

2016

**Lori Ramsay and Dan Smalling, Appellants, vs. Utah State Retirement Board, and Kane County Human Resource Special Service District, Appellees**

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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LORI RAMSAY and DAN  
SMALLING,

Appellants,

v.

UTAH STATE RETIREMENT  
BOARD and KANE COUNTY  
HOSPITAL,

Appellees.

Appellate Case No. 20150574-CA  
Agency Case No. 09-22R

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**BRIEF OF APPELLEE  
KANE COUNTY HOSPITAL**

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**APPEAL FROM THE UTAH STATE RETIREMENT BOARD**

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## **JURISDICTIONAL STATEMENT**

Kane County Hospital (the “Hospital”) <sup>1</sup> agrees that Utah Code section 78A-4-103(2)(a) grants the Utah Court of Appeals jurisdiction over final orders or decrees resulting from a formal adjudicative proceeding of a state agency.

But Ramsay and Smalling’s brief strays from that grant of jurisdiction. On appeal, the Court of Appeals has jurisdiction to review only the “final agency action” itself. *See, e.g., BMS 1999, Inc. v. Dep’t of Workforce Servs.*, 2014 UT App 111, ¶ 5 n.2, 327 P.3d 578. Thus, to the extent Ramsay and Smalling ask the Court to do more than review the Retirement Board’s final agency action—by, for example, addressing the merits of the underlying dispute when the action was based solely on limitations grounds—Ramsay and Smalling ask the Court to venture outside the jurisdiction granted by section 78A-4-103(2)(a). The Court should decline that invitation.

## **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

1. A three-year statute of limitations applies to Ramsay and Smalling’s state-retirement-benefit claims against the Hospital. This limitations period may be equitably tolled only upon the belated discovery of the facts forming the basis of the cause of action. Ramsay and Smalling knew about the single fact underlying their claim to state retirement benefits—the Hospital’s provision of a 401(k) plan—for almost 15 years before they intervened in the administrative action. Did the Retirement Board err when it found that Ramsay and Smalling were not entitled to equitable tolling of the limitations period?

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<sup>1</sup> Appellants refer to the Hospital in their opening brief, including its caption, as the Kane County Human Resources Special Service District. However, during the administrative action that is the subject of this appeal, the Hospital was identified as the “Kane County Hospital.” Thus, to be consistent with the proceeding below, the Hospital uses that name in its caption and in this brief.

The Retirement Board's decision about the statute of limitations is the only issue properly before this Court on appeal. Nevertheless, Ramsay and Smalling attempt to raise the following three additional issues on appeal:

- (1) Does the statutory discovery rule in the Governmental Immunity Act apply?
- (2) Has their retirement benefit claim against the Hospital accrued?
- (3) Is the Hospital liable under the Retirement Act?

For the reasons stated below, the Court should not reach these three additional issues.

### **STANDARD OF REVIEW**

The central issue on appeal is the application of the equitable discovery rule. The "applicability of . . . the discovery rule" is a question of law. *See Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2007 UT 25, ¶ 11, 156 P.3d 806. Thus, the Court of Appeals should review for correctness the Retirement Board's order dismissing Ramsay and Smalling's claims as time-barred. *See id.*

For the first time on appeal, Ramsay and Smalling urge the Court to apply a statutory discovery rule found in the Governmental Immunity Act. Ramsay and Smalling failed to preserve this argument, and their opening brief does not argue plain error or exceptional circumstances. Therefore, no standard of review applies here—the Court simply should not address this unpreserved issue. *See State v. Moa*, 2012 UT 28, ¶ 24, 282 P.3d 985; *see also Marcroft v. Labor Comm'n*, 2015 UT App 174, ¶ 4, 356 P.3d 164.

The same is true of Ramsay and Smalling's final two arguments. They fail to either appropriately assign error or meet their burden of persuasion on their accrual argument, and the Retirement Board expressly left their argument seeking interpretation of the Retirement Act unaddressed below. Again, no standard of review applies to these arguments—the accrual argument has not been properly raised on appeal, and if the



Retirement Act-interpretation argument needs to be reached, the Court of Appeals should remand to permit the Retirement Board to do so.

**DETERMINATION OF CONSTITUTIONAL PROVISIONS,  
STATUTES, ORDINANCES, AND RULES**

The Hospital agrees that Utah Code section 78B-2-305(4) is of “central importance,” as it provides the applicable statute of limitations.

**Utah Code § 78B-2-305(4)—Statutes of Limitations,  
Other than Real Property, Within Three Years**

An action may be brought within three years . . . for liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.

Utah Code section 49-13-202 is part of the Utah State Retirement and Insurance Benefit Act (the “Retirement Act”). The Retirement Act provides context and background, but the interpretation and application of that statute is beyond the scope of this appeal.

Utah Code section 63G-7-401—part of the Governmental Immunity Act—was not raised below, and Ramsay and Smalling have failed to argue that either plain error or exceptional circumstances justify its consideration on appeal. That statute is thus outside the scope of this appeal.

**STATEMENT OF THE CASE**

***The Hospital’s 401(k) Retirement Plan and the Utah Retirement Systems***

In 1993, on the advice of its insurance professionals, Kane County Hospital (the “Hospital”) began offering a 401(k) retirement benefit to its employees. (R. 32, 561.) Lori Ramsay and Dan Smalling, intervenors in the underlying administrative action, are

employees of the Hospital who have received 401(k) benefits.<sup>2</sup> (R. 561.) Ramsay began her participation in the Hospital's 401(k) plan on January 1, 1994. (*Id.*) Smalling began his participation in the Hospital's 401(k) plan on October 7, 1995. (*Id.*)

On January 5, 2007, Ramsay made an inquiry to the Utah State Retirement Board ("Retirement Board" or "Board") concerning employee benefits in the Utah Retirement Systems ("URS"). (R. 13–14, 561.) The Board sent Ramsay a letter with the information Ramsay had requested and a copy of a Retirement New Group Questionnaire, which Ramsay provided to the Hospital. (*Id.*) The purpose of this Questionnaire is to determine eligibility for a public employer to participate in the URS. (*Id.* at 561.) On January 22, 2007, the Hospital completed the Retirement New Group Questionnaire, which identifies its 401(k) plan, and returned it to the Retirement Board. (*Id.* at 16–18, 562.) On February 12, 2007, the Board informed the Hospital for the first time that it was allegedly required by the Utah State Retirement Act, U.C.A. § 49-13-202 (the "Retirement Act"), to participate in URS because it had provided a 401(k) benefit to its employees. (*Id.* at 4, 25, 562.) The Board's notice provides that the Hospital's participation in URS was still subject to completion of an application and a resolution from the Hospital's governing body requesting admission in URS. (*Id.* at 25.) There is no evidence in the record that the Hospital knew about any possible requirement that it must provide state retirement benefits through URS prior to its receipt of the February 12, 2007 notice from the Board. (R. 32, 424–25, 637.)

In August 2008, the Board demanded that the Hospital pay contributions to URS on behalf of all of its employees from 1993 and indefinitely moving forward. (*Id.* at 4.) However, because the Hospital denied liability under the Retirement Act (and because it

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<sup>2</sup> On occasion, this brief refers to Ramsay and Smalling collectively as "the Intervenor."

lacked the funds demanded by the Board), the Hospital declined to make retrospective or prospective contributions to URS on behalf of its employees. (*Id.* at 4, 562.) On April 30, 2009, in an effort to mitigate this potential liability, and pursuant to legislation passed by the Utah State Legislature in the 2009 General Legislative Session, the Hospital's Board of Directors approved a resolution to irrevocably elect nonparticipation in URS. (*Id.*)

***The Retirement Board's Action and Ramsay and Smalling's Intervention***

On August 11, 2009, the Retirement Board initiated the underlying administrative proceeding by filing a Notice of Board Action against the Hospital. (R. 2–10.) The Board alleged that under the Retirement Act the Hospital became a participant in URS the moment it offered a 401(k) retirement benefit to its employees. (*Id.* at 5–7.) The Board sought an order requiring the Hospital to pay alleged delinquent URS retirement contributions to the Board on behalf of all of its employees from 1993 (when the 401(k) benefit was first offered to Hospital employees) to April 30, 2009 (when the Hospital elected nonparticipation in URS). (*Id.* at 9.) On October 12, 2009, the Hospital answered the Notice of Board Action and denied all alleged liability. (*Id.* at 30–41.)

On December 16, 2009, Ramsay and Smalling filed a lawsuit in the Third Judicial District Court against the Board, the Hospital, and the Hospital's insurance advisors—John Hancock Life Insurance Company and Dean Johnson—seeking funding for URS benefits. (R. 47–59.) Each of these defendants moved to dismiss this lawsuit because, among other reasons, Ramsay and Smalling had failed to exhaust their administrative remedies by not pursuing their claim for funding of URS benefits before the Retirement Board. The district court granted the motions to dismiss, which decision was ultimately affirmed by the Utah Supreme Court. *See Ramsay v. Kane County Human Res. Special Serv. Dist.*, 2014 UT 5, 322 P.3d 1163.



On March 31, 2010, Ramsay and Smalling filed their Motion to Intervene in this case. (R. 43–44.) In support of this motion, Ramsay and Smalling described this dispute as “one that involves *legal issues* of whether [the Hospital] is required to fund the retirement benefits for Ramsay and Smalling at the minimum levels required under the [Retirement Act].” (R. 78) (emphasis added). Thus, at least at this time, Ramsay and Smalling recognized that the Hospital’s alleged liability under the Retirement Act is a question of law and not fact. On August 18, 2010, the Board’s Hearing Officer granted the Motion to Intervene. (R. 98.)

