

2007

Lawrence M. Jackson v. The State of Utah : Brief of Appellee

Utah Court of Appeals

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Lawrence M. Jackson.

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IN THE UTAH COURT OF APPEALS

LAWRENCE M. JACKSON,

Plaintiff/Appellant,

v.

THE STATE OF UTAH,

Defendant/Appellee.

STATE OF UTAH'S BRIEF

Appeal from an Order of the Sixth Judicial District Court, Sanpete County, State of Utah, the Honorable Wallace Lee presiding, granting the State of Utah's motion for summary judgment

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

FILED
UTAH APPELLATE COURTS

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LIST OF ALL PARTIES

All parties to the proceeding appear in the caption of this Brief. An individually named defendant was not served and was never a party to the action.

TABLE OF CONTENTS

Table of Authorities	v
Statement of Jurisdiction	1
Issues Presented	2
I. The trial court’s grant of summary judgment to the state should be affirmed	2
1. Standard of Review	2
2. Preservation of the Issue	3
II. The trial court’s interlocutory rulings and discretionary decisions respecting the conduct of litigation should be affirmed	3
A. GRAMA Review	3
1. Standard of Review	4
2. Preservation of the Issue	4
B. <i>Martinez</i> Report	4
1. Standard of Review	4
2. Preservation of the Issue	5
C. Motion to Compel	5
1. Standard of Review	5

2.	Preservation of the Issue	6
D.	Motion for Reconsideration	6
	Determinative Constitutional Provisions, Statutes and Rules	6
	Statement of the Case	7
I.	Nature of the Case	7
II.	Course of the Proceedings and Disposition Below	7
III.	Statement of Facts	11
	Summary of the Argument	15
	Argument	17
I.	The trial court's grant of summary judgment to the state should be affirmed	17
A.	Jackson failed to meet his summary judgment burden	17
B.	The trial court properly granted summary judgment to the state because the state neither acted with deliberate indifference to Jackson's serious medical needs nor subjected him to unnecessary abuse	20
II.	The trial court's interlocutory rulings and decisions respecting the conduct of litigation should be affirmed	28
A.	This court should affirm the denial of Jackson's GRAMA request	28

B.	The trial court did not abuse its discretion when it allowed the state to file a <i>Martinez</i> report	..	32
C.	The trial court did not abuse its discretion when it denied Jackson’s motion to compel	..	34
D.	This court has already dismissed Jackson’s appeal from the denial of his motion for reconsideration	..	35
Conclusion		..	36
Certificate of Service		..	37

LIST OF ADDENDA

Addendum A	<i>Memorandum Decision</i>
Addendum B	<i>Order Granting Defendant’s Motion for Summary Judgment.</i>

TABLE OF AUTHORITIES

STATE CASES

<i>Andalex Res. Inc. v. Myers</i> , 871 P.2d 1041, 1046 (UT App. 1994) . . .	18
<i>Bott v. DeLand</i> , 922 P.2d 732, 740 (Utah 1996)	20, 21, 22, 23
<i>Brown v. Glover</i> , 2000 UT 89, 16 P.3d 540	29, 30, 35
<i>Burns v. Summerhays</i> , 927 P.2d 197, 199 (UT App. 1996)	31, 35
<i>Cannon v. Salt Lake Reg'l Med. Ctr.</i> , 2005 UT App. 352, 121 P.3d 74	5, 34
<i>Dep't of Human Servs. v. Schwartz</i> , 2003 UT App. 406	30
<i>Espinal v. Salt Lake City Bd. of Educ.</i> , 797 P.2d 412, 413 (Utah 1990)	28
<i>Hartford Leasing Corp. v. State</i> , 888 P.2d 694, 702 (UT App. 1994)	4, 32
<i>Hatch v. Davis</i> , 2004 UT App. 378, 102 P.3d 744	28, 34
<i>Koulis v. Standard Oil Co.</i> , 746 P.2d 1182, 1185 (UT App. 1987)	29, 31
<i>Langeland v. Monarch Motors</i> , 952 P.2d 1058, 1061 (Utah 1988)	5
<i>Orvis v. Johnson</i> , 2008 UT 2,	2, 18
<i>Searle v. Searle</i> , 2001 UT App. 367, 38 P.3d 307	34
<i>State v. Anderson</i> , 789 P.2d 27, 29 (Utah 1990)	28

<i>State v. Archambeau</i> , 820 P.2d 920, 922 (UT App. 1991)	28
<i>State v. Green</i> , 2004 UT 76, 99 P.3d 820	29, 30, 35
<i>State v. Lafferty</i> , 20 P.3d 342, 365 (Utah 2001) cert. denied, 534 U.S. 1018 (2001)	20
<i>State v. Maguire</i> , 1999 UT App. 45, 975 P.2d 476	34
<i>State v. Thomas</i> , 961 P.2d 299, 305 (Utah 1998)	31, 35
<i>Tschaggeny v. Millbank Ins. Co.</i> , 2007 UT 37, 163 P.3d 615 ...	4, 5, 32
<i>Univ. of Utah v. Indus. Comm’n</i> , 736 P.2d 630, 633 (Utah 1987) ...	32

FEDERAL CASES

<i>Adickes v. S.H. Kress & Co.</i> , 398 U.S. 144, 160-61 (1970)	18
<i>Bd. of County Comm’rs v. Brown</i> , 520 U.S. 397, 410 (1997)	21, 22
<i>Boretti v. Wiscomb</i> , 930 F.2d 1150 (6th Cir. 1991)	26, 27
<i>Estelle v. Gamble</i> , 429 U.S. 97, 107 (1976)	21, 25
<i>Fidelity & Deposit Co. v. U.S.</i> , 187 U.S. 315, 319-21 (1902)	31
<i>Galloway v. U.S.</i> , 319 U.S. 372, 388-93 (1943)	31
<i>Hall v. Bellmon</i> , 935 F.2d 1106, 1109 (10th Cir. 1991)	33
<i>Martinez v. Aaron</i> , 570 F.2d 317, 319 (10th Cir. 1978)	32

<i>Northern v. Jackson</i> , 973 F.2d 1518, 1521 (10th Cir. 1992)	33
<i>Parlane Hosiery Co., Inc., v. Shore</i> , 439 U.S. 322, 337 (1979)	31
<i>Perkins v. Kansas Dep’t of Corr.</i> , 165 F.3d 803, 810 (10th Cir. 1999)	25
<i>Reed v. Bennett</i> , 312 F.3d 1190, 1195 (10th Cir. 2002)	18
<i>Riggins v. Nevada</i> , 504 U.S. 127, 132-139 (1992)	25
<i>Schmerber v. California</i> , 384 U.S. 757, 772 (1966)	26
<i>Supre v. Ricketts</i> , 792 F.2d 958, 963 (10th Cir. 1986)	24
<i>U.S. v. Bryant</i> , 670 F. Supp. 840, 845 (D. Minn. 1987)	24
<i>Washington v. Harper</i> , 494 U.S. 210, 229 (1990)	25
<i>Winston v. Lee</i> , 470 U.S. 753 (1985)	26
<i>Woodland v. Angus</i> , 820 F. Supp. 1497, 1504 (D. Utah 1993)	25

STATE STATUTES

Utah Code Ann. § 78-2-2(3)(j) (West 2004)	1
Utah Code Ann. § 78-7-5(3) (West 2004)	32
Utah Code Ann. §§ 78-2-2(4)	1
Utah Code Ann. 63-2-404	29

No. 20070588

IN THE UTAH COURT OF APPEALS

LAWRENCE M. JACKSON,

Plaintiff/Appellant,

v.

THE STATE OF UTAH,

Defendant/Appellee.

STATE OF UTAH'S BRIEF

JURISDICTION

The Utah Supreme Court has original appellate jurisdiction over this case. Utah Code Ann. § 78-2-2(3)(j) (West 2004), now codified at 78A-3-103. On July 25, 2007, the Utah Supreme Court transferred the case to this Court under Utah Code Ann. §§ 78-2-2(4) and 78-2a-3(2)(j) (West 2004), now codified at 78A-3-103 and 78A-4-105.

ISSUES PRESENTED

I. The trial court's grant of summary judgment to the State should be affirmed. (responding to Jackson's issues I, II and III).

Summary judgment is appropriately granted only when the moving party establishes *both* that there are no genuine issues of material fact and those facts entitle the party to judgment as a matter of law. In this case, it is undisputed that Jackson refused to take the insulin dose the prison medical staff gave to him for his diabetes because he disagreed with the dosage. Thereafter, he refused to take any insulin, to test his blood sugar level, or to eat for two days. Did the trial court correctly grant summary judgment to the State when it concluded that the undisputed facts established that the State did not treat Jackson with deliberate indifference or subject him to unnecessary abuse, despite the fact that Jackson also moved for summary judgment?

1. Standard of Review

Appellate courts review the trial court's legal conclusions and ultimate grant of summary judgment for correctness. *Orvis v. Johnson*, 2008 UT 2, ¶ 6, – P.3d – . The appellate court views the facts and all reasonable inferences from those facts in the light most favorable to the non-moving party. *Id.*

2. Preservation of the Issue

Jackson raised this issue in his motion for summary judgment. R. 397-98; 399-405. The State also raised it in its *Martinez* report, which the State asked the court to treat as a motion for summary judgment. R. 1197-1500. The court entered a *Memorandum Decision* denying Jackson's motion and granting the State's motion on July 3, 2007, R. 1548-69, and entered the *Order Granting the Defendant's Motion for Summary Judgment* on August 16, 2007. R. 1576-1602.

II. The trial court's interlocutory rulings and discretionary decisions respecting the conduct of litigation should be affirmed.

A. GRAMA review (responding to Jackson's Issues III, IV and V).

A plaintiff who fails to raise an issue before the trial court is generally barred from asserting it for the first time on appeal. This applies equally to constitutional questions. Jackson sought judicial review of the denial of his GRAMA request, but did not raise the constitutional claims as a basis for ordering disclosure of the records. Is Jackson barred from making his constitutional claims on appeal?

1. Standard of Review

This question does not involve review of the trial court's order and therefore no standard of review applies.

