IN THE UTAH COURT OF APPEALS

Thomas D. Martin, M.D., Plaintiff-Appellant, v. University of Utah, et al., Defendants-Appellees.	Appeal No. 20170844-CA

On appeal from a final judgment of the Third Judicial District Court,
Salt Lake County, State of Utah, Case No. 160906038,
the Honorable Andrew H. Stone presiding.

APPELLEES' RESPONSE BRIEF

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ORAL ARGUMENT NOT REQUESTED

LIST OF CURRENT AND FORMER PARTIES

The following are parties to this appeal:

Plaintiff-Appellant:

--Thomas Martin.

Defendant-Appellees:

--University of Utah.

--University of Utah College of Pharmacy. Though named as a separate legal entity, the College of Pharmacy is an operating unit of the University of Utah.

--Utah Poison Control Center. Though named as a separate legal entity, the Center is an operating unit of the University, organizationally within the College of Pharmacy, Department of Pharmacotherapy.

--Barbara Crouch, a University employee.

--Erik Barton, a University employee.

--Stephen Hartsell, a University employee.

--Samuel Finlayson, a University employee.

--Heidi Thompson, a University employee.

--Paula Peacock, a University employee.

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INTRODUCTION

This case arises out of Martin's brief employment with the University of Utah ("University") as the medical director of the Utah Poison Control Center ("UPCC"). In August 2013, the University's College of Pharmacy offered Martin the position of UPCC medical director and a faculty position in the College of Pharmacy. The offer guaranteed employment through June 30, 2014; the contract would be renewed annually unless either party elected not to renew. The offer anticipated that Martin's position would transition on July 1, 2014, to a split position between the College of Pharmacy and the University's School of Medicine. The offer also was contingent on Martin obtaining a medical staff appointment with the University hospital, which would require Martin to apply for and become a faculty member in the School of Medicine.

Martin began working as medical director in October 2013. Even before he began working, he was informed of the extensive application process necessary to obtain a faculty appointment in the School of Medicine by July 1, 2014. This process included providing necessary application materials, three external letters of reference, and obtaining medical staff privileges at the University hospital. Medical staff privileges are formal permission given by a medical facility to a provider allowing him or her to

practice medicine at that facility. Under the University's bylaws, a provider may not have medical privileges at the University hospital unless he is a member of the faculty of the School of Medicine; if a provider leaves the School of Medicine, the privileges are automatically relinquished. Martin was mistakenly granted medical privileges. Because he only had a College of Pharmacy faculty appointment, he should not have been granted privileges.

In December 2013, the School of Medicine offered Martin a faculty position to begin July 1, 2041. He was informed in the offer that he would receive instructions regarding the application process; he received those instructions shortly thereafter, and he began the application process by the end of January. Unlike every other applicant before him, Martin had significant difficulty completing his application. Despite repeated reminders, Martin failed to provide the three required outside letters of reference and failed to provide his curriculum vitae ("CV") in the proper format required by the University.

After months passed, the University's deadline approached to finalize its faculty appointments for a July 1 start date. Martin was given a firm deadline to complete his application. That deadline was extended, yet Martin did not timely complete his application. The School of Medicine denied his application because it had not been completed by the extended deadline. The

College of Pharmacy opted not to renew his contract, so it expired on its own terms and Martin's employment with the University ended.

Martin sued, bringing state and federal procedural due process claims, breach of contract claims, and a negligence claim. The district court granted the University Defendants'[1] motion for summary judgment and this appeal followed.

This Court should affirm. The undisputed evidence in the record below established that the University fulfilled all its obligations under the two offer letters and the bylaws and that Martin was not denied a liberty or property interest.

STATEMENT OF THE ISSUES

1. Premature notice of appeal

Martin filed his notice of appeal before final judgment entered. Does his premature notice of appeal deprive this Court of jurisdiction?

Standard of review:

This issue does not involve review of any lower court decision.

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[1] When referring to pleadings filed and arguments made, Appellees will be collectively referred to as "the University Defendants."

Preservation:

This issue is unique to the appeal and requires no preservation below.

2. Waiver

Martin has not challenged the district court's ruling on qualified immunity on the federal due process claim. And Martin has not briefed his negligence claim or his claim for injunctive relief. Has Martin waived and abandoned appellate review of these claims?

Standard of review:

This issue does not involve review of any lower court decision.

Preservation:

This issue is unique to the appeal and requires no preservation below.

3. Summary judgment standard

Though the district court did not recite the summary judgment standard in its memorandum decision, the correct standard was stated in the University Defendants' memoranda in support of their motion for summary judgment. Martin has failed to show that the district court applied the wrong standard and failed to demonstrate a genuine dispute of material fact that

would have changed the result. Should this Court affirm the grant of summary judgment?

Standard of review:

This Court's review of a grant of summary judgment is de novo. *Potter v. South Salt Lake City*, 2018 UT 21, ¶ 16, --- P.3d ---. This means that the district court's decision is afforded "no deference" and this Court determines de novo whether the moving party has "established that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." *Barneck v. Utah Dep't of Transp.*, 2015 UT 50, ¶ 13, 353 P.3d 140. "This court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness, and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Flygare v. Ogden City*, 2017 UT App 189, ¶ 5, 405 P.3d 970.

Preservation:

This issue was preserved in the State's motion for summary judgment and supporting memorandum. R. 1817-19.

4. Contract claims

The district court's ruling on the contracts claims was based on the undisputed record evidence below. Does Martin fail to show that the district court erred in granting summary judgment?

Standard of review:

The same de novo standard of review as in Issue 3, above, applies.

Preservation:

This issue was preserved in the University Defendants' motion for summary judgment and supporting memoranda. R. 1840-51, 3111-18.

5. State due process claim

The district court's ruling on the state due process claim was based on the undisputed record evidence. Does Martin fail to show that the district court erred in granting summary judgment?

Standard of review:

The same de novo standard of review as in Issue 3, above, applies.

Preservation:

This issue was preserved in the University Defendants' motion for summary judgment and supporting memoranda. R. 1820-3, 3100-05.

STATEMENT OF THE CASE

Facts:

The University's College of Pharmacy, through its Department of Pharmacotherapy,[2] and the UPCC had a five-year plan and strategy to have a toxicology fellowship jointly with the School of Medicine under which UPCC and the School of Medicine would be able to hire toxicology fellows to work in the UPCC. R. 2645, 2647-48. In light of that strategy, the UPCC wished to hire a full-time medical director certified in toxicology that would have clinical position in the School of Medicine. R. 2647-48.

College of Pharmacy Offer (August Offer)

The College of Pharmacy sent Martin an offer letter dated August 2, 2013, offering him a job as medical director of the UPCC and a faculty appointment in the College of Pharmacy. R. 1174-75, 1944. This offer was revised in a letter dated August 15, 2013. R. 1208-11, 1976. Martin had no

[2] For the sake of brevity, this brief will refer to the College of Pharmacy's Department of Pharmacotherapy as the College of Pharmacy except where specific reference to the Department of Pharmacotherapy is required.

objections to the revised offer and agreed to it by signing it. R. 1211, 1979, 1986, 1987.

The revised offer (hereafter "August offer") expressly provided that the appointment would end on June 30, 2014, and was subject to automatic one-year renewal each year unless either party provided notice of its intent not to renew. R. 1208-09. University Policy 6-300, which was referenced in the August offer, governs career-line faculty appointments like Martin's. R. 1071-90. The policy provides that appointments of career-line faculty members "are for limited terms only" and that "[a]ll annual appointments end automatically each June 30." R. 1079. The policy also provides that these limited term contracts may be terminated early "for the faculty member's failure to meet a term of the contract" or "if any condition specified in the contract is not fulfilled." R. 1079-80.

The August offer was expressly "contingent upon final approval of the President and Board of Trustees of the University of Utah and your ability to obtain a license to practice medicine in the State of Utah and a medical staff appointment at University Hospitals and Clinics." R. 1208. Martin's position would initially be a .75 FTE position, funded by the College of Pharmacy, with a transition to a full-time position on July 1, 2014, which would be split

between a College of Pharmacy faculty appointment and School of Medicine faculty appointment. R. 1208.

On November 12, 2013, Martin was notified by letter that the board of trustees had approved his College of Pharmacy appointment "effective October 1, 2013 and *ending June 30, 2014*." R. 1257 (emphasis added).