### ***Partial Summary Judgment Against the Board***

On March 1, 2013, the Hospital filed a Motion for Partial Summary Judgment seeking a judgment that the Retirement Board’s claim against the Hospital was limited by the applicable three-year statute of limitations. (R. 266–67.) Specifically, the Hospital sought a summary judgment that the Board could only look to recover URS contributions from the Hospital for the period between August 11, 2006 (three years before the Notice of Board Action was filed) and April 30, 2009 (when the Hospital opted out of any claimed requirement that it participate in URS). (*Id.*) The Board opposed this Motion. (R. 327–70.) Additionally, although the Motion for Partial Summary Judgment was expressly limited to the Board’s claim, Ramsay and Smalling also opposed this Motion. (R. 371–98.) The Retirement Board, along with Ramsay and Smalling, argued that the limitations period should be equitably tolled under a concealment theory because the Hospital did not make reports and did not pay contributions to the Board that were allegedly required by the Retirement Act. (R. 338, 372.) However, the Board and Ramsay and Smalling failed to come forward with evidence that the Hospital was aware of such alleged statutory reporting and payment requirements. (R. 424–25.)

Ramsay and Smalling also argued that, as applied to them, the statute of limitations should be tolled because they “had no knowledge of, nor reasonable opportunity to discover, the *legal analysis* that suggests that when [the Hospital] established a 401(k) plan in 1993, this action constituted opting in by” the Hospital under the Retirement Act. (R. 373) (emphasis added). Ramsay and Smalling also claimed that they did not “recognize the *legal significance*” or appreciate the “*legal effect*” of the Hospital’s establishment of a 401(k) benefit under the Retirement Act. (R. 380–81) (emphasis added). Thus, Ramsay and Smalling also acknowledged at this time that alleged liability under the Retirement Act arising from the Hospital’s 401(k) plan is a legal, and not a factual, issue.

On August 26, 2013, the Retirement Board’s Hearing Officer granted the Hospital’s Motion for Partial Summary Judgment and entered Findings of Undisputed Fact, Conclusions of Law, and Partial Summary Judgment (hereafter the “Partial Summary Judgment Order”). (R. 422–30.) The Hospital had made clear in its Motion for Partial Summary Judgment, and again in its reply memorandum, that its Motion was limited to just the claim filed by the Board and did not apply to any possible claims Ramsay and Smalling could pursue.<sup>3</sup> (R. 266–67, 410–11.) As a result, the Hearing Officer did not address at this time whether the statute of limitations applied to Ramsay and Smalling. (R. 422–27.)

The Hearing Officer ordered that the Retirement Board’s “claim for retirement contributions in this case is limited by the applicable three year statute of limitations to

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<sup>3</sup> By this time, Ramsay and Smalling had not yet articulated any express claims that they were pursuing before the Retirement Board. (R. 43–44.) As described below, Ramsay and Smalling would later amend their Motion to Intervene to make clear that they were bringing a claim against the Hospital to compel funding of URS benefits. (R. 523–24.)

contribution claims that rose between August 11, 2006 and April 30, 2009.” (*Id.*) The Hearing Officer explained that “[t]here is no evidence in the record that the Hospital actively or affirmatively concealed its 401(k) plan from [the Board]. Without such evidence, the concealment version of the equitable discovery rule does not apply.” (R. 427.) The Hearing Officer further “decline[d] to extend Utah law for tolling of the limitation period when a Respondent is silent about even an unknown statutory reporting obligation.” (*Id.*)

The Retirement Board had calculated the Hospital’s alleged liability for URS contributions between 1993 and 2009 as \$7,372,199.77. (R. 333.) Following the Partial Summary Judgment Order, the Board’s contribution claim against the Hospital was reduced to \$1,530,806.58. (*Id.*)

#### ***Post-Summary Judgment Settlement***

Following the ruling on the Partial Summary Judgment Order, the Hospital entered into settlement discussions with the current and former employees who may have a claim to service credit in URS during the applicable three-year limitations period. (R. 501.) Utilizing monies received from a state grant,<sup>4</sup> together with its own funds, the Hospital negotiated a monetary settlement with all but six of the affected employees. (R. 501, 506.) The Hospital applied the balance of its available grant money to pay URS contributions allegedly owed during the limitations period to the Board for the six employees who did not settle—including for Ramsay and Smalling. (*Id.*) Thereafter, on May 16, 2014, the Board filed a Motion to Dismiss its Request for Board Action

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<sup>4</sup> In the 2012 General Legislative Session, the Utah Legislature created a grant program to provide state funding assistance to rural county health care special service districts, such as the Hospital, in meeting a state retirement liability. (R. 501.) Pursuant to this program, the Hospital received a grant from the state to assist it in the resolution of the alleged URS liability in this case. (*Id.*)



“because all issues in the Board’s request have been resolved and the case between the Board and the Hospital is moot.” (R. 498.) On June 17, 2014, the Hearing Officer granted the Board’s Motion to Dismiss. (R. 529.)

***Summary Judgment Against Ramsay and Smalling***

On January 14, 2014, Ramsay and Smalling filed a Motion to Amend their Motion to Intervene to include a Statement of Claim “which explicitly establishes the relief Ramsay and Smalling seek . . . .” (R. 473.) Ramsay and Smalling’s proposed Statement of Claim stated that they were seeking an order that they “are entitled to service credits” under the Retirement Act “for the time they were employed from 1993 to 2009 and for funding from [the Hospital] as a participating employer under the Act of the full retirement benefits owed from 1993 to 2009 . . . .” (R. 481.) On May 19, 2014, the Hearing Officer granted the Motion to Amend the Motion to Intervene, and permitted filing of Ramsay and Smalling’s Statement of Claim. (R. 511.) On June 2, 2014, the Hospital filed its Answer to Ramsay and Smalling’s Statement of Claim, incorporating the defenses stated in its response to the Notice of Board Action, and specifically stating defenses for lack of standing, statute of limitations, and laches, among others. (R. 515–17.)

On August 18, 2014, with the Board’s claim fully resolved, the Hospital filed its Motion for Summary Judgment seeking dismissal of Ramsay and Smalling’s claims. (R. 531.) The Hospital sought a summary judgment that Ramsay and Smalling’s claims for retirement contributions arising between August 11, 2006 and April 30, 2009 are moot and must be dismissed because the Hospital had already funded URS contributions for them during this period. (*Id.*) The Hospital also sought a summary judgment dismissing Ramsay and Smalling’s claims for URS contributions arising prior to August 11, 2006 as

barred by the statute of limitations. (*Id.*) In connection with this Motion for Summary Judgment, the parties entered into a stipulation that “for the purposes of this Motion only, the parties ask the Hearing Officer to assume for sake of argument that the Hospital was an eligible employer under the Retirement Act, and thus able to participate in the State Retirement Systems.” (R. 561.)

Ramsay and Smalling opposed the Hospital’s Motion for Summary Judgment and argued that the limitations period should be equitably tolled for URS contributions allegedly arising prior to August 11, 2006. (R. 577.) Ramsay and Smalling argued (again) that the Hospital engaged in concealment when it did not fulfill alleged statutory reporting obligations to the Board. (R. 578.) However, Ramsay and Smalling failed to adduce any evidence that the Hospital was aware of such a statutory reporting obligation. (R. 637.)

Ramsay and Smalling also argued that the limitations period should be equitably tolled because they lacked knowledge of the “necessary *facts*” underlying their claims. (R. 679.) Specifically, in contrast to their response to the Hospital’s prior Motion for Partial Summary Judgment where they argued that they lacked knowledge of the “legal analysis,” “legal significance,” and “legal effect” of the Hospital’s establishment of a 401(k) benefit, Ramsay and Smalling argued now that they lacked knowledge of the “fact” that the Hospital’s 401(k) benefit triggered liability for URS benefits under the Retirement Act. (R. 373, 380–81, 679.)

Ramsay and Smalling also filed a cross motion for summary judgment that the “legal effect” of the Hospital’s provision of a 401(k) benefit “was to make [the Hospital] a participating employer in the URS under the [Retirement] Act.” (R. 569–83.)

On May 18, 2015, the Hearing Officer entered its Findings of Undisputed Fact, Conclusions of Law, and Summary Judgment (the “Summary Judgment Order”) granting the Hospital’s Motion for Summary Judgment and denying as moot Ramsay and Smalling’s cross Motion for Summary Judgment. (R. 631–38.) The Hearing Officer found that Ramsay and Smalling’s claim to URS contributions arising between August 11, 2006 and April 30, 2009 was moot and must be dismissed because the Hospital had already funded retirement contributions for them during that time period. (R. at 635.) The Hearing Officer held that Ramsay and Smalling’s claim for contributions arising prior to August 11, 2006 was barred by a three year statute of limitations. (*Id.*) The Hearing Officer further held that Ramsay and Smalling are not entitled to tolling of the statute of limitations for their claim to retirement contributions arising prior to August 11, 2006. (*Id.*) The Hearing Officer observed as follows:

Ramsay and Smalling’s contribution claim arises from a single fact: the Hospital’s provision of a 401(k) plan. . . . Intervenors have known about [this] fact . . . since at least the mid-1990s. Although Intervenors may not have discovered their legal theory until much later, the belated discovery of a legal theory does not justify equitable tolling of the statute of limitations.

(R. 636–37.) On June 4, 2015, the Retirement Board entered its Final Order adopting the Hearing Officer’s Summary Judgment Order and dismissing Ramsay and Smalling’s claims. (R. 640–41.)

### **STATEMENT OF THE FACTS**

The Hospital and the Intervenors stipulated that, for the purposes of the Hospital’s Motion for Summary Judgment, the Hearing Officer should “assume for sake of argument that the Hospital was an eligible employer under the Retirement Act, and thus able to participate in the State Retirement System.” (R. 560–61.) With that caveat, the Hospital and Intervenors stipulated to a set of undisputed facts regarding the Hospital’s



Motion for Summary Judgment. (R. 561–62.) The parties’ stipulated undisputed facts are repeated verbatim below:

1. Kane County Hospital (hereinafter the “Hospital”) is a special service district within the meaning of Utah Code § 17D-1-101, et seq. The special service district was created by the Kane County Commission in 1989 to operate the only hospital in Kane County.

