

2007

# William P. Ramey, III, an individual v. Salt Lake City Corporation, a Utah corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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WILLIAM P. RAMEY, III, an individual,	)	
	)	
Plaintiff-Appellant	)	
	)	Case No. 20070477-CA
	)	
vs.	)	
	)	
SALT LAKE CITY CORPORATION, a	)	
Utah corporation,	)	
	)	
Defendant-Appellee.	)	

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BRIEF OF APPELLEE SALT LAKE CITY CORPORATION

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE GLENN K. IWASAKI

---

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Plaintiff/Appellant

FILED  
UTAH APPELLATE COURTS  
NOV 13 2007

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Plaintiff-Appellant. )  
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HONORABLE GLENN K. IWASAKI

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## THE PARTIES

### Plaintiffs

William P. Ramey, III

### Defendants

Salt Lake City Corporation

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## **JURISDICTION**

This Court has jurisdiction pursuant to Utah Code Annotated section 78-2a-3(2)(j) (2001) (“The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over: . . . (j) cases transferred to the Court of Appeals from the Supreme Court.”).<sup>1</sup>

## **ISSUES PRESENTED FOR REVIEW<sup>2</sup>**

Did the district court correctly grant Salt Lake City Corporation’s (City) Motion to Dismiss based on Plaintiff William P. Ramey’s failure to exhaust his administrative remedies pursuant to Utah Code Annotated section 10-9a-801(1) and Mr. Ramey’s failure file a Notice of Claim in compliance with the Governmental Immunity Act of Utah, Utah Code Annotated section 63-30d-401 (2004), et seq.?

Did the district court correctly deny Mr. Ramey’s request for postjudgment relief under Utah Rules of Civil Procedure 59 and 60?

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<sup>1</sup> In the statement of jurisdiction, Mr. Ramey’s brief mistakenly cites Utah Code Annotated section 78-2-2a(3)(2). This Code section does not exist.

<sup>2</sup> Appellee Salt Lake City Corporation restates the issues presented for review pursuant to Utah Rule of Appellate Procedure 24(b)(1), because the City is “dissatisfied with the statement of the appellant.” Mr. Ramey’s presentation of the issues includes the trial court’s denial of his request for a Temporary Restraining Order (Ramey Brief p. 1, issue 2) and the trial court’s failure to address his claims for injunctive relief (*id.*, issue 3). Neither of these issues was preserved for appeal through designation in Mr. Ramey’s notice of appeal. Utah Rule of Appellate Procedure 3(d) requires that “[t]he notice of appeal shall . . . designate the judgment or order, or part thereof, appealed from.” *Id.* See footnote 9, *infra*, for analysis of this issue.



## **Standard of Review**

This Court reviews the grant of a motion to dismiss for correctness.

“Whether a trial court has subject matter jurisdiction presents a question of law, which this Court reviews ‘under a correction of error standard, giving no particular deference to the trial court’s determination.’” *Xiao v. University of Utah*, 2006 UT 57, ¶7, 144 P.3d 1142; *see also State v. Krueger*, 1999 UT App 54, ¶10, 975 P.2d 489.

## **RELEVANT STATUTES, ORDINANCES, RULES, AND REGULATIONS**

### **Utah Code Annotated**

#### **Utah Code Ann. § 10-9a-701 (2005) (Appeal authority required--Condition precedent to judicial review--Appeal authority duties.)**

- (1) Each municipality adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide:
  - (a) requests for variances from the terms of the land use ordinances; and
  - (b) appeals from decisions applying the land use ordinances.
- (2) As a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance.
- (3) An appeal authority:
  - (a) shall:
    - (i) act in a quasi-judicial manner; and
    - (ii) serve as the final arbiter of issues involving the interpretation or application of land use ordinances; and
  - (b) may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority.
- (4) By ordinance, a municipality may:
  - (a) designate a separate appeal authority to hear requests for variances than the appeal authority it designates to hear appeals;

- (b) designate one or more separate appeal authorities to hear distinct types of appeals of land use authority decisions;
  - (c) require an adversely affected party to present to an appeal authority every theory of relief that it can raise in district court;
  - (d) not require an adversely affected party to pursue duplicate or successive appeals before the same or separate appeal authorities as a condition of the adversely affected party's duty to exhaust administrative remedies; and
  - (e) provide that specified types of land use decisions may be appealed directly to the district court.
- (5) If the municipality establishes or, prior to the effective date of this chapter, has established a multiperson board, body, or panel to act as an appeal authority, at a minimum the board, body, or panel shall:
- (a) notify each of its members of any meeting or hearing of the board, body, or panel;
  - (b) provide each of its members with the same information and access to municipal resources as any other member;
  - (c) convene only if a quorum of its members is present; and
  - (d) act only upon the vote of a majority of its convened members.

**Utah Code Ann. § 10-9a-801(1) (2007) (No district court review until administrative remedies exhausted).**

No person may challenge in district court a municipality's land use decision made under this chapter, or under a regulation made under authority of this chapter, until that person has exhausted the person's administrative remedies as provided in Part 7, Appeal Authority and Variances, if applicable.

**Utah Code Ann. § 63-30d-101, et seq. (Governmental Immunity Act of Utah).**

Because of its length, section 63-30d-101 (2004) et seq. is attached in the Addendum at 2.

**Salt Lake City Code of Ordinances**

**§ 21A.12.040(D) (Procedures).**

“Any person adversely affected by an interpretation rendered by the zoning administrator may appeal to the board of adjustment in accordance with the provisions of chapter 21A.16 of this part.”

**§ 21A.16.020 (Parties Entitled To Appeal).**

“An applicant or any other person or entity adversely affected by a decision administering or interpreting this title [21A, Zoning] may appeal to the board of adjustment.”

**§ 21A.16.040 (Appeal of Decision).**

“Any person adversely affected by any decision of the board of adjustment may, within thirty (30) days after the decision is made, present to the district court a petition specifying the grounds on which the person was adversely affected.”

**§ 21A.36.020B (Conformance With Lot And Bulk Controls).**

“Central air conditioning systems, heating, ventilating, pool and filtering equipment, the outside elements shall be located not less than 4 feet from a lot line.”

**Utah Rules of Civil Procedure**

**Utah Rule of Civil Procedure 12(b).**

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required,

except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

## **I. STATEMENT OF THE CASE**

Mr. Ramey<sup>3</sup> brought this action relative to property he owned at 38 South 1000 East in Salt Lake City, Utah, after a Certificate of Noncompliance (the Certificate) was placed on the property due to the improper placement of an air conditioning unit. The unit was placed too close to the property line, in violation of a City building code.

On December 14, 2006, Mr. Ramey filed his Complaint and Request for a Temporary Restraining Order and Preliminary Injunction in Third District Court.

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<sup>3</sup> Although Mr. Ramey is appearing pro se, he is a member of the Utah State Bar, number 10901 (inactive status). While courts may be “generally lenient with pro se litigants,” *Lundahl v. Quinn*, 2003 UT 11, ¶4, 67 P.3d 1000, Mr. Ramey “is not in the same position as most pro se litigants in that . . . he is law trained.” *State v. Schwenke*, 2007 WL 3197537, \*1 n. 1, 2007 UT App 354 (unreported decision) (Addendum at 5).

(R. at 1-19; Addendum at 1.) After hearing the parties' oral arguments, the trial court denied the request for a Temporary Restraining Order in a minute entry. (R. at 69-71.) Subsequently, on January 11, 2007, the City filed a Motion to Dismiss and a Memorandum in support thereof, based on the fact that the trial court lacked jurisdiction over the case because of Mr. Ramey's failure to exhaust his administrative remedies and his failure to file a Notice of Claim pursuant to Utah statute. (R. at 89-91.) The City argued that the lack of jurisdiction required the trial court to dismiss Mr. Ramey's Complaint.

After the parties fully briefed the Motion to Dismiss, the trial court held a hearing on March 12, 2007. At that hearing, Mr. Ramey stated that he filed a Notice of Claim on January 5, 2007, which was twenty-two days after he filed the Complaint. (R. 238.) On March 14, 2007, the trial court granted the City's motion to dismiss in a minute entry. (R. 162-165.) Mr. Ramey then filed a Request for Relief under Utah Rules of Civil Procedure 59 and 60, which, after briefing, the trial court denied. (R. 166-68; 208-10.) On May 15, 2007, the trial court issued a Final Order granting the City's Motion to Dismiss pursuant to Utah Rule of Civil Procedure 12(b), based on the court's lack of jurisdiction. (R. 211-15.) Mr. Ramey filed a Notice of Appeal on June 14, 2007 (R. 216-19). On July 30, 2007, a Certificate of Correction and Compliance, documenting that the zoning violation on the property at issue had been corrected and removing the Certificate

of Noncompliance from the property, was filed and recorded with the Salt Lake County Recorder's Office. (Addendum at 3.)<sup>4</sup>

## **II. Statement of Undisputed Facts<sup>5</sup>**

Mr. Ramey filed his Complaint concurrently with his Motion for Temporary Restraining Order. (R. at 1-40.) His Complaint contained ninety-seven separately numbered paragraphs. (R. at 1-19.) He alleged his right to recover damages from the City based upon the following legal theories: 1) Tortious Interference with Contract and Prospective Contract (R. at 8, ¶¶ 43-46); 2) Negligent Misrepresentation (R. at 9, ¶¶ 47-52) and (R. at 9-10, ¶¶ 53-58); 3) Negligence (R. at 10, ¶¶ 59-63); 4) Fraud (R. at 9-11, ¶¶ 64-67), Wrongful Recordation and Wrongful Attachment (R. at 11-12, ¶¶ 68-72); 5) Conversion/Trespass to Try Title/Trespass to Real Property (R. at 12-13, ¶¶ 73-

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<sup>4</sup> The City acknowledges that the Certificate of Correction and Compliance was filed after the decision below and therefore is not in the Record. Nevertheless, this Court may take judicial notice of it because it is a public record and discloses that an issue has been mooted by actions subsequent to the proceedings below. “[A] reviewing court may take judicial notice of events or facts which, while not appearing in the record, disclose that an issue has been mooted.” AmJur Evidence § 44. *See* Argument, subsection C, *infra*, arguing that because the zoning violation has been remedied, and the Certificate of Noncompliance removed, Mr. Ramey's requests for injunctive relief are moot. The City will file a Motion pursuant to Utah Rule of Appellate Procedure 37, Suggestion of Mootness, on this issue.

<sup>5</sup> The City does not address facts which it deems irrelevant to determination of this case. The City is admitting these facts for purposes of this appeal only. The City also notes that Mr. Ramey never cites to the record in his appellate brief. This violates Utah Rule of Appellate Procedure 24(e), which requires “[r]eferences shall be made to the pages of the original record.” Further, subsection (k) of Rule 24 states, “briefs which are not in compliance may be disregarded or stricken.”

77); 6) Suit to Quiet Title/Trespass to Real Property (R. at 13-14, ¶¶ 78-81); and 7) Slander of Title (R. at 14-15, ¶¶ 82-86, 87-91). Based upon these legal theories, Mr. Ramey filed a Motion for a Temporary Restraining Order and Preliminary Injunction, (R. at 15-16, ¶¶ 92-97), including requests for damages (R. at 17), attorney's fees (R. at 17, ¶¶ E & G), costs (R. at 17, ¶ F), and "treble damages" (R. at ¶ G(2)).

Mr. Ramey's Complaint alleged that the damages and other relief were based upon his claim that the City improperly filed a "Notice of Non-Compliance" (Certificate) related to property Mr. Ramey owned at 38 South 1000 East in Salt Lake City, Utah. (R. at 2, 3 ¶ 8). The Certificate of Noncompliance at issue, dated November 21, 2006 (R. at 119), specifically stated that the noncompliance is with respect to Salt Lake City Code of Ordinances section 21A.36.020(B). Mr. Ramey alleged that the City wrongfully filed the Certificate despite previously indicating that an air conditioning unit on Ramey's property met the City's requirements. (R. at 3-8, ¶¶ 10-42). Specifically, Mr. Ramey alleged that the air conditioning unit on his property, which violated City Code by being too close to his property line, should be allowed to remain in place. (*Id.*) His Complaint alleged that he had exhausted his administrative remedies when he received "approval for the placement of the A/C unit when he purchased the property." (R. at 8, ¶ 41.) The Complaint also alleged alternatively that he was not required to file a Notice of Claim pursuant to the Governmental Immunity Act of Utah

because the City had notice of his allegations, and that he did file a Notice of Claim.

### **SUMMARY OF ARGUMENTS**

The trial court correctly dismissed Mr. Ramey's Complaint because it did not have subject matter jurisdiction. Under Utah Code Annotated section 10-9a-801(1), there is no jurisdiction to hear Mr. Ramey's allegations because he failed to exhaust his administrative remedies. Further, Mr. Ramey's failure to file a Notice of Claim with the City, as is required by the Governmental Immunity Act of Utah, is fatal to his claim and deprived the trial court of jurisdiction. *See* Utah Code Ann. § 63-30d-401 et seq. (Governmental Immunity Act of Utah). Even if Mr. Ramey has alleged equitable claims in addition to his claims for monetary damage, he is still required to exhaust his administrative remedies pursuant to state statute. *See Patterson v. Am. Fork City*, 2003 UT 7, ¶19, 67 P.3d 466 (holding, under predecessor statute, administrative process cannot be avoided in favor of filing equitable claims directly in district court). Because of these deficiencies, the trial court correctly dismissed Mr. Ramey's Complaint pursuant to Utah Rule of Civil Procedure 12(b).

### **ARGUMENT**

The trial court's Order in this case granting the City's Motion to Dismiss, filed May 15, 2007, cites Utah Rules of Civil Procedure 12(b)(6) and (1). (R. at 211-15.) A court may consider facts alleged outside the complaint in a 12(b)(1) ruling,



but not in a 12(b)(6) ruling. In *Millet v. Logan City*, this Court explained the standard used when reviewing a rule 12(b)(6) motion:

A trial court's decision granting a rule 12(b)(6) motion to dismiss a complaint . . . is a question of law that we review for correctness, giving no deference to the trial court's ruling. When reviewing for correctness, we accept the factual allegations in the complaint as true and interpret those facts and all inferences drawn from them in the light most favorable to the plaintiff as the non-moving party.

2006 UT App 466, ¶5, 147 P.3d 971 (internal citations and quotation marks omitted). In *Wheeler v. McPherson*, the Court explained that different factual allegations may be considered in 12(b)(1) motions: “Utah Rule of Civil Procedure 12 . . . does not convert motions based on subsections (b)(1) through (5) . . . into motions for summary judgment simply because they include some affirmative evidence relating to the basis for the motion.” 2002 UT 16, ¶20, 40 P.3d 632 (internal citations and quotation marks omitted). In this case, even if the trial court considered evidence outside of the Complaint, its grant of the Motion to Dismiss was still correct and should be upheld by this Court.

**A. Because Mr. Ramey Failed to Exhaust His Administrative Remedies, the Court below Correctly Dismissed for Lack of Subject Matter Jurisdiction.**

Mr. Ramey’s failure to exhaust his administrative remedies required the trial court to dismiss his Complaint. In this case, Mr. Ramey had a right to appeal his dispute under Salt Lake City Code of Ordinances sections 21A.12.040(D) and 21A.16.020. However, he does not claim in his Complaint, his Response to the

Motion to Dismiss, or on appeal that he appealed to the Board of Adjustment and received a result prior to filing in district court. Thus, Mr. Ramey had an administrative remedy regarding a land use decision that he failed to exhaust prior to filing suit. Mr. Ramey's failure to exhaust his administrative remedies deprived the trial court of jurisdiction, and it therefore correctly dismissed Mr. Ramey's Complaint.

Utah law states, "No person may challenge in district court a municipality's land use decision made under this chapter, or under authority of this chapter, until that person has exhausted the person's administrative remedies." Utah Code Ann. § 10-9a-801(1). Thus, prior to filing his Complaint, Mr. Ramey was required to exhaust administrative remedies, by appealing the land use decision and following the appeal process outlined in the City's ordinance. *See* Utah Code Ann. § 10-9a-701(1)(b) ("Each municipality adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide: . . . (b) appeals from decisions applying the land use ordinances.") Failure to exhaust administrative remedies deprives a court of subject matter jurisdiction, leaving it with "only the authority to dismiss the action." *Hom v. Utah Dept. of Pub. Safety*, 962 P.2d 95, 99 (Utah Ct. App. 1998) (quoting *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah Ct. App. 1989)).

The land use decision at issue found that the location of an air conditioning unit on Mr. Ramey's property did not comply with the City's zoning ordinance. The Certificate of Noncompliance, dated November 21, 2006 (R. at 119),

specifically stated that the noncompliance is with respect to Salt Lake City Code of Ordinances (SLCCO) section 21A.36.020(B). That land use ordinance requires that central air condition systems “shall be located not less than 4 feet from a lot line.” *Id.* To appeal the decision that the unit does not meet this requirement, Mr. Ramey was required to follow the City’s procedure authorized by Utah Code Annotated section 10-9a-801. Under City Code, “Any person adversely affected by an interpretation rendered by the zoning administrator may appeal to the board of adjustment in accordance with the provisions of chapter 21A.16 of this part.” SLCCO § 21A.12.040(D). Chapter 21A.16 specifically states, “An applicant or any other person or entity adversely affected by a decision administering or interpreting this title [21A, Zoning] may appeal to the board of adjustment.”<sup>6</sup> SLCCO § 21A.16.020. However, rather than appealing the land use decision as required by statute and ordinance, Mr. Ramey filed an action in district court.

Mr. Ramey argues that he was not required to exhaust his administrative remedies, because his Complaint is about the City’s policies and procedures, not about the Certificate of Noncompliance.<sup>7</sup> (Ramey Brief, p. 22, 24.) However, Mr. Ramey’s Complaint is based on the land use decision itself, and he is therefore required to exhaust the statutorily mandated administrative remedies before a trial

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<sup>6</sup> Under either City Code section 21A.12.040(D) or section 21A.16.020 Mr. Ramey has an administrative remedy, to the same entity, which he did not exhaust.

<sup>7</sup> Nevertheless, in his Complaint, Mr. Ramey repeatedly cites the City’s filing of a Certificate of Non-compliance against his property as a reason for filing his Complaint. (R. at 9-15 at ¶¶ 46, 52, 58, 63, 65-66, 69-71, 74-76, 79-86, 91, 93-97, and Prayer for Relief.)

court has jurisdiction to hear his case. *See Patterson v. Am. Fork City*, 2003 UT 7, ¶¶16-17, 67 P.3d 466 (interpreting predecessor statute and dismissing state law claims for failure to exhaust administrative remedies available for municipal land use decisions before filing in district court). Because Mr. Ramey failed to exhaust his administrative remedies by appealing that decision as required by City ordinance, the trial court lacked jurisdiction to hear Mr. Ramey’s Complaint and properly dismissed it.

