2009

Ryan Morford and Lene Morford v. State of Utah Division of Child and Family Services : Brief of Appellee

Utah Court of Appeals

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No. 20090931-CA

IN THE UTAH COURT OF APPEALS

RYAN MORFORD and LENE MORFORD,

Plaintiffs/Appellants,

vs.

STATE OF UTAH, DIVISION OF CHILD AND FAMILY SERVICES,

Defendant/Appellee,

APPELLEE' S ANSWER BRIEF

Appeal from Orders Granting Summary Judgment and Final Judgment of Dismissal of the Fourth Judicial District Court, Utah County, State of Utah, the Honorable Samuel McVey, presiding

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ORAL ARGUMENT NOT REQUESTED

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LIST OF ALL PARTIES

Plaintiffs named the Division of Juvenile Justice Services, Timothy McOmber, Carolyn Nay, and John and Jane Does 1-20 as parties to their original Complaint.[1] Plaintiffs have not appealed the district court's orders dismissing those parties.

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[1] Carolyn Nay joined the Division's first motion for summary for judgment that the district court granted on June 11, 2009. Plaintiffs have appealed from that order but they have not addressed any arguments toward Ms. Nay or her dismissal. *See* Aplt. Br. p. 3 and generally; Notice of Appeal, R. 500-501. Plaintiffs have therefore waived any claim they may otherwise have respecting Ms. Nay. *See Brown v. Glover*, 2000 UT 89, ¶ 23, 16 P.3d 540 (issues not presented in opening brief considered waived); *see also* Utah R. App. P. 24(a)(5), (9).

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IN THE UTAH COURT OF APPEALS

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ANSWER BRIEF

The State of Utah, Division of Child and Family Services (the Division) respectfully submits this answer brief.

Jurisdictional Statement

This Court possesses jurisdiction under Utah Code Ann. § 78A-4-103(2)(j) (West Supp. 2009).

Issues Presented

1. Failure to Comply with Appellate Rule 24.

The rules of appellate procedure require adequate briefing. Plaintiffs appeal from grants of summary judgment, but they fail to cite to the district

court record, to identify a single material fact that Plaintiffs contend is in dispute, or to provide any meaningful legal analysis of their claims before this Court. Have Plaintiffs adequately complied with appellate Rule 24 such that their brief should not be stricken?

Standard of review.

This issue requires no review of the lower court decision and no standard of review applies.

2. No Duty to Provide Reunification Services.

Utah's Juvenile Court Act separately addresses minors adjudicated by that court as abused, neglected or dependent from minors adjudicated as delinquent. The Act contains provisions respecting reunification services to parents of abused or neglected children, but not to parents of delinquent minors. Here, B.M. was removed from Plaintiffs' home and placed in the State's custody because B.M. committed a delinquent act. Did the district court err when it found the Division had no duty to provide Plaintiffs with reunification services?

Standard of review.

Interpretation of a statute constitutes a question of law reviewed for correctness. *Blackner v. Dep't of Transp.*, 2002 UT 44, ¶ 8, 48 P.3d 949.

3. Immunity from Suit.

Plaintiffs relinquished their parental rights to B.M. while he was in the State's custody and confined to a residential treatment center. Plaintiffs claim that they did so because the Division negligently failed to offer them reunification services. But Plaintiffs' alleged injury arose out of B.M.'s delinquent conduct and incarceration in a place of legal confinement, or alternatively, from an alleged negligent misrepresentation. Is the Division immune from Plaintiffs' negligence claim?

Standard of Review.

This issue presents the same standard of review as issue no. 2, above.

4. No Contract Exists.

Utah law makes clear that the burden of proving that a contract exists falls on the party seeking to enforce it. Here, Plaintiffs merely point, by name, to documents they contend constitute contracts between Plaintiffs and the Division. But Plaintiffs neither identify where those alleged contracts were introduced in the district court nor explain to this Court why those documents give rise to Plaintiffs' contract claim. Have Plaintiff met their burden here to show that a contract exists?[2]

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[2] Related to Plaintiffs' breach of contract claim is a claim that the Division violated an implied covenant of good faith and fair dealing. But Utah

Standard of review.

The existence of a contract presents a question of law reviewed for correctness. *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 16, 84 P.3d 1134.

Preservation of Issues

The adequacy of Plaintiffs' brief presents an issue unique to this appeal and no preservation requirement applies. The remaining, substantive issues were raised in the summary judgment pleadings. R. 279-392; 410-490. The district court orders granting those motions and the court's final judgment dismissing Plaintiffs' complaint with prejudice are attached at Addendum A. R. 393-394; 403-405; 492-498.

Determinative Statutes

The following statutory provisions determinative to this appeal are set out verbatim in Addendum B. *See* Utah Code Ann. § 62A-4a-250 (West 2009); *Id.* § 78A-6-118; *Id.* § 78A-6-312; *Id.* § 78A-6-401.

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law makes clear that in the absence of a contract, no implied covenants exist. *See Savage v. Educators, Inc.*, 908 P.2d 862, 866 (Utah 1995) (an implied contractual obligation cannot exist in the absence of an express contract).

Statement of the Case

Nature of the Case

Plaintiffs sued the Division for damages they allege to have suffered when Plaintiffs voluntarily relinquished their parental rights to a minor child whom Plaintiffs previously adopted.

