

2010

William A. Doyle v. Lehi City, Blythe Bay, Daniel Harrison, Amanda Len Mackintosh : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS, STATE OF UTAH

WILLIAM A. DOYLE, an individual,

Plaintiff/Appellant,

vs.

LEHI CITY, a Municipal Corporation,
BLYTHE BRAY, an individual, DANIEL
HARRISON, an individual, and AMANDA
LEN MACKINTOSH, an individual,

Defendants/Appellees.

**BRIEF OF APPELLANT
WILLIAM A. DOYLE**

Appellate Case No. 20100420

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

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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 striking certain portions of submitted affidavits in support of Appellant's *Memorandum in Opposition to Appellees' Motion for Summary Judgment*?**

Standard of Review: Abuse-of-discretion. In reviewing a decision to striking affidavits an appellate court “looks to [its] prior decisions regarding the admission of evidence more generally.” In civil cases, where the evidence sought to be introduced does not raise concerns of the type that have produced heightened standards of sensitivity, a trial court decision to admit evidence is reviewed under a broad grant of discretion. *In re General Determination of Rights to Use of All Water*, 982 P.2d 65, 72 (Utah, 1999).

Issue Preserved at: [R. 357-359, 447-449, 452-454, 462].

2. **Did the trial court err in determining that Appellant had no legally protectable interest in his position as a volunteer coach?**

Standard of Review: Correctness. *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 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); see also *Goodnow v. Sullivan*, 2002 UT 21, ¶ 1, 44 P.3d 704.

Issue Preserved at: [R. 202-245, 311-352, 405-422, 448-452].

3. Did the trial court err in determining that the Appellant's Amended Notice of Claim was inadequate to put Appellee Lehi City on notice of Appellant's defamation and breach of contract causes of action?

Standard of Review: Correctness. *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 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); see also *Goodnow v. Sullivan*, 2002 UT 21, ¶ 1, 44 P.3d 704.

Issue Preserved at: [R. 204, 311, 445-447].

STATEMENT OF THE CASE

Nature of the Case.

1. This appeal requires the Court to determine the following questions of law:
 - (1) Whether the paragraphs stricken from submitted affidavits in support of Appellant’s *Memorandum in Opposition to Appellees’ Motion for Summary Judgment* were relevant, established foundation, were non-conclusory, and admissible;
 - (2) Whether Appellant had a legally protectable interest in his position as a volunteer coach and the subsidiary questions:
 - (a) Whether volunteers are entitled to the same or similar First Amendment protections as public employees;
 - (b) Whether the individual Appellees are protected from Appellant’s 42 U.S.C. §1983 claim by a qualified immunity defense;
 - (c) Whether Appellant provided clearly established legal authority from the

Tenth Circuit to prove that he is entitled to First Amendment protection even though he was a volunteer;

- (d) Whether, for purposes of his Fourteenth Amendment violation claim, Appellant established: (1) that he was treated differently from other similarly situated volunteers, and (2) that Appellees had no rational basis for the disparate treatment;
 - (e) Whether Appellee Lehi City may be held liable for the acts of its employees if it is established that those employees *did* violate Appellant's constitutional rights;
 - (f) Whether Appellant had constitutionally protected liberty or property interests sufficient to invoke Fourteenth Amendment rights;
 - (g) If Appellant did have a liberty and/or property interest in volunteer coaching, whether the trial court's failure to analyze and determine Appellant's procedural due process claim was erroneous;
 - (h) Whether Appellant is entitled to attorney's fees under 42 U.S.C § 1988(b) if he establishes his 42 U.S.C § 1983 claims.
- (3) Whether Appellant strictly complied with Utah Code Ann. § 63G-7-401(3)(a)(ii) even though the *Amended Notice of Claim* did not specifically list potential breach of contract and defamation claims.
2. The Appellant in this case (who was Plaintiff in the underlying trial case) is William A. Doyle, a resident of Utah County, Utah.
 3. The Appellees in this case are Lehi City, a Utah municipal corporation [R. 20], Blythe

Bray, an employee of Lehi City [R. 20], Daniel Harrison, an employee of Lehi City [R. 19], and Amanda Len Mackintosh, an employee of Lehi City. [R. 19].

4. For ease of reference, this Brief will refer to Lehi City, Blythe Bray, Daniel Harrison, and Amanda Len Mackintosh collectively as the “Appellees.”

Course of Proceedings/Disposition of trial court.

5. On September 6, 2007, Appellant filed a *Verified Complaint* in the Fourth Judicial District Court, Utah County against Appellees. [R. 1-20].
6. On August 29, 2008, Appellant filed an *Amended Verified Complaint* in the Fourth Judicial District Court, Utah County against Appellees. [R. 38-61].
7. In the *Amended Verified Complaint*, Appellant alleged the following eight causes of action:
 - (1) First Amendment Retaliation;
 - (2) Equal Protection;
 - (3) Defamation;
 - (4) Procedural Due Process – Liberty Interest;
 - (5) Procedural Due Process – Property Interest;
 - (6) 42 U.S.C. §1983 Cause of Action;
 - (7) 42 U.S.C. §1988(b) Cause of Action; and
 - (8) Breach of Contract.
8. Appellees filed an *Answer and Notice of Intent to Rely on Jury Demand* on October 6, 2008. [R. 62-79].
9. On August 7, 2009, Appellees submitted a *Motion for Summary Judgment* pursuant to

Utah R. Civ. P. 56(c). The *Motion for Summary Judgment* and accompanying memorandum addressed Appellant's qualified immunity claim, constitutional claim, attorney fees claim, and *Notice of Claim*. [R. 97-100, 201-245].

10. Appellant filed a *Memoranda in Opposition* to the *Motion for Summary Judgment* on August 31, 2009. [R. 250-352].
11. On September 21, 2009, Appellees filed a *Motion to Strike Affidavits* with an accompanying memorandum. [R. 353-361].
12. Appellees filed a *Reply Memoranda in Support* of the *Motion for Summary Judgment* on September 21, 2009. [R. 121, 128].
13. Appellant filed a *Memoranda in Opposition* to the *Motion to Strike* on October 5, 2009. [R. 423-428].
14. Appellees filed a *Reply Memoranda* in support of the *Motion to Strike Affidavits* on October 19, 2009. [R. 429-435].
15. After the trial court heard oral arguments on December 14, 2009 [R. 475, p. 1-45] and on January 11, 2010 [R. 476, p. 1-47], the trial court issued its ruling on March 23, 2010 [R. 443-464] and entered an *Order Granting Defendant's Motion for Summary Judgment* and *Motion to Strike* on May 3, 2010. [R. 465-467].
16. In its *March 23, 2010 Ruling*, the trial court granted summary judgment in favor of Appellees on all claims brought by Appellant. The trial court generally determined the following [R. 464]:
 - a. Appellees were entitled to qualified immunity as to any Constitutional-based claim;

- b. Appellant was not a public employee, but a volunteer; therefore, Appellant had no legally protectable interest in coaching;
- c. Because the individual Appellees did not violate Appellant's rights (if any), Appellant's claims must fail as a matter of law;
- d. Appellant had no constitutionally-protected property or liberty interest in his position as a volunteer for the City;
- e. An analysis of any alleged procedural due process violation is unnecessary because Appellant had no protected liberty or property interest to speak of;
- f. 42 U.S.C. § 1988(b) is not a separate cause of action, and at any rate, the court has discretion to award fees only to a prevailing party. Because Appellant did not prevail, he is not entitled to attorney's fees;
- g. Appellant's Amended Notice of Claim did not contain any claim for breach of contract or defamation. Accordingly, those two claims merit dismissal;
- h. Appellant did not allege detrimental reliance and, therefore, could not claim promissory estoppel with respect to his coaching position.

17. The trial court determined that the following affidavits and their respective paragraphs should be stricken for being irrelevant, lacking in foundation, conclusory, containing inadmissible opinion testimony, and/or hearsay [R. 452-454]:

Affidavit	Paragraph(s)
Bridgit Doyle	8, 11, 12, 13, 14, 15, 16 and 17
James Johnston	8, 10, 11, 12, 13, 14 and 15
Alan Paul	7, 8, 10, 11, 12 and 13
Joyce Olson	8, 9 and 10
Sharon Johnston	8
Wayne Stanley Crump	7
Roger Dean	6

18. Appellant timely filed a *Notice of Appeal* on May 10, 2010. [R. 468-470].

STATEMENT OF THE FACTS

Parties and Background.

19. This case involves the termination of Appellant William A. Doyle (“Appellant”) from his position as a volunteer coach for Appellee Lehi City. [R. 100].
20. Lehi City is a municipality that offers formalized youth sports programs to its residents. [R. 238].
21. Lehi City operates the “Legacy Center,” a gym and sports center located in Lehi City. [R. 238].
22. At all relevant times, Appellee Dan Harrison (“Harrison”) was employed by Lehi City as the Director of the Legacy Center. [R. 238].
23. At all relevant times, Appellee Blythe Bray (“Bray”) was the Youth Sports Director at the Legacy Center. [R. 238].
24. Harrison was Bray’s immediate supervisor. [R. 234].
25. At all relevant times, Appellee Amanda Mackintosh (“Mackintosh”) was employed by Lehi City as a youth sports field supervisor. [R. 238].
26. Appellant has been a volunteer coach for Lehi City’s youth baseball program since 1981. [R. 463].
27. Through his participation in the Lehi City’s youth baseball program, Appellant established a reputation within the community as a dedicated and skilled coach and a man of good character and moral integrity. [R. 60].
28. Pursuant to the Volunteer Code of Conduct for Lehi City, volunteers are subject to

the same standards of performance as regular employees, drug tests and background checks. [R. 59, 77].

29. Appellant had taken and passed the “Set a Good Example” (S.A.G.E.) program required by Lehi City before participating in the Lehi City’s youth baseball program. Appellant received a card certifying that he had taken the S.A.G.E. class and was in good standing to continue coaching youth baseball for Lehi City. [R. 59].
30. During the 2006 baseball season, Appellant and his team, the “A’s,” finished in first place in regular season play, won the Lehi City tournament and placed third in the State tournament. [R. 59, 77].
31. At the beginning of the 2006 season, Bray announced a change in procedure that allowed certain teams to be unfairly stacked with an inordinate and disproportionate amount of talented players. [R. 59].
32. Appellant voiced his concerns to Bray that the method by which the draft was conducted was unfair to participants of Lehi City’s baseball program. [R. 59, 77].
33. Throughout the 2006 season, Appellant voiced his concerns to Bray and other members of the community regarding other matters of fairness and safety raised by the administration of Lehi City’s baseball program. [R. 58, 77].
34. In July 2006, after the season had ended, Bray, on two separate occasions affirmatively represented to both Appellant and his spouse, Bridgit Doyle that Appellant would definitely coach a team for the 2007 youth baseball season. [R. 58].

Termination of the Appellant as Volunteer.

35. In July 2006, Bray met with Harrison to discuss her concerns about Appellant and

- possible violations of the Volunteer Code of Conduct (which included allegations that Appellant had periodically acted in an angry manner towards Legacy Center personnel and/or umpires and had occasionally used the word “bullshit” in front of some of the children). [R. 230].
36. Bray and Harrison decided to wait until the following season to see if Doyle would apply for a volunteer coaching position before deciding on the appropriate course of action. [R. 229].
 37. In late March of 2007, Appellant completed and filed a Volunteer Coach Application for the 2007 season. [R. 229].
 38. After Appellant submitted the application, Bray met with Harrison to discuss what course of action to take. [R. 229].
 39. To prepare for discussing the issue of Appellant’s alleged behavior in the 2006 season, Harrison asked Bray to prepare a list of each incident involving Appellant’s behavior of which she was aware. [R. 229].
 40. Bray prepared a list of each incident of Appellant’s conduct that she believed violated the Volunteer Code of Conduct or which she believed was disruptive to the program, its employees, and other volunteers. [R. 229].
 41. The list included seven “instances” of allegedly disruptive behavior: three instances of yelling about policies or programs, two instances of Appellant coming in to Harrison’s office to talk about a policy or program, one instance of starting a petition concerning the recreational programs at the ballpark, and one instance of Appellant appearing at Bray’s office with his wife and other individuals to discuss a problem

that occurred at one of the games. [R. 183].

42. At least three of the instances cited by Bray could not be categorized as inappropriate (an “OK” is written next to those instances), and importantly, in only one instance is there an indication that Appellant used “inappropriate language.” [R. 183].
43. Ultimately Bray and Harrison jointly decided that, based upon alleged observations of “improper conduct” on the part of Appellant by several individuals, Appellant would be declined a volunteer position for the youth baseball program for the 2007 season. [R. 228].
44. On March 27, 2007, Harrison met with Appellant and informed Appellant that he was prohibited from coaching youth baseball for the 2007 season due to complaints about his behavior. [R. 58, 76, 228].
45. Harrison told Appellant that Appellant could coach football or basketball, but not baseball. [R. 58; 76].
46. Harrison told Appellant that if he would keep Bray “happy,” Appellant could have a team the following year. [R. 58].
47. During the March 27, 2007 meeting with Harrison, Appellant was never given any type of official written documentation to support Bray’s decision. [R. 58].
48. Harrison also reviewed the list of seven reasons with Appellant that Bray had provided him as the basis for her decision to prohibit Appellant from coaching baseball. [R. 58-59, 76].
49. Appellant disputed the characterization of his actions, and argued that Harrison never investigated Bray’s accusations to determine their accuracy. Appellant also noted that

Lehi City had never provided prior written notice of any violation or basis for termination prior to actual termination, and that he had no opportunity to for a review hearing or other proceeding prior to his termination. [R. 56].

50. Appellant contends that he was prohibited from serving as a volunteer baseball coach because he voiced concerns to his superiors over issues of fairness concerning the youth participants and how the program was being run. Appellant also argues that he was prohibited from serving as a volunteer baseball coach in an effort to limit his speech concerning the administration of a publicly organized program and to retaliate against Appellant for engaging in speech on a matter of public concern. [R. 305].
51. The list of seven instances prepared by Bray clearly indicates that one reason Appellant was expressly prohibited from volunteering as a baseball coach was because he “started a petition concerning the recreation programs (sports) in Lehi [and] tried to get signatures at the ballpark.” [R. 57, 183].
52. In fact, after Harrison informed Appellant that he would be prohibited from coaching baseball, he warned Appellant not to start a petition because petitions were “a sign of weakness.” Appellant was prohibited from coaching Lehi City baseball because he had engaged in lawful speech concerning the fair administration of the baseball program and other safety matters. [R. 53, 55].
53. Bray and Harrison acted in a manner that tarnished and impeached Appellant’s integrity, virtue, and reputation within the community. [R. 55].
54. The other reasons cited by Bray and Harrison for prohibiting Appellant’s involvement with the baseball program were either fabricated, exaggerated, or

pretextual. Appellant believes the motivations were pre-textual insofar as he was permitted to continue coaching basketball and football while being denied the opportunity to coach baseball. Furthermore, Bray and Harrison explicitly referenced their disapproval of Appellant's efforts to begin a petition. [R. 55-56].

55. There was no attempt by Lehi City to investigate or verify Bray's accusations against Appellant, and no file or documentation existed in support of those accusations prior to or at the time Appellant was denied the 2007 volunteer opportunity. R. 54].
56. Appellant filed a *Verified Complaint* in District Court September 6, 2007. [R. 20].
57. The Complaint alleged 10 separate causes of action: (1) First Amendment Retaliation, (2) Equal Protection, (3) Defamation, (4) Procedural Due Process – Liberty Interest, (5) Procedural Due Process – Property Interest, (6) 42 U.S.C. §1983 Cause of Action, (7) 42 U.S.C. §1988(b) Cause of Action, (8) Breach of Contract, (9) Equitable Estoppel, and (10) Attorney Fees. [R. 3-13].

SUMMARY OF THE ARGUMENT

The trial court erroneously struck paragraphs from the affidavits of Bridgit Doyle, James Johnston, Alan Paul, Joyce Olson, Sharon Johnston, Wayne Stanley Crump, and Roger Dean. The paragraphs that were struck, however, were based upon personal knowledge, show the existence of disputed fact, contain relevant information, and are provided by competent witnesses, thereby satisfying the requirements of Utah R. Civ. P. 56. Furthermore, the trial court erred in determining that fact issues raised in Appellant's own affidavit were immaterial.

The trial court erroneously determined that there was insufficient Tenth Circuit case

law to support Appellant's contention that volunteers have similar or the same First Amendment rights as public employees. The trial court failed to consider all facts detailed in the leading Tenth Circuit case on the issue, *Andersen v. McCotter*, 100 F.3d 723 (10th Cir. 1996), which establishes that volunteers have the similar or the same constitutional protections under the First Amendment.

The trial court erroneously determined that the individual Appellees were entitled to qualified immunity against Appellant's 42 U.S.C. § 1983 claims because volunteers do not have clearly established First Amendment protections or a protectable interest in keeping their volunteer jobs. Appellant argues, on the contrary, that volunteers do have such protections and interests and that the individual Appellees violated Appellant's clearly established constitutional rights of which a reasonable official would have known. Appellant also argues that Appellant provided clearly established legal authority from the Tenth Circuit to establish that he is entitled to First Amendment protection despite his volunteer status.

With respect to his Fourteenth Amendment violation claim, Appellant properly established: (1) that he was treated differently from other similarly situated volunteers, and (2) that Appellees had no rational basis for their disparate treatment in terminating his baseball coaching position for the 2007 season. Appellant contends that Lehi City may be held liable for the acts of its employees if it is established that those employees did violate Appellant's constitutional rights.

Appellant argues that he had constitutionally protected liberty or property interests sufficient to invoke Fourteenth Amendment rights; and if Appellant did have a liberty and/or property interest in volunteer coaching, the trial court's failure to analyze and

determine Appellant's procedural due process claim was erroneous.

If Appellant establishes his 42 U.S.C. § 1983 claims, he would be entitled to attorney's fees pursuant to 42 U.S.C. § 1988(b).

Finally, Appellant asserts that the trial court improperly determined that his *Amended Notice of Claim* did not strictly comply with Utah Code Ann. § 63G-7-401 of the Governmental Immunity Act of Utah ("UGIA") because Appellant did not specifically list "breach of contract" or "defamation" as causes of action. Utah Code Ann. § 63G-7-401 does not require a claimant to list specific causes of action in the notice of claim.

ARGUMENT

1. **The trial court erred in striking certain portions of submitted affidavits in support of Appellant's *Memorandum in Opposition to Appellees' Motion for Summary Judgment* because the portions of the submitted affidavits complied with the requirements of Utah R. Civ. P. 56.**

A. Standard of Review.

Because there is no established standard for reviewing a decision striking affidavits, the standard of review for the admission of evidence "varies depending on the type of evidence at issue." In civil cases, where the evidence sought to be introduced does not raise concerns of the type that have produced heightened standards of sensitivity, a trial court decision to admit evidence is reviewed under a broad grant of discretion. *In re General Determination of Rights to Use of All Water*, 982 P.2d 65, 72 (Utah, 1999).

B. The trial court improperly excluded relevant affidavit testimony in favor of Appellant's legal position.

Utah R. Civ. P. 56(c) establishes the standard for summary judgment and provides in relevant part:

The judgment sought shall be rendered if the pleadings, depositions, answers

to interrogatories, and admissions on file, together with *the affidavits*, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Emphasis added).

Utah R. Civ. P. 56(e) further indicates:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The bases upon which the trial court *actually* decided to strike certain portions of affidavits favorable to Appellant (thus removing any potential material fact “in controversy” and paving the way for summary judgment in favor of Appellees) are as follows: (1) Appellant had made inappropriate comments in a public forum, (2) affidavit testimony offered by witnesses favorable to the Appellees was relevant, and (3) affidavit testimony in direct contradiction to Appellees’ affidavits and in support of Appellant was immaterial.

Material facts in this case would be those that relate to: (1) Whether Appellant was banned from the voluntary coaching program because he publically raised an issue of concern about violations by the Lehi City in the sports program; (2) Whether Appellant, not in his capacity as citizen, but in his capacity as coach, had a right to raise such issues as they directly impacted the children who he coached, and the other children in the league in general, who could not represent themselves; and (3) Whether Appellant expressed himself inappropriately before children in violation of the rules so as to make his exclusion from coaching appropriate. Evidence from witnesses with personal knowledge about any of these three areas would be material.

Controversy cannot be “balanced” or “eliminated” by simply erasing one side of the ledger. The purpose of trial is to grant a forum for legitimate controversies to be aired in the

interest of justice. Summary judgment is only appropriate when, as a natural result of review, it is determined that there is no controversy—not because of systematic elimination by the trial court of sworn statements permitted under Rule 56 to establish the existence of two opposing points of view.

In *Drysdale v. Ford Motor Co.*, 947 P.2d 678 (Utah, 1997) the Utah Supreme Court warned that such a practice could be the equivalent of dismissal by discovery sanction rather than by a legitimate elimination of immaterial statements. In that case, the defendant (Ford Motor Company) sought summary judgment because the plaintiff (Drysdale) did not retain the wreck of his Ford vehicle that resulted from an accident based on what he called a defect caused in the automobile by Ford Motor Company. Although Drysdale had no control over the destruction of the remains of the vehicle, Ford Motor Company argued that the lack of material evidence meant that Drysdale could not establish his claim in any case.

After concluding that the trial court mistakenly granted summary judgment for Ford Motor Company under improper conditions, the Drysdale court advised that “[l]itigants must be able to present their cases fully to the courts before judgment can be rendered against them unless it is obvious from the evidence before the court that the party opposing judgment can establish no right to recovery.” *Id.* at 680. (Internal citations and emphasis omitted). In *Pigs Gun Club, Inc. v. Sanpete County*, 2002 UT 17, ¶24, 42 P.3d 379, the court reiterated that “[a] trial court is not authorized to weigh facts in deciding a summary judgment motion, but is only to determine whether a dispute of material fact exists.”

