

2016

Kelli Gonzalez, Plaintiff-Appellant, vs. Utah Department of Workforce Services, Defendant-Appellee

Utah Court of Appeals

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No. 20150582

IN THE UTAH COURT OF APPEALS

KELLI GONZALEZ,

Plaintiff-Appellant,

vs.

UTAH DEPARTMENT OF WORKFORCE SERVICES,

Defendant-Appellee.

Appeal from the final order dismissing a petition for review, from the Third

District Court, State of Utah

The Honorable Katie Bernards-Goodman presiding.

DEPARTMENT OF WORKFORCE SERVICES' ANSWER BRIEF

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Oral Argument Is Not Requested

**FILED
UTAH APPELLATE COURT**

MAR 22 2016

No. 20150582

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Oral Argument Is Not Requested

LIST OF PARTIES

The plaintiff/appellant is Kelli Gonzalez, “Gonzalez.” The defendant/appellee is the Department of Workforce Services, “Department.”

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JURISDICTION

This Court would normally have jurisdiction over this appeal pursuant to Utah Code § 78A-4-103(2)(a)(ii), which provides jurisdiction over district court review of informal agency adjudicative proceedings. But it is likely that the district court lacked jurisdiction over the case because it was untimely filed and therefore this Court also lacks jurisdiction.

ISSUES PRESENTED

I. Lack of jurisdiction

Under the Administrative Procedures Act, a party has 30 days to seek judicial review of informal agency proceedings. Here, the agency's final order issued on July 18, 2014. But Gonzalez sought judicial review on August 19, 2014—two days late. Did the district court have jurisdiction over the de novo review of the agency proceedings?

Standard of review:

This issue does not require review of the district court decision. “[T]he issue of subject matter jurisdiction is a threshold issue, which can be raised at any time and must be addressed before the merits of

other claims.” *Houghton v. Dep’t of Health*, 2005 UT 63, ¶ 16, 125 P.3d 860 (internal quotation marks omitted).

II. Dismissal for failure to appear

District courts have wide discretion to manage the cases before them. Here, Gonzalez failed to appear at the final pre-trial conference and also failed to inform the district court or counsel for the Department why she failed to appear until a week later. After hearing her excuse for her failure to appear and learning that she could have informed the court before the conference, the district court dismissed the action. Was the district court within the bounds of its discretion?

Standard of review:

This Court will not interfere with a district court’s broad discretion to manage its cases, absent an abuse of discretion. *Solis v. Burningham Enters. Inc.*, 2015 UT App 11, ¶ 12 342 P.3d 812. A decision to dismiss for failure to prosecute is within that broad discretion, and this Court will not disturb the decision absent an abuse of discretion and a likelihood that an injustice has occurred.” *Bryner v. Custodian of Records*, 2016 UT App 40, ¶ 6, — P.3d — (per curiam). This Court will reverse a district court’s exercise of discretion only if

“there is no reasonable basis” for the decision. *Solis*, 2015 UT App 11 at ¶12.

Preservation of the issue:

The Department moved to dismiss the petition for review after Gonzalez’s failure to appear at the final pre-trial conference. R. 529. Gonzalez opposed the motion. R. 534, 534-539. And after a hearing, the district court granted the motion. R. 534, 545-546. The order is attached as addendum A.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, AND
RULES

Any determinative constitutional provisions, statutes or rules are discussed in the body of the brief.

STATEMENT OF THE CASE

Nature of the case:

This appeal arises from the district court’s dismissal of Gonzalez’s petition for judicial review of informal agency action. The Department determined that Gonzalez received food stamp and Medicaid benefits to which she was not entitled. Gonzalez appealed to the district court. The district court dismissed the petition when Gonzalez failed to appear

at the final pre-trial conference, and she failed to adequately keep the district court informed about her failure to appear.

Course of proceedings and disposition below:

Gonzalez filed a petition for judicial review with this Court on August 19, 2013, and this Court transferred it to the district court. R. 54. More than a year later, Gonzales refiled the petition with the district court on September 8, 2014. R. 40-43, 54. The Department moved to dismiss the petition with supporting memorandum, R. 30-31, 32-47, and Gonzalez opposed the motion. R. 52-56. The Department replied. R. 57-62. The district court denied the motion and set the matter for discovery and trial. R. 71.

The district court set the final pre-trial conference for 9:00 a.m. on June 5, 2015. R. 519. Gonzalez failed to appear. R. 529. The Department moved to strike the bench trial and dismiss the petition. R. 529. The district court gave Gonzalez until 2:00 p.m. to appear. R. 545. When she did not, the district court struck the bench trial. R. 529.

At a hearing on June 19, 2015, the district court provided Gonzalez an opportunity to explain her failure to appear. R. 534. After hearing her explanation, the district court determined that, despite

opportunities to do so before the pre-trial conference, Gonzalez failed to adequately and timely inform the court why she failed to appear. R. 534, 545-546. The district court then dismissed the petition for review. *Id.* Gonzalez appealed to this Court. R. 557.

STATEMENT OF FACTS

The Department held informal proceedings and determined that Gonzalez received food stamps and Medicaid coverage to which she was not entitled. R. 17. Gonzalez's husband was living with her and her children during certain periods when she received those benefits and his income was not included in the calculations. R. 17. The Department issued its decision on July 18, 2013. *Id.*

Gonzalez filed a petition for judicial review in this Court on August 19, 2013. R. 54. This Court referred the petition to the Third District Court on September 9, 2013. R. 54. Nothing happened until Gonzalez refiled her petition on September 8, 2014. R. 1, 40-43.

The district court allowed the case to proceed and issued a scheduling order. R. 91-92, 512-514. The bench trial was rescheduled and finally set for June 9, 2015. R. 519. The final pre-trial was set for 9:00 a.m. on June 5, 2015. R. 519.

Gonzalez failed to appear at the pre-trial. R. 529. The Department's counsel moved to strike the bench trial and dismiss the petition. R. 529. The district court did not strike the bench trial until after 2:00 p.m. that day. R. 545. Gonzalez never contacted the court or the Department's counsel on June 5, 2015.

At the hearing on the Department's motion to dismiss, Gonzalez told the court that her mother had fallen down Gonzalez's stairs at 7:30 a.m. on June 5, and had refused medical attention. R. 534, 536, 537-39. The district court noted that Gonzalez failed to inform the court about any of the circumstances until well-after the events. R. 534, 546. Accordingly, the court dismissed the petition.

SUMMARY OF THE ARGUMENT

Subject matter jurisdiction can be raised for the first time on appeal. Here, Gonzalez's initial petition for judicial review was filed in this Court on August 19, 2013. But that was 32 days after the Department issued its final agency action. The petition was therefore two days late, and the district court lacked jurisdiction to hear it.

But even if the district court had jurisdiction over the petition, it did not abuse its discretion when it dismissed it based on Gonzalez's

failure to appear at the final pre-trial conference. Gonzalez had ample opportunity to contact the court or the Department's counsel before the hearing to explain why she could not appear. But she did nothing. Her neglect was not excusable.

ARGUMENT

I. The district court lacked jurisdiction over the petition because it was filed two days late.

Section 63G-4-401(3)(a) of the Utah Administrative Procedure Act (“UAPA”)¹ provides, “A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued” When addressing the filing of these petitions, “[the Utah Supreme Court] as well as the Court of Appeals, has strictly honored the statutory time limitation for filing a petition for judicial review of a final agency action under 63-46b-14(3)(a).” *Union Pac. R.R. Co. v. Utah State Tax Comm’n*, 2000 UT 40, ¶23, 999 P.2d 17. *See also Dusty’s, Inc. v. Auditing Div.*, 842 P.2d 868 (Utah 1992) (holding appeal untimely when filed three days late); *Maverik Country Stores v. Indus. Comm’n*, 860 P.2d 944 (Utah Ct. App.

¹ The Utah Administrative Procedure Act was formerly codified as § 63-46b-14.

1993) (dismissing appeal because appellant filed petition for review one day late); *Bonded Bicycle Couriers v. Dep't of Emp't Sec.*, 844 P.2d 358 (Utah Ct. App. 1992) (holding that filing after thirty-day statutory limitation period has expired is untimely and thus no jurisdiction exists).

Below, the Department moved to dismiss Gonzalez's petition because she filed it on September 8, 2014, more than a year after the Department issued its final agency decision. But the district court ruled that Gonzalez's improper filing of the initial petition with this Court excused her lateness. But no one, including the district court, considered whether the initial filing was timely. It was not.

The Department issued its final decision on July 19, 2013. Gonzalez filed her petition for review on August 19, 2013, albeit in the wrong court. But, to be timely, the petition had to be filed on or before August 17, 2013. Gonzalez's initial filing was two days late. Thus, the district court lacked jurisdiction over the petition.

Jurisdiction can be raised at any time, and challenges to subject matter jurisdiction cannot be waived. *Chen v. Stewart*, 2004 UT 82, ¶ 34, 100 P.3d 1177. The case should be dismissed for lack of jurisdiction.

II. The district court did not abuse its discretion when it dismissed the case based on Gonzalez's failure to appear.

If the district court did indeed have jurisdiction over the petition for judicial review, the district court was well-within the bounds of its discretion when it dismissed the petition based on Gonzalez's failure to appear at the final pre-trial conference. In examining whether the district court was within the bounds of its broad discretion, this Court balances the competing needs of expediting litigation and efficiently using judicial resources against the need to allow parties to have their day in court. *See Bryner*, 2016 UT App 40 at ¶ 6. But the Court always keeps in mind that, "the plaintiff, as the party initiating the lawsuit, has the primary responsibility to move the case forward." *Id.* (quoting *Hartford Leasing Corp. v. State*, 888 P.2d 694, 697 (Utah Ct. App. 1994)).

In the context of a dismissal for failure to prosecute, this Court considers "(1) the conduct of both parties, (2) the opportunity each party has to move the case forward, (3) what each party has done to move the case forward, (4) the amount of difficulty or prejudice that may have

caused the other side, and (5) whether injustice may result from the dismissal.” *Bryner*, 2016 UT App 40 at ¶ 6.

Those factors show that, here, there was no abuse of discretion. The district court’s scheduling order specifically states that, “The parties must appear and bring all relevant evidence and witnesses. If a party fails to appear, an order may be entered against that party.” R. 91, 513. The final pre-trial was scheduled for June 5, 2015 at 9:00 a.m. The Department was present, but Gonzalez was not.