2. Kane County Hospital, as a special service district, was an employer as defined under Utah Code Ann. § 49-11-102(23)(a) at all times relevant to this dispute.<sup>5</sup>

3. In 1993, the Hospital began offering a 401(k) retirement plan to its employees.

4. Intervenor Lori Ramsay participated in the Hospital’s 401(k) retirement plan from January 1, 1994 through July 20, 2007.

5. Intervenor Daniel Smalling participated in the Hospital’s 401(k) retirement plan from October 7, 1995 through July 22, 2000.

6. On January 5, 2007, Intervenor Lori Ramsay, an employee of the Hospital, spoke with Cindy Bon, Accounts Service Manager for the Utah State Retirement Office (“Retirement Office”), to obtain information about state retirement benefits. Thereafter, the Retirement Office sent Ms. Ramsay a letter with the information that Ms. Ramsay requested and a copy of a Retirement New Group Questionnaire, which Ms. Ramsay provided to the Hospital. The purpose of the Retirement New Group Questionnaire is to determine eligibility for participation in the State Retirement System.

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<sup>5</sup> As the Hospital explains in Section IV below, Ramsay and Smalling now urge the Court of Appeals to transform this stipulated fact into a legal conclusion. Because the Hospital stipulated to this fact only for the purpose of the summary-judgment motion, the Retirement Board did not reach this issue below, and it is therefore beyond the scope of this appeal.

7. On January 22, 2007, the Hospital completed the Retirement New Group Questionnaire and returned it to the Retirement Office.

8. On February 12, 2007, the Retirement Office informed the Hospital that it was eligible for membership in the State Retirement System. The Hospital declined to make any retrospective or prospective retirement contributions to the State Retirement System.

9. On April 30, 2009, pursuant to legislation passed by the Utah State Legislature in the 2009 General Legislative Session, the Hospital's Board of Directors approved a resolution to irrevocably elect nonparticipation in the State Retirement System.

10. The Hospital has paid all retirement contributions to the Retirement Office on behalf of the Intervenor for the period of time between June 2006 and April 30, 2009.<sup>6</sup>

11. The Retirement Office has granted each of the Intervenor retirement service credit for the entire time period for which retirement contributions were received (i.e., June 2006 through April 30, 2009).

### **SUMMARY OF THE ARGUMENT**

Ramsay and Smalling's pre-August 11, 2006 claims are barred by the applicable three-year statute of limitations. The Retirement Board concluded that Ramsay and Smalling could not escape that limitation through use of the equitable discovery rule. The Board is right. Ramsay and Smalling fail to make the initial showing required of any party seeking relief under the equitable discovery rule: that they reasonably lacked knowledge of the facts underlying their claims. Only one fact underlies their claim and legal theory in this case: the Hospital's provision of a 401(k) plan. That happened nearly

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<sup>6</sup> The Hospital funded retirement contributions from June 2006 through April 30, 2009, rather than from August 11, 2006, because the Retirement Board took the position that a claim for retirement contributions does not accrue until 60 days following the end of each pay period. (R. at 633.) The Hearing Officer declined to issue a ruling about whether the statute of limitations actually extends to June 2006. (R. at 635.)

two decades ago, and Ramsay and Smalling concede that they were aware of the plan from almost the beginning.

Ramsay and Smalling propose an end-around: while they admit knowledge of the 401(k) plan, they argue that they didn't know the *legal implications* of the plan. But Utah law is clear: the belated discovery of a legal theory does not toll the limitations period under the discovery rule. Ramsay and Smalling's discovery-rule argument fails for a second reason: the Retirement Board found that nothing in the record suggested that the Hospital had concealed the facts supporting Ramsay and Smalling's claims or that exceptional circumstances justified equitable tolling. Without satisfying either of those alternative prongs—concealment or exceptional circumstances—Ramsay and Smalling cannot avail themselves of the equitable discovery rule.

Ramsay and Smalling's remaining arguments should not be reached on appeal. At several points in their brief, Ramsay and Smalling urge the Court to apply an alternative statutory discovery rule—one found in the Governmental Immunity Act ("GIA"). This argument was not raised below, and Ramsay and Smalling make no plain-error or exceptional-circumstances arguments in their opening brief. The Court should thus decline to consider this argument. In any event, the GIA does not apply to claims filed before the Retirement Board.

Ramsay and Smalling also suggest that it "could be argued" that their claims will not actually accrue until they retire. Ramsay and Smalling fail to assign error to the Retirement Board's conclusion that their claims accrued at each pay period. What is more, Ramsay and Smalling fail to cite or apply relevant case law or to develop this argument. They thus fail to meet their burden of persuasion on this issue.

Finally, Ramsay and Smalling urge the Court to interpret the Retirement Act to find that the Hospital is liable to make URS contributions under that Act. But the Retirement Board never reached the merits of that argument—its decision was based solely on limitations grounds. Because Ramsay and Smalling’s claims are time-barred, there is no reason for this Court to reach the issue of the Hospital’s alleged liability under the Retirement Act. However, even if Ramsay and Smalling had filed timely claims, the interpretation and application of the Retirement Act should be performed in the first instance by the Retirement Board, the specialized agency assigned to do just that.

### **ARGUMENT**

#### **I. THE APPLICABLE STATUTE OF LIMITATIONS BARS RAMSAY AND SMALLING’S CLAIMS.**

There is no dispute that the three year limitation period provided by Utah Code section 78B-2-305(4) “for liability created by the statutes of this state” applies to Ramsay and Smalling’s claims in this case. The issue for this appeal is whether Ramsay and Smalling were entitled to equitable tolling of this three year limitations period. As explained below, the Retirement Board’s Hearing Officer correctly applied Utah’s limitations law when it held that Ramsay and Smalling’s claims are time-barred.

##### **A. The Retirement Board Applied Utah’s Limitations Law Correctly.**

Scores of Utah cases discuss statutes of limitations. The same essential principles echo through those cases. First, the general rule: “a cause of action accrues and the relevant statute of limitations begins to run upon the happening of the last event necessary to complete the cause of action.” *Walker Drug Co., Inc. v. La Sal Oil Co.*, 902 P.2d 1229, 1231 (Utah 1995) (internal quotation marks omitted). Second, a clear line: “mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations.” *Id.* (internal quotation marks omitted). And third, a limited caveat:

“in certain instances, the discovery rule may operate to toll the period of limitations until the discovery of facts forming the basis for the cause of action.” *Id.* (internal quotation marks omitted).

The discovery rule, in turn, applies in three narrow circumstances: (1) when it is mandated by statute, (2) when a defendant’s concealment keeps the plaintiff from becoming aware of the cause of action, or (3) when “exceptional circumstances” make the application of the general rule “irrational or unjust.” *See Russell/Packard Dev., Inc. v. Carson*, 2003 UT App 316, ¶ 13, 78 P.3d 616. Utah courts refer to the first circumstance as the “statutory discovery rule,” and the second and third circumstances as alternative versions of the “equitable discovery rule.” *See id.* ¶ 24; *Berneau v. Martino*, 2009 UT 87, ¶ 23, 223 P.3d 1128. Before either version of the equitable discovery rule applies, “the plaintiff must make an initial showing that he did not know nor should have reasonably known the facts underlying the cause of action in time to reasonably comply with the limitations period.” *See Berneau*, 2009 UT 87, ¶ 23. This initial lack-of-knowledge showing must account for both actual and constructive knowledge. *Id.*

The Retirement Board’s Hearing Officer applied this framework here. Ramsay and Smalling did not argue below that a statutory discovery rule applies, and the Retirement Board found that “there is no discovery rule mandated by statute.” (R. 636.)<sup>7</sup> As a result, the Retirement Board applied the equitable discovery rule. The Board found that Ramsay and Smalling’s “contribution claim arises from a single fact”—“the Hospital’s provision of a 401(k) plan”—and that Ramsay and Smalling “have known about the fact underlying their cause of action . . . since at least the mid-1990s.” (*Id.*) Although Ramsay and

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<sup>7</sup> On appeal, they appear to argue that Utah’s Governmental Immunity Act provides a discovery rule. That unpreserved argument is discussed in Section II, below.

Smalling “may not have discovered their legal theory until much later,” the Retirement Board explained, “the belated discovery of a legal theory does not justify equitable tolling of the statute of limitations.” (*Id.* at 636–37.) The Retirement Board thus concluded that Ramsay and Smalling had not “made the required threshold showing that they did not know, nor reasonably should have discovered, the facts underlying their claim in this case in time to bring a timely cause of action,” and thus Ramsay and Smalling “are not entitled to equitable tolling.” (*Id.* at 637.)

Nevertheless, the Retirement Board also specifically found that even if Ramsay and Smalling could make their threshold lack-of-knowledge showing, “[t]he Hospital has not concealed its 401(k) plan” from them and that “[t]here are no exceptional circumstances that justify equitable tolling of the limitation period.” (*Id.* at 637–638.)

As the Hospital explains in detail below, the Retirement Board did not err in its application of Utah’s limitations law or in finding that Ramsay and Smalling’s claims are time-barred.

**B. Ramsay and Smalling Failed to Make a Threshold Showing that They Lacked Knowledge of the Facts Underlying Their Claims.**

To qualify for tolling under either a concealment or exceptional-circumstances theory, Ramsay and Smalling were required to make an “initial showing” that they did not “know the facts underlying their cause of action in time to reasonably comply with the limitations period.” *Helfrich v. Adams*, 2013 UT App 37, ¶ 9, 299 P.3d 2 (internal quotation and alteration marks omitted); *see also Garza v. Burnett*, 2013 UT 66, ¶ 10, 321 P.3d 1104 (calling this showing an “essential prerequisite to the application of the discovery rule”). This showing has several interlocking parts: Ramsay and Smalling must show that they did not have either actual or constructive knowledge and that their lack of knowledge was reasonable. And, critically, Ramsay and Smalling must show that they



lacked knowledge of *facts*, not that they lacked knowledge of the legal effect or legal consequences of those facts. As the Utah Court of Appeals put it, “The limitations period is postponed only by belated discovery of key facts and not by delayed discovery of legal theories.” *Anderson v. Dean Witter Reynolds, Inc.*, 920 P.2d 575, 579 (Utah Ct. App. 1996).