Course of the Proceedings and Disposition Below

Plaintiffs sued the Division and others in the Fourth District Court for numerous common law torts and for breach of a contract and an implied covenant of good faith. R. 1-25. The Division filed an answer, while other defendants moved to dismiss Plaintiffs' complaint. R. 69-102. Plaintiffs did not timely oppose the motion and the district court issued a minute entry, granting the same. R 119. Plaintiffs then filed an opposition memorandum, which the district court disregarded in its order granting the motion and dismissing the moving parties from Plaintiffs' suit. R. 136-139. Plaintiffs have not appealed from that order. *See* R. 500-501.

The Division next filed a motion to dismiss all but Plaintiffs' negligence claim. R. 192-207. Co-defendant Carolyn Nay joined the motion and Plaintiff filed a memorandum opposing only the Division' s contract arguments. R.

208-212; 214-216. The Division submitted its reply and a notice asking the district court to rule without oral argument. R. 220-233. The district court did so on October 31, 2008. R. 236-238. The court dismissed the Division and defendant Nay from Plaintiffs' second, third, sixth, seventh, eighth, ninth and tenth causes of action. R. 238. The court denied the Division's motion as to Plaintiffs' contract claims, but dismissed defendant Nay with prejudice because there were no allegations that Ms. Nay entered into a contract or other agreement with Plaintiffs. *Id.* Plaintiffs also did not appeal from that order. *See* R. 500-501.

Then in April 2009, the Division filed a motion and memorandum, seeking summary judgment dismissing Plaintiffs' negligence claim. R. 278-332. Co-defendant Nay joined the motion and Plaintiffs' opposed it. R. 328-362. As before, the Division submitted its reply and a notice waiving oral argument. R. 369-392. In a June 11 order, the district court dismissed Plaintiffs' negligence claim against the Division and co-defendant Nay with prejudice. R. 393-394; 400-401.

The Division next conducted discovery relative to Plaintiffs' two, remaining claims. In their response, Plaintiffs identified three documents that Plaintiffs contended represent written contracts: 1) Adoptive Foster

Agreement, dated July 28, 2004; 2) Adoption Agreement, dated July 2005, and 3) Adoptive Parent Statement of Disclosure. R. 428-431, 451.[3]

On the close of this discovery, the Division filed an additional motion for summary judgment that Plaintiffs opposed. R. 410-460. There, the Division sought an order dismissing Plaintiffs' contract claims. *Id.* Plaintiffs responded, contending that Division service plans also provided written contracts to be enforced against the Division. R. 456-460. Plaintiffs did not attach any plans or cite to any express provisions in their opposition. *Id.*

The Division submitted its final reply memorandum, after which the district court set the matter for a hearing and asked the parties to specifically address whether a single provision contained in the July 2005 Adoption Agreement gave rise to a contract claim. R. 461-469; 473-475. The Division submitted a supplemental memorandum. R. 476-490. Plaintiffs did not.

The court heard oral argument on September 14, 2009, at the conclusion of which, Judge McVey granted the Division's motion. R. 491. The district court entered its summary judgment order dismissing the remaining contract

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[3] Each document was unsigned by Plaintiffs, a fact the Division agreed to overlook for purposes of its motion for summary judgment only. R. 451, n. 1. For this Court's reference, each document is set forth in the attached Addendum C.

claims with prejudice on October 2. R. 492-495. The court entered a final judgment and order the same day. R. 496-498.

Plaintiffs timely filed a notice of appeal from the order dismissing their first cause of action (negligence) and from the order dismissing Plaintiffs' fourth and fifth cause of action (contract claims). R. 500-501.

STATEMENT OF FACTS

B.M. was removed from his biological parents and placed in the State' s custody in April 2002. R. 22-23. In June 2004, he was placed with Plaintiffs' in foster care. R. 23.

At that time, the Division notified Plaintiffs that B.M. had been the victim of sex abuse and that B.M. had also been involved in a prior instance of sexual misconduct. R. 23. B.M. remained in Plaintiffs' care without incident, and Plaintiffs adopted him in October 2005. R. 21-22. During this time, Plaintiffs also became foster parents to another minor, J.G., who resided with Plaintiffs from February to November 2005. *Id.*

Shortly after Plaintiffs adopted B.M., they discovered J.G. sexually abusing their minor daughter. R. 21. J.G. was removed from Plaintiffs' home that day. *Id.* During a subsequent interview, J.G. disclosed that B.M. had also engaged in sexual misconduct with Plaintiffs' daughter. *Id.* B.M.

too was removed from Plaintiffs' home and was placed in the Slate Canyon Detention Center pending arraignment. R. 298, Affidavit of Timothy McOmber, ¶ 3.

B.M. came before the Fourth District Juvenile Court for an arraignment hearing on December 13, 2005, where he admitted one charge of sexual abuse of a minor and was adjudicated by that court as delinquent. R. 308, *Minutes, Findings and Order*, entered December 13, 2005. The juvenile court placed B.M. in the Division's interim, legal custody and ordered that he remain confined at the detention facility pending release to an appropriate setting. R. 307-308. The court continued the matter for further disposition. R. 307.

At the disposition hearing held January 10, 2006, the juvenile court ordered B.M. placed in the custody and guardianship of the Department of Human Services for appropriate "out of home placement" and named the Division as the lead supervising agency. R. 298, McOmber Aff., ¶ 4; 306, *Findings and Order*, dated January 10, 2006. The juvenile court made no orders directing the Division to provide reunification services. *See* R. 306, generally.

