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2019 UT 49

IN THE

SUPREME COURT OF THE STATE OF UTAH

CHERYL AMUNDSEN,
Appellant,

v.

UNIVERSITY OF UTAH,
Appellee.

No. 20180207
Filed August 15, 2019

On Direct Appeal

Third District, Salt Lake
The Honorable Judge Patrick Corum
No. 170900215

Attorneys:

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JUSTICE PEARCE authored the opinion of the Court in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE LEE, JUSTICE HIMONAS, and JUSTICE PETERSEN joined.

JUSTICE PEARCE, opinion of the Court:

INTRODUCTION

¶1 Cheryl Amundsen wants to bring a medical malpractice claim against the University of Utah for, among other things, injuries she suffered during a surgery performed at LDS Hospital by a University of Utah School of Medicine professor. The University is a State entity for purposes of the Utah Governmental Immunity Act (UGIA). And the UGIA is a deliberately stingy piece of legislation that outlines strict requirements a plaintiff must satisfy to file suit against a State entity.

¶2 The UGIA requires a plaintiff to give notice of her claim to the State within one year of the date the plaintiff knew, or through the exercise of reasonable diligence should have known, that she had a claim against a State entity or employee. Amundsen argues that her notice of claim was timely because she filed it within a year of when she knew or should have known that she had a claim against the University. The district court disagreed and dismissed her case.

¶3 We side with the district court. Although Amundsen's surgery took place at LDS Hospital, Amundsen had consulted with her surgeon at a University clinic multiple times and received an itemization from the University for his services. This was sufficient information to put a reasonable person on notice that her claim might be against the State. And because Amundsen had reason to inquire long before she filed her notice of claim, her notice was untimely. Amundsen's arguments to the contrary, including those based on the doctrine of res judicata and the Open Courts provision of the Utah Constitution, are without merit. Accordingly, we affirm.

BACKGROUND

¶4 "On appeal from a district court's decision granting a motion to dismiss, we view the facts pled in the complaint and all reasonable inferences from them in the light most favorable to the plaintiff." *Scott v. Universal Sales, Inc.*, 2015 UT 64, ¶ 4, 356 P.3d 1172. Where appropriate, we also consider materials submitted in relation to the motion.[1] We recite the facts consistent with this standard.

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[1] Under Utah Rule of Civil Procedure 12(b), various motions to dismiss may be supported by documents outside the pleadings. And a court may consider those documents without converting the motion into one for summary judgment. UTAH R. CIV. P. 12(b); *see also Wheeler v. McPherson*, 2002 UT 16, ¶ 20, 40 P.3d 632; *Spoons v. Lewis*, 1999 UT 82, ¶¶ 4–5, 987 P.2d 36. Accordingly, when adjudicating a motion brought under rule 12(b), with the exception of a rule 12(b)(6) motion, district courts may consider matters outside the pleadings, provided the opposing party has the opportunity to rebut that evidence. *See* UTAH R. CIV. P. 12(b); *Spoons*, 1999 UT 82, ¶ 5 (concluding that the district court was not required to convert a motion to dismiss into a motion for summary judgment, observing that the "court's treatment of the motion" did not prevent the plaintiff "from rebutting [potentially relevant] evidence").

Thus, when presented with a rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, district courts can consider (continued . . .)

¶5 Cheryl Amundsen visited the University of Utah Avenues Clinic three times between August 2011 and October 2013. On each visit she saw Dr. Mark Dodson, who worked as a professor in the University's Department of Obstetrics and Gynecology. Dr. Dodson was a full-time employee of the University, and in that role he provided clinical services to patients at the University of Utah Avenues Clinic.

¶6 On October 30, 2013, Dr. Dodson performed surgery on Amundsen. The surgery took place at LDS Hospital, pursuant to privileges the hospital granted Dr. Dodson. Amundsen alleges that during the surgery, Dr. Dodson injured her colon. As a result of that injury and the complications that followed, Amundsen underwent additional procedures and several months of intensive wound care.

¶7 On October 2, 2014, pursuant to the Utah Health Care Malpractice Act, UTAH CODE § 78B-3-401 et seq., which is a statutory scheme separate and apart from the UGIA, Amundsen served a notice of intent to commence action on several entities including University of Utah Health Care, Dr. Dodson, and LDS Hospital, *see id.* § 78B-3-412(1)(a) (requiring a notice of intent to commence action before filing a malpractice action against a health care provider). In that notice, Amundsen identified Dr. Dodson as "a gynecological oncologist who works at OB-GYN Avenues Clinic, which is part of University of Utah Health Care."

