2017

Jodi Howick Appellant v. Salt Lake City Corporation, Appellee

Utah Supreme Court

39557

Case No. 20150738-SC

IN THE
UTAH SUPREME COURT

JODI HOWICK,

Appellant,

vs.

SALT LAKE CITY CORPORATION,

Appellee.

REPLACEMENT BRIEF OF APPELLEE

Appeal from the Third District Court, Salt Lake County, State of Utah
The Honorable Richard D. McKelvie

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STATEMENT OF JURISDICTION

Contrary to Appellant's Statement of Jurisdiction, this appeal is *not* from an action of a municipal employee appeals board or from the district court's review of an agency adjudicative proceeding. *See* Aplt.Br.1. Rather, Howick appeals from the district court's grant of summary judgment in favor of Salt Lake City Corporation ("the City") on all of Howick's claims. This Court has jurisdiction over this matter.[1]

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[1] This case has a long history. In 2007 Howick filed an appeal with the Court of Appeals after the City terminated her as an at-will employee. In 2008 the Court of Appeals dismissed Howick's appeal for lack of jurisdiction. *Howick v. Salt Lake City Corp.*, 2008 UT App 216 (unpublished). Later in 2008 Howick appealed from the decision of the City's Employee Appeals Board ("the Board") that it did not have jurisdiction over her claim. While this second appeal was pending, Howick filed an action in Third District Court for a declaratory judgment and other claims based on her allegation that her employee status had been unlawfully changed in 1998. R.1-14. Not knowing that she had already filed her action in Third District Court, the Court of Appeals issued a decision in 2009, directing Howick to file a declaratory judgment action in the district court to determine whether she was an at-will or a merit employee. *Howick v. Salt Lake City Employee Appeals Bd.*, 2009 UT App 334, 222 P.3d 763 ("*Howick II*"). In 2011 Third District Court Judge Quinn ruled that Howick was a merit employee based on his interpretation of the Merit Protection Statute. R.2234-39. The City appealed, and in 2013 the Court of Appeals reversed the district court on the law and remanded the case. *Howick v. Salt Lake City Corp.*, 2013 UT App 218, 310 P.3d 1220 ("*Howick III*"). On August 4, 2015 Third District Court Judge McKelvie ruled that Howick was in fact an at-will employee and dismissed her claims. R.4040-47, 4073-74. On September 2, 2015, Howick appealed. R.4068-69.

STATUTES AND ORDINANCES

No statutes or ordinances are determinative of Howick's appeal

STATEMENT OF THE CASE

This appeal centers on whether Howick was an at-will employee when the City terminated her employment in 2007, after she knowingly and voluntarily accepted an at-will "Appointed Senior City Attorney" position, signed a document expressly recognizing her at-will employment, and received consideration in the form of increased compensation for nine years.

Procedural History and Disposition Below

Complaint and Original Grant of Summary Judgment

In 2008 Howick filed her second appeal to the Court of Appeals. *Howick II*, 2009 UT App 334. On August 12, 2009, apparently recognizing she was in the wrong court and before the Court of Appeals ruled, Howick filed a complaint against the City in Third District Court.[2] Howick's complaint seeks a declaratory judgment ruling that in 1998 the City unlawfully changed her merit employee status to at-will in violation of the Merit Protection Statute (Utah Code §§10-3-1105 and -1106).[3] She also asserts claims for (1) wrongful termination in violation

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[2] R.1-14.

[3] R.11-12.

of statutes and public policy, (2) breach of implied contract, and (3) breach of the implied covenant of good faith and fair dealing.[4] These claims rely on Howick's contention that she was a merit employee under the Merit Protection Statute.[5]

Not knowing that Howick had already filed an action in district court, the Court of Appeals issued *Howick II*, directing her to file a declaratory judgment action in district court regarding whether she was an at-will or merit employee. 2009 UT App 334, ¶¶1, 11. The Court of Appeals explained the two possible outcomes: "If the district court determines she was a merit employee, the [City's Employee Appeals] Board is indeed the proper forum to determine whether her termination was justified." If she was at-will, "the Board correctly ruled that it lacked jurisdiction over the case." *Id.* ¶8.

In the district court, the City moved for a ruling that Howick was an at-will employee.[6] The City argued that in 1998 Howick had contracted to become an at-will employee, had waived any statutory rights associated with merit employment, and was estopped from disclaiming her at-will status.[7] The City also argued that Howick's declaratory judgment action was time-barred because

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[4] R.7-10.
[5] *Id.*
[6] R.408–83.
[7] R.462–80.

it was not asserted until well after the statute of limitations had expired.[8] Howick moved for a ruling that she was a merit employee under the Merit Protection Statute.[9]

Third District Court Judge Quinn denied the City's motion and granted Howick's in part.[10] Although recognizing that Howick had accepted her at-will position with the "explicit understanding that she was giving up certain rights," the district court concluded that the Merit Protection Statute "trump[ed] all other arguments."[11] The district court ruled that Howick could not have legally relinquished her merit status, and therefore the City's defenses of contract, waiver, and estoppel were immaterial.[12] The district court also rejected the City's argument that Howick's declaratory judgment claim was time-barred even though the court acknowledged that Howick could have asserted her claim in 1998. Judge Quinn explained that he did not think that the Court of Appeals would want him to rule on that basis.[13] The City appealed.[14]

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[8] R.452-59.

[9] R.121-22.

[10] The district court denied Howick's request to be immediately restored to her former position with all back pay and benefits. R.1216.

[11] R.1215-16.

[12] R.1208.

[13] R.1214-15, 2236-37.

[14] R.1221–23.

Howick III's Reversal

In *Howick III*, the Court of Appeals reversed, holding that, as a legal matter, Howick could have relinquished merit protection by contract, waiver, or estoppel. 2013 UT App 218, ¶¶1, 29–46. The Court of Appeals affirmed that parties are free to contract away or waive statutory rights so long as doing so does not offend public policy. *Id.* ¶34. Relinquishing merit status did not violate public policy, the Court of Appeals concluded, because the Merit Protection Statute contained no provision prohibiting waiver—unlike numerous statutes with anti-waiver provisions—and because Howick had not shown that voluntarily relinquishing her merit rights violated public policy. *Id.* ¶¶35–43. The Court of Appeals rejected the City's statute of limitations argument, saying that Howick's other claims "subsumed her claim for declaratory relief" and therefore it was not time-barred. *Id.* ¶18.

The Court of Appeals remanded the case to the district court to adjudicate the City's three defenses of contract, waiver, and estoppel, and to "dispose of the case as appropriate" if Howick was an at-will employee. *Id.* ¶¶44–45.

Howick filed a petition for a writ of certiorari, arguing that *Howick III* had improperly relied on a 2012 amendment to the Merit Protection Statute.[15] This Court denied her petition.[16]

Summary Judgment Ruling on Remand

After remand, the City and Howick filed cross-motions for summary judgment.[17] The district court granted the City's motion and denied Howick's.[18] The district court determined that under each of the City's three defenses of contract, waiver, and estoppel, Howick had relinquished her merit rights and become an at-will employee. Additionally, the district court dismissed Howick's other claims of wrongful termination in violation of statues and public policy, breach of implied contract, and breach of the implied covenant of good faith and fair dealing, all of which were dependent on Howick's alleged merit status.[19]

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[15] R.3914–39.

[16] R.1332–35.

[17] Because the parties simultaneously filed their motions, some of Howick's exhibits are out of order in the record. The City's motion, supporting memorandum, and exhibits are found at R.1914–2284. Howick's summary judgment materials are found at R.1388–1913 and R.2291–2681.

[18] R.4040–48.

[19] R.1967–72, 4046.

Facts Relevant on Appeal

Howick's 1998 Appointment to an At-Will Position

The City hired Howick in 1992 to serve as counsel for the Salt Lake Airport.[20] In 1997 and 1998, Howick expressed dissatisfaction with her salary.[21] The City had a compensation plan known as the 600 Series Plan.[22] The 600 Series Plan had a range of pay grades, each of which had its own salary range.[23] At that time, grade 613 was the highest grade available to the City's staff attorneys.[24]

As a result of the salary complaints, then-City Attorney Roger Cutler obtained approval for a new "Appointed Senior City Attorney" position at grade 614 of the 600 Series Plan ("614 Position").[25] Cutler informed Howick in advance that the new position would be at-will:

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[20] R.1926, 4040.
[21] R.1926, 4040.
[22] R.1928, 4044.
[23] R.1844, 1871.
[24] R.1926.
[25] R.1927–28, 4040.