Further, if Mr. Ramey had followed the administrative appeal process before pursuing relief in court, the purposes behind the exhaustion requirement may have been met. The exhaustion requirement:

“serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency,” *McCarthy v. Madigan*, 503 U.S. 140, 145, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992), by allowing an agency to correct its own mistakes and apply its expertise in resolving conflict and by creating a factual record for judicial review, respectively.

*Culbertson v. Bd. Of Co. Comm’ns of Salt Lake Co.*, 2001 UT 108, ¶28, 44 P.3d 642; *see also Hom v. Utah Dept. of Pub. Safety*, 962 P.2d 95, 99 (Utah Ct. App. 1998). By filing directly in state court, Mr. Ramey denied the City the opportunity to apply its expertise and correct any mistakes, if necessary. Additionally, by filing his action before the Board of Adjustment had the opportunity to review the decision, Mr. Ramey sought to avoid the administrative hearing and attempted instead to obtain relief directly from the court. The Utah legislature and the Salt Lake City Council have made quite clear, however, that the statutory process cannot be circumvented.

Mr. Ramey's dispute about the land use decision is appealable under Salt Lake City Code of Ordinances section 21A.16.020 and section 21A.12.040(D). Despite this plain language, Mr. Ramey does not claim in his Complaint, his Response to the Motion to Dismiss, or on appeal that he appealed to the board of adjustment and received a result prior to filing suit, because he cannot. Mr. Ramey had an administrative remedy, regarding a land use decision, which he did not exhaust before filing his Complaint. Mr. Ramey's failure to exhaust deprived the trial court of jurisdiction leaving it only with the authority to dismiss. Therefore, this Court should affirm the dismissal below on this ground and need go no further.

**B. Mr. Ramey's Claims Were Correctly Dismissed Because He Failed to Comply with the Requirements for Making a Claim Against a Governmental Entity.**

Even if the lower court could have overlooked Mr. Ramey's failure to exhaust his administrative remedies, his failure to file a written Notice of Claim against the City in compliance with the Governmental Immunity Act of Utah deprived the trial court of jurisdiction and invalidated the claims outlined in his Complaint.<sup>8</sup> Under Utah law,

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<sup>8</sup> The City is also immune from suit for Mr. Ramey's claims, but because the trial court lacked jurisdiction to hear the matter, this issue was not briefed. Under the Governmental Immunity Act of Utah, governmental immunity is not waived:

Under Subsections (3) and (4) [of the Act] if the injury arises out of, in connection with, or results from:

(a) the exercise or performance, or the failure to exercise or perform, a discretionary function, whether or not the discretion is abused;

Any person having a claim against a governmental entity, or against its employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority *shall file a written Notice of Claim with the entity before maintaining an action*, regardless of whether or not the function giving rise to the claim is characterized as governmental.

Utah Code Ann. § 63-30d-401(2) (2006) (emphasis added). The claimant can file an action in court sixty days after filing the Notice of Claim if the governmental entity or employee has either denied the claim or failed to respond to the claim. *See* Utah Code Ann. § 63-30d-403 (2006).

Mr. Ramey argues that the City had notice of his claims, since he and the City “were in constant communication throughout 2006.” (Ramey Brief 26-27.) Whether or not he and the City were in communication, he was still required to follow the Notice of Claim provisions set out in section 63-30d-401(2), above. The Utah Supreme Court has repeatedly held that the UGIA generally, and the Notice of Claim provision in particular, “demands strict compliance with its requirements to allow suit against governmental entities.” *Wheeler v. McPherson*,

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- (b) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;
  - (c) the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization;
  - (d) a failure to make an inspection or by making an inadequate or negligent inspection; . . .
  - (f) a misrepresentation by an employee whether or not it is negligent or intentional . . . .

The City reserved its right to assert this immunity if and when Mr. Ramey brings his claims in a court with jurisdiction. *See* Utah Code Ann. §§ 63-30d-210 & -301.

2002 UT 16, ¶13, 40 P.3d 632 (interpreting predecessor statute). The UGIA requires plaintiffs to “file a written Notice of Claim with the [governmental] entity *before* maintaining an action.” Utah Code Ann. § 63-30d-401(2) (2006) (emphasis added).

In this case, Mr. Ramey does not allege that he filed a written Notice of Claim with the City in compliance with the statute. In fact, Mr. Ramey admits that he filed a Notice of Claim on or about January 5, 2007, twenty-two days after he filed the Complaint in this action. (R. at 238, ln. 22 (“I filed the Notice of Claim on January 5, [2007]”).) Thus, Mr. Ramey failed to strictly comply with the UGIA. “A plaintiff’s failure to comply with the UGIA’s Notice of Claim provisions deprives the trial court of subject matter jurisdiction.” *Patterson v. Am. Fork City*, 2003 UT 7, ¶10, 67 P.3d 466. Therefore, the trial court’s only option was to dismiss the Complaint. *See Wheeler*, 2002 UT 16 at ¶16 (interpreting predecessor statute and holding that because plaintiffs failed to strictly comply with Act’s Notice of Claim requirement “the district court correctly dismissed plaintiffs’ claims for lack of jurisdiction”). The touchstone is not whether the governmental entity knew of the issues that would be presented in the Notice of Claim as Mr. Ramey asserts. (Ramey Brief p. 26-27.) Rather, the touchstone is whether he followed the notice requirements. *See Xiao v. Univ. of Utah*, 2006 UT 57, ¶7, 144 P.3d 1142 (reviewing dismissal for failure to comply with statute under subject matter jurisdiction rubric).

Mr. Ramey hints in his brief on appeal that he was not required to file a Notice of Claim sixty days prior to filing a complaint in district court. (Ramey Brief p. 17.) However, Utah law is clear that an action may only be instituted in the district court after a Notice of Claim is either denied or the statutory period for the governmental entity's response has run. Utah Code Annotated section 63-30d-403(2)(a) provides that "a claimant may institute an action in the district court against the governmental entity" if the claim is denied. Municipalities have sixty days in which to approve or deny a claim. *See* Utah Code Ann. § 63-30d-403(1)(a). At the end of the sixty day period the claim is deemed denied if the municipality has not approved or denied the claim. *See* Utah Code Ann. § 63-30d-403(1)(b). "[P]laintiffs with claims against the state 'may institute an action in the district court' only after their 'claim is denied.'" *Hall v. Utah Dept. of Corr.*, 2001 UT 34, ¶26, 24 P.3d 958 (interpreting predecessor statute). Thus, while an action may be filed in district court earlier than sixty days from the Notice of Claim if the claim is denied earlier, an action may not be initiated prior to or contemporaneously with the claim being filed. In this case, Mr. Ramey filed his Notice of Claim *after* filing suit with the district court, in contravention of the statute. Therefore, the trial court correctly dismissed Mr. Ramey's Complaint for lack of jurisdiction.



**C. Even if Mr. Ramey Has Alleged Equitable Claims, Those Claims Are Now Moot.**

Mr. Ramey also maintains that he is not required to comply with the Notice of Claim requirement in the Governmental Immunity Act of Utah because his claims are equitable. (Ramey Brief p. 25, 29-33.) In his Complaint, Mr. Ramey requested equitable relief in the form of the removal and/or the non-enforcement of the Certificate of Noncompliance. (R. at 16, prayer A-C.) Since filing his Complaint, the zoning ordinance violation on Mr. Ramey's property has been corrected, resulting in the removal of the Certificate of Noncompliance. *See* Certificate of Correction and Compliance (Addendum 2) (documenting removal of Certificate of Noncompliance because conditions which necessitated Certificate of Noncompliance have "been corrected"). Therefore, the equitable relief Mr. Ramey sought, through the removal and/or the non-enforcement of the Certificate of Noncompliance, has occurred, mooted his equitable claims.<sup>9</sup>

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<sup>9</sup> As stated in footnote 2, *supra*, Mr. Ramey included the trial court's denial of his request for a Temporary Restraining Order (Ramey Brief p. 1, issue 2) and the trial court's failure to address his claims for injunctive relief (*id.*, issue 3) in his statement of the issues. Neither of these was preserved for appeal in his notice of appeal, pursuant to Utah Rule of Appellate Procedure 3(d) ("[t]he notice of appeal shall . . . designate the judgment or order, or part thereof, appealed from."). However, even if this Court were to liberally construe Mr. Ramey's notice of appeal under the "policy that where the notice of appeal sufficiently identifies the final judgment at issue and the opposing party is not prejudiced, the notice of appeal is to be liberally construed," *State ex rel. B.B.*, 2004 UT 39, ¶10, 94 P.3d 252, these issues are now moot. As documented in the Certificate of Correction and Compliance (Addendum 2), the Certificate of Noncompliance has been removed. The purpose for which Mr. Ramey sought injunctive relief was met when he took action to remedy the violation, and the Certificate of Noncompliance was removed.

Although the Certificate of Correction and Compliance is not in the Record, this Court may take judicial notice of it. Under Utah Rule of Evidence 201(f), judicial notice may be taken at “any stage of the proceedings,” including on appeal. *See, e.g., Fitzgerald v. Critchfield*, 744 P.2d 301, 305 (Utah App. 1987) (taking judicial notice on appeal for the first time a bankruptcy discharge). In this case, there was no opportunity for the issue to have been raised below; Mr. Ramey did not correct the problem, allowing the City to remove the Certificate, until after Mr. Ramey filed this appeal. *See Finlayson v. Finlayson*, 874 P.2d 843, 847 (Utah App. 1994) (“With very limited exceptions, judicial notice should not be used ‘to get around the rule precluding raising issues for the first time on appeal.’”) (quoting *Mel Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451, 456 (Utah App. 1988)). Accordingly, judicial notice may be taken that the Certificate of Noncompliance has been removed, mooted Mr. Ramey’s requests for injunctive relief.<sup>10</sup>

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<sup>10</sup> Further, Mr. Ramey’s briefing of the trial court’s alleged error in “not addressing [his] pending requests for injunctive relief” is inadequate. (Ramey Brief p. 35.) This section of his brief lacks any analysis or fact application in violation of Utah Rule of Appellate Procedure 24. *See State v. Thomas*, 961 P.2d 299, 304 (Utah 1998) (“It is well established that a reviewing court will not address arguments that are not adequately briefed.”). More strikingly, the three cases he relies on for his proposition that the court erred by failing to address his pending injunctive relief (*S.S. v. State*, 972 P.2d 439 (Utah 1998); *Orton v. Carter*, 970 P.2d 1254 (Utah 1998); and *A.K. & R. Whipple Plumbing and Heating v. Aspen Const.*, 977 P.2d 518 (Utah App.1999)) are not about pending injunctive relief. In fact, injunctive relief is not discussed in any of these cases.

This Court can decline to issue an opinion on a moot issue, which would be appropriate in this case. *See State ex rel. S.L.*, 1999 UT App 390, ¶40, 995 P.2d 17 (“we generally decline to render an advisory opinion on a moot issue”). “[A] case is moot where the requested judicial relief cannot affect the rights of the litigants.” *Jones v. Schwendiman*, 721 P.2d 893, 894 (Utah 1986) (per curiam). In this case, the requested relief has been obtained.

Even if this Court declines to hold that Mr. Ramey’s alleged equitable claims are moot, the trial court still lacked jurisdiction to hear his equitable claims because Mr. Ramey did not file a Notice of Claim or exhaust his administrative remedies before filing. While true equitable claims are not governed by the Notice of Claims provisions of the Governmental Immunity Act, a litigant is still required to exhaust his administrative remedies before going into court. *See Patterson v. American Fork City*, 2003 UT 7, ¶12, 67 P.3d 466 (citing *El Rancho Enter. Inc. v. Murray City Corp.*, 565 P.2d 778, 779 (Utah 1977)).

In *Patterson v. American Fork City*, the Utah Supreme Court noted that the provisions of the UGIA “may be inapplicable to some equitable claims.” *Id.* at ¶19. However, in that case the court held that the Pattersons “cite no authority for the proposition that the administrative process can be avoided in favor of filing equitable claims directly in district court. Thus, Pattersons' remaining equitable claims must fail.” *Id.* (citations omitted). Similarly, in this case, Mr. Ramey does not cite any relevant authority for his argument that he can avoid the administrative process and simply file his administrative claims in district court.

Moreover, Mr. Ramey's reliance on *Jenkins v. Swan*, 675 P.2d 1145, 1154 (Utah 1983) and *El Rancho Enterprises, Inc. v. Murray City Corp.*, 565 P.2d 778, 780 (Utah 1977), is misplaced. Each of these cases relies on specific statutory provisions not at issue here. For instance, the statutory provision authorizing suit in *El Rancho* was repealed, and the claims were subsumed under the Governmental Immunity Act. *See Jenkins*, 675 P.2d at 1154. The statutory provision at issue in *Jenkins* not only predated the Governmental Immunity Act, but it also provided a distinct basis for the claim and included its own notice provision. *See id.* Therefore, these cases are not applicable in the case before this Court.

Additionally, Mr. Ramey's "equitable" claims deserve dismissal for the separate reason that he "has an adequate remedy at law." *City of Page v. Utah Associated Mun. Power Sys.*, No. 2:05 CV 921, WL 1889882, \*6 (D. Utah July 7, 2006) (Mem. Decision) (attached at Addendum 3), (citing *Buckner v. Kennard*, 2004 UT 78, ¶56, 99 P.3d 842). In *Buckner v. Kennard*, the Utah Supreme Court stated, "[T]he general rule is that equitable jurisdiction is precluded if the plaintiff has an adequate remedy at law and will not suffer substantial irreparable injury. Equitable jurisdiction is not justifiable simply because a party's remedy at law failed." *Id.* 2004 UT 78 at ¶56 (internal citation omitted). However, the trial court did not reach these issues, because it lacked jurisdiction to do anything other than

dismiss the case for lack of subject matter jurisdiction.<sup>11</sup> Therefore, this Court should uphold the trial court's granting of the City's Motion to Dismiss, despite Mr. Ramey's arguments that some of his claims sounded in equity.

**D. Mr. Ramey's Postjudgment Motion to Reconsider Was Correctly Denied.**

Mr. Ramey argues that the trial court erred when it denied his request to reinstate his claims for relief under Utah Rules of Civil Procedure 59 and 60. (Ramey Brief p. 24, 36.) The trial court denied Mr. Ramey's Motion for Relief Under Rule 59 and 60 of the Utah Rules of Civil Procedure in a Minute Entry dated May 9, 2007, ruling that the "March 14, 2007 Minute Entry accurately reflected the issues, facts and correct legal ruling pertaining to this case; furthermore, the Court's holding dismissing this action was *without prejudice*, allowing plaintiff to revisit the issues if applicable procedural requirements are met." (R. at 162-165.) In this ruling, the trial court reiterated its earlier decision dismissing the case for lack of jurisdiction.

When considering requests for postjudgment motions to reconsider, this Court has cited the Utah Supreme Court's decision that "'postjudgment motions to reconsider are not recognized anywhere in either the Utah Rules of Appellate Procedure or the Utah Rules of Civil Procedure.'" [] Consequently, they will no

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<sup>11</sup> Although the trial court did not specifically reach these issues, it did hold that there was no irreparable harm to Mr. Ramey in its minute entry denying the request for a temporary restraining order. (R. at 69.) Accordingly, Mr. Ramey had an adequate remedy at law and was not suffering irreparable harm.

longer be recognized by this court.” *Radakovich v. Cornaby*, 2006 UT App 454, ¶5, 147 P.3d 1195 (citing *Gillett v. Price*, 2006 UT 24, ¶6, 135 P.3d 861).

Therefore, the trial court correctly denied Mr. Ramey’s request, because it was an impermissible postjudgment motion to reconsider, filed after the decision in *Gillett v. Price*, 2006 UT 24, ¶6, 135 P.3d 861.

This Court may also refuse to consider Mr. Ramey’s request to review the lower court’s ruling denying his request for relief under rules 59 and 60 because he offers neither analysis of his grounds for appeal nor application of the facts on which he relies. Although courts may be “generally lenient with pro se litigants,” *Lundahl v. Quinn*, 2003 UT 11, ¶4, 67 P.3d 1000, pro se parties are still required to adequately brief issues pursuant to Utah Rule of Appellate Procedure 24. *See State v. Thomas*, 961 P.2d 299, 304 (Utah 1998) (“It is well established that a reviewing court will not address arguments that are not adequately briefed.”) More importantly, Mr. Ramey is a member of the Utah State Bar, and should be held to the same standards as other attorneys. *See* footnote 3, *supra*. Mr. Ramey’s bald assertion that the trial court erred in denying his motion for relief is not adequately briefed, and accordingly this Court need not reach the merits of his claim. The trial court’s judgment should be affirmed.

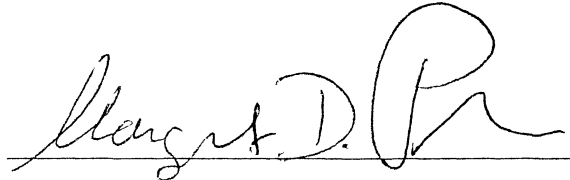
### CONCLUSION

The City respectfully requests that this Court affirm the trial court’s grant of the City’s Motion to Dismiss. This Court can affirm the trial court’s dismissal

on either one of two grounds. First, the trial court held that it lacked jurisdiction to hear Mr. Ramey's claims because Mr. Ramey had failed to exhaust his administrative remedies. Second, the trial court held that it lacked jurisdiction because Mr. Ramey had failed to strictly comply with the requirements in the Notice of Claim provision of the Governmental Immunity Act of Utah. Under either theory, the trial court lacked jurisdiction to do anything other than dismiss the case.<sup>12</sup>

This Court can also affirm the trial court's decision to deny Mr. Ramey's request for postjudgment relief under Utah Rules of Civil Procedure 59 and 60. Such postjudgment motions are not recognized by the Utah rules, and the request was properly denied. This Court should affirm the trial court's grant of the City's motion to dismiss.

Dated this 13<sup>th</sup> day of November, 2007.

A handwritten signature in black ink, appearing to read "Margaret D. Plane", written over a horizontal line.

