

2001

# Michael Kouris, Estate of Michael Kouris, Pam Kouris v. Utah Highway Patrol, State of Utah, Cortland Childs : Reply Brief

Utah Supreme Court

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Nancy L Kemp; Assistant Attorneys General; Mark L shurtleff; Attorney General; Attorneys for Appellee.

Warren W. Driggs, J. Bradford Debry; Robert J. Debry and Associates; Attorneys for Appellants.

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IN THE UTAH SUPREME COURT

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MICHAEL KOURIS, individually,  
and for the ESTATE OF MICHAEL  
KOURIS, a deceased minor; and  
PAM KOURIS, individually,

Plaintiffs/Appellants,

vs.

UTAH HIGHWAY PATROL, STATE OF  
UTAH and CORTLAND CHILDS,

Defendants/Appellees.

Appeal No.: 20010097-SC

Judge: Bruce K. Halliday

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REPLY BRIEF OF THE APPELLANTS

---

APPEAL FROM A SUMMARY JUDGMENT IN THE SEVENTH DISTRICT COURT

---

WARREN W. DRIGGS - 4027  
J. BRADFORD DEBRY - 7780  
ROBERT J. DEBRY & ASSOCIATES  
4252 South 700 East  
Salt Lake City, Utah 84107  
Telephone: (801) 262-8915  
Attorneys for Appellants

Nancy L. Kemp  
Assistant Attorney General  
Mark L. Shurtleff  
Attorney General  
160 East 300 South, Suite 600  
Salt Lake City, UT 84114-0856  
Attorneys for Defendants/Appellees

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UTAH SUPREME COURT

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PAT BARTHOLOMEW  
CLERK OF THE COURT

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J. BRADFORD DEBRY - 7780  
ROBERT J. DEBRY & ASSOCIATES  
4252 South 700 East  
Salt Lake City, Utah 84107  
Telephone: (801) 262-8915  
Attorneys for Appellants

Nancy L. Kemp  
Assistant Attorney General  
Mark L. Shurtleff  
Attorney General  
160 East 300 South, Suite 600  
Salt Lake City, UT 84114-0856  
Attorneys for Defendants/Appellees

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### III.

#### INTRODUCTION

This is a case where a Highway Patrol Trooper with high amounts of prescription drugs in his system hit and killed Michael Kouris while Michael was crossing the street on his bike. Although eyewitness and expert testimony contradict the State's position, it asserts that there are no disputed facts.

Additionally, the State mistakenly argues that this Court should not look beyond governmental immunity. However, if governmental immunity is not an absolute defense, the State has not contested that other duties exist such as a duty of reasonable care under the circumstances.

Finally, in arguing its brief, the State asserted a number of errant technical points. These are addressed in a separate point at the end of this brief.

#### IV.

#### ARGUMENT

#### POINT I

#### **IF THERE ARE FACTS IN DISPUTE, THE COURT WILL NOT EVEN REACH THE IMMUNITY ISSUE**

The parties' briefs take opposite positions on the analytical approach to this case. Kourises' opening brief argues that the analysis should begin by determining what duties apply. (Brief of Appellant at p.39-41.) On the other hand, the State's brief argues that the analysis should begin and end with immunity. (Brief of Appellee at p.11-14.)

Kourises still vigorously contend that the Court should begin its analysis by addressing duty. (See POINT III below.) However, for purposes of this section (POINT I) Kourises will agree arguendo that the analysis should begin with immunity.

Any argument on immunity begins with U.C.A. § 41-6-14 (1998) (see Exhibit A). Indeed, the State concedes that there can be no immunity if that section has been violated. (Brief of Defendants/Appellees at p. 15-22). But, whether or not there has been a violation of § 41-6-14 is a fact issue. Specifically, the State contends that there are no facts in dispute regarding violations of § 41-6-14 (Brief of Appellee at p.15-16). On the other hand, Kourises argue that there are several factual disputes regarding § 41-6-14. (See POINT II below.) The State argues that the analysis should begin with immunity. However, any analysis of

immunity must be based upon undisputed facts. If there are facts in dispute, the Court cannot opine about immunity and the case must be remanded.

Yet, if the Court remands because there are conflicting facts, the duty/immunity issue would still remain back in the trial court. In other words, on remand, what were the Highway Patrol and Trooper Childs' duties and does immunity attach? Did Trooper Childs have a duty not to drive impaired? Did he have a duty not to pass at a crosswalk? Did he have a duty of reasonable care under the circumstances?

In summary, Kourises urge this Court to reverse and remand because these are disputed issues of fact (see POINT II below.) However, even if this Court reverses and remands on the ground of disputed fact issues, Kourises urge this Court to instruct the trial court on the duty/immunity issues--thus avoiding another appeal and possibly another trial.

## **POINT II**

### **THERE ARE KEY ISSUES OF DISPUTED FACT**

The State's brief relies on the trial court's list of "undisputed" facts. (Appellee's Memorandum at p. 15-16.) The State mistakenly asserts that these "undisputed facts" are indeed undisputed. The State also mistakenly asserts there are no other disputed facts.

However, on summary judgment, a trial court cannot weigh disputed evidence. Bill Brown Realty Inc. v. Abbott, 562 P.2d 238,

239 (Utah 1978). If there is any dispute, those facts, and the inferences drawn must be interpreted in a light most favorable to Kourises. Blue Cross Blue Shield v. State, 779 P.2d 634, 636 (Utah 1989). This section will demonstrate that there are several fact disputes.

