THE COURT OF APPEALS OF THE STATE OF UTAH

SPENCER CHRISTENSEN, father and personal representative of CASIE MARIE CHRISTENSEN, similarly situated, Appellant/Plaintiff, v. SALT LAKE COUNTY; WELLCON, INC.; TODD WILCOX, MD; JAMES WINDER; and JOHN AND JANE DOES 1-10, whose true names are currently unknown, Appellees/Defendants.	Appellate No. 20200220-CA Trial Case No. 170907640

APPELLANT'S REPLY BRIEF

Appeal from Decisions of the Third Judicial District Court of Salt Lake County, The Honorable Laura Scott, District Judge

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INTRODUCTION

The primary question before the Court of Appeals is whether Spencer Christensen's state constitutional causes of action sounding in *unnecessary rigor* and *state due process* are barred under the doctrine of issue preclusion. Defendants claim:

> Because the state constitutional claims of unnecessary rigor and due process asserted in this suit are ***entirely predicated on the same set of facts, the same issues, and the same alleged injury***, the federal court's prior judgment on the merits precludes those claims as a matter of law.

Response Brief (hereinafter "Response"), p. 24 (emphasis and double emphasis added). Christensen replies that state unnecessary rigor and due process claims are not barred because **(a)** the constitutional standards for unnecessary rigor and due process are **wholly different** from, and **not identical** to, the federal standard for deliberate indifference, **(b)** unnecessary rigor and due process were **never raised** in the federal action, and **(c)** the relevant, operative **facts are different and were never raised** in the federal action.

Introductory Note: Because the standards applicable to unnecessary rigor and state due process are so similar, this Brief will generally refer only to unnecessary rigor, understanding that both doctrines are addressed by the unnecessary rigor arguments herein.

SUMMARY OF REPLY ARGUMENT

A. Issue Preclusion Is Not Applicable.

Issue preclusion requires that "the issue decided in the prior adjudication [was] ***identical*** to the one presented in the instant action; [and] … the issue in the first action [was] ***completely, fully, and fairly litigated*** …." *Jensen v. Cunningham*, 2011 UT 17, ¶41, 250 P.3d 465 (UT 2011), (*citing Oman v. Davis Sch. Dist.,* 2008 UT 70, ¶¶ 29, 31, 194 P.3d 956 (UT 2008)) (*quoting Snyder v. Murray City Corp.,* 2003 UT 13, ¶ 35, 73 P.3d 325 (UT 2003)) (bracketed word "was" in original *Jensen* passage). The issues, legal standards and facts necessary to prove state constitutional violations of unnecessary rigor and due process are wholly different than the standards, proof and facts for deliberate indifference. Therefore, the deliberate indifference **issue** decided in the prior federal adjudication was **not "identical"** but different from unnecessary rigor in the instant action. Additionally, these state constitutional claims were **never raised** in the federal action and therefore **cannot** have been "completely, fully, and fairly litigated." Christensen is therefore not barred from bringing this state court action.

B. Unnecessary Rigor Is Different.

Defendants' Response misses the point that unnecessary rigor is a unique state right in Utah. It is "broader" than its federal Eighth Amendment deliberate indifference counterpart. *State v. Lafferty*, 2001 UT 19, ¶73, 20 P.3d 342.

Accordingly, the standards used to analyze a claim of unnecessary rigor are legally and factually unique and different from the federal claim of deliberate indifference. Rather than address these differences head on, Defendants erroneously conflate the federal and state standards as "exactly" the same, contrary to the holdings of many Utah cases.

C. Disputed Material Questions of Fact Exist.

Defendants argue that because Christensen's state claim facts are allegedly exactly the same as the federal action facts, they were already adjudicated. This allegedly precludes Christensen from raising them in the instant case. This is misperceived. A great many important material facts presented in the state case were *never presented* in the federal action, so there is no "re-litigating" the facts. *See*, Brief of Appellant (hereinafter "Opening Brief" or "Opening"), FACT F, pps. 27-33; *see also*, pps. 38-40. Plaintiff is not barred from arguing additional facts learned during discovery in the state case. Also, Defendants ignore many disputed questions of fact. Opening, pps. 50-54.