**1. Ramsay and Smalling had actual knowledge of the single fact underlying their claims.**

Adopting the Retirement Board’s Notice of Board Action, Ramsay and Smalling alleged in their Statement of Claim below that the Retirement Act required the Hospital, “as a governmental entity, to participate with URS once [the Hospital] determined to offer a [401(k)] retirement plan to its employees” in 1993. (R. 5–7, 523–24.) Thus, Ramsay and Smalling’s legal theory is predicated on a single fact—the Hospital’s provision of a 401(k) benefit in 1993. Ramsay and Smalling admit actual knowledge of the Hospital’s 401(k) benefit dating back to the mid-1990s. (R. 561.) Accordingly, Ramsay and Smalling were armed with knowledge of the fact underlying their cause of action in time to commence a timely action. *See Helfrich*, 2013 UT App 37, ¶ 9.

Yet Ramsay and Smalling still contend that they “lacked knowledge of the necessary facts” underlying their claims in time to bring a timely cause of action. (*See* Appellants’ Br. 11.) But what Ramsay and Smalling list among their “necessary facts” are not facts at all—they are legal conclusions. Ramsay and Smalling argue that the “facts” they did not timely discover include (1) the Hospital’s 401(k) plan “obligated KCH to provide full retirement benefits to its employees under the Act,” (2) the Hospital “had an obligation to fund retirement benefits for Ramsay and Smalling,” and (3) Ramsay and Smalling were entitled to more than the 401(k) benefits they received. (*Id.* at 27.)

Again, these are not facts—they are legal conclusions drawn from the provisions of the Retirement Act itself. Ramsay and Smalling acknowledged this in the proceedings below. Before the Retirement Board, they said, time and time again, that what they hadn't learned prior to 2009 was the *legal effect* or *legal implications* of the facts they already knew. When intervening in the Hospital's Motion for Partial Summary Judgment against the Retirement Board, Ramsay and Smalling argued that equitable tolling should apply because they "had no knowledge of, nor reasonable opportunity to discovery, the *legal analysis*" regarding the Hospital's purported liability under the Retirement Act and the "legal effect" of the Hospital's establishment of a 401(k) plan. (R. 373) Later in that same pleading, Ramsay and Smalling again emphasized that prior to 2009 they were unable to "recognize the *legal significance*" of the 401(k) plan. (R. 380.)

Utah case law leaves no doubt about whether ignorance of the legal implications of facts qualifies a party for equitable tolling: for at least the past thirty years, Utah courts have consistently held that "simple ignorance of or obliviousness to the existence of a cause of action will not prevent the running of the statute of limitation."<sup>8</sup>

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<sup>8</sup> See *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶¶ 20, 108 P.3d 741 ("Mere ignorance of the existence of a cause of action will neither prevent the running of the statute of limitations nor excuse a plaintiff's failure to file a claim within the relevant statutory period."); *Williams v. Howard*, 970 P.2d 1282, 1284 (Utah 1998) (same); *Walker Drug Co., Inc. v. La Sal Oil Co.*, 902 P.2d 1229, 1231 (Utah 1995) (same); *Sevy v. Sec. Title Co. of S. Utah*, 902 P.2d 629, 634 (Utah 1995) (same); *Warren v. Provo City Corp.*, 838 P.2d 1125, 1129 (Utah 1992) (same); *O'Neal v. Div. of Family Servs., State of Utah*, 821 P.2d 1139, 1143 (Utah 1991) (same); *Brigham Young Univ. v. Paulsen Constr. Co.*, 744 P.2d 1370, 1374 (Utah 1987) (same); *Becton Dickinson & Co. v. Reese*, 668 P.2d 1254, 1257 (Utah 1983) (same); *Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981) (same); *Helfrich v. Adams*, 2013 UT App 37, ¶ 13, 299 P.3d 2 (same); *Sycamore Family, L.L.C. v. Vintage on the River Homeowners Ass'n, Inc.*, 2006 UT App 387, ¶ 4 n.3, 145 P.3d 1177 (same); *Cedar Prof'l Plaza, L.C. v. Cedar City Corp.*, 2006 UT App 36, ¶ 11, 131 P.3d 275 (same); *Hom v. Utah Dep't of Pub. Safety*, 962 P.2d 95, 102 (Utah Ct. App. 1998) (same); *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2004 UT App 436, ¶ 18, 104 P.3d 646 (same); *Nilson-Newey & Co. v. Utah Res. Int'l*, 905 P.2d 312, 315

Thus, by basing their threshold lack-of-knowledge argument on unknown legal theories rather than on unknown facts, Ramsay and Smalling fall at the first equitable-tolling hurdle. The equitable discovery rule may only toll the limitations period “until the discovery of *facts* forming the basis of the cause of action.” See *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶¶ 20–21, 108 P.3d 741 (emphasis added); *Snow v. Rudd*, 2000 UT 20, ¶¶ 10–13, 998 P.2d 262 (same). As the Retirement Board found below, a single fact forms the basis of Ramsay and Smalling’s cause of action—the Hospital’s funding of a 401(k) plan. Ramsay and Smalling concede that they knew about the Hospital’s 401(k) plan for more than 15 years before they moved to intervene. (R. 594). Accordingly, the Hearing Officer’s order dismissing Ramsay and Smalling’s claims as time-barred should be affirmed.

**2. Even if the legal implications of the Retirement Act constituted “underlying facts,” Ramsay and Smalling had constructive knowledge of those legal implications.**

Even if Ramsay and Smalling’s actual knowledge of the purported “legal effect” of the Hospital’s 401(k) plan were relevant to the tolling analysis (which it is not), Ramsay and Smalling also failed to demonstrate that they lacked constructive knowledge<sup>9</sup> of these legal effects—after all, these legal effects are creatures of a published statute. The “unknown facts” Ramsay and Smalling list are simply a part of the framework established by the Retirement Act. In other words, the Retirement Act itself would have

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(Utah Ct. App. 1995) (same); *Avis v. Bd. of Review of Indus. Comm’n*, 837 P.2d 584, 587–88 (Utah Ct. App. 1992) (same); *Whatcott v. Whatcott*, 790 P.2d 578, 580 (Utah Ct. App. 1990) (same).

<sup>9</sup> Constructive knowledge refers to knowledge that a plaintiff “reasonably should have discovered . . . .” See *Russell Packard*, 2005 UT 14, ¶ 22.

made each of these “unknown facts” known to Ramsay and Smalling, had they taken the opportunity to review it.<sup>10</sup>

Ramsay spoke with an agent of the Retirement Board in January 2007 and sent a follow-up letter to inquire about the Hospital’s eligibility to participate in the State Retirement System. *See* Statement of Facts ¶ 6, *supra*. Ramsay started to participate in the Hospital’s 401(k) plan on January 1, 1994. *Id.* at ¶ 4. And Smalling started to participate in the Hospital’s 401(k) plan on October 7, 1995. *Id.* at ¶ 5. Ramsay and Smalling do not explain why they waited until January 2007 to make such an inquiry when they could have made the same inquiry more than a decade earlier, when they first began to receive a 401(k) benefit. Ramsay and Smalling’s failure to make that inquiry disqualifies them from equitable tolling. *See Walker Drug Co.*, 902 P.2d at 1231–32 (refusing to toll when plaintiffs failed to meet “their initial burden to show that they did not know and could not have discovered the facts underlying their cause of action in time to file a complaint”).

Ramsay and Smalling direct the Court to a 2015 Utah Court of Appeals case called *Highlands at Jordanelle, LLC v. Wasatch County*, 2015 UT App 173, 355 P.3d 1047, alleging that in *Highlands* the Court “rejected a very similar argument presented by a governmental employer.” (*See* Appellants’ Br. 29.) But *Highlands* serves only to

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<sup>10</sup> Ramsay and Smalling may argue that if they had constructive notice of the Retirement Act, then the Hospital had constructive notice too. However, whether or not the Hospital had constructive notice of the Retirement Act is not relevant in the equitable tolling analysis. The threshold lack-of-knowledge showing to qualify for equitable tolling is focused on what a plaintiff knew and should have known, not on what a defendant knew or should have known. *See, e.g., Helfrich*, 2013 UT App 37, ¶ 9. Moreover, to satisfy the concealment prong of equitable tolling, it is not enough to establish that the Hospital should have known about its alleged liability under the Retirement Act. Instead, Ramsay and Smalling were required to show that the Hospital engaged in active or affirmative concealment. *See Russell Packard*, 2003 UT App 316, ¶¶ 15, 21.

reinforce the Hospital's argument. In that case, the Wasatch County Commission sought to raise funds to build a fire station near the Jordanelle Reservoir. *See* 2015 UT App 173, ¶ 2. To do so, the Commissioners passed Resolution 99–3, which authorized a monthly landowner fee. *Id.* ¶ 3. But to pay down the construction bond on the fire station, the Wasatch County Fire Protection Special Service District charged an additional lump-sum fee to landowners that was not authorized by Resolution 99–3. *Id.* ¶ 4. A landowner sued to recover the unauthorized fees it had paid, including fees paid outside the four-year statute-of-limitations period. *Id.* ¶ 41. The trial court held that the landowner was not entitled to equitable tolling of the limitations period and the landowner appealed. *Id.*

Although the Court of Appeals reversed the trial court, and held that equitable tolling was appropriate in the circumstances of that case, this case is distinguishable from *Highlands*. As the *Highlands* court explained, not only did the landowner lack *actual* knowledge of the lump-sum fee's invalidity, it also lacked *constructive* knowledge, because Resolution 99–3 was "silen[t] on the subject of lump-sum service fees." *Id.* ¶ 44. That is not true here. According to Ramsay and Smalling (and the Retirement Board), the Retirement Act is not silent on the Hospital's alleged liability. Instead, Ramsay and Smalling (and the Board) contend that Utah Code section 49-11-202(2)(a) expressly requires the Hospital to participate in URS because the Hospital provided a private 401(k) benefit. (R. 5, 523-24.) Thus, the Retirement Act provides Ramsay and Smalling with constructive notice of the legal effect of the Hospital's 401(k) benefit.

