

2017

Thomas G. Martin, M.D., Plaintiff-Appellant, v. the University of Utah; the University of Utah College of Pharmacy; the Utah Poison Control Center; Barbara Crouch; In Her Official and Individual Capacities; Diana Brixner, In Her Official and Individual Capacities; Erik Barton, In His Official and Individual Capacities; Stephen Hartsell, In His Individual and Official Capacities; Samuel Finlayson, In His Official and Individual Capacities; Heidi Thompson, In Her Official and Individual Capacities; Paula Peacock, In Her Official and Individual Capacities, and Does 1-10, In Their Official and Individual Capacities. Defendants-Appellees :

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 **Brief of Appellant**

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Martin v. U of U*, No. 20170844 (Utah Court of Appeals, 2017).
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IN THE UTAH COURT OF APPEALS

THOMAS G. MARTIN, M.D.,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF UTAH; THE UNIVERSITY OF UTAH COLLEGE OF PHARMACY; THE UTAH POISON CONTROL CENTER; BARBARA CROUCH; in her official and individual capacities; DIANA BRIXNER, in her official and individual capacities; ERIK BARTON, in his official and individual capacities; STEPHEN HARTSELL, in his individual and official capacities; SAMUEL FINLAYSON, in his official and individual capacities; HEIDI THOMPSON, in her official and individual capacities; PAULA PEACOCK, in her official and individual capacities, and DOES 1–10, in their official and individual capacities.

Defendants-Appellees.

BRIEF OF APPELLANT

Appellate Case No.: 20170844-CA

Trial Case No.: 160906038

Trial Court Judge: Andrew H. Stone

**Appeal from the Third Judicial District Court
In and for Salt Lake County, State of Utah
The Honorable Andrew H. Stone**

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

This appeal is filed by Thomas G. Martin, M.D. (“Dr. Martin” or “Appellant”), due to the early termination of his employment and revocation of his medical privileges, while employed at the University of Utah. In August of 2013, Dr. Martin entered into his first contract with the Department of Pharmacotherapy to act as the full-time Medical Director at the Utah Poison Control Center (the “UPCC”), which started on October 1, of 2013, and where he performed those duties for eight (8) months. R. at 00043 – 00047. In February of 2014, Dr. Martin entered into a second contract relating to a “split position with [his] primary appointment in the Division of Emergency Medicine, Department of Surgery, to start July 1, 2014[,]” through June 30, of 2015. R. 00051 – 00053. Dr. Martin’s second contract was rescinded unexpectedly in May of 2014. R. at 00312. At the same time, the Chief of the Division of Emergency Medicine, Dr. Barton (who had spearheaded the idea of having a split position for the Medical Director at the UPCC) announced that he would be leaving. R. at 02318, 02425, and 02648. Dr. Barton was asked to make any reductions in the budget of the Division of Emergency Medicine before he left in June of 2014. R. at 02433. There were concerns regarding funding to pay for Dr. Martin when he transitioned and whether the clinical shifts would be available. R. at 02374, and 02390. The University of Utah and its individual employees’ (the “University” or “Defendants/Appellees”) actions caused harm and unfair surprise to Dr. Martin.

Thereafter, Dr. Martin proceeded with litigation against the University, where ultimately at the state court level, the trial court denied Dr. Martin’s Motion for Summary Judgment on Liability and erroneously granted the University’s Cross-Motion for

Summary Judgment, as reflected in the Honorable Andrew H. Stone's Memorandum Decision of September 26, 2017 ("Memorandum Decision"), and subsequent Order entered on November 17, 2017 ("Final Order"). R. at 03135 – 03145.¹

The trial court's ruling should be reversed because in granting the University's Cross-Motion for Summary Judgment, the trial court: 1. Failed to follow the standards required under Utah R. Civ. P. Rule 56(c), when there were disputed issues over material facts and those facts or reasonable inferences were not viewed in the light most favorable to the non-moving party, Dr. Martin (R. at 03136 – 03143); 2. Despite the heavily disputed and conflicting material facts in the record, the trial court made improper factual determinations regarding the material terms of the contracts in favor of the University, and did not address the lack of good faith or fair dealing claim as a result (R. 03137 – 03144); and, 3. Finally, the trial court improperly weighed and only considered the University's claims (that were not raised until after the termination had occurred) that University staff had made an "error" in issuing clinical privileges and active medical staff appointment to Dr. Martin, (R. at 03136 – 03144), and which Dr. Martin wholeheartedly disputed as the active medical appointment with inpatient privileges was a requirement of his first signed contract letter from August 15, 2013 (R. at 00046), not to mention a fundamental

¹ See the Order on Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment, (the "Final Order") entered on November 17, 2017, by the trial court, and attached hereto in the Addendum. The Final Order was not entered by the trial court until after this Court filed a Sua Sponte Motion for Summary Disposition. The University's counsel had not previously submitted a proposed order as requested by the trial court that was consistent with its Memorandum Decision. After Dr. Martin submitted a response with the Final Order attached, this Court permitted briefing to continue.

requirement of the UPPC, to remain an accredited poison control center with the American Association of Poison Control Centers (“AAPCC”). R. at 02960 – 02962. Although the record reflects that the University’s actions caused unfair surprise and extreme harm to Dr. Martin, the trial court supported the University’s unilateral rescission of the second employment offer (deeming it was not even a contract) without any due process to Dr. Martin. R. at 03138 – 03142. The trial court incorrectly made a determination that Dr. Martin had no vested interest or property interest in the clinical privileges or medical staff appointment given to him the year before (despite referring to the contested position of both parties)(R. 03140), and ignored the material facts in the record, or the Policy and Bylaw provisions referenced by Dr. Martin, and failed to grant all reasonable inferences in favor of Dr. Martin as the non-moving party. R. at 03140 – 03141.

As a result, Dr. Martin respectfully asks that this Court reverse the trial court and remand the case back with instructions permitting Dr. Martin to proceed forward to trial.

STATEMENT OF THE ISSUES

FIRST ISSUE: Whether the trial court’s Memorandum Decision and Final Order, should be reversed and remanded, where the trial court failed to apply the correct standard in granting the University’s Cross-Motion for Summary Judgment despite genuine disputes over material facts and without considering all the facts or reasonable inferences in the light most favorable to Dr. Martin?

Standard of Review: The standard of review for a dismissal under Utah R. Civ. P. 56(c) is correctness, and an appellate court: “[R]eviews a trial court’s ‘legal conclusions and ultimate grant or denial of summary judgment’ *for correctness, id.*, and views ‘the

facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.”² A summary judgment movant *must show both* that there is no material issue of fact and that the movant is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c).³ “Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. UTAH R. CIV. P. 56(c)”⁴

Preservation: This issue was preserved in Dr. Martin’s Joint Reply Memorandum in Support of his Motion for Summary Judgment on Liability against the University and Opposition Memorandum to the University’s Cross-Motion for Summary Judgment (R. 02959 – 03034, at 02947 – 02948, 02957), the University’s Joint Memorandum in Opposition to Dr. Martin’s Motion for Summary Judgment and Dr. Martin’s Motion for Summary Judgment (R. 01760 – 01852, at 01817-01819) , and at oral argument (R. 03190 - 03250, at 03208, and 03231-03235).

SECOND ISSUE: Whether the trial court’s Memorandum Decision and Final Order, should be reversed and remanded, where the trial court improperly weighed conflicting facts in favor of the University, to determine that a contract did not culminate from the December 2013 signed acceptance letter between the University and Dr. Martin, and that Dr. Martin’s actions “failed to fulfill the fundamental conditions of the offer”

² See *Orvis v. Johnson*, 2008 UT 2, ¶ 10 (emphasis added); see also *Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993)(overruled on other grounds by *Scott v. Universal Sales, Inc.*, 2015 UT 64).

³ See *Orvis v. Johnson*, 2008 UT 2, ¶ 10 (emphasis added); see also *Martin v. Lauder*, 2010 UT App 216, ¶ 4 (internal citations omitted).

⁴ See *Jones & Trevor Marketing, Inc. v. Lowry*, 2012 UT 39, ¶ 9 (emphasis added).

sufficient to warrant the unilateral rescission of the second employment contract by the University?

Standard of Review: The standard of review is correctness, and the appellate court reviews: “[A] district court’s legal conclusions and ultimate grant or denial of summary judgment *for correctness*.”⁵ In *Arata v. Shefco, Ltd.*, 2014 UT App 148, this Court further held as follows: “A condition is ‘an event, not certain to occur, which must occur ... before performance under a contract becomes due.’ ” Because “no duties arise between the contracting parties until the condition has been fulfilled,”[], failure of “ ‘a material condition precedent relieves the obligor of any duty to perform,’” ... *Whether a condition precedent was fulfilled generally presents a question of fact.*”⁶

Preservation: This issue was preserved in Dr. Martin’s Motion for Summary Judgment on Liability against the University (R. 00166 - 00323, at 00171 – 00175, 00186 - 00189), the University’s Joint Memorandum in Opposition to Dr. Martin’s Motion for Summary Judgment, and Dr. Martin’s Motion for Summary Judgment (R. 01760 – 01852, at 01843-01847) , and at oral argument (R. 03190 - 03250, at 03209 - 03212).

