

2001

# John Richards v. State of Utah Department of Corrections : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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|                                 |   |                      |
|---------------------------------|---|----------------------|
| JOHN RICHARDS,                  | : |                      |
| Plaintiff/Appellant,            | : |                      |
| v.                              | : | Case No. 20010987-CA |
| STATE OF UTAH DEPARTMENT OF     | : |                      |
| CORRECTIONS DIVISION OF         | : |                      |
| CORRECTIONAL INDUSTRIES, and    | : |                      |
| WASTE MANAGEMENT OF UTAH, INC., | : |                      |
| Defendants/Appellee.            | : |                      |

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**BRIEF OF DEFENDANT - APPELLEE STATE OF UTAH, DEPARTMENT OF  
CORRECTIONS, DIVISION OF CORRECTIONAL INDUSTRIES**

---

Appeal from an Order of Dismissal of the Third Judicial District Court, Salt  
Lake County, State of Utah, the Honorable L. A. Dever presiding

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**ORAL ARGUMENT AND PUBLISHED OPINION NOT  
REQUESTED BY DEFENDANT - APPELLEE**

**IN THE UTAH COURT OF APPEALS**

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| Plaintiff/Appellant,            | : |                      |
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## **LIST OF ALL PARTIES**

To the best of Defendant State of Utah, Department of Corrections Division of Correctional Industries' knowledge, all interested parties appear in the caption of this Brief.

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**IN THE UTAH COURT OF APPEALS**

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|                        |   |                      |
|------------------------|---|----------------------|
| JOHN RICHARDS,         | : |                      |
| Plaintiff - Appellant, | : |                      |
| v.                     | : | Case No. 20010987-CA |
| STATE OF UTAH, et al., | : |                      |
| Defendants - Appellee. | : |                      |

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**BRIEF OF DEFENDANT - APPELLEE STATE OF UTAH, DEPARTMENT OF  
CORRECTIONS, DIVISION OF CORRECTIONAL INDUSTRIES**

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**STATEMENT OF JURISDICTION**

This matter comes within the original jurisdiction of the Supreme Court of the State of Utah under Utah Code Ann. § 78-2-2(3)(j) (Supp. 2001). On January 22, 2002, the matter was transferred to this Court by the supreme court pursuant to Utah Code Ann. §§ 78-2-2(4) and 78-2a-3(2)(j) (Supp. 2001). R. 112.

**STATEMENT OF THE ISSUES**

1. Plaintiff's alleged injuries arose out of, are connected with, or resulted from his incarceration in the state prison. For this reason, the trial court was correct to dismiss the plaintiff's negligence claims because the State of Utah, Department of Corrections, Division of Correctional Industries (State) was entitled to immunity under Utah Code Ann. § 63-30-10(10) (Supp. 2001).

This issue was raised by the State in its motion to dismiss (R. 34-35, 40-41, 74-79) and the trial court granted this motion, in part, based upon this issue R. 90, 92-93.

**STANDARD OF REVIEW:** This matter was decided below upon the State's motion to dismiss. Because this issue raises only questions of law, the Court should give the trial courts' ruling no deference and review it under a correctness standard. Zion's First National Bank v. Fox & Co., 942 P.2d 324, 326 (Utah 1997).

2. The plaintiff's attempted cause of action directly under the federal constitution was properly dismissed because the State of Utah is immune and no such cause of action against a sovereign state exists.

This issue was raised by the State in its motion to dismiss (R. 34-35, 41-43, 80-81) and the trial court granted this motion, in part, based upon this issue. R. 90, 92-93.

**STANDARD OF REVIEW:** This matter was decided below upon the State's motion to dismiss. Because this issue raises only questions of law, the Court should give the trial courts' ruling no deference and review it under a correctness standard. Zion's First National Bank, 942 P.2d at 326.

3. The trial court was without jurisdiction to consider the plaintiff's state constitutional claim because of the plaintiff's failure to raise such claim in his notice of claim.

This issue was not raised in the trial court, but is raised for the first time on appeal.

**STANDARD OF REVIEW:** A lack of subject matter jurisdiction can be raised at any time by either party or by the court. Weiser v. Union Pacific R.R. Co., 932 P.2d 596, 597 (Utah 1997). While this issue was not raised in the trial court, this Court can affirm the decision of the trial court on this related, alternative, ground. Buehner Block Company v. UWC Associates, 752 P.2d 892, 894-95 (Utah 1988); State v. South, 924 P.2d 354, 355 n.3 (Utah 1996).

4. The plaintiff failed to allege a cause of action under the Utah Constitution for unnecessary rigor where the facts alleged in the complaint state only a claim for negligence.

This issue was raised by the State in its motion to dismiss (R. 34-35, 43-48, 81-84) and the trial court granted this motion, in part, based upon this issue. R. 90, 92-93.

**STANDARD OF REVIEW:** This matter was decided below upon the State's motion to dismiss. Because this issue raises only questions of law, the Court should give the trial courts' ruling no deference and review it under a correctness standard. Zion's First National Bank, 942 P.2d at 326.

## **DETERMINATIVE CONSTITUTIONAL PROVISIONS & STATUTES**

### **U.S. Const. amend. VIII [Bail - Punishment]**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### **Utah Const. art. I, § 9 [Excessive bail and fines - Cruel punishments.]**

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 Code Ann. § 63-30-2(4) **Definitions.** (Supp. 2001)

(4)(a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

(b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.

Utah Code Ann. § 63-30-3(1) **Immunity of governmental entities from suit.** (1997)

(1) Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

Utah Code Ann. § 63-30-10 **Waiver of immunity for injury caused by negligent act or omission of employee - Exceptions.** (Supp. 2001)

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from:

...

(10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;

## **STATEMENT OF THE CASE**

John Richards brought this action against the State and Waste Management of Utah, Inc. R. 1-10. Richards alleged that he had been seriously injured as the result of an accident that occurred while he was involved in vocational training as an inmate of the Utah State Prison. R. 3, ¶¶ 7-11. He sought recovery against the State for the alleged

negligence of its employees and for the alleged infliction of cruel and unusual punishment upon an inmate. R. 4-5, ¶¶ 14-20; 7-9, ¶¶ 30-42.

Richard's notice of claim stated only claims for negligence and violation of federal law. R. 14-15. The notice of claim did not state any intent to bring an action under Utah Const. art. I, § 9.

The State filed a motion to dismiss this action on August 6, 2001. R. 34-50. This motion was granted by the trial court. R. 90-94. In its order of November 6, 2001, the trial court, pursuant to Utah R. Civ. P. 54(b), expressly determined that there was no just reason to delay and certified the dismissal of the State as a final judgment. R. 92-93. The plaintiff filed his notice of appeal on December 5, 2001. R. 95-96.