¶8 Amundsen subsequently dismissed her allegations against University of Utah Health Care and LDS Hospital, but she obtained a certificate of compliance with respect to Dr. Dodson.[2] She then

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relevant materials submitted by the parties and, if necessary, resolve fact questions regarding those materials after providing the plaintiff an opportunity to address them. No further proceedings are necessary, however, if the plaintiff does not challenge the facts established by the supporting materials. *See, e.g.*, *Wheeler*, 2002 UT 16, ¶ 20; *Spoons*, 1999 UT 82, ¶ 5.

[2] Under the Utah Health Care Malpractice Act, "[a] malpractice action against a health care provider may not be initiated unless and until the plaintiff . . . receives a certificate of compliance from the division in accordance with Section 78B-3-418." UTAH CODE § 78B-3-412(1)(b); *see also, id.* § 78B-3-418(3) (providing that "[t]he division shall issue a certificate of compliance" if certain requirements are met). We recently addressed this requirement in *Vega v. Jordan Valley*

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filed suit against him; and in May 2016, Dr. Dodson moved to dismiss on the basis that he was employed by the University and entitled to immunity under the UGIA. *See* UTAH CODE § 63G-7-101 et seq. Amundsen did not oppose the motion, and the claims against Dr. Dodson were dismissed.

¶9 Amundsen then filed an amended complaint naming the University as a defendant. The University moved to dismiss, asserting in part that Amundsen had not timely filed a notice of claim as the UGIA requires. *See id.* § 63G-7-401. Amundsen conceded that the case should be dismissed based on her failure to comply with the UGIA's notice requirement. But she sought dismissal without prejudice, asserting she had not known Dr. Dodson was an employee of the University until he filed his motion to dismiss. Although the moving papers are not in the record on appeal, it appears that Amundsen claimed that prior to receiving Dr. Dodson's motion, she did not have reason to know about his employment with the University. And it appears that she argued that the period for her to file a notice of claim had not expired. The University, in contrast, argued that the dismissal should be with prejudice.

¶10 The district court dismissed the case without prejudice. The court ruled it could not conclude, as a matter of law, which Amundsen knew prior to May 2016 that Dr. Dodson was an employee of the University and that the period for filing a notice of claim had therefore elapsed. Because the district court could not draw this conclusion as a matter of law, it decided a dismissal without prejudice was the appropriate course.

¶11 Shortly thereafter, in September 2016, Amundsen filed a notice of claim informing the State of Utah of her potential claims against the University. She then initiated this lawsuit against the University. She asserted claims of negligence and loss of consortium predicated on the services Dr. Dodson provided and the surgery he performed.

¶12 The University again moved to dismiss, asserting in part that Amundsen had failed to serve a notice of claim on the State of Utah within the one-year time period the UGIA requires. The University argued that Amundsen had served her "notice of claim nearly three years after the medical treatment and care at issue in this case was provided and nearly two years after serving a notice of

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Medical Center, LP, and held that section 412(1)(b) is facially unconstitutional. 2019 UT 35, ¶ 25, --- P.3d ---.

intent to commence legal action against the University." And while Amundsen "may not have known [until May 2016] whether Dr. Dodson was employed by the University," Amundsen was, by October 2014, "aware of facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence may exist."

¶13 Amundsen raised three main points in opposition. First, she noted that in her prior suit against the University, the district court had stated it was unable to "conclude as a matter of law that [she] knew prior to . . . [May] 2016[] that Dr. Dodson was an employee of the University and that the one-year statutory notice requirements under the UGIA had not [been] tolled." (Emphasis omitted.) On that basis, Amundsen argued the University was collaterally estopped from reasserting, in this proceeding, that her claims were time-barred.

¶14 Second, Amundsen contended that her notice of claim had been timely filed. Acknowledging that a notice of claim must be filed "within one year after the claim arises," UTAH CODE § 63G-7-402, she noted that the one-year period does not begin to run "until [the] claimant knew, or with the exercise of reasonable diligence should have known . . . that the claimant had a claim against the governmental entity or the governmental entity's employee; and . . . the identity of the governmental entity or the name of the employee," *id.* § 63G-7-401(1)(b). According to Amundsen, she did not know Dr. Dodson was an employee of the University until he filed his motion to dismiss in May 2016, and prior to that time she "did not have information sufficient to put a reasonable person on inquiry notice that she had a cause of action against the University."

¶15 Third, Amundsen argued that "[t]he extension of immunity to non-governmental medical services violates the Open Court[s] provision of the Utah Constitution." *See* UTAH CONST. art. I, § 11. Amundsen asserted that, by extending immunity to "all functions of government, no matter how labeled," *see* UTAH CODE § 63G-7-101(2)(a), the legislature had abrogated a cause of action without providing an effective or reasonable alternative remedy. Amundsen also asserted that the University received too little governmental funding to receive immunity under the UGIA, and that the State had waived any claim of immunity by failing to create a searchable database of State entities.

