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.	**APPELLANT'S REPLY BRIEF** 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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A trial court's standard of review for a summary judgment motion is well established: "A trial court may properly grant a motion for summary judgment or directed verdict only when reasonable minds could not differ on the facts to be determined from the evidence presented." *Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445, 450 (Utah Ct. App. 1994). Further, this Court has held that: "When reviewing a grant of summary judgment, we liberally construe all inferences that may be reasonably drawn from the facts in favor of the nonmoving party." *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1312 (Utah Ct. App. 1994).

Here, Thomas G. Martin, M.D.'s ("Dr. Martin" or "Appellant"), appeal is appropriately before this Court because, if the trial court had included Dr. Martin's version of the truth in its Memorandum Decision of September 26, 2017, ("Memorandum Decision"), than the summary judgment determination in favor of the University of Utah (the "University") and its individual employees ("Defendants/Appellees"), would not have been appropriate due to the existence of disputed issues of material fact. The trial court's failure to view the facts or reasonable inferences in the light most favorable to the non-moving party, Dr. Martin, caused severe harm to him with dismissal of his case.

As a result, Dr. Martin respectfully asks that this Court reverse the trial court's granting of the University's Cross-Motion for Summary Judgment and remand for further proceedings.

I. DR. MARTIN'S APPEAL IS APPROPRIATELY BEFORE THIS COURT.

This Court should maintain jurisdiction over Dr. Martin's appeal. On November 16, 2017, this Court issued a Sua Sponte Motion for Summary Disposition ("Sua Sponte Motion"). Both Dr. Martin and the University submitted responses, and on December 4, 2017, this Court issued an Order ("December 4, 2017, Order"), withdrawing its Motion and indicating that the "appeal shall proceed to the next procedural stage." On February 9, 2018, the parties received the briefing schedule via letter notice from this Court.

As confirmed in the December 4, 2017, Order, the Notice of Appeal was appropriately filed pursuant to the subsequent entry of a final appealable Order (that in fact the University's counsel stipulated to and submitted in lieu of an in-person hearing offered by the trial court).[1] *See* Order of Judge Kate A. Toomey, December 4, 2017.

Based upon the entry of this Court's Order, Dr. Martin should be permitted to proceed forward in good faith, where it would be unfair to now decline to hear Dr. Martin's appeal on the merits where the University already had its chance and should not be

[1] Dr. Martin's counsel believes that oral argument refuting the University's argument that this Court should not maintain jurisdiction over this appeal, would be helpful, and will allow Dr. Martin to correct the record regarding the communications and pertinent e-mails that were exchanged, and as outlined under Utah R. App. P. Rule 11(h). This should also be permitted because the University already waived this argument by submitting a stipulated and final Order dismissing all of the Plaintiff's claims with prejudice, which the Notice of Appeal would then relate to, versus attending an in person hearing that was offered by the trial court and contesting the ability of Dr. Martin to proceed with his appeal at that time. At a minimum, Dr. Martin requests that additional briefing be permitted since the record evidence disputing the University's argument cannot be introduced or attached to this Reply Brief. *See State v. Law*, 2003 UT App 228, ¶ 2.

permitted another bite at the apple. In an abundance of caution, Dr. Martin still addresses the University's position below.

First, the University makes its argument as if the stipulated final Order dismissing all of Plaintiff's causes of action with prejudice was not entered on November 17, 2017, which constitutes a final appealable Order, and which under the Utah Rules of Appellate Procedure, the Notice of Appeal specifically relates to. *See* Utah R. App. P. Rule 4(c). Instead, the University focuses on the Memorandum Decision of September 26, 2017, entered by the trial court, to assert that the appeal is based on an interlocutory order and was "not an announcement of the complete resolution of the case,"[2] In doing so, the University ignores the fact that in its Memorandum Decision, the trial court reviewed Dr. Martin's Fifth Cause of Action and ruled against Dr. Martin in the context of Dr. Martin's Motion for Summary Judgment on Liability. R. 03144.

In Dr. Martin's Motion for Summary Judgment on Liability Against the Defendants, he addressed at multiple points throughout his brief how each of the individual University Employees were negligent. R. 00167 and 00189 (footnote removed). Furthermore, and as required under the procedural due process claim, Dr. Martin articulated at length, each of the individual Appellees/Defendants' bad acts in his Verified Complaint, at ¶¶ 89 – 97. R. 00030 and 31.

The case law relied upon by the University is distinguishable and should not be given undue weight. *See* Appellees' Response Brief, pgs. 32-39; *See also Bradbury v.*

[2] *See* Appellees' Response Brief, pg. 39.

Valencia, 2000 UT 50, ¶¶ 10 - 11 (where the Supreme Court dismissed the appellant's appeal after finding that the summary judgment order entered by the trial court was not a "final order" or appealable, and two claims were not even addressed); *See also Garver v. Rosenberg,* 2014 UT 42 (where the Supreme Court of Utah specifically cited to its prior decisions confirming that a notice of appeal submitted after an arbitration decision was not a final order as defined by statute); *See also* Utah R. Civ. P. Rule 7 – 2015 Advisory Committee Notes (where the Utah Rules of Civil Procedure were amended and specifically: "… the 'magic words' required under the former Rule 7(f)(2)" were removed."); *See also Riggs v. Scrivner, Inc*., 927 F.2d 1146, 1148 (10th Cir. 1991), (where the Tenth Circuit held that there was an arbitration as well as liability determination made, however, damages were not decided, and again there was not a final determination); *See also* in the *Matter of Adoption of B.B.*, 2017 UT 59 ¶ 77 (where the Supreme Court of Utah was not addressing a summary judgment motion but was reviewing motions related to consent issues in an adoption case, where, based on the facts of that case, the Supreme Court reversed the trial court's decision to deny the birth father's motion to intervened and remanded it back to the trial court).

Given the underlying proceedings, Dr. Martin respectfully asks that this Court maintain jurisdiction over this appeal to uphold fairness in this matter.

II. THE TRIAL COURT FAILED TO APPLY THE CORRECT SUMMARY JUDGMENT STANDARD WHICH MANDATES REVERSAL OF THE TRIAL COURT'S ORDER GRANTING THE UNIVERSITY'S CROSS-MOTION FOR SUMMARY JUDGMENT IN ITS ENTIRETY.

Dr. Martin has met his burden of demonstrating that substantial and prejudicial errors were committed by the trial court when it incorrectly adopted the University's version of the events in granting the University's Cross-Motion for Summary Judgment, to the detriment of Dr. Martin, as the non-moving party. The trial court in its Memorandum Decision, either blatantly omitted the facts or reasonable inferences that were favorable to Dr. Martin, or egregiously misstated the record as to whether the facts were disputed or not, such that, if the trial court had not erred, there was a reasonable likelihood that both parties' Motions for Summary Judgment would have been denied due to genuine issues of material fact, and Dr. Martin would be proceeding to trial on all six of his causes of action.

Rather than outline the correct standard as required under Utah R. Civ. P. Rule 56(c), and reference either what the undisputed facts were, or that the trial court was viewing the facts in the light most favorable to which party, the trial court only stated in its Memorandum Decision, that the: "material facts in this case may be organized in the order of chronology." R. at 03135.

In Dr. Martin's principal brief, Dr. Martin appropriately identified some of the most egregious or genuinely disputed facts presented by the defense and that the trial court relied upon, where Dr. Martin stated that: "*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: …", (See Appellant's Brief, pg. 24)(emphasis added), and Dr. Martin

should not just be limited to those facts alone, for purposes of demonstrating how the trial court erred, where there were a multitude of misstatements as demonstrated by review of the record evidence, and where the taint of them permeates the rest of the Memorandum Decision.

In reality, the trial court only focused on facts that supported the University, where: the trial court omitted that there was a second contract in place (R. 03137; the trial court stated: "The April 25th deadline was subsequently extended to May 3rd[,]" without reference to any record evidence, and despite the fact that Dr. Martin specifically disputed that purported extension as included in his response in his Joint Reply Memorandum in Support of his Motion for Summary Judgment on Liability Against Defendants and Opposition Memorandum to Defendant's Motion for Summary Judgment, at pg. 25 – 26. R. 02942 – 02943; the trial court accepted several statements from the University's version of events that were directly and specifically disputed by Dr. Martin's prior lengthy refutation of the additional facts that the University provided in its Joint Opposition to Plaintiff's Motion for Summary Judgment and Motion for Summary Judgment. R. 01760 – 01852, at 01794 – 01816;[3] the trial court misstated the facts and improperly accepted the statements as asserted by the defense, where the trial court stated, without citation to the record: "The March and April, 2014, correspondence between the plaintiff and the various

[3] Dr. Martin, in his Joint Reply Memorandum in Support of his Motion for Summary Judgment on Liability Against Defendants and Opposition Memorandum to Defendant's Motion for Summary Judgment, spent twenty-six pages disputing the majority of the one hundred and twenty-one paragraphs of "Additional Material Facts", that the University included in its improperly submitted, over length, and ninety-four page brief. R. 02918 – 03058, at 02921 – 02947.

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." R. 03140 (where the trial court ignored that both parties have directly opposite views regarding those e-mails, and the issue of deadlines or instructions have been hotly contested since the start of this case, with Dr. Martin asserting that he did not have prior notice of any deadlines. R. 01783. *See* pgs. 8 and 9 of Plaintiff's Joint Memorandum at R. 02925 and 02926); and finally, the trial court egregiously included as a material fact, the following: "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." R. 03140. Dr. Martin absolutely disputed that the University had the ability to exercise any option to renew (or not) as to the second contract with the Department of Surgery, where the University materially breached the terms of the second contract and prematurely ended his employment as to his position with the Department of Surgery, before the full term that ended in June of 2015, had even been completed. R. 02938 – 02940.