### **STATEMENT OF RELEVANT FACTS**

"At all times material hereto, John Richards was an inmate" in the custody of the State. R. 1, ¶ 1. He "was an inmate at the Utah State Prison under the custody, care, and subject to the supervision of the Utah State Department of Corrections." R. 3, ¶ 7. At the time of his alleged accident, Richards was "engaged in a training program administered" by the State. R. 3, ¶ 8. Plaintiff alleged in his complaint that a forklift, operated by a fellow inmate, overturned onto the plaintiff causing his injuries. R. 3, ¶¶ 10-12.

Plaintiff's negligence claim against the State is based on allegations that the State failed to properly train and supervise the inmates during their participation in the training program and failed to warn the plaintiff of these dangerous conditions. R. 4, ¶¶ 15-19.

The plaintiff's constitutional claims are based upon this same allegation of a failure to properly supervise inmates in the use of a forklift that they were not properly trained to operate. R. 8, ¶¶ 34-36.

### SUMMARY OF ARGUMENT

The plaintiff alleged that he was injured when a forklift overturned in a prison training program because the inmates were inadequately supervised and trained. Plaintiff's negligence claim was properly dismissed because immunity has been retained for injuries arising out of, connected with or resulting from the incarceration of any person in any state prison. It is undisputed that the plaintiff, and the operator of the forklift, were inmates of the Utah State Prison participating in a prison program. This meets the statutory definition of "governmental function" and such immunity is not unconstitutional.

Plaintiff, admitting that his federal constitutional claim cannot be brought under section 1983, instead asks this Court to create a Bivens type federal action against the State of Utah. Bivens actions can only be brought against federal employees. Neither the government nor private corporations and citizens can be made defendants in such actions. Further, the State of Utah would be entitled to absolute sovereign immunity.

The plaintiff's notice of claim failed to identify any intention to bring a state constitutional claim. Thus the court has no jurisdiction to consider such a claim where the plaintiff has failed to strictly comply with the notice of claim requirement.



Finally, the plaintiff's claims of failure to adequately train and supervise inmates involved in a prison training program do not arise to the level of a violation of either Utah's cruel and unusual punishment or its unnecessary rigor provisions. The plaintiff, both in the trial court and on appeal, failed to present any clearly established law that would show that such negligence would violate either of these provisions.

## **ARGUMENT**

### **I. PLAINTIFF'S INJURIES AROSE OUT OF, IN CONNECTION WITH OR RESULTED FROM HIS INCARCERATION AT THE UTAH STATE PRISON**

The plaintiff's first cause of action against the State sounds in tort. R. 4-5. The State of Utah's immunity has not been waived for intentional torts. Atiya v. Salt Lake County, 852 P.2d 1007, 1011 (Utah App. 1993). The only possible waiver of immunity that might be applicable to the plaintiff's tort claim would be that found in Utah Code Ann. § 63-30-10 (Supp. 2001) for the negligence of government employees.

The Utah Supreme Court has applied a three-step approach to determining whether or not immunity is applicable to a specific case. Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1164 (Utah 1993). The first step is to determine whether the activity performed by the entity is a governmental function. The second step requires a determination of whether there is an applicable waiver of immunity. If such a waiver exists, the third step is to determine whether immunity has been retained by an applicable exception to the waiver of immunity.

## **A. The Complained of Actions were a Governmental Function**

The Governmental Immunity Act expressly defines all actions by governmental entities as being governmental functions.

(4)(a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

(b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.

Utah Code Ann. § 63-30-2(4) (Supp. 2001). This definition is very inclusive. The operation of a training program for incarcerated individuals comes within the statutory definition of "governmental function" and the first step is thereby satisfied.

Instead of even mentioning the statutory definition of what is a governmental function, the plaintiff relies upon an outdated and overturned judicial interpretation of what that phrase means. In Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1236 (Utah 1980), relied upon by the plaintiff, the court established the "core governmental function" test. This test was adopted as a matter of statutory interpretation of the phrase "governmental function" in the immunity act. But, as noted in Ledfors, the 1987 statutory definition of a "governmental function" was enacted with the intent of rejecting the Standiford test.

In 1987, the legislature broadened the definition of "governmental function" in section 63-30-2(4) to include all governmental operations that under our

prior case law construing the pre-1987 statutory language, conceivably could have been characterized as ineligible for immunity. Comparing the language in our pre-1987 case law with the language of the 1987 amendment leaves no doubt that our pre-1987 cases were the target of this amendment.

Ledfors, 849 P.2d 1162, 1164 (Utah 1993). In Ledfors, the court applied the statutory definition of "governmental function" in lieu of the rejected pre-1987 case law definition found in Standiford. Therefore the plaintiff's reliance on the Standiford test is misplaced.

Nor is there any constitutional infirmity in applying this statutory definition to the State of Utah and its Department of Corrections. Under the courts' interpretation of the open courts clause (Utah Const. art. I, § 11), the first question is whether the challenged statute has abrogated a remedy that existed at the time the statute was enacted. Day v. State of Utah, 980 P.2d 1171, 1184 (Utah 1999).

It is undisputed that at no time did a common law cause of action exist to sue the State of Utah. Tiede v. State of Utah, 915 P.2d 500, 503-4 (Utah 1996) (immunity of the State of Utah and its Department of Corrections does not violate state constitution). Sovereign immunity was a settled feature of the common law. From the time the common law was adopted by Utah until the present day, Utah's common law has recognized the ongoing viability of sovereign immunity. The State had absolute immunity at common law and could not be sued without its consent. All action undertaken by the State of Utah was considered to be a governmental function. See Tiede; Campbell v. Pack, 15 Utah 2d 161, 389 P.2d 464, 465 (1964) (school district, as

an agent of the State, partakes of the state's absolute sovereign immunity); Bingham v. Bd. of Educ., 118 Utah 582, 223 P.2d 432, 435 (1950) (all acts of a school board, as an agent of the State, are governmental functions and it is unlike a municipal corporation that has a dual character and can exercise either governmental or proprietary functions); State v. Dist. Court, Fourth Jud. Dist., 78 P.2d 502, 504 (Utah 1937) (state immune from both damage and injunctive claims at common law); Campbell Bldg. Co. v. State Road Comm'n, 70 P.2d 857, 861 (Utah 1937); Decorso v. Thomas, 50 P.2d 951, 952 (Utah 1935); Wilkinson v. State, 134 P. 626, 630 (Utah 1913).

For these reasons, the trial court was correct when it held that the State's conduct challenged by the plaintiff in his first cause of action was a governmental function for which immunity has been retained.

**B. The Challenged Actions Arose out of, in Connection with, and Resulted From the Plaintiff's Incarceration in the State Prison**

The plaintiff claims that the waiver of immunity found in Utah Code Ann. § 63-30-10 (2001) is applicable. This statute waives immunity for injuries proximately caused by the negligence of government employees, unless the injury "arises out of, in connection with, or results from" one of a list of exceptions to this waiver. One such exception in subsection 10 is for injuries arising out of, connected with, or resulting from "the incarceration of any person in any state prison." Utah Code Ann. § 63-30-10(10) (Supp. 2001).

