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George E. Brown, Jr. v. Carl Wanlass, Debbie Hansen, Gary Caldwell, Cindy Walker, Shauna Thomas, Ken Smith, Terry V. Fox, Marta Murvosh, Michael Patrick, The Daily Herald, the Pulitzer Community Newspapers, Inc., and John Does 1 Through 75 : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GEORGE E. BROWN, JR.,

Plaintiffs/Appellants,

vs.

No. 990932-CA

CARL WANLASS, DEBBIE HANSEN,
GARY CALDWELL, CINDY
WALKER, SHAUNA THOMAS, KEN
SMITH, TERRY V. FOX, MARTA
MURVOSH, MICHAEL PATRICK,
THE DAILY HERALD, a corporation,
and THE PULITZER COMMUNITY
NEWSPAPERS, INC., a corporation,
and JOHN DOES 1 through 75,

Argument Priority 15

(ORAL ARGUMENT REQUESTED)

Defendants/Appellees.

BRIEF OF APPELLEES

Appeal from the Fourth Judicial District Court
Utah County, State of Utah
Honorable Gary D. Stott, Presiding

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Clerk of the Court

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LIST OF PARTIES

All parties are identified in the caption. However, Marta Murvosh, Michael Patrick, The Daily Herald, and The Pulitzer Community Newspapers, Inc. are not parties to this appeal.

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JURISDICTION

Appellant George E. Brown, Jr., appeals the summary judgment dismissing Appellees, seven employees of American Fork City. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF THE ISSUE

A. *Issue*

In granting summary judgment, did the trial court correctly conclude the Utah Governmental Immunity Act §§ 63-30-1, *et seq.*, bars Brown's defamation and emotional distress claims against the employees?

B. *Standard of Review*

Summary judgment presents only a question of law, reviewed for correctness. *Ryan v. Dan's Foods*, 972 P.2d 395, 400 (Utah 1998).

GOVERNING LAW

The Petition Clause of the First Amendment bars plaintiff's claim. U.S. Const. amend. 1; See also Utah Const. Art. I § 1. Various statutory bars to his claims are embodied in the Governmental Immunity Act, §§ 63-30-10(2), 63-30-10(5) and 63-30-4(3) and (4) (1953, as amended.) Rule 9(b), Utah R. Civ. P. is also relevant and is set forth in the Addendum.

STATEMENT OF THE CASE

INTRODUCTION.

This is a political dispute that has no business in court. It is brought by lawyer Brown, a former city councilman, against seven city employees for petitioning the city council to address Brown's erratic behavior. It was dismissed because the First Amendment to the Constitution guarantees the employees every right to petition their government for redress of grievances. This Constitutional right is the foundation for the provisions of the Governmental Immunity Act that provide three independent statutory bars to Brown's action. The dismissal should be affirmed.

A. Nature of the Case, Course of Proceedings and Disposition Below.

Mr. Brown was an erratic councilman for American Fork City. After several public incidents, forty-five city employees petitioned the City Council to do something about Mr. Brown. The Council considered the grievance, but did not take any formal action. Mr. Brown retaliated and sued seven of the forty-five, alleging defamation and intentional infliction of emotional distress. He also sued newspapers and their reporters for reporting, *inter alia*, about the grievance. All defendants moved for summary judgment. The newspaper defendants were dismissed because the reported information was true, was not defamatory, and was protected by the public interest and fair reporting privileges. Plaintiff did not appeal that dismissal.

The city employees were also dismissed, the court holding three separate provisions on the Governmental Immunity Act barred plaintiff's claims:

1. Utah Code Ann. § 63-30-10(2) (1953, as amended) prohibits claims arising out of “abuse of power, libel, slander” and “infliction of mental anguish.” This bars both the defamation and the intentional infliction of emotional distress claims.

2. The grievance was the initiation of an administrative proceeding against Mr. Brown, so defendants are immune under Utah Code Ann. § 63-30-10(5), which bars claims arising out of “the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause.” Utah Code Ann. § 63-30-10(5) (1953, as amended.)

3. Under Utah Code Ann. § 63-30-4(3)(b) (1953, as amended), the action against the employees are barred because there is no evidence that the employees “acted or failed to act through fraud or malice.” The grievance, on its face, does not constitute legal malice under Utah law.

B. *Statement of Facts.*

Brown fails to meet his burden of showing that the trial court ignored issues of material fact that should have precluded summary judgment. He fails to recite those facts with specificity or explain how they are material. This Court should accept the trial court’s ruling that the material facts were undisputed, and review only the accuracy of the trial court’s application of the law to the facts.

1. Brown’s Facts Are Not Evidence.

The great majority of Brown’s twelve pages of facts are irrelevant. They have nothing to do with whether the Petition Clause of the First Amendment and the Governmental

Immunity Act bars his claims. Moreover, most of Brown's asserted facts are either hearsay or conclusory allegations. They are not evidence. He gives a narrative history of his tenure as a City Council member, including how people were out to get him, and how he thinks they tried to remove him from office. He attempts to justify yelling at a former City employee. He tries prove that because a City phone bill shows a telephone call to a number he asserts belonged to the Salt Lake Tribune, that someone faxed something, impliedly the grievance, to the Salt Lake Tribune.

He explains how newspaper reporters called him to question him about police reports involving alleged incidents of misconduct by Brown, how he was wrongly accused, and his unsuccessful attempts to obtain the police investigation files through GRAMA requests. He details alleged violations of GRAMA laws, which he did not assert in his Complaint and which are the subject of other litigation. He alleges the City's police chief improperly disclosed to the newspaper defendants police reports involving him. Yet, he did not name the chief as a defendant. He even recites verbatim a letter to the editor published in the *American Fork Citizen* newspaper as evidence of his good actions at City Hall. None of these so-called facts relate in any way to the allegedly defamatory statements in the grievance.