MARGARET D. PLANE  
EVELYN J. FURSE  
Attorneys for Defendants/Appellees

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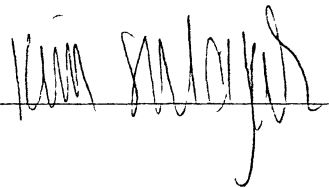
<sup>12</sup> In his conclusion, Mr. Ramey reiterates his request for attorney fees from the trial court action and requests attorney fees on appeal. The Utah Supreme Court has affirmed the rule in this jurisdiction that "pro se litigants should not recover attorney fees for successful litigation." *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1374 (Utah 1996). Even if Mr. Ramey were successful, he would not be entitled to fees.

## CERTIFICATE OF DELIVERY

I hereby certify that on the 13<sup>th</sup> day of November, 2007, I caused to be mailed,  
first class postage pre-paid, two true and correct copies of the foregoing BRIEF  
OF APPELLEE SALT LAKE CITY CORPORATION to the following:

William P. Ramey, III  
3818 Garrott Street  
Houston, TX 77006

Pro Se Attorney for Plaintiff/Appellant



A handwritten signature in dark ink, appearing to read "William P. Ramey, III", is written over a horizontal line.



Tab 1

William P. Ramey, III  
38 South 1000 East  
Salt Lake City, Utah 84102  
3818 Garrett St.  
Houston, Texas 77006  
(713) 857-6005 (phone)  
(713) 589-2243 (fax)  
*Pro Se*

FILED  
THIRD DISTRICT COURT

06 DEC 14 AM 11:54

SALT LAKE DEPARTMENT

BY \_\_\_\_\_  
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR THE COUNTY OF SALT LAKE

William P. RAMEY, III, an individual,  
Plaintiff,

v.

SALT LAKE CITY CORPORATION, a  
Utah corporation,  
Defendant.

ORIGINAL COMPLAINT AND  
REQUEST FOR A TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION

Civil No.

060920071

Judge:

J. W. [unclear]

Plaintiff, William P. Ramey, III (hereinafter referred to as "Ramey"), an individual, files this Original Complaint and Request Temporary Restraining Order and Preliminary Injunction against Defendants Salt Lake City Corporation, a corporation organized under the laws of the State of Utah, (hereinafter referred to as "SLC Corp") pursuant to at least Rule 65A of the Utah Rules of Civil Procedure.

### The Parties

1. Plaintiff William P. Ramey, III (hereinafter referred to as “Ramey”), is a natural person residing at 3818 Garrott Street, Houston, Texas 77006 and owning real property at 38 South 1000 East, Salt Lake City, UT 84102

2. Defendant Salt Lake City Corporation (hereinafter referred to as “SLC Corp”) can be served pursuant to Rule 4(d)(1) by delivering a copy of the summons and complaint to the recorder at City Recorder’s Office, Ken Cowley, 2001 S. State St., #N1600 Salt Lake City, Utah 84190. A courtesy copy has also been delivered to the Salt Lake City Attorney’s Office at 451 S. State St., Room 505, Salt Lake City, Utah 84111. Further, a courtesy copy has also been delivered to the Department of Community Development, Planning and Zoning Division, 451 S. State St., Room 505, Salt Lake City, Utah 84111.

### Jurisdiction and Venue

3. This is an action for tortious interference with contract and prospective contract, negligent misrepresentation, negligence, fraud, wrongful recordation, wrongful attachment, conversion, trespass to try title, trespass to real property, slander of title, and for various other related claims under applicable state law.

4. This Court has jurisdiction over this action pursuant to the Title 78, Chapter 3, Section 4 of the Utah Code.

5. Venue is proper in this Judicial District because a substantial part of the events giving rise to the claim occurred in this District. Further, venue is proper in this

judicial District because the underlying real property at 38 South 1000 East, Salt Lake City, UT 84102 is located within this judicial District.

### **THREE MAIN POINTS FOR PLEADINGS**

#### **Ramey is a Bona Fide Purchaser for Value**

6. Ramey asserts that he is a bona fide purchaser for value relying on the permits issued by the City in the purchase of the SLC Property. All permits indicated that the SLC property was in compliance. All inspections were Final. No Notices of Non-compliance were recorded against the SLC property at the time of Ramey's closing on the SLC Property.

7. Ramey's mortgage company searched the records at the time of closing and also did not locate any Notice of Non-compliance.

8. The SLC Corp filed a first Notice of Non-compliance after Ramey had purchased and recorded his interest in the property. Ramey's purchase was partial cash and a mortgage.

9. The A/C Unit was therefore a pre-existing condition.

#### **Ramey Acted in Reliance on SLC Corp Permits in Purchasing the SLC Property**

10. Ramey purchased the SLC Property in reliance on the SLC Corp's Final Inspection permits.

11. Ramey would not have purchased the property had the permits not been issued as Final and Approved.

12. The SLC Corp should not be allowed to remove validly issued Final Inspection Permits after Ramey has relied on them in the purchase of the property.

#### **Ramey Acted in Reliance on the Special Exception**

13. After becoming aware of a Non-compliance recorded against the SLC property, Ramey sought to have it removed by going through the extraordinary expense of both time and resources to prepare a Special Exception request for a previously granted Final Inspection Permit.

14. The SLC Corp's Planning and Zoning Division agreed with Ramey that the A/C Unit was a pre-existing condition on the SLC Property at the time of Ramey's purchase and granted the Special Exception.

15. When Ramey put his property on the market, the SLC Corp threatened to prevent Ramey from selling the property by recording a Notice of Non-compliance against the property.

16. The SLC Corp should not be allowed to alter recorded records as it desires after a valid Special Exception has issued from its office.

#### **Background of Action**

17. On or about August 10, 2005 Plaintiff Ramey purchased certain real property at 38 South 1000 East, Salt Lake City, UT 84102 (hereinafter referred to as "SLC Property") for \$575,000.00 dollars. There were no Certificates of Non-compliance recorded against the property. (See Affidavit of William P. Ramey, III, ¶ 4.) (hereinafter referred to as Affidavit)

18. The SLC Property had undergone several years of restoration including all electrical, plumbing and support structures. As such, there was a tremendous amount of contractor work service performed at the SLC Property. (Affidavit, ¶ 5)

19. Many of these contract work services performed at the SLC Property required special permitting and inspection procedures by the Defendant SLC Corp that

results in an ultimate Final Inspection report whereby the SLC Corp approves the contractor work services. (Affidavit, ¶ 6)

20. One such contractor work service was the placement of the Air Conditioning Unit, specifically a Kenmore with exterior dimensions of 27" X 33" X 14". The unit is a quiet, high efficiency slim-design Unit (hereinafter referred to as the A/C Unit). (Affidavit, ¶ 7)

21. Defendant SLC Corp performed several Mechanical inspections as to the placement of this A/C Unit that ultimately resulted in Permit No. 199163, Final Inspection, dated March 4, 2005, approved by, upon information and belief, Buck, #24. A true and correct copy of which is attached as Exhibit A. (See Affidavit, ¶ 8 and Exhibit A)

22. This final approval was the approval by the SLC Corp of the placement of the A/C Unit. (Affidavit, ¶ 8, Exhibit A)

23. Plaintiff Ramey purchased the SLC Property in reliance upon the various permits issued by the SLC Corp, especially the Final Approval of permit 199163. (Affidavit, ¶ 9)

24. In or about April of 2006, Plaintiff Ramey became aware that the SLC Corp had filed a Certificate of Non-compliance against the SLC Property.

25. The alleged Non-compliance was the placement of the A/C Unit within four (4) feet of the property line.

26. Ramey contacted the SLC Corp's Planning and Zoning division and was ultimately directed to Kevin LoPiccolo, Zoning Administrator (hereinafter referred to as "LoPiccolo"). LoPiccolo informed Ramey that the Final Approval had been granted

improperly. Ramey informed LoPiccolo that he had purchased the property in reliance upon the permits issued by his office of the SLC Corp. Ramey informed LoPiccolo that he felt he was a bona fide purchaser for value. (Affidavit, ¶ 11)

27. Ramey and LoPiccolo spoke several more times over the next few weeks. In fact, Ramey supplied the SLC Corp with copies of various final approvals that had been lost by the SLC Corp. (Affidavit, ¶ 12)

28. LoPiccolo informed Ramey that the only option for Ramey to keep the A/C Unit in its location was to file a Special Exception Request. (Affidavit, ¶ 13). The Special Exception allows the SLC Corp and/or the Community to approve a building project.

29. Ramey protested being required to seek approval for that which was already approved. The SLC Corp has a procedure in place that was followed. Ramey purchased the property in reliance on that procedure and the SLC Corp should not be changing its mind at a later date. To allow the SLC Corp to make such changes removed all certainty in the approval process. (Affidavit, ¶ 14)

30. However, Ramey did prepare the Special Exception request in an attempt to comply with the SLC Corp. The Special Exception Request is a long process whereby an Applicant provides a planned improvement, with all of the specification drawings, the \$200 fee, the cost for the mailing, and the address labels. Putting the documents together required about 20 hours worth of work and \$204. A true and correct copy of Ramey's Special Exception Request is attached as Exhibit B to the Affidavit.

31. The Special Exception Request was a complete document and accepted by the SLC Corp for review. (Affidavit, ¶ 16)

32. Ramey contacted LoPiccolo on numerous occasions concerning the Special Exception Request. (Affidavit, ¶ 17)

33. On or about June 19, 200, the SLC Corp granted the Special Exception request. (Affidavit, ¶ 18)

34. Ramey was told by Piccolo that the granting of the Special Exception Request was at least in part because the A/C Unit was a pre-existing condition at the time Ramey purchased the property and because of other adjacent properties to the SLC Property likewise had A/C Units placed in comparable proximity to the property line, namely the property at 42 South 1000 East. Shortly thereafter, the Special Exception was recorded at the County Recorder's Office. (Affidavit, ¶ 19)

35. Ramey then moved to Houston, Texas in August of 2006. However, Ramey still owns the SLC Property and has put it on the market. (Affidavit, ¶ 20)

36. On or about November 16, 2006, LoPiccolo contacted Ramey's agent and stated that the placement of the A/C Unit was not in compliance. In response, Ramey immediately contacted LoPiccolo, as they had talked before. LoPiccolo informed Ramey that the SLC Corp was going to issue another Non-compliant against the SLC Property for the placement of the A/C Unit. Ramey questioned LoPiccolo as to how that was possible in light of the two previous approvals and the fact that Ramey was a bona fide purchaser of the pre-existing condition. LoPiccolo informed him that the SLC Corp was requiring the action and there was nothing he could do. (Affidavit, ¶ 21)

37. Ramey's agent questioned whether the SLC property could be sold as it is presently permitted. (Affidavit, ¶22).



38. Further, LoPiccolo informed Ramey that the SLC Corp has told Ramey's neighbor that the SLC Property is not legally in compliance. (Affidavit, ¶23)

39. In response, Ramey has prepared and filed this document to require the SLC Corp to honor its two previous approvals of the placement of the A/C Unit.

#### **Conditions Precedent**

40. Plaintiff Ramey asserts that all conditions precedent to recovery under all causes of action has been met.

41. All administrative remedies have been exhausted. Ramey had an approval for the placement of the A/C Unit when he purchased the property.

42. Ramey then was required to get a Special Exception which was granted to him by the SLC Corp.

#### **COUNT I**

##### **Tortious Interference with Contract and Prospective Contract**

43. Ramey restates and incorporates herein by reference the averments set forth in paragraphs 1 through 42 of this Complaint.

44. As set forth above, Defendant SLC Corp, by and through the Planning and Zoning Division had granted approval of the placement of the A/C Unit through the normal permitting procedure under permit 199163, granted March 4, 1995.

45. Ramey purchased the property on August 10, 1995 when there were no Certificates of Non-compliance recorded against the property. In August of 2006, Ramey relocated to Texas and placed the SLC Property on the market. In November of 2006, when the SLC Corp contacted Ramey's agent it committed an act of interference with contract in that the SLC Corp was attempting to cause the agent not to market the property in light of a non-existent compliance issue.

46. The SLC Corp's action, by and through Kevin LoPiccolo and others will act to dissuade purchasers, have acted to cause potential purchasers to look elsewhere, and has acted to prevent Ramey from selling the property. Such damage carries a dollar amount at least to the appraised value of the property without the Certificate of Non-compliance.

## COUNT II

### Negligent Misrepresentation

47. Ramey restates and incorporates herein by reference the averments set forth in paragraphs 1 through 46 of this Complaint.

48. The SLC Corp has a duty to the property owners of Salt Lake City to honor its previously issued permits and Special Exceptions.

49. At a minimum, it would be expected that the SLC Corp would honor its issued permits as to a bona fide purchaser or a purchaser of a pre-existing condition.

50. The SLC Corp is not honoring its previously issued permit by threatening Ramey to prevent the sale of his house.

51. The SLC Corp is not honoring its previously issued Special Exception by threatening Ramey to prevent the sale of his house.

52. Ramey has been damaged by these threats and contacts at least to the appraised value of the property without the Certificate of Non-compliance at least to the appraised value of the property without the Certificate of Non-compliance.

## COUNT III

### Negligent Misrepresentation

53. Ramey restates and incorporates herein by reference the averments set forth in paragraphs 1 through 53 of this Complaint.

54. The SLC Corp has a duty to the property owners of Salt Lake City to not falsely make accusations.

55. At a minimum, it would be expected that the SLC Corp would not contact people to falsely state that the SLC Property is not legally in compliance.

56. The SLC Corp has contacted Ramey's agent and stated that the SLC Property was not legally in compliance.

57. The SLC Corp has contacted Ramey's neighbor and stated that the SLC Property is not legally in compliance.

58. Ramey has been damaged by these false statements by the SLC Corp at least to the appraised value of the property without the Certificate of Non-compliance. All of the permits and a Special Exception have been issued by the SLC Corp.

#### COUNT IV

##### Negligence

59. Ramey restates and incorporates herein by reference the averments set forth in paragraphs 1 through 58 of this Complaint.

60. The SLC Corp has a duty to treat all subject properties in a particular zoning area the same.

61. The standard of care would be that the rules should be enforced the same throughout a particular zoning area. The SLC property is in zoned R-2.

62. The SLC Corp has not treated all property owners within Ramey's zone the same or similar. Ramey's neighbor, at 42 South 1000 East, has a similar A/C Unit that should be treated like Ramey's A/C Unit.

63. Ramey has been damaged by this action at least to the appraised value of the SLC property without the Certificate of Non-compliance.

## COUNT V

### Fraud

64. Ramey restates and incorporates herein by reference the averments set forth in paragraphs 1 through 63 of this Complaint.

65. The SLC Corp's action of threatening to issue a Certificate of Non-compliance and/or issuing a Certificate of Non-compliance for the previously approved Final Inspection of Permit 199163 and the approved Special Exception for the A/C Unit is being perpetuated falsely without any legal basis. Ramey is a bona fide purchaser for value and the A/C Unit has been approved twice. The SLC Corp is bullying Ramey by preventing him from transferring title of the SLC Property.

66. Ramey will continue to be harmed by this false perpetuation and Defendant SLC Corp's wrongful conduct at least to the appraised value of the property without the Certificate of Non-compliance.

67. As the direct and proximate result of Defendant SLC Corp's wrongful conduct, Defendant has unlawfully profited and Ramey has suffered and will continue to suffer irreparable harm for which there is no adequate remedy at law.

## Count VI

### Wrongful Recordation and Wrongful Attachment

68. Ramey restates and incorporates herein by reference the averments set forth in paragraphs 1 through 67 of this Complaint.

69. The SLC Corp's action of threatening to record a Certificate of Non-compliance and/or recording a Certificate of Non-compliance for the previously approved Final Inspection of Permit 199163 and the approved Special Exception for the A/C Unit

is being perpetuated falsely without any legal basis. Ramey is a bona fide purchaser for value and the A/C Unit has been approved twice. The SLC Corp is bullying Ramey.

70. The SLC Corp's action of recording a Certificate of Non-compliance for the previously approved Final Inspection of Permit 199163 was perpetuated falsely without any legal basis. Ramey is a bona fide purchaser for value and the A/C Unit was approved. The SLC Corp is bullying Ramey by preventing him from transferring title of the SLC Property.

71. Ramey will continue to be harmed by this false perpetuation and Defendant SLC Corp's wrongful conduct at least to the appraised value of the property without the Certificate of Non-compliance at least to the appraised value of the property without the Certificate of Non-compliance.

72. As the direct and proximate result of Defendant SLC Corp's wrongful conduct, Defendant has unlawfully profited and Ramey has suffered and will continue to suffer irreparable harm for which there is no adequate remedy at law.

## **COUNT VII**

### **Conversion/Trespass to Try Title/Trespass to Real Property**

73. Ramey restates and incorporates herein by reference the averments set forth in paragraphs 1 through 72 of this Complaint.

74. The SLC Corp's action of threatening to record a Certificate of Non-compliance and/or recording a Certificate of Non-compliance for the previously approved Final Inspection of Permit 199163 and the approved Special Exception for the A/C Unit is being perpetuated falsely without any legal basis. Ramey is a bona fide purchaser for value and the A/C Unit has been approved twice. The SLC Corp is bullying Ramey.

75. The SLC Corp's action of recording a Certificate of Non-compliance for the previously approved Final Inspection of Permit 199163 was perpetuated falsely without any legal basis. Ramey is a bona fide purchaser for value and the A/C Unit was approved. The SLC Corp is bullying Ramey by preventing him from transferring title of the SLC Property.

76. Ramey will continue to be harmed by this false perpetuation and Defendant SLC Corp's wrongful conduct in that Ramey has been lost buyers in light of the SLC Corp's actions, including the threats and unlawful communications at least to the appraised value of the property without the Certificate of Non-compliance.

77. As the direct and proximate result of Defendant SLC Corp's wrongful conduct, Defendant has unlawfully profited and Ramey has suffered and will continue to suffer irreparable harm.

## COUNT VIII

### Suit to Quiet Title/Trespass to Real Property

78. Ramey restates and incorporates herein by reference the averments set forth in paragraphs 1 through 77 of this Complaint.

79. The SLC Corp is discriminating against Ramey in the sale of his property by recording an improper Certificate of Non-compliance and for threatening to file an improper Certificate of Non-compliance.

80. Ramey is being treated differently than even his next door neighbor who has a similar A/C Unit. Upon information and belief, Ramey's neighbor, at 42 South 1000 East, has not been harassed or even contacted concerning the A/C Unit on that property.