As will be discussed, the trial court in the instant case impermissibly weighed facts and then relied upon those facts in deciding to grant summary judgment in favor of

Appellees.

C. The affidavits submitted on behalf of Appellant comply with Utah R. Civ. P. 56(e) and are otherwise admissible.

When considering the admissibility of the affidavit testimony provided on behalf of Appellant (and submitted for purposes of opposing summary judgment) it is clear the trial court erred in striking those paragraphs where the affiant had personal knowledge, the evidence was admissible, and the affiant was competent. *See* Utah R. Civ. P. 56(e). Only in the presence of a clear violation in form and substance against this Rule 56(e) would the trial court be justified in striking portions of the affidavits.

i. Appellant's personal affidavit was material to the legal issues presented.

In considering Appellant's personal affidavit, the trial court noted that "[m]uch of the affidavit is directly contradictory to the many affidavits of Defendants." [R. 453]. Specifically, Appellant's affidavit contains denials that he ever yelled or cursed in front of players, umpires, etc. In spite of Appellant's counter-testimony, though, the trial court determined that "the fact issues raised in Plaintiff's affidavits are not material to the analysis and determination of this case, and ... Defendants are entitled to summary judgment as a matter of law." [R. 454]. No violation of form is cited; the trial court merely deemed all of Appellant's affidavit statements "immaterial."

Utah R. Evid. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 402 provides that "all relevant evidence is admissible, except as otherwise provided by the

Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state.”

Utah R. Civ. P 56(e) provides that: “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”

Appellant’s affidavit was: (1) made on personal knowledge, (2) factually admissible in accord with Rules 401 and 402, and (3) shows that affiant is competent to testify.

By complying with the above-standards, it must next be determined why the trial court deemed the factual issues raised in Appellant’s affidavit immaterial.

Appellee principal defense in justifying Appellant’s termination as a volunteer coach was that Appellant exhibited abusive behavior including yelling, cursing, and fighting with umpires, scorekeepers, and opposing coaches and that such behavior violated the Volunteer Code of Conduct. [R. 240, 331-350]. However, Appellant’s affidavit is replete with statements defending himself from these accusations. [R. 304-309].

The trial court appears to have forgotten that the primary controversy raised by the case is not “whether Lehi City was justified in restricting Appellant from continuing to volunteer as coach” (although this may be a defense); rather it is a controversy about whether Appellant was improperly and illegally banned because he publically brought to light the truth about the improper behavior of certain Lehi City officials in the operation of the recreational programs involving youth baseball teams that cheated the youth, violated the Code of Conduct, and compromised the integrity of the programs.

Appellant's volunteer track record stretching back to 1981 without prior dismissal or a demonstrated record of complaints, stands as a foundation as to the veracity of the statements made by Appellant in his supporting affidavit. The Appellees' efforts to remove Appellant from the volunteer position only *after* he complained about the changes in the recreational program (and to action against those changes) support Appellant's contention that the attempt to ban him from coaching really had nothing to do with any alleged behavior in front of players, spectators, or with umpires; it was indeed a reaction of certain individuals acting under a bureaucratic pretense to guard against public disclosure of their actions.

Among other things, Appellant's affidavit directly counters the principal allegations of the individual Appellees (and witness Kimberly Martinez) that Appellant was verbally abusive, threatening, and used inappropriate language in front of the youth participants, coaches, umpires or other staff members. [R. 304-309]. *Why* the trial court deemed Appellant's *entire* affidavit statement "immaterial" is never explained in the *March 23, 2010 Ruling*. The trial court fails to recognize that Appellant's affidavit is highly material insofar as it directly rebuts many of the Appellees' allegations—allegations that form the basis for the pretext that Appellant was terminated as a coach for reasons *other* than exercising his right to speak publicly about the baseball program. If the trial court was willing to accept the *entirety* of the affidavit testimony submitted by Appellees in support of their *Motion for Summary Judgment* as material to the legal issues, it should have done the same for Appellant. Conversely, if all of the factual matters asserted in Appellant's affidavit (matters directly relating to Appellant's behavior, attitude, interactions, rationale for objecting to certain

procedures, tangible benefits derived from coaching, etc.) are “immaterial” to the legal issues, then all of Appellees’ affidavit statements relating to those same matters should be deemed immaterial as well.

- ii. The other affidavits offered in support of Appellant’s Memorandum in Opposition are admissible and should not have been stricken.

The trial court erred in striking portions of affidavits submitted by various individuals in support of Appellant’s *Memorandum in Opposition to Defendants’ Motion for Summary Judgment*. The affidavits (marked Exhibits 2 through 8 to the *Memorandum in Opposition* [R. 277-302]) were based upon personal knowledge, show the existence of disputed facts, contain relevant information and were provided by competent witnesses—thus satisfying the requirements of Utah R. Civ. P. 56.

The particular statements stricken by the trial court were *not* based on unsubstantiated beliefs, but on observations based upon personal firsthand knowledge and should have been considered as evidence. The statements contained in the affidavits raise genuine issues of material fact as to the specific circumstances surrounding Appellant’s actions and behaviors as a coach. The witnesses who provided affidavits were competent to do so and the foundation for their knowledge was established by their participation in the Lehi City’s baseball program that enabled them to acquire firsthand knowledge of material issues at dispute in this case. Appellant contends that the trial court erred in striking relevant statements in the following affidavits for the following reasons:

- (1) Affidavit of Bridgit Doyle: Paragraph 8 is not based on hearsay but firsthand knowledge founded upon active participation in the matter and personal observation of the

conduct. Paragraph 10 is substantiated by the affiant's personal observation of conduct, it can be considered for impeachment purposes, and is directly relevant to counter allegations made by Appellees. Paragraph 11 is not hearsay but alleges facts based on personal knowledge that is directly probative of material issues. Paragraphs 12-15 are direct assertions of material facts witnessed firsthand. Paragraphs 16-17 directly contradict material facts alleged and relied upon by Appellees in justifying their removal of Appellant from his coaching position.

(2) Affidavit of James Johnston: Paragraph 8 is not hearsay but is based on firsthand knowledge founded upon active participation in the matter and personal observation. Paragraph 10 is based on personal observation of conduct, can be rightly considered for impeachment purposes, and is directly relevant to the substance of Appellees' opposing testimony. Paragraph 11 is not hearsay but alleges facts based on personal knowledge that is directly probative of material issues. Paragraphs 12-15 contain direct assertions of material facts witnessed firsthand. Paragraphs 16-17 are relevant as directly contradicting material facts alleged and relied upon by Appellees.

(3) Affidavit of Alan Paul: Paragraph 7 is not hearsay, is based upon firsthand knowledge and has a factual foundation as established in paragraphs 1-3 of the affidavit. Paragraph 8 is not hearsay, but based on firsthand knowledge founded upon active participation in the matter and personal observation of the conduct. Paragraph 10 can be rightly considered for impeachment purposes and is directly relevant to the substance of contradictory statements provided by Appellees. Paragraphs 11-13 are direct assertions of material facts witnessed firsthand.

(4) Affidavit of Joyce Olson: Paragraph 8 is not hearsay but is based on firsthand knowledge founded upon active participation in the matter and personal observation of the conduct. Paragraph 9 is not hearsay but alleges facts based on personal knowledge that are directly probative of material issues. Paragraph 10 is substantiated by personal observation of the conduct, and can be rightly considered for impeachment purposes.

(5) Affidavit of Sharon Johnson: Paragraph 8 is not hearsay but is based on firsthand knowledge founded upon active participation in the matter and personal observation of the conduct.

(6) Affidavit of Stanley Crump: Paragraph 7 is not hearsay but is based upon firsthand knowledge and the opinion stated is has a factual foundation as established in Paragraph 3.

(7) Affidavit of Roger Dean: Paragraph 6 is not hearsay but alleges facts based on personal knowledge that is directly probative of material issues.

The trial court's striking of the foregoing statements from the affidavits submitted in favor of Appellant's position was an abuse of discretion insofar as there was insufficient legal basis to do so. Accordingly, Appellant asks this Court to reverse the trial court's decision to strike these particular affidavit statements.

2. The trial court erred in determining that Appellant had nlegally protectable interest in his position as a volunteer coach.

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*, 2002 UT 21, ¶ 1, 44 P.3d 704.

B. The Trial Court's Analysis.

The trial court ultimately granted summary judgment against Appellant on all of his constitutional-based claims on the following grounds (which are set forth here in the order in which the trial court presented in its March 23, 2010 *Ruling*):

- (1) Appellant was not a public employee. Appellant was a volunteer who had no legally protectable interest in youth coaching. [R. 451-452].
- (2) Because Appellant had no legally protectable interest, the individual defendants sued in the case (Harrison, Bray, Mackintosh) have qualified immunity from a § 1983 suit because such immunity inheres if the individual(s)' conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Here, it was not "clearly established" that Appellant had a statutory or constitutional right to continue in his volunteer position as a coach, and Harrison, Bray and Mackintosh could not have known of such a right *even* assuming *arguendo* that the right to volunteer as a coach was legally protectable. [R. 451].
- (3) Cases outside the Tenth Circuit are not relevant in determining whether a volunteer can ever claim a legally protectable interest in his or her position. Because there are no Tenth Circuit cases clearly on point on the question of whether a volunteer has a legally protectable interest, Appellant has failed to provide sufficiently clear authority in support of such a proposition. [R. 450].

- 4) Appellant's Fourteenth Amendment Equal Protection cause of action is premised on Appellant's argument that he was engaged in First Amendment protected speech, but was treated differently than other similarly situated coaches. However, Appellant has not shown he was treated differently than other similarly situated coaches. Even assuming Appellant was treated differently, Appellant has also not shown that Lehi City did not have "rational basis for the difference in treatment." [R. 450].
- 5) Because none of the individual Lehi City employees violated any constitutional rights Appellant *may* have had, Lehi City cannot be held liable for any alleged violation of Appellant's constitutional rights. [R. 449].
- 6) Appellant did not have a constitutionally protected liberty or property interest. Appellant did not receive monetary or other tangible benefits from coaching. [R. 449].
- 7) Having concluded that Appellant had no liberty or property interest in volunteer coaching, the trial court need not analyze Appellant's claims for denial of procedural due process. [R. 448].
- 8) 42 U.S.C. § 1988(b) is not a separate cause of action, but only allows the trial court discretion to award attorney's fees to a prevailing party in certain federally created actions (e.g. § 1983). Because the trial court dismissed Appellant's § 1983 action, no basis exists under § 1988(b) for any award of fees.

Appellant will address each of these grounds in order.

C. Appellant had a legally protectable interest in his position despite his "volunteer" status.

In dismissing Appellant's constitutional-based claims, the trial court first determined that under applicable Tenth Circuit case law, Appellant had no legally protectable interest in

volunteer youth coaching. [R. 451-452]. The trial court based its decision on language found in the leading case on the matter, *Andersen v. McCotter*, 100 F.3d 723 (10th Cir. 1996).¹

One of the central questions addressed by the *Andersen* court was whether the plaintiff (Ms. Andersen) was strictly a volunteer, or whether she was a public employee. *Id.* at 726. After weighing a variety of factors² and reviewing Utah's statutory definitions of the terms "employee" and "volunteer," the *Andersen* court ultimately concluded that "Ms. Andersen was not a volunteer—she was obviously a government employee." *Id.*

In reaching the conclusion that Appellant was not entitled to First Amendment protection to voice his opinions about league policies because he had no legally protectable interest as a volunteer, the trial court in the instant case focused on the distinction that the plaintiff in *Andersen* received some monetary compensation and educational credit, while the Appellant was unpaid. [R. 451-452]. Appellant acknowledges this distinction; but the trial court utterly failed to recognize the clear position of the *Andersen* court that even unpaid volunteers are entitled to First Amendment protection:

When acting as a sovereign, the government may not, in the absence of justification, restrict an individual's right to speak freely on matters of public

¹ Ms. Andersen was an intern with Utah Department of Corrections who sought injunctive relief against the Department and monetary relief against various corrections officials, claiming that she was fired in retaliation for exercising her First Amendment free speech rights after publicly criticizing proposed changes in the Department's sex-offender treatment program. *Andersen*, 100 F.3d at 725.

² The *Andersen* court found that though she was an intern, Ms. Andersen was compensated for her services; she was paid for twenty hours of work per week by the Board of Pardons and received a nonmonetary benefit in the form of educational credit in exchange for her continued participation in the State program. The court noted that Ms. Andersen worked under the direction of officials at the Bonneville Community Corrections Center, and was subject to their control. Finally, the fact that Ms. Andersen's employment position was terminable at will did not diminish her First Amendment claim. *Andersen*, 100 F.3d at 726.

import, nor may the government indirectly exert leverage to suppress speech by unconstitutionally tying the receipt of benefits to the speaker's coerced silence. We hold that Ms. Andersen's termination from her employment position as an intern with the DOC because of her public comment on the DOC's proposed changes in the sex-offender treatment program implicated her First Amendment rights, and invoked the protections afforded by the *Pickering* balancing test. **However, even if we accepted Defendants' arguments and considered Ms. Andersen a nonpaid volunteer, her claim would not be defeated. Defendants argue that volunteers are not entitled to First Amendment protection under *Pickering*. We disagree. The exercise of free speech rights is not dependent upon the receipt of a full-time salary.** "[O]ur modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech'...." *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, ----, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843 (1996) (quoting *Perry*, 408 U.S. at 597, 92 S.Ct. at 2697). For example, the Court has recognized a variety of benefits which cannot be denied solely because of the exercise of constitutional rights. See, e.g., *Rutan*, 497 U.S. at 72-73, 110 S.Ct. at 2735-36 (promotion or transfer in a government job); *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6, 89 S.Ct. 1322, 1327 n. 6, 22 L.Ed.2d 600 (1969) (welfare benefits); *Sherbert v. Verner*, 374 U.S. 398, 404-05, 83 S.Ct. 1790, 1794-95, 10 L.Ed.2d 965 (1963) (unemployment benefits); *Speiser v. Randall*, 357 U.S. 513, 525-26, 78 S.Ct. 1332, 1341-42, 2 L.Ed.2d 1460 (1958) (tax exemptions). (Emphasis added).

Andersen, 100 F.3d at 727.

The *Andersen* court's disagreement with the proposition that volunteers are not entitled to First Amendment protection under *Pickering* is direct and unqualified. In fact, the entire tone of the *Andersen* decision is one that recognizes that significant weight must be given to broader constitutional principles when considering actions that inhibit free speech.

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result

which [it] could not command directly. Such interference with constitutional rights is impermissible (internal citations omitted).

Andersen, 100 F.3d at 726-27.

The *Andersen* court even goes to pains (contra the position of the defendants in that case) to reference other cases where volunteers have the same First Amendment protections to free speech as an employee. *Andersen*, 100 F.3d at 726-27. (See *Hyland v. Wonder*, 972 F.2d 1129, 1136 (9th Cir. 1992) (holding that volunteer status is a valuable governmental benefit or privilege that may not be denied on the basis of constitutionally protected speech); *cert. denied*, 508 U.S. 908, 113 S.Ct. 2337, 124 L.Ed.2d 248 (1993); *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 25 (2d Cir. 1979) (holding that the dismissal of a volunteer firefighter for complaining about low morale and inadequate training and discipline can violate the First Amendment)).

The Supreme Court has stated that the type of sanction imposed “need not be particularly great in order to find that rights have been violated.” *Elrod v. Burns*, 427 U.S. 347, 359 n. 13, 96 S.Ct. 2673, 2683 n. 13, 49 L.Ed.2d 547 (1976). Appellant’s status as a volunteer is the type of role that constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment protection. The trial court focused exclusively (and wrongly) on the fact that Appellant was unpaid for his volunteer efforts. In fact, Appellant had volunteered since 1981 and gained valuable experience and education while administering his duties with the youth baseball team. This opportunity to serve also provided Appellant with the satisfaction of giving something back to the public. Even if the trial court considered these trivialities, they were very important benefits in the eyes of the Appellant.

D. Appellees Bray and Harrison are not entitled to “qualified immunity” against Appellant’s claim for violation of his First and Fourteenth Amendment rights.

i. The qualified immunity standard.

Qualified immunity is “an affirmative defense to be asserted by a government official performing discretionary functions. It is premised on the contention that the challenged conduct was undertaken in good faith or did not violate clearly established law or constitutional rights that a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

In assessing a defense of qualified immunity, a court must determine the objective reasonableness of the challenged conduct by reference to the law clearly established at the time of the constitutional violation. *Snell v. Tunnell*, 920 F.2d 673, 696 (10th Cir.1990), *cert. denied*, 499 U.S. 976, 111 S.Ct. 1622, 113 L.Ed.2d 719 (1991). The burden rests with the plaintiff to come forward with facts or allegations to show the violation of a clearly established right. *Id.*; *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir.1990).

ii. The trial court’s analysis of qualified immunity.

In the case at bar, the trial court determined in conclusory fashion that the language in *Andersen v. McCotter*, 100 F.3d 723 (10th Cir. 1996) (which affirms that a volunteer would be afforded First Amendment protections) was “dicta” and did not create a “clearly established” constitutional right for the purpose of Appellant’s § 1983 claims. [R. 451]. As a result, the trial court concluded that there was no way that the individual Appellees could have knowingly violated any constitutional right that Appellant might have had.

Of course, the trial court’s conclusion rests wholly upon the premise that the *Andersen*

decision was *insufficient* to establish the principle that volunteers have a legally protectable interest in maintaining their jobs and that volunteers are protected from government reprisals when they exercise First Amendment rights. Appellants have already argued in section 2(c) of this brief that the *Andersen* decision (as well as Supreme Court and other federal circuit court cases), clearly establishes that volunteers have a legally protectable interest when they engage in First Amendment-covered free speech. If this Court determines that the *Andersen* ruling clearly establishes such a principle, then the trial court's premise is faulty, and the question of whether the individual Appellees have a legitimate "qualified immunity" defense is "back on the table."

Without citing any affidavit or other factual testimony, the trial court finished its analysis with this pronouncement: "No reasonable governmental official would have recognized that not selecting [Appellant] to serve as a volunteer baseball coach would have violated [Appellant's] constitutional rights" [R. 450]. While convenient, this type of "end-game" ultimate ruling is premature and legally inappropriate given the fact-sensitive nature of the case and that the issue was being considered under a summary judgment standard. The heart of Appellant's complaint was that the Appellees wrongfully deprived him of a volunteer position specifically because he raised concerns about changes in the recreational program (which Appellant believed affected the fairness and well-being of the youth participants). The motives and behaviors of the Appellees are highly relevant, and an inquiry into their motives and behaviors is highly fact-sensitive. The trial court mistakenly placed itself in the position of a "reasonable government official" and granted summary judgment without allowing Appellant the full and fair opportunity to vindicate his theory through

deposition or trial.

E. Appellant provided appropriate authority from the Tenth Circuit to establish that he is entitled to First Amendment protection even though he was a volunteer.

The trial court correctly noted the standard a plaintiff must meet in order overcome the “qualified immunity defense” and prove that a “clearly established law” was in effect at the time the alleged § 1983 violation occurred. In its analysis, the trial court referred to *Foote v. Spiegel*, 118 F.3d 1416, 1424 (10th Cir. 1997). The relevant paragraph from *Foote* indicates:

When a § 1983 defendant raises the defense of qualified immunity on summary judgment, the plaintiff must show the law was clearly established when the alleged violation occurred and must come forward with sufficient facts to show the official violated that clearly established law. The defendant bears the normal summary judgment burden of showing no material facts that would defeat the qualified immunity defense remain in dispute. For the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must be as plaintiff maintains. *V-1 Oil Co. v. Means*, 94 F.3d 1420, 1423 (10th Cir.1996).

The trial court then simply announced that the *Andersen* decision was not “on point” and that Appellant had not shown by the clear weight of extra-judicial authority that a volunteer would be entitled to First Amendment protections on par with a public employee. [R. 450].

This is an incorrect assessment of the law and the presentation of the law set forth in Appellant’s *Memorandum in Opposition* to Appellees’ *Motion for Summary Judgment* that was before the trial court. In the *Memorandum in Opposition*, Appellant detailed the holding in *Andersen* (a Tenth Circuit case) and cited to Supreme Court and other federal circuit court decisions that directly support Appellant’s contention that volunteers have a protectable First Amendment right to free speech. [R. 325-326].

As a volunteer, Appellant received non-monetary benefits and was improperly dismiss from his position for exercising his First Amendment rights by bringing to light the improper operation of recreational programs in Lehi City.

It is unclear of what further degree of judicial authority the trial court was asking Appellant to invoke. The *Andersen* court left no doubt as to the fact that unpaid volunteers would be entitled to First Amendment protection, and the authority cited in that decision (Second and Ninth Circuit Courts and the United States Supreme Court) affirms the general principle that a governmental entity may revoke a volunteer's position on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

Appellant respectfully requests this Court to consider the judicial authority presented by Appellant, to find that a volunteer's First Amendment rights are protectable and to reverse the trial court's legal conclusion.

F. For purposes of his Fourteenth Amendment violation claim, Appellant has established: (1) that he was treated differently from other similarly situated volunteers, and (2) that Appellees had no rational basis for the disparate treatment.

The “purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).

The United States Supreme Court has recently held that “a plaintiff need not be a member of a traditionally ‘protected class’ in order to allege an equal protection violation.”

Tuskowski v. Griffin, 359 F.Supp.2d 225 (D.Conn.2005); see also *Harvey v. Mark*, 352 F.Supp.2d 285, 290 (D.Conn.2005). Rather, a plaintiff may maintain a “class of one” equal protection claim, as long as the plaintiff alleges that he or she was treated differently than similarly situated persons, and there was no rational basis for that differential treatment. *Id.* (citing *Village of Willowbrook v. Olech*, 528 U.S. at 564, 120 S.Ct. 1073).