2. Preservation of the Issue

Jackson failed to properly raise the constitutional issues before the trial court, and he has not properly preserved them. Jackson did seek judicial review of the denial of his records request. R. 1103-27. The trial court upheld the denial of the GRAMA request in its *Memorandum Decision*. R. 1551-53.

B. *Martinez* Report (responding to Jackson's issues III and VI).

Trial courts have broad discretion to determine how a case will proceed. During the proceedings below, the State requested the trial court's permission to file a *Martinez* report, a document that creates an administrative record to help the court determine whether the inmate's claims have any factual or legal basis. Did the trial court abuse its discretion when it allowed the State to file the report?

1. Standard of Review

The appellate court reviews a trial court's decision respecting the conduct of litigation for an abuse of discretion. *Tschaggeny v. Millbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615; *Hartford Leasing Corp. v. State*, 888 P.2d

694, 702 (UT App. 1994). Such decisions will not be reversed unless they were made without any reasonable basis. *Tschaggeny*, 2007 UT 37 at ¶ 16; *Langeland v. Monarch Motors*, 952 P.2d 1058, 1061 (Utah 1988).

2. Preservation of the Issue

The State moved for permission to file the *Martinez* report, and Jackson opposed the motion. R. 1084-96; 1138-72. The court entered an order allowing the State to file the report on March 28, 2007. R. 1098-99.

C. Motion to compel (responding to Jackson's issues III and VII).

Trial courts have broad discretion in handling discovery matters. Jackson filed a motion to compel the State to provide him with certain documents, but neither the motion nor its supporting memorandum included a description of the documents he wanted. Did the trial court abuse its discretion when it denied Jackson's motion to compel?

1. Standard of Review

The trial court's decision to deny a motion to compel is reviewed for an abuse of discretion. *Cannon v. Salt Lake Reg'l Med. Ctr.*, 2005 UT App. 352, ¶ 7, 121 P.3d 74.

2. Preservation of the Issue

Jackson raised the issue in his *Motion for an Order Compelling Discovery*. R. 1059-68 The court denied the motion. R. 1550-51.

D. Motion for reconsideration (responding to Jackson's issues III and VIII).

This Court has already denied Jackson's appeal from the denial of his motion for reconsideration. *Jackson v. State of Utah*, 2008 UT App. 18 (per curiam).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Article 1, Section 9 of the Utah Constitution states:

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

Utah Const., art. I, § 9 (West 2004).

STATEMENT OF THE CASE

I. Nature of the Case

Pro se inmate Lawrence Jackson appeals the trial court's final order granting summary judgment to the State of Utah. Jackson sued the State to recover damages he claims were caused by the State's medical malpractice and failure to give him proper medical care in violation of his rights under the Utah Constitution and the Americans with Disabilities Act.

II. Course of the Proceedings and Disposition Below

Jackson, a diabetic, claims prison officials violated his rights when they refused to give him a dosage of insulin that exceeded the prescribed amount. Instead of taking the prescribed dose, Jackson refused to take any insulin, refused to test his blood sugar levels, and refused to eat. After two days without food or insulin, Jackson fainted and fell in his cell, striking his face on a metal stool. The fall caused injuries to Jackson's eye.

Jackson filed his first complaint against the State on November 17, 2004, alleging medical malpractice and constitutional violations. R. 1-22. The State moved to dismiss the complaint, R. 33-43, and Jackson filed an *Amended Complaint for Medical Malpractice and Constitutional Rights Violations* in

February 2006. R. 194-202. The State answered, R. 309-15, and later filed a motion for judgment on the pleadings. R. 320-44. Jackson filed a second amended complaint and a motion for summary judgment on June 8, 2006. R. 378-85; 397-405. The next day, the State filed a notice to submit for decision and a motion to stay briefing on Jackson's motion for summary judgment until the court ruled on the motion for judgment on the pleadings. R. 410-22. In July 2006, Jackson filed a motion to file another amended complaint. R. 474-86.

The trial court stayed briefing on Jackson's motion for summary judgment in August. R. 512-13. And on September 28, 2006, the trial court denied the State's motion for judgment on the pleadings. R. 620-24. Jackson then filed a motion to supplement the pleadings on October 5, 2006, and later filed a third amended complaint. R. 628-75 and 684-91.

The State, faced with the dilemma of responding to Jackson's claims in piecemeal fashion – due to the pending motion for summary judgment and the pending motions to supplement the pleadings and to file another amended complaint – entered into a stipulation with Jackson that aimed to streamline the litigation. R. 700-64. The State agreed to allow Jackson to amend the complaint, to supplement the pleadings, and to provide Jackson with some limited discovery. The Stipulation also allowed the State to respond to all of

Jackson's claims at one time, once Jackson filed his supplemental pleading and amended complaint. The *Joint Motion and Stipulation* was filed, but the trial court never entered the proposed order on the stipulation. R. 700-64.

In December, Jackson wrote the trial court and claimed that the State missed the opportunity to oppose his summary judgment motion and that he was tricked into signing the stipulation. In response to Jackson's claim, the trial court held a telephone conference with the State's counsel and Jackson on December 12, 2006. Docket and R. 786; 886-89. The parties appeared and presented their positions to the court. The court ordered that Jackson could file his supplemental pleadings and amended complaint, to which the State could respond. Afterward, Jackson would have thirty days to file a renewed motion for summary judgment, to which the State could respond. Docket and R. 786; 886-89. The trial court was clear that the State did not have to respond to Jackson's claims in piecemeal, but could file one response to everything, including the pending motion for summary judgment. Docket and R. 786; 886-89.

After the hearing, Jackson attempted to file a motion to strike the *Joint Motion and Stipulation*. The State's counsel received it, but it was not filed with the court. R. 1549-50. Jackson filed both his supplement to the pleadings and his second *Amended Complaint for Medical Malpractice and*

Constitutional Rights Violations on January 16, 2007. R. 807-16 and 797-806.

The State filed an answer to Jackson's supplemental claims, R. 790-95, and on January 31, 2007, filed its answer to the second amended complaint. R. 890-97. Jackson filed several affidavits and documents in response to the State's answer, including a *Memorandum in reply to Defendant's Answer to Plaintiff's Supplemental Pleadings* and a *Memorandum in reply to Defendant's Answer to Plaintiff's Second Amended Complaint*.¹ R. 904-61 and 1028-58.

Jackson filed a *Motion for Order Compelling Discovery* on March 1, 2007. Neither the motion nor its supporting memorandum identified the documents Jackson wanted the State to produce. R. 1059-69.

On March 15, 2007, the State filed a motion asking the court to allow it to file a *Martinez* report and to stay the proceedings until the report was filed. R. 1084-86. Jackson opposed the motion arguing that the State missed its opportunity to oppose his motion for summary judgment. R. 1138-72. The court granted the State's motion and entered the order on March 28, 2007. R. 1098-99. Jackson filed several documents with the court after the stay, including petitions for judicial review of GRAMA requests. R. 1173-80.

¹ The Utah Rules of Civil Procedure do not authorize those documents.

On June 1, 2007, the State filed its *Martinez* report and supporting documentation. R. 1197-1547. The State asked the court to treat the report as a motion for summary judgment. R. 1197.

The court reviewed the report and Jackson's motion for summary judgment and his other various motions. On July 3, 2007, the court entered a *Memorandum Decision* that denied Jackson's motions, including his motion for summary judgment, and granted the State's motion for summary judgment. R. 1548-69. On July 11, 2007, Jackson filed his first notice of appeal. The final order was not signed until August 16, 2007. R. 1576-1602.² Jackson filed a second notice of appeal from the denial of his motion for reconsideration and that appeal, 20070954CA, has already been denied by this Court. *Jackson v. State of Utah*, 2008 UT App. 18 (per curiam).

III. Statement of Facts

Jackson is an insulin-dependant diabetic. R. 798. When taking his insulin, Jackson is not impaired from major life activities. R. 1228. During events about which Jackson complains, he was incarcerated at the Central

² A portion of the trial court record contains duplicate numbers, R. 1560-89, located in File No. 6. Cites to the trial court's *Order Granting Defendant's Motion for Summary Judgment*, entered on August 16, 2007, are the duplicated numbers 1576-1602, located in File No. 6.

Utah Correctional Facility (CUCF). R. 797. While at CUCF, Jackson attended a morning and evening “pill line” where he would self-inject his insulin. R. 1227-28. The pill line is for inmates who need to take any medication. R. 1227. At CUCF, insulin-dependent diabetics possess a glucometer and are required to self-check their blood sugar level before reporting to the pill line. R. 1227. Nurses, who staff the pill line, give inmates their insulin dosage based on three factors: (1) the insulin dosage prescribed by the inmate’s physician; (2) the inmate’s blood sugar level at the time the insulin is administered; and (3) the appropriate number of additional units of insulin added to the prescribed dose based on an established “sliding scale.” R. 1227.

The insulin dosage prescribed by the physician includes two doses, one for “regular” insulin, which acts almost immediately, and one for “NPH” insulin, which acts approximately four hours from the time it is administered. R. 1233. The sliding scale allows the nurse administering the pill line to give the inmate additional units of regular insulin based on the inmate’s blood sugar that day. R. 1227-28. The NPH insulin dose is never modified. R. 1233. It is crucial that an insulin-dependent diabetic is not given too much insulin; an overdose can cause insulin shock, which can be fatal. R. 1233.

On November 7, 2006, Jackson's glucometer reading before breakfast showed his blood sugar level was 177. According to medical records, Jackson demanded to take an insulin dose of 15 regular and 30 NPH units. R. 1338. But based on Jackson's blood sugar level and the sliding scale, Nurse Lisa Soper told Jackson he could take only a total of 11 units regular. R. 1338. She told Jackson that his prescribed dose was 7 units regular and 30 units of NPH. R. 1338. Jackson refused to take the dose that Nurse Soper told him was appropriate and argued that he should take 15 regular units. R. 1338.

