

2016

**Lancer Insurance Company, an Illinois Corporation, vs. Lake Shore Motor Coach Lines, Inc., a Corporation; Janna Crane, a Resident of Utah County; Elizabeth Hutchison, a Resident of Utah County; Mette Seppi, a Resident of Utah County; Tiffany Thayne, a Resident of Utah County; And Debra Kay Jarvis, a Resident of Utah County : Brief of Appellant**

Utah Supreme Court

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

**LANCER INSURANCE COMPANY,**  
an Illinois corporation,

**Plaintiff and Appellant,**

**vs.**

**LAKE SHORE MOTOR COACH LINES,**  
INC., a corporation; **JANNA CRANE,** a  
resident of Utah County; **ELIZABETH**  
**HUTCHISON,** a resident of Utah County;  
**METTE SEPPI,** a resident of Utah  
County; **TIFFANY THAYNE,** a resident  
of Utah County; and **DEBRA KAY**  
**JARVIS,** a resident of Utah County,

**Defendants and Appellees.**

**Appeal No. 20160244-SC**

**Federal Case No. 2:14cv00785**

**BRIEF OF APPELLANT**

**Certification from the United States District Court for the District of Utah-Central  
Division to the Utah Supreme Court  
Honorable Jill N. Parrish**

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**FILED**  
**UTAH APPELLATE COURTS**

**JUN 27 2016**



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**IN THE SUPREME COURT OF THE STATE OF UTAH**

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**LANCER INSURANCE COMPANY,  
an Illinois corporation,**

**Plaintiff and Appellant,**

**vs.**

**LAKE SHORE MOTOR COACH LINES,  
INC., a corporation; JANNA CRANE, a  
resident of Utah County; ELIZABETH  
HUTCHISON, a resident of Utah County;  
METTE SEPPI, a resident of Utah  
County; TIFFANY THAYNE, a resident  
of Utah County; and DEBRA KAY  
JARVIS, a resident of Utah County,**

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**BRIEF OF APPELLANT**

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**Certification from the United States District Court for the District of Utah-Central  
Division to the Utah Supreme Court  
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## **PARTIES TO THE PROCEEDINGS**

The names of all parties to the proceedings in the United States District Court for the District of Utah-Central Division are set forth in the caption of this brief.

## **TABLE OF CONTENTS**

STATEMENT OF QUESTIONS CERTIFIED. ....	1
STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS. ....	1
STATEMENT OF FACTS. ....	2
SUMMARY OF ARGUMENT. ....	8
ARGUMENT. ....	12
I.	
THE UNFORSEEN LOSS OF CONSCIOUSNESS IS A COMPLETE DEFENSE TO A NEGLIGENCE CLAIM. ....	12
II.	
U.C.A. §31A-22-303(1)(a)(v) SPECIFIES THE COVERAGES A VEHICLE INSURANCE POLICY MUST HAVE. ....	15
III.	
U.C.A. §31A-22-303(1)(a)(v) DOES NOT GIVE RISE TO STRICT LIABILITY. ....	17
IV.	
THE INJURED PARTIES ARE ONLY ENTITLED TO TO THE STATUTORY MINIMUMS IF ANYTHING. ....	25
CONCLUSIONS. ....	26
ADDENDUM. ....	27

## TABLE OF AUTHORITIES

### Cases Cited

<i>Allstate Ins. Co. v. United States Fidelity &amp; Guaranty Co.</i> , 619 P.2d 329 (Utah 1980) .....	26
<i>Anderson v. Bell</i> , 234 P.3d 1147 (Utah 2010) .....	16
<i>Farmers Ins. Exchange v. Call</i> , 712 P.2d 231 (Utah 1985) .....	26
<i>Grays v. Northeastern Services, Inc.</i> , 345 P.3d 619 (Utah 2015) .....	22
<i>Green v. Lowder</i> , 29 P.3d 638, 644 (2001) .....	14
<i>Hammontree v. Jenner</i> , 20 Cal. App. 3d 528 (2 <sup>nd</sup> App. Dist. Div. 1, 1971) .....	18, 19
<i>Hansen v. Heath</i> , 852 P.2d 977 (Utah 1993) .....	13, 15
<i>Maloney v. Rath</i> , 445 P.2d 513 (CA 1968) .....	20
<i>Porter v. Price</i> , 355 P.2d 66, 67-68 (Utah 1960) .....	12, 13, 15
<i>Randle v. Allen</i> , 862 P.2d 1329, 1336 (Utah 1993) .....	12, 13, 14, 15
<i>Regan v. Wald</i> , 468 U.S. 222, 237 (1984) .....	23
<i>Roman v. Estate of Gobbo</i> , 791 N.E.2d 422 (Ohio 2003) .....	18, 20, 21
<i>Solorio v. United States</i> , 228 F. Supp. 2d 1280 (D. Utah 2002) ( <i>Solorio I</i> ) .....	14, 15

