

2008

# Kipp Cabaness v. Brent Thomas, Clifford C. Michaelis, Bountiful City : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Craig L. Taylor; Willis F. McComas; Hal Armstrong; Bryan D. Nielsen; Craig L. Taylor and Associates; Attorneys for Appellant.

Stanley J. Preston; Maralyn M. Reger; Bryan M. Scott; Snow, Christensen and Martineau; Russell L. Mahan; Bountiful City Attorney; Attorneys for Appellees.

---

## Recommended Citation

Brief of Appellee, *Cabaness v. Thomas*, No. 20080446 (Utah Court of Appeals, 2008).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/932](https://digitalcommons.law.byu.edu/byu_ca3/932)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH SUPREME COURT

---

KIPP CABANESS,

Plaintiff/Appellant,

vs.

BRENT THOMAS, CLIFFORD C.  
MICHAELIS, and BOUNTIFUL CITY,

Defendants/Appellees.

**BRIEF OF APPELLEES**

**Case No. 20080446-SC**

**ORAL ARGUMENT REQUESTED**

---

Appeal from the Second Judicial District Court, Davis County, State of Utah

The Honorable Glen R. Dawson, District Judge

Civil No. 040700494

---

CRAIG L. TAYLOR  
WILLIS F. MCCOMAS  
HAL ARMSTRONG  
BRYAN D. NIELSEN  
**CRAIG L. TAYLOR &  
ASSOCIATES, P.C.**  
472 North Main Street  
Kaysville, Utah 84037  
*Attorneys for Appellant Kipp Cabaness*

STANLEY J. PRESTON (4119)  
MARALYN M. REGER (8468)  
BRYAN M. SCOTT (9381)  
**SNOW, CHRISTENSEN & MARTINEAU**  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
Telephone: (801) 521-9000

RUSSELL L. MAHAN (2059)  
**BOUNTIFUL CITY ATTORNEY**  
790 South 100 East  
Bountiful Utah 84010

*Attorneys for Appellees Bountiful City, Brent  
Thomas and Clifford C. Michaelis*

FILED  
UTAH APPELLATE COURTS

---

**IN THE UTAH SUPREME COURT**

---

KIPP CABANESS,

Plaintiff/Appellant,

vs.

BRENT THOMAS, CLIFFORD C.  
MICHAELIS, and BOUNTIFUL CITY,

Defendants/Appellees.

**BRIEF OF APPELLEES**

**Case No. 20080446-SC**

**ORAL ARGUMENT REQUESTED**

---

Appeal from the Second Judicial District Court, Davis County, State of Utah

The Honorable Glen R. Dawson, District Judge

Civil No. 040700494

---

CRAIG L. TAYLOR  
WILLIS F. MCCOMAS  
HAL ARMSTRONG  
BRYAN D. NIELSEN  
**CRAIG L. TAYLOR &  
ASSOCIATES, P.C.**  
472 North Main Street  
Kaysville, Utah 84037  
*Attorneys for Appellant Kipp Cabaness*

STANLEY J. PRESTON (4119)  
MARALYN M. REGER (8468)  
BRYAN M. SCOTT (9381)  
**SNOW, CHRISTENSEN & MARTINEAU**  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
Telephone: (801) 521-9000

RUSSELL L. MAHAN (2059)  
**BOUNTIFUL CITY ATTORNEY**  
790 South 100 East  
Bountiful Utah 84010

*Attorneys for Appellees Bountiful City, Brent  
Thomas and Clifford C. Michaelis*

## TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF JURISDICTION .....	1
II. ISSUES PRESENTED FOR REVIEW .....	1
III. DETERMINATIVE STATUTES AND RULES .....	2
IV. STATEMENT OF THE CASE .....	2
A.    NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW .....	2
B.    RESPONSE TO CABANESS' STATEMENT OF FACTS .....	4
V. SUMMARY OF ARGUMENT .....	24
VI. ARGUMENT .....	25
A.    THE SUBJECT POLICIES OF THE MANUAL DO NOT CREATE AN IMPLIED CONTRACT .....	25
1.    The Relevant Personnel Policies Are Warnings To Employees, And Do Not Create Any Contractual Obligations .....	26
2.    Cabaness' Unilateral Expectations Are Insufficient To Create An Implied Contract .....	27
3.    The Trial Court Properly Excluded The Improper And Untimely Affidavits Of Mears and Quinn .....	28
4.    The Utah Cases Cited by Cabaness Are Distinguishable .....	30
5.    Cabaness Misstates The Record Below .....	31
B.    THE IMMUNITY ACT BARS CABANESS' CONTRACT CLAIMS ....	34
C.    DAMAGES FOR MENTAL DISTRESS ARE NOT RECOVERABLE UNDER CABANESS' CONTRACT CLAIMS .....	38
D.    CABANESS' WRONGFUL CONSTRUCTIVE TERMINATION CLAIM FAILS AS A MATTER OF LAW .....	39

E. THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS  
CLAIM AGAINST THOMAS AND MICHAELIS IS WITHOUT  
MERIT ..... 41

1. Cabaness Cannot Rely On Evidence Of Incidents That Occurred  
When He Was Not Present, Nor On Incidents That Allegedly  
Occurred Prior To March 31, 2000 ..... 41

2. Dr. Hawk’s Untimely Report And Affidavit Were Properly  
Excluded ..... 43

3. The Relevant Actions Of Thomas Or Michaelis Do Not Give Rise  
To A Claim For Intentional Infliction Of Emotional Distress. .... 44

VII. CONCLUSION ..... 49

# TABLE OF AUTHORITIES

## CASES

	<u>Page</u>
<i>Americans Disabled for Accessible Public Transp. v. SkyWest Airlines, Inc.</i> , 762 F.Supp. 320 (D. Utah 1990) .....	38
<i>Amica Mut. Ins. Co. v. Schettler</i> , 768 P.2d 950 (Utah Ct. App. 1989) .....	29
<i>Anderson Dev. Co. v. Tobias</i> , 2005 UT 36, 116 P.3d 323 .....	45
<i>Atiya v. Salt Lake County</i> , 852 P.2d 1007 (Utah Ct. App. 1993) .....	34
<i>Barson v. E.R. Squibb &amp; Sons, Inc.</i> , 682 P.2d 832 (Utah 1984) .....	29
<i>Beck v. Farmers Ins. Exchange</i> , 701 P.2d 795 (Utah 1985) .....	38
<i>Bennett v. Jones, Waldo, Holbrook &amp; McDonough</i> , 2003 UT 9, 70 P.3d 17, 30 .....	45
<i>Berube v. Fashion Centre, Ltd.</i> , 771 P.2d 1033 (Utah 1989) .....	30
<i>Boisjoly v. Morton Thiokol, Inc.</i> , 706 F. Supp. 795, 802 (D. Utah 1988) .....	48
<i>Brehany v. Nordstrom, Inc.</i> , 812 P.2d 49 (Utah 1991) .....	30, 31
<i>Broadbent v. Board of Educ. of Cache County Sch. Dist.</i> , 910 P.2d 1274 (Utah Ct. App. 1996) ..	40
<i>Butler, Crockett &amp; Walsh Dev. Corp. v. Salt Lake County</i> , 2005 UT App 402 .....	36
<i>Caldwell v. Ford, Bacon &amp; Davis Utah, Inc.</i> , 777 P.2d 483 (Utah 1989) .....	32, 33, 40
<i>Calliari v. Sugar</i> , 435 A.2d 139 (N.J. Super. Ct. Ch. Div. 1980) .....	43
<i>Canfield v. Layton City</i> , 2005 UT 60, 122 P.3D 622 .....	31
<i>Capital Assets Fin. Serv. v. Lindsay</i> , 956 P.2d 1090 (Utah Ct. App. 1998) .....	6
<i>Croft by Croft v. Wicker</i> , 737 P.2d 789 (Alaska 1987) .....	43
<i>Demasse v. ITT Corp.</i> , 984 P.2d 1138 (Ariz. 1999) .....	31
<i>Foote v. Clark</i> , 962 P.2d 52 (Utah 1998) .....	38
<i>Franco v. The Church of Jesus Christ of Latter-Day Saints</i> , 2001 UT 25, 21 P.3d 198 .....	45

<i>Gally v. Columbia University</i> , 22 F.Supp.2d 199 (S.D.N.Y. 1998) .....	31
<i>GNS Partnership v. Fullmer</i> , 873 P.2d 1157 (Utah Ct. App. 1994) .....	6
<i>Hansen v. America Online</i> , 2004 UT 62, 96 P.3d 950 .....	39, 40
<i>Hatch v. Davis</i> , 2006 UT 44, 147 P.3d 383 .....	42, 43
<i>Hatch v. Davis</i> , 2004 UT App 378, 102 P.3d 774 .....	41, 42
<i>Heideman v. Washington City</i> , 2007 UT App 11, 155 P.3d 900 .....	33
<i>H.L.O. v. Hossle</i> , 381 N.W.2d 641 (Iowa 1986) .....	43
<i>Hodges v. Gibson Prods. Co.</i> , 811 P.2d 151 (Utah 1991) .....	40
<i>In the Matter of the General Determination of Rights</i> , 982 P.2d 65 (Utah 1999) .....	6
<i>Kornegay v. Mundy</i> , 379 S.E.2d 14 (Ga. Ct. App. 1989) .....	46
<i>Koulis v. Standard Oil</i> , 746 P.2d 1182 (Utah App. Ct. 1987) .....	4
<i>Larson v. SYSCO Corp.</i> , 767 P.2d 557, 561 (Utah 1989) .....	45
<i>Ledfors v. Emery County Sch. Dist.</i> , 849 P.2d 1162 (Utah 1993) .....	35, 36
<i>Litton v. Maverick Paper Co.</i> , 388 F.Supp.2d 1261 (D.Kan. 2005) .....	31
<i>Lund v. Caple</i> , 675 P.2d 226 (Wash. 1984) .....	43
<i>Machan v. UNUM Life Insurance Company of America</i> , 2005 UT 37, ¶ 16, 116 P.3d 342 ..	38, 39
<i>Manning v. Cigna Corp.</i> , 807 F.Supp. 889 (D. Conn. 1991) .....	32
<i>Mastic Tile Division of Ruberoid Co. v. Acme Distributing Co.</i> , 389 P.2d 56 (Utah 1964) .....	33
<i>Miller v. Cook</i> , 273 N.W.2d 567 ( Mich. Ct. App. 1978) .....	43
<i>National Farmers Union Property &amp; Cas. Co. v. Western Cas. &amp; Sur. Co.</i> , 577 P.2d 961 (Utah 1978) .....	35
<i>Norton v. Blackham</i> , 669 P.2d 857 (Utah 1983) .....	6
<i>Panis v. Mission Hills Bank, N.A.</i> , 60 F.3d 1486 (10th Cir. 1995) .....	27

<i>Peralta v. Cendant Corp.</i> , 123 F.Supp.2d 65 (D. Conn. 2000) .....	27
<i>Peterson v. Browning</i> , 832 P.2d 1280 (Utah 1992) .....	40
<i>ProMax Dev. Corp. v. Mattson</i> , 943 P.2d 247 (Utah Ct. App. 1997) .....	29
<i>R.D. v. W.H.</i> , 875 P.2d 26 (Wyo. 1994) .....	43
<i>Retherford v. AT&amp;T Comms.</i> , 844 P.2d 949 (Utah 1992) .....	40
<i>Ryan v. Dan's Food Stores, Inc.</i> 972 P.2d 395, 401 (Utah 1998) .....	33
<i>Sanderson v. First Sec. Leasing Co.</i> , 844 P.2d 303 (Utah 1992) .....	33
<i>Sauers v. Salt Lake County</i> , 735 F. Supp. 381 (D. Utah 1990) .....	34
<i>Schurk v. Christensen</i> , 497 P.2d 937 (Wash. 1972) .....	43
<i>State of Utah v. Huntington-Cleveland Irrigation Co.</i> , 2002 UT 75, 52 P.3d 1257 .....	34
<i>Taylor in re Taylor v. Ogden City Sch. Dist.</i> , 927 P.2d 159 (Utah 1996) .....	35
<i>Treloggan v. Treloggan</i> , 699 P.2d 747 (Utah 1985) .....	6
<i>Williams v. Melby</i> , 699 P.2d 723 (Utah 1985) .....	6
<i>Wood v. Utah Farm Bureau Ins. Co.</i> , 2001 UT App 35, 19 P.3d 392 .....	27, 28

## STATUTES

Utah Code Ann. § 63-30-1 (2003) .....	1
Utah Code Ann. § 63-30-10 (2003) .....	1, 2, 34, 35, 36
Utah Code Ann. § 78-12-25 (1996) .....	2, 6, 41
Utah Code Ann. § 78B-2-309) .....	6

## RULES

Utah Rules of Civil Procedure 56 .....	2, 6
Utah Rules of Civil Procedure 59 .....	2, 3, 4, 10, 28, 29, 45



Utah Rules of Civil Procedure 60 .....	2, 3, 10, 28
--	--------------

## OTHER AUTHORITIES

Samuel Williston, 24 Williston on Contracts § 64:7 (4th ed. 1990) .....	38
<i>Restatement (Second) of Torts</i> , § 46, comment d (1965) .....	45, 46

## I. STATEMENT OF JURISDICTION

Jurisdiction in this Court is proper pursuant to Utah Code Ann. § 78A-3-102(j).