D. A "Reasonable Jury" Could View the Facts Differently.

Reasonable people can often look at facts and differ as to their meaning. The Utah Supreme Court has stated that: "the standard is not whether *these parties'* minds differ … but whether reasonable jurors would be unable to come to any other conclusion … ." *Newman v. White Water Whirlpool*, 2008 UT 79, ¶ 11, 197 P.3d

654 (italicized words in original). One of the guiding principles in addressing summary judgment motions in Utah is whether "reasonable jurors," properly instructed, might look at the facts in a case and come to different conclusions. *Id.*

A reasonable jury might analyze the facts in this case and come to a different conclusion than did the trial court. A "reasonable jury" could readily conclude that Casie was exposed to unnecessary rigor and that her due process rights were violated. Accordingly, the granting of summary judgment was error.

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REPLY ARGUMENT

REPLY POINT I

~ Issue Preclusion Is Not Applicable to the State Claims ~

ISSUE PRECLUSION DOES NOT APPLY WHERE THE STATE AND FEDERAL ISSUES WERE NOT IDENTICAL AND WHERE THE STATE CLAIMS WERE NOT COMPLETELY, FULLY AND FAIRLY LITIGATED IN THE FEDERAL CASE.

A. Focus of This Reply.

Appellant Christensen has thoroughly addressed the *trial court's errors* in his Opening Brief. *See*, Opening, pps. 38-40, 55-62. Accordingly, this Reply will focus on the Response's factual and legal errors, erroneous case citations, misperceptions, and misstatements.

B. Summary of Errors in Response Brief.

The following are major errors in Defendants' Response relating to issue preclusion, followed by Christensen's *Brief Replies*:

(1) Date of death. Defendants misstate the date of Casie's death as January **8**, 2014. Response, p. 5. That is the date of admission to the Salt Lake County Jail (SLCJ).

Brief Reply: The date of Casie's death was January **10**, 2014. R. 14.

(2) Unnecessary rigor facts were not adjudicated. Defendants claim that unnecessary rigor facts were adjudicated in the federal action:

> ***The adjudicated facts*** the court found material and without dispute in the prior Federal Action [sic] ***were found to be dispositive*** to Plaintiff's 'unnecessary rigor' and due process claims under the Utah State Constitution.

Response, p. 7 (emphasis added). Defendants further claim:

> The lower court addressed Mr. Christensen's disputed material facts regarding the ***use of a different protocol and applied them***, along with all other admitted and controlling material facts, to determine whether those facts precluded Mr. Christensen's claims under state constitutional standards.

Response, p.18 (emphasis added). Defendants' Response later referenced the opiate withdrawal scales such as COWS and SOWS, and stated

> These are ***the same substantive facts and issues that underlined the federal deliberate indifference*** and wrongful death claims asserted in the prior federal action.

Response, p. 20 (emphasis added). Finally, Defendants claim that:

> [T]hose facts and issues [from the federal action] ***cannot be altered or re-litigated***, despite Mr. Christensen's recast of argument, claim or theory.

Response, p. 23 (brackets and emphasis added).

Brief Reply: Unnecessary rigor and due process facts and claims were most decidedly *not litigated* in the federal action because they were never raised. See the federal Complaint, R. 84-89. Similarly, Defendants' Motion for Summary Judgment in the federal action does not mention anything about unnecessary rigor or the facts involving SOWS or WOWS or COWS. R. 92-127. Unnecessary rigor

was not an issue before the federal court and, therefore, was never argued or litigated. R. 87-88.

(3) Appropriateness of "medical treatment" is <u>not</u> the issue. Defendants claim that:

> The appropriateness of Casie Christensen's medical treatment while incarcerated and ***whether Defendants utilized proper, appropriate, and accurate evaluation protocols to assess her mental health status - <u>the identical issue underpinning the subject state constitutional claims</u> - were litigated and adjudicated*** in the prior Federal Action [sic].

Response, p. 11 (emphasis and <u>double</u> emphasis added). Therefore, defendants claim that Christensen "is bound by the undisputed, adjudicated facts and issues" regarding Casie's "medical care while incarcerated," and barred from relitigating these issues. *Id.*

<u>*Brief Reply*</u>: Christensen's claims do not involve "the appropriateness of … medical treatment," and Casie's "medical treatment" certainly <u>does not</u> underpin her state constitutional claims. Opening, pps. 38-40, 47-48, 50-54, and 55-56. Plaintiff alleges that failure to assess her with an opiate withdrawal rather than an alcohol withdrawal protocol was unreasonably harsh and severe and exposed Casie to unnecessary risk of serious harm, i.e., unnecessary rigor. Opening FACTS B and C, pps. 14-21; *see also*, pp. 38-40, 47-50, 56-60. It subjected Casie, a known and active heroin addict, to cold turkey opiate withdrawal without the proper monitoring and drug regimens. Opening, FACTS D and E, pps. 21-27; *see also,* pp.

