Did the district court have jurisdiction to consider the validity of the challenged administrative decisions, not on appeal or review, but during a garnishment proceeding years later?

### **Preservation and Standard of Review**

This issue was raised by the Commission below and was ruled on by the district court. R. 169-71, 298-303. This Court reviews the district court's conclusions of law de novo "according no deference to its resolution of such issues." *In re Adoption of Baby B*, 2012 UT 35, ¶ 41, 308 P.3d 382.

2. Did the district court err by not applying res judicata to preclude Derek Price from collaterally attacking the Commission's decision in the related administrative proceeding?

### **Preservation and Standard of Review**

This issue was raised by the Commission below and was ruled on by the district court. R. 173-76, 303-04. This Court reviews the district court's conclusions of law de novo "according no deference to its resolution of such issues." *In re Adoption of Baby B*, 2012 UT 35, ¶ 41.

3. Did the district court err in holding that the Commission should have sent notice to Mr. Price by certified mail instead of first class mail?



## **Preservation and Standard of Review**

This issue was raised by the Commission below and was ruled on by the district court. R. 171-73, 300-01. This Court reviews the district court's conclusions of law de novo "according no deference to its resolution of such issues." *In re Adoption of Baby B*, 2012 UT 35, ¶ 41, 308 P.3d 382.

## **STATEMENT OF THE CASE**

Mr. Marc Cummings filed a wage dispute claim with the Commission against Level II Mentoring, L.L.C., and Mad Cow Productions, L.L.C.. Mr. Derek Price had been listed as the sole manager of the manager-managed Mad Cow Productions from the time its Articles of Incorporation were filed through the proceedings before the district court. Mr. Price was also listed as a member of the member-managed company Level II Mentoring from the time its Articles of Incorporation were filed through the proceedings before the district court.

The Commission mailed to Mr. Price copies of the notice of a wage claim, its Preliminary Findings, and its Default and Order to Pay to the addresses shown for him on the Commission's records. The mailing was done in accordance with the applicable statutes. None of these mailings were returned as undeliverable by the U. S. Postal Service.

The Commission filed an Abstract of Judgment in the district court. R. 1-2. The abstract set out the unpaid wages, fines, and attorney fees established by the Commission's decision. The Commission filed the abstract to enforce its decision and obtain for Mr. Cummings his unpaid wages. Among other efforts made to satisfy the judgment, the Commission filed a writ of garnishment against Derek Price. Mr. Price, rather than addressing the writ of garnishment that he sought to quash, he filed a motion to set aside the underlying judgment, and a reply in support thereof. R. 84-127, 238-53. The Commission filed a memorandum in opposition to Mr. Price's motion. R. 165-210.

In its Memorandum Decision and Order, the district court held that Mr. Price could collaterally attack the Commission's decision. R. 299-300. It also held that the Commission should be required to provide notice in this and similar actions by certified mail, even though no statute requires it. R. 300-01. The district court quashed the outstanding writ of garnishment against Mr. Price (R. 306) but did not set aside the abstract of judgment. R. 304. Instead the district court ordered Mr. Price to "pursue a motion to set aside in the administrative proceeding with notice to all interested parties." R. 306. The district court also denied "at this juncture" Mr. Price's request for attorney fees. R. 305. The Commission timely filed its Notice of Appeal. R. 309-10. Mr. Price then timely filed his Notice of Cross-Appeal. R. 313-15.

### **SUMMARY OF ARGUMENT**

Mr. Price's challenge to the Commission's decision is untimely. The current action deals with an abstract of judgment and efforts to collect on the Commission's decision. Mr. Price can't use this proceeding to mount a belated challenge to the final agency action.

The district court did not have jurisdiction to address Mr. Price's arguments.

Mr. Price's arguments are also barred by res judicata. A garnishment or other proceeding trying to enforce an agency's final action is subject to res judicata and can't be used to challenge the final agency action.

The applicable statute requires that the Commission's notices in wage claim proceedings be mailed to the parties. The statute does not require the use of a particular form of mail, such as certified mail. The only times that this Court or the Utah Supreme Court have required the use of certified mail is when the legislature has mandated its use by statute.