<i>Solorio I aff'd</i> , 85 Fed. Appx. 705 (10 <sup>th</sup> Cir. 2004) ( <i>Solorio II</i> ) (an unpublished opinion) . . . . .	14, 15
<i>Speros v. Fricke</i> , 98 P.3d 28 (Utah 2004) . . . . .	25, 26
<i>State v. Biggs</i> , 167 P.3d 544 (Utah App. 2007) . . . . .	15, 16, 17

### **Law Review Articles**

<i>Article: The Death of Strict Liability</i> , 56 Buffalo L. Rev.245. . . . .	24
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## **CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES ETC.**

### **Statutes**

The statutes determinative of this matter and of central importance to this Certification are U.C.A. §31A-22-302(1)(a), U.C.A. §31A-22-303(1)(a)(v) and U.C.A. §31A-22-304(1)(a)(b) and (2).

U.C.A. §31A-22-302(1)(a) provides:

(1) Every policy of insurance or combination of policies purchased to satisfy the owner's or operator's security requirements of §41-12A-301 shall include:

(a) Motor vehicle liability coverage under §31A-22-303 and §31A-22-304.

U.C.A. §31A-22-303(1)(a)(v) provides:

(1)(a) In addition to complying with the requirements of Chapter 21, Insurance Contracts in General, and Chapter 22, Part 2, Liability Insurance in General, a policy of motor vehicle liability coverage under Subsection 31(A)-22-302(1)(a) shall:

(v) cover damages or injury resulting from a covered driver of a motor vehicle who is stricken by an unforeseeable paralysis, seizure, or other unconscious condition and who is not reasonably aware that paralysis,

seizure, or other unconscious condition is about to occur to the extent that a person of ordinary prudence would not attempt to continue driving.

(b) The driver's liability under Subsection (1)(a)(v) is limited to the insurance coverage.

U.C.A. §31A-22-304(1) (a)(b) and (2) provides:

Policies containing motor vehicle liability coverage may not limit the insurer's liability under that coverage below the following:

(1)(a) \$25,000 because of liability for bodily injury to or death of one person, arising out of the use of a motor vehicle in any one accident;

(b) subject to the limit for one person in Subsection (1)(a), in the amount of \$65,000 because of liability for bodily injury to or death of two or more persons arising out of the use of a motor vehicle in any one accident;

(2) \$80,000 in any one accident whether arising from bodily injury to or the death of others, or from destruction of, or damage to, the property of others.

### **Rules**

Utah Rules of Appellate Procedure, Rule 41. . . . . 1,2

## **STATEMENT OF QUESTIONS CERTIFIED**

The Honorable Judge Jill Parrish of the United States Federal District Court for the District of Utah-Central Division ("district court") pursuant to Rule 41 of the Utah Rules of Appellate Procedure (U.R.A.P.) certified the following questions:

1. Does Utah Code Ann. §31(A)-22-303(1)(a)(v) impose liability on an insured driver or damages to third parties resulting from the driver's unforeseeable loss of consciousness while driving, thereby abrogating the common law principle that liability for personal injury may not be imposed absent fault or negligence?

2. If question 1 is answered in the affirmative, is the driver's liability limited to the limits of the applicable insurance policy or the applicable minimum statutory limit?

(Certifying Questions: R. 211)

## **STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS**

On October 29, 2014, Appellant ("Lancer") filed a Complaint for Declaratory Relief ("CDR") asking the district court to interpret two statutes: U.C.A. §31A-22-303(1)(a)(v) and U.C.A. § 31A-22-304(1)(a)(b) and (2). (These statutes are quoted above, pages iv and v). The Amended, Second Amended and Third Amended Complaints for Declaratory Relief ("CDRs") were filed on 2/4/2013, 1/19/2016 and 1/20/2016, respectively to correct jurisdictional defects.

After the answers were filed, on August 28, 2015, Lancer moved for summary judgment. On October 30, 2015, the Appellees ("Injured Parties") filed an opposition to that summary judgment and a cross-motion for summary judgment. On December 5, 2015, Lancer filed its opposition to the cross-motion and a reply to the Injured Parties'



opposition to its motion for summary judgment. The Injured Parties filed their reply to Lancer's opposition to their cross-motion on January 8, 2016.

In response to the parties' motions, on January 14, 2016, the district court entered an Order Regarding Possible Certification. Lancer and the Injured Parties' responded to the Court's order by providing U.R.A.P Rule 41 briefs on January 20, 2016 and January 25, 2016, respectively. On March 28, 2016, the district court signed an order certifying the questions outlined on page 1 to this brief. On May 26, 2016, the Utah Supreme Court granted Certification.