Appellant is able to show that Appellees treated him differently than others similarly situated and that there was no rational basis for the difference in treatment. For example, during the 2006 season, Appellant acted no differently than any other similarly situated youth baseball coaches in Lehi, and Appellant did not engage in any conduct that violated the Volunteer Code of Conduct. [R. 304-309].

Importantly, the Harrison instructed Bray to create an “incident” list after Appellant publicly agitated for changes to the baseball programs drafting procedures. The various incident reports ultimately created by “witnesses” against Appellant were not even in existence during the 2006 season and are clearly after the fact rationalizations used to justify and support Harrison and Bray’s decision to exclude Appellant from coaching for the 2007 youth baseball season.

Appellant’s equal protection rights under the Fourteenth Amendment were violated by Bray and Harrison because Appellant’s conduct was the same as any other coach in the league yet Appellant was arbitrarily and capriciously singled out for disparate treatment.

G. If individual Lehi City employees did violate Appellant’s constitutional rights, Appellee Lehi City may be held liable for said violations.

After determining that none of the individual Appellees violated any of Appellant’s rights, the trial court concluded that Appellee Lehi City could not be held vicariously liable

for any alleged constitutional violations. [R. 449]. Appellant agrees with the general principle relied upon by the trial court in reaching its conclusion (“A municipality may not be held liable where there was no underlying constitutional violation by any of its officers.” *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1223 (10th Cir. 2006)). However, if this Court finds that summary judgment was improperly granted as to Appellant’s § 1983 claims, Lehi City’s liability would become an open issue that would be determined only after further proceedings in the trial court.

H. Appellant did have constitutionally protected property and liberty interests even though he did not receive monetary benefits from coaching.

“The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.” *Bd. of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it.” *Id.* at 577. Property interests (as opposed to liberty interests) are not created by the Constitution, but by existing rules or understandings that stem from independent sources, “such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Id.* at 577. See also, *Darr v. Town of Telluride*, 495 F.3d 1243, 1251 (10th Cir. 2007).

The Supreme Court has found that implied contracts for continued employment can implicate procedural due process safeguards. See *Connell v. Higginbotham*, 403 U.S. 207, 208, 91 S.Ct. 1772, 1773, 29 L.Ed.2d 418; *Perry v. Sindermann*, 408 U.S. 593, 601-602, 92 S.Ct. 2694, 2699-2700, 33 L.Ed.2d 570 (1972); *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074,

2077, 48 L.Ed.2d 684 (1976).

The trial court, in the instant case, granted summary judgment in favor of Appellees and against Appellant on his Fourteenth Amendment procedural due process violation claims because: (1) Appellant received no monetary or other tangible benefits from coaching [R. 449], and (2) Appellee Bray's two statements confirming that Appellant would be coaching a youth baseball team in the 2007 year did not create an actual *legal entitlement* to a volunteer position in 2007.

As to the trial court's first point: while there is no dispute that Appellant did not receive financial compensation for his volunteer service, there is absolutely no factual basis for the contention that Appellant received no other tangible benefit from coaching. In making such an assertion, the trial court is engaging in pure, subjective speculation. There can be no question that Appellant received many tangible benefits (even if non-monetary in nature) by participating as a volunteer coach. Furthermore, the trial court cites no legal authority for its suggestion that a tangible benefit must be one of a monetary nature under a Fourteenth Amendment "property interest" deprivation analysis.

As to the trial court's second point: if Bray verbally promised Appellant on two different occasions that he would be allowed to coach a baseball team in 2007, then there was certainly an implied agreement in place and a reasonable expectation by Appellant that he would be coaching in 2007. Appellant's volunteer status does not diminish the fact that an express oral contract was formed when Bray made the commitment to Appellant.

The liberty interest protected by the due process clause of the Fifth and Fourteenth Amendments encompasses an individual's freedom to work and earn a living. If in the

course of dismissing an employee, the government takes steps or makes charges that so severely stigmatize the employee that she cannot avail herself of other employment opportunities, a claim for deprivation of liberty will stand. *Board of Regents*, 408 U.S. at 573-74, 92 S.Ct. at 2707-08.

Appellant has been seriously burdened in that he has been deprived of the opportunity of coaching his son in this setting, the Lehi baseball team; a setting where Appellant's roots that go back a generation.

I. If Appellant did have a liberty and/or property interest in volunteer coaching, the trial court's failure to analyze and determine Appellant's procedural due process claim was erroneous.

Because the trial court concluded that Appellant had no liberty or property interests in volunteer coaching youth baseball teams, the trial court did not feel obligated to address Appellant's claim of procedural due process violations. [R. 448]. If this Court reverses the trial court's decision and finds that Appellant did have a liberty or property interest in volunteering as a coach, the trial court should be required to address Appellant's claim of procedural due process violations.

J. If the trial court is reversed and Appellant establishes his § 1983 claim, an award of attorney's fees under § 1988 could be awarded in the trial court's discretion.

42 U.S.C. § 1988(b) authorizes courts to award attorney's fees to the prevailing party in any action or proceeding to enforce provisions of a variety of federally created statutes, including 42 U.S.C. § 1983. Should this Court reverse the trial court's decision as to the dismissal of Appellant's § 1983 claim, Appellant would be entitled to renew his request for attorney's fees under § 1988(b).

3. The trial court erred granting Summary Judgment in favor of Appellees by dismissing Appellant's defamation and breach of contract causes of action on the basis that Appellant did not reference such causes of action in his Amended Notice of Claim.

A. Standard of review.

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.” *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108 (Utah 1991); *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636-37 (Utah 1989); *Goodnow v. Sullivan*, 2002 UT 21, ¶ 1, 44 P.3d 704.

B. Appellant was not required to list specific causes of action in the notice of claim in order to preserve those causes of action.

The trial court dismissed Appellant’s causes of action for defamation, breach of contract, and equitable estoppel on grounds that Appellant’s *Amended Notice of Claim* fails to reference those causes of action in the “Nature of the Claim” section.³ [R. 446-447].

In reaching its decision, the trial court indicated that Utah Code Ann. § 63G-7-401(3)(a)(ii) requires that “[t]he notice of claim shall set forth...the nature of the claim asserted.” The trial court also referenced *Cedar Profl Plaza L.C. v. Cedar City Corp.*, 2006 UT App 36, ¶ 9, 131 P.3d 275 in acknowledging that the UGIA does *not* require a listing of “each specific cause of action that might be pleaded.”

Nevertheless, in the instant case, the trial court dismissed the three causes of action because “...no information in the *Amended Notice of Claim* apprises Lehi City of its potential liability for out-of-the-blue claims such as defamation or breach of contract.” [R. 447]. Citing

³ Appellant does not appeal the dismissal of the equitable estoppel cause of action.

the “strict compliance” language from *Greene v. Utah Transit Auth.*, 2001 UT 109, ¶ 12, 37 P.3d 1156 and *Heideman v. Washington City*, 2007 UT App 11, ¶ 14, 155 P.3d 900, the trial court found that Appellant’s failed to “strictly comply” with the notice requirement because there was no information contained in the *Amended Notice of Claim* that would “apprise” Lehi City of possible defamation and/or breach of contract claims. [R. 446-447].

On appeal, Appellant asserts that there is direct conflict between the rulings in the *Cedar Profl Plaza L.C.* and *Heideman* cases and that the ruling in the *Cedar Profl Plaza L.C.* case should apply and the trial court’s dismissal of Appellant’s defamation and breach of contract claims.

- i. The plain language of Utah Code Ann. § 63G-7-401(3)(a)(ii) and relevant case law interpreting that section does not require an aggrieved party to list all specific causes of action it might have in the notice of claim.

It is a well-established principle of statutory construction that courts should consider the plain meaning of a statute’s language. “Under our established rules of statutory construction, we look first to the plain meaning of the pertinent language in interpreting [a statute]; only if the language is ambiguous do we consider other sources for its meaning.”

Fla. Asset Fin. Corp. v. Utah Labor Comm’n, 2006 UT 58, ¶ 9, 147 P.3d 1189.

Utah Code Ann. § 63G-7-401(3)(a)(ii) requires that a notice of claim contain four elements.⁴ The second required element that a claimant must provide in the notice of claim is “the nature of the claim asserted.” Importantly, the statutory language does not require a

⁴ The four elements are: (1) a brief statement of the facts; (2) the nature of the claim asserted; (3) the damages incurred by the claimant so far as they are known; and (4) if the claim is being pursued against a governmental employee individually as provided in Utah Code Ann. § 63G-7-202(3)(c), the name of the employee.

claimant to include “all legal claims,” “all causes of action” or any other enumeration of specific or particular theories or claims. All that is required is for a claimant to indicate the “nature” of the claim.

It is also significant that the word “claim” is singular. Claimants need not list “claims” or “causes of action,” but only indicate the *nature* of the *claim*. This sort of broad and general language is mirrored in the first and third elements required for a notice of claim. The first element is a “brief” statement of facts and the third element is the damages incurred by the claimant “insofar as they are known.” Claimants are not required to provide a litany of facts or ascertain all potential damages resulting from a governmental entity’s (or employee’s) actions.

While the Utah Supreme Court has indicated that claimants must “strictly comply” with the requirements of the UGIA (see *Greene v. Utah Transit Auth.*, 2001 UT 109, ¶ 12, 37 P.3d 1156), this directive does not speak to the matter of *how those individual requirements should be construed or interpreted*. It is a fallacy to argue that broad mandate of “strict compliance” with UGIA’s requirements somehow means that the words “nature of the claim” require a claimant to list all possible causes of actions or claims. What is at issue in this particular case is not the broader rule of “strict compliance” but how a claimant can conceivably articulate the “nature of the claim” in a notice of claim without categorically listing each cause of action. To state that strict compliance is required says nothing about how a claimant strictly complies with a particular requirement.

Unfortunately, the *Heideman* decision does nothing to provide clarity on the matter; and, when read in its plainest terms, appears to contradict the ruling in *Cedar Profl Plaza L.C.*

In *Cedar Profl Plaza L.C.*, the court specifically allowed the plaintiff to maintain a direct negligence claim against the defendant city despite the fact that the effective notice of claim only contained an allegation of negligent supervision of contractors by the city and not a claim of direct negligence. In reaching this decision, the court specifically ruled: “Nothing in the Act requires a claimant to set forth in the notice of claim each specific cause of action that might be pleaded against the government entity. Rather, the Act requires only that the notice of claim include ‘a brief statement of the facts,’ ‘the nature of the claim asserted,’ and ‘the damages incurred by the claimant so far as they are known.’” (Internal citations omitted). *Cedar Profl Plaza L.C.*, 2006 UT App 36, ¶ 9.

In *Houghton v. Department of Health* 2005 UT 63, ¶ 21, 125 P.3d 860, the Utah Supreme Court advised: “Although we have mandated strict compliance with the notice of claim procedures, we have not required that such notices ‘meet the standards required to state a claim for relief.’ *Peeples v. State*, 2004 UT App 328, ¶ 11, 100 P.3d 254 (quoting *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1183 (Utah 1983)). Rather, a plaintiff need only include ‘enough specificity in the notice to inform as to the nature of the claim so that the defendant can appraise its potential liability.’ *Yearsley v. Jensen*, 798 P.2d 1127, 1129 (Utah 1990).”

The *Peeples* decision is also instructive. In that case, the court was required to determine whether the plaintiff strictly complied with the notice of claim requirements. The defendant (the State of Utah) had argued that the plaintiff’s one sentence statement of facts was insufficient to meet the first element of the notice of claim requirement. In reversing the lower court’s dismissal of the plaintiff’s claim for failure to provide a sufficiently detailed

statement of the facts, the court made the following observation:

Having determined that the Act [the UGIA], while not a model of specific clarity, is not ambiguous, our analysis turns to whether Peeples's notice strictly complied with the Act. The strict compliance standard favors the State, and its application often results in the barring of claims. See, e.g., *Gurule*, 2003 UT 25 at ¶¶ 4-8, 69 P.3d 1287 (barring claim when notice was not properly directed to county clerk, even though notice was timely directed to county commissioner); *Greene v. Utah Transit Auth.*, 2001 UT 109, ¶ 17, 37 P.3d 1156 (barring claim when notice was not properly directed to president or secretary of UTA board, despite communications with and timely notice to claims adjuster); *Thimmes v. Utah State Univ.*, 2001 UT App 93, ¶¶ 2, 6-7, 22 P.3d 257 (barring claim when notice directed to risk management rather than attorney general). Strict compliance is not, however, a one-way street, and a claimant is not required to do more than the Act clearly requires. Notice need not be given to any person other than that directed by statute, even if that person's awareness of the claim might facilitate investigation or settlement; notice provided exactly one year after an injury arises is just as timely as notice comfortably provided six months earlier; and so on. All that is required is simple compliance, and there is no need for a claimant to exceed the Act's requirements even if such action might more optimally accomplish the purposes underlying the Act. *Peeples*, 2004 UT App 328, ¶ 9.

The *Peeples*' court then cited the *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1183 (Utah 1983) and drew a comparison between the UGIA and the Utah Health Care Malpractice Act to illustrate the quantum of information that should be included in a notice of claim. The language is of particular import to Appellant's argument in the instant matter:

Even if we were to view the brevity of Peeples's claim as a defect, "defects in the form or content of notices of claim do not always act to bar a claim." *Brittain v. State*, 882 P.2d 666, 669 (Utah Ct.App.1994); cf. *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1183 (Utah 1983); *Spencer v. Salt Lake City*, 17 Utah 2d 362, 412 P.2d 449, 450 (1966) (finding sufficient notice of claim despite failure to declare the amount of damages as required by statute). We find the supreme court's analysis of a similar provision within the Utah Health Care Malpractice Act, see Utah Code Ann. §§ 78-14-1 to -17 (2002), to be instructive:

Defendant also argues that denial of the motion [to amend] was proper because the proposed amendment set forth additional allegations and claims outside the scope of plaintiff's notice of intent to sue, which had been filed prior to commencement of this action. A notice of intent to sue, as required by [Utah Code section 78-14-8 (2002)], is not intended to be the equivalent of a complaint and need not contain every allegation and claim set forth in the complaint.... Although the notice must include "specific allegations of misconduct on the part of the prospective defendant," that requirement does not need to meet the standards required to state a claim for relief in a complaint. The parties need to give only general notice of an intent to sue and of the injuries then known and **not a statement of legal theories** (emphasis added). *Behrens*, 675 P.2d at 1183.

Peeples, 2004 UT App 328, ¶ 11.

Finally, the *Peeples*' court noted: "While the State may desire more information than *Peeples* provided, that desire does not render *Peeples*'s notice insufficient under the plain language of the Act. Rather, the State may obtain the desired information through formal discovery, informal communications with claimant's counsel, and/or its own investigation. Alternatively, the legislature may choose, as it has in the past, to require claimants to provide more specific facts in a notice of claim (internal footnote and citations omitted). *Id.* at ¶ 12.

While the statutory element at issue in *Peeples* was the "brief statement of facts" element (rather than the "nature of the claim" element), the position taken by the *Peeples*' court suggesting that a governmental entity may obtain additional desired information the formal discovery, investigation, (etc.) is equally applicable to the situations where the notice of claim may not contain every legal theory or cause of action. The overall

Although the Utah Supreme Court has established a rule of strict compliance with the notice provisions of the UGIA it has also held that:

[A] statute is ... to be construed in light of its intended purpose. It is necessary to consider the policy of the notice requirement so that in any particular case the facts can be evaluated to determine if the intent of the statute has been accomplished The primary purpose of a notice of claim requirement is to afford the responsible public authorities an opportunity to pursue a proper and timely investigation of the merits of a claim and to arrive at a timely settlement, if appropriate, thereby avoiding the expenditure of public revenue for costly and unnecessary litigation (internal citations omitted). *Stahl v. Utah Transit Auth.*, 618 P.2d 480, 482 (Utah 1980).

In summary, Utah courts have indicated that:

- (1) Nothing in the UGIA requires a claimant to set forth in the notice of claim each specific cause of action that might be pleaded against the government entity. *Cedar Profl Plaza L.C.*, 2006 UT App 36, ¶ 9;
- (2) the notice of claim need *not* meet the standards required to state a claim for relief. *Houghton*, 2005 UT 63, ¶ 21;
- (3) a claimant is not required to do more than the UGIA *clearly* requires. *Peeples*, 2004 UT App 328, ¶ 9;
- (4) [By analogy to the Utah Health Care Malpractice Act], parties need to give only general notice of an intent to sue and of the injuries then known and not a statement of legal theories. *Peeples*, 2004 UT App 328, ¶ 11.

In returning again to the *Heideman* decision, it is clear that the court in that case upheld dismissal of one of the plaintiff's causes of actions for one reason and one reason only: **the plaintiff had not listed the cause of action in the notice of claim.** The problem, though, is that Utah courts have explicitly ruled that identifying and listing each possible cause of action in the notice of claim is not required. Equally important is the fact that the legislature *could simply have* required claimants to do so by including language to that

effect in Utah Code Ann. § 63G-7-401(3)(a)(ii)—but the legislature did not do so.

As the *Peeples* court acknowledged, the UGIA may not be a model of clarity, but it is not ambiguous in that a claimant need only state the nature of the claim (and not specific causes of actions or legal theories) in order to strictly comply. The *Heideman* decision resulted in an extrapolation of the statutory “nature of the claim” requirement and is tantamount to a judicially redefined (and constricted) interpretation of the requirement. No other conclusion can be drawn from *Heideman* than that the failure to specifically name a particular cause of action in the “nature of the claim” section results in a claimant forever forfeiting that claim. Such a conclusion, however, is squarely at odds with other judicial authority in Utah and with the statute itself.⁵

Ultimately, the strict “identify every specific cause of action or lose it” standard seemingly established by the *Heideman* decision and the less strict standard articulated in *Cedar Profl Plaza L.C.*, *Peeples* (and other cases) creates a “grey area” of ambiguity for claimants. Must a claimant *really* list every potential cause of action/claim/legal theory/basis for recovery in order ensure preservation of such for litigation? If not, what level of particularity is actually required to set forth the “nature” of the claim? In light of the *Heideman* decision, it appears that there is no clear answer.

Nevertheless, Appellant argues that a general description identifying the broader legal implications of the alleged violation (when read in conjunction with the brief statement of

⁵ The Court may be inclined to “square” the *Cedar Profl Plaza L.C.*, decision with *Heideman* by rationalizing that the *Cedar Profl Plaza L.C.* plaintiff at least *mentioned* the word “negligence” in its third Notice of Claim (even though negligence was never asserted directly against the defendant city). Appellant asserts that such a position is still incorrect insofar as it would require a claimant to postulate and identify a specific legal theory or general cause of action in the notice of claim—something the statute itself does not require.

facts and a statement of potential damages) is sufficient to strictly comply with Utah Code Ann. § 63G-7-401(3)(a)(ii).

As argued in the next section, applying the strict *Heideman* standard can result in the unfair forfeiture of legitimate claims that might only become known *after* the complaint has been filed and discovery undertaken. Furthermore, such a strict standard effectively nullifies the general provisions allowing for the amendment of pleadings under Utah R. Civ. P. 15.

ii. Requiring a claimant to list specific causes of action in the notice of claim defeats the “justice” policy for allowing amended pleadings.

A narrow interpretation of the “nature of the claim” requirement in Utah Code Ann. § 63G-7-401(3)(a)(ii) that requires a claimant to identify all causes of action by name or risk losing them wreaks havoc with the established principle that leave to amend pleadings “shall be freely given when justice so requires.” Utah R. Civ. P. 15(a). Utah courts have accepted a liberal interpretation of Rule 15(a) “so as to allow parties to have their claims fully adjudicated.” *Nunez v. Albo*, 2002 UT App 247, ¶ 19, 53 P.3d 2.

Additionally, the general rules of discovery as embodied in Utah’s Rules of Civil Procedure 26 through 37 contemplate that the process of formal discovery may result in the revelation of claims that were initially unknown at the time a complaint was filed or in the modification or elimination of other claims.

If claimants in a suit against a governmental entity are required to state with specificity all causes of action in the notice of claim, they will be effectively foreclosed from ever amending their pleadings *even* where a claimant may have been legitimately unaware of a specific cause of action at the time the notice of claim was filed, or where such a cause of

action is only revealed after litigation discovery has ensued. Such a result is unjust as a policy matter and does not accord with the primary purpose of the notice of claim requirement.

“[T]he primary purpose of the notice of claim requirement is to afford the responsible public authorities an opportunity to pursue a proper and timely investigation of the merits of a claim and to arrive at a timely settlement, if appropriate, thereby avoiding the expenditure of public revenue for costly and unnecessary litigation.” *Stabl v. Utah Transit Auth.*, 618 P.2d 480, 482 (Utah 1980); see *Nunez v. Albo*, 2002 UT App 247, ¶ 25.

Construing the “nature of the claim” requirement to mandate that all conceivable causes of action be listed in particularity at the outset in the notice of claim turns Utah Code Ann. § 63G-7-401(3)(a)(ii) into an unreasonable hurdle of exactitude and prescience for a claimant.

Appellant included all causes of actions known to him at the time in his *Amended Notice of Claim*. Moreover, Appellant indicated therein that there may be further causes of action discovered during the course of the suit by including the language of “[o]ther unknown causes of action.” [R. 132]. Appellant also noted in his *Amended Notice of Claim* that Harrison had changed positions in “contradiction to the previous representation” that Appellant would be able to assist coaching the basketball team (a claim that could be reasonably construed as a breach of contract claim). [R. 132].

The *Amended Notice of Claim* contains approximately two pages of facts. In the “nature of the claim” section, Appellant specifically advised Lehi City that “[t]he following legal theories or causes of action may be asserted in whole or in part. The following list is not

intended to be a complete summary of all legal theories that may eventually be asserted.” [R. 132].