Utah's courts have repeatedly held that the statutory retention of immunity applies regardless of the particular type of negligence that the plaintiff may claim, or how the plaintiff may style his claims. The important question is not the type of negligence alleged, but rather whether the injuries arose out, are connected with or result from the incarceration of any person in the state prison. In Ledfors, the court explained:

Again, our prior cases have looked to whether the injury asserted "arose out of" conduct or a situation specifically described in one of the subparts of 63-30-10; if it did, then immunity is preserved. We have rejected claims that have reflected attempts to evade these statutory categories by recharacterizing the supposed cause of the injury . . . .

In sum, the Ledforses ignore the fact that the structure of the Utah Governmental Immunity Act, especially section 63-30-10, focuses on the conduct or situation out of which the injury arose, not on the theory of liability crafted by the plaintiff or the type of negligence alleged. Because Richie's injuries arose out of a battery, we cannot ignore the plain meaning and fair import of section 63-30-10 of the Act.

Id. at 1166-67 (citing Sheffield v. Turner, 21 Utah 2d 314, 316, 445 P.2d 367, 368 (1968)). See also Maddocks v. Salt Lake City Corp., 740 P.2d 1337, 1340 (Utah 1987) (rejecting argument that assault and battery exception did not apply to claim that two police officers negligently failed to intervene to prevent beating of plaintiff by another officer).

The Utah Supreme Court reached the same conclusion in Malcolm v. State, 878 P.2d 1144, 1146-47 (Utah 1994); S.H. v. State, 865 P.2d 1363, 1364-65 (Utah 1993); Petersen v. Bd. of Educ., 855 P.2d 241, 242-43 (Utah 1993); and Higgins v. Salt Lake County, 855 P.2d 231, 240-41 (Utah 1993). In each of these decisions, the court

reiterated that the question of whether the retention of immunities under section 10 is applicable is determined not by considering the type of negligence alleged, but rather looking to whether or not the complained-of injuries arose out of one of the listed situations or conducts found in section 10.

Finally, in Taylor v. Ogden School District, 927 P.2d 159 (Utah 1996), the court expressly defined what was meant by the statutory phrase "arose out of."

Taylor maintains that the assault exception should not apply because Zachary's injuries have a greater link to the dangerous window in the restroom than to Trenton's assault. However, "arises out of" within the assault exception "is a phrase of much broader significance than "caused by." Under the phrase's ordinary meaning, the assault need not be the sole cause of the injury to except the governmental entity from liability for the injury. The language demands "only that there be *some* causal relationship between the injury and the risk" provided for.

Taylor, 927 P.2d at 163 (citations omitted).

Most recently, the Utah Supreme Court held that injuries received from an avalanche caused by the naturally occurring snow pack on federal land "arose out of" a "natural condition on publicly owned or controlled lands" (Utah Code Ann. § 63-30-10(11) (Supp. 2001)).

Further, Blackner's injuries arose out of the snow pack and the first avalanche. Under the statute, the "arise out of" language requires only that there be some causal nexus between the risk and the resulting injury. In other words, but for the snow pack and the first avalanche, Blackner would not have suffered injury. Here, were it not for the first avalanche, Payne would not have stopped Blackner and others from proceeding up the canyon. In addition, if the snow pack had not been situated on public land above Route 210, it would not have resulted in either avalanche, which

caused Payne to stop traffic from moving up the canyon and directly occasioned Blackner's injuries.

Blackner v. State of Utah, 2002 UT 44, ¶15 (citations omitted) (a copy is attached hereto as Addendum A).

It cannot be disputed that but for the plaintiff's incarceration in the Utah State Prison, he would not have been participating in a training program under the supervision of the Division of Correctional Industries. There is more than simply some causal nexus between the plaintiff's incarceration, the incarceration of the inmate who is alleged to have injured the plaintiff through his negligent operation of a forklift, and the complained of injuries.

Even if this were not so, the statute gives three alternative relationships between the injury and the retention of immunity for the incarceration of any person in the Utah State Prison of which "arises out of" is only one, "connection with" and "results from" being the others. "Connection" is defined as "3. anything that connects; connecting part; link; bond." Webster's Encyclopedic Unabridged Dictionary of the English Language 432 (1996). "Result" is defined as "1. to spring, arise, or proceed as a consequence of actions, circumstances, premises, etc.; be the outcome." Webster at 1642.

An injury suffered during a prison-sponsored training program was clearly "connected with" the incarceration of a person in the state prison. The cause and effect connection between the plaintiff's injuries and his incarceration (and that of the inmate who was driving the forklift) cannot be disputed. This relationship is more than sufficient

to demonstrate a connecting link or bond between the incarceration of a person in any state prison and the plaintiff's injuries.

Further, the plaintiff's injuries clearly "resulted from" the incarceration of a person in a state prison. Plaintiff's complaint expressly alleges that his injuries were caused by the failure of the State to train and supervise inmates involved in a prison training program. The claimed injuries were the consequence, the outcome, of the incarceration of a person in a state prison.

Interpreting broadly these two phrases, as this Court in Taylor, explained "arises out of" must be interpreted, makes it clear that the trial court correctly determined that the State's governmental immunity had been retained and the plaintiff's first cause of action was correctly dismissed.

Nor is the fact that the plaintiff was injured outside the confines of the Utah State Prison significant. In Kirk v. State, 784 P.2d 1255, 1256-57 (Utah App. 1989), this Court explained that the retention of immunity applied when an incarcerated person was under the control of the state.

Either Gardner had "totally escaped the control of the prison and was thus acting on his own so the prison was not responsible for him" or "he was still under the control of the prison authorities ... in which latter instance the prison is immune from suit under the statute."

Id. at 1257. The plaintiff expressly claims that he was injured because the State failed to adequately supervise and train the plaintiff and his fellow inmates. There is no claim that the plaintiff or his fellow inmates had totally escaped the control of the State. The trial



court correctly determined that immunity had been retained relative to the plaintiff's first cause of action and that decision should be affirmed on appeal.

## **II. THE STATE OF UTAH AND ITS AGENCIES CANNOT BE SUED DIRECTLY UNDER THE FEDERAL CONSTITUTION FOR DAMAGES**

In his third cause of action (R. 7-9), the plaintiff seeks to state a claim against the State of Utah and its Department of Corrections for alleged violations of both his federal and state constitutional rights. In the trial court, the State sought dismissal of the federal claim on the grounds that no such cause of action existed. R. 41-43, 80-81. As to the state constitutional claim, the State argued that the plaintiff had failed to state a claim because he had only factually alleged a claim for simple negligence. R. 43-48, 81-84.

Unfortunately, the plaintiff conflates these two very distinct questions in his brief. Appellant's Brief at 20-26. Whether a direct cause of action against the State of Utah exists under the federal constitution is unrelated to the question of whether the plaintiff has stated a cause of action against the State of Utah under a self-executing provision of Utah's Constitution.