## **STATEMENT OF FACTS**

### **STIPULATED UNDISPUTED FACTS<sup>1</sup>**

1. Lancer insured Defendants Lake Shore Motor Coach Lines, Inc. ("Lake Shore") (no longer in existence) and Debra Kay Jarvis ("Jarvis"), an employee of Lake Shore and the driver of the bus at the time of the October 10, 2009 accident.<sup>2</sup> (Exhibit 2: Lancer Policy) (R. 46, ¶1)

2. The passengers in the bus at the time of the accident and who are claiming injury include Defendants Janna Crane ("Crane"); Elizabeth Hutchison ("Hutchison"); Mette Seppi ("Seppi"); and Tiffany Thayne ("Thayne") ("Injured Parties"). (R. 46, ¶2)

3. On October 10, 2009, Jarvis was employed as a bus driver with Lake Shore. Lake Shore was hired to provide transportation for the American Fork High School Band

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<sup>1</sup> The facts stated herein are stipulated to as undisputed and material for purposes of the summary judgment motions filed in the trial court and for this appeal. The parties reserve the right to dispute these facts as appropriate in the underlying state lawsuits.

<sup>2</sup> Lake Shore Motor Coach Lines and Debra Kay have not entered appearances.

to attend a band competition in Pocatello, Idaho. Lake Shore agreed to provide transportation for the band to and from Idaho. (R. 46, ¶3)

4. The accident at issue occurred on October 10, 2009 at 7:17 p.m., when Jarvis suffered a sudden and unforeseeable loss of consciousness while driving, causing the bus to leave the roadway, hit a ravine and roll on its side. (R. 46, ¶4)

5. When Jarvis left Pocatello, she did not feel ill and had no reason to believe she had a medical condition that could cause incapacitation or loss of consciousness. (R. 46, ¶5)

6. Prior to the accident Jarvis never lost consciousness or suffered from a similar event. Jarvis had not been ill, and had no knowledge that this could occur, and that it occurred suddenly and without warning, rendering her unconscious and incapacitated causing the bus to veer off the roadway. (R. 46, ¶6)

7. Jarvis' loss of consciousness was a result of an "independent, intervening, unforeseeable medical condition". (R. 46, ¶7)

8. Following the October 10, 2009 accident the Injured Parties filed lawsuits in the Fourth Judicial District Court:

- a. **Janna Crane** filed a Complaint (March 21, 2013) captioned *Janna Crane v. Debra Kay Jarvis, an individual, and Lake Shore Motor Coach Lines, a corporation*, Civil No. 130400418, pending before the Honorable Christine Johnson alleging personal injury as a result of this accident. Subsequently, the Complaint was amended (August 27, 2014) to include a cause of action based on U.C.A. §31A-22-303(1)(a)(v). A

Second Amended Complaint (January 8, 2015) was filed adding Lancer as a party.

- b. **Elizabeth Hutchison** filed a Complaint (March 22, 2013) captioned *Elizabeth Hutchison v. Debra Kay Jarvis, an individual, and Lake Shore Motor Coach Lines, Inc.*, Civil No.130400423, pending before the Honorable Christine Johnson , alleging personal injury. The Complaint was amended on (August 27, 2014, and January 8, 2015), to add a Sixth Cause of Action based on U.C.A. §31A-22-303(1)(a)(v) and adding Lancer as a party.
- c. **Mette Seppi** filed a Complaint (January 17, 2014) captioned *Mette Seppi v. Debra Kay Jarvis, an individual, and Lake Shore Motor Coach Lines, Inc.*, Civil No. 140400088, pending before the Honorable Lynn W. Davis, alleging personal injury as a result of the accident. The Complaint was amended (January 28, 2015), adding a Sixth Cause of Action based on U. C. A. §31A-22-303(1)(a)(v) and adding Lancer as a party.
- d. **Tiffany Thayne** filed a complaint (December 12, 2014) captioned *Tiffany Thayne v. Debra Kay Jarvis, an individual; Lake Shore Motor Coach Lines, Inc., a corporation; and Lancer Insurance Company, an Illinois Corporation*, in the Fourth Judicial District Court in and for Utah County, State of Utah, Civil No. 140401741, pending before the Honorable Darold McDade, adding a Sixth Cause of Action based on

U.C.A. §31A-22-303(1)(a)(v) and adding Lancer as a party. (R. 47 & 48, ¶8)

9. On March 12, 2014, Crane and Hutchison filed motions for partial summary judgment [sic summary judgment] based on liability citing to U.C.A. §31A-22-303(1)(a)(v), Motor Vehicle Liability Coverage. Both matters were heard by the Honorable Judge Christine Johnson. That section states that an automobile policy shall provide:

(a) **Utah Code Annotated §31A-22-303(1)(a)(v)** provides:

(1) (a) In addition to complying with the requirements of Chapter 21, Insurance Contracts in General, and Chapter 22, Part 2, Liability Insurance in General, a policy of motor vehicle liability coverage under Subsection 31A-22-302(1)(a) shall:

...