The district court did not immediately strike the bench trial or grant the Department’s motion to dismiss. Instead, the court gave Gonzalez until 2:00 p.m. that day to contact the court or appear. R. 545. She did neither. Nor did she contact the Department’s counsel. The district court set a hearing on the motion to dismiss for June 19, 2015.

At the hearing, Gonzalez told the court that her mother had fallen at 7:30 a.m. on the morning of the pre-trial. R. 534, 536-39. Her mother refused medical attention at that time. *Id.* Gonzalez had time to make several calls before the 9:00 a.m. pre-trial conference, but did not call the court or Department’s counsel. In fact, Gonzalez did not tell anyone about what was going on until a week later.

In addition, the district court noted that Gonzalez's mother waited seven days before seeking any type of medical assessment, and the receipt evidencing a medical assessment did not specify that there was an injury or that any medical care was indeed provided to her mother. R. 546. Furthermore, Gonzalez was not the one injured, and she "failed to keep the Court apprised of the reason for Plaintiff's failure to appear." R. 534, 546.

On appeal, Gonzalez shows no error on the district court's part. She simply reiterates her excuse for not being at the pre-trial conference. But the district court was free to listen to the excuse and judge Gonzalez's credibility, demeanor, and sincerity and make the decision whether the excuse adequately explained the failure to appear or even contact the court. *See Glauser Storage, LCC v. Smedley*, 2001 UT App 141 ¶ 24, 27 P.3d 565 (judge in best position to make credibility assessment).

The district court was within its discretion to dismiss Gonzalez's petition for her failure to appear. Gonzalez could have contacted the court and the Department's counsel on that morning to say she could not appear. She could have even contacted them later that day, but she

did nothing. Moving the case forward was her primary responsibility. Her lack of diligence wasted judicial resources and cost the Department time and money. By failing to appear or to even contact the court, Gonzalez risked the possibility her case would be dismissed. There was no abuse of discretion here.

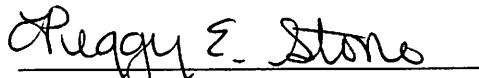
CONCLUSION

The district court lacked jurisdiction to entertain the petition for review here. But even if it did possess jurisdiction, the court did not abuse its discretion when it dismissed the petition based on Gonzalez's failure to appear.

Dated this 22nd day of March, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1)

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because:

this brief contains 2,501 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because:

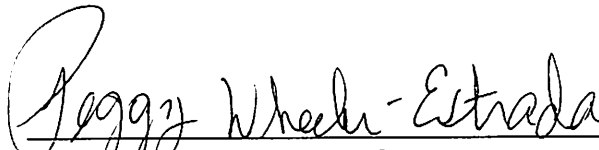
this brief has been prepared in a proportionally spaced typeface using Microsoft Word in at least 14 point Century Schoolbook font.

Peggy E. Stone
Peggy E. Stone

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 2016, a true, correct and complete original brief along with seven bound copies and electronic .pdf copy on CD of the foregoing Utah Department of Workforce Services' Answer Brief was filed with the court and two copies and a CD were served via United States mail as follows:

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Peggy Wheeler-Estrada

ADDENDUM
(Final Order)

The Order of Court is stated below:

Dated: July 09, 2015
01:43:05 PM

/s/ Katie Bernards-Goodman
District Court Judge



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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KELLI A. GONZALEZ, Plaintiff, v. DEPARTMENT OF WORKFORCE SERVICES, Defendant.	FINAL ORDER DISMISSING PLAINTIFF'S PETITION FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION (PROPOSED) Case No. 140906172 Judge Katie Bernards-Goodman
--	--

On June 5, 2015, Plaintiff failed to appear at the final pretrial conference for a bench trial scheduled for June 9, 2015 at 9:00 a.m. Based on Plaintiff's failure to appear, Defendant moved to dismiss the appeal and strike the bench trial. The Court gave Plaintiff until 2:00 p.m. on June 5, 2015 to appear for the final pretrial conference. After Plaintiff failed to appear by 2:00 p.m., the Court struck the bench trial.

Plaintiff subsequently emailed the court to request that her absence at the final pretrial conference be excused due to an unspecified family emergency. The Court scheduled a motion

to dismiss hearing for June 19, 2015 to allow Plaintiff the opportunity to state the reason for her failure to appear. At the motion to dismiss hearing, Plaintiff stated that she failed to appear because her mother had fallen down the stairs at Plaintiff's house, and Plaintiff needed to assist her. The fall occurred at 7:30 a.m. Plaintiff's mother declined emergency care. Plaintiff was able to make several other phone calls before the scheduled time of the final pretrial conference, but did not call the Court or opposing counsel. Plaintiff's mother also waited seven days before seeking any type of medical assessment, and the receipt evidencing a medical assessment does not specify that there was an injury or that any medical care was indeed provided to Plaintiff's mother. Plaintiff was not the one injured, and Plaintiff failed to keep the Court apprised of the reason for Plaintiff's failure to appear.

Based on the foregoing, the Court finds that Plaintiff's reason for not appearing at the final pretrial conference does not excuse her failure to appear. Accordingly, Plaintiff's Petition for Judicial Review of Final Agency Action is dismissed with prejudice.

This is the final order of the Court.

*****END OF ORDER*****
(Signature at the Top of First Page)

CERTIFICATE OF SERVICE

Pursuant to Utah R. Civ. P 5(b)(1)(A)(i), I certify that on July 8, 2015, a true and correct copy of the foregoing **FINAL ORDER DISMISSING PLAINTIFF'S PETITION FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION (PROPOSED)** was sent via United States mail, first class, postage prepaid, to:

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/s/Marie B. Lujan

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ORAL ARGUMENT / PUBLISHED OPINION REQUESTED

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Exhibit B. Nelson Payment Summary (R. 941)

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IN THE UTAH COURT OF APPEALS

ANDREW VEYSEY,
Petitioner/Appellee

vs.

ALEXIS VEYSEY,
Respondent/Appellant.

)
)
)
)
)
)
)

Court of Appeals Case No. 20150609

BRIEF OF APPELLANT

JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(h), resulting from a final Order by the Third Judicial District Court, Salt Lake County, the Honorable Barry Lawrence presiding, entered on July 16, 2015 (the “Order”).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS,

STATEMENT OF ISSUES PRESENTED ON APPEAL, AND

STANDARD OF REVIEW

1. **Issue I:** Did the Court act contrary to Utah law in applying laches as a defense to court-ordered child support?

Determinative Law:

Veysey v. Veysey, 2014 UT App 264, ¶ 15 (Ut. Ct. App. 2014): “[V]ariable daycare expenses constitute child support.”

French v. Johnson, 16 Utah 2d 360, 401 P.2d 315, 316 (Utah 1965): “[A] decree awarding child support payments cannot be avoided by parent’s conduct or agreement.”

McReynolds v. McReynolds, 787 P.2d 530, 533 (Utah App. 1990): “[E]ven contumacious actions by the custodial parent do not . . . preclude the custodial parent from recovering past due child support.”

Doit, Inc. v. Touche Ross & Co., 926 P.2d 835, 845 (Utah 1996): “[W]here the plaintiff’s claims are based in the law, the statute of limitations, not the doctrine of laches, governs the time surrounding a plaintiff’s filing of a complaint.”

Hammond v. Hammond, 14 P.3d 199, 201 (Wyo. 2000): “Laches does not apply to child support collection actions because suits for monetary judgments for child support arrearages are legal rather than equitable.”

In re Marriage of Johnson, 2014 CoA 145 (Colo. 2014): “Laches . . . does not apply to actions for the recovery of past due child support.”

In re Parentage of Shade ex rel. Shade, 126 P.3d 445 (Kan. App. 2006): “[D]efendants in child support actions may not invoke the defense of laches as a bar to the enforcement of . . . legal obligations to their minor children.”

Cowan v. Cowan, 19 P.3d 322 (Okla.Civ.App.Div. 1 2000): “[E]quitable defenses are not available to excuse noncompliance with a support order.”

Standard of Review:

Doyle v. Doyle, 2009 UT App 306, ¶ 6, citing *Huish v. Munro*, 2008 Ut. Ct. App. 283, ¶ 19, 191 P. 3d 1242 (Utah Ct. App. 2008): “Pure questions of law . . . are reviewed for correctness.”

State v. Pena, 869 P.2d 932, 936 (Utah 1994): “[C]orrectness’ means the appellate court decides the matter for itself and does not defer in any degree to the trial judge’s determination of law.”

2. **Issue II:** Did the Court violate the separation of powers doctrine by applying laches to shorten, by nearly two-thirds, the applicable statute of limitations of a case at law?

Determinative Law:

Jacobsen v. Deseret Book Co., 287 F. 3d 936, 951 (10th Cir. 2002): “Because laches is a judicially created equitable doctrine, whereas statutes of limitations are legislative enactments, . . . in deference to the doctrine of the separation of powers . . . when a limitation on the period for bringing suit has been set by statute, laches will generally not be invoked to shorten the statutory period.”

Veysey v. Veysey, 2014 UT App 264, ¶ 15 (Ut. Ct. App. 2014): “[V]ariable daycare expenses constitute child support and . . . the statute of limitations governing enforcement of child support orders applies to Mother’s claim for reimbursement.”

U.C.A. § 78B-5-202(6)(a)(i)(2003): A “child support order . . . may be enforced: (i) within four years after the date the youngest child reaches majority.”

Petrella v Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1973-74 (2014):

“[L]aches is a defense developed by courts of equity . . . and [applies] to claims of an equitable cast for which the Legislature has provided no fixed time limitation.”

Yeager v. Fort Knox Security Products, No. 14-4011, p. 13 (10th Cir. 2015):

“[C]ourts have looked to analogous state limitation provisions and invoked presumptions . . . against laches defenses to claims brought . . . inside the analogous limitations period.”

Fisher v. Davis, 291 P. 493, 494 (Utah 1930): “Laches apply to equitable demands. If a legal right gets into equity, the statute [of limitations] governs.”

Doit, Inc. v. Touche Ross & Co., 926 P.2d 835, 845 (Utah 1996): “[W]here the plaintiff’s claims are based in the law, the statute of limitations, not the doctrine of laches, governs the time surrounding a plaintiff’s filing of a complaint.”

Standard of Review:

Doyle v. Doyle, 2009 UT App 306, ¶ 6, citing *Huish v. Munro*, 2008 Ut. Ct. App. 283, ¶ 19, 191 P. 3d 1242 (Utah Ct. App. 2008): “Pure questions of law . . . are reviewed for correctness.”