43-46. Withdrawing heroin addicts are subject to extreme distress and heightened risk for sudden suicide because of the intensity of that distress. Opening, FACTS C, D, E and pps. 19-27. These issues were decidedly not litigated in the federal case. Opening, pps. 55-60. Unnecessary rigor and opiate withdrawal protocols were not mentioned in nor were they part of the federal action. R. 84-89; Opening, FACT B, pps. 14-19; also 38-40, 43-50.

(4) Key elements of issue preclusion were not present. Defendants claim:

> ***All four requirements required to collaterally estop*** Mr. Christensen's state constitutional claims ***are present*** and the District Court properly entered summary judgment accordingly.

Response, p.13, citing *Oman v. Davis County Sch. Dist.*, 2008 UT 70, ¶ 29, 194 P.3d 965 (emphasis added).

Brief Reply. Defendants' reliance on *Oman* is misplaced. In *Oman*, the federal and state standards for breach of contract were *identical*. *Jensen v. Cunningham* applied the same four element test for issue preclusion in collateral estoppel, requiring that the issue decided in the prior litigation be "identical" to the one in the instant action, and that the same issue be "completely, fully, and fairly litigated" in the first action. *Jensen v. Cunningham*, 2011 UT 17, ¶41, 250 P.3d 465. *Jensen* involved questions regarding both federal and state constitutional claims. *Oman* did not. *Jensen* ruled that state and federal *constitutional* claims are not

identical. *Id.*, ¶49. This applies to Plaintiff's state constitutional claim of unnecessary rigor. It is not "identical" to any issue raised in the federal action. Not having been raised, unnecessary rigor was never litigated in the federal action. Opening Brief, pps. 56-58.

(5) Full opportunity to litigate unnecessary rigor. Defendants claim that Christensen "had every opportunity to assert" unnecessary rigor in the federal case and therefore "had a full and fair opportunity to litigate the issue." Christensen should therefore be barred from raising it in this action. Response, p.14.

Brief Reply. State constitutional causes of action like unnecessary rigor asserted in a federal court are deemed to be pendent. R. 707-712, Plaintiff's Memorandum in Opposition to Defendants' MSJ, pps. 15-20, filed September 18, 2019; *see also*, *Snyder v. Murray City Corp*, 214 F.3d 1349, 1354-55 (10th Cir. 1997) and *Snyder v. Murray City Corp*, 2003 UT 13, ¶¶34, 36, 37, 73 P.3d 325. When the underlying federal causes of action are dismissed, pendent state causes of action almost always survive, absent some unusual facts, and are remanded to state court. *Id.* *Finlinson*, a Utah federal case, addresses the pendency of a state claim that is nested in a federal action, "The Utah Supreme Court … [held] that the inquiries were not the same and that the [state] trial court (or, if the evidence was sufficient, a jury) must determine whether a state constitutional violation had occurred, independent

of the Tenth Circuit's findings." *Finlinson v. Millard County*, 455 F.Supp.3d 1232, 1245 (D. Utah 2020) (parenthetical in original).

(6) Unnecessary rigor protections are <u>not identical</u> to 8th Amendment protections. Defendants claim:

> And the ***protections afforded in inmate in a failure to provide medical treatment arising under the "<u>unnecessary rigor</u>" clause <u>are identical</u> to those afforded federal court plaintiffs under the <u>Eighth and Fourteenth Amendments</u>*** to the United States Constitution, and apply where a prisoner shows that a prison employee was deliberately indifferent to the prisoner's medical needs or subjected him [/her] to clearly excessive or deficient or unjustified treatment.

Response, pps. 16-17 (emphasis and <u>double</u> emphasis added; punctuation and citations omitted). Thus, according to Defendants, state unnecessary rigor standards **"are identical"** with federal Eighth Amendment cruel and unusual punishment standards.