Later that day, Nurse Soper reported to the on-duty physician's assistant (PA) that Jackson wanted to take a higher dose of insulin than the prescribed amount. R. 1338-39. The PA agreed with the nurse that Jackson could not take a dose in excess of the amount prescribed. "If he feels he needs more insulin, he needs to put in HCR [health care request] and see Dr. Burnham to explain why he needs more." R. 1339. An HCR request is a form that inmates are required to fill out when they want to see a physician or PA. When inmates first arrive at a Department of Corrections facility, they receive a copy of the inmates Inmate Orientation Handbook, which includes an explanation of the HCR requirement. R. 1412 and 1433-34.

At the afternoon pill line, Jackson again refused to take his insulin. He also refused to allow the nurse on duty to test his blood sugar or tell her what his blood sugar level was based on self-testing. R. 1339.

On November 8, 2003, Jackson arrived at the morning pill line looking gray. Again he refused to allow his blood sugar to be tested and refused to take insulin. R. 1339. And at the afternoon pill line, Jackson continued to refuse to have his blood sugar tested and informed the nurse on duty that he did not check his blood sugar in his cell. R. 1340. Jackson also refused to take any insulin. R. 1340 and 799. Jackson also quit eating. R. 799.

At about 2:00 a.m. on November 9, 2003, Jackson got up from his bed to use the bathroom and fainted, striking his face on a metal stool in the cell. R. 1345-46. Jackson was taken to the clinic, and examined by a PA. R. 1346-47. The PA reported that Jackson had probably fainted because he was dehydrated and his blood pressure dropped too low. She advised Jackson that, as an insulin-dependent diabetic, it was important for him to eat properly, to take his insulin, and to monitor his blood sugar. R. 1348.

The fall caused a cut on Jackson's face, just under his eye. The wound was closed with steri-strips. R. 1345. Jackson was given an IV to help him rehydrate and he was checked every two hours. R. 1342-44. Jackson received

follow-up care for the eye injury, including surgery to repair a fractured facial bone. R. 1342-49; 1315-16; 1250; 1296.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court in all respects. Although Jackson raises eight issues on appeal, there are, in fact, only four³ issues for this Court to consider. And none require the reversal of the trial court.

First, the trial court properly granted summary judgment to the State, even though Jackson filed a motion for summary judgment and the State.⁴ Jackson failed to establish that the material issues of fact on each element of his claims were undisputed and that under the governing law, he was entitled to judgment.

³ In Issue III, Jackson claims that the trial court violated his federal constitutional rights. But the claim is really that the trial court's orders and decisions should be reversed because of the trial court's numerous errors. This brief addresses each of the trial court's challenged orders and does not directly address Issue III. But because the trial court did not err, there can be no constitutional violations.

⁴ Jackson file a motion for summary judgment. The State did not file a memorandum in opposition to Jackson's motion for summary judgment. But the State had the trial court's permission to respond after Jackson filed his supplement to the pleadings and his second amended complaint. R. 786; 886-89; 1550. The State was also granted leave to file a *Martinez* report. The report and Jackson's motion were in effect, cross motions for summary judgment. R. 1550, 1552 and R. 1577.

In this case, the undisputed facts established that the State was entitled to judgment because prison medical staff did not refuse to treat Jackson's diabetes. Instead, Jackson refused to accept treatment because he disagreed with the amount of insulin the staff offered him. Once Jackson refused treatment, medical staff was powerless to do anything. Jackson's injury was caused by his refusal to take insulin, to test his blood sugar levels, and to eat, not by a violation of his state constitutional rights.

Second, Jackson did not raise before the trial court his claims that the denial of his GRAMA request, for Nurse Soper's home address, violated his federal or state constitutional rights. He is therefore barred from asserting those claims for the first time on appeal.

Third, the trial court did not abuse its discretion when it allowed the State to file a *Martinez* report. The purpose of the report is to create an administrative record to help the court determine whether a pro se inmate's constitutional claims have any factual or legal basis. The court was well within its discretion to control the course of the litigation before it when it allowed the State to file the report.

Fourth, the trial court did not abuse its discretion when it denied Jackson's motion to compel. Neither the motion nor its supporting

memorandum identified the documents Jackson wanted. Accordingly, the court could not compel any production and did not abuse its discretion when it denied the motion.

ARGUMENT

I. The Trial Court’s Grant of Summary Judgment to the State Should Be Affirmed.

A. Jackson failed to meet his summary judgment burden.

Summary judgment is appropriate only when “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of a law.” Utah R. Civ. P. 56(c). In addition, Rule 56(e) provides that if a moving party files a motion for summary judgment and properly supports it,

an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, *if appropriate*, shall be entered against a party failing to file such a response.

Utah R. Civ. P. 56(e) (emphasis added). Jackson contends that Rule 56(e) required the trial court to enter summary judgment in his favor because the State did not file a memorandum in opposition to his motion for summary

judgment.⁵ Jackson fails to understand the procedural burden of summary judgment.

Rule 56(e) does not entitle a moving party to a default judgment if the motion is not opposed. *See* Utah R. Civ. P. 56(e); *accord* *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160-61 (1970) (construing identical language of federal rule 56(e) and holding that unless moving party has met its initial burden of production under Rule 56(c), “summary judgment must be denied even if no opposing evidentiary matter is presented”); *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002) (same).

Summary judgment shall be granted only when it is appropriate. Jackson, as the party with the burden of proof at trial and as the moving party, had an affirmative duty to provide the court with facts that demonstrated both that there were no genuine issues on the facts essential to prove his claim, and that, based on those essential facts, he was entitled to judgment as a matter of law. He was required to show that for every element on each of his claims. *Orvis v. Johnson*, 2008 UT 2, ¶¶ 9, 19, – P.3d – ; *see also* *Andalex Res. Inc. v. Myers*, 871 P.2d 1041, 1046 (UT App. 1994) (in granting

⁵ *See supra* Note 4.

summary judgment, court must consider each element of the claim under the appropriate standard of proof).

Here, the trial court's *Memorandum Decision* reviewed the five affidavits that Plaintiff filed in support of his summary judgment motion. The two important facts contained in the affidavits were: 1) that there is a court order directing prison staff to provide insulin and foodstuffs to Jackson; and 2) that Jackson discontinued his use of insulin and stopped eating when he was offered what he considered an improper dose of insulin. R. 1557 and 407.⁶

The trial court's *Memorandum Decision* makes clear that the court considered Jackson's motion and his supporting materials. R. 1153 and 1577. The trial court correctly determined that Jackson's motion for summary judgment and his supporting affidavits did not meet his burden to show that summary judgment was appropriate. Instead, the material facts and the governing law established that the State was entitled to judgment. And, contrary to Jackson's assertions, the trial court did not grant summary judgment to the State based on Jackson's failure to respond. The court

⁶ Several inmate's affidavits merely corroborated Jackson's testimony that he was not taking his insulin or eating. R. 1558. One inmate also described his personal interactions with Nurse Soper, but the court concluded that those statements were not relevant because those interactions did not take place on November 7, 2003. R. 1558.

considered the two motions together. The trial court's grant of summary judgment to the State should be affirmed.

B. The trial court properly granted summary judgment to the State because the State neither acted with deliberate indifference to Jackson's serious medical needs nor subjected him to unnecessary abuse.

This Court should affirm the trial court's grant of summary judgment to the State because the undisputed facts establish that the State did not violate Jackson's rights under Article I, § 9 of the Utah Constitution. Article I, § 9 includes a "cruel and unusual punishment" clause, similar to the federal constitution, and an "unnecessary rigor" clause. Utah Const. art. I § 9. The Utah Supreme Court has stated that, under Article I, § 9, "[a] criminal punishment is cruel and unusual . . . if it is 'so disproportionate to the offense committed that it shock[s] the moral sense of all reasonable men as to what is right and proper under the circumstances.'" *State v. Lafferty*, 20 P.3d 342, 365 (Utah 2001) *cert. denied*, 534 U.S. 1018 (2001) (citations omitted). And, "a prisoner may not recover damages under article I, section 9 unless he shows that his injur[ies] [were] caused by a prison employee who acted with *deliberate indifference* or *inflicted unnecessary abuse* upon him." *Bott v. DeLand*, 922 P.2d 732, 740 (Utah 1996) (*rev'd on other grounds*,

Spackman v. Bd. of Educ., 2000 UT 87, 16 P.3d 533) (emphasis added).

Deliberate indifference “is a stringent standard of fault.” *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 410 (1997). The deliberate indifference standard “differentiates between inadvertent misconduct, which does not give rise to liability . . . and the ‘unnecessary and wanton infliction of pain,’ which does.” *Bott*, 922 P.2d at 740 (quoting *Estelle v. Gamble*, 429 U.S. 97, 105 (1976)); see also *Brown*, 520 U.S. at 407 (“A showing of simple or even heightened negligence will not suffice.”).

Similarly, to prevail under the unnecessary rigor clause, an inmate must show extraordinary conduct. “[S]imple negligence is not sufficient justification for a damage claim” under unnecessary rigor. *Bott*, 922 P.2d at 738. Unnecessary rigor is, instead, a “difficult standard” that few inmates will be able to meet and requires a showing of “unnecessary abuse.” *Id.* at 744. Such abuse is “needlessly harsh, degrading, or dehumanizing treatment of prisoners.” *Id.* (internal citations and quotations omitted). The alleged treatment must be “clearly excessive or deficient and unjustified.” *Id.* at 741.

Here, the trial court correctly found that the material facts were not in dispute. As identified by the court, those facts were:

[T]he plaintiff was given a certain amount of insulin. The nurse believed it was the correct amount. Even if she was wrong, she did not refuse to give it to him. The plaintiff himself refused to

take the offered insulin because he believed it was the wrong amount. The plaintiff continued to refuse insulin and food for two days until he fell and injured his eye.

R. 1559. The trial court also specifically noted the important and undisputed fact that “taking too much insulin can be dangerous to a diabetic because ‘an overdose can cause insulin shock, which can be fatal.’” R. 1557. The trial court found that it could not determine Jackson’s exact insulin prescription, but even if there were a question of fact as to the exact prescription, the question was not material because medical staff never refused to give Jackson insulin.⁷ R. 1558-59. Plaintiff has demonstrated no error in the trial court’s identification of the essential, undisputed facts.