Due to those improperly stated facts, the trial court ultimately concluded that: "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." R. 03140. This then led to the extreme harm to Dr. Martin, where the trial court then concluded that he "therefore suffered no deprivation of a constitutionally protected property interest" (R. 03140), regarding his employment, medical privileges, or liberty interests, such that the trial court granted the University's Cross-Motion for Summary Judgment on Plaintiff's First Cause of Action. R. 03140 – 03141. Moreover, the harm continued where the trial

court again stated the version of the facts as asserted by the University, when it stated that: "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. 03142. The trial court did so based on accepting the University's position, that: "According to the defense, the plaintiff was not a faculty member of the School of Medicine and therefore should have received privileges in the first place." R. 03138. The University has held that position based on inapplicable Bylaw provisions, and previously stated that a College of Pharmacy faculty appointment was insufficient R. 1525-26. Yet, review of the Bylaw provision that the University relies upon does not indicate anywhere that an appointment by the Department of Pharmacotherapy or College of Pharmacy, would not qualify. R. 01526. The trial court was incorrect to accept that fact because it was genuinely in dispute. Dr. Martin submitted an uncontested affidavit that he was required to have privileges with the University's Hospital and Clinics, which he properly obtained,[4] and where the testimony of the University's own 30(b)(6) representative, confirmed that Dr. Martin would not have been granted those privileges, unless it was already thought that he had the appropriate appointment with the School of Medicine. *See* Appellant's Brief, pg. 8, ¶ 5. R. at 01960; See also Id., pg. 10, ¶ 15. R. at 02835 – 02836, and R. at 02866. This improper and disputed factual determination resulted in harm to Dr. Martin because the

[4] As this Court has upheld, " '[a] single sworn statement is sufficient to create an issue of fact[,]'" and … "because this account differs in material respect from plaintiff's version of events, it merely underscores that summary judgment is inappropriate. Rather, [defendant's] version of events shows there is a fundamental dispute as to what happened, requiring a fact finder to hear the evidence, weigh credibility, and determine the facts." *Crisman v. Hallows*, 2000 UT App 104, ¶¶ 12, 13 (internal citations omitted).

trial court then also granted the University's Cross-Motion for Summary Judgment on Plaintiff's Second Cause of action regarding his federal due process claims as well as his Sixth Cause of Action for injunctive relief. R. 03142.

Similarly, in regards to the contract claims found under Dr. Martin's Third and Fourth Causes of Action, the trial court also improperly weighed the evidence against Dr. Martin and specifically refused to incorporate Dr. Martin's version of events that the December 2013 letter from the Department of Surgery, that Plaintiff accepted and signed in February of 2014, constituted a second contract. "Next, the Court is unpersuaded by the plaintiff's position that the December 2013 offer from the School of Medicine culminated into a contract." R. 03143. Again, however, the Court reached that determination after accepting only the University's version of the events, and refusing to consider even a single inference in Dr. Martin's favor, as to his lack of notice or any instructions regarding any deadlines, that Dr. Townes had not provided a letter on letterhead after telling Dr. Martin that he did, or that, Dr. Martin had fulfilled all of the material terms required for the application in a timely manner, such that he performed as to his end of the second contract, and it was the University that materially breached the terms and not Dr. Martin.

It was inappropriate for the trial court to weigh the evidence or make a credibility determination regarding which affidavit to rely upon and the United States Supreme Court has specifically indicated that such actions are functions for the jury and not the court:

> " … [A]ll that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." … ***Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from***

> ***the facts are jury functions …. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor…***

See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-249 (1986)(internal citations omitted)(emphasis added).

The University concedes that the trial court did not state to a standard in its Memorandum Decision, but then states this Court should accept that "presumably" the trial court used the University's standard as stated in its briefing. *See* Appellees' Response Brief, pg. 44. To "presume" what the trial court was thinking, as the University suggests, is not fair to the non-moving party, or in this case, Dr. Martin, nor does it permit this Court to support the trial court's findings.

A recent Supreme Court of Utah decision, *Gonzalez v. Cullimore*, 2018 UT 9, confirms that reversing the trial court is appropriate in this case. In *Gonzalez*, the Supreme Court of Utah held that the district court erred because it failed to apply the correct standard. Moreover, it held that: "Under the correct standard, the district court should have first determined whether there was a genuine issue of material fact… [as to the specific claim alleged by the plaintiff],"[5] where it: "… reverse[d] and remand[ed] this case to the district court[.]" *See Gonzalez v. Cullimore*, 2018 UT 9, ¶ 40 (in pertinent part)(internal citations omitted).

Similarly, here, the trial court failed to first determine whether there were any genuine issues of disputed material facts, as to any of Dr. Martin's six causes of actions or claims, before ruling on the claims, such that reversal in its entirety must occur.

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5 *See Gonzalez v. Cullimore*, 2018 UT 9, ¶ 31.

Those disputed or facts favorable to Dr. Martin, were appropriately provided to this Court in Dr. Martin's principal brief, in the Introduction (*See* Appellant's Brief, pgs. 2-3), and in the ***Relevant Facts*** section of Dr. Martin's principal brief, as identified at ¶¶ 1 - 43:

It should be noted that, even in the parties' respective appellate briefs, that there remains, among other issues, a genuine and fundamental dispute over the reason why Dr. Martin's second contract was terminated early. Dr. Martin asserts that the record evidence reflects that once Dr. Barton announced he was leaving, and the Division of Emergency Medicine faced budget cuts, that the University made conscious and deliberate efforts in bad faith to end his second contract and his employment improperly to avoid paying his guaranteed salary for another year or provide the set ER shifts. *See* Appellant's Brief, pgs. 1, 12, 13, 22, 23, 24, and 25. The University, however, claims the exact opposite, stating that: "Budget cuts and tight shift availability were not a part of the decision not to move forward with Martin's application." *See* Appellees' Response Brief, pg. 22.

This fundamental dispute, alone, demonstrates that there are issues regarding pivotal facts that should have precluded summary judgment for the University.

Regardless of the arguments and facts previously submitted by Dr. Martin, in the University's briefing, starting at pg. 46 and continuing through pg. 51, the University repeatedly claims that Dr. Martin's challenge is "woefully inadequate" or his arguments lack "reasoned analysis" (*See* Appellees' Response Brief, pgs. 46-51), where Dr. Martin denies every one of those claims and believes that the University's statements lack merit.[6]

[6] Dr. Martin has adequately briefed the issues before this Court, where: "An issue is inadequately briefed if it 'lacks sufficient development of the argument and citation to legal

Dr. Martin would respectfully ask that this Court note that he submitted a principal brief that was over thirty pages in length and as permitted by Utah R. App. P. Rule 24(g). Dr. Martin included in his Statement of the Case, under the *Relevant Facts* section, at least forty paragraphs of omitted or misstated facts that the trial court should have used and that were favorable to Dr. Martin's position. *See* Appellant's Brief, footnote eight (8); *See also* pgs. 7 – 18. Dr. Martin also cited to the record in his principal brief, approximately one hundred and eighteen times. *See* Appellant's Brief, pgs. 1-30. Furthermore, Dr. Martin relied upon eighteen binding or persuasive cases. *See* Appellant's Brief, pgs. 4-31. Review of the University's brief indicates that they cited to twenty-six of their own cases, and yet, five of those cases addressed their new jurisdictional argument, and are non-responsive to the issues raised in Dr. Martin's brief. *See* Appellees' Response Brief, pgs. 33 - 39. As a result, the University relied on approximately two more cases, than Dr. Martin, where any claims as to a lack of legal analysis or provision of persuasive case law on Dr. Martin's part, should be given little weight. Dr. Martin's brief is a far cry from those deemed inadequate by this Court. *See Cora USA LLC v. Quick Change Artist LLC*, 2017 UT App 66 (where appellant failed to adequately brief arguments in the six pages provided and where some of the plaintiff's arguments were made in only one paragraph).

Under the Utah Rules of Appellate Procedure, Rule 24, it clearly states that an appellant must cite to the record in the following places: "… (a)(5) A statement of the

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authority' or if the argument is 'largely incoherent.' *Golden Meadows Props., LC v. Strand*, 2010 UT App 257, ¶ 32, 241 P.3d 375 (citation and internal quotation marks omitted)." *See Bresee v. Barton*, 2016 UT App 220, Footnote 7 (in pertinent part).

issue. … (a)(6)A statement of the case. … [and at] (a)(8) An argument." *See* Utah R. App. P. Rule 24(a)(5), (a)(6), and (a)(8) (in pertinent part). Dr. Martin did that, although he did not then restate his version of the truth or those facts again at length in the Argument section.

Dr. Martin appropriately provided citations to the record in his principal brief, this Court should not uphold the trial court's decision based on Dr. Martin's lack of reiteration of each disputed fact in his Argument section that he had already stated, and cited to, at length in his *Relevant Facts* section. Particularly, Dr. Martin should not be penalized for his counsel's efforts to comply with the recent amendments to the Utah Rules of Appellate Procedure that now focus on briefs avoiding "unnecessary repetition." *See* Utah R. App. P. Rule 24, Editors' Notes, 2017 Amendments.

Notably, the University did not respond to the case law Dr. Martin provided in support of his first argument section, however, review of the case law relied upon by the University, starting at pg. 44 of Appellees' Response Brief, to refute Dr. Martin's arguments demonstrate holdings that either support Dr. Martin, or are distinguishable from the facts in this case. *See Koerber v. Mismash*, 2015 UT App 237(where the plaintiffs in that case failed to respond to a properly submitted motion for summary judgment and any oral submissions raised during the hearing were insufficient to raise a genuine issue of material fact); *See also* the *Estate of Flygare v. Ogden City*, 2017 UT App 189(where this Court recognized that a trial court must ***first*** confirm that "there are no genuine issues of material fact" before determining if the moving party is entitled to judgment as a matter of law.); *See also Bresee v. Barton*, 2016 UT App 220(where the plaintiffs failed to attend a

Motion for Summary Judgment hearing, and then after a bench trial, the trial court awarded bad-faith attorney fees because it found that the action was without merit – which is not the case here); *See also Barneck v. Utah Dept. of Transp.*, 2015 UT 50 (where the Supreme Court of Utah reversed the trial court's grant of summary judgment to the defendant and remanded it back to the trial court because there was a genuine issue of material fact as to whether the plaintiffs' injuries were caused by the defendant; *See also Uintah Basin Med. Ctr. V. Hardy*, 2008 UT 15 (where the Supreme Court of Utah actually reversed the trial court's grant of summary judgment to the hospital because the Supreme Court found that there was a material issue of fact as to whether the hospital terminated the physician's employment agreement for just cause: A district court is precluded from granting summary judgment "if the facts shown by the evidence on a summary judgment motion support more than one plausible but conflicting inference on a pivotal issue in the case ... *See Uintah Basin Med. Ctr. V. Hardy*, 2008 UT 15, ¶¶ 18 – 20).

Finally, the University's statement that: "In any event, the district court properly concluded that there were no genuine disputes of fact regarding the three factual points Martin cites[,]"(See Appellees' Response Brief, pg. 49) is tenuous at best, where the trial court completely fails to mention any analysis about disputed facts. Moreover, the University's claims that: "Dr. Martin fails to engage with this evidence [relating to Dr. Martin's privileges and the CV or provision of deadlines related to Dr. Martin's application with the School of Medicine]," (*See* Appellees' Response Brief, pgs. 49 – 50), or that the evidence is "undisputed", also lacks a good faith basis, in the face of hundreds of pages of briefing related to the underlying summary judgment motions of both parties, not to

mention the disputes raised at oral argument, but also when one considers the twelve pages included in Dr. Martin's principal brief, wherein Dr. Martin went over the specific relevant facts that the trial court omitted, with citations to the record evidence, that directly contradict the University's position. *See* Appellant's Brief, pgs. 7 – 18.