<u>*Brief Reply*</u>. This claim is contrary to many years of Utah cases which hold that federal and state constitutional standards are different. For example, the Utah Supreme Court has stated, "Although the first sentence of article I, section 9 closely approximates the language of the Eighth Amendment to the United States Constitution, the unnecessary rigor provision ***has no federal counterpart****." Dexter v. Bosko*, 2008 UT 29, ¶7, 184 P.3d 592 (emphasis added). The Utah Supreme Court further elaborated:

> [T]he last sentence [of Article I, section 9] makes section 9 ***broader than its federal counterpart.*** … Article I, section 9 is also a self-executing provision that prohibits specific evils that can be remedied without implementing legislation.

Lafferty, ¶73 (emphasis and double emphasis added; citation omitted).

Finally, the Supreme Court's ruling in *Jensen* made the difference very clear stating "the framework for making out a claim for damages for a violation of one's constitutional rights is ***different under state and federal law***." *Jensen*, ¶ 47 (emphasis added).

C. Defendants' Case Citations are Misapplied.

Defendants cite to *Haik v. Salt Lake City Corporation*, 2017 UT 14, ¶14, 393 P.3d 285 for the proposition that "issue preclusion requires only identical factual or legal issues, regardless of whether the claims are the same." Response, p. 12. Defendants fail to mention that *Haik* is a *claim preclusion* case and does not consider issue preclusion. *Haik*, ¶14. The trial court in the instant case already ruled that "claim preclusion" does not bar Plaintiff's causes of action, and Defendants did not appeal this ruling. R. 724-728. The Defendants' reading of *Haik*, that ***issue preclusion doesn't apply unless the "factual or legal issues" are identical***, actually supports Plaintiff's argument herein.

Defendants cite *Taylor* and *Fowler* for the proposition that unnecessary rigor was "actually litigated" and that there is no "substantive difference" between Plaintiff's unnecessary rigor claims and the deliberate indifference claims litigated

in the federal action. Response, p. 12. *Taylor* actually says, "Issue preclusion … bars successive litigation of an issue of fact or law ***actually litigated*** … [in] the prior judgment." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis and brackets added; quote marks omitted). As noted, unnecessary rigor was not "actually litigated." R. 84-89; Opening, pp. 56-58.

Fowler echoes the U.S. Supreme Court, "[W]hat is critical is whether the ***issue*** that was ***actually litigated*** in the first suit was essential to resolution of that suit and ***is the same factual issue as that raised in the second suit.***" *Fowler v. Teynor*, 2014 UT App 66, ¶14, 323 P.3d 594 (brackets in original and emphasis added). The state claim of unnecessary rigor, as a legal issue, was not "essential" to the federal action because it was never raised therein. Further, the standards for a state claim of unnecessary rigor are wholly different than the standards that were adjudicated in the federal action. Opening, pps. 38-40, 56-60. Thus, unnecessary rigor was not "actually litigated" in the federal action. Contrary to Defendants' application of these cases, *Taylor* and *Fowler* act to further support Plaintiff's argument that issue preclusion does not apply.

D. Defendants Fail the Four Element Test.

Plaintiff's Opening Brief, p. 58-60, addresses the Utah Supreme Court's four element *Jensen* test for issue preclusion. Defendants' arguments fail in two of the four elements, "identical issue" and "fully litigated." Opening, p. 58.

Under *Jensen,* issue preclusion does not apply because state constitutional claims like unnecessary rigor are not identical, or are "different," from the federal constitutional claims raised in the federal action:

> At the most fundamental level, the standards for state and federal constitutional claims ***are different*** because they are based on ***different constitutional language*** and different interpretive case law.

Jensen, ¶45 (emphasis added). Further,

> The ***determinations made by the federal judge***, under federal law, regarding the materiality of facts or the inferences that could be drawn from those facts ***were not dispositive as to questions arising under state law***.

Jensen, ¶44 (emphasis added). These passages frankly contradict Defendants' claim that if any "substantive differences" exist between unnecessary rigor and the federal causes of action "previously litigated," they are not dispositive. Response, p. 12. Under Utah law, there is no federal counterpart to unnecessary rigor. *Dexter,* ¶7. Because the issues are not identical, the Supreme Court's element (ii) for preclusion is not met. *Jensen,* ¶41.

Defendants' also claim that unnecessary rigor facts were "the same substantive facts and issues that underlined the federal deliberate indifference" claim. Response, p. 20. But that is patently untrue. The unnecessary rigor allegations and evidence in this case deal with the application of an alcohol withdrawal protocol to Casie. But Casie was clearly a known heroin (opiate) addict and required one of the existing opiate withdrawal protocols. Opening, FACTS B,

C, D, F. This failure likely resulted in Casie's sudden suicide impulse because of the extraordinary distress caused by cold turkey heroin withdrawal. Opening, FACTS C, D, E. Even Defendant Dr. Wilcox acknowledged that "opiate withdrawal is a life threatening medical condition" because of the greatly enhanced suicide risk. Opening, Facts 40 – 44.

