STATE RECORDS COMMITTEE

NOTICE OF PUBLIC MEETING

Thursday, July 9, 2015 at 9 a.m. to 4 p.m.

Utah State Archives Building
346 S. Rio Grande St.
Salt Lake City, UT 84101

NOTE: The Chair may recess at 12 noon and may reconvene at 12:30 p.m. for lunch when there are two or more hearings scheduled.

AGENDA

HEARINGS:

Jason Behar vs. Department of Human Resource Management. Mr. Behar is appealing the partial denial of "[a]ll records the state of Utah has with my name on it." DHRM partially denied access to witness statements, investigative records, and personal recommendations.

Gray Smith vs. Cottonwood Heights City, Utah. Mr. Gray is appealing the partial denial of requested copies and records of inquiries and City's investigations of improper communications. Emails from March 18 and 20, 2015 were not provided because of attorney client privileges.

CANCELED/POSTPONED HEARINGS:

Patrick Sullivan vs. Utah Department of Corrections (UDC). Mr. Sullivan is requesting a fee waiver and refund for medical records requested and received in the amount of $2.50. The petitioner withdrew the appeal.

Isaac Lemus vs. Department of Human Services, DCFS. Durham Jones & Pinegar, on behalf of the Lemus Family, is appealing the partial denial of Isaac Lemus' appeal to DHS. DHS redacted requested surveillance footage that now renders the video footage unintelligible.

Patrick Sullivan vs. University of Utah Healthcare. Mr. Sullivan is appealing the partial denial of medical records and emails.

Patrick Sullivan vs. University of Utah Healthcare. Mr. Sullivan is appealing the partial denial of itemized billing, invoices, and accounting summary sent to UDC for all services provided 9-19-2014 to present. Mr. Sullivan's two appeals have been combined because it is the same governmental entity.

Nate Carlisle, *The Salt Lake Tribune* vs. Washington County Attorney's Office. Mr. Carlisle is appealing the Washington County Attorney's Office (WCAO) partial denial of records responsive to a multi-jurisdictional task force examining the FLDS and a search warrant 1314885.

Corydon Day vs. Utah Department of Corrections. Mr. Day is appealing the partial denial of AP&P "all detailed criminal history notes" about himself from 2006 to current. Telephonic.

BUSINESS

Approval of June 11, 2015, SRC Minutes, action item

Retention Schedules, action item

SRC appeals received

Cases in District Court

Other Business
Transparency board
Next meeting scheduled for August 13, 2015 @ 9 a.m. to 4 p.m.

ADA: In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this meeting should notify Nova Dubovik at the Utah State Archives and Records Service, 346 S. Rio Grande, Salt Lake City, Utah 84101, or call (801)531-3834, at least three days prior to the meeting.

Electronic Participation: One or more members of the State Records Committee may participate electronically or telephonically pursuant to Utah Code 52-4-207(2) and Administrative Rule 35-1-2. Please direct any questions or comments to: State Records Committee, Utah State Archives, 346 S. Rio Grande, Salt Lake City, Utah 84101 (801) 531-3834.