The trial court, notwithstanding, determined that Appellant’s *Amended Notice of Claim* was not “sufficiently specific” as to the nature of the claim asserted with respect to the subsequent defamation and breach of contract causes of action appearing in the *Complaint*. Appellant asserts that the trial court erred in applying such a rigid standard and that he strictly complied with the “nature of the claim” element required by Utah Code Ann. § 63G-7-401(3)(a)(ii) by providing a description of the broad legal grounds on which he would proceed if compelled to file suit. Accordingly, Appellant respectfully requests that this Court reverse the trial court’s dismissal of the defamation and breach of contract claims on grounds that Appellant did not strictly comply with Utah Code Ann. § 63G-7-401(3)(a)(ii).

CONCLUSION

For the above-stated reasons, Appellant respectfully requests that this Court reverse the trial court’s grant of Appellees’ *Motion to Strike* and *Motion for Summary Judgment* on those claims outlined herein.

Respectfully submitted this 15th day of November 2010.



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November 2010, I served two printed copies and an electronic copy of the foregoing **BRIEF OF APPELLANT WILLIAM A. DOYLE** by the following method on the person(s) listed below:

Party/Attorney	Method
David C. Richards Sarah Elizabeth Spencer CHRISTENSEN & JENSEN, P.C. 15 W. South Temple, Suite 800 Salt Lake City, UT, 84101 Telephone: 801-323-5000 Facsimile: 801-355-3472	<input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Fax Transmission <input type="checkbox"/> Email


Assistant

ADDENDUM “1”
(*Andersen v. McCotter*, 100 F.3d 723 (10th Cir.
1996))

100 F.3d 723, 12 IER Cases 401
(Cite as: 100 F.3d 723)

H

United States Court of Appeals,
Tenth Circuit.
Jessica ANDERSEN, Plaintiff-Appellant,
v.

O. Lane McCOTTER, in his official capacity as Executive Director of the Utah Department of Corrections; Gary Bortolussi; Katherine Ockey; Betty Gaines-Jones; Raymond H. Wahl. Defendants-Appellees.

No. 95-4186.

Nov. 12, 1996.

Intern with Utah Department of Corrections sought injunctive relief against Department and monetary relief against various corrections officials, claiming that she was fired in retaliation for exercising her First Amendment free speech rights. The United States District Court for the District of Utah, Dee Benson, J., granted summary judgment for defendants. Intern appealed. The Court of Appeals, Paul J. Kelly, Jr., Circuit Judge, held that: (1) intern was entitled to First Amendment protection; (2) material fact questions precluded summary judgment; and (3) defendants were not entitled to qualified immunity.

Reversed and remanded.

West Headnotes

[1] Constitutional Law 92 ☞ 1181

92 Constitutional Law

92X First Amendment in General

92X(B) Particular Issues and Applications

92k1180 Public Employees and Officials

92k1181 k. In General. Most Cited Cases

(Formerly 92k82(11))

Prisons 310 ☞ 390

310 Prisons

310V Officers and Employees

310k390 k. In General. Most Cited Cases

(Formerly 310k7)

University student receiving college credit and being paid for 20 hours of work per week as intern with state Board of Pardons was entitled to First Amendment protections recognized for public employees. U.S.C.A. Const.Amend. 1.

[2] Federal Courts 170B ☞ 766

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk763 Extent of Review Dependent on Nature of Decision Appealed from

170Bk766 k. Summary Judgment.

Most Cited Cases

When First Amendment is implicated, Court of Appeals reviewing grant of summary judgment is obligated to make independent examination of whole record to ensure that judgment does not constitute forbidden intrusion on field of free expression. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[3] Constitutional Law 92 ☞ 1925

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(P) Public Employees and Officials

92k1925 k. In General. Most Cited Cases

(Formerly 92k90.1(7.2))

Whether individual is public employee or volunteer for purposes of applying First Amendment guarantee of free speech is matter of state law. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ☞ 1501

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and

100 F.3d 723, 12 IER Cases 401
(Cite as: 100 F.3d 723)

Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1501 k. Denial of Benefits. Most

Cited Cases

(Formerly 92k90.1(1))

Constitutional Law 92 ☞ 1555

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and
Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Ap-
plications in General

92k1555 k. Matters of Public Concern.

Most Cited Cases

(Formerly 92k90.1(1))

When acting as sovereign, government may not, ab-
sent justification, restrict individual's right to speak
freely on matters of public import, nor may govern-
ment indirectly exert leverage to suppress speech
by unconstitutionally tying receipt of benefits to
speaker's coerced silence. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ☞ 1545

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and
Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Ap-
plications in General

92k1545 k. In General. Most Cited

Cases

(Formerly 92k90.1(1))

Unpaid government volunteers are entitled to First
Amendment protection; exercise of free speech
rights is not dependent upon receipt of full-time
salary. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ☞ 1928

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and

Press

92XVIII(P) Public Employees and Officials

92k1928 k. Retaliation in General. Most

Cited Cases

(Formerly 92k90.1(7.2))

Government employer can deny benefit of employ-
ment to employee who speaks out against it on mat-
ter of public concern only if it can show that such
speech adversely affects efficiency or effectiveness
of its operations, and that government's interest as
employer outweighs individual employee's interest
in particular speech. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ☞ 1947

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and
Press

92XVIII(P) Public Employees and Officials

92k1947 k. Discharge. Most Cited Cases

(Formerly 92k90.1(7.2))

For government employee to support claim that her
dismissal violated her First Amendment rights, em-
ployee must show that speech involves matter of
public concern and not merely issue internal to
workplace, and that her interest in expression out-
weighs government's interest in promoting effi-
ciency of public services it performs through its
employees; these are issues for district court.
U.S.C.A. Const.Amend. 1.

[8] Civil Rights 78 ☞ 1430

78 Civil Rights

78III Federal Remedies in General

78k1425 Questions of Law or Fact

78k1430 k. Employment Practices. Most

Cited Cases

(Formerly 78k244)

Constitutional Law 92 ☞ 1932

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and
Press

92XVIII(P) Public Employees and Officials

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92k1932 k. Causation; Substantial or Motivating Factor. Most Cited Cases

(Formerly 92k90.1(7.2))

If government employee shows that her protected speech was substantial or motivating factor in decision to deny her benefit, government then has burden to show that it would have reached same decision, absent protected speech; these are questions of fact for jury. U.S.C.A. Const.Amend. 1.

[9] Federal Civil Procedure 170A ⚡2497.1

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2497 Employees and Employment Discrimination, Actions Involving

170Ak2497.1 k. In General. Most Cited Cases

Material fact questions regarding whether employee's interest in voicing criticism of proposed changes in Department of Corrections policy regarding sex offenders outweighed Department's interest in enforcing its code of conduct precluded summary judgment in employer's § 1983 claim against Department alleging that her termination violated her First Amendment right to free speech. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[10] Constitutional Law 92 ⚡1933

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(P) Public Employees and Officials

92k1933 k. Disruption or Interference. Most Cited Cases

(Formerly 92k90.1(7.2))

Government does not have to wait for public employee's speech to actually disrupt core operations before it takes action, and its reasonable predictions of harm used to justify restriction of employee speech are entitled to some deference, however, government cannot rely on purely speculative alleg-

ations that certain statements caused or will cause disruption to justify regulation of employee speech. U.S.C.A. Const.Amend. 1.

[11] Civil Rights 78 ⚡1376(2)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases

(Formerly 78k214(2))

Qualified immunity protects government official from personal liability and burden of having to go to trial unless he violated clearly established statutory or constitutional rights of which reasonable person would have known.

[12] Civil Rights 78 ⚡1376(10)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(10) k. Employment Practices. Most Cited Cases

(Formerly 78k214(7))

State corrections officials were not entitled to qualified immunity from § 1983 suit brought by employee who alleged she was fired for speaking out about department policies regarding sex offenders, since law was clearly established that public employees may not be discharged in retaliation for speaking on matters of public concern, absent showing that employer's interest in efficiency of its operations outweighed employee's interest in speech. 42 U.S.C.A. § 1983.

*724 Nathan B. Wilcox, Anderson & Karrenberg. (Ross C. Anderson and Kate A. Toomey with him on the brief), Salt Lake City, Utah, for Plaintiff-

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Appellant.

Norman E. Plate, Assistant Utah Attorney General, (Jan Graham, Utah Attorney General, with him on the brief), Salt Lake City, Utah, for Defendants-Appellees.

Before EBEL, KELLY and BRISCOE, Circuit Judges.

PAUL KELLY, Jr., Circuit Judge.

Plaintiff-Appellant Jessica Andersen appeals from the grant of summary judgment in favor of Defendants-Appellees on her civil rights claim under 42 U.S.C. § 1983. Plaintiff sought injunctive relief against O. Lane McCotter, in his official capacity as Executive Director of the Utah Department of Corrections (DOC), and monetary relief against various corrections officials, in their individual capacities, claiming that she was fired from her position as an intern with the DOC in retaliation for exercising her First Amendment rights. Defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted under Fed.R.Civ.P. 12(b)(6), arguing that they were protected by the doctrine of qualified immunity. The motion was supported by affidavits, and was therefore treated by the district court as a motion for summary judgment under Fed.R.Civ.P. 56. Applying the two-step qualified immunity analysis, the district court found in the first instance that Defendants' actions did not violate Plaintiff's First Amendment rights, and thus granted summary judgment. We exercise jurisdiction under 28 U.S.C. § 1291 and reverse.

**725 Background*

[1] In the summer of 1993, Ms. Andersen, then a student at Weber State University, began an internship with the Utah Board of Pardons. She received college credit, and was paid for twenty hours of work per week. In September 1993, she was gran-

ted permission by the Board of Pardons to work at the Bonneville Community Corrections Center (BCCC), a facility managed by the DOC. Ms. Andersen's work at BCCC was credited by the Board of Pardons toward the wages it paid her. Until March 1994, Ms. Andersen worked as an intern at BCCC two nights per week, assisting in a therapy program for sex-offenders.

Early in 1994 the DOC announced proposed changes in the sex-offender treatment program. In February 1994, Ms. Andersen was interviewed by a Salt Lake City television station. During the interview, which was televised on the evening news, she criticized the proposed changes, expressing her concern that the changes could result in the premature release of potentially dangerous sex-offenders into the community. Ms. Andersen confined her comments to expressing her own opinion, and did not disclose any confidential information. The next day Ms. Andersen was informed that she was being terminated because she had said "something negative about the Department," thus violating official DOC policy. The policy prohibited DOC employees from speaking to the media without prior authorization.

Ms. Andersen filed suit under § 1983, alleging that her criticism of the proposed changes to the sex-offender treatment program constituted speech on a matter of public concern, and was therefore protected by the First Amendment. She further alleged that her exercise of her First Amendment rights was the sole motivating factor in her dismissal. Defendants claimed qualified immunity, arguing that Ms. Andersen's status as a "volunteer" controlled the issue, and that the law was not clearly established that volunteers were afforded the same First Amendment protection as employees. In the first part of the two-part qualified immunity analysis, the district court concluded that Ms. Andersen's constitutional rights were not violated, and therefore did not reach the second step in the qualified immunity analysis. *See Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277

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(1991); *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 779-80 (10th Cir.1993). In making this determination, the district court applied the balancing test set forth in *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968), weighing Ms. Andersen's interest in commenting upon matters of public concern against the DOC's interest, as a government employer, in promoting the efficiency of the public services it performs.

On appeal, Ms. Andersen claims that her position with the DOC was a valuable governmental benefit which could only be denied in a manner that comports with the protections of the First Amendment. As such, she was entitled to the same protection under *Pickering* as any public employee. In addition, she argues that the district court improperly granted summary judgment because it performed the *Pickering* balancing test without sufficient evidence. She also claims that the law was clearly established in this area, thereby precluding Defendants' claims of qualified immunity. We agree.

Discussion

[2] We review the district court's grant of summary judgment de novo. *Hom v. Squire*, 81 F.3d 969, 973 (10th Cir.1996). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). When the First Amendment is implicated, we are obligated to "make an independent examination of the whole record" in order to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *Melton v. City of Oklahoma City*, 879 F.2d 706, 713 (10th Cir.1989) (quoting *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984)).

I. First Amendment Protection

As an initial matter, we must determine whether Ms. Andersen is entitled to the same First Amend-

ment protections long recognized^{*726} for public employees. Defendants argue that Ms. Andersen was simply a volunteer, and as such cannot claim she was deprived of a valuable governmental benefit or privilege because (1) she received no remuneration from the DOC for her services at BCCC, (2) the college credit she received for her internship was not necessary for the completion of her degree, and (3) the DOC policy manual governing volunteers specifically provided that the position could be terminated at any time for any reason by either party. Essentially, Defendants argue that because Ms. Andersen's position could be terminated "at will," it cannot be viewed as a valuable governmental benefit. We are not persuaded. The uncontroverted facts indicate that Ms. Andersen was, for all relevant purposes, a public employee.

[3] Whether Ms. Andersen was a public employee or volunteer for purposes of applying the First Amendment is a matter of state law. *Cf. Jones v. University of Central Okla.*, 13 F.3d 361, 364-65 (10th Cir.1993) (whether an employee has a property interest in employment for purposes of the Fourteenth amendment requires reference to state law). Under Utah law, "an employee is hired and paid a salary or wage, works under the direction of the employer, and is subject to the employer's control." *Gourdin ex rel. Close v. Sharon's Cultural Educ. Recreational Ass'n*, 845 P.2d 242, 244 (Utah 1992) (quoting *Board of Educ. of Alpine Sch. Dist. v. Olsen*, 684 P.2d 49, 52 (Utah 1984)). The Utah Volunteer Government Workers Act defines a "Volunteer" as "any person who donates service without pay or other compensation except expenses actually and reasonably incurred as approved by the supervising agency." Utah Code Ann. § 67-20-2 (3)(a) (Supp.1995). Section Cgr06/01.03 of the DOC's Adult Probation and Parole Manual defines a "Volunteer" as "an individual who provides uncoerced and uncompensated services, including intern services, for the Field Operations Division." Aplt.App. at 45.

Though an intern, Ms. Andersen did not provide

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uncompensated services: she was paid for twenty hours of work per week. The fact that she was paid by the Board of Pardons instead of directly by the DOC does not alter the source of the payment—the State of Utah. The hours Ms. Andersen worked at BCCC were credited by the Board of Pardons toward the wages it paid her. She was, in effect, loaned by the Board of Pardons to the DOC. Ms. Andersen also received college credit for her work at BCCC. Whether that particular credit was required for completion of her degree is a separate matter from whether such credit has value. It is uncontroverted that the educational institution granted credit for the experience, thereby conferring a non-monetary benefit upon Ms. Andersen in exchange for her continued participation in the State program.

Ms. Andersen worked under the direction of officials at BCCC, and was subject to their control. Under the terms of her unsigned agreement with the DOC, Ms. Andersen was required to:

4. attend orientation, on-the-job, and in-service training as directed;

....

6. follow instructions of paid staff members to whom [she was] responsible;

....

8. accept the responsibility of completing assignments and meeting the agreed upon work schedule; and

9. conduct [herself] with the dignity and assurance of a qualified member of a team performing a needed service in a pleasant and efficient manner.

Aplt.App. 52. Although the agreement was entitled “Volunteer Agreement,” we believe that the proper focus must be on analyzing the uncontroverted facts about the relationship against a backdrop of state employment law. “cutting through the convenient labeling of plaintiff as a ‘volunteer.’ ” Aplt.App.

142. Therefore, we conclude that under Utah law, and by the terms of the DOC’s own policies and manuals, Ms. Andersen was not a volunteer—she was obviously a government employee.

Finally, the fact that Ms. Andersen’s employment position was terminable at will does not diminish her First Amendment claim.

For at least a quarter-century, this Court has made clear that even though a person “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which [it] could not command directly. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972) (citations and quotations omitted); *see also Rutan v. Republican Party*, 497 U.S. 62, 72, 110 S.Ct. 2729, 2736, 111 L.Ed.2d 52 (1990) (“[T]he assertion here that the employee petitioners ... had no legal entitlement to promotion, transfer, or recall [is] beside the point.”); *Rankin v. McPherson*, 483 U.S. 378, 383–84, 107 S.Ct. 2891, 2896–97, 97 L.Ed.2d 315 (1987) (holding that a probationary at-will employee is entitled to First Amendment protection); *Seamons v. Snow*, 84 F.3d 1226, 1236 (10th Cir.1996); *Abercrombie v. City of Catoosa, Okla.*, 896 F.2d 1228, 1233 (10th Cir.1990).

[4][5] When acting as a sovereign, the government may not, in the absence of justification, restrict an individual’s right to speak freely on matters of public import, nor may the government indirectly exert

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leverage to suppress speech by unconstitutionally tying the receipt of benefits to the speaker's coerced silence. We hold that Ms. Andersen's termination from her employment position as an intern with the DOC because of her public comment on the DOC's proposed changes in the sex-offender treatment program implicated her First Amendment rights, and invoked the protections afforded by the *Pickering* balancing test. However, even if we accepted Defendants' arguments and considered Ms. Andersen a nonpaid volunteer, her claim would not be defeated. Defendants argue that volunteers are not entitled to First Amendment protection under *Pickering*. We disagree. The exercise of free speech rights is not dependent upon the receipt of a full-time salary. "[O]ur modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech'...." *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, ---, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843 (1996) (quoting *Perry*, 408 U.S. at 597, 92 S.Ct. at 2697). For example, the Court has recognized a variety of benefits which cannot be denied solely because of the exercise of constitutional rights. See, e.g., *Rutan*, 497 U.S. at 72-73, 110 S.Ct. at 2735-36 (promotion or transfer in a government job); *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6, 89 S.Ct. 1322, 1327 n. 6, 22 L.Ed.2d 600 (1969) (welfare benefits); *Sherbert v. Verner*, 374 U.S. 398, 404-05, 83 S.Ct. 1790, 1794-95, 10 L.Ed.2d 965 (1963) (unemployment benefits); *Speiser v. Randall*, 357 U.S. 513, 525-26, 78 S.Ct. 1332, 1341-42, 2 L.Ed.2d 1460 (1958) (tax exemptions).

[6] Having concluded that a protectible interest exists, we must ascertain whether the court properly balanced the interests of the institution against those of the plaintiff. The district court merely took the DOC's written policy and, in essence, concluded that because it was in writing it was therefore justified. A government employer can deny the benefit of employment to an employee who speaks out against it on a matter of public concern only if it can show that such speech adversely affects the ef-

iciency or effectiveness of its operations, see *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35, and that the government's interest, as an employer, outweighs the individual employee's interest in the particular speech. *Id.* It is no different here. If Ms. Andersen's speech on a matter of public concern sufficiently disrupted the operations of the DOC, the benefit of the opportunity to work at BCCC may also be denied. *Pickering* and its progeny make no distinctions based on the type of benefit received by the individual. Thus, any benefits conferred by government employers may be limited or denied on the basis of speech, *728 but only if that speech adversely affects the government employer's ability to carry out its operations and if the adverse effect to the government outweighs the interests of the speaker. The government employer must justify the denial of benefits by showing that its interest in maintaining efficient operations *actually* outweighs the individual's interest in her speech on matters of public concern. Since Ms. Andersen was deprived of this benefit by a government employer, we must apply the *Pickering* balancing test to determine whether this termination violated her First Amendment rights.

[7] In order for Ms. Andersen to prevail on a claim that her dismissal violated her First Amendment rights, the court must first determine that her speech is constitutionally protected. *Hom*, 81 F.3d at 974; *Moore v. City of Wynnewood*, 57 F.3d 924, 931 (10th Cir.1995). To establish that speech is protected, the plaintiff must first show that the speech involves a matter of public concern and not merely an issue internal to the workplace. *Connick v. Myers*, 461 U.S. 138, 146-47, 103 S.Ct. 1684, 1689-90, 75 L.Ed.2d 708 (1983); *Moore*, 57 F.3d at 931. If the speech does involve a matter of public concern, the plaintiff must then show that her interest in the expression outweighs the government's interest in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35; *Considine v. Board of County Comm'rs*, 910 F.2d 695, 700 (10th Cir.1990). In this regard, the "[s]tate bears a

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burden of justifying the discharge on legitimate grounds.” *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899; *Connick*, 461 U.S. at 150, 103 S.Ct. at 1691-92; *Considine*, 910 F.2d at 700-01. These are questions of law for the district court.

[8] If the balance in the *Pickering* test tips in favor of the plaintiff-meaning the speech in question is protected-the plaintiff must then show that the speech was a substantial or motivating factor in the decision to deny the benefit. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *Hom*, 81 F.3d at 974. The government then has the burden to show that it would have reached the same decision in the absence of the protected speech. *Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 576; *Hom*, 81 F.3d at 974. These are questions of fact for the jury.

The parties agree and the district court found that Ms. Andersen's statements criticizing the DOC's proposed changes in its sex-offender treatment policy did constitute speech on a matter of public concern. At issue here is the district court's application of the *Pickering* balancing test.

[9] The district court granted summary judgment to Defendants because it found that Ms. Andersen's interest in voicing her criticism was “clearly outweighed” by the DOC's interest in enforcing its Code of Conduct. In so deciding, the court found (1) that Ms. Andersen's criticisms were “unwarranted,” (2) that the criticism “undermine[d] public confidence” in the DOC, and (3) that Ms. Andersen's noncompliance with DOC policy-speaking to the public without prior authorization-“interfered with the regular operation of the DOC.” Such conclusions might be proper after balancing the interests under *Pickering*, if they were supported by evidence. In this case, however, Defendants put forth no evidence to support the district court's findings. Instead, they rely solely on statements contained in the DOC's Code of Conduct and its Community Relations Manual. Section AE 02/03.01 (O) of the Code of Conduct provides that “[n]o member shall act or behave privately or offi-

cially in such a manner that undermines the efficiency of the Department, causes the public to lose confidence in the Department, or brings discredit upon himself, the State of Utah, or the Department.” Aplt.App. at 33. Section AE 02/03.06 states that “[m]embers shall not make critical or disloyal public remarks about any policy, procedure, official act, or other member of the Department...” Aplt.App. at 35. The Community Relations policy expressly states that public criticism “undermines public confidence in the DOC” and, therefore, is forbidden. Aplt.App. at 37.