The trial court should not have granted the University's Cross-Motion for Summary Judgment due to the genuine and disputed issues of material fact that existed.

III. DR. MARTIN HAS NOT WAIVED OR ABANDONED ANY OF HIS SIX CAUSES OF ACTION OR CLAIMS FOR RELIEF WHERE DR. MARTIN SOUGHT REVERSAL OF THE TRIAL COURT'S ORDER GRANTING THE UNIVERSITY'S CROSS-MOTION FOR SUMMARY JUDGMENT IN ITS ENTIRETY.

Dr. Martin appropriately argued that the trial court's errors mandated reversal of the Order granting the University's Cross-Motion for Summary Judgment in its entirety and Dr. Martin preserved his claims for relief on each of his six causes of action in his principal brief.

A. Dr. Martin Preserved His Appeal Regarding His Second Cause of Action or 42 U.S.C. § 1983 Federal Claim For Violation of the Procedural Due Process Clause Under the United States Constitution, Where the University and/or Its Individual Employees are Not Entitled to Qualified Immunity.

First and foremost, despite the University's claims to the contrary, (*See* Appellees' Response Brief, pgs. 40 – 42), Dr. Martin preserved his appeal as to his Second Cause of Action, not only where he actually stated his "procedural due process claims" in the plurality but also where he specifically asked this Court to "reverse the trial court as to his First ***and Second Causes of Action***[.]" *See* Appellant's Brief, pg. 32 (emphasis added). Moreover, when outlining the necessary elements of a principal brief, at the Preservation

portion related to the Third Issue on procedural due process in his principal brief (*See* Appellant's Brief, pg. 6), Dr. Martin specifically referenced the record evidence and arguments relating to the analysis of why the University violated his federal procedural due process claims, and also as to qualified immunity, why the University or its individual employees, should not be afforded any qualified immunity protection in his principal brief and relied upon the underlying briefing related to the summary judgment motions and oral argument related thereto. *See* Appellant's Brief, pg. 7, including the record citations relating to 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 Motion for Summary Judgment, at R. 02948-02954, and at oral argument, R. 03193-03208. Dr. Martin has included a copy of that transcript from the Summary Judgment Hearing, with the pertinent portions highlighted where those arguments were addressed at length, in his Addendum.

Dr. Martin has previously stated at length, the standard that he must meet to demonstrate that the Defendants/Appellees are not entitled to qualified immunity:

> Because Defendants have asserted qualified immunity, it is the Plaintiffs' burden to show with respect to each claim that (1) a reasonable jury could find facts supporting a violation of a constitutional right that (2) was clearly established at the time of the Defendants' conduct."

See Estate of Booker v. Gomez, 745 F.3d 405, 418 (10th Cir. 2014)(internal citations omitted).

Under the *Estate of Booker*, the Tenth Circuit upheld the trial court's decision and denial of summary judgment to the individual defendants based on genuine issues of material facts that related to several of the plaintiff's causes of action, holding in part, that:

"To be clear, our decision is based on what a reasonable jury *could* find, not what a reasonable jury *will* find. As the district court found, this case is rife with disputed fact issues—many of which surround the Plaintiffs' claim for failure to provide medical care. For this reason, this issue is appropriate for trial, not summary judgment." *See Estate of Booker v. Gomez*, 745 F.3d 405, 434 (10th Cir. 2014).

Dr. Martin's counsel argued at the Hearing on the Cross-Motions for Summary Judgment (and as specifically indicated was preserved in Appellant's Brief, at pg. 7, R. 03193-03208) that the University violated ***both*** Dr. Martin's state and federal due process claims under 42 U.S.C. § 1983, in addition to asserting that none of the Appellees/Defendants were entitled to qualified immunity. *See* Appellant's Brief, pg. 7, and oral argument on the Summary Judgment Hearing, as identified at R. 03193-03208.

Regarding the individual Defendants/Appellees,[7] Dr. Martin has addressed at length the individual violations of his state and federal right to procedural due process or the negligent actions of the University's individual employees since the start of this case in his Complaint, and he referenced that Complaint in the Procedural History of Appellant's brief at pg. 19, R. 00001-00038). Further, review of Dr. Martin's Fifth Cause of Action in his Complaint, (and in the paragraphs which are already identified above), clearly identify each

[7] It should be noted that the University, a governmental entity, is not able to assert qualified immunity as a defense for the deprivation of Dr. Martin's constitutional rights. *See Osuagwu v. Gila Regional Medical Center*, 938 F.Supp.2d 1142, 1146 (2012), case law referenced in Appellant's Brief at pgs. 22, 31.

of the specific negligent actions and conduct taken by each individual that violated Dr. Martin's state and federal procedural due process rights. *See* R. 00030-31, ¶¶ 89-97.

Moreover, the University's case law under this section, actually supports Dr. Martin's position that the individual University employees are not entitled to qualified immunity, where they acted in bad faith and refused to give Dr. Martin even the smallest modicum of due process or an opportunity to be heard. The University relies on *Tonkovich v. Kansas Bd. Of Regents*, 159 F.3d 504, 517 (10th Cir. 1998), yet review of Tonkovich indicates there that the Tenth Circuit reversed the trial court's ruling on a Motion to Dismiss and granted qualified immunity to the individual defendants, but only after the defendants gave the plaintiff, a law professor, a full hearing, because it recognized that: "A fundamental principle of procedural due process is a hearing before an impartial tribunal." *See Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 518 (10th Cir. 1998).

In another case relied upon by the University, *A.M. v. Holmes*, 830 F. 3d 1123 (10th Cir. 2016), the Tenth Circuit addressed that: "in determining whether the plaintiff has satisfied the necessary two-pronged qualified-immunity showing, courts ordinarily accept the plaintiff's version of the facts. *See A.M. v. Holmes*, 830 F. 3d 1123, 1136 (10th Cir. 2016)(internal citations omitted).

In this case, where the trial court failed to apply the correct standard for summary judgment, and failed to take the facts alleged by Dr. Martin in the light most favorable to him, any subsequent ruling regarding qualified immunity must be reversed.

Similar to the *Booker* decision, here, this Court should also find that this case "is rife with disputed fact issues," sufficient to warrant that Plaintiff's claims under his Second Cause of Action are appropriate for trial.

B. Dr. Martin Preserved His Appeal Regarding His Fifth Cause of Action for Negligence Against the University Employees, Dr. Crouch, Dr. Brixner, Dr. Barton, Dr. Hartsell, Dr. Finlayson, Ms. Thompson, and Ms. Peacock.

The University claims that Dr. Martin has waived his appeal as to the dismissal of his Fifth Cause of Action for Negligence asserted against the individual University employees. (*See* Appellees' Response Brief, pg. 42). As cited in the University's own authority, however, in *Scudder v. Kennecott Copper Corp*., 886 P.2d 48 (1994), it was held that it was not necessary to specify every interlocutory order when appealing a final judgment, and *Gregory v. Shurtleff*, 2013 UT 18, ¶ 8, would not be applicable where it references a motion to dismiss standard that Dr. Martin did not have to address.

Dr. Martin specifically noted the trial court's complete failure to include the facts and inferences that should have been drawn in his favor, in footnote 8 of his principal brief (See Appellant's Brief, footnote 8, pgs. 7-8), and then he included the key omitted facts in the forty paragraphs thereafter in the *Relevant Facts* section of his principal brief, while including just under one-hundred citations to the record evidence to support his version of the events. *See* Appellant's Brief, pgs. 8-18, ¶¶ 3 – 43.

Further, Dr. Martin also pointed this Court in his principal brief to the University's Motion to Dismiss in his Procedural History section and this Court could also review Dr. Martin's refutation of the University's position regarding his negligence claim in his

Memorandum Opposing Defendants' Motion to Dismiss, as Dr. Martin pointed out that some of the immunity arguments raised by the University, did not even apply. R. 00706 – 007301 (without exhibits), and specifically 00728 – 00729. Dr. Martin has adequately preserved his appeal as to his Fifth Cause of Action, where the summary judgment determination should be reversed.

C. Dr. Martin Preserved His Appeal Regarding His Sixth Cause of Action for Injunctive Relief.

For similar reasons, Dr. Martin has also preserved his claims regarding injunctive relief as addressed in his briefing for summary judgment (R. 00729 – 00730. There are disputed issues relating to the harmful e-mails and letters there were circulated by the University in May, June and July of 2014, and whether the language questioning his competency in those non-protected letters, caused him harm such that his liberty or reputational interests were affected, and injunctive relief should be considered.

Like the physician in *Rehman v. State University of New York at Stony Brook*, 596 F.Supp.2d 643 (E.D.N.Y. 2009), where the district court found that the physician stated a due process claim against the university because a letter was placed in his personnel file, and "[p]ublic charges that go to a person's professional competence sufficiently impair a liberty interest and require that the employee be afforded an opportunity to clear his name[,]" (*See Rehman v. State University of New York at Stony Brook*, 596 F.Supp.2d 643,

658 (E.D.N.Y. 2009)), here, Dr. Martin has also demonstrated harm that only injunctive measures can correct.

IV. THE TRIAL COURT INCORRECTLY GRANTED SUMMARY JUDGMENT TO THE UNIVERSITY ON THE CONTRACT CLAIMS.

Dr. Martin properly briefed and preserved his arguments regarding his contract claims found under his Third and Fourth Causes of Action, where Dr. Martin not only pointed this Court to critical portions of the record, but further outlined the specific (that the University disputed) relating to the two contracts. *See* Appellant's Brief, pg. 5, R. at 00171 – 00175, 00186 – 00189, with the relevant portions of the record attached hereto to the Addendum. Moreover, Dr. Martin further specifically designated or cited to the critical and improper factual determinations that the trial court made in its Memorandum Decision that were most problematic or harmful to him, as the basis to which his legal argument and analysis applied to. *See* Appellant's Brief, pg. 27.

The University's repeated statements that the "undisputed evidence" supports that the University did not breach either contract in this case, lacks credibility and cannot be relied upon. Again, review of the case law submitted by the University finds different factual circumstances that do not encourage a parallel holding in this case. *See Ladd v. Bowers Trucking, Inc*., 2011 Ut App 355, yet review of *Ladd* (the plaintiff testified that he could not recall the accident but then later he purportedly had a "dream", which was not deemed sufficient to support his version of the facts); *See also Cross v. Olsen*, 2013 UT App 135, ¶ 29(where this Court held that "[w]hether a breach of a contract constitutes a material breach is a question of fact[,]" and this Court reversed and remanded the case back

to the trial court). The University breached, at a minimum, Dr. Martin's second contract for employment, such that this Court should reverse the trial court regarding any determinations on Dr. Martin's contract claims.