> Q: [Y]ou knew that the position, the 614 position that you accepted, was, in fact, an at-will position?
>
> A: I knew it had been stated to me that it was at-will.[26]

Howick told Cutler she "did not want to go at-will," and she "believed that he could not ask [her] to do that," but Cutler reiterated that the 614 Position was at-will.[27] Cutler then gave Howick a document she described as "a waiver," which she refused to sign.[28] Cutler later gave Howick a revised document titled "Salt Lake City Corporation At-Will Employment Disclaimer" ("Disclaimer"). It stated:

> I understand that, if I am appointed by the Salt Lake City Attorney to the "Appointed Senior City Attorney" position, my employment *will be at-will and will be for no fixed length of time.*
>
> I understand that *no oral or written statements (in personnel manuals, policies, procedures, or elsewhere)* or any conduct of the Mayor, City Attorney, or other City official at any time, other than in a written contract of employment signed by the Mayor or City Attorney, *can create an express or implied contract to the contrary.*[29]

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[26] R.1928–29, 3052, 3071.
[27] R.3052, 3054.
[28] R.3052, 3053.
[29] R.1929, 4040–41 (emphases added).

Howick chose to move to the 614 Position and signed the Disclaimer on July 22, 1998.[30] She did not object to the Disclaimer's language before signing it.[31]

On August 4, 1998, Cutler provided Howick a copy of the 614 Position's job description.[32] The job description stated the position was an "at-will professional position, exempt from the career service system . . . ."[33] Howick understood the phrase "career service system" to refer to "merit employment."[34]

Howick's Increased Compensation

Howick had the option to remain a level 613 merit employee,[35] and she had additional room for salary growth at that grade.[36] She was "not aware of anything that would have prevented [her] from remaining at [the 613] level."[37] Three attorneys eligible for the 614 Position chose to remain merit employees at the 613 level.[38] Howick accepted the at-will 614 Position.[39]

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[30] R.3054.
[31] R.1930, 3057–58.
[32] R.1928.
[33] *Id.*
[34] R.3117.
[35] R.1930.
[36] R.2069 (showing 613 range of $4,312 to $6,814 per month), R.2099 (showing Howick's monthly salary of $5,437 in 1997, before appointment to 614 Position).
[37] R.1930.
[38] R.1931.
[39] *Id.*

In accepting the 614 Position, Howick did not experience a change in job duties or workload, but she did receive higher pay.[40] Roger Cutler reported to the City's controller that Howick had been "appointed to a new classification of 614" and her salary increase reflected her "leaving the career service system."[41]

Upon her appointment to the 614 Position, Howick's salary increased 11% — $600 per month.[42] In contrast, the three attorneys who remained 613 merit employees received monthly raises of $119 (1.9%), $171 (3.25%), and $181 (3.5%).[43] As the City's compensation manager explained, the 614 Position was created to give senior attorneys like Howick "the opportunity to elect to go to appointed [at-will] status" and receive "higher pay."[44] The at-will term was a "significant factor" in the 614 Position's creation, and Cutler's office negotiated with human resources to get the large pay increase based on "the fact that it was an at-will position."[45]

In 2005, well after her appointment to the 614 Position, Howick explained to a junior co-worker that attorneys go "at will" by "sign[ing] something

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[40] R.1932, 2025–26, 2721.
[41] R.1931, 2095.
[42] R.2095, 4041.
[43] R.1932, 4041.
[44] R.1928.
[45] R.3879.

acknowledging they have given up the[ir] merit status."[46] In contrast to at-will employees, Howick explained, "[m]erit employees have a property interest in their job" and a right to "due process."[47]

The City's Compensation Plans

In 1998, the 614 Position was within the City's 600 Series Plan.[48] As the City's compensation manager explained, the 600 Series Plan covered professional employees, "most" – but not all – of whom were career service employees.[49] The 600 Series Plan nowhere stated it covered only merit or career service employees.[50] To the contrary, the 600 Series Plan stated that 600 Series Plan employees "in appointed positions . . . are 'at will' employees" who are not eligible for certain benefits available to merit employees.[51] The Mayor's office, the head of human resources, the City's compensation manager, and the City Attorney all approved the 614 Position.[52]

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[46] R.1933.
[47] *Id.*
[48] R.2860, 2894.
[49] R.2894.
[50] R.1844–74, 2894–95.
[51] R.1868 (Sections XIX(C)(7) and XXIII).
[52] R.2904.

In 2001, the City Council adopted a new "Unclassified Plan" specifically for appointed, at-will positions.[53] Howick was a "Senior Advisor" (the highest grade) under the Unclassified Plan, and her position was within the Unclassified Plan at the time of her termination.[54]

The Termination of Howick's Employment

The City terminated Howick's employment in 2007.[55] Ed Rutan, the City Attorney at the time, did not "go through the procedural steps applicable to merit employees" when he terminated Howick's employment because he had "relied on the fact that Ms. Howick was an at-will employee and had signed a disclaimer agreement to that effect."[56] Howick received severance which was only available to at-will employees.[57]

SUMMARY OF ARGUMENTS

Howick's appeal should be denied for three reasons: her declaratory judgment action is time-barred, her attack on *Howick III* is without merit, and her criticisms of the district court's decision do not distub the entry of summary judgment.

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[53] R.1932–33.
[54] *Id.*
[55] R.4041.
[56] R.1934.
[57] *Id.*, R.3130, R.3146.

First, Howick's declaratory judgment action (contending that she was improperly made an at-will employee in 1998) is time-barred. She could have asserted the claim as early as July 1998 when she became an at-will employee. At that time she knew she was no longer a merit employee with the job protections of merit employment; in her words, she no longer had "a property interest in [her] job" or a right to "due process." She viewed the change as adverse to her, objected to it, stated that she "did not want to go at-will," and told the City Attorney that she "believed that he could not ask [her] to do that." Under any statute of limitations, Howick's declaratory judgment action (filed 11 years after she became at-will) is time-barred.[58]

Second, Howick's primary argument on appeal is her attack on *Howick III* (not the district court's decision). Howick claims that the Court of Appeals

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[58] Despite the fact that the Court of Appeals rejected the City's statute of limitations argument in *Howick III* (discussed in detail below), the City may still properly raise this argument. *See Butler v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 2014 UT 41, ¶ 1, 337 P.3d 280 (noting that once final judgment is entered, prior rulings that were steps towards final judgment become appealable); *Zions First Nat'l Bank, N.A. v. Rocky Mountain Irrigation, Inc.*, 931 P.2d 142, 144 (Utah 1997) (after final judgment, any "intermediate orders" may be appealed even if not specifically identified in notice of appeal). This Court may affirm a judgment on "any grounds apparent in the record," even if such ground differs from that stated by the lower court. *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 36, 250 P.3d 465.

retroactively applied a 2012 amendment to the Merit Protective Statute "to determine what the law was before the amendment was enacted." Aplt.Br.5. Howick is incorrect. The Court of Appeals expressly stated it did not retroactively apply the subsequent amendment to the statute. Rather, the Court of Appeals held that Howick could lawfully have relinquished her merit rights because the Merit Protection Statute did not prohibit a waiver of statutory rights—in contrast to many other statutes—and because Howick failed to show that her action in relinquishing her merit rights affected the public as a whole.

Third, Howick provides no valid reasons for reversing the district court's grant of summary judgment. Howick ignores two of the three grounds for the district court's ruling: the City's waiver and estoppel defenses. Although she conflates these defenses with the City's contract defense, they are independent and have different elements. Due to Howick's inadequate briefing, the Court may affirm the district court's waiver and estoppel rulings under the undisputed facts.

This Court also should affirm the district court's conclusion that Howick relinquished merit protection by contract. Howick disputes this determination. Her arguments about lack of consideration, the City's 600 Series Plan, the City Council's actions, and public contract law are misplaced.

Finally, Howick contends that the district court erred in dismissing her other three claims for relief. But Howick's arguments are procedurally foreclosed, and summary judgment was correctly entered on those claims.

ARGUMENT

I. HOWICK'S DECLARATORY JUDGMENT ACTION IS TIME-BARRED.

Howick's declaratory judgment action seeks a ruling that the City could not lawfully have created an at-will attorney position in 1998 or "coerced" her into the position,[59] given Utah Code sections 10-3-1105 and -1106. This claim, filed eleven years after the events giving rise to it, is time-barred under any statute of limitations.[60]

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[59] Howick's "coercion" argument is contradicted by the record given that she admitted she could have remained a 613 merit employee, she signed the Disclaimer to become at-will, and three other senior attorneys decided to remain merit employees. But for the purpose of determining whether a controversy had arisen between Howick and the City in 1998, the City may rely on her "coercion" argument.

[60] The statute of limitations is not merely a "technical" rule that can be ignored. *Bd. of Regents of Univ. of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980) ("[W]e have emphasized the importance of the policies underlying state statutes of limitations. Statute of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system."); *Hirtler v. Hirtler*, 566 P.2d 1231, 1231 (Utah 1977) ("[S]tatutes of limitations are not designed exclusively for the benefit of individuals but are also for the public good. These statutes of repose are intended to prevent the revival and enforcement of stale demands.").