The implication of these facts and issues not being identical is manifest in the third *Jensen* element. It therefore follows that the "issue" of the state claim of unnecessary rigor was not "completely, fully and fairly litigated." Thus, *Jensen* element (iii) fails. *Jensen,* ¶41.

REPLY POINT II

~ *Unnecessary Rigor Standards Were Absent in the Federal Action* ~

THE STANDARDS FOR THE STATE UNNECESSARY RIGOR AND DUE PROCESS CLAIMS ARE WHOLLY DIFFERENT FROM DELIBERATE INDIFFERENCE CLAIMED IN THE FEDERAL ACTION. DEFENDANTS HAVE IGNORED THESE DIFFERENCES.

A. Standards for Unnecessary Rigor Are Unique.

Defendants mistakenly argue that the legal standards for unnecessary rigor are "identical," "parallel" or "the same" to the legal standards of deliberate indifference litigated in the federal action. Response, pp. 11, 16 ("identical"), 20 ("parallel"), 24 ("the same").

Federal deliberate indifference involves a two-fold test. First, under the "objective component," a plaintiff must show that a prisoner's medical needs are "sufficiently serious." *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000). Defendants conceded suicide was "significantly serious." R. 117. Second, the "subjective component" requires that an official have a "sufficiently culpable state of mind" and "be aware of facts from which the inference could be drawn that a substantial risk of [suicide] exists, and ***he must also draw that inference***." *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) (emphasis and brackets added). The second test required that Casie's imminent likelihood of suicide would have been known or inferred by SLCJ officials and they disregarded that knowledge.

The state constitutional claim of unnecessary rigor is different. It "is broader than its [Eighth Amendment] federal counterpart." *Lafferty*, ¶73 (brackets added); *see also*, the extensive review of case law on unnecessary rigor over the past 25 years. Opening, pp. 37-50.

In short, unnecessary rigor addresses whether the actions of jail officials "***unnecessarily expose[d Casie] to an increased risk of serious harm***." *Dexter*, ¶19 (emphasis and brackets added). As Christensen has demonstrated, failure to administer an opiate withdrawal protocol was an "act [that] presented an obvious and known serious risk of harm to the arrested or imprisoned person; and knowing of that risk the official ***acted without other reasonable justification."*** *Miranda v.*

Utah, 2009 WL 383387, *10 (D. Utah), Opening, p. 41-42 (emphasis added). Based on FACTS C, D, E and F "a prison official would be liable … for ***choosing an easier and less efficacious treatment*** than professional judgment dictates." *Bott v. DeLand*, 922 P.3d 732, 741 (Utah 1996) (emphasis added).

Bott further lays out the difference between deliberate indifference in confinement, and unnecessary rigor, which is the unnecessary exposure to harm or pain:

> The deliberate indifference standard differentiates between inadvertent misconduct, which does not give rise to liability under article 1, section 9, and the ***unnecessary and wanton infliction of pain, which does.***

Id., at 740 (emphasis added).

The federal standard for deliberate indifferences argues that Defendants could not reasonably have inferred or known of Casie's imminent suicidal ideation and, therefore, as a matter of law, they were not obligated to do more than what they did. R. 412-414. On the other hand, the state claim for unnecessary rigor argues that Defendants' choice to monitor her withdrawal symptoms with a less effective CIWA-Ar alcohol withdrawal protocol over an easily available and more effective opiate withdrawal protocol "unnecessarily exposed [Casie] to an increased risk of serious harm." *Dexter*, ¶19.[1] Further, the withdrawal protocol provided by

[1] The director of medical services at SLCJ, Defendant Dr. Wilcox, wrote that "we view opiate withdrawal treatment to be a critical component of our suicide prevention plan." He affirmed in a national journal that CIWA should be used "for alcohol withdrawal." However, "opiate withdrawal is more clinically severe

Defendants was unreasonable because it was known to be "clearly … deficient and unjustified." *Id*. (quoting *Bott*, 922 P.3d at 741). In other words, by using the less effective, deficient CIWA-Ar protocol, SLCJ unnecessarily exposed Casie to significant risk by a knowing failure to treat Casie's true condition, heroin (opiate) withdrawal, with potentially deadly withdrawal consequences.

