

2009

John Daniel Thorpe v. Washington City : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS, STATE OF UTAH

JOHN DANIEL THORPE, A/K/A
DANNY THORPE,

Plaintiff/Appellant,

vs.

WASHINGTON CITY, a municipal
corporation; and UNKNOWN PERSONS
1-10 individually,

Defendants/Appellees.

**BRIEF OF APPELLANT JOHN
DANIEL THORPE, A/K/A
DANNY THORPE**

Appellate Case No. 20090798

**Appeal from Final Judgment and Order of the Fifth Judicial District Court in
and for Washington County, State of Utah.**

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**FILED
UTAH APPELLATE COURTS**

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103.

ISSUES PRESENTED FOR REVIEW

1. **Did the trial court err in granting Summary Judgment in favor of Appellee on Appellant's Whistleblower Act claim when Appellant filed a Notice of Claim within the 180-day statutory limitation period designated by Utah Code Ann. § 67-21-4?**

Standard of review: Correction-of-error. *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108 (Utah 1991). In reviewing a grant of summary judgment, an appellate court views “the facts in a light most favorable to the losing party below” and gives “no deference to the trial’s conclusions of law: those conclusions are reviewed for correctness.” *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636-37 (Utah 1989); *Goodnow v. Sullivan*, 44 P.3d 704 (Utah 2002).

Issue Preserved at: [R. 156-159]. [R. 245]. [R. 310, p. 10].

2. **Did the trial court err in granting Summary Judgment in favor of Appellee on Appellant's Wrongful Discharge, Due Process and Breach of Contract claims when it determined that Utah Code Ann. § 10-3-1106 provides the sole basis of adjudication of those claims?**

Standard of review: Correction-of-error. *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108 (Utah 1991). In reviewing a grant of summary judgment, an appellate court views “the facts in a light most favorable to the losing party below” and gives “no deference to the trial’s conclusions of law: those conclusions are reviewed for correctness.” *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636-37 (Utah 1989); *Goodnow v. Sullivan*, 44 P.3d 704 (Utah 2002).

Issue Preserved at: [R. 107-109]. [R. 242-244]. [R. 310, pp. 12-14].

3. Did the trial court err in granting Summary Judgment in favor of Appellee on Appellant's claim for Unjust Enrichment?

Standard of Review: Correction-of-error. *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108 (Utah 1991). In reviewing a grant of summary judgment, an appellate court views “the facts in a light most favorable to the losing party below” and gives “no deference to the trial’s conclusions of law: those conclusions are reviewed for correctness.” *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636-37 (Utah 1989); *Goodnow v. Sullivan*, 44 P.3d 704 (Utah 2002).

Issue Preserved at: [R. 114]. [R. 244-245]. [R. 310, pp. 14-15].

STATEMENT OF THE CASE

Nature of the Case.

1. This appeal requires the Court to determine the following questions of law:
 - (1) Whether a Notice of Claim (under the Governmental Immunity Act of Utah, hereinafter, “UGIA”) containing a “whistleblower” claim filed within the 180-day statutory limitations period imposed by the Utah Protection of Public Employees Act (hereinafter, “Whistleblower Act,” or “WBA”) is sufficient to preserve that claim even if an actual complaint is not filed until after the 180-day limitation period.
 - (2) Whether Utah Code Ann § 10-3-1106 provides the sole basis of adjudication of a municipal employee’s claims and whether a municipal employee must exhaust the remedies set forth in Utah Code Ann § 10-3-1106.
 - (3) Whether, under the liberal standard of notice pleading in Utah, a party who

includes an “unjust enrichment” claim must plead with particularity that all legal remedies are either inadequate or non-existent.

2. The Appellant in this case (who was Plaintiff in the underlying trial case) is John Daniel Thorpe, a resident of Washington County, Utah.
3. The Appellees in this case are Washington City, a Utah municipal corporation [R. 45] and Unknown Persons 1-10 who are individuals employed by or acting as agents of (all of whom were Defendants in the underlying trial case). [R. 1].
4. For ease of reference, this Brief will refer to Washington City as the “Appellee” since no other parties were specifically identified as Defendants in the underlying case and because no party other than Washington City filed an answer.

Course of Proceedings/Disposition of trial court.

5. On August 1, 2006, Appellant filed a *Complaint* in the Fifth Judicial District Court, Washington County against Appellees. [R. 1-40].
6. In the *Complaint*, Appellant alleged the following seven causes of action:
 - (1) Unjust Enrichment – Claim for Wages
 - (2) Wrongful Discharge from Employment
 - (3) Due Process
 - (4) Breach of Contract
 - (5) Violation of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.*)¹
 - (6) Violation of the Whistleblower Act (Utah Code Ann. § 67-21-1 *et seq.* (1985))

¹ Appellant agreed to the dismissal of the ADA claim [R. 310, p. 11, lines 3-5], and therefore, this Brief does not address any issue related thereto.

- (7) Private Attorney General [R. 10-21].
7. Appellee filed an *Answer* on August 25, 2006. [R. 44-65].
 8. On December 5, 2006, Appellee submitted a *Motion for Judgment on the Pleadings* pursuant to Utah R. Civ. P. 12(c). The Motion for Judgment on the Pleadings and accompanying memorandum addressed Appellant's Unjust Enrichment and WBA claims. [R. 74-82].
 9. On the same day, Appellee also filed a *Motion to Dismiss for Lack of Subject Matter Jurisdiction* (hereinafter, "Motion to Dismiss"). The Motion to Dismiss and accompanying memorandum addressed the balance of Appellant's claims (Wrongful Discharge from Employment, Due Process, Breach of Contract, Violation of the ADA, and Private Attorney General). [R. 83-99].
 10. Appellant filed *Memoranda in Opposition* to the Motion to Dismiss and Motion for Judgment on the Pleadings on January 16, 2007.² [R. 105-118].
 11. Appellee filed a *Reply Memoranda* on January 22, 2007. [R. 121 and R. 128].
 12. Prior to any hearing on the Motion to Dismiss and Motion for Judgment on the Pleadings, counsel for Appellant and Appellee stipulated to allow Appellant to file an *Amended Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings* [R. 147] which Amended Memorandum was filed on August 17, 2007. [R. 150].
 13. Additionally, Appellant filed a *Motion for Leave to File Supplemental Brief on 12(b)(1)*

² In the Memorandum in Opposition to the Motion for Judgment on the Pleadings, Appellant voluntarily agreed to dismiss the WBA claim. [R. 116]. However, respective counsel for the parties stipulated to allow Appellant to file an Amended Memorandum in Opposition to the Motion for Judgment on the Pleadings [R. 147]. Appellant's Amended Memorandum reinstituted the WBA claim. [R. 156].