Claims that a federal right has been violated by someone acting under color of state law must be brought under 42 U.S.C. § 1983. But the State of Utah and its agencies cannot be sued under this statute.<sup>1</sup> In Will v. Michigan Department of State Police, 491

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<sup>1</sup> Under the proper circumstances, state employees may be sued under 42 U.S.C. § 1983, but this the plaintiff has not sought to do. Instead, he has sought to sue the State of Utah and its agencies directly.

U.S. 58, 71 (1989), the Supreme Court expressly held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Utah's Supreme Court, following Will, has also concluded that § 1983 claims cannot be brought against state agencies because they are not "persons" under the statute. Ambus v. Utah State Bd. of Educ., 858 P.2d 1372, 1376-77 (Utah 1993).

In an effort to circumvent these decisions, the plaintiff asks this Court to create a new cause of action. He asks this Court to create a direct cause of action under the federal constitution against a sovereign state. Appellant's Brief at 24. The plaintiff urges this Court to "do what the Supreme Court did in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)." Id. What plaintiff fails to understand is that Bivens-type actions cannot be brought against the government, only against federal employees.

"A Bivens claim is a cause of action brought directly under the United States Constitution against a federal official acting in his or her individual capacity for violations of constitutionally protected rights" Buford v. Runyon, 160 F.3d 1199, 1203 n.6 (8<sup>th</sup> Cir. 1998). See also Correctional Services Corporation v. Malesko, 534 U.S. 61, 122 S. Ct. 515, 521 (2001) ("The purpose of Bivens is to deter individual federal officers from committing constitutional violations.")

In Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471 (1994) (FDIC), the court was asked to create a Bivens-type action against the government. In determining

whether such a cause of action should be created, the court determined that it must examine two issues. "The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver, as in this case, the second inquiry comes into play – that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief." Id. at 484.

#### **A. The Sovereign Immunity of the State of Utah Has Not Been Waived**

As a matter of federal law, the State of Utah is entitled to absolute sovereign immunity. The Eleventh Amendment to the United States Constitution prohibits federal courts from exercising jurisdiction over suits by private parties against a state. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1995); Kennecott Copper Corp. v. State Tax Comm’n, 327 U.S. 573 (1946); Ford Motor Co. v. Dep’t of Treasury of Indiana, 323 U.S. 459 (1945); Watson v. Univ. of Utah Medical Ctr., 75 F.3d 569 (10<sup>th</sup> Cir. 1996). This Eleventh Amendment jurisdictional bar applies regardless of the nature of the relief sought. Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993); Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985); Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89 (1984); Florida Dep’t of Health v. Florida Nursing Home Ass’n, 450 U.S. 147 (1981); Alabama v. Pugh, 438 U.S. 781 (1978); and Missouri v. Fiske, 290 U.S. 18 (1933). States are immune from suits from Native American tribes and foreign states as well. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991); Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

Despite the narrowness of its terms, since Hans we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the “plan of the convention.”

Blatchford, 501 U.S. at 779.

Because the State of Utah's sovereign immunity, no federal claim can be brought against the state unless its immunity has been waived. Sovereign immunity can be waived by Congress in certain circumstances, and by the states themselves.

Congress can waive the states' Eleventh Amendment immunity “by making its intention unmistakably clear in the language of the statute.” Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989). But the only time that Congress can waive Eleventh Amendment immunity is when it is acting pursuant to a valid exercise of power. Green v. Mansour, 474 U.S. 64 (1985). The only congressional power that has been held, to date, to validly authorize Congress to waive the state's Eleventh Amendment immunity is Section 5 of the Fourteenth Amendment. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). If Congress does not have the authority to waive the immunity of the states in federal court, it is without the power to waive their immunity in state courts as well. Alden v. Maine, 527 U.S. 706 (1999). Of most importance to the present action is the fact that 42 U.S.C. § 1983 does not contain a waiver of the immunity of the states. Quern v. Jordan, 440 U.S. 332, 342 (1979).

Because Congress has not waived the immunity of Utah for a direct claim under the federal constitution, no such cause of action can exist unless Utah has waived its own immunity.

While the states can waive their Eleventh Amendment immunity, such waivers will not be inferred easily. The United States Supreme Court has said: “we will find waiver only where stated ‘by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.’” Florida Dep’t of Health, 450 U.S. at 150 (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

A state does not waive its Eleventh Amendment immunity by enacting a statute authorizing suits against the state in its own courts. Id. Utah, far from waiving its sovereign immunity, has expressly stated in the Governmental Immunity Act that its immunity is retained for injuries arising out of, connected with or resulting from a violation of civil rights. Utah Code Ann. § 63-30-10(2) (Supp. 2001).

Because the State of Utah would be entitled to sovereign immunity, no Bivens cause of action can be brought against it and the trial court correctly dismissed the plaintiff’s third cause of action in so far as it sought to state such a federal claim.

**B. Bivens-Type Actions Can Only Be Brought Against Federal Officers**

Even if the State of Utah was not immune from suit under federal law, the United States Supreme Court has expressly rejected attempts to extend Bivens-type claims to government or others who are not federal employees. In FDIC, the United States

Supreme Court expressly held that a federal agency could not be a defendant in a Bivens action, even though the agency's sovereign immunity had been waived.

Myer's real complaint is that Pattullo, like many Bivens defendants, invoked the protection of qualified immunity. But Bivens clearly contemplated that official immunity would be raised. More importantly, Meyer's proposed "solution" – essentially the circumvention of qualified immunity – would mean the evisceration of the Bivens remedy, rather than its extension. It must be remembered that the purpose of Bivens is to deter the officer. If we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. Under Meyer's regime, the deterrent effects of the Bivens remedy would be lost.

Finally, a damages remedy against federal agencies would be inappropriate even if such a remedy were consistent with Bivens. Here, unlike in Bivens, there are "special factors counselling hesitation" in the creation of a damages remedy. If we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government. . . . We leave it to Congress to weigh the implications of such a significant expansion of Government liability.

FDIC, 114 S. Ct. at 1005-6 (citations omitted).

These same two considerations weigh against the creation of a Bivens action against the State of Utah. First, the plaintiff could have brought a civil rights action under section 1983 against individual employees of the State of Utah. While these defendants would have been permitted to raise various immunities as defenses to such a claim, permitting the plaintiff to circumvent these defenses by suing the State of Utah directly is incompatible with the purposes behind such defenses.

Second, Congress has not seen fit to waive the immunity of the State of Utah and create such a direct cause of action. Instead, Congress has made the affirmative decision to instead provide only a cause of action against state employees under section 1983. Nor has the Legislature of the State of Utah seen fit to waive the state's immunity.

In Correctional Services Corp. v. Malesko, 534 U.S. 61, 122 S. Ct. 515 (2001), the court again held that only federal employees can be sued in a Bivens action. Malesko rejected an attempt to bring a Bivens action against a private corporation that contracted with the federal government to provide a community correctional facility. The court reiterated that the purpose behind Bivens was to deter constitutional wrongdoing by individual federal officers. "For if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury." Malesko, 122 S. Ct. at 521.

