

2001

Michael Kouris and Pam Kouris v. Utah Highway Patrol and Cortland Childs : Brief of Appellee

Utah Supreme Court

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Case No. 20010097-SC
Priority No. 15

IN THE SUPREME COURT OF UTAH

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

Plaintiffs and Appellants,

v.

UTAH HIGHWAY PATROL, STATE OF UTAH and
CORTLAND CHILDS,

Defendants and Appellees.

Appeal from a Final Judgment of the
Seventh Judicial District Court in and for
Carbon County, State of Utah,
Honorable Bruce K. Halliday

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PRIOR AND RELATED APPEALS

To the best of defendants' knowledge, there are no prior or related judicial appeals in this case.

IN THE SUPREME COURT OF UTAH

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

Plaintiffs and Appellants,

v.

UTAH HIGHWAY PATROL, STATE OF UTAH and
CORTLAND CHILDS,

Defendants and Appellees.

BRIEF OF APPELLEES

JURISDICTION AND NATURE OF PROCEEDINGS

Plaintiffs filed the complaint in this action in December, 1998 (R. 1-5), alleging that defendants had wrongfully caused the death of their son in a collision between his bicycle and defendant state trooper Childs' patrol vehicle. Subsequent to defendants' answer (R. 15-21), plaintiffs added claims for negligent supervision and civil rights violations (amended complaint, R. 62-69). On August 7, 2000, defendants moved the court separately to dismiss the civil rights claims (R. 115-37), to dismiss the claims against defendant Childs (R. 138-55), and to grant summary judgment on all claims (R. 156-214). They further moved on September 18, 2000, to strike the affidavit of plaintiffs' sole designated expert witness filed in response to these motions (R. 289-355). After an exchange of memoranda and hearings on three dates--during one of which plaintiffs stipulated to dismiss their civil rights claims and the

individual claims against Trooper Childs (R. 651 at 9)--the district court granted summary judgment for defendants on January 3, 2001, and also declined plaintiffs' motion for reconsideration pursuant to Utah R. Civ. P. 60(b) and 56(f) (R. 605-14). On January 29, 2001, plaintiffs filed a timely notice of appeal (R. 645-46). This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (Supp. 2001) as a case not within the original appellate jurisdiction of the Utah Court of Appeals.

ISSUES PRESENTED UPON APPEAL

1. Did the district court correctly find that there were no genuine issues of material fact precluding summary judgment for defendants?

Plaintiffs cite to R. 360 and 363 as the portions of the record preserving their claim that the trial court erroneously made findings of material fact (see Aplt. Brief at 1). However, these record citations do not identify any material facts found by the court that are subject to dispute. The court ruled in defendants' favor on the undisputed facts (see R. 611-12).

Standard of Review: "On appeal from a summary judgment, this Court resolves only legal issues, and we do not, therefore, defer to the trial court's rulings. We determine only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues

of material fact." Ferree v. State, 784 P.2d 149, 151 (Utah 1989); see also Hill v. Allred, 2001 UT 16, ¶12, 28 P.3d 1271.

2. Did the district court correctly hold that Trooper Childs' actions were immunized from liability under the exception to waiver of immunity for the operation of an emergency vehicle pursuant to Utah Code Ann. §§ 63-30-10(15) (Supp. 2001) and 41-6-14 (1998)?

Plaintiffs preserved this issue in their memorandum opposing summary judgment (see R. 364-68). The court ruled in defendants' favor on the issue (see R. 612).

Standard of Review: the Court reviews questions of law for correctness. See Ferree, 784 P.2d at 151; Hill, 2001 UT 16, ¶12.

3. Did the district court err in striking the affidavit of plaintiffs' sole designated expert witness as irrelevant to the issues for decision and because he was unqualified to opine on Trooper Childs' alleged impairment by prescription medications?

Plaintiffs preserved this issue in their memorandum opposing defendants' motion to strike the expert's affidavit (see R. 502-513). The court ruled for defendants on this issue (see R. 612).

Standard of Review: "[Q]uestions regarding the relevance of evidence are reviewed for abuse of discretion." Slisze v. Stanley-Bostitch, 1999 UT 20, ¶19, 979 P.2d 317. Moreover, "[t]he determination of whether a witness is qualified as an expert is within the trial court's discretion." Vitale v.

Belmont Springs, 916 P.2d 359, 361 (Utah App. 1996); see also Patey v. Lainhart, 1999 UT 31, ¶15, 977 P.2d 1193.

4. Did the court abuse its discretion in denying plaintiffs' motion to reconsider, under Utah R. Civ. P. 60(b) and 56(f), its grant of summary judgment for defendants to allow evidence from a former treating physician whose identity defendants had previously disclosed to them but whom plaintiffs did not name as a witness?

Plaintiffs raised the issue of submitting this additional evidence by motion and memorandum to the court (R. 539-78). The court ruled for defendants on this issue (see R. 607).

Standard of Review: "We review the trial court's denial of a motion to reconsider summary judgment under rule 60(b) of the Utah Rules of Civil Procedure for abuse of discretion." Lund v. Hall, 938 P.2d 285, 287 (Utah 1997). Likewise, this Court "will review a trial court's grant or denial of a rule 56(f) motion under an abuse of discretion standard." Price Dev. Co. v. Orem City, 2000 UT 26, ¶30, 995 P.2d 1237.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, and rules pertinent to the issues before the Court is contained in the body of this brief.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

Plaintiffs filed their complaint and jury demand on December 21, 1998 (R. 1-5). The complaint asserted that Trooper Childs' negligent operation of a patrol vehicle caused it to collide with the bicycle on which plaintiffs' 11-year-old son, Michael, was riding, injuring the boy and ultimately causing his death (R. 2). It further alleged that at all relevant times, Trooper Childs was acting within the course and scope of his employment and that defendants Utah Highway Patrol and the State of Utah are therefore vicariously liable (R. 2). Plaintiffs sought special and general damages for Michael's medical expenses, suffering, funeral expenses, and wrongful death (R. 5). Defendants answered (R. 15-21), denying liability and raising a number of defenses, including failure to state a claim upon which relief can be granted and protection from liability under the Utah Governmental Immunity Act.