Motion to Dismiss for Lack of Jurisdiction and the accompanying *Supplemental Brief (Memorandum)* on August 20, 2007. [R. 161-164].

14. Appellee filed its *Reply to Plaintiff's Amended Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings* on August 28, 2007. [R. 172] and its *Reply to Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss for Lack of Subject Jurisdiction* on September 14, 2007. [R. 183].
15. Appellee submitted a *Motion for Summary Judgment* and accompanying memorandum on April 2, 2009.³ [R. 196-238].
16. Appellant responded in his *Memorandum in Opposition* on April 24, 2009. [R. 239].
17. Appellee's *Reply Memorandum* was filed on May 4, 2009. [R. 264].
18. After the trial court heard oral arguments on June 23, 2009, the court entered an *Order Granting Defendant's Motion for Summary Judgment* on August 19, 2009.
19. Appellant timely filed a *Notice of Appeal* on September 17, 2009.

STATEMENT OF THE FACTS

20. Appellant is a former Washington City employee who was employed in the City's public works department. [Admin H. Tr. 18-19]⁴.
21. Appellant suffered a workplace injury in September 2003 and was unable to return to full duty until February 2004. [Admin H. Tr. 22].

³ Appellee's Motion for Summary Judgment is a reiteration (with some refinements) of the legal arguments that first appeared in the Motion to Dismiss for Lack of Subject Matter Jurisdiction which was filed several years prior on December 6, 2006 [R. 83].

⁴ References to the April 6, 2005 administrative hearing conducted before the Washington City Employee Appeals Board in the *Matter of the Appeal of the Termination of John Daniel Thorpe's Employment* are designated "[Admin. H. Tr. ____]". Documents introduced during the administrative hearing are designated "[Admin. H. Ex. ____]."

22. On March 9, 2004, Appellant returned to work and was asked to submit to an alcohol test which included both a breath and urine analysis component. [Admin H. Tr. 79].
23. Mike Shaw (“Shaw”), the Public Works Director for Washington City and Appellant’s direct supervisor [Admin H. Tr. 17-18] requested the test because Appellant had failed a breath alcohol test that had been administered approximately two years earlier on April 2, 2002 and Shaw wanted to ensure that Appellant was returning to work without any alcohol in his system. [Admin H. Tr. 24-25].
24. Jody Westover (“Westover”) a certified breath and alcohol technician [Admin. H. Ex. 6] administered both the breath and urine tests. [Admin. H. Exs. 8 and 9].
25. Westover employed the Alco Sensor VI machine for the breath test. [Admin. H. Exs. 8 and 9].
26. At the time of the initial breath test⁵, Appellant registered an initial 0.44 blood alcohol concentration (“BAC”)) level. Approximately 15 minutes later, Westover performed a confirmation test resulting in a positive showing of 0.36 BAC level for Appellant. [Admin H. Tr. 86-87]. [Admin. H. Ex. 8].
27. Between the initial and confirmation breath tests, Westover performed a urine analysis. The results showed a .086 BAC level. [Admin H. Tr. 90]. [Admin. H. Ex. 9].
28. After leaving the worksite, Appellant promptly visited Jeff Cutler (“Cutler”), an independent breath alcohol and calibration technician who performed a breath test with results showing a .004 BAC level. Cutler performed at 10:42 a.m., approximately 1 hour and 17 minutes after the confirmation test performed by Westover. [Admin.

⁵ At approximately 9:10 a.m. on March 9, 2004.

H. Ex. C].

29. Appellee prepared an Employee Disciplinary Report on March 9, 2004 for Appellant's alleged "second offense" of "reporting under the influence." [Admin. H. Ex. 2].
30. On March 10, 2004, Shaw issued a letter on behalf of Appellee notifying Appellant that Appellant's employment would terminate March 15, 2004⁶ due to violation of Appellee's personnel policy. In the letter, Shaw also noted that Appellant was entitled to provide any information that might justify a reevaluation of the termination, including proof of "prescription or nonprescription drugs or other relevant medical information." Shaw also advised Appellant of his right to appeal the termination within 10 days and a public hearing pursuant to Section § 10-3-1106 and the Washington City Personnel Policy, Section XIX. [Admin. H. Ex. 3].
31. Appellant's physician subsequently explained to Appellant that Appellant's liver condition and the four prescription medicines that he was taking at the time of the alcohol testing could have affected the test results. After receiving this information, Appellant wrote a letter dated March 19, 2004 outlining his concerns about the accuracy of the machinery used in the workplace breath tests, the accuracy of the urine test, the influence of prescription medications on his test results, and the concern that Shaw held a personal vendetta against him. [Admin. H. Ex. 4].
32. Appellant's physician's office also provided a letter dated March 19, 2004 affirming that Appellant had elevated liver enzymes and had been referred to

⁶ As of March 15, 2004, Appellant had been employed with Washington City for approximately 10 years and 3 months. [R. 7].

hematology/oncology to be evaluated for possible hemochromatosis (a disease resulting in accumulation of iron in the liver and other organs. [Admin. H. Ex. A].

33. Appellee did not reverse its decision to terminate Appellant's employment, and Appellant timely appealed his termination to the Washington City Employee Appeals Board ("Appeals Board"). [R. 7].
34. Prior to Appellants April 6, 2005 Appeals Board hearing, Appellant was asked to testify in front of the Appeals Board in November, 2004 concerning the termination of another Washington City employee. During that hearing, Appellant testified that Shaw had misused and wasted public funds, property and manpower. [R. 8].
35. Appellant felt certain that Shaw would seek retribution against Appellant at his own hearing on April 6, 2005. [R. 8].
36. After the hearing before the Appeals Board on April 6, 2005, the Appeals Board unanimously (by 5-0 vote) ratified the termination decision. [Admin H. Tr. 181-184] and [R. 8].
37. Appellant filed a *Notice of Claim* on September 1, 2005 pursuant to the UGIA, specifically Utah Code Ann. § 63-30d-401 and 402 (2004).⁷ [R. 38-40].
38. In the Notice of Claim, Appellant made various substantive factual allegations that would later serve as a basis for the civil Complaint filed on August 1, 2006. Among other things, Appellant asserted that:
 - (1) Westover was inexperienced and the Alco Sensor VI machine for the

⁷ Title 63 of the Utah Code was recodified effective May 15, 2008. Former Utah Code Ann. § 63-30d-101 through § 63-30d-904 (and any amendments) is now codified at Utah Code Ann. § 63G-7-101 through § 63G-7-904.