1. Trooper Childs' Drug Impairment Can Be Established Even Without Expert Testimony.

A central issue in this case is whether or not Trooper Childs was impaired by drugs at the time of the accident. Kourises relied, in part, on the expert testimony of Dr. Struempfer. However, there are also documentary admissions, and factual evidence in the Record. (See Memorandum of Appellant at p. 6-9). The State's Memorandum challenges the expert testimony of Dr. Struempfer (Appellee's Memorandum at p. 22-30). However, the State has totally ignored the documentary admissions and factual evidence regarding Trooper Childs' drug impairment.

Specifically, Trooper Childs had a long and documented history of prescription drug problems. He had been taking prescription narcotics for many years. R. 373. Because of its concern over his drug use, the Highway Patrol sent Trooper Childs for numerous medical exams. Appellant's Brief pg. 6-11. The result of many of those medical exams were findings that Trooper Childs was impaired and unsafe to drive. Id. Still, the Highway Patrol chose to ignore those medical recommendations that he be taken off the road. By the time of the Kouris accident, Trooper Childs was taking three

times the amount of the same medications that had impaired him at the time of those medical evaluations. Id. At the time of the Kouris accident, he had blood levels of those medications that far exceeded his prescribed dosage. Id.

As a result of his history and continued problems, the Highway Patrol concluded:

...Trooper Childs is not able to make the decision to rehabilitate from the prescribed medication in order to be able to drive safely...Because of his prescribed medication use, Trooper Childs i[s] not able to perform his functions as a field trooper with the Utah Highway Patrol. (R. 652, pg 3, 578).

In short, even the Highway Patrol thought he was unsafe to drive because of the drugs!

The State also ignores the facts from which a jury could conclude that Trooper Childs was impaired. For example, Trooper Childs intended to pass Tammy Auberger. She was approaching an intersection and was stopping at a crosswalk. He accelerated and passed her. Even assuming the State's version of the facts, Trooper Childs did not turn on any lights or signals until he had passed Auberger. R. 408, 411. His reaction was slow. An unimpaired driver would have turned lights on in ample time.

Second, the other eyewitnesses clearly saw children in and around the crosswalk. R. 396, 398-403, 405. However, Trooper Childs did not see any. The unimpaired drivers (eyewitnesses) saw what the impaired driver did not.

Thus, the admission by the Highway Patrol; the extensive drug history; and Trooper Childs' lack of perception at the time of the accident are all facts from which a jury could conclude that Trooper Childs was impaired. Those facts should preclude summary judgment.

2. A Factual Dispute Exists With Regard to the Radio Call.

The State argues that the dispatch call made prior to the accident made an emergency response appropriate. However, to meet the prerequisites of the statute, the call must be an emergency call and the Trooper must respond to the call as an emergency. See Appellant's Opening Brief pg. 29, §41-6-14 U.C.A. There are factual disputes as to both issues.

In support of its contention that Trooper Childs' response was justified as an emergency, the State mischaracterizes testimony and relies on Trooper Childs' after the fact account. R. 187.

The State argues that Kourises' own accident reconstruction expert testified that the call was an "emergency call."

Even plaintiff's reconstruction expert, Ronald Probert (see R. 107), acknowledged that it was within Trooper Childs' discretion to respond to the situation as an emergency (R.284). Not a shred of record evidence supports plaintiffs' contention that a genuine issue of material fact exists regarding the propriety of Trooper Childs' election to respond to the call as an emergency. Appellee's Brief pg. 18.

Conveniently omitted from the State's summation of that evidence was Mr. Probert's opinion on the same page:

Q: If Cortland Childs's supervisor were to say that he believed this was a legitimate emergency response, would that affect your opinion?

A: I read that. Sergeant Kelly. And again, it's an opinion. I guess I'm looking at this and saying, I don't see this as the emergency response that Cortland Childs did. R. 284

Indeed, three pages earlier in the same deposition Mr. Probert testified:

I don't think that - I've already said that. I don't think that in my classification I would look at this as an emergency....He believed it was. And I think it was unreasonable. I don't think that that was correct.

In addition to Probert's testimony and the testimony of Officer Allred discussed in Kourises' opening memo<sup>1</sup>, Trooper Childs' actions immediately before the accident conflict sharply with the statements he made after the accident. The State ignores Trooper Child's actions and looks only at his later, self-serving statement that he was responding to an emergency.

Eyewitness testimony raises factual disputes as to whether the call was an emergency and whether Trooper Childs treated it as an emergency. Specifically, Trooper Childs heard the dispatch call while driving south on Highway 10, about a mile from where Michael was hit. R. 382, 385-86. He made a U-turn and began to head north (toward the intersection where Michael was hit) on Carbon Avenue

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<sup>1</sup> Due to a clerical error, a page of the deposition was omitted from appellants' opening brief. They are included here for full disclosure to the Court. See Exh. B.

following directly behind Tammy Auberger. R.385-86. During that time, Ms. Auberger drove at the posted speed limit of 45 MPH. Id.

About a quarter of a mile from the point of impact, the speed limit changed to 30 MPH. Ms. Auberger slowed to 30 MPH as did Trooper Childs behind her. At no point did Trooper Childs exceed the speed limit, attempt to pass her, or turn on any lights, sirens, or signal devices. R. 398.

Finally, as Ms. Auberger approached the intersection, she began to stop to allow Michael to cross the street. R. 393. It was only as she was stopping that Trooper Childs sped up and pulled around her. Still, she saw no lights or sirens. R. 408, 411.

Thus, after getting the call, Trooper Childs followed Ms. Auberger for approximately one mile. He followed at a normal distance while going the speed limit. He slowed when she slowed. He did not turn on any lights and appeared to be in no hurry whatsoever. Only when Ms. Auberger began to stop did Trooper Child's suddenly accelerate, swerve around her, and turn on his lights. The accident happened a second or two later.

Thus there are factual disputes as to whether this was an emergency and whether Trooper Childs treated the call as an emergency. Both factual question must be resolved in order to decide if governmental immunity applies.