Plaintiffs subsequently amended their complaint (R. 62-69) to add claims of negligent supervision, based on Trooper Childs' alleged prescription drug dependencies, and violations of their civil rights. On August 7, 2000, defendants filed three motions: one seeking dismissal of the civil rights claims (R. 115-37); another seeking dismissal of the claims against Trooper Childs (R. 138-55); and a third seeking summary judgment on all claims based on governmental immunity (R. 156-214). At a hearing on September 18, 2000, plaintiffs agreed not to contest the first

two motions, withdrawing their civil rights claims and all individual claims against Trooper Childs (R. 651 at 9-10).

Also on September 18, 2000, defendants moved to strike the affidavit of plaintiffs' sole designated expert witness, Richard Streumpler (R. 289-355), which was attached as an exhibit to plaintiffs' oppositional memoranda, and to exclude him from testifying at trial. The basis for the motion was that, as a clinical chemist with no medical training, he is incompetent to opine as to Trooper Childs' alleged impairment by prescribed medications at the time of the accident. At plaintiffs' request, the summary judgment hearing was continued to October 2, 2000 (R. 652) to address the motion to strike following an exchange of memoranda, and the district court judge granted both motions from the bench on that date (R. 652 at 16 and 52).

On October 17, 2000, plaintiffs moved the court to reconsider its summary judgment ruling pursuant to Utah R. Civ. P. 60(b) and 56(f) (R. 539-78), arguing that another witness, from among plaintiffs' generically designated "medical providers who have treated defendant Cortland Childs in the past" (R. 108), could render an expert opinion as to Trooper Childs' alleged impairment. Defendants opposed this asserted "new evidence," arguing, inter alia, that the witness in question had been disclosed to plaintiffs well in advance of argument on the summary judgment motion but plaintiffs had never designated him by name as a witness or for purposes other than to authenticate medical records and reports (R. 579-88). After a third hearing

date on November 27, 2000 (R. 653), the court agreed with defendants that plaintiffs had failed to comply with the requirements of Rule 56(f) and denied the motion to reconsider in a memorandum decision filed January 3, 2001 (R. 605-14). Plaintiffs' notice of appeal followed on January 29, 2001 (R. 645-46).

B. Statement of Relevant Facts

On July 19, 1998, a collision occurred in Price, Utah, between a Utah Highway Patrol vehicle driven by Trooper Childs and a bicycle operated by Michael Kouris, the eleven-year-old son of plaintiffs, which resulted in Michael's death (R. 2). Plaintiffs acknowledge that at the time of the accident, Trooper Childs was acting within the course and scope of his employment with the Utah Highway Patrol (R. 2).

Just before the accident occurred, Trooper Childs received a radio transmission describing a child riding in the trunk of an automobile and holding down the trunk lid (R. 161 and 187). When he realized that he was the closest officer to the reported vehicle, Trooper Childs responded by increasing his speed in an attempt to catch up to the reported vehicle (R. 162 and 188). At that time, a red car was in front of him, northbound on Carbon Avenue, a two-way street with one lane of traffic in either direction and a center turning lane (R. 162 and 190). As the red car approached the intersection of Carbon Avenue and 500 South, it slowed to accommodate a decreased speed limit (R. 162-63 and 393). At the same time, Trooper Childs began to pull into the

center lane to pass the red car and activated his emergency lights (R. 163 and 190)--just as Michael Kouris steered his bicycle onto the roadway from the east shoulder where he had been riding (R. 163 and 403), more than 36 feet short of the crosswalk (R. 195). Although Trooper Childs swerved in an attempt to avert a collision (R. 190), he was unable to avoid the impact which resulted in Michael's injuries.

SUMMARY OF ARGUMENT

The Utah Governmental Immunity Act waives immunity for the negligent acts of its employees, with certain exceptions. One of those exceptions is for injury that "arises out of, in connection with, or results from . . . (15) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14." Utah Code Ann. § 63-30-10 (Supp. 2001). The undisputed facts show that Trooper Childs was in compliance with the statute at the time of the accident. Consequently, the district court correctly applied the law and determined that defendants bore no liability for the actions that resulted in Michael's unfortunate death. To the extent that plaintiffs contend there are genuine factual disputes, they have either neglected to raise the issues in the district court, thereby waiving them for purposes of appeal, or failed to demonstrate that the facts they now contest are material to this Court's decision.

Plaintiffs attempt to escape summary judgment by claiming that Trooper Childs was impaired at the time of the accident by the use of prescription medications. However, the sole evidence presented in the district court to support this theory was the affidavit of a clinical chemist with no medical training. As the court correctly ruled, any nexus between Trooper Childs' prescription medications and his alleged impairment was beyond the competence of this witness. Excluding his affidavit from consideration was therefore within the court's discretion.

Finally, plaintiffs claim that the court erred in denying their motion to admit additional evidence under Utah R. Civ. P. 60(b) and 56(f) after summary judgment for defendants had been announced from the bench. The proposed evidence, in the form of an affidavit from a one-time treating physician whose identity was known to plaintiffs well in advance of the summary judgment argument but who was not named as a witness, did not meet the requirements of the rules and was irrelevant to the issue of Trooper Childs' alleged impairment at the time of the accident, the purpose for which it was presented. The court was therefore within its discretion to deny the motion.