Just as the United States Supreme Court has held that it would be inappropriate to create a Bivens cause of action against the government or private individuals, the trial court was correct to dismiss the plaintiff's efforts to bring a Bivens action against the State.

For this reason the trial court's dismissal of the plaintiff's third claim, so far as it is based on a purported federal cause of action similar to Bivens, should be affirmed.

### **III. THE PLAINTIFF'S FAILURE TO FILE A NOTICE OF CLAIM CONCERNING HIS STATE CONSTITUTIONAL CAUSE OF ACTION DEPRIVED THE COURTS OF JURISDICTION OVER THIS CLAIM**

The Utah Governmental Immunity Act governs the procedure for suing the State of Utah, its agencies, and its employees. Both this Court and the Utah Supreme Court have held that the filing of the notices of claim required by the Act is a jurisdictional precondition to filing any suit against the state or its employees. Lamarr v. Utah State Dep't of Transp., 828 P.2d 535, 540-42 (Utah App. 1992); Rushton v. Salt Lake County, 1999 UT 36, ¶18, 977 P.2d 1201; Madsen v. Borthick, 769 P.2d 245, 249-50 (Utah 1988). Full (strict) compliance with the requirements of the Utah Governmental Immunity Act is essential to maintain a cause of action thereunder. Lamarr, 828 P.2d at 540-42; Rushton, 1999 UT 36, ¶19; Scarborough v. Granite School District, 531 P.2d 480, 482 (Utah 1975).

At the relevant time, the Governmental Immunity Act required that:

[a] claim against the state, or against its 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 with the attorney general within one year after the claim arises . . .

Utah Code Ann. § 63-30-12 (Supp. 2001) (in part). The Utah Supreme Court has held that the requirement of filing a notice of claim is very broad and applies comprehensively to many types of actions.

The Immunity Act defines injury as "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person,



or estate, that would be actionable if inflicted by a private person or his agent." Utah Code Ann. § 63-30-2(5). The language "any other injury that a person may suffer," in addition to the generalized enumerated categories listed in the definition indicates an intent to draw a broad net over the multitudinous harms that plaintiffs might allege against government officials.

Thomas v. Lewis, 2001 UT 49, ¶19, 26 P.3d 217 (court without jurisdiction to consider statutory forfeiture claim due to plaintiff's failure to file a notice of claim).

While the plaintiff filed a notice of claim before commencing this action, it only gave notice that he would bring a negligence action against the State (R. 14-15) and a claim "for a violation of John Richards [sic] constitutional rights guaranteed under the Eighth Amendment and Fourteenth Amendment of the United States Constitution and 42 USCS § 1983 against cruel and unusual punishment." R. 14. No mention of a cause of action under Utah Const. art. I, § 9 is made in the notice of claim.

The courts are without jurisdiction to consider plaintiff's state constitutional claim because it is beyond the scope of the notice of claim that was filed. The notice did not articulate any intent to bring a state constitutional claim, only a federal civil rights claim and a claim for negligence. The state constitutional claim is beyond the scope of the notice of claim that was filed and it failed to give the courts jurisdiction to consider the plaintiff's third cause of action in so far as it is based on a state constitutional claim.

Straley v. Halliday, 2000 UT App 38, ¶¶12-17, 997 P.2d 338 (failure of timely filed notice of claim to include claim that individual acted with fraud or malice was a jurisdictional defect for which the suit was properly dismissed: "A proper notice of claim

must be filed to invoke the trial court's jurisdiction."); Yearsley v. Jensen, 798 P.2d 1127, 1129 (Utah 1990) (action is barred on any claim not within the scope of the notice of claim filed); White v. Heber City, 82 Utah 547, 26 P.2d 333, 335 (1933) (causes of action for damages not raised in first, timely, notice of claim were not properly before the court); Sweet v. Salt Lake City, 43 Utah 306, 134 P. 1167, 1172 (1913) ("What we do hold, however, is that where the claimant seeks to recover for a different item or element of damages, as in this case, he cannot do so for the reason that such item or element is not described or referred to in the original claim presented to the city council").<sup>2</sup>

A claim for violation of a state constitutional right is a common law cause of action the same as a tort claim.

We begin by identifying the source of our authority to award damages for constitutional violations. Except for the Takings Clause, the Utah Constitution does not expressly provide damage remedies for constitutional violations. Thus, aside from the Takings Clause, there is no textual constitutional right to damages for one who suffers a constitutional tort. . . . In the absence of applicable constitutional or statutory authority, Utah courts employ the common law. . . . Hence, a Utah court's ability to award damages for violation of a self-executing constitutional provision rests on the common law.

Spackman v. Bd. of Educ. of the Box Elder Sch. Dist., 2000 UT 87, ¶20, 16 P.3d 533.

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<sup>2</sup> While White and Sweet were decided under prior statutes, the Utah Supreme Court has expressly stated that the statutes in question are "substantively similar to the provision now in effect" and that "these cases demonstrate that both before and since enactment of the Government Immunity Act, plaintiffs may sue the state and its subdivisions only by complying exactly with the statutory requirements provided to do so." Hall v. Dep't of Corrs., 2001 UT 34, ¶24 n.6, 24 P.3d 419.

Any cruel and unusual punishment and unnecessary rigor cause of action that the plaintiff may have for damages is founded on the common law, and not directly upon the state constitution as is an action under the Takings Clause. As such, the notice of claim provision of the Immunity Act applies.

In regards to such claims, the legislature has the right to implement “any rule or regulation in regard to the remedy which does not, under pretense of modifying or regulating it, take away or impair the right itself.” Bott v. DeLand, 922 P.2d 732, 736 (Utah 1996) abrogated in part on other grounds by Spackman v. Bd. of Educ. of the Box Elder Sch. Dist., 2000 UT 87, ¶20 n.5, 16 P.3d 533. Requiring that a constitutional common law action meet the procedural requirements of the Immunity Act is such an appropriate rule or regulation.

Regardless of whether the State of Utah may or may not be entitled to sovereign immunity from a suit brought under the state constitution, the plaintiff was still required to provide notice of his intent to bring such a suit. In Hall v. Utah State Department of Corrections, 2001 UT 34, 24 P.3d 419, the court expressly held that the substantive immunity of the state did not protect it from lawsuits under the Whistleblower Act. Id. at ¶18. But even though substantive immunity did not apply, the court upheld the dismissal of the action on the grounds that the plaintiff had failed to comply with the procedural requirement that he file a notice of claim before filing his action. Id. at ¶21-27. In reaching this decision, the court stressed the very real and important purposes that the

notice of claim requirement fulfilled. Id. at ¶22-23 (prevent payment of spurious claims, permit government ample opportunity to examine into both the cause and extent of the injury).