In addition, when faced with disputed issues of material facts surrounding contract claims and the covenant of good faith and fair dealing, it has been repeatedly held that that any breach related to the same is better left for a jury to decide. *See Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445, 451-452 (Utah Ct. App. 1994)(internal citations omitted).

The cases included by the University, again, do not prove instructive nor should they be deemed persuasive. *See Oman v. Davis School Dist*., 2008 UT 70(where the Supreme Court affirmed the trial count's summary judgment determination because it found that the district did not violate the implied covenant of good faith and fair dealing when it terminated the maintenance contract because there were criminal charges and the contract specifically permitted it); *See also Colony Ins. Co. v. Human Ensemble, LLC*, 2013 UT App 68, ¶ 10 , (where this Court held that: "The covenant of good faith and fair dealing "inheres in almost every contract" and is "implied in contracts to protect the express covenants and promises of the contract.").

Here the University improperly denied Dr. Martin's reasonable expectation of having continued employment through June of 2015, and the University's bad actions should not be allowed in this case.

V. THE TRIAL COURT INCORRECTLY GRANTED SUMMARY JUDGMENT ON BOTH THE STATE AND FEDERAL DUE PROCESS CLAIMS.

Dr. Martin's third argument preserved his appeal as to ***both*** his First and Second Causes of Action addressing his state and federal due process claims (and not just his state due process claim). *See* Appellees' Response Brief, pg. 59 – 67).

While the University's argument here is, in essence, the same as that addressed under its waiver argument, Dr. Martin responds accordingly to clarify some of the misstatements made by the University, and particularly regarding the University's counsel improper claims related to Dr. Martin's Argument section.

First, and foremost, as articulated in his Standard of Review section, for the third issue, Dr. Martin appropriately addressed that: "The standard of review is both correctness and a clearly erroneous standard." *See* Appellant's Brief, pg. 6. Dr. Martin agrees that constitutional issues are reviewed for correctness, but to the extent that the trial court made improper factual determinations against Dr. Martin, it appeared that the clearly erroneous standard would be used. To the extent that this Court disagrees, Dr. Martin would respectfully defer to this Court on the appropriate standard, and if it is deemed to be correctness for these constitutional issues, Dr. Martin asserts that the trial court should still be found to have erred.

Second, Dr. Martin respectfully disagrees with the University's claim that he only cites to his underlying opposition memorandum on this issue, thereby forcing this Court to "scour the record". *See* Appellees' Response Brief, pg. 61. Dr. Martin did pinpoint the evidence, and if the Court refers to the Preservation section of Dr. Martin's principal brief, this Court will find references to specific portions of the record that support Dr. Martin's arguments as to his First and Second Causes of Action, while denying that the Appellees/Defendants should be entitled to any qualified immunity defense, starting at page 6 of Appellant's brief: "… (R. 03135 – 03145, at 03136, 03140 – 03141… R. 00166 – 00323, at 00183 – 00186 … R. 01760 – 01852, at 01820-01840 … R. 02918 – 02958, at 02934 – 02935, 02948 – 02954 … R. 03190 – 03250, at 03193 – 03208. *See* Appellant's Brief, pgs. 6 – 7.

Finally, regarding *Spackman ex rel. Spackman v. Bd. of Educ. Of Box Elder Cty. Sch. Dist.*, 2000 UT 87, whether Dr. Martin established that the three necessary components are dependent on his version of the facts being presented in the list most favorable to him, and to the extent those facts are disputed, then it should be left up to a jury because reasonable minds could differ regarding whether the removal of a physician's medical privileges without due process, could be considered flagrant or not.

The University concludes by providing three pages of facts, again only reiterating its side of the events in its argument, and which unnecessarily repeats facts that Dr. Martin has clearly and vehemently disputed throughout the entirety of these proceedings.

Dr. Martin preserved both of his causes of action and due to the issues of genuinely disputed material facts that affect each claim, that the trial court failed to consider, this Court should reverse the trial court accordingly.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's ruling that granted the University's Cross-Motion for Summary Judgment in its entirety, and remand the case back for further proceedings permitting Dr. Martin to move forward to trial.

DATED this 20th day of July, 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 6,944 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 20th day of July, 2018.

DURHAM JONES & PINEGAR

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

PROOF OF SERVICE

I hereby certify that, on the 20th day of July, 2018, two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** were mailed, postage prepaid, to the following:

J. Clifford Petersen
Daniel R. Widdison
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/s/ Nila Bladen
Nila Bladen

ADDENDUM

Transcript of Summary Judgment Hearing of September 6, 2017

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THOMAS G. MARTIN, M.D.,

Plaintiff, Case No. 160906038

v.

THE UNIVERSITY OF UTAH,

Defendant.

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TRANSCRIPT OF SUMMARY JUDGMENT

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BEFORE THE HONORABLE ANDREW H. STONE

SEPTEMBER 6, 2017

APPEARANCES:

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

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SALT LAKE, UTAH; WEDNESDAY, SEPTEMBER 6, 2017; 1:30 p.m.

COURT CLERK: Remain seated. Court is again in session.

THE COURT: All right, good afternoon. This is case number 160906038, Martin vs. the University of Utah and others. Those who are here, if you'd make your appearances, please.

MS. KYTE: Good afternoon, Your Honor, Julia Kyte here on behalf of the plaintiff, Dr. Thomas Martin.

MR. WIDDISON: Daniel Widdison here with my assistant, Megan Hutchins, on behalf of defendants.

THE COURT: Okay, so we have cross motions for summary judgment today. I believe the first motion was made by Dr. Martin. Ms. Kyte?

MS. KYTE: Thank you. Good afternoon, Your Honor. Thank you for being here to hear our two motions. Plaintiff respectfully asks that this Court grant plaintiff's motion for summary judgment on liability against defendants. We would also ask that this Court deny defendant's motion for summary judgment in its entirety.

Moving forward to the facts before this Court, given that we had a motion to dismiss hearing that was fairly substantial in regards to procedural background. At issue today under plaintiff's complaint are, there were originally six causes of action filed.

The first was lack of procedural due process under the

Utah State constitution. Th second was lack of procedural due process under the Unites States constitution. The Third was breach of contract. The fourth was breach of good faith and fair dealing. The fifth was negligence, but that cause of action was previously dismissed by this Court after the motion to dismiss hearing.

The Court, at that time, declined to dismiss it with or without prejudice, but for purposes of this hearing, it is a dismissed cause of action. And finally, the sixth cause of action is for injunctive release, relief, excuse me. The five remaining causes of action that are before this Court are the same causes of action that were before the federal court and Judge Jenkins.

We believe, in this case, that it is now clear, after review of the record, that the defendants have failed to act in good faith regarding plaintiff's employment and the decision to terminate his privileges and medical staff appointment. Simply put, the facts don't add up in this case. They have caused Dr. Martin actual harm, and Dr. Martin should be permitted the opportunity to have his day in court after this Court has made a liability determination regarding his damages.

We believe that plaintiff was given no procedural due process regarding either his employment or his medical privileges, and liabilities should be found against the defendants on plaintiff's first and second causes of action. We recognize that although there are cross motions for summary

judgment, this Court does not have to grant either motion, but if the Court agrees that there are no genuine issues of disputed material facts, that this Court can grant motion for summary judgment to one of the parties, and we believe here, this Court can grant plaintiff's motion.

Regarding the first cause of action, with procedural due process under the Utah constitution, article one section seven of the Utah constitution states no person shall be deprived of life, liberty or property without due process of law. The defendants have claimed that plaintiff has not met that burden under Spackman or Jensen.

We respectfully disagree. The elements of Spackman are--

THE COURT: How is the relief you're seeking under these due process claims different from your contract relief?

MS. KYTE: So Your Honor, in regards to the Utah constitution and the United States constitution due process claims, the federal due process claims are different because they are going to the fair hearing. They are going to his right to be able to have been heard by his peers. They are going to the liberty interests, and also under the 42-1980--excuse me, 42-USC-1983 claim, there's obviously additional remedies such as requesting or obtaining attorney's fees and costs.

That is different than the remedies afforded under the contractual issues, which focus on the $252,000 that was his

guaranteed salary for 2014 through 2015, the benefits or the ability of future employment. Those are some of the different remedies. In further distinction between the Utah constitution and the United States constitution, the violations of those were two separate causes of action.

The defendants have asserted that under Spackman, the second element of which is that plaintiff already has redress under another claim, and they've asserted under either their contract claims or their federal constitutional claims, we actually have a matter currently before the Utah Supreme Court to address that specific issue, because right now, the case law is not clear that a plaintiff can only seek redress for constitutional violations under federal claims.

Both are permitted at this time, and because we believe we've established, the record is clear as to the violation of no due process being given under either the Utah State constitution or the federal--

THE COURT: Doesn't Spackman say that you have to show that you don't have another remedy?

MS. KYTE: So if there is another remedy, but the case law, and I actually have Christensen or Jensen. I have it over there. I don't want to misquote it to the Court. The Court's aware of the case.

The problem is that in the federal court, we obviously brought our federal constitutional claims. Under Spackman and

Christensen, the courts have held that a plaintiff can go to the Utah courts and address both their constitutional state claims, and their constitutional state claims, and their constitutional federal claims, if the federal court has not otherwise dealt with them on the merits, and in this case, there has been no addressment of those injuries on the merits.

So we believe both claims should be permitted to move forward at this time, and it is not a full redress under the contractual causes of action, for the reasons I've already stated involving the due process right to be heard--

THE COURT: Yeah, well, I mean, that aside, I mean, it's not that you're asking to move these cases forward. You want a judgment on liability, and what I'm trying to see is, Spackman seems to say pretty clearly that if you have another remedy, you don't qualify for the state remedy, and I don't understand what remedy you're seeking under your state due process claim that isn't covered by your federal due process claim.

MS. KYTE: So Your Honor, I believe the case law is slightly different. So the remedies are different. Under the state law claim, we are addressing fair hearings at the state level, and there is a certain process under state law, such as the Don Houston case, that addresses what's available there.

Under the federal constitutional claim, we also then have access to the fair hearing processes with the healthcare quality improvement act and other remedies that are afforded

under that. So that's where I believe there is actually different remedies that are not--one does not fully cover the other, and if we're only tied to the Utah constitutional claim versus the federal constitutional claim, Dr. Martin is harmed because he does not get his full redress.

THE COURT: Okay.