State v. Pena, 869 P.2d 932, 936 (Utah 1994): “[C]orrectness’ means the appellate court decides the matter for itself and does not defer in any degree to the trial judge’s determination of law.”

3. **Issue III:** Did the Court act contrary to Utah law in finding unreasonable delay, despite also finding that Nelson brought the action well within the applicable statute of limitations?

Determinative Law:

Lee v. Gaufin, 867 P.2d 572 (Utah 1993): Statutes of limitations are “designed . . . to necessarily allow a ‘reasonable’ time in which to file a lawsuit . . . What shall be considered a reasonable time must be settled by the judgment of the legislature.”

Jacobs v. Hafen, 917 P.2d 1078 (Utah 1996): “[Parties] have a right to rely on the certainty the statute [of limitations] provides.”

Standard of Review:

Doyle v. Doyle, 2009 UT App 306, ¶ 6, citing *Huish v. Munro*, 2008 Ut. Ct. App. 283, ¶ 19, 191 P. 3d 1242 (Utah Ct. App. 2008): “Pure questions of law . . . are reviewed for correctness.” .

State v. Pena, 869 P.2d 932, 936 (Utah 1994): “[C]orrectness’ means the appellate court decides the matter for itself and does not defer in any degree to the trial judge’s determination of law.”

4. **Issue IV:** Did the Court act contrary to Utah law by rendering a finding of prejudice with respect to expenses incurred prior to an arbitrary date of April, 2005?

Determinative Law:

Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg, 2010 UT 51, ¶ 28, 238 P.3d 1054, 1063 (Utah 2010): “Laches has two elements: (1) a party’s lack of diligence and (2) an injury resulting from that lack of diligence.”

Papanikolas Bros. Ent. v. Sugarhouse Shopping Center Assoc., 535 P.2d 1256, 1260 (Utah 1975): “Laches is not mere delay, but delay that works a disadvantage to another.”

Standard of Review:

Johnson v. Johnson, 2014 UT 21, ¶ 8, 330 P.3d 704 (Utah 2014): “[T]he question of laches presents a mixed question of law and fact.”

Anderson v. Doms, 984 P.2d 392, 396 (Ut. Ct. App. 2003): “[T]he determination of whether a party was prejudiced for purposes of the doctrine of laches is a legal conclusion that we review for correctness.”

Anderson v. Doms, 984 P.2d 392, 396 (Ut. Ct. App. 2003): “[W]e will not set aside a trial court’s findings of fact underlying that conclusion [of prejudice] unless they are clearly erroneous.”

STATEMENT OF THE CASE

A Decree of Divorce between the parties was entered on September 9, 1999. (R. 60). An Order Modifying Decree of Divorce (the “Modification Order”) was entered in February, 2013. (R. 305). The Modification Order includes a provision acknowledging that Appellant Alexis Nelson (“Nelson”) believes that Appellee Andrew Veysey (“Veysey”) is in arrearages for child support and day care, and that Nelson may pursue her claims with the court. (R. 311). In March, 2013, Nelson filed a Motion for Order to Show Cause for past-due child support and daycare expenses incurred from September 2002 – June 2006. (R. 316).

A hearing on the Motion was held on April 1, 2013 before Commissioner Blomquist. (R. 556). The Commissioner held that the statute of limitations on child care expenses and the principle of laches precluded consideration of child care expenses more than eight years old. (R. 556-557). Nelson filed an objection to the Commissioner's recommendation (R. 505), which was followed on June 20, 2013 by an evidentiary hearing before the Honorable L.A. Dever. (R. 575). On July 12, 2013, the trial court entered a minute entry approving the order of the Commissioner. (R. 577).

Nelson appealed the order in its entirety. (R. 593). On November 14, 2014, this Court vacated the district court's order and remanded for further proceedings. (R. 707). A second evidentiary hearing was held on June 16, 2015 before the Honorable Barry Lawrence. (R. 949). On July 16, 2015, the district court entered an order holding that although all of Appellant's claims for reimbursement fell within the applicable statute of limitations, the claims prior to April 2005 were barred by laches. (R. 964).

Specifically, with respect to the unreasonable delay element of laches, the Court found that Nelson's "knowledge as an attorney of the applicable statute of limitations does not excuse her delay, and is not applicable to a laches analysis . . . [Nelson] failed to adequately explain the reasons for the delay and failed to explain her lack of diligence in pursuing the claims, other than her assertion that she believed the statute of limitations had not yet run. The Court was not persuaded that her conduct was justified, reasonable, or diligent." (R. 965).

With respect to the undue prejudice element of laches, the Court found that “by failing to properly raise the issue at the time, [Veysey] was prevented from having an opportunity to contest the amount owed, [and that] the passage of time has also made it difficult to demonstrate the amount owed.” (R. 966). Despite this finding, the Court also found, with respect to the expenses incurred after April, 2005, “[Veysey] does not strenuously object to those costs [and] as a result, [Veysey] cannot demonstrate the same level of prejudice with respect to those amounts. Accordingly, laches does not bar those claims.” (R. 966).

Following the Court’s Order, Nelson filed a Motion to Alter or Amend Judgment Under Rule 59(e), based on an error in law. (R. 977). Specifically, Nelson submitted that the Court’s Order was erroneous because it failed to consider the seminal Utah Supreme Court case *Doit, Inc. v. Touche Ross & Co.*, 926 P.2d 835, 845 (Utah 1996), which prohibits application of laches to a claim based in law and governed by a statute of limitations. (R. 977). On September 23, 2015, the Court denied Nelson’s Motion. (R. 1035).

STATEMENT OF FACTS

Nelson incorporates those facts referenced above as they may be relevant to any issue stated here.

The Court of Appeals in this case found that the “commissioner’s recommendation contains no findings supporting a determination that laches applies,” (R. 714) and that, as a result, “the commissioner’s recommendation – and, accordingly, the district court’s

adoption of that recommendation – was erroneous.” (R. 715). This Court further held that “additional findings are necessary to determine which of [Nelson’s] expenses may be properly reimbursed.” (R. 716).

In dicta, this Court equivocated the point, opining that “[i]f supported by adequate findings, a determination that some portion of [Nelson’s] claims are barred by laches would not necessarily be inappropriate. Alternatively, based on adequate findings, the district court may exercise its discretion to deny [Nelson’s] claims if it determines that she failed to comply with Utah Code section 78B-12-214(2)(b), which outlines the verification requirements a parent must comply with to obtain reimbursement for daycare expenses . . . or with the requirements of the parties’ divorce decree. Or the district court may conclude that all of [Nelson’s] claims are reimbursable because they were brought within the statute of limitations.” (R. 716).

On remand, the district court found that “[a]ll of [Nelson’s] claims for reimbursement fall within the applicable statute of limitations.” (R. 964). The court also held that “Utah Code Ann. § 78B-12-214 [is] not dispositive of this case.” (R. 965). The court relied exclusively on a laches analysis to limit reimbursement to Nelson to the amount owed for the time period from April 2005 – June 2006. (R. 965-967). To this end, the court heard testimony from Nelson and Veysey to “make a determination concerning the reasonableness of Ms. Nelson’s actions and any prejudice to Mr. Veysey.” (R. 1039 at p. 7, ln. 6-8).

With respect to reasonableness, Nelson explained that she “was aware of the statute of limitations [and] didn’t think there was any urgency [to file her claim].” (R. 1039 at p. 29, ln. 18-20). She further testified that “[t]he main reason” she waited to bring the action was “that [Veysey] kept assuring me that he would pay or that he would get caught up on payments when he could[. And] because he was paying [at least something], I took him at his word that he would get caught up[.]” (R. 1039 at p. 29, ln. 29 - p. 30, ln. 3). Nelson further testified that when “[Veysey] relocated to Arizona[,] he told me that he was going to be seeking modification of the divorce decree and that all of the arrearages [could be taken care of] at that point.” (R. 1039 at p. 30, ln. 14-20).

Veysey’s testimony did not contradict Nelson’s in this regard. (R. 1039). The Court, however, found that “[w]ith respect to the element of unreasonable delay, [Nelson’s] knowledge as an attorney of the applicable statute of limitations does not excuse her delay, and is not applicable to a laches analysis . . . [Nelson] failed to adequately explain the reasons for the delay and failed to explain her lack of diligence in pursuing the claims, other than her assertion that she believed the statute of limitations had not yet run. The Court was not persuaded that her conduct was justified, reasonable, or diligent.” (R. 965, ¶ 5).

With respect to prejudice, Nelson testified that Veysey was on notice that the children were attending Challenger School, and that he was responsible to pay half. Nelson testified that she specifically discussed the daycare expense with Veysey prior to enrolling the children at Challenger School (R. 1039 at p. 28, ln. 6 – p. 29, ln. 11), that

she personally gave Veysey updated pricing sheets from Challenger prior to the beginning of each applicable school year (R. 1039 at p. 34, ln. 4-12), that Veysey was aware of and consented to the children's ongoing attendance at Challenger (R. 1039 at p. 34, ln. 1-3), and that Nelson regularly requested payment from Veysey (R. 1039 at p. 31, ln. 7 – p. 32, ln. 1).

Veysey testified that “[t]here may have been a handbook that she may have shown me[.]” (R. 1039 at p. 53, ln. 20-21). He also testified that he knew immediately when the children were enrolled at Challenger because he picked them up there and went to their programs. (R. 1039 at p. 54, ln. 8 – p. 55, ln. 4). When the Court asked Veysey how he could be aware the children were attending Challenger but not be aware that the child care payments he was making were going toward that expense, Veysey replied, “I don’t remember what I was paying for.” (R. 1039 at p. 55, ln. 5-10).

Veysey testified that Nelson never told him that he was not expected to pay towards the tuition costs of Challenger, but that tuition costs were never discussed (R. 1039, p. 48, ln. 17-21). Veysey testified that he did not recall whether he had ever objected to enrolling the children at Challenger. (R. 1039 at p. 45, ln. 17-19). Veysey testified that he “would have objected because [he] wasn’t making very much money,” (R. 1039 at p. 46, ln. 2-3). This testimony, however, contradicted Veysey’s testimony at the first evidentiary hearing where he testified that, “My bank records clearly show I had the money.” (R. 1039 at p. 57, ln. 5-13). Veysey testified that he understood that “under

the terms of the divorce, [Nelson] had sole custody of the children [and] the legal authority . . . to make decisions regarding their care.” (R. 1039 at p. 57, ln. 15-20).