This Court reached the same conclusion in rejecting a plaintiff's argument that he was not required to file a notice of claim because there was no substantive sovereign immunity applicable to his cause of action.

However, Nielson confuses the scope of the notice requirement with the extent of substantive sovereign immunity protection. Complying with the notice provisions of the Governmental Immunity Act is a jurisdictional requirement and a precondition to suit, and is in no way co-extensive with the substantive provisions contained within the Governmental Immunity Act which insulate the sovereign and its operatives from liability.

Nielson v. Gurley, 888 P.2d 130, 135 (Utah App. 1995) (emphasis in original).

The Governmental Immunity Act is applicable to the plaintiff's state common law constitutional claim. To hold otherwise would be to create a unique exception from the legislatively created system for handling all claims against Utah and its political subdivisions and would cause confusion as to which claims for money or damages came under the Immunity Act and which did not. Utah's legislature has not made such an exception in this case and the plaintiff is consequently required to comply with the Governmental Immunity Act.

Because the plaintiff failed to provide a notice of claim to the State concerning any claim of violation of his rights under Utah Const. art. I, § 9, the courts are without jurisdiction to consider this claim and the same was properly dismissed.

#### **IV. NEGLIGENCE IS INSUFFICIENT TO SUSTAIN A CLAIM UNDER ARTICLE I, § 9 OF THE UTAH CONSTITUTION**

While alleging that his injuries resulted from the negligence and carelessness of unnamed state employees (R. 4-5), the plaintiff also seeks to state a cause of action for violation of the unnecessary rigor clause of the Utah Constitution. "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. But in doing so, plaintiff makes only the factual claim that the State failed to adequately train and supervise inmates using a forklift. R. 8. Factual allegations of simple negligence are not enough to state a claim that the plaintiff was treated with unnecessary rigor.

##### **A. Plaintiff Has Failed to Meet the Flagrant Violation Test of Spackman**

In Spackman v. Board of Education of the Box Elder County School District, 2000 UT 87, 16 P.3d 533, the court held that common law damage actions to enforce self-executing state constitutional rights exist only in appropriate circumstances. The first of three limitations placed on such claims was that the violation must be flagrant.

First, a plaintiff must establish that he or she suffered a "flagrant" violation of his or her constitutional rights. In essence, this means that a defendant must have violated "clearly established" constitutional rights "of which a reasonable person would have known." To be considered clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The requirements that the unconstitutional conduct be "flagrant" ensures that a government employee is allowed the ordinary "human

frailties of forgetfulness, distractibility, or misjudgment without rendering [him or her]self liable for a constitutional violation."

Id. at ¶23.

The only allegations of fact made by the plaintiff in his complaint are that the State failed to adequately train and supervise inmates working with a forklift in a training program. Plaintiff has completely failed to allege any facts indicating that a reasonable person would have understood such allegations of negligent conduct would constitute a "clearly established" violation of the plaintiff's right to be free from cruel and unusual punishment and not to be treated with unnecessary rigor.

The "flagrant" violation test used by the Utah Supreme Court is nothing more nor less than the common law qualified immunity test used under federal law in section 1983 and Bivens actions. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For this reason, the State submits that federal and state decisions concerning qualified immunity are pertinent to whether or not the plaintiff has stated a "flagrant" violation in the present action. In Hilliard v. City and County of Denver, 930 F.2d 1516 (10th Cir. 1991) the court explained, under qualified immunity law, what is meant by the requirement that the plaintiff demonstrate that the alleged violation was clearly established.

It is the plaintiff's burden to convince the court that the law was clearly established. In doing so, the plaintiff cannot simply identify a clearly established right in the abstract and allege that the defendant has violated it. Instead, the plaintiff "must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." While the plaintiff need not show that the specific action at issue has previously been held unlawful,

the alleged unlawfulness must be "apparent" in light of preexisting law. The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." If the plaintiff is unable to demonstrate that the law allegedly violated was clearly established, the plaintiff is not allowed to proceed with the suit.

930 F.2d at 1518 (citations omitted).

The "preexisting law" which must show the unlawfulness of the alleged misconduct must be case law. To be clearly established, the case law must be such that a reasonable person would be able to recognize that his or her conduct had been declared unconstitutional by prior court decisions. "For the law to be 'clearly established,' there 'must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must be as plaintiff maintains.'" Holland v. Harrington, 268 F.3d 1179, 1189 n.13 (10<sup>th</sup> Cir. 2001). See also Horstkoetter v. Dep't of Pub. Safety, 159 F.3d 1265, 1278 (10<sup>th</sup> Cir. 1998) (plaintiff must demonstrate through binding precedent, or the weight of authority of other jurisdictions, that the right alleged was clearly established); Foote v. Spiegel, 118 F.3d 1416, 1424 (10<sup>th</sup> Cir. 1997) (contours of alleged right, as established by controlling authority, must be "sufficiently clear that a reasonable officer would understand that what he is doing violates that right"); D'Aguanno v. Gallagher, 50 F.3d 877, 881 n.6 (11<sup>th</sup> Cir. 1995) ("The remaining cases on which plaintiffs rely do not come from the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or the Florida Supreme Court and, therefore, cannot show that plaintiffs' right to due process was clearly established.").

Plaintiff fails to identify even one prior court decision that would clearly establish that a failure to adequately train and supervise inmates in a prison training program constitutes either cruel and unusual punishment or unnecessarily rigorous treatment. Instead, without any supporting authorities, he contends that Utah law establishes standards for the operation of heavy equipment. Appellant's Brief at 26. Such an abstract general proposition is inadequate to state a claim. What plaintiff must to show, by binding legal authority, is that Utah's Constitutional prohibition against unnecessary rigor has been found to be violated by a failure to adequately train and supervise inmates in a workplace environment. This he has completely failed to do on appeal and in the trial court.

We said in Lassiter that the most common error we encounter in qualified immunity cases involves the point that "courts must not permit plaintiffs to discharge their burden by referring to general rules and to the violation of abstract 'rights.'" we emphasized that "[g]eneral propositions have little to do with the concept of qualified immunity" and that the facts of a case relied upon to clearly establish the law must "be materially similar," because "[p]ublic officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases."

Hamilton v. Cannon, 80 F.3d 1525, 1531-32 (11<sup>th</sup> Cir. 1996) (citations omitted).

The trial court correctly dismissed the plaintiff's third cause of action as far as it sought to plead a state constitutional claim and that dismissal should be affirmed.



## **B. No Facts Demonstrating Cruel and Unusual Punishment or Unnecessarily Rigorous Treatment Were Alleged in the Complaint**

Even if the plaintiff had met the flagrant violation test of Spackman, the trial court was still correct to dismiss his state constitutional claim because the factual allegations of the complaint did not state a claim that the plaintiff had been subjected to cruel and unusual punishment or treated with unnecessary rigor. Utah's cruel and unusual punishment, unnecessary rigor, clause was originally understood "to prohibit only certain methods of punishment, including torture, that were deemed barbaric." State v. Gardner, 947 P.2d 630, 636 (Utah 1997). It has been extended to prohibit punishments that are grossly disproportionate or that are excessive. Id. at 638.