3. A Factual Dispute Exists as to Where Michael Was at the Time of The Accident.

The trial court concluded and the State argues that it is undisputed that Michael was outside the crosswalk when he was hit. The State also argues that Michael's location is immaterial. Appellee's Brief pg.19,20. However, Michael's location is material for at least two reasons and is disputed by eyewitness testimony.

First, in its Memorandum Opinion, the trial court cited Michael's location as an undisputed fact. R. 612. It then granted summary judgment based on its opinion that Michael was outside the crosswalk. Thus, Michael's location is a material fact because the trial court thought it was material and based summary judgment thereon.

Secondly, this is an intersection auto/pedestrian case. The central issues in nearly all automobile intersection cases center around time, speed, distance, visibility, etc. It seems axiomatic that the locations of the people involved are material. Each persons position in relation to one another is critical to the decision making process. A fact decided one way effects how the next fact fits in the puzzle. The location of the pedestrian and the vehicle are keystone facts. Here, the State cannot simply say that Trooper Childs' lights were on when Trooper Childs hit Michael, unless the State knows where Michael was.

Finally, in addition to arguing that Michael's location is immaterial, the State argues that his location is undisputed. In

doing so, the State cites to an inadmissible police report and simply ignores conflicting eyewitness testimony. Appellee's Brief pg.19. The conflicting, eyewitness testimony, was that:

...It made no sense that the police officer, with the kids crossing the crosswalk, would turn on his lights and speed off like that. R.363, 416, 548, 651 pg.2., 652 pg. 46 (Emphasis added).

4. There is a Factual Dispute as to Whether Trooper Childs' Lights Were On.

The State argues as an undisputed fact that Trooper Childs activated his emergency lights before the accident. Actually, when he activated his lights is very much disputed. The State interprets the conflicting facts in a light most favorable to itself. Again, the State is not entitled to that viewpoint. Blue Cross at 636.

Testimony by witness Tammy Auberger provides evidence that there were no lights on Trooper Childs car until he had passed her. R. 408. Id. This puts him past her car and in to the intersection. Yet, where exactly was Michael? Was he directly in the crosswalk? Was he in the unmarked crosswalk?

These unknown questions are the precise reason why the disputed facts regarding Michael and Trooper Child's locations are critical. They create material issues of disputed fact as to whether or not Trooper Childs turned on his lights before the point of impact.

5. A Factual Dispute Exists as to Whether Trooper Childs Acted Reasonably.

As argued in its opening brief, Kourises continue to assert that §41-6-14 contains a duty of reasonable care under the circumstances. Even if Trooper Childs turned his lights on a split second before he hit Michael, is he now immune? If this Court agrees that a duty of reasonable care exists, then even under the State's view of the facts, a dispute exists as to whether Trooper Childs acted reasonably.<sup>2</sup>

POINT III

**THE COURT MUST ADDRESS THE ISSUE OF DUTY**

Kourises have argued in Point I above, that if there are disputed issues of fact, it will not be necessary for the Court to address immunity. However, regardless of the factual outcome, the Court must address duty. In other words, it is not possible to analyze Trooper Childs' and the Highway Patrol's immunity without first determining what duties apply. (See generally Brief of Appellant at p.33-38.) Again, the lower court erred by ruling on immunity without first determining the duty. (Id.)

The State argues that it is not necessary to examine the issue of duty. Appellee's Brief pg.12. In support of this position, the State cites Ledfords v. Emery County School Dist., 849 P.2d 1162

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<sup>2</sup> The issue of whether or not Trooper Childs acted reasonably is related to the legal issue of Trooper Childs' duty. See POINT III below.

(Utah 1993). Id. There, the State quotes selectively from Ledfords stating that it would be improper to analyze duty first.

In some of our past cases in which we analyzed such a claim against a governmental entity, we have begun with a traditional tort analysis to determine whether the plaintiff had alleged a legally cognizable duty and breach of duty. If the plaintiff had not stated a legally valid tort cause of action, we usually have declined to undertake the immunity analysis. At other times, we have performed the immunity analysis first, typically when it ended the inquiry.

\* \* \*

Whatever the order in which we address the questions, it is important to keep in mind that a legislative waiver of immunity is not a legislative consent to liability. Even when immunity is waived, there can be no liability absent a breach of a common law duty owed to the plaintiff. Appellee's Brief pg. 13, quoting Ledfords at 1163-64.

However, the State's analysis left out the next paragraph in the opinion which explains the Court's current position and its reasoning for not adhering to that position in Ledfords:

In our more recent cases, we have tended to address the traditional tort questions first, for the sake of analytical clarity and of keeping distinct the questions of immunity and liability. However, in the present case, the parties have made it easy for us to decide whether to begin with immunity or duty. They did not brief the issue of [duty]...Ledfords at 1164, emphasis added.

Here, the question of whether the Highway Patrol owed Kourises a duty has been before the court from the first summary judgment motion.

In addition to §41-6-76, other statutes created a duty of care towards Michael. For example, the trooper was driving with drugs[] in his system, he passed a vehicle stopped at a crosswalk, and he failed to take reasonable precautions for people in the crosswalk. In each instance there are Utah statutes that create a specific

duty of care that runs from the Trooper to the pedestrian...

In addition to specific State statutes cited above, the Highway Patrol's own internal policy for responding to emergency calls creates an even higher duty of care... R. 365-366 (footnotes and citations omitted).

Kourises extensively argued to the trial court that there were duties from which the Highway Patrol and the State are not immune. Id., R. 547-550, R.592-93, R.561 pg.20, etc. Moreover, these duty arguments were a major theme of Kourises' brief before this Court. Appellants' brief pg.33-41. In summary, the issue of duty was plainly argued below and extensively briefed to this Court. It is necessary that the duties be determined before looking at immunity.