APPEALS TO THE STATE RECORD COMMITTEE: As of JULY 2015

Archives Case No.	Case Title/ Participants	Records Sought	Notes	Status
2015-31	**Patrick Sullivan vs. Utah Department of Corrections (UDC) (Appealed 14 May)**		**Telephonic Draper**	**Appeal withdrawn.**
Mr. Sullivan is requesting a fee waiver and refund for medical records requested and received in the amount of $2.50. The petitioner withdrew the appeal.				
2015-27	**John Rice vs. Utah Department of Corrections (UDC) (Appealed 5 May)**			**Hearing Denied.**
Mr. Rice is appealing Utah Department of Corrections' denial to provide access to his background investigation for a position he applied for with UDC. Missing original request, governmental entities and CAO's denial letters. Incomplete notice of appeal to SRC. On June 29, 2015, Mr. Rice submitted the required documentation but the appeal was untimely to the SRC.				
2015-35	**Nate Carlisle, *The Salt Lake Tribune* vs. Washington County Attorney's Office (WCAO) (Appealed 9 June)**			**Appeal withdrawn.**
Mr. Carlisle is appealing the Washington County Attorney's Office (WCAO) partial denial of records responsive to a multi-jurisdictional task force examining the FLDS and a search warrant 1314885. Through mediation the parties reached a resolution.				
2015-34	**Jason Behar vs. Department of Human Resource Management (Appealed 8 June)**			**Hearing Scheduled July 9, 2015**
Mr. Behar is appealing the partial denial of "[a]ll records the state of Utah has with my name on it." DHRM partially denied access to witness statements, investigative records, and personal recommendations. In accordance with Utah Code 63G-2-302 and 305.				
2015-36	**Gray Smith vs. Cottonwood Heights City, Utah (Appealed 9 June)**			**Hearing Scheduled July 9, 2015**
Mr. Gray is appealing the partial denial of requested copies and records of inquiries and City's investigations of improper communications. Emails from March 18 and 20, 2015 were not provided because of attorney client privileges. Utah Code 63G-2-305.				
2014-73	**Isaac Lemus vs. Department of Human Services, DCFS (Appealed 26 Nov)**			**Hearing Rescheduled August 13, 2015**
Durham Jones & Pinegar, on behalf of the Lemus Family, is appealing the partial denial of Isaac Lemus' appeal to DHS. DHS redacted requested surveillance footage that now renders the video footage unintelligible. Hearing postponed for May 14, 2015, and rescheduled on July 9, 2015. Hearing postponed for July 9, 2015, and rescheduled on August 13, 2015.				

2015-32	**Corydon Day vs. Utah Department of Corrections, AP & P (Appealed 21 May)**	**Telephonic Draper**	**Hearing Rescheduled August 13, 2015**
Mr. Day is appealing the partial denial of "ALL DETAILED CRIMINAL HISTORY NOTES" from 2006 to current. Hearing postponed for July 9, 2015, and rescheduled on August 13, 2015.			
2015-33	**Patrick Sullivan vs. University of Utah Healthcare**	**Telephonic Draper**	**Hearing Rescheduled August 13, 2015**
Mr. Sullivan is requesting medical records on paper format because he is an inmate and unable to received CD Rom format in the prison. The University of Utah Health Care has not provided the requested records in specified format. Petitioner postponed, both parties working towards a resolution through mediation.			
2015-41	**Patrick Sullivan vs. University of Utah Healthcare**	**Telephonic Draper**	**Hearing Rescheduled August 13, 2015**
Mr. Sullivan requested itemized billing, invoices, and accounting summary sent to UDC for all services provided 9-19-2014 to present. UMC was responsive with an itemization record. This hearing is combined with Archive Case No. 2015-33, same governmental entity. Petitioner postponed, both parties working towards a resolution through mediation.			
2015-37	**Michael Clára vs. Salt Lake City School District (Appealed 9 June)**		**Hearing Scheduled August 13, 2015**
Mr. Clára is appealing the partial denial of requested copies of records pertaining to the Salt Lake City Police and removal from the Board of Education meeting and all communications referencing petitioner between Board of Education, SLC School District, and SLC personnel.			
2015-39	**Patrick Sullivan vs. Department of Insurance, Fraud Division**	**Telephonic Draper**	**Hearing Scheduled August 13, 2015 at 1100**
Mr. Sullivan is appealing the Utah Insurance Department, Fraud Division, partial denial of records responsive to case number # 121402082 and/or 141402082 between January 1, 2012 and March 30, 2015.			
2015-40	**Patrick Sullivan vs. Utah Department of Corrections (Appealed 18 Jun)**	**Telephonic Draper**	**Hearing Scheduled August 13, 2015 at 1000**
Mr. Sullivan requested a copy of the posted Infirmary Schedule for OQ4 on September 22, 2014 and March 12, 2015. He was provided his Patient Schedule Detail in lieu because the Infirmary Schedule is shredded daily and is not the dept. record copy according to the retention schedule. He is also requesting a fee waiver of .50 for being provided the incorrect record.			

2015-38	**Jamis Johnson vs. UDC (Appealed 11 June)**	**Telephonic Draper**	**Hearing Scheduled August 13, 2015 at 0900**
Mr. Johnson is appealing the Utah Department of Corrections denial of a "fee waiver for copies of all AP&P Field Notes and emails regarding you t/from AP&P Agents…" Mr. Johnson is non-indigent status.			