Defendants essentially claim that the comparison between the federal standard for deliberate indifference and the state standard for unnecessary rigor is a distinction without a difference. R. 409. That is untrue. Since 1996, more than 25 years ago, the Utah Supreme Court has made it clear that unnecessary rigor is wholly different than deliberate indifference. *Bott*, 922 P.2d at 737. Deliberate indifference focuses specifically on the methods and conditions of ***punishment***. *Id.* (emphasis added). But unnecessary rigor protects prisoners from "unnecessary abuse" and "unreasonably harsh, strict or severe" conditions of ***confinement***. *Bott*, 922 P.2d at 737 ("abuse"), and *Dexter*, ¶ 19 ("harm").

B. Defendants Have Not Addressed Plaintiff's Arguments.

The Defendants have failed to address or engage Plaintiff's arguments regarding 1) the differences between state unnecessary rigor and federal deliberate indifference (Opening, pp. 47-50); and 2) the Jail's insistence on using an alcohol

and can frequently result in death if not managed appropriately." Therefore, "Managing opiate withdrawal includes obtaining a COWS score, assessing for suicidality …." *See*, Opening Brief, pp. 17-21, 27-31.

protocol on a known withdrawing opiate addict when the Jail had an opiate withdrawal protocol which Defendants knew was more effective at detecting potential for sudden suicide. Opening, FACTS D, E and F, pps. 21-33; *see also*, pps. 43-49. This question of protocols presents disputed facts from which flow other critical, disputed facts. Opening, pp. 50-54.

The trial court waved these issues off, saying that even with these disputed facts, it "cannot possibly conclude" there was deliberate indifference, unnecessary rigor, or a violation of due process. In fact, the trial court went one step further explaining, as a summary, that Plaintiff's "inadequate medical care claims fail as a matter of law." R. 971, Opinion, p. 5. Plaintiff has never raised "inadequate medical care," or "deliberate indifference" as claims in the state case. R. 1-21. Those were made in the federal action and adjudicated under a federal constitutional standard. R. 85-88. These claims are not identical to the issues and facts in Plaintiff's state constitutional claim. Other than providing conclusory statements with a few passing references to case law, Defendants have simply ignored and not addressed these differences in state claims and standards regarding unnecessary rigor and due process discussed by Plaintiff in his Opening Brief.

REPLY POINT III

~ Critical Material Facts are Disputed ~

DEFENDANTS IMPROPERLY ARGUE THAT THERE ARE NO MATERIALLY DISPUTED FACTS BECAUSE OF THE FEDERAL ACTION. YET DEFENDANTS ADMIT THAT A KEY FACT OF THIS CASE IS IN DISPUTE. AS A RESULT, SUMMARY JUDGMENT WAS INAPPROPRIATE.

A. Critical Disputes of Material Fact.

Defendants argue that Plaintiff is attempting to "re-litigate" the facts and issues adjudicated in the federal action. However, the facts surrounding unnecessary rigor cannot be "re-litigated" because they were never actually litigated as part of the federal action. This is particularly true with respect to the "Facts About Dr. Wilcox and Wellcon," FACT F, Opening, pps. 27-33, comprising 14 separate numbered facts.

Plaintiff specifically disputed two critical matters in Defendants' MSJ:

(1) Key facts not adjudicated in the federal action. Christensen set forth seven (7) key facts that were not litigated in the federal action. Opening, 50-54. Defendants Response Brief never addressed Plaintiff's arguments on these important questions of fact.

(2) Use of withdrawal protocol. Both sides seem to agree that whether or not SLCJ should have used the more effective opiate withdrawal protocol is the central controversy in this matter. For example, Defendants don't deny the

importance of COWS, SOWS and WOWS; they simply claim that "the same substantive facts" underlying these claims were litigated in the federal action. Response, p. 20. This seems to be an easily resolved legal question, as Defendants point to nothing specific to support this contention. There is absolutely no indication the decision to use the CIWA-Ar protocol instead of the more efficacious COWS, SOWS or WOWS opiate withdrawal protocols was ever raised or litigated in the federal action.