School of Medicine Offer (December Offer)

On December 3, 2013, the University's School Medicine, by its Department of Surgery, Division of Emergency Medicine,[3] formally offered Martin a faculty position. R. 1261-63. The position was to begin July 1, 2014, and included an appointment as an associate professor in the Division of Emergency Medicine, Department of Surgery and Medical Director of the Utah Poison Control Center. R. 1261. The offer (hereafter "December offer") expressly provided that it was "contingent upon final approval of the President and Board of Trustees of the University of Utah," and that Martin "need[ed] a confirmed academic appointment through the School of Medicine

[3] For the sake of brevity, this brief will refer to the School of Medicine's Department of Surgery, Division of Emergency Medicine, as the School of Medicine except for when specific reference to the Department of Surgery or Division of Emergency Medicine is required.

and medical credentialing through University Hospital." R. 1261 (emphasis added). Martin would be sent "instructions regarding your responsibility in obtaining the necessary documents for your academic appointment." *Id*. Martin's appointment was subject to University Policy 9-2 (which was renumbered as 6-300), which provided that these types of appointments "are for limited terms only" that "automatically end on June 30 of each academic year." *Id*. Martin signed and accepted the conditions as written in the December 2013 offer letter. R. 1263, 2039-40.

The College of Pharmacy and the School of Medicine have their own respective processes for faculty appointments; a faculty appointment application in one is completely separate from the other. R. 2452, 2692. Martin understood there were different application processes for both and that he would have to submit separate applications for each. R. 2003-04.

Medical Staff Appointment (Medical Privileges)

Martin also understood that there is a different application process to obtain medical staff privileges at the University's hospital and clinics. R. 2003-04. The application and approval process for medical staff privileges is completely separate from the application and approval process for a faculty appointments. R. 2579, 2659-60.

The Bylaws of the Medical Staff, University of Utah Hospitals and Clinics, Part II, Credentialing Policy ("Bylaws") governs, among other things, the qualifications for, conditions, and responsibilities of appointment and reappointment to the medical staff. R. 1499-1612. Under Article 1.A.1 of the Bylaws, to be eligible for medical staff privileges, Martin needed a School of Medicine faculty appointment; a College of Pharmacy faculty appointment is insufficient. R. 1525-26. Under Article 5.D.5 of the Bylaws, medical staff privileges are automatically relinquished upon loss of faculty status in the University of Utah School of Medicine, or upon termination of employment with the hospital or School of Medicine. R. 1557. Under Article 6 of the Bylaws, automatic relinquishment of medical staff privileges is not grounds for a hearing. R. 1559-60.

Martin was mistakenly granted hospital medical staff privileges

On November 19, 2013, Martin received a standard form letter informing him that his application for medical staff privileges at the University's hospitals and clinics had been approved. R. 1258, 2560. These medical staff privileges were mistakenly granted because Martin did not have a School of Medicine faculty appointment; under Article 1.A.1 of the Bylaws, Martin should not have had his medical staff privileges approved

without a School of Medicine faculty appointment; Martin's application for medical staff privileges included only his faculty appointment with the College of Pharmacy, which was insufficient to qualify for medical staff privileges. R. 1339, 1525-26, 2586-87, 2594.

Incomplete Application for School of Medicine Faculty Appointment

The December 2013 offer expressly contemplated a July 1, 2014 start date and required Martin to complete the application process to obtain a faculty position in the School of Medicine. R. 1261. As part of the application process, letters of reference are required to be on a professional letterhead, must be addressed to the department in the School of Medicine specific to the faculty position offered, and must address the candidate involved and the position for which the candidate is applying. R. 2466-67. It is a uniform requirement of all applicants for the position of associate professor, which is what Martin applied for, that they obtain three external letters of reference. R. 2761. The letters must be on institutional letterhead because letters on plain white paper can be prepared by anyone; the candidate requests their letters of support from colleagues outside the institution. R. 2762.

Timely completion of the application is necessary to meet the candidate's effective start date. R. 2761. Reference letters for a School of

Medicine faculty appointment differ from letters requested by another department or organization; the University asks reviewers to write a letter of support specific to the faculty appointment the candidate is being hired for. R. 2762. In the School of Medicine's Department of Surgery, the division chiefs talk a lot about deadlines and the need for everyone to meet their deadline for faculty appointments so everyone can be ready to go by July 1 of each year. R. 2490. It would not be unusual to decline an incomplete application. R. 2467.

In anticipation of being made a formal offer from the School of Medicine, the University informed Martin on August 22, 2013, that he needed outside letters of reference for a faculty appointment in the School of Medicine. R. 1221. In September, Martin was notified that the formal hiring and credentialing process for a School of Medicine appointment took four to six months, and that he would be contacted about the application for the faculty appointment and for medical staff privileges. R. 1233, 2004-05, 2006. The University contacted Martin a short time later about the applications for the faculty position and for medical staff privileges. R. 2006. On January 23, 2014, the University reminded Martin that he needed to include external letters of reference in his application for the School of Medicine faculty appointment. R. 1272, 2052.

On April 4, Martin was again contacted about his external letters of reference and asked if he was able to obtain the letters in their "acceptable state" – meaning the letters were to be on the referring doctors' letterhead. R. 1309, 2070-71.

On April 21, Martin was given a firm deadline of April 25 to complete his application. R. 1310, 2469-70. This deadline was imposed because Martin had previously been nonresponsive despite multiple requests to complete his application, and the University was facing a hard deadline to finalize applications in time to plan for the upcoming fiscal year. R. 2470. Martin was told that the deficiencies in his application needed to be "addressed immediately"; Martin was again reminded that the external letters of reference needed to be signed and on letterhead; he was also reminded that his CV needed to be formatted properly for the School of Medicine. R. 1310, 2074-75. Martin was told that he needed to complete his application "by April 25th or your packet will not be approved and you will not have your clinical appointment in the [School of Medicine].

The next day, Martin sent the University one external reference letter on letterhead and stated: "I will work on the other two today." R. 1311. On that same day, Martin was again reminded that he also needed to submit his CV in the correct format and that it was "crucial" that he do so. *Id*. On April

23, 2014, the University received a second external reference letter on letterhead. R. 1312, 2082.

On April 24, Martin was working with a University employee Jennifer Johnson, on getting his CV in the proper format; Johnson requested that Martin review, make any needed changes to, and sign off on the final version of his CV before she would send it off to the School of Medicine, Department of Surgery. R. 1315-16, 2083-84. After this communication on April 24, Martin did not have any other written communications with Johnson until after May 13, 2014. R. 2095. The School of Medicine internally extended Martin's deadline to May 3. R. 1325.

As of May 13, ten days after the extended deadline, Martin's application remained incomplete. Dr. Erik Barton was then the Chief of the Division of Emergency Medicine in the School of Medicine's Department of Surgery. From his perspective as Martin's potential boss if Martin had succeeded at obtaining the faculty position, Barton was extremely concerned about Martin's inability to meet deadlines and timely respond to requests from the Department. R. 2510. Barton thought Martin's inability to meet deadlines was problematic and he had concerns about Martin when the deadlines were not met. R. 2510, 2523-24. Barton was concerned that Martin was an individual who didn't pay attention to details and wasn't a

team player. R. 2524. Barton also had concerns about Martin's interaction with an administrator and Martin's inappropriate response to someone who was trying to help him get his application done. R. 2524.

Budget cuts and tight shift availability were not a part of the decision not to move forward with Martin's application. R. 2512, 2738-39. Barton had no concerns that Division of Emergency would be required to fund of 25 percent of Martin's salary beginning July 1, 2014, since the Division had already committed to that and included it in its annual budget totals. R. 2495-96. The Division of Emergency Medicine's budget issues were "completely separate" from what was going on with Martin's faculty appointment application; the Division had actually contracted and planned for Martin's position in terms of shift allocation. R. 2496-97. There was no correlation between budget discussions and the timing of the termination of Martin's application process. R. 2498. If Martin had obtained his faculty appointment with the School of Medicine, clinical shifts would have been made available to him. R. 2496.

On May 13, 2014, the School of Medicine notified Martin that his application was "unsuccessful due to incomplete documentation in the appropriate formats at the deadline for a July 1st start." R. 1324, 2088-89. As a result, Martin was informed that he would not receive a School of

Medicine faculty appointment or any clinical privileges within the School of Medicine. *Id*.