Much of Brown's "citations to the record" are not cites to admissible evidence. For example, the first three pages of his Statement of Facts, Brown repeatedly cites as evidence the introduction section of his memorandum in opposition to the Newspaper Defendants' motion for summary judgment. [Brown brief, pp. 4-6.] He cites to multiple affidavits he

filed, the majority of them his own, comprised of inadmissible hearsay, opinions and legal conclusions. (See employees Motion to Strike, R. 973-984.) He relies on newspaper articles as evidence. He cites an opinion letter and a GRAMA decision that are wholly irrelevant. He even cites allegations in his Complaint as evidence. Brown's Statement of Facts is unreliable and not based on the record.

2. Undisputed Facts Supporting Summary Judgment.

Brown was a member of the American Fork City Council at all relevant times. (R. 36.) During his term as a City Council member, he verbally and physically abused numerous employees of the City. (R. 864, 868, 872.) He yelled at one employee about an item she placed on the agenda for a City Council meeting. The employee broke down into tears. (R. 864 868, 872.) He repeatedly threatened other city employees in a violent manner causing them to fear for their safety and the safety of others. (R. 864.) Brown often sneered at female employees. (R. 860.) He even tried to humiliate an American Fork City citizen at a City Council meeting by dismissing a question asked by the citizen, because the citizen's wife was one of several employees who filed a class action lawsuit against Brown. (R. 857.)

On June 24, 1997, a city employee voiced his opinion about City matters during a City Council meeting. (R. 853-54.) The following day, Brown confronted him and instructed him never to stand up in City Council and make derogatory comments again. (R. 853-54.) The City Administrator, who witnessed Brown's verbal attack on the employee, told Brown to stop threatening City workers. (R. 851.)

Thereafter, American Fork City police received a report that Brown was out of control at City Hall. An officer and a lieutenant responded and saw the city employee that Brown had attacked leaving the building. They asked what happened. (R. 843-49.) While they were talking, Brown came out and tried to tell the employee what to write in his statement to the police. The employee told Brown to leave him alone. To prevent a potential altercation, the lieutenant stepped between Brown and the employee. Brown grabbed the lieutenant by the arm to push him out of the way. The lieutenant told Brown not to touch him or he would arrest Brown. The police cited Brown for assaulting a police officer. (R. 843-49.) Brown was prosecuted and entered a plea in abeyance. (R. 0562.)

Tired of Brown's abusive and threatening behavior, 45 employees filed a formal written grievance with the City Administrator against Brown. (R. 839-41.) (Addendum, E.) The City Administrator was responsible for handling all personnel matters relating to American Fork City employees. (R. 864.) In the grievance, the employees alleged seven types of wrongful conduct by Brown:

1. Brown threatened and intimidated a City employee for voicing his opinion during a City Council meeting;
2. Brown attempted to incite a confrontation with employees at City Hall following a City Council meeting;
3. Brown assaulted a police officer during the officer's investigation of a disorderly conduct claim against Brown;
4. Brown attempted to coerce a City employee into giving a false statement to a officer;
5. Brown repeatedly threatened to fire employees for disagreeing with him;

6. Brown repeatedly violated City policies and procedures by degrading, embarrassing and demeaning them in public; and
7. Brown repeatedly discriminated against, ridiculed, demeaned and coerced female employees.

(R. 839-41.) None of the defendant employees drafted the grievance. They only signed it.

(R. 872, 868, 860, 857, 836, 833.) Mr. Brown did not sue the author of the grievance.

The employees were at all relevant times employees of American Fork City. (R. 36-37.) Each statement in the grievance concerned matters relating exclusively to their employment with the City, such as how they were treated on the job by City officials. (R. 839-841.) None of the statements addressed any personal issues the employees may have had with Brown. (R. 839-841.) Each statement in the grievance raised concerns of the employees solely in their capacities as employees of American Fork City. (R. 1031.) By filing the grievance, employees intended to bring Brown's offensive and abusive conduct to the attention of City officials, and to initiate administrative proceedings against Brown, thereby putting an end to his bad behavior. (R. 872, 868, 860, 857, 836, 833.) None of the employees gave a copy of the grievance to any person or entity, other than the City Administrator, nor did they reveal the contents of the grievance to anyone else. (R. 872, 868, 860, 857, 836, 833.)

The American Fork City Council, not the City Administrator, is responsible for reviewing complaints about City Council members. Consequently, upon receipt of the grievance, defendant City Administrator Wanlass forwarded it to the American Fork City

Council for review. (R. 864.) He never gave a copy of the grievance to anyone other than the members of the American Fork City Council. (R. 864.)

The Council asked the City Attorney whether under formal written city policies and procedures the Council had to proceed against Brown. (R. 926.) The City Attorney opined that the policy and procedure manual did not apply to Councilpersons. (R. 924.) The Council proceeded no further.

Brown alleged that the Newspaper Defendants defamed him by reporting he “assaulted” a police officer, and was charged with misdemeanor when he was ultimately charged with disorderly conduct, an infraction. (R. 29.) The Newspaper defendants got out on summary judgment because the allegedly defamatory statements were not actionable because, *inter alia*, they were true, they did not convey a defamatory meaning and the damaging impact of any defamatory statement was nominal compared with the damage done by the truthful statement. (R. 185-86.) Stating that Brown was charged with a misdemeanor instead of an infraction was not defamatory, because it was “true or substantially true as a matter of law and, therefore, Brown’s claim fails.” (R. 1012.) “[T]he Article’s inaccurate reference to the disorderly conduct charge against Brown as a ‘misdemeanor’ rather than an ‘infraction’ does not, as a matter of law, render the statement false.” (R. 1012.) The trial court continued, “Such an error in legal terminology cannot serve as the basis for Brown’s defamation claim, particularly where the term ‘misdemeanor’ is commonly understood to describe relatively minor, non-felony offenses, an infraction is such an offense, and the

Article accurately reported the underlying allegation upon which the charge against Brown was based.” (R. 1012.) Brown did not appeal the trial court’s ruling.