(3) Key admitted question of fact. Herein lies a key, admitted question of fact that should compel reversal of the trial court's grant of summary judgment. Dr. Wilcox made it very clear in his deposition, at least four (4) times, that his WOWs (Wilcox Opiate Withdrawal Scale) was implemented ***before 2014***. Opening, Fact 42, p. 30. The very similar SOWS and COWS opiate withdrawal scales had been around for years ***before 2014***. Opening, Facts 10, 11 and 13.

The Jail medical records are very clear that Casie was not administered an opiate withdrawal protocol (Opening Fact 14, p. 18), which Dr. Wilcox described as "a critical component of our suicide prevention plan." Opening Fact 44, p. 31.

Question of Fact:

> **If WOWS or one of its cousins is so critical for suicide prevention in an opiate withdrawing prisoner, and if it was available prior to 2014, why was it not given to Casie in January 2014?**

B. Unnecessary Rigor Is Fact Supported.

Plaintiff's facts, as set forth in the Opening Brief, pp. 37-50, strongly support a claim of unnecessary rigor:

(1) Being free from unreasonably harsh or severe treatment. It was unreasonably harsh and severe to subject Casie, a known heroin addict, to cold-turkey withdrawal without using a well-known, effective opiate withdrawal regimen to monitor her. Opening, Facts 8, 9, 10, 13. Such withdrawing individuals are subject to extreme physical, mental and emotional distress leading to sudden suicide risk. Opening, Facts 16-27. As a result, Casie's last hours were absolutely horrifying. Opening, Facts 28-32.

(2) Unnecessarily exposed to increased risk of serious harm. A withdrawing heroin addict is knowingly and unnecessarily exposed to a greatly increased risk of sudden suicide owing to the pain and distress of cold-turkey withdrawal. This is especially true when the proper withdrawal monitoring protocol is not used to provide more exact information. Opening, FACT C. Casie was monitored for withdrawal symptoms based on an alcohol protocol when SLCJ officials knew that the opiate withdrawal protocol they had available would have provided better feedback to monitor her worsening symptoms. Opening, FACTS C, D.

(3) SLCJ acted without reasonable justification. SLCJ officials knew the risks of potential suicide inherent in a known heroin user going through opiate withdrawal. Opening, FACT C. Those officials had easy access to a more effective opiate withdrawal protocol. Opening, FACTS D and F. There was no reasonable justification for choosing an alcohol protocol to treat Casie and not the "more efficacious" opiate protocol. Opening, FACT F.

(4) Easier but less efficacious medical treatment. Defendants knowingly and intentionally chose the less efficacious CIWA-Ar protocol, used for alcohol withdrawal, on a known heroin addict. There were easily available and more efficacious COWS or WOWS treatment protocols for heroin addicts that were known by SLCJ medical staff to prevent sudden suicide ideation. Opening, FACTS B, C, D and F.

(5) Demands more than society is entitled to require. A known withdrawing heroin addict should not be required to undergo the extreme pain and distress of heroin withdrawal, which has a very high risk of sudden suicide, using an alcohol withdrawal protocol. Stated another way, society is not entitled to demand that a known heroin addict essentially withdraw cold-turkey because, *inter alia*, that addict will be in extreme and unnecessary distress and will be subject to greatly enhanced risk of suicide. Opening, FACT C.

(6) Protects from "unnecessary abuse." Failure to treat a known heroin addict with a known, more effective heroin withdrawal protocol subjected Casie to "unnecessary abuse" because it required her to endure unnecessary and severe mental, physical and emotional distress and a greatly heightened risk of sudden suicide. Opening, FACT C.

(7) Flagrant violation of rights. The medical director and personnel at SLCJ were well aware of the "obvious and known serious risk of harm" to someone who was a withdrawing opiate addict. Still, they chose to flagrantly expose Casie to an unnecessary and increased risk of serious harm by not putting her on the proper opiate withdrawal protocol. Opening, FACT F.

C. Case Citations are Inapposite.

Defendants cite to a number of cases to undergird their positions. Response, p. 23. Not one of the cited cases addresses the differences existing between federal and state constitutional claims or gives guidance on how issue preclusion should be applied in such claims. Defendants simply ignore the differences between federal and state constitutional claims.

D. Disputed Facts Prevent Summary Judgment.

The standard for summary judgment requires the "nonmoving party to show that there is a genuine issue of material fact or a deficiency in the moving party's legal theory that would preclude summary judgment." *Nelson v. Target*

Corp., 2014 UT App 205, ¶15, 334 P.3d 1010. Plaintiff has met this burden. Plaintiff has demonstrated that issue preclusion does not apply. Defendants also admit that there is at least one critical question of fact as to why a known withdrawing heroin addict was not given the proper opiate withdrawal protocol, which was very effective and available before 2014. R. 696-703, Response, p. 22-23.