#### POINT IV

##### **TROOPER CHILDS' DRUG USE PRECLUDES SUMMARY JUDGMENT**

##### **A. The Trial Court Abused its Discretion When Ruling on Struempler's Opinion Testimony.**

The trial court erred in excluding Struempler's affidavit because it applied the wrong law. The trial court's Memorandum Decision and the State's brief all argue the same point: an expert must be a medical doctor (or have the training and experience of a medical doctor) in order to opine whether a person is impaired. Appellee's Brief pg. 25. Neither here nor below did the State or the trial court ever look at Mr. Struempler's qualifications, education, or experience.

In support of its position, the State attempts to distinguish the controlling Utah authority, State v. Mason, 530 P.2d 795 (Utah 1975). Mason stands for the proposition that a person need not be a medical doctor in order to testify to the impairing effect of drugs. Yet, the State argues that Struemppler's testimony goes to liability whereas the expert testimony in Mason went to testimonial capacity. Although the State's argument raises a possible distinguishing element, the difference here is immaterial.

In Mason, as well as here, the issue is whether the proposed expert is qualified to testify to the impairing effect of a drug, not what element of a claim the testimony goes to. Id. at 795, 798. The Mason Court correctly looked at the experts' qualifications and ruled that a police officer could testify as an expert on the issue of impairment. Id. Mason stands for the proposition that in Utah, one does not need to be a medical doctor to testify to the impairing effect of a drug.

The State also attempts to distinguish Roberts v. United States, 316 F.2d 489 (3<sup>rd</sup> Cir. 1963). The State argues that the Roberts expert had extensive training and experience in the field of toxicology and two years of scientific work in a medical school. Id. at 493. It then argues that the present case is different because Struemppler had no medical training whatsoever. Appellee's Brief at pg.28.

In reality, the State's argument supports Kourises' position. The Roberts expert had two years of scientific work in a medical school. However, similar to the State's arguments, the Roberts expert did not have medical training. Yet here, Struempler not only has extensive training and clinical experience in chemistry and toxicology, he spent time teaching doctors in a medical school and for the United States Navy. R. 307-311.

Finally, the State attempts to distinguish State v. Platt, 496 S.W.2d 878 (Mo. App. 1973). The State argues:

...the challenged expert testimony was held inadmissible for lack of materiality. Consequently, any statement addressing the issue of its admissibility on other grounds is merely dictum. Appellee's Brief pg. 28.

Here, the State has failed to disclose to the Court the pertinent part of the Platt case. The Platt court stated:

A ruling on this evidentiary point is not necessary for the disposition of the present appeal, but will be considered nevertheless, for the guidance of counsel and the trial court in connection with retrial. The objection made at trial, that the witness was not qualified to answer the question as an expert witness, is without merit. A qualified chemist, particularly one trained in toxicology, is competent to testify as to the effect of drugs upon the human body. (citations omitted). Id. at 884. (Emphasis added).

This is not dictum. Contrary to the State's implication, this court is instructing its trial court on the law.

Yet in the present case, the trial court simply concluded that because Mr. Struempler was not a medical doctor, he was automatically disqualified:

...The Motion to Strike should be granted for the reasons set forth therein<sup>3</sup>, namely that because Richard Struempler is not a medical doctor he is unqualified to render the opinion stated in his affidavit that Trooper [Childs] was impaired at the time of the collision.... R. 610.

The trial court ignored the fact that Mr. Struempler taught medical doctors at George Washington School of Medicine, and, for the U.S. Navy R. 307-311; it ignored the fact that he has published numerous articles on drugs, impairment, and drug metabolites Id.; it ignored the fact that as an expert witness for the United States Navy, he has been qualified in over a hundred cases to testify to similar issues in state and federal courts Id.; and, it ignored the fact that as a clinical chemist with training in toxicology, his job for over twenty five years has been dealing with drugs in people and how those drugs effect them.

B. Struempler's Opinion was not Speculative.

The State also argues that Mr. Struempler's opinion was speculative. Appellee's Brief pg. 26-27. This argument was not preserved below and should not be considered. Julian v. State, 966 P.2d 249, 258 (Utah 1998). Nevertheless, a review of Struempler's entire affidavit shows his opinion was not speculation. In the

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<sup>3</sup> The Utah Court of Appeals has recently held that granting a motion for reasons set forth in a supporting memorandum is insufficient. Gabriel v. Salt Lake City Corp., 34 P.3d 234 (Ut. App. 2001). It held that the presumption of correctness ordinarily afforded trial court rulings has little operative effect when [the court] cannot divine the trial court's reasoning because of a cryptic ruling. Id. citing Allen v. Prudential 839 P.2d 798, 800 (Utah 1992).

affidavit, Mr. Struempler discusses the materials he reviewed, his findings, what the literature says about the drugs, and then offers his opinion. R. 304-306. Mr. Struempler's opinion was clear and unequivocal:

¶12. In my opinion, Mr. Childs was impaired by use of these medications at the time of the motor vehicle accident on 7/19/98. R. 306.

C. Medical Malpractice Cases are Not Applicable.

In its brief, the State argues that it has offered substantial authority for the proposition that only a medical doctor may testify to impairment. The State's cases are incorporated by reference to arguments it made to the trial court. There, the State presented a series of medical malpractice cases: Fitz v. Synthes Inc., 990 P.2d 391 (Utah 1999), Fredericksen v. Maw, 227 P.2d 772 (Utah 1951), Chadwick v. Nielsen, 763 P.2d 817 (Utah App. 1988), Kent v. Pioneer Valley Hospital, 930 P.2d 904 (Utah App. 1997), Dikeou v. Osborn, 881 P.2d 943 (Utah App. 1994).