81 Ramey is being damaged by this disparate treatment in that the SLC Property cannot be sold because of the threats and actions from the SLC Corp. Accordingly, the SLC Corp is damaging Ramey at least to the amount of his mortgage

## **COUNT IX**

### **Slander of Title**

82 Ramey restates and incorporates herein by reference the averments set forth in paragraphs 1 through 81 of this Complaint

83 Defendant SLC Corp, by and through LoPiccolo, made a false statement to Ramey's neighbor and real estate agent that the property was out of compliance

84 The SLC Corp knew that all of the permits had been approved and that a Special Exception had been granted

85 The SLC Corp's actions damaged Ramey because he can now not sell the SLC Property

86 The damages are at least the appraised value of the house without the Certificate of Non-compliance

## **COUNT X**

### **Slander of Title**

87 Ramey restates and incorporates herein by reference the averments set forth in paragraphs 1 through 86 of this Complaint

88 Defendant SLC Corp, by and through LoPiccolo and, upon information and belief, other SLC Corp employees, has spread the word that the SLC property is not in compliance, a false statement

89 The SLC Corp knew that all of the permits had been approved and that a Special Exception had been granted

90. The SLC Corp's actions damaged Ramey because he can now not sell the SLC Property.

91. The damages are at least the appraised value of the house without the Certificate of Non-compliance.

## **COUNT XI**

### **Temporary Restraining Order and Preliminary Injunction**

92. Ramey restates and incorporates herein by reference the averments set forth in paragraphs 1 through 91 of this Complaint.

93. Under Rule 65A(e) of the Utah Rules of Civil Procedure, a temporary restraining order and a preliminary injunction is warranted because:

- (1) Ramey will suffer irreparable harm unless the order or injunction issues in that Ramey is not able to sell the property because of the threatened and/or Recorded Notice of Non-compliance;
- (2) The threatened injury to Ramey outweighs the damage that the SLC Corp may experience, as there is quantifiable damage;
- (3) The order or injunction, if issued, serves the public interest in that it restores certainty to various processes and prevent capricious action by SLC Corp; and
- (4) There is a substantial likelihood that Ramey will prevail on the merits of the underlying claim because Ramey has a validly issued permit and a granted Special Exception.



### **Effect of Allowing the SLC Corp to Record a Notice of Non-compliance**

94. Allowing the SLC Corp to again record a Notice of Non-compliance removes all certainty from property records.

95. Allowing the SLC Corp to again record a Notice of Non-compliance removes all certainty from the special exception procedure.

96. Allowing the SLC Corp to again record a Notice of Non-compliance removes all certainty from the inspection process.

97. Public policy dictates that the SLC Corp be estopped from recording and/or enforcing another Notice of Non-compliance against the SLC Property.

### **PRAYER FOR RELIEF**

WHEREFORE, Ramey demands a judgment in his favor and demands the following relief:

**A.** An Order temporarily Restraining the SLC Corp from recording and/or enforcing a Notice of Non-compliance against the SLC Property for placement of the A/C Unit on the North side of the property where it has been previously been approved through the permit procedure under permit 199163 and through the Special Exception Procedure.

**B.** An Order prohibiting and permanently enjoining Defendant SLC Corp from recording, enforcing, or threatening to record a Notice of Non-compliance against the SLC Property for placement of the A/C Unit on the North side of the property where it has been previously been approved through the permit procedure under permit 199163 and through the Special Exception Procedure.

C. A decree ordering Defendant to SLC Corp to file a Notice of Compliance specifically stating that the A/C Unit is properly placed to prevent further abuse of process by the SLC Corp.

D. Or, in the alternative, an Order directing the SLC Corp to pay for the moving the A/C Unit to a platform on the roof in a location agreed to by Ramey;

E. An award of a reasonable attorney's fee for Ramey.

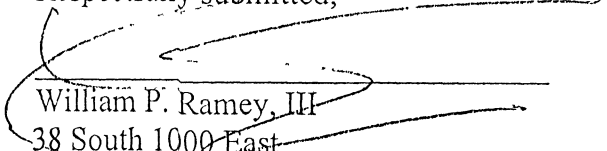
F. An award of reasonable costs for Ramey, including travel costs and court costs.

G. Judgment against Defendant SLC Corp specifically including but not limited to the following, to the extent allowed by law: (1) actual monetary damages sustained by Ramey, in the amount of at least \$575,000.00 and the cash value of all mortgage payments from the time of the first filed Notice of Non-compliance; (2) treble damages in light of the egregious conduct of the SLC Corp; (3) costs and prejudgment interest; and (4) attorneys' fees.

H. Such other and further relief as the Court deems appropriate and just under the circumstances.

Dated: December 14, 2006

Respectfully submitted,

  
William P. Ramey, III  
38 South 1000 East  
Salt Lake City, Utah 84102  
3818 Garrott St.  
Houston, Texas 77006  
(713) 857-6005 (phone)  
(713) 589-2243 (fax)  
*Pro Se*

Tab 2

**63-30d-101. Title, scope, and intent.**

(1) This chapter is known as the "Governmental Immunity Act of Utah."

(2) (a) The waivers and retentions of immunity found in this chapter apply to all functions of government, no matter how labeled.

(b) This single, comprehensive chapter governs all claims against governmental entities or against their employees or agents arising out of the performance of the employee's duties, within the scope of employment, or under color of authority.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

### **63-30d-102. Definitions.**

As used in this chapter:

(1) "Claim" means any asserted demand for or cause of action for money or damages, whether arising under the common law, under state constitutional provisions, or under state statutes, against a governmental entity or against an employee in the employee's personal capacity.

(2) (a) "Employee" includes:

- (i) a governmental entity's officers, employees, servants, trustees, or commissioners;
- (ii) members of a governing body;
- (iii) members of a government entity board;
- (iv) members of a government entity commission;
- (v) members of an advisory body, officers, and employees of a Children's Justice Center created in accordance with Section **67-5b-104**;
- (vi) student teachers holding a letter of authorization in accordance with Sections **53A-6-103** and **53A-6-104**;
- (vii) educational aides;
- (viii) students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program;
- (ix) volunteers as defined by Subsection **67-20-2(3)**; and
- (x) tutors.

(b) "Employee" includes all of the positions identified in Subsection (2)(a), whether or not the individual holding that position receives compensation.

(c) "Employee" does not include an independent contractor.

(3) "Governmental entity" means the state and its political subdivisions as both are defined in this section.

(4) (a) "Governmental function" means each activity, undertaking, or operation of a governmental entity.

(b) "Governmental function" includes each activity, undertaking, or operation performed by a department, agency, employee, agent, or officer of a governmental entity.

(c) "Governmental function" includes a governmental entity's failure to act.

(5) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person or estate, that would be actionable if inflicted by a private person or his agent.

(6) "Personal injury" means an injury of any kind other than property damage.

(7) "Political subdivision" means any county, city, town, school district, community development and renewal agency, special improvement or taxing district, local district, special service district, an entity created by an interlocal agreement adopted under Title 11, Chapter 13, Interlocal Cooperation Act, or other governmental subdivision or public corporation.

(8) "Property damage" means injury to, or loss of, any right, title, estate, or interest in real or personal property.

(9) "State" means the state of Utah, and includes each office, department, division, agency, authority, commission, board, institution, hospital, college, university, Children's Justice Center, or other instrumentality of the state.

(10) "Willful misconduct" means the intentional doing of a wrongful act, or the wrongful failure to act, without just cause or excuse, where the actor is aware that his conduct will

probably result in injury.

Amended by Chapter 329, 2007 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-201. Immunity of governmental entities from suit.**

(1) Except as may be otherwise provided in this chapter, each governmental entity and each employee of a governmental entity are immune from suit for any injury that results from the exercise of a governmental function.

(2) Notwithstanding the waiver of immunity provisions of Section **63-30d-301**, a governmental entity, its officers, and its employees are immune from suit for any injury or damage resulting from the implementation of or the failure to implement measures to:

(a) control the causes of epidemic and communicable diseases and other conditions significantly affecting the public health or necessary to protect the public health as set out in Title 26A, Chapter 1, Local Health Departments;

(b) investigate and control suspected bioterrorism and disease as set out in Title 26, Chapter 23b, Detection of Public Health Emergencies Act; and

(c) respond to a national, state, or local emergency, a public health emergency as defined in Section **26-23b-102**, or a declaration by the President of the United States or other federal official requesting public health related activities.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-202. Act provisions not construed as admission or denial of liability -- Effect of waiver of immunity -- Exclusive remedy -- Joinder of employee -- Limitations on personal liability.**

(1) (a) Nothing contained in this chapter, unless specifically provided, may be construed as an admission or denial of liability or responsibility by or for a governmental entity or its employees.

(b) If immunity from suit is waived by this chapter, consent to be sued is granted, and liability of the entity shall be determined as if the entity were a private person.

(c) No cause of action or basis of liability is created by any waiver of immunity in this chapter, nor may any provision of this chapter be construed as imposing strict liability or absolute liability.

(2) Nothing in this chapter may be construed as adversely affecting any immunity from suit that a governmental entity or employee may otherwise assert under state or federal law.

(3) (a) Except as provided in Subsection (3)(c), an action under this chapter against a governmental entity for an injury caused by an act or omission that occurs during the performance of an employee's duties, within the scope of employment, or under color of authority is a plaintiff's exclusive remedy.

(b) Judgment under this chapter against a governmental entity is a complete bar to any action by the claimant, based upon the same subject matter, against the employee whose act or omission gave rise to the claim.

(c) A plaintiff may not bring or pursue any civil action or proceeding based upon the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless:

(i) the employee acted or failed to act through fraud or willful misconduct;

(ii) the injury or damage resulted from the employee driving a vehicle, or being in actual physical control of a vehicle:

(A) with a blood alcohol content equal to or greater by weight than the established legal limit;

(B) while under the influence of alcohol or any drug to a degree that rendered the person incapable of safely driving the vehicle; or

(C) while under the combined influence of alcohol and any drug to a degree that rendered the person incapable of safely driving the vehicle;

(iii) injury or damage resulted from the employee being physically or mentally impaired so as to be unable to reasonably perform his or her job function because of:

(A) the use of alcohol;

(B) the nonprescribed use of a controlled substance as defined in Section 58-37-4; or

(C) the combined influence of alcohol and a nonprescribed controlled substance as defined by Section 58-37-4; or

(iv) in a judicial or administrative proceeding, the employee intentionally or knowingly gave, upon a lawful oath or in any form allowed by law as a substitute for an oath, false testimony material to the issue or matter of inquiry under this section.

(4) Except as permitted in Subsection (3)(c), no employee may be joined or held personally liable for acts or omissions occurring:

(a) during the performance of the employee's duties;

(b) within the scope of employment; or

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(c) under color of authority.

Enacted by Chapter 267, 2004 General Session

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**63-30d-203. Exemptions for certain takings actions.**

An action that involves takings law, as defined in Section **63-90-2**, is not subject to the requirements of Sections **63-30d-401**, **63-30d-402**, **63-30d-403**, and **63-30d-601**.

Amended by Chapter 306, 2007 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-301. Waivers of immunity -- Exceptions.**

(1) (a) Immunity from suit of each governmental entity is waived as to any contractual obligation.

(b) Actions arising out of contractual rights or obligations are not subject to the requirements of Sections **63-30d-401**, **63-30d-402**, **63-30d-403**, or **63-30d-601**.

(c) The Division of Water Resources is not liable for failure to deliver water from a reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development Act, if the failure to deliver the contractual amount of water is due to drought, other natural condition, or safety condition that causes a deficiency in the amount of available water.

(2) Immunity from suit of each governmental entity is waived:

(a) as to any action brought to recover, obtain possession of, or quiet title to real or personal property;

(b) as to any action brought to foreclose mortgages or other liens on real or personal property, to determine any adverse claim on real or personal property, or to obtain an adjudication about any mortgage or other lien that the governmental entity may have or claim on real or personal property;

(c) as to any action based on the negligent destruction, damage, or loss of goods, merchandise, or other property while it is in the possession of any governmental entity or employee, if the property was seized for the purpose of forfeiture under any provision of state law;

(d) subject to Subsection **63-30d-302(1)**, as to any action brought under the authority of Article I, Section 22, of the Utah Constitution, for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation;

(e) subject to Subsection **63-30d-302(2)**, as to any action brought to recover attorney fees under Sections **63-2-405** and **63-2-802**;

(f) for actual damages under Title 67, Chapter 21, Utah Protection of Public Employees Act; or

(g) as to any action brought to obtain relief from a land use regulation that imposes a substantial burden on the free exercise of religion under Title 63, Chapter 90b, Utah Religious Land Use Act.

(3) (a) Except as provided in Subsection (3)(b), immunity from suit of each governmental entity is waived as to any injury caused by:

(i) a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) any defective or dangerous condition of a public building, structure, dam, reservoir, or other public improvement.

(b) Immunity from suit of each governmental entity is not waived if the injury arises out of, in connection with, or results from:

(i) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement.

(4) Immunity from suit of each governmental entity is waived as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of

employment.

(5) Immunity from suit of each governmental entity is not waived under Subsections (3) and (4) if the injury arises out of, in connection with, or results from:

(a) the exercise or performance, or the failure to exercise or perform, a discretionary function, whether or not the discretion is abused;

(b) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;

(c) the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization;

(d) a failure to make an inspection or by making an inadequate or negligent inspection;

- (e) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
- (f) a misrepresentation by an employee whether or not it is negligent or intentional;
- (g) riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;
- (h) the collection of and assessment of taxes;
- (i) the activities of the Utah National Guard;
- (j) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;
- (k) any natural condition on publicly owned or controlled lands;
- (l) any condition existing in connection with an abandoned mine or mining operation;
- (m) any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire, and State Lands;
- (n) the operation or existence of a pedestrian or equestrian trail that is along a ditch, canal, stream, or river, regardless of ownership or operation of the ditch, canal, stream, or river, if:
  - (i) the trail is designated under a general plan adopted by a municipality under **Section 10-9a-401** or by a county under **Section 17-27a-401**;
  - (ii) the trail right-of-way or the right-of-way where the trail is located is open to public use as evidenced by a written agreement between the owner or operator of the trail right-of-way, or of the right-of-way where the trail is located, and the municipality or county where the trail is located; and
  - (iii) the written agreement:
    - (A) contains a plan for operation and maintenance of the trail; and
    - (B) provides that an owner or operator of the trail right-of-way or of the right-of-way where the trail is located has, at minimum, the same level of immunity from suit as the governmental entity in connection with or resulting from the use of the trail.
- (o) research or implementation of cloud management or seeding for the clearing of fog;
- (p) the management of flood waters, earthquakes, or natural disasters;
- (q) the construction, repair, or operation of flood or storm systems;
- (r) the operation of an emergency vehicle, while being driven in accordance with the requirements of **Section 41-6a-208**;
- (s) the activities of:

- 
- (i) providing emergency medical assistance;
  - (ii) fighting fire;
  - (iii) regulating, mitigating, or handling hazardous materials or hazardous wastes;
  - (iv) emergency evacuations;
  - (v) transporting or removing injured persons to a place where emergency medical assistance can be rendered or where the person can be transported by a licensed ambulance service; or
  - (vi) intervening during dam emergencies;
  - (t) the exercise or performance, or the failure to exercise or perform, any function pursuant to Title 73, Chapter 10, Board of Water Resources - Division of Water Resources; or
  - (u) unauthorized access to government records, data, or electronic information systems by any person or entity.

Amended by Chapter 357, 2007 General Session  
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**63-30d-302. Specific remedies -- "Takings" actions -- Government Records Access and Management Actions.**

(1) In any action brought under the authority of Article I, Section 22, of the Utah Constitution for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation, compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain.

(2) (a) Notwithstanding Section **63-30d-401**, a notice of claim for attorneys' fees under Subsection **63-30d-301(2)(e)** may be filed contemporaneously with a petition for review under Section **63-2-404**.

(b) The provisions of Subsection **63-30d-403(1)**, relating to the governmental entity's response to a claim, and the provisions of **63-30d-601**, requiring an undertaking, do not apply to a notice of claim for attorneys' fees filed contemporaneously with a petition for review under Section **63-2-404**.

(c) Any other claim under this chapter that is related to a claim for attorneys' fees under Subsection **63-30d-301(2)(e)** may be brought contemporaneously with the claim for attorneys' fees or in a subsequent action.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-401. Claim for injury -- Notice -- Contents -- Service -- Legal disability -- Appointment of guardian ad litem.**

(1) (a) Except as provided in Subsection (1)(b), a claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(b) The statute of limitations does not begin to run until a claimant knew, or with the exercise of reasonable diligence should have known:

- (i) that the claimant had a claim against the governmental entity or its employee; and
  - (ii) the identity of the governmental entity or the name of the employee.
- (c) The burden to prove the exercise of reasonable diligence is upon the claimant.

(2) Any person having a claim against a governmental entity, or against its employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental.

(3) (a) The notice of claim shall set forth:

- (i) a brief statement of the facts;
- (ii) the nature of the claim asserted;
- (iii) the damages incurred by the claimant so far as they are known; and
- (iv) if the claim is being pursued against a governmental employee individually as provided in Subsection 63-30d-202(3)(c), the name of the employee.

(b) The notice of claim shall be:

(i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and

(ii) directed and delivered by hand or by mail according to the requirements of Section 68-3-8.5 to the office of:

(A) the city or town clerk, when the claim is against an incorporated city or town;

(B) the county clerk, when the claim is against a county;

(C) the superintendent or business administrator of the board, when the claim is against a school district or board of education;

(D) the presiding officer or secretary/clerk of the board, when the claim is against a local district or special service district;

(E) the attorney general, when the claim is against the State of Utah;

(F) a member of the governing board, the executive director, or executive secretary, when the claim is against any other public board, commission, or body; or

(G) the agent authorized by a governmental entity to receive the notice of claim by the governmental entity under Subsection (5)(e).

(4) (a) If an injury that may reasonably be expected to result in a claim against a governmental entity is sustained by a claimant who is under the age of majority or mentally incompetent, that governmental entity may file a request with the court for the appointment of a guardian ad litem for the potential claimant.

(b) If a guardian ad litem is appointed, the time for filing a claim under Section 63-30d-402 begins when the order appointing the guardian is issued.

(5) (a) Each governmental entity subject to suit under this chapter shall file a statement with the Division of Corporations and Commercial Code within the Department of Commerce containing:

- 
- (i) the name and address of the governmental entity;
  - (ii) the office or agent designated to receive a notice of claim; and
  - (iii) the address at which it is to be directed and delivered.