When Martin responded to this notification and asked "what wasn't done on time," he was informed that he had not reviewed and signed off on his CV "despite multiple requests" and that his application lacked an external letter of reference in the proper format. R. 1325-26, 2093. Martin was reminded that he had been asked numerous times to complete the application, had been given a "final deadline" of April 25 to complete the application that was then extended to May 3, but had failed to complete his application on time. *Id*.

Two days later, on May 15, Martin conceded in an email that his third of reference on letterhead had not been submitted by the May 3 deadline. R. 1333, 2100. Martin did not submit the third letter in the proper format until May 15. R. 1333, 1335.

On May 27, 2014, the School of Medicine formally informed Martin that his application for a faculty appointment had been rejected because it was not completed by the deadlines he had been given, and that his faculty appointment process had been terminated. R. 1337. On May 28, Martin was informed that, because he did not have a School of Medicine faculty appointment, his medical staff privileges had been terminated; he was also

informed that the privileges had initially been granted in error because he did not have a School of Medicine faculty appointment at the time the privileges had been granted. R. 1339, 2103.

When Martin's School of Medicine faculty application failed, there were no other options available to keep Martin on as UPCC medical director that would support the UPCC's collaboration with the School of Medicine for a joint toxicology fellowship. R. 2670, 2672. Accordingly, the College of Pharmacy elected not to renew Martin's contract and provided him notice of that decision by letter dated June 25, 2014. R. 1345, 2112. The letter noted that Martin had not obtained a School of Medicine faculty appointment, and that his position "was contingent upon" him obtaining that appointment "by July 1, 2014." R. 1345. The letter noted that this faculty appointment was "critical" for the UPCC medical director to have, and that without it, it was "not an acceptable alternative" for Martin to continue in the position. *Id*. The letter thanked Martin for his contributions to the UPCC and wished him well in his future endeavors. *Id*. To ease Martin's transition to new employment, the College of Pharmacy offered to extend his appointment beyond June 30 to October 31, but Martin declined. R. 1345, 1347-51. Martin was paid through July 8, 2014. R. 2112.

Martin's Subsequent Employment and Earnings

In 2013, Martin earned approximately $36,000 in wages, tips, and other compensation from the University. R. 1144. In 2014, Martin earned approximately $92,000 in wages, tips, and other compensation from the University. R. 1147. In 2014, Martin had a total income of approximately $210,000. R. 1147-51, 1902.

At the time of his deposition (April 2016), Martin was employed by the Schumacher Group, as an emergency physician in Spokane, Washington, where he was earning $230 per hour. R. 1886-88. He had been employed with the Schumacher Group since February 2016. R. 1889. Martin was also employed at that time as the medical director at the Texas Panhandle Poison Center in Amarillo, Texas, a part-time position, where he was earning $150,000 per year, plus benefits. R. 1886, 1888. He had been employed in that position since October of 2015. R. 1888-89. After his employment with the University ended, Martin has successfully obtained other employment, including positions at: Redington-Fairview General Hospital in Skowhegan, Maine; Saint Alphonsus Medical Center in Ontario, Oregon; William Beaumont Army Medical Center in El Paso, Texas; Creighton University Medical Center in Omaha, Nebraska; Kittitas Valley Healthcare in Ellensburg, Washington; and Deaconness Medical Center, in Spokane,

Washington. R. 1894. After his employment with the University ended, Martin was offered but did not accept approximately ten other positions at other places of employment. R. 1894. After his employment with the University ended, Martin continued to publish. R. 1904.

At the time of deposition, Martin believed that he could earn $275,000 in the next twelve months. R. 2155.

When Martin initially came to Utah, he bought a condominium for $168,000. R. 2010. In February 2015, he sold it for a purchase price that was a little more than what he paid for it. R. 2010-11. Since the end of his employment with the University, Martin has not sought medical treatment or taken any medication for stress or difficulty sleeping, nor missed work due to these symptoms. R. 2132-33. Martin's wife did not plan on moving with him to Salt Lake City in 2013. R. 1914. She had a job in Seattle that she couldn't leave. R. 1914. The plan was for Martin to work in Salt Lake City for a year before his wife would make a decision about moving to Salt Lake City. R. 1914.

July 9 Letter

On July 9, the University's Medical Staff Services Department sent Martin a form letter generated from the credentialing database, which pulls

from fields in the database to generate the letter. R. 1355, 2595-96. The letter stated:

> This letter is to notify you that the University of Utah Hospitals and Clinics Governing Board has acknowledged your resignation from the Active staff effective 05/27/2014. The following reason was given for your resignation: Terminated by department.
>
> We wish you well in your future endeavors. Please contact me at (801) 587-6026 if you have any questions. Thank you!

R. 1355.

The letter was addressed and sent to Martin, with a carbon copy sent to "Credential File." R. 1355. "Credential File" means Martin's credentialing file with the Medical Staff Services, and is not a physical file, but a completely electronic file. R. 2615. Only members of the Medical Staff Services Department have access to Martin's credentialing file. R. 2615. Medical Staff Services does not respond to employment inquiries; a licensing entity or future employer would need to inquire with the Human Resources or Academic Affairs. R. 2619. Neither Human Resources nor Academic Affairs have access to the July 9, 2014 Letter. R. 2620-21. In his deposition, Martin testified that he did not know whether the July 9 letter was seen by any person other than himself and Medical Staff Services employee who generated the letter. R. 2121. It was not the practice of the University to send this type of letter to people outside of the University. R. 2615.

In Medical Staff Services, "resignation" of employment relationship is a loose term, meaning simply that the employee has left. R. 2597. The term "resignation" goes beyond voluntary resignation, and applies to people who have retired, people who have relocated, people who have been terminated by their departments, and people who have gone on to become honorary staff. R. 2597. The language "terminated by department" comes from a drop-down field in the database. R. 2599. The options in that drop-down field are resigned, relocated, terminated by department, and retired. R. 2599. In Medical Staff Services, the word "terminated" does not have a more negative consequence than the words "lack of renewal of contract." R. 2600. "Terminated by department" does not indicate anything negative about Martin's privileging and credentialing. R. 2602. Within the University, "termination" of employment relationship is not understood to have a negative connotation or to mean that someone was fired; "termination" is commonly understood to signify the end date of employment, whatever the reason. R. 2701-02, 2237.

In his deposition, Martin could not specifically identify any other allegedly defamatory statement besides the July 9 letter. R. 2120.

Course of proceedings:

Martin initially sued the University and its institutions in federal court. The parties exchanged discovery and conducted depositions; much of the information obtained there was used by both parties in the summary judgment memoranda filed in the present matter. In the federal case, the University filed a motion for judgment on the pleadings for lack of jurisdiction. The federal district court gave Martin the option of amending his complaint or having the University's motion granted. After Martin elected not to file an amended complaint, the federal court dismissed the case.

Martin then filed the present complaint in state court, which overlapped somewhat with the federal complaint, but included some new causes of action while omitting some, and named seven University employees as defendants in addition to the institutional defendants. R. 1-123. Martin's claims included: (1) a state procedural due process claim; (2) a federal procedural due process claim; (3) a breach of contract claim; (4) a claim for breach of the implied covenant of good faith and fair dealing; (5) a negligence claim against the individually named defendants in their individual capacities; and (6) a claim for injunctive relief.

Less than a month after filing the complaint, Martin filed a motion for summary judgment on liability. R. 166-323. The University Defendants filed a motion to dismiss. R. 327-49. The district court granted the motion to dismiss on the fifth cause of action only – the negligence claim against the individually named defendants – but expressly reserved ruling on whether the dismissal would be with or without prejudice. R. 881-86. The University Defendants filed a memorandum jointly opposing Martin's motion for summary judgment and seeking summary judgment in favor of the University. R. 1760-1852. Martin filed a memorandum opposing the University Defendants' motion for summary judgment. R. 2918-58. The University Defendants then filed a reply memorandum. R. 3066-3120.