The employees also filed a motion for summary judgment, arguing the Petition Clause of the First Amendment and §§ 63-30-10(2) & 63-30-10(5) of the Governmental Immunity Act bar Brown’s claims. (R. 832-92 and 1046, p.4. [Summary Judgment hearing transcript.]) The employees also argued § 63-30-4(4) of the Act barred his claims against the employees personally because Brown failed to produce any evidence whatsoever that they acted with malice. (R. 832-92.) The trial court agreed and entered summary judgment in favor of the employees. (R. 1029-1032.)

SUMMARY OF ARGUMENT

The First Amendment’s Petition Clause guarantees the right “to petition the Government for a redress of grievances.” U.S. Const., amend. 1. It is a near absolute right. Even without the statutory immunities relied on by the court, this formidable constitutional right bars plaintiff’s claims.

The trial court correctly ruled the Governmental Immunity Act bars Brown’s claims against the employees in their official capacities. Specifically, Utah Code Ann. § 63-30-10(2) preserves immunity for injuries resulting from “abuse of process, libel, [and] slander” by a governmental employee. Further, Utah Code Ann. § 63-30-10(5) retains immunity for injuries resulting from the “institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause.” The undisputed facts establish the employees signed the grievance in their capacities as employees, and that all of the

allegations in the grievance concerned matters relating exclusively to Brown's treatment of them as City employees. Therefore, signing the grievance was done within the course and scope of their employment. They are immune from suit in their official capacities.

The trial court also correctly ruled the Act bars Brown's claims against the employees in their personal capacities. A governmental employee is not personally liable for acts occurring within her scope of employment, unless she acts with fraud or malice. Utah Code Ann. § 63-30-4(3). The undisputed facts demonstrate the allegations in the grievance were based upon specific instances of misconduct by Brown and were, therefore, not fraudulent. Moreover, Brown did not plead specific facts alleging the employees knowingly or recklessly made a false representations of existing fact about him, nor did he present any evidence to rebut their testimony that they signed the grievance not to retaliate against Brown, but to end to his tyrannical, odd behavior. Brown presented no evidence that the employees acted with fraud or malice, so they are immune from Brown's personal capacity claims.

ARGUMENT

I. THE PETITION CLAUSE BARS THIS CLAIM.

The First Amendment Petition Clause guarantees the right "to petition the Government for a redress of grievances," and "protect[s] any peaceful, lawful attempt to promote or discourage government action at all levels and branches of government." *Pring*, 7 Pace Envtl. L. Rev. at 9 (citations omitted). Protected activity includes political advocacy, lobbying and testifying to the government, writing letters about public matters, public debate,

and making complaints or reporting violations to governmental bodies. Barker, 26 Loy. L.A. L. Rev. at 425.

The Petition Clause is part of the panoply of rights which “encourage, promote, and make it a test of good citizenship for Americans to debate, campaign, lobby, testify, complain, litigate, demonstrate, and otherwise ‘invoke the law’ on public issues.” Pring, 7 Pace Envtl. L. Rev. at 11 (citation omitted). As one commentator observed:

the petition clause, indeed our entire political system, recognizes that the “word of the represented” is essential to the way government shapes our lives. . . . [T]he right is not dependent on whether the citizens’ views are right or wrong, wise or foolish, public-spirited or venally self interested. Implicit in this concept is a very modern . . . view of the superior competitiveness of truth in a free market of ideas. As Justice Holmes stated in one of his famous dissents, destined to become the law: “[T]he ultimate good desired is better reached in free trade in ideas [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market That at any rate is the theory of our Constitution.”

Id. at 11-12 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). Another commentator observed that the right to petition is so well-protected that “courts have universally declared that [even] common-law malice, or ill-will, will not defeat the petitioning privilege,” and that “courts will not interfere with the exercise of the right . . . absent sham or fraud, or in some cases, even with sham or fraud.” Barker, 26 Loy. L.A. L. Rev. at 427 (citations omitted).

Numerous cases illustrate the broad sweep of the Petition Clause to protect citizens’ rights to petition the government to act or not to act. For example, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), trucking

companies (“truckers”) sued railroads, claiming the railroads conspired to conduct a publicity campaign designed to foster distaste for truckers and the adoption of laws destructive of the trucking business. *Id.* at 129. Their activities included lobbying the governor of Pennsylvania to veto the “Fair Truck Bill,” which would have allowed truckers to carry heavier loads on Pennsylvania roads. *Id.* at 130. The trial court and the circuit court held that the railroads violated antitrust laws with their actions.

The United States Supreme Court reversed, relying primarily on the railroads’ first amendment right to petition. *Id.* at 143-45. The Court observed that attempts to influence legislation always results in the party against whom the campaign is made facing potential injury. *Id.* It pointed out that:

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that people cannot freely inform the government of their wishes would . . . be particularly unjustified.

Id. at 137. The Court also observed that there is generally only one situation where petitioning with the purpose of influencing government action might not be protected, *i.e.*, where the campaign “is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship *of a competitor.*” *Id.* at 144 (emphasis added).

Four years later, the Court reiterated its support of Petition Clause protections in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). One of the issues

there was a union's petitioning the Secretary of Labor, which a coal company claimed had resulted in its injury. *Id.* at 669-672. Relying on *Noerr*, the Court rejected the idea that the union could be liable for its actions in petitioning the government. *Id.* at 671. These cases comprise the *Noerr-Pennington* doctrine.

Significantly, in *Searle v. Johnson*, 646 P.2d 682 (Utah 1982), the Utah Supreme Court recognized *Noerr* and that “[t]he First Amendment protects expressions designed to influence governmental action even when the content of those expressions brings incidental injury to parties concerned.” *Id.* at 689. See also *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523 (N.D.Ill. 1990) (developer's suit against protesting neighbors barred); *Lobiondo v. Schwartz*, 733 A.2d at 518-19 (N.J. 1999) (same).