## II. ISSUES PRESENTED FOR REVIEW

In his brief, Plaintiff/Appellant Kipp Cabaness (“Cabaness”) frames seven appeal issues in an argumentative manner that assumes their conclusion. Defendants/Appellees Bountiful City (the “City”), Brent Thomas (“Thomas”), and Clifford C. Michaelis (“Michaelis”) (collectively “appellees”) restate the issues on appeal as follows:

**1. Issue:** Do Cabaness’ contractual claims for breach of an implied contract, and for breach of an implied covenant of good faith and fair dealing, fail because there is no implied contract based on the following: (a) the relevant provisions of the Bountiful City Personnel Policies & Procedures Manual<sup>1</sup> (the “Manual”), which state the City’s goals and policies and warn employees not to engage in certain misconduct, do not create a contractual obligation on the part of the City to insure that no such conduct will occur in the workplace; (b) Cabaness failed to meet his burden of coming forward with sufficient admissible evidence of an implied contract; (c) Cabaness cannot rely on the untimely Affidavits of Kenneth Mears and Bonnie Quinn, because they do not constitute “new evidence”; and/or (d) Cabaness’ claims are not supported by case law?

**2. Issue:** Are Cabaness’ purported contractual claims also barred by former Section 63-30-10(2) of the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-1, *et. seq* (the “Immunity Act”), because they are based on an injury that arises out of the alleged

---

<sup>1</sup>As part of his Appendix, Cabaness attaches the Manual dated January 1, 2004, which was issued the same month that Cabaness resigned his employment. The relevant Manual is the one dated November 5, 1997. (R. 1565-1613).

infliction of mental anguish?

3. **Issue:** Can Cabaness recover emotional distress damages under his contract claims?

4. **Issue:** Does Cabaness' claim for wrongful constructive termination, which is clearly pled as a tort claim, fail because it is not based on the contravention of a clear and substantial public policy; and/or because it is barred by the Immunity Act?

5. **Issue:** In determining whether Cabaness provided sufficient evidence to establish his intentional infliction of emotional distress claim, can he rely on evidence of: (a) incidents where he was not present; (b) incidents that allegedly occurred prior to March 31, 2000, pursuant to the four-year statute of limitations; (c) inadmissible evidence; and/or (d) the untimely Report and Affidavit of Dr. Hawks, which the trial court excluded?

6. **Issue:** Based on the applicable legal standard, do the actions of Thomas or Michaelis give rise to a claim of intentional infliction of emotional distress?

### **III. DETERMINATIVE STATUTES AND RULES**

Utah Code Ann. § 63-30-10 (2003)

Utah Code Ann. § 78-12-25 (1996)

Utah Rules of Civil Procedure 56, 59, 60

### **IV. STATEMENT OF THE CASE**

#### **A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW.**

Cabaness, a long-time City employee, resigned his employment in January 2004. He served his Notice of Claim on March 31, 2004. (R. 6 at ¶ 20). On September 23, 2004, Cabaness filed the underlying lawsuit, wherein he alleged various contract and tort claims

against appellees based on his assertion that he had been constructively terminated as a result of the harassment of Thomas, his supervisor, which caused him to suffer severe emotional distress. After discovery, appellees filed a summary judgment motion, in response to which, Cabaness filed a 106 page opposing memorandum, multiple affidavits, and a cross-motion for summary judgment. Appellees moved to strike Cabaness' lengthy memorandum and affidavits. After holding three separate hearings on the motions over a three-week period, the trial court entered its January 11, 2007 Order and its January 10, 2007 Memorandum Decision, wherein it denied appellees' motion to strike (though it stated that much of Cabaness' evidence failed to satisfy the authenticity and admissibility requirements of the Utah Rules of Evidence), granted appellees' summary judgment motion, and denied Cabaness' cross-motion for summary judgment.

On January 26, 2008, Cabaness filed a Rule 59 and 60(b) Motion to Alter or Amend the Court's Final Order ("Rule 59 Motion") together with a 46 page memorandum, the Affidavit of Willis McComas, one of his attorneys, to which were attached as exhibits the Affidavit and Report of Dr. Hawks. By stipulation of the parties, Cabaness withdrew his original memorandum and the McComas Affidavit and, in their place, filed a shorter memorandum and the Affidavit of Matthew Hilton, another one of Cabaness' attorneys, to which were attached as exhibits both the Mears and Quinn Affidavits, but not the Hawks Affidavit and Report.

In response, appellees moved to strike the Quinn and Mears Affidavits and certain portions of the Hilton Affidavit, and later objected to the Hawks Affidavit and Report. The trial court's April 23, 2008 Order denied Cabaness' Rule 59 Motion, granted appellees' motion to strike, and ruled that the Hawks Affidavit and Report should be disregarded, while

noting that, even if it had considered the Quinn and Mears Affidavits and the Hawks Affidavit and Report, its ruling would not have changed. Cabaness timely filed this appeal, which addresses some, but not all, of his dismissed claims.<sup>2</sup>

## **B. RESPONSE TO CABANESS' STATEMENT OF FACTS.**

Appellees submit that Cabaness' Brief, and particularly his Statement of Facts therein, are improper and should be largely disregarded because they fail to satisfy the *Koulis v. Standard Oil*, 746 P.2d 1182 (Utah App. Ct. 1987), standard that a brief must be concise, presented with accuracy, and free from burdensome, irrelevant, immaterial or scandalous matters.<sup>3</sup> Cabaness' fact statement is filled with inaccurate and distorted assertions that are not supported by the record he cites, based on inadmissible evidence and/or irrelevant and immaterial to the issues on appeal. It is also peppered with legal argument and many statements which are conclusory and speculative.<sup>4</sup> Appellees respond to these facts, and clarify the record, as follows:

1-3. Undisputed for purposes of this appeal. In addition, Thomas was hired by the City as a groundman in August 1971. (R. 1411 at 14:11-13). During his employment with the City, Thomas has worked as a groundman, apprentice, journeyman, foreman and the

---

<sup>2</sup>Among other things, Cabaness does not appeal the dismissal of his claims against the City for negligent infliction of emotional distress and punitive damages, or any contract claims to the extent they were alleged against the individual defendants.

<sup>3</sup>Briefs which do not comply with the *Koulis* standard may be disregarded or stricken *sua sponte* by the Court, with an assessment of attorney's fees. *Id.* at 1185.

<sup>4</sup>These problems are consistent with the overzealous manner in which Cabaness has litigated this case, including the filing of lengthy memoranda and 18 separate attorney affidavits, that are conclusory and filled with improper argument and hearsay, and his attorneys' improper actions in depositions, which led the court to find that Cabaness' attorneys had engaged in inappropriate and unprofessional conduct. (R. 1346).

Superintendent of Operations in the City's Power Department. (R. 1411 at 14:11-13; 1417 at 37:7-13; 1418 at 41:6-9; 1420 at 49:15-16, 51:11-13).

4. Inaccurate. The relevant Manual provisions state policies and procedures, but do not make "promises." (R. 1570, 1590-1593, 1604; *generally* R. 1565-1613).

5. Inaccurate. The Manual makes no representation as to whether it creates a contract. It does expressly state, however, that "the policies and procedures in this manual may be unilaterally added to, rescinded, or modified from time to time as may be decided by the Bountiful City Council," and, "No contract exists between Bountiful City and its employees with respect to salary, salary ranges, movement within salary ranges or employee benefits." (R. 1570 at § 101(a) and (b)).

6. Inaccurate. Cabaness' Affidavit does not state that he believed the City had an "obligation" to comply with the Manual's provisions, or that he believed that Michaelis was responsible to implement the Manual. (R. 1381). Rather, he stated that he had an "expectation" that the City would comply with the Manual's provisions. (R. 1381 at ¶ 10). He also improperly asserts a legal conclusion that he considered certain Manual policies to be an implied agreement. (R. 1381 at ¶ 10). Michaelis did not testify that he was responsible to implement the Manual, nor did he refer to statements in the Manual regarding harassment as "promises." (R. 1861). Rather, in response to a question as to whether it was his responsibility to enforce City policy with respect to harassment, Michaelis testified "the buck stops with me. You're asking a very broad question that has a legal implication and I don't know that I know that." (R. 1861 at 98:20-99:9). The Manual also contains other relevant policies regarding "Grievance Procedures" (Section 424), "Sexual and Other Harassment" (Section 409), "Disciplinary Appeals" (Section 604). (R. 1593-1594, 1601, 1609-1612).

Cabaness never took the concerns he had regarding Thomas or Michaelis to the City Manager, in compliance with the policies set forth in the Manual. (R. 1298 at 115-116:25, 1-4). Similarly, he never filed any appeal regarding his alleged constructive termination to the City Manager, the City's Board of Appeals, or the City Council, nor did he otherwise avail himself of the appeal rights provided for in the Manual. (R. 1297 at 104:14-16).

7. The statements in paragraph 7 are inaccurate and constitute improper assertions of opinions and legal conclusions as facts. Also, the evidence cited in support of these statements is inadmissible and fails to comply with Rule 56 of the Utah Rules of Civil Procedure.<sup>5</sup> Appellees submit that many of the incidents detailed in Cabaness' fact statement are not relevant to this case because they occurred many years ago, or because he was not even present during the alleged incidents. As discussed below, appellees maintain that the only relevant incidents are those which occurred between the four-year period of March 31, 2000 through March 31, 2004.<sup>6</sup> During his deposition, Cabaness was given the opportunity to detail all of the alleged conduct by appellees that forms the basis of his lawsuit. His deposition establishes that only the conduct set forth in subparagraphs (a) through (f)

---

<sup>5</sup>Affidavits reflecting an affiant's unsubstantiated conclusions and opinions are inadmissible. See, e.g., *In the Matter of the General Determination of Rights*, 982 P.2d 65, 72 (Utah 1999) (affidavit stricken that was riddled with hearsay, conclusory and lacked foundation); *Smith v. Four Corners Mental Health Ctr., Inc.*, 2003 UT 23, ¶ 50, 70 P.3d 904; *Williams v. Melby*, 699 P.2d 723, 725 (Utah 1985); *Treloggan v. Treloggan*, 699 P.2d 747 (Utah 1985) (disregarding affidavit statements that consisted of unsubstantiated opinions and conclusions); *Norton v. Blackham*, 669 P.2d 857, 864 (Utah 1983); *Capital Assets Fin. Serv. v. Lindsay*, 956 P.2d 1090, 1094 (Utah Ct. App. 1998) (legal conclusions in affidavits are not admissible); *GNS Partnership v. Fullmer*, 873 P.2d 1157 (Utah Ct. App. 1994).

<sup>6</sup>A four year statute of limitations applies to Cabaness' tort and implied contract claims. See Utah Code Ann. § 78-12-25 (1996) (renumbered as Utah Code Ann. §78B-2-309). Since Cabaness filed his Notice of Claim herein on March 31, 2004, only the conduct occurring during the four-year period prior to that date is relevant.

definitely took place within this four-year period, while the conduct detailed in subparagraphs (g) through (m) may have occurred during this four-year period:

(a) In late 2003, Thomas allegedly told Cabaness that he needed to leave his wife. (R. 1291 at 68:3-11). When Cabaness told him that his relationship with his wife was not Thomas' business and he should not talk to him about it, Thomas stopped discussing the issue with Cabaness. (R. 1291 at 68:11-14).

(b) In 2003, after Cabaness' crew had to re-dig an underground line and replace a pipe because a different crew had done the work improperly, Thomas asked Cabaness, in front of the other crew, how he liked doing their work. Cabaness said that it didn't matter. Thomas asked the other crew foreman what he thought, and that crew foreman said, "I'm sorry I'm not perfect. I made a mistake." Thomas then said to that crew foreman, "Boy you've got a bad attitude. I'm going to have to write you up on that." (R. 1285-1286 at 39:20-41:1).

(c) In 2002 or 2003, Cabaness told Thomas that he replaced a blown fuse on a power line near an elementary school three times in one week and that it was a potentially hazardous condition for the school children. Thomas said okay but nothing was done to correct the problem until five or six months later. (R. 1292 at 69:10-71:23).

(d) In 2000 or 2001, Cabaness was getting ready to set a pole on a new line for a substation. Thomas told Cabaness to set a different pole. Cabaness thought this created additional, unnecessary work. (R. 1289 at 53:14-54:25).

(e) In March 2000, Thomas singled Cabaness out for not wearing his Bountiful Power hat. Cabaness was not aware if anything was said to other lineman



who did not wear their Bountiful Power hats. (R. 1299 at 134:20-135:18).