THIRD ISSUE: Whether the trial court’s Memorandum Decision and Final Order, should be reversed and remanded, where the trial court held that Utah Courts do not recognize a physician’s constitutionally protected property interest right relative to employment or medical staff privileges, but even if recognized, that Dr. Martin suffered no

⁵ See *Arata v. Shefco, Ltd.*, 2014 UT App 148, ¶ 6 (internal citations omitted)(emphasis added).

⁶ See *Id.* at ¶ 8(internal citations omitted)(emphasis added); See also *McArthur v. State Farm Mut. Auto. Ins. Co.*, 2012 UT 22.

procedural due process violation in this case because “the defense maintains that this letter [granting Dr. Martin active medical staff privileges] was issued in error” and the University’s unilateral mistake (and that was only raised after Dr. Martin had been actually acting as the Medical Director for eight months at the UPCC) apparently justified rescission of the contract, despite the unfair harm to Dr. Martin?

Standard of Review: The standard of review is both correctness and a clearly erroneous standard. “Constitutional issues, including questions regarding due process, are questions of law that we review *for correctness*... However, because [these questions require] the application of facts in the record to the due process standard, we *incorporate a clearly erroneous standard for the necessary subsidiary factual determinations*.”. ... Procedural due process claims are evaluated under a two-part test. The first question is “whether the [complaining party] has been deprived of a protected interest” in property or liberty. ... If the court finds deprivation of a protected interest, we consider whether the procedures at issue comply with due process. *Id.*”⁷

Preservation: This issue was preserved in the Memorandum Decision (R. 03135 – 03145, at 03136, 03140 - 03141), Dr. Martin’s Motion for Summary Judgment on Liability against the University (R. 00166 - 00323, at 00183 – 00186), the University’s Joint Memorandum in Opposition to Dr. Martin’s Motion for Summary Judgment and Dr. Martin’s Motion for Summary Judgment (R. 01760 – 01852, at 01820-01840), Dr. Martin’s Joint Reply Memorandum in Support of his Motion for Summary Judgment on Liability

⁷ See *Salt Lake City Corp. v. Jordan River Restoration Network*, 2012 UT 84, at ¶¶ 47-48 (internal citations omitted)(emphasis added).

against the University and Opposition Memorandum to the University’s Motion for Summary Judgment (R. 02918 – 02958, at 02934 – 02935, 02948 – 02954), and at oral argument (R. 03190 - 03250, at 03193 - 03208).

STATEMENT OF THE CASE

Relevant Facts

1. Dr. Martin is a physician Board Certified in Emergency Medicine and Preventative Medicine (Occupational) and Medical Toxicology. In addition, Dr. Martin has been recognized by the American College of Emergency Physicians for thirty (30) years of continuous Board Certification. R. at 00006.

2. On August 2, 2013, Dr. Martin was offered the position of the Medical Director for the UPCC, with a faculty appointment in the College of Pharmacy at the rank of Associate Professor (Clinical), at the University of Utah. R. at 00043. The position was anticipated to “***transition to a split position*** with your primary academic appointment in the Division of Emergency Medicine, Department of Surgery, to start July 1, 2014.” *See Id.* (emphasis added). The proposed start date was October 1, 2013. R. at 00043 – 44; *See also* Memorandum Decision, R. 03135 – 03145, at 03135 – 03136.⁸

⁸ Dr. Martin recognizes that pursuant to *State v. Nielsen*, 2014 UT 10, he is not required to marshal every scrap of evidence to support the trial court’s specific factual determinations that he is challenging herein, but rather, for persuasive purpose, Dr. Martin is providing facts as well as inferences, that were favorable to him but that the trial court did not include or misstated. Dr. Martin is aware that the Supreme Court of Utah has: “repudiate[d] the default notion of marshaling sometimes put forward in our cases and reaffirm[ed] the traditional principle of marshaling as a natural extension of an appellant’s burden of persuasion.” *See State v. Nielsen*, 2014 UT 10, ¶ 41. In addition, Dr. Martin is also aware that under the Advisory Committee Notes on the 2017 Amendments to Rule 24, it states as follows: “Paragraph (a)(8). The 2017 amendments remove the reference to

3. The “split position” was unusual, (R. at 02419), and had never been done before at the University to Ms. Thompson’s knowledge (R. at 03047); however, it was an idea spearheaded by the then Chief of the Emergency Medicine Division, Dr. Erik Barton, as he, along with Dr. Barbara Crouch, wanted the Department of Pharmacotherapy and the UPCC to have a toxicology fellowship program jointly with the Department of Surgery. R. 02413 - 02414.

4. On August 15, 2013, Dr. Martin received an updated letter for the same position. R. 00046 – 00047, and 03136. It had additional language, including that Dr. Martin had to obtain a license to practice medicine in the State of Utah “**and a medical staff appointment** at University Hospitals & Clinics.” R. at 00046 (emphasis added).

5. It was necessary that Dr. Martin obtain his clinical privileges and a medical staff appointment at the University Hospital & Clinics because, (and as Dr. Martin asserted in his Declaration), the UPCC is an accredited poison center with the AAPCC, and to maintain accreditation it is required that: “The Medical Director and all other individuals designated as providers of medical direction **must** have medical staff appointments at an inpatient treatment facility”.[] R. at 02961. Furthermore, it is an AAPCC requirement that any Medical Director must be a practicing physician. R. at 01960.

6. Dr. Martin accepted the offer in August of 2013. R at 03136.

7. Thereafter, upon reliance of the signed offer and without knowledge of prior

marshaling. *State v. Nielsen*, 2014 UT 10, 326 P.3d 645, holds that the failure to marshal is not a technical deficiency resulting in default, but is a manner in which an appellant may carry its burden of persuasion when challenging a finding or verdict.” *See* Rules App. Proc., Rule 24, Editors’ Notes.

discussions between Dr. Brixner and Dr. Crouch of the “temporary” nature of the position, Dr. Martin relocated from Seattle where he bought a condominium in Salt Lake City, and obtained his medical licenses in the State of Utah on September 6, 2013. R. at 00008.

8. In September of 2014, Dr. Barton, informed Dr. Martin that the credentialing process for the Department of Surgery, Division of Emergency Medicine, would take “four to six months” to complete and that “[Rebecca] Bryce in the Division of Emergency Medicine would contact him about the application for an appointment in the Department of Surgery and for clinical privileges.[] R. at 01802.

9. The record reflects that during the various application processes (of which there were at least four (4) different full applications) that would proceed over the following months , that Dr. Martin responded to over one hundred (100) e-mail exchanges in an effort to be responsive. R. at 02510.

10. On October 1, 2013, Dr. Martin started as the full-time Medical Director at the UPCC. R. at 00008.

11. On October 9, 2013, Dr. Martin’s credentialing application for his role as the Medical Director was approved by the University’s Credentialing Committee. R. at 00008.

12. On October 16, 2013, a full copy of Dr. Martin’s application for credentialing with the Department of Pharmacotherapy was sent to Rebecca Bryce, an Administrative Assistant in the Division of Emergency Medicine, by Jeffrey Carter (with the exact same three letters of reference that would be sought by Ms. Bryce a few months later). R. at 00008 – 00009.

13. On November 12, 2013, *the President of the University of Utah*, issued a

letter to Dr. Martin, advising him that, “*the University’s Board of Trustees has approved* your appointment in the full-time clinical track as Associate Professor (Clinical) of Pharmacotherapy, effective October 1, 2013 and ending June 30, 2014.” R. at 00009.

14. On November 19, 2013, Dr. Martin received a letter from Ms. Heidi Thompson, the Manager of Medical Staff services, confirming that his application for privileges at the University of Utah Hospitals and Clinics had been approved. It was documented that: “Your reappointment/appoint is for the period: **10/02/2013 to 10/01/2015**” and the “Category: **Active** Status: **Provisional** Division: **Emergency Medicine** Department: **SURGERY**”. R. at 00049.

15. During her deposition, the Rule 30(b)(6) University representative, Ms. Lisa Hooper, who is the present Manager of the Medical Staff Offices and Business Operations Manager, testified that after November 19, 2013, when Dr. Martin received that letter of appointment to the UUHC, that the medical Bylaws applied to him. R. at 02835 – 02836. Ms. Hooper also agreed that under the provision in subsection 5.D.5, of the Bylaws, at page 52, it does not contemplate a circumstance where for some reason the applicant would be given clinical privileges before the faculty appointment. R. at 02886.

16. In December of 2013, Dr. Martin was offered the second, or “split” position on the faculty in the Division of Emergency Medicine, Department of Surgery at the University of Utah, within the School of Medicine. Dr. Martin’s appointment offer was as an Associate Professor and Medical Director of the Utah Poison Control Center, in the Clinical Track beginning July 1, 2014. The second offer letter stated in pertinent part, certain instructions and guidelines:

You need a confirmed academic appointment through the School of Medicine and medical credentialing approval through University Hospital. ***We will send you instructions regarding your responsibility in obtaining the necessary documents for your academic appointment;*** Utah medical license; DEA license, and medical credentialing that must be completed according to the timeline set by the department. ... Your initial salary will be \$252,000 plus benefits ... ***This salary is guaranteed for the first twelve months after which you will be included in the Division of Emergency Medicine Faculty Performance Incentive Plan beginning July 2015.*** ... As a clinical faculty member in the Clinical Track ***you will be asked to fulfill a minimum of 48 clinical shifts per year (average 4 shifts per month) in the emergency department with the remainder of your responsibilities as Medical Director*** of the Utah Poison Control Center.