Disposition below:

The district court denied Martin's motion for summary judgment and granted summary judgment on all claims except the fifth cause of action. R. 3135-45. Martin then filed a notice of appeal on October 24, 2017. R. 3146-48. Final judgment was entered November 17, 2017. R. 3163-67. Consistent with a stipulation between the parties entered into after the appeal was filed, the final judgment included the dismissal with prejudice of the fifth cause of action, an issue that had previously been unresolved. R. 3164; *see also* R. 882

(district court expressly "reserv[ing] ruling on whether Plaintiff's Fifth Cause of Action is dismissed with or without prejudice at this time").

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over this appeal because Martin's premature notice of appeal is untimely and deprives this Court of jurisdiction.

Martin has waived several claims by not briefing them: the federal due process claim; the negligence claim; and the claim for injunctive relief.

Martin's contract claim fails because the undisputed evidence showed that the University fulfilled all of its obligations under the two offer letters and the University's Bylaws. Martin's annual contract with the College of Pharmacy was not renewed, and expired under its own terms; Martin was employed through the duration of the contract and received all that he bargained for. Martin failed to timely complete his application process to obtain a School Medicine faculty appointment. Given Martin's failure, he was not entitled to have his incomplete application accepted or to receive a faculty appointment with the School of Medicine. And the University fulfilled all of its obligations under the Bylaws; Martin never qualified to received medical staff privileges because he did not obtain the required School of

Medicine faculty appointment; though the privileges were mistakenly granted to him due to an error, the privileges were subject to automatic relinquishment without a hearing because Martin never obtained the School of Medicine faculty appointment.

Martin's state due process claim fails because his medical privileges were subject to automatic relinquishment without a hearing, and the University fulfilled all of its obligations under the offer letters, so Martin was not deprived of any property or liberty interest.

ARGUMENT

I. Martin's premature notice of appeal is untimely and deprives this Court of jurisdiction.

This appeal should be dismissed for lack of jurisdiction. Martin's notice of appeal was untimely because he prematurely filed it before final judgment was entered. The notice of appeal was filed on October 24, 2017. R. 3146-47. Therein Martin appealed the September 26, 2017 memorandum decision. *Id.* But this decision was a non-final, interlocutory order that did not dispose of all claims. The memorandum decision granted summary judgment to the University Defendants on *most* of the claims, denied Martin's motion for summary judgment in its entirety, and *expressly did not rule* on Martin's fifth

cause of action (the negligence claim): "While the defense has moved for summary judgment in the entirety, the Court could not locate any legal argument on the plaintiff's Fifth Cause of Action. Therefore, while denying the plaintiff's Motion [for Summary Judgment on Liability], the Court *cannot grant* the defendants' Motion on this cause of action." R. 3144 (emphasis added).

Thus, the September order was an interlocutory order that expressly did not resolve *all* of the issues between the parties. *See Bradbury v. Valencia*, 2000 UT 50, ¶ 9, 5 P.3d 649 (stating that for an order or judgment to be final, it "must dispose of the case as to all parties, and finally dispose of the subject-matter litigation on the merits of the case") (citation and quotations omitted). The district court instructed the University Defendants' counsel to prepare an order consistent with the memorandum decision – in other words, counsel was to prepare an interlocutory order memorializing the court's interlocutory decision. *Id.* The court did not instruct the University Defendants to prepare a final judgment. The University Defendants did not submit a proposed order within fourteen days, and Martin did not submit a proposed order either, as he could have done under Utah R. Civ. P. 7(j)(2) ("If the party directed to prepare a proposed order fails to timely serve the order, any other party may prepare a proposed order confirming the court's decision

and serve the proposed order on the other parties for review and approval as to form.").

Instead of seeking a resolution of the outstanding claim, Martin then filed a notice of appeal on October 24, 2017, purporting to appeal "the entire Memorandum Decision denying Plaintiff's Motion for Summary Judgment on Liability and granting the Defendants' Cross Motion for Summary Judgment, entered by the Honorable Andrew H. Stone on September 26, 2017." R. 3146-47.

But this notice of appeal was premature. As the Utah Supreme Court recently reiterated, "[t]o be timely, a notice of appeal cannot be filed too late, but it also *cannot be filed too early*." *Garver v. Rosenberg*, 2014 UT 42, ¶ 10, 347 P.3d 380 (emphasis added). The Supreme Court observed that a premature notice of appeal will relate forward in *only one* circumstance, outlined in Utah R. App. P. 4(c): "only when the notice is filed between the announcement of the judgment and the entry of the judgment." 2014 UT 42, ¶ 11, n.19 (disavowing, based on new version of Rule 4(c), statements in prior cases that premature notice of appeal was merely an irregularity that would be grounds for dismissal within the court's discretion). In all other circumstances, a premature notice of appeal will not relate forward. *Id*.

Thus, if a notice of appeal "is filed before the judgment is even announced, it is considered a nullity." *Id.* Martin's notice of appeal was filed before judgment was announced. The September memorandum decision expressly reserved ruling on one claim and therefore cannot be construed as an announcement of judgment. *See* R. 3144 ("the Court cannot grant the defendants' Motion on this cause of action"). Martin's notice of appeal was therefore premature under *Garver* and considered a nullity that did "not divest the district court of jurisdiction over the case." *Garver*, 2014 UT 42, ¶ 10, n.17 (observing that "[f]ederal courts, under a nearly identical federal rule of appellate procedure, have concluded that a premature notice of appeal does not divest the district court of jurisdiction over the case") (citing *Riggs v. Scrivner, Inc.*, 927 F.2d 1146, 1148 (10th Cir. 1991)).

After Martin filed his premature notice of appeal, this Court issued a sua sponte motion for summary disposition. *See* Order dated November 15, 2017. This Court noted its concern with the language in the September memorandum decision that reserved ruling on the one remaining claim. *Id.* Apparently because Martin desired to proceed with this appeal by obtaining a final order adjudicating all claims, Martin then offered to stipulate to the dismissal with prejudice of the outstanding claim. This outstanding claim, the fifth cause of action, had been the subject of the University Defendants'

previous motion to dismiss. R. 327-49; 808-21. The district court had concluded that the University Defendants' motion to dismiss the fifth cause of action was well taken and warranted dismissal of the claim, but expressly "reserve[d] ruling on whether Plaintiff's Fifth Cause of Action is dismissed with or without prejudice." R. 882. Thus, the issue was left outstanding. And the issue remained outstanding when the district court entered its September memorandum decision declining to grant summary judgment on that cause of action.

Instead of pursuing a dismissal without prejudice, which would have allowed Martin to amend his complaint and further litigate the fifth cause of action, Martin offered to stipulate to a dismissal with prejudice. Consistent with that informal stipulation between the parties, the University Defendants prepared a proposed order that not only formalized the ruling of the September memorandum decision, but went beyond that to completely resolve all claims, including the fifth cause of action: "The court further orders that based on its prior May 22, 2017 order, Plaintiff's fifth cause of action is dismissed with prejudice." R. 3164. But for Martin's stipulation, the proposed order would have mirrored the memorandum decision's treatment of the fifth cause of action, leaving the claim unresolved. The

proposed order was signed by the court and duly entered on the docket on November 17, 2017. R. 3163-65.

The November 17 order was the first and only time that *all claims* were definitively and finally resolved. The parties' informal stipulation, and inclusion in the final order of the fifth cause of action, does not change the plain language of the September memorandum decision that expressly withheld ruling on that cause of action. It was still an interlocutory order requesting counsel to prepare another interlocutory order, even though the order that was eventually prepared disposed of more claims than the September order did. And Martin did not question the district court's jurisdiction to enter judgment in November; if his notice of appeal had not been a nullity, the district court would have been divested of jurisdiction. *See Garver*, 2014 UT 42, ¶ 10, n.17 (noting that only a "timely" notice of appeal "divests the trial court of further jurisdiction over the matter") (citations and quotations marks omitted).

The November 17 order was the first event that could have been considered an announcement of a complete resolution of the case. Thus, it was the first event that could have triggered the time period in Utah R. App. P. 4(c). But the November 17 order was not merely an announcement of

judgment, it was the actual judgment[4] that resolved all of the claims for the first time. So a Rule 4(c) time period never existed in this case. The only circumstance that could have saved Martin's premature appeal is not present here. Because the notice of appeal was prematurely filed before judgment was entered, and because Rule 4(c) is inapplicable, the notice of appeal is a nullity, and this Court lacks jurisdiction over the appeal. *Garver*, 2014 UT 42, ¶ 11, n.19.