MS. KYTE: Does Your Honor--

THE COURT: I don't think you've sold me on that, but, I still don't see the difference in remedies, but let's go, move on. We do have an hour today. So--

MS. KYTE: And Your Honor, as I'm going through, when I come, when I address that in a little bit further, it might--

THE COURT: Okay.

MS. KYTE: --through my argument, provide some additional clarification if I'm not, if I'm not addressing it thoroughly at this point. In regards to the due process claim under the Utah constitution, as we address, there needs to be a demonstration of a flagrant violation. We believe that we've met that element.

We believe that the record shows that there was absolutely no due process, not even minimal due process afforded to Dr. Martin after his privileges were terminated. It's admitted they were granted in error. We respectfully disagree. We think that they were admitted, excuse me, they were issued appropriately and as-needed for accreditation by the Utah Poison

Control Center.

THE COURT: Well, you didn't dispute that the bylaws regarding privileges are, restrict privileges, in this case at least, to college of medicine faculty members.

MS. KYTE: So Your Honor, I actually do not agree with that, and that's been one of the problems is--

THE COURT: But your, you dispute that by saying they gave me privileges, so it must not be the rule.

MS. KYTE: Your Honor, what I think is that the bylaw doesn't appropriate distinguish between the school of medicine and the college of pharmacy. That is, I think, the problem here, and that's why there's been two different interpretations given. The record evidence at this time reflects, and there's testimony by the 30(b)(6) deponent, that Dr. Martin, in November of 2013, was issued from the medical staff office, which deals with the school of medicine, his clinical privileges and his membership at the Utah hospitals and clinics.

Now what that means is that at that point in time, he was bound by the bylaws. He was also protected by the bylaws, and that was a requirement that he have hospital privileges to be the director of the Utah Poison Control Center. There's also further testimony that prior to Dr. Martin, there had never been considered a "split position" such as this.

Everyone was operating, the president of the university, the board of trustees, approved his original

application, where the testimony reflects that he would never have been granted privileges unless everyone was operating that that faculty appointment constituted appropriate process through those bylaws.

So the--from plaintiff's perspective, the evidence reflects that everyone was operating, that he did have an appropriate appointment, and but for Dr. Martin, excuse me, Dr. Barton, or any of these other events that happened in 2014, whether it was, whether it's a budget cut, whether it's Dr. Barton leaving, whether it was some issue with administration staff interaction.

But for that happening, this would never have come about. Everyone was operating that he was doing everything appropriately, and he fell under the bylaws. So--

THE COURT: When were, when were the privileges terminated?

MS. KYTE: The privileges were terminated in May of 2014, and they were terminated based on Ms. Thompson's testimony that she reviewed the letter of Dr. Hartsell that was drafted by Dr. Barton from the Division of Emergency Medicine and the department of surgery, and that's what the record reflects, is that his employment and privileges were terminated by the department.

THE COURT: Employment with--

MS. KYTE: Well Your Honor, the July 2014 letter

indicates that his privileges and medical staff appointment ended pursuant to termination by the department, which Ms. Thompson testified she believed that meant the department of surgery, because she relied on the letter of Dr. Hartsell and Dr. Barton.

His employment, there is again dispute over who made the ultimate decision, but Dr. Brixner, that issued a letter in, I also believe May of 2014, but it may have been June, Your Honor, and I apologize on that date. The eventual letter was I believe issued in June of 2014, where Dr. Brixner stated there are no other appropriate alternative options, and so your employment is ending as the medical director of the Utah Poison Control Center.

THE COURT: That was a contract that went to July 1, 2014?

MS. KYTE: That was, Your Honor, and Your Honor, there's been some discussion of well, that contract was fulfilled, but we would respectfully address that it wasn't. The terms of the contract discuss an automatic renewal. It discussed a split appointment, but the key here, Your Honor, is that the defendant keeps focusing on it fulfilled because there's an opportunity that it didn't automatically renew.

And that's what the language would be, but that's not what the documentation shows. The documentation is that he was terminated, and that is different, and it's a different harm. If there was only documentation throughout that there was a formal

decision not to renew his contract, we would be in a different position today, but that is not the record evidence.

It is that there was a termination by his department, and that department was the department of surgery. Now, because they're so tied together, despite defendant's claim that they're separate, there is nothing in the bylaws that expressly addresses this Court's question of the college versus the school of medicine, and that's where we also believe that the language is clear.

The two offers of employment address a split position. They do not say one is dependent on the other. The contracts also address that he will be given written instructions. Now, in the briefs, in the pleadings, defendants have claimed that these couple of emails sent from the administrative staff constitute written instructions.

Well, there's no deadlines in those emails. There's different requests being made in those emails, and over the course of this application period, Dr. Martin responded to 100-200 emails. So to specifically point out those couple of emails, we think falls flat.

We believe that there's a flagrant violation in this case because there are whole sections designated in every set of bylaws, in every medical facility, not only in this state but across the country, regarding fair hearing plans, and when there's even a question of someone's medical staff appointment or

clinical privileges being removed, Dr. Martin wasn't even given an opportunity to provide a written statement in his defense as to what happened, to be put into his file.

This is a flagrant violation, where their whole fair hearing plan is designated to these very issues. The defendants were looking for a way to end his employment, and despite all of his efforts, all of these requests to meet with people, to be heard, each and every one was denied, and that's a violation of a constitutional right not to be deprived of your property or liberty interest.

And further, in regards to the liberty interest, there is case law that addresses the harm to professional reputation and integrity, and while there's been some issue of whether any letters were circulated outside of the facility, that's missing the point. The point is, with any future employer, Dr. Martin has to express where he was previously employed, and almost every future employer requests documentation of how a physician left the facility.

And he can't produce that because the last letter circulated says terminated by his department, which is not true, and the letters before that indicate information that's also not accurate. The May letters address information about him failing to comply or not responding, things that the record has clearly shown he did try.

Regarding the second issue that this Court has brought

up in regards to whether the state constitutional claim is appropriately addressed by the federal, defendant addressed this in their brief at page eight. The contract, as I already addressed, focuses on the guaranteed salary and benefits. It doesn't remedy his opportunity to present his case to his peers or his committee regarding his medical privileges.

It doesn't undo the reputational harm. It doesn't undo that he will not have an ability to stay at a facility that he wanted to stay at, and that, I think, is one of the key things. Throughout Dr. Martin's deposition testimony, he addressed that if the facility had offered him his position back, even to this day, he would go back as the medical director at the university.

And because of this deprivation, he has been removed of that opportunity to have had his peers or present his defense, and that's a constitutional right that is something that, now, we have to address through a monetary remedy, because we've already addressed the injunctive relief as to the written harm.

Regard--

THE COURT: How is that a monetary remedy? So we have a reputational injury, but with respect to your claim that I want my job back, how is there a monetary remedy that's different than his breach of contract remedy?

MS. KYTE: Your Honor, I think in regards to the additional components he testified to, which is--if a court is willing to address in a contract claim some of the intangible

things of him having to move, him having to lose the prestige of being at the university, those are intangible things that contract claims don't typically address.

But in a fair hearing, it's understandable if someone says well, this physician, as a result of an improper action of a MEC, or something like that, has these additional reputational harms, the community is a small one, Your Honor, and the constitutional claims address protections that contract law simply don't, unless Your Honor has some other example.

THE COURT: Consequential damages, but--

MS. KYTE: Yeah. Your Honor, in a fair hearing process, there is in-essence a chance for a physician to, in a small way, have his day in court and defend himself, where that will never happen in this case now, regardless of how this case comes out in an informal way.

Dr. Martin has now had to address it publicly. It's been personally embarrassing, very difficult for he and his wife, and he had really hoped to resolve this well before this presentation to this Court.

In regards to the federal claims, I believe I've already addressed that to this Court. Obviously, under the 14th amendment, we believe that Dr. Martin has been deprived, and further, we also believe that the law is clearly established that medical privileges, or at least the weight of the law from other circuits and the State of Utah, clearly fall in favor of that

medical privileges are a protected property interest.

I know the defendant has tried to distinguish that, but it does not remove the fact that the Eleventh, the Sixth and the Fifty Circuits have explicitly held that a physician has a constitutionally protected property interest in medical staff privileges, and the Tenth Circuit has noted in at least 1 other case.

The Utah state law, although I understand it's not, it might be factually distinguishable, it still clearly establishes it's a protected property interest, and Dr. Martin taking, we are here on a summary judgment motion. We believe that the law, excuse me, the record clearly establishes he had them. It is not contested that they were given to him.

Now in revisionist history, they've tried to say oh, well, that was all done in error. Well, the error of the University shouldn't fall or hurt Dr. Martin in this case.

THE COURT: I'm not sure this came out, but we have this period of time, almost one year, where he's been given the position in pharmacy.

[Phone rings].

THE COURT: It's a wrong number I'm pretty sure. He's been given the position in pharmacy, and he's purportedly in the process of applying for a position at the school of medicine. Did he exercise privileges during that period of time? Is he treating patients at the hospital?

MS. KYTE: Your Honor, so in regards to the status of what he was granted, he was granted consultation privileges. So that's not a physical inpatient. In April of 2013, he was granted, so to speak, bedside privileges, and the coordinator had actually started his ER schedule to start in June, and that actually when his, his emergency schedule got deleted, was when he first wrote to Dr. Barton to find out what had happened, in regards to why those were cancelled.

And he was then informed of--

THE COURT: You're not supposed to have privileges?

MS. KYTE: Right, the subsequent chain of events.

THE COURT: So it got as far as scheduling, never actual bedside.

MS. KYTE: Correct, Your Honor.

THE COURT: Okay.

MS. KYTE: He did not have that. He did have consultation privileges, consultation, toxicology privileges. So physicians from the hospital could consult with him on different cases in regards to poison.

THE COURT: And did he do that?

MS. KYTE: Your Honor, to my understanding, he acted in the full scope of what a medical director does at the Utah Poison Control Center. It's my understanding he interacted with the physicians.

I do not think there's anything in the record that

expressly states the scope of that, but I do know that the prior doctor who actually worked as the medical director was helping him get his consultation privileges in place so that he could better coordinate with him, because he was still a physician in the hospital.

THE COURT: Does the, was it contemplated under this position? Maybe this is in the record. Maybe it's not, but just tell me if it's in the record. Was he going to bill patients?

MS. KYTE: Your Honor, I am afraid I don't know that.

THE COURT: Okay, I'm guessing it's--

MS. KYTE: I couldn't answer--

THE COURT: --not in the record, but--

MS. KYTE: I couldn't answer that. I do know that it contemplated a certain amount of hours per month in the ER, which would lead me to believe that the hospital would certainly bill for his services provided during that ER time.

THE COURT: Once he starts taking the ER shifts.

MS. KYTE: Right.