EMPLOYEE WAGE HISTORY RECORDS (Item 10-32)

These records document employee cumulative salary for employees needed for retirement purposes. Information includes employee details, department and position information, earnings, deductions, and related records.

RETENTION

Retain for 65 years and then destroy.

PAYROLL POST PROCESSING RECORDS (Item 10-31)

This schedule is for payroll reporting. Each payroll period is closed out when disbursement information is verified using payroll reports.

RETENTION

Retain for 7 years and then destroy.

PAYROLL PROCESSING RECORDS (Item 10-30)

These records verify compensation data for each employee, including salary, hourly rate and type of pay. Deductions are confirmed in processing payroll before employees are paid.

RETENTION

Retain for 3 years and then destroy.

TIMEKEEPING RECORDS (Item 10-29)

Information regarding hours worked, paid or unpaid permitted absence from work for family emergency, sickness, personal time, vacation, or other reasons as outlined by policy are included in this schedule.

RETENTION

Retain for 3 years and then destroy.

COMPLAINT INVESTIGATION FILES (Item 11-66)

Initial documentation of complaints that result in an investigation but do not result in disciplinary action.

RETENTION

Retain for 7 years after end of employment or case closed, whever is greater and then destroy.

SUGGESTED PRIMARY CLASSIFICATION

Private: Utah Code 63G-2-302 (2)(a)(2015).

GRIEVANCE RECORDS (Item 11-64)

Initial documentation responding to working condition grievances that result in any type of investigation for possible personnel or administrative action.

RETENTION

Retain for 3 years resolution and then destroy.

SUGGESTED PRIMARY CLASSIFICATION

Private: Utah Code 63G-2-302 (2)(a)(2014).

July 2015 State Records Committee Case Updates

District Court Cases

Paul Amann v. Utah Dept. of Human Resources, 3rd District, Salt Lake County, Case No. 150904275, filed June 24, 2015.

Current Disposition: Answer to be filed on behalf of the Committee. Potential that case may be combined with other GRAMA appeal.

Utah Attorney General v. Salt Lake Tribune, 3rd District, Salt Lake County, Case No. 150904266, Filed June 24, 2015.

Current Disposition: Petition for Judicial Review has been filed with District Court. Respondents have not been served with a Summons.

Utah Dept. of Human Resources v. Paul Amann, 3rd District, Salt Lake County, Case No. 150901160, filed February 19, 2015.

Current Disposition: Hearing held on July 9, 2015 for Motions to Intervene filed by the Utah AG's Office and the Department of Commerce. Counsel for Committee to report on the hearing after the hearing.

Daniel Rivera Jr. v. Utah Department of Human Services, Division of Child and Family Services, 3rd District, Salt Lake County, Case No. 150900589, Judge Toomey, filed January 27, 2015.

Current Disposition: Motion to Dismiss filed on June 24, 2015 based upon failing to timely file his appeal from the Committee's decision and failing to timely serve a summons on the Committee. Mr. Rivera has filed a motion to extend his time to file a response.

Salt Lake City v. Jordan River Restoration Network, 3rd Judicial District, Salt Lake County, Case No. 100910873, Judge Stone, filed June 18, 2010.