Following that hearing and according to guidelines published by the Utah Network on Juveniles Offending Sexually and input from Division personnel, B.M. was moved from Slate Canyon to Progressive Youth, Inc., for residential

sex abuse treatment. R. 297-298, McOmber Aff. at ¶¶ 4-5. Progressive Youth provided B.M. with an alternative to continued juvenile detention. *Id.* at ¶ 5. B.M. remained involuntarily placed at Progressive Youth until the date of his court-ordered release in July 2007. *Id.* at ¶ 8.

B.M. next appeared in the juvenile court on April 12, 2006. R. 305. There, the court continued its prior orders and set B.M.' s case for review on July 12, 2006. *Id.* On that date, the juvenile court received and reviewed a Court Report, prepared by a Division caseworker. R. 301-303, *Review Order*, dated July 12, 2006; R. 330-333, Quarterly Progress Summary Court Report, dated July 10, 2006. That Report set out several " Service Plan" objectives pertaining to B.M., but none pertaining to Plaintiffs. R. 330-333. The Report also indicated

> There recently has been a concern that [B.M.' s] adoptive family has disengaged with [him] and his therapeutic process. It seems that Mr. and Mrs. Morford are stepping back from the whole process involving [B.M.] to assess what level and how they will be involved in [his] life. [B.M.] had made a comment that he did not want to return home. It was reported that his comment was made during a time of frustration and [B.M.] has since stated that he does not wish to return home. This may be the catalyst for the Morford' s withdrawal.

R. 332.

At the close of that hearing, the court continued B.M. in the State' s custody for appropriate residential placement. R. 302-303. The court once

more made no orders respecting reunification services. *See* R. 302-303, generally.

On July 19, 2006, the Division held a team meeting to address B.M.'s continued needs.[4] R. 18, Compl, ¶ 45. Plaintiffs attended the meeting, after which they determined to relinquish their parental rights to B.M. *Id.* at ¶ 47. Plaintiffs formally relinquished their parental rights in a juvenile court proceeding held August 30. 2006. R. 292, *Order of Termination of Parental Rights*; R. 293-295, *Relinquishment of Termination of Parental Rights.*

Therein, Plaintiffs stated that relinquishment was in B.M.'s best interest; that Plaintiffs knowingly and voluntarily agreed to terminate their ongoing and residual relationship with B.M.; and that as of the date of the relinquishment, all of Plaintiffs' "responsibilities for [,] obligations to and rights in connection with" B.M. were terminated. R. 293-294.

Plaintiffs have never sought to rescind their voluntary relinquishment of or the juvenile court's order terminating Plaintiffs' parental rights to B.M.

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[4] Plaintiffs also attended team meetings held to discuss B.M. and his care on January 30, 2006 and February 21, 2006. R. 420-421.

SUMMARY OF THE ARGUMENT

The district court correctly granted the Division's motions for summary judgment because the Division neither owed Plaintiffs a duty in tort nor under contract to reunify Plaintiffs with a delinquent child. Those orders are sound and should be affirmed by this Court.

As a threshold matter, Plaintiffs have both failed to adequately brief their claims before this Court or to provide this Court with any case law warranting reversal as a matter of law. Plaintiffs have not shown that any material facts are in dispute. They have not shown that the Division owed them a duty under Utah's child welfare laws to provide reunification services. And they have not shown the existence of a contract or any implied contractual obligations respecting those services. The district court orders granting summary judgment are sound and they should be affirmed.

ARGUMENT

I. Plaintiffs' Brief Fails to Comply with Rule 24 of the Utah Rules of Appellate Procedure.

Appellate Rule 24 sets out the component parts of a proper appellate brief. Plaintiffs' brief fails to comply with that rule in a number of respects. The Court may strike and disregard Plaintiffs' brief in total, Utah R. App. P.

24(k); *see Burton Lumber & Hardware Co.*, 2008 UT App. 207, n. 5, 186 P.3d 1012; *Burns v. Summerhays*, 927 P.2d 197, 199 (Utah Ct. App. 1996), or alternatively, the Court may disregard those portions of the brief that fail comply with Rule 24 and to presume, instead, the correctness of the district court' s actions below. *See Koulis v. Standard Oil Co. of Cal.*, 746 P.2d 1182, 1185 (Utah 1987).

Pertinent here, Rule 24 provides:

> **(a) Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:
>
> . . . .
>
> (a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes, and other cited authorities, with references to the pages of the brief where they are cited.
>
> . . . .
>
> (a)(5)(A) citation to the record showing that the issue [presented for review] has been preserved in the trial court;
>
> . . . .
>
> (a)(6) Constitutional provisions [and] statutes . . . whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

> (a)(7) A statement of the case. . . . . A statement of the facts relevant to the issues presented shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

Utah R. App. P. 24(a).

In addition, Utah law makes certain that an adequate appellate brief is one that goes beyond mere assertions and conclusory allegations. Instead, an adequate brief contains a thorough identification of the issues and thoughtful analysis of those issues, with citation to relevant legal authorities. *See State v. Lee*, 2006 UT 5, ¶ 22, 128 P.3d 1179; *Kramer v. State Retirement Bd.*, 2008 UT App. 351, ¶ 22, 195 P.3d 925.