THE COURT: I'm talking about the consultation. I mean, the Poison Control is in a unique position, but we don't know that from this record.

MS. KYTE: Your Honor, it's not on the record in that context.

THE COURT: Okay.

MS. KYTE: To refute, although it is in defendant's

argument, not ours, we certainly do not believe that defendants should be found entitled to qualified immunity in this case. Again, the Supreme Court of Utah is clear that a plaintiff's assertion of facts must be accepted as true in the context of a case asserting qualified immunity.

There are two elements of qualified immunity. The first part is whether, determining the facts as alleged by the plaintiff make out a violation of a constitutional right, and then whether that alleged right was clearly established at the time, and we believe the cases cited by defendants are not instructive. They are factually dissimilar.

The precedent and the cases that defendants are relying upon are primarily dealing with law enforcement. In this case, we believe that the case law is clearly established that there's a protected interest, and we believe that it was clearly established at the time. In fact, here, the defendants actually consulted with legal counsel in some context before going forward, which seems to indicate they were aware there might be concerns with how they were acting.

THE COURT: And we talk about constitutional interests here, we're talking again, property interest, employment liberty interest and reputation.

MS. KYTE: Both.

THE COURT: And property interests and privileges?

MS. KYTE: And privileges. All three, Your Honor.

THE COURT: Okay.

MS. KYTE: We believe we've produced the case law, and I'm not going to recite the case law to this Court. Returning to our third and fourth causes of action, which are the breach of contract and the breach of the covenant of good faith and fair dealing.

We believe, on its face, that there are three contracts at issue here. We believe there are the bylaws, and the bylaws incorporate within them the policies and the faculty code. Then there is the first offer of employment, which occurred in August of 2013, and then there was the second offer of employment while the letter was drafted in December of 2013. Dr. Martin officially signed that acceptance in February of '14.

We believe that as a matter of law, this Court can rule that the defendants breached the contracts at issue, that the terms are unambiguous, and that as a result of the breach, Dr. Martin was caused harm such that he should be awarded damages by a future jury.

We believe that they breached the contract on their face because the bylaws are clear, and the record reflects that he did have his privileges. He did have his medical staff appointment. He was entitled to those protections. Those were denied to him by the language of the bylaws, the policies, and the faculty code of conduct.

We believe that applies to both his employment with the

University, as well as his medical privileges or staff appointment as they fall within the clinic and the hospital. We believe we spent numerous pages in the complaint addressing that. We referenced the policies. We referenced the bylaws, and we believe we've appropriately provided the supporting evidence to show how those were breached.

We also believe the covenant of good faith and fair dealing. It was egregiously breached in this case. For whatever reason, we believe there are a variety of reasons the defendants did everything they could to ensure that Dr. Martin could not move forward, despite his efforts. They did not grant him the additional 30 days to correct the issue.

The record reflects that April 21st of 2014 was the first time that Dr. Martin was given a written deadline, and he was given four days. And by April 25th, he had received assurance from the administrative staff person that he was working with, and he thought he had complied.

He had reached out to his letters of reference, which, as we know, as professionals in our own field, typically letters of reference are supposed to be sought once the names are provided by the potential employer or the staff. There is a certain amount of professionalism, where you're not supposed to influence your letters of reference, or obviously, you know, force them to write something in here--

THE COURT: Is there testimony in the record that

that's how he understood it to be? I mean, because that's not my experience.

MS. KYTE: In his deposition, I believe what the record reflects is that he understood and he did reach out to each of his physicians that provided letters of support and provided them the timelines, and provided them, you know, when there were deadlines coming up, he asked them to write another letter.

And in this case, I believe each of his three references provided nine separate letters during this application process. So 9 times 3, 27 letters, and so what the record evidence reflects is, regarding that final letter of support that needed to be on letterhead, it was already on letterhead in his original faculty application.

Dr. Brixner had a copy of it, the exact same letter. It was directed to her, mind you, but Rebecca Bryce, from the Division of Emergency Medicine, had already gotten that full application. So any claim that they were uncertain about the verification or the authenticity of this specific letter just doesn't hold weight.

And to have a denial based on one letter on letterhead that was produced by at least May 15th, and the record reflects that Ms. Peacock also sent a letter, an email, in May, saying if we get this letter, he can start by August 1st. The defendant still moved forward in ending his employment, for whatever reason. We have not gotten to the bottom of it, but that's for a

jury eventually to decide, in regards to damages and his harm.

THE COURT: Well, yeah, I mean, if we don't know why, I mean, how can I--

MS. KYTE: Well, Your Honor--

THE COURT: --conclude that it's bad faith?

MS. KYTE: We believe that there's a breach in the end of, excuse me, the termination of his employment, and we believe based on the contracts, regardless of the reason, there's been a material breach, and we believe this Court can make that determination as a matter of law.

THE COURT: All right, thanks.

MS. KYTE: In regards to the final cause of action before this Court, which is the sixth cause of action addressing injunctive relief, it is only a partial remedy, and the only thing it is addressing is that there are currently letters and written publications that are not marked as confidential that include, we believe, incorrect information, that so long as Dr. Martin is practicing, that is a continuing harm, and it needs to be corrected or retracted.

Your Honor, unless the Court has any other questions, I will turn it over to defendant's counsel.

THE COURT: All right, thank you.

MS. KYTE: Thank you.

THE COURT: Mr. Widdison?

MR. WIDDISON: Thank you, Your Honor. Before I begin,

do you have any specific questions you'd like me to address?

THE COURT: You gave him privileges. That's undisputed.

MR. WIDDISON: Correct.

THE COURT: Why don't the bylaws, provisions regarding hearings before revocation of privileges, apply?

MR. WIDDISON: That's simple. It's because of the language of the bylaws. So--

THE COURT: I mean, I, I think I comprehend your automatic revocation argument, but doesn't that require loss of faculty privileges by its express terms?

MR. WIDDISON: I don't think I understand the question.

THE COURT: The bylaws say that the automatic revocation applies. I believe your argument is because the bylaws say if your employment, if your privileges are contingent on a faculty position, words to that effect, then upon the loss of faculty position, you're subject to automatic revocation.

It uses the term "loss of faculty position".

MR. WIDDISON: Okay.

THE COURT: When did he lose his faculty position if he never had it?

MR. WIDDISON: That's a valid point, Your Honor. And so in order to, in order to get around that provision--so our position is that the, either the privileges were issued in error, and he can have no property right to something that's issued in error, or alternatively, that the privileges were issued--well, I

mean, we can look at it a couple of ways.

The privileges were issued on the letter in which they were issued, the November 19 letter. It says these privileges are issued under the school of medicine, department of surgery, division of emergency medicine, right? And so, if he has privileges according, you know, under the administration of this department, and the bylaws clearly say that in order to have privileges under that department, you have to have a faculty appointment under that department.

Then the minute, then his privileges were subject to automatic revocation the entire time he had them. That's our position.

THE COURT: But he had them.

MR. WIDDISON: That's correct, Your Honor. He did have them. I mean, he had them in error, which is why we have this sort of weird, he had them but he shouldn't have--

THE COURT: [Inaudible] of privileges.

MR. WIDDISON: But the reality here is that he never actually used those privileges. He never practiced those privileges. He was scheduled for shifts in, you know, he was given the schedule in May of 2015, and the shifts were to begin in June of 2015, but because he never, he never consummated his application with the school of medicine, he never actually had any shifts.

He never appeared in a hospital. He never practiced

medicine within the University of Utah Hospital, and so based on that, even though he had privileges, he never actually used them. There was no benefit from them. They were just there.

And again, assuming the plaintiff's argument, or I'm sorry, reading the facts in the light most favorable to the plaintiff, then we have to assume that the school of medicine intended to give him those privileges for the purpose of facilitating his position as medical director. Once he lost his position as medical director, those privileges were no longer necessary, and thus subject to automatic relinquishment.

So even if we read plaintiff's interpretation that the privileges attach to his position with the college of pharmacy, his loss of the position with the college of pharmacy still resulted in automatic revocation, automatic relinquishment rather, I'm sorry.

Revocation and relinquishment are slightly different, automatic relinquishment, which actually, according to the record, didn't happen until July 9th, even though he was sent an email in May saying hey, we accidentally gave you these privileges. We're sorry, but they're going to be terminated.

The actual letter terminating his privileges wasn't issued until July 9th, long after his employment with the University of Utah had ended. So he never used those privileges, and was never in a position where he could gain any benefit from them, other than the benefit of continued employment as medical

director.

THE COURT: Counsel relays facts that he was on the schedule to serve shifts in the emergency department, was taken off?

MR. WIDDISON: Correct.

THE COURT: Okay.

MR. WIDDISON: Correct, and that's precisely because at the time that they scheduled him, they anticipated him finishing the application, but he never finished it, and so they had to take him off the schedule, because of the closed-system hospital that they created.

Now, there's one statement that opposing counsel made that has been a constant source of, I think, confusion in this case, and it's that there are actually three different things going on here, right? We have the college of pharmacy contract, which is the offer letter, and then the policies, the school policies, that 6-300 series that applies to the college of pharmacy contract.

Then we have the school of--and our position is, we gave him the position. We paid him through the end of the year, and on July 28th, we sent him a letter saying hey, you know, we're sorry it didn't work out, but we're terminating, you know, we're not going to renew your contract. You're going to get paid through July 9, and that will be the end of your employment with the University.

And so he was paid through the end of that one-year contract, which the University lawfully exercised its right not to renew, and that's governed by the policies. It has, the bylaws are completely separate from that.

So the second contract is the school of medicine contract, and that was an offer for him to fulfill, to send an application, fulfill the application requirements, and once he fulfilled those requirements, then his application would be submitted to the faculty senate, and to the school of medicine board of trustees, so that they could approve the faculty appointment, assuming he passed muster, and then he could take his position with the school of medicine faculty.

That process is also governed by that policy, 6-300 series, and again, has nothing to do with the bylaws. The bylaws only apply in the very narrow context of medical staff privileges, and all of the record evidence here supports that, along with the language of the bylaws themselves. They apply to the members of the hospital staff of the University of Utah, and bylaws for hospital staff is a standard, as opposing counsel pointed out, is a standard throughout the entire country.

And so the bylaws govern who can practice in a hospital, and here, the bylaws say that in order to practice in the University of Utah hospital, you have to have a school of medicine faculty appointment. If you don't, you don't get to practice, and that's precisely what happened here.

And so it's our position that the contracts essentially all played out exactly as, while not the parties had hoped, but exactly as allowed and contemplated under the agreements. Plaintiff never completed his application for the school of medicine.