Furthermore, *Highlands* cannot fairly be read the way Ramsay and Smalling urge the Court to read it: if *Highlands* stands for the proposition that belated discovery of a *legal effect* of a fact tolls the statute of limitations under the discovery rule, then

*Highlands* would run counter to at least thirty years of Utah precedent saying otherwise.<sup>11</sup>

Had *Highlands* intended to overrule those cases, it would have done so explicitly.<sup>12</sup>

In sum, the equitable discovery rule applies only when a plaintiff reasonably lacks actual and constructive knowledge of *the facts* underlying a cause of action—not when a plaintiff lacks knowledge about the legal implications of those facts. *See, e.g., Russell Packard*, 2005 UT 14, ¶¶ 20–21. Ramsay and Smalling had actual knowledge of the facts underlying their claim for retirement benefits (the Hospital’s 401(k) plan) for more than 15 years before they filed their Motion to Intervene. And even if the legal implications of that 401(k) were relevant in the equitable-tolling analysis, Ramsay and Smalling had constructive knowledge of the Retirement Act’s rules throughout the relevant period. Simply put, Ramsay and Smalling are not entitled to any tolling of the statute of limitations—even if they did not understand the law.

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<sup>11</sup> *See* note 8, *supra*.

<sup>12</sup> As the Utah Supreme Court has explained, “In general, the Court has not subsequently read a decision to work a ‘sharp break in the web of the law’ unless that ruling caused ‘such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an order one.’ Furthermore, ‘[s]uch a break has been recognized only when a decision explicitly overrules a past precedent of this Court, or disapproves a practice this Court arguably has sanctioned in prior cases.’” *See State v. Baker*, 935 P.2d 503, 509 (Utah 1997) (citations omitted), *overruled on other grounds by Turner v. Univ. of Utah Hosps. & Clinics*, 2013 UT 52, ¶ 15, 310 P.3d 1212; *see also Beddoes v. Griffin*, 2007 UT 35, ¶ 11, 158 P.3d 1102 (“[H]ad we intended to overrule *ProMax* in *Loffredo*, we would have done so explicitly.”); *Nat’l Farmers Union Prop. & Cas. Co. v. Moore*, 882 P.2d 1168, 1169 (Utah Ct. App. 1994) (“This court is not in a position to overrule or hold contrary to explicitly holdings of the supreme court under the doctrine of stare decisis.”).



**C. The Hearing Officer Did Not Err in Finding that the Hospital Did Not Conceal Its 401(k) Plan or in Finding that No Exceptional Circumstances Justified Equitable Tolling.**

Because Ramsay and Smalling have not satisfied their threshold showing that they lacked knowledge about the Hospital's 401(k) plan (i.e., that they lacked knowledge of the facts underlying their claim), there is no need to specifically address Ramsay and Smalling's concealment and exceptional-circumstances arguments. But for sake of argument, even if the Court set aside the threshold lack-of-knowledge requirement, Ramsay and Smalling still have not established that tolling is appropriate under a concealment or exceptional circumstances theory.

**1. Ramsay and Smalling are not entitled to equitable tolling under a concealment theory.**

As explained above, one fact underlies Ramsay and Smalling's contribution claim against the Hospital—the Hospital's offering of a 401(k) benefit to its employees in 1993. In order to obtain tolling under the concealment version of the equitable discovery rule, Ramsay and Smalling must show that the Hospital actively or affirmatively concealed this 401(k) benefit from them. *See Russell/Packard*, 2003 UT App 316, ¶¶ 15, 21; *see also Russell Packard*, 2005 UT 14, ¶¶ 38–39; *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2007 UT 25, ¶ 49, 156 P.3d 806.

The Hospital never hid its 401(k) benefit from Ramsay or Smalling, and thus the Retirement Board was right to find that Ramsay and Smalling failed to show concealment. After all, Ramsay and Smalling participated in the Hospitals' 401(k) plan for many years. Ramsay has known about the 401(k) benefit since at least January 1, 1994, when she started to participate in the program. And Smalling has known about the 401(k) benefit since at least October 7, 1995, when he started to participate in the

program. *See* Statement of Facts ¶¶ 4–5, *supra*. Accordingly, there can be no finding of concealment.

Ramsay and Smalling argue that they qualify for equitable tolling under the concealment prong because the Hospital “failed to report to [the Retirement Board] the necessary information about eligible employees.” (*See* Appellants’ Br. 24–25.) The Hearing Officer considered and rejected that argument, finding that “[t]here is no evidence in the record that the Hospital actually knew about any possible requirement that it report and make retirement contributions to the State Retirement Systems prior to February 12, 2007—when URS informed the Hospital that it was eligible to participate.” (R. 637.) Ramsay and Smalling came forward with no evidence to dispute that finding. Accordingly, because tolling under the concealment version of the equitable discovery rule requires a showing that the Hospital actively or affirmatively concealed its 401(k) plan<sup>13</sup>, mere silence in the face of an unknown statutory obligation does not constitute concealment.

Ramsay and Smalling also argue that the Hospital concealed the underlying facts here by “communicat[ing] to its employees, including Ramsay and Smalling . . . that [its] 401(k) plan was proper, legitimate, and constituted all retirement benefits to which the employees were entitled under state or federal statute.” (Appellant’s Br. 25.) However, Ramsay and Smalling do not cite to any portion of the record in support of that allegation, just as they failed below to provide any support for that claim. Below, Ramsay and Smalling submitted the Declaration of Dan Smalling, which provides only that “KCH and its agents provided regular statements in connection with the 401(k) and never

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<sup>13</sup> *See Russell Packard*, 2003 UT App 316, ¶ 27; *Russell Packard*, 2005 UT 14, ¶¶ 38–39; *Colosimo*, 2007 UT 25, ¶ 49

communicated to me any information to indicate that the 401(k) plan was not properly established.” (R. 594.) The provision of 401(k) statements—presumably about the status of Mr. Smalling’s 401(k) account (he does not say)—is not evidence that the Hospital made some type of affirmative statement to Smalling about his possible entitlement to URS benefits or any other retirement benefits.

In any event, the question here is whether the Hospital concealed its 401(k) plan—the sole fact underlying Ramsay and Smalling’s claims. Ramsay and Smalling have not come forward with any evidence that the Hospital actively or affirmatively concealed its 401(k) plan from them. To the contrary, Ramsay and Smalling admit a long-standing knowledge of these benefits. Indeed, Smalling’s declaration makes clear that he received “regular statements in connection with the 401(k)” plan from the Hospital. (R. 594.) The Retirement Board thus did not err when it found that Ramsay and Smalling failed to provide evidence that the Hospital concealed the facts underlying their cause of action.

**2. Ramsay and Smalling are not entitled to equitable tolling under an exceptional-circumstances theory.**

Finally, Ramsay and Smalling argue that the statute of limitations should be tolled under an exceptional circumstances theory because (1) there is a purported fiduciary relationship between them and the Hospital (*see* Appellants’ Br. 28–29), and (2) the balance of harms tips in their favor (*see id.* at 30–32). Neither of these arguments supports tolling under an exceptional-circumstances theory.

**a. The Hospital did not owe Ramsay and Smalling a fiduciary duty to report an unknown (and disputed) obligation.**

Ramsay and Smalling argue that exceptional circumstances justify tolling of the limitations period because they contend there is “a fiduciary relationship” between them and the Hospital and the Hospital did not disclose its alleged obligations under the

Retirement Act. (*See id.* at 28–29.) However, the Hospital did not assume fiduciary obligations when it offered a 401(k) benefit (administered by third parties) to its employees—and Ramsay and Smalling again cite no law to the contrary.<sup>14</sup>

Further, the Hospital did not knowingly fail to disclose anything. There is no evidence that the Hospital knew about a purported obligation to participate in URS prior to February 2007, when the Retirement Board informed the Hospital of its position in that regard. (R. 637.)

In any event, the Hospital’s silence about an unknown and disputed statutory obligation does not give rise to tolling of the statute of limitations. Adopting analysis from another jurisdiction concerning equitable tolling, the Utah Supreme Court has held that “‘in no case . . . is mere silence or failure to disclose sufficient in itself to constitute fraudulent concealment.’” *Colosimo*, 2007 UT 25, ¶ 44 (quoting *Helleloid v. Indep. Sch. Dist. No. 361*, 149 F. Supp. 2d 863, 869 (D. Minn. 2001)); *see also First Sec. Bank of Utah N.A. v. Banberry Dev. Corp.*, 786 P.2d 1326, 1328 (Utah 1990) (“Silence, in order to be an actionable fraud, must relate to a material matter known to the party . . .”). Accordingly, because there is no evidence that the Hospital knew that providing a 401(k) benefit to its employees would trigger possible liability under the Retirement Act, its unknowing failure to disclose that disputed obligation to Ramsay and Smalling does not support equitable tolling.

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<sup>14</sup> Ramsay and Smalling cite case law for the proposition that “[f]ailure to disclose is not fraudulent unless a fiduciary duty exists,” *see* Appellants’ Br. 28 (citing *Helfrich*, 2013 UT App 37, ¶ 15). But they cite no law supporting their assertion that an employer’s decision to provide a 401(k) benefit for an employee creates a fiduciary duty requiring an employer to disclose what other retirement benefits he or she may be entitled to receive.