## **ARGUMENT**

### **I. The District Court Was Without Jurisdiction To Consider Derek Price's Untimely Challenge To The Labor Commission's Order**

The Utah Administrative Procedures Act (UAPA) gives parties 30 days to file a petition for judicial review from a final agency action.

Utah Code § 63G-4-401(3)(a). "The timeliness of the . . . petition, on

the other hand, is a question of jurisdictional significance.” *Living Rivers v. U.S. Oil Sands, Inc.*, 2014 UT 25, ¶ 18, 344 P.3d 568. In *Living Rivers*, no party sought review of the granting of a permit in 2008. When a modified permit was granted in 2011, Living Rivers filed a petition for judicial review, but sought to challenge the granting of the 2008 permit.

The Supreme Court held that it was without jurisdiction because the petition was filed more than 30 days after the issuance of the 2008 permit. *Id.* at ¶ 21. “The jurisdictional question presented is a matter dictated by the substance of Living Rivers’ petition for review.” *Id.* Because the substance of the petition was directed to the 2008 permit, the Court held that was without jurisdiction and dismissed the petition as being untimely. *Id.*

The timely filing of a petition for review, like the timely filing of a notice of appeal, is jurisdictional. *Blauer v. Dep’t of Workforce Serv.*, 2007 Ut App 280, ¶ 7, 167 P.3d 1102. Mr. Price did not file a timely petition for judicial review of the Commission’s decision.

Mr. Price could not use this garnishment proceeding to challenge those prior decisions; he could only challenge the garnishment itself. Utah Rules of Civil Procedure 64D does not authorize a challenge to the underlying judgment, only to matters related to the garnishment. “The district court correctly determined that it lacked subject matter jurisdiction to consider a collateral attack on an underlying judgment in the context of the garnishment proceedings.” *Utah State Tax Comm’n v. Echols*, 2006 UT App 19 (Per Curiam).

While Mr. Price can’t use a garnishment proceeding to challenge the underlying default decision, he is not left without a possible remedy. As a defaulted party, he can ask the Commission to set aside the default “by following the procedures outlined in the Utah Rules of Civil Procedure.” Utah Code § 63G-4-209(3)(a). This motion would be made to the presiding officer who granted the default. *Id.* § 209(3)(b). The decision of the presiding officer would be subject to agency review. *Id.* § 209(3)(c).

## **II. Res Judicata Barred Mr. Price's Attempt To Challenge The Labor Commission's Order In A Garnishment Proceeding**

The district court considered Mr. Price's challenge to the Commission's decisions. It did not limit its review to questions concerning the writ of garnishment that was before it. The district court failed to consider the Commission's argument that res judicata precluded the court's review of the Commission's decision. Apparently the district court accepted Mr. Price's claim that the Commission's decisions could be collaterally attacked because the Commission filed a civil enforcement proceeding (Abstract of Judgment) with the court. R. 299-300.

But this argument was rejected by the Utah Supreme Court in *Career Service Review Board v. Utah Department of Corrections*, 942 P.2d 933, 939-40 (Utah 1997) (applying res judicata and collateral estoppel to prevent the Department of Corrections from collaterally attacking the Board's administrative orders in a civil enforcement action brought by the Board). "Res judicata, which subsumes the doctrine of collateral estoppel, applies to administrative adjudications in Utah." *Id.* at 938 (internal quotation marks omitted).

Mr. Price's claims are barred by the claim preclusion branch of res judicata. Claim preclusion has three elements. "First, both cases must involve the same parties or their privies." *Gillmor v. Family Link LLC*, 2012 UT 38, ¶ 10, 284 P.3d 622 (internal quotation marks omitted). It is undisputed that the parties in the garnishment action are the same as those that were before the Commission. "Second, the claim that is alleged to be barred must have been presented in the first suit or be one that could and should have been raised in the first action." *Id.* The issue before the Commission was the claim for unpaid wages of Marc Cummings. The Commission determined that Derek Price, among others, was liable for these unpaid wages. The claims Mr. Price now asserts challenging the Commission's decisions could and should have been brought during the agency proceedings. "Third, the first suit must have resulted in a final judgment on the merits." *Id.* This element is met as well. Indeed, Mr. Price's attack on the Commission's decision is because it is a final judgment that the Commission seeks to enforce through this garnishment action.