Next, based on its determination of the essential, undisputed facts, the trial court analyzed the governing law. The court concluded that the State was entitled to judgment because the State’s actions constituted neither deliberate indifference nor unnecessary rigor. R. 1558-59; 1577. The trial court’s legal conclusion was correct and should be affirmed.

⁷ Even if Nurse Soper mistakenly read Jackson’s prescribed dosage, it was, at best, negligence, which does not rise to the level of a constitutional violation. *Bott*, 922 P.2d at 738, 740; *see also Brown*, 520 U.S. at 407. And if she intentionally gave him an inaccurate dosage, his refusal to take any insulin at all is an intervening causal event. Thus, even if there were a question of fact on the prescribed dosage, that would not preclude summary judgment for the State.

Jackson argues that the State violated his rights when prison medical staff gave him a dosage of insulin with which he disagreed. But because Jackson's denial of prescribed medication and food was self-imposed, he cannot prevail on his claim.

Several factors inform the determination whether a prison official has been deliberately indifferent in providing or withholding medical treatment. First, was the prisoner subjected to "unnecessary and wanton infliction of pain;" second, did the medical staff choose an "easier and less efficacious treatment;" third, was the medical staff refusing to treat with the knowledge of the injury; and finally, was there an intentional denial or delay in access to medication or medical treatment. *Bott*, 922 P.2d at 740 (internal citations and quotations omitted).

Jackson was not subjected to unnecessary and wanton pain. It is undisputed that Jackson is an insulin-dependent diabetic, who refused to take insulin when he disagreed with the dosage that the nurse at the morning pill line offered him. R. 1338. She did not refuse to give him insulin, she just refused to give him more than the amount allowed by the sliding scale. Jackson's medical records show that the nurses told Jackson that he could and should continue to take his insulin, but he simply refused to take any insulin unless the nurses gave him the dose he wanted. R. 1338. After

Jackson's initial refusal to take his insulin, he then refused to test his blood sugar levels or to allow the prison medical staff to do so. Jackson also then chose not to eat. R. 1338-40.

The nursing staff made every reasonable effort to convince Jackson to take his insulin and to test his blood sugar levels until he could see the doctor for evaluation. R. 1338-40 and 1552. The medical staff did not refuse to properly treat Jackson's diabetes. At no time was Jackson refused his insulin treatment. Instead, medical staff refused to provide him with the increased insulin dosage Jackson wanted to take. R. 1338.

The Utah Supreme Court has held that "a prison worker would not be liable for failing to administer unnecessary medical treatment desired by an inmate." *Id.* 740 (citing *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986)); see also *U.S. v. Bryant*, 670 F. Supp. 840, 845 (D. Minn. 1987) ("[C]ourts should defer to the expertise of prison administrators and mental health professionals.") Not only were the additional units of insulin unwarranted according to the medical prescription, allowing Jackson to take too much insulin could be very dangerous. R. 1233. An overdose of insulin can be lethal. R. 1233. Under the standards set out by the Utah Supreme Court, Jackson was not treated with deliberate indifference. Nor was he subjected to

unnecessary abuse when medical staff insisted that he take an appropriate dose of insulin.

Moreover, disagreements in appropriate treatment do not rise to the level of a constitutional violation. *Estelle v. Gamble*, 429 U.S. 97, 107 (1976); *Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803, 810 (10th Cir. 1999). In this case, Jackson and the prison medical staff agreed that he required insulin to treat his diabetes. But they disagreed over *how much* insulin he should take.

Furthermore, once Jackson refused to take the proper dose of insulin, medical staff were powerless to do anything. It is well-settled law that a functioning adult cannot be forced to take medication that he refuses. *See, e.g., Woodland v. Angus*, 820 F. Supp. 1497, 1504 (D. Utah 1993) (“Every human being of adult years and sound mind has a right to determine what shall be done with his own body”) (quoting *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125 (1914)); *see also Riggins v. Nevada*, 504 U.S. 127, 132-139 (1992) (holding that the enforced administration of medication during trial violates defendant’s Sixth and Fourteenth Amendment rights); *Washington v. Harper*, 494 U.S. 210, 229 (1990) (“The forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty”); *Riggins*, 504 U.S. at 155 (Thomas, J., dissenting) (“A state could violate *Harper* by forcibly administering *any* kind of medication.”).

Jackson claims that the State is liable for injuries he sustained as a result of his refusal to take prescribed medication. But the State cannot force a prisoner to take medication against his will. *See also Winston v. Lee*, 470 U.S. 753 (1985); *Schmerber v. California*, 384 U.S. 757, 772 (1966). Jackson chose not to take his insulin because he could not take the dose he wanted. He then refused to test his blood sugar levels, refused to eat or take any insulin. R. 1338-40. Jackson, not the State, chose an “easier and less efficacious treatment” when he refused to fill out an HCR and failed to take his insulin.

Relying on *Boretti v. Wiscomb*, 930 F.2d 1150 (6th Cir. 1991), Jackson argues that the trial court erred because, by failing to give Jackson the amount of insulin that he believed was correct, Nurse Soper interfered with his prescribed treatment plan and therefore violated his rights. Appt.’s Brief at p. 40.

Jackson’s reliance on *Boretti* is misplaced. In that case, the plaintiff suffered a gunshot wound while he was an escapee. *Id.* at 1151. His treating physician prescribed a pain reliever and directed that the wound be dressed daily. When he was returned to custody, Plaintiff claimed that he complained to a nurse that he was in severe pain and that the bandages covering his wound were dirty. Allegedly, the nurse flatly refused to do anything for the plaintiff or to inform a doctor about his need for treatment. *Id.* at 1152.

Meanwhile, the plaintiff resorted to cleaning his wound with soap and water and dressing the wound with toilet paper. The *Boretti* court reversed the trial court's grant of summary judgment, holding that there was an issue of material fact about whether the nurse was deliberately indifferent to the plaintiff's medical needs. *Id.* at 1154.

The facts in *Boretti* are vastly different from the facts here. There the nurse refused to provide any type of medical attention to the plaintiff or to report his medical needs to a doctor. Jackson, on the other hand, was provided insulin and refused to take it. Then he began to refuse to test his blood sugar levels or allow any medical staff to do so. Medical staff could not treat his diabetes due to Jackson's refusal for treatment. Moreover, it is undisputed that Jackson had access to medical providers and knew how to request an appointment with the doctor if he felt that his insulin dosage was incorrect. R. 1411-51.

The State did not treat Jackson with deliberate indifference or unnecessary rigor. Any "unnecessary and wanton infliction of pain" in this case was self-inflicted. Jackson's own recalcitrance caused his injury. The trial court properly granted summary judgment to the State, and this Court should affirm the decision.

II. The Trial Court's Interlocutory Rulings and Decisions Respecting the Conduct of Litigation Should Be Affirmed.

A. This Court Should Affirm the Denial of Jackson's GRAMA Request.

Jackson argues that the trial court violated his federal constitutional rights under the Seventh Amendment and his state constitutional rights under Article I, § 9 by denying his GRAMA request for Nurse Soper's home address.⁸ The claim fails on several grounds.

First, appellate courts refuse to hear arguments made for the first time on appeal. *E.g., Espinal v. Salt Lake City Bd. of Educ.*, 797 P.2d 412, 413 (Utah 1990); *State v. Archambeau*, 820 P.2d 920, 922 (UT App. 1991). The rule applies equally to constitutional questions. *State v. Anderson*, 789 P.2d 27, 29 (Utah 1990); *Archambeau*, 820 P.2d at 922. Jackson neither argued nor properly preserved those issues before the trial court and cannot raise them now. An issue is properly raised in the trial court if it: 1) was raised in a timely fashion; 2) was specifically raised; and 3) was supported by evidence or legal authority. *Hatch v. Davis*, 2004 UT App. 378, ¶ 56, 102 P.3d 744.

⁸ The State argued that Jackson's petition for judicial review under GRAMA, could not be filed in Jackson's civil rights lawsuit, but instead had to be filed as a separate petition. R. 1188-90. But the trial court examined the issue on the merits.

Here, Jackson argued that the Department of Corrections improperly denied his GRAMA request, but never argued that the denial violated either the Seventh Amendment or Article I, § 9. Jackson failed to preserve the issues. Moreover, Jackson fails to argue that plain error or exceptional circumstances excuse his failure to raise the issue below,⁹ and he has now waived that opportunity. *Brown v. Glover*, 2000 UT 89, ¶ 23, 16 P.3d 540 (arguments not presented in the opening brief are waived and will not be considered by the appellate court). Because Jackson raises the issues for the first time on appeal, this Court should refuse to hear them.

Second, and closely related, Jackson fails to brief how the trial court erred in its review of the GRAMA request. GRAMA allows disclosure of private, protected, or controlled records if the court determines that the “interest favoring access outweighs the interest favoring restriction to access.” Utah Code Ann. 63-2-404 (8)(a) (West 2004). The trial court

⁹ Jackson’s brief fails to provide the Court with the proper standards of review required by Utah R. App. P. 24(a)(5). And it fails to provide the Court with citations “to the record showing that [each] issue was preserved in the trial court” or “a statement of the grounds for seeking review of an issue not preserved in the trial court.” Utah R. App. P. 24(a)(5) (A), (B). That alone is sufficient grounds for this Court to assume the correctness of the trial court’s decision and affirm the trial court. *E.g.*, *State v. Green*, 2004 UT 76, ¶ 15, 99 P.3d 820; *Koulis v. Standard Oil Co.*, 746 P.2d 1182, 1184 (UT App. 1987).

examined the competing policies of the public's right to access to information concerning the public's business and the right to privacy to personal data that is collected by the government. R. 1552. The trial court concluded that the right to privacy outweighed Jackson's interests. The court explained the balancing of interests and the need for protecting prison employees from having personal information disclosed:

A former government employee is entitled to have assurance that his or her personal information will not be released. This applies especially to employees who work within high-risk facilities such as prisons. *A prison employee's personal information must be protected from access by inmates* the employee knew and encountered in the course of employment.

R. 1552. (Emphasis added). The court found it significant that Jackson's interest was not to obtain information regarding the "conduct of the public's business but to obtain the home address of a former governmental employee in order to sue her." R. 1552-53.