(v) cover damages or injury resulting from a covered driver of a motor vehicle who is stricken by an unforeseeable paralysis, seizure, or other unconscious condition and who is not reasonably aware that paralysis, seizure, or other unconscious condition is about to occur to the extent that a person of ordinary prudence would not attempt to continue driving.

(b) The driver's liability under Subsection (1)(a)(v) is limited to the insurance coverage.

(R. 48, ¶9)

10. Citing to the above statutory language, Crane and Hutchinson argued (in the underlying lawsuits) in their partial summary judgment motion [sic summary judgment] that "a sudden medical emergency...does not establish a defense in Utah." "To the contrary, a sudden onset of a medical emergency establishes a duty on the part of

[Lake Shore and Jarvis] to pay [Crane's and Hutchinson's] damages as established at trial up to the policy limits of [Lake Shore's and Jarvis'] auto insurance policy.” (R. 49, ¶10)

11. In opposition to Crane and Hutchison's partial summary judgments [sic summary judgment], Lake Shore and Jarvis, in the underlying lawsuit, took the following position(s): (1) U.C.A. §31A-22-303(1)(a)(v) only describes the type of vehicle coverage a policy must have; (2) the emergency medical statute is not ambiguous; (3) the “sudden emergency” defense is good law and applies to bar coverage [sic liability]; (4) the statute is not ambiguous and does not create a strict liability cause of action; (5) Crane and Hutchison are only entitled to a judgement against Lake Shore and Jarvis based on a showing of negligence; and (R. 49, ¶11)

12. On June 6, 2014 the court ruled on Crane's and Hutchison's motions for partial summary judgement [sic summary judgment] in the underlying lawsuits, finding that:

(a) The language of the statute at issue is not ambiguous. “It simply directs that insurance policies for motor vehicles must include coverage for damages resulting from drivers who suffer from an unforeseeable unconscious condition. Nowhere does it state that a new form of strict liability has been created. Nowhere does it state that any principles of tort law have been abrogated or supplanted. To adopt Crane's position is to impose a marked change in tort law absent any legislative direction. This the court is unwilling to do”.

(Exhibit 2: Court's Memorandum Decision) (R. 49, ¶12)

13. The Court also concluded that: “Subsection (v) does not apply to a claim of negligence. Rather, by its own terms it applies to the obligations of an insurer to provide coverage. Therefore, it cannot serve as the basis for a finding of



liability and depends upon facts and legal theories not touched upon in (Crane's and Hutchison's) Complaints. Accordingly, that theory is not properly before the Court in this summary judgment motion. Summary judgment is properly denied. (Exhibit 2: Court's Memorandum Decision Pg. 10) (R. 49, ¶13)

14. Lancer filed its CDR on October 29, 2014, and an Amended CDR on February 4, 2015, alleging that the Injured Parties' claims are barred by the "Sudden Incapacity" defense. (R. 50, ¶14)

15. Lancer also alleges that Utah Code Annotated §31A-22-303(1)(a)(v) is not ambiguous and simply directs insurers that policies for motor vehicle insurance must include coverage for damages resulting from drivers who suffer from an unforeseeable medical condition; that the statute does not state that a new form of risk has been created, nor does it state that any principles of tort law have been abrogated; that, in fact, to hold otherwise would impose a significant change in tort law, without any legislative direction; that the statute does not create a strict liability cause of action; and finally, if at all, the recovery is limited to the statutory minimums. (R. 50, ¶15; R.71, page 7)

16. Following the Court's order, the Injured Parties stayed all underlying complaints and amended complaints on the following dates: Crane (2/24/25), Hutchison (2/24/15), Seppi (2/24/15) and Thayne (3/27/15), pending resolution of the Amended Complaint for Declaratory Relief. (R. 50, ¶16)

17. In their response to the Amended Complaint for Declaratory Relief, Crane, Hutchison, Thayne and Seppi allege that Utah Code Annotated §31A-22-303(1)(a)(v)

creates strict liability for insured drivers who become suddenly and unforeseeably medically incapacitated while driving a motor vehicle, resulting in injury. (R. 50, 51, ¶17)

18. Other statutory provisions at issue include Utah Code Annotated §31A-22-302(1)(a), and §31A-22-304(1)(a)(b) and (2).

**(A) Utah Code Annotated §31A-22-302(1) (a) provides:**

(1) Every policy of insurance or combination of policies purchased to satisfy the owner's or operator's security requirement of Section 41-12a-301 shall include:

(a) motor vehicle liability coverage under Sections 31A-22-303 and 31A-22-304;

**(B) Utah Code Annotated §31A-22-304(1)(a)(b) and (2) provides:**

Policies containing motor vehicle liability coverage may not limit the insurer's liability under that coverage below the following:

(1)(a) \$25,000 because of liability for bodily injury to or death of one person, arising out of the use of a motor vehicle in any one accident;

(b) subject to the limit for one person in Subsection (1)(a), in the amount of \$65,000 because of liability for bodily injury to or death of two or more persons arising out of the use of a motor vehicle in any one accident; or

(2) \$80,000 in any one accident whether arising from bodily injury to or the death of others, or from destruction of, or damage to, the property of others.