**b. The balancing of hardships weighs against tolling.**

Ramsay and Smalling also argue that exceptional circumstances justify tolling of the limitations period because the balancing of hardships favors them. *See* Appellants' Br. 30–32. If a claimant has met the threshold showing that they did not know and should not have reasonably discovered the facts underlying their cause of action, Utah courts may equitably toll a limitations period based on exceptional circumstances. *See Helfrich*, 2013 UT App 37, ¶ 9. Applied here, the Court must weigh the hardship on Ramsay and Smalling caused by not being able to seek state retirement contributions prior to August 2006 against the prejudice to the Hospital arising "from difficulties of proof caused by the passage of time." *Id.* ¶ 18. As the Retirement Board found below, these relative hardships do not weigh in favor of Ramsay and Smalling. (R. 638.)

Ramsay and Smalling's intervention in this case proves the old adage that "no good deed goes unpunished." Ramsay and Smalling make a technical statutory-construction argument that because the Hospital provided a 401(k) benefit to them, they should *also* receive URS retirement benefits. But Ramsay and Smalling were not actually harmed when the Hospital provided them a 401(k) retirement *benefit*. The Hospital was under no obligation to provide this benefit to them, which included employer-matching contributions. (R. 32.) If the Hospital had not provided 401(k) benefits, then Ramsay and Smalling would have absolutely no employer-provided retirement benefits at all. Thus, Ramsay and Smalling were not prejudiced by the 401(k) benefits they received.

On the other hand, the Hospital will be substantially prejudiced from difficulties of proof caused by the passage of time. Evidence concerning the adoption of the Hospital's 401(k) plan in 1993 is no longer available. Memories have faded with the passing of two decades since the implementation of the 401(k) plan. The Hospital has also been unable to find correspondence from 1993 between its prior management and the third-party

administrators of its 401(k) plan. Thus, if liability were found dating back to 1993, the Hospital's ability to seek indemnification from these third party administrators would be impaired. Such evidentiary problems could have been avoided if Ramsay and Smalling had not waited until 2007 to investigate their possible entitlement to URS benefits. Accordingly, exceptional circumstances do not justify equitable tolling.<sup>15</sup>

## **II. RAMSAY AND SMALLING HAVE NOT PRESERVED AN ARGUMENT THAT A STATUTORY DISCOVERY RULE APPLIES.**

For the first time on appeal, Ramsay and Smalling appear to argue that the discovery rule that appears in Utah's Governmental Immunity Act (GIA) applies here. Ramsay and Smalling acknowledge that they "did not specifically discuss the [GIA's] statutory discovery rule." Put less delicately, Ramsay and Smalling did not raise this argument below.

### **A. Ramsay and Smalling Did Not Preserve an Argument About the Discovery Rule Contained in the GIA.**

Ramsay and Smalling argue that the equitable discovery rule that was "briefed and decided by the USRB hearing officer" and the GIA's statutory discovery rule are "close" and "overlapping," and it thus would be "proper" for the Court of Appeals to overlook their failure to raise this argument below. (Appellants' Br. 22–23.) This proposition contradicts Utah law. To preserve an issue for appeal, a party must present the issue

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<sup>15</sup> Ramsay and Smalling also argue that the Hospital will not be prejudiced by tolling because "[f]unds are available to pay the value of the service credits Ramsay and Smalling seek" because of an amendment passed in 2012 to U.C.A. § 26-9-5. This is not true and is unsupported by the record. The Hospital used limited funds it received from the Legislature to resolve its alleged URS liability. (R. 501, 507.) Some of these funds went directly to employees in exchange for an affidavit relinquishing any right to URS service credit. (*Id.*) For employees who did not sign an affidavit relinquishing URS benefits (including Ramsay and Smalling), the Hospital applied the funds it received from the Legislature (and some of its own) to fund URS service credits during the applicable limitations period. (*Id.*) All grant funds were exhausted during that process.

below “in such a way that the [decision-maker] has an opportunity to rule on that issue.” *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801. To meet that requirement, the issue must not only be raised in a timely manner, but it also must be raised with *specificity*—“specific enough to give the trial court notice of the *very error* of which counsel complains.” *State v. Byrant*, 965 P.2d 539, 546 (Utah Ct. App. 1998).

“When a party fails to present an issue [below], and instead raises the issue for the first time on appeal,” Utah appellate courts “require that the party articulate an appropriate justification for appellate review.” *State v. Moa*, 2012 UT 28, ¶ 24, 282 P.3d 985 (internal quotation marks omitted). Given Ramsay and Smalling’s failure to raise this issue below, they have two options on appeal: they “must argue either that [their] claim should be evaluated under the plain error standard or that [their] claim qualifies as an exceptional circumstance.” *Id.* Ramsay and Smalling do not make either argument. Accordingly, this Court should decline to reach their GIA argument on appeal. *See Menzies v. State*, 2014 UT 40, ¶ 72 n.69, 344 P.3d 581, (when a party “raises claims for the first time on appeal,” the appellate court will decline to reach them unless the party urging review “argue[s] that either exceptional circumstances or plain error justify review”).

Even if Ramsay and Smalling pivot in their reply brief to argue these exceptions to the preservation requirement, the Court should not consider those arguments. Utah appellate courts “have consistently ‘refused to consider arguments of plain error raised for the first time in an appellant’s reply brief, even if the plain error argument is in response to a dispute over preservation raised for the first time in the appellee’s brief.’” *See Marcroft v. Labor Comm’n*, 2015 UT App 174, ¶ 4, 356 P.3d 164. In short, “[a]n appellant proceeds at his peril if preservation or plain error is not dealt with in his



opening brief.” *Id.* ¶ 4 n.1. That is precisely what Ramsay and Smalling have done here. Thus, this Court should decline to reach the question of whether the statutory discovery rule in the GIA applies to this case.<sup>16</sup>

**B. Even Had Ramsay and Smalling Preserved Their GIA Argument, It Fails on Its Merits.**

Even if Ramsay and Smalling had preserved an issue about the statutory discovery rule in the GIA by raising it to the Hearing Officer below, the GIA simply does not apply to claims filed before the State Retirement Board (or any other administrative agency). Instead, the GIA only applies to matters over which the “district courts have exclusive, original jurisdiction.” *See* Utah Code Ann. § 63G-7-501(1). Here, the Legislature has delegated exclusive adjudicative authority over all URS retirement-benefit disputes to the Retirement Board. *See* Utah Code Ann. § 49-11-613(1)(b). Thus, as the Utah Supreme Court held when it affirmed dismissal of Ramsay and Smalling’s state court lawsuit, district courts lack jurisdiction to address the retirement-benefit claims asserted by Ramsay and Smalling in this case. *See Ramsay v. Kane County Human Res. Special Serv. Dist.*, 2014 UT 5, ¶¶ 9–13, 17, 322 P.3d 1163. Accordingly, the Hearing Officer was correct when it held that “[h]ere, there is no discovery rule mandated by statute. As a result, the limitations period on Ramsay and Smalling’s contribution claim may only be equitably tolled upon a showing of concealment or exceptional circumstances.” (R. 636.)

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<sup>16</sup> There is one additional point that merits attention: the statute-of-limitations issue was, of course, central to the proceedings below. In their briefing and arguments before the Retirement Board, Ramsay and Smalling not only failed to raise the GIA as providing a statutory discovery rule—they affirmatively represented that the equitable discovery rule applies here. (R. 575–83.)

### **III. RAMSAY AND SMALLING FAIL TO MEET THEIR BURDEN OF PERSUASION ON APPEAL WITH RESPECT TO ACCRUAL OR TO ASSIGN ERROR TO THE BOARD'S ACCRUAL FINDINGS.**

Without citation to Utah law, Ramsay and Smalling baldly state that “[i]t could be argued that that the statute of limitations for them has not yet begun to run” because they have not yet retired. (Appellants’ Br. 23.) This Court should not consider that argument, because it has not been meaningfully briefed and because Ramsay and Smalling do not assign error to the Hearing Officer’s findings about accrual.

#### **A. Ramsay and Smalling Have Not Meaningfully Briefed the Issue of Accrual.**

Ramsay and Smalling’s brief does not contain meaningful legal analysis on the issue of accrual. A “brief must go beyond providing conclusory statements and fully identify, analyze, and cite its legal arguments. Meaningful analysis requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority.” *See Hess v. Canberra Dev. Co.*, 2011 UT 22, ¶ 25, 254 P.3d 161. Here, aside from pointing out that an argument about accrual *could* be made, Ramsay and Smalling do not actually argue that it *should* apply here. (Appellants’ Br. 23.) Further, Ramsay and Smalling have failed to cite, let alone analyze or apply, any legal authority in support of their argument that their retirement claims have not yet accrued.

Instead, and without discussion or analysis, Ramsay and Smalling cite to *Bailey v. Shelby County*, a Tennessee Court of Appeals decision, for the proposition that “[c]laimants in similar situations have asserted that claims in connection with retirement benefits cannot be brought prior to the actual retirement of the claimant.” (Appellants’ Br. 23.) However, while there is no dispute that the claimant in *Bailey* did assert that his claim for retirement benefits did not accrue until the age of retirement, the court rejected this argument and held that the plaintiff’s claim was barred by the statute of limitations.

*See Bailey v. Shelby County*, No. W2012-1498-COA-R30-CV, 2013 WL 2149734, at \*7–9 (Tenn. Ct. App. May 16, 2013). Ramsay and Smalling have not provided meaningful analysis on the issue of accrual when all they offer is a case from another state where a claimant made a similar argument that was rejected.

**B. Ramsay and Smalling Did Not Assign Error to the Hearing Officer’s Findings About Accrual.**

With respect to the statute of limitations there is only one issue on appeal: Should the applicable statute of limitations been tolled? (Appellants’ Br. 6.) Ramsay and Smalling have not assigned error to the Retirement Board’s express rejection of their accrual argument below. (*Id.*)

As they do on appeal, Ramsay and Smalling also argued to the Retirement Board’s Hearing Officer that it “could be argued” that their claim against the Hospital does not accrue until they reach retirement age. (R. 576–77.) The Retirement Board expressly rejected this argument for two reasons.