Jackson fails to show how the trial court erred in balancing the competing interests. That failure alone is enough for this Court to affirm the trial court. *Dep't of Human Servs. v. Schwartz*, 2003 UT App. 406, *1. (per curiam) (pro se party who failed to brief how the trial court erred in the balancing of interests favoring and opposing disclosure of private information waived the argument); *see also Glover*, 2000 UT 89 at ¶ 23; *State v. Green*,

2004 UT 76, ¶ 15, 99 P.3d 820; *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) *Koulis v. Standard Oil Co.*, 746 P.2d 1182, 1185 (UT App. 1987); *Burns v. Summerhays*, 927 P.2d 197, 199 (UT App. 1996).

Third, denial of Jackson's GRAMA request violates neither the Seventh Amendment nor Article I, § 9, and even if the trial court should have ordered the State to provide Jackson with Nurse Soper's address, the error is harmless. The Seventh Amendment has never been interpreted in a rigid manner. Many procedural devices developed after 1791 and that have diminished the jury's historic domain have been found not to violate the Seventh Amendment. *Parlane Hosiery Co., Inc., v. Shore*, 439 U.S. 322, 337 (1979); *e.g.*, *Galloway v. U.S.*, 319 U.S. 372, 388-93 (1943) (directed verdict does not violate Seventh Amendment); *Fidelity & Deposit Co. v. U.S.*, 187 U.S. 315, 319-21 (1902) (summary judgment does not violate Seventh Amendment). The amendment does not provide the right to sue a particular individual.

Similarly, Article I, § 9 does not provide the right to sue a particular defendant. Article I, § 9 rights are not unduly burdened by GRAMA because GRAMA does not provide immunity from suit; it governs the disclosure of government records. Jackson had the opportunity to vindicate his Article I, § 9 rights. His claims against the State and those against Nurse Soper were

identical and based on identical facts. The trial court examined the claims on the merits and concluded that there was no state constitutional violation. Thus, even if the court should have ordered the State to provide Jackson with Soper's address, for purposes of service of process, it was harmless error.

B. The trial court did not abuse its discretion when it allowed the State to file a *Martinez* Report.

Appellate courts grant “[a] trial judge . . . broad discretion in determining how a [case] shall proceed in his or her courtroom.” *Hartford Leasing Corp. v. State*, 888 P.2d 694, 702 (UT App. 1994) (alteration in original); *Tschaggeny v. Millbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615; *Univ. of Utah v. Indus. Comm’n*, 736 P.2d 630, 633 (Utah 1987); *see also* Utah Code Ann. § 78-7-5(3) (West 2004) (court has authority to “provide for the orderly conduct of proceedings before it or its officers.”) (now codified as 78A-2-201). In this case, the trial court did not abuse its discretion when it allowed the State to file a *Martinez* report.

A *Martinez* report is a document that a state department of corrections typically files when an inmate has sued either the department or one of its employees alleging constitutional violations. *Martinez v. Aaron*, 570 F.2d 317, 319 (10th Cir. 1978). In addition to helping the court determine if it has

jurisdiction to hear the matter, the report creates an administrative record that is sufficient for the court to determine whether there are any factual or legal bases for the inmate's claims. *E.g., Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991); *Northern v. Jackson*, 973 F.2d 1518, 1521 (10th Cir. 1992).

The State asked for permission to file a *Martinez* report, and Jackson opposed the motion, arguing that the report allowed the State to oppose his motion for summary judgment out of time. But the trial court had already ruled that the State could respond to all of Jackson's claims at one time, after Jackson filed his supplement to the pleadings and his second amended complaint. The court made that ruling before the State requested leave to file the report. R. 786; 886-89; 1550. In addition, the report provided the court and Jackson with the medical records that were crucial to the determination of Jackson's claims. R. 1551 and 1577. Jackson never took advantage of his opportunity to cross-move for summary judgment with the benefit of the medical records, nor did he try to create a material issue of fact in response to the State's facts with those records. Jackson suffered no prejudice because ultimately, the trial court did consider his summary judgment motion on the merits. And the trial court concluded that the facts that Jackson presented in support of the motion failed to show Jackson was entitled to judgment and

failed to genuinely dispute the facts offered by the state. The trial court did not abuse its discretion when it allowed the State to file the report.

C. The trial court did not abuse its discretion when it denied Jackson's Motion to Compel.

The trial court is “granted broad latitude in handling discovery matters.” *Cannon v. Salt Lake Reg'l Med. Ctr.*, 2005 UT App. 352, ¶ 7, 121 P.3d 74. Here, the trial court denied Jackson's motion because he failed to specify what information or materials he wanted the court to order the State to give him. R. 1551 and 1059-61. The trial court was well within its discretion to deny the motion because it “could not” order any relief [when] it is not clear which documents the defendant should be compelled to produce. R. 1551.

On appeal, Jackson provides this Court with examples of some of the documents he wanted the State to provide. But this Court should not evaluate the discovery requests because they were not made to the trial court. The trial court should have had the opportunity, in the first instance, to analyze the issue. *See, e.g., Searle v. Searle*, 2001 UT App. 367, ¶ 17, 38 P.3d 307. The issue was not properly preserved because Jackson did not specifically raise it before the trial court. *Hatch*, 2004 UT App. 378 at ¶ 56; *State v. Maguire*, 1999

UT App. 45, ¶ 6, 975 P.2d 476. Because Jackson's motion did not properly preserve the issue, this Court cannot rule on it. Thus, this Court should find that trial court's denial of Jackson's motion to compel was not an abuse of discretion.

D. This Court has already dismissed Jackson's appeal from the denial of his *Motion for Reconsideration*.

This Court has already concluded that the trial court did not abuse its discretion when it denied Jackson's post-judgment motion for reconsideration. *Jackson v. State of Utah*, 2008 UT App. 18 (per curiam). That ruling controls here.

In addition, Jackson's supplement to the brief and his request that this Court examine the other claims addressed in the *Martinez* report should be disregarded. Jackson has not properly argued the issues in his opening brief. This Court consistently refuses to examine issues that have not been properly briefed. *See, e.g., Glover*, 2000 UT 89 at ¶ 23; *Green*, 2004 UT 76 at ¶ 15; *Thomas*, 961 P.2d at 305; *Burns*, 927 P.2d at 199.

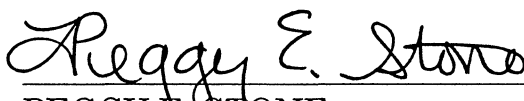
CONCLUSION

This Court should affirm the trial court. The State established that the material facts were undisputed and that under the controlling law, it was entitled to judgment. Prison medical staff were not deliberately indifferent to Jackson's serious medical needs, nor did they treat him with unnecessary rigor.

The trial court's interlocutory rulings and decisions respecting the conduct of litigation are likewise firm. Jackson failed to raise his constitutional challenges to the denial of his GRAMA request to the trial court, and he is barred from making those arguments here. Finally, the trial court did not abuse its discretion when it allowed the State to file a *Martinez* report or when it denied Jackson's motion to compel. In sum, this Court should affirm the trial court in all respects.

DATED this 27th day of January, 2008.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

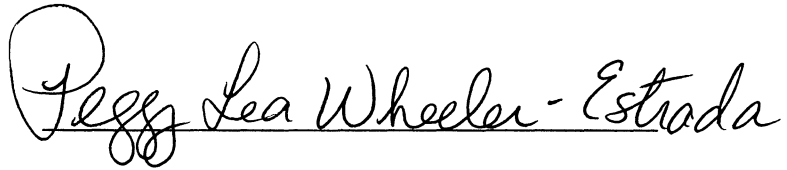


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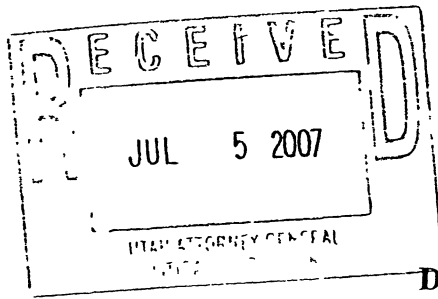
CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of February 2008, I caused to be served by U.S. Mail two true and correct copies of the foregoing, **STATE OF UTAH'S BRIEF**, to the following:

Lawrence M. Jackson, #28879
Oquirrh III - 210 - B
Utah State Prison
PO Box 250
Draper, UT 84020

Peggy Lea Wheeler-Estrada

ADDENDUM A



FILED
SANPETE COUNTY CLERK
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SANDY TOWNE
SANPETE COUNTY CLERK
BY _____ DEPUTY

**DISTRICT COURT, STATE OF UTAH
COUNTY OF SANPETE**

160 North Main, P.O. Box 100
Manti, Utah 84642

Telephone (435) 835-2131 Facsimile (435) 835-2135

LAWRENCE M. JACKSON,

Plaintiff,

vs.

STATE OF UTAH, et. al.,

Defendants.

MEMORANDUM DECISION

Case No. **040600383**

Assigned Judge: **Wallace A. Lee**

INTRODUCTION

On 4 May 2007, the plaintiff filed a Notice to Submit for Decision. The plaintiff submitted the following motions for a decision: (1) Plaintiff's Motion to Strike Defendants' Joint Motion and Stipulation allegedly filed on 2 January 2007; (2) Motion to Compel Discovery allegedly filed on 2 January 2007; (3) Supplemental Pleadings filed on January 16, 2007; (4) Motion for an Order Compelling Discovery filed on 1 March 2007; (4) Petition for Judicial Review of Denial of GRAMA Records Request Appeal filed on 12 April 2007; and (5) Motion for Summary Judgment filed on 8 June 2006.

On 15 March 2007, the defendant submitted a request to file a *Martinez* Report. This request was granted on 28 March 2007. The defendant filed its *Martinez* Report on 1 June 2007. The defendant asks the Court to consider this report as a motion for summary judgment. The plaintiff did not respond to the *Martinez* Report, and the time to do so has expired.

The Court considers all of the above motions including the defendant's *Martinez* Report at this time.