[10] Here, there is no integration of facts with the policy statements. It is the governmental defendant's burden to justify the challenged discharge on legitimate grounds. *729 *Considine*, 910 F.2d at 700-01. The government does not have to wait for speech to actually disrupt core operations before it takes any action, and its reasonable predictions of harm used to justify restriction of employee speech are entitled to some deference. *Moore*, 57 F.3d at 934 (citing *Waters v. Churchill*, 511 U.S. 661, 673, 677, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686 (1994)). However, “[t]he government cannot rely on purely speculative allegations that certain statements caused or will cause disruption to justify the regulation of employee speech.” *Moore*, 57 F.3d at 934; *Wulf v. City of Wichita*, 883 F.2d 842, 862 (10th Cir.1989). The *Pickering* balancing test requires a “fact-sensitive” weighing of the government's interests. *Umbehr*, 518 U.S. at ---, 116 S.Ct. at 2348. Necessarily, Defendants must provide evidence sufficient to assess the character and weight of the DOC's interests. *Considine*, 910 F.2d at 701. Defendants provided no such evidence. Accordingly, at this stage of the proceedings, Defendants are not entitled to summary judgment.

II. Qualified Immunity

The district court found that Defendants' actions did not violate Ms. Andersen's constitutional rights, and therefore did not address whether, in the event of such a violation, Defendants would be entitled to

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qualified immunity. We have concluded, however, that the allegations at least implicate a clearly established right. Because both parties fully argued the issue of qualified immunity before the district court and on appeal, and because we find that the proper resolution is apparent, we will consider this legal question. *See Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1229 (10th Cir.1996); *Medina v. City and County of Denver*, 960 F.2d 1493, 1497 (10th Cir.1992).

[11][12] Qualified immunity protects a government official from personal liability and the burden of having to go to trial unless he violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Moore*, 57 F.3d at 931. Defendants argue that even if Ms. Andersen's termination violated her First Amendment rights, they are entitled to qualified immunity because the law was not clearly established in March 1994 that a volunteer had the same rights as an employee or that one's volunteer status could not be revoked on the basis of protected speech. *But see Hyland v. Wonder*, 972 F.2d 1129, 1136 (9th Cir.1992), *cert. denied*, 508 U.S. 908, 113 S.Ct. 2337, 124 L.Ed.2d 248 (1993); *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 25 (2d Cir.1979). We need not decide whether it was clearly established before this case that volunteers had *Pickering* protection, because Ms. Andersen was not a volunteer. As discussed above, she was a public employee who was paid by the State of Utah, who worked under the direction of officials at BCCC and who was subject to the control of the DOC. *See Gourdin*, 845 P.2d at 244. The law has been clearly established since 1968 that public employees may not be discharged in retaliation for speaking on matters of public concern, absent a showing that the government employer's interest in the efficiency of its operations outweighs the employee's interest in the speech. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35;

Rankin, 483 U.S. at 388, 107 S.Ct. at 2899; *Hom*, 81 F.3d at 974; *Moore*, 57 F.3d at 931. Because the law in this area was clearly established in March 1994, Defendants are not entitled to qualified immunity.

REVERSED and REMANDED.

C.A.10 (Utah).1996.
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END OF DOCUMENT

ADDENDUM “2”
(Utah Code Ann. § 63G-7-401)

Title/Chapter/Section:

Utah Code

Title 63G General Government

Chapter 7 Governmental Immunity Act of Utah

Section 401 Claim for injury -- Notice -- Contents -- Service -- Legal disability -- Appointment of guardian ad litem.

63G-7-401. Claim for injury -- Notice -- Contents -- Service -- Legal disability -- Appointment of guardian ad litem.

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

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

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

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

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

- (i) a brief statement of the facts;
- (ii) the nature of the claim asserted;
- (iii) the damages incurred by the claimant so far as they are known; and
- (iv) if the claim is being pursued against a governmental employee individually as provided in Subsection **63G-7-202**(3)(c), the name of the employee.

(b) The notice of claim shall be:

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

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

- (A) the city or town clerk, when the claim is against an incorporated city or town;
- (B) the county clerk, when the claim is against a county;
- (C) the superintendent or business administrator of the board, when the claim is against a school district or board of education;
- (D) the presiding officer or secretary/clerk of the board, when the claim is against a local district or special service district;

(E) the attorney general, when the claim is against the state;

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

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

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

(b) If a guardian ad litem is appointed, the time for filing a claim under Section **63G-7-402** begins when the order appointing the guardian is issued.

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

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

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

(c) The Division of Corporations and Commercial Code shall develop a form for governmental entities to complete that provides the information required by Subsection (5)(a).

(d) (i) A newly incorporated municipality shall file the statement required by Subsection (5)(a) promptly after the lieutenant governor issues a certificate of incorporation under Section **67-1a-6.5**.

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

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

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

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

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

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

Amended by Chapter 350, 2009 General Session

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ADDENDUM “3”
(*Cedar Prof'l Plaza L.C. v. Cedar City Corp.*,
2006 UT App 36, 131 P.3d 275)

131 P.3d 275, 535 Utah Adv. Rep. 5, 2006 UT App 36
(Cite as: 131 P.3d 275)

C

Court of Appeals of Utah.
CEDAR PROFESSIONAL PLAZA, L.C., Plaintiff
and Appellant.
v.
CEDAR CITY CORPORATION, Defendant and
Appellee.
No. 20040958-CA.

Feb. 9, 2006.

Background: Following the dismissal, due to failure to comply with pre-suit notice requirements of Governmental Immunity Act, of property owner's negligent supervision action against city, which sought compensation for damage caused by an irrigation pipe that burst during construction project at adjacent city-owned property, owner filed second complaint that also included claims for direct negligence based on city's own activities. The Fifth District Court, Cedar City Department, J. Philip Eves, J., awarded summary judgment to city. Owner appealed.

Holdings: The Court of Appeals, McHugh, J., held that:

- (1) trial court lacked subject matter jurisdiction over first complaint;
- (2) owner was not required to set forth all specific causes of action it might assert in the pre-suit notice of claim; and
- (3) equitable discovery rule did not toll one-year period within which owner was required to file pre-suit notice of claim.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚡842(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in

General

30k838 Questions Considered

30k842 Review Dependent on Whether
Questions Are of Law or of Fact

30k842(1) k. In General. Most
Cited Cases

Limitation of Actions 241 ⚡199(1)

241 Limitation of Actions

241V Pleading, Evidence, Trial, and Review

241k199 Questions for Jury

241k199(1) k. In General. Most Cited
The applicability of a statute of limitations and the applicability of the discovery rule are questions of law, which Court of Appeals reviews for correctness.

[2] Municipal Corporations 268 ⚡845(1)

268 Municipal Corporations

268XII Torts

268XII(D) Defects or Obstructions in Sewers, Drains, and Water Courses

268k845 Actions for Injuries

268k845(1) k. Nature of Remedy and
Notice or Presentation of Claim. Most Cited Cases

Trial court lacked subject matter jurisdiction over first complaint filed by property owner against city arising out of damage caused by an irrigation pipe that burst during construction project on adjacent city-owned property, where pre-suit notices of claim sent by owner pursuant to the Governmental Immunity Act were not sent to city recorder, as required by the Act. U.C.A.1953, 63-30-11 (3)(b)(ii)(A) (Repealed).

[3] Municipal Corporations 268 ⚡845(1)

268 Municipal Corporations

268XII Torts

268XII(D) Defects or Obstructions in Sewers, Drains, and Water Courses

268k845 Actions for Injuries

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268k845(1) k. Nature of Remedy and Notice or Presentation of Claim. Most Cited Cases
Property owner that sought to assert claim against city for damage to its property caused by an irrigation pipe that burst during construction project on adjacent city-owned property was not required to set forth, in the pre-suit notice of claim required by the Governmental Immunity Act, all specific causes of action it might assert against city, and thus notice of claim that alleged negligent supervision of contractors was sufficient to provide notice of claim for direct negligence by city based on its own construction activity; notice was required only to inform city of the nature of the claim, and additional theories of negligence could be added to the complaint by way of amendment. U.C.A.1953, 63-30-11(3)(a) (Repealed).

[4] Municipal Corporations 268 ⚡ 741.15

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k741 Notice or Presentation of Claims for Injury

268k741.15 k. Necessity and Purpose. Most Cited Cases

Purpose of the notice of a claim that is required to be served on a governmental entity by the Governmental Immunity Act is to provide the governmental entity an opportunity to correct the condition that caused the injury, evaluate the claim, and perhaps settle the matter without the expense of litigation. U.C.A.1953, 63-30-11(3)(a)(Repealed).

[5] Municipal Corporations 268 ⚡ 741.50

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k741 Notice or Presentation of Claims for Injury

268k741.50 k. Form and Sufficiency. Most Cited Cases

The notice of claim required to be served on a governmental entity by the Governmental Immunity Act need not meet the standards required to plead a claim for relief, but must include only enough specificity in the notice to inform as to the nature of the claim so that the defendant can appraise its potential liability. U.C.A.1953, 63-30-11(3)(a)(Repealed).

[6] Municipal Corporations 268 ⚡ 741.40(1)

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k741 Notice or Presentation of Claims for Injury

268k741.40 Excuses for and Relief from Delay or Failure

268k741.40(1) k. In General. Most Cited Cases

Attempts to avoid the rigors of the Governmental Immunity Act's requirement of notice of claim by tactical characterization of a claim are disfavored. U.C.A.1953, 63-30-11 (Repealed).

[7] Municipal Corporations 268 ⚡ 845(1)

268 Municipal Corporations

268XII Torts

268XII(D) Defects or Obstructions in Sewers, Drains, and Water Courses

268k845 Actions for Injuries

268k845(1) k. Nature of Remedy and Notice or Presentation of Claim. Most Cited Cases
Equitable discovery rule did not toll one-year period within which property owner was required, pursuant to Governmental Immunity Act, to file pre-suit notice of claim against city for damages caused by irrigation pipe that burst during construction project at adjacent city-owned property, and thus such period began to run no later than date owner attempted to file notice asserting a claim for negligent supervision of contractors, rather than date owner learned city directly participated in construction; owner knew it had some form of negligence

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claim against city when it attempted to file notice, and owner was not entitled to wait until it knew all of the facts. U.C.A.1953, 63-30-13 (Repealed).

[8] Limitation of Actions 241 ⚡43

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k43 k. Causes of Action in General. Most Cited Cases

Generally, a statute of limitations is triggered upon the happening of the last event necessary to complete the cause of action.

[9] Limitation of Actions 241 ⚡165

241 Limitation of Actions

241IV Operation and Effect of Bar by Limitation

241k165 k. Operation as to Rights or Remedies in General. Most Cited Cases

If the plaintiff does not commence litigation within the statutory time limit, the claim is barred.

[10] Limitation of Actions 241 ⚡95(1)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k95 Ignorance of Cause of Action

241k95(1) k. In General; What Constitutes Discovery. Most Cited Cases

Mere ignorance of the existence of a cause of action will neither prevent the running of a statute of limitations nor excuse a plaintiff's failure to file a claim within the relevant statutory period.

[11] Limitation of Actions 241 ⚡95(1)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k95 Ignorance of Cause of Action

241k95(1) k. In General; What Constitutes Discovery. Most Cited Cases

In narrow instances, a statute of limitations may be tolled pending the discovery of the facts forming the basis of the claim.

[12] Limitation of Actions 241 ⚡95(1)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k95 Ignorance of Cause of Action

241k95(1) k. In General; What Constitutes Discovery. Most Cited Cases

Under the "equitable discovery rule," the running of a statute of limitations may be tolled: (1) where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct, or (2) where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action.

*277 Blaine T. Hofeling and Justin W. Wayment, Hofeling & Wayment LLP, Cedar City, for Appellant.

Allan L. Larson and David F. Mull, Snow Christensen & Martineau, Salt Lake City, for Appellee.

Before BENCH, P.J., DAVIS, and McHUGH, JJ.

OPINION

McHUGH, Judge:

¶ 1 Cedar Professional Plaza, L.C. (Cedar Professional) appeals the trial court's dismissal with prejudice of its complaint against Cedar City Corporation (Cedar City) for failure to comply with the notice provisions of the Utah Governmental Immunity Act (the Act). See Utah Code Ann. §§ 63-30-1 to -

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38 (1997 & Supp.2001).^{FN1} We affirm.

FN1. The Utah Legislature amended and recodified the Act in 2004. *See* Utah Code Ann. §§ 63-30d-101 to -904 (2004). The injuries alleged to be caused by Cedar City occurred before those amendments and are governed by the former version of the Act. *See Houghton v. Department of Health*, 2005 UT 63, ¶ 3 n. 2, 125 P.3d 860. Therefore, all references in this decision are to the former version of the Act.

BACKGROUND

¶ 2 On April 30, 2000, a buried irrigation pipe burst on property (City Property) owned by Cedar Affordable Housing, an entity of Cedar City Housing Authority, which was created by Cedar City. At the time of the incident, a low-income housing project was under construction on the City Property. The rupture caused flooding that infiltrated Cedar Professional's adjacent property, causing significant damage.

¶ 3 On June 29, 2000, and September 28, 2000, Cedar Professional sent two separate letters (First Notice and Second Notice, respectively) to Cedar City officials in an attempt to comply with the notice provisions of the Act. *See id.* §§ 63-30-11, -13. Thereafter, on January 8, 2001, Cedar Professional filed a complaint against Cedar City and others (First Complaint), claiming that Cedar City was liable for damages caused by the burst pipe due to its negligent supervision of the construction on the City Property.

¶ 4 Upon motion by Cedar City, the trial court dismissed the First Complaint on the grounds that the First Notice and Second Notice had not been directed to the authorized governmental agent identified in the Act. *See id.* § 63-30-11(3)(b)(ii)(A). Cedar Professional does not challenge the dismissal of the First Complaint. Although over a year had passed since the flooding, the trial court dismissed Cedar

Professional's complaint without prejudice.

*278 ¶ 5 On October 25, 2002, Cedar Professional prepared a new notice of claim (Third Notice) and delivered it to the proper governmental agent. *See id.* Subsequently, on January 10, 2003, Cedar Professional filed a new complaint against Cedar City (Second Complaint) that included claims for negligent supervision, as well as claims for direct negligence caused by Cedar City's own activities at the construction site on the City Property. Cedar City moved for summary judgment, arguing that the notice of claim had not been filed within one year as required by the Act. *See id.* § 63-30-13. The trial court agreed and dismissed the Second Complaint with prejudice. Cedar Professional appeals.

ISSUE AND STANDARD OF REVIEW

[1] ¶ 6 The issue before this court is the application of the discovery rule to the one-year notice requirement in the Act. *See id.* "The applicability of a statute of limitations and the applicability of the discovery rule are questions of law, which we review for correctness." *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 18, 108 P.3d 741 (quotations and citation omitted).

ANALYSIS

[2] ¶ 7 Cedar City is a municipal corporation that can be sued only in accordance with the provisions of the Act. When a claim is against an incorporated city, the Act requires a plaintiff to deliver a notice of claim to the city recorder "within one year after the claim arises." Utah Code Ann. § 63-30-13; *see id.* § 63-30-11(3)(b)(ii)(A). There is no dispute that the First Notice and Second Notice were not delivered to the Cedar City recorder. Thus, the trial court properly dismissed the First Complaint for lack of subject matter jurisdiction. *See, e.g., Houghton v. Department of Health*, 2005 UT 63, ¶ 20, 125 P.3d 860 (providing that strict compliance with the notice requirements of the Act is necessary to confer subject matter jurisdiction); *Gurule v. Salt*

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Lake County, 2003 UT 25, ¶ 5, 69 P.3d 1287 (same); *Wheeler v. McPherson*, 2002 UT 16, ¶ 11, 40 P.3d 632 (same); *Greene v. Utah Transit Auth.*, 2001 UT 109, ¶¶ 15-16, 37 P.3d 1156 (same).

[3] ¶ 8 On October 25, 2002, after the First Complaint was dismissed, Cedar Professional prepared the Third Notice, which it delivered to the Cedar City recorder. Although it was delivered to the correct governmental agent, *see* Utah Code Ann. § 63-30-11(3)(b)(ii)(A), the Third Notice was sent well over one year after the April 30, 2000 incident that caused the flooding. Cedar Professional argues that the Third Notice was timely because it was delivered within one year of the time Cedar Professional learned that Cedar City had operated construction equipment on the City Property and was allegedly negligent for its own activities, as opposed to being negligent in its supervision of other parties. We disagree.

[4][5] ¶ 9 Nothing in the Act requires a claimant to set forth in the notice of claim each specific cause of action that might be pleaded against the government entity. Rather, the Act requires only that the notice of claim include "a brief statement of the facts," "the nature of the claim asserted," and "the damages incurred by the claimant so far as they are known." *Id.* § 63-30-11(3)(a)(i)-(iii). "The purpose of the notice is to provide[] the governmental entity an opportunity to correct the condition that caused the injury, evaluate the claim, and perhaps settle the matter without the expense of litigation." *Houghton*, 2005 UT 63 at ¶ 20, 125 P.3d 860 (alteration in original) (quotations and citations omitted). The notice need not meet the standards required to plead a claim for relief, but must include only "enough specificity in the notice to inform as to the nature of the claim so that the defendant can appraise its potential liability." *Id.* at ¶ 21 (quotations and citation omitted).

[6] ¶ 10 Thus, the First Notice and Second Notice were sufficient to inform Cedar City of the nature of the claim so that it could appraise its potential liability. *See id.* The First Complaint named Cedar

City as a defendant and asserted negligence claims against it. Had Cedar Professional directed the First Notice or Second Notice to the correct governmental agent, *see* Utah Code Ann. § 63-30-11(3)(b)(ii)(A), its First Complaint would not have been dismissed for lack of subject matter jurisdiction. Upon learning*279 of Cedar City's direct involvement in the construction activities on the City Property, Cedar Professional would then have been entitled to amend the First Complaint to add additional negligence theories, even if the statute of limitations had run.^{FN2} It is only because the First Notice and Second Notice were ineffective that Cedar Professional attempted to repackage its claims arising out of the April 30, 2000 incident as a new cause of action. Attempts to avoid the rigors of the Act by tactical characterization of a claim are disfavored. *See Gillman v. Department of Fin. Insts.*, 782 P.2d 506, 512 (Utah 1989) (rejecting bankruptcy trustee's attempt to cast a claim arising out of a regulator's licensing decision as a negligence action to avoid the Act); *see also Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 336-37 (Utah 1997) (rejecting attempt to avoid medical malpractice statute of limitations by characterizing claim as fraud).

FN2. Utah Rule of Civil Procedure 15(c) provides that new claims added in an amended complaint relate back to the date of the original complaint if "the claim ... asserted in the amended [complaint] arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original [complaint]." Utah R. Civ. P. 15(c); *see also Gary Porter Constr. v. Fox Constr., Inc.*, 2004 UT App 354, ¶ 40, 101 P.3d 371 (discussing test for relation back under rule 15(c)), *cert. denied*, 123 P.3d 815 (Utah 2005).

[7][8][9][10] ¶ 11 Furthermore, Cedar Professional cannot rely on the discovery rule to avoid the effects of the running of the statutory time in which it could file a valid notice of claim. The Act provides

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that a claim against a governmental entity is barred unless a notice of claim is filed "within one year after the claim arises." Utah Code Ann. § 63-30-13; *see also Warren v. Provo City Corp.*, 838 P.2d 1125, 1128 (Utah 1992) ("The notice of claim provisions of sections 63-30-11 and 63-30-13 operate as a one-year statute of limitations in cases brought against a governmental entity."). "A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run." Utah Code Ann. § 63-30-11(1). Generally, a statute of limitations is triggered "upon the happening of the last event necessary to complete the cause of action." *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 20, 108 P.3d 741 (quotations and citation omitted). If the plaintiff does not commence litigation within the statutory time limit, the claim is barred. *See id.* Furthermore, "[m]ere ignorance of the existence of a cause of action will neither prevent the running of [a] statute of limitations nor excuse a plaintiff's failure to file a claim within the relevant statutory period." *Id.*

[11][12] ¶ 12 In narrow instances, a statute of limitations may be tolled pending the discovery of the facts forming the basis of the claim. *See id.* at ¶ 21. The Act does not contain an internal statutory discovery rule. Thus, there are two situations in which the running of the one-year notice requirement in the Act may be tolled under the "equitable discovery rule":

(1) where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct, and (2) where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action.

Id. at ¶ 25 (quotations and citations omitted). Cedar Professional concedes that, absent application of the equitable discovery rule, the Third Notice is untimely. It argues, however, that the one-year notice requirement in the Act, *see* Utah Code Ann. §

60-30-13, did not commence until it discovered Cedar City's direct participation in the construction activities on the City Property that allegedly caused the flooding.

¶ 13 There is nothing exceptional about the circumstances of this case that would satisfy the second situation for application of the equitable discovery rule, *see Carson*, 2005 UT 14 at ¶ 25, 108 P.3d 741, and Cedar Professional does not assert its application here. Thus, the Third Notice is timely only if Cedar Professional did not become aware of the cause of action because of the City's concealment or misleading conduct. *See id.* From the allegations contained in the First Complaint and the First Notice and Second Notice, it is undisputed that Cedar Professional²⁸⁰ was aware of a negligence claim against Cedar City as early as June 29, 2000. Nevertheless, Cedar Professional asserts that the one-year notice period in the Act, *see* Utah Code Ann. § 63-30-13, did not commence until it discovered facts to support a direct negligence claim against Cedar City. We disagree.