¶16 The district court reviewed the evidence before deciding whether Amundsen had timely filed her notice of claim. That evidence included documents the University submitted in support of

its motion to dismiss. The record before the court thus included the following:

- the allegations in Amundsen's complaint asserting that, between 2011 and 2013, she had multiple visits with Dr. Dodson at the University of Utah Avenues Clinic;
- Amundsen's October 2014 notice of intent to commence action, in which she identified Dr. Dodson as "a gynecological oncologist who works at OB-GYN Avenues Clinic, which is part of University of Utah Health Care";
- a consent to service form Amundsen signed in October 2013, in connection with her surgery at LDS Hospital, which indicated that "some of the physicians . . . providing health care services to [her] [were] independent contractors," she would "consider them independent contractors unless [she] receive[d] written notice" to the contrary, "[s]ome of those independent contractors may be employees of the State of Utah, University of Utah faculty, University of Utah School of Medicine, or other training programs," and the UGIA "controls all claims of liability or malpractice against University or State employees"; and
- a December 2014 itemization of services form on University of Utah Health Care letterhead, addressed to Amundsen, which covered services provided by Dr. Dodson at the clinic.[3]

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[3] In her briefing on appeal, Amundsen asserted that some of these documents "were not before the trial court" and claimed "it [would] be improper to address them" in this proceeding. In fact, Amundsen included a section in her reply brief entitled "The University's Additional Documents Were Not Before the Trial Court." But when asked about this assertion during oral argument, Amundsen's counsel replied, "We . . . later realized those [documents] were before the [district] court . . . ." Counsel was thus aware of an affirmative material misrepresentation to this court regarding whether documents had been presented to the district (continued . . .)

¶17 The district court dismissed the case with prejudice. The court concluded it was not barred by the doctrine of res judicata from ruling on the timeliness of Amundsen's notice of claim. And Amundsen's "consultation with a physician at a University clinic [was] sufficient to trigger notice inquiry that the physician she was seeing [might] be a state employee and that she [might] have a claim against the State of Utah." Additionally, "because at least one of the claims alleged . . . involve[d] a consultation that occurred at a University clinic, [Amundsen] knew, at a minimum, that she had a medical malpractice claim involving a claim that occurred at a University clinic." Moreover, Amundsen had not demonstrated that she exercised reasonable diligence in ascertaining whether she had a claim against an entity or employee of the State. The district court did not address Amundsen's constitutional or waiver arguments.

¶18 On appeal, Amundsen reiterates the arguments she raised before the district court. Citing the doctrine of collateral estoppel, she

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court. And counsel made no effort to correct that misrepresentation until directly asked about it during oral argument.

We remind counsel of the professional obligation to promptly appraise a court of any false statement of law or fact made to the tribunal. *See* UTAH R. PROF'L CONDUCT 3.3(a)(1) ("A lawyer shall not knowingly or recklessly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ."). If counsel discovers that she has made a material error, the Rules of Professional Conduct do not permit counsel to wait and hope that the court will not discover the error. To the contrary, counsel has a professional duty to expeditiously bring the error to the court's attention and correct it, either through submission of an amended brief or another similarly appropriate course of action.

We note that Amundsen's counsel did neither in this instance and, in fact, was completely unapologetic when questioned about it. The Rules of Professional Conduct exist for a reason. In this instance, taxpayer resources were spent checking and rechecking the record in hopes of understanding whether the documents had been presented to the district court and why Amundsen had asserted the contrary. These resources could have been spent more productively had Amundsen followed the rules and alerted the court and opposing counsel to her error upon discovery. We understand that everyone makes mistakes, but we expect better from the members of our bar when it comes to alerting us to them.

asserts that the University cannot challenge the timeliness of her notice of claim. She also contends that her notice of claim was timely filed and that barring her claims on the basis of governmental immunity would violate the Utah Constitution's Open Courts provision.[4] She also contends the University receives too little governmental funding to receive immunity under the UGIA, and the State waived any claim of immunity by failing to create a searchable database of State entities.

STANDARD OF REVIEW

¶19 "Compliance with the [UGIA] is a prerequisite to vesting a district court with subject matter jurisdiction over claims against governmental entities." *Wheeler v. McPherson*, 2002 UT 16, ¶ 9, 40 P.3d 632. We have stated that whether "a trial court has subject matter jurisdiction presents a question of law, which this Court reviews under a correction of error standard." *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 10, 266 P.3d 702 (ellipsis omitted) (citation omitted). The parties briefly contest whether this standard governs the specific question of subject matter jurisdiction at issue here, but because we reach the same result whether we apply correctness or a more deferential standard of review, we need not resolve that question and leave it for a case in which the parties have focused on the issue.[5]

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[4] Amundsen raises additional arguments on appeal regarding whether the certificate of compliance issued with respect to Dr. Dodson applied to her claims against the University and whether one of the statutory requirements for obtaining a certificate of compliance is unconstitutional. Because we determine that the district court properly dismissed the case for lack of subject matter jurisdiction, due to the untimely notice of claim, we do not reach any of the additional questions Amundsen poses.