Plaintiffs fail to comply with both the technical and substantive requirements of that rule. In part, Plaintiffs fail to state whether or where they preserved the issues presented on appeal. Plaintiffs have set out a section entitled " Statutory Provisions and Rules," but they have failed to cite to or provide a restatement in that section of the statutory provisions that Plaintiffs argue elsewhere in their brief. Plaintiffs have also attached a " Table of Authorities" to their brief, but that tables references none of the authorities that Plaintiffs cite. Instead, the table appears to pertain to an entirely different cause of action.

Substantively, Plaintiffs have challenged the district court' s grants of summary judgment, claiming that a genuine dispute of the material facts exists, but Plaintiffs offer no citation to the record below. *See* Aplt.' s Br. at pp. 3-5, and generally. And perhaps most glaring, Plaintiffs have failed to properly identify or to develop any analysis of the legal authority upon which they base their claims. But Plaintiffs merely point to sporadic provisions that they believe aid their appeal, without also informing this Court of the legal basis for those claims.

Those reasons provide the Court with sufficient basis to strike and to not consider Plaintiffs' brief. *See* Utah R. App. P. 24. The Division asks that the Court make a searching review of Plaintiffs' brief and to strike it where appropriate. *See, infra,* Point IV. Elsewhere, this Court should limit its review to record facts that the Division has appropriately cited and which are supported by reference to proceedings in the district court below, *see Koulis*, 746 P.2d at 1185, and to give credence to only those legal arguments which are accompanied by thoughtful analysis. *See Lee*, 2006 UT 5, ¶ 22; *Kramer*, 2008 UT App. 351, ¶ 22.

II. The Division Did Not Owe Plaintiffs a Legal Duty and Their Negligence Claim Fails.

The material facts are not in dispute and the district court's summary judgment dismissing Plaintiff's negligence claim should be affirmed. *See* Utah R. Civ. P. 56(c). Neither in the district court nor here on appeal have Plaintiffs made even the barest attempt to dispute the Division's statement of material facts or to illustrate the existence of other, factual disputes sufficient to preclude summary judgment. Instead, Plaintiffs make only unsupported, conclusory allegations that carry no probative weight and that cannot create a genuine issue of material fact. *See Rawson v. Conover*, 2001 UT 24, ¶ 33, 20 P.3d 876 (bald statements do not suffice to establish genuine issue of material fact); *Schunphase v. Storehouse Markets*, 918 P.2d 476, 477-78 (Utah 1996) (bare contentions, unsupported by specific facts raise no material fact as will preclude summary judgment) (citation omitted).

A. The Division had no duty to provide reunification services on behalf of a delinquent child.

Plaintiffs claim the Division owed them a legal duty to provide reunification services respecting B.M. But the Division urges that no legal duty existed. In light of this *legal* dispute, Plaintiffs claim that a genuine issue exists that is sufficient to preclude summary judgment. Plaintiffs err.

" Duty is an essential element of negligence." *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993), *reh' g denied*. One party cannot be liable to another in tort absent a duty. *Yazd v. Woodside Hom e Corp.*, 2006 UT 47, ¶ 11, 143 P.3d 283 (citation omitted). Moreover, the existence of a duty presents a legal question for the court to determine. *Id.* at ¶14. Here, the Division possessed no legal duty to provide reunification services to Plaintiffs and their appeal thus fails.

1. Plaintiffs Possess No Statutory Right to Reunification Services.

Utah' s Juvenile Court Act is comprised of multiple parts that separately address minors adjudicated by that court as abused and neglected from minors adjudicated as delinquent. Pertinent here are Parts 3 and 4. Part 3 speaks to the needs of abused, neglected and dependent children and outlines the rights and obligations owed by the Division to parents of the same. *See* Utah Code Ann. §§ 78A-6-301 to -323 (" Abuse, Neglect, and Dependency Proceedings"). As to those children and their parents, subsection -312 addresses whether and when reunification services are appropriate. *Id.* § 78A-6-312. B.M. was adjudicated as delinquent, not abused or neglected, in December 2005. Accordingly, Part 3 is inapposite here.

By contrast, Part 4 states that " [t]he processes and procedures described in Part 3 . . . *are not applicable* to a minor who is committed to the custody of the [Division] on a basis other than abuse or neglect and who [is] classified in the division' s management information system as having been placed in custody primarily on the basis of delinquent behavior or a status offense." *Id.* § 78A-6-401(1) (emphasis added).[5] Instead, " [t]he procedures described in Subsection 78A-6-118(2)(a) [apply]." *Id.* § 78A-6-401(2). That subsection contains no provision for reunification services, but contemplates that an order vesting the Division with legal custody of a minor for reasons other than abuse, neglect, and dependency " may be for an indeterminate term."

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[5] Utah Code Ann. § 78A-6-117(2)(c)(iii)(A) similarly states " A minor who is committed to the custody of the Division of Child and Family Services on grounds other than abuse or neglect is subject to the provisions of Title 78A, Chapter 6, Part 4, Minors in Custody on Grounds Other Than Abuse or Neglect, and Title 62A, Chapter 4a, Part 2A, Minors in Custody on Grounds Other Than Abuse and Neglect." Utah Code Ann. § 62A-4a-250 states, in turn

> (2)(a) The processes and procedures designed to meet the needs of children who are abused or neglected, described in Part 2 and in Title 78A, Chapter 6, Part 3, Abuse, Neglect and Dependency Proceedings, are not applicable to the minors described in subsection (1).
>
> (b) The procedures described in Subsection 78A-6-118(2)(a) are applicable to the minors described in Subsection (1).

Id.