¶ 14 Cedar Professional was not entitled to wait until it knew all of the facts supporting its negligence claim against Cedar City. It is enough that Cedar Professional was "aware that the governmental entity's action or inaction ha[d] resulted in some kind of harm to its interests." *Bank One Utah, N.A. v. West Jordan City*, 2002 UT App 271, ¶ 12, 54 P.3d 135. Further, this is not a case where the claimant was unaware that the governmental entity had harmed its interest. *See Vincent v. Salt Lake County*, 583 P.2d 105, 107 (Utah 1978) (holding that the one-year limit under the Act was tolled until the plaintiff learned, despite the defendant's contrary representations, that the defendant's storm drain was the cause of damage). Whether Cedar City had hoped to conceal its potential liability, which we do not decide, Cedar Professional knew enough to assert that Cedar City's negligence had resulted in "some kind of harm to its interests" as of the date of the First Notice. *Bank One Utah*, 2002 UT App 271 at ¶ 12, 54 P.3d 135. The fact that sub-

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sequently learned information allowed Cedar Professional to refine its negligence claim did not toll the one-year period during which it was required to serve notice upon Cedar City pursuant to the Act. *See* Utah Code Ann. § 63-30-13; *Peterson v. Union Pac. R.R. Co.*, 79 Utah 213, 8 P.2d 627, 630-31 (1932) (holding that plaintiff's amended complaint was not barred by the applicable statute of limitations where the amendment merely expanded on plaintiff's negligence theories, and stating that "in a tort action an amendment may vary the statement of the original complaint as to the manner in which the plaintiff was injured or as to the manner of the defendant's breach of duty").

CONCLUSION

¶ 15 The trial court properly concluded that the discovery rule was inapplicable in this case and that Cedar Professional's action was barred by the one-year notice requirement in the Act. *See* Utah Code Ann. § 63-30-13. Therefore, we affirm the trial court's dismissal with prejudice of Cedar Professional's complaint.

¶ 16 WE CONCUR: RUSSELL W. BENCH, Presiding Judge and JAMES Z. DAVIS, Judge.
Utah App., 2006.
Cedar Professional Plaza, L.C. v. Cedar City Corp.
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END OF DOCUMENT

ADDENDUM “4”
*(Heideman v. Washington City, 2007 UT App
11, 155 P.3d 900)*

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(Cite as: 155 P.3d 900)

C

Court of Appeals of Utah.

Kent A. HEIDEMAN; Kimball B. Gardner; and
Birdview Manufacturing Inc., a Utah corporation,
Plaintiffs and Appellants,

v.

WASHINGTON CITY, a Utah municipal corpora-
tion; and unknown persons working for or under the
authority of Washington City, Defendants and Ap-
pellees.

No. 20050941-CA.

Jan. 11, 2007.

Background: Developers who had paid water im-
pact fees to city prior to fee increase for prospective
units sued city for breach of contract, breach of
duty of good faith and fair dealing, violation of
civil rights under § 1983, taking without just com-
pensation, due process violations, intentional inter-
ference with prospective economic relations, and
attorney fees, all regarding the city's refusal to hon-
or fee payments. On competing motions for sum-
mary judgment, the Fifth District Court, St. George
Department, G. Rand Beacham, J., entered judg-
ment for city. Developers appealed.

Holdings: The Court of Appeals, Greenwood, As-
sociate P.J., held that:

- (1) developers' notice of claim was insufficient to
support intentional interference with prospective
economic relations claim;
- (2) developers failed to put alleged disputed facts at
summary judgment at issue with admissible evi-
dence of such facts;
- (3) water impact fees were not "permits" to which
developers could have a legitimate claim of entitle-
ment;
- (4) developers failed to meet city eligibility require-
ments to honor prepaid water impact fees;
- (5) even if fee were a permit, developers had no
protected property interest in issuance of water im-
pact fee permit required for due process violation

claim;

(6) city employees' acceptance of prepayment of
water impact fees did not create a contract that ob-
ligated city to honor those fees in the future;

(7) any contract formed by prepayment of water im-
pact fees was void as against public policy.

Affirmed.

West Headnotes

[1] Municipal Corporations 268 ↪ 741.35

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and
Corporate Powers in General

268k741 Notice or Presentation of Claims
for Injury

268k741.35 k. Effect of delay or fail-
ure to give. Most Cited Cases

Failure to strictly comply with the notice of claim
requirements under the Governmental Immunity
Act results in a court's lack of jurisdiction.
U.C.A.1953, 63-30-11 (Repealed).

[2] Municipal Corporations 268 ↪ 741.50

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and
Corporate Powers in General

268k741 Notice or Presentation of Claims
for Injury

268k741.50 k. Form and sufficiency.
Most Cited Cases

Developers' notice of claim against city alleging
breach of contract, § 1983 claims, and "other
causes of action," was insufficient to put city on no-
tice of intentional interference with economic rela-
tions claim developers brought against city in law-
suit. U.C.A.1953, 63-30-11(3)(a) (Repealed).

[3] Judgment 228 ↪ 185.2(9)

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228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.2 Use of Affidavits

228k185.2(9) k. Effect of failure to file affidavit. Most Cited Cases

Judgment 228 ⚡ 185.3(1)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(1) k. In general. Most Cited

Cases

Developers who brought various claims against city after city refused to honor water impact fees paid by developers in anticipation of fee increase for future units, failed to put alleged disputed facts at issue in response to city's summary judgment motion, given that developers failed to support memorandum alleging disputed facts with any admissible evidence of the alleged disputed facts. Rules Civ.Proc., Rule 7(c)(3)(B).

[4] Constitutional Law 92 ⚡ 387.4(1)

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3868 Rights, Interests, Benefits, or Privileges Involved in General

92k3874 Property Rights and Interests

92k3874(1) k. In general. Most

Cited Cases

(Formerly 92k277(1))

To prevail on a due process claim that the party was deprived of certain property by the city, the party must first establish that it has a "protectible property interest," which is a legitimate claim of entitlement. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 ⚡ 4093

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)3 Property in General

92k4091 Zoning and Land Use

92k4093 k. Particular issues and applications. Most Cited Cases
(Formerly 92k278.2(1))

Zoning and Planning 414 ⚡ 1382(4)

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(A) In General

414k1379 Maps, Plats, and Plans; Subdivisions

414k1382 Conditions and Agreements

414k1382(4) k. Fees, bonds and in lieu payments. Most Cited Cases
(Formerly 414k382.4)

Developers did not have legitimate claim of entitlement to water impact fee "permits" at reduced rates before city's rate increase, as required to show that city's failure to honor payment of such fees violated developer's due process rights, given that water impact fee was not "permit," but was merely prerequisite to obtaining a building permit, and fee was a charge by city to regulate new growth and development and to provide adequate public facilities and services. U.S.C.A. Const.Amend. 14; West's U.C.A. § 11-36-102(7)(a).

[6] Constitutional Law 92 ⚡ 4093

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)3 Property in General

92k4091 Zoning and Land Use

92k4093 k. Particular issues and applications. Most Cited Cases
(Formerly 92k278.2(1))

Zoning and Planning 414 ⚡ 1382(4)

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414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(A) In General

414k1379 Maps, Plats, and Plans; Subdivisions

414k1382 Conditions and Agreements

414k1382(4) k. Fees, bonds and in lieu payments. Most Cited Cases

(Formerly 414k382.4)

City did not violate developers' due process rights by refusing to honor prepayment of water impact fees at reduced rate before fee increase, given that city established eligibility for payment under prior rate of submitting permit applications within two weeks after effective date of fee increase, and developers failed to submit permit applications within the time provided. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law 92 ⚡ 4093

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)3 Property in General

92k4091 Zoning and Land Use

92k4093 k. Particular issues and applications. Most Cited Cases

(Formerly 92k278.2(1))

Zoning and Planning 414 ⚡ 1382(4)

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(A) In General

414k1379 Maps, Plats, and Plans; Subdivisions

414k1382 Conditions and Agreements

414k1382(4) k. Fees, bonds and in lieu payments. Most Cited Cases

(Formerly 414k382.4)

Even if city's water impact fee were a permit, developers did not have legitimate claim of entitlement to receive such permit, as required to demonstrate a protected property interest for claim that city violated their due process rights by refusing to

honor their prepayment of water impact fees prior to fee increase, given that there were no established rules or guidelines to secure developers a certain benefit when they tendered payment for the fees to the city. U.S.C.A. Const.Amend. 14; West's U.C.A. § 11-36-101.

[8] Contracts 95 ⚡ 9(1)

95 Contracts

95I Requisites and Validity

95I(A) Nature and Essentials in General

95k9 Certainty as to Subject-Matter

95k9(1) k. In general. Most Cited Cases

Contracts 95 ⚡ 15

95 Contracts

95I Requisites and Validity

95I(B) Parties, Proposals, and Acceptance

95k15 k. Necessity of assent. Most Cited Cases

Contracts 95 ⚡ 27

95 Contracts

95I Requisites and Validity

95I(B) Parties, Proposals, and Acceptance

95k27 k. Implied agreements. Most Cited Cases

An express or implied-in-fact contract results when there is a manifestation of mutual assent, by words or actions or both, which reasonably are interpretable as indicating an intention to make a bargain with certain terms or terms which reasonably may be made certain.

[9] Zoning and Planning 414 ⚡ 1382(4)

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(A) In General

414k1379 Maps, Plats, and Plans; Subdivisions

414k1382 Conditions and Agreements

414k1382(4) k. Fees, bonds and in

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lieu payments. Most Cited Cases
(Formerly 414k382.4)

City employees' acceptance of developers' tender of prepayment for water impact fees at prior rate before increase for prospective units did not create a contract that obligated city to honor the payments for a development at some time in the future, given that there was no offer to enter into a contract, there was no acceptance from any qualified to enter into contracts for the city, no communication that indicated any type of meeting of the minds, and city did not vote on contract or have one signed by city recorder. West's U.C.A. §§ 10-3-506, 10-6-138.

[10] Zoning and Planning 414 1382(4)

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(A) In General

414k1379 Maps, Plats, and Plans; Subdivisions

414k1382 Conditions and Agreements

414k1382(4) k. Fees, bonds and in

lieu payments. Most Cited Cases

(Formerly 414k382.4)

Any contract that could have been formed by acceptance by city employees of developers' prepayment of water impact fees for future development in anticipation of fee increase was void as against public policy; city's ability to protect health, safety, and welfare of the public would be seriously hampered if mere acceptance of fee created binding obligation on city.

*902 Justin R. Elswick and Justin D. Heideman, Ascione Heideman & McKay, LLC, Provo, for Appellants.

Jeffrey N. Starkey and Bryan J. Pattison, Durham Jones & Pinegar, St. George, for Appellees.

Before GREENWOOD, Associate P.J., BILLINGS and ORME, JJ.

OPINION

GREENWOOD, Associate Presiding Judge:

¶ 1 Kent A. Heideman, Kimball B. Gardner, and Birdview Manufacturing, Inc.(collectively, Plaintiffs) ^{FN1} appeal the trial court's grant of summary judgment in favor of Defendant Washington City (the City), claiming the trial court erred in concluding that (1) Plaintiffs' notice of claim was defective because it failed to name all possible causes of action, (2) there were no genuine issues of material fact, (3) Plaintiffs did not have a protected property interest at stake, (4) the City had not converted Plaintiffs' property, (5) the City's conduct did not amount to an unconstitutional taking, (6) the parties had not entered into a contractual relationship, (7) the City had not breached any contracts with Plaintiffs, and (8) the City had not breached the implied covenant of good faith and fair dealing. We affirm.

FN1. Plaintiff Birdview Manufacturing, Inc. was not named as a claimant in Plaintiffs' notice of claim. *see* Utah Code Ann. § 63-30-11(2) (Supp.2003), *repealed by id.* § 63-30d-401 (2004), and was therefore barred from pursuing any claim for intentional interference with economic relations against the City. *See Pigs Gun Club, Inc. v. Sanpete County*, 2002 UT 17, ¶ 10, 42 P.3d 379 ("Each plaintiff's name must be on the notice of claim.").

BACKGROUND

¶ 2 On October 23, 2002, the City passed Ordinance Number 2002-13 (the Ordinance), *see* Washington City, Utah, Ordinance 2002-13 (Oct. 23, 2002), which increased water impact fees from \$2284 to \$3182 per dwelling unit.^{FN2} During the October 23 hearing at which the Ordinance was first discussed, Plaintiff Kent Heideman, a city council member and land developer, expressed concern about when the Ordinance would go into effect. Mr. Heideman argued that the city council should give developers, including himself, "thirty

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days to get [current projects] wrapped up.” Council member Roger Bundy stated that the City of St. George “had a stampede” when it did as Mr. Heideman suggested. When it came time to vote on the *903 Ordinance, Mr. Bundy stated that “there may be some people that have permits sitting there ready to be pulled,” and he thought a two-week waiting period was necessary.^{FN3} The council ultimately voted to approve the Ordinance with a November 6, 2002 effective date.

FN2. Impact fees are sums of money “imposed upon development activity as a condition of development approval.” Utah Code Ann. § 11-36-102(7)(a) (Supp.2006). Municipalities are authorized to charge them under Utah’s Impact Fees Act. *See id.* §§ 11-36-101 to -501 (2003 & Supp.2006).

FN3. The term “pulled” is used to refer to a building permit that is ready to be issued.

¶ 3 On November 6, 2002, Mr. Heideman tendered two checks to the City for a total of \$150,744 and requested sixty-six “water impact fee permits” ^{FN4} at the prior rate of \$2284. On the same day, Plaintiff Kimball Gardner, on behalf of Birdview Manufacturing, Inc., provided the City with a \$34,230 check and \$30 in cash for fifteen water impact fee permits at the \$2284 rate. The City’s front office staff accepted the payments from Mr. Heideman and Mr. Gardner and issued receipts indicating that the payments were for “66 water impact fees” and “15 water impact fees” respectively. Both checks were negotiated and deposited into the City’s financial account. Prior to accepting Plaintiffs’ payments, the City’s front office staff had not received any instruction regarding the impact fee rate increase.

FN4. Although Plaintiffs repeatedly refer to “permits” throughout their brief, there are no permits at issue in this case. An impact fee is a condition precedent to a building permit, *see* Utah Code Ann. § 11-36-102(7)(a); it is not a “tax, a special

assessment, a building permit fee, ... or other reasonable permit or application fee.” *See id.* § 11-35-102(7)(b).

¶ 4 At the next city council meeting, on November 13, 2002, the council addressed the fact that there was some confusion regarding prepayment of impact fees. Specifically, the council discussed the fact that builders usually pay impact fees when their building permits are ready for approval, but in response to the fee increase, some were paying impact fees early. The city attorney stated that “[t]here needs to be clarification to exceptions to early payment of impact fees put on the agenda for the Council to approve.” The mayor then stated that the city manager would contact those who had prepaid and let them know the issue would be on the next city council meeting’s agenda for purposes of clarification. The next hearing to discuss the impact fees was set for December 11, 2002, and public notice was promptly posted.

¶ 5 At the December 11 hearing, the agenda item, “Clarification of the pre-purchasing of fees concerning the increase of the Water Impact Fee that was effective November 6, 2002,” was addressed. The council discussed the following issues: the City’s intent to tie impact fees to specific lots, whether the two-week time frame was meant to accommodate building permits that were being pulled during the two-week period, and how the City would proceed with prepaid impact fees from those who were not at the meeting.

¶ 6 During the meeting, the city council expressed concern that if it accepted all of the prepayments, it would simply need to raise the fees again to accommodate more growth. The council then allowed audience members to comment, at which time Mr. Gardner argued that the City should honor his prepayments and “stick by [the] contract that [it] made when [it] cashed the check.” The city attorney responded that “[b]reach of contract is not an issue because the staff does not have authority to enter into a contract.” Mr. Heideman requested an executive session to address his payments to the City;

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however, his request was not granted. He made no additional statements. At the close of the discussion, the mayor announced that "those people who have prepaid the impact fees and have not pulled their permits have two weeks until December 26 [] to pull their permits, if they don't meet ... the City's criteria then the City will refund their money." Neither Mr. Heideman nor Mr. Gardner submitted building permits to the City by the December 26, 2002 deadline.

¶ 7 On January 27, 2003, the City mailed a certified letter to Mr. Heideman stating that he was not entitled to prepay water impact fees because he failed to present the City with a building permit prior to the December 26 deadline. The City enclosed a check, dated January 2, 2003, for \$150,744. Mr. Heideman returned the check on January 30, 2003. A similar letter was mailed to Mr. Gardner. However, after three failed delivery*904 attempts, it was returned to sender. Mr. Heideman claims he eventually accepted payment after the City stipulated, at a temporary restraining order (TRO) hearing, that he could preserve his claims for litigation despite receiving the refund. However, there is no evidence of the stipulation agreement or the TRO hearing in the record on appeal. There is also no evidence regarding when Mr. Heideman actually cashed the City's check.^{FN5}

FN5. On appeal, Plaintiffs request interest for the "almost 6 month period" in which the City "wrongfully retained" their funds. Plaintiffs specifically request such relief for the first time in this appeal. All of their pleadings in the trial court sought delivery of the "permits." Moreover, Plaintiffs fail to provide any evidence documenting for how long the City held their funds. Therefore, we will not address their claim for interest on the funds. *See State v. Irwin*, 924 P.2d 5, 7 (Utah Ct.App.1996) ("It is a well-established rule that a defendant who fails to bring an issue before the trial court is generally barred from raising it for the

first time on appeal.").

¶ 8 On or about February 4, 2003, Mr. Heideman filed a notice of claim with the City.^{FN6} *See* Utah Code Ann. § 63-30-11 (Supp.2003). In the nature of claims section, Mr. Heideman listed the following claims: breach of contract, " § 1983 claims against certain city officials," and "[o]ther causes of action." On or about April 2, 2003, Mr. Heideman filed another notice of claim adding Mr. Gardner as a claimant. Other than the additional claimant, the two notices were identical.

FN6. After Plaintiffs filed their notice of claim, the Utah Legislature repealed the Governmental Immunity Act, *see* Utah Code Ann. §§ 63-30-01 to -38 (1997 & Supp.2003) (repealed), and replaced it with the Governmental Immunity Act of Utah, *see id.* §§ 63-30d-101 to -904 (2004). Because Plaintiffs' notice of claim was filed when the Governmental Immunity Act was effective, we refer to that version of the legislation. *See Cook v. City of Moroni*, 2005 UT App 40, ¶ 1 n. 1, 107 P.3d 713.

¶ 9 On March 12, 2003, Plaintiffs filed a complaint against the City alleging breach of contract and breach of the duty of good faith and fair dealing. About six months later, Plaintiffs filed an amended complaint alleging, in addition to the two previous claims, governmental taking without just compensation, conversion, violation of due process, and violation of appellants' civil rights under chapter 42, section 1983 of the United States Code. Eight months later, Plaintiffs filed yet another amended complaint, this time adding claims for attorney fees under section 1988 of the United States code and "the private attorney general doctrine," and a claim for intentional interference with prospective economic relations.

¶ 10 After filing the second amended complaint, Plaintiffs moved for summary judgment. The City opposed, and filed its own cross-motion for summary judgment and motion to strike the substantive

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paragraphs of Mr. Heideman's affidavit submitted in support of Plaintiffs' motion for summary judgment.^{FN7} On October 22, 2004, the trial court granted the City's motion for summary judgment and denied Plaintiffs'. Plaintiffs filed a motion to reconsider, which the court denied. They now appeal.

FN7. Plaintiffs' motion was supported with citations to the record and Mr. Heideman's own sworn affidavit. The trial court struck the affidavit as improper. Plaintiffs do not appeal that ruling, yet refer to the affidavit in their brief. This court will not consider the stricken affidavit.

ISSUES AND STANDARD OF REVIEW

¶ 11 Plaintiffs argue the trial court erred in granting the City's cross-motion for summary judgment based on its conclusions that (1) Plaintiffs' notice of claim was defective because it failed to name all possible causes of action, (2) there were no genuine issues of material fact, (3) Plaintiffs did not have a protected property interest at stake, (4) the City had not converted Plaintiffs' property, (5) the City's conduct did not amount to an unconstitutional taking, (6) the parties had not entered into a contractual relationship, (7) the City had not breached any contracts with Plaintiffs, and (8) the City had not breached the implied covenant of good faith and fair dealing. Summary judgment is only appropriate when there are no genuine issues of material fact and the parties are entitled to judgment as a matter of law. *See* Utah R. Civ. P. 56(c). Consequently, we review the trial court's legal conclusions for correctness. *See* *905 *Jones v. Salt Lake City Corp.*, 2003 UT App 355, ¶ 7, 78 P.3d 988. In doing so, "we view the [undisputed] facts in a light most favorable to the party against which the motion was granted." *Anderson v. Provo City Corp.*, 2005 UT 5, ¶ 10, 108 P.3d 701 (alteration in original) (quotations and citations omitted).

ANALYSIS

I. Plaintiffs' Notice of Claim

[1] ¶ 12 The trial court held that Plaintiffs' intentional interference claim was jurisdictionally barred because, among other reasons, the notice of claim was defective. The Governmental Immunity Act (the Act) requires individuals with claims against government entities to comply with the notice of claim requirements set forth in Utah Code section 63-30-11. *See* Utah Code Ann. § 63-30-11 (1997 & Supp.2003). Failure to strictly comply with these requirements results in a lack of jurisdiction. *See Gurule v. Salt Lake County*, 2003 UT 25, ¶ 5, 69 P.3d 1287; *Greene v. Utah Transit Auth.*, 2001 UT 109, ¶¶ 15-16, 37 P.3d 1156.^{FN8}

FN8. Because the notice of claim provision is the same in both versions of the Act, *see* Utah Code Ann. §§ 63-30-01 to -38 (1997 and Supp.2003); *id.* §§ 63-30d-101 to -904 (2004), case law addressing the notice of claim requirement under either version governs. *See Johnson v. Utah Dep't of Transp.*, 2006 UT 15, ¶ 12 n. 6, 133 P.3d 402.