Nelson presented a detailed accounting (R. 941) summarizing daycare and child support costs incurred, by month, and payments received from Veysey therefor. (R. 1039 at p. 10, ln. 4 – p. 11, ln. 8). This summary (R. 941) was nearly identical to the summary received into evidence as Exhibit R-B (R. 617) at the first evidentiary hearing and was supported by the same back-up documents, including the Challenger ledger (R. 596 at pp. 7-8) (received as Exhibit R-A at R. 596, p. 8), Nelson’s bank records from America First (R. 618), and Veysey’s bank records from America First (R. 635). (R. 1039 at p. 14, ln. 7-22, p. 18, ln. 10-18).

Nelson testified that the only differences between the summary (R. 941) presented on remand and the previous summary entered into evidence (R. 617) were: (1) calculation of Veysey’s portion of all-day kindergarten expenses, necessitated by the Court of Appeals’ ruling in this case (R. 1039 at p. 12, ln. 13-20); (2) exclusion of costs and late fees (R. 1039 at p. 15, ln. 1-5); and (3) inclusion of interest (R. 1039 at p. 32, ln. 5-16).

Nelson testified that Veysey always paid “child support and day care expenses by direct deposit from his America First account to my America First account.” (R. 1039 at p. 11, ln. 18-23). At the first evidentiary hearing, Nelson likewise testified that Veysey made payments by direct deposit, and that she never received cash payments from Veysey. (R. 596 at p. 24, ln. 14-17; p. 25, ln. 12-14). Veysey’s testimony did not contradict Nelson’s. Indeed, Veysey testified that he never paid “a penny” towards child

care expenses for the children while they attended Challenger. (R. 596 at p. 45, ln. 13-18) (R. 1039 at p. 57, ln. 5-10). Veysey's attorney, however, argued that there could have been one cash payment for child support on May 13, 2003. (R. 596 at p. 34, ln. 14 - p. 35, ln. 11)(R. 1039 at p. 77, ln. 1-2).

The Court found, with respect to prejudice, "that by failing to properly raise the issue at the time, [Veysey] was prevented from having an opportunity to contest the amount owed." (R. 966, ¶ 13). The Court also found that "[t]he passage of time has . . . made it difficult to demonstrate the amount owed. For example, [Nelson's] payment summary entered into evidence only dealt with credit card payments made by [Veysey]. If there were cash payments or some equitable adjustments that needed to be made, those would not have been able to be made because of the passage of time. If [Nelson] were now permitted to claim the child care expenses from 2002 to 2005, that would be unfair to [Veysey] . . . As a result . . . [Veysey] was prejudiced by the delay sufficient to support a finding of laches." " (R. 966, ¶¶ 14, 15).

The Court further held, however, that it was "not persuaded that the Commissioner's ruling allowing the April 2005 to June 2006 costs should be disallowed. Moreover, [Veysey] does not strenuously object to those costs. As a result, [Veysey] cannot demonstrate the same level of prejudice with respect to those amounts. Accordingly, laches does not bar those claims." (R. 966, ¶ 16).

The Court found Nelson's testimony persuasive regarding the "amount owed for the time period from April 2005 – June 2006," finding specifically that Nelson's payment

summary for this time period was “a reasonable approximation of the amount owed, and is consistent with the Court of Appeals’ mandate regarding the calculation of [Veysey’s] portion of kindergarten expenses.” (R. 967, ¶ 18).

With respect to Nelson’s Motion to Amend or Alter Judgment (R. 977), the parties agreed that “*Doit, Inc.* stands for the proposition that a claim based in law is governed by the applicable statute of limitations, not the doctrine of laches.” (R. 992, ¶ 6). The parties also agreed that “[Nelson’s] claims are based in the law.” (R. 992, ¶ 5).

SUMMARY OF ARGUMENT

First, applicable law precludes laches as a defense to court-ordered child support, including variable daycare expenses. This Court held that “variable daycare expenses constitute child support.” *Veysey v. Veysey*, 2014 UT App 264, ¶ 15 (Ut. Ct. App. 2014); (R. 714). Enforcement of court-ordered child support is based in the law. See *Hammond v. Hammond*, 14 P.3d 199, 201 (Wyo. 2000). “[W]here . . . claims are based in the law, the statute of limitations, not the doctrine of laches, governs the time surrounding a plaintiff’s filing of a complaint.” *Doit, Inc. v. Touche Ross & Co.*, 926 P.2d 835, 845 (Utah 1996). The statute of limitations, not laches, thus applies in this case.

Second, the separation of powers doctrine provides that laches should not be invoked where the legislative branch of the government has already made a clear policy judgment by establishing a statute of limitations. *Jacobsen v. Deseret Book Co.*, 287 F. 3d 936, 951 (10th Cir. 2002). Here, the Utah legislature established a limitations period

for child support arrearages, and to allow judges to equitably shorten that period would violate the separation of powers.

Third, Nelson's compliance with the applicable statute of limitations renders any delay reasonable per se. Statutes of limitations "necessarily allow a 'reasonable' time in which to file a lawsuit." *Lee v. Gaufin*, 867 P.2d 572, (Utah 1993). The Court found that Nelson relied on the applicable statute of limitations to determine when to bring suit. (R. 965, ¶ 5). Under Utah law, such reliance was per se reasonable. Accordingly, it was erroneous for the Court to find that Nelson was not reasonable in her delay.

Fourth, the finding of prejudice with respect to expenses incurred prior to April, 2005 is clearly erroneous. This finding goes against the weight of the evidence and the parties' testimony. Further, there are no facts on record to support the apparently arbitrary cutoff date of April, 2005. Rather, this date seems to originate from the Commissioner's initial recommendation based on an erroneous statute of limitations, which was later reversed by this Court. Using this date to support a finding of prejudice only perpetuates already-established legal error.

ARGUMENT

I. UTAH LAW PRECLUDES LACHES AS A DEFENSE TO COURT-ORDERED CHILD SUPPORT, INCLUDING VARIABLE DAYCARE EXPENSES.

This Court established that "variable daycare expenses constitute child support and that the statute of limitations governing enforcement of child support orders applies to [Nelson's] claim for reimbursement." *Veysey v. Veysey*, 2014 UT App 264, ¶ 15 (Ut. Ct.

App. 2014); (R. 714, ¶ 15). Under Utah law, a “child support order . . . may be enforced: (i) within four years after the date the youngest child reaches majority.” U.C.A. § 78B-5-202(6)(a)(i)(2003).

Child support is defined as “the money legally owed by one parent to the other for the expenses incurred for children of the marriage.” (R. 714). Enforcement of court-ordered child support, including variable daycare expenses, is thus based in law, not equity. *See Hammond v. Hammond*, 14 P.3d 199, 201 (Wyo. 2000)(“Laches does not apply to child support collection actions because suits for monetary judgments for child support arrearages are legal rather than equitable.”). The parties agree on this point. (R. 992, ¶ 5).

The Utah Supreme Court has specifically rejected the application of laches as a defense to legal claims. *“[W]here the plaintiff’s claims are based in the law, the statute of limitations, not the doctrine of laches, governs the time surrounding a plaintiff’s filing of a complaint.”* *Doit, Inc. v. Touche Ross & Co.*, 926 P.2d 835, 845 (Utah 1996)(citing *United States v. Mack*, 295 U.S. 480, 489 (1935)(“Laches within the term of the statute of limitations is no defense at law.”))(emphasis added).

The parties agree that claims for daycare expense arrearages arising from a child support order are legal rather than equitable. (R. 992, ¶ 5). Since a statute of limitations has been enacted to apply to such claims, laches cannot be invoked against claims brought within the limitations period. This result is consistent with other Utah law acknowledging that “a decree awarding child support payments cannot be avoided by

parent's conduct or agreement," and that "even contumacious actions by the custodial parent do not . . . preclude the custodial parent from recovering past due child support." *French v. Johnson*, 16 Utah 2d 360, 401 P.2d 315, 316 (Utah 1965); *McReynolds v. McReynolds*, 787 P.2d 530, 533 (Utah App. 1990).

This result also comports with the large majority of courts within the Tenth Circuit, which specifically hold that laches is not available as a defense to court-ordered child support. *See Hammond*, 14 P.3d at 201; *In re Marriage of Johnson*, 2014 CoA 145 (Colo. 2014)("Laches . . . does not apply to actions for the recovery of past due child support"); *In re Parentage of Shade ex rel. Shade*, 126 P.3d 445 (Kan. App. 2006)("[D]efendants in child support actions may not invoke the defense of laches as a bar to the enforcement of . . . legal obligations to their minor children."); *Cowan v. Cowan*, 19 P.3d 322 (Okla.Civ.App.Div. 1 2000)("[E]quitable defenses are not available to excuse noncompliance with a support order.").

In this case, Veysey's obligation to reimburse Nelson for daycare expenses arises from the 1999 support order. (R. 79). The parties agree that enforcement of that order is an action at law, not in equity. (R. 992, ¶ 5). Accordingly, "the statute of limitations, not the doctrine of laches, governs the time surrounding Nelson's filing of a complaint." *Doit*, 926 P.2d at 845. "All of [Nelson's] claims . . . fall within the applicable statute of limitations." (R. 964). Accordingly, all of Nelson's claims, including interest, are valid and reimbursable.

II. APPLYING LACHES TO SHORTEN A STATUTE OF LIMITATIONS VIOLATES THE SEPARATION OF POWERS DOCTRINE.

In deference to the separation of powers doctrine, an equitable principle such as laches should not be invoked where the legislative branch of the government has already made a clear policy judgment by establishing a statute of limitations. *See Jacobsen v. Deseret Book Co.*, 287 F. 3d 936, 951 (10th Cir. 2002). In this case, “[t]he statute of limitations governing enforcement of child support orders applies to Mother’s claim for reimbursement.” *Veysey v. Veysey*, 2014 UT App 264, ¶ 15 (Ut. Ct. App. 2014). This statute provides that a “child support order . . . may be enforced: (i) within four years after the date the youngest child reaches majority.” U.C.A. § 78B-5-202(6)(a)(i).

Even under extraordinary circumstances (such as Lanham Act claims where there is “no fixed time limitation” and the doctrine of laches performs a “gap-filling” function) (see *Petrella v Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1973-74 (2014)), “courts have looked to analogous state limitation provisions and invoked presumptions . . . against laches defenses to claims brought . . . inside the analogous limitations period.” *Yeager v. Fort Knox Security Products*, No. 14-4011, p. 13 (10th Cir. 2015).