- breath test was not operating properly;
- (2) Appellant suffered from a liver condition and was taking medications that might have affected the outcome of the tests;
 - (3) Appellant's testimony against Shaw for misusing Washington City property at the November 2004 hearing on behalf of another employee provided an additional motive for Shaw and the Appeals Board to ratify Appellant's termination;
 - (4) Appellee failed to pay Appellant approximately \$522.56.
39. In the Notice of Claim, Appellant also asserted the following as potential claims: (1) Breach of Contract, (2) Violation of 34 U.C.A. § 28 "Payment of Wages," (3) ERISA Violations, (4) Wrongful Termination, (5) Denial of Due Process, and any other specific cause of action discovered during litigations. [R. 39-40].
40. Appellee did not respond to the Notice of Claim; therefore, Appellant filed a Complaint alleging the seven cause of action (previously noted) on August 1, 2006. [R. 1].
41. After various motions and memoranda had been filed by both parties⁸ over a period of almost three years, the trial court issued an Order Granting Defendant's Motion for Summary Judgment ("Order Granting Summary Judgment") resulting in a dismissal of all of Appellant's seven claims. [R. 295].
42. Relevant to the issues and arguments presented in this case on appeal are the legal

⁸ See the preceding "Course of Proceedings/Disposition of trial court" section of this Brief for an description of the motions and memoranda.

bases on which the trial court relied to justify dismissal of Appellant's claims.⁹ In fact, most of Appellant's underlying factual allegations were never considered or addressed because the trial court focused almost exclusively on statutory and prior case law in precluding Appellant's claims.

43. The rationale applied by the trial court in its Order can be summarized by the following chart:

Appellant's Claim(s)	Trial court's Reason for Dismissal
1. Wrongful Discharge 2. Breach of Contract 3. Due Process	1. Article VIII, section 5 of the Utah Constitution delineates a district court's authority to directly review the decisions of lower tribunals. 2. There is no statute that authorizes the district court to review the Washington City Appeals Board's decision. 3. In fact, Utah Code Ann. § 10-3-1106(6)(a) lodges jurisdiction over such review exclusively with the Utah Court of Appeals (not the district courts). 4. Appellant's claims of Wrongful Discharge, Due Process, and Breach of Contract are all obligations that arise out of or relate to the Appeals Board Hearing on April 6, 2005. 5. Because Utah courts look to the nature of the action and not the pleading labels chosen, Appellant's Wrongful Discharge, Due Process, and Breach of Contract claims are in substance part and parcel of a <i>single claim</i> , namely that "the appeal board abused its discretion or exceeded its authority." 6. This "single claim" can only be heard by the Court of Appeals (not the district court) per Utah Code Ann. § 10-3-1106(6)(a) and (c). 7. Although Utah Code Ann. § 10-3-1106(6)(a) does provide that "a final action or order of the appeal board <i>may</i> be appealed to the Court of Appeals" (emphasis added), the term "may" is permissive only in

⁹ Through some oversight on the trial court's part, it does not appear that Appellant's seventh cause of action for "Private Attorney General" was technically disposed of in the Order Granting Summary Judgment.

	<p>that it allows a discharged employee the option to appeal if he/she wishes to. The term “may,” however, does not mean that the discharged employee may appeal to a court other than the Court of Appeals.</p> <p>8. Therefore, the district court does not have jurisdictional authority over Appellant’s Wrongful Discharge, Due Process or Breach of Contract claims and summary judgment is appropriate. [R. 298-301].</p>
4. ADA	<p>1. Appellant did not timely file a verified charge of discrimination with the EEOC.</p> <p>2. Appellant agreed to dismissal. [R. 301].</p>
5. Unjust Enrichment	<p>1. Unjust Enrichment is an equitable remedy that may be invoked only when there is no adequate remedy at law.</p> <p>2. A plaintiff seeking equitable remedy must affirmatively show a lack of adequate remedy at law on the face of the pleading and from evidence.</p> <p>3. Appellant did not allege in his complaint that legal remedies are inadequate or present an argument that state/federal laws are inadequate to address nonpayment. [R. 301-302].</p>
6. WBA	<p>1. Utah Code Ann. § 67-21-4(2) indicates that employee “may bring a civil action for appropriate injunctive relief of actual damages, or both within 180 days after the occurrence of the alleged violation.”</p> <p>2. The alleged violation occurred on the date Appellant’s appeal was denied (April 6, 2005); however Appellant did not file an action alleging a violation of WBA until August 1, 2006—more than 180 days after the alleged violation.</p> <p>3. Although Appellant filed a Notice of Claim within the 180-day statutory period under the WBA, the Act requires that a “civil action” be brought within 180 days, <i>not</i> that a notice of claim be filed within 180 days.</p> <p>4. Because an actual complaint for Appellant’s Whistleblower claim was not filed within 180 days of the violation, Appellant’s claim thereunder is precluded.</p> <p>5. Even if the Notice of Claim preserved Appellant’s WBA claim Appellant admitted that he was not terminated for “blowing the whistle.” [R. 302-303].</p>
7. Private Attorney General	<p>* It does not appear this claim was ever disposed of by the district court as there is no specific reference to it in the Order Granting Summary Judgment.</p>

SUMMARY OF THE ARGUMENT

The trial court erroneously determined that Appellant did not comply with the 180-day statutory filing deadline imposed by Utah Code Ann. § 67-21-4 of the WBA because Appellant filed a UGIA Notice of Claim within that 180-day period, but did not file a complaint. In fact, Appellant's filing of the Notice of Claim within the 180-day period was sufficient to preserve Appellants WBA claim even though an actual complaint was not filed within the 180-day period.