Other courts have likewise relied on the Petition Clause to protect citizens' rights to communicate on issues of public importance. See *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (defendants' actions in calling nursing home's violations to attention of state and federal authorities and rousing public interest protected by Petition Clause and cannot serve as basis for tort liability); *Barnes Found. v. Township of Lower Merion*, 927 F. Supp. 874, 876-78 (E.D.Pa. 1996) (neighbors who met to discuss and later protest alleged violations of land use ordinances exempt from tort liability).¹

¹ See also, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (*Noerr-Pennington* doctrine immunizes citizens from liability for exercising right to boycott); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (Petition Clause provides absolute privilege and protects citizens from liability for zoning dispute); *Protect Our Mountain Env't, Inc. v. District Court*, 677 P.2d 1361, 1369 (Colo. 1984) (applying *Noerr-*

Brown contends that the employees acted with malice and that therefore he states a claim for relief. These allegations, even if true, do not prove a sham within the meaning of the *Noerr Pennington Doctrine*. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the court held that it was “irrelevant that a petitioning party’s political motives are selfish,” because the Petition Clause “shields . . . a concerted effort to influence public officials regardless of intent or purpose.” In *Omni*, the plaintiff had alleged that a competitor who had petitioned the government for favorable legislation spread “untrue and malicious rumors about Omni and attempted to induce Omni’s customers to break their contracts.” *Omni Outdoor Advertising*, 499 U.S. at 380. Nonetheless, the Supreme Court held that the competitor’s activities were protected by the Petition Clause. Courts have steadfastly held that the petitioner’s intent is irrelevant, *Eastern RR Presidents’ Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Cogeneration, Inc., v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir. 1996); *Concourse Nursing Home v. Engelstein*, 692 N.Y.S.2d 888 (S.Ct.N.Y. 1999).

Courts across the country reject each and every complaint that Mr. Brown makes about the employees petitioning activities. For example, false statements made in petitioning activities are immune under the *Noerr-Pennington Doctrine*. *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); so is labeling the plaintiff a racist, *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292 (6th Cir. 1992); spreading false derogatory rumors,

Pennington doctrine to suit for abuse of process and civil conspiracy).

Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980); filing groundless complaints, *Weiss v. Willow Tree Civic Association*, 467 F.Supp. 803 (S.D.N.Y. 1979); acting out of “animus,” *Associated BodyWorks and Massage Professionals v. AMTA*, 897 F.Supp. 1116 (N.D. Ill. 1995); accusing plaintiff of not following ordinances, *King v. Township of East Lampeter*, 17 F.Supp.2d 394 (E.D.Pa. 1998); and communicating *ex parte* with legislators, holding secret meetings with officials, and making covert agreements between petitioners and policy makers, *Obernoff v. City and County of Denver*, 900 F.2d 1434 (10th Cir. 1990).

The employees’ United States constitutional immunity, via the Supremacy Clause, defeats any state law cause of action. *Cheminar Drugs, Ltd. v. Ethyl Corporation*, 168 F.3d 119 (3d Cir. 1999) (tortious interference with contract, tortious interference with prospective economic relation, unfair competition and malicious prosecution claims fall to Petition Clause immunity). Consequently, they have immunity, and every cause of action arising out of their petitioning activities fails. *Associated BodyWorks & Massage Professionals v. AMTA*, 897 F.Supp. 1116, 1120 (N.D.Ill. 1995) (libel claim fails); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (libel claim fails); *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998) (libel claim fails); *Cardtoons v. Major League Baseball Players Ass’n.*, 182 F.3d 1132, 1139 (10th Cir. 1999) (libel claim trumped by Petition Clause immunity).

The Petition Clause guarantees the rights of citizens to become involved in government matters, and our form of government depends on this involvement. It is an

affront for Mr. Brown to subject the employees to this harassing litigation simply because they took advantage of their rights and obligations as citizens. As one court observed, “[t]he problem is not too much citizen involvement but too little.” *Brownsville*, 839 F.2d at 160. The employees’ summary judgment should accordingly be affirmed.

II. THE UNDISPUTED MATERIAL FACTS ESTABLISH THE CITY EMPLOYEES ARE IMMUNE FROM SUIT IN THEIR OFFICIAL CAPACITIES.

To state a defamation claim, plaintiff must prove the allegedly defamatory statements are not subject to any privilege. *West v. Thomson Newspapers*, 872 P.2d 999, 1007-08 (Utah 1994). The employees asserted Utah Code Ann. §§ 63-30-10(2) & (5) provides them with absolute immunity from Brown’s claims. Brown not only failed to establish that the privileges in these statutes do not apply, but more fundamentally he failed to show any material issues of fact to preclude summary judgment.

A. Section 63-30-10(2) of the Act Provides Absolute Immunity Against Brown’s Claims.

Utah Code Ann. § 63-30-10(2) (1953, as amended) expressly retains immunity for municipal employees and officials for claims “aris[ing] out of, in connection with, or result[ing] from . . . abuse of process, libel, slander . . . [and] infliction of mental anguish” This statutory bar is unqualified, and is not defeated by evidence of malice. Brown admits in his complaint that each of the employees were employed by the City at all relevant times (R. 36.), and at summary judgment he submitted no evidence to the contrary. The trial court concluded the employees were acting within the course and scope of their employment when they signed the grievance and, therefore, § 63-30-10(2) bars his claims. Brown does

not challenge this conclusion on appeal. On this basis alone, this Court should affirm the trial court's ruling.

In any event, the court correctly interpreted Utah Code Ann. § 63-30-10(2) (1953, as amended), to bar defamation and emotional distress claims regardless of the underlying facts, even if they prove malice. The Tenth Circuit Court of Appeals held without further explanation in *Molina v. Spanos*, 1999 WL 626126 (10th Cir. 1999), that §63-30-10(2) barred a plaintiff's against government agents defamation and intentional infliction of emotional distress claims. *Molina* had asserted that County officials acted with the specific intent to damage him.