Moreover, despite Amundsen's invitation, we do not address any of those additional questions on the asserted ground that "this case . . . falls within the public interest exception" to our mootness doctrine. That doctrine does not apply. Arguments we do not reach because the district court lacked subject matter jurisdiction to address them are not "moot" for justiciability purposes.

[5] Specifically, the parties dispute whether correctness is the appropriate standard of review, with Amundsen asserting that it is and the University claiming the district court's ruling should receive some measure of deference. Here, the question of subject matter

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jurisdiction turns on when Amundsen "knew, or with the exercise of reasonable diligence should have known[,] . . . that [she] had a claim against [a] governmental entity or the governmental entity's employee." *See* UTAH CODE § 63G-7-401(1)(b)(i). The district court determined that Amundsen should have, with the exercise of reasonable diligence, known she had a claim against an employee of the State well over a year before she filed her notice of claim. Given the fact findings embedded in that determination, we can understand why the University claims the ruling should receive at least some measure of deference on appeal. *See Arnold v. Grigsby*, 2018 UT 14, ¶ 33, 417 P.3d 606; *In re Adoption of Baby B.*, 2012 UT 35, ¶ 46, 308 P.3d 382. But the parties have addressed the question only in passing, and we need not resolve the issue here because it would not alter the outcome. Regardless of whether we apply correctness review or afford some level of deference, we reach the same conclusion.

Still, we flag the issue for consideration in a future case, noting the apparent lack of clarity in Utah law as to the appropriate standard of review in these circumstances. We have stated, in the context of personal jurisdiction, that when "a pretrial jurisdictional decision has been made on documentary evidence only, an appeal from that decision presents only legal questions that are reviewed for correctness." *Pohl, Inc. of Am. v. Webelhuth*, 2008 UT 89, ¶ 8, 201 P.3d 944 (citation omitted) (internal quotation marks omitted). The district court's ruling here was based on documentary evidence—allegations in the complaint and unchallenged documents the University submitted. But we do not appear to have applied this principle in the context of subject matter jurisdiction or to otherwise have stated the standard of review that would govern.

With respect to whether rulings based solely on documentary evidence generally receive deference on appeal, Utah law appears to lean toward correctness review. *See, e.g.*, *In re Estate of Kleinman*, 970 P.2d 1286, 1293 (Utah 1998) (Zimmerman, J., dissenting) (acknowledging that Utah law "seems to support the proposition . . . that where a trial court relies solely on documentary evidence and draws inferences only from undisputed facts, appellate review gives no deference to the trial court," but asserting that Utah law actually aligns with federal law, under which appellate courts "should not substitute [their] judgment for that of the trial court in determining" questions of fact, "even where evidence is undisputed"); *Lebrecht v. Deep Blue Pools & Spas Inc.*, 2016 UT App 110, ¶ 10, 374 P.3d 1064 ("A

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¶20 "We review a decision granting a motion to dismiss for correctness, granting no deference to the decision of the district court." *Scott v. Universal Sales, Inc.*, 2015 UT 64, ¶ 13, 356 P.3d 1172 (citation omitted) (internal quotation marks omitted). "In so doing, we accept the plaintiff's description of the facts alleged in the complaint to be true" and view all reasonable inferences from those facts in the light most favorable to the plaintiff. *Id.* ¶¶ 4, 13 (citation omitted) (internal quotation marks omitted). Where appropriate, we also consider facts set forth in materials submitted in support of the motion. *See* UTAH R. CIV. P. 12(b); *supra* ¶ 4 n.1.

ANALYSIS

I. Res Judicata

¶21 We first briefly address Amundsen's argument that res judicata principles should have prevented the district court from dismissing her claims. In the earlier proceeding, the University filed a motion to dismiss asserting Amundsen had not timely filed a notice of claim in accordance with the UGIA's requirements. In response, Amundsen conceded she had not filed a notice of claim. But she asserted she did not know Dr. Dodson was an employee of the University until May 2016, and therefore, the one-year period for filing her notice had not yet expired.

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trial court's finding about whether a party accepted an offer or counteroffer is a finding of fact, usually reviewed for clear error. But because we are in as good a position as the trial court to examine the [documentary evidence], we owe the trial court no deference in that regard." (citation omitted) (internal quotation marks omitted)); *In re Adoption of Infant Anonymous*, 760 P.2d 916, 918 (Utah Ct. App. 1988) ("Because the trial court's finding was based solely on these written materials and involved no assessment of witness credibility or competency, this court is in as good a position as the trial court to examine the evidence de novo and determine the facts." (emphasis omitted)); *Bench v. Bechtel Civil & Minerals, Inc.*, 758 P.2d 460, 461 (Utah Ct. App. 1988) ("Because the trial court made its determination based solely upon [the party's] deposition, proffers and the pleadings, it had no opportunity to evaluate the credibility of witnesses. Thus, this Court on appellate review has as good an opportunity as the trial court to examine the evidence and may review the facts de novo." (emphasis omitted)). Whether this approach requires refinement or clarification we leave for consideration in a future case.