The trial court also erred in finding that Section § 10-3-1106(6)(a) provides the only legal recourse for Appellant in seeking adjudication of his claims for Wrongful Discharge, Due Process and Breach of Contract. Furthermore, even if the Court of Appeals is the only direct body to which a municipal appeals board decision might be appealed, Appellant formulated subsequent theories based on violation of Due Process and Breach of Contract that were never fully expounded by Appellant or heard by the Appeals Board and these subsequent claims may be brought independently in district court.

Finally, the trial court improperly dismissed Appellant's Unjust Enrichment claim on the basis that Appellant failed to specifically plead that no legal remedy existed or that any such remedy was inadequate to satisfy his claim of non-payment of wages. Based on Utah's liberal notice pleading standard (Utah R. Civ. P. 8), Appellant provided facts in his Complaint that are sufficient to establish the elements of an unjust enrichment claim.

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ARGUMENT

1. The trial court erred in granting Summary Judgment in favor of Appellee on Appellant's Whistleblower Act claim because Appellant properly filed a Notice of Claim within the 180-day statutory period designated for such claims, thereby preserving the claim.

A. Standard of Review.

A grant of summary judgment is appropriate only when “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” Utah R. Civ. P. 56(c). In reviewing the appropriateness of a grant of summary judgment, this Court views “the facts in a light most favorable to the losing party below” and gives “no deference to the trial court’s conclusions of law: those conclusions are reviewed for correctness.” *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636-37 (Utah 1989); *Goodnow v. Sullivan*, 44 P.3d 704 (Utah 2002).

B. Appellant timely complied with the requirements of the UGIA and Whistleblower Act.

When taking the facts in the light most favorable to the non-moving party (in the trial court action, the Appellant), as required by the summary judgment standard, it is clear the trial court erred in ruling that Appellant failed to timely file within “180 days after the occurrence of the alleged violation.” Utah Code Ann § 67-21-4(2).

Utah Code Ann. § 67-21-3(1)(a) provides:

An employer may not take adverse action against an employee because the employee, or a person authorized to act on behalf of the employee, communicates in good faith the existence of any waste of public funds, property, or manpower, or a violation or suspected violation of a law, rule, or regulation adopted under the law of this state, a political subdivision of this state, or any recognized entity of the United States.

Additionally, Utah Code Ann. § 67-21-3(2) indicates that:

An employer may not take adverse action against an employee because an employee participates or gives information in an investigation, hearing, court proceeding, legislative or other inquiry, or other form of administrative review held by the public body.

Appellant specifically alleged facts supporting a violation the foregoing provisions of the WBA in both his September 1, 2005 Notice of Claim [R. 39] and Complaint [R. 7-8].

Former Utah Code Ann. § 63-30d-301(f)¹⁰ of the UGIA expressly waives immunity “for actual damages under Title 67, Chapter 21, Utah Protection of Public Employees Act[.]” Utah Code Ann. § 63-30d-401 sets forth the requirements and elements of a filing of a “notice of claim,” while § 63-30d-402 mandates that the notice of claim be filed with the appropriate authority within one year after the claim arises, and § 63-30d-403 allows the governmental entity (or its insurance carrier) 60 days from the date the notice of claim was filed to either approve or deny the claim. Once the claim is denied (or if the governmental entity fails to approve or deny the claim within the 60 days), the claimant is required to file an action in district court within one year.

Pursuant to Utah Code Ann. § 67-21-4(2) of the WBA, an employee alleging a violation of the Act “may bring a civil action for appropriate injunctive relief or actual damages or both, within 180 days after the occurrence of the alleged violation[.]”

At issue in this appeal is whether Appellant properly complied with *both* the requirements of the UGIA notice of claim provisions and the WBA’s 180-day limitation period by filing a notice of claim (but not a complaint) within the 180-day period.

¹⁰ All citations to the relevant UGIA provisions shall refer to the former codification in effect at the time of the underlying action in this case (i.e. at § 63-30d-101 *et seq.*).

The parties do not dispute that the denial of Appellant's appeal by the Appeals Board on April 6, 2005 was the date on which the violation occurred. [R. 19, 303]. It is also undisputed that Appellant issued his Notice of Claim (which referenced the alleged WBA violations) on September 1, 2005, *well within the 180-day statutory period designated by the WBA*. Finally, Appellant filed his Complaint on August 1, 2006—within the one-year period required by the UGIA from the time the Notice of Claim was denied.

Notwithstanding this compliance, the trial court ruled that the timely filing of a Notice of Claim under the UGIA and *within the 180-day period set forth in the WBA* does not toll the 180-day limitations period in the WBA requiring the filing of a civil action. [R. 302-303].

In granting summary judgment on this particular cause of action, the trial court specifically concluded: “A notice of claim, however, is not *a civil action*. The plain language of the Whistleblower Act is not that ‘a notice of claim’ must be filed within 180 day [sic], but that a ‘civil action’ must be brought within 180 days.”

In *Hall v. Utah State Depart. of Corrections*, 2001 UT 34, 24 P.3d 958, Hall, a governmental officer with the Utah State Department of Corrections (“USDC”), made public reports concerning hazing incidents and subsequently resigned. Shortly thereafter, Hall was informed that the USDC would not provide a positive recommendation for rehire with the USDC or to any other future employers. *Id.* ¶¶3-6. Believing that this action was based on his whistle-blowing, Hall then attempted to file a claim under the WBA but Hall did not timely file a Notice of Claim prior to filing his complaint.

The Utah Supreme Court specifically held that the UGIA does not protect the state

and its political subdivisions from lawsuits arising under the WBA. *Id.* ¶18. Importantly, the *Hall* court noted that that “The Governmental Immunity Act clearly requires that where the state may be sued—such as under the Whistleblower Act—potential plaintiffs must provide a formal ‘notice of claim’ to the appropriate governmental official before bringing their action.” *Id.* ¶22. The court also explained that “Once a plaintiff’s notice of claim is filed, the Act continues to bar its initiation in the court until the state either denies the claim in writing or fails to act for ninety¹¹ days[.]” *Id.* ¶ 22. Ultimately, the *Hall* court affirmed the lower court’s dismissal of Hall’s WBA claims because he failed to comply with UGIA’s notice of claim requirement. *Id.* ¶26.