In short, plaintiffs have shown neither abuse of discretion nor error of law in the district court's decision. Consequently, that decision is entitled to this Court's affirmance.

ARGUMENT

I. THE UNDISPUTED FACTS SHOW THAT TROOPER CHILDS' COMPLIANCE WITH THE STATUTE GOVERNING EMERGENCY VEHICLE OPERATION ENTITLES HIM TO IMMUNITY UNDER UTAH CODE ANN. § 63-30-10(15).

A. Recharacterizing the Claim as One for Negligent Supervision Does Not Change the Relevant Facts or Alter the Analysis.

Section 63-30-10 of the Utah Code waives governmental immunity for injuries caused by the negligent acts or omissions of government employees. However, the statute also contains a number of explicit exceptions from that waiver "if the injury arises out of, in connection with, or results from" specified causes. Utah Code Ann. § 63-30-10 (Supp. 2001). Included among the listed causes is "the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14." Utah Code Ann. § 63-30-10(15) (Supp. 2001).

The circumstance giving rise to plaintiffs' claim in the present action is Trooper Childs' allegedly negligent operation of his patrol vehicle, while responding to a call he perceived as an emergency, in a manner that caused the death of plaintiffs' son. However, plaintiffs have withdrawn all individual claims against Trooper Childs (see R. 651 at 9). Even though their cause of action "arises out of, in connection with, or results from" the operation of an emergency vehicle by Trooper Childs (Utah Code Ann. § 63-30-10 (Supp. 2001)), plaintiffs attempt to recharacterize their claim as one against defendant Utah Highway Patrol (UHP) for negligent supervision.

This Court has repeatedly "rejected attempts to evade the statutory categories by recharacterizing the supposed cause of the injury." Tiede v. State, 915 P.2d 500, 502 (Utah 1996); see also Bullock v. State, Dep't of Transp., 966 P.2d 1215, 1217 (Utah App. 1998). As the Court has stated, "If a subpart of section 63-30-10 describes that conduct or situation [giving rise to the alleged injury], then immunity is preserved." Malcolm v. State, 878 P.2d 1144, 1147 (Utah 1994); see also Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1166 (Utah 1993). For this reason, the district court correctly analyzed plaintiffs' action under the exception to waiver of immunity pursuant to the emergency vehicle exception.

B. There is No Need to Reach the Issue of Duty When Defendants Have Not Challenged It and Governmental Immunity Provides a Complete Defense.

In order for the emergency vehicle exception to apply, the statute requires that the vehicle be driven in compliance with Utah Code Ann. § 41-6-14 (1998). In relevant part, the statute states:

(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 of 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.

Plaintiffs attempt to argue around the statute by contending that before the question of immunity is reached, the court "must first decide whether the defendants owed a duty of due care to the plaintiff" (Aplt. Brief at 33). They further argue that under this analytical approach, "the inquiry is not whether §41-6-14 (1993) imposes a duty; rather, the question is whether there are any statutory or common-law duties intended to protect the plaintiffs from the type of harm they suffered" (Aplt. Brief at 33-34). This argument both misconstrues the holdings of the cases they cite in its support and squarely contradicts well-established authority to the contrary. As the Court explained in Ledfors, questions of governmental immunity are independent of the tort questions of duty and breach:

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.

Ledfors, 849 P.2d at 1163-64 (citations omitted). In other words, the purpose of undertaking a duty analysis first is to ensure that no duty is presumed where none exists:

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.

Id. Where duty is not contested--as in Ledfors, and as here, for purposes of summary judgment--and where the statutory exception to waiver of immunity resolves the claim, there is no reason to reach the element of duty. Instead, the court will assume, without deciding, the existence of a legal duty. See Malcolm, 878 P.2d at 1146.

The cases on which plaintiffs rely, Day v. State, 1999 UT 46, 980 P.2d 1171, and Lyon v. Burton, 2000 UT 19, 5 P.3d 616, vacated in part on other grounds and remanded, 2000 UT 55, 5 P.3d 616, are not to the contrary (see Apl't. Brief at 32-36). In Day, the State defendants explicitly raised the issue of whether they owed a duty of care to plaintiff: "The State denies that it or Officer Colyar owed a duty of care to the Days." Day, 1999 UT 46 at ¶11. In that circumstance, as the Court observed, "If Officer Colyar owed no duty of care to the Days, there can be no prima facie case of negligence as a matter of law, and immunity would be immaterial." Id. at ¶10. The opposite is true here: if immunity applies, as the district court held that it does, the issue of duty is immaterial. Because defendants in the case at bar have never challenged the element of duty, Day is factually inapposite to plaintiffs' claims.

Nor does Lyon support plaintiffs' position. The Lyon defendants, like defendants here, contended that provisions of

the Governmental Immunity Act provided them complete immunity. The Court "address[ed] this claim first because plaintiff's other claims are relevant only if the Act does not provide complete immunity." Lyon, 2000 UT 19, ¶10. Plaintiffs have provided no reason compelling the Court, contrary to its own decision in Lyon, to address an issue there is no need to reach.