(R. 51, ¶18)

**SUMMARY OF ARGUMENT**

On October 10, 2009, Debra Jarvis ("Jarvis") was employed as a bus driver with Lake Shore Motor Coach Lines, Inc. ("Lake Shore"). Ms. Jarvis was driving a Lake Shore bus to a high school band event when she suddenly and unexpectedly lost consciousness and drove off the road. As a result of which four (4) passengers in the bus

at the time, Janna Crane, Elizabeth Hutchison, Mette Seppi and Tiffany Thayne, alleged personal injury collectively (“Injured Parties”). All four individuals filed suit claiming various forms of negligence on the part of Jarvis and Lake Shore (“underlying lawsuits”).<sup>3</sup>

Two of the Injured Parties, Crane and Hutchison, filed for summary judgment alleging that Jarvis’ sudden loss of consciousness caused the accident, giving rise to a statutory obligation to pay damages up to the policy limits. In support of this, they cite to U.C.A. §31A-22-303(1)(a)(v) (the “Medical Emergency” statute), claiming that this statute applies and creates a strict liability cause of action. Lancer maintains, however, that this statute only outlines the mandatory requirements for motor vehicle liability coverage. Among those requirements in Subsection (v) is that motor vehicle liability coverage must include a provision that covers damages resulting from an unforeseen medical condition rendering the driver incapacitated. Specifically, that insurance policies must cover:

“damages or injury resulting from a covered driver of a motor vehicle who is stricken by an unforeseeable paralysis, seizure, or other unconscious condition and who is not reasonably aware that paralysis, seizure, or other unconscious condition is about to occur to the extent that a person of ordinary prudence would not attempt to continue driving”.

The position taken by the Injured Parties is that this statute creates a strict liability cause of action, and they are entitled to damages up to the policy limits without having to show fault.

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<sup>3</sup> The underlying lawsuits allege negligence, breach of duty to passenger, negligence per se, and *res ipsa loquitur*.

Lancer's position is that: (1) the Sudden Incapacity defense, that tort law does not impose liability absent fault, is still good law; (2) the Medical Emergency statute only describes the requirements for motor vehicle liability insurance, among those is that there must be coverage for an unforeseeable act rendering a driver incapacitated; (3) this statute is not ambiguous; (4) there can be no liability absent fault, and in circumstances of an unforeseen medical emergency rendering the driver incapacitated, the driver cannot be liable for the injuries caused; (5) under the Medical Emergency statute the Injured Parties are only entitled to judgment against Lake Shore and Jarvis based on a showing of negligence, it does not create a cause of action for strict liability; and (6) if the Injured Parties are entitled to any recovery, it is limited to the statutory minimums (*See* U.C.A§31A-22-304).

Lancer's position is supported by the Hon. Christine Johnson's June 6, 2014 ruling denying these motions for summary judgment, finding that:

In the present case, the plain language of Subsection (v) is not ambiguous. It simply directs that insurance policies for motor vehicles must include coverage for damages resulting from drivers who suffer from an unforeseeable unconscious condition. Nowhere does it state that a new form of strict liability has been created. Nowhere does it state that any principles of tort law have been abrogated or supplanted. To adopt Crane's position is to impose a marked change in tort law absent any legislative direction. This the court is unwilling to do.

(Exhibit 1: Ruling and Order on Plaintiff's MSJ: pg.7) (R. 71, page 7).

After the court's ruling, the Injured Parties filed amended complaints in the underlying lawsuit, addressing the interpretation of the Medical Emergency statute at issue. Lancer then filed its CDR (R. 10-18) and Amended Complaints for Declaratory

Relief (“CDRs”) (R. 19-39)<sup>4</sup> in the district court reaffirming Lancer’s above positions. Because of the CDR, the parties in the underlying lawsuits stipulated to a stay pending resolution of the CDR by the district court.

Lancer filed for Summary Judgment on its CDR requesting the Court find as a matter of law that the statutory language of the Emergency Medical statute is not ambiguous, requiring only that a Motor Vehicle policy provide coverage for a driver who is suddenly stricken by an unforeseeable medical condition resulting in injury to a third party. The Injured Parties filed a cross-motion for summary judgment also taking the position that the statute is not ambiguous and requires that in all circumstances where there is an unforeseen medical condition resulting in injury that the Court find that the victim must be compensated up to the policy limits. In essence, asking the Court to find that the Emergency Medical statute establishes strict liability and that a finding of fault is not necessary.