The courts have also been very clear that parties can agree on the objective facts and still have a genuine dispute as to material facts. "A genuine dispute as to material facts may exist even when the parties agree on the objective facts, but disagree as to the reasonable inferences that can be drawn from them regarding the understanding, intention, and consequences of those facts." *Heartwood Home Health & Hospice LLC v. Huber,* 2020 UT App 13, ¶14, 459 P.3d 1060. (quotation marks and citations omitted). The parties agree on most of the objective facts. However, there are fundamental disagreements as to the understanding, intention and consequences of those facts, especially regarding SLCJ's choice of withdrawal protocols. These materially disputed facts are genuinely critical to this case and may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The trial court, based on these genuinely disputed facts, should not have granted summary judgment.

REPLY POINT IV

~ The Objective "Reasonable Jury" Standard ~

THE "REASONABLE JURY" STANDARD ARTICULATED BY THE COURTS SHOULD HAVE PRECLUDED SUMMARY JUDGMENT FOR DEFENDANTS.

It is clearly understood in our culture that reasonable minds can differ even when viewing the same evidence and facts. Utah courts have provided consistent direction on how to determine when factual disputes exist. Courts are to apply an "objective standard." *Heslop v. Bear River Mutual Ins. Co.*, 2017 UT 5, ¶20, 390 P.3d 314. "In reviewing a district court's grant of summary judgment, we first determine whether a dispute as to any material fact exists by asking 'whether reasonable jurors, properly instructed, would be able to come to only one conclusion, or if they might come to different conclusions, thereby making summary judgment inappropriate.'" *Heartwood,* ¶14 (quoting *Clegg v. Wasatch County*, 2010 UT 5, ¶15, 227 P.3d 1243).

Where, as in this case, there are multiple disputed facts, a "reasonable jury" would very likely see things differently than both the trial court and the Defendants. Based on this standard, a grant of summary judgment is inappropriate. The case should be remanded for a "reasonable jury" to sift through the facts and come to a final conclusion.

CONCLUSION

The fundamental principle that state constitutional claims are different, even broader, than their federal constitutional counterparts, underlies this entire matter. However, Defendants have missed this point and have done all they could to conflate the federal constitutional standards of deliberate indifference with the state constitutional standards of unnecessary rigor and due process arguing they are "identical," "parallel," or "the same." This is error.

There is no issue preclusion where 1) the issues being litigated in the state action are not identical to those "actually litigated" in the federal action; and, 2) the federal action did not fully, fairly and completely adjudicate them. The Utah Supreme Court has consistently held that when these two elements are not reached, issue preclusion does not apply.

The principle of unnecessary rigor as a unique state right has been developed by the Courts, albeit slowly, over the past 25 years. *Dexter,* ¶7. That development has led to a unique state right that has no federal counterpart. *Id.* The principle articulated by *Lafferty*, that unnecessary rigor is "broader" than its federal Eighth Amendment counterpart, is an important part of the legal development of unnecessary rigor as a unique Utah constitutional right.

This Court should not allow Defendants to carelessly cut away at long-developed unnecessary rigor jurisprudence by proposing, as a matter of law, that

deliberate indifference and unnecessary rigor now be viewed as "identical" or "the same thing." They are not. Unnecessary rigor is needed as a distinctly separate and robust legal doctrine to protect the least among us, vulnerable prisoners. Matthew 25:36 ("I was in prison, and ye came unto me").

This Court has the opportunity in this case to cement prior rulings on this unique and important doctrine of Utah constitutional law. We respectfully hope that this Court will take advantage of this moment and do so.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Appellant's Reply Brief** to be served upon counsel for Appellees via e-mail on this 11th day of June 2021, as follows:

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CERTIFICATE OF COMPLIANCE WITH URAP 24(a)(11)

I hereby certify that this brief complies with:

(A) Rule 24, Paragraph (g), in that Appellant's Brief contains 5,619 words, excluding the table of contents, table of authorities, addendum, and certificates of counsel.

(B) Rule 21, governing public and private records, in that Appellant's Brief and Addendum do not contain non-public information.

/s/ Robert B. Sykes