The relevance of the *Hall* decision is that even though the UGIA does not protect governmental entities from WBA suits, plaintiffs must still strictly comply with UGIA’s notice of claim requirements regardless of the claim asserted. In the instant case, Appellant *did* comply with the notice of claim requirements.

The more specific question to be addressed is whether the filing of a notice of claim that includes a WBA cause of action within the 180-day statutory period is sufficient to satisfy the requirement in Utah Code Ann. § 67-21-4(2). The trial court in the instant case based its decision to grant summary judgment in favor of Appellee on the position that the filing of a notice of claim is not the same thing as the filing of a civil action. Appellant disagrees with this position for the reasons set forth hereinafter.

The unpublished opinion issued by this Court in *Fannen v. Lehi City*, 2005 UT App 301 supports Appellant’s position that the filing of a Notice of Claim (which contains a

¹¹ The ninety-day period referred to was adjusted to a sixty-day period with the 2004 amendment of the UGIA.

WBA cause of action) within the 180-day period mandated by Utah Code Ann. § 67-21-4(2) is sufficient to preserve a WBA claim *even when a complaint is not filed within the 180-day period*.

In *Fannen*, the appellant (Fannen) sought reversal of the trial court's denial of his Motion to Strike Defendants' Summary Judgment Motion and grant of summary judgment to Defendants. Fannen (erroneously) argued that the WBA's 180-day statutory limitation is superseded by the language in the UGIA which provides that "[a] claim against a governmental entity" is barred "unless notice of claim is filed ... within one year after the claim arises." Utah Code Ann. § 63-30d-402.

This Court disagreed with Fannen's argument holding that:

While the WBA creates a cause of action that must be brought within 180 days after the alleged occurrence, the [U]GIA "does not itself serve as the basis for liability or any cause of action." *Hall v. Department of Corr.*, 2001 UT 34, ¶ 16, 24 P.3d 958. The [U]GIA merely gives a deadline for which notice must be given that there is a claim against the State; it does not prohibit the legislature from imposing a shorter statutory filing date on a cause of action.

Fannen filed his notice of claim (the Notice) on February 4, 2002. His last day at work, and subsequently the beginning date for the running of the statute of limitations, was June 20, 2001. **Because Fannen failed to file the Notice before the statutory period designated in the WBA**, the district court properly dismissed his Whistle Blower claim (emphasis added) (internal footnote omitted). 2005 UT App 301.

The only logical implication of this Court's language is that *had* Fannen filed his notice of claim before the WBA's 180-day statutory period expired, Fannen's WBA claim would have survived. Unlike Fannen, Appellant *did* file a notice of claim within the 180-day period. Furthermore, Appellant does not argue on appeal that the UGIA's one-year notice of claim requirement completely tolls the 180-day WBA period—Appellant only argues that a proper UGIA notice of claim filed within the

180-day WBA period tolls the requirement for a plaintiff to file a *complaint* within the 180-day period.

In *Youren v. Tintic School Dist.* 343 F.3d 1296 (10th Cir., 2003), the defendant school district sought to have the plaintiff's WBA claim dismissed because the plaintiff (Youren) had timely filed a notice of claim with the 180-day statutory period, but had *not* actually filed a complaint until after the 180-day period expired. The Tenth Circuit Court noted, "In a post-trial order, the [federal] district court denied the defendant's motion for judgment as a matter of law on Ms. Youren's whistleblower claim, holding that Ms. Youren met the 180-day statute of limitations for bringing claims under the Whistleblower Act by filing a timely notice of claim, even though the complaint was not filed until after the 180-day deadline." *Id* at 1299-1300.

The Tenth Circuit Court further noted that "The district court rejected the defendants' post-trial motion for judgment as a matter of law, holding that Ms. Youren's timely filing of her Notice of Claim was sufficient to serve the purposes of the statute's prompt notification requirements." *Youren*, 343 F.3d at 1302. Ultimately, the Tenth Circuit Court declined to address the merits of defendant's argument that the 180-day time limit cannot be met by merely filing a notice of claim, but rather that the claim itself must be filed within 180-days because defendants had waived this affirmative defense by omitting the issue from the pre-trial order. *Id.* at 1305.

The importance of the *Fannen* and *Youren* cases is to illustrate the fact that this Court and Judge Dale A. Kimball of the United States District Court for the District

of Utah appear to hold a position that is entirely opposite to the one taken by the trial court—namely that the filing of a notice of claim containing a WBA cause of action within the 180-day period *does*, in fact, preserve that claim even if the actual complaint is filed after the 180-day period.

- C. The actual language of Utah Code Ann. § 67-21-4(2) does not require an employee to “file a complaint;” rather, the language requires only that an employee “bring a civil action” within 180 days after the occurrence of the alleged violation.**

The trial court based its decision to grant summary judgment in favor of Appellee on Appellant’s WBA claim on the general premise that “a notice of claim is ... not a civil action.” [R. 303]. However, in making such a declaration, the trial court assumes that the statutory language in Utah Code Ann. § 67-21-4(2) which requires an employee to “bring a civil action” necessarily equates to “file a complaint.” It is not unreasonable to interpret the word “bring” as encompassing the pre-complaint notice of claim requirements established by the UGIA prior to the actual filing of a civil action in court.

Furthermore, if this Court were to affirm the trial court’s interpretation, a plaintiff would technically be required to issue a Notice of Claim involving a WBA cause of action no later than 120 days from the date of the alleged violation in order to allow the governmental entity the requisite 60 days to review the Notice of Claim and approve or deny the claim (per Utah Code Ann. § 63-30d-403); assuming the plaintiff had already prepared a complaint, that complaint would have to be filed by the 180th day. This scenario would result in an unfair, drastic hyphenation of the UGIA’s one-year limitations period for filing a notice of claim and the one year

limitations period for filing a complaint once a notice of claim is denied.

For the reasons set forth above, Appellant requests that this Court reverse the trial court's legal conclusion that filing of a UGLA notice of claim within the WBA's 180-day limitations period is insufficient to meet the requirements of Utah Code Ann. § 67-21-4. Rather, this Court should rule that Appellant's timely filing of his Notice of Claim within the 180-day WBA limitation period was sufficient to preserve Appellant's WBA cause of action.

D. Even if Appellant admitted he was not *terminated* for “whistle-blowing,” Appellant has asserted that his testimony against his supervisor resulted in an “adverse action”—the denial of his appeal to the Appeals Board.