Plaintiffs' statutory construction argument on the issue of duty (see Aplt. Brief at 35-38) fails for two reasons. First, as explained above, it addresses an issue which would have been relevant only had the trial court found that immunity did not provide a complete defense. Second, the argument was not raised in the trial court and is therefore inappropriate for this Court's deliberations. It is the well-established practice of Utah's appellate courts not to reach issues not presented to the trial court. "An appellate court generally will not review any issue that was not raised in the court below. This rule is based, in part, on the principle that it is unfair to fault the trial court for failing to rule correctly on an issue that it was never given the opportunity to consider." Ellis v. Swensen, 2000 UT 101, ¶30, 16 P.3d 1233 (citation omitted); see also Julian v. State, 966 P.2d 249, 258 (Utah 1998) (noting the court's "longstanding rule that we will not consider issues raised for the first time on appeal"). Because plaintiffs did not give the trial court an opportunity to rule on their statutory construction argument, it is improperly presented here.

C. The Undisputed Facts Entitle Defendants to Immunity under the Emergency Vehicle Exception.

The Test and the Undisputed Facts

The test for governmental immunity is

a three-step analysis: (1) Did the [defendants] here perform a governmental function? (2) If so, does some section of the governmental immunity act waive the general immunity granted by section 63-30-3? (3) Does the governmental immunity act nonetheless except from that waiver of blanket immunity the particular claim asserted here?

Petersen v. Board of Educ., 855 P.2d 241, 243 (Utah 1993).

Plaintiffs have conceded the performance of a governmental function under section 63-30-3, the waiver of immunity under section 63-3-10, and the existence of an apparent exception under section 63-30-10(15) (see Aplt. Brief at 39). As they admit, "[t]he question is whether the exception applies" (id.). The court's careful application of the law to the relevant, undisputed facts shows that it does.

The court predicated its decision on the following eight undisputed facts:

1. At the time of the collision Trooper Childs was responding to an emergency radio call.
2. At the time of the collision Trooper Childs was driving in an authorized emergency vehicle as defined by UCA 41-6-1(3).
3. At the time of the collision Trooper Childs had activated the vehicle's visible signal as defined by UCA 41-6-132.
4. The collision took place on Carbon Avenue south of the intersection of Carbon Avenue and 5th South (the intersection). Immediately north of the intersection is a cross walk.

5. Michael Kouris was not crossing Carbon Avenue at the cross walk. The point of collision being some 30+ feet south of the cross walk.

6. There are no semaphores or stop signs at the intersection controlling traffic in the direction both Trooper Childs and Michael Kouris were traveling.

7. The state and UHP are governmental entities.

8. At the time of the collision Cortland Childs was acting within the scope of his employment with the Utah Highway Patrol.

R. 611-12. Plaintiffs attack the findings numbered 1, 3, 4, and 5 (see Aplt. Brief at 28-32) as genuinely disputed for purposes of summary judgment. The record, however, belies their contentions.

The Call was One to Which an Emergency Response was Appropriate

Plaintiffs first claim that there is a genuine issue of material fact as to whether Trooper Childs was responding to an emergency (see Aplt. Brief at 28-31). In support of this claim, they attach, as an exhibit to their brief, an excerpt from the affidavit of Officer Tracy Allred of the Price Police Department (Aplt. Brief at Ex. B). The exhibit, however, does not support plaintiffs' contention that Officer Allred did not believe the call was an emergency. It merely recounts what the officer heard when the initial call about the child riding in an automobile trunk was made to dispatch. Contrary to plaintiffs' representation, the excerpt contains no statement by Officer Allred describing the dispatch as "a response call" rather than an emergency (see Aplt. Brief at 29), nor does it support plaintiffs' representation that Officer Allred "did not turn on

his emergency lights or sirens. He did not speed to the scene, nor break any other traffic laws as he responded to the scene" (id.). In fact, there is nothing in the record to indicate that Officer Allred responded to the call at all (though he did respond to the subsequent accident), particularly in light of the fact that Trooper Childs communicated that he was the closest vehicle and would respond (see R. 190).

Tellingly, plaintiffs have not given a record citation for the Allred deposition excerpt, there is no other indication that it was ever presented as evidence to the trial court, and defendants' scrutiny of the record has found no trace of it. As this Court has stated, "[W]e do not consider new evidence on appeal." Low v. Bonacci, 788 P.2d 512, 513 (Utah 1990); see also Otteson v. State, Dep't of Human Services, 945 P.2d 170, 171 (Utah App. 1997) ("Appellate courts will not consider new evidence on appeal"). Therefore, even if the Allred excerpt were relevant to plaintiffs' argument, it is properly disregarded by the Court as not of record in the trial court.

The evidence of record uniformly supports the district court's finding. Trooper Childs stated in his deposition that he considered the situation an emergency (R. 187). Newell Knight, an accident reconstructionist (see R. 113), replied affirmatively in his deposition when asked if he agreed that the situation was an emergency (R. 287). Don Kelley, Trooper Childs' sergeant at the time of the accident, also agreed in his deposition testimony that the situation was an emergency (R. 212-13). Even

plaintiffs' 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.

Trooper Childs Activated a Visual Signal as Required by Statute

Plaintiffs concede that Trooper Childs "turn[ed] on his lights as he passed Tammy Auberger" before the collision (Aplt. Brief at 31). This concession is fully consistent with the deposition testimony of the witnesses. As Trooper Childs explained, he activated his lights, increased his speed, and changed lanes to pass Ms. Auberger's car all at the same time (R. 190-91). This testimony is corroborated by the statements of two other witnesses, Jan Nelson (see R. 413-14) and John Wunnenberg (see R. 204). Even plaintiffs do not contend that Ms. Auberger's failure to observe the lights raises a genuine issue of material fact.