DECISION

The defendants' Motion for Summary Judgment (*Martinez* Report) should be granted. The plaintiff's Motion for Summary Judgment should be denied. The plaintiff's Motion to Strike Defendants' Joint Motion and Stipulation should be denied. The plaintiff's Motion to Compel Discovery and Motion for an Order Compelling Discovery should both be denied. The plaintiff's Supplemental Pleadings should not be considered because they are properly framed before the Court as a motion. The plaintiff's Petition for Judicial Review of Denial of GRAMA Records Request Appeal should be denied.

ANALYSIS

1. Plaintiff's Motion to Strike Defendants' Joint Motion and Stipulation

This Motion has not been filed with the Court. The Court was unable to locate it in the file. As nearly as the Court can tell the defendant received the Motion and responded to it. The defendant's response is in the file dated 25 January 2007.

In the file, there is also a letter dated 4 December 2006 wherein the plaintiff explains his understanding of the stipulation reached with the defendant. In the letter, the plaintiff explains his main concern is that by entering into the stipulation he may have inadvertently set aside his

Motion for Summary Judgment filed on 8 June 2006.

The stipulation was reached on 17 November 2006. In the stipulation, the parties agreed to allow the plaintiff to file supplemental pleadings. This agreement has since become moot because on 13 December 2006 the Court granted the plaintiff's Motion to Supplement Pleadings. The remainder of the stipulation concerns the plaintiff's Motion for Summary Judgment. The parties agreed the defendant was not required to respond to this Motion. The defendant also agreed to provide additional discovery materials. Either of the parties could then move for summary judgment. Again, it appears the plaintiff's main concern is that his Motion for Summary Judgment would not be considered because of this stipulation.

The Court does not find that the parties agreed to set aside the plaintiff's Motion for Summary Judgment. The Court recognizes the Motion for Summary Judgment is still pending before the Court and will be considered later in this decision.

The plaintiff's Motion to Strike Defendants' Joint Motion and Stipulation is denied because some of the issues agreed upon have become moot and there is no disagreement on other issues.

2. Motion to Compel Discovery and Motion for an Order Compelling Discovery

The Court is unable to locate the plaintiff's Motion to Compel Discovery in the file. However, there is a motion titled "Motion for an Order Compelling Discovery" in the file. This

latter Motion does not specify what information or materials the plaintiff is seeking. The Motion refers to the Second Request for Production which the defendant failed to answer. The Court cannot order any relief because it is not clear which documents the defendant should be compelled to produce.

Additionally, the State has filed a *Martinez* Report. This report contains all the information and materials the defendant has in its possession. The report was intended to satisfy the plaintiff's discovery requests.

Therefore, the plaintiff's Motion to Compel Discovery and Motion for an Order Compelling Discovery are denied.

3. Supplemental Pleadings

The document entitled Supplemental Pleadings is not a motion. It is intended to supplement the Complaint. Any issues concerning this document are not properly framed and presented to the Court for decision.

4. Petition for Judicial Review of Denial of GRAMA Records Request Appeal

The plaintiff sought to obtain information concerning Lisa Soper's physical address from the State of Utah. The plaintiff filed a GRAMA request with the Utah Department of Corrections, which was denied. He appealed this denial to the Executive Office of the Utah Department of Corrections. The plaintiff's request was again denied based on Utah Code

Annotated, Section 63-2-302(1)(f).

Section 63-2-302(1)(f) classifies employment records of former state employees that disclose the home address of such an employee as private. It appears the plaintiff's records request was denied because he asked for information classified as private.

This Court has authority to review this decision and order the government to disclose otherwise protected information if the Court finds "the interest favoring access outweighs the interest favoring restriction of access." Utah Code Annotated, Section 63-2-404(8)(a).

The Court has examined the policies underlying this statute. Section 63-2-102(1) explains the intent of the Legislature in enacting the Government Records Access and Management Act. The purpose of this Act is to protect two important constitutional rights: (1) the right of the public to access information concerning the conduct of the public's business and (2) the right of privacy in relation to personal data collected by the government.

The Court finds that in this case the right of privacy outweighs the plaintiff's interests. A former government employee is entitled to have assurance that his or her personal information will not be released. This applies especially to employees who work within high-risk facilities such as prisons. A prison employee's personal information must be protected from access by inmates the employee knew and encountered in the course of employment.

In addition, the plaintiff's interest here is not to obtain information regarding the conduct

of the public's business but to obtain the home address of a former governmental employee in order to sue her.

On this basis, the plaintiff's Petition for Judicial Review of Denial of GRAMA Records Request Appeal is denied.

5. State's Martinez Report and Plaintiff's Motion for Summary Judgment

_____The Court considers these two motions together to determine whether there are any genuine issues of material fact which would preclude granting summary judgment in this case. See Utah Rules of Civil Procedure, Rule 56(c). The Court finds the defendants have adequately supported their position with appropriate affidavits. The plaintiff has failed to present affidavits to counter the defendant's affidavits and to raise genuine issues of material fact. Therefore, the Court finds the facts essentially undisputed and concludes that there is no genuine issue of material fact.

The plaintiff's claims against the State of Utah are based on Utah State Constitution, Article 1 §9 and Title II of the Americans with Disability Act of 1990 ("ADA"), 42 U.S.C.S. §12131 *et seq.* The Court proceeds with analysis of each.

A. Utah State Constitution, Article 1 §9 claims

Article 1 §9 of Utah's Constitution provides, in pertinent part that "[p]ersons arrested or imprisoned shall not be treated with unnecessary rigor." To prevail on his claims for monetary

damages, the plaintiff must show a flagrant violation of this constitutional right. See *Spackman v. Board of Education*, 16 P.3d 533, 538-39 (Utah 2000). This means he must show that prison employee(s) acted with deliberate indifference or inflicted unnecessary abuse upon him. See *Bott v. Deland*, 922 P.2d 732, 740 (Utah 1996).

Deliberate indifference is further defined as “unnecessary and wanton infliction of pain” as opposed to inadvertent misconduct. *Id.* Some examples of deliberate indifference include: choosing easier and less efficacious treatment or intentionally denying or delaying access to medical care. *Id.* Unnecessary abuse is defined as “needlessly harsh, degrading, or dehumanizing” treatment. *Id.* With this standard in mind, the Court examines the facts of this case.

1. Refusal to Take Insulin and Subsequent Injury

The plaintiff’s first claim is based on the events of 7 November through 9 November of 2003. On 7 November, the plaintiff refused to take insulin at the pill line because he disagreed with a nurse about the amount of insulin prescribed for him. On 8 November, the plaintiff refused to take any insulin and stopped eating. On 9 November, the plaintiff fell while in his cell and struck a metal stool causing injury to his face. See Plaintiff’s Amended Complaint for Medical Malpractice and Constitutional Rights Violations filed on 16 January 2007.

The defendant submitted the Affidavit of Renee Springman, Records Manager for Clinical Services at the Utah State Prison. This Affidavit contains copies of the plaintiff's medical records. The Court examined entries made by the prison's medical staff on 7 November through 9 November of 2003.

On 7 November 2003 at 7:59 a.m. the following entry was made by Lisa Soper:

Refused to take insulin when advised he can only take the prescribed amount of insulin plus sliding scale. He wanted to take 15 units reg./ 30 units NPH and has 7 units reg./ 30 units NPH ordered. On sliding scale he could only take 4 extra units of regular (total of 11 units reg).

Affidavit of Renee Springman, Jackson 311.

The affidavits of Cathy Davis and Dr. Richard Garden explain the term "sliding scale." An inmate's physician prescribes a dosage of insulin. Garden Affidavit, ¶7. A dosage includes two amounts: one for regular insulin and one for "NPH" insulin. *Id.* The "NPH" insulin amount remains constant unless changed by a physician. Davis Affidavit, ¶¶14, 16. The regular insulin amount is modified or adjusted depending on the inmate's blood sugar level as individually tested by the inmate before the inmate appears at the pill line. *Id.* ¶¶7, 8. The nurse on duty follows the sliding scale to determine the correct regular dose of insulin depending on the

inmate's blood sugar level. Id. ¶14. The sliding scale is attached to the Davis Affidavit.

On 7 November 2003, at 12:55 p.m, Physician's Assistant, Barbara Hennagir, made the following entry:

... RN Soper reports to me that Mr. Lawrence¹ is taking sliding scale insulin at a higher dose than ordered. He is to be allowed only what is ordered, if he feels he needs more insulin, he needs to put in HCR² and see Dr. Burnham to explain why he needs more.

Id., Jackson 312.

The next entry on 7 November 2003 was made at 3:29 p.m. by Angelica Tuft. Id. She wrote that Mr. Jackson refused to check his blood sugar and refused to take any insulin. Id. She noted that Jackson did not have any insulin all day and argued that when he was housed in Draper he was allowed to take a different dose. Id.

The first entry on the next day (8 November 2003) was made at 6:57 a.m. by Lisa Soper. She wrote: "Inmate came to pill line this am. Color is grayish. Adamantly refusing to test his blood sugar and take insulin." Id. The plaintiff also refused to take insulin at the afternoon pill

¹It is clear that though Ms. Hennagir refers to "Mr. Lawrence" in this entry, she is actually taking about the plaintiff because this entry is included in the defendant's medical records. The plaintiff's given name is Lawrence.

²HCR stands for health care request

line on that day. *Id.*, Jackson 313.

The entry on 9 November 2003 at 3:19 a.m. describes the incident when plaintiff fell and injured his face. *Id.*

The Court also found the following entry concerning the plaintiff's prescribed amount of insulin. This entry was made on 5 February 2004 by Dr. Burnham. He wrote: "[n]o change on the 30 and 15 am, and 20 and 10 pm dosage." Affidavit of Renee Springman, Jackson 1528.

Another important fact for purposes of this analysis is found in in Dr. Garden's Affidavit. Dr. Garden testified that taking too much insulin can be dangerous to a diabetic because "an overdose can cause insulin shock, which can be fatal." ¶11.