Id. § 78A-6-118(2)(a).[6] Because B.M. was adjudicated as a delinquent child, Part 4 thus controls.

In the court below, the parties focused on statutes governing abuse, neglect and dependency. Plaintiffs focused on Section 78A-6-312(2)(A)(I),[7] and the Division on Section 62A-4a-203(4)(b) (West 2009). That fact is inconsequential. This Court may affirm the summary judgment order on any ground available the district court, " even if it is one not relied on below." *Higgins*, 855 P.2d at 235; *see Bailey v. Bayles*, 2002 UT 58, ¶¶ 10, 13, 52 P.3d 1158 (court may affirm grant of summary judgment on any ground apparent from the record).

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[6] And like Part 4, Part 6 specifically addressees delinquency proceedings involving criminal offenses committed by minors. It too is bereft of any provision mandating or even describing discretionary reunification services. *See id.* §§ 78A-6-601 to -606 passim.

[7] In addition to their claims under Utah Code Ann. § 78A-6-312, Aplt Br. pp. 7-9, Plaintiffs contend that in the absence of a legal duty, the Division undertook a gratuitous obligation to provide reunification services. *Id.* p. 8. *But see* R. 330-333, *Out of Home - Foster Care Quarterly Progress Summary Court Report*, attached as Exhibit D to Plaintiffs' opposition memorandum. There is no evidence that the Division assured Plaintiffs that B.M. would return to reside with them. The only evidence of B.M.' s permanency goal is the court report itself. R. 330-333. And that report is unequivocal on its face: at such time as he was able, the Division believed that B.M. should either be reunified with Plaintiffs *or* be placed in the guardianship of relatives. R. 333. The mere fact that the Division stated a concurrent permanency goal disclaims any obligation on the Division' s part to reunify B.M. with Plaintiffs. Further, even had the Division agreed to provide reunification services to Plaintiffs as a gratuity, Plaintiffs voluntary extinguished that gratuity when they knowingly and voluntarily relinquished their parental rights to B.M.

Here, the undisputed record supports the district court's grant of summary judgment. B.M. was removed from home in April 2002 due to his biological parents' abuse or neglect of B.M. R. 23. But he was removed from Plaintiffs' care in December 2005 due to B.M.'s own, delinquent conduct. R. 298, McOmber Aff. ¶ 3; 333, Quarterly Progress Summary Court Report, ¶ IV., dated 4/12/06; 425, Quarterly Progress Summary Court Report, ¶ IV, dated 7/10/06. This distinction is material and compels this Court to affirm the district court's grant of summary judgment.

Because B.M. was removed from Plaintiffs' home due to his delinquent conduct, not Plaintiffs' abuse or neglect of B.M., the Division had no legal duty to provide Plaintiffs with reunification services. *Compare* Utah Code Ann. § 78A-6-312 to § 78A-6-401; *see also id.* § 62A-4a-250. In the absence of a legal duty, the Division cannot be liable to Plaintiffs in tort. *See Higgins*, 855 P.2d at 235; *Yazd*, 2006 UT 47, ¶ 11. The district court's grant of summary judgment is therefore sound, and this Court should affirm that court's dismissal of Plaintiffs' negligence claim.

2. Plaintiffs possess no constitutional right to reunification services.

Parental rights constitute constitutionally protected interests. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (parental rights constitute Fourteenth

Amendment fundamental liberty interest); *In re. J.P.*, 648 P.2d 1364, 1375 (Utah 1982) (recognizing similar interest under the Utah Constitution). But the issue here is not Plaintiffs' parental rights, but their claimed right to receive reunification services. On that point, this Court has previously held that " [r]eunification services are a gratuity provided to parents by the Legislature, and appellants thus have no constitutional right to receive [them]." *State ex rel. N.R.*, 967 P.2d 951, 955-56 (Utah Ct. App. 1998) (citing *State ex rel. M.E.C.*, 942 P.2d 955, 959 (Utah Ct. App. 1997); *State ex rel. L.D.S.*, 797 P.2d 1133, 1139 (Utah Ct. App. 1990)).[8]

Because Plaintiffs possess neither a statutory nor constitutional right to receive reunification services. Their claim here thus fails.

III. Plaintiffs Concede that the Division Is Immune from Plaintiffs' Negligence Claim.

Even assuming Plaintiffs could demonstrate the existence of a duty, the Division possesses sovereign immunity from Plaintiffs' negligence claim.

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[8] Stare decisis also compels this Court to conclude that Plaintiffs possess no constitutional right to reunification services. In other parts of their brief, Plaintiffs acknowledge that reunification services constitute a " gratuity provided to parents," Aplt Br. p. 8. But without citing *State ex rel. N.R.* or *State ex rel. L.D.S.*, Plaintiffs urge this Court to find that they possess a protected right to receive reunification services. " Those asking [the court] to overturn prior precedent have a substantial burden of persuasion." *See State v. Menzies*, 889 P.2d 393, 398 (Utah 1994). Plaintiffs have done nothing to meet that burden. Absent that showing, this Court must affirm the district court.

Utah courts take a three-step approach to determine whether the State retains immunity from suit. *See e.g., Hoyer v. State*, 2009 UT 38, ¶ 10, 212 P.3d 547; *Peck v. State*, 2008 UT 39, 8, 191 P.3d 4. Plaintiffs ignore the first two questions, but focus only on the third inquiry – whether the Division has retained its immunity from Plaintiffs' second cause of action. Aplt. Br. p. 9-10. That inquiry is dispositive and calls on this Court to affirm the district court's order dismissing Plaintiffs' negligence claim.