Similarly, in *Devlin v. Smalley*, 4 F. Supp.2d 1315 (D. Utah 1998), the court held that §63-30-10(2) barred claims against Sandy City and its officials, both in their representative and personal capacities, for defamation arising out of the officials' reports of alleged child abuse to the Division of Child and Family Services. Likewise, in *Devlin* plaintiff asserted that defendants acted with malice.

As in *Molina* and *Devlin*, it is undisputed that the employees were employed by the City at all relevant times, and the grievance related solely to the employees' terms and conditions of employment. Consequently, the trial court correctly ruled §63-30-10(2) bars Brown's claims.

B. Section 63-30-10(5) of the Act Provides Absolute Immunity Against Brown's Claims.

There is immunity for municipal employees and officials against claims “aris[ing] out of, in connection with, or result[ing] from . . . the institution or prosecution of any judicial or administrative proceeding, *even if malicious or without probable cause . . .*” Utah Code Ann. § 63-30-10(5) (1953, as amended) (emphasis added). Nothing in the statute requires that an administrative hearing actually occur. Here the employees signed the grievance to alert City officials to Brown’s offensive and abusive conduct, so the Council would initiate administrative proceedings against Brown to put an end to his bad behavior. Brown did not rebut any of that testimony. Based upon these undisputed facts, the trial court concluded Utah Code Ann. § 63-30-10(5) (1953, as amended) barred Brown’s claims.

Brown argues the City’s policies and procedures do not give the City Council the authority to initiate administrative proceedings against a City Council member. However, state law provides: “The governing body of each municipality may fine or expel any member for disorderly conduct on a two-thirds vote of the members of the governing body.” Utah Code Ann. § 10-3-607. The term “governing body,” while not expressly defined in the Act, has been repeatedly held by Utah courts to be the mayor and the city council. *Bellonio v. Salt Lake City Corp.*, 911 P.2d 1294 (Utah 1996). The council also has the power to remove a member from office if she is guilty of “oppression, malconduct, misfeasance or malfeasance in office.” Utah Code Ann. § 10-3-826 (1953, as amended). Beyond that, the Petition Clause expressly allows citizens “to petition the Government for a redress of

grievances.” Thus, the City Council had the authority to initiate administrative proceedings against Brown.

Brown also argues that the City Council never initiated any proceedings relating to the grievance against him. The fact the City Council, which Brown was a member of, chose not to initiate an administrative review against Brown, one of their own, is immaterial. The controlling factor is the employees’ intent in signing the grievance, not the council’s technical ability or political resolve to act.

In the end, it is undisputed that the employees thought they were taking proper steps to improve their working conditions. They alerted City officials to Brown’s maltreatment of them as employees. Although the City Council did not initiate a formal administrative review or conduct a hearing on the grievance allegations, it did investigate them by asking the city attorney whether they had to proceed with the grievance. The statements in the grievance were, therefore, made in connection with the institution of an administrative proceeding and Utah Code Ann. § 63-30-10(5) (1953, as amended) bars Brown’s claims.

III. THE UNDISPUTED MATERIAL FACTS ESTABLISH THE CITY EMPLOYEES ARE IMMUNE FROM SUIT IN THEIR PERSONAL CAPACITIES.

A. His Fraud Claim Fails.

The trial court correctly held that Brown failed to plead fraud with sufficient particularity, dismissing the claim. Rule 9(b) of the Utah Rules of Civil Procedure requires that fraud claims be pled with particularity. Brown alleged in his Complaint that the employees fraudulently signed the grievance, but he never stated with particularity any fraud

elements. To plead fraud, plaintiff must specifically allege that the defendant knowingly or recklessly made a false representation of an existing material fact for the purpose of inducing reliance thereon, actual reliance reasonable under the circumstances, resulting in injury. *DeBry v. Noble*, 889 P.2d 428 (Utah 1995). Brown failed to do so.

In *DeBry*, the plaintiffs filed a claim against a Salt Lake County building inspector alleging the inspector fraudulently issued a building permit for a defective building they purchased. The trial court dismissed the plaintiffs' fraud claim as a matter of law pursuant to § 63-30-4(4) of the Utah Governmental Immunity Act. The Utah Supreme Court affirmed reasoning the plaintiffs "did not allege with specificity that . . . [the inspector] intentionally or recklessly misrepresented an existing fact to the . . . [plaintiffs]." *Id.* at 443. The court continued, "Furthermore, they do not allege that a misrepresentation was made with the intent of inducing . . . [them] to rely on the representation to their detriment." *Id.*

Brown asserted only that the allegedly defamatory statements were published with fraud. He failed, however, to allege specific facts to support his claim. Like the plaintiffs in *DeBry*, Brown failed to plead fraud with particularity. Consequently, the trial court correctly ruled Brown failed as a matter of law to adequately plead his claims for fraud.

Even if Brown had pled fraud with sufficient particularity, the undisputed facts establish the allegations in the grievance were not fraudulent, and they were grounded in fact. The employees testified about numerous specific instances when Brown verbally and physically abused not only them but others as well. He yelled at and threatened them for doing their jobs, sneered at female employees, and even attempted to humiliate a citizen

because his wife was one of several employees who filed a class action lawsuit against him. Brown tried to tell a city employee what he could and could not say during City Council meetings, threatened him if he did not obey him in the future and told him what to write in his statement to the police. He also struck a police officer who was investigating the matter, and otherwise interfered with the officer's investigation. Although he was only charged only with disorderly conduct, he was also cited for assaulting a police officer.