The plaintiff filed several affidavits in support of his Motion for Summary Judgment: (1) Affidavit in Support of Motion for Summary Judgment filed on 8 June 2006 concurrently with the Motion for Summary Judgment; (2) Affidavit of Russell Allen; (3) Affidavit of Paul D. Nelson; (4) Affidavit of James Stills; and (5) Affidavit of Percy Wilder³. There are really only two (2) important facts contained in these affidavits: (1) there is a court order directing prison staff to provide insulin and regular foodstuffs to the plaintiff. Affidavit in Support of Motion for Summary Judgment, ¶5; and (2) the plaintiff discontinued his use of insulin and stopped eating when he was offered what he considered an improper dose of insulin. *Id.*, ¶6.

³ Affidavits (2) through (5) were filed on 9 March 2007

The rest of the affidavits simply do not supply any additional facts but merely corroborate the plaintiff's testimony that the plaintiff was not taking insulin and was not eating⁴ at the time he fell and was injured.

The Affidavit of Paul D. Nelson describes Lisa's personality and the environment that she created. See ¶¶10-13. Mr. Nelson describes several encounters that he personally had with Lisa. *Id.* However, he does not supply any facts concerning Lisa's behavior at the pill line where the plaintiff refused to take insulin. Therefore, this affidavit is not helpful in reconstructing the events of 7 November 2003.

Thus, the facts are essentially undisputed about what happened on 7 November 2003. There is no genuine issue of material fact. It is established that the plaintiff was given a certain amount of insulin. The nurse believed it was the correct amount. Even if she was wrong, she did not refuse to give it to him. The plaintiff himself refused to take the offered insulin because he believed it was the wrong amount. The plaintiff continued to refuse insulin and food for two days until he fell and injured his eye.

It is impossible for the Court to determine which dose was the right dose. The only entry by Dr. Burnham concerning the prescribed dose is the entry dated 5 February 2004, which was several months after the injury. It is not clear when the plaintiff's dosage was originally

⁴ Affidavit of Russell Allen, ¶¶c, d, Affidavit of James Stills, ¶¶b, c; Affidavit of Percy Wilder, ¶¶c, d.

prescribed. However, this issue does not create a genuine issue of material fact because even if the nurse offered the plaintiff an incorrect dose, she did not refuse him medical treatment. Indeed, the plaintiff made a personal decision and determined to refuse to take the medication.

With no genuine issue of material fact, the Court must next consider whether the acts by the defendants amount to “unnecessary and wanton infliction of pain.” The Court finds they do not. There is no proof that the defendants acted with deliberate indifference to the plaintiff’s condition. To the contrary, entries on 8 November 2003 show the medical staff attempted to persuade the plaintiff to take his insulin. Of course, they could not force him to take it. In fact, the Court finds the prison staff acted in the plaintiff’s best interest by not giving him the higher dose of insulin he requested because it might have been dangerous to him.

2. **Delay in Medical Treatment of the Wound**

The plaintiff next claims that after he sustained the injury to his eye, medical staff deliberately delayed access to appropriate medical care. The basis for this claim is the Operative Report prepared by Dr. Bhupendra Patel who performed surgery on the plaintiff. The Report is a part of the Affidavit of Renee Springman numbered as Jackson 1569. It was prepared on 19 March 2004, the day the surgery was done.

Dr. Patel wrote that the patient understands that “double vision cannot be completely relieved because of the length of time that has passed between the injury and the surgery.” The

plaintiff claims the surgery was intentionally delayed by the State.

The plaintiff also claims he was told by an ophthalmologist at the Moran Eye Center that prison officials waited too long to bring the plaintiff for treatment and that as a result, he would have permanent impairment of his injured eye. Affidavit in Support of Motion for Summary Judgment, ¶10.

The affidavits of Russell Allen and Percy Wilder corroborate the plaintiff's claim that he waited several months to have surgery and that two of his appointments with his ophthalmologist were cancelled. Affidavit of Russell Allen, ¶¶ g,h; Affidavit of Percy Wilder, ¶¶ f, g.

The State submitted copies of the plaintiff's medical records to show what post-traumatic medical care the plaintiff received. These records indicate that on the date of the injury the plaintiff was admitted into the prison infirmary and the wound was treated with steri strips and ice. See Affidavit of Renee Springman, Jackson 313. The wound was checked approximately every two hours. *Id.*, Jackson 315-18. No apparent drainage was noted. *Id.*, Jackson 315, 317, 323.

The next day, 10 November 2003, the plaintiff was seen by Dr. Burnham. *Id.*, Jackson 324. Dr. Burnham examined the wound and ordered the continued use of ice. *Id.*

On 11 November 2003, at the pill line, the plaintiff complained of a headache and asked to see the physician's assistant. *Id.*, Jackson 325. The plaintiff was directed to fill out a health

care request. Id. He was given Tylenol and advised to use ice. Id. The plaintiff left the pill line without filling out a health care request. Id. It is prison policy for inmates to fill out health care requests before they can be scheduled to see a medical provider. See Affidavit of Lael Askew, Jackson 2736. The plaintiff was familiar with this policy. Id., Jackson 2718.

The plaintiff filled out a health care request on 15 November 2003. Affidavit of Renee Springman, Jackson 329. He complained that his eye was swollen and uncomfortable and was given eye drops. Id.

On 17 November 2003, the plaintiff was seen by Dr. Burnham. Id., Jackson 330-31. Dr. Burnham noted redness in the left eye, but no corneal abrasion or anterior chamber bleeding. Id. He prescribed “naphazoline ophth” drops to ease swelling and pain in the eye. Id.; Dr. Garden’s Affidavit, ¶13.

On 1 December 2003, the plaintiff filled out another health care request. Affidavit of Renee Springman, Jackson 343. He complained about having problems with his left eye. Id. On 4 December 2003, the plaintiff was seen by Barbara Hennagir. Id., Jackson 346. The plaintiff complained he was having problems with his vision. Id. Ms. Hennagir thought it was a temporary muscle or nerve injury that should heal with time, but told the plaintiff he should also be seen by the doctor. Id., Jackson 347.

On 15 December 2003, the plaintiff was seen by Ms. Hennagir again to receive clearance

for a cervical pillow. *Id.*, Jackson 357. At the appointment, he complained about “nerve pain” in his face. *Id.*

On 17 December 2003, the plaintiff was seen at the Moran Eye Center for glaucoma and possible facial fracture. *Id.*, Jackson 359. The specialist at the Moran Eye Center thought there was a fracture and recommended CT scans and surgery. *Id.*, Jackson 360. CT scans were ordered by Dr. Burnham on 19 December 2003. The scans were performed on 29 December 2003. *Id.*, Jackson 370.

On 5 February 2004, the plaintiff was seen by Dr. Burnham. *Id.*, Jackson 404. Dr. Burnham reviewed the scans and discovered they were mistakenly done on the sinuses. *Id.*, Jackson 405. The scans were reordered. *Id.* The surgery was performed on 19 March 2004. *Id.*, Jackson 442.

The Court finds there is no genuine issue of material fact. The facts, which are not disputed by the plaintiff, clearly show that the prison medical staff made every effort to care for plaintiff’s injury. If there were some medical mistakes made, mere medical malpractice does not qualify for “unnecessary and wanton infliction of pain.” See *Bott* at 740. The Court finds no deliberate delay or refusal to provide plaintiff with necessary medical care.

3. Delay in Providing Plaintiff Snack Boxes When he was Temporarily Housed at Uintah-IV in Draper

The plaintiff filed a supplemental claim alleging he was delayed his diabetic snack boxes

for several hours until approximately 12:30 a.m when he was temporarily housed at Uintah-IV in Draper pending his appointment at the Moran Eye Center in April of 2006.

The plaintiff claims he called the control room several times and asked officers on “skin count” about diabetic snack boxes. He received his snack boxes every day but he received them late. On one day (13 April 2006), he suffered hypoglycemic reaction because he did not receive his snack box on time. He also claims he received a nutritionally inadequate supper that day. See Amended Complaint for Medical Malpractice and Constitutional Rights Violations filed on 16 January 2007.

The State submitted the Affidavit of Sergeant Thomas Laursen, an officer employed at Uintah-IV. He testified about the procedure for obtaining a diabetic snack box for someone temporarily housed at Uintah-IV. He indicated that officers on “skin counts” would not be able to accommodate such requests immediately. Laursen’s Affidavit, ¶¶16. These officers might also not remember the request at the time they finish with the count. *Id.* It is the responsibility of an inmate with a special dietary need to inform the housing officer about the need. Affidavit of Peggy Monson, ¶7. The officer then checks to see if there is a medical order on file for a diabetic snack box. Laursen’s Affidavit, ¶14.

Uintah-IV does not receive any extra diabetic snack boxes. *Id.*, ¶15. Thus, upon receiving an inmate request for a snack box, an officer would have to go to Uintah-III to obtain it. *Id.* If an

officer has other inmates or incidents to attend to, he may not be able to immediately go to Uintah-III to obtain the box. *Id.*, ¶17.

There is no genuine issue of material fact on this issue. The question here, again, is whether, based on these facts, the prison staff acted with deliberate indifference and inflicted unnecessary and wanton pain on the plaintiff. The Court concludes the prison staff made reasonable efforts to accommodate the plaintiff's needs. The delay may have been caused by the plaintiff's temporary status at Uintah-IV and the necessity to go to Uintah-III to obtain the snack boxes. The Court finds no flagrant violation of the plaintiff's constitutional right under Utah State Constitution, Article I, §9.

4. Restraints

The plaintiff claims that on 13 April 2006, he was transported from the prison facility in Draper to the Moran Eye Center. Officer Austin Smith was responsible for the transportation. Officer Smith placed handcuffs on the plaintiff. The plaintiff felt the handcuffs were too tight. He also told Officer Smith that he had a double-cuff clearance because of injuries to his shoulder. Officer Smith refused to adjust his handcuffs.

The plaintiff was placed in a prison vehicle. When the plaintiff and Officer Smith arrived at the North Gate of the prison, Officer Smith went asked Sergeant Katie Healy about the handcuffs. Sgt. Healy checked for double-cuff clearance on the computer and found none.

However, the cuffs were adjusted so the plaintiff's palms faced each other.⁵ Officer Smith also added a second set of cuffs.