R. at 00051 – 00053.

17. Dr. Martin accepted the second offer on February 26, 2014. *See Id.*

18. Based on the prior representations by Dr. Barton, the anticipated completion date for the hiring process on the second position was between April and June of 2014. R. at 01802.

19. Also, the deposition testimony of Ms. Hooper reflected that there should have been a separate set of instructions issued from either the Department of Surgery or the Division of Emergency Medicine to Dr. Martin regarding his second faculty appointment application, with a letter that explained the timelines, and the separate nature of the departments and that they could not share information. R. at 02839 – 02840.

20. On January 21, 2014, Dr. Martin received an e-mail from Ms. Bryce (who already had his full faculty appointment from October with the same three letters of reference), asking about 2 references, which he responded to, and then he received another e-mail near the end of February from Ms. Peacock, with follow-up on March 28, and April 4, 2014, and their e-mails addressed different things regarding his letters of reference. R.

at 00011 - 00012. None of those e-mails sent provided a timeline for when Dr. Martin's second faculty application was due. *See Id.*

21. During the early months of 2014, Dr. Martin had at least twenty-six (26) mutual e-mail exchanges, with four (4) or five (5) additional text messages also sent to Dr. Townes by Dr. Martin regarding the reference letter needing to be on letterhead. R. at 00012.

22. What Dr. Martin did not know was that, in the beginning of April of 2014, two things happened internally within the University. First, Dr. Barton announced he was leaving to move to California and the Department of Surgery were reviewing the Division of Emergency Medicine's budget because there had been cuts to funding, and there was scrutiny of all new hires. Before Dr. Barton left, he was asked to make a proposed budget for the upcoming year, incorporating any reductions he could. On the matrix for the Budget for the Division of Emergency Medicine, Dr. Martin was not included on the 2014/2015 Schedule (unlike Dr. Barton or Dr. Madsen, who were included but whose names were stricken out). Also, for the first time, the Division of Emergency Medicine was going to be contributing 25% towards the salary of the Medical Director of the Utah Poison Control Center starting on July 1, 2014, a commitment made by Dr. Barton, who was no longer staying. R. at 00012 – 00013.

23. Dr. Brixner, the Chair of the Department of Pharmacotherapy, testified in her deposition, that she: “knew that [the Division of Emergency Medicine] had some budget constraint concerns, which was another – going to be another concern was whether they were even going to be able to pay for him or not in July.” R. at 02698.

24. Also, during his deposition, Dr. Hartsell admitted that he inherited budget cuts when he came on as the Chief of the Division of Emergency Medicine in late spring of 2014, and further, when asked about an e-mail that Dr. Crouch sent in September of 2014 to Dr. Brixner and others (two months after Dr. Martin had left) regarding the Emergency Department not being willing to pay any portion of the salary of the medical director or providing any clinical shifts in September of 2014, and whether anything had changed from July 1, 2014 and September, Dr. Hartsell stated: “A. I think by that time we realized how tight we were, and so there was nothing available clinically at the University Hospital to provide the ability to do clinical work in our Emergency Department.” R. at 02366.

25. Only on April 21, 2014, *for the first time*, and shortly after the e-mails scrutinizing the budget, was Dr. Martin put on written notice by Dr. Barton that if he did not complete two final things (within only 4 days) or by April 25, 2014, on his credentialing application packet, that his “packet will not be approved and you will not have your clinical appointment in the Division of Emergency Medicine, Department of Surgery, or be able to work in our ED starting in July.” R. at 00262.

26. On April 23, 2014, Dr. Martin responded to Dr. Barton to inform him that his CV had been submitted in the proper format, one letter of reference on letterhead was submitted, and the other two were promised and that would fulfill all outstanding requirements. R. at 00263. The administrative assistant whom Dr. Martin had been working with confirmed in a subsequent email to Dr. Martin that she had timely submitted the properly formatted CV on April 25, 2014. R. at 00271.

27. On April 30, 2014, Dr. Martin received a positive e-mail notifying him and other staff members of his approved provider status. That e-mail indicated that as of April 28, 2014, Dr. Martin, as a provider in the “Surgery/Emergency Medicine” Department, was ***granted “added inpatient admission privileges and toxicology consultation privileges.”*** R. at 00268.

28. On May 6, 2014, Paula Peacock, Administrative Assistant to Dr. Barton, sent an e-mail to both Dr. Hartsell and Dr. Barton. Ms. Peacock stated that: “I heard from Academic Affairs this morning. Yesterday, they spoke with Phyllis Vetter, in General Counsel. If Dr. Martin has failed to provide the necessary documents in order to submit his file in to meet the deadline, ***then you would be able to cancel his offer for an appointment.***” Then Ms. Peacock went on and concluded her e-mail with the statement: “If the decision is to go forward with his appointment, he still needs one external letter on stationary. ***His start date would be August 1st.***” R. at 00272.

29. On May 13, 2013, Dr. Martin received a notification from the Manager of Medical Staff Services that upon the recommendation of the Credentials Committee and approval of the Medical Board and Hospital Board, ***his additional privileges had been approved for inpatient consultation privileges.*** R. at 00297. Dr. Martin was also scheduled to work shifts starting in June of 2014. R. at 00270.

30. Later that same day, on May 13, 2014, Dr. Martin received a separate email from Dr. Barton addressing that there remained a problem with Dr. Martin’s file. Dr. Martin took immediate steps that same day to try to correct the situation. R. at 00109. Dr. Martin testified in his deposition that between April 23 and May 13, 2014, no one contacted

him and he thought everything had been completed in a timely manner. In fact, Dr. Martin was not aware that an extension had been granted to May 3rd until the litigation occurred.

31. It came to light that one letter of reference apparently was not produced on letterhead by Dr. Townes through no fault of Dr. Martin, but everything else had been completed. R. at 00462. Ms. Peacock provided a self-serving declaration addressing a requirement regarding letterhead, yet attached to her declaration was a checklist, and nowhere on that checklist was such a requirement stated. R. 02759 – 2764. Apparently, Dr. Martin's reference, Dr. Townes, thought he had already provided the updated letter to the Department of Surgery and was confused due to the multiple letters of reference that he had already sent on Dr. Martin's behalf for his position. Accordingly, on May 13, 2014, Dr. Townes apologized to Dr. Martin and re-sent the letter on the letterhead in an e-mail of May 15, 2014. R. at 00462. As a result, any issue with Dr. Martin's application had been corrected, at the latest, by May 15, 2014. R. at 00273.

32. Although Dr. Martin tried to find out how he could fix the issue, or at least explain what had happened, no one was willing to meet with him.

33. During his deposition, Dr. Barton testified that the reason that Dr. Martin was not accepted was actually because he didn't think Dr. Martin would be a good fit, based on the e-mail interactions that his two assistants had had with Dr. Martin, and specifically with Ms. Paula Peacock. However, Dr. Barton admitted that Dr. Martin was never told that the denial was related to any purported interactions between himself and the assistants. R. 02519 – 02520. Although Dr. Barton said that it was a group decision not to move forward with Dr. Martin's appointment with the Division of Emergency Medicine, based on his

input, as well as Dr. Finlayson, the Chair of the Department of Surgery that occurred at a meeting with others, during his subsequent deposition, Dr. Finlayson did not recall the details of that meeting. R. at 02725.

34. On May 27, 2014, Dr. Martin received a letter from Dr. Hartsell indicating that his faculty appointment in the Division of Emergency Medicine, had not proceeded successfully in a timely manner and his file was rejected, and that his School of Medicine (“SOM”) faculty appointment process had been terminated as of that date. R. at 00114.

35. On May 28, 2014, Dr. Martin also received an e-mail from Ms. Thompson indicating that his privileges and medical staff appointment apparently were terminated as of the May 27, 2014 letter because it was a purported “error” on the Medical Staff Offices part to have issued those privileges to Dr. Martin under the Medical Bylaws. R. at 01339.

36. On May 30, 2014, Dr. Martin wrote to the Dean of the College of Pharmacy to try and see if there was anything else he could do to stay on with his employment. The Dean forwarded the e-mail on to Dr. Brixner, whose response was unforgiving and she stated that it was already predetermined that: “[Dr. Crouch] plans to end his contract June 30th and go back to OR taking their on calls until she finds a new MD Director.” R. at 00018 – 00019.

37. On June 2, 2014, Dr. Martin was able to meet with Dr. Hartsell, and Dr. Hartsell indicated he would have no problem with Dr. Martin continuing on as the Medical Director while having his primary privileges through Occupational Medicine/Family Medicine, yet when Dr. Martin followed up with Occupational Medicine, the offer to meet was suddenly withdrawn. R. at 00019.

38. On June 2, 2014, Dr. Crouch also had a phone call with Dr. Hartsell and then sent an e-mail to Dean Ireland and Dr. Brixner, further discouraging either of them from permitting Dr. Martin to continue on at the University. R. at 00019.