First, the Retirement Board held that Ramsay and Smalling “are judicially stopped from asserting” that their claims against the Hospital for retirement contributions have not yet accrued. (R. 634.) The Board found that such an argument “is contrary to the position they have taken all along in this case—that they have a right to seek retirement contribution payments from the Hospital now.”<sup>17</sup> (*Id.*)

Second, the Board concluded that even if Ramsay and Smalling were not judicially estopped from making this argument, their claim to retirement contributions from the

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<sup>17</sup> It bears repeating that Ramsay and Smalling also asserted a right to seek immediate relief in the form of retirement contributions from the Hospital in the lawsuit they filed against the Hospital and others in the Third Judicial District Court, State of Utah. (R. 47–59.) Ramsay and Smalling pursued these claims before the district court, before the Utah Court of Appeals, and before the Utah Supreme Court. *See Ramsay v. Kane County Human Res. Special Serv. Dist.*, 2014 UT 5, ¶¶ 1–6, 322 P.3d 1163.

Hospital “has already accrued.” (*Id.*) The Board explained that the “statute of limitations begins to run upon the last act that forms the basis of the claim. In a claim arising under the Retirement Act for retirement contributions against a participating employer, the last act that forms the basis of the claim is when the employer does not pay required contributions to the State Retirement Office.” (*Id.*) (internal citation omitted) (citing *Colosimo*, 2004 UT App 436, ¶ 18). The Board also held that Ramsay and Smalling’s “argument that a claim for retirement contributions does not accrue until the age of retirement contravenes the purpose of the statute of limitations to encourage litigants to diligently seek out and file their claims in a timely manner. A ruling that the statute does not begin to run until Ramsay and Smalling retire would allow a claimant to sit on a claim for decades while interest accrues, documents are lost, memories fade, and witnesses pass away.” (R. 634–35.)

Because Ramsay and Smalling have not challenged the Retirement Board’s rulings about judicial estoppel and accrual, this Court should not disturb those rulings. *Malloy v. Malloy*, 2012 UT App 294, ¶ 11, 288 P.3d 597 (“In the absence of an adequately briefed argument that a district court’s ruling is in error, we will not disturb that ruling.”); *see also In re G.C. v. State of Utah*, 2008 UT App 270, ¶ 17, 191 P.3d 55 (holding that an appellant’s failure to challenge the validity of all grounds supporting a decision below “essentially conceded[es] the validity” of those conclusions). Accordingly, this Court should not consider Ramsay and Smalling’s theory that it “could be argued” that their claims against the Hospital have not yet accrued.

**IV. ANY DECISION REGARDING THE APPLICABILITY OF THE RETIREMENT ACT SHOULD BE LEFT TO THE RETIREMENT BOARD, NOT ADDRESSED FOR THE FIRST TIME ON APPEAL.**

Ramsay and Smalling begin at the wrong end of the argument, and they encourage the Court to do the same. Before reaching the question of whether their claims are time-barred, they urge the Court of Appeals to issue a “ruling . . . that specifically established their rights to funding from [the Hospital] for their retirement benefits under the Act.” (Appellants’ Br. 20.) Because the Retirement Board’s Hearing Officer never reached this question below, even if the Court of Appeals were to reverse on the limitations question, the Court should remand all remaining issues to the Retirement Board. However, if the Court of Appeals were to consider Ramsay and Smalling’s substantive argument regarding their rights under the Retirement Act, it should find in the Hospital’s favor.

**A. Because the Retirement Board Did Not Address the Interpretation of the Retirement Act Below, the Court of Appeals Should Not Address It Here.**

As Ramsay and Smalling concede, the Retirement Board’s Hearing Officer did not reach the issue of the Hospital’s alleged liability under the Retirement Act—it based its decision entirely on the running of the statute of limitations. (*Id.* at 18.) That was no accident: the Retirement Board made clear that the parties had “asked the [Board] to assume for the sake of argument that the Hospital was an eligible employer under the Retirement Act.” (R. 561, 633.) Thus, because the Board concluded that Ramsay and Smalling’s “claim for retirement contributions arising prior to August 11, 2006 is barred by the statute of limitations,” it “decline[d] to consider the merits of [Ramsay and Smalling’s] Cross Motion for Summary Judgment,” including the argument they raise now, that the Hospital is an eligible employer under the Retirement Act. (R. 638.)

In other words, the statute of limitations “foreclose[d]” Ramsay and Smalling’s “cause of action before it [was] ever litigated on its merits.” *See Federated Capital Corp.*

v. *Haner*, 2015 UT App 132, ¶ 17, 351 P.3d 816 (quoting *In re Adoption of J.S.*, 2014 UT 51, ¶ 21, 358 P.3d 1009). Furthermore, because the Retirement Board’s decision rested solely on statute-of-limitations grounds, the Board did not address any of the Hospital’s alternative, independent defenses, including standing, laches and waiver, and the Hospital’s inability to provide the service-credits remedy that Ramsay and Smalling seek. (R. 515–17.)

The consequence of the Retirement Board’s single-issue decision is clear: even if the Court reverses the decision regarding the statute of limitations, it should not proceed to address the remaining merits of Ramsay and Smalling’s claim. Instead, the Court should remand to permit the Retirement Board’s Hearing Officer to address the merits.

Utah precedent dictates this result. In *CIG Exploration*, for example, the appellant and appellee “extensively briefed and argued the merits of the claims,” but the Utah Supreme Court recognized that its review was limited by the decision below—“whether the trial court accurately applied the statute of limitations to each claim.” *CIG Exploration, Inc. v. State*, 2001 UT 37, ¶ 8, 24 P.3d 966. Thus, though the Court would “discuss the nature of [the underlying] claims to determine the applicability of the statute of limitations,” it declined to “decide the merits of either claim.” *Id.* A number of other Utah cases stress the importance of remand in circumstances like these, to permit the proper decision-maker to pass first on each issue before an appellate court takes up a review.<sup>18</sup> A remand would be particularly important—and meaningful—here, where the

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<sup>18</sup> See, e.g., *Hernandez v. Baker* 2004 UT App 462, ¶ 4, 104 P.3d 664 (“The trial court did not address the first two points, despite the parties’ arguments. Baker asserts that because the trial court did not rule on these points, we should imply that they were met. We decline to do so. Instead, we remand this issue to the trial court to make findings and rulings.”); *Crawford v. Tilley*, 780 P.2d 1248, 1252 (Utah 1989) (“The final issue plaintiff has presented on appeal is whether plaintiff’s decedent was a common law trespasser on defendants’ property. The trial judge declined to decide this issue on summary judgment

Retirement Board, by its nature, possesses areas of “special competence,” including its ability to “make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.” See *Ramsay v. Kane County Human Res. Special Serv. Dist.*, 2014 UT 5, ¶ 9, 322 P.3d 1163 (quoting *Maverik Country Stores, Inc. v. Indus. Comm’n*, 860 P.2d 944, 947 (Utah Ct. App. 1993)). Accordingly, the first body to pass on this question should be the Retirement Board itself, as the Board’s “view of the meaning of the terms of the [Retirement] Act, and possibly the manner in which the retirement fund is administered, is information which a reviewing court might find necessary to have to make an informed decision.” *Johnson v. Utah State Retirement Office*, 621 P.2d 1234, 1237 (Utah 1980).

**B. If the Court Reaches the Issue of Liability, It Should Hold that the Hospital Does Not Owe Any Contributions Under the Retirement Act.**

**1. The Hospital is not liable for retirement contributions.**

If the Court reaches the issue of the Hospital’s alleged liability under the Retirement Act—which it should not—the Court should find that the Hospital is not liable to pay retirement contributions under the Retirement Act. Specifically, the Court should hold that liability for contributions under the Retirement Act does not accrue until there has been an affirmative and knowing admission into URS. Utah Code Ann. § 49-13-202(4).

“When a construction of [a statute] will bring it into serious conflict with another [statute],” courts have a “duty is to construe the [statutes] to be in harmony and avoid conflicts.” *Jerz v. Salt Lake County*, 822 P.2d 770, 773 (Utah 1991). Courts have a “duty to avoid interpreting a statute in a manner that renders portions of the statute, or related

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and instead based his judgment for defendants on the Landowner Liability Act. We therefore remand this case to the trial court to determine the decedent’s legal status under common law standards of landowner liability.”).



statutes, meaningless.” *Lyon v. Burton*, 2000 UT 19, ¶ 19 n.5, 5 P.3d 616. Furthermore, a “court should not follow the literal language of a statute if its plain meaning works an absurd result or is ‘unreasonably confused, inoperable, or in blatant contravention of the express purpose of a statute.’” *Savage v. Utah Youth Vill.*, 2004 UT 102, ¶ 18, 104 P.3d 1242 (quoting *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996)).

Ramsay and Smalling set aside these statutory construction concepts and ask this Court to adopt a reading of the Retirement Act that renders the application and approval provisions of the Retirement Act meaningless and leads to an inoperable result. Ramsay and Smalling contend that any public employer that offers a retirement benefit to its employees becomes a *de facto* “participating employer” under the Retirement Act—whether they know it or not—the moment such alternative retirement benefits are offered. In support of this position, Ramsay and Smalling rely on Utah Code Ann. § 49-13-202(2), which provides, in relevant part, as follows:

(2) The following employers may be excluded from participation:

(a) An employer not initially admitted or included as a participating employer in this system before January 1, 1982, if:

(i) The employer elects not to provide or participate in any additional public or private retirement, supplemental or defined contribution plan, either directly or indirectly, for their employees.

Thus, Ramsay and Smalling conclude that because the Hospital offered a 401(k) plan—a defined contribution plan—it must participate in URS. However, this provision is silent concerning when liability for contributions may accrue.