Lancer is requesting the Court find that the Injured Parties’ interpretation of this statute is not valid, and that Lancer’s position is well taken, that is, that this particular statutory section only requires that coverage for unforeseen medical conditions be included in motor vehicle liability policies. The statute does not alter tort law, nor does it establish a cause of action in strict liability. Lancer also requests that this Court find if the Injured Parties are entitled to damages then their damages are subject to the statutory minimums.

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<sup>4</sup> Lancer subsequently filed Second and Third Amended Complaints to correct jurisdictional defects (R. 168-170 and R. 179-187, respectively).



## ARGUMENT

### POINT I THE UNFORESEEN LOSS OF CONSCIOUSNESS IS A COMPLETE DEFENSE TO A NEGLIGENCE CLAIM

Since 1960, under Utah case law, a driver who is rendered unconscious or incapacitated due to an unforeseen medical emergency is not liable for negligence (the "Sudden Incapacity" defense). *Porter v. Price*, 355 P.2d 66, 67-68 (Utah 1960), *overruled in part on other grounds by Randle v. Allen*, 862 P.2d 1329, 1336 (Utah 1993).

In *Porter*, the defendant, a 17-year-old diabetic, was driving his car when he suffered a severe insulin reaction, causing him to lose control of his vehicle impacting plaintiff's parked vehicle. At the time of the accident his diabetes was well-regulated; there was no change in his routine; his prior insulin reactions were mild, had never incapacitated him, and were always preceded by a warning. He had never had a severe reaction like the one on the day of the accident, which occurred without warning. It was a rare occurrence and "its likelihood of happening to him was therefore not great enough to cause a reasonable man to act any differently than he acted." *Id.* 67. The jury found that he was not negligent.

On appeal, Plaintiff challenged jury instructions #9 and #10 addressing the Sudden Incapacity defense.

Instruction No. 9 provided:

"A driver of an automobile who is stricken by paralysis, seized by a fit or otherwise rendered unconscious and who still continues to drive while unconscious and causes damages or injury to another cannot be held responsible therefor unless he was reasonably aware that he was about to lose consciousness to

the extent that a person of ordinary prudence would not attempt to continue driving.” *Id.* 68.

Instruction No. 10 provides:

“You are instructed that fainting or loss of consciousness while driving is a complete defense to an action based on negligence if such loss of consciousness was not foreseeable. If you find that defendant... was suffering from an unforeseen insulin reaction, resulting in a fainting spell or loss of consciousness at the time of this accident, then you must return a verdict in favor of the defendant and against plaintiffs.”

*Id.* 68.

The Utah Supreme Court upheld the use of these jury instructions and affirmed the jury’s finding in favor of the driver.

In April 1993, the Utah Supreme Court in *Hansen v. Heath*, 852 P.2d 977 (Utah 1993) reaffirmed the Sudden Incapacity defense. In *Hansen*, defendant blacked out while driving and plead as an affirmative defense “that he had suddenly and without prior warning lost consciousness at the time of the accident and was therefore, not liable for [plaintiff’s] injuries”. *Id.* 978. The jury found no negligence on the defendant. The Supreme Court affirmed the jury’s verdict holding that: “if a person driving an automobile is suddenly stricken by an illness that he or she has no reason to anticipate and the illness makes it impossible for him or her to control the car, that person is not liable for negligence associated with the accident”. *Id.* 978, fn.2 (citing to *Porter*, *Id.* 68).

In October 1993 the Utah Supreme Court addressed this issue again in *Randle*, which reaffirmed *Porter* finding that there is no tort liability for personal injury “absent fault or negligence on the part of the defendant.” *Id.* 1335. *Porter* was overruled to the extent it permitted the use of a separate jury instruction on unavoidable accident. The

court eliminated this instruction finding it confusing and unnecessary in light of “the traditional negligence framework for determining liability”. *Id* 1336. (See also *Green v. Lowder*, 29 P.3d 638, 644 ¶16, 17 &18 (2001)).

The Sudden Incapacity defense was last addressed in Utah by the U.S. District Court for the District of Utah in *Solorio v. United States*, 228 F. Supp. 2d 1280 (D. Utah 2002) (*Solorio I*), *aff’d*, 85 Fed. Appx. 705 (10<sup>th</sup> Cir. 2004) (*Solorio II*) (an unpublished opinion)<sup>5</sup>. The district court, in *Solorio I*, determined that: “in Utah, a sudden and unforeseeable loss of consciousness that incapacitates a driver does not constitute negligence because the circumstances are beyond the control of the driver”. *Id.* 1283. *Solorio I* is significant because it was decided after the enactment of the Medical Emergency statute in 1998. Yet, in spite of the statute both the district court and the 10<sup>th</sup> Circuit Court of Appeals upheld the Sudden Incapacity defense on summary judgment, lending further credence to Lancer’s position that this statute did nothing more than require policies to have “medical emergency” coverage. It does not mention, nor does it create, a cause of action for strict liability.<sup>6</sup>

The cases Lancer relies on were decided prior to the enactment of the Medical Emergency statute at issue, but these cases are still good law given that the statute at

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<sup>5</sup> *Solorio II* “while it lacks precedential value, it may be cited for its persuasive value”. (See DuCiv R7-2(a)).