(f) In 2000, after a car had struck a transmission pole, Thomas instructed Cabaness to bring a replacement pole to the site. Thomas complained to Cabaness that the two men cutting down the old pole were not doing it right and told him to tell the men they needed to do it differently. Cabaness refused and Thomas turned and stomped away. (R. 1288 at 50:23-52:7).

(g) In the late nineties or early 2000, two crews were assigned to pull some wire at a school. After the crews had positioned the trucks to pull the wire, Thomas arrived and told Cabaness that the crews could not pull wire the way they were set up and told him to change the trucks' positions. Cabaness said, "we have been pulling wire like that for years, why change." Thomas replied, "I'm the boss you move the stuff. If you don't, you're insubordinate and I can fire you for that." The other crew foreman asked Thomas why he wanted the trucks moved and Thomas said, "Oh, now I have two foreman that don't do what I tell them." He told Cabaness and the other crew foreman that he was the boss and if they didn't do what he said, he was going to write them up and they could get fired for stuff like that. The trucks' positions were not switched. Thomas then told Cabaness and the other crew foreman that, as far as he was concerned, they had mended things and that nothing else was going to happen. (R. 1286-1287 at 42:25-45:24).

(h) Periodically the power department would get new trucks. Thomas would lock the trucks and not allow the lineman to see inside and start the trucks. Thomas explained that he did not want the linemen messing with the trucks. Later, when the linemen asked if they could look at the new trucks, Thomas threw the keys

on the ground and said they could look at the trucks. (R. 1290 at 61:1-62:5).

(i) Almost weekly as the lineman would gather by their trucks to talk, Thomas would stare at them and say, “let’s go, let’s get this job done.” When Cabaness responded he needed to brief his lineman about the day’s assignment, Thomas would tell Cabaness to get in his truck and get going. Sometimes, Thomas would walk out of his office, put his hands up, and look like he wanted the crews to leave to take care of their assignments. (R. 1290 at 63:5-64:20).

(j) At times when it was raining the linemen would want to stay inside but Thomas would have them go outside to work on the assigned jobs. When asked by the linemen why they couldn’t wait until it stopped raining, Thomas said that he had bought them rain gear they could use. (R. 1295 at 82:8-20).

(k) Thomas commonly responded to linemen who told him they had finished their assigned tasks by saying “Congratulations” in a sarcastic manner, or “What do you want, a star on your forehead?” (R. 1291 at 65:3-17).

(l). Thomas would comment that none of the men wanted to work and that they had “piss poor attitudes.” (R. 1291 at 65:25-66:9).

(m) When Cabaness and others told Thomas they had problems communicating with him and he was not approachable, Thomas said “this is the way I am. You can’t change the spots on a dog.” (R. 1291 at 66:14-20).

8. This paragraph should be stricken because it is based on the untimely Mears Affidavit, which was submitted after the trial court had ruled on the parties’ summary judgment motions. The trial court properly determined that the Mears and Quinn Affidavits

should not be considered and it ordered that they be stricken.<sup>7</sup> Furthermore, this hearsay evidence is immaterial because what Mears was told or believed is not at issue in this lawsuit.

9-10. Paragraphs 9 and 10 constitute improper assertions of opinions and legal conclusions as facts, and should be stricken because they rely solely on the untimely Affidavit and Report of Dr. Rick D. Hawks, Cabaness' expert witness. On July 26, 2006, the trial court ruled that the Hawks Report, which had not been submitted to the court until long after the cross-motions for summary judgment were fully briefed, would not be admitted or considered in ruling on the summary judgment motions. (R. 4440). Six months later, the Hawks Report and Affidavit were attached as exhibits to the lengthy McComas Affidavit, filed in support of the Rule 59 Motion. (R. 3889-3910). By joint stipulation, however, the McComas Affidavit was withdrawn, and the Hilton Affidavit was substituted in its place. (R. 3994-3995). The Hawks Report and Affidavit were not attached as exhibits to the Hilton Affidavit. (R. 4110-4157). As discussed in greater detail below, the trial court properly ruled that the Hawks Report and Affidavit should be disregarded because they did not constitute "new evidence" that satisfied the standards set forth in Rules 59 or 60 of the Utah Rules of Civil Procedure. (R. 4565).

11. The statements in paragraph 11 are inaccurate and argumentative, and are not supported by any citation to the record. As a result, they should not be considered.

12. The statements in paragraph 12 are inaccurate and constitute improper

---

<sup>7</sup>The trial court stated these affidavits were stricken for the reasons set forth in defendants' motion, (R. 4229-4234, 4439-4444, 4565), because they were untimely, and because Cabaness failed to satisfy the necessary showing of surprise and that the information could not have been previously discovered and timely submitted. The trial court also ruled that the evidence in these affidavits were cumulative, incidental and, if considered, would not change the trial court's decision. (R. 4565).

assertions of opinions and legal conclusions as facts. Also, the evidence cited in support of the statements is inadmissible, and the evidence cited does not support the characterizations set forth in paragraph 12. For example, paragraph 10 of the Knighton Affidavit is inadmissible because it refers to a meeting that occurred more than eleven years before Cabaness terminated his employment with the City. Also, paragraph 10 and paragraph 15 of the Knighton Affidavit, and the cited portion of Farnes' deposition, are conclusory and based on inadmissible hearsay. The trial judge ruled the Knighton Affidavit was conclusory and, therefore, not helpful. Furthermore, the testimony cited from Farnes' deposition at most shows that Thomas was interested in how long it would take to complete certain tasks. (R. 1519 at 72:19-21).

13. Cabaness testified that there were times when Thomas used the referenced profanities, but that Thomas did not use them every time he was critical of Cabaness. (R. 2120 at 33:1-34:14). Also, the Hawks Report is inadmissible and should not be considered. *See* Response to ¶¶ 9-10, above.

14. The allegations in paragraph 14 should not be considered. Cabaness was not present during the conversation and his testimony as to what occurred is based on inadmissible hearsay. (R. 2130 at 73:5-9). Cabaness also failed to establish that the conduct occurred within the relevant four-year period.

15. The statements in paragraph 15 are inaccurate and constitute improper assertions of opinions and legal conclusions as facts. Also, the evidence cited in support of the statements is inadmissible and does not support the characterizations set forth in paragraph 15. For example, Cabaness relies on his own deposition testimony wherein he alleges certain conduct occurred. However, Cabaness testified that the incident occurred

before 1996 (R. 2121 at 37:5-16), which is outside the four-year period and, therefore, is irrelevant. The cited statements from the Knighton Affidavit are also irrelevant in that they refer to conduct that occurred outside the relevant four-year period. Regardless, none of the evidence cited in paragraph 15, even if it was admissible, establishes the statements and characterizations made in paragraph 15.

16. The conduct alleged in paragraph 16 is immaterial and should not be considered. Cabaness testified that the incident occurred before 1996 (R. 2121 at 37:5-16), which is outside the relevant four-year period.

17. The specific conduct alleged in paragraph 17 is irrelevant because Cabaness has failed to establish that it occurred within the relevant four-year period. In addition, the characterization of the motive for Thomas' directions to his subordinates constitutes inadmissible speculation and should not be considered.

18. The conduct alleged in paragraph 18 is undisputed for purposes of this appeal. However, the characterization of Thomas' motives constitutes inadmissible speculation and should not be considered.

19. The conduct alleged in paragraph 19 is based on inadmissible hearsay. Cabaness was not present during the alleged incident, and he has not established that it occurred during the relevant four-year period. (R. 2133 at 85:20-23).

20. The conduct alleged in paragraph 20 is undisputed for purposes of this appeal. However, the characterization of Thomas' motives should not be considered because it is based upon inadmissible speculation.

21. It is undisputed for purposes of this appeal that there were occasions when Thomas threatened to terminate the employment of certain subordinates. The evidence

cited, however, does not establish how often this occurred during the relevant four-year period. Moreover, Cabaness admitted that he was familiar with the Manual and was generally familiar with its contents (R. 1296 at 97-98:24-25:1-19), and therefore he knew, or should have known, that Thomas did not have the authority to terminate him and that only a Department Head or the City Manager had the authority to terminate employees. (R. 1608 at § 602(b)(5)). Furthermore, the characterization of Thomas' motives should not be considered because it is based upon inadmissible speculation.

22. The conduct alleged in paragraph 22 is immaterial, in that the conduct alleged is outside the four-year period, and was not directed at Cabaness. The evidence does not establish whether Cabaness was present during the incident, or whether his testimony is based on inadmissible hearsay. *Cf.* (R. 1509 at 29:25-30:5). Also, the characterization of Thomas' motives is based on inadmissible speculation.

23. The statements in paragraph 23 are inaccurate and inconsistent with the cited evidence. Cabaness' testimony with respect to Thomas stating, "You are lucky to have this job. If you don't do what you are told, we can fire you" was in response to a question regarding what occurred during his first four years of employment (which employment began in 1978). Cabaness did not testify that the statement was made to him "regularly", rather he testified "it happened at least, I would say, every six months, every year, you know, around there." (R. 2118-2119 at 28:9-29:16). The citation to the Knighton Affidavit is immaterial and should not be considered because it refers to a meeting that occurred outside the relevant four-year period. The cited evidence does not show that Thomas criticized Cabaness publicly about personal and confidential issues, or that any of the alleged conduct occurred during the four-year period. Also, the characterization of Thomas' motives is

inadmissible speculation.

24. The statements in paragraph 24 are inaccurate and inconsistent with the cited evidence. Cabaness testified that when he told Thomas that his relationship with his wife was none of Thomas' business and to drop the subject, Thomas dropped the subject. (R. 2128 at 68:11-14).

25. The statements in paragraph 25 are immaterial, inaccurate and inconsistent with the record. Cabaness testified of one, and only one, physical altercation involving Thomas, and that it occurred in the early 1990s (R. 2132 at 84:9-11), which is consistent with Hutchings' testimony that it occurred approximately five to six years before he quit his job in 1999. (R. 1952 at ¶¶ 5, 7). Thus, the alleged incident occurred in 1993 or 1994, which is well outside the relevant four-year period. This is also true even if it occurred in 1999 and, regardless, Thomas' conduct was not physical abuse; rather, it was a response to Hutchings pushing Thomas. (R. 1508-1509 at 28:22-29:7). Also, Thomas' conduct was not directed to Cabaness. (R. 2132 at 84:5-7).

26. The conduct alleged in paragraph 26 is immaterial and should not be considered. Cabaness testified that the incident occurred in 1983 or 1984 (R. 2132 at 81:12-13), which is at least sixteen years prior to the relevant four-year period. Also, Cabaness did not testify that he had received a shock or that he knew he could have been killed. (R. 2132 at 81:14-82:3). Furthermore, he testified that he was already up the pole when he told Thomas he needed to put a ground on the wire. (R. 2132 at 81:15-16).

27. The conduct alleged in paragraph 27 is immaterial and should not be considered. Cabaness testified that the incident occurred in the mid-1990s (R. 2131 at 79:14-15), which is outside the relevant four-year period. Cabaness did not testify that Thomas

ordered the crew to do their work without the proper safety equipment. He testified that Thomas said to open the door and start their work. (R. 2132 at 81:14-82:3). The statement that Thomas knew it was unsafe to do so constitutes improper speculation.

28. The conduct alleged in paragraph 28 is immaterial and should not be considered. Cabaness was not in the immediate vicinity of the incident and his testimony is based on inadmissible hearsay. (R. 2131-2132 at 80:23-81:4). Cabaness also testified that the incident occurred in the mid-1990s (R. 2131 at 79:14-15), which is outside the relevant four-year period. Furthermore, Cabaness did not testify that the crew “lacked the right safety equipment,” he testified that the switch they were working on didn’t have safety devices on it because it was an old piece of equipment. (R. 2131 at 80:5-6).

29. The evidence cited does not fully support the statements in paragraph 29. For example, the evidence cited refers to work Thomas directed the lineman to do in the rain, not the wind and snow. Moreover, when Cabaness was asked, “Were there occasions when there were emergencies that had to be done in the rain,” he responded, “Always.” (R. 2132 at 83:12-17).

30. The evidence does not support the allegation that every month Thomas cut the safety meetings short of the planned time. Rather, Cabaness testified that the safety meetings were to last anywhere from one to two hours and that Thomas did not say that they were done and needed to go to work until “like an hour” after the meeting started. (R. 2145 at 136:19-25).

31-32. The statements in paragraphs 31 and 32 are immaterial and should not be considered. The jackhammer incident occurred outside of Cabaness’ presence while Cabaness was on extended leave. (R. 2125 at 56:1; R. 2126 at 60:8-21; R. 1941 at ¶ 15; R.