Accrual of liability for URS contributions is answered by another provision of the Retirement Act, which adds to the definition of “participating employer” one that “by resolution of its governing body, appl[ied] for admission to the system” and had its

application approved by the Board. *See* Utah Code § 49-13-202(4) (2009). These threshold participation requirements were removed from the Retirement Act in 2012, but applied at all times relevant to this dispute. *See* Utah Code Ann. § 49-13-202(3) (2012) (adding the phrase “regardless of whether the employer has applied for admission under Subsection (4)”).

This Court should construe the Retirement Act (at least under the pre-2012 version of that Act) in a way that requires a public employer to actually be admitted in URS, following application to the Board, in order to be defined as a “participating employer” under the Retirement Act and before liability for URS contributions begins to accrue.<sup>19</sup> Construing the Retirement Act in this way will give meaning to all provisions and avoid the absurd result (as in this case) of an unknowing public employer (the Hospital) racking up millions of dollars in alleged liability owed to another public entity (the Board) over a span of decades.

Additionally, construing the Retirement Act to require knowing participation is consistent with the express purposes of the Retirement Act to establish a “uniform system of membership” and to promote “economy and efficiency in public service.” Utah Code Ann. § 49-11-103(1)(a)(i), (vi). Ramsay and Smalling would create two classes of participating employers: those who are aware of their participation and those who are not.

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<sup>19</sup> Prior to the filing of Notice of Board Action in this case, the Board seemed to agree that application and admission into URS were necessary prerequisites to becoming a participating employer. On February 12, 2007, in light of information it received about the Hospital’s 401(k) plan, the Board informed the Hospital for the first time about its alleged eligibility to participate in URS. (R. 25.) However, the Board did not contend that the Hospital’s 401(k) plan made it a URS participant dating back to the first offering of the 401(k) plan in 1993. Instead, the Board confirmed that the Hospital “must” still submit an employer application to the Board “accompanied by a resolution from your governing body requesting admission” in URS. (*Id.*)

Participating employers that are aware of their status in URS receive the benefit of statutorily mandated education and instruction from the Retirement Board—they are told by the Board what their duties are and the manner in which contributions must be paid.<sup>20</sup> However, a public employer that unknowingly becomes a URS participant because it has offered some alternative retirement benefit is not treated the same way—the Retirement Board does not educate them on their duties and does not instruct on the manner in which contributions must be paid. Until its February 12, 2007 letter to the Hospital, the Board had not made any effort to educate the Hospital about its alleged obligations under the Retirement Act. (R. 25, 36, 637.) A system that allows for both knowing and unknowing URS participants, where one group receives education and instruction from the Board and the other does not, lacks fairness and uniformity.<sup>21</sup>

Furthermore, as demonstrated by this case, the potential liability that may stack up over many years for an unknowing “participant” can be crippling. Before the Hearing Officer limited the Retirement Board’s claim against the Hospital in this case by the statute of limitations, the Board claimed that the Hospital owed more than \$7 million dollars in delinquent contributions and interest allegedly owed from 1993 to 2009. (R. 333.) This potential liability threatened the very existence of the only hospital in rural Kane County. Such a result is inconsistent with the purpose of the Retirement Act to promote economical and efficient public service.

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<sup>20</sup> The Retirement Board has a statutory duty to regulate participating employers by “educating them on their duties imposed by” the Retirement Act. Utah Code Ann. § 49-11-204(17)(a). The Board must also instruct participants about the “the time, place, and manner in which contributions shall be withheld and paid.” *See id.* § 49-11-204(17)(b).

<sup>21</sup> It bears noting that the Board discovered the Hospital’s 401(k) plan after it took the simple act of sending the Hospital a 2 1/2-page questionnaire in 2007. (R. 16–18.)

Accordingly, if this issue is reached (which it should not be), this Court should construe the Retirement Act in a way that eliminates the notion of *de facto* and unknowing participation and require that liability for contributions does not accrue until a public employer has applied for URS participation and been approved by the Board. Utah Code Ann. § 49-13-202(4). Such a reading does not render meaningless the Retirement Act provision relied upon by Ramsay and Smalling—that an employer must participate in URS if it provides another form of retirement benefit. *See* Utah Code Ann. § 49-13-202(2). In such a situation, the Retirement Board may compel a public employer to apply and participate in URS. However, liability for contributions should not back-date to the adoption of an alternative retirement plan. Again, liability for contributions should only accrue upon affirmative and knowing acceptance into URS by the Retirement Board.

Here, by the time the Board filed its Notice of Board Action (on August 11, 2009), the Hospital had already irrevocably elected not to participate in URS. (R. 562.) Thus, the Hospital has never applied for, or been admitted by the Board to participate in, URS. Accordingly, if the Court reaches the merits of the Hospital’s alleged liability, it should find that the Hospital is not liable to make retirement contributions in URS.

**2. The Hospital’s remedial measures and settlement efforts do not establish liability under the Retirement Act.**

Ramsay and Smalling argue that the Retirement Act should be construed based on the Hospital’s conduct after the Retirement Board demanded that the Hospital pay alleged delinquent URS contributions. Specifically, Ramsay and Smalling argue that the Hospital somehow admitted that it is a “participating employer” in URS when it sought an amendment to the Retirement Act to allow an opt out of URS participation. (*See* Appellants’ Br. 18.) However, prior to this action the Retirement Board had taken the position that not only must the Hospital pay URS contributions for prior years dating

back to 1993, the Board also demanded that Hospital participate forever into the future. (R. 4.) Thus, the Hospital elected to opt out of URS-participation not because it agreed with the Board's position, but because such an election would cut off its potential liability to April 30, 2009—the date of its election. This subsequent remedial measure is inadmissible to establish liability. *See* Utah Rules of Evid. 407.

Ramsay and Smalling also argue that the Hospital “recognized” its obligations under the Retirement Act when it funded retirement contributions during the applicable limitations period between 2006 and 2009. (Appellants’ Br. 19.) However, the Hospital had obtained a grant from the Legislature to assist it in resolving its alleged (and disputed) liability under the Retirement Act. (R. 501.) The Hospital used this grant, together with some of its own funds, to negotiate a settlement of this dispute. (*Id.*) The Hospital negotiated a monetary settlement with all but six of the affected employees. (*Id.*) To resolve its dispute with the Board, the Hospital applied the balance of its available grant money to pay URS contributions allegedly owed during the limitations period to the Retirement Board for the six employees who did not settle—including for Ramsay and Smalling. (*Id.*) Thereafter, on May 16, 2014, the Board filed a Motion to Dismiss its Request for Board Action “because all issues in the Board’s request have been resolved and the case between the Board and the Hospital is moot.” (R. 498.) On June 17, 2014, the Hearing Officer granted the Board’s Motion to Dismiss. (R. 529.) The Hospital’s decision to fund URS contributions was made to settle and resolve a dispute—it does not constitute an admission of liability. *See* Utah Rule of Evidence 408.

In any event, the Retirement Act should not be construed based on the Hospital’s conduct. Instead, the Retirement Act must be construed based on the text of that Act. Accordingly, Ramsay and Smalling’s argument that the Hospital’s conduct informs a

decision on the meaning of the Retirement Act should be rejected. *Savage*, 2004 UT 102, ¶ 18 (“It is a well-settled principle of statutory construction that this court looks ‘first to the plain language of the statute’ when interpreting meaning.”).

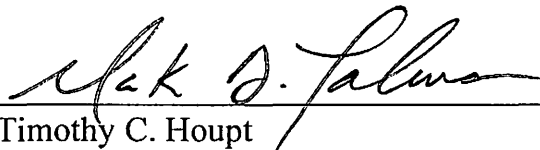
### CONCLUSION

Ramsay and Smalling’s claim against the Hospital for URS contributions arising prior to August 11, 2006 is time-barred. The limitations period may not be equitably tolled because Ramsay and Smalling knew the factual basis of their URS claim—the Hospital’s 401(k) plan—for almost 15 years before they intervened in this case. Moreover, the Hospital did not conceal any facts from Ramsay and Smalling and there are no other exceptional circumstances that could justify equitable tolling. Therefore, the Court should affirm the Retirement Board’s decision to dismiss Ramsay and Smalling’s URS claims.

The Court should not reach Ramsay and Smalling’s remaining issues, as they are either unpreserved, improperly briefed, or beyond the scope of this appeal.

DATED this 10<sup>th</sup> day of February, 2016.

JONES WALDO HOLBROOK & McDONOUGH PC

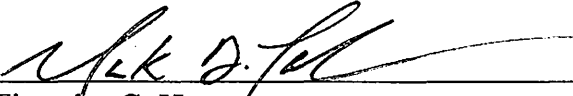
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**ADDENDUM**

Pursuant to Rules 24(a)(11) and (b)(2), Utah Rules of Appellate Procedure, no addendum is necessary for the foregoing Brief of Appellee.

DATED this 10<sup>th</sup> day of February, 2016.

JONES WALDO HOLBROOK & McDONOUGH PC

By:   
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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the foregoing Brief of Appellee contains 13,635 words, based on the word count of the word processing system used to prepare this brief, exclusive of table of contents, table of citations, and any addendum containing statutes, rules, regulations or portions of the record, and therefore complies with the type-volume limitation provided in Rule 26(f)(1), Utah Rules of Appellate Procedure.

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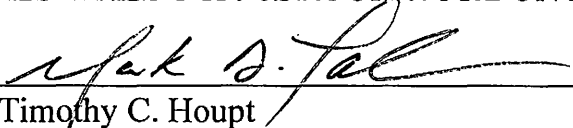
**CERTIFICATE OF SERVICE**

I hereby certify that on the 10<sup>th</sup> day of February, 2016, I caused to be mailed, postage prepaid, two print copies and one electronic copy on CD of the **BRIEF OF APPELLEES KANE COUNTY HOSPITAL** to the following:

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