A default judgment is a final judgment for the purposes of res judicata. “The Judgment by Default was a final judgment, i.e., one which puts an end to a lawsuit by declaring that the plaintiff is or is not entitled to recover the remedy sought.” *Schoney v. Memorial Estates, Inc.*, 863 P.2d 59, 61 (Utah Ct. App. 1993). Mr. Price’s claims are barred by res judicata.

Because res judicata applies, this Court does not need to determine whether *Heaps v. Nuriche, LLC*, 2015 UT 26, 345 P.3d 655, should be applied retroactively. It is undisputed that *Heaps* held that managers and members of Limited Liability Corporations were not employers under Utah’s Payment of Wages Act. *Id.* at ¶¶ 11-18. This is contrary to the prior practice of the Commission. The Commission has followed the *Heaps* decision since it was issued. Res judicata precludes Mr. Price from trying to apply *Heaps* to overturn a final judgment that was issued years before it was decided. New precedent has been applied retroactively to actions that are ongoing. *Heartwood Home Health & Hospice LLC v. Rita Huber*, 2016 UT App 183, ¶¶ 5, 10-12, 382 P.3d 1074 (new Utah Supreme Court decision applied

retroactively to ongoing action on appeal at the time the decision was made). But plaintiff's counsel are unaware of any Utah appellate decision that permits a closed case to be reopened so that a new decision can be applied to it.

### **III. Utah Law Does Not Require The Service Of Notice By Certified Mail In Wage Claim Proceedings**

UAPA requires that notices to parties be mailed. Utah Code § 63G-4-201(2)(b). The Commission has defined mail to mean “first class mailing sent to the parties of a wage claim or claim of retaliation, to the last known address on the Commission's record.” Utah Administrative Code R610-3-2(I). Nothing in the statute requires that any particular type of mail be used, such as certified mail. But the district court held that certified mail was required even though the legislature did not see fit to do so. R. 300-01.

Utah law only requires that notice be sent by certified mail when the applicable statute expressly says so. In fact, the Supreme Court has held that a prescribed form of service requires only that type of service, not something more onerous. For example, in *Anderson v. Public Service Commission*, 839 P.2d 822 (Utah 1992), the Court

addressed the Utah Motor Carrier Act's requirement that notice be sent by certified mail. *Id.* at 825. The PSC had complied with the certified mail requirement, but Anderson still argued that he should have been served by personal service. The Court disagreed and held that certified mail was adequate and personal service, or proof of actual notice was not required: "The most burdensome form of service articulated [in the statute] is certified mail. Thus, we can infer that, at most, the legislature intended that the Commission be obligated to serve its orders by certified mail, not by personal service." *Id.*

Likewise, this Court recently held that a statute mandating that notice be sent by "certified mail" required notice by U.S. Postal Service certified mail, not some other method of sending notice. *John Kuhni & Sons Inc. v. Labor Commission*, 2018 UT App 6, ¶¶ 20-21. This Court only required the use of the statutory method for providing notice. It did not require, as did the district court, the use of a more burdensome method of service.

Here, UAPA requires only that notice be mailed. So the Commission was required only to mail its notice, not to use certified

mail. The Commission is not aware of any Utah appellate decision that requires agencies to use certified mail when the applicable statute requires only service by mail.

Nonetheless, the district court held that certified mail was necessary because the Department of Commerce's business directory "is open to fraud." R. 301. And yet the district court acknowledged that "[n]either party has presented evidence of whether this sort of situation has occurred in the past and how often." *Id.* Without explanation, the district court stated that certified mail would be more effective at reaching the right person than first class mail. *Id.* But none of the Commission's notices mailed to Mr. Price were returned as undeliverable. If the addresses on file for Mr. Price were erroneous, the notices would not have reached him whether mailed first class or certified.

## CONCLUSION

For the reasons set forth above, the district court's decision should be reversed.

Respectfully submitted this 19<sup>th</sup> day of April, 2018.

/s/ Brent A. Burnett  
BRENT A. BURNETT  
Assistant Solicitor General  
Attorney for the Office of Recovery  
Services

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

I hereby certify that the Opening Brief of Appellant Labor Commission contains 2,578 words, including headings, footnotes, and quotations, but excluding the Table of Contents and Table of Authorities.