¶22 Because the district court lacked subject matter jurisdiction over the suit, it dismissed the case, and it did so without prejudice. In its order, the court stated it could not conclude, as a matter of law, that the period for filing a notice of claim had expired. "The Court assumes—as it must on a motion to dismiss—that [Amundsen] did not know that Dr. Dodson was a University employee until May[] 2016. Based on that fact, this Court cannot conclude[] that the UGIA limitations period [has expired] as a matter of law." (Emphasis omitted.)

¶23 Amundsen argues that the district court's statement conclusively decided the issue, and the University cannot now challenge the timeliness of her later-filed notice of claim. Amundsen's argument teeters on the edge of frivolousness.

¶24 As a general rule, issue preclusion kicks in only when there has been a final judgment on the merits of an identical issue. *See Gressman v. State*, 2013 UT 63, ¶ 37, 323 P.3d 998.[6] The doctrine "prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first." *Id.* (citation omitted) (internal quotation marks omitted).

¶25 A dismissal without prejudice, particularly on the basis that the court lacks subject matter jurisdiction, will generally not be given preclusive effect because it is not a judgment on the merits of the underlying action. UTAH R. CIV. P. 41(b) ("Unless the dismissal order otherwise states, a dismissal under this paragraph and any dismissal not under this rule, other than a dismissal *for lack of jurisdiction*, improper venue, or failure to join a party under Rule 19, operates as an adjudication on the merits." (emphasis added)); *see also Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 2012 UT 66, ¶ 22, 289 P.3d 502 ("Our case law defines 'the merits' for res

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[6] For issue preclusion to apply, a party must establish four elements:

> (i) the party against whom issue preclusion is asserted was a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication was identical to the one presented in the instant action; (iii) the issue in the first action was completely, fully, and fairly litigated; and (iv) the first suit resulted in a final judgment on the merits.

Gressman, 2013 UT 63, ¶ 37 (quoting *Moss v. Parr Waddoups Brown Gee & Loveless*, 2012 UT 42, ¶ 23, 285 P.3d 1157).

judicata in light of rule 41 of the Utah Rules of Civil Procedure."); *Beaver v. Qwest, Inc.*, 2001 UT 81, ¶ 19, 31 P.3d 1147 (applying rule 41 in determining whether a dismissal was on the merits).[7]

¶26 There is a bit of a wrinkle, however, in the way that rule operates with respect to jurisdictional questions. A final judgment on the substance of a jurisdictional question will have preclusive effect as to that issue, even though it is not a judgment "on the merits" of the underlying action. A district court has jurisdiction to determine its own jurisdiction. And while "the general rule [is] that a judgment becomes res judicata only when the court has acquired jurisdiction over the subject matter and the parties[,] . . . a judgment of dismissal for want of jurisdiction is conclusive as to the matters upon which the ruling was necessarily based." *McCarthy v. State*, 1 Utah 2d 205, 265 P.2d 387, 389 (1953) (emphasis omitted). In other words, "[i]f the same issue . . . was finally resolved in an earlier case . . . (and otherwise meet[s] the elements of issue preclusion), then further litigation of that issue is barred—even if the issue is a threshold matter of jurisdiction, and does not go to the 'merits' of the underlying dispute." *Davis & Sanchez, PLLC v. Univ. of Utah Health Care*, 2015 UT 47, ¶ 15, 349 P.3d 748 (emphases omitted).

¶27 So if Amundsen could point to a final judgment on the substance of the jurisdictional inquiry, she might have a credible argument on the collateral estoppel question. But the order at issue here bears no resemblance to a final judgment resolving any relevant question. The order expressly indicates that the district court had not definitively determined whether the period for filing a notice of claim had expired. That issue had not been fully litigated, there was

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[7] We have previously looked to rule 41 to determine if a judgment is "on the merits" when addressing questions involving claim preclusion. *See, e.g.*, *Horne*, 2012 UT 66, ¶ 22; *Beaver*, 2001 UT 81, ¶ 19. It does not appear that we have previously done so with respect to issue preclusion. But our approach in both instances is the same. We turn to rule 41 for guidance as to whether a judgment is "on the merits" for res judicata purposes when addressing either claim or issue preclusion. We note, however, that issue preclusion requires a final judgment on the merits with respect to an identical issue, *Gressman*, 2013 UT 63, ¶ 37, while claim preclusion requires a final judgment on the merits with respect to a claim that was presented or could and should have been raised in the prior proceeding, *Mack v. Utah State Dep't of Commerce*, 2009 UT 47, ¶ 29, 221 P.3d 194.

no final judgment on the matter, and the order does not bar relitigation of the question in a subsequent proceeding.