The State cited these as support for the proposition that expert medical testimony is required to establish medical causation. It argues that because Struempler is not a medical doctor he cannot testify that Trooper Childs' use of drugs "caused" the accident. This argument is misplaced because impairment and medical causation are completely different concepts.

The cases referred to by the State are all medical malpractice or medical device injury cases. In that realm, the issue of

medical causation is an essential element of the medical cause of action: Did the breach of the medical standard of care (or the faulty medical device) cause the injuries claimed? Typically, there must be expert medical testimony on this issue because the necessary knowledge is beyond that of the average jurors.

The present case is significantly different. The question before the court was impairment, not medical causation. As argued above, drug induced impairment can be established by non-medical expert testimony.

However, the State has offered no support whatsoever for its proposition that where there is an alleged impairment, the causation of a car accident must be established by expert medical testimony. There is no such requirement in Utah because in most cases a jury can look at the evidence and come to its own conclusion as to whether the impairment contributed to the crash. Thus, the cases cited by the State do not support the trial court's conclusion that Kouris must have expert medical causation testimony.

D. Driving With Controlled Substances in the Blood is Prohibited Regardless of Impairment.

Utah Code §41-6-44.6 prevents anyone from driving a car if they have a controlled substance in their blood. The legislature passed this statute because of the inherent dangers of driving while under the influence of a controlled substance, whether or not one is visibly impaired. See Utah Code Annotated §41-6-44.6.

Yet, the State argues that all drug testimony is inadmissible because there is no evidence of impairment. Appellee's Brief pg. 29. However, the question of impairment under 41-6-44.6 is irrelevant because it is not an element of the statute. Thus, it is unlawful for one to drive with a controlled substance in their blood, even if unimpaired.

Ironically, the Highway Patrol is the agency charged with enforcing this statute. It was the Highway Patrol's responsibility to protect Michael from drivers with controlled substances in their blood. It was the Highway Patrol that allowed Trooper Childs to drive with controlled substances in his blood. R. 377. The Highway Patrol knowingly let Trooper Childs drive for years when some of its own doctors warned that it was dangerous and recommended he not be allowed to drive. R. 559.

The State specifically knew he had a drug problem. It hired doctors that said he was impaired and that he displayed drug seeking behavior. The Highway Patrol instructed Trooper Childs' supervisors not to ask about, question, or discuss his drug problem. R. 377. Finally, a few months after Michael's death, when Trooper Childs nearly killed a fellow officer, the Highway Patrol finally took him off the road. It concluded he was unsafe to drive because of his drug use. R. 578, 652 pg. 3.

## POINT V

### **THE STATE'S TECHNICAL ARGUMENTS ARE UNFOUNDED**

Throughout the State's brief, it raised a number of issues that address technicalities as opposed to the substance of Kourises' arguments. Moreover, for the most part, these technical arguments arise from the States incomplete review of the record. In order to keep the preceding substantive replies concise, Kourises have addressed the State's technical arguments here under a single heading.

1. The Complaint Adequately Covers All of Kourises' Causes of Action.

The State asserts that the Kourises have re-characterized their claims from a negligence claim to a negligent supervision claim. Appellee's Brief p.10.

On December 28, 1998, Kourises filed a negligence and wrongful death complaint against the Utah Highway Patrol, the State of Utah, and Cortland Childs. R.1. The complaint sought a judgment against each defendant. R.5. It sought a judgment against Cortland Childs for his negligence. Separately, under the doctrine of vicarious liability, it sought a judgment against the Highway Patrol and the State of Utah for the negligence of their employee while in the course and scope of his employment. R. 3-5.

Based on early discovery of the narcotic medications in Trooper Childs' system, and his long and significant drug history while an employee of the Highway Patrol, Kourises filed an amended

complaint adding a cause of action against the Highway Patrol for negligent hiring, training, and supervision, as well as a cause of action for violation of Kourises' civil rights. R. 62-68.

The State filed several summary judgment motions including one opposing the individual claim against Cortland Childs. R. 115, 138. The State's trial counsel argued that the governmental immunity act immunized state employees from individual liability while acting in the course and scope of their employment. R.138-39. To simplify the issues, Kourises agreed to dismiss the individual claim purporting to hold Trooper Childs personally liable. R. 651 at pg.9.

The vicarious liability claims against the Highway Patrol and the State for Trooper Childs' negligence as an employee, were never dismissed. This is clear not only from the procedural history of the case, but also from the oral arguments that followed the dismissal of the individual claim.

...Well we're down to, um, a negligent supervision claim and [] negligence claim, Your Honor, at this point, cause the civil rights claims have gone away and the individual claims against Trooper Childs have gone away...Sandra Steinvoot, Defendants' Trial Counsel, R. 652 p.5. (See also R. 651 pp.9-25.

This case still contains a negligence/wrongful death claim against the State and the Highway Patrol for the negligence of its employee Trooper Childs. It also contains a negligent supervision claim against the State and the Highway Patrol. R.62

2. Statutory Construction was Extensively Argued Below.

The State argues that the Kourises' statutory construction argument was not preserved below. Appellee's Brief p.14. However, it was preserved in the Plaintiff's Memorandum in Opposition to Summary Judgment. R. 360-369. Additionally, it was preserved at oral argument in lengthy argument from both sides over the precise issue. R. 652 pp.25-48.

3. Michael's Disputed Location at Impact was Argued Below.

The State argues that Kourises did not raise below that Michael was in the crosswalk. Thus, it contends that Kourises cannot raise that issue here. Appellee's Brief p. 19, 20. That argument is without merit. The following testimony was argued extensively in Kourises' pleadings below and at oral arguments:

...It made no sense that the police officer, with the kids crossing the crosswalk, would turn on his lights and speed off like that. R.363, 416, 548, 651 pg.2., 652 pg.46 (Emphasis added).