I have relied upon the word count of the word processing system, Word 2016, used to prepare this brief. The font used is Century Schoolbook, 14 point.

/s/ Brent A. Burnett  
Brent A. Burnett

## CERTIFICATE OF SERVICE

This is to certify that I emailed a copy of the foregoing  
OPENING BRIEF OF APPELLANT LABOR COMMISSION to the  
following this 19<sup>th</sup> day of April, 2018:

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/s/ Brent A. Burnett

# **“Addendum A”**

**AUG 02 2017**

By:  SALT LAKE COUNTY  
Deputy Clerk

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

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LABOR COMMISSION,

Plaintiff,

vs.

LEVEL II MENTORING, LLC; AARON  
CHRISTNER; MAD COW  
PRODUCTIONS, LLC; RYAN JENSEN;  
and DEREK PRICE,

Defendants.

MEMORANDUM DECISION AND  
ORDER

Case No. 126918635

Judge Su Chon

This matter is before the Court on Defendant Derek Price's Motion to Set Aside Judgment, Order to Return Garnished Funds, and Sanctions. Oral argument was held June 19. The Court first stayed the continuing garnishment until it could rule on the motion that was taken under advisement. The following is the Court's decision.

**BACKGROUND**

In 2010, Marc Cummings brought a wage dispute to the Utah Labor Commission ("Commission") against Level II Mentoring and Mad Cow Productions. The Administrative Procedures Act requires a claim be "mailed" to the relevant parties, but it does not explain what type of mailing is sufficient to provide notice. See Utah Code Ann. § 63G-4-201 ("When adjudicative proceedings are commenced by the agency, the



agency shall: (i) mail the notice of agency action to each party."'). The Commission adopted a standard mailing procedure: "first class mailing sent to the parties of a wage claim or claim of retaliation, to the last known address on the Commission's record." Administrative Code R610-3-2(I). The Commission's record, in turn, is the business directory kept by the Utah Department of Commerce of each state-licensed business and its principal agents and their mailing addresses.

Mr. Price asserts that the Labor Commission's practice was to issue a wage claim against the principal agents and managers of an offending business.<sup>1</sup> Mad Cow's business registration listed Derek Price as its agent and manager with an address of 3068 S. 1000 E. in Salt Lake City. Level II Mentoring's records listed Mr. Price as its agent with an address of 553 E. 1050 N. in Orem. In September 2010, the Commission mailed the wage claim to Mr. Price at both addresses. When Mr. Price did not respond within the time permitted, the Commission entered preliminary findings in November 2010 and again mailed copies to him at the address in the corporate records. And again, the Commission received no response, so in January 2011 it mailed him an order to pay/order on default for \$12,590. Each document was sent first class mail to Derek Price at the Salt Lake City and Orem addresses on file with the Department of Commerce.

In 2012, the Commission began this action by filing an Abstract of Final Award for \$12,590 with the district court. The Abstract states that it is brought under section 34-28-9 of Utah code:

An abstract of any final award under this section may be filed in the office of the clerk of the district court of any county in the state. If so filed, the abstract shall be docketed in the judgment docket of that district court.

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<sup>1</sup> The Labor Commission did not refute that assertion so the Court presumes that it is true.



Utah Code Ann. § 34-28-9(4)(a). The Abstract states that it was mailed to Mr. Price at the two addresses on file. None of the mailings was ever returned to the Commission as undeliverable.

Mr. Price claims he never received any of the Commission's mailings and only learned of the judgment in early 2017 when his employer was served with a writ to garnish his wages. Mr. Price claims he quit Mad Cow in 2010 and moved to California. The Salt Lake Address is unfamiliar to him, and the Orem address was his residence years earlier in the 1990s. He denies being a principal in either Level II or Mad Cow and believes that the actual principals, co-Defendants Christner and Jensen, fraudulently listed him on the business records without his knowledge.