Under Utah Code section 63G-7-301(5), the State plainly retains sovereign immunity "if the injury arises out of, in connection with, or results from" one of twenty enumerated fact patterns. Relevant here are subsections (f), retaining the Divisions' s immunity in the face of "a misrepresentation by an employee whether or not it is negligent or intentional," *id.* § 63G-7-301(5)(f), and subsection (j), immunizing the Division when an injury arises out of "the incarceration of any person in any state prison, county or city jail, or other place of legal confinement." *Id.* § 63G-7-301(5)(j).

Utah's courts have broadly interpreted the phrase "arises out of, in connection with, or results from" and have found that it requires "only that there be some causal nexus between the risk and the resulting injury." *Blackner v. State*, 2002 UT 44, ¶ 15, 48 P.3d 949 (citing *Taylor v. Ogden City Sch. Dist.*, 927 P.2d 159, 163 ("term 'arising out of' . . . reaches further than

'caused by' "). The Utah Supreme Court recently clarified that the State retains its sovereign immunity " when 'but for' the act covered by the [retainer], the harm would not have occurred." *Hoyer*, 2009 UT 38, ¶ 25. Plaintiffs do not seriously analyze that authority; instead, they concede the Division' s immunity in two different ways.

First, Plaintiffs agree that B.M. was incarcerated in a place of legal confinement as that phrase has been interpreted by Utah' s court; *see* Aplt. Br. p. 9, and they concede that their claimed injury resulted, instead, from another immune category – the Division' s alleged, negligent misrepresentations to Plaintiffs.[9] *See id.* p. 9-10. Because Plaintiffs agree both that B.M. was " incarcerated in a place of legal confinement" and that Plaintiffs voluntarily relinquished their parental rights to B.M. " as result of misrepresentations," Plaintiffs concede the Division' s immunity from their

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[9] Not only does this concession give rise to the Division' s immunity under Utah Code Ann. § 63G-7-301(5)(f), it raises an argument on appeal that Plaintiffs have waived. In September 2008, the Division moved to dismiss all but Plaintiffs' negligence claim, including Plaintiffs second, third and ninth causes of actions predicated on the Division' s alleged negligent misrepresentations. R. 192-207. Plaintiffs filed a memorandum opposing the motion, but addressing only the Division' s contract arguments and none of the Division' s immunity claims. R. 208-212. The district court granted in part the Division' s motion and dismissed Plaintiffs' second, third, sixth, seventh, eighth, ninth and tenth causes of action. R. 238. By failing to respond to the Division' s claim at that time, Plaintiffs have not properly preserved their ability to raise that issue here. *Sittner v. Schriever*, 2000 UT 45, ¶ 16, 2 P.3d 442 (failure to raise argument in trial court precludes party from raising it on appeal).

negligence claim. Thus, even were this Court to find that the Division had a duty to provide Plaintiffs with reunification services and that it breached that duty by failing to offer those services, the Division is immune under Utah Code Ann. § 63G-7-301(5)(f) and (j). The Court should therefore affirm the district court order dismissing Plaintiffs' negligence claim. *See Higgins*, 855 P.2d at 235;*Bailey*, 2002 UT 58, ¶¶ 10, 13.

IV. Plaintiffs' Contract Claims Fail as a Matter of Law.

Long-standing Utah law provides that absent a meeting of the minds, no contract exists. *Oberhansly v. Earle*, 572 P.2d 1384, 1386 (Utah 1977). That law also makes clear that the burden of proving that a contract exists falls on the party seeking enforcement. *Id.* Here, Plaintiffs allege that the Division entered into and then breached a host of alleged contracts to provide them with reunification services. Aplt. Br. p. 12. Plaintiffs neither cite to where those agreements are contained in the record nor explain how those agreements, or Utah law, supports their claim. The summary judgment order should be affirmed.

Utah law maintains that an adequately briefed argument contains the appellant' s contentions and reasons with respect to the issues presented; it includes the grounds for review; and sets forth citation to the authorities,

statutes and parts of the record that the appellant relies on. *See* Utah R. App. P. 24(a) (9). To this end, Utah courts consistently hold that " to be adequate, briefs must provide 'meaningful legal analysis.' " *Lee*, 2006 UT 5, ¶ 22. Moreover, " bald citation to authority" that is devoid of analysis is not adequate. *Id.*

Here, Plaintiffs' briefing is wholly inadequate. Plaintiffs' contract claims are conclusory. They offer no citations to the record. They cite to no legal authority. And Plaintiffs give this Court no thoughtful analysis. In short, Plaintiffs' contract claims fail to meet even the threshold requirements of Rule 24. The Division therefore ask that this Court decline to address the merits of those claims and to uphold the trial court' s grant of summary judgment.

Alternatively, and should the Court find that Plaintiffs have adequately supported their claims, they nonetheless fails.

A. The Division Service Plans Do Not Give Rise to a Contract for Reunification Services.

Plaintiffs first allege that after B.M. was removed from them and placed in detention and then with Progressive Youth, the Division entered into and

breached a series of service plans with Plaintiffs.[10] But Plaintiffs failed to properly identify or to introduce those plans in the court below or to point – there, or on appeal – to any case law holding that a service plan constitutes a binding contract.[11]

Instead and without producing the alleged plans, Plaintiffs assert that they contractually obligated the Division

> 1. " [T]o place B.M. in an 'adequately supervised, safe and secure . . . treatment facility."
>
> 2. " [T]o use its 'best efforts to return [B.M.] to [Plaintiffs'] home following his treatment, and to involve the [Plaintiffs] by giving and accurate status reports of [B.M.' s] treatment"
>
> and
>
> 3. " [T]o promptly notify Plaintiffs of any incident or injury during [B.M.' s] treatment plan."