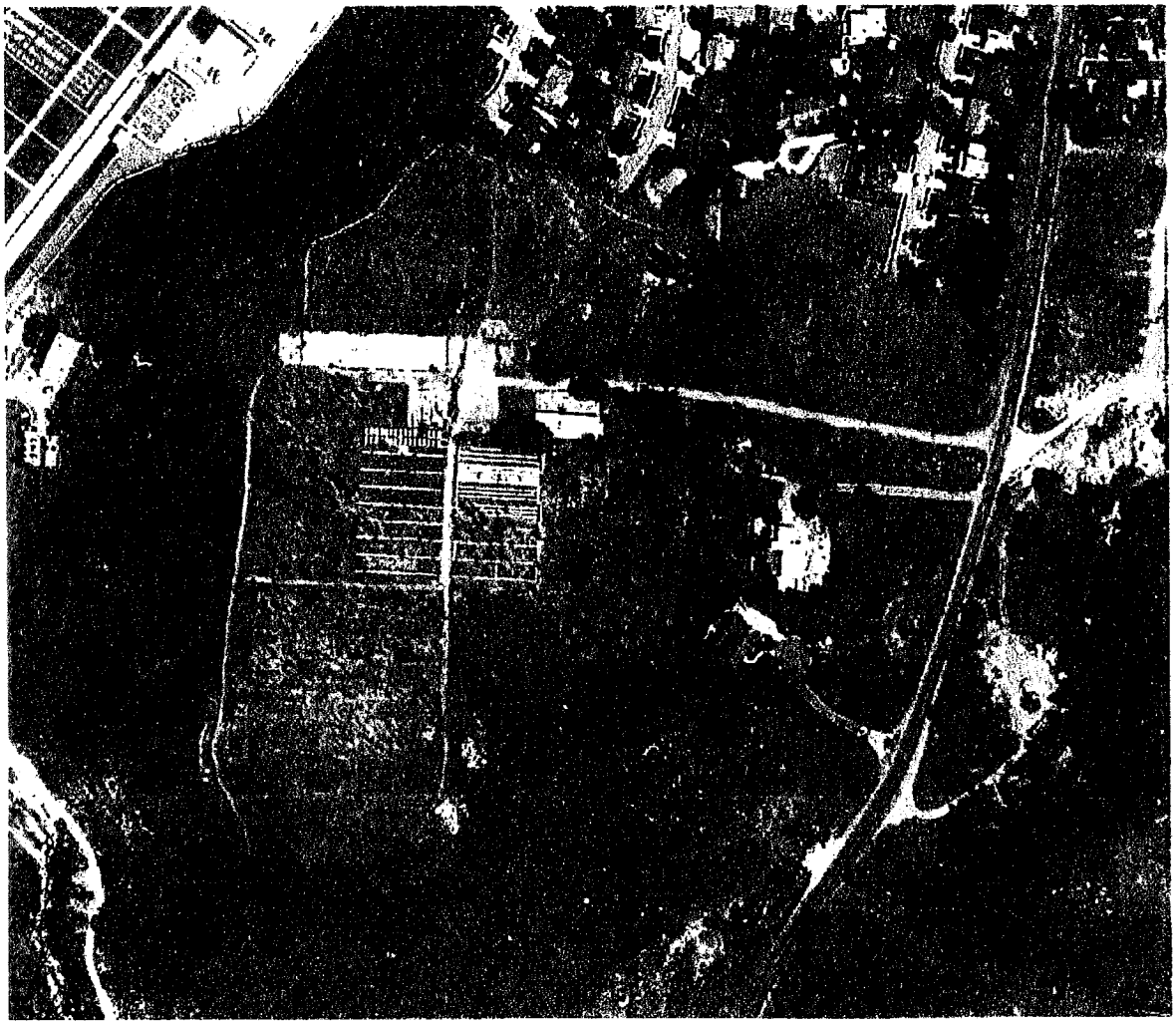
Current Disposition: Pretrial conference held on June 17, 2015 and a trial date was set for December 3rd and 4th.

Appellate Court Cases

Attorney General Office. v. Schroeder, Utah Supreme Court, Appeal No. 20121057.

Current Disposition: Oral argument heard by Utah Supreme Court on April 1, 2015. Case has been submitted to the Court for decision.

Gray Smith vs. Cottonwood Heights



2012 Aerial Photograph

[4] [5] ¶ 12 Finally, the Terrys argue that the trial court erred because the amount ultimately available to them from the settlement agreement "shocks the conscience." Whether a settlement agreement is so unfair that it shocks the conscience, which is generally a term used to describe substantive unconscionability of a contract, is a mixed question of fact and law. *See Woodhaven Apartments v. Washington,* 942 P.2d 918, 924 (Utah 1997). "A trial court's determination of the law is reviewed for correctness, while its findings of fact are reviewed for clear error." *Id.*

ANALYSIS

I. The Trial Court Did Not Err When It Determined that the Terrys Waived the Attorney–Client Privilege Because the Terrys Placed Their Communications . with Their Attorney at the Heart of the Case

[6] ¶ 13 The Terrys argue that the trial court erred by concluding that the Terrys waived the attorney-client privilege provided by rule 504 of the Utah Rules of Evidence by denying that they had agreed to the defendant's settlement offer. Specifically, the Terrys argue that it was defendants, not them, who placed their former attorney's conduct at issue. Although we do not base our decision on rule 504, we agree with the trial court that by contesting their consent to the settlement agreement, the Terrys put their former attorney's conduct at issue and waived the attorney-client privilege as to that question.