In addition to conceding the fact that Trooper Childs' emergency lights were activated prior to the collision, plaintiffs do not argue that this visible signal failed to comply with the statute. Instead, they maintain that the activation of the lights was an insufficient precaution. Their irrelevant, two-sentence argument on this point (see Aplt. Brief at 31) is both inflammatory and unsupported by record evidence. Contending that Trooper Childs "was speeding through an intersection with

children in the crosswalk" (Aplt. Brief at 31) (emphasis in original), they ignore the uncontested facts that Michael entered the intersection more than 36 feet before the crosswalk (R. 195) and that the point of impact was south of the intersection (see R. 196 and 201). It is likewise uncontested that the crosswalk in question was north of the intersection (see R. 196 and 201). Consequently, Trooper Childs could not have been speeding *through* the intersection with children present; he did not speed *through* the intersection at all. Moreover, as defendants pointed out below, the witness testimony on which plaintiffs relied "was that children were *near* the crosswalk, not *in* the crosswalk" (R. 273; see also R. 396), and "the video of the accident shows that no one was in the crosswalk at the time of the accident" (R. 273). Plaintiffs' unsupported statement to the contrary serves no purpose other than an attempt to provoke the Court's outrage. It certainly does nothing to establish whether a visual signal was properly activated.

The Location of the Intersection and Crosswalk are Not Contested

Plaintiffs list as contested the district court's statement regarding the location of the collision and the crosswalk (see Aplt. Brief at 31). Beyond repeating the court's statement, they provide no analysis of the court's language or citation to the record. This void does not fulfill plaintiffs' burden under Utah R. App. P. 24(a)(9), which requires that "[t]he argument shall contain the contentions and reasons of the appellant with respect

to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on." This Court has repeatedly held that it "'is not simply a depository in which the appealing party may dump the burden of argument and research.'" Brewer v. Denver & Rio Grande W. R.R., 2001 UT 77, ¶20 n.4, 31 P.3d 557 (quoting State v. Bishop, 753 P.2d 439, 450 (Utah 1988) (quoting Williamson v. Opsahl, 92 Ill. App. 3d 1087, 416 N.E. 2d 783, 784, 48 Ill. Dec. 510 (Ill. App. 1981))); see also State v. Butterfield, 2001 UT 59, ¶21 n.3, 27 P.3d 1133.

Given the absence of any discussion by plaintiffs, there is no need to give further consideration to this unsupported challenge. Plaintiffs did Not Argue Below that Michael was in the Crosswalk

Plaintiffs now purport to contest the previously undisputed fact that Michael was not in the crosswalk at the time of the collision (see Apl't. Brief at 32). Not only is this fact immaterial to the issues for decision, but it has been raised for the first time on appeal. As previously noted, it is the Court's well-established practice not to review issues appellants failed to raise in the district court. See Ellis, 2000 UT 101, ¶30; Julian, 966 P.2d at 258. Plaintiffs have articulated no grounds on which this well-established rule should be ignored.

Even if the Court were to consider plaintiffs' belated challenge, plaintiffs have not shown how the fact is material to whether defendants complied with the emergency vehicle operation statute, which bears no language addressing crosswalks. As this

Court has recognized, "the mere existence of genuine issues of fact in the case as a whole does not preclude the entry of summary judgment if those issues are immaterial to resolution of the case." Horgan v. Industrial Design Corp., 657 P.2d 751, 752 (Utah 1982). Plaintiffs have made no attempt to show any nexus between Michael's position in or out of the crosswalk and the issues before the Court for determination.

The Court Correctly Applied the Law to the Undisputed Facts

Given the undisputed facts as the trial court found them, plaintiffs have shown--and can show--no error in its application of the law to the facts. Trooper Childs was operating an authorized emergency vehicle and responding to an emergency call. Therefore, under Utah Code Ann. § 41-6-14, he was statutorily privileged to exceed the maximum speed limit and to disregard regulations governing direction of movement and turning. Those privileges are restricted to emergency vehicles using a visual signal as defined under Utah Code Ann. § 41-6-132 which is visible from the front of the vehicle or, alternatively, an audible signal. (Plaintiffs have raised no issue regarding the compliance of the emergency lights in the patrol vehicle with section 41-6-132.) Trooper Childs activated the visual signal prior to the collision in compliance with the plain language of the statute. For these reasons, the court correctly concluded that "[a]t the time of the collision Trooper Childs was operating his emergency vehicle in accordance with the requirements of UCA 41-6-14" (R. 612) and that defendants are consequently immune

from liability under Utah Code Ann. § 63-30-10(15), a determination entitled to affirmance by this Court.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN STRIKING THE AFFIDAVIT OF PLAINTIFFS' EXPERT WITNESS.

A. Admissibility of Expert Testimony is a Matter within the Trial Court's Discretion

Rule 702 of the Utah Rules of Evidence governs the testimony of expert witnesses. Under the rule, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an expert opinion or otherwise." Under this Court's jurisprudence, "[t]he trial court has wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion standard. Under this standard, we will not reverse unless the decision exceeds the limits of reasonability." State v. Larsen, 865 P.2d 1355, 1361 (Utah 1993) (citations omitted).

B. The Motion to Strike the Expert's Affidavit was Timely

In attempting to circumvent Trooper Childs' immunity under the law, plaintiffs claim that he was impaired by prescription medications at the time of the accident. In support of this claim, plaintiffs designated Richard Streumpler, a clinical chemist with no medical training, as their sole expert witness on the issue of Trooper Childs' purported impairment. This designation was mailed to defendants on April 10, 2000, and filed

with the trial court on April 13 (see R. 106 and 108). However, not until August 28, 2000, did plaintiffs provide Streumpler's curriculum vitae to defendants (see R. 520), who took his deposition just four days later, on September 1 (id.).