Brown argues the statement he "assaulted" a police officer is defamatory, because he was charged with disorderly conduct, not assault. He further argues that charge was ultimately dismissed. The trial court expressly ruled the Newspaper Defendants' "inaccurate reference to the disorderly conduct charge against Brown as a 'misdemeanor' rather than an 'infraction' does not, as a matter of law, render the statement false" and that "[s]uch an error in legal terminology cannot serve as the basis for Brown's defamation claim, particularly where the term 'misdemeanor' is commonly understood to describe relatively minor, non-felony offenses, an infraction is such an offense, and the Article accurately reported the underlying allegation upon which the charge against Brown was based." Brown did not challenge that ruling and is, therefore, bound by it on appeal.

B. He Has Not Shown Malice.

The trial court also concluded Utah Code Ann. § 63-30-4(4) (1953, as amended) of the Act barred Brown's claims against the employees in their personal capacities. Section 63-30-4(4) states, "[N]o employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment,

or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.” Brown argues the trial court should not have dismissed his claims, because he presented facts tending to show the employees signed the grievance with malice.

The facts show they intended to bring to the Council’s attention Brown’s offensive and abusive conduct and to initiate administrative proceedings against Brown, thereby putting an end to his inappropriate behavior. They gave the grievance to the City Administrator, who they believed was responsible for initiating proceedings against Brown. Brown argues the employees published the grievance to others, but presented no evidence to contradict their testimony that none of them ever gave a copy of the grievance to any individual or entity other than the City Administrator or revealed the contents of the grievance to anyone other than him. The statements in the grievance concerned matters relating exclusively to their employment with the City, such as how they were treated on the job by City officials, and did not address any personal issues outside of their employment that they may have had with Brown. The City Administrator testified the City Council is the entity responsible for reviewing complaints about City Council members, so he sent the grievance to them. He never gave a copy of the grievance to *anyone* other than the members of the American Fork City Council. Brown failed to present any evidence to the contrary.

To put an end to Brown’s abusive and threatening behavior, the employees did what any employee would do: they told their supervisor. They did so collectively and in writing to impress upon their “boss” the seriousness of their complaints. Under Brown’s argument, these distinctions make no difference. He would have sued them for slander instead, which is simply another type of defamation. Taken to a logical conclusion, Brown could sue for

defamation if any of the employees had reported to her boss that Brown sexually harassed her. This is not the type of communication the law meant to prohibit.

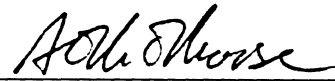
There was simply no evidence, direct or inferred, that the employees signed the grievance with malice. Consequently, the trial court correctly ruled § 63-30-4(4) bars Brown's claims as a matter of law.

CONCLUSION

For the reasons set forth above, the Court should affirm summary judgment and award fees and costs to appellees.

DATED this 5th day of July, 2000.

SNOW, CHRISTENSEN & MARTINEAU

By 

Andrew M. Morse

Heather S. White

Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July, 2000, I caused two copies of the foregoing Brief of Appellants to be served by first class mail upon the following:

GEORGE E. BROWN, JR.
Attorney Pro Se for Appellant
6 West Main Street, Suite B
American Fork, Utah 84003

As the Elmore

ADDENDUM

The following addendum is submitted pursuant to the provisions of Rule 24(a)(11).

- A. United States Constitution, Amendment I
- B. Utah Constitution, Article I, Section 1
- C. Utah Code Ann. §§ 63-30-10(2) and (5).
- D. Utah Code Ann. §§ 63-30-4(3) and (4).
- E. Rule 9, Ut. R. Civ. P.
- F. Grievance

Tab A

Amend. I

UNITED STATES CONSTITUTION

AMENDMENT I

[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

[Right to bear arms.]

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

[Quartering soldiers.]

No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

AMENDMENT VII

[Trial by jury in civil cases.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

[Bail — Punishment.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

[Rights retained by people.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

[Powers reserved to states or people.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI

[Suits against states — Restriction of judicial power.]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII

[Election of President and Vice-President.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open the certificates and the votes shall then be counted;—The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have such majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for this purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Tab B

CONSTITUTION OF UTAH

PREAMBLE

Article

- I. Declaration of Rights
- II. State Boundaries
- III. Ordinance
- IV. Elections and Right of Suffrage
- V. Distribution of Powers
- VI. Legislative Department
- VII. Executive Department
- VIII. Judicial Department
- IX. Congressional and Legislative Apportionment
- X. Education
- XI. Counties, Cities and Towns
- XI. Local Governments [Proposed]
- XII. Corporations
- XIII. Revenue and Taxation
- XIV. Public Debt
- XV. Militia
- XVI. Labor
- XVII. Water Rights
- XVIII. Forestry
- XIX. Public Buildings and State Institutions
- XX. Public Lands
- XXI. Salaries
- XXII. Miscellaneous
- XXIII. Amendment and Revision
- XXIV. Schedule

PREAMBLE

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION.

1896

ARTICLE I

DECLARATION OF RIGHTS

Section

1. [Inherent and inalienable rights.]
2. [All political power inherent in the people.]
3. [Utah inseparable from the Union.]
[Religious liberty.] [Proposed.]
4. [Habeas corpus.]
5. [Right to bear arms.]
6. [Due process of law.]
7. [Offenses bailable.]
8. [Excessive bail and fines — Cruel punishments.]
9. [Trial by jury.]
10. [Courts open — Redress of injuries.]
11. [Rights of accused persons.]
12. [Prosecution by information or indictment — Grand jury.]
13. [Unreasonable searches forbidden — Issuance of warrant.]
14. [Freedom of speech and of the press — Libel.]
15. [No imprisonment for debt — Exception.]
16. [Elections to be free — Soldiers voting.]
17. [Attainder — Ex post facto laws — Impairing contracts.]
18. [Treason defined — Proof.]
19. [Military subordinate to the civil power.]
20. [Slavery forbidden.]
21. [Private property for public use.]
22. [Irrevocable franchises forbidden.]
23. [Uniform operation of laws.]
24. [Rights retained by people.]

Section

26. [Provisions mandatory and prohibitory.]
27. [Fundamental rights.]
28. [Declaration of the rights of crime victims.]