¶ 14 The attorney-client privilege has long been recognized as a mechanism "to encourage candor between attorney and client and [to] promote the best possible representation of the client." *See Doe v. Maret,* 1999 UT 74, ¶ 7, 984 P.2d 980, *overruled on other grounds by Munson v. Chamberlain,* 2007 UT 91, ¶¶ 20–21, 173 P.3d 848 (internal quotation marks omitted) (explaining that the attorney-client privilege "is the oldest of the common law privileges protecting confidential communications"). The privilege is recognized by both Utah Code section 78B–1–137(2) and rule 504(b) of the Utah Rules of Evidence. *See* Utah Code Ann. § 78B–1–137(2) (2008); Utah R. Evid 504(b). Rule 504(b) of the Utah Rules of Evidence provides "that [a] client has a privilege to refuse to disclose ... confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's ... lawyers." *See* Utah R. Evid. 504(b); *see also* Utah Code Ann. § 78B–1–137(2) ("An attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or any advice given regarding the communication in the course of the professional employment."). Despite the existence of the privilege, rule 504(d) provides several instances where the privilege is inapplicable, and Utah courts have recognized that the privilege is waived in certain situations. *See* Utah R. Evid. 504(d); *State v. Johnson,* 2008 UT App 5, ¶ 20, 178 P.3d 915; *see also* Utah R. Evid. 507(a) (providing that the privilege may be waived if the holder "voluntarily discloses or consents to the disclosure" of privileged materials). Rule 504(d)(3) provides that the privilege does not apply "[a]s to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer." *See* Utah R. Evid. 504(d)(3). The Terrys claim that they have not raised *193 an issue of breach of duty by former counsel and, therefore, the privilege is not waived. Because rule 504(d) is only one way in which the attorney-client privilege may be deemed inapplicable, we need not consider whether the Terrys have alleged that former counsel breached his professional duty.

[7] ¶ 15 In *Doe v. Maret,* 1999 UT 74, 984 P.2d 980, *overruled on other grounds by Munson v. Chamberlain,* 2007 UT 91, ¶¶ 20–21, 173 P.3d 848, the Utah Supreme Court recognized that "[a] party may also waive the privilege by placing attorney-client communications at the heart of a case, as where a party raises the defense of good faith reliance on advice of counsel." *Id.* ¶ 9. The Terrys claim that they did not authorize former counsel to enter into the settlement agreement, which directly placed communications between former counsel and the Terrys regarding the settlement offer at the heart of the case. Therefore, the Terrys waived the attorney-client privilege as to that issue. *See id.*

[8] [9] ¶ 16 Generally, when a party places "privileged matters 'at issue' in the litigation" that party implicitly consents to disclosure of those matters.[1] *See Public Serv. Co. v. Lyons,* 2000–NMCA–077, ¶ 15, 129 N.M. 487, 10 P.3d 166. Communications between the attorney and client are "placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication." *Rhone–Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d 851, 863 (3d Cir.1994). This is essentially a rule of fairness. *See Bittaker v. Woodford,* 331 F.3d 715, 719 (9th Cir.2003); *see also Beery v. Thomson Consumer Elecs.,* 218 F.R.D. 599, 604 (S.D.Ohio 2003) ("An attorney-client communication is placed at issue when the party makes an assertion that in

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fairness requires examination of protected communications." (internal quotation marks omitted)). Although much of the case law discussing waiver of the privilege focuses on whether the attorney's *advice* to the client is at issue, even courts adopting the most conservative approach agree that waiver occurs "where direct use [of the privileged communication] is anticipated because the holder of the privilege must use the materials at some point in order to prevail." *See Lyons,* 2000–NMCA–077, ¶ 22, 129 N.M. 487, 10 P.3d 166; *see also Bittaker,* 331 F.3d at 719 ("[P]arties in litigation may not abuse the [attorney-client] privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials. The party asserting the claim is said to have implicitly waived the privilege."); *In re Kidder Peabody Sec. Litig.,* 168 F.R.D. 459, 470 (S.D.N.Y.1996) (acknowledging that while waiver often occurs when the advice of an attorney is at issue, the privilege extends to situations "when defendant asserts a claim that in fairness requires examination of protected communications" (internal quotation marks omitted)).