Howick's Complaint confirms that the events in question occurred in 1998:

> In 1998, the Attorney's Office created a new...
> Appointed Senior City Attorney [position] that...
> purported to create an "at-will" status outside of the
> state merit system . . . .
>
> Plaintiff entered the newly-created Job Description
> while objecting to the City's requirement that [she]
> purport to relinquish merit status.
>
> Defendant violated statutory restrictions by classifying
> Plaintiff's position [as at-will] in violation of . . . Utah
> Code Ann. §§ 10 3 1105 and 1106 . . . .[61]

All the events in question occurred in 1998. *Howick II* summarized the facts as follows:

> "In July of 1998 [Howick] accepted a new position and a
> higher salary, in connection with which she signed a
> document titled 'Salt Lake City Corporation At-Will
> Employment Disclaimer.' The disclaimer stated that
> [Howick] understood her position would 'be at-will and
> will be for no fixed length of time.'"

Howick II, 2009 UT App 334, ¶ 2.

The Utah Declaratory Judgment Act, under which Howick brings her claim, allows an action by any person "whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract, or franchise" to "request the district court to determine any question of construction or validity

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[61] R.2,3,7.

arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations." Utah Code § 78B-6-408. A declaratory judgment is intended to "remove . . . uncertainty," and, with respect to the validity of a contract in particular, the issue may be decided by the district court even "before . . . there has been a breach." *Id.* §§ 78B-6-402 & -409. The "purpose of [a declaratory judgment] [i]s to provide a means of securing an adjudication without the necessity of someone having to suffer damage or get into serious difficulty before he could seek to have his rights determined in court." *Alternative Options & Servs. for Children v. Chapman*, 2004 UT App 488, ¶16, 106 P.3d 744 (quoting *Parker v. Rampton*, 497 P.2d 848, 850-51 (Utah 1972)).

Four requirements must be satisfied for a plaintiff to proceed with a declaratory judgment: (1) there must be a judiciable controversy; (2) the interests of the parties must be adverse; (3) the plaintiff must have a legally protectable interest in the controversy; and (4) the issues between the parties must be ripe for judicial determination. *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983).

A "judiciable controversy" exists when "either [] there is an actual controversy," or "there is a substantial likelihood that one will develop so that *the adjudication will serve a useful purpose in resolving or avoiding controversy or possible litigation.*" *Chapman*, 2004 UT App 488, ¶18 (emphasis added). Howick

alleges that in 1998 the City imposed the at-will requirement on her despite her "objecting," stating that she "did not want to go at-will," and telling the City Attorney that she "believed that he could not ask [her] to do that."[62] As an at-will employee, Howick lost the "property interest in [her] job" and the right to "due process" which she previously enjoyed as a merit employee.[63] The existence of a judiciable controversy did not require Howick to have been terminated in 1998. There was an actual "clash of legal rights" because Howick lost her merit "rights, status or other legal relations" allegedly over her opposition. *Chapman*, 2004 UT App 488 at ¶ 20 ("Appellants need not have already suffered from a license suspension to be adversely affected" because a declaratory judgment action is a means of securing adjudication "without the necessity of someone having to suffer damage or get into serious difficulty"). In sum, in 1998 there was a judiciable controversy between Howick and the City when Howick suffered the alleged injury of losing her property interest and due process rights in her job.

The second requirement for a declaratory judgment action also was satisfied in 1998 because the "interests of the parties [were] adverse." *Id.* ¶ 17.

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[62] R.3052, 3054.
[63] R.1933.

As explained, Howick alleges she "objected" to going at-will and signed the at-will Disclaimer under alleged "coercion," with Ms. Howick insisting she did not want to be at-will and the City insisted it was a requirement of the new position—although she later admitted she did not have to accept the new position.

The third requirement that Howick "have a legally protectable interest in the controversy" was satisfied in 1998. *Chapman*, 2004 UT App 488, ¶ 23. Howick had been a merit employee and claims that the City unlawfully took away her merit status.

The final requirement that the issue be "ripe for judicial determination" also was satisfied in 1998. All the facts Howick alleges in support of her declaratory judgment action occurred in 1998. There was an actual live controversy, and there also was "a substantial likelihood" that a legal dispute would develop "*so that the adjudication will serve a useful purpose in resolving or avoiding controversy or possible litigation.*" *Id.* ¶ 24 (emphasis added). Had Howick brought her declaratory judgment action in 1998, when the City allegedly made Howick at-will in violation of statute, it would have resolved the issues of whether the City had acted lawfully and whether Howick could relinquish her merit rights in exchange for consideration.

A statute of limitations begins to run from the date of the action (whether a government action or a contract) that affects the interests of the party bringing the claim. In *Gillmor v. Summit County*, for instance, this Court held that where a government ordinance adversely affects a person's property interests, the statute of limitations on any challenge to the ordinance begins to run "the moment the ordinance is enacted." 2010 UT 69, ¶ 31, 246 P.3d 102. *See also Tolman v. Logan City*, 2007 UT App 260, ¶ 10, 167 P.3d 489 (a challenge to validity of an ordinance "became ripe upon the enactment of the ordinance and is now barred by the statute of limitations").

Likewise, because entering into a contract immediately affects a party's interests, a challenge to the contract's enforceability is subject to the limitations period that runs from the date of the contract. This Court has held that a party to a contract with a governmental entity cannot challenge the enforceability of the contract after the statute of limitations has run:

> Plaintiff's claim of duress is clearly barred by the running of the statute of limitations. The claim is basically that plaintiff entered into the contract [with Salt Lake County] because [it was forced] to do so. . . . Assuming, *arguendo*, that the [County's] threat did constitute duress, nevertheless, plaintiff has sat idly by for over ten years without challenging the transaction. . . . [S]uch tardiness in asserting the claim barred it under the statute of limitations.

Rice, Melby Enters. v. Salt Lake Cnty., 646 P.2d 696, 698 (Utah 1982).

In the instant case, the alleged improper contract, the violation of Merit Protection Statute, and Howick's loss of merit protection occurred in 1998. Howick could have brought her declaratory judgment action in 1998 as Judge Quinn acknowledged:

> [T]echnically either side could have brought a declaratory judgment action testing the validity of Ms. Howick's at-will status from the time it went into effect [in 1998]. . . . Ms. Howick had the technical ability to have previously brought a declaratory judgment action . . . .[64]

See Johnson v. State, 945 P.2d 673, 675 (Utah 1997) (statute of limitations begins to run from when plaintiff "could have first filed" a claim). Howick's declaratory relief claim is time-barred.[65]

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[64] R.2237. It appears that Judge Quinn did not apply the statute of limitations because he believed that the Court of Appeals did not want him to do so and stated: "I would not decide this case on statute of limitations grounds." R. 2204.

[65] Whether Howick's claim is viewed as alleging fraud, mistake, or a statutory violation (three-year limitation period under Utah Code § 78B-2-305), or as subject to the catch-all limitations period (four-years limitation period under Utah Code § 78B-2-307), or as challenging a written contract (six-year limitation period under Utah Code § 78B-2-309), her claim is time-barred because she did not file her Complaint until eleven years after her cause of action accrued.

The Court of Appeals rejected the City's statute of limitations argument on the ground that Howick's other claims "subsumed her claim for declaratory relief" and therefore it was not time barred. *Howick III*, 2013 UT App 218, ¶18. The Court of Appeals did not cite any Utah law and instead invoked a Ninth Circuit case concerning a civil rights action brought by a prisoner. *Id.* (citing *Rhodes v. Robinson*, 408 F.3d 559, 566 n.8 (9th Cir. 2004)). Howick's other claims are "wrongful discharge" claims based on her discharge in 2007 and are all derivative claims relying on her contention that she was unlawfully made at-will in 1998 in violation of Utah Code sections 10-3-1105 and -1106.[66]

If the reasoning of *Howick III* were accepted, it would mean that Howick's declaratory relief action would be *forever* exempt from the running of the statute of limitations so long as she asserts another claim that invokes her alleged merit status in 1998. Howick could wait eleven years (or more) from when she became an at-will employee and yet still contest the legality of the change of her employee status. This approach would allow Howick to escape the application of the statute of limitations to her declaratory relief claim merely because she asserted derivative claims relying on the success of her declaratory relief claim.

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[66] R.2-10 (¶¶ 8,15,18,32-33,34,38,40-41,43-44,50,61 invoking Utah Code §10-3-1105 and -1106 plus ordinances and policies relating to merit employment).