4. Kourises' Statutory Construction Argument is Proper.

As argued in Point III, a central issue in this case has always been what duties existed and whether immunity attaches. Kourises propounded a line of reasoning based on statutory construction. The State argued in reply that statutory construction is not relevant because the trial court ruled immunity was a complete defense; and, that the statutory construction was not preserved below. Appellee's Brief pg. 13-14.

On review of a Summary Judgment, an appellate court accords no deference to a trial court's legal conclusions given to support the grant of summary judgment and reviews those conclusions for correctness. Schurtz v. B.M.W. of N. America, 814 P.2d 1108, 1111-1112 (Utah 1991). Thus, it is irrelevant that the trial court found immunity to be a complete defense. This Court can analyze the statutes to determine whether the trial court was correct.

Additionally, the statutory construction issue was preserved below. Appellant's Opening Brief pg. 1-2. A central issue has always been what Utah motor vehicle statutes and common-laws impose duties on the State. In order to determine whether a statute creates a duty or confers immunity, one must construe the applicable statutes. The trial court had to do this in order to come to its conclusion that immunity attached. This Court is free to use principles of statutory construction here.

5. The State Improperly Alludes to the Contents of a Video.

The State alludes to a video of the accident, in support of several of its arguments. Appellee's Brief pg. 19. There was video footage captured by a nearby gas station's video surveillance system. However, the quality of the video is at best, extremely poor. Had this video been in anyway illuminating, it would have been part of the Record in this case. It is not. The video reveals almost nothing, and it was never offered in evidence. Moreover,

the State does not even cite to portions of the video, it cites to its trial counsel's interpretation of the video. Id.

6. Dr. Bender's Affidavit is Properly Before the Court.

The State argues that Dr. Bender's affidavit is ineffective because it is not signed or notarized. However, the affidavit before the court is proper. See Exh. C.

Kourises have no explanation why the original signed affidavit does not appear in the Record. It was filed with the trial court and hand delivered to the Attorney General. The affidavit and its contents were argued at oral arguments on the Motion to Reconsider. R. 653. Neither the trial court nor the State raised any objections because both had a signed copy in their possession. Therefore, since the trial court reviewed and made legal rulings on Dr. Bender's signed affidavit; and, no objections were raised below, it is properly before this Court.

V.

CONCLUSION

In its decision granting Summary Judgment, the trial court made several errors which require that the Summary Judgment be reversed. The trial court improperly weighed or ignored evidence on impairment, the emergency vehicle statute, and on the accident itself. An additional critical piece of evidence was Richard Struempfer's expert opinion that Trooper Childs was impaired. The trial court abused its discretion by excluding this testimony

because Struempler was not a medical doctor. Based on the disputed facts and the impairment evidence, there can be no immunity.

However, even if the facts are undisputed, Trooper Childs violated duties for which there is no immunity. These duties include a duty of care under the circumstances; a duty not to drive while impaired or with a controlled substance in ones body; a duty not to pass a car at a crosswalk; and, a heightened duty of care with children present. The State appears to have conceded these duties.

Therefore, the Kourises submit that this Court should remand this case for a trial of the facts with the testimony of Richard Struempler. So as to avoid further appeals, Kourises respectfully suggest that this Court instruct the parties on the issues of duty and governmental immunity.

DATED this 7<sup>th</sup> day of March, 2002.

ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Appellants

By: 

WARREN W. DRIGGS  
J. BRADFORD DeBRY

CERTIFICATE OF HAND-DELIVERY

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS (Kouris v. Utah Highway Patrol) was hand delivered this 7<sup>th</sup> day of March, 2002, to the following:

Nancy L. Kemp  
Assistant Attorney General  
Mark L. Shurtleff  
Attorney General  
160 East 300 South, Suite 600  
Salt Lake City, UT 84114-0856

Attorneys for Defendants/Appellees

A handwritten signature in cursive script, appearing to read "L. J. Albright", written over a horizontal line.

peggy\lit\Kouris.WP

VI.

ADDENDUM

1. EXHIBIT A

Page 1

2. EXHIBIT B

Pages 2-3

3. EXHIBIT C

Pages 4-7

Tab A

## EXHIBIT A

U.C.A. § 41-6-14 (1998) states as follows:

(1) The operator of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges under this section, subject to Subsections (2) through (4).

(2) The operator of an authorized emergency vehicle may:

- (A) park or stand, irrespective of the provisions of this chapter;
- (B) proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
- (C) exceed the maximum speed limits; or
- (D) disregard regulations governing direction or movement or turning in specified directions.

(3) Privileges granted under this section to the operator of an authorized emergency vehicle, who is not involved in a vehicle pursuit, apply only when the operator of the vehicle sounds an audible signal under Section 41-6-146, or uses a visual signal as defined under Section 41-6-132, which is visible from in front of the vehicle.