[10] ¶ 17 We agree with the jurisdictions holding that fairness dictates that "[t]he privilege which protects attorney-client communications may not be used both as a sword and a shield." *See, e.g., Chevron Corp. v. Pennzoil Co.,* 974 F.2d 1156, 1162 (9th Cir.1992). In *Chevron Corp. v. Pennzoil Co.,* 974 F.2d 1156 (9th Cir.1992), the defendant asserted as an affirmative defense that a tax position was reasonable based on the advice of counsel. *194 *See id.* at 1162. When the plaintiff sought to discover the attorney's advice, the defendant asserted the attorney-client privilege. *See id.* The trial court ruled that the privilege had been waived, and the Ninth Circuit agreed, explaining that "[the defendant] cannot invoke the attorney-client privilege to deny [the plaintiff] access to the very information that [the plaintiff] must refute in order to" succeed against the affirmative defense. *Id.* at 1162–63. However, even when a court determines that the privilege has been waived, courts should exercise caution to ensure that only communications relevant to the subject matter at issue are introduced. *See Bittaker,* 331 F.3d at 720 ("Because a waiver is required so as to be fair to the opposing side, the rationale only supports a waiver broad enough to serve that purpose."); *see also In re EchoStar Commc'ns Corp.,* 448 F.3d 1294, 1301 (Fed.Cir.2006) ("To prevent such abuses, we recognize that when a party defends its actions by disclosing an attorney-client communication, it waives the attorney-client privilege as to all such communications regarding the same subject matter.").

¶ 18 Here, the trial court allowed former counsel to testify only as to the attorney-client communications directly related to whether the Terrys had instructed him to accept the $15,000 settlement offer. By cautioning former counsel to avoid any discussions about the merits of the Terrys' claims, the trial court carefully narrowed the intrusion into attorney-client discussions. In addition, even as identified by the Terrys, the heart of the matter is the substance of the communications between the Terrys and former counsel concerning the $15,000 settlement offer. Although the Terrys claim that they are not placing "their [former] attorney's conduct in issue," Mr. Terry asserts, "I have never told anyone that I would accept $15,000 to settle my case," and, "I have never agreed to settle my case for $15,000, nor would I ever settle for this amount." Likewise, the Terrys claim that they "never at any time accepted the alleged settlement offer, and never would accept such an offer" and that they "at no time entered into a settlement agreement or accepted $15,000 to settle their claims against [defendants]." By the Terrys' own arguments, it is apparent that what they communicated to former counsel was at the center of their claim that the settlement agreement was unenforceable.

¶ 19 Moreover, the Terrys should not be permitted to use the privilege as a sword by relying on their statements about what was not said during the communications with former counsel, while also asserting the attorney-client privilege as a shield when the defendants attempt to refute those assertions. *See Chevron Corp.,* 974 F.2d at 1162–63. This case presents precisely the type of situation where the attorney-client privilege must be deemed waived to ensure fairness to both parties. *See id.* To hold otherwise would "deny [defendants] access to the very information that [defendants] must refute in order to" succeed against the Terrys' argument that the settlement agreement was not authorized. *See id.* at 1163. The trial court correctly determined that, by asserting the defense that they never authorized former counsel to accept the settlement offer, the Terrys waived the attorney-client privilege with respect to communications about that issue.

II. The Terrys Did Not Preserve Their Argument that Settlement Agreements Should Not Be Enforced Unless They Are in Writing

[11] [12] [13] ¶ 20 The Terrys argue that we should extend the Utah Supreme Court's decision in *Reese v. Tingey Construction,* 2008 UT 7, 177 P.3d 605, to oral settlement agreements and require that such agreements be "reduced to a writing and signed" before they will be enforced by the courts. *See id.* ¶ 15. However, the Terrys do not provide a record citation directing the court to where they

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