39. Dr. Brixner, the Chair of the Department of Pharmacotherapy, testified that even if Dr. Martin would have gotten a faculty appointment with the Department of Occupational and Family Medicine, who initially was very interested in working with Dr. Martin, it would not have supported her “strategy”. Dr. Brixner did not support that appointment: “Because it’s not our strategy. It wasn’t what we wanted. We wanted to work with the School of Medicine and the Department of Emergency Medicine.” R. at 02672.

40. On June 25, 2014, Dr. Martin received a letter from the College of Pharmacy indicating that they were aware that Dr. Martin had not obtained an academic appointment and they did not have an acceptable alternative because of the other requirements for accreditation from the AAPCC. R. at 00121.

41. On July 9, 2014, Dr. Martin received a letter from the Medical Staff Services indicating that the Board had acknowledged Dr. Martin’s “resignation” from the Active staff effective “5/27/2014 and that the following reason was given for your resignation: Termination by Department.” The letter from the University contained improper mischaracterizations of Dr. Martin’s employment. R. 00123.

42. Based on the University’s actions, Dr. Martin asserted that the University violated its own Policies and Procedures. Dr. Martin relied upon Section 6-300, University Faculty, of the Policies, where early termination is addressed because the policy states that

faculty members have legal rights and privileges and faculty members are entitled to “due process” when substantial sanctions are considered. R. at 00022 – 00023.

43. Finally, Dr. Martin asserted that the University also violated their Medical Bylaws in two parts; first regarding its Credentialing Policies, where the University failed to give Dr. Martin the adequate time to correct any purported issue with the faculty appointment application that was submitted to the Division of Emergency Medicine, within the School of Medicine (which the Bylaws apply to); and second, the University violated its Bylaws when it indicated that it was terminating Dr. Martin’s privileges and medical staff appointment, which requires, at a minimum, some basic due process, given that the termination occurred purportedly based on a negligent and unilateral error committed by the University in prematurely issuing Dr. Martin his clinical privileges and medical staff appointment. R. at 00021 – 00027.

Procedural History

44. This case began in November of 2014 with a formal Notice of Claim. R. at 00170 – 00171.

45. On April 10, 2015, Dr. Martin timely filed his Verified Complaint and Jury Demand in federal court under Case No.: 2:15-cv-00248. An Answer was filed on June 11, 2015, and the parties moved forward with full written discovery and ten (10) depositions were also taken. On July 12, 2016, Dr. Martin filed a Motion for Summary Judgment seeking a liability determination on all of his claims.⁹ On July 22, 2016, rather

⁹ See D.E. 32.

than file an opposition memorandum, the University filed a Motion for Judgment on the Pleadings for Lack of Subject Matter Jurisdiction and asserted immunity under the Eleventh Amendment.¹⁰

46. On August 29, 2016, after hearing oral argument on the University's Motion, Judge Jenkins entered the Order¹¹ with his ruling that all claims were dismissed, without prejudice.¹² While Dr. Martin sought equitable relief, including his attorneys' fees and costs, for having to respond to the University's late motion, Judge Jenkins felt he no longer had jurisdiction to address that request, although he recognized the delayed nature of the University's filing and Dr. Martin's concerns.

47. On September 28, 2016, Dr. Martin timely filed his Complaint in state court. Dr. Martin asserted six causes of action in his Complaint for: 1. Lack of Procedural Due Process under the Utah Constitution; 2. Lack of Procedural Due Process under the United States Constitution; 3. Breach of Contract; 4. Breach of Good Faith and Fair Dealing; 5. Negligence; and 6. Injunctive Relief. R. 00001 – 00038.

48. On October 20, 2016, Dr. Martin filed his Motion for Summary Judgment on Liability against the University, and attached over one hundred and sixty pages (160) pages in supporting documents. R. 00166 – 00323.

49. On November 21, 2016, the University filed a Motion to Dismiss. R. 00327 – 00349. On May 1, 2017, oral argument was heard on the University's Motion to Dismiss,

¹⁰ See D.E. 33.

¹¹ See D.E. 44.

¹² See *Id.*

where the trial court denied the University's Motion on five of the six causes of action, but granted the University's Motion as to the Fifth Cause of Action for Negligence, and dismissed it (while reserving whether it was with prejudice or not). R. 00881 – 00886.

50. On June 23, 2017, the University filed its Joint Opposition to Dr. Martin's Motion for Summary Judgment and the University's Motion for Summary Judgment. R. 01760 – 01852. After full briefing on both Motions for Summary Judgment, the trial court heard oral argument on September 6, 2017.

51. On September 26, 2017, the trial court issued its Memorandum Decision. R. 03135 – 03145. On October 24, 2017, Plaintiff timely filed his Notice of Appeal, which was received by the Utah Appellate Courts on October 25, 2017. R. 03146 – 03148.

52. On November 15, 2017, this Court issued a Sua Sponte Motion for Summary Disposition after it noted that a Final Order had not been submitted in this case. On November 17, 2017, the Final Order was entered, (R. 03163 – 03165) and on November 28, 2017, undersigned submitted a Response, after which this Court permitted briefing to proceed.

Disposition of the Case in the Trial Court

53. Dr. Martin and the University both moved for summary judgment before the trial court. R. 00166 – 00323 and 01760 - 01852.

54. Dr. Martin filed a Joint Opposition Memorandum to the University's Motion for Summary Judgment, as well as a Reply in support of his Motion for Summary Judgment. R. 02918 – 02958.

55. In its Memorandum Decision, the trial court rejected Dr. Martin's assertion

that the University should be found liable on his due process, contractual, or injunctive relief, claims and denied Dr. Martin's Motion for Summary Judgment on Liability against the University. R. 03135 - 03145. In that same Memorandum Decision, the trial court then unfairly weighed and adopted the disputed facts and inferences in favor of University and granted the University's Cross-Motion for Summary Judgment, which resulted in the dismissal of Dr. Martin's claims with prejudice.

56. Presently, Dr. Martin has moved the trial court to stay the proceedings, pending the outcome of this appeal. R. 03173 – 3187.

SUMMARY OF THE ARGUMENT

Dr. Martin asserts that the trial court failed to apply the correct standard of review when addressing competing motions for summary judgment. *See Martin v. Lauder*, 2010 UT App 216, ¶¶ 7-8. In addition, the trial court weighed the conflicting evidence, credibility of the witnesses, and interpreted the record in a manner that was unfairly skewed in favor of the University on its Cross-Motion for Summary Judgment, which should not have been granted and constitutes grounds for reversal. *See Martin v. Lauder*, 2010 UT App 216, ¶ 14. Not only did the trial court improperly assign weight to the conflicting evidence, but the trial court reached legal conclusions regarding whether a condition precedent had been fulfilled, which generally presents a questions of fact. *See Arata v. Shefco*, 2014 UT App 148, ¶ 8. In addition, the trial court incorrectly applied the law when it made a determination regarding where there was an offer versus a contract and in relation to Dr. Martin's Fourth Cause of Action for breach of the implied covenant of good faith and fair dealing "that every contract is subject to[.]" *See Brehany v. Nordstrom, Inc.*, 812

P.2d 49, 55 (1991).

Finally, in failing to grant all inferences in favor of Dr. Martin, the trial court minimized the Declaration of Dr. Martin where Dr. Martin identified why the University correctly issued both a medical staff appointment and clinical privileges to him, in favor of Ms. Thompson's testimony. As a result, the trial court improperly determined that Dr. Martin did not have a constitutionally protected property interest in his medical staff appointment or clinical privileges. Moreover, the trial court also applied the law incorrectly regarding *Spackman ex. rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 16 P.3d 533 (Utah 2000), as it related to Dr. Martin's state constitutional rights. Also, while Utah appellate courts have not specifically addressed the issue, in a federal context and under *Osuagwu v. Gila Regional Medical Center*, 938 F.Supp.2d 1142, 1158 (D. N.M. 2012), it has been repeatedly held that a physician's "[m]edical staff privileges embody such a valuable property interest that notice and hearing should be held prior to [their] termination or withdrawal[.]" *See Id.*

Given the multiple errors committed by the trial court, this Court should reverse the trial court's holding in granting the University's Cross-Motion for Summary Judgment as reflected in its Memorandum Decision and Final Order, and remand with further instructions that permit Dr. Martin to move forward to trial.

ARGUMENT

In this case, summary judgment was only appropriate if no genuine issue of material fact existed and the Defendants/Appellees were entitled to judgment as a matter of law. *See Higgins v. Salt Lake County*, 855 P.2d 231, 233 (1983)(overruled on other grounds by

Scott v. Universal Sales, Inc., 2015 UT 64). Dr. Martin asserts that there were numerous genuinely disputed material facts regarding key issues reflected in the record, where even if his Motion for Summary Judgment was correctly denied by the trial court, the existence of that conflicting evidence should have also mandated denial of the University’s Cross-Motion for Summary Judgment in this case.

I. THE TRIAL COURT’S FAILURE TO APPLY THE CORRECT STANDARD IN GRANTING THE UNIVERSITY’S CROSS-MOTION FOR SUMMARY JUDGMENT MANDATES REVERSAL.