In a postscript to its decision granting summary judgment in favor of Appellee on the WBA cause of action, the trial court added: “Finally, even assuming the [WBA] claim was timely, Plaintiff admits that he was not terminated for “blowing the whistle on the City.” [R. 303].

In support of this statement, the trial court cites to Appellant's deposition transcript where Appellant was asked: “Did your termination—did it have anything to do with your testimony that you'd given against Mr. Shaw in any proceeding, to your knowledge?” Appellant responded “No.” [R. 303].

However, the trial court apparently did not closely scrutinize Appellant's actual claim under the WBA as set forth in his Complaint. A review of his WBA claim in the Complaint shows that Appellant believed that it was his testimony provided in relation to another employee's appeal on November 18, 2004 (*after* Appellant had already been terminated) that resulted in an adverse action *at his own*

subsequent Appeals Board hearing on April 6, 2005. [R. 18-19]. In other words, Appellant's claim was not that he was initially terminated for providing testimony against his supervisor, Shaw (which would not make sense at any rate because Appellant's negative testimony was given at the November 18, 2004 hearing for Ritch Johnson—months after Appellant had already been terminated); rather as stated in his Complaint: “[Appellee’s] decision regarding [Appellant’s] appeal was made in retaliation for [Appellant’s] prior testimony at Mr. Johnson’s appeal hearing regarding [Shaw’s] waste of public funds, property, or manpower. [R. 19].

The trial court’s “fallback” reason for dismissing Appellant’s WBA claim is without merit and this Court should reverse this conclusion as well.

2. **The trial court erred in granting Summary Judgment in favor Appellee on Appellant’s Wrongful Discharge, Due Process and Breach of Contract claims because an appeal to this Court after Appellant’s administrative hearing is permissive and does not deprive Appellant of the right to file in district court; even if an appeal to this Court is mandatory, the administrative hearing did not address Appellant’s Due Process or Breach of Contract claims.**

A. Standard of Review.

A grant of summary judgment is appropriate only when “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” Utah R. Civ. P. 56(c). In reviewing the appropriateness of a grant of summary judgment, this Court views “the facts in a light most favorable to the losing party below” and gives “no deference to the trial court’s conclusions of law: those conclusions are reviewed for correctness.” *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636-37 (Utah 1989); *Goodnow v. Sullivan*, 44 P.3d 704 (Utah 2002).

B. The relevant statutes and the trial court's incorrect assumptions.

Utah Code Ann § 10-3-1106 provides a method by which a municipal employee (as delineated in Utah Code Ann. § 10-3-1105) may appeal a discharge, suspension without pay or involuntary transfer to a position with less remuneration.

Utah Code Ann. § 10-3-1106(7)(a) provides that the “procedure for conducting an appeal and the standard of review shall be prescribed by the governing body of each municipality by ordinance.” Appellee admits that it established the Appeals Board pursuant to this statutory authorization. [R. 89].

An employee may obtain review of the municipal appeal board's final decision by complying with Utah Code Ann. § 10-3-1106(6) which provides that:

- (a) A final action or order of the appeal board may be reviewed by the Court of Appeals by filing with that court a petition for review.
- (b) Each petition under Subsection (6)(a) shall be filed within 30 days after the issuance of the final action or order of the appeal board.
- (c) The Court of Appeals' review shall be on the record of the appeal board and for the purpose of determining if the appeal board abused its discretion or exceeded its authority.

The trial court improperly granted Summary Judgment in favor of Appellee on Appellant's Wrongful Discharge, Due Process and Breach of Contract claims based on the incorrect interpretation of Utah Code Ann. § 10-3-1106 (hereinafter “1106”). Specifically, the trial court assumed: (1) that the Wrongful Discharge, Due Process and Breach of Contract claims all “arise out of or relate to the hearing Plaintiff received before the Board” and therefore that all three claims were, in substance a single claim that “the appeal board abused its discretion or exceeded its authority;” and that (2) because Utah Code § 10-3-1106(6)(a) lodges jurisdiction over such review exclusively with the Utah Court of Appeals

(not the district courts), Appellant's *sole and exclusive* remedy was to appeal the alleged "single claim" to the Court of Appeals.

The trial court was mistaken on both counts. Appellant will first address the trial court's second (statutory) presumption and then address the trial court's contention that Appellant's Wrongful Discharge, Due Process and Breach of Contract claims were actually a "single claim" that should have been appealed to this Court.

C. Utah Code Ann. § 10-3-1106 provides a permissive adjudicative procedure, and is not Appellant's exclusive remedy.

1. 1106 does not require the exhaustion of administrative remedies.

1106 provides an option for aggrieved municipal employees to seek adjudication of their grievances. 1106 allows, but does not require, review by a municipal appeal board and, subsequently, this Court. However, this is by no means the exclusive remedy for an employee. Where the legislature intends that a statute provide either exclusive or mandatory adjudicative procedures, it has expressly declared so. *See e.g.* Municipal Land Use, Development, and Management Act, Utah Code Ann. § 10-9a-801(1) ("No person may challenge in district court a municipality's land use decision made under this chapter ... until that person has exhausted the person's administrative remedies..."). There is *no* language in 1106 mandating that the procedures outlined therein provide the exclusive remedy for aggrieved municipal employees.

2. Appellant's claims against Appellee fall under the purview of the UGIA, and the UGIA vest jurisdiction over such claims in the district courts.

The trial court's interpretation of 1106 is further flawed because such an interpretation conflicts with the UGIA, which provides that "The district courts have

exclusive, original jurisdiction over any action brought under this chapter.” Utah Code Ann. § 63-30d-501. Where two statutes address the same subject matter, a specific provision controls over a general one. *See Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 216 (Utah, 1984); *Floyd v. Western Surgical Assocs. Inc.*, 773 P.2d 401, 404 (Utah App. 1989). The UGLA’s scope is very specific: “This single, comprehensive chapter governs all claims against governmental entities or against their employees or agents arising out of the performance of the employee’s duties, within the scope of employment, or under color of authority.” Utah Code Ann. § 63-30d-101(b). Conversely, 1106 gives provides no such specific scope—it merely indicates that an aggrieved city employee *may* seek review of their termination, etc.