Tab B

Page 1	Page 3
<p>1 IN THE SEVENTH JUDICIAL DISTRICT COURT</p> <p>2 IN AND FOR CARBON COUNTY, STATE OF UTAH</p> <p>3</p> <p>4</p> <p>5 MICHAEL KOURIS, individually,) Civil No. 980700823PI and for the ESTATE OF MICHAEL) 6 KOURIS, a deceased minor; and) Judge Bryce K. Bryner PAM KOURIS, individually, ) 7 Plaintiffs, ) DEPOSITION OF: 8 vs. ) TRACY ALLRED 9 UTAH HIGHWAY PATROL, STATE OF) 10 UTAH, and CORTLAND CHILDS, ) TAKEN: 12/21/99 11 Defendants. )</p> <p>12</p> <p>13</p> <p>14 -ooOoc-</p> <p>15 Deposition of TRACY ALLRED, taken on</p> <p>16 behalf of the Plaintiff, at 149 East 100 South,</p> <p>17 Price, Utah, before DEANNA M. CHANDLER, Certified</p> <p>18 Shorthand Reporter and Notary Public in and for the</p> <p>19 State of Utah, pursuant to notice.</p> <p>20 -ooOoc-</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 I N D E X</p> <p>2 WITNESS PAGE</p> <p>3 TRACY ALLRED</p> <p>4 Examination by Mr. Driggs 4</p> <p>5 Examination by Mr. Robinson 58</p> <p>6 Examination by Mr. Driggs 81</p> <p>7 Examination by Mr. Robinson 83</p> <p>8</p> <p>9</p> <p>10 E X H I B I T S.</p> <p>11</p> <p>12</p> <p>13 EXHIBITS PAGE</p> <p>14 None marked.</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
Page 2	Page 4
<p>1 A P P E A R A N C E S</p> <p>2</p> <p>3 FOR PLAINTIFFS: Mr. Warren W. Driggs</p> <p>4 ROBERT J. DEBRY &amp; ASSOCIATES</p> <p>5 4252 South 700 East</p> <p>6 Salt Lake City, UT 84107</p> <p>7</p> <p>8 FOR DEFENDANT: Mr. J. Wesley Robinson</p> <p>9 Assistant Attorney General</p> <p>10 160 East 300 South, #600</p> <p>11 Salt Lake City, Utah 84114</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p>1 Tuesday, December 21, 1999: 11:15 a.m.</p> <p>2</p> <p>3 TRACY ALLRED,</p> <p>4 called as a witness, having been first</p> <p>5 duly sworn, was examined and testified as follows:</p> <p>6</p> <p>7 EXAMINATION</p> <p>8 BY MR. DRIGGS:</p> <p>9 Q. Mr. Allred, will you please state your</p> <p>10 name for the record?</p> <p>11 A. My name is Tracy Allred.</p> <p>12 Q. And how old are you, sir?</p> <p>13 A. I'm 41 years old.</p> <p>14 Q. And where do you work?</p> <p>15 A. I'm a patrol officer with the Price</p> <p>16 City Police Department.</p> <p>17 Q. How long have you been employed as a</p> <p>18 patrol officer with Price City?</p> <p>19 A. A little over ten years.</p> <p>20 Q. And before that what did you do?</p> <p>21 A. I was a patrol officer with the Helper</p> <p>22 City Police Department.</p> <p>23 Q. For what period of time?</p> <p>24 A. Three years and four months.</p> <p>25 Q. Okay. And before working for the City</p>

1 if you are notified over your radio that someone is  
 2 breaking the law and you're asked to go check it  
 3 out, would that be pursuit?  
 4 A. No.  
 5 Q. Why not?  
 6 A. A vehicle pursuit would be when I'm  
 7 following someone, trying to get them to pull  
 8 over. That would be just a response call.  
 9 Q. Okay. A response call. Is a response  
 10 call an emergency?  
 11 A. It depends on the call.  
 12 Q. Okay.  
 13 A. A family fight would be a Code 3  
 14 emergency call. You might get an accident and  
 15 that's a Code 1 call, where you just respond  
 16 normally. Get there when you get there.  
 17 Q. Okay. You don't know what this call  
 18 was that he got? You don't know what level of  
 19 emergency or response?  
 20 A. What I heard it over the radio, to me  
 21 that's just a violator call.  
 22 Q. Did you hear it over the radio?  
 23 A. Yes, I did.  
 24 Q. Did you hear this very thing over the  
 25 radio?

1 started that way.  
 2 Q. Did you put on your siren?  
 3 A. No.  
 4 Q. Did you put on your lights?  
 5 A. No.  
 6 Q. Did you consider is it to be an  
 7 emergency?  
 8 A. No, I didn't. I was out, it was  
 9 ineffective, it wouldn't matter if put my lights on  
 10 and siren, I would have been ineffective anyway.  
 11 It would have been by. So I just tried to get  
 12 there as fast as I could.  
 13 Q. Did you exceed the speed limit on your  
 14 way?  
 15 A. Not that I recall.  
 16 Q. You didn't really regard that to be an  
 17 emergency?  
 18 A. Well, I tried to get there as soon as I  
 19 could, but at the same time I didn't activate my  
 20 overhead lights or anything like that.  
 21 Q. Okay. You didn't think that was  
 22 necessary?  
 23 A. Not from where I was coming from.  
 24 Q. Did you ever hear Cortland Childs's  
 25 response to the thing that you heard?

1 A. Yes, I did.  
 2 Q. Okay. And what did you hear?  
 3 A. Well, 29 Alpha 11 was going up Carbon  
 4 Avenue -- and I put this together through the  
 5 conversations -- and I notified dispatch that there  
 6 was a kid holding the trunk closed, they were going  
 7 north on Carbon Avenue, gave a location, and  
 8 Sgt. Drolc asked where I was; I was at K-Mart.  
 9 Q. Where was St. Drolc?  
 10 A. I don't know.  
 11 Q. Was he in his car?  
 12 A. Oh, he was in his patrol car, yes.  
 13 Q. So when you heard Jeremiah Davies call  
 14 to dispatch --  
 15 A. He was on his hand-held.  
 16 Q. Okay. He called into dispatch and  
 17 that's what you heard?  
 18 A. That's correct.  
 19 Q. And you heard him describe a child in a  
 20 trunk trying to hold the lid down?  
 21 A. That's correct.  
 22 Q. Okay. And then what?  
 23 A. Then I started that way, Sgt. Drolc  
 24 asked me how close I was, and I said, hey, I'm at  
 25 600 West, Second South, I'm a ways out. So it