Although defendants' motion for summary judgment had been mailed to plaintiffs on August 4, 2000, and filed with the court on August 7 (see R. 156 and 158), plaintiffs sought and received an extension of nearly three weeks, until September 6, 2000, to serve defendants with a copy of their response, which included the Streumpler affidavit. The response was filed with the court on September 18, 2000 (see R. 360). Defendants mailed their motion to strike the affidavit to plaintiffs on September 13, 2000 (R. 302), only five days after the affidavit was originally mailed to them; the motion was filed with the court on September 18 (R. 289).

It is clear from this timetable that defendants not only responded promptly to the information provided in the affidavit, but that they agreed to an extension of nearly three weeks for plaintiffs to file the affidavit in response to defendants' motion for summary judgment. Any argument plaintiffs make as to a lack of timeliness in moving to strike the tardy affidavit is unsupported by the facts. Moreover, as defendants pointed out below, plaintiffs provide no authority establishing a time requirement for the filing of a motion to strike (see R. 520).

Further, as Utah's appellate courts have recognized,

"It is undoubtedly true that courts of general and superior jurisdiction possess certain inherent powers

not derived from any statute. Among these are the power to . . . make, modify, and enforce rules for the regulation of the business before the court Such inherent powers of courts are necessary to the proper discharge of their duties"

Griffith v. Griffith, 1999 UT 78, ¶13, 985 P.2d 255 (quoting In re Evans, 42 Utah 282, 130 P. 217, 224 (1913) (cited in Barnard v. Wassermann, 855 P.2d 243, 249 (Utah 1993))). See also Charlie Brown Constr. Co. v. Leisure Sports Inc., 740 P.2d 1368, 1370 (Utah App. 1987) (noting "'the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases'") (quoting Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962))). Especially in light of plaintiffs' own request for additional time to file a response to the motion for summary judgment, the court did not abuse its discretion in allowing defendants' motion to strike.

The district court, observing that defendants became aware of the competence issue only on plaintiffs' use of the Streumpler affidavit in response to the summary judgment motion, stated that the motion to strike

was timely and in support of [defendants'] Motion for Summary Judgement [sic] which was also timely filed under the original scheduling order, before August 10, 2000, to wit: on August 7, 2000. Discovery under the original scheduling order was to have been complete by May 19, 2000. The parties mutually agreed to an extension of that date and the Court concurred in their actions. The original oral arguments on dispositive motions were to be scheduled before September 1, 2000. Again, however, at the request of the parties the Court concurred in a modification of that original order and scheduled oral argument for September 18, 2000. At the same time the Court allowed the parties time to file formal responses to various pending motions, as well as pleadings to clear up the record to the extent necessary. Again, the order provided for specific

dates for those filings and it appears from the record that the parties, although not technically complying with those dates, may have shared their responses in a relatively timely fashion and neither party raised those issues in their pleadings and/or at oral argument.

R. 609-10. Plaintiffs neither cite to nor address the court's explanation for its decision that the motion to strike was timely. However, it is clear that the court's decision was based on the course of action between the parties and the court's own concurrence in it. Plaintiffs have not only failed to show an abuse of discretion by the court, but have waived the issue of the motion's timeliness by not raising it in pleadings or oral argument to the trial court prior to its initial grant of summary judgment for defendants.

C. The Expert Witness was Unqualified to Address Impairment

Nor have plaintiffs established an abuse of discretion in the court's substantive decision finding Streumpler unqualified to render an opinion on Trooper Childs' alleged impairment. As the court explained, it

never suggested that Dr. Richard Streumpler could not testify at trial about matters within his competence. The Court only concluded that the causal connection between Trooper Childs' pain therapy medications and Michael Kouris's death were beyond such competency and since there was no other designated expert and certainly no evidence by affidavit or otherwise from a competent expert before the Court, plaintiff's [sic] case must fail for lack of such evidence as a matter of law.

R. 611. The court ruled that the motion "should be granted for the reasons set forth therein" (R. 610).

Defendants did not argue that Streumpler was unqualified to testify as to the levels of prescription medications found in the sample of Trooper Childs' blood that was drawn immediately following the accident. Instead, they argued that his training and experience did not qualify him to testify as to whether Trooper Childs was medically impaired by these prescribed drugs. See R. 296-300. An examination of Streumpler's affidavit supports defendants' argument and the court's decision. After an extensive review of the substances found in the blood sample (R. 305-06), Streumpler's affidavit states as follows:

10. The PDR (Physicians Desk Reference) states each of these medications *may* impair the mental and physical ability to drive a motor vehicle.

11. Found alone, each of the medications in Mr. Childs' blood *could* impair his ability to drive. However, taking these medications in combination (even at the prescribed doses) *could* accelerate the amount of impairment.

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 (emphasis added). The affidavit makes clear that Streumpler's opinion on the effect of the medications on Trooper Childs was based solely on speculation that possible side effects of the prescribed medications may have occurred.

As prior decisions have established, where there is speculation as to medical causation, ""the claim fails as a matter of law."" Kent v. Pioneer Valley Hosp., 930 P.2d 904, 907 (Utah App. 1997) (quoting Clark v. Farmers Ins. Exch., 893 P.2d 598, 601 (Utah App. 1995); see also Beard v. K-Mart Corp.,

2000 UT App 285, ¶7, 12 P.3d 1015 (relying on Denney v. St. Mark's Hosp., 21 Utah 2d 189, 442 P.2d 944 (1968), "for the proposition that 'if the expert evidence offered on the issue of medical causation is simply that a particular [status] **could** have resulted from a particular [event], but not that it probably did, such testimony is insufficient for submission of the issue to the jury'")). Nor is the requirement for expert medical evidence limited to cases of medical malpractice. See Beard, 2000 UT App 285 at ¶12.