The Court of Appeals' reasoning also is contrary to Utah case law. Because Howick's wrongful discharge claims rely on her underlying claim that her merit status was unlawfully changed in 1998, those claims are subject to the statute of limitations applicable to Howick's underlying claim (not the reverse). *See Davidsen v. Salt Lake City*, 81 P.2d 374, 276-77 (Utah 1938) (explaining that, while a quiet title claim generally is not subject to a statute of limitations, if the claim "depends ... upon the cancellation of a deed for fraud or mistake," it must be brought "within the period provided by law for an action based on that ground"); *Bangerter v. Petty*, 2009 UT 67, ¶12, 225 P.3d 874 ("If the party's claim for quiet title relief can be granted only if the party succeeds on another claim, then the statute of limitations applicable to the other claim will also apply to the quiet title claim.") (citation omitted). Howick's wrongful discharge claims do not extend the limitations period governing her declaratory relief action, as the Court of Appeals concluded; the opposite is the case. Howick's declaratory relief claim is time-barred because Howick did not assert the claim until 2009, eleven years after the events in question. Her assertion of additional, derivative claims does not change that result.

Consequently, this Court may properly conclude that Howick's declaratory relief claim is time-barred, and affirm judgment in the City's favor on that basis.

II. *HOWICK III* CORRECTLY HELD THAT HOWICK COULD RELINQUISH MERIT STATUS BY CONTRACT, WAIVER, OR ESTOPPEL.

On appeal, Howick primarily attacks the Court of Appeals' holding in *Howick III* that, although Howick "was covered by the protections of the Merit Protection Statute," she could nevertheless relinquish her merit protection through contract, waiver, or estoppel. *Howick III*, 2013 UT App 218, ¶¶29–47. The Court of Appeals correctly found that Howick failed to meet her burden to show that an attorney's voluntary relinquishment of merit protection in exchange for additional compensation violated public policy. *Howick III* is also consistent with recent decisions from this Court.

A. Howick Failed to Show, Free From Doubt, That an Attorney's Choice to Relinquish Merit Protection In Exchange for Significant Consideration Violated Public Policy.

Relying on *Ockey v. Lehmer*, 2008 UT 37, 189 P.3d 51, and *Lee v. Thorpe*, 2006 UT 66, 147 P.3d 443, the Court of Appeals reiterated the principle that "[p]eople are generally free to bind themselves pursuant to any contract," even one that conflicts with statutory language, unless the contract offends "the public policy

to which the statute gives voice." *Howick III*, 2013 UT App 218, ¶34 (quoting *Lee v. Thorpe*, 2006 UT 66, ¶22). A contract in conflict with a statute is enforceable unless the party challenging the contract makes a showing "'free from doubt that the contract is against public policy.'" *Id.* (quoting *Ockey*, 2008 UT 37, ¶21). Two factors are relevant to that showing: (1) whether "the statute specifically declare[s] contrary contracts to be void," and (2) whether the contract "harm[s] the public as a whole, as opposed to the contracting party only." *Id. (citing Ockey*, 2008 UT 37, ¶23 (price fixing contract void where statute expressly made it "prohibited," "unlawful," and "absolutely void," and "the contract harmed the public as a whole—not just an individual")).

The Court quickly resolved the first factor in the City's favor. Nothing in the Merit Protection Statute prohibited a municipal employee from waiving merit status. *Id.* ¶35. This is in contrast to many other Utah statutes with express anti-waiver provisions. *Id.* Howick's argument therefore failed under *Ockey*'s threshold question—a fact that Howick has not disputed in this appeal.

On the second *Ockey* factor—whether Howick's contract harmed the public as a whole or only her—the Court recognized that Howick had a heavy burden of making this showing "free from doubt." *Id.* ¶¶34, 36. Howick did not meet her burden. Howick failed to show that her contract affected anyone but herself. She

was given a choice to waive her merit rights in return for higher compensation, and she took it, in contrast to three other attorneys who chose to remain merit employees. No one else's employment status was altered by what Howick did. Her decision to sign the Disclaimer and accept the higher-paid, at-will 614 Position affected her alone, not "the public as a whole." *Ockey*, 2008 UT 37, ¶ 23.

Howick III is not a broad decision affecting municipal employees generally, but one narrowly confined to the facts of Howick's individual decision as a senior attorney to go at-will in exchange for substantial consideration. The Court of Appeals earlier pointed out the unique facts of the case:

> [Howick] is a sophisticated, seasoned attorney who entered into a contract, and then for many years accepted the benefits of the contract's at-will status—chiefly increased pay—and who now claims the contract that afforded her those benefits is illegal.

Howick II, 2009 UT App 334, ¶ 6 n.5. In *Howick III*, Judge Orme emphasized the importance of Howick's status as an attorney to the public policy analysis:

> The lead opinion correctly concludes that Howick has not made 'a showing free from doubt that the contract offends public policy.' . . . . Howick was not an unsophisticated public employee but rather was a seasoned, experienced attorney who can be presumed to have known exactly what she was doing in entering into the contract. Indeed, as a key attorney for the City, she should have alerted her client, who also happened to be her employer, to the possibility that the contract was illegal if she honestly believed that it was. . . . [T]he

> public policy implications of [Howick's contract] would be very different [if she were not an attorney].

Howick III, 2013 UT App 218, ¶47 (Orme, J., concurring). *Howick III* correctly concluded that Howick had not satisfied "[]either *Ockey* factor," and therefore that "the Merit Protection Statute did not prohibit Howick from contracting away her merit protection." *Id.* ¶43.[67]

Apparently recognizing that she cannot satisfy either *Ockey* requirement, Howick attempts to change the law, arguing that she should prevail because the Merit Protection Statute "did not contain a provision *allowing* employees to waive ... merit protections." Aplt.Br.19 (emphasis added). This is not the law. As *Ockey*, *Lee*, and other decisions hold, a party may make a contract that is inconsistent with a statute so long as the statute does not prohibit the contract and the contract does not harm the public as a whole. *See* pp. 24-25 *supra*. *See also Touchard v. La-Z-Boy Inc.*, 2006 UT 71, ¶16, 148 P.3d 945 (noting that Utah Workers' Compensation Act embodies public policy prohibiting employer from making agreement with employee to waive statutory rights because Act

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[67] Because Judge Quinn's decision was limited to his interpretation of the statute and did not address the City's contract, waiver and estoppel arguments, the Court remanded the case to the district court for "resolution of those issues." *Howick III*, 2013 UT App 218, *Id.* ¶44.

expressly states "an agreement by an employee to waive the employee's rights to compensation … is not valid.").

Howick III was correctly decided and should be affirmed.

B. Recent Decisions From This Court Support *Howick III*.

Decisions of this Court provide further support for *Howick III*. First, this Court has emphasized that a party to a contract, even one who is the victim of fraud, cannot enjoy the benefits of the contract and then try to undo it: "[It is a] well-established principle that a defrauded party, after learning the truth will not be permitted to go on deriving benefits from the transaction and later elect to rescind." *Dillon v. S. Mgt. Corp. Ret. Trust*, 2014 UT 14, ¶32 n.20, 326 P.3d 656 (citation omitted).

Second, this Court has continued to apply the *Ockey* standard that for a contract to be void on the basis of public policy, "there must be a showing free from doubt that the contract is against public policy" and that it "harmed the public as a whole." *Penunuri v. Sundance Partners, Ltd.*, 2013 UT 22, ¶26, 301 P.3d 984; *Bank of Am. v. Adamson*, 2017 UT 2, ¶21, — P.3d —.

Third, in interpreting a statute, a court must "give effect to omissions in statutory language by presuming all omissions to be purposeful." *Penunuri*, 2013 UT 22, ¶15. In particular, while some Utah statutes expressly make "certain

contractual provisions unenforceable as against public policy," other statutes contain "no such expression" and the court must "'give effect' to this omission" and not prohibit agreements without statutory basis. *Id.* ¶¶19, 27.

This Court's decisions confirm that Howick cannot repudiate the at-will Disclaimer she signed after enjoying its benefits for nine years, that she has not shown that her contract was contrary to public policy under *Ockey*, and that the Merit Protection Statute did not prohibit her from entering into the contract.

III. HOWICK'S ATTACKS ON *HOWICK III* ARE WITHOUT MERIT.

A. *Howick III* did not retroactively apply the 2012 amendment.

Howick repeatedly asserts that *Howick III* retroactively applied the 2012 amendment to the Merit Protection Statute. Aplt.Br.2, 5, 15, 17. Her argument is contrary to the decision's express holding that the 2012 amendment "may not be applied to actions taken before its passage" and therefore is "inapplicable to this case." *Howick III*, 2013 UT App 218, ¶¶41, 42.

If the Court of Appeals had retroactively applied the 2012 amendment as Howick contends, *Howick III* would have been a short decision in favor of the City, without any *Ockey* analysis and without remand. The 2012 amendment "excludes from merit protection an employee who has either 'acknowledged in writing that the employee's employment status is appointed or at-will' or

'voluntarily waived the protections required by Section 10-3-1106.'" *Id.* ¶37 (quoting Utah Code § 10-3-1105(2)(e) (2012)). Because Howick signed the at-will Disclaimer and chose the at-will 614 Position, the court would have simply found that Howick was at-will under the 2012 amended statute. It did not do so.