The plaintiff claims these adjustments did not relieve his pain and discomfort. When he arrived at the Moran Eye Center to see the doctor, he felt he could not handle the pain any more and asked to be transported back to the prison rather than proceed with his appointment. The plaintiff further claims that Officer Smith was indifferent to his complaints about the pain and did nothing to adjust the cuffs. Finally, the plaintiff alleges Officer Smith made several unnecessary stops on the way back to the prison to prolong the plaintiff's pain and suffering. These facts are taken from the plaintiff's Supplemental Pleadings filed on 16 January 2007.

The State submitted the Affidavit of Officer Austin Smith and the Affidavit of Sergeant Katie Healy. Both of these affiants agree that at the North Gate of the prison, they tried to deal with the plaintiff's reported discomfort by adjusting the handcuffs. According to both affiants, the cuffs were adjusted so the plaintiff's palms were facing each other and they were checked for tightness. Affidavit of Austin Smith, ¶¶18-20; Affidavit of Katie Healy, ¶¶6, 8, 9. Further, Officer Smith reportedly used two sets of cuffs to accommodate the plaintiff's large size in order to make him more comfortable. Affidavit of Austin Smith, ¶12; Affidavit of Katie Healy, ¶7.

Officer Smith testified that according to the transportation order⁵, he was required to have

⁵ Transportation order is attached to Affidavit of Austin Smith

the plaintiff fully restrained. Affidavit of Austin Smith, ¶10. Attached to the Affidavit of Austin Smith are copies of several pages from the Institutional Operations Division Manual concerning transportation of inmates. Provision FFr16/03.01 (A) reads: “during the transportation of inmates the primary goal is to ensure adequate security to prevent escapes and to prevent harm to officers and other persons.”

Officer Smith also testified that all the stops he made on the way back to prison were necessary stops. *Id.*, ¶¶28-30.

Again, the plaintiff has failed to demonstrate any genuine issue of material fact. Based on these undisputed facts, the Court concludes the plaintiff was not treated with unnecessary rigor. The need for restraints in this situation was of primary concern because plaintiff was taken to a public hospital. The Court finds it was reasonable for Officer Smith not to tamper with or adjust the restraints while at the hospital.

Officer Smith and Sergeant Healy made every effort to accommodate plaintiff within the prison policy guidelines. The cuffs were adjusted and checked; a second pair of cuffs was used. This holding is in accord with *Samuel v. First Correctional Medical*, 463 F. Supp.2d 488 (D. Del. 2006), where a prisoner sued for injuries arising out of restraint during a dental appointment. The prisoner in that case sued under Federal Constitution’s Eight Amendment which is substantially similar to Utah State Constitution, Article I, §9.

5. Conclusion

The defendants' Motion for Summary Judgment is granted on all Utah State Constitution, Article I, §9 claims. The plaintiff's Motion for Summary Judgment is denied because there is no genuine issue of material fact and the plaintiff is not entitled to a judgment as a matter of law that the defendants treated him with "unnecessary rigor."

B. ADA Claims

The plaintiff brings his claims of refusal to provide the correct amount of insulin and delay in medical care after the injury under the ADA. To succeed, he must show that he was excluded by the State from certain services or activities because of his disabilities. Claimants are expressly prohibited from using the ADA as an avenue to assert medical malpractice claims. *Fitzgerald v. Corr. Corp. Of Am.*, 403 F.3d 1134, 1144 (10th Cir. 2005).

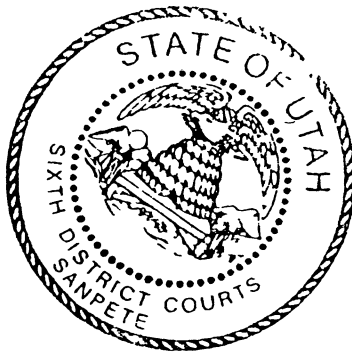
The plaintiff's claims in this case are in the nature of medical malpractice. Therefore, they do not fall under the ADA. On this basis, the defendants' Motion for Summary Judgment on the plaintiff's ADA claims is also granted.

CONCLUSION

The defendants' Motion for Summary Judgment (*Martinez* Report) is granted. Counsel for the defendant is appointed to draft an appropriate implementing order. The plaintiff's Motion for Summary Judgment is denied. The plaintiff's Motion to Strike Defendant's Joint Motion and

Stipulation is denied. The plaintiff's Motion to Compel Discovery and Motion for an Order Compelling Discovery are denied. The plaintiff's Supplemental Pleadings are not be considered because this document is not a motion and not properly framed for decision. The plaintiff's Petition for Judicial Review of Denial of GRAMA Records Request Appeal filed on 12 April 2007 is likewise denied.

DATED this 3rd day of July, 2007.



Wallace A Lee

WALLACE A. LEE, Judge

Digitally signed by Wallace A Lee
DN: cn=Wallace A Lee, c=US, o=TrustID
personal certificate, ou=DST TrustID Personal
Certificate, email=wlee@email.utcourts.gov
Reason: I am approving this document
Date: 2007.07.03 11:08:07 -06'00'

CERTIFICATE OF SERVICE

On July 2, 2007, a copy of the above document was sent to the following by the method indicated:

Addressee

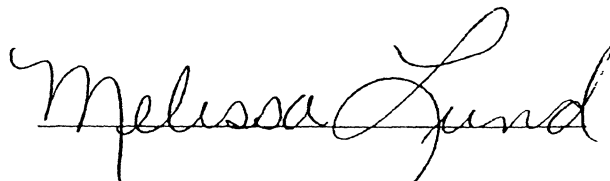
Method

☒ Lawrence M. Jackson
Inmate #28879
Utah State Prison
P.O. Box 250
Draper, Utah 84020

☒ Mail
☐ Hand delivery
☐ Fax
☐ Courthouse box

☒ Joni J. Jones
Assistant Attorney General
Mark L. Shurtleff
Utah Attorney General
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Salt Lake City, Utah 84114-0856

☒ Mail
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ADDENDUM B

COPY

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FILED
SANPETE COUNTY, UTAH
2007 AUG 16 AM 10 38
SANDY NEILL
SANPETE COUNTY CLERK
BY _____ DEPUTY

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SANPETE COUNTY
STATE OF UTAH – MANTI DIVISION

LAWRENCE M. JACKSON,	:	ORDER GRANTING DEFENDANT'S
	:	MOTION FOR SUMMARY
Plaintiff,	:	JUDGMENT
	:	
vs.	:	Case No. 040600383
	:	
STATE OF UTAH, et al.	:	Judge Wallace A. Lee
	:	
Defendants.	:	
	:	

On July 3, 2007, the Court issued a written ruling granting Defendant State of Utah's motion for summary judgment. The State based its motion on the *Martinez* report¹ it filed,

¹ A *Martinez* report is a document that a state department of corrections typically files when an inmate has sued the department or one of its employees alleging a constitutional violation. *See, e.g., Martinez v. Aaron*, 570 F.2d 317, 319 (10th Cir. 1978) (holding that report is necessary to determine "preliminary issues including those of jurisdiction"); *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991) (noting *Martinez* report is often necessary in pro se inmate cases "to develop a record sufficient [for the trial judge] to ascertain whether there are any factual or legal bases for the prisoner's claims").

which included Utah Department of Corrections' records relating to Plaintiff's claims, including Plaintiff's medical records and affidavits of Department of Corrections officers and medical personnel. In the July 3, 2007 ruling, the Court held that the State had established, by affidavit and other admissible evidence, including Plaintiff's medical records, that there was no genuine issue of material fact and that Plaintiff's claims that the State violated his rights under the Utah Constitution and under the Americans with Disabilities Act failed as a matter of law. Based upon that ruling, which is attached as Exhibit A and incorporated herein, the Court orders that the State's motion for summary judgment is granted, and Plaintiff's complaint is dismissed with prejudice.

The Court also considered in the July 3, 2007 ruling several of Plaintiff's motions, including Plaintiff's motion for summary judgment. As set forth above, the Court found that Plaintiff failed to create a material dispute as to the facts the State submitted and therefore failed to show the State was not entitled to summary judgment. In addition, the Court considered the affidavits Plaintiff submitted in support of his motion for summary judgment. The Court specifically found that those affidavits failed to support Plaintiff's claims against the State. Based upon the July 3, 2007 ruling, which is incorporated herein, the Court denies Plaintiff's motion for summary judgment.

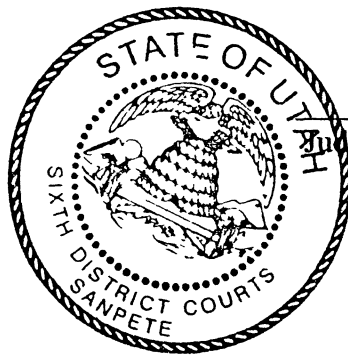
In addition, and also based upon the reasoning set forth in the July 3, 2007 ruling, the Court: (1) Denies Plaintiff's Motion to Strike Defendant's Joint Motion and Stipulation; (2) Denies Plaintiff's Motion to Compel Discovery and denies Plaintiff's Motion for an Order

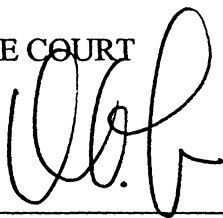
Compelling Discovery, and (3) Denies Plaintiff's Petition for Judicial Review of Denial of GRAMA Records Request.

IT IS SO ORDERED.

15 August 2007

BY THE COURT



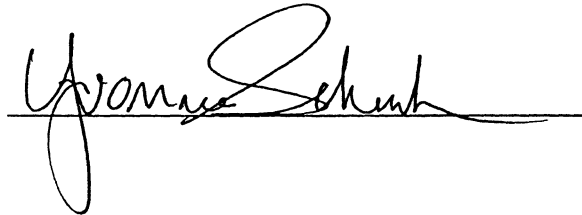


Judge Wallace A. Lee

CERTIFICATE OF SERVICE

I certify that on this 25th day of July 2007, I caused to be served by U.S. mail a true and correct copy of the foregoing **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** to the following:

Lawrence Jackson, USP 28879
Utah State Prison
P.O. Box 250
Draper, Utah 84020

A handwritten signature in black ink, appearing to read "Thomas Schenk", is written over a horizontal line.