Moreover, the Utah Supreme Court has specifically addressed this issue, holding that “where the plaintiff’s claims are based in the law, the statute of limitations, not the doctrine of laches, governs the time surrounding a plaintiff’s filing of a complaint.” *Doit*, 926 P.2d at 845; see also *Fisher v. Davis*, 291 P. 493, 494 (Utah 1930)(“Laches apply to equitable demands. If a legal right gets into equity, the statute [of limitations] governs.”).

In this case, this Court specifically found that all of Nelson's claims fall within the applicable statute of limitations. (R. 714). The parties agree that Nelson's claims are based in the law. (R. 992, ¶ 5). The Utah legislature established a limitations period, and to allow judges to equitably shorten that period would violate the separation of powers. It was thus clearly erroneous for the district court to apply laches to Nelson's legal claims for daycare expense reimbursement, which were brought well within the statute of limitations. All of Nelson's claims, plus interest, should be deemed valid and reimbursable.

III. NELSON'S COMPLIANCE WITH THE APPLICABLE STATUTE OF LIMITATIONS RENDERS ANY DELAY REASONABLE PER SE.

Statutes of limitations "necessarily allow a 'reasonable' time in which to file a lawsuit." *Lee v. Gaufin*, 867 P.2d 572, (Utah 1993); see also *McHenry v. Utah Valley Hosp.*, 724 F.Supp. 835 (D. Utah 1989)((citing *Brubaker v. Cavanaugh*, 741 F.2d 318, 321 (10th Cir. 1984)(A "statute [of limitations] provides a reasonable length of time in which to bring suit.")). "What shall be considered a reasonable time must be settled by the judgment of the legislature." *Id.* (citing *Wilson v. Iseminger*, 185 U.S. 55, 63 (1902)).

A statute of limitations provides certainty, uniformity and predictability by prescribing what constitutes a "reasonable time" for bringing suit. *Jacobs v. Hafen*, 917 P.2d 1078, 1081 (Utah 1996); see also *State of Utah v. Canton*, 308 P.3d 517, 522 (Utah 2013) ((citing *Johnson v. Nedeff*, 192 W. Va. 260, (W. Va. 1994)(rejecting a request to read an equitable exception into a statute of limitations because "[d]efendants have a

right to rely on the certainty the statute provides,” in accordance with “the legislative intent underlying such provisions”).

Nelson testified, and the Court found, that Nelson relied on the applicable statute of limitations to determine when to bring suit. (R. 965, ¶ 5). The Court held, however, that “[Nelson’s] knowledge . . . of the applicable statute of limitations does not excuse her delay, and is not applicable to a laches analysis.” (R. 965, ¶ 5). This is a misapplication of Utah law. To the contrary, compliance with a statute of limitations renders any delay within that established time period as reasonable per se, and even desirable as a matter of public policy. It was thus erroneous for the Court to find that Nelson “was not reasonable in her delay.” (R. 965, ¶ 12).

IV. THE FINDING OF PREJUDICE WITH RESPECT TO EXPENSES INCURRED PRIOR TO APRIL, 2005 IS CLEARLY ERRONEOUS.

“Laches has two elements: (1) a party’s lack of diligence and (2) an injury resulting from that lack of diligence.” *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg*, 2010 UT 51, ¶ 28, 238 P.3d 1054, 1063 (Utah 2010) “Laches is not mere delay, but delay that works a disadvantage to another.” *Papanikolas Bros. Ent. v. Sugarhouse Shopping Center Assoc.*, 535 P.2d 1256, 1260 (Utah 1975).

Here, the Court held that Veysey was “prejudiced by the delay sufficient to support a finding of laches” with respect to the child care expenses from 2002 to 2005, but that “[Veysey] cannot demonstrate the same level of prejudice with respect to [the child care expenses from April, 2005 to June, 2006].” (R. 966, ¶¶14-16). There are,

however, no facts on record to support the apparently arbitrary cutoff date of April, 2005. The only finding the Court makes to justify this date is that “[Veysey] does not strenuously object to those costs. (R. 966, ¶ 16). This finding fails to demonstrate how the April, 2005 cutoff date marks separates a “delay that works a disadvantage to [Veysey]” from a delay that does not.

In fact, the April, 2005 date seems to originate from the Commissioner’s initial recommendation, and the district court’s adoption thereof, of an erroneous statute of limitations. (R. 556-557). Since this holding was later reversed by this Court of Appeals (R. 714, ¶ 15), the April, 2005 cutoff date used to support the district court’s finding of prejudice only perpetuates already-established legal error.

Moreover, the findings of fact used to support the Court’s holding of prejudice with respect to the 2002 – 2005 amounts are contradicted by the record, as well as by the findings of fact used to support the Court’s holding of no prejudice with respect to the post-April, 2005 expenses. First, for example, the Court found that “[Veysey] was prevented from having an opportunity to contest the amount owed. [This] should have been brought to [Veysey’s] attention so that he could have challenged that at the time, and perhaps cause the parties to agree to a less expensive provider.” (R. 966, ¶ 13). The record, however, shows that Veysey understood that Nelson had sole custody of the children, and hence “the legal authority . . . to make decisions regarding their care.” (R. 1039, at p. 57, ln. 15-20). In other words, Veysey was not legally entitled to challenge

the selection of a particular child care provider. A finding of prejudice on this basis is thus unsupported by facts in evidence.

Further, no fact in evidence supports the cutoff date of April, 2005 with respect to a prejudice analysis. The child care provider and all other facts concerning the children's enrollment there were consistent from September, 2002 until June, 2006. (R. 938)(Ex. R-A). Both parties testified that Veysey was on notice that the children were enrolled at Challenger and incurring costs there from their initial enrollment in 2002. (R. 1039 at p. 54-55). Moreover, all of the testimony from Nelson and Veysey at the evidentiary hearing and on remand covered the entire time period in question, from 2002 – 2006. (R. 596, 1039). There was never any mention of any material fact happening in April, 2005. It was thus clearly erroneous to arbitrarily set a cutoff date of April, 2005 to support a finding of prejudice.

Second, the Court found that “[t]he passage of time has also made it difficult to demonstrate the amount owed. For example, [Nelson’s] payment summary entered into evidence only dealt with credit card payments made by [Veysey]. If there were cash payments or some equitable adjustments that needed to be made, those would not have been able to be made because of the passage of time. If [Nelson] were now permitted to claim the child care expenses from 2002 through 2005, that would be unfair to [Veysey].” (R. 966).

This finding of fact is clearly erroneous as it goes against the weight of the evidence and the parties’ testimony. Nelson consistently testified that Veysey always

paid “child support and day care expenses by direct deposit from his America First account to my America First account” and that she never received cash payments from Veysey. (R. 1039 at p. 11, ln. 18-23) (R. 596 at p. 25, ln. 12-14). While Veysey’s attorney argued that it was possible that one cash payment was made for child support in May 2003, Veysey personally testified that he never paid “a penny” toward the child care expenses at issue. (R. 596 at p. 34, ln. 14 - p. 35, ln. 11) (R. 596 at p. 45, ln. 13-18). Indeed, Veysey repeatedly admitted that no cash payments, or any payments whatsoever, were made for child care expenses. (R. 596 at p. 45, ln. 13-18) (R. 1039 at p. 57, ln. 5-10). As a result, the amount owed for child care expenses is easily determined by reconciling the parties’ bank records, as clearly set forth in Nelson’s payment summary. (R. 941).

The Court also found that “[b]ased upon [Nelson’s] testimony, the amount owed for the time period from April 2005 – June 2006 . . . is a reasonable approximation of the amount owed, and is consistent with the Court of Appeals’ mandate regarding the calculation of [Veysey’s] portion of kindergarten expenses.” (R. 967). There is absolutely nothing in the record and no finding of fact which would support treating the amount owed from September 2002 – April 2005 any differently from the amount owed from April 2005 – June 2006. Nelson relied on the same underlying documents and methodology to calculate all amounts due from 2002 – 2006, and the Court indicated that it understood the methodology, and that the amounts were reasonably accurate. (R. 1039 at p. 14, ln. 6-22; p. 20, ln. 21-22)(R. 967).

Indeed, the Court's holding of prejudice with regard to the child care expenses from 2002 through 2005 based on the finding that "[t]he passage of time has . . . made it difficult to demonstrate the amount owed" does not comport with the Court's contemporaneous finding that "[b]ased upon [Nelson's] testimony, the amount owed for the time period from April 2005 – June 2006 . . . is a reasonable approximation of the amount owed." Since the amount owed from April 2005 – June 2006 is reasonable, then all amounts owed from 2002 -2006 should be deemed reasonable and reimbursable to Nelson, including interest.

CONCLUSION

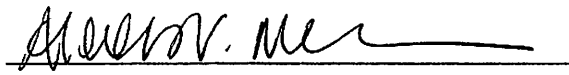
Laches cannot be applied to deny or limit Nelson's claims for child care expense arrearages. Utah law provides that variable daycare expenses constitute child support. Laches does not apply to Nelson's claims because suits for monetary judgments for child support arrearages are legal rather than equitable. The Utah Supreme Court has held that "where the plaintiff's claims are based in the law, the statute of limitations, not the doctrine of laches, governs the time surrounding a plaintiff's filing of a complaint." Moreover, the Utah legislature established a limitations period, and to allow judges to equitably shorten that period would violate the separation of powers.

With respect to the elements of laches, the Court's finding of unreasonable delay is clearly erroneous since Nelson relied on the statute of limitations to determine when to file suit. Statutes of limitations are specifically enacted to define what period of time is reasonable for bringing suit, and parties have a right to rely on the certainty the statute

provides. Nelson's compliance with the statute of limitations renders any delay within that established time period as reasonable per se. The Court's finding of prejudice with respect to expenses incurred prior to April, 2005 is also clearly erroneous. There are no facts on record to support the apparently arbitrary cutoff date of April, 2005. Rather, the April, 2005 date seems to stem from the Commissioner's recommendation of an erroneous statute of limitations, thereby perpetuating already-established legal error. The findings of fact used to support the holding of prejudice contradict the weight of the evidence, and other findings of fact.

The Court's order in this case should be reversed and all of Nelson's claims for child expense arrearages from 2002 – 2006 should be deemed reimbursable, plus interest, because they were brought within the statute of limitations.

SIGNED and DATED this 19th day of February, 2016.



Alexis V. Nelson
Pro Se

CERTIFICATE OF MAILING

I hereby certify that I submitted the Original and Seven Copies (eight copies total), with attachments, of the foregoing Brief of Appellant to the clerk of the Appellate Court, and that I mailed two true and correct copies, postage pre-paid, of the foregoing Brief of Appellant, with attachments, on this 19th day of February, 2016, to the following:

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EXHIBIT A

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The Order of Court is stated below:

Dated: July 16, 2015
08:47:14 AM

/s/ BARRY LAWRENCE
District Court Judge



IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ANDREW VEYSEY,

Petitioner,

vs.