<sup>6</sup> *Solorio I* raised the statute, but mislabeled it “§31A-22-303(1)(a)(iv)” instead of subsection (v). The defendant in that case, whose driver lost consciousness as a result of a seizure-like event, argued in his reply that the statute merely addresses insurance policy coverage, and does not apply to the case. (See Exhibit 1: reply memo supporting defendant’s motion for S.J. at 8, ECF No. 37). The Utah district court found that rule announced in *Porter* remains good law, and entitled the defendant to summary judgment. (*Solorio I*, *Id.* ¶1283)

issue only mandates what coverages are necessary for motor vehicle insurance policies. The Medical Emergency statute “is directed to insurance companies” and “simply specifies what coverage a vehicle insurance policy must include in order to satisfy the Motor Vehicle Insurance Code requirements”. *State v. Biggs*, 167 P.3d 544 (Utah App. 2007), Id. ¶15. The statute unambiguously provides for the type of policy for emergency medical coverage, it does not create a new duty outside of existing tort law allowing strict liability against Defendants Jarvis and/or Lake Shore (in the underlying action), but requires a showing of negligence or proof of fault.

The case law relied on by Lancer, which includes *Porter, Randle, Hansen, Green* and *Solorio I and II*, supports its position that there can be no liability absent fault, and is still good law. As such, the Sudden Incapacity defense bars coverage for the Injured Parties in this case.

## **POINT II**

### **U.C.A. §31A-22-303(1)(a)(v) SPECIFIES THE COVERAGES A VEHICLE INSURANCE POLICY MUST HAVE**

The Medical Emergency statute unambiguously provides only for the types of coverage insurance policies must have to comply with the statute, which identifies the required components of motor vehicle insurance policies.

U.C.A. §31A-22-303 provides that:

In addition to complying with the requirements of Chapter 21, Insurance Contracts in General, and Chapter 22, Part 2, Liability Insurance in General, a policy of motor vehicle liability coverage under Subsection § 31A-22-302(1)(a) shall:

(v) cover damages or injury resulting from a covered driver of a motor vehicle who is stricken by an unforeseeable paralysis, seizure, or other unconscious condition and who is not reasonably aware that paralysis, seizure, or other unconscious condition is about to occur to the extent that a person of ordinary prudence would not attempt to continue driving.(Emphasis added).

U.C.A. §31A-22-302(1)(a), Required components of motor vehicle insurance policies—Exceptions, states:

(1) Every policy of insurance or combination of policies purchased to satisfy the owner's or operator's security requirements of Section 41-12a-301<sup>7</sup> shall include:

(a) motor vehicle liability coverage under §§31A-22-303 and 31A-22-304...<sup>8</sup>

The statute's plain language is "the best evidence of legislative intent". (*Anderson v. Bell*, 234 P.3d 1147, ¶9 (Utah 2010). There is nothing in the statutory language of either statute that addresses damages or directs the entry of personal liability judgments against innocent drivers who suffer from medical incapacitation. Both of these statutes unambiguously address the types of coverages insurance policies must provide.

The Utah Court of Appeals in *State v. Biggs*, 167 P.3d 544 (Utah App. 2007), discussed the Medical Emergency statute and confirmed that: "[t]his section, however, simply specifies what coverage a vehicle insurance policy must include in order to satisfy the Motor Vehicle Insurance Code requirements. ...It is therefore directed to insurance

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<sup>7</sup> U.C.A. §41-12a-301(2)(a) provides that: "every resident owner of a motor vehicle shall maintain owner's or operator's security in effect at any time that the motor vehicle is operated on a highway or on a quasi-public road or parking area within the state;...."

<sup>8</sup> 31A-22-304 provides the minimum limits a motor vehicle liability policy must have.



companies, not vehicle owners, and in no way relieves Defendant of any other statutory obligation she has to insure her car". *Id.* ¶15. (Emphasis added).

The Medical Emergency statute does not create a new duty outside existing tort or insurance law allowing strict liability against the drivers who experience medical emergencies. There must still be a showing of fault. Lancer's position that this is a coverage, and not a liability statute, was confirmed by Judge Johnson's memorandum decision denying the Injured Parties' motion for summary judgment in the underlying action. In this regard, Judge Johnson stated that:

In the present case, the plain language of subsection (v) is not ambiguous, it simply directs that insurance policies for motor vehicles must include coverages for damages resulting from drivers who suffer from an unforeseeable unconscious condition. Nowhere does it state that a new form of strict liability has been created. Nowhere does it state that any principles of tort law have been abrogated or supplanted. To adopt [the Injured Parties'] position is to impose a marked change in tort law absent any legislative direction. This court is unwilling to do this."