Aplt. Br. p. 12-13.

But in their answers to the Division' s interrogatories, Plaintiffs described the support for each, respective obligation as 1) a juvenile court order placing B.M. in a level 5 facility and Plaintiff' s belief that B.M. would be placed in

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[10] A service plan is a statutorily required treatment plan the Division creates for any child entering state custody. *See* Utah Code. Ann. § 62A-4a-205 (West. 2009).

[11] Moreover, the Division has searched for that authority and has found none.

that facility,[12] R.285-286; Answers to State of Utah's First Set of Interrogatories to Plaintiffs, Ans. to Int No. 6; 2) unspecified training that Plaintiffs received, a court report,[13] and an undefined statute, R.284-285, Ans to Int. No. 7; and 3) a Progressive Youth Supervisor, named Dawnya. R. 283-284, Ans. to Int. No. 8.

It is Plaintiff's burden to prove the existence of contractual obligations. *Oberhansly*, 572 P.2d at 1386. Here, Plaintiffs have failed to produce the alleged service plans or to show that the alleged obligations were contained in those plans. Plaintiffs have thus failed to defeat the Division's properly supported motion for summary judgment and the district court's order should be affirmed. *See Orvis v. Johnson*, 2008 UT 2, ¶ 8, 177 P.3d 600.

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[12] The juvenile court did not order B.M. placed in a "level 5 facility," but that court directed the Division to screen B.M.'s case for "an appropriate out of home placement." R. 307-308. Plaintiffs have offered no evidence that Progressive Youth did not constitute such a placement.

[13] Plaintiffs contend that because the court reports provided that B.M. had a concurrent permanency goal of reunification with Plaintiffs that the Division was contractually bound to see that that occurred. But B.M.'s concurrent "goal" was just that – a goal – neither a contractual obligation nor a guarantee. It reflects only the Division's judgment that at such time as B.M. was rehabilitated and released from the juvenile court's jurisdiction, he should be reunified with Plaintiffs, *or* be placed in an approved kinship placement. *See also, supra* n.7.

B. The Adoption Agreements Do Not Give Rise to a Contract for Reunification Services.

Plaintiffs next claim that the Division breached various adoption agreements by failing to inform them of B.M.' s sexual history, and by interfering with Plaintiffs' parental rights. However, Plaintiffs concede the failure of their first claim and they fail to adequately support their second contention. The Division addresses those claims in reverse.

1. The adoption agreement do not contractually obligate the Division to provide Plaintiffs with post-adoption reunification services.

Without more, Plaintiffs assert that the Division possessed a duty under unspecified adoption documents to not interfere with their parental rights. Plaintiffs claim that the Division breached those agreements by failing to offer them reunification services relative to B.M.' s delinquency action, and by manipulating Plaintiffs' into relinquishing their parental rights to B.M. The district court addressed only the first claim, but both claims fail.

i. The adoption agreements.

Plaintiffs do not distinguish among the various adoption agreements. But as the Division made clear in the district court, to the extent it is a contract at

all, only the document entitled " Adoption Agreement" pertains.[14] R. 430. That agreement, dated July 2005, sets forth various responsibilities by adoptive parents and the Division " to help facilitate the successful adoptive placement." *Id.* And with the exception of paragraph 3 under the section entitled " Agency Responsibilities", that agreement applies to the pre-adoption period only.

Paragraph 3 states " [t]he agency agrees to provide information, services, and referrals during and after the supervision period to enable the family to be successful in the adoption." R. 430, attached as Ex. C to the Division' s Memorandum in Support of Summary Judgment. Admittedly, that paragraph places some onus on the Division to cooperate with Plaintiffs to reach a successful adoption. But the paragraph places no obligation upon, nor any agreement by the Division to offer Plaintiffs post-adoption reunification services that the juvenile court did not order or that Juvenile Court Act does not require. *See* discussion at Point II, *supra*. Moreover, because Plaintiffs

[14] The remaining documents address only the supervision and pre-adoption periods and on their fact, they have no application here. R. 429, 431.

have failed to point here or in the trial court to record facts that support an alternative interpretation of the agreement, Plaintiffs' claim thus fails.[15]

ii. Plaintiffs' voluntary relinquishment.

Finally, in a single sentence argument, Plaintiffs claim that the Division breached the adoption agreements by improperly manipulating them into relinquishing their parental rights. Aplt. Br. p. 16. Plaintiffs do not detail the offending conduct, but elsewhere in their brief, Plaintiffs claim that they relinquished their parental rights to B.M. because the Division misrepresented B.M.' s progress and also that B.M. no longer wished to live with Plaintiffs. Aplt. Br. p. 15.

Plaintiffs' first contention – that the Division misrepresented the progress that B.M. was making in his residential treatment – stands alone. It has no support in the record and is insufficient to preclude a grant of summary judgment.

But Plaintiffs' second claim – that the Division misrepresented to them that B.M. did not wish to return to their home – is rebutted by the record.