(b) Each governmental entity shall update its statement as necessary to ensure that the information is accurate.

(c) The Division of Corporations and Commercial Code shall develop a form for governmental

entities to complete that provides the information required by Subsection (5)(a).

(d) (i) Newly incorporated municipalities shall file the statement required by Subsection (5)(a) at the time that the statement of incorporation and boundaries is filed with the lieutenant governor under Section **10-1-106**.

(ii) Newly incorporated local districts shall file the statement required by Subsection (5)(a) at the time that the written notice is filed with the lieutenant governor under Section **17B-1-215**.

(e) A governmental entity may, in its statement, identify an agent authorized by the entity to accept notices of claim on its behalf.

(6) The Division of Corporations and Commercial Code shall:

(a) maintain an index of the statements required by this section arranged both alphabetically by entity and by county of operation; and

(b) make the indices available to the public both electronically and via hard copy.

(7) A governmental entity may not challenge the validity of a notice of claim on the grounds that it was not directed and delivered to the proper office or agent if the error is caused by the governmental entity's failure to file or update the statement required by Subsection (5).

Amended by Chapter 329, 2007 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-402. Time for filing notice of claim.**

A claim against a governmental entity, or against an employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the person and according to the requirements of Section **63-30d-401** within one year after the claim arises regardless of whether or not the function giving rise to the claim is characterized as governmental.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-403. Notice of claim -- Approval or denial by governmental entity or insurance carrier within 60 days -- Remedies for denial of claim.**

(1) (a) Within 60 days of the filing of a notice of claim, the governmental entity or its insurance carrier shall inform the claimant in writing that the claim has either been approved or denied.

(b) A claim is considered to be denied if, at the end of the 60-day period, the governmental entity or its insurance carrier has failed to approve or deny the claim.

(2) (a) If the claim is denied, a claimant may institute an action in the district court against the governmental entity or an employee of the entity.

(b) The claimant shall begin the action within one year after denial of the claim or within one year after the denial period specified in this chapter has expired, regardless of whether or not the function giving rise to the claim is characterized as governmental.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*



**63-30d-501. Jurisdiction of district courts over actions.**

- (1) The district courts have exclusive, original jurisdiction over any action brought under this chapter.
- (2) An action brought under this chapter may not be tried as a small claims action.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-502. Venue of actions.**

(1) Actions against the state may be brought in the county in which the claim arose or in Salt Lake County.

(2) (a) Actions against a county may be brought in the county in which the claim arose, or in the defendant county, or, upon leave granted by a district court judge of the defendant county, in any county contiguous to the defendant county.

(b) Leave may be granted ex parte.

(3) Actions against all other political subdivisions, including cities and towns, shall be brought in the county in which the political subdivision is located or in the county in which the claim arose.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-601. Actions governed by Utah Rules of Civil Procedure -- Undertaking required.**

(1) An action brought under this chapter shall be governed by the Utah Rules of Civil Procedure to the extent that they are consistent with this chapter.

(2) At the time the action is filed, the plaintiff shall file an undertaking in a sum fixed by the court that is:

(a) not less than \$300; and

(b) conditioned upon payment by the plaintiff of taxable costs incurred by the governmental entity in the action if the plaintiff fails to prosecute the action or fails to recover judgment.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-602. Compromise and settlement of claims.**

(1) A political subdivision, after conferring with its legal officer or other legal counsel if it does not have a legal officer, may compromise and settle any action as to the damages or other relief sought.

(2) The risk manager in the Department of Administrative Services may compromise and settle any action against the state for which the Risk Management Fund may be liable:

(a) on the risk manager's own authority, if the amount of the settlement is \$25,000 or less;

(b) with the concurrence of the attorney general or the attorney general's representative and the executive director of the Department of Administrative Services if the amount of the settlement is \$25,000.01 to \$100,000; or

(c) by complying with the procedures and requirements of Title 63, Chapter 38b, State Settlement Agreements, if the amount of the settlement is more than \$100,000.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-603. Exemplary or punitive damages prohibited -- Governmental entity exempt from execution, attachment, or garnishment.**

(1) (a) A judgment may not be rendered against a governmental entity for exemplary or punitive damages.

(b) If a governmental entity would be required to pay the judgment under Section **63-30d-902** or **63-30d-903**, the governmental entity shall pay any judgment or portion of any judgment entered against its employee in the employee's personal capacity even if the judgment is for or includes exemplary or punitive damages.

(2) Execution, attachment, or garnishment may not issue against a governmental entity.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-604. Limitation of judgments against governmental entity or employee -- Process for adjustment of limits.**

(1) (a) Except as provided in Subsection (2) and subject to Subsection (3), if a judgment for damages for personal injury against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds \$583,900 for one person in any one occurrence, the court shall reduce the judgment to that amount.

(b) A court may not award judgment of more than the amount in effect under Subsection (1)(a) for injury or death to one person regardless of whether or not the function giving rise to the injury is characterized as governmental.

(c) Except as provided in Subsection (2) and subject to Subsection (3), if a judgment for property damage against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds \$233,600 in any one occurrence, the court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the damage is characterized as governmental.

(d) Subject to Subsection (3), there is a \$2,000,000 limit to the aggregate amount of individual awards that may be awarded in relation to a single occurrence.

(2) The damage limits established in this section do not apply to damages awarded as compensation when a governmental entity has taken or damaged private property for public use without just compensation.

(3) The limitations of judgments established in Subsection (1) shall be adjusted according to the methodology set forth in Subsection (4).

(4) (a) Each even-numbered year, the risk manager shall:

(i) calculate the consumer price index as provided in Sections 1(f)(4) and 1(f)(5), Internal Revenue Code;

(ii) calculate the increase or decrease in the limitation of judgment amounts established in this section as a percentage equal to the percentage change in the Consumer Price Index since the previous adjustment made by the risk manager or the Legislature; and

(iii) after making an increase or decrease under Subsection (4)(a)(ii), round up the limitation of judgment amounts established in Subsection (1) to the nearest \$100.

(b) Each even-numbered year, the risk manager shall make rules, which become effective no later than July 1, that establish the new limitation of judgment amounts calculated under Subsection (4)(a).

(c) Adjustments made by the risk manager to the limitation of judgment amounts established by this section have prospective effect only from the date the rules establishing the new limitation of judgment take effect and those adjusted limitations of judgment apply only to claims for injuries or losses that occur after the effective date of the rules that establish those new limitations of judgment.

Amended by Chapter 71, 2007 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-701. Payment of claim or judgment against state -- Presentment for payment.**

(1) (a) Each claim, as defined by Subsection **63-30d-102**(1), that is approved by the state or any final judgment obtained against the state shall be presented for payment to:

(i) the state risk manager; or

(ii) the office, agency, institution, or other instrumentality involved, if payment by that instrumentality is otherwise permitted by law.

(b) If payment of the claim is not authorized by law, the judgment or claim shall be presented to the board of examiners for action as provided in Section **63-6-10**.

(c) If a judgment against the state is reduced by the operation of Section **63-30d-604**, the claimant may submit the excess claim to the board of examiners.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-702. Payment of claim or judgment against political subdivision -- Procedure by governing body -- Payment options.**

(1) (a) Each claim approved by a political subdivision or any final judgment obtained against a political subdivision shall be submitted to the governing body of the political subdivision.

(b) The governing body shall pay the claim immediately from the general funds of the political subdivision unless:

(i) the funds are appropriated to some other use or restricted by law or contract for other purposes; or

(ii) the political subdivision opts to pay the claim or award in installments under Subsection (2).

(2) If the subdivision is unable to pay the claim or award during the current fiscal year, it may pay the claim or award in not more than ten ensuing annual installments of equal size or in whatever other installments that are agreeable to the claimant.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*



**63-30d-703. Reserve funds for payment of claims or purchase of insurance created by political subdivisions.**

Any political subdivision may create and maintain a reserve fund or, may jointly with one or more other political subdivisions, make contributions to a joint reserve fund, for the purpose of:

(1) making payment of claims against the cooperating subdivisions when they become payable under this chapter; or

(2) for the purpose of purchasing liability insurance to protect the cooperating subdivisions from any or all risks created by this chapter.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-704. Tax levy by political subdivisions for payment of claims, judgments, or insurance premiums.**

(1) Notwithstanding any provision of law to the contrary, a political subdivision may levy an annual property tax sufficient to pay:

- (a) any claim, settlement, or judgment;
- (b) the costs to defend against any claim, settlement, or judgment; or
- (c) for the establishment and maintenance of a reserve fund for the payment of claims, settlements, or judgments that may be reasonably anticipated.

(2) (a) The payments authorized to pay for punitive damages or to pay the premium for authorized insurance is money spent for a public purpose within the meaning of this section and Article XIII, Sec. 5, Utah Constitution, even though, as a result of the levy, the maximum levy as otherwise restricted by law is exceeded.

(b) No levy under this section may exceed .0001 per dollar of taxable value of taxable property.

(c) The revenues derived from this levy may not be used for any purpose other than those specified in this section.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-801. Insurance -- Self-insurance or purchase of liability insurance by governmental entity authorized -- Establishment of trust accounts for self-insurance.**

(1) Any governmental entity within the state may self-insure, purchase commercial insurance, or self-insure and purchase excess commercial insurance in excess of the statutory limits of this chapter against:

- (a) any risk created or recognized by this chapter; or
- (b) any action for which a governmental entity or its employee may be held liable.

(2) (a) In addition to any other reasonable means of self-insurance, a governmental entity may self-insure with respect to specified classes of claims by establishing a trust account.

(b) In creating the trust account, the governmental entity shall ensure that:

(i) the trust account is managed by an independent private trustee; and

(ii) the independent private trustee has authority, with respect to claims covered by the trust, to:

(A) expend both principal and earnings of the trust account solely to pay the costs of investigation, discovery, and other pretrial and litigation expenses including attorneys' fees; and

(B) pay all sums for which the governmental entity may be adjudged liable or for which a compromise settlement may be agreed upon.

(c) Notwithstanding any law to the contrary, the trust agreement between the governmental entity and the trustee may authorize the trustee to:

(i) employ counsel to defend actions against the entity and its employees;

(ii) protect and safeguard the assets of the trust;

(iii) provide for claims investigation and adjustment services;

(iv) employ expert witnesses and consultants; and

(v) provide other services and functions that are necessary and proper to carry out the purposes of the trust.

(d) The monies and interest earned on the trust fund may be invested by following the procedures and requirements of Title 51, Chapter 7, State Money Management Act, and are subject to audit by the state auditor.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-802. Insurance -- Liability insurance -- Government vehicles operated by employees outside scope of employment.**

(1) A governmental entity that owns vehicles driven by an employee of the governmental entity with the express or implied consent of the entity, but which, at the time liability is incurred as a result of an automobile accident, is not being driven and used within the course and scope of the driver's employment is, subject to Subsection (2), considered to provide the driver with the insurance coverage required by Title 41, Chapter 12a, Financial Responsibility of Motor Vehicle Owners and Operators Act.

(2) The liability coverages considered provided are the minimum limits under Section **31A-22-304**.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-803. Liability insurance -- Construction of policy not in compliance with act.**

(1) If any insurance policy, rider, or endorsement issued after June 30, 2004 that was purchased to insure against any risk that may arise as a result of the application of this chapter contains any condition or provision not in compliance with the requirements of this chapter, that policy, rider, or endorsement is not invalid, but shall be construed and applied according to the conditions and provisions that would have applied had the policy, rider, or endorsement been in full compliance with this chapter, provided that the policy is otherwise valid.

(2) If any insurance policy, rider, or endorsement issued after June 30, 1966 and before July 1, 2004 that was purchased to insure against any risk that may arise as a result of the application of this chapter contains any condition or provision not in compliance with the requirements of the chapter, that policy, rider, or endorsement is not invalid, but shall be construed and applied according to the conditions and provisions that would have applied had the policy, rider, or endorsement been in full compliance with this chapter, provided that the policy is otherwise valid.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-804. Liability insurance -- Methods for purchase or renewal.**

(1) Except as provided in Subsection (2), a contract or policy of insurance may be purchased or renewed under this chapter only upon public bid to be let to the lowest and best bidder.

(2) The purchase or renewal of insurance by the state shall be conducted in accordance with the provisions of Title 63, Chapter 56, Utah Procurement Code.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-805. Liability insurance -- Insurance for employees authorized -- No right to indemnification or contribution from governmental agency.**

(1) (a) A governmental entity may insure any or all of its employees against liability, in whole or in part, for injury or damage resulting from an act or omission occurring during the performance of an employee's duties, within the scope of employment, or under color of authority, regardless of whether or not that entity is immune from suit for that act or omission.

(b) Any expenditure for that insurance is for a public purpose.

(c) Under any contract or policy of insurance providing coverage on behalf of a governmental entity or employee for any liability defined by this section, regardless of the source of funding for the coverage, the insurer has no right to indemnification or contribution from the governmental entity or its employee for any loss or liability covered by the contract or policy.

(2) Any surety covering a governmental entity or its employee under any faithful performance surety bond has no right to indemnification or contribution from the governmental entity or its employee for any loss covered by that bond based on any act or omission for which the governmental entity would be obligated to defend or indemnify under the provisions of Section **63-30d-902**.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-901. Expenses of attorney general, general counsel for state judiciary, and general counsel for the Legislature in representing the state, its branches, members, or employees.**

(1) (a) The Office of the Attorney General has primary responsibility to provide legal representation to the judicial, executive, and legislative branches of state government in cases where coverage under the Risk Management Fund created by Section **63A-4-201** applies.

(b) When the attorney general has primary responsibility to provide legal representation to the judicial or legislative branches, the attorney general shall consult with the general counsel for the state judiciary and with the general counsel for the Legislature, to solicit their assistance in defending their respective branch, and in determining strategy and making decisions concerning the disposition of those claims.

(c) Notwithstanding Subsection (1)(b), the decision for settlement of monetary claims in those cases lies with the attorney general and the state risk manager.

(2) (a) If the Judicial Council, after consultation with the general counsel for the state judiciary, determines that the Office of the Attorney General cannot adequately defend the state judiciary, its members, or employees because of a conflict of interest, separation of powers concerns, or other political or legal differences, the Judicial Council may direct its general counsel to separately represent and defend it.

(b) If the general counsel for the state judiciary undertakes independent legal representation of the state judiciary, its members, or employees, the general counsel shall notify the state risk manager and the attorney general in writing before undertaking that representation.

(c) If the state judiciary elects to be represented by its own counsel under this section, the decision for settlement of claims against the state judiciary, its members, or employees, where Risk Management Fund coverage applies, lies with the general counsel for the state judiciary and the state risk manager.

(3) (a) If the Legislative Management Committee, after consultation with the general counsel for the Legislature, determines that the Office of the Attorney General cannot adequately defend the legislative branch, its members, or employees because of a conflict of interest, separation of powers concerns, or other political or legal differences, the Legislative Management Committee may direct its general counsel to separately represent and defend it.

(b) If the general counsel for the Legislature undertakes independent legal representation of the Legislature, its members, or employees, the general counsel shall notify the state risk manager and the attorney general in writing before undertaking that representation.

(c) If the legislative branch elects to be represented by its own counsel under this section, the decision for settlement of claims against the legislative branch, its members, or employees, where Risk Management Fund coverage applies, lies with the general counsel for the Legislature and the state risk manager.

(4) (a) Notwithstanding the provisions of Section **67-5-3** or any other provision of the Utah Code, the attorney general, the general counsel for the state judiciary, and the general counsel for the Legislature may bill the Department of Administrative Services for all costs and legal fees expended by their respective offices, including attorneys' and secretarial salaries, in representing the state or any indemnified employee against any claim for which the Risk Management Fund may be liable and in advising state agencies and employees regarding any of those claims.

(b) The risk manager shall draw funds from the Risk Management Fund for this purpose.



*Last revised. Thursday, July 19, 2007*

**63-30d-902. Defending government employee -- Request -- Cooperation -- Payment of judgment.**

(1) Except as provided in Subsections (2) and (3), a governmental entity shall defend any action brought against its employee arising from an act or omission occurring:

- (a) during the performance of the employee's duties;
- (b) within the scope of the employee's employment; or
- (c) under color of authority.

(2) (a) Before a governmental entity may defend its employee against a claim, the employee shall make a written request to the governmental entity to defend him:

- (i) within ten days after service of process upon him; or
- (ii) within a longer period that would not prejudice the governmental entity in maintaining a defense on his behalf; or
- (iii) within a period that would not conflict with notice requirements imposed on the entity in connection with insurance carried by the entity relating to the risk involved.

(b) If the employee fails to make a request, or fails to reasonably cooperate in the defense, including the making of an offer of judgment under Rule 68, Utah Rules of Civil Procedure, Offers of Judgment, the governmental entity need not defend or continue to defend the employee, nor pay any judgment, compromise, or settlement against the employee in respect to the claim.

(3) The governmental entity may decline to defend, or, subject to any court rule or order, decline to continue to defend, an action against an employee if it determines:

- (a) that the act or omission in question did not occur:
  - (i) during the performance of the employee's duties;
  - (ii) within the scope of his employment; or
  - (iii) under color of authority; or

(b) that the injury or damage on which the claim was based resulted from conditions set forth in Subsection **63-30d-202(3)(c)**.

(4) (a) Within ten days of receiving a written request to defend an employee, the governmental entity shall inform the employee whether or not it shall provide a defense, and, if it refuses to provide a defense, the basis for its refusal.

(b) A refusal by the entity to provide a defense is not admissible for any purpose in the action in which the employee is a defendant.

(5) Except as provided in Subsection (6), if a governmental entity conducts the defense of an employee, the governmental entity shall pay any judgment based upon the claim.

(6) A governmental entity may conduct the defense of an employee under a reservation of rights under which the governmental entity reserves the right not to pay a judgment if any of the conditions set forth in Subsection (3) are established.

(7) (a) Nothing in this section or Section **63-30d-903** affects the obligation of a governmental entity to provide insurance coverage according to the requirements of Subsection **41-12a-301(3)** and Section **63-30d-802**.

(b) When a governmental entity declines to defend, or declines to continue to defend, an action against its employee under any of the conditions set forth in Subsection (3), it shall still provide coverage up to the amount specified in Section **31A-22-304**.

Enacted by Chapter 267, 2004 General Session

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**63-30d-903. Recovery of judgment paid and defense costs by government employee.**

(1) Subject to Subsection (2), if an employee pays a judgment entered against him, or any portion of it, that the governmental entity is required to pay under Section **63-30d-902**, the employee may recover from the governmental entity the amount of the payment and the reasonable costs incurred in the employee's defense.