The cases cited by plaintiffs are readily distinguishable from the circumstances present here. Watkins v. Utah Poultry & Farmers Cooperative, 122 Utah 459, 251 P.2d 663 (1952), involved the testimony of non-expert, fact witnesses as to their personal observations of the defendant's conduct in the hours prior to an accident. By contrast, plaintiffs in the present case acknowledge that their expert has never personally examined Trooper Childs (see R. 545). In State v. Mason, 530 P.2d 795 (Utah 1975), an officer who had held a special assignment in narcotics and drugs for two-and-a half years, who had attended a Maryland State Narcotics Seminar, and who had taken a course on drugs at the Utah State Police Academy was permitted to testify as to the probable effect of the plaintiff's use of a given amount of heroin seven hours before testifying. The trial court

explained to the jury that the only charge against the defendant was theft; and that any evidence pertaining to the use of heroin had had nothing to do with her guilt or innocence of that charge; that they should not "indulge any bias or prejudice against her because of

the use of heroin"; and that that testimony had been admitted "for one purpose only, and that purpose is for you to try to determine her mental condition at the time she testifies . . . [so] you can properly evaluate her testimony."

Mason, 530 P.2d at 797-98. The Court, acknowledging the trial court's "considerable latitude of discretion" (530 P.2d at 798), declined to find an abuse of discretion. In the present case, unlike in Mason, the expert testimony in the form of the Streumpler affidavit did not address a defendant's testimonial capacity, but directly addressed an issue pertaining to defendants' liability.

The two remaining cases plaintiffs cite are not Utah cases and are therefore not binding authority. They are of little persuasive value in the light of contrary Utah precedent. In Roberts v. United States, 316 F.2d 489 (3d Cir. 1963), an industrial hygienist and toxicologist was permitted to testify that a substance is toxic to humans generally (other medically trained experts testified as to its effect on the plaintiff). However, in addition to his "extensive training and experience in the field of toxicology" (316 F.2d at 493), he also had "two years of scientific work in a medical school" (id.). Streumpler, by contrast, had "no medical training whatsoever" (R. 290). Finally, in State v. Platt, 496 S.W.2d 878 (Mo. App. 1973), 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.

Defendants provided substantial case authority below showing that non-medical experts are not qualified to testify to medical causation. See R. 298-300. Plaintiffs have addressed none of these cases, nor have they provided any authority demonstrating an abuse of discretion by the trial court in striking the Streumpler affidavit. Because the court's decision on this issue does not exceed the limits of reasonability, there is no basis for its reversal.

D. Testimony as to Drugs in Trooper Childs' Blood is Irrelevant Because It is Not Causally Linked to Any Alleged Impairment

Plaintiffs attempt to create an issue out of Trooper Childs' prescription drug use by claiming that it shows Trooper Childs to have violated Utah Code Ann. § 41-6-44.6 (1998). This statutory provision prohibits persons from operating motor vehicles if their bodies contain measurable quantities of controlled substances or their metabolites. Prescription of the controlled substance for the use of the accused is an affirmative defense.

Plaintiffs' argument on this point is simply irrelevant to defendants' liability, as the court correctly concluded. Not only does governmental immunity provide a complete defense of defendants' actions, making it unnecessary to reach plaintiffs' other claims (see Lyon, 2000 UT at ¶10), but there is no evidence of record that suggests any causal nexus between the prescription medications in Trooper Childs' bloodstream at the time of the collision and the accident.

Neither plaintiffs' nor defendants' accident reconstruction expert calculated a delay in Trooper Childs' reaction time that

would have contributed to the accident. When asked about reaction time, defendants' expert, Newell Knight, testified in deposition that "I don't see any delay in his time. When I ran those numbers with various distances, I said I just don't see a delay of perception on him. I cannot at this point prove there was a delay of perception on the part of Cort Childs" (R. 314). While plaintiffs' reconstructionist, Ronald Probert, indicated in his deposition that impairment would generally lengthen a driver's reaction time, he did not base his calculations on impaired reaction times (see R. 318). As the trial court correctly ruled,

[W]ithout competent expert opinion of impairment at the time of the collision, there was no evidence of a causal connection between the medications allegedly taken by Trooper Childs and the collision, and any other evidence of the effect of drugs, etc., in the abstract[,] eg. [sic] not specifically tied to Trooper Childs and this incident[,] was irrelevant and inadmissible, both as to the Motion for Summary Judgment and as to any trial in the matter.

R. 610. Without a causal connection to plaintiffs' injury, any violation of section 41-6-44.6 is meaningless to establish liability. Plaintiffs' failure to establish a causal connection in the trial court gives this Court no ground on which to disturb its decision on this point.

III. THE COURT DID NOT ABUSE ITS DISCRETION IN REJECTING PLAINTIFFS' MOTION FOR RECONSIDERATION.

After the trial court initially struck the Streumpler affidavit and granted defendants' motion for summary judgment from the bench (see R. 652 at 52), plaintiffs moved for reconsideration of the decision under Utah R. Civ. P. 60(b) and

56(f) (R. 539-78). Rule 60(b) permits a court to "relieve a party or his legal representative from a final judgment, order, or proceeding for" various reasons, including "(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)" and "(6) any other reason justifying relief from the operation of the judgment." The basis for plaintiffs' motion was that "there were other designated medical witness[es] with different credentials who could also testify as to Trooper Childs' drug use and impairment" (R. 543). The witness plaintiffs identified in the memorandum supporting the motion was Dr. John Bender, who "examined Trooper Childs in November, 1991" (R. 544)--nearly seven years before the accident.