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[15] Below, Plaintiffs had both the opportunity and obligation to point to facts sufficient to defeat the Division' s motion for summary judgment. *See* Utah R. Civ. P. 56(c). Were Plaintiffs unable to oppose that motion by affidavit or otherwise, Plaintiffs could have moved under rule 56(f) for a continuance of the summary judgment proceedings to permit them to obtain those facts by deposition or discovery. Having failed to do so, Plaintiffs cannot be heard to complain that a question of fact may yet exist.

Namely, one week before Plaintiffs determined to relinquish their rights to B.M., Plaintiffs were present in court when the juvenile court judge received and reviewed a court report, wherein a Division caseworker stated:

> There recently has been a concern that [B.M.' s] adoptive family has disengaged with [him] and his therapeutic process. It seems that [Plaintiffs] are stepping back from the whole process involving [B.M.] to assess what level and how they will be involved in [his] life. [B.M.] had made a comment that he did not want to return home. It was reported that his comment was made during a time of frustration and [B.M.] has since stated that he does not wish to return home. This may be the catalyst for the [Plaintiffs'] withdrawal.

R. 330-333, Quarterly Progress Summary Court Report, dated July 10, 2006.

Notwithstanding, Plaintiffs relinquished their parental rights on August 30. 2006 because that was their desire. R. 292, *Order of Termination of Parental Rights*; R. 293-295, *Relinquishment of Termination of Parental Rights*. It is undisputed that Plaintiffs have never sought to set aside that relinquishment or to reinstate their familial relationship with B.M.[16] But the record facts make clear that Plaintiffs relinquished their parental rights to B.M. not because the Division tricked them into doing so, but because Plaintiffs believed that relinquishment was in B.M.' s best interest; that Plaintiffs knowingly and voluntarily made the decision to sever that

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[16] Plaintiffs did not ask the district court to reverse or to set aside their relinquishment in the action below, nor have they instituted any other action seeking relief from the order terminating their parental rights.

relationship; and that as of August 30, 2006 all of Plaintiffs " responsibilities for [,] obligations to and rights in connection with" B.M. were terminated. R. 293-294.

Having voluntarily, knowingly and intentionally relinquished any and all rights that they had as adoptive parents to B.M., Plaintiffs relinquished any contractual right they may otherwise have had under the paragraph 3 of the adoption agreement. By relinquishing their parental rights to B.M., Plaintiffs not only extinguished and waived any continued relationship that they had with B.M., they extinguished and thus waived any ongoing relationship with the Division as well. *See In re Estate of Flake*, 2003 UT 17, ¶¶ 310-31, 71 P.3d 589 (a contract waiver occurs when a party intentionally acts in manner inconsistent with its contractual rights).

2. Plaintiffs concede that the Division provided them with evidence of B.M.' s past history of sexual abuse and perpetration.

Finally, at paragraph 11 of their complaint, Plaintiffs aver:

> [B.M.] was taken into DCFS custody in April 2002 . . . because he and other youths in his neighborhood were involved in an incident of sexual behavior. It was discovered that [B' s] brother had introduced him to such sexual behavior.

R. 23. And at paragraph 12, Plaintiffs agree that at the time B.M. was placed in their care, the Division informed them about that incident of sexual

misconduct. *Id.* But on appeal, Plaintiffs contend that the Division breached several adoption-related contracts or documents when " the State of Utah failed to inform [Plaintiffs] of B.M.' s sexual history prior to the adoption." Aplt Br. p. 16. Plaintiffs' own complaint belies that claim. Having admitted that the Division provided Plaintiffs with information related to B.M.' s history as both a victim and perpetrator of sex abuse, this claim necessarily fails. The summary judgment must be affirmed.

C. The Adoption Agreements Do Not Give Rise to Any Implied Contractual Obligations.

Even despite the existence of a contract for reunification services, Plaintiffs contend that the Division breached an implied covenant or good faith and fair dealing. R. 7, Compl. ¶¶ 100-106.[17] But in the absence of an express contract, no implied duties may stand. *Savage v. Educators Ins. Co.*, 908 P.2d 862, 866 (Utah 1995).

The Utah Supreme Court has stated a " duty of good faith and fair dealing is a contractual covenant[;] one that arises solely as an incident to contractual

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[17] In their opening brief, Plaintiffs mistakenly state that they possess an implied contract. *See* Aplt. Br. p. 17. Furthermore, a party a cannot enforce a contract against the state absent " very specific written representations by authorized government entities." *Anderson v. Pub. Serv. Comm' n*, 839 P.2d, 822, 827 (Utah 1992).

obligations." *Id.* Because here, Plaintiffs have failed to show the existence of a contract with the Division, Plaintiffs have also failed to show they possess a cause of action for the breach of an implied covenant. The trial court's order dismissing Plaintiffs' fifth cause of action is therefore sound. The Division asks this Court to affirm it.

CONCLUSION

Plaintiffs have failed to show that the district court erred when it granted the Division's motions for summary judgment. Those decisions were correct and the Division therefore asks this Court to affirm the orders granting summary judgment and the district court's final judgment and order dismissing Plaintiffs' complaint with prejudice.

RESPECTFULLY submitted this 10th day of May, 2010.

Bridget K. Romano
Assistant Utah Attorney General
Attorney for Appellee

CERTIFICATE OF SERVICE

I certify that two copies of **APPELLEE' S ANSWER BRIEF** was sent by U.S. Mail, postage prepaid, this 10th day of May, 2010 to the following:

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