(2) (a) If a governmental entity does not conduct the defense of an employee against a claim, or conducts the defense under a reservation of rights as provided in Subsection **63-30d-902**(6), the employee may recover from the governmental entity under Subsection (1) if the employee can prove that none of the conditions set forth in Subsection **63-30d-202**(3)(c) applied.

(b) The employee has the burden of proof that none of the conditions set forth in Subsection **63-30d-202**(3)(c) applied.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

**63-30d-904. Indemnification of governmental entity by employee not required.**

If a governmental entity pays all or part of a judgment, compromise, or settlement based on a claim against the governmental entity or an employee, the employee is not required to indemnify the governmental entity for the payment.

Enacted by Chapter 267, 2004 General Session

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*Last revised: Thursday, July 19, 2007*

Tab 3

**COMMUNITY DEVELOPMENT**

**Building Services and Licensing**  
**451 South State Street, Room 218**  
**535-6679**  
**Salt Lake City, Utah 84111**

Sidwell Number: 16-05-128-012-0000

10179233  
 7/31/2007 1:16:00 PM \$16.00  
 Book - 9497 Pg - 7024-7027  
 Gary W. Ott  
 Recorder, Salt Lake County, UT  
 TITLE WEST  
 BY: eCASH, DEPUTY - EF 4 P.

**CERTIFICATE OF CORRECTION AND COMPLIANCE**

BE IT KNOWN BY THESE PRESENTS:


1. That I, Orion Goff, the undersigned Building Official of Building Services and Licensing, have either inspected, or have caused to be inspected, the property within the City of Salt Lake, County of Salt Lake, State of Utah, known by the street address of 38 South 1000 East, Salt Lake City, Utah said property being more particularly described as: COM AT SE COR OF LOT 8 BLK 57 PLAT B SLC SUR N 2 1/2 RD W 10 RD S 2 1/2 RD E 10 RD TO BEG 5654-0465 6183-0772 7107-1798 7590-3001 8891-7342 9030-6260

Owner: William P. Ramey

2. That the conditions which caused said property to be declared a substandard building, as noted in that Certificate of Noncompliance and substandard conditions issued on August 8, 2005 and November 20, 2006, was recorded on August 17, 2005 and November 21, 2006, in book numbers 9175 and 9383, at page(s) number 1814 and 7696, as entry numbers 9463690 and 9916056, in the official records of the County Recorder in and for the County of Salt Lake, State of Utah, have been corrected.

IN WITNESS WHEREOF, this Certificate was duly signed this 30 day of July

2007.

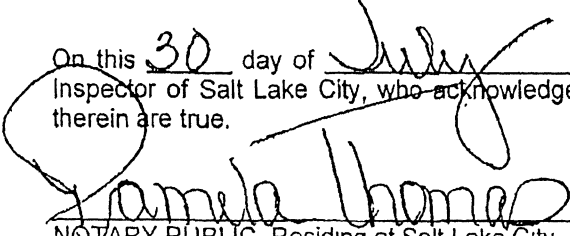
  
 Orion Goff, Building Official

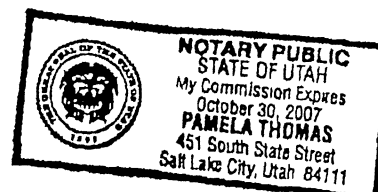
STATE OF UTAH

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COUNTY OF SALT LAKE

On this 30 day of July, 2007, personally appeared before me Orion Goff, Building Official Inspector of Salt Lake City, who acknowledged they signed the above certificate and that the statements contained therein are true.

  
 NOTARY PUBLIC, Residing at Salt Lake City, Utah



Tab 4

Only the Westlaw citation is currently available.

United States District Court,  
 D. Utah,  
 Central Division.  
 CITY OF PAGE, COCONINO COUNTY,  
 ARIZONA, a political subdivision and municipal  
 corporation of the State of Arizona, Plaintiff,  
 v.  
 UTAH ASSOCIATED MUNICIPAL POWER  
 SYSTEMS ("UAMPS"), a Utah public entity and an  
 interlocal cooperative agency, Defendant.  
**No. 2:05 CV 921 TC.**

July 7, 2006.

J. Scott Rhodes, Mia K. Jaksic, Jennings Strouss & Salmon, Phoenix, AZ, J. Michael Bailey, Vicki M. Baldwin, Parsons Behle & Latimer, Salt Lake City, UT, for Plaintiff.

Matthew F. McNulty, III, John P. Ashton, Sam Meziani, Van Cott Bagley Cornwall & McCarthy, Salt Lake City, UT, for Defendant.

#### MEMORANDUM DECISION AND ORDER

TENA CAMPBELL, District Judge.

\*1 Plaintiff City of Page, Arizona ("Page"), filed this lawsuit against Defendant Utah Associated Municipal Power Systems ("UAMPS"), an interlocal cooperative agency of which Page is a Member. In its Complaint, Page alleges nine causes of action against UAMPS, most of which are in relation to UAMPS's imposition of a "Cost Recovery Charge" on its Members. UAMPS filed a motion to dismiss "counts" three through seven, as well as count nine. The three causes of action that UAMPS does not challenge through this motion are all breach of contract claims.

UAMPS's primary contention in support of its motion is that the Utah Governmental Immunity Act ("UGIA") bars nearly all of Page's claims. In relation to various causes of action, UAMPS also argues that (1) Page failed to follow procedural rules applicable to derivative suits, (2) Page failed to plead with enough particularity to overcome the presumption that the challenged actions of the UAMPS Board of Directors were properly left to the business judgment of the board, and (3) the relevant limitations period

bars Page's challenge of the legality of certain UAMPS meetings.

The court grants in part and denies in part UAMPS's motion. Specifically, Page's claims for "Conflict of Interest," "Breach of Fiduciary Duty," and "Unjust Enrichment/Constructive Trust" are dismissed. The court agrees with UAMPS that the UGIA has not expressly waived immunity for those claims. And although it may be the case that Page's claim for unjust enrichment falls within the equitable exception to the immunity doctrine, Page has an adequate remedy at law to address the allegations underlying that claim. As a result, it is not appropriate to exercise equitable jurisdiction over that claim.

UAMPS's motion to dismiss Page's request for declaratory judgments is denied, because those causes of action fall within the equitable exception to the immunity doctrine. Additionally, Page has sufficiently stated a claim that UAMPS violated the Utah Open and Public Meetings Act. Accordingly, UAMPS's motion to dismiss that claim is denied.

#### *Motion to Dismiss Standard*

A court should grant a motion to dismiss when the complaint, viewed in the light most favorable to the plaintiff, fails to state a claim on which relief can be granted. *See Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir.2006) (all well-pleaded factual allegations of the complaint are accepted as true and viewed in the light most favorable to the nonmoving party), accord *Dill v. City of Edmond*, 155 F.3d 1193, 1201 (10th Cir.1998). While well-pleaded factual allegations are accepted as true, the court makes its own determination on legal issues. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991). "[D]ismissal under Rule 12(b)(6) 'is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.' " *Moore*, 438 F.3d at 1039 (quoting *Duran v. Carris*, 238 F.3d 1268, 1270 (10th Cir.2001) (quotation and citation omitted)). Granting dismissal is only appropriate when "it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Gas-A-Car, Inc. v. Am. Petrofina, Inc.*, 484 F.2d 1102, 1107 (10th Cir.1973)

#### *Factual Allegations*

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Complaint.

#### *UAMPS*

UAMPS was formed under the Utah Interlocal Cooperation Act. (*See* Compl. ¶ 2.) That act allows local governmental units "to cooperate with other localities on a basis of mutual advantage" in an effort to efficiently provide services and facilities. Utah Code Ann. § 11-13-102. UAMPS consists of approximately forty-five Members and is governed internally by its Amended and Restated Bylaws ("Bylaws") and its Amended and Restated Agreement for Joint and Cooperative Action ("Joint Action Agreement"). (*See id.* at ¶ ¶ 8-9). The Bylaws require each Member to appoint a Member Representative to represent that Member's interests when UAMPS exercises its powers. (*Id.* at ¶ 10.) The Bylaws require the UAMPS Board of Directors to act in the best interest of UAMPS. (*Id.* at ¶ 11.)

Each Member of UAMPS is required to sign a Power Pooling Agreement ("Pooling Agreement") and to subscribe to a power pool. (*Id.* at ¶ 17.) But Members are not required to consign surplus energy to the power pool and, similarly, are not required to purchase energy from the power pool. (*Id.*) With the exception of Page's claim that UAMPS violated the Utah Open and Public Meetings Act, the claims UAMPS seeks to dismiss through this motion involve the Pooling Agreement, (*see* Pool Agreement, attached to Compl. as Ex. C).

#### *The UAMPS Power Pool and Cost Recovery Charge*

Citing volatility in the energy market, the UAMPS Power Pool Committee directed UAMPS staff to acquire "forward-purchase contracts," which are essentially energy purchase agreements set at a locked rate. (*See* Compl. ¶ 37.) The purchaser of such a contract is betting that the locked-in purchase rate will be lower than the market rate at the time the purchases are consummated. (*See id.*)

Although UAMPS received assurances from several Members that they would subscribe to the forward-purchased power, UAMPS entered into several purchase contracts without securing firm commitments that Members would subscribe to the power purchased. (*Id.* at ¶ 42.) UAMPS Members instead waited on the sidelines watching market rates to determine if subscribing to the power acquired by UAMPS would be economically beneficial. (*See id.* at ¶ 54.) Prevailing market conditions rendered the power secured by the forward-purchase contracts

economically unattractive and not one Member of UAMPS subscribed to the power UAMPS acquired through those contracts. (*See id.* at ¶ ¶ 65, 68.)

As a result, UAMPS was saddled with uneconomical forward-purchase contracts and began to take steps to cover the loss. (*See id.* at ¶ ¶ 74-75.) As part of UAMPS's effort to offset the losses it had suffered, the UAMPS Board imposed a "Cost Recovery Charge" on all UAMPS Members.

In its Complaint, Page raises several allegations of wrongdoing on the part of UAMPS in connection with the procurement of the forward-purchase contracts and the steps taken by UAMPS to cover the losses resulting from those contracts. Page's essential claim is that UAMPS impermissibly allowed active participants in the Power Pool to speculate on the energy market and to use UAMPS Members as a safety net to cover any losses that could result from that speculation. According to Page, any profit gained as a result of the energy-market speculation would benefit only Power Pool participants, but any loss would unfairly be allocated to all UAMPS Members, whether they actively participated in the Power Pool or not. In short, Page claims that UAMPS failed to place the interests of UAMPS, as an entity, above the individual interests of some UAMPS Members.

#### *Open Meetings*

\*3 In its Complaint, Page also alleges that UAMPS violated the Utah Open and Public Meetings Act. Page does not identify any particular meeting that was held in violation of the act, but claims that UAMPS held executive meetings without providing proper notice and without following any approved procedure to close meetings to the public. Page additionally alleges that UAMPS took actions against Page's interest at meetings held in violation of the act.

#### *Analysis*

Through this motion, UAMPS is seeking to dismiss six of Page's causes of action: Cause Three (Conflict of Interest), Cause Four (Breach of Fiduciary Duty), Cause Five (Declaratory Judgment Under Arizona Law), Cause Six (Declaratory Judgment Under Utah Law), Cause Seven (Unjust Enrichment), and Cause Nine (Violation of Open Meetings Law). UAMPS argues that Causes 3-4 (Conflict of Interest and Breach of Fiduciary Duty) should be dismissed because (1) the UGIA has not expressly waived immunity from the claims, (2) Page failed to follow procedural rules applicable to derivative actions, and (3) Page failed to plead with enough particularity to

overcome the presumption that the challenged actions of the UAMPS Board were properly left to the board's business judgment UAMPS argues that Causes 5-7 (the requests for declaratory relief and claim for unjust enrichment) are also barred by the UGIA Finally, UAMPS contends that Cause 9 (violation of open meetings law) is barred by the limitations period set forth in the Utah Open and Public Meetings Act

The court concludes that the UGIA does not expressly waive governmental immunity from Page's claims for conflict of interest, breach of fiduciary duty, and unjust enrichment Nevertheless, Page argues that even if the UGIA does not expressly waive immunity from Page's unjust enrichment claim, that claim should not be dismissed because it falls within the equitable exception to the immunity doctrine But Page's contract claims provide it with an adequate remedy at law to address the factual allegations underlying its unjust enrichment claim Accordingly, the court declines to exercise equity jurisdiction over that claim

Because the court finds that there has been no waiver of immunity from Page's claims for breach of fiduciary duty and conflict of interest, there is no need to address UAMPS's argument that those causes of action should be dismissed for failure to comply with procedural requirements applicable to derivative suits Similarly, the court's conclusion renders moot UAMPS's argument that those causes should be dismissed for Page's alleged failure to overcome the presumption that the challenged actions of the UAMPS Board were properly left to the board's business judgment

The court denies UAMPS's motion to dismiss Page's request for declaratory relief under both Arizona and Utah law Page's declaratory judgment claims fall within the equitable exception to the immunity doctrine and, because Page does not have an adequate remedy at law to address the allegations underlying its request for declaratory judgments, those claims may proceed

\*4 Finally, the court denies UAMPS's request to dismiss Page's claim that UAMPS violated Utah open meetings laws In outlining this cause of action, Page's Complaint is sufficient to satisfy the liberal notice pleading requirement and defeat a motion to dismiss

*The Utah Governmental Immunity Act*

"Governmental immunity is an affirmative defense to suits against state or local government " Buckner v Kennard, 2004 UT 78, ¶ 35, 99 P 3d 842 But Utah, through the UGIA, has waived its immunity from certain types of claims See *id* Utah also recognizes a common law exception to the UGIA that allows plaintiffs to pursue equitable claims See El Rancho Enters, Inc v Murray City Corp, 565 P 2d 778, 779 (Utah 1977) ("The common law exception to governmental immunity pertaining to equitable claims has long been recognized in this jurisdiction") Page concedes that UAMPS enjoys governmental immunity to the extent that immunity is not waived by the UGIA or otherwise abrogated by the equitable exception to the immunity doctrine

*The UGIA's Waiver of Immunity Is Limited*

Page contends that its claims are not barred because the UGIA waives immunity for claims that "arise" from contractual rights The heart of the parties' disagreement on this point is the proper interpretation of Utah Code section 63-30d-301(1)(a)-(b), which states

- (1)(a) Immunity from suit of each governmental entity is waived as to any contractual obligation
- (b) Actions arising out of contractual rights or obligations are not subject to the requirements of Sections 63-30d-401, 63-30d-402, 63-30d, 403, or 63-30d-601 [all of which relate to notification and initiation procedures]

Page argues that the language of subsections (a) and (b) must be considered together and that, therefore, the UGIA waives immunity for all contractual obligations as well as any claim that "arises out" of a contractual relationship According to Page, Causes 3-4 (breach of fiduciary duty and conflict of interest) arise out of contract because they are premised on UAMPS's alleged violation of express contractual language that requires UAMPS to "act in the best interests of the UAMPS " (Plf's Opp'n to Def's Mot to Dismiss Counts Three Through Seven and Nine 7-8, *see id* ("[T]he plain language of the Complaint casts Causes of Action Three and Four as arising directly from the contractual obligations set forth in the Bylaws Page has suffered a direct harm as a result of UAMPS' failure to comply with *express contractual provisions* requiring UAMPS to act in the 'best interests of the UAMPS' and forbidding it from holding Page liable for the debts and liabilities of other Members ") More specifically, Page claims that the UAMPS Board was "*contractually required* to refrain from engaging in conflict of interest transactions and voting," and "*contractually required* to uphold their fiduciary duty to the organization and

its Members," and that the breach of express contractual provisions "entitl[ed] Page to bring its conflict of interest and breach of fiduciary duty causes of action. (*Id.* at 11.) Additionally, Page argues that its unjust enrichment claim arises out of contract because UAMPS was unjustly enriched as a direct result of its breach of contract.

\*5 Page's argument boils down to an assertion that its claims for breach of fiduciary duty, conflict of interest, and unjust enrichment "aris[e] directly" from a breach of express contract but are not breach of express contract claims in and of themselves. Case law does provide some support for Page's position that some claims can be considered as "arising" from contract. For example, the Utah Supreme Court has stated that "a claim for breach of fiduciary duty is an independent tort that, on occasion, arises from a contractual duty." Norman v. Arnold, 2002 UT 81, ¶ 35, 57 P.3d 997. See Sadwick v. Univ. of Utah, 2001 WL 741285 (D.Utah 2001) ("Although an action for breach of fiduciary duty may on rare occasions sound in contract, see Hal Taylor Associates v. Unionamerica, Inc., 657 P.2d 743, 749 (Utah 1982), under Utah law contracts rarely implicate a fiduciary relationship. See Semenov v. Hill, 982 P.2d 578, 580 (Utah 1999).").

UAMPS counters that it makes no difference whether Page's causes of action "arise" from contract because, properly interpreted, the UGIA's waiver of immunity is not broad enough to encompass such claims. According to UAMPS, the broad interpretation of the UGIA proposed by Page would eviscerate governmental immunity, rendering governmental entities exposed to any and all claims of a potential plaintiff whenever a contract is implicated in some fashion. The court agrees with UAMPS, at least so far as Causes 3-4 and Cause 7 (breach of fiduciary duty, conflict of interest, and unjust enrichment) are concerned.

When interpreting a statute, the court's "primary goal ... is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve. Foutz v. City of S. Jordan, 2004 UT 74 ¶ 11, 100 P.3d 1171 (internal quotation omitted). And the plain language of Utah Code section 63-30d-301(1) does not support Page's assertion that the State of Utah has waived governmental immunity for claims "arising out of contractual rights or obligations."

In interpreting the UGIA's waiver provision, Page puts the proverbial cart before the horse and asks the

court to read the statute backward, with subsection (b) defining the scope of the immunity waived by subsection (a). But the more appropriate interpretation is that subsection (a) waives immunity for contract claims and that subsection (b) waives notice requirements for any claim brought under subsection (a). It is evident from the plain language of the statute that subsection (a) directly identifies the scope of the waiver, while subsection (b) deals only with the issues of notice and suit initiation. In short, subsection (b) does not attempt to modify the scope of the waiver announced in subsection (a). Therefore, it would be incorrect to rely on subsection (b) as an aid to ascertain the scope of the waiver announced in subsection (a). [FN1]

FN1. In contrast to Utah Code section 63-30d-301(1)(b), the plain language of subsection (c) unquestionably modifies the scope of the waiver announced in subsection (a). Subsection (c) expressly retains immunity for the Division of Water Resources in certain situations where the Division is unable to meet contractual obligations to provide a set amount of water. The clear intent of subsection (c) is to modify the scope of the immunity waived by subsection (a). A similarly clear expression of legislative intent to modify the scope of waived immunity is noticeably lacking in subsection (b).