Howick attempts to make much of the fact that *Howick III* states that while the 2012 amendment is "inapplicable to this case," it is not "irrelevant ... as a reflection of current legislative views on public policy." *Howick III*, 2013 UT App 218, ¶42 (quoting *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1246 n.2). There was nothing improper in the court's comment on the fact that public policy may change over time. The Merit Protection Statute may originally have been concerned about "spoils systems." It was then amended in 2004 to make it easier for cities to terminate employees,[68] and was amended again in 2012 to greatly expand the number of non-merit positions and at-will employment generally. *See* Utah Code § 10-3-1105(2)(3) (2012).

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[68] The 2004 amendment, according to its sponsor, was intended to "provide stronger ability of a city to release or discipline some of [its] employees" and to "giv[e] city councils and administrations the ability to fire employees. . . ." House Floor Debate, 2004 Gen. Sess., (Statement of Rep. David Ure), *available at* http://www.le.state.ut.us/asp/audio/index.asp?Sess=2004GS&Day=O&Bill=SB0023SO1&House=H.

Because Howick's public policy claim is not rooted in the specific language of the Merit Protection Statute or any other statute, a reviewing court may properly consider multiple possible sources of public policy, including subsequent statutes. This Court has explained:

> The centerpiece of our inquiry is the strength and scope of public policy. In our effort to assay this question, we are not restricted to parsing statutory text and may properly look to many sources, including legislative history, which may illuminate the dimensions of the public policy at issue. *We are not troubled by relying on legislative debate in 2004 to measure the clarity and strength of public policy relating to weapons in the workplace in September 2000 when the employees were terminated.* The legislature's 2004 debates on the interplay between private property rights and the right to bear arms reflects the latest stage of the uncompleted search for equipoise between the right of persons to bear arms and the right of persons, including employers, to regulate private property.

Hansen v. Am. Online, Inc., 2004 UT 62, ¶15 n.7, 96 P.3d 950 (emphasis added).

In fixating on *Howick III*'s reference to the 2012 amendment, Howick attempts to obscure the true weakness of her position: her failure to prove free from doubt that her contract, even in 1998, violated public policy; it was not

expressly prohibited by statute and it did not harm the public as a whole.[69] *Howick III* was correctly decided.

B. Howick's "intervening controlling authority" does not conflict with *Howick III*.

Howick characterizes three cases as intervening controlling authority that should cause *Howick III* to be overturned: *Gressman v. State*, 2013 UT 63, 323 P.3d 998, *Waddoups v. Noorda*, 2013 UT 64, 321 P.3d 1108, and *State v. Perez*, 2015 UT 13, 345 P.3d 1150. *See* Aplt. Br.17-19. The three cases explained that a court cannot retroactively apply a substantive statutory amendment—as opposed to a procedural one--on the basis that it is a "mere clarification" of the prior statute. *Gressman*, 2013 UT 63, ¶17; *Waddoups*, 2013 UT 64, ¶9; *Perez*, 2015 UT 13, ¶9.

Howick III in no way conflicts with these decisions; it rejected retroactively applying the 2012 amendment under the clarification exception. 2013 UT App 218, ¶¶39, 40–41. Howick concedes this, noting that *Howick III* "expressly stated that the 2012 Amendment could not be applied to 'actions taken before its passage,'" and "was 'not a mere clarification.'" Aplt.Br.18.

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[69] Howick claims that by supposedly applying the 2012 amendment retroactively, *Howick III* "impaired vested rights or altered prohibitions contained in an existing statute." Aplt. Br.23. Howick had no "vested right" that was "impaired" by the decision, and nor was there a statutory "prohibition" that was "altered" by the decision.

C. *Howick III* is not clearly erroneous or manifestly unjust.

Howick contends that *Howick III* is clearly erroneous and manifestly unjust. Aplt. Br.20. That showing is a tall task—one Howick has not come close to satisfying. This Court illustrated the demanding nature of the "clearly erroneous" standard in *Thurston v. Box Elder Cty.*, 892 P.2d 1034 (Utah 1995), when it refused to find an earlier decision clearly erroneous even though the appellant's argument appeared to have some merit. 892 P.2d at 1039. The court concluded that its prior analysis, while "overstat[ing]" a legal issue, had not been "unreasonable" and the "interests of the parties and the court [were] best served by adhering" to the law of the case. *Id.* For a decision to be clearly erroneous, there should be no doubt under established precedent that the decision reached the wrong result, and reversal must be in the interest of the parties and the court. Howick has not met this standard.

D. The authorities cited in *Howick III* are consistent with its holding.

Howick claims that *Howick III* is clearly erroneous because it relied on cases that, as she views them, are not supportive of that decision. Aplt. Br.22-23. Her characterization of these decisions is incorrect and is no basis to reverse *Howick III*.

In *Farmers New World Life Insurance Co. v. Bountiful City*, 803 P.2d 1241 (Utah 1990), the Utah Supreme Court recognized that the appellant's request for damages for indirect, avoidable injuries was inconsistent with the "policy expressed in the current eminent domain statute." *Id.* at 1246 n.2. Although the current statute was "inapplicable," it still was "a reflection of current legislative views on public policy" and supported the court's ruling that the appellant was not entitled to its requested relief. *Id.* at 1246 n.2. *Farmers* thus supports *Howick III*.

Howick also faults *Howick III* for relying on *Ockey*, 2008 UT 37. According to Howick, *Ockey* holds that if a statute prohibits an act, the act is "illegal and void." Aplt.Br.23. *Ockey* does not so hold, and Howick's argument is flawed for several reasons. First, Howick claims that the Merit Protection Statute prohibited her relinquishing her merit status, but identifies no such prohibition in the statute. *Howick III* pointed out that "the Merit Protection Statute contains no express anti-waiver provision," unlike many other statutes. 2013 UT App 218, ¶35. Howick does not controvert *Howick III*'s statement or show it to be erroneous. Next, she ignores *Howick III*'s reliance on *Lee v. Thorpe*, 2006 UT 66, which recognized that "an enforceable contract *can* coexist with a statute that *may conflict* with its terms so long as the contract does not offend the public policy to

which the statute gives voice." *Howick III*, 2008 UT 37, ¶34 (emphasis added). Howick's assertion that a contract cannot conflict with a statute is contrary to *Lee*, which noted that "not every statutory enactment rises to the level of public policy." 2006 UT 66, ¶24. Finally, *Ockey* also relied on *Millard County School District v. State Bank of Millard County*, 14 P.2d 967, 971-72 (Utah 1932), a case in which a bank exceeded its statutory authority and the court still held that the bank's acts did not violate public policy. *Howick III*, 2008 UT 37, ¶22. Under *Millard County*, Howick is incorrect in arguing that any act inconsistent with a statute renders the act void.

Howick III was consistent with *Ockey* and other authorities discussing public policy.

E. Howick does not identify statutes, ordinances, or case law that renders *Howick III* clearly erroneous.

Howick also contends that *Howick III* conflicts with certain statutes, City ordinances, and case law. Utah Code Section 10-3-1221 (1998), cited by Howick, Aplt.Br.24, states that municipal officers can prescribe rules and regulations "not inconsistent" with law. But as *Howick III* noted, the Merit Protection Statute did not contain a provision prohibiting an employee from giving up merit status by contract, waiver, or estoppel. The City did not unilaterally strip Howick of her merit status without her consent, which might be inconsistent with the Merit

Protection Statute. She was given the option of relinquishing merit protection and pursuing a higher-paying, at-will position if she so desired.[70]

Howick also invokes *Baird v. Cutler*, 883 F. Supp. 591 (D. Utah 1995). Aplt.Br.15n.6, 25. Contrary to Howick's apparent belief, Baird has no relevance to this case and is not binding Utah precedent. While *Baird* addresses many issues—a public employee's free speech rights, due process rights, retaliation, and the ability of a City attorney to sue his client, *id.* at 597–607—it has nothing to say about the Merit Protection Statute, public policy, or relinquishing merit status by contract, waiver, and estoppel.

None of Howick's cited authorities is "at odds" with *Howick III*. Aplt.Br.25.

IV. THE DISTRICT COURT PROPERLY CONCLUDED AS A MATTER OF LAW THAT HOWICK RELINQUISHED MERIT PROTECTION THROUGH CONTRACT, WAIVER, AND ESTOPPEL.

The Court of Appeals instructed the district court to adjudicate the City's defenses of contract, waiver, and estoppel. *Howick III*, 2013 UT 218, ¶¶44–45. The district court did so and ruled in the City's favor on all three defenses.

On appeal, Howick ignores the district court's waiver and estoppel rulings. Her inadequate briefing as to these defenses provides ample basis for

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[70] This same analysis applies Howick's citation to Salt Lake City Code §§ 2.53.030.A and 2.53.060.A.

affirmance. *See State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) (noting that issue is inadequately briefed when "the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court").