[2] ¶ 13 The Act specifically requires the notice of claim to include "(i) a brief statement of the facts; (ii) the nature of the claim asserted; and (iii) the damages incurred by the claimant so far as they are known." Utah Code Ann. § 63-30-11(3)(a). In Plaintiffs' notice of claim, they listed three potential claims against the City: "Breach of Contract[,] § 1983 claims against certain city officials[,] ... and [o]ther causes of action." Plaintiffs now argue that this was sufficient to put the City on notice of an intentional interference with economic relations claim. They assert that the document, when viewed as a whole, "provided Appellees sufficient opportunity to investigate, discuss and resolve the potential claim before the parties became locked in a lawsuit." This argument, however, is unpersuasive.

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¶ 14 The requirement of strict compliance derives from the fact that the ability to sue the government is “a statutorily created exception to the Doctrine of Sovereign Immunity. Inasmuch as the maintenance of such a cause of action derives from such statutory authority, a prerequisite thereto is meeting the conditions prescribed in the statute.” *Gallegos v. Midvale City*, 27 Utah 2d 27, 492 P.2d 1335, 1336-37 (1972). Although Plaintiffs cite to cases liberally applying the strict compliance requirement, those cases predate the Act’s 1998 amendment. “As [the supreme court] stated in *Gurule v. Salt Lake County*, 2003 UT 25, 69 P.3d 1287], we have allowed for ‘less than strict compliance [only] in cases which depended upon ambiguities in the ... Act; ambiguities clarified by the 1998 amendments.’” *Davis v. Central Utah Counseling Ctr.*, 2006 UT 52, ¶ 44, 147 P.3d 390 (third alteration in original) (quoting *Gurule*, 2003 UT 25 at ¶ 7, 69 P.3d 1287). Moreover, there is no ambiguity in the nature of claim requirement: “There must be enough specificity in the notice to inform as to the nature of the claim so that the defendant can appraise its potential liability.” *Yearsley v. Jensen*, 798 P.2d 1127, 1129 (Utah 1990). In this case, Plaintiffs’ notice of claim failed to indicate that they intended to pursue an intentional interference with economic relations claim. Therefore, Plaintiffs are precluded from raising that claim on appeal, and the trial court was correct in concluding that it lacked jurisdiction to consider it.

II. Disputed Facts

¶ 15 Plaintiffs attempt to raise the issue, for the first time on appeal, that there was a dispute regarding the Ordinance’s effective date, thereby making summary judgment inappropriate. However, they are barred from raising this issue on appeal because it was not argued below. *See State v. Richins*, 2004 UT App 36, ¶ 8, 86 P.3d 759 (“In order to preserve an issue for appeal, it ... must be specifically raised such that the issue is sufficiently raised to a level of consciousness before the trial court, and must be supported by evidence or relevant legal authority.”

(quotations and citation omitted)).

*906 [3] ¶ 16 More precisely, in the context of summary judgment, we are confined to the disputed facts that were properly before the trial court. *See Granite Credit Union v. Remick*, 2006 UT App 115, ¶ 10 n. 4, 133 P.3d 440. In this instance, there are no disputed issues of material fact in the record. In fact, in their motion for summary judgment, Plaintiffs included a lengthy undisputed facts section, after which they stated, “[T]here are no remaining genuine issues as to any material facts.” When they responded to the City’s motion for summary judgment, Plaintiffs disputed three facts, but did not put any of these facts at issue because they failed to support their memorandum with any admissible evidence, as required by rule 7 of the Utah Rules of Civil Procedure. *See Utah R. Civ. P. 7(c)(3)(B)*. Consequently, we do not further address Plaintiffs’ argument that there were disputed issues of material fact.^{FN9}

FN9. Plaintiffs also argue that there were disputed issues of law, and ask this court to apply the so-called “complexity analysis” from *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948), to the facts of this case. However, this argument was not presented below and therefore will not be considered on appeal. *See State v. Richins*, 2004 UT App 36, ¶ 8, 86 P.3d 759.

III. Protected Property Interest

[4] ¶ 17 Plaintiffs claim that they had a protected property interest in the water impact fee “permits” because they had a “legitimate claim of entitlement” to them.^{FN10} The Fourteenth Amendment prohibits states from depriving its citizens of “property without due process of law.” U.S. Const. amend. XIV, § 1. To prevail on a due process claim, a party must first establish that it has a “protectible property interest.” *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th

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Cir.2000); see also *Patterson v. American Fork City*, 2003 UT 7, ¶ 23, 67 P.3d 466. This is an interest in which one has “a legitimate claim of entitlement.” *Patterson*, 2003 UT 7 at ¶ 23, 67 P.3d 466 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). It is not “an abstract need for, or [a] unilateral expectation of, a benefit.” *Hyde Park*, 226 F.3d at 1210. Rather, it is a “right to a particular decision reached by applying rules to facts.” *Fleury v. Clayton*, 847 F.2d 1229, 1231 (7th Cir.1988).

FN10. In their brief, Plaintiffs state that they have a protected property interest in “the water impact fees on the one hand, or, in the alternative, in the proper handling of [their] funds.” The “proper handling claim” was not argued below, and therefore will not be considered on appeal. See *Richins*, 2004 UT App 36 at ¶ 8, 86 P.3d 759.

¶ 18 The Tenth Circuit explains that to establish a legitimate claim of entitlement, the complaining party must “demonstrate that a set of conditions exist under state and local law, ‘the fulfillment of which would give rise to a legitimate expectation’ that the City Council would approve” the plaintiff’s request. *Hyde Park*, 226 F.3d at 1210 (quoting *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1116 (10th Cir.1991)). The relevant analysis revolves around “whether there is discretion in the defendants to deny [a permit or an action requested] by the plaintiffs.” *Id.* (quotations and citation omitted). If there is considerable discretion, one is not likely to have a legitimate claim of entitlement. See *id.* On the other hand, if the City has little discretion to deny a permit or request, one would be more likely to have a legitimate claim of entitlement. See *id.* Under this standard, Plaintiffs do not have a legitimate claim of entitlement to pre-pay water impact fees.

[5] ¶ 19 Plaintiffs argue that they had a legitimate claim of entitlement to the water impact fee permits because the City was obligated to honor their pay-

ments and issue them water impact fee permits. In other words, they assert that the City had no discretionary authority to deny them the permits and that they therefore had a protected property interest in them.^{FN11} However, contrary to Plaintiffs’ position, a water impact fee is not a “permit” that they are entitled to obtain. Instead, a water impact fee is a fee imposed as a prerequisite to obtaining a *907 building permit. See Utah Code Ann. § 11-36-102 (7)(a). More specifically, it is a charge “levied by local governments against new development in order to generate revenue for capital funding necessitated by the new development.” *Salt Lake County v. Board of Educ. of Granite Sch. Dist.*, 808 P.2d 1056, 1058 (Utah 1991) (emphasis added) (quotations and citation omitted). One of the primary purposes of impact fees is to “regulate new growth and development and provide for adequate public facilities and services.” *Id.* at 1058-59. Plaintiffs’ argument that they are entitled to pay impact fees at a reduced rate prior to having any recognized development projects or pending building permit applications circumvents the City’s ability to manage new growth and development and adequately provide for services needed as a result of that growth.^{FN12}

FN11. The City argues that we should not address this argument because Plaintiffs did not raise the discretionary authority argument below. However, this is merely an extension of the legitimate expectation argument, which Plaintiffs briefed to the trial court.

FN12. The Ordinance also specifically states that the impact fees “should be charged to all new connections to the City’s culinary water system.” See Washington City, Utah, Ordinance 2002-13 (Oct. 23, 200), and by their own admission, neither Mr. Heideman nor Mr. Gardner had any development projects ready for connection to the City’s water system.

[6] ¶ 20 Also, Plaintiffs could not have had a legit-

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imate claim of entitlement to the lower impact fee because they did not meet the City's criteria for eligibility. At the December 11 hearing, the City made it clear that developers could pay the impact fee at the \$2284 rate if the developers provided building permits to the City by December 26, 2002. Neither Mr. Heideman nor Mr. Gardner complied with that requirement. Therefore, they were not entitled to pay the impact fees at the prior rate.

¶ 21 Plaintiffs argue that the "retroactive application of [the] condition precedent to obtaining impact fees at the lower price during the extension period" was invalid, yet they offer no legal authority in support of that position. In contrast, we find convincing the City's position that it was entitled to clarify the Ordinance without implicating due process concerns. *See, e.g., Foil v. Ballinger*, 601 P.2d 144, 151 (Utah 1979) (finding no error in retroactive application of a law "where the later statute or amendment deals only with clarification or amplification as to how the law should have been understood prior to its enactment." (quotations and citation omitted)).

[7] ¶ 22 Even if a water impact fee were a permit, as Plaintiffs suggest, they would not have been automatically entitled to receive one. As the cases Plaintiffs cite to in their brief make clear, those seeking land-use permits do not have a protected property interest in permit approval. *See Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1212-13 (10th Cir.2000) (finding no property interest in approval of proposed plat); *Patterson v. American Fork City*, 2003 UT 7, ¶ 24, 67 P.3d 466 (holding that land developers do "not typically have a claim of entitlement to a favorable [land-use] decision"). Plaintiffs distinguish their case by noting that, in contrast to building or zoning permit cases, there is no application requirement for water impact fees. However, the fact that there is no application process hurts, not helps, Plaintiffs' position. *See Hyde Park*, 226 F.3d at 1212-13 ("Because the ordinances as written contain no standards governing the City Council's exercise of discretion, the ordin-

ances simply do not impose 'significant substantive restrictions' on the City Council's power of review." (citation omitted)).

¶ 23 A legitimate claim of entitlement springs from "existing rules and understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits." *Id.* at 1210. As acknowledged in Plaintiffs' brief, "The Impact Fees Act[, *see* Utah Code Ann. §§ 11-36-101, to -402 (2003).] establishes no guidelines about when parties are eligible to purchase impact fees, what parties are eligible to purchase impact fees, etc." Therefore, there are no rules or guidelines that would have secured Plaintiffs a certain benefit at the time they tendered payment to the City. *See Hyde*, 226 F.3d at 1212-13. In sum, Plaintiffs fail to establish that they had a legitimate claim of entitlement to prepay the water impact fees. As a result, several of their remaining claims necessarily fail. ^{FN13}

FN13. Without a protected property interest, Plaintiffs' Article I Section 22, takings claim fails. *See Bagford v. Ephraim City*, 904 P.2d 1095, 1097 (Utah 1995) ("To recover under [A]rticle I, [S]ection 22, a claimant must possess a protectable interest in property that is taken or damaged for a public use."). The same is true for their conversion claim. *See Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, ¶ 20, 974 P.2d 288 (requiring current possessory right to a chattel as a prerequisite to a conversion claim).

It is also worth noting that in their motion for summary judgment, Plaintiffs claimed conversion because they had a protected property interest in the "water impact permits at the time such permits were applied for," and when the City failed to give them any permits, it interfered with their existing or potential economic relations. On appeal, however, they claim that they had a protected in-

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terest in the money paid for the permits. As previously noted, because Plaintiffs did not raise this second argument before the trial court, we will not consider it for the first time on appeal. *See Richins*, 2004 UT App 36 at ¶ 8, 86 P.3d 759.

*908 VI. Contractual Relationship

¶ 24 Plaintiffs argue that the City entered into a contract with them by accepting payment for water impact fee permits. Specifically, Plaintiffs assert that when they tendered payment to the City for the impact fees, an offer occurred, and when the City's front office staff accepted the payments and provided a receipt, an acceptance occurred, thereby creating an implied-in-fact contract.^{FN14}

FN14. In their reply brief, Plaintiffs state that an offer occurred when the city council voted to extend the deadline to pay water impact fees *or* when they tendered the money to the City. Because they are raising the argument that the City made an offer to them for the first time in their reply brief, this court will not consider it. *See Romrell v. Zions First Nat'l Bank, N.A.*, 611 P.2d 392, 395 (Utah 1980) ("As a general rule, an issue raised in a reply brief will not be considered on appeal."). However, even if this court did consider the argument raised in Plaintiffs' reply brief, it would fail because there were clearly no certain terms in the City's alleged offer. *See Rapp v. Salt Lake City*, 527 P.2d 651, 654 (Utah 1974).

[8][9] ¶ 25 An express or implied-in-fact contract results when "there is a manifestation of mutual assent, by words or actions or both, which reasonably are interpretable as indicating an intention to make a bargain with certain terms or terms which reasonably may be made certain." *Rapp v. Salt Lake City*, 527 P.2d 651, 654 (Utah 1974) (quotations and citation omitted). We conclude there was no contract between the parties in this matter because

there is no evidence that the necessary elements of a contract were present. There was no offer to enter into a contract, no acceptance from anyone qualified to enter into contracts for the City, and no communication that would indicate any type of meeting of the minds. *See id.*; *see also Trevino & Gonzalez Co. v. R.F. Muller Co.*, 949 S.W.2d 39, 42 (Tex.App.1997) ("The application for an issuance of a building permit does not constitute a voluntary agreement between the parties to enter into binding contract.").

¶ 26 There is also no evidence that the City voted on a contract with Plaintiffs or had one signed by the city recorder as required by Utah Code sections 10-3-506 and 10-6-138. *See Utah Code Ann.* §§ 10-3-506, 10-6-138 (2003); *see also Patterson*, 2003 UT 7 at ¶ 13, 67 P.3d 466 (finding no binding contract with city because city council never voted on or approved a binding agreement); *Rapp*, 527 P.2d at 654 (requiring statutory formalities "[p]articularly in the case of public contracts"). *But see Canfield v. Layton City*, 2005 UT 60, ¶ 17, 122 P.3d 622 (observing the possibility of an implied employment contract with a municipality based on "the conduct of the parties, announced personnel policies, practices of that particular trade or industry, or other circumstances" (quoting *Berube v. Fashion Ctr., Ltd.*, 771 P.2d 1033, 1044 (Utah 1989))).

[10] ¶ 27 Additionally, Plaintiffs' argument offends public policy. As the Colorado Court of Appeals held, if the issuance of a permit, or, as is the case here, the acceptance of a fee were to create a "binding obligation ... the City's ability to protect the health, safety, and welfare of the public would be seriously hampered." *Patzer v. City of Loveland*, 80 P.3d 908, 911 (Colo.Ct.App.2003). As a result, we do not disturb the trial court's conclusion that no contract existed between the parties.^{FN15}

FN15. Because there was no contract, there was necessarily no breach of the covenant of good faith and fair dealing. *See Buckner v. Kennard*, 2004 UT 78, ¶ 31, 99 P.3d 842

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(“Any claim for breach of contract must be predicated on the existence of an express or implied contract, in this case a contract for employment.”).

***909 CONCLUSION**

¶ 28 Plaintiffs fail to identify a protected property interest on appeal, they have not provided any evidence indicating that there was a contract between the parties, and their notice of claim was facially insufficient. Accordingly, we affirm the trial court's grant of summary judgment.

¶ 29 WE CONCUR: JUDITH M. BILLINGS and GREGORY K. ORME, Judges.
Utah App., 2007.
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END OF DOCUMENT

ADDENDUM “5”
*(Peeples v. State, 2004 UT App 328, 100 P.3d
254)*

100 P.3d 254, 509 Utah Adv. Rep. 16, 2004 UT App 328
(Cite as: 100 P.3d 254)

H

Court of Appeals of Utah.
Delone PEEPLES, an individual, Plaintiff and Appellant,
v.
STATE OF UTAH; and Magna Investments and Development, a limited partnership, Defendants and Appellee.
No. 20030509-CA.

Sept. 23, 2004.

Background: Pedestrian brought negligence action against owner of building from which water allegedly dripped on sidewalk and froze, and against the state, alleging that she slipped and fell on ice in front of a state liquor store. The Third District Court, Salt Lake Department. Timothy R. Hanson, J., dismissed complaint for failure to comply with notice requirements of Utah Governmental Immunity Act. Pedestrian appealed.

Holding: The Court of Appeals, Thorne, J., held that pedestrian complied with requirement for brief statement of the facts in mandatory notice of claim under Act.

Reversed and remanded.

Jackson, J., concurred and filed opinion.

Davis, J., dissented and filed opinion.

West Headnotes

[1] Appeal and Error 30 ⚔ 919

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k915 Pleading
30k919 k. Striking Out or Dismissal.
Most Cited Cases

When determining whether a trial court properly dismissed a complaint, an appellate court accepts the factual allegations in the complaint as true and considers them, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving party. Rules Civ.Proc., Rule 12(b)(6).

[2] Municipal Corporations 268 ⚔ 741.20

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.20 k. Requirement as Mandatory or Condition Precedent. Most Cited Cases
Compliance with the Utah Governmental Immunity Act notice of claim requirement is a prerequisite to vesting a district court with subject-matter jurisdiction over claims against governmental entities. West's U.C.A. § 63-30-11 et seq. (Repealed).

[3] Statutes 361 ⚔ 188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
When faced with a question of statutory construction, an appellate court first looks to the plain language of the statute.

[4] Statutes 361 ⚔ 189

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k189 k. Literal and Grammatical Interpretation. Most Cited Cases

Statutes 361 ⚔ 212.6

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361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k212 Presumptions to Aid Construc- tion

361k212.6 k. Words Used. Most Cited

Cases

In construing a statute, an appellate court assumes that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.

[5] Statutes 361 ⚡190

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

A statute is not ambiguous merely because the parties disagree about its meaning; rather, a statute is ambiguous only if it can be understood by reasonably well-informed persons to have different meanings.

[6] States 360 ⚡195

360 States

360VI Actions

360k194 Conditions Precedent to Action Against State

360k195 k. In General. Most Cited Cases

The strict-compliance standard for brief statement of facts in claim under Utah Governmental Immunity Act favors the state, and its application often results in the barring of claims. West's U.C.A. § 63-30-11(3)(a)(i) (Repealed).

[7] Municipal Corporations 268 ⚡741.50

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k741 Notice or Presentation of Claims for Injury

268k741.50 k. Form and Sufficiency.

Most Cited Cases

Strict compliance with requirement for brief statement of the facts in claim form under the Utah Governmental Immunity Act is not a one-way street, and a claimant is not required to do more than the Act clearly requires. West's U.C.A. § 63-30-11(3)(a)(i) (Repealed).

[8] Municipal Corporations 268 ⚡741.30

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k741 Notice or Presentation of Claims for Injury

268k741.30 k. Service or Presentation;

Time Therefor. Most Cited Cases

Notice of claim under Utah Governmental Immunity Act need not be given to any person other than that directed by statute, even if that person's awareness of the claim might facilitate investigation or settlement. West's U.C.A. § 63-30-11 et seq. (Repealed).

[9] Municipal Corporations 268 ⚡741.50

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k741 Notice or Presentation of Claims for Injury

268k741.50 k. Form and Sufficiency.

Most Cited Cases

All that is required for notice of claim under Utah Governmental Immunity Act is simple compliance, and there is no need for a claimant to exceed the Act's requirements even if such action might more optimally accomplish the purposes underlying the Act. West's U.C.A. § 63-30-11 et seq. (Repealed).

[10] States 360 ⚡195

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360 States

360VI Actions

360k194 Conditions Precedent to Action Against State

360k195 k. In General. Most Cited Cases
Pedestrian's brief statement of the facts in claim submitted under Utah Governmental Immunity Act for slip and fall complied with Act, although address of state liquor store in front of which pedestrian slipped on icy sidewalk was not provided; statement contained multiple facts, including date of injury, alleged cause, details of alleged property defect, and that injury occurred near state liquor store. West's U.C.A. § 63-30-11(3)(a)(i)(Repealed).

[11] Municipal Corporations 268 ↪ 741.50

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k741 Notice or Presentation of Claims for Injury

268k741.50 k. Form and Sufficiency. Most Cited Cases

Defects in the form or content of notices of claim under Utah Governmental Immunity Act do not always act to bar a claim. West's U.C.A. § (3)(a)(i)(Repealed).

*255 Brock Van de Kamp and Dustin Lance, Siegfried & Jensen, Murray, for Appellant.

Mark L. Shurtleff, Attorney General, Barry G. Lawrence and Nancy L. Kemp, Assistant Attorney General, Salt Lake City, for Appellee.

Before Judges DAVIS, JACKSON, and THORNE.

OPINION

THORNE, Judge:

¶ 1 The trial court dismissed Delone Peeples's complaint for failure to strictly comply with the Utah

Governmental Immunity Act (Act), which requires claimants to present a "brief statement of the facts" in their mandatory notice of claim. Utah Code Ann. § 63-30-11(3)(a)(i) (1997). ^{FN1} We reverse and remand.

FN1. Effective July 1, 2004, the relevant provision was reenacted as Utah Code section 63-30d-401(3)(a)(i).

FACTUAL BACKGROUND ^{FN2}

FN2. "When determining whether a trial court properly dismissed a complaint, we accept the factual allegations in the complaint as true and consider them, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving party." *Wood v. University of Utah Med. Ctr.*, 2002 UT 134, ¶ 2, 67 P.3d 436, cert. denied, 540 U.S. 946, 124 S.Ct. 388, 157 L.Ed.2d 276 (2003). "We recite the facts accordingly." *Id.*

[1] ¶ 2 On December 5, 2001, Peeples slipped and fell on an icy sidewalk in front of the Utah State Liquor Store located at 1863 East 7000 South in Salt Lake City, injuring her hip. Peeples's attorneys first informed the Utah State Risk Management Department (the Department) of Peeples's accident by letter dated March 12, 2002. This initial letter identified Peeples, stated the date and alleged cause of the accident, asserted that Peeples had suffered multiple injuries, and identified by address the liquor store where the accident occurred. The letter also requested *256 information regarding insurance coverage.

¶ 3 On June 17, 2002, Peeples's attorneys sent the Department another letter describing Peeples's background and injuries in greater detail, along with other reports and information related to the accident. This letter also identified Peeples and the date of the accident, but referred to the location of the accident solely as "the Utah State Liquor

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Store.” An ambulance report that appears to have been enclosed with this letter indicates that Peeples was transported by ambulance from 1864 East Fort Union, an address very near the liquor store identified in the March 12 letter.