In *Hatton-Ward v. Salt Lake City Corporation*, 828 P.2d 1071 (Utah App. 1992), this Court rendered an important (and apropos) ruling that allowed the plaintiff to maintain his statutory whistleblower cause of action despite the defendant city’s argument that the plaintiff’s sole remedy was under the Civil Service Statute found in Utah Code Ann. § 10-3-1012.

The legal issues in *Hatton-Ward* are strikingly similar to the ones in this case, and the parallels and rationale supporting this Court’s decision in *Hatton-Ward* are equally relevant in reviewing whether the district court erred in the instant case.

The Civil Service Statute provides that terminated civil service workers “*may* appeal to the civil service commission” Utah Code Ann. § 10-3-1012(2) (emphasis added). And in language that is almost verbatim to 1106, the Civil Service Statute provides that, “any final action or order of the commission *may* be appealed to the Court of Appeals for review ... for the purpose of determining if the commission has abused its discretion or exceeded its

authority.” Utah Code Ann. § 10-3-1012.5 (emphasis added).

In reversing the lower court’s dismissal for lack of subject matter jurisdiction, this Court in *Hatton* determined that a terminated police officer did *not* have to exhaust the administrative remedies under the Civil Service Statute (including the filing of an appeal) before bringing suit in district court. *See Hatton*, 828 P.2d at 1074. This Court specifically noted that the Civil Service Statute’s limited scope of commission and appellate court review was only for the purpose of determining whether discharge was proper, not to hear other civil claims related to the discharge. This Court pointed out that nothing in the civil service statute empowered the commission to hear other civil claims or provide any other legal remedy. *See Id.* at 1073.

It is further significant that the Civil Service Statute at issue in *Hatton* is located in the same title and section of the Utah Code as 1106. Here, just as in *Hatton*, the statute in question (1106) provides a specific and limited avenue of review for municipal employees. Moreover, Appellant’s Wrongful Discharge, Due Process, and Breach of Contract claims clearly fall within the UGIA’s scope. It is unreasonable to think that the permissive “may” in 1106 creates an exclusive remedy that divests the district courts of the jurisdiction granted to them by the UGIA to address claims by municipal employees against a governmental entity. 1106 may vest limited review of municipal appeal board decisions with this Court, but it does not preclude Plaintiff from seeking civil remedies in district court.

D. Even if 1106 precludes the district court from hearing Appellant’s Wrongful Discharge claim, he is entitled to sue in district court on his Due Process and Breach of Contract claims

The Appeals Board is not the proper forum for adjudication of Appellant’s civil

claims. As noted above, the Appeals Board's scope of review is limited to a determinations of whether discharge was proper. The Appeals Board's expertise is in interpreting company policy and in assessing whether an adverse employment action was warranted. It is not equipped to determine issues of constitutional or contract law. Nor is the appellate court given authority to review substantive legal questions for correctness, but merely to ensure that the board does not abuse its discretion or exceed its authority. *See* Utah Code Ann. § 10-3-1106(6)(c). The *Hutton* decision made clear that the law does not require a plaintiff to exhaust administrative remedies where the remedy sought is one that the administrative body is not empowered to provide. *See Hutton*, 828 P.2d at 1073-74.

The trial court also mistakenly assumed that the Wrongful Discharge, Due Process and Breach of Contract claims all "arise out of or relate to the hearing [Appellant] received before the Board." On the contrary, Appellant's Due Process and Breach of Contract claims principally arise out of and relate to allegations of Appellee's failure to follow its own internal policies for alcohol testing and the use of an inexperienced person and faulty machinery during the testing.

Plaintiff is entitled to his day in court on his Due Process and Breach of Contract claims. The district court forum allows Appellant the full use of the rules of evidence and civil procedure before a neutral fact finder. More importantly, the district court can grant Appellant legal and equitable remedies not available through the Appeal's Board/Court of Appeal's process including damages and attorney fees. *See Hutton*, 828 P.2d at 1073.

Appellant did not even fully formulate his Due Process and Breach of Contract claims until he filed his Complaint with the district court.

Accordingly, Appellant respectfully requests that this Court reverse the district court's grant of Summary Judgment in favor of Appellee on Appellant's Wrongful Discharge, Due Process and Breach of Contract claims.

3. The trial court erred in granting Summary Judgment in favor of Appellee on Appellant's Unjust Enrichment claim because Appellant adequately pled his cause of action for Unjust Enrichment.

A. Standard of Review.

A grant of summary judgment is appropriate only when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). In reviewing the appropriateness of a grant of summary judgment, this Court views "the facts in a light most favorable to the losing party below" and gives "no deference to the trial court's conclusions of law: those conclusions are reviewed for correctness." *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636-37 (Utah 1989); *Goodnow v. Sullivan*, 44 P.3d 704 (Utah 2002).

B. Appellant adequately pled his cause of action for Unjust Enrichment under Utah R. Civ. P. 8.

In its Order Granting Summary Judgment, the trial court correctly notes that a claim for "unjust enrichment" is an equitable remedy and that under relevant court rulings, the law will not imply an equitable remedy when there is an adequate remedy at law. [R. 302].

Unjust enrichment is a cause of action used to rectify a situation where a party has received a benefit without any bargain. Three elements that must be established in order for a party to prevail on a claim of unjust enrichment:

First, there must be a benefit conferred on one person by another. Second, the conferee must appreciate or have knowledge of the benefit. Finally, there must be the acceptance or retention by the conferee of the benefit under such

circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value. *Desert Miriah, Inc. v. B & L Auto, Inc.*, 2000 UT 83, ¶ 13, 12 P.3d 580 (quotations and citations omitted).

In his Complaint, Appellant succinctly alleges that Appellee failed to pay Appellant the amount of \$522.56 (apparently, the payment was mistakenly sent to Appellee's attorney). [R. 9-10]. There is no dispute that Appellant performed work for Appellee or that Appellant was entitled to be paid the amount of \$522.56 for the labor.

The trial court, however, improperly and preemptively foreclosed Appellant's unjust enrichment claim for the following reasons: (1) Appellant's Complaint contained no allegation that his legal remedies were inadequate, and (2) Appellant did not present any argument that state and federal statutes regulating wages were inadequate to address his claim of nonpayment. [R. 302].