This Court's order of December 4, 2017, withdrawing its sua sponte motion for summary disposition, and commenting on Rule 4(c), is not a bar to this Court's consideration of this jurisdictional question. *See* Order of December 4, 2017. In that order, which was entered by one judge, the

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[4] Martin stipulates that the November order is the final order in this case. *See* Aplt. Brf. at 20. And the order meets the separate document requirement in Utah R. Civ. P. 58A because it substantially omits recitation of facts, procedural history, and the reasoning of the court, and it contains ordering clauses stating the relief to which the prevailing party is entitled. *See* 2015 Advisory Committee Notes to Utah R. Civ. P. 58A. But even if the November order does not meet the separate document requirements of Utah R. Civ. P. 58A, judgment would have been deemed entered 150 days from that order, April 16, 2018. *See* Utah R. Civ. P. 58A(e)(2)(B) (if separate document is required, judgment is complete when "150 days runs from the clerk recording the decision, however designated, that provides the basis for the entry of judgment"). Martin's time to appeal would therefore have run thirty days later, on May 16, 2018. The University alerted this Court and Martin of the jurisdictional defect in his notice of appeal in its response to the sua sponte motion for summary disposition when there was still time to correct the deficiency by filing a new notice of appeal after final judgment entered. Nevetheless, Martin proceeded at his own peril by not filing a new notice of appeal.

comment about Rule 4(c) was based on a misunderstanding of the September order. This Court misconstrued the September interlocutory order as an announcement of judgment and incorrectly noted that the November order merely clarified that all claims were dismissed with prejudice. *Id*. That is an incorrect statement of the procedural history of the case below. The September order expressly left one claim outstanding, a fact noted in this Court's sua sponte motion for summary disposition (*see* Order of November 15, 2017), but overlooked in this Court's order withdrawing the motion. Because this issue presents an important question of this Court's subject matter jurisdiction (which can be raised at any time), and because Utah R. App. P. 23 provides that "[t]he action of a single justice or judge may be reviewed by the court," the University Defendants ask this Court to consider, or reconsider, this important jurisdictional question with a correct understanding of the September order's interlocutory nature. *See Matter of Adoption of B.B.*, 2017 UT 59, ¶ 33, 417 P.3d 1 ("parties can raise subject matter jurisdiction at *any time* during a proceeding") (emphasis added). And because the September order was interlocutory and not an announcement of the complete resolution of the case, Rule 4(c) does not render timely Martin's premature notice of appeal, as explained above.

Accordingly, this appeal should be dismissed with prejudice for lack of jurisdiction.

II. Waiver and abandonment.

Martin has abandoned several of his causes of action and waived any claim of error regarding their dismissal by not briefing them in his principal brief. *See State v. Johnson*, 2017 UT 76, ¶ 16 (issue not raised in principal brief is waived, even if raised in reply brief). Martin's argument is divided into three sections. In the first section, Martin asserts that the district court overlooked factual disputes but fails to identify which causes of action were improperly decided as a result. In the second section, Martin makes arguments regarding only his contract claims (third and fourth causes of action). In the third section, Martin makes arguments regarding only his state due process claim (first cause of action).

Martin makes no arguments regarding the other causes of action, as discussed below, and therefore has waived any claim of error as to the dismissal of those causes of action.

A. Qualified immunity on federal due process claim

Martin does not address the district court's qualified immunity ruling on the federal due process claim (the second cause of action). He obliquely references the claim in the final sentence of his third argument. *See* Aplt. Brf. at 32. But he includes no analysis of the qualified immunity standard and does not challenge the district court's analysis and conclusions under that standard. *See* Aplt. Brf. at 29-32. Specifically, Martin fails to address his two-part burden to show that the University Defendants violated a constitutional right and that the right was clearly established. *See Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009) (once qualified immunity is asserted at summary judgment, burden shifts to plaintiff, who "must demonstrate on the facts alleged both that the defendant violated his constitutional or statutory rights, and that the right was clearly established"). He likewise fails to include any argument making clear exactly *who* is alleged to have done *what* to *whom*. *See A.M. v. Holmes*, 830 F.3d 1123, 1163 (10th Cir. 2016) ("to defeat a claim of qualified immunity, a plaintiff must present evidence of a violation traceable to a defendant-officials' own individual actions") (citation and quotation marks omitted); *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 517 (10th Cir. 1998) ("A plaintiff must do more than identify in the abstract a clearly established

right and allege that the defendant has violated it. A plaintiff must articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity.") (internal citations and quotations omitted). Thus, any claim of error against the district court for dismissing of the federal due process claim has been waived and abandoned on appeal and this Court should affirm the district court's grant of summary judgment on Martin's second cause of action.

B. Negligence claim

Martin does not address the district court's dismissal of the negligence claim (the fifth cause of action). Martin fails to state this Court's standard of review for reviewing a motion to dismiss, nor engage in any analysis of that standard, and he does not make any claim of error against the district court's May 22, 2017 order granting the University Defendants' motion to dismiss the negligence claim. *See Gregory v. Shurtleff*, 2013 UT 18, ¶ 8, 299 P.3d 1098 (standard of review for grant of motion to dismiss). Nor does Martin challenge the immunity arguments the University Defendants made in support of their motion to dismiss. *See* R. 345-46, 818-20 (arguing that multiple provisions of the Utah Governmental Immunity Act, Utah Code §§ 63G-7-101 to -904, bar the negligence claim). Thus, Martin has waived and

abandoned any claim of error regarding this claim, and this Court should affirm the district court's dismissal of the fifth cause of action.

C. Claim for injunctive relief

Martin makes no argument regarding his injunctive relief claim (the sixth cause of action). He does not cite or discuss any case law governing the grant or denial of a request for injunctive relief; does not demonstrate what ongoing violation of law might warrant injunctive relief or otherwise show why he might be entitled to injunctive relief; does not cite this Court's standard of review; and does not ask this Court to reverse the district court's grant of summary judgment on that claim. Thus, Martin has waived and abandoned any claim of error regarding this claim, and this Court should affirm the district court's grant of summary judgment on that cause of action.

III. The district court applied the correct summary judgment standard.

Though Martin asserts the district court applied the wrong summary judgment standard, he fails to so demonstrate. Martin has the burden of persuasion on appeal to show error, and that, absent the error, the district court would have reached a different result. "To justify reversal of summary

judgment, a party must show that an alleged error is 'substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a different result.'" *Koerber v. Mismash*, 2015 UT App 237, ¶ 25, 359 P.3d 701 (quoting *Scudder v. Kennecott Copper Corp.*, 886 P.2d 48, 50 (Utah 1994)).

Martin asserts that the district court must have applied the wrong standard simply because the court failed to recite any standard in its memorandum decision. Aplt. Brf. at 24. Martin cites no authority to support this mechanical rule, and the University Defendants have found none. Martin concedes that the University Defendants included the correct standard in its memorandum below. *Id.*; *see also* R. 1817-19, 3098. In agreeing with the University Defendants' arguments, the district court impliedly agreed that they had stated the correct standard and presumably used that standard in reviewing the claims.

The problem with Martin's argument is that, under de novo review, this Court looks not to whether the correct standard was merely *recited* below, but to whether the standard was correctly *applied*. De novo review means this Court will review, without affording deference to the trial court, whether the moving party "established that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." *Barneck*,

2015 UT 50, ¶ 13. In so doing, this Court "views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Flygare*, 2017 UT App 189, ¶ 5. Under de novo review, failing to recite a standard doesn't necessarily mean error any more than simply reciting the correct standard means the correct standard was in fact applied.

By failing to recite the standard that is otherwise correctly set forth in the memoranda, a district court doesn't necessarily apply the wrong standard. De novo review might still reveal that the district court "view[ed] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party," *Flygare*, 2017 UT App 189, ¶ 5, and correctly concluded that "there are no genuine issues of material fact and that [the moving party] is entitled to judgment as a matter of law." *Barneck*, 2015 UT 50, ¶ 13.