Before reciting the facts in its Memorandum Decision, it was expected that the trial court would have included reference to the applicable standard of review in granting summary judgment under Utah R. Civ. P. Rule 56(c), where a court must: “view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” *See Higgins v. Salt Lake County*, 855 P.2d 231, 233 (1983)(overruled on other grounds by *Scott v. Universal Sales, Inc.*, 2015 UT 64). The trial court failed to cite to either the Utah R. Civ. P. Rule 56 standard, or point out the slightly more complex review that needs to occur when there are competing dispositive motions.

This Court has previously recognized, when faced with cross-motions for summary judgment, that:

To be entitled to summary judgment, a party filing a cross-motion for summary judgment must establish its own entitlement to summary judgment rather than simply rely on the other party’s failure on its own motion ... “it is not true that once both parties move for summary judgment the court is bound to grant it to one side or another” ... typically “the denial of [plaintiffs’] motion for summary judgment only mean[s] the [plaintiffs] would have to prove their claim at trial”[].

See Martin v. Lauder, 2010 UT App 216, ¶ 7.

Dr. Martin concedes that the University stated the correct standard for review of cross-motions for summary judgment in its joint memorandum:

“Cross-motions for summary judgment do not ipso facto dissipate factual issues, even though both parties contend ... that they are entitled to prevail because there are no material issues of fact.” ... Rather, cross-motions may be viewed as involving a contention by each movant that no genuine issue of fact exists under the theory it advances, but not as a concession that no dispute remains under the theory advanced by its adversary.

R. at 01818 – 01819 (internal citations omitted).

The University also points out that: “In effect, each cross-movant implicitly contends that it is entitled to judgment as a matter of law, but that if the court determines otherwise, factual disputes exists which preclude judgment as a matter of law in favor of the other side.” R. at 01819, *See also Martin v. Lauder*, 2010 UT 216, ¶ 8. Here, both parties asserted there were disputed facts, which should have precluded granting judgment in favor of the University.

Review of the entire Memorandum Decision reveals that it is devoid of any reference to the correct standard of review, or recognition of how to resolve cross-motions for summary judgment. R. at 03135 – 03145. Accordingly, the trial court’s determinations understandably failed to consider the University’s Cross-Motion in the appropriate context, or review the facts in the light most favorable to the nonmoving party, (i.e. Dr. Martin), and that ultimately led to the incorrect granting of the University’s Cross-Motion for Summary Judgment.

At a minimum, the factual determinations provided by “the defense” that Dr. Martin contested, and the trial court relied upon to Dr. Martin’s detriment included:

“The defense maintains that this letter [approving Dr. Martin’s application for privileges] was issued in error because the plaintiff did not have a faculty appointment in the School of Medicine or the Department of Surgery. (Deposition Exhibit 70).” R. 03135 – 03145, at 03136 (emphasis added).

“The defense denies that the plaintiff’s CV was in the proper format.” R. 03135 – 03145, at 03137 (emphasis added).

“However, the defense maintains that this was past the April 25th or May 3rd deadlines that the plaintiff had been given and only after Dr. Barton had already informed the plaintiff of his failed application.” R. 03135 – 03145, at 03138 (emphasis added).

“According to the defense, the plaintiff was not a faculty member of the School of Medicine and therefore should never have received privileges in the first place.” R. 03135 – 03145, at 03138 (emphasis added).

Each of the determinations referenced above were premised on a disputed fact identified by Dr. Martin, where the University presented an opposing view of, creating genuine issues, and where the trial court should not have granted the University’s Cross-Motion for Summary Judgment.

II. THE TRIAL COURT’S DETERMINATIONS THAT DR. MARTIN’S ACTIONS “FAILED TO FULFILL THE FUNDAMENTAL CONDITIONS OF THE OFFER” SUCH THAT “THE CONTINGENCY DID NOT OCCUR, [AND] THE SCHOOL OF MEDICINE OFFER NEVER ROSE TO THE LEVEL OF A CONTRACT” WERE IMPROPER.

Dr. Martin had two employment contracts, and the trial court’s statements that the December 2013 offer letter never rose to the level of a contract in this case, is an improper determination regarding the merits of the case that are better left to a jury.

Generally, formation of a contract requires an offer, an acceptance, and consideration. ... The obligations of the parties must be “set forth with sufficient definiteness that [the contract] can be performed.” ... “The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.” ... “An acceptance is a manifestation of assent to an offer, such that an objective,

reasonable person is justified in understanding that a fully enforceable contract has been made.” ... It “must unconditionally assent to all material terms presented in the offer, including price and method of performance ...”¹³

Here, the trial court took it upon itself to evaluate Dr. Martin’s contractual claims on the merits, which was not proper. Moreover, not only did the trial court determine that the language in the second offer constituted condition precedents versus covenants or a breach, but then the trial court determined that any issues regarding the second contract (which Dr. Martin had corrected by May 15, 2014), constituted a failure to fulfill a material condition precedent, which was not proper. Whether a material condition precedent exists, and then whether it has been fulfilled or not, is a question of fact better left for a jury to determine:

“A condition is ‘an event, not certain to occur, which must occur ... before performance under a contract becomes due.’”... . Because “no duties arise between the contracting parties until the condition has been fulfilled,” *id.*, failure of ““a material condition precedent relieves the obligor of any duty to perform,”” ... ***Whether a condition precedent was fulfilled generally presents a question of fact.***

See Arata v. Shefco, Ltd., 2014 UT App 148, ¶ 8 (internal citations omitted).

At most, the terms of the second contract would have to be deemed ambiguous, or at a minimum, incomplete, when Dr. Martin was not provided any instructions or a deadline prior to the e-mail of Dr. Barton on April 21, 2014.

Again, however, rather than view the facts in favor of Dr. Martin, the trial court made numerous factual determinations, to Dr. Martin’s detriment, that included:

¹³ *See Cea v. Hoffman*, 2012 UT App 101, ¶¶ 24-25 (internal citations omitted).

“By its very nature, the offer which was contingent upon the review and acceptance of a properly submitted application lacked mutuality and necessarily implied a right to decline the application ... In this case, the plaintiff failed to fulfill the fundamental conditions of the offer submitting an application in the proper format and with the requisite corollary documents. Given the notifications to the plaintiff of the deficiencies in the application process and his failure to fulfill the requirements by the stated deadline, the offer was effectively terminated or revoked. Thus, since the contingency did not occur the School of Medicine offer never rose to the level of a contract.” R. 03135 – 03145, at 03143.

“Further, the plaintiff’s assertion that he was not provided with written instructions relative to the application process or an actual deadline is clearly contradicted by the record showing that he was repeatedly contacted regarding his obligations in completing the application, the stated deadline(s) and the consequences of a failure to follow through. The March and April, 2014, correspondence between the plaintiff and the various individual defendants confirms that he was fully aware of the requirements and the deadlines, but nevertheless failed to comply, leading to a rejection of this application because it was incomplete.” R. 03135 – 03145, at 03140.

“As a corollary, where the plaintiff cannot assert a breach of contract claim, he is also barred from asserting his Fourth Cause of Action for breach of the implied covenant of good faith and fair dealing [...] Likewise, the plaintiff has not explained how his own failure to fulfill the School of Medicine conditional offer would implicate the covenant of good faith and fair dealing.” R. 03135 – 03145, at 03144.

The trial court should have construed the facts and all reasonable inferences taken therefrom in favor of Dr. Martin, including the inference that no matter what Dr. Martin did to correct the issues with the application, the University no longer wanted to have him as the Medical Director of the UPCC, now that Dr. Barton was leaving, and because the Division of Emergency Medicine did not want to pay any portion of his salary and no longer had shifts to provide for him within the Emergency Department. Moreover, whether the small oversight by a third party regarding putting a letter on letterhead should be deemed a material failure, is an issue better left to a jury.

Once Dr. Martin completed the requirements needed to fulfill all of the terms of the second offer, or by May 15, 2014, that created a contract, where the University then had an obligation to perform. Instead, the evidence reflects that the University rescinded the contract, and came up with the claim that Dr. Martin's privileges and medical staff appointment were issued in error based on a revisionist theory, and which the trial court adopted, again, to the detriment of Dr. Martin.

While rescission or unilateral revocation is permitted in some circumstances, a party is "not entitled to rescission if [the] mistake occurred as a result of that party's own negligence[.]" See *Equitable Life & Cas. Ins. Co. v. Ross*, 849 P.2d 1187, 1191 (1993)(internal citations omitted). In this case, the trial court claimed that Dr. Martin had failed to demonstrate how his own "failure to fulfill the School of Medicine conditional offer would implicate the covenant of good faith and fair dealing[.]" Yet, the trial court ignored the fact that Dr. Martin did complete the application, and could have started in his second position in the Division of Emergency Medicine starting on August 1, 2014, but for the fact that the University did not want to fulfill the terms of the contract, and so unilaterally rescinded the contract to the unfair surprise and harm of Dr. Martin. The University's unconscionable actions should not be permitted.