Given the above, the court concludes that Utah Code section 63-30d-301(1) does not waive UAMPS's immunity from Causes 3-4 and Cause 7 of Page's Complaint (breach of fiduciary duty, conflict of interest, and unjust enrichment). Because Page has made no argument that its claims for breach of fiduciary duty and conflict of interest are allowable under another section of the UGIA or fall within the equitable exception to the UGIA, those two claims must be dismissed on governmental immunity grounds.

#### *Equitable Exception*

\*6 Page argues that even if the UGIA does not contain an express waiver allowing Page to pursue Cause 7 (unjust enrichment), that claim falls within the equitable exception to the immunity doctrine and should therefore not be dismissed. Page also argues that its requests for declaratory relief under Arizona and Utah law (Causes 5-6) fall within the equitable exception and should not be dismissed.

The Utah Supreme Court has frequently recognized a common-law exception to the governmental immunity doctrine that enables plaintiffs to pursue equitable claims in spite of governmental immunity. See e.g., *Houghton v Dept of Health*, 2005 UT 63, ¶ 19 n 3, 125 P 3d 860, *El Rancho Enterprises, Inc.*, 565 P 2d at 780. The equitable exception to the immunity doctrine survived the passage of the UGIA. See *Houghton*, 2005 UT 63 at ¶ 19 n 3. But the exact scope of the equitable exception remains ill-defined.

#### *Unjust Enrichment*

Even if Page's unjust enrichment claim falls within the equitable exception to the immunity doctrine, it is nevertheless appropriate to dismiss that cause of action from this suit because Page has an adequate remedy at law. See *Buckner v Kennard*, 2004 UT 78, ¶ 56, 99 P 3d 842 ("[T]he general rule is that equitable jurisdiction is precluded if the plaintiff has an adequate remedy at law and will not suffer substantial irreparable injury. Equitable jurisdiction is not justifiable simply because a party's remedy at law failed." (internal citations omitted)), see also William Q. de Funiak, *Handbook of Modern Equity* 38 (2d ed. 1956) ("The want of equity jurisdiction does not mean that the court has no power to act but that it should not act, as on the ground, for example, that there is an adequate remedy at law.") In Utah, the ability to pursue an unjust enrichment claim presupposes the absence of an enforceable express contract. See *Am. Towers Owners Ass'n v CCI Mech.*, 930 P 2d 1182, 1193 (Utah 1996) ("If a legal remedy is available, such as breach of an express contract, the law will not imply the equitable remedy of unjust enrichment"), *Davies v Olson*, 746 P 2d 264, 268 (Utah Ct App 1987) ("Recovery under quantum meruit presupposes that no enforceable written or oral contract exists.")

Here, the parties agree that there are valid, express contracts that govern the relationship between UAMPS and Page. A review of Page's unjust enrichment claim reveals that Page, through that claim, challenges the very actions at issue in its express contract claims. In short, Page has an adequate remedy at law for the allegations that serve as the foundation for its unjust enrichment claim and its unjust enrichment claim is therefore dismissed.

#### *Page's Request for Declaratory Judgments*

Page's Complaint also contains a request for declaratory judgments under both Arizona and Utah law. Specifically, Page requests declarations that the

Cost Recovery Charge, as well as certain loans to UAMPS from Zions First National Bank are ultra vires and void under either Arizona law, Utah law, or both. Page represents that it "do[es] not seek money or damages" under Causes 5-6 (the declaratory judgment requests), but only a declaration concerning the legal authority of UAMPS's and Page's authority in relation to the Cost Recovery Charge and the loans from Zions Bank. (Plf's Opp'n to Def's Mot to Dismiss Counts Three Through Seven and Nine 15.)

\*7 Accordingly, Page argues that its request for declaratory judgments falls within the equitable exception to the immunity doctrine. The court agrees. Both *El Rancho Enterprises*, 565 P 2d at 779-80, and *Jenkins v Swan*, 675 P 2d 1145, 1154 (Utah 1983), indicate that requests for equitable relief are not barred by governmental immunity and that the notice provisions of the UGIA are inapplicable to equitable claims. See *Jenkins*, 675 P 2d at 1154 ("Jenkins seeks equitable relief in the form of a declaratory judgment. [E]quitable claims of this nature are exempt from the notice requirements.") Indeed, Page's requests for declaratory relief appear strikingly similar to the types of claims in *El Rancho Enterprises* and *Jenkins*, namely, whether a governmental entity was acting within its lawful authority. See *Jenkins*, 675 P 2d at 1148 (action challenging permissibility of property tax practices), *El Rancho Enterprises*, 595 P 2d at 780 (overcharges by municipality "made by mistake or fraud and without authority of law").

Unlike Page's unjust enrichment claim, the allegations contained in Page's request for declaratory judgments raise issues that extend beyond the boundaries of the express contracts that otherwise govern UAMPS. If the court dismissed Page's request for declaratory judgments, it would effectively deprive Page of any relief warranted by the allegations serving as the foundation for that request. Accordingly, UAMPS's motion to dismiss those claims is denied.

#### *Open and Public Meetings Act*

Finally, it is premature to dismiss Page's claim that UAMPS violated the Utah Open and Public Meetings Act. UAMPS argues that this cause of action should be dismissed because Page failed to file suit within ninety days of a meeting allegedly held in violation of the Utah Open and Public Meetings Act. See *Utah Code Ann. § 52-4-8* (requiring suits seeking to void final actions taken at meetings held in violation of the act to be commenced within ninety days of the final

action). [FN2]

FN2. The Utah Open and Public Meetings Act was renumbered and amended during the 2006 General Session of the Utah State Legislature. Because the prior version of the act was in effect at the time Page filed its Complaint and because the parties have relied on that version while briefing this issue, the court similarly cites to the previous version. No party has alleged that the revisions to the act in any way materially effect Page's claim.

Page's Complaint does not identify any specific dates on which it alleges UAMPS held meetings in violation of the Open and Public Meetings Act. Also, Page does not confine its requested relief to voiding final actions taken by UAMPS. Rather, it seeks an order compelling UAMPS to comply with the act and making public any information evidencing what was discussed during meetings that were improperly closed. (*See* Compl. ¶ 261.)

Although Page's allegations do not provide specific dates of improper meetings, its Complaint does allege that UAMPS violated the act, and specifically claims that UAMPS held meetings without providing adequate notice and also illegally closed meetings. Applying liberal rules of notice pleading, Page's claim is sufficient to withstand a request for dismissal. *See Corbin v. Runyon*, No. 98-6288, 1999 WL 590749 (10th Cir. Aug. 6, 1999) ("Even though Ms. Corbin's second amended complaint is certainly not a picture of clarity, it is sufficient under our liberal notice pleading rules to survive a motion to dismiss." (citing *Porter v. Karavas*, 157 F.2d 984, 985-86 (10th Cir.1946) ("Indefiniteness of a complaint is not ground for dismissing the action if it states a claim showing that the plaintiff is entitled to relief.")). Accordingly, Page has sufficiently stated a claim that UAMPS violated the Utah Open and Public Meetings Act, and UAMPS's motion to dismiss that claim is premature.

### ***Conclusion***

\*8 The court GRANTS in part and DENIES in part UAMPS's Motion to Dismiss Counts Three Through Seven and Nine. The court dismisses Page's third and fourth causes of action (Conflict of Interest and Breach of Fiduciary Duty) because the UGIA has not expressly waived immunity from those claims. The court declines to dismiss Page's fifth and sixth causes of action (both requests for declaratory relief) because those claims fall within the equitable

exception to the immunity doctrine and seek relief on a broader scale than a simple recovery under contract. The court dismisses Page's seventh cause of action (unjust enrichment) because the UGIA has not waived immunity from that claim and Page possesses an adequate remedy at law to redress the alleged wrong. Finally, the court declines to dismiss Page's ninth cause of action pertaining to alleged violations of open meetings law. That claim sufficiently states a cause of action under the liberal rules of notice pleading to overcome UAMPS's request for dismissal.

SO ORDERED this 7th day of July, 2006.

Not Reported in F.Supp.2d, 2006 WL 1889882  
(D.Utah)

END OF DOCUMENT

Only the Westlaw citation is currently available.

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 CITY OF PAGE, COCONINO COUNTY,  
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The court grants in part and denies in part UAMPS's motion. Specifically, Page's claims for "Conflict of Interest," "Breach of Fiduciary Duty," and "Unjust Enrichment/Constructive Trust" are dismissed. The court agrees with UAMPS that the UGIA has not expressly waived immunity for those claims. And although it may be the case that Page's claim for unjust enrichment falls within the equitable exception to the immunity doctrine, Page has an adequate remedy at law to address the allegations underlying that claim. As a result, it is not appropriate to exercise equitable jurisdiction over that claim.

UAMPS's motion to dismiss Page's request for declaratory judgments is denied, because those causes of action fall within the equitable exception to the immunity doctrine. Additionally, Page has sufficiently stated a claim that UAMPS violated the Utah Open and Public Meetings Act. Accordingly, UAMPS's motion to dismiss that claim is denied.

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A court should grant a motion to dismiss when the complaint, viewed in the light most favorable to the plaintiff, fails to state a claim on which relief can be granted. *See Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir.2006) (all well-pleaded factual allegations of the complaint are accepted as true and viewed in the light most favorable to the nonmoving party), *accord Dill v. City of Edmond*, 155 F.3d 1193, 1201 (10th Cir.1998). While well-pleaded factual allegations are accepted as true, the court makes its own determination on legal issues. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991). "[D]ismissal under Rule 12(b)(6) 'is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.' " *Moore*, 438 F.3d at 1039 (quoting *Duran v. Carris*, 238 F.3d 1268, 1270 (10th Cir.2001) (quotation and citation omitted)). Granting dismissal is only appropriate when "it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Gas-A-Car, Inc. v. Am. Petrofina, Inc.*, 484 F.2d 1102, 1107 (10th Cir.1973)

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## Complaint

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As a result, UAMPS was saddled with uneconomical forward-purchase contracts and began to take steps to cover the loss (*See id* at ¶ ¶ 74-75) As part of UAMPS's effort to offset the losses it had suffered, the UAMPS Board imposed a "Cost Recovery Charge" on all UAMPS Members

In its Complaint, Page raises several allegations of wrongdoing on the part of UAMPS in connection with the procurement of the forward-purchase contracts and the steps taken by UAMPS to cover the losses resulting from those contracts Page's essential claim is that UAMPS impermissibly allowed active participants in the Power Pool to speculate on the energy market and to use UAMPS Members as a safety net to cover any losses that could result from that speculation According to Page, any profit gained as a result of the energy-market speculation would benefit only Power Pool participants, but any loss would unfairly be allocated to all UAMPS Members, whether they actively participated in the Power Pool or not In short, Page claims that UAMPS failed to place the interests of UAMPS, as an entity, above the individual interests of some UAMPS Members

### *Open Meetings*

\*3 In its Complaint, Page also alleges that UAMPS violated the Utah Open and Public Meetings Act Page does not identify any particular meeting that was held in violation of the act, but claims that UAMPS held executive meetings without providing proper notice and without following any approved procedure to close meetings to the public Page additionally alleges that UAMPS took actions against Page's interest at meetings held in violation of the act

### *Analysis*

Through this motion, UAMPS is seeking to dismiss six of Page's causes of action Cause Three (Conflict of Interest), Cause Four (Breach of Fiduciary Duty), Cause Five (Declaratory Judgment Under Arizona Law), Cause Six (Declaratory Judgment Under Utah Law), Cause Seven (Unjust Enrichment), and Cause Nine (Violation of Open Meetings Law) UAMPS argues that Causes 3-4 (Conflict of Interest and Breach of Fiduciary Duty) should be dismissed because (1) the UGIA has not expressly waived immunity from the claims, (2) Page failed to follow procedural rules applicable to derivative actions, and (3) Page failed to plead with enough particularity to

overcome the presumption that the challenged actions of the UAMPS Board were properly left to the board's business judgment UAMPS argues that Causes 5-7 (the requests for declaratory relief and claim for unjust enrichment) are also barred by the UGIA Finally, UAMPS contends that Cause 9 (violation of open meetings law) is barred by the limitations period set forth in the Utah Open and Public Meetings Act

The court concludes that the UGIA does not expressly waive governmental immunity from Page's claims for conflict of interest, breach of fiduciary duty, and unjust enrichment Nevertheless, Page argues that even if the UGIA does not expressly waive immunity from Page's unjust enrichment claim, that claim should not be dismissed because it falls within the equitable exception to the immunity doctrine But Page's contract claims provide it with an adequate remedy at law to address the factual allegations underlying its unjust enrichment claim Accordingly, the court declines to exercise equity jurisdiction over that claim

Because the court finds that there has been no waiver of immunity from Page's claims for breach of fiduciary duty and conflict of interest, there is no need to address UAMPS's argument that those causes of action should be dismissed for failure to comply with procedural requirements applicable to derivative suits Similarly, the court's conclusion renders moot UAMPS's argument that those causes should be dismissed for Page's alleged failure to overcome the presumption that the challenged actions of the UAMPS Board were properly left to the board's business judgment

The court denies UAMPS's motion to dismiss Page's request for declaratory relief under both Arizona and Utah law Page's declaratory judgment claims fall within the equitable exception to the immunity doctrine and, because Page does not have an adequate remedy at law to address the allegations underlying its request for declaratory judgments, those claims may proceed

\*4 Finally, the court denies UAMPS's request to dismiss Page's claim that UAMPS violated Utah open meetings laws In outlining this cause of action, Page's Complaint is sufficient to satisfy the liberal notice pleading requirement and defeat a motion to dismiss

*The Utah Governmental Immunity Act*

"Governmental immunity is an affirmative defense to suits against state or local government " Buckner v Kennard, 2004 UT 78, ¶ 35, 99 P 3d 842 But Utah, through the UGIA, has waived its immunity from certain types of claims See *id* Utah also recognizes a common law exception to the UGIA that allows plaintiffs to pursue equitable claims See El Rancho Enters, Inc v Murray City Corp, 565 P 2d 778, 779 (Utah 1977) ("The common law exception to governmental immunity pertaining to equitable claims has long been recognized in this jurisdiction") Page concedes that UAMPS enjoys governmental immunity to the extent that immunity is not waived by the UGIA or otherwise abrogated by the equitable exception to the immunity doctrine

*The UGIA's Waiver of Immunity Is Limited*

Page contends that its claims are not barred because the UGIA waives immunity for claims that "arise" from contractual rights The heart of the parties' disagreement on this point is the proper interpretation of Utah Code section 63-30d-301(1)(a)-(b), which states

- (1)(a) Immunity from suit of each governmental entity is waived as to any contractual obligation
- (b) Actions arising out of contractual rights or obligations are not subject to the requirements of Sections 63-30d-401, 63-30d-402, 63-30d, 403, or 63-30d-601 [all of which relate to notification and initiation procedures]

Page argues that the language of subsections (a) and (b) must be considered together and that, therefore, the UGIA waives immunity for all contractual obligations as well as any claim that "arises out" of a contractual relationship According to Page, Causes 3-4 (breach of fiduciary duty and conflict of interest) arise out of contract because they are premised on UAMPS's alleged violation of express contractual language that requires UAMPS to "act in the best interests of the UAMPS " (Plf's Opp'n to Def's Mot to Dismiss Counts Three Through Seven and Nine 7-8, *see id* ("[T]he plain language of the Complaint casts Causes of Action Three and Four as arising directly from the contractual obligations set forth in the Bylaws Page has suffered a direct harm as a result of UAMPS' failure to comply with *express contractual provisions* requiring UAMPS to act in the 'best interests of the UAMPS' and forbidding it from holding Page liable for the debts and liabilities of other Members ") More specifically, Page claims that the UAMPS Board was "*contractually required* to refrain from engaging in conflict of interest transactions and voting," and "*contractually required* to uphold their fiduciary duty to the organization and



its Members," and that the breach of express contractual provisions "entitl[ed] Page to bring its conflict of interest and breach of fiduciary duty causes of action. (*Id.* at 11.) Additionally, Page argues that its unjust enrichment claim arises out of contract because UAMPS was unjustly enriched as a direct result of its breach of contract.

\*5 Page's argument boils down to an assertion that its claims for breach of fiduciary duty, conflict of interest, and unjust enrichment "aris[e] directly" from a breach of express contract but are not breach of express contract claims in and of themselves. Case law does provide some support for Page's position that some claims can be considered as "arising" from contract. For example, the Utah Supreme Court has stated that "a claim for breach of fiduciary duty is an independent tort that, on occasion, arises from a contractual duty." *Norman v. Arnold*, 2002 UT 81, ¶ 35, 57 P.3d 997. See *Sadwick v. Univ. of Utah*, 2001 WL 741285 (D.Utah 2001) ("Although an action for breach of fiduciary duty may on rare occasions sound in contract, see *Hal Taylor Associates v. Unionamerica, Inc.*, 657 P.2d 743, 749 (Utah 1982), under Utah law contracts rarely implicate a fiduciary relationship. See *Semenov v. Hill*, 982 P.2d 578, 580 (Utah 1999).").

UAMPS counters that it makes no difference whether Page's causes of action "arise" from contract because, properly interpreted, the UGIA's waiver of immunity is not broad enough to encompass such claims. According to UAMPS, the broad interpretation of the UGIA proposed by Page would eviscerate governmental immunity, rendering governmental entities exposed to any and all claims of a potential plaintiff whenever a contract is implicated in some fashion. The court agrees with UAMPS, at least so far as Causes 3-4 and Cause 7 (breach of fiduciary duty, conflict of interest, and unjust enrichment) are concerned.

When interpreting a statute, the court's "primary goal ... is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve. *Foutz v. City of S. Jordan*, 2004 UT 74 ¶ 11, 100 P.3d 1171 (internal quotation omitted). And the plain language of Utah Code section 63-30d-301(1) does not support Page's assertion that the State of Utah has waived governmental immunity for claims "arising out of contractual rights or obligations."