Mr. Price made his first appearance in this case on February 9, 2017 with a pro se document titled Reply and Request for Hearing in which he states that the judgment was in error because he was merely an employee of Mad Cow and that the "owners (Aaron Christner and Ryan Jensen) used my ID provided for employment to put their business under my name. I had a similar thing in the state of Idaho from them I just got removed." In a February 17 hearing at which Mr. Price appeared pro se, the Court stayed the garnishment order of Mr. Price's wages for one month to see if the parties could come to a settlement. Mr. Price states that he tried several times to speak with the Commission but that the Commission was unwilling to alter the judgment and remove Mr. Price as a liable party.

### **DISCUSSION**

Mr. Price now moves the Court to set aside the judgment and order a return of his garnished wages. The Commission argues that its Abstract of Judgment was filed

under the labor code, which does not provide defendants the right to collaterally attack the underlying merits of the judgment.

(4)(a) An abstract of any final award under this section may be filed in the office of the clerk of the district court of any county in the state. If so filed, the abstract shall be docketed in the judgment docket of that district court.

...

(c) Unless the award was previously satisfied, if an abstract is filed and docketed, the award constitutes a lien upon the employer's real property that is situated in the county in which the abstract is filed for a period of eight years after the day on which the award is granted,

(d) Execution may be issued on the award within the same time and in the same manner and with the same effect as if the award were a judgment of the district court.

Utah Code Ann. § 34-28-9(4)(a).

Mr. Price argues that the Abstract of Judgment was *also* brought under the Administrative Procedures Act, which does permit a collateral attack on the merits:

(1)(a) In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district courts.

...

(d) The action may request, and the court may grant, any of the following:

- (i) declaratory relief;
- (ii) temporary or permanent injunctive relief;
- (iii) any other civil remedy provided by law; or
- (iv) any combination of the foregoing.

...

(3) In a proceeding for civil enforcement of an agency's order, in addition to any other defenses allowed by law, *a defendant may defend on the ground that:*

- (a) the order sought to be enforced was issued by an agency without jurisdiction to issue the order;*
- (b) the order does not apply to the defendant;*
- (c) the defendant has not violated the order; or*
- (d) the defendant violated the order but has subsequently complied.*

(4) Decisions on complaints seeking civil enforcement of an agency's order are reviewable in the same manner as other civil cases.

Utah Code Ann. § 63G-4-501 (emphasis added). Mr. Price claims the Commission does not have jurisdiction over him due to its failure to properly serve him, and the order

does not apply to him because he was not a principal of the companies sued. Because it does appear that section -501 permits a collateral attack, the Court will address Mr. Price's concerns.

First, with respect to the jurisdiction question, Mr. Price seeks relief from judgment under Rule 60(b)(4) for a void judgment. Where service of process is inadequate, a judgment is void and a district court is without personal jurisdiction. *Smith Springs, LLC v. Fullingim*, 2006 UT App 488, ¶ 6 ("proper service ensures that an individual will not be deprived of "life, liberty, or property, without due process of law.").

Notice must be reasonably calculated under all the circumstances to give interested parties an opportunity to protect their interests. Under this standard, the proper inquiry focuses on whether the agency 'acted reasonably in selecting means likely to inform persons affected, not whether each [affected person] actually received notice. To determine whether the agency has acted reasonably in choosing a method of notice, we balance the interest sought to be protected against the interest of the agency. In undertaking this analysis, we focus on whether the method of service strikes a reasonable balance between the interests of the agency and the affected individual, while keeping in mind that the state's burden is less onerous in administrative proceedings.

*Anderson v. Public Service Com'n of Utah*, 839 P.2d 822, 825 (Utah 1992) (internal quotations and citations omitted). In *Anderson*, the Motor Vehicle Act required the Public Service Commission to send its orders by "certified mail to the designated person at the address filed" with the agency. The agency tried several times to serve its order on Anderson by certified mail, but Anderson refused to accept it. The Utah Supreme Court held that the agency sufficiently provided notice by (a) sending it certified and by (b) sending it to the address Anderson had given the agency for the purpose of service of process.

Mr. Price argues that the Commission's policy -- sending notice of a claim by first class mail to the name and address of the principal agents listed in the Department of Commerce database -- violated his due process rights to notice. It appears that notice by first class mail has not been addressed by Utah's appellate courts.