Finally, under *St. Benedicts Development Company v. St. Benedicts Hospital*, 811 P. 2d 194, 199 (1991), it is well recognized that: "In this state, a covenant of good faith and fair dealing inheres in most, if not all, contractual relationships." Here, a contractual relationship was created between the parties with the execution of the first contract in August of 2013, and continued with the execution of the second contract in February of

2014. The conduct and dealings of the parties should be considered, where given that Dr. Martin had been there for numerous months, that the University should have acted in good faith prior to terminating his employment and rescinding the second employment offer under the pretext of a failure to obtain an academic appointment, particularly when the record reflects that he did fulfill all components of it, apart from a *de minimus* oversight by a third party, that he quickly had corrected as soon as he became aware of the issue.

III. THE TRIAL COURT WAS CLEARLY ERRONEOUS IN DETERMINING THAT DR. MARTIN DID NOT HAVE A PROTECTED PROPERTY, OR LIBERTY, INTEREST IN EITHER OF HIS FACULTY POSITIONS OR MEDICAL PRIVILEGES SUFFICIENT TO WARRANT PROCEDURAL DUE PROCESS.

The Supreme Court of Utah has identified a two-part test to evaluate procedural due process claims:

Procedural due process claims are evaluated under a two-part test. The first question is “whether the [complaining party] has been deprived of a protected interest” in property or liberty. ... If the court finds deprivation of a protected interest, we consider whether the procedures at issue comply with due process.[]

See Salt Lake City Corp. v. Jordan River Restoration Network, 2012 UT 84, ¶ 48 (internal citations omitted).

Under the first prong of the due process analysis, the trial court should have applied the facts in the record to the due process standard to make a determination on whether the University failed to meet the due process standard. The trial court should have done so, in the light most favorable regarding whether the termination of Dr. Martin’s employment as a faculty member and revocation of his medical staff appointment and clinical privileges deprived him of a protected property, or liberty, interest.

The trial court absolutely did not apply the facts and all reasonable inferences in favor of Dr. Martin, where the trial court made factual determinations against Dr. Martin supporting the University's decision not to accept his faculty appointment application, even once complete, and rescission of the second contract with the Department of Surgery, in addition to reiterating the defense's assertion that Dr. Martin was granted his medical staff appointment and privileges prematurely, such that the University could terminate both terms of employment early without due process.

The trial court held that: "Ultimately, the plaintiff did not have the required academic appointment and was therefore not entitled to continued enjoyment of the medical staff privileges which were prematurely granted." R. 03135 – 03145, at 03142. "Ultimately, the plaintiff did not have a right to a School of Medicine faculty appointment and did not have a right to continued employment beyond the term of the first agreement. He has therefore suffered no deprivation of a constitutionally protected property interest." R. 03135 – 03145, at 03140.

The trial court's application of facts in favor of the University, was clearly erroneous, and Dr. Martin contested the facts underlying the trial court's determinations in his Joint Memorandum in Opposition to the University's Cross-Motion for Summary Judgment and Reply Memorandum in Support of his Motion for Summary Judgment on Liability. R. at 02918 – 02958.

Although, Dr. Martin acknowledges that Utah Courts have not held specifically that a physician holds a protected property interest in his or her medical staff appointment and clinical privileges, the lack of case law at the state level does not minimize the federal case

law, which can be viewed as persuasive as to the presumption that physicians practicing in the State of Utah should also have a recognized and protected property interest in their privileges:

The Eleventh, Sixth, and Fifth Circuits have explicitly held that a physician has a constitutionally-protected property interest in medical-staff privileges where the hospital's bylaws detail an extensive procedure to be followed when corrective action or suspension or reduction of these privileges is going to be taken. *See Shahawy v. Harrison*, 875 F.2d 1529, 1532 (11th Cir.1989) (holding that a physician has a “constitutionally-protected property interest in medical staff privileges”); *Yashon v. Hunt*, 825 F.2d 1016, 1022–27 (6th Cir.1987); *Northeast Ga. Radiological Assoc. v. Tidwell*, 670 F.2d 507, 511 (5th Cir. Unit B 1982) (“Medical staff privileges embody such a valuable property interest that notice and hearing should be held prior to [their] termination or withdrawal, absent some extraordinary situation where a valid government or medical interest is at stake.”). The Tenth Circuit has noted this property interest in at least one case in which the parties conceded the interest exists. *See Setliff v. Mem'l Hosp. of Sheridan County*, 850 F.2d 1384, 1395 (10th Cir.1988).¹⁴

Furthermore, Dr. Martin respectfully disagrees with the trial court’s analysis under *Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 16 P.3d 533 (Utah 2000), that the medical staff membership and clinical privileges extended to Dr. Martin, once revoked, cannot constitute a “flagrant” violation of his constitutional rights. In July of 2014, Dr. Martin lost his membership within the Hospital, employment as the Medical Director at the UPCC, and received a letter that he was “Terminated by his Department”, the ramifications of which can be career ending for a physician in a similarly situated position. Despite that, the trial court refused to recognize that nowhere in the record did the University ever indicate that it was opting not to renew Dr. Martin’s contracts.

¹⁴ *See Osuagwu v. Gila Regional Medical Center*, 938 F.Supp.2d 1142, 1158 (D. N.M. 2012).

Moreover, the trial court refused to grant any of the inferences in Dr. Martin's favor that the minor technicality in failing to get one letter of reference on letterhead, or short delay in completion of Dr. Martin's fourth application, was actually just an excuse to unilaterally rescind the second contract the University had entered into with Dr. Martin (because the Division of Emergency Medicine needed to make a budget cut somewhere and with Dr. Barton leaving, his prior idea of having a joint program with the UPCC was no longer desired), which deprived Dr. Martin of the opportunity to work at the University for another year.

As a result, the trial court resolved the factual disputes in favor of the University on Dr. Martin's procedural due process claims in a way that was clearly erroneous, and where Dr. Martin has met his higher burden, this Court should reverse the trial court as to his First and Second Causes of Action, and permit him to move forward to trial on the same.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's ruling that granted the University's Cross-Motion for Summary Judgment, and remand for further proceedings.

DATED this 21st day of March, 2018.

DURHAM JONES & PINEGAR, P.C.

/s/ Julia D. Kyte
Julia D. Kyte
Attorney for Appellant

Certificate of Compliance with Rule 24(f)(1)

1. This brief complied with the type-volume limitation of Utah R. App. P. Rule 24(f)(1) because it contains 10,245 words, in total.

2. This brief complies with the typeface requirements of Utah R. App. P. Rule 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows 2010, Times New Roman, Font Size 13.

DATED this 21st day of March, 2018.

DURHAM JONES & PINEGAR

/s/ Julia D. Kyte _____

Julia D. Kyte

Attorney for Appellant

PROOF OF SERVICE

I hereby certify that, on the 21st day of March, 2018, two true and correct copies of the foregoing **BRIEF OF APPELLANT** were mailed, postage prepaid, to the following:

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ADDENDUM

Memorandum Decision

Final Order on Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion
for Summary Judgment

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

THOMAS G. MARTIN, M.D.,

Plaintiff,

vs.

THE UNIVERISTY OF UTAH; THE UNIVERSITY OF UTAH COLLEGE OF PHARMACY; UTAH POISON CONTROL CENTER; BARBARA CROUCH, in her official and individual capacities; DIANA BRIXNER, in her official and individual capacities; ERIK BARTON, in his official and individual capacities; STEPHEN HARTSELL, in his official and individual capacities; SAMUEL FINLAYSON, in his official and individual capacities; HEIDI THOMPSON, in her official and individual capacities; PAULA PEACOCK, in her official and individual capacities; and DOES 1-10 in their official and individual capacities,

Defendants.

MEMORANDUM DECISION

CASE NO. 160906038

Judge Andrew H. Stone

This matter came before the Court for a hearing on September 6, 2017, in connection with the plaintiff's Motion for Summary Judgment and the defendants' cross Motion for Summary Judgment. At the conclusion of the hearing, the Court took the matter under advisement to further consider the parties' written submissions, the relevant legal authorities and counsel's oral argument. Being now fully informed, the Court rules as stated herein.

The material facts in this case may be organized in the order of chronology. On August 2, 2013, the plaintiff was sent a letter signed by defendant Barbara Crouch, the Executive Director of the Utah Poison Control Center ("UPCC"), and defendant Diana Brixner, Chair of the Department of Pharmacotherapy, stating:

I am pleased to offer you the position of Medical Director, Utah Poison Control Center with a faculty appointment in the College of Pharmacy at the rank of Associate Professor (Clinical). This position will start at 0.75 FTE funded by the Utah Poison Control Center with a transition to a split position with your primary academic appointment in the Division of Emergency Medicine, Department of Surgery, to start July 1, 2014.

(Deposition Exhibit 18). The plaintiff "accepted" by signing the letter on August 2, 2013.

An August 15, 2013, letter to the plaintiff confirmed the need for final approval of the President and Board of Trustees of the University of Utah. The letter also specified that the initial term of appointment was from October 1, 2013 until June 30, 2014, and that the appointment was to "automatically renew each year thereafter for successive terms of one (1) year unless either [the plaintiff] or the University gives written notice to the other of its intent not to renew [the plaintiff's] appointment." The plaintiff accepted this letter on August 22, 2013.