In the "conditions of confinement" area, cruel and unusual punishment must be shown by evidence that the prison employee "acted with deliberate indifference or inflicted unnecessary abuse" upon an inmate. Bott v. DeLand, 922 P.2d 732, 740 (Utah 1996). Plaintiff seeks to read too much into the words "deliberate indifference." This standard was borrowed from the identical "cruel and unusual punishment" provision of the federal constitution.

Precisely what constitutes deliberate indifference on the part of prison officials has been the subject of some debate. It is at least clear that mere negligence or inadvertence is insufficient to satisfy this standard. Indeed, deliberate indifference requires the "unnecessary and wanton infliction of pain." In the work assignment context, prison officials are deliberately indifferent when they "'knowingly ... compel convicts to perform physical labor ... which is beyond their strength, or which constitutes a danger to their ... health, or which is unduly painful.'" Thus, whatever its exact

contours, deliberate indifference requires a highly culpable state of mind approaching actual intent.

Choate v. Lockhart, 7 F.3d 1370, 1374 (8<sup>th</sup> Cir. 1993).

In Choate the court held that claims that a prison failed to take adequate safety precautions on a worksite did not rise to the level of deliberate indifference. Id. at 1375-76. To prove such a claim would require that there be evidence of knowledge of "extreme dangers at the worksite" that were intentionally ignored. Id. at 1375. The only fact alleged by the plaintiff is that inadequate training and supervision led to a forklift being mishandled and overturning on a prison worksite. The trial court correctly dismissed this cause of action for failure to state a claim.

Nor did the plaintiff adequately allege facts that would show that he had been treated with unnecessary rigor. This standard targets the infliction of unnecessary abuse. Bott, 922 P.2d at 740-41. "Under this standard, the main consideration is 'whether a particular prison or police practice would be recognized as an abuse to the extent that it cannot be justified by necessity.' The definition of 'abuse' focuses on 'needlessly harsh, degrading, or dehumanizing' treatment of prisoners. Id. at 740.

The plaintiff's factual allegations, that inmates in a prison training program were inadequately trained and supervised, does not meet the definition of abuse under this standard. No facts were alleged that would even begin to show that the plaintiff's treatment was needlessly degrading or dehumanizing. Nor has he alleged facts that his treatment was unconstitutionally harsh. The unnecessary rigor standard does not apply to

these circumstances. It is not "a catch-all provision applicable to every adverse condition accompanying confinement. Rather, it serves to prohibit extreme instances of mistreatment and abuse." McQueen v. State, 711 N.E.2d 503, 505 (Ind. 1999). An industrial accident allegedly caused by inadequate training and supervision does not come within this definition of extreme mistreatment and abuse. The trial court correctly dismissed the plaintiff's state constitutional claim and that decision should be affirmed on appeal.

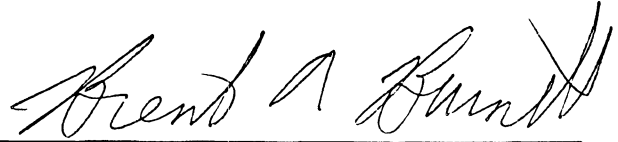
### **CONCLUSION**

For the reasons presented above, the trial court's decision, dismissing this action with prejudice as to the State, should be affirmed.

### **DEFENDANT STATE OF UTAH DOES NOT DESIRE ORAL ARGUMENT OR A PUBLISHED OPINION**

Defendant-appellee State of Utah does not request oral argument and a published opinion in this matter. The questions raised in this appeal, having already been decided by the courts in published opinions, are not such that oral argument or a published opinion are necessary, though the defendant desires to participate in oral argument if such is held by the Court.

DATED this 8<sup>th</sup> day of May, 2002.

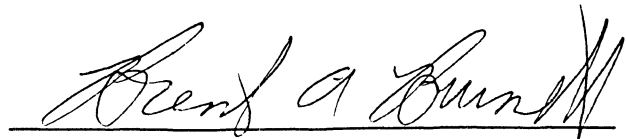


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#### CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing BRIEF OF  
DEFENDANT - APPELLEE STATE OF UTAH, DEPARTMENT OF CORRECTIONS,  
DIVISION OF CORRECTIONAL INDUSTRIES to the following this 8<sup>th</sup> day of  
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# **ADDENDUM “A”**

*This opinion is subject to revision before final  
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Paul Blackner,  
Plaintiff and Appellant,

v.

State of Utah,  
Department of Transportation,  
and Town of Alta,  
Defendants and Appellees.

No. 20000906

FILED  
April 30, 2002

2002 UT 44

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Third District, Salt Lake  
The Honorable William B. Bohling

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RUSSON, Justice:

¶1 Paul Blackner ("Blackner") appeals from an order granting summary judgment to defendants the Town of Alta, Utah ("Alta"), and the Utah Department of Transportation ("UDOT"). We affirm.

**BACKGROUND**

¶2 On March 14, 1998, an avalanche ("the first avalanche") thundered down on State Route 210, a two-lane road, in the White Pine Chutes area of Little Cottonwood Canyon near Alta. It buried part of the road, blocking the downhill lane of traffic. Soon thereafter, the avalanche was reported to Alta's Central Dispatch Office.

¶3 Kevin Payne ("Payne"), an Alta Deputy Marshal, was notified of the first avalanche and responded within minutes. Upon arrival, Payne noticed that only one lane of traffic was open and became concerned that vehicles traveling in opposite directions on State Route 210 would collide with one another in the avalanche area. Therefore, he began to direct traffic. Several minutes after Payne arrived on the scene, Dave Medara ("Medara"), an avalanche forecaster with UDOT, who was also notified of the first avalanche, arrived on the scene. After discussing the situation with Payne, Medara departed to assess other slide activity lower in the canyon.

¶4 Several minutes later, a front-end loader was dispatched from the Snowbird Ski Area to remove the snow from the road. While the loader was clearing the road, traffic on both sides of the first avalanche was stopped. Payne instructed travelers in the canyon—including Blackner, who had been driving up Little Cottonwood Canyon—to stop while the loader continued to work. As Blackner and others waited for the loader to finish clearing the road, they exited their vehicles and stood on the roadside to watch the road-clearing activities.

¶5 After evaluating the slide activity lower in the canyon, Medara traveled up the canyon until he arrived at an area just below the scene of the first avalanche. This was the same area where Blackner and the other travelers had exited their vehicles. Medara became concerned when he noticed that the stopped vehicles, including Blackner's vehicle, were located under a known avalanche slide area. Medara therefore informed Payne by radio that he was concerned about the safety of his location and asked how long the loader would continue working.