More importantly, regardless of what standard was recited below, or whether any was recited at all, an appellant still has the burden of persuasion on appeal to demonstrate that the district court actually applied the wrong standard, and that the result would have been different under the correct one. *Koerber*, 2015 UT App 237, ¶ 25. Meeting this burden of persuasion on appeal arguably requires, at minimum, a reasoned analysis of: what specific evidence was presented by both sides, why different inferences

should have been drawn from that evidence, how drawing the correct inferences would have led to different result, and how specific evidence and inferences tie in to specific causes of action. *See* Utah R. App. P. 24(a)(8) (argument portion of principal brief "must explain, with reasoned analysis supported by citations to legal authority and the record, why the party should prevail on appeal").

But Martin has done none of that. His challenge is woefully inadequate. He wholly fails to demonstrate that the district court used the wrong standard. He simply lists three factual points[5] relied on by the district followed by a conclusory assertion, without citation to the record, that he disputed the facts below. Aplt. Brf. at 25. He does not cite to the evidence the University Defendants relied on in asserting these facts. He does not cite to any of his own evidence that purportedly created a genuine dispute of material fact. He does not include any analysis – reasoned or otherwise – to support a claim of error. He fails to analyze either why the University Defendants' evidence supporting these facts was inadequate or why his own evidence created a genuine dispute of material fact. He doesn't even discuss

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[5] Martin lists factual points as four statements, but the first and fourth relate to the same fact – that he was mistakenly granted medical privileges. *See* Aplt. Brf. at 25.

which causes of action might be impacted by any purported factual disputes. Instead, he makes a conclusory assertion and abruptly ends his first argument.

Martin fails to show what affirmative evidence he submitted below would have entitled him to inferences different than those drawn by the district court. *See Uintah Basin Med. Ctr. v. Hardy*, 2008 UT 15, ¶ 19, 179 P.3d 786 (holding party opposing summary judgment must put forth record evidence to support its argument). He fails to support his argument with an examination of the relevant evidence and authority or explain why his inferences are reasonable. *IHC Health Servs., Inc. v. D & K Mgmt. Inc.*, 2008 UT 73, ¶ 19, 196 P.3d 588 ("The word 'genuine' indicates that a district court is not required to draw every possible inference of fact, no matter how remote or improbable, in favor of the nonmoving party. Instead, it is required to draw all reasonable inferences in favor of the nonmoving party."); *Johnson's v. Gold's Gym*, 2009 UT App 76, ¶ 26, 206 P. 3d 302 ("bare contentions, unsupported by any specification of facts in support thereof, raise no material questions of fact as will preclude entry of summary judgment"). Martin thus wholly fails to meet his burden to show why, under a de novo review, this Court should reverse the district court with respect to these factual points. Accordingly, this Court should reject Martin's first argument.

Martin's approach is similar to the appellants in *Breese v. Barton*, 2016 UT App 220, 387 P.3d 536. Appellants there asserted that they had disputed "each and every one of the eighty-five (85) paragraphs" in the motion for summary judgment. *Id*. at ¶ 30. But the appellants "failed to identify the specific factual disputes they raised below that were relevant" to specific claims, failed to "identify the specific facts" they set forth below, and didn't even "attempt to analyze any particular disputes of fact." *Id*. (citation and quotation marks omitted). As with the *Breese* appellants, Martin's similar failure here "places the burden on the appellate court to go through the record, identify the potentially relevant disputed facts, and make their arguments about those facts for the appellant." *Id*. But Martin "may not 'dump the burden of argument and research' on [this C]ourt." *Id*. (quoting *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) and citing *Wohnoutka v. Kelley*, 2014 UT App 154, ¶ 6, 330 P.3d 762).

Like the appellants in *Breese*, Martin has "the burden to develop [his] arguments with 'reasoned analysis' based on the pertinent portions of the record, but [he has] failed to do so." *Breese*, 2016 UT App 220, ¶ 30 (quoting *Thomas*, 961 P.2d at 205); *see also Andersen v. Andersen*, 2015 UT App 260, ¶ 6, 361 P.3d 698 ("an appellate court is not a depository into which parties may dump the burden of their argument and research"). Accordingly, this

Court should reject Martin's first argument because it is inadequately briefed – as are his other two arguments, as discussed in sections IV and V, below.

In any event, the district court properly concluded that there were no genuine disputes of fact regarding the three factual points Martin cites.

First, there was no genuine dispute of material fact regarding the mistaken issuance of Martin's medical privileges; even if there were a dispute of fact, it was immaterial because the privileges remained subject to automatic relinquishment at all times. The plain language of section 1.A.1. of the bylaws required that Martin have a faculty appointment in the School of Medicine to receive medical privileges. R. 1525-26. Martin did not have such an appointment when the privileges were mistakenly granted (and in fact never obtained one). R. 1337, 1339. The grant of privileges was via a standard form letter; the privileges were mistakenly granted because Martin had no faculty appointment in the School of Medicine. R. 1258, 2560, 2587. Martin's faculty appointment with the College of Pharmacy was insufficient to qualify for medical privileges. R. 2587. All of the foregoing undisputed evidence leads to only one reasonable inference – that the privileges were mistakenly granted because Martin did not have a faculty appointment in the School of Medicine. Martin fails to engage with this evidence or argue what

specific evidence counters it. In any event, regardless of whether the privileges were mistakenly granted in the first place, or whether this Court deems that to be a dispute of fact, it is not material because the privileges were always subject to automatic relinquishment under the Bylaws. R. 1557, 1559-60.

Second, there was no genuine dispute of material fact regarding Martin's CV being in the wrong format. The University Defendants presented undisputed evidence that though Martin was working with a University employee on April 24, 2014, to get his CV in the correct format, R. 1315-16, 2083-84, he failed afterward to have any other communication with that employee until May 13, 2014, when he was notified that the deadline had expired for him to complete his application. R. 2095. Martin fails to engage with this evidence or argue what specific evidence counters it.

Third, the University Defendants' undisputed evidence below showed that the April 25 deadline was communicated to Martin, R. 1310, 2074-76, that Martin knew of the letterhead requirement, R. 1311, 1312, 2082, and that the deadline was extended to May 3. R. 1325. The third reference letter was not properly submitted before the deadline, which Martin conceded in his May 15 email. R. 1333, 1335, 2100. Martin fails to engage with this evidence or argue what specific evidence counters it.

Because Martin has failed to show that the district court applied the wrong summary judgment standard, and because Martin's one-sentence conclusory assertion is woefully inadequate to show a genuine dispute of material fact, this Court should reject Martin's first argument.

IV. The district court correctly granted summary judgment on the contract claims.

As with his first argument, Martin inadequately briefs his second argument. He again fails to cite a single piece of his own evidence in the record below. He cites to the district court's discussion of the University Defendants' evidence but does not cite directly to the evidence itself. Aplt. Brf. at 27. He improperly "places the burden on the appellate court to go through the record [and] identify the potentially relevant disputed facts." *Breese*, 2016 UT App 220, ¶ 30.

Untethered from the record below, Martin's argument relies on speculation, conjecture, and mischaracterizations of the undisputed record evidence. Among these mischaracterizations, Martin asserts without evidentiary support that the terms of the December offer were ambiguous or incomplete; that Martin was not provided any instructions on how to complete his School of Medicine faculty application before April 21, 2014; that

funding had anything to do with the rejection of Martin's incomplete application; that the medical privileges were not granted in error; and that any University Defendant acted in bad faith.

The undisputed evidence showed that the University did not breach the contract under the August offer. The August offer said it was for a limited term – ending automatically each June 30 – and would not renew if either party gave notice of non-renewal. R. 1208-09. The College of Pharmacy gave Martin written notice of non-renewal on June 25, 2014. R. 1345, 2112. Martin enjoyed the full term of his contract – he was in fact paid beyond June 30 to July 8. R. 2112.

The undisputed evidence showed that the School of Medicine did not breach the December offer either; rather, Martin failed to timely complete his application for the faculty appointment; given this failure, the University had no obligation to process his application. The offer unambiguously and unequivocally stated that Martin "need[ed] a confirmed academic appointment through the School of Medicine and medical credentialing through University Hospital." R. 1261. He failed to obtain a School of Medicine faculty appointment. R. 1337. He never qualified for medical privileges in the first place and those privileges remained subject to automatic relinquishment under the plain language of the Bylaws – a fact he

was notified of when the mistake was discovered. R.1339, 1525-26, 2586-87, 2594. There was simply no breach because the School of Medicine did everything it was obligated to do.