Service by first class mail may be adequate most of the time, but this situation is a reminder that the Department of Commerce's business directory is open to fraud when people can register a business in the name of another without their knowledge or consent. Neither party has presented evidence of whether this sort of situation has occurred in the past and how often. The burden on the Commission to alter its service requirement to certified mail would be minimal for its outgoing mail. Certified mail would have avoided this situation where Mr. Price was blindsided with the judgment against him. Simply sending notices by certified mail would be almost as effective at reaching the correct person than personally serving the parties but without the burden and expense of paying a process server. The Court notes that certified mail would meet the notice burden under Rule 4 for service of a civil complaint, and the burden "is less onerous in administrative proceedings." *Anderson*, 839 P.2d at 825.

Second, Mr. Price has raised a defense that he is not an employer under the Payment of Wages Act. Utah's Payment of Wages Act permits the Commission to include as a defendant in a wage claim dispute the party's "employer." The Act defines employer:

"Employer" includes every person, firm, partnership, association, corporation, receiver or other officer of a court of this state, and any agent or officer of any of the above-mentioned classes, employing any person in this state.

Utah Code Ann. § 34-28-2(c). Traditionally, the Commission interpreted employer to include anyone who was listed as a member or officer. Because Mr. Price was listed on the official records for Level II and Mad Cow, the Commission included him. But in 2015, the Utah Supreme Court was asked to clarify “employer” under the Payment of Wages Act, and it held that the phrase “employing any person in this state” in the statute limits liability only to individuals who employ others.

This conclusion is buttressed by long-accepted principles of Utah corporate law. The general rule is that a corporation is an entity separate and distinct from its officers, shareholders and directors and that they will not be held personally liable for the corporation's debts and obligations. . . . Had the Legislature intended to impose personal liability in contravention of long-standing principles of corporate law, it would have done so expressly as it has in other sections of the code.

*Heaps v. Nuriche, LLC*, 2015 UT 26, ¶ 16, 345 P.3d 655 (internal quotations and citations omitted). Consequently, *Heaps* held that employees who do not employ other employees are not personally liable under the Act.<sup>2</sup> (The Labor Commission has since changed its practice and does not include non-employing officers as defendants in wage claim cases.)

Mr. Price argues that *Heaps* is retroactive and should apply to him, while the Commission argues that *Heaps* is prospective only.

The general rule from time immemorial is that the ruling of a court is deemed to state the true nature of the law both retrospectively and prospectively. In civil cases, at least, constitutional law neither requires nor prohibits retroactive operation of an overruling decision, but in the vast majority of cases a decision is effective both prospectively and

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<sup>2</sup> In 2017, the code was amended to define “employer” to mean the same as it is defined in the federal labor code: “Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.” 29 U.S.C. § 203(d).



retrospectively, even an overruling decision. Whether the general rule should be departed from depends on whether a substantial injustice would otherwise occur.

We may, in our discretion, prohibit retroactive operation where the "overruled law has been justifiably relied upon or where retroactive operation creates a burden." For example, we have limited or prohibited retroactive application of decisions invalidating or reinterpreting certain statutes. In these cases, the challenged statute had been justifiably relied on, and complete retroactive application of the statute would have irreparably burdened the individuals or entities who relied on it.

*Malan v. Lewis*, 693 P.2d 661, 676 (Utah 1984) (citations omitted). *Heaps* did not make new law but rather clarified existing law. Consequently, *Heaps* should be applied retroactively, and Mr. Price is not properly deemed an "employer," and thus is not a proper defendant here. See also *Monarrez v. Utah Dep't of Transp.*, 2016 UT 10, ¶ 28, 368 P.3d 846 (court could not find a "single case applying a decision purely prospectively that did not also expressly recognize the decision would significantly alter the legal landscape by ending or overruling a relied-upon practice, statute, or case.").

Mr. Price's collateral attack of the judgment based on lack of jurisdiction and that the judgment does not apply to him are well taken.

### **Res judicata**

The Commission argues that Mr. Price's arguments regarding the Commission's finding of his liability is barred by res judicata, which requires:

First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

*Macris & Assocs., Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 20, 16 P.3d 1214. Res judicata does not apply here because the abstract of judgment case is not a separate cause of



action. Furthermore, the Commission's finding of Mr. Price's liability was not made on the merits but was a default judgment based on his failure to respond to the charges.