2052 at ¶ 7). Cabaness did not return to work from his leave of absence for more than one month after the incident. (R. 2052 at ¶ 7). Cabaness' deposition and affidavit testimony of the incident should also not be considered because his testimony is based on inadmissible hearsay. (R. 2126 at 60:17-21). Moreover, the characterizations of Thomas' knowledge, as well as the alleged motive for Thomas' directions to his subordinates, constitute inadmissible speculation and should not be considered.

33. It is undisputed that Cabaness was not present for the jackhammer incident that occurred on July 30, 2003. (R. 2125 at 56:1). The remainder of the statements in paragraph 33 are immaterial and should not be considered because they rely solely on the inadmissible Hawks Report. *See* Response to ¶¶ 9-10, above.

34. The evidence cited does not support the statements made in paragraph 34.

35. The statements in paragraphs 35 are immaterial and should not be considered because Cabaness was not present during the jackhammer incident. It is undisputed that Cabaness was Safety Director, and that the persons listed were on the Safety Committee which investigated the jackhammer incident and issued reports. However, Cabaness was off work between July 23, 2003 and September 8, 2003, and did not participate in the investigation of this incident. (R. 1769 at 44:10-24; R. 2052 at ¶ 7).

36-39. The statements in paragraphs 36, 37, 38 and 39 are supported only by citations to reports that constitute inadmissible hearsay. The statements are also immaterial and should not be considered because Cabaness was not present during the jackhammer incident. Furthermore: (1) regarding paragraph 39, the reports do not indicate that the Safety Committee cited Thomas with a serious safety violation; rather, the reports indicate that the Safety Committee merely recommended that Thomas be given a serious safety violation

citation (R. 2013); (2) regarding paragraph 38, the report cited does not state who told the Safety Committee that Michaelis was conducting an investigation, nor does the report cited state that the accusations of intimidation Michaelis was investigating were about Thomas; and (3) regarding paragraph 39, the evidence cited does not specifically mention Thomas or Tuttle.

40. Undisputed for purposes this appeal. Cabaness was off work pursuant to a request for medical leave. (R. 2053 at ¶ 7).

41. The statements in paragraph 41 are not supported by the evidence cited. Michaelis testified that he believed Cabaness' doctor had stated that Cabaness was being treated with antidepressants for depression during his leave. (R. 1855 at 73:20-74:1). Michaelis testified he would have shared that information with Thomas. (R. 1855 at 74:2-5). The record cited does not refer to Cabaness' mental health as being "fragile."

42. Most of the statements in paragraph 42 are not established by the evidence cited. For purposes of this appeal, it is undisputed that, during an employee meeting on September 9, 2003, Thomas said he was considering firing Cabaness. The evidence cited does not establish the other statements. Cabaness has not established that Michaelis had any personal knowledge of what was said during this employee meeting. The testimony cited from the Farnes deposition does not refer to an employee meeting on September 9, 2003. The cited testimony in the McComas Affidavit is obviously improper since it is based on inadmissible hearsay, not personal knowledge.

43. Undisputed for purposes of this appeal.

44-46. The statements in paragraphs 44, 45 and 46 regarding what the committee "learned" during interviews rely on inadmissible hearsay and should not be considered. Also,

any evidence regarding conduct that occurred outside the relevant four-year period is irrelevant and should not be considered. Regardless, the evidence cited in paragraph 45 fails to establish that Michaelis did not take any action to correct Thomas' conduct. Rather, the citation to Michaelis' testimony establishes that Michaelis thought he had dealt with Thomas when he received complaints about Thomas in the early 1990s, the mid 1990s, and in 2003, and that Michaelis thought that Thomas' conduct had improved. (R. 1852 at 62:24-64:14; R. 1853 at 68:12-16; R. 1854 at 69:5-22, 70:4-7, 71:5-10, 71:21-72:18; R. 1858 at 85:8-24). The evidence cited also does not establish that Michaelis told employees they would be terminated if they complained again about Thomas. Rather, Michaelis testified that he told the employees that he had taken care of what occurred in the past and their job was to go forward and not bring up complaints from the past. (R. 1852 at 63:21-64:14). The statement in paragraph 46 that Thomas had threatened to fire employees who took complaints over his head relies on inadmissible hearsay and should not be considered. (R. 1889 at 210:20-23). Also, much of the testimony cited is conclusory, and Cabaness has not established that the testimony cited refers to conduct that occurred within the relevant four-year period.

47. Undisputed for purposes of this appeal. However, evidence of what occurred at the jackhammer incident is irrelevant since Cabaness was not present.

48-49. Inaccurate. While it is undisputed that Michaelis' letter to Thomas states, "Your intimidation needs to stop" and that, over and over again, employees said "that this man needs to change" (R. 2039), the letter does not state that each employee interviewed begged Michaelis to make Thomas change. Michaelis' letter also told Thomas that, if he did not change "over the next few months," Michaelis would help him retire. (R. 2039). Michaelis planned on giving Thomas ninety days to change so that the feeling of

disgruntlement among the employees could be overcome. (R. 1866 at 117:11-21).

50. Undisputed for purposes of this appeal.

51. Inaccurate. The sanction recommended by the Safety Committee was enforced. Thomas wrote a memorandum that accepted his actions that led to the incident, despite the fact that he strongly disagreed with the findings of the Safety Committee. (R. 1496). Thomas' statement that he had changed as much as he was going to change and that "You can't change the spots on a dog" were made on September 9, 2003. (R. 1518-1519 at 68:1-69:4). The Safety Committee report is dated September 10, 2003. Thus, Thomas' "spots on a dog" statement was made before the Safety Committee's recommendation and before Michaelis wrote Thomas the warning letter. (R. 1496-1497).

52. The statements in paragraph 52 are inaccurate and rely on inadmissible evidence. Michaelis did not testify that he was responsible to implement the Manual; nor did he testify that the City followed its provisions for discipline and termination for City employees besides Thomas. (R. 1861); *see* Response to ¶ 6, above. The Mears and Quinn Affidavits are inadmissible and do not state that Michaelis was responsible to implement the Manual nor that the City did not follow its provisions for discipline and termination with Thomas. Regardless, both affidavits were untimely and were properly stricken by the trial court. *See* footnote 7, above. Also, the hearsay evidence in the affidavits is immaterial because what Mears or Quinn were told or believed is not at issue in this lawsuit.

53. The statements in paragraph 53 should not be considered because Cabaness has failed to provide any supporting citation to the record. *See* Response to ¶ 45, above.

54. The statements in paragraph 54 are inaccurate, immaterial and/or based on hearsay and should not be considered. According to the evidence cited, the conversation

with Shafter occurred in 1986, which is outside the relevant four-year period. Cabaness' allegation as to what Shafter said is inadmissible hearsay. The evidence cited fails to establish that no action was taken; rather, it only establishes that Cabaness did not know if Shafter passed on his complaints about Thomas to Michaelis. (R. 1387 at ¶ 21).

55. The statements in paragraph 55 are inaccurate and some are immaterial because they refer to conduct that occurred outside the relevant four-year period. The evidence cited does not establish that Michaelis received complaints about Thomas from the early 1990s "through" 2003, and Michaelis testified that he only received such complaints in the early 1990s, the mid-1990s and in 2003. (R. 1854 at 69:4-9).

56. The statements in paragraph 56 are inaccurate and immaterial, and some are based on inadmissible hearsay. The evidence cited does not establish that Michaelis received complaints about Thomas prior to 1991. The statements are immaterial because they refer to conduct that occurred outside the relevant four-year period. The cited evidence in paragraph 11 of the Hutchings Affidavit is inadmissible hearsay.

57-59. The statements in paragraphs 57, 58 and 59 are immaterial because they refer to conduct that occurred outside the relevant four-year period.

60. The statements in paragraph 60 are not supported by the evidence cited, are immaterial, and are based on speculation and hearsay. The statements are immaterial because they refer to conduct that occurred outside the relevant four-year period. The statements regarding Thomas' motive in writing a letter, and whether it was unjust to threaten to terminate Cabaness' employment, should not be considered because they are based on inadmissible hearsay, constitute improper speculation or a legal conclusion, and are inconsistent with the tone of the letter. (R. 1956-1957).

61. The statements in paragraph 61 are immaterial because the meeting occurred in 1997, which is outside the relevant four-year period.

62. The statements in paragraph 62 are irrelevant and based on hearsay and should not be considered. Based on the evidence cited, the conversation with Shafter occurred in 1997, which is outside the relevant four-year period. Also, Cabaness' allegation as to what Shafter said is inadmissible hearsay. (R. 1387 at ¶ 21).

63. Inaccurate. Dr. Warden's notes for August 4, 1997, state that Cabaness has been receiving unusual stress at work, that "has been persisting for a long time plus stress in his own family. He's having depression with much anxiety." (R. 2044). The evidence cited shows Cabaness was prescribed an antidepressant on August 4 and 21, 1997. The evidence cited does not establish that Cabaness was treated with antidepressants through June 1999.

64-66. The statements in paragraph 66 are not supported by the evidence cited, and the statements in paragraphs 64, 65 and 66 are immaterial and irrelevant because the referenced meeting occurred in 1997 or early 1998, which is outside the relevant four-year period. *See also*, Response to ¶¶ 44-46, above, regarding Michaelis' statements.

67. The statements in paragraph 67 are immaterial because Cabaness has not established that the conduct occurred within the relevant four-year period.

68. The statements in paragraph 68 are immaterial to the extent they rely on conduct that Cabaness has not established occurred within the relevant four-year period.

69. The statements in paragraph 69 are based on inadmissible hearsay, and are irrelevant because the alleged conduct did not occur within the relevant four-year period.

70. The statements in paragraph 70 are inaccurate and not supported by the evidence cited. Dr. VandeMerwe treated Cabaness from June 24, 2003 to April 19, 2004.

(R. 2052 at ¶¶ 3-4). Sometime during that period, Dr. VandeMerwe diagnosed Cabaness with major depression/chronic dysthymia with insomnia. (R. 2052 at ¶ 5). There was also a question of whether Cabaness was bipolar. (R. 2052 at ¶ 7). Based upon Cabaness' account of his employment situation, Dr. VandeMerwe considered Cabaness' leave from work to be for depression attributed to a hostile work environment and an abusive boss. (R. 2052 at ¶ 7). It is undisputed that Cabaness was treated with antidepressants. (R. 2052 at ¶¶ 6-7).<sup>8</sup>

71. Undisputed for purposes of this appeal.

72. The statements in paragraph 72 are not supported by the evidence cited. *See* Response to ¶ 41, above. The record cited does not refer to Cabaness' mental condition as being "fragile" or "work-related major" depression.

73. The statements in paragraph 73 should not be considered because they rely upon inadmissible hearsay. Also, the Knighton Affidavit is conclusory.

74. Paragraph 74 should be stricken because the statements therein rely solely on the Hawks Affidavit, which was stricken. *See supra* Response to ¶¶ 9-10.

75. The statements in paragraph 75 are irrelevant to the issues in this appeal and should not be considered.

---

<sup>8</sup>Significantly, there were significant other sources of stress in Cabaness' life including: (1) he suffered from a bad back, sinus problems and a deviated septum (R. 1301-1302 at 176:12-178:10); (2) he was diagnosed with erectile dysfunction (R. 1328); he suffered from lack of sex drive in 2003 (R. 1306 at 195:2-4); (4) he had marital problems (R. 1302-1303 at 180:21-181:18); (5) he had significant financial problems having filed bankruptcy on two occasions, including a filing for bankruptcy in 2003 when he lost his home (R. 1303 at 183:19-185:24); (6) his daughter was charged with DUI on more than one occasion during his employment with the City (R. 1304 at 186:18-188:4); (7) his son was convicted of crimes related to drug use and burglaries, and served six months in jail (R. 1304-1305 at 188:5-190:18); and (8) he was depressed by his lack of church attendance which resulted from his early release from service in an LDS bishopric, which embarrassed him. (R. 1305-1306 at 192:21-194:13).

76. The statement in paragraph 76 with respect to what Mayor Johnson allegedly said to Tuttle is inadmissible hearsay and should not be considered.

77. It is undisputed that Cabaness terminated his employment with the City on January 4, 2004. (R. 5-6 at ¶ 19). The remaining statements are conclusory and constitute legal argument. In addition, when Cabaness resigned, he had accepted a job with Kaysville Power to do the same work. (R. 1297 at 101:13-14; 104:20-22). He terminated his employment of his own volition, without anyone telling him that he had to quit, nor did the City ever tell him that it wanted him to resign. (R. 1297 at 101:3-7). Also, the City never instituted any disciplinary procedures or actions against Cabaness. (R. 1297 at 104:17-24).

78. Inaccurate. Sandberg did not testify that the work environment was the sole cause of Cabaness' depression and panic disorder; rather, he testified they were caused, "in substantial part" by the work environment. (R. 2059 at ¶ 6).