In justifying its reasoning, the trial court cited to a single footnote (42) in the case of *Ockey v. Lehmer*, 2008 UT 37, 189 P.3d 51. The language in the footnote refers to 27A Am. Jur. 2d Equity § 21 (2008). [R. 302]. It is important to quote the language in the *Ockey* decision with which the footnote is associated as well as the actual full text of the footnote itself. The text in the decision (at ¶44) is as follows:

The general rule regarding equitable jurisdiction is that "equitable jurisdiction is precluded if the plaintiff has an adequate remedy at law and will not suffer substantial irreparable injury." FN42

The full text of footnote 42 is:

FN42. *Buckner v. Kennard*, 2004 UT 78, ¶ 56, 99 P.3d 842; see also *Belnap v. Blain*, 575 P.2d 696, 700 (Utah 1978) ("[A] resort to equity for collection of a judgment is not authorized in the absence of a showing of unavailability of collection by legal process" (internal quotation marks omitted)); 27A Am. Jur. 2d Equity § 21 (2008) ("[T]he plaintiff must affirmatively show a lack of an adequate remedy at law on the face of the pleading and from the evidence,

and if a complaint on its face shows that adequate legal remedies exist, equitable remedies are not available.”).

The central issue that Appellant asks this Court to consider is the quantum of factual and legal detail and specificity that a plaintiff is expected to present *in the initial Complaint* in bringing an unjust enrichment claim sufficient to avoid a summary judgment motion.

Utah R. Civ. P. 8 simply require that a complaint contain: “(1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.”

In *Crowley v. Porter*, 2005 UT App 518, ¶¶ 37-38, 127 P.3d 1224, this Court further elaborated upon the purpose of the liberal pleading standard under Utah R. Civ. P. 8:

The fundamental purpose of these rules is to “liberaliz [e] both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute.” *Cheney v. Rucker*, 14 Utah 2d 205, 381 P.2d 86, 91 (1963). In *Cheney*, the Utah Supreme Court held that the failure of the defendants to plead a subsequent agreement as an affirmative defense was not fatal to the trial court’s consideration of that agreement. *See id.* In rejecting the plaintiff’s argument to the contrary, the court explained:

What [a party is] entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required. Our rules provide for liberality to allow examination into and settlement of all issues bearing upon the controversy, but safeguard the rights of the other party to have a reasonable time to meet a new issue if he so requests. Rule 15(b) [of the Utah Rules of Civil Procedure] so states.

...

Rule 54(c)(1) requires trial courts to be liberal in awarding appropriate relief justified by the facts developed at trial, as long as the failure to request a particular form of relief does not prejudice a party in the preparation or trial of the case. If there is no prejudice, it is necessary only that the relief granted be

supported by the evidence and be a permissible form of relief for the claims litigated. *Henderson*, 757 P.2d at 472 (quotations and citations omitted).

Appellant's Complaint sufficiently states specific facts and circumstances supporting his claim for unjust enrichment, thereby satisfying the requirements of Rule 8. Furthermore, it would not make sense that Appellant would plead that he has exhausted all legal remedies (as the trial court apparently thought he should) because Appellant was not *sure* that he had done so and because, pursuant to Rule 8, he is allowed to plead the alternative theory of unjust enrichment. The liberalized pleading standard does not mandate that Appellant *actually* allege "I have exhausted all of my legal remedies and/or there are no legal remedies available to me at law" in his Complaint. Furthermore, *27A Am.Jur.2d Equity* § 21 (2008) only proposes that a plaintiff must "affirmatively show a lack of an adequate remedy at law on the face of the pleading and from the evidence." The "showing" of a lack of adequate remedy at law can be clearly construed from cumulative facts presented by the Appellant in this case in the original Complaint on file.

Under the liberal standard of notice pleading in Utah, Appellant has adequately asserted facts sufficient to establish the elements of an unjust enrichment claim. Therefore, this Court should reverse the trial court's grant of summary judgment in favor of Appellee on Appellant's Unjust Enrichment claim.

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CONCLUSION

For the above-state reasons, Appellant respectfully requests that this Court reverse the trial court's grant of Summary Judgment on those claims outlined herein.

Respectfully submitted this 21st day of January 2010.

A handwritten signature in black ink, appearing to read "Justin D. Heideman", with a stylized flourish at the end.

JUSTIN D. HEIDEMAN,
HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.,
Attorneys for Plaintiff/Appellant John Daniel Thorpe

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January 2010, I served two copies of the foregoing **BRIEF OF APPELLANT JOHN DANIEL THORPE, A/K/A DANNY THORPE** by the following method on the person(s) listed below:

Jeffrey N. Starkey

Bryan J. Pattison

DURHAM, JONES & PINEGAR

Attorneys for Defendant/ Appellee
Washington City

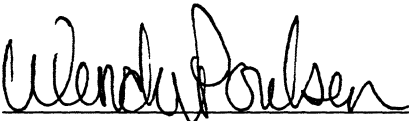
192 East 200 North, 3rd Floor

St George, UT 84770-2866

Telephone: 435-674-0400

Facsimile: 435-628-1610

 X US Mail, Postage Prepaid


Assistant to Justin D. Heideman.

STATEMENT THAT NO ADDENDUM IS NECESSARY

Pursuant to Utah R. App. P. 24(a)(11), Appellant affirms that no addendum is necessary.

Respectfully submitted this 21st day of January 2010.

A handwritten signature in black ink, appearing to read "Justin D. Heideman", with a stylized flourish at the end.

JUSTIN D. HEIDEMAN,
HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.,
Attorneys for Plaintiff/Appellant John Daniel Thorpe

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January 2010, I served two copies of the foregoing **STATEMENT THAT NO ADDENDUM IS NECESSARY** by the following method on the person(s) listed below:

Jeffrey N. Starkey

Bryan J. Pattison

DURHAM, JONES & PINEGAR

Attorneys for Defendant/Appellee

Washington City

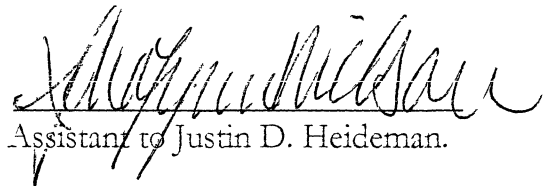
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A handwritten signature in black ink, appearing to read "Justin D. Heideman", written over a horizontal line.

Assistant to Justin D. Heideman.