II. Untimely Notice of Claim

¶28 Amundsen next asserts that a notice of claim she filed in September 2016, regarding the medical services she received no later than 2013, is timely because it wasn't until 2016 that she learned Dr. Dodson was a University employee. The UGIA does not, however, require actual notice that an individual may have a claim against a State employee before the one-year filing period begins to lapse. Inquiry notice is sufficient to start the clock running. And in this case, that clock had long been running and the one-year filing period had expired well before Amundsen filed her notice of claim.

¶29 Under the UGIA, "[a] claim against a governmental entity, or against an employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed . . . within one year after the claim arises." UTAH CODE § 63G-7-402. The one-year filing period begins to run when the "claimant knew, or with the exercise of reasonable diligence should have known . . . that the claimant had a claim against the governmental entity or the governmental entity's employee." *Id.* § 63G-7-401(1)(b)(i). "The burden to prove the exercise of reasonable diligence is upon the claimant." *Id.* § 63G-7-401(1)(c).

¶30 Amundsen asserts she did not know that Dr. Dodson was a University employee until May 2016 when, in a prior suit, he moved to dismiss on that basis. But, as noted above, the relevant question is not just Amundsen's actual knowledge. It is also the time at which, through the exercise of reasonable diligence, she should have discovered Dr. Dodson's employment status. *See McBroom v. Child*, 2016 UT 38, ¶ 36, 392 P.3d 835 ("Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which [reasonably diligent] inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." (citation omitted)).

¶31 On that issue, the district court concluded Amundsen's "consultation with a physician at a University clinic [was] sufficient to trigger [inquiry notice] that the physician she was seeing [might] be a state employee and that she [might] have a claim against the State of Utah." Additionally, "because at least one of the claims alleged . . . involve[d] a consultation that occurred at a University clinic, [Amundsen] knew, at a minimum, that she had a medical

malpractice claim involving a claim that occurred at a University clinic."

¶32 We agree with the district court. These facts, standing alone, put Amundsen on notice by late 2013 that her claims related to Dr. Dodson's medical services might well be against an employee of the University. And triggered her duty to exercise reasonable diligence with respect to that question.

¶33 The additional documents presented to the district court further confirm that, at least by late 2014, Amundsen had all of the necessary information—*i.e.*, all the facts needed to lead an ordinary person to use reasonable diligence to determine if her claims were against a University employee. Those documents include the December 2014 itemization of services form on University of Utah Health Care letterhead, which was addressed to Amundsen and covered services provided by Dr. Dodson at the clinic. In addition, in October 2013, Amundsen signed a consent form in connection with her surgery at LDS Hospital, indicating that some physicians providing healthcare services might be employees of the University and that the UGIA governs claims against the University and State employees.[8]

¶34 Amundsen asserts that none of this information was sufficient to trigger the UGIA's one-year filing period because "she was never put on notice that [Dr. Dodson] *was* a University employee." (Emphasis added.) She claims that "a reasonable person

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[8] In her briefing, Amundsen briefly cites case law dealing with disclaimers of implied warranties, *see, e.g.*, *Christopher v. Larson Ford Sales, Inc.*, 557 P.2d 1009, 1012 (Utah 1976), and summarily suggests that language in "fine print" does not provide "notice" of the information communicated. But this argument lacks any persuasive weight. Undeveloped citation to case law dealing with distinct subject matter, without more, will almost always prove inadequate to carry one's burden of persuasion on appeal.

For example, Amundsen has not explained how notice, entitled "Independent Contractors" in bold print, on a two-page consent form, is insufficient to communicate information to a person who has signed the form indicating that "I have read this agreement," "I have had the opportunity to ask any questions," "all of my questions have been answered to my satisfaction," and "I understand what I am agreeing to by signing below." Given the lack of a developed argument from Amundsen, we do not address the issue further.

would not," for example, "necessarily assume a doctor was a University employee simply because they visited the doctor three times over two years at a particular clinic."[9] In other words, Amundsen claims that all of this information fell short of putting her on *actual* notice as to Dr. Dodson's employment status. And that may be true. But that is not the test; at least, it is not all of the test.

¶35 Amundsen claims the University seeks to hold her "on inquiry notice if she had a mere suspicion that Dr. Dodson was a professor at the University" and further asserts she reasonably lacked any such suspicion as to his employment status. This is where we lose the thread. A person who repeatedly receives care at a medical clinic with "University of Utah" in its name receives far more than a vague hint that the treating physician might be a University employee. Particularly when that treatment is followed by a signed acknowledgement and other evidence that the physician may be employed by the University.

¶36 A physician may provide care at a number of locations, several of which may not be run by a governmental entity. But a patient who has received services at a University clinic—which operates under the University's name with signage that advertises itself as the University's clinic—and who then receives an itemization of services from the University health care system, cannot credibly claim that she had no reason to inquire whether her treating physician might be a State employee.