Section 1. [Inherent and inalienable rights.]

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

1896

Sec. 2. [All political power inherent in the people.]

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

1896

Sec. 3. [Utah inseparable from the Union.]

The State of Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land.

1896

Sec. 4. [Religious liberty — No property qualification to vote or hold office.]

The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.

1896

[Religious liberty.] [Proposed.]

The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

[1999]

Sec. 5. [Habeas corpus.]

The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it.

1896

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

1984 (2nd S.S.)

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

1896

Tab C

governmental entities is waived for any injury caused from dangerous or defective condition of any public building, structure, dam, reservoir, or other public improvement. 1991

63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions.

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of employee committed within the scope of employment if the injury arises out of, in connection with, or results from:

- (1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
- (2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;
- (3) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;
- (4) a failure to make an inspection or by making an inadequate or negligent inspection;
- (5) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
- (6) a misrepresentation by an employee whether or not it is negligent or intentional;
- (7) riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;
- (8) the collection of and assessment of taxes;
- (9) the activities of the Utah National Guard;
- (10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;
- (11) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire and State Lands;
- (12) research or implementation of cloud management or seeding for the clearing of fog;
- (13) the management of flood waters, earthquakes, or natural disasters;
- (14) the construction, repair, or operation of flood or storm systems;
- (15) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14;
- (16) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them;
- (17) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement;
- (18) the activities of:
 - (a) providing emergency medical assistance;
 - (b) fighting fire;
 - (c) regulating, mitigating, or handling hazardous materials or hazardous wastes;
 - (d) emergency evacuations; or
 - (e) intervening during dam emergencies; or
- (19) the exercise or performance or the failure to exercise or perform any function pursuant to Title 73, Chapter 10 or Title 73, Chapter 10 which immunity is in addition to all other immunities granted by law. 1996

63-30-10.5. Waiver of immunity for taking private property without compensation.

(1) As provided by Article I, Section 22 of the Utah Constitution, immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation.

(2) Compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain. 1991

63-30-10.6. Attorneys' fees for records requests.

(1) Immunity from suit of all governmental entities is waived for recovery of attorneys' fees under Sections 63-2-405 and 63-2-802.

Notwithstanding Section 63-30-11:

(a) a notice of claim for attorneys' fees under Subsection (1) may be filed contemporaneously with a petition for review under Section 63-2-404; and

(b) Sections 63-30-14 and 63-30-19 shall not apply.

(2) Any other claim under this chapter that is related to a claim for attorneys' fees under Subsection (1) may be brought contemporaneously with the claim for attorneys' fees or in a subsequent action. 1992

63-30-11. Claim for injury — Notice — Contents — Service — Legal disability.

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(2) Any person having a claim for injury 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; and
- (iii) the damages incurred by the claimant so far as they are known.

(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 to:
 - (A) the city or town recorder, 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 president or secretary of the board, when the claim is against a special district;
 - (E) the attorney general, when the claim is against the State of Utah; or
 - (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.

(4) (a) If the claimant is under the age of majority, or mentally incompetent and without a legal guardian at the time the claim arises, the claimant may apply to the court to extend the time for service of notice of claim.

(b) (i) After hearing and notice to the governmental entity, the court may extend the time for service of notice of claim.

Tab D

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

(7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

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

(9) "State" means the state of Utah, and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

1999

63-30-3. Immunity of governmental entities from suit.

(1) Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

(2) (a) For the purposes of this chapter only, the following state medical programs and services performed at a state-owned university hospital are unique or essential to the core of governmental activity in this state and are considered to be governmental functions:

(i) care of a patient referred by another hospital or physician because of the high risk nature of the patient's medical condition;

(ii) high risk care or procedures available in Utah only at a state-owned university hospital or provided in Utah only by physicians employed at a state-owned university acting in the scope of their employment;

(iii) care of patients who cannot receive appropriate medical care or treatment at another medical facility in Utah; and

(iv) any other service or procedure performed at a state-owned university hospital or by physicians employed at a state-owned university acting in the scope of their employment that a court finds is unique or essential to the core of governmental activity in this state.

(b) If any claim under this subsection exceeds the limits established in Section 63-30-34, the claimant may submit the excess claim to the Board of Examiners and the Legislature under Title 63, Chapter 6.

(3) The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

(4) Officers and employees of a Children's Justice Center are immune from suit for any injury which results from their joint intergovernmental functions at a center created in Title 62A, Chapter 4a.

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63-30-4. Act provisions not construed as admission or denial of liability — Effect of waiver of immunity — Exclusive remedy — Joinder of employee — Limitations on personal liability.

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

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

(c) No cause of action or basis of liability is created by any waiver of immunity in this chapter, nor may any

provision of this chapter be construed as imposing strict liability or absolute liability.

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

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

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

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

(ii) the injury or damage resulted from the conditions set forth in Subsection 63-30-36(3)(c).

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

63-30-5. Waiver of immunity as to contractual obligations.

(1) Immunity from suit of all governmental entities is waived as to any contractual obligation. Actions arising out of contractual rights or obligations shall not be subject to the requirements of Sections 63-30-11, 63-30-12, 63-30-13, 63-30-14, 63-30-15, or 63-30-19.

(2) Notwithstanding Subsection (1), the Division of Water Resources is not liable for failure to deliver water from a reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development Act, if the failure to deliver the contractual amount of water is due to drought, other natural condition, or safety condition that causes a deficiency in the amount of available water.

63-30-6. Waiver of immunity as to actions involving property.

Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

63-30-7. Repealed.

63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.

Unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10, immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them.

63-30-9. Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement — Exception.

Unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10, immunity from suit of

Tab E

(4) *Application of rules to motions, orders, and other papers.* The rules applicable to captions, signings, and other matters of form of pleadings apply to all motions, orders, and other papers provided for by these rules.

(c) *Demurrers, pleas, etc., abolished.* Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Rule 8. General rules of pleadings.