79. The statements in paragraph 79 are based, in part, on inadmissible hearsay and speculation. The statements are also immaterial because Cabaness is the only plaintiff in the lawsuit, and the fact that others quit their employment is not relevant to Cabaness' claims. Also, the evidence cited is based, in part, on inadmissible hearsay regarding the reasons some employees quit. The statement regarding Michaelis' knowledge and motivation are based on improper speculation.

80-81. Undisputed for purposes of this appeal. Dr. Smith's opinion as to the cause of Cabaness' mental problems is based on the history he received from Cabaness. (R. 2068 at ¶ 7).

82-83. The statements in paragraphs 82 and 83 are irrelevant to the issues on appeal. Also, to the extent these statements rely on the Hawks Report and Affidavit, the statements



should not be considered. *See* Response to ¶¶ 9-10, above

84. Undisputed for purposes of this appeal.

85. The statements in paragraph 85 are immaterial and inaccurate. No disciplinary procedures were instituted against Cabaness during his employment with the City. (R. 1297 at 104:17-24).

86. The statements in paragraph 86 are immaterial and inaccurate. Thomas is a named defendant in this matter and had the right to be present at each deposition taken in this case. Furthermore, conduct that occurred after the lawsuit was filed is not material to Cabaness' claims. Cabaness has also failed to properly cite to the record to show that the issue was before the trial court at the time it rendered its decision.

## V. SUMMARY OF ARGUMENT

Specifically, this Court should affirm the trial court's rulings below for the following reasons. First, Cabaness failed to come forward with sufficient admissible evidence from which a reasonable jury could conclude that the subject Manual provisions created an implied contract. The unambiguous terms of the Manual itself do not create an implied contract. The untimely Quinn and Mears Affidavits were properly stricken and cannot be relied upon, and the relevant case law does not support Cabaness' position.

Alternatively, Cabaness' implied contract claims are barred by the Immunity Act because they are based on the same conduct that he alleges caused him to suffer emotional distress and immunity has **not** been waived for claims that arise out of the infliction of mental anguish. Relevant case law also establishes that no emotional distress damages are allowed for a breach of contract claim, and the only recognized exception to this rule is in

the case of insurance contracts.

Cabaness' claim for "wrongful constructive termination" is a tort claim that is barred by the Immunity Act and by Cabaness' failure to show that his "constructive termination" contravened "a clear and substantial public policy." Moreover, even if this claim is deemed to be a contract claim, which result would be extremely unfair to appellees, it is barred for the same reasons that the first claim fails. Finally, in considering whether the alleged conduct of Thomas and Michaelis satisfies the requisite high standard of a claim of intentional infliction of emotional distress, one should only consider admissible evidence, the actual facts, and not incidents where Cabaness was not present or those that occurred outside the four-year statute of limitations. Based on the applicable legal standard, the relevant evidence here does not support an intentional infliction of emotional distress claim.

## **VI. ARGUMENT**

### **A. THE SUBJECT POLICIES OF THE MANUAL DO NOT CREATE AN IMPLIED CONTRACT.**

In his first claim for relief, Cabaness alleges the City breached both an implied employment contract and an implied good faith covenant based on the novel argument that certain City policies regarding work-place environment, violence, standards of conduct and harassment give rise to a contractual obligation on the part of the City to ensure that its employees do not experience any of the prohibited conduct. Under Cabaness' theory, if an employer warns its employees that they may be subject to discipline for engaging in certain misconduct, that employer is then contractually liable to an employee who is the victim of any such misconduct. Such a result would wreak havoc on employers and expose them to unforeseen liability. The trial court properly rejected this argument and held that the relevant

policies, on their face, do not give rise to an implied contractual obligation.

**1. The Relevant Personnel Policies Are Warnings To Employees, And Do Not Create Any Contractual Obligations.**

Cabaness specifically claims that an implied employment contract is created by the Manual's policies regarding work environment, harassment and standards of conduct. Nothing in these provisions, however, establishes that the City is undertaking an affirmative contractual obligation to protect its employees from the misconduct described therein, or to guarantee its employees that the prohibited conduct will not occur in the workplace. The fact that these provisions are included in the Manual evidences the possibility that the described misconduct may, in fact, occur in the workplace. The Manual does not guarantee that City employees will only work with other employees or supervisors who are pleasant and polite, and who will never engage in misconduct.

Rather, these provisions put employees on notice of what is expected of them and what constitutes employee misconduct. They warn employees not to engage in the conduct described therein, and they state certain policies and goals of the City. By including these policies in its Manual, the City is not promising its employees that the subject misconduct will not occur in the workplace, nor is the City undertaking a contractual obligation to protect its employees from such misconduct.

To hold otherwise would expose Utah employers to unprecedented and unforeseen contractual liability. For example, employee handbooks commonly provide that it is an employer's policy to prohibit assault, theft, damage to property, and profanity, but also to warn its employees that they may be disciplined for engaging in such misconduct. It is incredulous to think that promulgation of these policies renders an employer contractually

liable to any employee who is a victim of the prohibited conduct. If this were the case, every incident of workplace theft, violence, threat, abuse, profanity, or intimidation may expose an employer to a claim for breach of an implied contract. Public policy is not “served by allowing contractual recovery under such policies and procedures, as employers might thus be chary of publicizing and enforcing their complaint procedures.” *Peralta v. Cendant Corp.*, 123 F.Supp.2d 65, 84 (D. Conn. 2000).

## **2. Cabaness’ Unilateral Expectations Are Insufficient To Create An Implied Contract.**

This claim also fails because Cabaness failed to offer sufficient admissible evidence at the summary judgment stage to create a material issue of fact that the City had entered into an implied contract to protect him from the subject conduct. Cabaness bears the burden of proof on this issue. *See Wood v. Utah Farm Bureau Ins. Co.*, 2001 UT App 35, ¶ 14, 19 P.3d 392 (“Plaintiffs have ‘the burden of proof of establishing the existence of an implied-in-fact contract provision.’”). In a futile effort to carry this burden, Cabaness offered his own affidavit testimony regarding his “expectation” or what he “considered” the City’s contractual obligation to be. This is not sufficient to satisfy his burden. *See id.* ¶¶ 15, 16 (holding plaintiffs’ affidavits that included statements as to what they believed or what their impression was with respect to the contract did not meet plaintiffs’ burden of establishing an implied contract provision). Indeed,

A mutual intent to form a contract is necessary to show that an implied-in-fact contract exists. A unilateral expectation on the part of the employee does not create an implied-in-fact contract for continued employment. A reasonable person must be able to find from all relevant circumstances of the plaintiff’s employment that there was an intent on both sides to be bound.

*Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1492 (10th Cir. 1995) (citations omitted).

Even though it was his burden to do so, Cabaness offered no evidence at the summary judgment stage of the City's intent to create any such contractual obligations. Thus, the trial court appropriately determined, as a matter of law, that no reasonable jury could find the existence of an implied contract. *See Wood*, 2001 UT App 35, ¶ 13.<sup>9</sup>

**3. The Trial Court Properly Excluded The Improper And Untimely Affidavits Of Mears and Quinn.**

On appeal, Cabaness tries to satisfy his evidentiary burden by relying on the untimely and stricken Mears and Quinn Affidavits,<sup>10</sup> both of which are dated March 1, 2007. Neither of these affidavits were offered at the summary judgment stage, and the trial court properly excluded them when they were filed in support of the Rule 59 Motion, on the grounds that the evidence in the Quinn and Mears Affidavits was not before the Court during summary judgment and they did not constitute newly discovered evidence pursuant to Rules 59(a)(4) or 60 of the Utah Rules of Civil Procedure. The trial court also determined that many of the statements in the Quinn and Mears Affidavits are conclusory, based on speculation, conjecture and the affiants' own unsupported opinions.

For evidence to be considered after judgment is entered, a party must establish: (1) the existence of newly discovered evidence which is material and competent; (2) that by due diligence the evidence could not have been discovered and produced before trial; and (3) that the evidence is not merely cumulative or incidental, but is substantial enough that with the

---

<sup>9</sup>Cabaness complains that appellees did not brief this issue, but the characterization of a policy as a "goal" based upon a simple reading of the policy, without reference to case law, is a fair comment at an oral argument and need not be preceded by briefing.

<sup>10</sup>Significantly, Ms. Quinn was a former disgruntled City employee who was fired by the City for embezzling City funds, and who subsequently pled guilty to felony criminal charges stemming from her embezzlement. (R. 826, 2431-2435).

evidence there is a reasonable likelihood of a different result. *See, e.g., Barson v. E.R. Squibb & Sons, Inc.*, 682 P.2d 832, 841 (Utah 1984); Utah R. Civ. P. 59(a)(4).<sup>11</sup>

Cabaness failed to meet his substantial burden of showing that this evidence could not have been discovered prior to the filing of his post-trial motions.<sup>12</sup> To justify the late filing of these Affidavits, Cabaness argues that he did not present them earlier because he was unaware of defendants' argument that the provisions of the Manual did not create an implied contract until July 26, 2006, the first day of hearings on the summary judgment motions. (R. 4181-4182 at ¶¶ 5-7). Cabaness, however, had been put on notice that this was appellees' position when they filed their Answer herein and denied the allegation in the Complaint that the provisions of the Manual "created an implied employment contract between" Cabaness and the City.<sup>13</sup> (R. 6 at ¶ 24; R. 30 at ¶ 24). Furthermore, proving the

---

<sup>11</sup>Granting a new trial based on newly discovered evidence in only limited circumstances serves the judicial policy of finality by encouraging parties to fully investigate and present their cases at the appropriate time, during pretrial discovery and at trial. *Cf. Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 969 (Utah Ct. App. 1989). Thus, it is essential that parties seeking a new trial on the basis of newly discovered evidence meet the due diligence component of the rule, "[n]o matter how material or beneficial the [evidence would be] on a new trial." *See ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 253 (Utah Ct. App. 1997) (quotation & citation omitted). "[W]hen it appears that the degree of activity or inquiry which led to the discovery of a witness or evidence after trial would have produced the same evidence had it been exercised prior thereto, due diligence has not been exercised." *Id.* at 254.

<sup>12</sup>Cabaness was well aware of Ms. Quinn at least two years earlier, inasmuch as he had her sign an Affidavit on his behalf which he filed in July of 2005. (R. 725-731).

<sup>13</sup>Even if Cabaness first became aware at the summary judgment hearing that appellees were claiming the Manual did not create an implied contract, he still could have exercised due diligence to raise the issue at that time. Significantly, there were three different hearings on the summary judgment motions over a three-week period—July 26, August 10, and August 17, 2006. Cabaness certainly had sufficient time to procure and produce the Quinn and Mears Affidavits during this three-week period. Cabaness could have also advised the Court that he was caught by surprise and asked for additional time to brief the

existence of an implied contract is an essential element of Cabaness' claim, for which he bears the burden of proof without the benefit of any presumption.

In addition, pursuant to the legal standard set forth in footnote 5, above, the key testimony stricken in these Affidavits was inadmissible because it was conclusory, lacked foundation, and merely reflected the affiant's unsubstantiated conclusions, without stating facts based upon personal knowledge. For example, this is true of Quinn's affirmations that the Manual was designed for her benefit and protection as an employee, and that the Manual constituted an agreement between the City and its employees (R. 4170-4171 at ¶¶ 12, 14), as well as Mears' statements that he made a good faith effort to make recommendations to the Manual that would protect City employees (R. 4163 at ¶ 11), and that he would have objected and refused to serve on a committee if he had known that the City thought the Manual's provisions were unenforceable goals (R. 4165 at ¶ 15).

#### **4. The Utah Cases Cited by Cabaness Are Distinguishable.**

Significantly, there are no Utah cases which have expanded the implied employment contract theory to encompass an employer's policies which identify and prohibit misconduct and the cases cited by Cabaness to support his argument are distinguishable. For example, *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033 (Utah 1989) and *Brehany v. Nordstrom, Inc.*, 812 P.2d 49 (Utah 1991) both dealt with the issue of whether an employee manual limited the employer's right to terminate at-will employees. Indeed, this Court in *Brehany* stated that, "when it is plain that a manual or bulletin does not limit the right to discharge at will, the

---

issue and submit the affidavits in question. While appellees would have opposed the request, at least the issue could have been dealt with at that stage of the proceedings, instead of months later after judgment had been entered.

case need not go to a jury.” *Id.* at 56. While the Court in *Canfield v. Layton City*, 2005 UT 60, 122 P.3D 622, stated that “a municipal employer may create an implied contract through its personnel policies,” that case dealt with an employee who claimed her termination violated written policies because the discipline she received was not proportionate to her offense, nor was it uniform with how other employees were treated. *Id.* at ¶¶ 3, 22, 24.

Here, of course, Cabaness was not an “at-will” employee. The City did not fire him, nor did it ever take any disciplinary action against him. Rather, Cabaness quit his job with the City in order to go to work for another city. Moreover, though appropriate pre- and post-termination due process and grievance procedures were available to Cabaness, he never filed a grievance with the City Manager, nor did he appeal his purported “constructive” termination. Thus, the cases cited by Cabaness are unavailing.