The plaintiff then relocated from Seattle, Washington, in the fall of 2013 and purchased a residence in Salt Lake City. On September 6, 2013, the plaintiff obtained his medical licenses in the State of Utah, and started as the Medical Director of the UPCC on October 1, 2013. The plaintiff's application for medical credentials to practice in the University of Utah Hospital was approved on or about October 9, 2013. A November 12, 2013, letter from the President of the University of Utah, sent to the plaintiff, advised him that the "the University's Board of Trustees has approved your appointment in the full-time clinical track as Associate Professor (Clinical) of Pharmacotherapy, effective October 1, 2013 and ending June 30, 2014."

On November 19, 2013, defendant Heidi Thompson, Manager of Medical Staff Services, sent a letter to the plaintiff stating: "I am pleased to inform you that upon the recommendations of the Credentials Committee and approval of the Medical Hospital Boards, your application for privileges at the University of Utah Hospitals and Clinics has been approved . . . Your reappointment/appointment is for the period: **10/02/2013 to 10/01/2015**. Category: **Active**. Status: **Provisional**. Division: **Emergency Medicine**. Department: **Surgery**." The defense maintains that this letter was issued in error because the plaintiff did not have a faculty appointment in the School of Medicine or the Department of Surgery. (Deposition Exhibit 70).

In a letter, dated December 3, 2013, but not received by the plaintiff until February of 2014, defendant Erik Barton, Chief of the Division of Emergency Medicine, and defendant Samuel Finlayson, Chair of the Department of Surgery, offered the plaintiff "a position on the faculty in the Division of Emergency Medicine, Department of Surgery at the University of Utah School of Medicine." (Deposition Exhibit 72). The letter details the approval process for the offer of appointment and states that the initial term of appointment "is intended to begin on July 1, 2014."

On January 23, 2014, Becky Brice, an administrative assistant in the Department of Surgery sent the following email to the plaintiff: "Because of your faculty rank, you need three outside the institution letters. You currently have two from Drs. Townes and Cummins. Would you please solicit one more? Thanks. If you would have sent to my attention that would be preferable."

On March 28, 2014, and April 4, 2014, defendant Paula Peacock, an assistant within the Department of Surgery, emailed the plaintiff and asked him to call Drs. Townes and Hurley to instruct them to print their letters on letterhead.

On April 21, 2014, Dr. Barton sent an email to the plaintiff indicating that there were deficiencies in his application materials. Dr. Barton informed the plaintiff that if he did not complete two aspects of his credentialing application by April 25, 2014, his "packet will not be approved and you will not have your clinical appointment in the Division of Emergency Medicine, Department of Surgery, or be able to work in our ED starting in July." The April 25th deadline was subsequently extended to May 3rd.

The plaintiff responded to Dr. Barton on April 23, 2014, informing him that his CV had been submitted in the proper format, one letter of reference on letterhead was submitted, and the other two were promised to fulfill all outstanding requirements. The defense denies that the plaintiff's CV was in the proper format.

On May 13, 2014, Dr. Barton informed the plaintiff that his credentialing packet was not successful. The defense asserts that the plaintiff failed to obtain all of the required letters of recommendation, in the proper format, by the designated deadline.

On May 15, 2014, the plaintiff sent a letter of recommendation on letterhead from Dr. Townes. However, the defense maintains that this was past the April 25th or May 3rd deadlines that the plaintiff had been given and only after Dr. Barton had already informed the plaintiff of his failed application.

On May 28, 2014, the plaintiff received an email from Ms. Thompson indicating that his privileges and medical staff appointment were terminated as of May 27, 2014. According to the defense, the plaintiff was not a faculty member of the School of Medicine and therefore should never have received privileges in the first place.

The plaintiff seeks summary judgment on his remaining five causes of action. With respect to the First and Second Causes of Action, the plaintiff asserts that he was deprived of procedural due process under Article 1, section 7 of the Utah Constitution and that the defendants violated the Procedural Due Process Clause of the United States Constitution. The latter claim is being brought under 42 U.S.C. §1983. The plaintiff's Third and Fourth Causes of Action allege that the defendants breached each of the plaintiff's three contracts for employment and that they acted in bad faith by depriving the plaintiff from continued employment at the University of Utah. Finally, in his Fifth Cause of Action, the plaintiff asserts that the individual defendants acted with fraud and malice when they negligently published certain documents concerning him. The plaintiff's Sixth Cause of Action is a request for injunctive relief relative to the alleged publication of negative information. The defense has responded in seeking summary judgment on these same causes of action. The Court will address each of plaintiff's claims in turn.

The first issue before this Court is whether the defendants violated Article 1, section 7 of the Utah Constitution in denying the plaintiff his procedural due process rights. The plaintiff asserts that the defendants deprived him of procedural due process rights with respect to (1) his ability to continue in his faculty appointment in the Department of Pharmacotherapy and as Medical Director of the UPCC; (2) the revocation of his medical privileges; and (3) the determination that he failed to submit a timely, complete application to achieve a School of Medicine faculty appointment.

Notably, in their Opposition to the plaintiff's Motion for Summary Judgment, the defense asserts that based on the allegations of the Complaint, the plaintiff has limited his state due process claim to the alleged deprivation of

only his medical staff privileges and not his employment. The plaintiff counters that the defendants' interpretation of the Complaint is too narrow. According to the plaintiff, he has claimed that the defendants failed to provide him due process with respect to his employment and faculty status when they violated the Medical Staff Bylaws and Policies for the UUHC.

In reviewing the Complaint, the Court notes that Paragraph 82 specifically alleges that "[the] Defendants engaged in deliberate actions that deprived Dr. Martin of his medical staff privileges at the University of Utah that he obtained on November 19, 2013. Dr. Martin's medical staff privileges are a recognized property interest subject to state constitutional due process protections." (Complaint at para. 82). However, a broader view of the Complaint suggests that the plaintiff is also alleging a due process claim relating to a prospective faculty appointment with the School of Medicine and continued employment with the Department of Pharmacotherapy. The Court therefore examines the alleged due process deprivations with respect to both the plaintiff's medical staff privileges and prospective/future employment.

The plaintiff's employment-based due process claims rest on an alleged series of employment contracts and the Bylaws. However, as discussed in more detail below, the plaintiff's due process claims based on prospective or future employment can only be based upon (1) a contract pertaining to the plaintiff's position of Medical Director of the UPCC with a faculty appointment in the College of Pharmacy, and (2) a qualified and conditional offer to achieve a School of Medicine faculty appointment upon the successful submission and acceptance of an application. As to the latter, it is undisputed that the plaintiff's application was incomplete as of the April 25th or May 3rd deadlines established by Dr. Barton. Ms. Peacock's un rebutted deposition testimony as well as the documentary evidence before the Court establish that the plaintiff was required to provide three letters of reference on letterhead prior to these deadlines and that he failed to provide a third compliant letter until May 15, 2014.

Further, the plaintiff's assertion that he was not provided with written instructions relative to the application process or an actual deadline is clearly contradicted by the record showing that he was repeatedly

contacted regarding his obligations in completing the application, the stated deadline(s) and the consequences of a failure to follow through. The March and April, 2014, correspondence between the plaintiff and the various individual defendants confirms that he was fully aware of the requirements and the deadlines, but nevertheless failed to comply, leading to a rejection of his application because it was incomplete.

Further, the plaintiff's position as Medical Director with a faculty position in the College of Pharmacy was the subject of the August 15, 2013, offer letter - the parties' first agreement. This agreement provides for automatic renewal each year "unless either you or the University gives written notice to the other of its intent not to renew your appointments." (Emphasis added). It is undisputed that the University had the right and did exercise its option not to renew the plaintiff's positions on June 25, 2014.

Ultimately, the plaintiff did not have a right to a School of Medicine faculty appointment and did not have a right to continued employment beyond the term of the first agreement. He has therefore suffered no deprivation of a constitutionally protected property interest. Accordingly, to the extent that the plaintiff is claiming a due process violation relative to his employment status, the Court grants the defendants' Motion for Summary Judgment.

The Court next addresses the plaintiff's due process claim regarding his medical staff privileges and whether the revocation of these privileges without providing him with a hearing amounts to a constitutional deprivation. The defense correctly points out that there are no Utah cases which recognize medical staff privileges to be constitutionally protected rights. The plaintiff has cited federal court cases recognizing that medical staff privileges embody a constitutionally protected property interest. See e.g. Osuagwu v. Gila Regional Medical Center, 938 F.Supp.2d 1142, 1158 (D. N.M. 2012). However, the presumption in these cases that a physician has a valuable property interest in such privileges is based on an underlying logical inference that the privilege was correctly and properly extended to the physician in the first place. While the plaintiff maintains that medical privileges were a mandated requirement for him to act as the Medical Director at the UPCC, Ms. Thompson has testified that the medical staff privileges granted by her department to the plaintiff was in error because the only faculty appointment that accompanied his medical staff application was the College of Pharmacy, Department of

Pharmacotherapy faculty appointment, and, according to the Bylaws, the plaintiff should not have had his privileging or credentialing approved without a School of Medicine faculty appointment. (Exhibit 6, Thompson Dep. at 65:10-11). Ms. Thompson's testimony and the controlling language of the Bylaws which requires a School of Medicine faculty appointment in advance of medical staff privileges being extended to a physician are unrefuted. Clearly, the plaintiff's privileges were granted prematurely when his right to the same was not yet vested because his faculty appointment in the School of Medicine was still subject to the application process and was not a fait accompli by any means. Thus, in contrast to the cases cited by the plaintiff, the plaintiff's interest in the medical privileges never rose to the level of a constitutionally protected property interest.