(a) *Claims for relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) *Defenses; form of denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, license, release, payment, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(d) *Effect of failure to deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to be concise and direct; consistency.*

1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of pleadings.* All pleadings shall be so construed as to do substantial justice.

Rule 9. Pleading special matters.

(a)(1) *Capacity.* It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge, and on such issue the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(2) *Designation of unknown defendant.* When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(3) *Actions to quiet title; description of interest of unknown parties.* In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may describe such unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

(b) *Fraud, mistake, condition of the mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) *Conditions precedent.* In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) *Official document or act.* In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) *Judgment.* In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) *Time and place.* For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) *Special damage.* When items of special damage are claimed, they shall be specifically stated.

(h) *Statute of limitations.* In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

(i) *Private statutes; ordinances.* In pleading a private statute of this state, or an ordinance of any political subdivision

thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

(j) *Libel and slander.*

(1) *Pleading defamatory matter.* It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(2) *Pleading defense.* In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

Rule 10. Form of pleadings and other papers.

(a) *Caption; names of parties; other necessary information.* All pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, the file number, the name of the pleading or other paper, and the name, if known, of the judge to whom the case is assigned. In the complaint, the title of the action shall include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action." Every pleading and other paper filed with the court shall also state the name, address, telephone number and bar number of any attorney representing the party filing the paper, which information shall appear in the top left-hand corner of the first page. Every pleading shall state the name and address of the party for whom it is filed; this information shall appear in the lower left-hand corner of the last page of the pleading. The plaintiff shall file together with the complaint a completed cover sheet substantially similar in form and content to the cover sheet approved by the Judicial Council.

(b) *Paragraphs; separate statements.* All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) *Adoption by reference; exhibits.* Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading, or in any motion. An exhibit to a pleading is a part thereof for all purposes.

(d) *Paper quality, size, style and printing.* All pleadings and other papers filed with the court, except printed documents or other exhibits, shall be typewritten, printed or photocopied in black type on good, white, unglazed paper of letter size (8 1/2" x 11"), with a top margin of not less than 2 inches above any typed material, a left-hand margin of not less than 1 inch, a right-hand margin of not less than one-half inch, and a bottom margin of not less than one-half inch. All typing or printing shall be clearly legible, shall be double-spaced, except for

matters customarily single-spaced or indented, and shall not be smaller than pica size. Typing or printing shall appear on one side of the page only.

(e) *Signature line.* Names shall be typed or printed under all signature lines, and all signatures shall be made in permanent black or blue ink.

(f) *Enforcement by clerk; waiver for pro se parties.* The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with this rule, the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown the court may relieve any party of any requirement of this rule.

(g) *Replacing lost pleadings or papers.* If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

Rule 11. Signing of pleadings, motions, and other papers; representations to court; sanctions.

(a) *Signature.* Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) *Representations to court.* By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or later advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) *Sanctions.* If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How initiated.*

(A) *By motion.* A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party

Tab F

To: Carl Wanlass

From: American Fork City Employees, Departments in General

Date: July 1, 1997

RE: Grievance

This memo is forwarded with the intent to pursue resolution by grievance the following matters:

At issue is the matter of Councilman George Brown violating employees rights to freedom of speech in that he did threaten and intimidate an employee of American Fork City for exercising his right as a citizen to voice an opinion in an open City Council meeting. That in doing so BROWN has created a hostile environment for all city employees who would comment on city issues in open forum where opinions over such matters are invited from the public and other interested parties. That all city employees must now be fearful of retaliation for expressing their views and beliefs in invited open forum if those views and beliefs are contrary to those held by Councilman George Brown.

Issue is the assault committed by Councilman George Brown upon Lieutenant Terry Fox pursuant to an investigation Lieutenant Fox had undertaken concerning the disorderly conduct of George Brown on 6/25/97 in American Fork City Hall. George Brown had attempted to "browbeat" and incite confrontation with American Fork City employees in a public place. When he attempted to coerce an employee into giving a statement to police that was favorable to Brown, Lieutenant Fox rightly corrected Brown, advising Brown not to tell the employee what to write in the statement. Councilman Brown then assaulted Lieutenant Fox in an attempt to intimidate him and control the information release in the report of disorderly conduct and assaultive behavior by Brown. At issue is the fact that all American Fork City Employees must be fearful of assaultive behavior from Councilman George Brown if their views and opinions are contrary to the views and beliefs of George Brown.

Issue is the repeated threats of termination from employment of American Fork City employees by Councilman George Brown. On numerous occasions George Brown has threatened termination of employment or has told employees to "resign" because the employee has disagreed with Browns opinions, views; or politics.

Further, Brown has repeatedly violated American Fork Policy and Procedure concerning personnel problems. Brown has repeatedly degraded, embarrassed, humiliated, and insulted American Fork City employees in open public forum, in public meetings, and in front of fellow city workers exposing American Fork City employees to humiliation and contempt.

We, therefore, issue complaint, and grieve the above listed issues and seek relief under section IX of American Fork City Policy and Procedure. We Grieve the fact that Councilman George Brown has violated Utah Criminal Code 76-9-102- Disorderly Conduct, 76-5-102.4- Assault against a peace officer, and American Fork City Policy and Procedures Section VII (C)(2)- Indulging in Offensive Conduct.

This Complaint and Grievance in no way limits individual persons from seeking redress for damages, civil and criminal, against George Brown.

protections guaranteed under American Fork City Policy, Utah State Law, and the United States Constitution

Stabilizer *M. L. Lutz* *John J. Fox* *Ar. Hays*

Signed, American Fork City Employees

Allen Jensen *Neill Furlay* *Donnell Caldwell*
Andy Jensen *Red Hustill* *Calvin*
Nauna Thomas *Stephen* *John*
John *Arthur* *Ed*
Don *Carl* *John*
W. W. W. W. *Ed* *John*
Ed *John* *Ed*

Richard Jensen.

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