Moreover, the conclusion that the subject provisions of the Manual do not create an implied contract is supported by the weight of case law in other jurisdictions. *See Demasse v. ITT Corp.*, 984 P.2d 1138, 1143 (Ariz. 1999) (“If the statement is merely a description of the employer’s present policies . . . it is neither a promise nor a statement that could reasonably be relied upon as a commitment”); *Litton v. Maverick Paper Co.*, 388 F.Supp.2d 1261, 1293 (D.Kan. 2005) (provisions of an employee handbook regarding the reporting of harassment was not sufficient as a matter of law to establish an implied contract of employment); *Gally v. Columbia University*, 22 F.Supp.2d 199, 208 (S.D.N.Y. 1998) (a provision in a code of conduct which provided “all students should receive fair and equal treatment” held not to create a separate and independent contract obligation).

## **5. Cabaness Misstates The Record Below.**

In an effort to salvage his implied contract claims, Cabaness incorrectly asserts that:



(1) appellees' counsel conceded that the issue of whether an implied contract exists is a fact question for the jury; and (2) the trial court "incorrectly assumed *sua sponte*, and without justification, that the parties had agreed that all of the necessary facts on the implied contract issue were before the court . . . ." (Aplt. Brief at 40). Both statements are unsupported by the record.

First, Cabaness has mischaracterized the statement of appellees' counsel. The transcripts of the hearing demonstrate that appellees' counsel stated that, while courts have held as a matter of law that there was **not** an implied contract, they have generally not held as a matter of law that there **is** an implied contract because there are generally issues of fact for a jury to decide in that circumstance. (R. 4091-4093 at 3-5). This statement is consistent with the legal principle that the threshold question of whether there is an implied contract (absent ambiguous terms that raise a question of fact) is a question of law for the court. *See Caldwell v. Ford, Bacon & Davis Utah, Inc.*, 777 P.2d 483, 486 (Utah 1989); *Manning v. Cigna Corp.*, 807 F.Supp. 889, 893 (D. Conn. 1991).

Second, the trial court expressly stated in its Memorandum Decision, that both sides agreed that the Court had before it "all of the facts necessary to determine whether a contract exists between plaintiff and the City based on the above-referenced provisions in the Manual." (R. 3637). Since Cabaness has failed to include the full transcripts of the summary judgment hearings in the record, he cannot demonstrate that this statement by the trial court is inaccurate. The trial court noted that, since both sides had moved for summary judgment on this issue, it was an "indication" to the trial court "that the parties do not believe there are material issues of disputed fact which would preclude the Court from ruling on whether the Manual did create a contract between the City and plaintiff." *Id.* This observation does not

constitute an abuse of discretion and is supported by applicable case law.<sup>14</sup> See *Mastic Tile Division of Ruberoid Co. v. Acme Distributing Co.*, 389 P.2d 56, 57 (Utah 1964) (when both sides of matter lay a decision in the lap of the court by their mutual motions for summary judgment, and unequivocally invite and authorize the court to decide the case by interpreting the documents, the court should not be required to submit to the subsequent urging of the loser that although he took his chances without reservation, he must have another go at the case).

Finally, since there is no implied contract, Cabaness has no claim for breach of an implied covenant of good faith and fair dealing. See *Heideman v. Washington City*, 2007 UT App 11, ¶ 27 n. 15, 155 P.3d 900 (“because there was no contract, there was necessarily no breach of the covenant of good faith and fair dealing”).

In summation, this Court has held that, unless the contract terms are ambiguous and raise factual issues, the proper construction of a contract’s terms is an issue of law to be decided by the court. See *Caldwell*, 777 P.2d at 486. “The court retains the power to decide whether, as a matter of law, a reasonable jury could find that an implied contract exists.” *Ryan v. Dan’s Food Stores, Inc.* 972 P.2d 395, 401 (Utah 1998) (quoting *Sanderson v. First Sec. Leasing Co.*, 844 P.2d 303, 306 (Utah 1992)). Applying this legal standard to this case, the trial court correctly found the Manual is not ambiguous, and correctly concluded as a matter of law that no reasonable jury could find that the subject provisions created an implied contract.

---

<sup>14</sup>The trial court specifically stated that there was no ambiguity in the relevant provisions of the Manual, and it also correctly noted that the Manual’s clear and conspicuous disclaimer at §101(b) “precludes the existence of a contract as to any items or rights identified in said disclaimer.” (R. 3654). “Employee benefits” is one of the rights identified in the disclaimer, which encompasses working conditions.

## B. THE IMMUNITY ACT BARS CABANESS' CONTRACT CLAIMS.

Alternatively, as the trial court found, Cabaness' implied contract claims are barred by the Immunity Act because they are based on the same conduct that he alleges caused him to suffer emotional distress. It is well established that immunity has **not** been waived for claims that arise out of the infliction of emotional or mental anguish. *See* Utah Code Ann. § 63-30-10(2) (2003).<sup>15</sup> Specifically, the Immunity Act expressly excludes from the waiver of immunity, any claim where the “injury arises out of, in connection with, or results from . . . infliction of mental anguish.” *Id.* Thus, the court in *Atiya v. Salt Lake County*, 852 P.2d 1007 (Utah Ct. App. 1993), noted that § 63-30-10 contained “an explicit exception to the waiver provided for . . . injuries arising out of ‘infliction of mental anguish.’”<sup>16</sup> *Id.* at 1011 n. 6 (emphasis added). Similarly, in *Sauers v. Salt Lake County*, 735 F. Supp. 381, 384 (D. Utah 1990), the court held that “[t]he waiver of governmental immunity . . . does not include injuries which arise out of infliction of mental anguish . . . .”

---

<sup>15</sup>Similar to the intentional infliction of emotional distress claim discussed below, the statute of limitations on implied contracts is four years. *See State of Utah v. Huntington-Cleveland Irrigation Co.*, 2002 UT 75, ¶ 12, 52 P.3d 1257. Thus, only those incidences which occurred from March 31, 2000 to March 31, 2004 (the date Cabaness filed his Notice of Claim) are relevant to the implied contract claim.

<sup>16</sup>Cabaness incorrectly cites *Atiya* as a Utah Supreme Court case, when actually it is a Utah Court of Appeals decision. *See* Aplt.'s Brief at 45. Regardless, in *Atiya*, the court held that the plaintiff's claim for intentional infliction of emotional distress was barred by the Immunity Act. The court, in dicta, further opined that Utah Code Ann. § 63-30-10 applies only to negligent acts and omissions. However, the dicta is not controlling and it conflicts with the list of intentional conduct identified in § 63-30-10, which includes malicious prosecution, intentional trespass, abuse of process, assault, battery, and false imprisonment. This dicta is also contrary to the holding in *Sauers v. Salt Lake County*, *supra*, 735 F. Supp. at 384.

Accordingly, the inquiry here is whether § 63-30-10(2)'s "infliction of mental anguish" exception to the waiver of governmental immunity applies to Cabaness' contract claims. In resolving this issue, it is important to note that the phrase "arises out of" has a much broader meaning than "caused by." *Taylor in re Taylor v. Ogden City Sch. Dist.*, 927 P.2d 159, 163 (Utah 1996). In fact, this Court has explained that the words "arises out of" "are very broad, general and comprehensive. They are commonly understood to mean originating from, growing out of, or flowing from, and require only that there be some causal relationship between the injury and the risk [provided for]." *Id.* (quoting with approval *National Farmers Union Property & Cas. Co. v. Western Cas. & Sur. Co.*, 577 P.2d 961, 963 (Utah 1978)) (alteration in original). Based on this Court's precedent, if the injuries a plaintiff alleges to have suffered originated from, grew out of, or flowed from the infliction of emotional or mental anguish, the claim against a governmental entity is barred because immunity from liability has not been waived. *See id.* Moreover, the infliction of emotional anguish need not be the sole cause of the injury, only that it bear some causal relationship to the injury. *See id.*

Under the Immunity Act, a court is required to look to the conduct that the claim arises out of to determine whether there is a waiver of immunity. This Court has rejected "claims that have reflected attempts to evade the statutory categories by recharacterization of the supposed cause of the injury." *See Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162, 1166 (Utah 1993). In *Ledfors*, the plaintiffs' son suffered a vicious beating by two students in a gym class which was left unsupervised. *Id.* at 1163. The plaintiffs' lawsuit asserted a battery claim against the two students, and a negligence claim against the school district, the principal and the physical education teacher. The Court found that immunity had been retained under the exception to the waiver and found that § 63-30-10(2) of the Act specifically provided that

suit is not allowed against a governmental entity if the underlying “injury . . . arises out of” an assault or battery. *Id.* The Court concluded that the injuries suffered by the plaintiffs’ son arose out of a battery which specifically exempted the governmental entity from suit. *See id.* at 1166. The plaintiffs then argued that the alleged injuries arose from the failure to supervise rather than from the battery. *See id.* In answering this argument this Court stated:

Again, our prior cases have looked to whether the injury asserted “arose out of” conduct or a situation specifically described in one of the subparts of 63-30-10; if it did, then immunity is preserved. We have rejected claims that have reflected attempts to evade these statutory categories by recharacterizing the supposed cause of the injury.

*Id.*

The court in *Butler, Crockett & Walsh Dev. Corp. v. Salt Lake County*, 2005 UT App 402 (per curiam unpublished decision) reached a similar conclusion. There, the court dismissed a contract-based claim against a public entity on the grounds that the injury arose out of conduct for which governmental immunity is preserved. In *Butler*, the plaintiff filed a breach of contract claim based on Salt Lake County’s denial of a conditional use permit. The court concluded that the “complaint as a whole demonstrates that the underlying harm was the denial of the CUP,” and it further noted that immunity has not been waived under the Immunity Act for denial of a permit or license pursuant to Utah Code Ann. § 63-30-10(3). *Id.* at ¶ 1. Thus, the court held that the contract claim was barred by the Immunity Act “[b]ecause the injury arose out of conduct or a situation specifically described in one of the subparts of Utah Code section 63-30-10, governmental immunity is preserved.” *Id.*

The foregoing cases establish that, regardless of how a claim is labeled or the theory of liability on which a plaintiff relies is framed, a court is required to look to the conduct that the claim arises out of to determine whether there is a waiver of immunity. Here, Cabaness

expressly claims that his injuries flowed from the infliction of mental anguish. In the general allegations of the Complaint, plaintiff unequivocally alleges: “Prior to January 2004, Plaintiff’s mental condition had deteriorated to the point that he could no longer meet his job requirements, **directly resulting from the mental and emotional abuse inflicted on Plaintiff by Defendants.**”<sup>17</sup> (R. 5 at ¶ 17) (emphasis added). In his contract claim, Cabaness specifically alleges that appellees “wrongfully violated and breached the employment contract by . . . creating a hostile and abusive working environment for Plaintiff, which directly and proximately caused Plaintiff’s injury and damage.” (R. 7 at ¶ 27). Similarly, Cabaness alleges that appellees breached the implied good faith covenant by engaging “in a practice of harassing, intimidating and abusing Plaintiff . . . to the point that it interfered with his work, caused severe emotional harm, and profound clinical depression . . . .” (R. 7 at ¶ 28).

Further, Cabaness admitted in his opposition to appellees’ summary judgment motion that the alleged infliction of emotional anguish caused his injuries. (R. 2400-2401). Indeed, Cabaness’ 106 page opposing memorandum was largely devoted to establishing the assertion that he suffered mental anguish based on Thomas’ alleged harassment and abusive conduct,<sup>18</sup> as does his brief in this appeal. In short, Cabaness’ own admissions, arguments, allegations,

---

<sup>17</sup>In a section of the Complaint entitled “Facts Common To All Claims For Relief.” Cabaness alleges that Thomas “engaged in a practice of harassing, intimidating and abusing Plaintiff to the point that said practice interfered with his work, caused severe emotional harm and profound clinical depression”. (R. 4 at ¶ 14).

<sup>18</sup>Cabaness references affidavits from certain of his medical care providers, who opine that his “depression and panic disorders . . . were caused, in substantial part, by the hostile work environment and an abusive boss while Cabaness was employed as a lineman at Bountiful Power.” *See, e.g.*, Affidavit of Jerry L. Sanders, Ph.D. (R. 2059 at ¶ 6). All of these affidavits are further proof that it is Cabaness’ position that the underlying harm to all his claims is the infliction of mental anguish.

pleadings and court filings establish that his contract claims arise out of the alleged infliction of mental anguish. Thus, they are barred by the Immunity Act.