The undisputed evidence shows that the School of Medicine waited for months for Martin to complete his application and yet he failed to complete it, even when he was given a firm deadline. The letterhead requirement was no mere formality; it was the School of Medicine's regular practice to require letterhead because letters on plain white paper could be prepared by anyone. R. 2761-62. Timely completion of a candidate's application was necessary to allow the School of Medicine to meet the effective start date. R. 2490, 2761. Martin knew in August 2013 that he needed outside reference letters and that the hiring and credentialing process for the School of Medicine took *four to six months*. R. 1221, 1233. Martin was contacted multiple times between August 2013 and April 2014 about completing his application. R. 1272, 1309, 2006, 2052, 2070-71. Finally, he was given a firm April 25 deadline because of his months-long nonresponsiveness and the impending fiscal deadlines the School of Medicine was facing. R. 1310, 2469-70. Even with the extended deadline of May 3, Martin failed to timely complete his application. R. 1324, 1325-26, 1333, 1335, 2088, 2093.

The undisputed evidence shows that funding issues and budget cuts had absolutely nothing to do with the School of Medicine's decision to deny Martin's incomplete application. R. 2495-98, 2512, 2738-39. "While a plaintiff facing summary judgment 'is entitled to all favorable inferences, [he] is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.'" *Judge v. Saltz Plastic Surgery, PC*, 2014 UT App 144, ¶ 15, 330 P.3d 126 (quoting *Ladd v. Bowers Trucking, Inc.*, 2011 UT App 355, ¶ 7, 264 P.3d 752).

The undisputed evidence also shows that the University did not breach any obligation it had under the Bylaws. The provision of the Bylaws setting forth the requirements for receiving medical staff privileges is not ambiguous. R. 1525-26. Martin should have never received the privileges in the first because he did not have a School of Medicine faculty appointment and he therefore had no contractual right whatsoever to those privileges. R. 1339, 1525-26, 2586-87, 2594. And under the plain language of the Bylaws, those privileges were subject to automatic relinquishment without a hearing. R. 1557, 1559-60.

In addition to factual exaggerations and misstatements made without record citation, Martin also misstates the law. He asserts without citation to legal authority that it was "not proper" to evaluate the contractual claims on

their merits and that the merits of the case are "better left to a jury." Aplt. Brf. at 25, 26. These bald assertions should be dismissed out of hand. He also cites *Arato v. Shefco, Ltd.*, 2014 UT App 148, 330 P.3d 115, for the general proposition that whether a condition precedent is fulfilled generally presents a question of fact. That's a true proposition, to be sure, but here there was no dispute of fact as to what the historical events were – Martin did not complete the application to obtain a School of Medicine faculty appointment and did not qualify for medical staff privileges. The December offer unambiguously contained a condition, and Martin failed to meet that condition. Given these undisputed facts, the district court correctly determined, as a matter of law, that there were no genuine issues of material fact as to Martin's failure to meet that condition. Martin has failed to engage with specific record evidence to show otherwise, and this Court should affirm the grant of summary judgment on Martin's contract claim.

Instead of engaging with specific record evidence, Martin instead opts to simply disagree with how the district court interpreted the undisputed facts. But the district court's interpretation, including the inferences it drew, are guided by the undisputed evidence. Martin is entitled to only reasonable inferences that are supported by the evidence. He is not entitled to an unreasonable interpretation of the undisputed facts, especially an

interpretation that runs counter to plain language of the offer letters and the Bylaws. And he certainly is not entitled to inferences that are supported only by his mischaracterization of the evidence below. Martin fails to show that the inferences he seeks are reasonable, and he fails to show what evidence he presented below would have entitled him to those inferences.

Finally, to the extent Martin implies that his failure to complete his application properly was not a material breach, it should be rejected because Martin fails to analyze the five factors this Court has set forth for determining materiality:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Cross v. Olsen, 2013 UT App 135, ¶ 28, 303 P.3d 1030 (internal citations and quotation marks omitted). The undisputed evidence showed that timely completion of the application was necessary to meet the candidates effective start date, and that the letterhead requirement was not a mere formality, but the University's normal practice for legitimate reasons. R. 2761-62. A letter

on letterhead signifies a level of officiality not present in a personal letter; letters of support on plain white paper can be prepared by anyone. R. 2762. Moreover, this is a universal requirement of all applicants to the School of Medicine faculty. R. 2461, 2466-67. Martin was repeatedly informed that his application was incomplete, yet he failed to timely correct the deficiencies as the University's deadline loomed to finalize its appointments for the next fiscal year.

Because the University fulfilled all the obligations it owed to Martin, and because he obtained everything he bargained for, the district court correctly dismissed the breach of contract claim, and this Court should affirm.

Implied Covenant of Good Faith and Fair Dealing

The grant of summary judgment on Martin's claim under the implied covenant of good faith and fair dealing should also be affirmed. Martin again does not cite to the record evidence even a single time to support his argument. For instance, he asserts the University acted in bad faith, yet fails to explain what evidence supports this assertion, or any inferences based on that assertion. Aplt. Brf. at 29. He asserts that his admitted failure to timely complete the application was merely a *de minimus* oversight by a

third party that he "quickly corrected as soon as he became aware of the issue." *Id*. Yet the undisputed evidence discussed above showed the opposite of quick action. The evidence summarized above also showed that the letterhead requirement was not merely a formality, but an important regular practice of the University imposed for legitimate reasons. R. 2461-62.

In addition, the covenant of good faith and fair dealing cannot be used to obtain a better bargain than the one negotiated or "establish new, independent rights or duties to which the parties did not agree." *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991). Nor can it be used to impose a burden on one party to correct the other party's own errors. *See Colony Ins. Co. v. Human Ensemble, LLC*, 2013 UT App 68, ¶ 16, 299 P.3d 1149. Both principles would be violated by requiring the University to accept Martin's incomplete application when, under the undisputed facts, he had ample notice and opportunity to correct the deficiencies. The undisputed record facts show that Martin's failure to timely complete his application is attributable to him and him alone. There is no evidence of any alleged bad acts or bad faith by the University, despite Martin's fleeting conclusory accusation made without factual citation.

Where a party to an employment contract acts in accordance with that contract and within its discretion, there can be no breach of the covenant.

See Oman v. Davis Sch. Dist., 2008 UT 70, ¶ 49, 194 P.3d 956, 969 (holding that there is no breach of the covenant where the employer had the discretion to terminate a contract for the reasons listed therein). The University had the discretion to exercise its right to non-renewal and did just that; the exercise of that discretion cannot violate the covenant of good faith and fair dealing since, as shown by the undisputed facts, the University fulfilled all of its obligations under the August offer, the December offer, and the Bylaws.

Accordingly, this Court should affirm the district court's dismissal of Martin's third and fourth causes of action.

V. The district court correctly granted summary judgment on the state due process claim.

Martin's third argument addresses his state due process claim. His argument focuses on Utah case law analyzing due process claims brought under the Utah constitution. He mentions federal case law but only as persuasive authority in support of his state due process claim. Aplt. Brf. at 31. As discussed in section II, above, Martin does not even mention his federal due process claim until the final sentence of his argument, when he summarily asks for that federal claim to be reinstated along with his state claim. And, as also discussed in section II, above, Martin does not address,

let alone challenge, the district court's qualified immunity analysis. *See* Aplt. Brf. at 29-32. Accordingly, Martin has waived any challenge to the grant of summary judgment on the federal due process claim and this Court need only review the grant of summary judgment on the state due process claim.

But Martin's state due process argument is as inadequately briefed as his other arguments. He inexplicably shapes his arguments to the wrong standard of review – the clearly erroneous standard. Aplt. Brf. at 6, 29, 30, 31. That standard is a deferential one that applies to factual findings made when the court sits as fact-finder, not to the de novo standard this Court uses when reviewing a district court's grant of summary judgment. Martin mistakenly relies on *Salt Lake City Corp. v. Jordan River Restoration Network*, 2012 UT 84, 299 P.3d 990. But that case was not a summary judgment case. The due process issue analyzed there was whether the lower court had afforded the litigants due process in the lower court proceeding itself, not whether the lower court had correctly granted summary judgment on a claim of due process brought before it. 2012 UT 84, at ¶ 46. The district court there necessarily made factual findings of what had occurred in the district court proceedings.