As a corollary, under Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist., 16 P.3d 533 (Utah 2000), the Court is not persuaded that the medical staff privileges extended to the plaintiff garnered constitutional due process protections such that the revocation of the same constitutes a "flagrant" violation of his constitutional rights.¹ In addition, where the plaintiff has asserted identical §1983 and contract claims, he has established the existence of other avenues of relief, thus failing the second element of Spackman.

Further, since the plaintiff cannot meet his burden under Spackman, his state law liberty interest claim similarly fails as a matter of law, assuming of course that an employee has a liberty interest in his reputation under the Utah Constitution.² In addition, the plaintiff cannot maintain a claim that his reputation was harmed because of the revocation of privileges which were prematurely granted and could be revoked once the plaintiff's faculty appointment in the School of Medicine failed to materialize. The Court therefore grants summary judgment to the defense on the plaintiff's First Cause of Action in the entirety.

¹ The Court notes that the plaintiff has not evaluated the elements of Spackman in any detail and has primarily focused only on the first element.

² The Court concludes that the plaintiff has failed to cite any legal authority that would support such a claim and the Court will not extend State v. Briggs, 199 P.3d 948 (Utah 2008), beyond its finding of a liberty interest under the United States Constitution.

As to the plaintiff's Second Cause of Action, the defendants have asserted qualified immunity. Under Martinez v. Beggs, 563 F.3d 1082, 1088 (10th Cir. 2009), "[w]hen a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right, and (2) the constitutional right was clearly established." (Citations omitted). Based on the foregoing analysis, the Court determines that the plaintiff has not met his burden in establishing a constitutional violation that was clearly established. To the contrary, as with his state constitutional due process claim, the plaintiff has not established a deprivation of his due process rights either in connection with his continued employment or with the revocation of his medical staff privileges. Ultimately, the plaintiff did not have the required academic appointment and was therefore not entitled to continued enjoyment of the medical staff privileges which were prematurely granted. Likewise, no due process rights attached to the plaintiff's employment which was subject to non-renewal at the option of the University prior to June 30, 2014. Finally, the plaintiff's claim of a federal liberty interest fails under the same standards set forth above. The Court therefore grants summary judgment on the plaintiff's Second Cause of Action. As a corollary, because the plaintiff's Sixth Cause of Action is predicated on prevailing on the Second Cause of Action, the Court's determination in granting summary judgment on this claim also entitles the defense to summary judgment on the plaintiff's injunctive relief claim.

Next, with respect to his Third Cause of Action, the plaintiff asserts that the defendants breached the Bylaws and two alleged employment contracts. Again, the first contract between the parties pertains to the plaintiff's position of Medical Director of the UPCC with a faculty appointment in the College of Pharmacy. Under this contract, the plaintiff was offered a one-year appointment with a transition to a split appointment with the School of Medicine. This transition and tenure with the School of Medicine, which was anticipated to occur on July 1, 2014, ultimately failed because of the plaintiff's rejected application. Further, given this failure and under the express terms of the parties' agreement, the College of Pharmacy had the option to give written notice of its intent "not to renew the appointment," which it did on June 25, 2014. This option of non-renewal was unconditional and did not involve a disciplinary matter. Therefore, the College of Pharmacy's decision to not renew did not carry with

it a right to due process or peer judgment before the decision was made. To the contrary, the College of Pharmacy contract simply expired on its own terms.

Next, the Court is unpersuaded by the plaintiff's position that the December 2013 offer from the School of Medicine culminated into a contract. By its very nature, the offer which was contingent upon the review and acceptance of a properly submitted application lacked mutuality and necessarily implied a right to decline the application. In addition, the submission of an application was no mere formality and its approval, which was clearly discretionary, was integral to gaining a faculty appointment. In this case, the plaintiff failed to fulfill the fundamental conditions of the offer of submitting an application in the proper format and with the requisite corollary documents. Given the notifications to the plaintiff of the deficiencies in the application process and his failure to fulfill the requirements by the stated deadline, the offer was effectively terminated or revoked. Thus, since the contingency did not occur, the School of Medicine offer never rose to the level of a contract.

Further, the plaintiff's reliance on the Bylaws in asserting that he should have been given 30 days' advance notice that his application would be rejected is misplaced. The Bylaws have no application to the faculty appointment process, but rather apply strictly to medical staff privileges.

Finally, the third contract allegedly breached is the Bylaws. The plaintiff again asserts that the defendants' actions in automatically revoking his privileges without a hearing constitutes a breach of the Bylaws. However, as discussed in the Court's analysis above, where the privileges were granted prematurely in the first place, prior to the plaintiff being granted a faculty appointment through the School of Medicine, he was not entitled to a hearing under the Bylaws when the privileges were subsequently revoked. Having failed to obtain a faculty appointment, the plaintiff had no vested entitlement in the privileges and the revocation of the same cannot constitute a breach of the Bylaws. Based on the foregoing, the Court rules that having failed to establish a breach of the two contracts and the Bylaws, the plaintiff's Third Cause of Action fails as a matter of law. The Court grants summary judgment to the defendants on this cause of action.

As a corollary, where the plaintiff cannot assert a breach of contract claim, he is also barred from asserting his Fourth Cause of Action for breach of the implied covenant of good faith and fair dealing. See Brehany v. Nordstrom, Inc., 812 P.2d 49, 55 (Utah 1991) (The covenant of good faith and fair dealing cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante). In addition, the plaintiff has not sufficiently articulated a theory as to why the defendants acted in bad faith in opting to not renew the Pharmacy contract. Likewise, the plaintiff has not explained how his own failure to fulfill the School of Medicine conditional offer would implicate the covenant of good faith and fair dealing. Accordingly, the Court grants summary judgment on this cause of action as well.

Finally, in the absence of liability under each of the foregoing causes of action, the Court denies the plaintiff's Motion for Summary Judgment seeking a liability determination against the defendants in their personal capacity under the plaintiff's Fifth Cause of Action. While the defense has moved for summary judgment in the entirety, the Court could not locate any specific legal argument on the plaintiff's Fifth Cause of Action. Therefore, while denying the plaintiff's Motion in this regard, the Court cannot grant the defendants' Motion on this cause of action.

Counsel for the defense is to prepare an Order consistent with this Memorandum Decision and submit the same to the Court for review and signature.

Dated this 26th day of September, 2017.

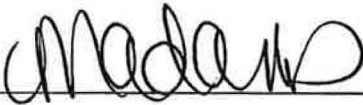

ANDREW H. STONE
DISTRICT COURT, JUDGE
SALT LAKE COUNTY, UTAH

CERTIFICATE OF SERVICE

I hereby certify that I emailed/mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 26 day of September, 2017:

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

THOMAS G. MARTIN, M.D.,

Plaintiff,

vs.

THE UNIVERSITY OF UTAH; THE
UNIVERSITY OF UTAH COLLEGE OF
PHARMACY; L.S. SKAGGS PHARMACY
INSTITUTE; UTAH POISON CONTROL
CENTER; BARBARA CROUCH, in her
official and individual capacities; DIANA
BRIXNER, in her official and individual
capacities; ERIK BARTON, in his official
and individual capacities; STEPHEN
HARTSELL, in his official and individual
capacities; SAMUEL FINLAYSON, in his
official and individual capacities; HEIDI
THOMPSON, in her official and individual
capacities; PAULA PEACOCK, in her
official and individual capacities; and DOES
1-10, in their official and individual
capacities;

Defendants.

**ORDER ON
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT
AND
DEFENDANTS' CROSS-MOTION FOR
SUMMARY JUDGMENT**

Case No. 160906038

Judge Andrew H. Stone

On September 6, 2017, this court held a hearing on Plaintiff's Motion for Summary Judgment and Defendants' cross Motion for Summary Judgment. Both parties presented argument and this court issued a memorandum decision on September 26, 2017. Based upon the reasoning and decision set forth in the Court's September 26, 2017 memorandum decision, the Court hereby orders that Plaintiff's motion for summary judgment is denied and Defendants' motion for summary judgment is granted¹ as follows:

1. Plaintiff's first cause of action for denial of due process under the Article 1, section 7 of the Utah Constitution is dismissed with prejudice;
2. Plaintiff's second cause of action for denial of due process under the Procedural Due Process clause of the United States Constitution and 42 U.S.C. § 1983 is dismissed with prejudice;
3. Plaintiff's third cause of action for breach of contract is dismissed with prejudice,
4. Plaintiff's fourth cause of action for breach of the covenant of good faith and fair dealing is dismissed with prejudice; and
5. Plaintiff's sixth cause of action for injunctive relief is dismissed with prejudice.

The court further orders that based on its prior May 22, 2017 order, Plaintiff's fifth cause of action is dismissed with prejudice.

SO ORDERED.

¹ Defendant did not move for summary judgment on Plaintiff's fifth cause of action.

APPROVED AS TO FORM:

/s/ Julia D. Kyte

JULIA D. KYTE

STIRBA PC

Signed with permission by email

*** * * END OF ORDER * * ***

SIGNATURE AND DATE ARE AT TOP OF FIRST PAGE