¶37 In an attempt to sidestep this seemingly obvious conclusion, Amundsen cites to a concurring opinion in a court of appeals case, *Nuñez v. Albo*, 2002 UT App 247, 53 P.3d 2. The concurring opinion notes that, under the circumstances present in that case, "it would not have been at all clear to Plaintiff that [the physician] was rendering treatment to her as a University employee." *Id.* ¶ 41 (Orme, J., concurring specially). But as the concurrence emphasizes, the patient in *Nuñez* did not see the physician at a University facility: "[The patient] visited him not at the University Hospital or any of the ancillary buildings, but at a private office off campus, adjacent to Salt Lake Regional Hospital . . . ." *Id.* As such, the concurring opinion provides no support for Amundsen's suggestion that, having been

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[9] That said, Amundsen's October 2014 notice of intent to commence action identified Dr. Dodson as "a gynecological oncologist who works at OB-GYN Avenues Clinic, which is part of University of Utah Health Care."

repeatedly treated at a University clinic, and having received the other information she had at her fingertips, she was not on inquiry notice as to whether Dr. Dodson was a University employee.

¶38 Amundsen similarly misplaces her reliance on *McTee v. Weber Center Condominium Ass'n*, 2016 UT App 134, 379 P.3d 41. In *McTee*, the court of appeals addressed the timeliness of the plaintiff's notice of claim, which depended on when the plaintiff reasonably should have discovered that a governmental entity owned or maintained a parking structure. *Id.* ¶¶ 12–20. The court of appeals affirmed the district court's conclusion that the notice of claim was timely filed. *Id.* ¶¶ 11, 21. Relying in large part on a sign "prominently displayed at the entryway from the parking structure," which identified "only [a nongovernmental entity] as responsible for leasing space in the [multi-tenant] building," the court of appeals concluded that "the circumstances . . . would not [have] put a reasonable person on immediate inquiry notice that the parking structure was owned or maintained by a governmental entity." *Id.* ¶¶ 14, 17. There "appear[ed] to be nothing in the circumstances that would have suggested to [the plaintiff] that any of the [private and governmental] entities occupying space in the building . . . were its owners rather than tenants"—in fact, the large sign "suggested the opposite." *Id.* ¶ 17.

¶39 In this case, the circumstances are reversed. Unlike the sign in *McTee*, the most significant evidence on the question (the receipt of medical care at a University clinic) suggested Amundsen might have a claim against a University employee. Like *Nuñez*, *McTee* does not support Amundsen's argument that she had no obligation to inquire as to Dr. Dodson's employment status.

¶40 And as the district court concluded, Amundsen has not demonstrated that she exercised reasonable diligence in ascertaining whether she had a claim against a State entity or employee. Amundsen does not claim to have taken any steps to ascertain Dr. Dodson's employment status. According to Amundsen, "[That] information was never provided." Again, Amundsen insists on relying upon what actually happened—not what would have happened had she inquired.

¶41 Tellingly, Amundsen concedes that if she *had* exercised reasonable diligence, she would have "discovered that Dr. Dodson . . . was a professor in the University's school of medicine." That discovery might not have completely clarified the relationship Dr. Dodson shared with the University when providing medical services. But it would have provided further reason to investigate

the question. Amundsen provides no indication that had she inquired with Dr. Dodson, the University clinic, or any other reasonable source, she would not have readily obtained the relevant information regarding Dr. Dodson's employment status and its relation to her claims. Accordingly, like the district court, we conclude her notice of claim against the University was not timely filed.

III. Open Courts Challenge

¶42 Amundsen also contends the University cannot, in defending against her claims, constitutionally avail itself of immunity under the UGIA. Amundsen points to language added to the UGIA in 2004, providing that "[t]he waivers and retentions of immunity found in this chapter apply to *all functions* of government, no matter how labeled." 2004 Utah Laws 1192 (emphasis added). She asserts this language resulted in an "expansion of . . . immunity" to all governmental activities in violation of the Open Courts provision of the Utah Constitution. According to Amundsen, prior to 2004, Dr. Dodson would have "been held liable for his tortious acts" in treating her, and the legislature abrogated her cause of action without providing an effective and reasonable alternative remedy. She also claims the University receives too little funding from the State to receive governmental immunity through the UGIA, and any claim of immunity has been waived due to the absence of a searchable database of State entities. Here again, there are several problems with the arguments Amundsen asserts.

¶43 To determine whether legislation violates the Open Courts provision, we first examine whether the legislature has abrogated a cause of action.[10] *Petersen v. Utah Labor Comm'n*, 2017 UT 87, ¶ 20, 416 P.3d 583. "If so, the legislation is invalid unless the legislature has

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[10] The Open Courts provision of the Utah Constitution provides as follows:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

UTAH CONST. art. I, § 11.

provided an effective and reasonable alternative remedy, or the abrogation is not an arbitrary or unreasonable means for eliminating a clear social or economic evil." *Id.* (citations omitted) (internal quotation marks omitted).