¶6 Seconds after Payne told Medara that the loader was taking its last scoop, a second avalanche occurred ("the second avalanche"). The second avalanche inundated the area where Medara and Blackner had stopped their vehicles. Many people, including Medara and Blackner, were caught in and overwhelmed by the second avalanche. Blackner was seriously injured. About thirty-four minutes passed between the first avalanche and the second avalanche. Both of the avalanches originated on public land managed by the National Forest Service as part of the Wasatch-Cache National Forest.

¶7 Blackner brought suit against UDOT and Alta, alleging that their negligence in managing the first avalanche resulted in his injuries. Both UDOT and Alta moved for summary judgment, arguing that the Governmental Immunity Act (the "Act") barred Blackner's claims against them. Specifically, UDOT and Alta asserted that they were immune from suit because subsections 63-30-10(11) and (13) of the Utah Code preclude suits against governmental entities for injuries arising out of, in connection with, or resulting from (1) any natural condition on publicly owned or controlled land and (2) the management of natural disasters. The trial court granted the motions for summary judgment under both subsections of the Act. Blackner appeals.

## STANDARD OF REVIEW

¶8 Summary judgment is proper only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c); Ault v. Holden, 2002 UT 33, ¶ 15, \_\_\_ P.3d \_\_\_. When reviewing whether the trial court properly granted summary judgment, we accord the trial court's legal conclusions no deference and review those conclusions for correctness. Ault, 2002 UT 33 at ¶ 15. Furthermore, a trial court's interpretation of a statute is a question of law that we review for correctness. State ex rel. Div. of Forestry, Fire & State Lands v. Tooele County, 2002 UT 8, ¶ 8, \_\_\_ P.3d \_\_\_; State v. Lusk, 2001 UT 102, ¶ 11, 37 P.3d 1103.

## ANALYSIS

¶9 The issue presented on appeal is whether the trial court erred in granting UDOT and Alta summary judgment under subsections 63-30-10(11) and (13) of the Act. Specifically, the issue is whether the trial court correctly interpreted the exceptions set forth in those subsections in holding that UDOT and Alta are immune from suit on Blackner's negligence claim because Blackner's injuries arose out of, were in connection with, or resulted from a natural condition on public lands or the management of a natural disaster. Utah Code Ann. § 63-30-10(11), (13) (1997).

¶10 Generally, to determine whether a governmental entity is immune from suit under the Act, we apply a three-part test, which assesses (1) whether the activity undertaken is a governmental function; (2) whether governmental immunity was waived for the particular activity; and (3) whether there is an exception to that waiver. See Taylor v. Ogden City Sch. Dist., 927 P.2d 159, 162 (Utah 1996); Keegan v. State, 896 P.2d 618, 619-20 (Utah 1995). However, in this case, the parties do not dispute whether immunity has been waived, but rather dispute only whether an exception to that waiver applies pursuant to the third part of the test. Thus, we address only the issue of whether a specific exception applies to the waiver of immunity.

¶11 The relevant portion of the Act provides:

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from:

...

(11) any natural condition on publicly owned or controlled lands, [or]

...

(13) the management of flood waters, earthquakes, or natural disasters . . . .

Id. (emphasis added). We first resolve whether UDOT and Alta are immune from Blackner's suit under subsection (11), and if they are immune, we need not address whether they are immune under subsection (13).

¶12 To resolve whether the trial court erred in concluding that UDOT and Alta were immune from Blackner's suit under subsection (11) because his injuries arose out of, were connected with, or resulted from a natural condition on publicly owned or controlled land, we must determine whether the trial court correctly interpreted section 63-30-10(11) of the Utah Code. When interpreting statutes, we determine the statute's meaning by first looking to the statute's plain language, and give effect to the plain language unless the language is ambiguous. *State v. Lusk*, 2001 UT 102, ¶ 19, 37 P.3d 1103; *City of Hildale v. Cooke*, 2001 UT 56, ¶ 36, 28 P.3d 697. The statute's language plainly states that all governmental entities are immune from suit for a government employee's negligence when the plaintiff's injury arose from, was connected with, or resulted from a "natural condition on publicly owned or controlled lands." Utah Code Ann. § 63-30-10(11) (1997).

¶13 Blackner does not argue that the first avalanche was not a natural condition. Rather, he contends that the negligence of UDOT and Alta was the proximate cause of his injuries instead of that avalanche. However, Blackner's argument either miscomprehends or misapplies the plain language of the Act. The Act unequivocally provides that when a plaintiff's injury either "arises out of[] [or] in connection with, or results from" a "natural condition on publicly owned or controlled lands," governmental immunity is retained with respect to any action to recover for injuries proximately caused by a government employee's negligence. The application of the "natural condition" exception to the waiver of governmental immunity does not hinge on whether the "natural condition" in any way "proximately caused" the plaintiff's injuries. See id.

¶14 In the instant case, even assuming that the actions of Payne and Medara were negligent and proximately caused Blackner's injuries, UDOT and Alta are immune from suit to recover for those injuries because Blackner's injuries arose out of a natural condition on publicly owned or controlled land. The first avalanche and the snow pack from which both avalanches originated were natural conditions. The snow pack was situated on Forest Service land, and the first avalanche partially covered and blocked Route 210, a state-owned-and-controlled road.

¶15 Further, Blackner's injuries arose out of the snow pack and the first avalanche. Under the statute, the "arise out of" language requires only that there be some causal nexus between the risk and the resulting injury. *Taylor v. Ogden City Sch. Dist.*, 927 P.2d 159, 163 (Utah 1996). In other words, but for the snow pack and the first avalanche, Blackner would not have suffered injury. See id. Here, were it not for the first avalanche, Payne would not have stopped Blackner and others from proceeding up the canyon. In addition, if the snow pack had not been situated on public land above Route 210, it would not have resulted in either avalanche, which caused Payne to stop traffic from moving up the canyon and directly occasioned Blackner's injuries.

¶16 Therefore, Blackner's injuries arose out of a natural condition existing on publicly owned or controlled land. Accordingly, the trial court correctly concluded that UDOT and Alta are immune from Blackner's suit because the "natural condition" exception to the waiver of governmental immunity applies to Blackner's injuries regardless of whether Payne and Medara were negligent.<sup>(1)</sup>

## CONCLUSION

¶17 The trial court correctly granted UDOT and Alta summary judgment under the Governmental Immunity Act because Blackner's injuries arose out of, were in connection with, or resulted from a natural condition on publicly owned or controlled land. We therefore affirm.

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¶18 Chief Justice Durham, Associate Chief Justice Durrant, Justice Howe, and Justice Wilkins concur in



Justice Russon's opinion.

1. Blackner also contends on appeal that if we were to affirm the trial court's summary judgment order in this case, our affirmance would be contrary to public policy. However, Blackner never raised this argument before the trial court and has thus waived the argument on appeal. Associated Gen. Contractors v. Bd. of Oil, Gas & Mining, 2001 UT 112, n.5, 38 P.3d 291; Treff v. Hinckley, 2001 UT 50, ¶ 15, 26 P.3d 212.