As to the City's contract defense, Howick attacks the district court's determinations that she received consideration for her at-will position, that the Disclaimer made her an at-will employee, and that a City ordinance regarding public contracts was inapplicable. Aplt.Br.27–34. The district court was correct on all three points.

A. Howick Fails to Challenge the District Court's Waiver and Estoppel Rulings.

Howick's appeal does not address the district court's rulings on the City's defenses of waiver and estoppel. Instead, Howick conflates the City's contract defense with its waiver and estoppel defenses, which she makes particularly clear when she invokes a supposed "waiver contract."[71] She asserts that the City's contract defense "is central to its three defenses," Aplt.Br.34, but provides

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[71] *See* Aplt.Br.26 (arguing that "a contract is a necessary under pinning [sic] for all three of the City's defenses"), Aplt.Br.30 (contending that the City's three defenses rely on the existence of a contract), Aplt.Br.34 (arguing that "[t]he City's contract claim concerning the Disclaimer is central to its three defenses"); *see also* R.2854 (arguing that Howick's argument about a "waiver contract" conflated two independent defenses).

no reasoning for that assertion. Contract, waiver, and estoppel are distinct defenses with different elements.

The differences among the defenses are significant. While a contract is created through offer, acceptance, and consideration, "[w]aiver is the intentional relinquishment of a known right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it."[72] Waiver is not subject to Howick's arguments that she received no consideration or that the City failed to follow public contract law. *See* Aplt.Br.27–33. All the City had to show was that Howick understood she had merit rights and that she intentionally relinquished those rights by accepting the 614 Position. The City did so.

The district court also explained that estoppel requires:

> (1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's [conduct]; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate [its] statement, admission, act or failure to act.[73]

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[72] R.4045 (quoting *Anderson v. Thompson*, 2009 UT App 3, ¶37, 175 P.3d 465).

[73] R.4044 (quoting *Whitaker v. Utah State Retirement Bd.*, 2008 UT App 282, ¶22, 191 P.3d 814).

Again, no consideration is required, and there are no public contract requirements for estoppel. The City only had to show that Howick made a statement, admission, act, or failure to act indicating she was an at-will employee, that the City took reasonable action or inaction as a result, and that allowing Howick to repudiate her at-will status would injure the City. Again, the City did so.

In her opening appellate brief, Howick inadequately briefed any challenge to the grant of summary judgment waiver and estoppel. *See In re Estate of Cosby*, 2003 UT 23, ¶3, 257 P.3d 509 (mem.) (declining to reach inadequately briefed issues). Howick's reply brief does not cure her lack of adequate briefing. Moreover, any additional arguments raised on reply would be improper and should not be considered. *State v. Phathammavong*, 860 P.2d 1001, 1004 (Utah Ct. App. 1993) ("[T]he rule is well settled that the court will not consider issues raised for the first time in a reply brief." (internal quotation marks omitted)).

This Court may affirm the district court's summary judgment ruling on waiver and estoppel without having to turn to Howick's convoluted attacks on the district court's contract ruling.

B. Howick's Acceptance of the At-Will 614 Position Was Supported by Consideration.

The City pointed out that a contract may be oral, in writing, or a combination of the two, and contract formation does not require formality or express language, so long as the elements of a contract are met.[74] On appeal, Howick does not dispute she was offered the 614 Position, that she accepted it, and that she received an 11% raise, in contrast to smaller raises received by attorneys who did not take the 614 Position. She also testified that *before* accepting the position, she "knew it had been stated to [her] that [the position] was at-will."[75]

Confirming her acceptance of an at-will position, Howick signed the Disclaimer stating her new position "will be at-will." She did not object to the terms of the Disclaimer when she signed it, nor did she object when she received the job description stating that the position was at-will.[76] Under these undisputed

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[74] R.1950 (citing Richard A. Lord, *Williston on Contracts*, § 3:2 at 259 (4th ed. 2007)).

[75] R.1928–29, R.3052, R.3071.

[76] Howick references a "1997 Job Description" stating the 614 Position was "an appointed position in the Career Service System." Aplt.Br.10,11; R.2440–41. Although she fails to do so on appeal, Howick correctly acknowledged in the district court that this job description was "a draft." R.1409, ¶21. Cutler asked a subordinate "to take a swing" at the description, and Cutler "was disappointed" that the subordinate "had just taken the old 613 [job description] and hadn't

facts, the district court was correct in holding that the City had satisfied the elements of offer, acceptance, and consideration. *See In re Estate of Beesley*, 883 P.2d 1343, 1351 (Utah 1994) (noting that consideration exists "whenever a promisor receives a benefit or where [a] promisee suffers a detriment, however slight" (internal quotation marks omitted)).

Howick disagrees that she was compensated for the at-will aspect of the 614 Position. She argues that she signed the Disclaimer *after* she accepted the 614 Position and its 11% raise, and, as a result, concludes that she could not have been compensated for the at-will nature of her position. Aplt.Br.28. This temporal argument is beside the point. Howick knew the position was at-will *before* she accepted it and before she signed the Disclaimer. By signing of the Disclaimer, she confirmed and memorialized her acceptance of the position's at-will feature. That the Disclaimer came after she knowingly accepted the offer of an at-will position and its increased compensation does not change the fact that the elements of a contract were met.

Howick also asserts that her 11% raise had nothing to do with relinquishing merit protection because the City's compensation manager did not

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thought it through." R.2897. Cutler did not approve the 1997 draft to which Howick cites. *Id.*

complete a "salary survey" of at-will positions. Aplt.Br.28. Whether a salary survey was done is irrelevant; Howick cannot pick and choose the aspects of the 614 Position for which she was compensated. The only changes in her job were her at-will status and increased pay, as Howick admitted that her job duties did not change. Indeed, as both the City Attorney and the compensation manager testified, the higher pay of 614 Position was provided in exchange for the attorney accepting at-will status. *See* p.10 *supra*.

The undisputed facts show that Howick's acceptance of the at-will position was supported by consideration. Judge Quinn as well as *Howick II* and *III* recognized that Howick received substantial consideration for going at-will. Judge McKelvie did not err in reaching the same conclusion after a fresh look at the undisputed facts.

C. Howick Misinterprets the 600 Series Plan and the City Council's Role.

To avoid the City's contract defense, Howick repeatedly argues that the 614 Position was placed in the Council-approved "merit" 600 Series Plan in 1998. Aplt.Br.29. Based on this assertion, she argues she could not have been an at-will employee. This argument crumbles on Howick's false premise.

The 600 Series Plan was not a "merit" plan. The City's compensation manager stated that the plan included at-will positions—Howick even

acknowledges one at-will position in the 600 Series Plan aside from the 614 Position. Aplt.Br.8. Howick has never identified a single sentence in the 600 Series Plan stating it applies only to merit employees. In contrast, the City highlighted a provision in the 600 Series Plan stating that appointed positions under the plan were "at will."[77] The district court was correct in concluding that the 600 Series Plan "is not a determinative factor of whether a position is . . . at-will or merit status."[78]

Howick also asserts that the City Council "expressly rejected at-will attorney employment." Aplt.Br.29. Not only is this assertion wrong, it is unpreserved. Howick relies on an exhibit to the deposition of Victor Blanton, the City's compensation manager, who testified that he was unfamiliar with the exhibit, that it did not have the City Attorney's seal of approval, and that it "may be a draft" document.[79] Howick cites no testimony or other evidence in the record showing this draft plan was ever presented to the Council.

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[77] R.2859, R.4044.
[78] R.4044.
[79] R.3468–69.

More problematic is that Howick argued the *exact opposite* to the district court and did not cite to this draft version in any of her memoranda.[80] In an effort to portray Cutler as acting outside the Council's authority, Howick argued that the Council *never* discussed and *never* considered making attorney positions at-will.[81] For instance, while Howick asserts on appeal that "someone (in all likelihood Mr. Cutler) asked the Council to make the new 614 position 'at-will,'" Aplt.Br.9, she argued below that "Mr. Cutler *never* asked the City Council to create an at-will attorney position . . . ."[82] Her new assertion that the Council considered and expressly rejected the at-will position is unsupported, contrary to her argument below, unpreserved, and cannot be considered on appeal. *See Winward v. State*, 2012 UT 85, ¶9, 293 P.3d 259; *see also Tele-Commc'ns, Inc. v. C.I.R.*, 104 F.3d 1229, 1233 (10th Cir. 1997) ("Propounding new arguments on

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[80] The exhibit is included in the record because the City, in an effort to avoid piecemeal attachments and citation to deposition transcripts and exhibits, submitted to the district court all deposition transcripts and accompanying exhibits.