1 A. Yes, I did.  
 2 Q. What did he say?  
 3 A. He said, "I'm on Carbon Avenue, I'll go  
 4 ahead and see if I can't catch up to it."  
 5 Q. Okay. Is that what he said, or is that  
 6 the gist of what he said?  
 7 A. Something like that, yes. I can't  
 8 remember his exact words.  
 9 Q. Okay. Then what's the next thing you  
 10 heard?  
 11 A. Just the 10-33 call that he gave.  
 12 Q. Okay. Was that -- let me back up. Was  
 13 that call that you heard describing a kid in the  
 14 trunk, was that on Channel 3 or was that -- do you  
 15 know?  
 16 A. I can't remember.  
 17 Q. Okay.  
 18 A. I believe the first conversation  
 19 between Jeremiah and the dispatcher was on  
 20 Channel 4.  
 21 Q. So that initial conversation, Jeremiah  
 22 Davies is describing the child in the trunk?  
 23 A. That's correct.  
 24 Q. After that communication, you hear  
 25 Cortland Childs say, "I'm close, I'll check it

Tab C

WARREN W. DRIGGS A4027  
ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Plaintiff  
4252 South 700 East  
Salt Lake City, UT 84107  
Telephone: (801) 262-8915

FILE COPY

IN THE SEVENTH JUDICIAL DISTRICT COURT  
IN AND FOR CARBON COUNTY, STATE OF UTAH

---

MICHAEL KOURIS, individually,	)	
and for the ESTATE OF MICHAEL	)	
KOURIS, a deceased minor; and	)	AFFIDAVIT OF JOHN BENDER, M.D.
PAM KOURIS, individually,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	Civil No. 980700823 PI
UTAH HIGHWAY PATROL, STATE OF	)	
UTAH, and CORTLAND CHILDS,	)	Judge Bruce K. Halliday
Defendants.	)	

---

STATE OF COLORADO )  
COUNTY OF Montezuma ) ss:

COMES NOW, JOHN BENDER, M.D., and having first been duly sworn under oath states and asserts as follows:

1. I am a licensed physician in the State of Utah. I have practiced medicine for 38 years. From approximately 1972 through 1997 my specialty was physical medicine and rehabilitation. I served as the medical director for Stewart Rehabilitation at McKay-Dee Hospital in Ogden, Utah. I have also served as medical director of Western Rehabilitation Institute in Sandy, Utah (now referred to as HealthSouth Rehabilitation Center). I have also worked at Holy Cross/St. Benedict's Hospitals in both Salt Lake and Ogden. My specialty was chronic pain management. I am very

familiar with issues surrounding medication use for pain management. I believe I am uniquely qualified through my education, training, and experience to address the issues and opinions raised in this Affidavit.

2. I personally performed a medical evaluation of Trooper Cortland Childs on November 12, 1991. I generated a report on that date as a result of that interview and examination. I also prepared two follow-up letters. My initial report and follow-up letters are attached as Exhibit B.

3. In addition to my medical examination, I have reviewed the medical records of Trooper Childs generated by physicians and other medical personnel from approximately 1991 through 1999. Included in those records were, among other things, summaries of Trooper Childs' prescription drug history during that period of time.

4. I have also reviewed the toxicology reports that were generated shortly after the Kouris accident.

5. I have also reviewed Trooper Childs' personnel file which includes, among other things, correspondence, memoranda, and reports commenting on his drug use, disability, and potential impairment from drug use while on the job.

6. Based upon my experience, education, training, medical examination, and a review of the aforementioned documents, I can offer the following opinions:

a. At the time of my examination, Mr. Childs was impaired by virtue of his narcotic prescription drug use. It was my opinion at that time that he should not drive a patrol car, unless and until he was weaned from the drugs he was taking.

b. It appears from the records I have reviewed that, since my examination, Trooper Childs was not weaned from his narcotic prescription drug use. In fact, at the time of the Kouris accident, it appears he was taking nearly three times the amount of controlled narcotic medications than he was taking at the time of my previous examination.

c. Trooper Childs' regimen for use of narcotic pain medications was inconsistent with accepted practices of long-term pain management through the use of narcotic medication.

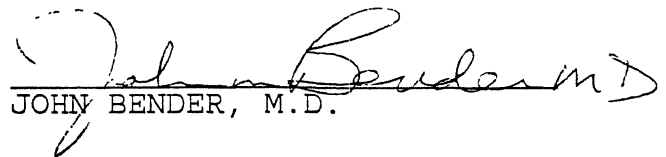
d. It appears from his personnel file that, in the year or two before the Kouris accident, he demonstrated erratic behavior, and was involved in other motor vehicle accidents (or near accidents) where, by his own admission, his judgment was impaired. It is my opinion that these incidents were consistent with a person who is addicted to prescription medication and impaired by its effects.

e. I have reviewed the Affidavit of Richard Struempfer, a toxicologist hired by the Kouris family. I agree with the statements and conclusions he made in that


Affidavit. Moreover, I believe he is qualified to address issues concerning the amount of controlled substances in the body and its relationship to prescribed dosages.

f. To a reasonable degree of medical certainty, I believe Trooper Childs was impaired by the use of narcotic medications at the time that his car struck and killed Michael Kouris.

DATED this 19<sup>th</sup> day of October, 2000.

  
JOHN BENDER, M.D.

Oct. Subscribed and sworn to before me this 19<sup>th</sup> day of October, 2000.

  
NOTARY PUBLIC  
Residing at: 101 S. 6<sup>th</sup> St.

My Commission Expires:  
9-20-02

Dallas, Co.  
F1323