In interpreting the UGIA's waiver provision, Page puts the proverbial cart before the horse and asks the

court to read the statute backward, with subsection (b) defining the scope of the immunity waived by subsection (a). But the more appropriate interpretation is that subsection (a) waives immunity for contract claims and that subsection (b) waives notice requirements for any claim brought under subsection (a). It is evident from the plain language of the statute that subsection (a) directly identifies the scope of the waiver, while subsection (b) deals only with the issues of notice and suit initiation. In short, subsection (b) does not attempt to modify the scope of the waiver announced in subsection (a). Therefore, it would be incorrect to rely on subsection (b) as an aid to ascertain the scope of the waiver announced in subsection (a). [FN1]

FN1. In contrast to Utah Code section 63-30d-301(1)(b), the plain language of subsection (c) unquestionably modifies the scope of the waiver announced in subsection (a). Subsection (c) expressly retains immunity for the Division of Water Resources in certain situations where the Division is unable to meet contractual obligations to provide a set amount of water. The clear intent of subsection (c) is to modify the scope of the immunity waived by subsection (a). A similarly clear expression of legislative intent to modify the scope of waived immunity is noticeably lacking in subsection (b).

Given the above, the court concludes that Utah Code section 63-30d-301(1) does not waive UAMPS's immunity from Causes 3-4 and Cause 7 of Page's Complaint (breach of fiduciary duty, conflict of interest, and unjust enrichment). Because Page has made no argument that its claims for breach of fiduciary duty and conflict of interest are allowable under another section of the UGIA or fall within the equitable exception to the UGIA, those two claims must be dismissed on governmental immunity grounds.

#### *Equitable Exception*

\*6 Page argues that even if the UGIA does not contain an express waiver allowing Page to pursue Cause 7 (unjust enrichment), that claim falls within the equitable exception to the immunity doctrine and should therefore not be dismissed. Page also argues that its requests for declaratory relief under Arizona and Utah law (Causes 5-6) fall within the equitable exception and should not be dismissed.

The Utah Supreme Court has frequently recognized a common-law exception to the governmental immunity doctrine that enables plaintiffs to pursue equitable claims in spite of governmental immunity. *See, e.g. Houghton v Dept of Health*, 2005 UT 63, ¶ 19 n 3, 125 P 3d 860, *El Rancho Enterprises, Inc.*, 565 P 2d at 780. The equitable exception to the immunity doctrine survived the passage of the UGIA. *See Houghton*, 2005 UT 63 at ¶ 19 n 3. But the exact scope of the equitable exception remains ill-defined.

#### *Unjust Enrichment*

Even if Page's unjust enrichment claim falls within the equitable exception to the immunity doctrine, it is nevertheless appropriate to dismiss that cause of action from this suit because Page has an adequate remedy at law. *See Buckner v Kennard*, 2004 UT 78, ¶ 56, 99 P 3d 842 ("[T]he general rule is that equitable jurisdiction is precluded if the plaintiff has an adequate remedy at law and will not suffer substantial irreparable injury. Equitable jurisdiction is not justifiable simply because a party's remedy at law failed" (internal citations omitted)), *see also* William Q. de Funiak, *Handbook of Modern Equity* 38 (2d ed 1956) ("The want of equity jurisdiction does not mean that the court has no power to act but that it should not act, as on the ground, for example, that there is an adequate remedy at law"). In Utah, the ability to pursue an unjust enrichment claim presupposes the absence of an enforceable express contract. *See Am Towers Owners Ass'n v CCI Mech.*, 930 P 2d 1182, 1193 (Utah 1996) ("If a legal remedy is available, such as breach of an express contract, the law will not imply the equitable remedy of unjust enrichment"), *Davies v Olson*, 746 P 2d 264, 268 (Utah Ct App 1987) ("Recovery under quantum meruit presupposes that no enforceable written or oral contract exists").

Here, the parties agree that there are valid, express contracts that govern the relationship between UAMPS and Page. A review of Page's unjust enrichment claim reveals that Page, through that claim, challenges the very actions at issue in its express contract claims. In short, Page has an adequate remedy at law for the allegations that serve as the foundation for its unjust enrichment claim and its unjust enrichment claim is therefore dismissed.

#### *Page's Request for Declaratory Judgments*

Page's Complaint also contains a request for declaratory judgments under both Arizona and Utah law. Specifically, Page requests declarations that the

Cost Recovery Charge, as well as certain loans to UAMPS from Zions First National Bank are ultra vires and void under either Arizona law, Utah law, or both. Page represents that it "do[es] not seek money or damages" under Causes 5-6 (the declaratory judgment requests), but only a declaration concerning the legal authority of UAMPS's and Page's authority in relation to the Cost Recovery Charge and the loans from Zions Bank. (Plf's Opp'n to Def's Mot to Dismiss Counts Three Through Seven and Nine 15.)

\*7 Accordingly, Page argues that its request for declaratory judgments falls within the equitable exception to the immunity doctrine. The court agrees. Both *El Rancho Enterprises*, 565 P 2d at 779-80, and *Jenkins v Swan*, 675 P 2d 1145, 1154 (Utah 1983), indicate that requests for equitable relief are not barred by governmental immunity and that the notice provisions of the UGIA are inapplicable to equitable claims. *See Jenkins*, 675 P 2d at 1154 ("Jenkins seeks equitable relief in the form of a declaratory judgment. [E]quitable claims of this nature are exempt from the notice requirements"). Indeed, Page's requests for declaratory relief appear strikingly similar to the types of claims in *El Rancho Enterprises* and *Jenkins*, namely, whether a governmental entity was acting within its lawful authority. *See Jenkins*, 675 P 2d at 1148 (action challenging permissibility of property tax practices), *El Rancho Enterprises*, 595 P 2d at 780 (overcharges by municipality "made by mistake or fraud and without authority of law").

Unlike Page's unjust enrichment claim, the allegations contained in Page's request for declaratory judgments raise issues that extend beyond the boundaries of the express contracts that otherwise govern UAMPS. If the court dismissed Page's request for declaratory judgments, it would effectively deprive Page of any relief warranted by the allegations serving as the foundation for that request. Accordingly, UAMPS's motion to dismiss those claims is denied.

#### *Open and Public Meetings Act*

Finally, it is premature to dismiss Page's claim that UAMPS violated the Utah Open and Public Meetings Act. UAMPS argues that this cause of action should be dismissed because Page failed to file suit within ninety days of a meeting allegedly held in violation of the Utah Open and Public Meetings Act. *See Utah Code Ann. § 52-4-8* (requiring suits seeking to void final actions taken at meetings held in violation of the act to be commenced within ninety days of the final

action). [FN2]

[FN2]. The Utah Open and Public Meetings Act was renumbered and amended during the 2006 General Session of the Utah State Legislature. Because the prior version of the act was in effect at the time Page filed its Complaint and because the parties have relied on that version while briefing this issue, the court similarly cites to the previous version. No party has alleged that the revisions to the act in any way materially effect Page's claim.

Page's Complaint does not identify any specific dates on which it alleges UAMPS held meetings in violation of the Open and Public Meetings Act. Also, Page does not confine its requested relief to voiding final actions taken by UAMPS. Rather, it seeks an order compelling UAMPS to comply with the act and making public any information evidencing what was discussed during meetings that were improperly closed. (See Compl. ¶ 261.)

Although Page's allegations do not provide specific dates of improper meetings, its Complaint does allege that UAMPS violated the act, and specifically claims that UAMPS held meetings without providing adequate notice and also illegally closed meetings. Applying liberal rules of notice pleading, Page's claim is sufficient to withstand a request for dismissal. See Corbin v. Runyon, No. 98-6288, 1999 WL 590749 (10th Cir. Aug. 6, 1999) ("Even though Ms. Corbin's second amended complaint is certainly not a picture of clarity, it is sufficient under our liberal notice pleading rules to survive a motion to dismiss." (citing Porter v. Karavas, 157 F.2d 984, 985-86 (10th Cir.1946) ("Indefiniteness of a complaint is not ground for dismissing the action if it states a claim showing that the plaintiff is entitled to relief.")). Accordingly, Page has sufficiently stated a claim that UAMPS violated the Utah Open and Public Meetings Act, and UAMPS's motion to dismiss that claim is premature.

### ***Conclusion***

\*8 The court GRANTS in part and DENIES in part UAMPS's Motion to Dismiss Counts Three Through Seven and Nine. The court dismisses Page's third and fourth causes of action (Conflict of Interest and Breach of Fiduciary Duty) because the UGIA has not expressly waived immunity from those claims. The court declines to dismiss Page's fifth and sixth causes of action (both requests for declaratory relief) because those claims fall within the equitable

exception to the immunity doctrine and seek relief on a broader scale than a simple recovery under contract. The court dismisses Page's seventh cause of action (unjust enrichment) because the UGIA has not waived immunity from that claim and Page possesses an adequate remedy at law to redress the alleged wrong. Finally, the court declines to dismiss Page's ninth cause of action pertaining to alleged violations of open meetings law. That claim sufficiently states a cause of action under the liberal rules of notice pleading to overcome UAMPS's request for dismissal.

SO ORDERED this 7th day of July, 2006.

Not Reported in F.Supp.2d, 2006 WL 1889882 (D.Utah)

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Tab 5

State v. Schwenke  
Utah App., 2007.

UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Court of Appeals of Utah.  
STATE of Utah, Plaintiff and Appellee,

v.

A. Paul SCHWENKE, Defendant and Appellant.  
**No. 20050791-CA.**

Nov. 1, 2007.

Third District, Salt Lake Department, 031902460;  
The Honorable Leslie A. Lewis.

A. Paul Schwenke, Draper, Appellant Pro Se.  
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake  
City, for Appellee.

Before Judges BENCH, McHUGH, and THORNE.

MEMORANDUM DECISION (Not For Official  
Publication)

THORNE, Judge:

\*1 Defendant A. Paul Schwenke appeals from his jury trial convictions of securities fraud, *see* Utah Code Ann. § 61-1-1 (2006), attempted theft by deception, *see* Utah Code Ann. § 76-6-405 (2003), communications fraud, *see id.* § 76-10-1801 (Supp.2007), and pattern of unlawful activity, *see id.* § 76-10-1603 (2003). Because Defendant's brief is inadequate under rule 24 of the Utah Rules of Appellate Procedure, we decline to review his claims. Accordingly, we affirm.

"It is well established that Utah appellate courts will not consider claims that are inadequately briefed." *State v. Garner*, 2002 UT App 234, ¶ 8, 52 P.3d 467. Utah Rule of Appellate Procedure 24(a)(9) states that the appellant's brief "shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on." Utah R.App. P. 24(a)(9). Although appellate courts are generally lenient with pro se litigants, *see Lundahl v. Quinn*, 2003 UT 11, ¶ 4, 67 P.3d 1000, such parties must still comply with

the rules. Even taking into account Defendant's circumstances in preparing his brief while incarcerated, considering references to well settled principles of law without citation, and giving him the leniency generally afforded pro se litigants,<sup>FN1</sup> Defendant's brief is nonetheless inadequate for failure to substantially comply with rule 24.

<sup>FN1</sup>. We do note that Defendant is not in the same position as most pro se litigants in that, as a disbarred attorney, he is law trained.

We initially note that Defendant failed to demonstrate grounds for reviewing issues not preserved in the trial court. Defendant argues for the first time on appeal that (1) his convictions violate his constitutional right against double jeopardy; (2) the trial court erred in its jury instructions on the elements of attempted theft by deception and communications fraud; and (3) the evidence presented at trial was insufficient to support his convictions of securities fraud, communications fraud, and pattern of unlawful activity. " 'Under ordinary circumstances, we will not consider an issue brought for the first time on appeal unless the trial court committed plain error or exceptional circumstances exist.' " *State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551 (quoting *State v. Nelson-Waggoner*, 2004 UT 29, ¶ 16, 94 P.3d 186). Defendant did not, in his opening brief, argue that plain error or exceptional circumstances existed to justify a review of these issues.<sup>FN2</sup> Defendant did assert, in his reply brief, that the issues raised on appeal were questions of law and plain error. However, "we will not consider matters raised for the first time in the reply brief." *Coleman v. Stevens*, 2000 UT 98, ¶ 9, 17 P.3d 1122. Because Defendant failed to argue that plain error or exceptional circumstances exist to justify a review of those issues, we decline to consider them on appeal. *See State v. Pledger*, 896 P.2d 1226, 1229 n. 5 (Utah 1995).

<sup>FN2</sup>. Defendant, in his statement of the issues presented in his opening brief, identified the standard of review for the first two issues as plain error, but did not argue plain error in his opening brief.

\*2 Even if Defendant's issues were properly preserved, we would nonetheless decline to review

his issues because Defendant's brief is, in large part, devoid of any meaningful legal analysis.

"[T]o permit meaningful appellate review, briefs must comply with the briefing requirements sufficiently to enable us to understand ... what particular errors were allegedly made, where in the record those errors can be found, and why, under applicable authorities, those errors are material ones necessitating reversal or other relief."

Garner, 2002 UT App 234, ¶ 13 (alteration and omission in original) (quoting State v. Lucero, 2002 UT App 135, ¶ 13, 47 P.3d 107). "This analysis 'requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority.' " Id. ¶ 12 (quoting State v. Thomas, 961 P.2d 299, 305 (Utah 1998)).

Defendant's arguments on appeal consist, in large part, of conclusory statements without relevant legal citations and reasoned analysis based on that authority. Defendant's argument that the trial court erred in its jury instructions on attempted theft by deception and communications fraud provides an illustration of his inadequate briefing. Defendant asserts that the jury instructions reduced the State's burden of proof because the instructions improperly state the elements of attempted theft by deception and communications fraud. However, the jury instructions track the statutory language, and Defendant fails to address or otherwise identify the manner in which either of the jury instructions conflict with the statutory language to reduce the State's burden. See Utah Code Ann. § 76-6-405, 76-10-1801. Because the relevant jury instructions track the statutory language and Defendant demonstrates no conflict, we conclude that Defendant has failed to brief a challenge to the jury instruction issue sufficient to permit review.

Similarly, Defendant also failed to adequately brief his argument that the evidence was insufficient to support his jury trial convictions of securities fraud, communications fraud, and pattern of unlawful activity. In arguing that the State failed to prove various elements, Defendant provides few relevant citations to legal authority and no legal basis for his contention that the evidence presented was insufficient to support his convictions. For example, Defendant provides one citation pertaining to his securities fraud argument that the stock at issue was not a security. However, the case cited, Securities & Exchange Commission v. W.J. Howey Co., 328 U.S. 293 (1946), which addresses federal securities fraud law, does not provide support for Defendant's

argument that the stock at issue was only a "paper transfer" and therefore was not a security. Neither does Defendant provide any supporting legal analysis for this contention. Likewise, other citations pertaining to communications fraud and pattern of unlawful activity are similarly afflicted. Because Defendant fails to provide meaningful analysis or supporting legal citation for his insufficiency of the evidence arguments, we decline to review them.

\*3 Defendant also failed to adequately brief his argument that defense counsel was ineffective. To demonstrate ineffective assistance of counsel, Defendant must show that his counsel "rendered deficient performance which fell below an objective standard of reasonable professional judgment, and ... counsel's deficient performance prejudiced him." State v. Hernandez, 2005 UT App 546, ¶ 17, 128 P.3d 556 (internal quotation marks omitted). Although Defendant references the two-part test previously stated, he fails to challenge the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See Strickland v. Washington, 466 U.S. 668, 689 (1984). Defendant also makes no attempt to demonstrate how defense counsel's actions or inactions fell below an objective standard of reasonableness or prejudiced Defendant in any manner. Instead, Defendant merely lists defense counsel's alleged failings and concludes that the various failings constitute ineffective assistance of counsel. However, "[a] brief must go beyond providing conclusory statements and 'fully identify, analyze, and cite its legal arguments.'" West Jordan City v. Goodman, 2006 UT 27, ¶ 29, 135 P.3d 874 (quoting State v. Green, 2005 UT 9, ¶ 11, 108 P.3d 710). Because Defendant's ineffective assistance of counsel argument provides no relevant legal citation or meaningful analysis, we decline to review this issue based on inadequate briefing.

Likewise, Defendant fails to adequately analyze the issues pertaining to his argument that the trial court erred in permitting the State to amend the charge of theft to attempted theft by deception. An indictment or information may be amended with the trial court's permission at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. See Utah R.Crim. P. 4(d). Defendant asserts that, because the attempted theft by deception charge involves different elements of proof than the original charge <sup>FN3</sup> of theft, the theft by deception charge is a new and separate offense for which he was not properly charged. Therefore he contends that he was convicted

in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

FN3. Theft by deception requires a misrepresentation, which is not necessary for a theft conviction. See Utah Code Ann. § 76-6-404 (2003), 76-6-405.

Although the two theft charges at issue involve different elements, this does not in and of itself demonstrate that attempted theft by deception is a new and separate offense. Utah's consolidated theft statute provides that a theft by deception charge is a theory of theft and not a separate offense. See Utah Code Ann. § 76-6-403 (2003). Neither does the information's amendment to charge a different theory of theft necessarily offend the procedural safeguards in the criminal process. Under Utah's consolidated theft statute, allowing an information's amendment to charge a different theory of theft, even though the theory being advanced involves different elements of proof, "does not offend the procedural safeguards in the criminal process, so long as defendant is adequately notified of the theory being used and given ample time to prepare a defense to the charge." State v. Bush, 2001 UT App 10, ¶ 16, 47 P.3d 69. Defendant does not claim that he was inadequately notified of the alternate theory of theft by deception or that he had inadequate time to prepare a defense. Rather, he simply argues, without addressing the contrary holding in *Bush*, that theft by deception is a new charge that violates his due process rights. Because Defendant does not challenge the *Bush* holding or claim that he was not afforded sufficient time to prepare a defense to the amended charge of theft by deception, his brief is inadequate to allow review. We therefore decline to address this issue.

\*4 Finally, we address Defendant's motion to strike an addendum in the State's brief, which contained a typed copy of Defendant's handwritten brief. The State did not purport to provide the typed copy as a substitute for Defendant's brief, rather the State provided it as a courtesy, which is appreciated. Although Defendant directs our attention to some minor differences between the typed and handwritten versions, he does not point to any errors that affect the meaning of his brief. Because Defendant does not identify any substantial errors that would affect the meaning of his brief, we deny Defendant's motion to strike.

Affirmed.

WE CONCUR: RUSSELL W. BENCH, Presiding Judge and CAROLYN B. McHUGH, Judge.

Utah App., 2007.

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Not Reported in P.3d, 2007 WL 3197537 (Utah App.), 2007 UT App 354

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