[81] R.1411 ("The Council's minutes for its 1998 briefings concerning the City's employment plans and budget show there were no discussions with the Council concerning making any attorney positions 'at will' rather than merit positions . . . ."); R.1412 ("The Council and Mayor thus formally adopted the . . . 600 Series Plan . . . *without considering* or including any at-will employment term for attorneys . . . ." (emphasis added)); R.2749 (arguing that "the City did not even ask the Council to" adopt an at-will position for attorneys).

[82] R.2712 (emphasis added).

appeal in an attempt to prompt [a court] to reverse the trial court undermines important judicial values.").

As the City explained at length below, and as the district court recognized in its decision, the Council adopted general compensation plans as part of its budgetary process. It was not tasked with approving specific job descriptions other than for its own staff.[83] The Salt Lake City Code assigned the executive branch the authority to establish positions and job descriptions within the Council's plans and budgeted appropriations, and the 600 Series Plan allowed the executive branch to create job descriptions and to appoint personnel to positions.[84] Here, the 614 Position was approved by the Mayor's office, human resources, the City Attorney, and the compensation manager as a position within the 600 Series Plan, which included at-will employees. And the City Attorney's salary expenditures in 1998 did not exceed the Council-approved budget.[85]

Accordingly, Howick is wrong in asserting that the creation of the 614 Position was contrary to the Council's actions, Aplt.Br.30, or that somehow the position existed for her to have accepted it and its compensation, but not its at-

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[83] R.4043.

[84] *Id.* A thorough explanation of Howick's misunderstanding of Council involvement is found at R.2859–64.

[85] R.2879, R.2975–81.

will feature. Even assuming *arguendo* there was some bureaucratic mix-up in 1998, as Howick claims, in 2001 the Council approved a plan specific to at-will employees, the Unclassified Plan. Howick's position was in that plan from 2001 until the termination of her employment. She has never explained how her theory of events in 1998 leads to the conclusion that she was not an at-will employee for the subsequent nine years, most of which time her position was in the Unclassified Plan for at-will employees.

D. The District Court Correctly Held that Howick's Relinquishment of Merit Status Did Not Have to Satisfy Public Contract Law.

Finally, Howick contends that she could not have become an at-will employee under contract principles because any such contract is void for failure to satisfy conditions of public contract law.[86] The district court correctly rejected this argument.

Howick relies primarily on Salt Lake City Code section 3.25.010. That ordinance protects *the City* against claims that *the City* has entered into a contract when it has not. The ordinance states that "[n]o liability *against the city* shall or may be created . . . which is not for a public purpose." *Id.* § 3.25.010(A) (emphasis added). It then states that "[n]o contract may become valid or is binding *against*

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[86] The City's response to this argument in the district court is found at R.2872–77.

the city until" seven enumerated prerequisites are established. *Id.* § 3.25.010(B) (emphasis added). This ordinance exists to protect the City from meritless contract claims and to protect public funds. Indeed, it is found after ordinances regarding procurement contracts, and before an ordinance explaining how contractors can enter into contracts with the City. *Id.* § 3.24, § 3.25.030. As the district court correctly concluded, "it is clear that [the ordinance] applies to contracts in which liability is against the City" and not to an employment with a City employee such as Howick.[87]

Howick also cites Utah Code section 10-6-138, which requires the City Recorder to countersign contracts. But again, this statute provides a defense to cities against claims of informal or implied contracts asserted by outside parties. For instance, in *Rapp v. Salt Lake City*, 527 P.2d 651 (Utah 1974), the court rejected the plaintiff's assertion that it had an "implied in fact contract" with the City. *Id.* at 654. Because the supposed implied contract did not comply with the countersignature requirement and other requirements, no liability based on the supposed contract could "be created *against the City*." *Id.* (emphasis added).[88]

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[87] R.4043.

[88] Even if the statute did apply, this Court has not required compliance with the countersignature requirement in all cases against cities. *See, e.g., Midwest Realty v. City of W. Jordan*, 541 P.2d 1109, 1110 (Utah 1975).

Finally, Howick asserts that City Attorney Cutler acted without Council authorization. Aplt.Br.33. As the City has shown above, and as it explained to the district court, Howick's arguments regarding the Council are meritless. No Council authorization was required for the creation of the 614 Position, as it was an executive function. When the City's compensation manager was asked whether the Council would have to approve a job description for a position within a compensation plan, he testified succinctly: "No."[89]

Howick cannot use ordinances and statutes meant to protect the City against contract claims by outside parties to avoid her own acceptance of an at-will employment position. The district court correctly rejected her arguments in holding that she had contractually waived merit status.

In sum, this Court should affirm the district court's dismissal of Howick's declaratory judgment claim under its waiver, estoppel, and contract rulings.

V. THE DISTRICT COURT CORRECTLY ENTERED SUMMARY JUDGMENT ON HOWICK'S OTHER CLAIMS FOR RELIEF.

Howick takes issue with the district court's entry of summary judgment on her three other claims for relief: wrongful termination in violation of statutes and public policy, breach of implied contract, and breach of the implied covenant

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[89] R.3454.

of good faith and fair dealing. As shown below, her at-will status and signing of the Disclaimer are dispositive of those claims.

A. Howick's At-Will Status and Signing of the Disclaimer Are Dispositive of Her Claims for Wrongful Termination, Breach of Implied Contract, and Breach of the Implied Covenant of Good Faith and Fair Dealing.

In its motion for summary judgment, the City explained that, if the district court determined Howick was an at-will employee, this ruling and the undisputed facts of the case would necessarily extinguish her other claims for relief, as Howick pleaded them.[90]

Howick's claim for wrongful termination in violation of statutes and public policy identified two areas of "public policy" the City allegedly violated when it terminated her employment: (1) public policies purportedly contained in the Merit Protection Statute, Utah Code §§ 10-3-1105 and -1106, and (2) public policies allegedly contained in Salt Lake City Code §§ 2.53.020 and .030.[91] The City observed that if Howick was an at-will employee, she would be outside the Merit Protection Statute. Similarly, the ordinances cited by Howick covered "employment practices and decisions relating to . . . [the] *classified career and civil*

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[90] R.1967–72.

[91] *See* R.7-8.

service systems" under the Merit Protection Statute.[92] Howick's 614 Position was "exempt from the career service system."[93] The City could not have violated alleged public policies in statutes and ordinances concerning merit employees if Howick was at-will.

Howick's claim for breach of an implied contract experienced a similar fate because the Disclaimer prohibited it. Howick alleged she had an implied contract created by City "ordinances, policies, procedures, resolutions and compensation plans in furtherance of state municipal employment statutes," as well as procedures enacted by the Salt Lake City Employee Appeals Board.[94] But Howick had signed a Disclaimer acknowledging that her employment was at-will and that

> no oral or written statements (*in personnel manuals, policies, procedures, or elsewhere*) or any conduct of the Mayor, City Attorney, or other City official at any time, other than in a written contract of employment signed by the Mayor or City Attorney, *can create an express or implied contract to the contrary*.[95]

Signing this Disclaimer was more than sufficient under Utah law to preclude Howick from claiming an implied contract with the City contrary to

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[92] Salt Lake City Code § 2.53.020 (emphasis added).
[93] R.2074-75.
[94] R.8.
[95] R.1929 (emphasis added).

what she signed. A clear statement of at-will employment like Howick's, as a matter of law, "prevents employee manuals or other like material from being considered as implied-in-fact contract terms." *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1003 (Utah 1991); *see also Tomlinson v. NCR Corp.*, 2014 UT 55, ¶25, 345 P.3d 523, *reh'g denied* (Feb. 11, 2015).

Finally, Howick's claim for breach of the implied covenant of good faith and fair dealing asserted that her implied contract created by "ordinances, policies, procedures, resolutions and compensation plans" contained an implied covenant of good faith and fair dealing, which the City breached.[96] But because Howick had no implied contract, she could have no claim for breach of the implied covenant of good faith and fair dealing. *See Tomlinson*, 2014 UT 55, ¶32 ("Because we conclude that [appellant] failed to establish the existence of an implied contract, he cannot establish a violation of the covenant of good faith and fair dealing.").

This claim is also a derivative claim, based on the assumption that Howick was a merit employee. The implied covenant claim expressly relies on the Merit

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[96] R.9–10.

Protection Statute and cites to "Utah Code Ann. § 10-3-1105(2)" as a basis for claiming that the City "acted in bad faith."[97]

In its summary judgment motion, the City argued that under Utah law, courts will not inject terms into an at-will employment arrangement under the guise of the implied covenant of good faith and fair dealing because the implied covenant cannot "establish new rights or duties that are inconsistent with express contractual terms." *Young Living Essential Oils, LC v. Marin*, 2011 UT 64, ¶110 n.4, 266 P.3d 814. This Court also has held that where an employee's execution of a disclaimer prohibited an implied contract—as is the case here—the employee cannot "establish a violation of the covenant of good faith and fair dealing." *Tomlinson*, 2014 UT 55, ¶32.