And in fact, plaintiff made a mention, both in the briefing and, opposing counsel I'm sorry, made a mention in the briefing and just a moment ago, that Paula Peacock sent an email saying hey, if the plaintiff is able to get his application to us in time, we can start him in August, and that's correct. Paula Peacock absolutely said that, and we stand by that.

The problem is he was scheduled for a July 1st start date in order to meet the requirements of the college of pharmacy and the poison control center. He could not meet the July 1st start date, even if he turned in his application at that late hour, and so thus, he was, his application was no longer of any use to, or I'm sorry, he couldn't fulfill the exact role they asked him to fulfil when they hired him in the first place, and that's why they terminated the, that's why they rejected his application and ended the process.

THE COURT: Tell me, I mean, again, only answer this if it's in the record.

MR. WIDDISON: Right.

THE COURT: But has the position been filled?

MR. WIDDISON: Right now, no. They are working on--I'm

sorry, Dr. Crouch testified in her deposition. It's not in our statement of facts, but it's in the Crouch deposition that right now, they're working with the same stop gap they had in place before they hired Dr. Martin, because they've still had trouble filling that position.

THE COURT: All right. Okay.

MR. WIDDISON: All right, so moving on then. The last thing I wanted to make clear before I get into the, the rest of the legal argument is, is that although the bylaws provide for these fair hearing processes, and notices and all of that, those bylaws are designed to comply with both due process and, as opposing counsel pointed out, the healthcare quality improvement act.

And so that brings me then to my first, my first point here, and it's on the first cause of action plaintiff brings under the Utah constitution. I believe the Court is absolutely correct on its analysis of Spackman. Spackman requires that, in order for there to be money damages, a plaintiff must show that they have no other recourse available to them, and that injunctive relief will not satisfy them.

Plaintiff brought two claims under, or two brands of complaints under the state constitution, deprivation of due process with respect to his employment, and then deprivation of due process with respect to his medical staff privileges, and as a corollary to that, liberty interest. No, our position is and

still remains that plaintiff simply hasn't pled claim of due process for his employment, I'm sorry, for his employment, loss of his employment.

It's not in the complaint. It's asserted for the first time in his motion for summary judgment, and we believe that a proper, it should have properly been brought under a motion to amend under rule 12, or under rule 15. That didn't happen. Therefore, it's not properly in front of the Court.

However, even if it were, it would still fail, because he was granted all the process that was due for his, I'm sorry, for his employment, and then as to liberty interest, he can't show that equitable relief, i.e. a name-clearing hearing, which is the remedy for a liberty interest claim. If a plaintiff succeeds on a liberty interest claim, they're entitled to a name-clearing hearing, where they get not necessarily a clean slate.

They get the opportunity to rebut what they allege are the false statements that were made against them, and so again, Spackman clearly bars plaintiff's first cause of action, and it must be dismissed with prejudice.

Plaintiff's second cause of action under the federal constitution likewise suffers from the same problem of not pleading a claim for deprivation of his due process under his employment. However, I'd like to address just a couple of specific things that I think were brought up by opposing counsel's argument that are already addressed in great detail in

our brief, but I just want to clarify them here for the record.

The first one is that plaintiff can't point to any policy of the University that requires a due process hearing for the non-renewal of a contract, and there's ample case law cited in our brief that states that non-renewal of a contract does not implicate your property interest under, or it does not, you can't have a property interest beyond the end of, beyond the renewal period under the federal constitution.

And so he had a property interest through the end of the one year, which he was given, and he was paid through that year, and then the contract was not renewed and thus expires his, excuse me, thus expired his property interest.

The second is as to the college, or I'm sorry, the school of medicine. His argument there, his due process argument there is somewhat confusing, and I'm not sure exactly what he's pleading, but if I understand it correctly, essentially what he's saying is that he should have been given some opportunity to say hey, my application was incomplete but here's the reasons why, and therefore, you know, be able to have a right to notice and to be heard.

Well, the facts of this case clearly establish that one, he didn't have a property interest because that contract never came into fruition, and then two, he did have notice and an opportunity to be heard.

He complained to every person he could find and

provided extensive emails and correspondence and phone calls, all explaining why the various problems that he had with his application process weren't his fault, or were otherwise, attributable to other people, when the record evidence is clear that the responsibility, that both, and both plaintiff, Dr. Barton, who was the chief of emergency medicine at the time, Dr. Hartsell, who was the interim chief after that, and Dr. Finlayson, all testified that it is the responsibility of--and I'm sorry, also Paula Peacock, who is the administrator for that office.

They all testified that it is the responsibility of the applicant to ensure that their application is complete by the deadline given, and here, we know that the plaintiff had received numerous notifications about the deficiencies in his application, beginning in January and repeated again in February, March and April. He was given a deadline in April that he almost met, and would have met, but for the absence of doctor, of one of his references, and for whatever reason, we're not sure, he didn't ask someone else to be his reference, which again, would have satisfied the requirement.

But the fact of the matter is, he simply didn't complete his application on time. He was missing that last letter, and the argument that the letter that he gave to the college of pharmacy satisfied the requirement of the school of medicine is simply belied by the record. Paula Peacock and Dr.

Brixner, who is the recipient of the college of pharmacy letter, explained that letters of recommendation for a specific position have to be unique to that position.

So in the college of pharmacy, what they're looking for is a letter that says Dr. Martin is an excellent pharmacologist and will be an excellent medical director. With the school of medicine, what they're looking for is, Dr. Martin will be an excellent emergency room physician in the area of toxicology, will do an excellent job of handling toxicology patients and admitting, and those kinds of things.

Those are completely different and thus require different letters, and we sympathize with plaintiff's position that this was a complicated and long process, but the reality is, it is a complicated position. I mean, this is not, this is not like applying for a job at a call center. This is applying to provide medical care under very serious and extreme circumstances, and it's a process that, as Paula Peacock testified, has been successfully completed by every other member of the college of, I'm sorry, the school of medicine faculty.

For whatever reason, Dr. Martin stands alone as the one person who has simply been unable to meet this requirement. And so it's hard to say that the University acted in bad faith when every other applicant has been able to do this under the exact same process, but for whatever reason Dr. Martin could not.

So moving on then to the medical staff privileges.

There are numerous cases that are cited in our briefing that talk about the viability of medical staff privileges as a protected property interest under the United States Constitution. Now as plaintiff pointed out, and as we pointed out in our briefing and in the cases that we cited, no Utah court or Tenth Circuit Court, or the Supreme Court, has held that medical staff privileges are absolutely a protected property interest.

The cases where they have found that there is a right to medical staff privileges rest on the contractual right that's created by the bylaws, and here, the contract clearly states that the plaintiff's provisions, or that the plaintiff's privileges were provisional, were for a limited period, and were subject to automatic revocation.

Under these circumstances, it's impossible to say that there was a flagrant violation of an established constitutional right, where no court has ever held that there was such a right. The same, by the way, to the extent the Court feels inclined to address the state constitutional due process, the same applies there. Under the McArthur vs. San Juan County case and the Don Houston case, both of those cases rely on contractual rights to medical staff privileges, not constitutional ones.

So finally then to plaintiff's federal liberty interest claim, plaintiff unfortunately, makes very limited effort to address the workman factors that are necessary in order to prove a federal liberty interest claim, and so we've had to somewhat

define what those arguments would be, but the biggest one that we focused on, and I think the one that bears the most, I'm sorry, that deserves the most focus here is the damage to reputation.

So plaintiff's argument is that this letter, which he never alleges was published, never has been seen by anyone else, somehow damaged his reputation, and he argues that it's because of the federal healthcare quality improvement act, and that because under this act, he is required to report to future employers that he's had his privileges revoked.

Well, the federal healthcare quality improvement act only says that you have to report it when they're revoked for cause. There's no cause finding here, and that's the key. That is critical to the plaintiff's claim. Where there is no cause finding, the privileges terminate, just as they would whenever anyone leaves a medical facility.

They just go away. It carries neither a negative nor positive connotation. Now furthermore, in the Fenneter case, although, it's from the District of Colorado, I think it's instructive and persuasive on its point. In the Fenneter case, the Court examined this exact question of whether or not the reporting requirement for the federal healthcare quality improvement act implicated a liberty interest.

And in holding that it did not, the court held that the national practitioner databank, which is created by this act, acts as a clearing house for information about individual

physicians. Access to information in the databank is not available to the general public, but is restricted to a limited group of persons and entities.

Where publications are not, I'm sorry, where communications are not made public, they cannot form the basis of a claim for impairment in one's good name and reputation, and the court cites to Bishop vs. Wood, which is the sort of Seminole liberty interest claim from the Supreme Court.

And then it goes on, the court goes on to explain, while it is true that the report of the final action against Dr. Fenninger is available to any state licensing board or healthcare entity, for which he applies membership, or practice privileges. Plaintiffs have produced no evidence indicating that any individual or entity sought access to the report.

And the same is true here. The plaintiff has produced absolutely no evidence that anyone has asked about whether or not plaintiff's privileges were terminated for cause. Failure to provide that evidence is fatal to his motion for summary judgment, and fatal to his claims.

All right, so--

THE COURT: Why's it fatal to his claims if the information is still out there, and his burden is just to show harm.

MR. WIDDISON: Well precisely, he has to show harm. He has to show that the information has somehow damaged his

reputation. The problem we have here is that he has applied for and received jobs in his exact field, and in fact, right now practices as the medical director of a poison control center.

It's hard to say that his reputation has been damaged when he's doing precisely what he claims he should be doing.

THE COURT: I guess I'm going a little bit different direction there.

MR. WIDDISON: I'm sorry, go ahead.

THE COURT: He says there's a stain on my record, and while I can't prove that I, I mean, we'll agree to disagree on whether he can prove or not whether he's been harmed to date. No question it's there. Isn't that enough for purposes of some kind of remedy to clear his name?

MR. WIDDISON: No, he has to show actual harm. He can't just show perspective harm. He has to show actual harm.

THE COURT: Isn't that what injunctions are for?

MR. WIDDISON: Well injunctions--well, he would only be entitled to an injunction in order to redress actual harm. Since he hasn't shown actual harm, he hasn't even met the threshold of being entitled to argue whether or not he's entitled to an injunction.

THE COURT: We're early on discovery in this case, correct?

MR. WIDDISON: Well, that's kind of a mixed question. So we're early in discovery in the state-court version of this

case, but we've conducted extensive discovery in the federal-court version of this case, and in fact, have proceeded all the way through discovery to the summary judgment phase.

THE COURT: I assume there's been an answer, and the court has issued its order setting cutoff dates. Are we at the cutoff date for, say, expert testimony yet?

MR. WIDDISON: No.

THE COURT: Okay.