**Exhaustion of Administrative Remedies**

The Commission argues that Mr. Price failed to exhaust his administrative remedies. It suggests he should have appealed the Commission's decision, but the time in which he had to do it has long passed. Mr. Price has not filed a motion to set aside as suggested by the Commission's counsel. He called the Commission to see what they would do given his circumstances, and it refused to reconsider.

Mr. Price argues that the Court should relieve him of the obligation to exhaust his administrative remedies.

[T]he court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

- (i) the administrative remedies are inadequate; or
- (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

Utah Code Ann. § 63G-4-401(2)(b). When the Court gave Mr. Price a month to negotiate with the Commission, the Commission refused and made it clear it would not change its position on Mr. Price's liability. At the hearing, counsel for the Commission, indicated that Mr. Price could still file a motion to set aside before the Commission. Mr. Price could be permitted to forego his administrative remedies and come directly to the district court. However, the wage claimant has not been made aware of this pending action nor the defenses that Mr. Price asserts. The Court is concerned that setting aside the abstract at this point would require notice to the wage claimant.

Mr. Price asks the Court to order the Commission to return the amount that has already been garnished. However, the concern here is that the Commission has already

sent the payments to the wage claimant. The Commission no longer has control over the funds. It seems that Mr. Price would need to include the wage claimant under any motion to set aside the judgment.

**Attorney fees under bad faith statute**

Mr. Price seeks attorney's fees under the bad faith statute.

(1) In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith[.]

Utah Code Ann. § 78B-5-825. Mr. Price argues that because the Abstract of Judgment was filed under the UAPA, section 63G-4-501, it was obligated to first determine that the order was well grounded in fact and warranted by existing law.

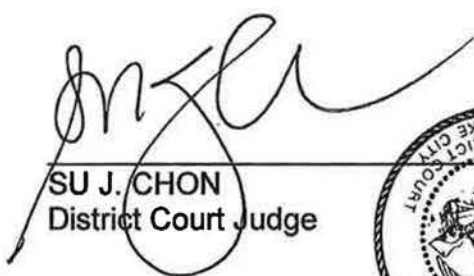
The commission . . . shall commence an action under Section 63G-4-501 for civil enforcement of a final order of the commission issued under Subsection 34A-5-107(11) if:

- (a) the order finds that there is reasonable cause to believe that a respondent has engaged or is engaging in discriminatory or prohibited employment practices made unlawful by this chapter;
- (b) *counsel to the commission or the attorney general determines after reasonable inquiry that the order is well grounded in fact and is warranted by existing law;*
- (c) the respondent has not received an order of automatic stay or discharge from the United States Bankruptcy Court; and
- (d)(i) the commission has not accepted a conciliation agreement to which the aggrieved party and respondent are parties; or (ii) the respondent has not conciliated or complied with the final order of the commission within 30 days from the date the order is issued.

Utah Code Ann. § 34A-5-108(1) (emphasis added). At this point, it is insufficient to demonstrate that the Commission acted in bad faith. If it did proceed in this action based on a prior interpretation of the law and believed in good faith that its counsel told them it would not be retroactive, it would not be bad faith. However, the facts are insufficient to determine that bad faith has occurred at this juncture.

Accordingly, the Court orders that the writ of garnishment be quashed and that Mr. Price pursue a motion to set aside in the administrative proceeding with notice to all interested parties. No further order is necessary.

DATED this 1<sup>st</sup> day of August, 2017.

  
SU J. CHON  
District Court Judge





CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 126918635 by the method and on the date specified.

MAIL: AARON CHRISTNER 3068 SOUTH 1000 EAST SALT LAKE CITY, UT 84106

MAIL: RYAN JENSEN 8964 SOUTH 1075 WEST WEST JORDAN UT 84088

MAIL: LEVEL 11 MENTORING LLC 6135 SOUTH STRATLER STREET SUITE A MURRAY  
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MAIL: MAD COW PRODUCTIONS LLC 3068 SOUTH 1000 EAST SALT LAKE CITY UT  
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08/02/2017

/s/ JENNIFER WILLIAMS

Date: \_\_\_\_\_

\_\_\_\_\_

Deputy Court Clerk