Here, however, the district court was reviewing evidence presented on a summary judgment motion – not about what happened in the district court,

but what happened historically between the parties. The clearly erroneous standard is inapplicable because the district court here did not do any fact-finding. To the extent that Martin invokes the wrong standard of review, this Court can affirm the factual determinations for that reason alone; it would seem difficult for an appellant to meet his burden of persuasion on appeal in a de novo factual review if he asserts a claim of error under the more deferential "clearly erroneous" standard.

Just as importantly, Martin's argument should be rejected because he again wholly fails to cite or discuss specific record evidence and fails to explain why certain evidence created disputes of fact or otherwise did not support the district court's ruling. In support of his erroneous assertion that he "contested the facts" below, Martin cites to his *entire* memorandum below. *See* Aplt. Brf. at 30 (citing to R. 2918-58). His only other record citations in the argument are to the district court's decision, which is obviously not evidence. Instead of pinpointing specific evidence, Martin would have this Court scour his 40-page memorandum to see what evidence he cited there, then scour the record to see if he correctly characterized that evidence, and then make Martin's argument for him based on that evidence.

This absurd approach is precisely what this Court rejected in *Breese*. *See* 2016 UT App 220, ¶ 30 (appellants "failed to identify the specific factual

disputes they raised below that were relevant" to specific claims, failed to "identify the specific facts" they set forth below, and didn't even "attempt to analyze any particular disputes of fact") (citation and quotation marks omitted). Martin has wholly failed to meet his "burden to develop [his] arguments with 'reasoned analysis' based on the pertinent portions of the record." *Breese*, 2016 UT App 220, ¶ 30 (quoting *Thomas*, 961 P.2d at 205). This Court can and should affirm on that basis alone.

In any event, Martin's argument should be rejected because it is based on mischaracterization of the undisputed record evidence. For example, Martin erroneously (and without record citation) asserts that the University never opted for non-renewal of his contract when, in fact, the University did precisely that in a letter to Martin dated June 25, 2014. R. 1345. The letter noted that Martin had failed to obtain a faculty appointment and that his role as director of the Utah Poison Control Center was expressly contingent on that faculty appointment. *Id.* The University further indicated a willingness to temporarily extend his employment beyond June 30 for an additional five months to "ease" his "transition" out of his employment with the University and give him "some time to identify and take advantage of other [employment] opportunities to apply [his] knowledge and skills." *Id.*

The University also noted that if he "need[ed] time and support to pursue other positions, please let us know how we can help you." *Id*.

This letter unequivocally served as notice that the University would not be renewing Martin's contract beyond June 30. Martin does not address how this letter supports any other reasonable inference other than the one accepted by the district court – that the letter was a notice of non-renewal. Nor does he address any of his own evidence, if any, that might have supported a different inference. He simply overlooks the letter. Because the undisputed evidence supports the inference the district court drew, and Martin has wholly failed to show why that inference was wrong, the inference should be affirmed.

And Martin calls his failure to complete his application a mere technicality, again without citing to any record evidence to support this characterization, and without acknowledging the undisputed evidence below that the letterhead requirement was standard practice, that it was for a very important reason (not a mere technicality), and that no one else had ever failed to meet that requirement. R. 1261, 2461-62, 2466-67. He calls the University's actions a mere "excuse" to end his employment, yet he fails to cite any evidence in support of this assertion and fails to argue why the record evidence entitles him to this inference. Indeed, as the University

showed below, and to which the district court agreed, the undisputed record evidence was capable of only one reasonable inference: Martin failed to complete his application for the faculty appointment with the School of Medicine and therefore the University was not obligated to give him a faculty position. Martin also ignores the record evidence below that the decision regarding Martin's employment was not because of funding issues. R. 2495-98, 2512, 2738-39.

Martin's argument also fails in its legal reasoning, to the extent this Court is even able to review that reasoning in a vacuum without "reasoned analysis based on the pertinent portions of the record." *Breese*, 2016 UT App 220, ¶ 30 (citation and quotation marks omitted).

Procedural due process claims brought under the Utah constitution are evaluated under a two-part test: whether the plaintiff been deprived of a protected interest in property or liberty; and, if so, whether the procedures at issue comply with due process. Martin had no property interest in his employment beyond the initial term set forth in the August offer. The offer unambiguously provided for non-renewal, an option which the University exercised. R. 1208, 1345. Martin ignores the undisputed record evidence that the University gave him written notice of non-renewal on June 25, 2014. R. 1345, 2112. Because the term of employment ended on June 30, and was

not renewed pursuant to an unambiguous provision of the contract, Martin had no property interest in continued employment beyond that date.

Likewise, Martin had no property interest arising from the December offer because it was his and only his failure to complete the application for the School of Medicine position. Without discussing specific evidence, Martin advances a pretext argument based on conjecture and speculation. *See Judge*, 2014 UT App 144, ¶ 15 (stating that a plaintiff opposing summary judgment is not entitled to inferences based on conjecture and speculation). There is no evidence of pretext. The December offer made clear that it was conditioned on Martin securing a confirmed School of Medicine faculty appointment and obtaining medical staff privileges. He qualified for neither of these. There is no evidence to support any other inference.

Nor is there any evidence that Martin had a protected property interest in his medical staff privileges. The unambiguous language of the Bylaws makes it clear that an applicant could qualify for privileges only with a School of Medicine faculty appointment. R. 1525-26. Martin had no such appointment when he was mistakenly given the privileges, and those privileges, whether mistakenly given or not, were subject at all times to automatic relinquishment with a hearing because Martin continued to not have a School of Medicine faculty appointment. R. 1525-26, 1557, 1559-60.

And Martin's liberty interest claim also fails. He exaggerates in insisting that the July 9 letter could have been "career ending" when the undisputed evidence showed that the letter was never communicated to anyone outside the University (except Martin) and that no University entity, such as human resources, that might have responded to outside information requests from potential employers, had access to the letter. Moreover, Martin's *Spackman*[6] analysis consists of the simple statement that Martin "disagrees" with the district court's *Spackman* analysis, coupled with his baseless exaggeration that the July 9 letter could be "career ending." Not only is the first prong *Spackman* argument completely disconnected from the undisputed record evidence, but Martin fails to address the second and third prongs of *Spackman* and therefore dooms his argument.

And Martin fails to demonstrate that he had a property interest in his medical staff privileges. Martin concedes that Utah's appellate courts "have not held specifically that a physician holds a protected property interest in

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[6] *Spackman ex rel. Spackman v. Bd. of Educ. Of Box Elder Cty. Sch. Dist.*, 2000 UT 87, ¶¶ 23-25, 16 P.3d 533 holds that, in order to prevail on a damages claim for alleged constitutional violations, a plaintiff must establish three things: that he suffered a flagrant violation of his constitutional rights, meaning a defendant must have violated clearly established constitutional rights of which a reasonable person would have known; that existing remedies do not redress his injuries; and that equitable relief is wholly inadequate to redress plaintiff's injuries.

his or her medical staff appointment and clinical privileges." Aplt. Brf. at 30. He then invokes an inapposite federal district court decision that based its holding not on federal Constitutional rights but on contractual provisions. *See Osuagwa v. Gila Reg'l Med. Ctr.*, 938 F.Supp.2d 1142, 1159 (D. N.M. 2012) (focusing analysis on contract language limiting suspension of privileges). This inapplicable federal case certainly does not support Martin's insistence that this Court should now, in the first instance, adopt a new presumption that a property interest exists under the state constitution. What's more, the undisputed evidence does not lend itself to any reasonable inference that Martin was contractually entitled to medical staff privileges, given the plain language of the Bylaws and the unrefuted historical facts in the record below.

In summary, Martin falls far short of supporting his conclusory assertions of error with "reasoned analysis based on the pertinent portions of the record." *Breese*, 2016 UT App 220, ¶ 30 (citation and quotation marks omitted). This Court should affirm the district court's grant of summary judgment on Martin's state due process claim.

CONCLUSION

For the foregoing reasons, the Appellees ask this Court to affirm the district court's grant of summary judgment.

Respectfully submitted this 22nd day of June, 2018

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g) because this brief contains 13,759 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21(g), as follows: this filing does not contain any non-public information.

/s J. Clifford Petersen

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June, 2018, a true, correct, and complete copy of the foregoing Brief was filed with the court and served via email as follows:

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/s J. Clifford Petersen