Thus, the City established that if Howick was an at-will employee, it was entitled to summary judgment on her other claims. In her opposition to the City's motion in the district court, Howick dedicated just two pages of her 68-page reply brief to her other claims and did not rebut the City's arguments or authorities.[98]

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[97] R.10 (¶61).
[98] R.2761-62.

B. Howick Cannot Avoid Summary Judgment Under an Unpreserved Theory and a Dilatory, Procedurally Deficient Request for Discovery.

Rather than address the merits of the City's summary judgment motion, Howick contends that (1) the district court erred in finding her claims to be "moot," (2) she could have prevailed on her breach of implied covenant claim under a theory she never pleaded or raised in the district court, and (3) further discovery was necessary on her other claims, even though she failed to move for such discovery under Rule 56(f) of the Utah Rules of Civil Procedure. Aplt. Br. 34-36.

1. The district court's use of the term "moot" does not change its grant of summary judgment on the merits.

Howick faults the district court for stating that her remaining claims were "moot." Aplt.Br.34. In using this term, the district court was merely stating in shorthand that Howick's at-will status was dispositive of her other claims. *See* Black's Law Dictionary (10th ed. 2014) (defining "moot" as "[h]aving no practical significance"). The district court dismissed Howick's other claims on the merits because she "was an at-will employee at the time of her termination."[99] This Court can simply review the City's arguments below and affirm based on the

[99] R.4047.

legal theories and grounds apparent in the record, as well as the fact that Howick has never legitimately challenged the merits of the City's arguments. *See Bailey v. Bayles*, 2002 UT 58, ¶13, 52 P.3d 1158.

2. The Court should reject Howick's unpreserved theory of recovery for breach of the implied covenant.

Howick next argues that the district court erred in granting summary judgment on her claim for breach of the implied covenant of good faith and fair dealing because "it is very conceivable" she could show that she was fired "because she sought to address serious concerns that she observed in the workplace." Aplt.Br.34. This argument is unpreserved.

Howick's Complaint never alleges that she reported workplace concerns or that the City fired her for doing so. Nor did she raise this issue—either through argument or affidavit—in opposing the City's motion for summary judgment. Whether Howick reported "serious concerns" in the workplace was within her personal knowledge. Utah R. Civ. P. 56(e) (2014). She had an obligation to oppose the City's motion through affidavit with any evidence within her personal knowledge, but she did not. *Id.* 56(e). If Howick felt her complaint did not adequately express the bases for her claim, she had the opportunity to seek leave to amend it, but she did not. *See Harper v. Evans*, 2008

UT App 165, ¶14, 185 P.3d 573 (rejecting allegations not contained in complaint where appellant failed to seek leave to amend).

3. Howick failed to move under Rule 56(f) for further discovery on her other claims.

Howick also contends the district court's ruling was premature because her other claims were not subject to discovery and that the parties agreed to stay discovery as to those claims in a scheduling order. These arguments fail for several reasons.

First, Howick did not follow summary judgment procedure to prevail on this argument. If Howick was aware of facts supporting her other claims for relief—aside from her alleged merit status—she was required to oppose the City's motion by submitting an affidavit setting forth those facts to raise genuine and disputes. *See* Utah R. Civ. P. 56(a), (e) (2014). Alternatively, she was required to move under Rule 56(f) and submit an affidavit explaining why she could not adequately oppose the City's motion by affidavit and without further discovery. *Id.* 56(f) (2014).[100] Howick did neither.

Instead, she referenced the need for further discovery *one* time in her opposition memorandum, stating that "[i]f the City prevailed on its current

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[100] The current rule is Rule 56(d).

motion, additional issues would then require discovery and further action."[101] In attempting to articulate why her other claims were different, Howick continued to rely on her asserted merit status—confirming that her other claims were derivative of her declaratory judgment claim.[102] Because she did not submit an affidavit to raise genuine issues of material fact or move for further discovery in compliance with Rule 56(f), the district court did not err in granting summary judgment on her other claims for relief on the merits. *See Midland Funding, LLC v. Pipkin*, 2012 UT App 185, ¶4, 283 P.3d 541 (affirming summary judgment where party failed to submit affidavit raising genuine issue of fact and failed to move under Rule 56(f)); *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶57, 70 P.3d 1 ("[T]he Grynbergs' request to reverse summary judgment to allow discovery was not properly raised before the district court as a rule 56(f) motion, and we will not address the issue as such.").

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[101] R.2760.

[102] *See* R.2761 (arguing that the Unclassified Plan did not comply with the Merit Protection Statute and that Howick held "a position of merit employment"); R.2762 (arguing that the City had committed to using merit practices for positions covered by the Merit Protection Statute); *id.* (arguing that the City breached the implied covenant of good faith and fair dealing by terminating her "at-will and without cause").

To mask these deficiencies, Howick refers to a scheduling order entered on March 31, 2010. Under its terms, any stay regarding discovery and "proceedings" on Howick's other claims lasted only until the district court ruled on her request for declaratory judgment.[103] Any such stay expired when the district court first ruled on her request for declaratory judgment prior to *Howick III*. Upon remand, the district court held a scheduling conference, and its signed minutes from that hearing did not limit the claims upon which the City could seek summary judgment.[104] Under the rules, the City was allowed to move for summary judgment "at any time." Utah R. Civ. P. 56(b) (2014).

But even assuming that the scheduling order somehow precluded the City's motion for summary judgment on Howick's other claims, she did not preserve that argument. Howick's memorandum opposing the City's motion did not reference the March 31, 2010 scheduling order. At the hearing on the parties' cross-motions, Howick vaguely referenced "an agreement" that discovery would be done on "a limited basis," but she did not refer to the March 31, 2010 scheduling order or contend that it procedurally barred the City from moving for

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[103] R.51.

[104] R.1370–72.

summary judgment on her other claims for relief.[105] Her argument is unpreserved. *See 438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶51, 99 P.3d 801 (noting that issue must be "specifically raised" in a way that gives the district court an opportunity to rule on it).

Finally, Howick contends that in one paragraph of a docketing statement filed in 2011, the City "acknowledged that [her] first three causes of action were not affected by the declaratory judgment action." Aplt.Br.35. This assertion is inaccurate. In the docketing statement for *Howick III*, the City stated that "the facts underlying this appeal"—related to Howick's declaratory judgment claim—"are not sufficiently similar to the facts underlying the claims remaining before the trial court to constitute res judicata on those claims." Aplt.Br.Add.3. The City was correct because Howick's other claims were *not the same* as her declaratory judgment claim. *See Pride Stables v. Homestead Golf Club, Inc.*, 2003 UT App 411, ¶15, 82 P.3d 198 (noting that claim preclusion applies to a claim that was previously litigated). It is not inconsistent to later explain to the district court how Howick's other claims depended on her at-will status. Rather than rely on a statement about res judicata in a 2011 docketing statement, Howick was required

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[105] R.4122 at 52:11–53:3.

to "set forth specific facts showing that there [was] a genuine issue for trial" on her other claims. *See Orvis v. Johnson*, 2008 UT 2, ¶18, 177 P.3d 600 (internal quotation marks omitted). She did not.

In light of Howick's procedural deficiencies in opposing summary judgment and her failure in this appeal to address the merits of the City's argument on her other claims, this Court should affirm the entry of summary judgment.

CONCLUSION

As a threshold matter, Howick's declaratory judgment claim is time-barred. Further, *Howick III* was correct in concluding that Howick could, as a matter of law, relinquish her merit status by contract, waiver, and estoppel. The district court correctly determined that Howick did, in fact, relinquish her merit status by contract, waiver, and estoppel. This Court can affirm on all, or any one, of those grounds for summary judgment.

Finally, the City was entitled to summary judgment on Howick's other claims for relief. Her arguments on appeal do not challenge the merits of the City's arguments, but instead raise unpreserved, procedurally barred reasons to further extend this nearly decade-old litigation.

Consequently, the City requests that this Court affirm the district court's judgment in all respects.

DATED this 31st day of March, 2017.

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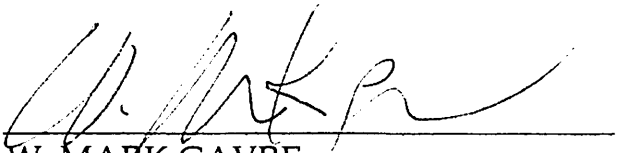
CERTIFICATE OF COMPLIANCE

I hereby certify that in compliance with Rule 24(f)(1) of the Utah Rules of Appellate Procedure, this brief contains 12,698 words, excluding table of contents, table of authorities, and addenda. I further certify that in compliance with Rule 27(b) of the Utah Rules of Appellate Procedure, this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Book Antiqua 13 point.



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2016, I caused to be served by U.S. mail, postage prepaid, two true and correct copies of the foregoing **REPLACENT BRIEF OF APPELLEE** to:

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