**C. DAMAGES FOR MENTAL DISTRESS ARE NOT RECOVERABLE UNDER CABANESS' CONTRACT CLAIMS.**

Even assuming Cabaness has a valid contract claim that is not barred by the Immunity Act, he cannot recover damages for emotional distress and mental suffering on his contract claims. It is a basic principle of contract law that a party cannot recover damages for mental suffering caused by a breach of contract. *See* Samuel Williston, 24 Williston on Contracts § 64:7 (4th ed. 1990); *see also Americans Disabled for Accessible Public Transp. v. SkyWest Airlines, Inc.*, 762 F.Supp. 320, 326 (D. Utah 1990) (with respect to damages for emotional and mental distress, the traditional rule is that there is no recovery of damages for mental anguish stemming from a breach of contract); *Footte v. Clark*, 962 P.2d 52, 54 (Utah 1998) (a party cannot, in general, recover damages for mere disappointment or mental distress in an action for the breach of a land sale contract).

In his brief, Cabaness relies on cases dealing with insurance contracts to support his claim to recover mental anguish damages under his employment contract claims. In *Machan v. UNUM Life Ins. Co. of America*, 2005 UT 37, ¶ 16, 116 P.3d 342, however, this Court considered the contractual obligations of an insurance company to its insureds and, at the outset of its opinion, was careful to state that it was addressing “insurance law questions”. The decision also contains discussion of the “unique nature and purpose of an insurance contract”. *Id.* ¶ 9 (quoting *Beck v. Farmers Ins. Exchange*, 701 P.2d 795, 802 (Utah 1985)); ¶¶ 11-14, 17 (noting that what the insured bargains for in the context of an insurance contract is “peace of mind” and payment of the sum owed). Within the very narrow context of

insurance law, this Court states that in “**unusual** cases,” a breach of the covenant of good faith and fair dealing in an insurance contract may encompass damages for mental anguish. *Id.* ¶ 16 (emphasis added).

Cabaness fails to cite any Utah precedent establishing that damages for mental distress are compensable under a breach of employment contract claim, or other instances not involving insurance law. Therefore, even if Cabaness’ implied contract claims were viable, he cannot recover any mental distress damages under these claims.

#### **D. CABANESS’ WRONGFUL CONSTRUCTIVE TERMINATION CLAIM FAILS AS A MATTER OF LAW.**

Ignoring that his second claim for relief for wrongful constructive discharge was properly dismissed as a tort claim, Cabaness argues that this claim sounds in contract. Cabaness, however, cannot escape his express allegations to the contrary. Nowhere in the second claim for relief does the word “contract,” or a derivative thereof, appear. Rather, Cabaness alleges that he was “wrongfully terminated” by reason of appellees’ “abusive, . . . wrongful and outrageous conduct.” (R. 8 at ¶ 31 b., c. and d). He also alleges that he was “wrongfully constructively terminated” and that his damages and unemployable condition are a direct and proximate result of appellees’ “wrongful and **tortious** conduct.” (R. 8-9 at ¶ 32-34) (emphasis added). The phrase “wrongful and tortious conduct” appears three times in this claim. Finally, Cabaness seeks to recover punitive damages under this claim, which confirms that this claim sounds in tort. (R. 9 at ¶ 35).

As a tort claim, the second claim for relief necessarily fails as a matter of law. Utah only recognizes a tort claim for wrongful termination in the narrowly defined circumstance where a discharge “contravenes a clear and substantial public policy.” *Hansen v. America*



Online, 2004 UT 62, ¶ 7, 96 P.3d 950 (citing *Peterson v. Browning*, 832 P.2d 1280, 1284 (Utah 1992)).<sup>19</sup> Such public policies are narrowly limited to those “clear” public policies that are plainly defined by legislative enactments, constitutional standards, or judicial decisions. See *Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 165-66 (Utah 1991); *Caldwell*, 777 P.2d at 485. Here, Cabaness did not, and could not, show that he was terminated in violation of a “clear and substantial public policy.” In fact, no public policy is identified in Cabaness’ allegations by name or description. (R. 7-9 at ¶¶ 30-35).

Regardless, Cabaness’ tort claim for wrongful termination is also expressly barred by the Immunity Act pursuant to *Broadbent v. Board of Educ. of Cache County Sch. Dist.*, 910 P.2d 1274, 1276-77 (Utah Ct. App. 1996).

Despite the Complaint’s express allegations to the contrary, Cabaness asserted for the first time during the summary judgment proceedings that this claim is a contract claim, not a tort claim. Cabaness was not allowed to change his legal theory for this claim long after the deadline for amending pleadings and conducting discovery has passed. Cabaness failed to offer any basis which would justify allowing him to morph his tort claim into a contract claim. Even if this claim was a contract claim, however, it is duplicative of his first claim for relief, (compare R. 7-9 at ¶¶ 31-33 with R. 7 at ¶¶ 27-28), and fails as a matter of law for the same reasons that his breach of implied contract claim fails, as discussed above.

---

<sup>19</sup>In *Peterson*, this Court held that “the duty at issue in actions for wrongful termination in violation of public policy does not arise out of the employment contract. It is imposed by law, and thus is properly conceptualized as a tort.” *Peterson*, 832 P.2d at 1285; see also *Retherford v. AT&T Comms.*, 844 P.2d 949, 966 n.9 (Utah 1992).

**E. THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM AGAINST THOMAS AND MICHAELIS IS WITHOUT MERIT.**

**1. Cabaness Cannot Rely On Evidence Of Incidents That Occurred When He Was Not Present, Nor On Incidents That Allegedly Occurred Prior To March 31, 2000.**

A large portion of Cabaness' brief is devoted to detailing alleged acts of abuse and harassment that occurred prior to 2000. All such incidents and conduct, however, are immaterial and irrelevant based on the applicable four-year statute of limitations. *See* Utah Code Ann. § 78-12-25 (1996). In *Hatch v. Davis*, 2004 UT App 378, 102 P.3d 774, the court explained that the four-year statute of limitations for intentional infliction of emotional distress claims begins to run when the distress is actually inflicted on the plaintiff. *Id.* at ¶ 41. In circumstances such as this case, where Cabaness sought and received medical or psychiatric treatment as a result of alleged harassment, the statute of limitations begins to run on that date.<sup>20</sup> *See id.*

Here, Cabaness admitted and alleged that he “was diagnosed with depression caused by an abusive boss and a hostile working environment by Dr. David Warden MD on August 4, 1997 . . . .” (R. 2351 at ¶ 23). Thus, Cabaness had until August 4, 2001 to file a claim for intentional infliction of emotional distress based on any acts which occurred prior to Dr. Warden's diagnosis. Moreover, each subsequent act which allegedly inflicted emotional distress on Cabaness started the running of a four-year statute of limitations on that event. Since Cabaness did not serve his Notice of Claim until March 31, 2004, (R. 6 at ¶ 20), he can only rely on incidents and conduct that occurred between the four-year period of March 31,

---

<sup>20</sup>Only where “it is unclear when the plaintiff suffered severe emotional distress, the statute of limitations begins to run from the time the last injury is suffered or the tortious conduct ceases.” *Hatch*, 2004 UT App 378 at ¶ 44.

2000 through March 31, 2004. Also, inasmuch as Cabaness fails to offer any dates for some of the alleged incidents of abuse, he cannot rely on those incidents because he did not establish that they occurred within the relevant four-year time period.

Furthermore, a plaintiff asserting an intentional infliction of emotional distress claim cannot rely on conduct directed toward another person unless that plaintiff was present at the time of the outrageous conduct. *See Hatch*, 2004 UT App 378, ¶¶ 50, 53. As discussed above, the record establishes that Cabaness was not present for many of the incidents he cites and, as a result, he cannot rely on them. Cabaness primarily relies on the July 30, 2003, jack-hammer incident to support his intentional infliction claim. Specifically, Cabaness alleges that, on this date, Thomas ordered City employees to jack-hammer a concrete block that encased plastic conduit containing “live” electrical conductors. *See* (R. 2019-2026). It is undisputed, however, that Cabaness was not present during the jack-hammer incident because he started a medical leave of absence on July 23, 2003, a week before this incident occurred, and he did not return to work until approximately six weeks later, September 8, 2003. (R. 2052 at ¶ 7).

Cabaness argues that he is entitled to an exception to the “presence” rule articulated in *Hatch v. Davis*, 2006 UT 44, 147 P.3d 383, because it was his crew that was ordered to perform the unsafe work. In *Hatch*, however, this Court identified four factors which should be considered in determining whether an exception to the presence rule should be allowed:

In considering whether conduct triggers the exception, a finder of fact may consider (1) the relationship of the target of the conduct to the plaintiff, (2) the relationship between the person committing the conduct and the plaintiff, and (3) the egregiousness of the conduct. Finally, (4) a plaintiff must establish that the conduct was undertaken, in whole or in part, with the intention of inflicting injury to the absent plaintiff.

*Id.* at ¶ 27. With respect to the first element, this exception is typically limited to a family relationship, which does not, of course, exist here. More importantly, Cabaness has failed to come forward with any evidence to satisfy the fourth factor identified in *Hatch*, other than his bald assertion, without any basis or citation to the record, that Thomas ordered the employees to engage in this act as a way of tormenting, or getting at, Cabaness. It is significant to note that Courts have been reluctant to recognize exceptions to the “presence” rule and that the few exceptions which have been allowed have generally been limited to incidents of sexual abuse involving a family member.<sup>21</sup> Thus, the jack-hammer incident, and any other incidents where Cabaness was not present, should not be considered in determining whether Thomas’ actions were extreme and outrageous.

## **2. Dr. Hawk’s Untimely Report And Affidavit Were Properly Excluded.**

To support his intentional infliction claim, Cabaness relies heavily on the Hawks Affidavit and Report. The trial court, however, properly excluded them. Cabaness first attempted to submit the Hawks Report on July 19, 2006, approximately one week before the first hearing on the summary judgment motions, which was several months after the briefing

---

<sup>21</sup>*See, e.g., R.D. v. W.H.*, 875 P.2d 26, 33-34 (Wyo. 1994) (noting exception to presence requirement where defendant sexually abused plaintiff’s wife for several years and indirectly helped her commit suicide); *Croft by Croft v. Wicker*, 737 P.2d 789, 792-93 (Alaska 1987) (allowing recovery where houseguest molested plaintiff’s daughter although plaintiff did not witness actual incident); *Schurk v. Christensen*, 497 P.2d 937, 940-41 (Wash. 1972) (relaxing the presence requirement for plaintiff whose child was molested by baby-sitter); *but see H.L.O. v. Hossle*, 381 N.W.2d 641, 644-645 (Iowa 1986) (parents not present at the time of the defendant’s tortious acts may not recover for emotional distress caused by neighbor’s sexual abuse of their children); *Miller v. Cook*, 273 N.W.2d 567 ( Mich. Ct. App. 1978) (plaintiff not present when child was beaten may not recover); *Calliari v. Sugar*, 435 A.2d 139 (N.J. Super. Ct. Ch. Div. 1980) (purchasers of real property may not recover for emotional distress resulting from discovery of body of vendor’s wife buried in back yard); *Lund v. Caple*, 675 P.2d 226 (Wash. 1984) (husband not present when defendant had sexual relations with wife may not recover).

on these motions was completed. After considering the matter, the trial court ruled on July 26, 2006 that the Hawks Report would not be admitted or considered in ruling on the summary judgment motions.

Several months later, when Cabaness filed his Rule 59 Motion, he filed a 46 page supporting memorandum and the McComas Affidavit, to which the Hawks Affidavit and Report were attached as Exhibits L and M. Later, Cabaness voluntarily withdrew both the memorandum and the McComas Affidavit based on a stipulation of the parties. (R. 3994). In their place, Cabaness filed a much shorter memorandum, and the Hilton Affidavit. The Hawks Affidavit and Report were, however, not refiled or resubmitted with either the Hilton Affidavit or the amended memorandum. Therefore, appellees' submit that the Hawks Affidavit and Report were not properly before the trial court.

When Cabaness subsequently tried to rely on the Hawks Affidavit and Report in support of the Rule 59 Motion, appellees objected. Cabaness subsequently moved to strike appellees' objection. The trial court, however, properly concluded that the Hawks Affidavit and Report were untimely and did not constitute "new evidence" under the legal standard discussed above. Cabaness simply did not satisfy the "surprise" or the "due diligence" requirements for establishing that the Hawks Affidavit and Report constitute "new evidence" where he had the Hawks Report for months (as shown by the date of the Report) and he had failed to timely file it at the summary judgment stage of this case.

### **3. The Relevant Actions Of Thomas Or Michaelis Do Not Give Rise To A Claim For Intentional Infliction Of Emotional Distress.**

Utah recognizes a cause of action for the intentional infliction of emotional distress when a defendant:

intentionally engage[s] in some conduct **toward[s] the plaintiff**, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; *and* his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.

*Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶ 58, 70 P.3d 17, 30 (emphasis added); *see also Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 57, 116 P.3d 323; *Larson v. SYSCO Corp.*, 767 P.2d 557, 561 (Utah 1989).<sup>22</sup> To determine whether the alleged conduct rises to the level of outrageousness required under Utah law to support a claim for severe emotional distress, Utah courts rely on the *Restatement (Second) of Torts*, § 46, comment d (1965), which states that liability should be found:

Only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

*Id.* In addition, to be considered outrageous, the conduct must evoke outrage or revulsion; it must be more than unreasonable, unkind, or unfair. *See Franco v. The Church of Jesus Christ of Latter-Day Saints*, 2001 UT 25, ¶ 28, 21 P.3d 198. Conduct is not necessarily outrageous merely because it is tortious, injurious, or malicious, or because it would give rise to punitive damages, or because it is illegal. *See id.* Finally, liability for intentional infliction of emotional distress clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *See Restatement (Second) of Torts*, § 46, comment d (1965). Indeed, as one court has noted,

---

<sup>22</sup>The intentional infliction claim must be based on conduct that Thomas and/or Michaelis engaged in “towards Cabaness.” Thus, the allegations that Thomas abused or harassed others are largely irrelevant, particularly if Cabaness was not present.

The rough edges of our society are still in need of . . . filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt.

*Kornegay v. Mundy*, 379 S.E.2d 14, 16 (Ga. Ct. App. 1989). Thus, “ongoing frustration in the work place, born of a personality conflict with a co-employee does not give rise to” an intentional infliction claim, and such conflicts “should not be litigated in court.” *Id.*

Based on the legal standard, the trial court correctly concluded that Thomas and Michaelis did not engage in conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Restatement (Second) of Torts*, § 46, comment d (1965). Indeed, the alleged harassing actions, at most, fall within the list of conduct which the Restatement states is insufficient to support a claim, *i.e.*, “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” *Id.*<sup>23</sup>

In his brief, Cabaness attempts to paint a picture of constant abuse and harassment against a backdrop of dangerous and life-threatening working conditions. He does this by relying on inadmissible evidence, referring to immaterial and irrelevant conduct, compressing events that took place over decades, and overstating the facts. For example, to support his characterization of Thomas unnecessarily risking the lives of employees, Cabaness points to: (1) the July 23, 2003 jack-hammer incident where Cabaness was not present; (2) an incident in 1983, when Thomas allegedly told Cabaness there was not time to ground a pole, and Cabaness received a painful shock; and (3) an incident where Thomas ordered another

---

<sup>23</sup>This is particularly true when one considers all the other sources of stress in Cabaness’ life during the relevant four-year period. *See* footnote 8, above.

employee to pull a loaded fuse, and then pulled it himself without proper safety equipment, whereupon the fuse exploded.

None of these incidents, however, are relevant, and Cabaness has overstated the facts in describing them, and, as a result, they should not be considered by the Court. Cabaness was not present for the jack-hammer incident and the Court should not consider it for the reasons discussed above. The ungrounded pole incident occurred at least twenty years before Cabaness resigned, Cabaness never testified that he received a shock or that he knew he could have been killed, and he further testified that he was already up the pole when he told Thomas he needed to put a ground on the wire. (R. 2132 at 81:14-82:3). Finally, regarding the exploding fuse incident, Cabaness was not in the immediate vicinity when the fuse exploded, his testimony of what happened is based on inadmissible hearsay, and the incident occurred in the mid-1990s, which is outside the relevant four-year period. (R. 2131-2132 at 80:23-81:4; R. 2131 at 79:14-15). Further, Cabaness did not testify that the crew “lacked the right safety equipment”; rather, he testified that the switch they were working on didn’t have safety devices on it because it was an old piece of equipment. (R. 2131 at 80:5-6). A careful analysis of the relevant facts demonstrates that Cabaness’ version of the facts in his brief, is not reliable and is filled with inaccuracies.

In addition to the jack-hammer incident discussed above, Cabaness also relies heavily on the September 9, 2003 employee meeting as a basis for his claim. The only evidence of this incident is found in the Knighton Affidavit. Significantly, Cabaness himself did not mention it in either his deposition or his Affidavit, which causes one to wonder how traumatic the incident could have been. Specifically, Cabaness asserts that, on September 9, 2003, the day after he returned to work from his medical leave, he attended an employee



meeting wherein, according to Knighton, Thomas “belittled and berated [plaintiff] and told him, in the presence of all of the employees, that he was considering firing him. He also brought up some personal matters involving [Cabaness] and ridiculed him in the presence of the other employees.” (R. 2215 at ¶ 19). Knighton also said that he found Thomas’ behavior to be “unforgivable.” *Id.*

The trial court correctly concluded that the majority of the allegations made by Knighton are conclusory and insufficient to support a finding that Thomas engaged in the requisite extreme and outrageous conduct necessary to constitute an intentional infliction claim. Pursuant to the Knighton Affidavit, the only specific thing Thomas said during the September 9<sup>th</sup> meeting was that he was “considering firing” Cabaness. Such a statement falls squarely within the type of conduct which does not support a claim. *See Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 802 (D. Utah 1988) (where threatening to terminate an employee, discrediting his reputation, and demoting him failed to support a claim). Other than this statement, all Knighton offers is his conclusory characterization of what Thomas said—belittling, berating, bringing up personal matters, ridiculing. These allegations cannot support a claim because Knighton fails to disclose exactly what was said, which prevents any evaluation of the statements themselves. Knighton fails to identify any personal matters discussed by Thomas, or any statements Thomas made that he thought belittled Cabaness. Accordingly, as the trial correctly ruled, these assertions in the Knighton Affidavit fail to satisfy the standard of what constitutes admissible statements from an affiant, based on the legal standard and case law discussed above, in footnote 5.

In short, when one sorts through the actual facts, focusing on those events that are not barred by the four-year statute of limitations, and considers the admissible evidence, even

granting all reasonable inferences in favor of Cabaness, the evidence (which the trial court summarized in its Memorandum Decision (R. 3641-3642)) it reveals that neither Thomas nor Michaelis engaged in conduct that meets the threshold level of extreme and outrageous conduct necessary to give rise to a claim for intentional infliction of emotional distress. Certainly, there is no basis for such a claim against Michaelis, who never engaged in any harassing conduct himself, and is only accused of failing to stop Thomas. Appellees refer the Court to its Response to ¶ 7 of Cabaness fact statement, above. The events detailed there, whether considered individually or cumulatively, at most constitute the type of personality conflicts, threats, indignities, insults, petty oppressions and annoyances which do not give rise to intentional infliction claim. Indeed, appellees submit that, even if the Court were to consider cumulatively all the incidents which Cabaness alleges occurred over the last twenty years, Cabaness still has failed to present sufficient evidence to establish a intentional infliction of emotional distress claim against Thomas or Michaelis.

## VII. CONCLUSION

Based on the foregoing, the City respectfully submits that the trial court's dismissal of Cabaness' claims should be affirmed.

DATED this 21<sup>st</sup> day of January, 2009.

SNOW, CHRISTENSEN & MARTINEAU

By: 

Stanley J. Preston

Maralyn M. Reger

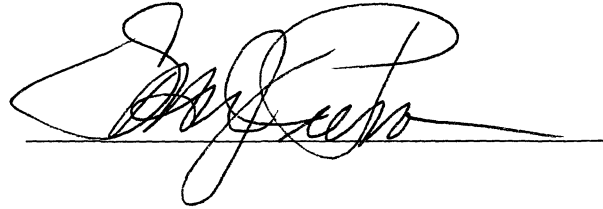
Bryan M. Scott

Attorneys for Appellees Bountiful City, Brent Thomas  
and Clifford C. Michaelis

**CERTIFICATE OF SERVICE**

I hereby certify that on the 21<sup>st</sup> day of January, 2009, I caused two (2) true and correct copies of the **BRIEF OF APPELLEES** to be mailed by first class United States Mail, postage prepaid, to the following:

CRAIG L. TAYLOR  
WILLIS F. MCCOMAS  
HAL ARMSTRONG  
BRYAN D. NIELSEN  
**CRAIG L. TAYLOR & ASSOCIATES, P.C.**  
472 North Main Street  
Kaysville, Utah 84037  
*Attorneys for Appellant Kipp Cabaness*

A handwritten signature in black ink, appearing to read "Craig L. Taylor", is written over a horizontal line.

# APPENDIX

Westlaw

Not Reported in P.3d  
Not Reported in P.3d, 2005 WL 2303808 (Utah App.), 2005 UT App 402  
(Cite as: 2005 WL 2303808 (Utah App.))

Page 1

**H**  
UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Court of Appeals of Utah.  
BUTLER, CROCKETT AND WALSH DEVELOP-  
MENT CORPORATION, Plaintiff and Appellant,  
v.  
SALT LAKE COUNTY, Defendant and Appellee.  
**No. 20050057-CA.**

Sept. 22, 2005.

Third District, Salt Lake Department, 000904688.  
The Honorable Robert K. Hilder.

John Walsh, Salt Lake City, for Appellant.  
David E. Yocom and Donald H. Hansen, Salt Lake  
City, for Appellee.

Before Judges BILLINGS, MCHUGH, and ORME.

MEMORANDUM DECISION (Not For Official  
Publication)

PER CURIAM.

\*1 Butler, Crockett and Walsh Development Cor-  
poration (Butler) appeals the trial court's dismissal  
of its complaint.

Butler filed its complaint against Salt Lake County  
(the County) in 2000, after the County denied But-  
ler's application for a conditional use permit (CUP).  
The complaint alleged six causes of action, seeking  
monetary damages and the granting of the CUP.  
The trial court dismissed the first three causes of  
action in January 2003, determining that the claims  
were barred by governmental immunity under the  
Governmental Immunity Act. *See* Utah Code Ann.  
§§ 63-30-1 to -38 (1997).<sup>FN1</sup> The trial court dis-  
missed the remaining claims in December 2004  
based on failure to prosecute.

FN1. This chapter was repealed effective  
July 1, 2004, and a new governmental im-  
munity act was enacted. *See* Utah Code  
Ann. §§ 63-30d-101 to -904 (2004). The  
former Act controls this case.

Butler asserts the trial court committed reversible  
error in its January 2003 order when it dismissed  
claims for failure to file a notice of claim and fail-  
ure to file an undertaking. *See id.* § 63-30-12  
(providing for notice of claim); § 63-30-19  
(requiring an undertaking to be filed at the time a  
complaint is filed). However, the trial court did not  
dismiss the claims on those grounds. In its order,  
the trial court noted that Butler had complied with  
the notice requirements and that Butler had filed an  
undertaking, although untimely. The trial court then  
dismissed the claims based solely on governmental  
immunity. In sum, Butler's asserted error does not  
directly address the trial court's decision.

Butler does not show that the trial court erred in  
concluding that governmental immunity applied. In  
determining whether immunity applies, Utah courts  
have "looked to whether the injury asserted 'arose  
out of' conduct or a situation specifically described  
in one of the subparts of 63-30-10; if it did, then  
immunity is preserved." *Ledfors v. Emery County  
Sch. Dist.*, 849 P.2d 1162, 1166 (Utah 1993).  
Courts will reject claims that reflect "attempts to  
evade these statutory categories by recharacterizing  
the supposed cause of the injury." *Id.* The theory of  
liability crafted by a plaintiff does not control. *See id.*

Although couched as a contract-based declaratory  
action, the substance of the complaint seeks affirm-  
ative relief, not just the declaration of rights under a  
contract. The breach cause of action demands that  
the trial court grant the CUP and damages. It does  
not request the trial court to enforce the contract  
through specific performance or declare the stand-  
ard to which Butler is entitled under the contract.  
The additional causes of action in the complaint, al-

Not Reported in P.3d

Page 2

Not Reported in P.3d, 2005 WL 2303808 (Utah App.), 2005 UT App 402  
(Cite as: 2005 WL 2303808 (Utah App.))

though supposedly based on the same contract, go further afield from contract relief. One seeks a review and reversal of the County's decision; the others assert violations of due process and civil rights rather than contract-based actions. The complaint as a whole demonstrates that the underlying harm was the denial of the CUP.

Because the injury asserted arose out of conduct or a situation specifically described in one of the subparts of Utah Code section 63-30-10, governmental immunity is preserved. *See* Utah Code Ann. § 63-30-10. Section 63-30-10(3) expressly retains immunity for any injury that “arises out of, in connection with, or results from ... the issuance, denial, suspension, or revocation or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization.” *Id.* § 63-30-10(3). The denial of a CUP comes within the scope of this section, retaining immunity for claims arising from the denial of a permit. *See id.* As a result, the trial court properly dismissed the causes of action based on governmental immunity.

\*2 The remaining causes of action were dismissed in December 2004 for failure to prosecute. Butler does not challenge that dismissal, but attempts to reach back to challenge prior rulings. However, because the prior rulings did not provide the grounds for the actual final dismissal, Butler's arguments are not on point. Butler has not shown that the trial court erred in dismissing the remaining claims for failure to prosecute.

Accordingly, the dismissal of Butler's complaint is affirmed.

Utah App., 2005.

Butler, Crockett and Walsh Development Corp. v. Salt Lake County

Not Reported in P.3d, 2005 WL 2303808 (Utah App.), 2005 UT App 402

END OF DOCUMENT