As a part of their motion to reconsider, plaintiffs contended that the court had failed to rule on an earlier request, contained in their memorandum opposing the motion to strike the Streumpler affidavit, to grant them additional time to procure another affidavit pursuant to Utah R. Civ. P. 56(f). Attached as an exhibit to the memorandum in support of the motion to reconsider was Dr. Bender's affidavit (R. 563-66). Plaintiffs alleged that Dr. Bender was a designated witness "and that both parties were aware of his existence and his potential testimony, and therefore no surprise existed to justify this Court refusing to grant plaintiff's [sic] continuance" (R. 607).

Under Utah R. Civ. P. 56(f),

[s]hould it appear from the affidavits of a party opposing the motion [for summary judgment] that he

cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Plaintiffs acknowledge that under Rule 56(f), "courts should not grant such motions when a party is dilatory or the arguments are lacking in merit" (Aplt. Brief at 23). However, they reject the trial court's conclusion

that the delays in this matter have been predominantly caused by plaintiffs; plaintiff's [sic] failed to move to amend the designation of expert witnesses; and/or failed to submit with their Rule 56(f) Motion the affidavit of Dr. Bender; or set forth reasons for their failure to do so. All of the foregoing justify and require this Court to deny the Motion for Continuance, and also the Motion to Reconsider.

R. 610.

Plaintiffs incorrectly assert that "[w]hen a Rule 56(f) motion is made, the trial court's discretion is invoked" (see Aplt. Brief at 23). This Court "ha[s] held that when a party timely presents an affidavit under rule 56(f) stating reasons why it is unable to proffer an evidentiary affidavit in opposition to its opponent's motion for summary judgment, the trial court's discretion is invoked." United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 893 (Utah 1993). Here, no such affidavit was filed. As the court noted in denying the motion for reconsideration, plaintiffs did not comply "with Rule 56(f) since they neither proffered Dr. Bender's affidavit nor set forth any explanation or justification why it was not provided" (R. 608). On appeal, plaintiffs have not addressed this finding.

Instead, they contend that they "proffered the testimony of Dr. Bender at oral argument, they offered to obtain an additional affidavit, and did in fact obtain that affidavit" (Aplt. Brief at 24). None of these actions cured plaintiffs' failure to invoke the court's discretion by presenting an affidavit containing the facts relevant to their inability to provide the evidentiary affidavit in a timely manner.

Contrary to plaintiffs' argument below, plaintiffs had never designated Dr. Bender as a witness who could testify as to Trooper Childs' alleged drug impairment; in fact, they never identified him by name at all. Instead, they included on their witness list a generic designation of unnamed "medical providers who have treated defendant Cortland Childs in the past" (R. 108) to be identified more specifically as trial approached "unless there is a stipulation that those medical records and reports can be admitted without foundational testimony" (*id.*). No specific identification of these individuals was made prior to plaintiffs' tardy proffer. Moreover, by plaintiffs' own admission, Dr. Bender treated Trooper Childs in November, 1991 (R. 544). Plaintiffs do not articulate how a 1991 examination is relevant to a determination of impairment at the time of an accident that occurred in 1998. In addition, because Dr. Bender's affidavit as originally filed with the court was neither signed nor notarized (*see* R. 566), it was ineffective. *See Goetz v. American Reliable Ins. Co.*, 844 P.2d 366, 372 (Utah App. 1992) (observing that under Utah R. Civ. P. 56(e), "affidavits 'shall set forth such

facts as would be admissible in evidence,' which requires an oath by reason of Utah R.Evid. 603"). (It is questionable whether a signed copy was ever filed with the court. None appears in the paginated record.) Finally, given plaintiffs' claim to have designated Dr. Bender in their April, 2000 witness list, they can hardly claim to have acted diligently in attempting to obtain his affidavit. In light of these facts, the district court cannot be said to have abused its discretion in denying plaintiffs' motion for reconsideration, and its decision is entitled to this Court's affirmance.

CONCLUSION

The material facts that underlie this case are undisputed. Trooper Childs, in responding appropriately to an emergency call, collided with plaintiffs' minor son, with a tragic result. While initially suing both the trooper and his employer, plaintiffs relinquished all claims against Trooper Childs, choosing instead to pursue only a negligent supervision action against UHP. Because governmental immunity protects defendants from liability under the exception to waiver of liability for emergency vehicle operation, plaintiffs' claim cannot go forward. For this reason, the district court correctly granted summary judgment in defendants' favor.

The trial court acted within its discretion to exclude the testimony of plaintiffs' expert witness. Not only was the issue of impairment beyond the witness' expertise, but it was

irrelevant because the Governmental Immunity Act provided a complete defense for defendants' actions and because plaintiffs failed to establish a nexus of causation between any alleged impairment and the harm they suffered. It was also within the court's discretion to deny plaintiffs' belated attempt to substitute a previously unnamed witness after the judge struck the expert's affidavit and announced summary judgment for defendants from the bench. Rather than showing that the district court abused its discretion, plaintiffs merely repeat on appeal the arguments made unsuccessfully below.

For these reasons, as more fully explained above, defendants respectfully request the Court to affirm the judgment of the district court.

Dated this 19th day of December, 2001.



Nancy L. Kemp
Assistant Attorney General
Attorney for Defendants/Appellees

CERTIFICATE OF MAILING

I hereby certify that on this 19th day of December, 2001, I caused to be mailed, first class postage prepaid, two true and correct copies of the foregoing BRIEF OF APPELLEES to the following:

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