ALEXIS VEYSEY nka ALEXIS NELSON,

Respondent.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Case No. 984907587

Judge: Barry Lawrence
Commissioner: Michelle Blomquist

THIS MATTER comes before the Court on following Respondent Alexis Nelson's ("Respondent's") Objection to Commissioner Recommendation on the Respondent's Motion for Order to Show Cause regarding reimbursement for daycare expenses incurred for the parties' minor children between 2002 and 2006. The Court, having received testimony and evidence by the parties, now enters in its FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. The Court recognizes that variable daycare expenses constitute child support, and that the statute of limitations governing enforcement of child support orders applies to Respondent's claims for reimbursement. *Veysey v. Veysey*, 2014 UT App 264, ¶ 15.
2. All of Respondent's claims for reimbursement fall within the applicable statute of limitations.

3. Respondent's claims for reimbursement prior to April 2005, however, are barred by laches.
4. Under Utah case law, a laches analysis requires a determination of: (1) whether Respondent delayed unreasonably; and (2) whether Petitioner was prejudiced by that delay. In order for laches to bar any of Respondent's claims, both elements must be found.
5. With respect to the element of unreasonable delay, Respondent's knowledge as an attorney of the applicable statute of limitations does not excuse her delay, and is not applicable to a laches analysis. Respondent waited for over a decade to seek reimbursement of the requested expenses. And, she failed to adequately explain the reasons for the delay and failed to explain her lack of diligence in pursuing the claims, other than her assertion that she believed the statute of limitations had not yet run. The Court was not persuaded that her conduct was justified, reasonable or diligent.
6. The Court found Utah Code Ann. § 78B-12-214, while ~~is not~~ dispositive of this case, ~~but is~~ was persuasive with respect to the reasonableness of Respondent's actions.
7. Under this statute, a party needs to provide written notification of the costs and identity of the provider, and notify the other party if anything changes within 30 days of the change. Essentially, this statute establishes a policy of keeping the other party informed when you are going to seek costs.
8. Prior to September 2002, the parties' children were enrolled in daycare at the University of Utah. At some point, the children were moved to Challenger School.
9. Petitioner was aware that the children were enrolled in Challenger School and incurring costs there, but based on the record, there are questions as to whether he knew specifically the amount of costs, whether the costs were significantly more than the University of Utah costs, and what his obligations were with respect to those costs.
10. The only evidence of any written verification given by Respondent to Petitioner was a handbook that was not provided to the Court. There has never been anything in writing given to Petitioner other than that handbook to support Respondent's claims. And, there was nothing presented to the Court indicating that any increased child care expense was ever communicated to Petitioner. The passage of time has made it difficult for Respondent to support her claims.
11. From an email presented to the Court by Petitioner, it appears that Respondent never truly intended to

pursue her claims, but did so as a sort of retribution against Petitioner. That inference is supported by the fact that there was nothing done by Respondent from the time the expenses were incurred until the date of the email ~~over that period of time~~ that indicated an intent to collect these costs from Petitioner.

12. As a result, the Court finds that Respondent was not reasonable in her delay.

13. With respect to prejudice, the Court finds that by failing to properly raise the issue at the time, Petitioner was prevented from having an opportunity to contest ~~contesting~~ the amount owed. If, for example, costs of Challenger School were significantly more than those of the University of Utah, that should have been brought to Petitioner's attention so that he could have challenged that at the time, and perhaps cause the parties to agree to a less expensive provider.

14. The passage of time has also made it difficult to demonstrate the amount owed. For example, Respondent's payment summary entered into evidence only dealt with credit card payments made by Petitioner. If there were cash payments or some equitable adjustments that needed to be made, those would not have been able to be made because of the passage of time. If Respondent were now permitted to claim the child care expenses from 2002 through 2005, that would be unfair to the Petitioner. Moreover, the passage of time has contributed to Respondent's inability to properly and reasonably support the amount of her claims, as demonstrated by the confusion surrounding her explanation of her methodology in computing the amount owed.

15. As a result, the Court finds that Petitioner was prejudiced by the delay sufficient to support a finding of laches.

16. The Court, however, is not persuaded that the Commissioner's ruling allowing the April, 2005 to June, 2006 costs should be disallowed. Moreover, Petitioner does not strenuously object to those costs. ~~The parties, however, agree that costs from April 2005 to June 2006 are legitimate and supportable.~~ As a result, Petitioner cannot demonstrate the same level of prejudice with respect to those amounts. Accordingly, laches does not bar those claims.

17. Petitioner is not responsible for the cost of regular half-day kindergarten tuition, but is responsible for any extra tuition paid for full-day kindergarten as an extended care expense. *See Veysey*, 2014 UT App 264 at ¶ 20.

18. Based upon Respondent's testimony, the amount owed for the time period from April 2005 – June 2006 is \$875.00. This amount is a reasonable approximation of the amount owed, and is consistent with the Court of Appeals' mandate regarding the calculation of Petitioner's portion of kindergarten expenses.

19. However, given the unreasonableness of Respondent's delay, it would be inequitable to allow for the collection of interest for that time period. The Court thus denies any award of interest in this case.

20. The Court also denies fees or costs to either party.

21. The Court rules in favor of Respondent, in the amount of \$875.00.

Dated: July 4, 2015

[DOCUMENT ENDS HERE; SIGNATURES ARE FOUND ON FIRST PAGE]

EXHIBIT B

	<u>Year</u>	<u>Month</u>	<u>Amt Pd</u>	<u>Daycare</u>	<u>Total</u>	<u>Difference</u>	<u>Interest</u>	<u>Int. Rate</u>
Halle & Chloe	2002	Sep	898	488	988	90		
		Oct	898	488	988	90		
		Nov	898	488	988	90		
		Dec	898	488	988	90	200.3	4.28%
	2003	Jan	898	488	988	90		
		Feb	898	504.8	1004.8	106.8		
		Mar	898	488	988	90		
		Apr	298	488	988	690		
		May	0	488	988	988		
		Jun	898	488	988	90		
		Jul	0	488	988	988		
		Halle - ADK	Aug	898	524	1024	126	
Sep	0		387.75	887.75	887.75			
Oct	0		387.75	887.75	887.75			
Nov	500		387.75	887.75	387.75			
Dec	500		387.75	887.75	387.75	2340.54	3.41%	
2004	Jan		500	387.75	887.75	387.75		
	Feb		500	387.75	887.75	387.75		
	Mar		0	387.75	887.75	887.75		
	Apr		0	387.75	887.75	887.75		
	May		500	387.75	887.75	387.75		
Halle ends	Jun		500	115.06	615.06	115.06		
	Jul		500	0	500	0		
	Aug	500	296	796	296			
	Sep	300	296	796	496			
	Oct	400	296	796	396			
	Nov	400	296	796	396			
	Dec	400	296	796	396	1816.2	3.28%	
	2005	Jan	400	296	796	396		
		Feb	0	312.8	812.8	812.8		
		Mar	0	296	796	796		
		Apr	400	296	796	396		
		May	400	296	796	396		
Jun		500	0	500	0			
Jul		500	0	500	0			
Chloe - ADK		Aug	500	71.7	571.7	71.7		
	Sep	597	88.5	588.5	-8.5			
	Oct	580	88.5	588.5	8.5			
	Nov	585	88.5	588.5	3.5			
	Dec	500	93.5	593.5	93.5	1414.54	4.77%	
	2006	Jan	585	88.5	588.5	3.5		
		Feb	585	93.5	593.5	8.5		
		Mar	585	98.5	598.5	13.5		
		Apr	633	93.5	593.5	-39.5		
		May	585	98.5	598.5	13.5		
	Chloe ends	Jun	585	0	500	-85	-85.5	n/a
	Total		22400	13393.61	36393.61	13993.61	5686.237	19679.69
Costs on Appeal							807.16	
Attorney Fees							337.46	
TOTAL							20824.31	

EXHIBIT C

**78B-5-202. Duration of judgment -- Judgment as a lien upon real property
-- Abstract of judgment -- Small claims judgment not a lien -- Appeal of judgment
-- Child support orders.**

(1) Judgments shall continue for eight years from the date of entry in a court unless previously satisfied or unless enforcement of the judgment is stayed in accordance with law.

(2) Prior to July 1, 1997, except as limited by Subsections (4) and (5), the entry of judgment by a district court creates a lien upon the real property of the judgment debtor, not exempt from execution, owned or acquired during the existence of the judgment, located in the county in which the judgment is entered.

(3) An abstract of judgment issued by the court in which the judgment is entered may be filed in any court of this state and shall have the same force and effect as a judgment entered in that court.

(4) Prior to July 1, 1997, and after May 15, 1998, a judgment entered in the small claims division of any court may not qualify as a lien upon real property unless abstracted to the civil division of the district court and recorded in accordance with Subsection (3).

(5) (a) If any judgment is appealed, upon deposit with the court where the notice of appeal is filed of cash or other security in a form and amount considered sufficient by the court that rendered the judgment to secure the full amount of the judgment, together with ongoing interest and any other anticipated damages or costs, including attorney fees and costs on appeal, the lien created by the judgment shall be terminated as provided in Subsection (5)(b).

(b) Upon the deposit of sufficient security as provided in Subsection (5)(a), the court shall enter an order terminating the lien created by the judgment and granting the judgment creditor a perfected lien in the deposited security as of the date of the original judgment.

(6) (a) A child support order or a sum certain judgment for past due support may be enforced:

- (i) within four years after the date the youngest child reaches majority; or
- (ii) eight years from the date of entry of the sum certain judgment entered by a tribunal.

(b) The longer period of duration shall apply in every order.

(c) A sum certain judgment may be renewed to extend the duration.

(7) (a) After July 1, 2002, a judgment entered by a district court or a justice court in the state becomes a lien upon real property if:

(i) the judgment or an abstract of the judgment containing the information identifying the judgment debtor as described in Subsection 78B-5-201(4) is recorded in the office of the county recorder; or

(ii) the judgment or an abstract of the judgment and a separate information statement of the judgment creditor as described in Subsection 78B-5-201(5) is recorded in the office of the county recorder.

(b) The judgment shall run from the date of entry by the district court or justice court.

(c) The real property subject to the lien includes all the real property of the judgment debtor:

(i) in the county in which the recording under Subsection (7)(a)(i) or (ii) occurs;
and

(ii) owned or acquired at any time by the judgment debtor during the time the judgment is effective.