¶ 4 On September 18, 2002, Peeples filed a notice of claim with the Utah Attorney General pursuant to the Act. Peeples’s notice of claim contained the following statement of the facts and circumstances of her accident: “On December 5, 2001, Ms. Peeples fell in front of a Utah State Liquor Store on ice, which was allowed to accumulate on the sidewalk, from a poorly designed rain gutter that drains onto the top of the sidewalk, rather than underneath it.” The notice of claim did not identify the liquor store by address or otherwise.

¶ 5 Peeples brought suit against the property owner and the State. The State moved to dismiss Peeples’s claim pursuant to rule 12(b)(6) of the Utah Rules of Civil Procedure, alleging that she failed to strictly comply with the Act’s requirement that her notice of claim include a “brief statement of the facts.” Utah Code Ann. § 63-30-11(3)(a)(i) (1997). The trial court concluded that, in a slip and fall case, the brief statement of the facts required by the Act “must identify the location of the accident.” Notwithstanding the prior communications between Peeples’s counsel and the Department, the trial court concluded that because Peeples’s notice of claim failed to provide the address where her accident occurred, Peeples failed to comply with the “brief statement of the facts” provision of the Act. *Id.* The trial court subsequently dismissed the State from Peeples’s lawsuit. Peeples appeals.

ISSUE AND STANDARD OF REVIEW

[2] ¶ 6 The sole issue on appeal is whether the trial court properly dismissed Peeples’s complaint for failure to comply with the Act’s notice of claim provisions. “Compliance with the ... Act is a prerequisite to vesting a district court with subject matter jurisdiction over claims against governmental entities.

Accordingly, a district court’s dismissal of a case based [on the Act] is a determination of law that we afford no deference[and review] for correctness.” *Wheeler v. McPherson*, 2002 UT 16, ¶ 9, 40 P.3d 632 (citations omitted).

ANALYSIS

¶ 7 The Act requires that a notice of claim “shall set forth: (i) a brief statement of the facts; (ii) the nature of the claim asserted; and (iii) the damages incurred by the claimant so far as they are known.” Utah Code Ann. § 63-30-11(3)(a)(i)-(iii) (1997). Decisions of this court and the Utah Supreme Court have uniformly held that claimants must strictly comply with the Act’s notice provisions. *See, e.g., Gurule v. Salt Lake County*, 2003 UT 25, ¶ 5, 69 P.3d 1287; *Nunez v. Albo*, 2002 UT App 247, ¶ 21, 53 P.3d 2, *cert. denied*, 59 P.3d 603 (Utah 2002). “The only authority for allowing less than strict compliance is found in cases which depended upon ambiguities in the Act.” *Gurule*, 2003 UT 25 at ¶ 7, 69 P.3d 1287; *see, e.g., Larson v. Park City Mun. Corp.*, 955 P.2d 343, 345-46 (Utah 1998) (allowing claim where statute was unclear as to where notice was to be filed).

[3][4][5] ¶ 8 “When faced with a question of statutory construction ... this court first looks to the plain language of the statute.” *In re Estate of Flake*, 2003 UT 17, ¶ 25, 71 P.3d 589. “In construing a statute, we assume that ‘each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.’ ” *Id.* (quoting *Savage Indus., Inc. v. Utah State Tax Comm’n*, 811 P.2d 664, 670 (Utah 1991)). We find no ambiguity in the Act’s “brief statement of the facts” provision and conclude that the plain language of that provision *257 does not require specifics.^{FN3} While specific information might well be helpful, it would not be appropriate for this court to “improve” the statute by reading an additional element into the legislatively mandated notice requirements. Pursuant to statute, a claimant complies merely by providing a

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brief statement of facts about the claim being made.

FN3. "A statute is not ambiguous merely because the parties disagree about its meaning." *State v. Beason*, 2000 UT App 109, ¶ 19, 2 P.3d 459. Rather, " '[a] statute is ambiguous [only] if it can be understood by reasonably well-informed persons to have different meanings.' " *Id.* (second alteration in original) (quoting *Derbridge v. Mutual Protective Ins. Co.*, 963 P.2d 788, 791 (Utah Ct.App.1998)) (other citation omitted). Our conclusion that the statutory language is unambiguous renders irrelevant any dispute over whether Peeples's notice satisfied the legislative intent of the Act. *See State v. Vigil*, 842 P.2d 843, 845 (Utah 1992) ("To determine [what] the legislature intended ... we begin with the statutes' plain language. We will resort to other methods of statutory interpretation only if we find the language of the statutes to be ambiguous."), *overruled in part on other grounds by State v. Casey*, 2003 UT 55, 82 P.3d 1106.

[6][7][8][9] ¶ 9 Having determined that the Act, while not a model of specific clarity, is not ambiguous, our analysis turns to whether Peeples's notice strictly complied with the Act. The strict compliance standard favors the State, and its application often results in the barring of claims. *See, e.g., Gurule*, 2003 UT 25 at ¶¶ 4-8, 69 P.3d 1287 (barring claim when notice was not properly directed to county clerk, even though notice was timely directed to county commissioner); *Greene v. Utah Transit Auth.*, 2001 UT 109, ¶ 17, 37 P.3d 1156 (barring claim when notice was not properly directed to president or secretary of UTA board, despite communications with and timely notice to claims adjustor); *Thimmes v. Utah State Univ.*, 2001 UT App 93, ¶¶ 2, 6-7, 22 P.3d 257 (barring claim when notice directed to risk management rather than attorney general). Strict compliance is not, however, a one-way street, and a claimant is not required to

do more than the Act clearly requires. Notice need not be given to any person other than that directed by statute, even if that person's awareness of the claim might facilitate investigation or settlement; notice provided exactly one year after an injury arises is just as timely as notice comfortably provided six months earlier; and so on. All that is required is simple compliance, and there is no need for a claimant to exceed the Act's requirements even if such action might more optimally accomplish the purposes underlying the Act.

[10] ¶ 10 In this case, Peeples's notice does strictly comply with the Act's requirements. The relevant sentence from Peeples's notice of claim states that "[o]n December 5, 2001, Ms. Peeples fell in front of a Utah State Liquor Store on ice, which was allowed to accumulate on the sidewalk, from a poorly designed rain gutter that drains onto the top of the sidewalk, rather than underneath it." By definition, this is a statement. It contains multiple facts, including the date of Peeples's injury, its alleged cause, details of the alleged property defect, and that the injury occurred at a Utah State Liquor Store. Finally, as complained of by the State, it is undeniably brief. ^{FN4} Peeples's satisfaction of these factors complies with the "brief statement of the facts" requirement of the Act. ^{FN5}

FN4. Judge Jackson's concurring opinion would find a point at which a "brief statement of the facts" can be too brief. This author does not find that issue to be before the court today, and accordingly refrains from joining in Judge Jackson's otherwise thoughtful concurrence.

FN5. We are not unaware of the potential for mischief that our literal interpretation of the Act's language may present. As a practical matter, however, claimants have an interest in providing sufficient facts to move their claims forward and avoid litigation over the adequacy of their notice. There is no evidence in this case that the omission of the location of Peeples's acci-

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dent was a significant impediment to the State obtaining adequate information concerning the claim or acting upon it.

[11] ¶ 11 Even if we were to view the brevity of Peeples's claim as a defect, "defects in the form or content of notices of claim do not always act to bar a claim." *Brittain v. State*, 882 P.2d 666, 669 (Utah Ct.App.1994); cf. *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1183 (Utah 1983); *Spencer v. Salt Lake City*, 17 Utah 2d 362, 412 P.2d 449, 450 (1966) (finding sufficient notice of claim despite failure to declare the amount of damages as required by statute). We find the supreme court's analysis of a similar provision within the Utah Health Care Malpractice Act, see Utah Code Ann. §§ 78-14-1 to -17 (2002), to be instructive:

Defendant also argues that denial of the motion [to amend] was proper because the proposed amendment set forth additional allegations and claims outside the scope of plaintiff's notice of intent to sue, which had been filed prior to commencement of this action. A notice of intent to sue, as required by [Utah Code section 78-14-8 (2002)], is not intended to be the equivalent of a complaint and need not contain every allegation and claim set forth in the complaint.... Although the notice must include "specific allegations of misconduct on the part of the prospective defendant," that requirement does not need to meet the standards required to state a claim for relief in a complaint. The parties need to give only general notice of an intent to sue and of the injuries then known and not a statement of legal theories.

Behrens, 675 P.2d at 1183. In our view, the Act's "brief statement of the facts" requirement is no more stringent than the "specific allegations of misconduct" requirement addressed in *Behrens*. As such, factual notice under the Act need not "meet the standards required to state a claim for relief," and factual defects in the notice will not bar a claim so long as the claim gives "general notice of an intent to sue." *Id.*

¶ 12 While the State may desire more information than Peeples provided, that desire does not render Peeples's notice insufficient under the plain language of the Act. Rather, the State may obtain the desired information through formal discovery, informal communications with claimant's counsel, and/or its own investigation.^{FN6} Alternatively, the legislature may choose, as it has in the past, to require claimants to provide more specific facts in a notice of claim. See, e.g., *Sweet v. Salt Lake City*, 43 Utah 306, 134 P. 1167, 1169 (1913) (discussing prior version of the Act requiring, in certain claims, notice "stating the particular time at which the injury happened, and designating and describing the particular place in which it occurred, and also particularly describing the cause and circumstances of the said injury or damages " (emphasis in original)).

FN6. In this case, the State had actual knowledge of the location of Peeples's accident from prior correspondence with Peeples's attorneys.

¶ 13 Because the Act's "brief statement of the facts" requirement is unambiguous, Peeples's notice of claim was required to provide such a statement, no more and no less. Peeples's notice contained a brief statement of facts about her alleged accident and injury. Therefore, her notice strictly complied with the Act's requirement.

CONCLUSION

¶ 14 The trial court incorrectly ruled that Peeples's notice of claim did not strictly comply with Utah Code section 63-30-11(3)(a)(i). We reverse and remand to the trial court for further proceedings consistent with this opinion.

JACKSON, Judge (concurring):

¶ 15 I concur in the opinion but write separately to lay out my methodology for understanding what the broad "brief statement of the facts" demands of claimants. See Utah Code Ann. § 63-30-11(3)(a)(i) (1997) repealed and reenacted as § 63-30d-401

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(Supp.2004). Starting with the plain language of the Utah Governmental Immunity Act (the Act), the pivotal term “brief” indicates that the claimant need not recite in comprehensive detail all of the facts pertaining to the claim. Thus, I conclude that the requirement is not an exacting one and that the State has no reasonable expectation that a claimant’s notice will satisfy every informational need.

¶ 16 The analysis could end here, but this case raises a further question: Even if the State cannot expect to have all of the details, is there a point at which a claimant’s statement of the facts is so devoid of information as to be insufficient? In other words, can a claimant’s “brief statement of the facts” be, *259 in fact, too brief? I agree with Judge Thorne that a claimant’s statement of the facts should not be faulted for brevity, but, in my view, there is a point—albeit a considerably low one—at which a statement of the facts can be overly brief.

¶ 17 The point at which a brief statement of the facts becomes insufficient is defined in part by the purposes of the Act. Although we focus on the “plain language,” we also “recogniz[e] that ‘our primary goal is to give effect to the legislature’s intent in light of the purpose the statute was meant to achieve.’” *Dowling v. Bullen*, 2004 UT 50, ¶ 8, 94 P.3d 915 (quoting *Evans v. State*, 963 P.2d 177, 184 (Utah 1998)). Accordingly, I agree with the dissent that the notice required by the Act seeks to achieve the dual purposes of (1) affording the State with an opportunity to investigate and expeditiously settle the case and (2) allowing the State to correct dangerous conditions. See, e.g., *Wills v. Heber Valley Historic R.R. Auth.*, 2003 UT 45, ¶ 6, 79 P.3d 934; *Larson v. Park City Mun. Corp.*, 955 P.2d 343, 345-46 (Utah 1998).

¶ 18 However, in assessing the statutory methods by which these purposes are to be achieved, I determine that the brief statement of the facts plays only a minor role. Of course, in emphasizing the notice’s reduced role I do not mean to diminish the claimant’s responsibility to provide timely and accurate information. Nonetheless, it seems almost

axiomatic to me that a “brief statement of the facts” was not intended to act as the primary vehicle for the State’s investigation and remedial efforts.

¶ 19 Ideally, the “brief statement of the facts” should be informative and useful. A circumspect claimant would probably include the address of an accident. However, based on my understanding of the notice requirement’s limited role, I conclude that a notice’s brief statement of the facts is sufficient, at a minimum, when it both identifies the claimants and the general facts establishing the claim.^{FN1} Such information is enough to meet the notice’s primary goal in the statutory scheme: to warn the State that a particular plaintiff now plans to assert a particular claim and that all prior and subsequent information provided by the claimant should be collected, organized, and investigated.

FN1. I emphasize “general” facts because it is only natural that the level of detail required in a notice supported by a “brief statement of the facts” ought to be less stringent than that required by a formal pleading. See Utah R. Civ. P. 8(a) (requiring pleadings to contain a “short and plain statement of the claim showing that the pleader is entitled to relief”). Because our notice-pleading requirements are already minimal, see *Guardian Title Co. v. Mitchell*, 2002 UT 63, ¶ 15 n. 4, 54 P.3d 130 (“[A]ll that is required is that the pleadings be sufficient to give fair notice of the nature and basis of the claim asserted and a general indication of the type of litigation involved.”) (citation and quotation omitted), the notice required by section 63-30-11 should demand even less factual detail.

¶ 20 I disagree with the dissent’s position that the sufficiency of a claimant’s notice with regard to these purposes should become a matter of fact-intensive inquiry. Although the “brief statement of the facts” requirement invites judicial factweighing in this case, I am concerned that such an

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approach may prove wasteful and ultimately unfair. A fact-intensive analysis would undermine judicial economy since the sufficiency of every "brief statement of the facts" would fall into question. More importantly, it also places an unfair burden on claimants to intuit what information a particular State entity may or may not require to expeditiously investigate and repair a particular incident. For example, would it be sufficient for a claimant injured on the grounds of the state capitol to include the address of the capitol or would the State require more precise information? Such high stakes should not be attached to a citizen's relatively unimportant determination of which details to include in the "brief statement of the facts" and which to include in more comprehensive filings.

¶ 21 In the present case, the State had sufficient information to investigate the claim because Peeples identified herself and the facts underlying her claim. Also, prior to the notice, she provided information indicating the location of the accident, and therefore she was not required to restate the information in her brief statement of the facts.

¶ 22 Accordingly, I concur in the opinion.

*260 DAVIS, Judge (dissenting):

¶ 23 I dissent. I agree that the Act requires that a notice of claim "shall set forth ... (i) a brief statement of the facts; (ii) the nature of the claim asserted; and (iii) the damages incurred by the claimant so far as they are known." Utah Code Ann. § 63-30-11(3)(a)(i)-(iii) (Supp.2003). The notice of claim provision, as well as other provisions under the Act, requires strict compliance by claimants. See *Wheeler v. McPherson*, 2002 UT 16, ¶ 13, 40 P.3d 632 ("[T]he ... Act demands strict compliance with its requirements to allow suit against governmental entities. The notice of claim provision, particularly, neither contemplates nor allows for anything less."). If a complaint does not strictly comply with the requirements of the Act, plaintiffs cannot bring suit "against the [S]tate or its subdivisions." *Id.* at ¶ 11.

¶ 24 While a notice of claim is required to "provide[] the entity being sued with the factual details of the incident that led to the plaintiff's claim," *Rushon v. Salt Lake County*, 1999 UT 36, ¶ 20, 977 P.2d 1201, the Act does not further define what constitutes a sufficient "brief statement of the facts." Utah Code Ann. § 63-30-11(3)(a)(i). However, Utah caselaw has established two purposes of the notice of claim. "[T]he purpose[s] of such notice of claim [are] to provide the governmental entity an opportunity to [(1)] correct the condition that caused the injury, [and (2)] evaluate the claim, and perhaps settle the matter without the expense of litigation." *Larson v. Park City Mun. Corp.*, 955 P.2d 343, 345-46 (Utah 1998).^{FN1} "In deciding how to file a notice of claim upon [the State] to satisfy the Act, a claimant has no other choice but to rely upon the statutes and upon the purpose of the notice statute" *Id.* at 346 (emphasis added).

FN1. Notwithstanding the lead opinion's assertion to the contrary, our supreme court has already "improved" the Act. See *Larson v. Park City Mun. Corp.*, 955 P.2d 343, 345-46 (Utah 1998).

¶ 25 Based upon the plain language of the Act, see *Dick Simon Trucking, Inc. v. Utah State Tax Comm'n.*, 2004 UT 11, ¶ 17, 84 P.3d 1197 (" 'When interpreting statutes, we determine the statute's meaning by first looking to the statute's plain language, and give effect to the plain language unless the language is ambiguous.' " (citation omitted)); *Lovendahl v. Jordan Sch. Dist.*, 2002 UT 130, ¶ 21, 63 P.3d 705 (same), Plaintiff's notice of claim constituted a "brief statement of the facts." Utah Code Ann. § 63-30-11(3)(a)(i). Plaintiff's notice of claim read, in relevant part,

On December 5, 2001, Ms. Peeples fell in front of a Utah State Liquor Store on ice, which was allowed to accumulate on the sidewalk, from a poorly designed rain gutter that drains onto the top of the sidewalk, rather than underneath it.

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Whether the brief statement of the facts in a notice of claim addresses the purposes underlying the notice requirement is, however, fact dependent—a point conceded by the State in its brief as follows:

The phrase “a brief statement of facts” is not statutorily defined. That is because section 63-30-11, by definition, applies to *any* claim asserted against the State and so it must be general enough to apply to all manner of claims—slip[—]and[—]fall claims such as this case, as well as cases that arise out of very different circumstances. Thus, section 63-30-11(3)(a) must be generally worded in order to fulfill the purposes of the Act in any case.^[FN2]

FN2. At oral argument, counsel for the State agreed that respecting certain claims, such as defamation, location would be irrelevant. It is undisputed, however, that location is relevant to the purposes of correcting the condition and evaluating the claim in this case.

Relying on *Pigs Gun Club, Inc. v. Sanpete County*, 2002 UT 17, ¶ 10, 42 P.3d 379, and *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 20, 977 P.2d 1201, however, the trial court ruled as a matter of law that, in effect, the notice document must contain both the notice requirements in the Act *and* the purposes of the notice statute. This notwithstanding, the State was well aware of which Utah State Liquor Store was the subject of Plaintiff's claim and thereby in a position to (1) “correct the condition that caused the injury,” and (2) “evaluate the claim, and perhaps settle the matter without the expense of litigation.” *261 *Larson*, 955 P.2d at 345-46.^{FN3} Neither of the cases relied upon by the trial court, nor any of the other so-called actual notice cases, address what constitutes a “brief statement of the facts.” Utah Code Ann. § 63-30-11(3)(a)(i); see *Gurule v. Salt Lake County*, 2003 UT 25, ¶ 5, 69 P.3d 1287 (concluding that actual notice by a municipality of a potential claim does not lower the strict compliance standard for filing a notice of claim, but not addressing whether the notice com-

plied with the brief statement of the facts requirement). Although the focus of *Larson* is upon the determination of what constitutes the “governing body” for the purpose of filing a notice of claim, *Larson* is nonetheless instructive. *Larson*, 955 P.2d at 345 (quotations and citation omitted). The *Larson* court, having reiterated the purposes set out in *Stahl v. Utah Transit Authority*, 618 P.2d 480, 482 (Utah 1980), and having declared that “a claimant has no other choice but to rely upon the statutes and upon the purpose of the notice statute,” engaged in a purpose-based, fact-intensive analysis to determine which government official is “reasonably and logically” the proper person to receive the filing.^{FN4} *Larson*, 955 P.2d at 346 (emphasis added).

FN3. I fail to see the point of the lead opinion's analysis of irrelevant strict compliance cases and observation that “[t]he strict compliance standard favors the State.”

FN4. A point counsel for the State refused to concede at oral argument, asserting that some critical person at the State may not have had actual knowledge of the location and needed to rely solely on the notice.

¶ 26 Whether the purposes of the notice of claim are addressed in any given case is contextual and requires a fact inquiry. “Purpose” is defined as “[a]n objective, goal or end.” Black's Law Dictionary 1250 (7th ed.1999), “something set up as an object or end to be attained,” or “an action in course of execution.” Webster's New Collegiate Dictionary 957 (9th ed.1986). Thus, the concept of “purpose” is inherently prospective in nature. A notice of claim that must be relied upon for the recipient to appropriately and prospectively respond would have to contain sufficient information to guide the response. It is absurd, however, having complied with the plain language of the statute, to require a notice of claim to contain information already obtained to accomplish the purpose of providing an opportunity to correct, evaluate, and perhaps settle—a purpose that has already been accomplished and,

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therefore, is no longer a purpose.

¶ 27 Therefore, I conclude that when determining whether a notice of claim contains a sufficient "brief statement of the facts," Utah Code Ann. § 63-30-11(3)(a)(i), a trial court must, when necessary, make a fact inquiry to determine if the purposes of (1) correcting the condition that caused the injury, and (2) evaluating a claim, and possibly settling the claim without litigation have been satisfied.^{FN5} See *Larson*, 955 P.2d at 345-46. Since the State has refused to concede satisfaction of the purpose requirements in this case, it should have an opportunity to address the issue before the trial court.

FN5. Cf. *Johnson v. City of Bountiful*, 996 F.Supp. 1100, 1103 (D.Utah 1998) (ruling that "Utah requires strict compliance with the notice of claim provision. Nonetheless, 'defects in the form or content of notices of claim do not always act to bar a claim.' By including the police report and informing Bountiful that Plaintiff was injured, the letter may satisfy the first required element of a notice of claim." (citation and emphasis omitted)).

¶ 28 Accordingly, I also would reverse the trial court's dismissal, but remand for the purpose of conducting a fact inquiry to determine whether the aforementioned purposes have been satisfied. See *id.*

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