¶44 Amundsen appears to assume that if she cannot sue Dr. Dodson for her claims, the UGIA has abrogated her cause of action. But that is not the case. Application of the UGIA does not, by itself, abrogate a cause of action. We have reasoned that if a plaintiff still "ha[s] a remedy against the state defendants for injuries arising out of the [alleged] negligent acts of State employees," there is no Open Courts violation. *Payne ex rel. Payne v. Myers*, 743 P.2d 186, 190 (Utah 1987). Indeed, in *Payne*, we discussed whether the UGIA's notice of claim provision violated the Open Courts provision and reasoned that because the plaintiffs needed only to "give notice of their claim to the State within one year" to pursue that cause of action, the plaintiffs had "not [been] denied the guarantees of [the Open Courts provision] because [the plaintiffs] still had an opportunity to seek redress in the courts." *Id.* Amundsen does not cite this principle or engage with it in any way. And a party who neglects to recite and address controlling precedent will, almost necessarily, fail to carry her burden of persuasion.

¶45 Even if Amundsen were operating in a world where we had not addressed the specific argument she wants to raise, Amundsen has not provided any of the statutory analysis that would be necessary to convince us that the UGIA abrogates her claims. She has not, for example, cited any provision of the UGIA that governed the scope of governmental immunity prior to 2004 to demonstrate that a substantive change occurred at that time. Nor has she addressed any provision of the UGIA that speaks to whether immunity would, or would not, be waived for the acts or claims alleged in her complaint—either prior to or following the 2004 amendment. And she has not demonstrated how, under those provisions, her ability to sue for redress was, in fact, abrogated by the language added in 2004. "[A]ll statutes are presumed to be constitutional and the party challenging a statute bears the burden of proving its invalidity." *Salt Lake City v. Kidd*, 2019 UT 4, ¶ 21, 435 P.3d 248 (alteration in original) (citation omitted). Without any such analysis from Amundsen, we cannot conclude that the legislature abrogated a previously existing cause of action in violation of the Open Courts provision.

¶46 Because Amundsen fails to demonstrate that the UGIA abrogated her cause of action, we do not reach the additional Open Courts arguments Amundsen presses. For example, Amundsen asserts the UGIA contains a damages cap that will reduce her

potential recovery, *see* UTAH CODE § 63G-7-604, and she claims the cap leaves her without an effective and reasonable alternative remedy. But Amundsen does not assert the damages cap relates to the first step in our analysis regarding whether her cause of action has been abrogated. And because she has failed to carry her burden of persuasion on that point, our analysis ends there.

¶47 Likewise, Amundsen appears to assert that the UGIA cannot apply to her suit against the University because the University receives too little State funding to qualify for governmental immunity. And while her briefing is not clear on this point, our best reading is that her argument is also predicated on the Open Courts provision. And it would fail for the reasons outlined above. But if we are misreading Amundsen's argument and it is based on another constitutional violation, then the argument fails as inadequately briefed. Appending the term "unconstitutional" to an argument adds nothing to it. And provides no basis for overturning a legislative enactment. When asserting a constitutional violation, a party must identify the provision allegedly infringed and develop an argument as to how that provision has been violated. As we recently put it, "A party may not simply point toward a pile of sand and expect the court to build a castle. In both district and appellate courts, the development of an argument is a party's responsibility, not a judicial duty." *Kidd*, 2019 UT 4, ¶ 35.

¶48 We also briefly note Amundsen's argument that the State waived its ability to assert immunity under the UGIA because it failed to provide "a searchable database of State entities so the public can readily identify such entities." Even assuming the State failed to provide such a database, the UGIA specifies the consequences of that failure: "A governmental entity may not challenge the validity of a notice of claim on the grounds that it was not directed and delivered to the proper office or agent if the error is caused by the governmental entity's failure to file or update the statement required by Subsection (5)." UTAH CODE § 63G-7-401(7).

¶49 The University has not argued that the notice of claim was invalid because Amundsen directed it to the wrong office or agent. So Amundsen's argument fires at the wrong target. The district court properly dismissed Amundsen's case for lack of subject matter jurisdiction because she failed to timely file a notice of claim as the UGIA requires.

CONCLUSION

¶50 The district court properly dismissed Amundsen's suit against the University for lack of subject matter jurisdiction.

Amundsen did not timely file a notice of claim. The doctrine of res judicata does not preclude consideration of that question on appeal, and Amundsen has failed to demonstrate any waiver of immunity or violation of the Open Courts provision that would alter the outcome in this proceeding. Accordingly, we affirm.