(d) State agencies are exempt from the recording requirement of Subsection (7)(a).

(8) (a) A judgment referred to in Subsection (7) shall be entered under the name of the judgment debtor in the judgment index in the office of the county recorder as required in Section 17-21-6.

(b) A judgment containing a legal description shall also be abstracted in the appropriate tract index in the office of the county recorder.

(9) (a) To release, assign, renew, or extend a lien created by a judgment recorded in the office of a county recorder, a person shall, in the office of the county recorder of each county in which an instrument creating the lien is recorded, record a document releasing, assigning, renewing, or extending the lien.

(b) The document described in Subsection (9)(a) shall include:

(i) the date of the release, assignment, renewal, or extension;

(ii) the name of any judgment creditor, debtor, assignor, or assignee; and

(iii) for the county in which the document is recorded in accordance with

Subsection (9)(a):

(A) the date on which the instrument creating the lien was recorded in that county's office of the county recorder; and

(B) in accordance with Section 57-3-106, that county recorder's entry number and book and page of the recorded instrument creating the judgment lien.

Amended by Chapter 88, 2011 General Session

IN THE UTAH COURT OF APPEALS

LARRY HARMON,

Petitioner-Appellant,

vs.

UTAH BOARD OF PARDONS AND
PAROLE,

Respondent-Appellee.

No. 20160192-CA

BRIEF OF APPELLEE UTAH BOARD OF PARDONS AND PAROLE

On Appeal from the Third Judicial District Court
The Honorable Todd M. Shaughnessy presiding
Case No. 150903620

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FILED
UTAH APPELLATE COURTS

ORAL ARGUMENT NOT REQUESTED

DEC 13 2016

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STATEMENT OF JURISDICTION

The Court has jurisdiction to review the district court's final judgment under Utah Code section 78A-4-103(2)(g).

ISSUE PRESENTED

Did the district court err by dismissing Mr. Harmon's rule 65B petition for failure to state any claims upon which relief could be granted?

Preservation: The Appellee raised this issue in its motion to dismiss. Record (R.) 117-31.

Standard of review: The Court reviews a dismissal under rule 12(b)(6) for correctness. *Helf v. Chevron U.S.A., Inc.*, 2009 UT 11, ¶ 14, 203 P.3d 962.

DETERMINATIVE PROVISIONS

Any determinative provisions are provided in the text of the brief.

STATEMENT OF THE CASE

Nature of the case: Mr. Harmon challenges the Board of Pardons and Parole's decision in 2008 refusing to grant him parole from his life sentence for murder.

Proceedings below: Several years after the Board decision, Mr. Harmon filed a petition for extraordinary relief in district court. Record (R.) 1-7. The Board moved to dismiss under Utah Rule of Civil Procedure 12(b)(6); Mr. Harmon filed a response to which the Board replied. R. 117-132, 178-184, R. 187-93.

Disposition: The trial court granted the Board's motion to dismiss because prior controlling decisions bar any claim upon which relief can be granted. R. 202-07.

STATEMENT OF THE FACTS

In 1995, Mr. Harmon shot two men; one died and the other was injured. *See State v. Harmon*, 956 P.2d 262, 264 (Utah 1998). A jury later found Mr. Harmon guilty of murder, a first degree felony, and attempted murder, a second degree felony. R. 134-38. In September, 1996, the district court sentenced Mr. Harmon to prison for indeterminate terms of five years to life for the Murder conviction, and one to fifteen years for the Attempted Murder conviction. R. 136-37. These sentences were to run concurrently. R. 136.¹

Two months later, the Board of Pardons and Parole ("Board") scheduled an Original Hearing for Mr. Harmon to take place in September 2008. R. 140. In the meantime, he completed multiple training and rehabilitation programs and held various jobs while incarcerated. R. 31-42, 49-61, 65, 72, 147. He also unsuccessfully requested an earlier parole hearing and parole date. R. 145-47.

¹ Mr. Harmon also received two one-year sentencing enhancements because both crimes were committed with a firearm. R. 136. The sentencing enhancements were to run consecutively to the other sentences. R. 136.

On September 2, 2008, Mr. Harmon appeared personally before the Board for his Original Hearing. Beforehand, he received his “blue packet” containing all of the records and materials the Board would rely upon when making its decision. R. 2-3. After reviewing the packet and conducting the Original Hearing, the Board determined Mr. Harmon would not receive a parole date but instead would expire his life sentence in prison. R. 150. The Board’s decision meant Mr. Harmon would serve the maximum amount of time—life—to which he was sentenced for his crimes. R. 2, 136.

The Board also issued a Rationale for Decision sheet that specified aggravating and mitigating factors upon which the Board based its decision. R. 151. The Board found relevant the following aggravating factors: “Multiple incidents and/or victims,” “Extent of the injury (physical, emotional, financial, social),” “Relatively vulnerable victim vs. aggressive or provoking victim,” and “Denial or minimization vs. complete acceptance of responsibility.” R. 151 (emphasis in original). By underlining “minimization,” the Board appears to have put special emphasis on that factor. R. 151. On the other hand, the Board found relevant the following mitigating factors: “Programming (effort to enroll, nature of programing),” and “Disciplinary problems or other defiance of authority.” R. 151. The Board left other potentially relevant aggravating and mitigating factors unchecked, including

“Use of weapons or dangerous instrumentalities,” and “[Lack of] [p]ersonal gain reaped from the offense.” R. 151.

In 2015, Mr. Harmon filed a rule 65B petition for extraordinary relief in district court claiming the Board’s 2008 decision violated fundamental fairness, due process, cruel and unusual punishment, double jeopardy, and that Utah’s sentencing scheme was unconstitutional. R. 5-6. The Board moved to dismiss the petition for failure to state any claims upon which relief could be granted. R. 119-32. In essence, the Board argued that Mr. Harmon had failed to allege any facts supporting his claims or the facts he did allege failed to state viable claims as a matter of law. *Id.* The trial court agreed and dismissed the petition under rule 12(b)(6). R. 202-07. Mr. Harmon timely filed this appeal. R. 219.

SUMMARY OF THE ARGUMENTS

Rule 12(b)(6) authorizes dismissal when, as a matter of law, a complaint fails to state any claims upon which relief may be granted. The district court correctly applied that standard to Mr. Harmon’s petition and dismissed his claims.

Mr. Harmon first argues that the Board’s rationale sheet did not adequately advise him of the Board’s reasoning. But the Supreme Court has already held that the Board’s rationale sheets are adequate. At most, Mr.

Harmon's arguments about the factors the Board did or did not consider go to the substance of the Board's decision, which the Court cannot review.

Similarly, Mr. Harmon argues that the Board should have advised him of his ability to hire counsel for his parole hearing. But he has no constitutional right to counsel at a parole hearing, nor has he identified any authority requiring the Board to advise him of his ability to hire his own attorney. Case law suggests no such right exists.

Finally, Mr. Harmon argues without much analysis that the Board's decision was arbitrary or capricious. But case law squarely holds that absent unusual circumstances, a Board's parole determination is not arbitrary or capricious as long as it falls within the indeterminate sentence imposed by the district court. Here, the Board decided simply that Mr. Harmon would serve the full amount of his life sentence. To the extent he argues that his good behavior in prison constitutes "unusual circumstances," that argument has also already been rejected by Utah courts.

In short, Mr. Harmon's claims and supporting allegations fail to state claims upon which relief could be granted as a matter of settled precedent. The district court therefore appropriately dismissed the petition.

STANDARD OF REVIEW

The propriety of a dismissal under rule 12(b)(6) presents a question of law reviewed for correctness. *Helf*, 2009 UT 11, ¶ 14. The Court must “accept the material allegations in the [petition] as true and interpret those facts and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff as the non-moving party.” *Moss v. Pete Suazo Utah Athletic Comm’n*, 2007 UT 99, ¶ 8, 175 P.3d 1042. But the Court need not countenance mere legal conclusions or conclusory fact allegations unsupported by recitation of any relevant supporting facts. *Commonwealth Prop. Advocates, LLC v. Mortg. Elec. Registration Sys., Inc.*, 2011 UT App 232, ¶ 16, 263 P.3d 397.

The Board’s decisions are generally not subject to judicial review. Utah Code § 77-27-5(3). However, courts may use an extraordinary writ to review the Board’s decisions in two narrow circumstances: to correct “a gross and flagrant abuse of discretion,” *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 683 (Utah 1995), and to assure that procedural due process was not denied, *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 909-13 (Utah 1993).

Importantly, judicial review of Board decisions considers only “the fairness of the *process* by which the Board undertakes its sentencing function,” not the result. *Padilla v. Utah Bd. of Pardons & Parole*, 947 P.2d

664, 667 (Utah 1997) (internal quotation marks omitted). The Board has exclusive authority to determine the actual number of years a defendant serves within his sentence, *Preece v. House*, 886 P.2d 508, 512 (Utah 1994), and the court does not “sit as a panel of review on the result, absent some other constitutional claim.” *Lancaster v. Utah Bd. of Pardons*, 869 P.2d 945, 947 (Utah 1994).

ARGUMENT

The district court properly dismissed Mr. Harmon’s petition for failure to state a claim. The court used the correct rule 12(b)(6) analysis to dismiss the claims. As a matter of settled precedent, Mr. Harmon’s allegations about the rationale sheet, an alleged right to be advised to seek his own counsel, and fundamental fairness, do not state a claim upon which his requested relief—reversal of the Board’s decision—could be granted.

I. The District Court Applied The Right Standard Under Rule 12(B)(6) And Properly Dismissed The Petition.

Mr. Harmon first argues generally that the petition alleges enough facts to survive a rule 12(b)(6) motion, but the district court “ignored the facts.” Apl’t. Br. at 10.² But he doesn’t specify which facts were allegedly

²Mr. Harmon also argues that his claims need only be “plausible” under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) to survive dismissal. Apl’t. Br. at 9. But Utah hasn’t adopted the “heightened plausibility standard for pleadings” required under the federal procedure rules. *See, e.g., Am. W. Bank Member, L.C. v. State*, 2014 UT 49, ¶ 13 n.22, 342 P.3d 224. At any rate, because Mr.

ignored nor how those facts state a viable claim undermining the Board's decision. He has therefore failed to show any district court error on this point. Nor can he foist his burden of persuasion onto the Court or the Board to review the petition looking for any redressable allegations that he did not raise himself.