MR. WIDDISON: No. No, but again, our position is that in order to survive our summary judgment motion at this stage, he has to show harm, and he hasn't made a 56-F request for additional discovery or anything like that, and so absent making a 56-F request, he simply hasn't asked the court for the relief that I think that the court is suggesting, and so procedurally, we're just not there.

So finally, moving on then to the contracts. I mean, I think I've already addressed this pretty well. Does the Court have any specific questions about the contracts?

THE COURT: No.

MR. WIDDISON: So finally then, to the question of good faith and fair dealing, the one major point that I wanted to make is that, while the covenant of good faith and fair dealing adheres in every contract, it does not entitle a party to a better benefit than the one that was bargained for.

Here, the benefit that was bargained for was, excuse

me, a one-year appointment with the college of pharmacy, which he received and was paid for, an opportunity to apply for a faculty position with the school of medicine, which he simply failed, I mean, he got most of the way there. I mean, we'll all agree he got most of the way there, but he didn't complete this one last important detail, and so therefore, he breached the contract and the University is relieved from its obligations.

And then finally, with regard to the bylaws, there is no breach, because everybody has acted perfectly in accordance with the bylaws. The bylaws clearly contain the automatic relinquishment provision, and no matter what privilege attaches, or to what right the privilege, the bylaw, the privileges attach, those all terminated by July 1st when the privileges were terminated.

And so under these circumstances, and especially under the case law, and there is ample case law that says that hospitals should be given broad discretion in determining who can practice within their facilities, and how to administer their own bylaws. That was salient in the Don Houston case. It was salient in the McArthur case. It was even salient in the [Inaudible] case that the plaintiff relies on, and the court found that--and then also in the IHC case that we cited.

But the court found that in all of these cases, the broad discretion that applies when hospitals are interpreting their own bylaws needs to protect hospitals, because hospitals

shouldn't be put in the position of having to allow doctors into their facilities that they don't agree with, that they don't support, and that they can't trust.

And so under those circumstances, we believe that the covenant of good faith and fair dealing cuts in favor of what the defendants have done, and in this case, the covenant is actually just the University of Utah, and so therefore, there is no breach of the covenant, and defendants are entitled to judgment on that claim as well.

Although we didn't explicitly address it in oral argument today, I'd like to just finally mention that plaintiff's sixth cause of action under the, at the motion to dismiss, plaintiff's sixth cause of--the Court and opposing counsel had a colloquy where opposing counsel acknowledged that the sixth cause of action is inextricably linked with his due process claims.

So if the due process claims fail, the sixth cause of action also fails. So to be perfectly frank, Your Honor, at this point, we believe that the record evidence is clear, that the law is clear, and that there is no bar to entering summary judgment in favor of the defendants on all five of plaintiff's remaining claims. Thank you.

THE COURT: Thanks. Ms. Kyte, a brief reply? And I do mean brief, and I'll give Mr. Widdison an opportunity to reply on their cross motion too, but let's, I mean, we've covered it pretty well, but let's just--

MS. KYTE: Your Honor, I'll try to address, in a few minutes, just the points as, in order of what defendant's counsel addressed. First, the beginning question that this court asked, I think goes to the heart of the matter, and that is the fact that everyone thought that Dr. Martin had a faculty appointment that satisfied the school of medicine's requirements and bylaws, and that's the only reason that he was given his clinical privileges and appointment.

And if you turned to our complaint and the letter from November of 2013, it not only says that the credentialing committee approved his application first, but it also says that the hospital and clinics board approved it as well. There has been this distinction made between the school of pharmacy and the school of medicine, but the truth is both fall under the University of Utah.

There is not separate privileging measures for the school of pharmacy. It has to go under the school of medicine. Everyone thought he had an appropriate faculty appointment. He was given privileges, and to the question of whether he was actually using those privileges, I would like to clarify for the record. As the medical director at the Utah Poison Control Center, although he was not actively in the emergency department, he still had to have the ability to admit or transfer patients into the hospital.

So although he was not actively in the emergency

department, he was still under the measures, protections of those privileges and staff appointment where he was using them, just not necessarily in regards to the emergency room physically at bedside. So I do want that clarified. He was using and granted benefits by having those privileges that were required for accreditation.

Also, in regards to his coordination with, as the medical director, if you look, Dr. Barbara Crouch, who is also tied to Dr. Martin in the medical director role, is also working with the hospital. So there is medical direction being given. There is correlation between the two.

In regards to Ms. Peacock, I would also like to clarify Ms. Paula Peacock did not testify in this case. Her deposition was never taken, and she did provide a declaration in support of the motion for summary judgment, but if you review the declaration and documents attached, and we pointed this out. Review of the policy and information provided, there's no formal requirement stated therein that any letter of support needs to be on letterhead. There's numerous other guidelines, but that is not there.

Further, in regards to this allegation that there was no harm to his reputation. The information is there. There is a published letter. It's not marked as confidential. We simply have to address all reasonable inferences that this could cause Dr. Martin harm, and we have, but moreover, Dr. Martin testified to

actual harm.

He, after he lost his position at the University of Utah, submitted dozens of applications, and I believe he indicated a dozen or more so, he didn't get for various reasons, but he also testified that he applied for jobs that he would never have even considered taking before this staying on his record, because no one believed that the University of Utah, which is a prestigious institution, would have denied him or let him go because of one letter of support not being on letterhead.

That's actual harm. He further testified that he now is practicing. Yeah, he's practicing in Texas, but he is hundreds of miles away from home. He commutes. His wife, who was going to move here, and was excited to move to Utah, they're not separated, where he has a lengthy commuting travel schedule for his work.

Dr. Martin is a hardworking physician, and I will credit him that, but because he was denied his employment at the University of Utah under the terms that happened, no one believes him for the reason he was given for his termination, and he has suffered actual harm. He is now across the country, yes practicing, but not in somewhere that he particularly likes or enjoys, and that is an actual harm.

Going forward to this question of automatic relinquishment, and does it apply, or doesn't it apply? Well, that's an interpretation that is in direct contradiction to the

plaintiff here, and from our position and our motion, we believe that the contracts are clear, that Dr. Martin was guaranteed, at a minimum, employment through July of 2015, and that employment was cut short through a material breach on the part of the University. We believe that's clear on its face.

We also believe he was afforded protections, but that's under his due process claims. However, if this Court is persuaded by defendant's argument in regards to automatic relinquishment or defendant's interpretation of the bylaws and the contracts, that would be a determination as a matter of law that the contracts and bylaws are ambiguous, and that, the Court can determine as a matter of law, but that creates an issue of fact that needs to go to a jury.

So as to any contractual matters, we believe that this court should grant plaintiff's motion for summary judgment on the cause of actions numbers three and four. In the event that the Court is disinclined to do so, we believe there are genuine issues of disputed material facts and/or ambiguities in the contracts that warrant denial of defendant's motion such that this should go forward to a jury.

The last point I wanted to address is this broad discretion that hospitals have regarding their bylaws. Defendants have gone back and forth, and back and forth, in regards to whether the bylaws apply or the bylaws don't apply. They're relying on the bylaws to address this automatic relinquishment

issue, but then they say well, we're supposed to have broad discretion to protect the patient.

Well here, defendants didn't apply their bylaws at all. They didn't, even if it is automatic relinquishment, they didn't issue letters saying this is non-renewal. They issued letters that this was termination. They didn't substantially comply by even giving Dr. Martin the benefit of one meeting with someone.

This isn't a substantial compliance issue. They failed to even apply them, and secondly, it also falls flat, because surgical or medical care is not at issue in this case. Everyone indicated that Dr. Martin fulfilled his role and did an excellent job as a medical director, and for those reasons, we believe that our motion for summary judgment should be granted, and defendant's motion should be denied. Thank you.

THE COURT: Thanks. Mr. Widdison?

MR. WIDDISON: I'm going to shoot for less than two minutes.

THE COURT: All right.

MR. WIDDISON: Here we go. So the first, the only issue I feel like needs to be addressed at this point is the damages related to the liberty interest claim, whether or not the plaintiff has to prove damages in order to be able to prove a claim, and on page, oh, I wrote over my page number.

Page 14 of our reply brief, under subsection D, we address for two pages the damages question. We cite to a number

of, several different cases, but I'd like to quote one of them, Asbell vs. Housing Authority of the Choctaw Nation of Oklahoma. This is a Tenth Circuit case from 1984, and the court held, it may well be true that Asbell has experienced some difficulties in obtaining employment as a result of her discharge.

Certainly, termination from employment constitutes a black mark on any employee's resume. It is much more speculative, however, to conclude that Asbell's difficulties are a result of Thomson's statements as to the reason for her discharge. Arguably, the reasons for discharge are no more stigmatizing than the discharge itself, and that's the key.

The key is not necessarily whether or not the plaintiff has suffered any harm. It's whether or not he's suffered extra harm, or what's called a stigma-plus harm. He has to show that he suffered something beyond what comes with just the end of any employment, and in fact, the Tenth Circuit went on to hold 4 years later, in Setliff vs. Memorial Hospital of Sheridan County, that restrictions on medical staff privileges cannot create a liberty interest claim.

And so there's a breadth of, there's a breadth of law that talks, that supports the defendant's position that a plaintiff must show actual harm, and even if the Court were inclined to find yes, there is harm in this case, qualified immunity then becomes triggered, and the individual defendants, who are the only defendants named in plaintiff's federal due

process claims, are entitled to qualified immunity, because the law has not clearly established that what they did was wrong.

So under those circumstances, we believe that either under an absolute just merits-based analysis, or under qualified immunity, the due process claims, including the liberty interest claim, must be dismissed.

Your Honor, this case really comes down to one point. I mean, there was no nefarious plot. There was no secret agenda. There was no, no master plan to both hire Dr. Martin and then engineer his departure from the University.

Both parties, Dr. Martin and the University, wanted to see if it was a good fit. Dr. Martin even testified that his wife was hot on coming down to Utah, but that he talked her out of it, because he wanted to see if it was a good fit, and under these circumstances, Your Honor, we believe that simply what we have here is a case of where an employer and employee are simply not a good fit, and under those circumstances, we believe that factually and legally, defendants are entitled to judgment on all of plaintiff's claims. Thank you.

THE COURT: Thanks. Well, there are a lot of issues and claims, and issues within claims, for me to sort out. So I'm going to take the matter under advisement. I appreciate the work that was done here in briefing and argument. It's first rate, and we'll try to get something out promptly.

MR. WIDDISON: Thank you, Your Honor.

THE COURT: All right, thanks.

C E R T I F I C A T E

I, Michael Stump, do hereby certify that the foregoing pages contain a true and accurate transcript of the electronically recorded proceedings and was transcribed by me to the best of my ability.

Michael Stump

I, Kelly Thacker, do certify this transcription was prepared under my supervision and direction.

Kelly Thacker