Moreover, it is readily apparent that the district court correctly dismissed Mr. Harmon's petition because settled law precludes any relief based on the few facts alleged in Mr. Harmon's petition. When considering a 12(b)(6) motion, the court's "inquiry is concerned solely with the sufficiency of the pleadings, and not the underlying merits of the case." *State v. Apotex Corp.*, 2012 UT 36, ¶ 42, 282 P.3d 66. Thus, dismissal is appropriate when it is "apparent that as a matter of law, the plaintiff could not recover under the facts alleged." *Lowe v. Sorenson Research Co.*, 779 P.2d 668, 669 (Utah 1989). As indicated below, the district court properly concluded that Mr. Harmon could not recover under the facts alleged in his petition.

II. The District Court Properly Rejected Mr. Harmon's Due Process Claims.

The petition shows the Board provided Mr. Harmon the requisite procedural due process under Utah law. As a general matter, "[t]he Board must satisfy two due process requirements in conducting parole hearings.

Harmon's petition does not satisfy Utah's traditional rule 12(b)(6) standards, the petition could not satisfy the heightened plausibility standard.

First, ‘an inmate must receive adequate notice to prepare for a parole hearing.’ Second, the inmate must ‘receive copies or a summary of the information in the Board’s file upon which the Board will rely.’” *Stewart v. Bd. of Pardons & Parole*, 2015 UT App 246, ¶ 6, 360 P.3d 800 (quoting *Peterson v. Utah Bd. of Pardons*, 931 P.2d 147 (Utah Ct. App. 1997)). The Board is not required to provide inmates any additional information or procedures. *Peterson*, 931 P.2d at 150.

Here, the Petition states that Mr. Harmon was incarcerated in 1996 and received an Original Hearing before the Board on September 2, 2008. R. 2-3. The Petition also states that “Mr. Harmon was provided a ‘blue packet’” which was “the information contained in the Board’s file on an inmate of which the Board intends to rely during its decision-making process.” R. 4. Mr. Harmon’s petition did not allege the “blue packet” was lacking information or that the Board considered information outside of the packet materials, nor did the Petition allege Mr. Harmon failed to receive adequate notice to prepare for the Board hearing. Thus, under Utah law, Mr. Harmon has not alleged facts showing violation of procedural due process in the Board hearing.

A. The Board’s rationale sheet is constitutionally adequate.

Mr. Harmon asserts the Board failed to provide him a constitutionally adequate rationale for its decision. Appt’s Br. at 10-11. To his credit, he

acknowledges that the Board's rationale sheets have already been found to satisfy constitutional requirements. *Id.* at 10; *Padilla*, 947 P.2d at 669-70 (“[R]ationale sheets used by the Board . . . were adequate and did not deprive [the defendant] of due process.”). And he does not dispute the fact that he received a rationale sheet explaining the Board's decision. R. 151. Accordingly, the Board provided Mr. Harmon a constitutionally adequate rationale for its decision as a matter of law.

Nonetheless, he suggests that *Padilla* is old and much has changed. Aplt. Br. at 10. But that provides no basis for this Court to deviate from binding precedent. Mr. Harmon's real complaint seems to be that the Board's rationale sheet did not check off all of the mitigating factors he thinks apply. Aplt. Br. at 10-11. The Court, however, can only review the “fairness of process” in the Board's decision, not the “substance.” *Padilla*, 947 P.2d at 667; *see also Renn*, 904 P.2d at 684 (“[T]he substance of the Board's decision is not reviewable by an extraordinary writ except perhaps in an extreme case.”). Accordingly, the Court has previously held that it will not review arguments about the rationale sheet factors the Board considered because they go to the substance of the Board's decision, not the procedural fairness. *Stack v. State Bd. of Pardons & Parole*, 2001 UT App 280. That precedent means Mr. Harmon's allegations do not state a claim as a matter of law and were properly dismissed by the district court.

Further, even if the court could examine the substance of the rationale sheet, the Board's marks, or absence thereof, were in no way arbitrary or unfair. Although Mr. Harmon argues that he qualified for several unchecked mitigating factors, Aplt's Br. at 10, he fails to acknowledge other aggravating factors the Board could have but did not mark (e.g., "Use of weapons or dangerous instrumentalities"). R. 151. The Board therefore did not, as Mr. Harmon suggests, merely exclude mitigating factors that might favor Mr. Harmon, but also excluded one or more aggravating factors that disfavor him.

Moreover, the premise of Mr. Harmon's argument is unfounded. It's wrong to presume—as Mr. Harmon's argument necessarily does—that the Board's discretion whether to parole someone is simply a matter of determining whether there are more mitigating than aggravating factors. In reality, different factors (aggravating and mitigating) will matter more than others in general, and various factors may weigh more in specific cases. For example, the Board placed particular emphasis on Mr. Harmon's minimization of his actions as opposed to completely accepting responsibility. R. 151.

The rationale sheet reflects a fair and calculated decision in which the Board marked the factors that were most influential in its decision-making process. Mr. Harmon has no viable due process claim that the Board's decision was procedurally or substantively unfair.

B. Mr. Harmon has no right to counsel nor a right to be advised of his ability to obtain his own counsel at a parole hearing.

Mr. Harmon also argues the Board violated his due process rights by failing to “advise” him of “his right to seek private counsel.” Appt’s Br. at 11-12. But he fails to point to any authority that requires the Board to do so. Instead, he relies upon *Neel v. Holden* and the Sixth Amendment for support—neither of which support his assertion.

In *Neel v. Holden*, the Utah Supreme Court reiterated that “there is no constitutional right to counsel in” a parole revocation hearing. 886 P.2d 1097, 1104 (Utah 1994). Nowhere in the *Neel* opinion does the Court suggest the existence of a right to be advised of the ability to seek counsel in any parole hearing. *Id.* Notably, the Court refused to find “that Neel was denied due process by the Board’s refusal to allow Neel’s counsel to address the Board.” *Id.* at 1103. If anything, *Neel* illustrates the court’s unwillingness to find any ancillary right associated with counsel when an inmate has no constitutional or statutory right to counsel in the first place.

Furthermore, analogous Utah case law contradicts Mr. Harmon’s right-to-be-advised argument. The Utah Supreme Court summarily rejected a similar argument that an inmate was not advised of his right to counsel at a parole revocation hearing. *Folkes v. Turner*, 449 P.2d 649, 649 (Utah 1969). The Court simply noted that the inmate “was not entitled” to counsel in the

first place. *Id.* Similarly, because Mr. Harmon is not entitled to counsel here, the Board had no due process duty to advise him that he could obtain his own counsel.

Likewise, Mr. Harmon's reliance on the Sixth Amendment of the United States Constitution is misplaced. The Sixth Amendment does not grant a right to be advised of counsel at a Board hearing because it applies only to "criminal prosecutions." *Neel*, 886 P.2d at 1103; U.S. CONST. amend VI. And the Original Hearing was not a "criminal prosecution." *See, e.g., Neel*, 886 P.2d at 1103 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) ("the revocation of parole is not a part of the criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply.")).

In sum, the district court did not err in dismissing Mr. Harmon's due process claims because, as a matter of law, they did not state actual due process violations.

II. A Board Decision Cannot Be Arbitrary Or Capricious When It Falls Within The Indeterminate Sentencing Range.

Lastly, Mr. Harmon claims that the Board acted arbitrarily and capriciously when it determined Mr. Harmon would finish out his life sentence in prison. *Aplt. Br.* at 12-13. But, again, Utah law clearly contradicts his assertion.

Generally, the Board cannot abuse its discretion regarding parole decisions if the Board's decision falls within the indeterminate sentencing range imposed by the trial judge. *Preece*, 886 P.2d at 512 (“[S]o long as the period of incarceration decided upon by the board of pardons falls within an inmate's applicable indeterminate range, e.g. five years to life, then that decision, absent unusual circumstances, cannot be arbitrary and capricious.”); see also *McCammon v. Bd. of Pardons & Parole*, 2016 UT App 119, ¶ 4, 378 P.3d 106 (quoting *Padilla*, 947 P.2d at 669) (“In setting or denying parole, ‘the Board merely exercises its constitutional authority to commute or terminate an indeterminate sentence that, but for the Board's discretion, would run until the maximum period is reached.’”)).

Mr. Harmon's petition stated that he “is currently serving a 5-to-life sentence for Murder.” R. 2. The petition also states that the Board decided on the “maximum period” of Mr. Harmon's indeterminate sentence—life sentence. R. 4. Because the Board's decision “falls within [Mr. Harmon's] applicable indeterminate range,” the Board's decision cannot be arbitrary or capricious. *Preece*, 886 P.2d at 512. Thus, the district court did not err in dismissing the petition.

Although not argued in his brief, Mr. Harmon might be suggesting that his case satisfies the “unusual circumstances” exception mentioned in *Preece*. By listing Mr. Harmon's completion of training, rehabilitation and

educational programs, his employment within the prison, and a letter from Sherriff Phillips urging the Board to grant a parole hearing, Mr. Harmon may be trying to suggest that his status as a “model inmate” creates an “unusual circumstance” baring the Board from letting him serve the maximum period within his indeterminate range. Aplt. Br. at 8 and attachments to brief. However, the Utah Supreme Court expressly rejected this identical argument. In *Padilla*, an inmate argued his situation constituted “unusual circumstances” because both “the rationale sheets used by the Board were insufficient” and the inmate “ha[d] been an ‘exemplary inmate’ since his incarceration.” *Padilla*, 947 P.2d at 671. The Utah Supreme Court dismissed the inmate’s claims stating that “these do not constitute sufficiently unusual circumstances to justify review of the Board’s substantive decision.” *Id.* Mr. Harmon’s implied argument mirrors *Padilla* and must also be rejected.

Moreover, Mr. Harmon has no constitutional right to parole. It is well established that parole “is a privilege, an act of grace, as distinguished from a right,” and therefore no constitutional protection applies to an inmate’s expectation of parole. *Ward v. Smith*, 573 P.2d 781, 782 (Utah 1978). Here, Mr. Harmon never had a right to parole, and any expectation he had thereof was contrary to law.

The district court did not err in its dismissal because the Board's decision fell within the indeterminate sentencing range, no unusual circumstances existed, and Mr. Harmon had no right to parole.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision granting the Board's motion and dismissing Mr. Harmon's Petition for Extraordinary Relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the total type-volume limitations of Utah Rule of Appellate Procedure 24(f)(1) because:
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s/ Stanford Purser
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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2016, a true, correct and complete copy of the foregoing Brief of Appellee was filed with the court and served via United States mail and/or electronic mail as follows:

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