(Exhibit 1: Ruling and Order on Plaintiff's MSJ: pg 7) (R. 71)

The two statutes cited above, in conjunction with Judge Johnson's opinion, support Lancer's position that the Medical Emergency statute at issue merely describes the type of coverage that insurance policies must provide, and does not discuss nor address liability of any kind.

### **POINT III**

#### **U.C.A. § 31A-22-303(1)(a)(v) DOES NOT GIVE RISE TO STRICT LIABILITY**

There are very good reasons to interpret the Medical Emergency statute as a coverage statute and not one creating a strict liability cause of action. Currently, strict

liability applies to products liability and inherently dangerous activities. As the two cases cited below illustrate, there is no good reason to extend strict liability to motor vehicle accidents. The two cases that have addressed the issue of strict liability in the context of the Sudden Incapacity defense involve circumstances where a driver loses control of his vehicle due to an unforeseen loss of consciousness. *Hammontree v. Jenner*, 20 Cal. App. 3d 528 (2<sup>nd</sup> App. Dist. Div. 1, 1971) and *Roman v. Estate of Gobbo*, 791 N.E.2d 422 (Ohio 2003). Neither of these cases involved any statutes, but only address the application of strict liability for a driver's unforeseen loss of consciousness, resulting in injury, and in that context have declined to apply strict liability. They conclude this by distinguishing the application of strict liability under product liability law versus its application to automobile accidents.

In *Hammontree*, the defendant, an epileptic under a doctor's care, had been given a driver's license on the condition that he follow his prescribed treatment. He followed the prescribed treatment. Nonetheless, he blacked out and drove into the plaintiff's bicycle shop. The owner of the bicycle shop filed suit, and the court applied negligence principles, refusing to support plaintiff's claim that defendant should be responsible for the injuries caused by his "black out" or "defective condition". The court did not refer to strict liability, but instead held the defendant to principles of negligence, finding that the condition was neither abnormally dangerous nor defective, even though the risk of seizure could be controlled but not eliminated with medical treatment. Plaintiff was unable to prove that the defendant acted unreasonably in light of his condition, and recovered nothing. In that case, the California Appellate Court rejected the contention

that a driver who loses consciousness (because of a health issue) and his ability to safely operate and control the vehicle should be held strictly liable under products liability law.

The doctrine of product liability law states that: “[a] manufacturer [or retailer] is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to human beings.” *Id.* 532. Appellants claimed that this principle should apply to motor vehicle accidents, arguing that: “only the driver affected by a physical condition which could suddenly render him unconscious and who is aware of that condition can anticipate the hazards and foresee the dangers involved in his operation of a motor vehicle, and that the liability of those who by reason of seizure or heart failure or some other physical condition lose the ability to safely operate and control a motor vehicle resulting in injury to an innocent person should be predicated on strict liability”. *Id.* 532.

The court, however, refused to apply strict liability to automobile drivers who, by virtue of being rendered unconscious, injure innocent victims. In noting this, the court declined to “superimpose the absolute liability of products liability cases upon drivers [involved in a sudden emergency], stating that:

The theory on which those cases are predicated is that manufacturers, retailers and distributors of products are engaged in the business of distributing goods to the public and are an integral part of the over-all producing and marketing enterprise that should bear the cost of injuries from defective products... This policy hardly applies here and it is not enough to simply say, as do appellants, that the insurance carriers should be the ones to bear the cost of injuries to innocent victims on a strict liability basis.”

*Id.* 532.

More specifically, the California Appellate Court adopted the reasoning of the California Supreme Court in *Maloney v. Rath*, 445 P.2d 513 (CA 1968), wherein it stated:

To invoke a rule of strict liability on users of the streets and highways, however, without also establishing in substantial detail how the new rule should operate would only contribute confusion to the automobile accident problem. Settlement and claims adjustment procedures would become chaotic until the new rules were worked out on a case-by-case basis, and the hardships of delayed compensation would be seriously intensified. Only the Legislature, if it deems it wise to do so, can avoid such difficulties by enacting a comprehensive plan for the compensation of automobile accident victims in place of or in addition to the law of negligence.

*Id.* 532-533.

The Ohio Supreme Court, in *Roman*, also addressed strict liability in the context of an automobile accident resulting from an unforeseen sudden medical emergency, finding that: “strict liability, is principally limited to cases involving products liability and “abnormally dangerous activity” and that the concept of liability without fault has no place in the circumstances [where a driver who is suddenly and unforeseeably rendered incapacitated causes injury to another party].” *Id.* ¶ 27.

In discussing negligence and strict liability in the context of an unforeseeable and unanticipated loss of consciousness, resulting in injury, the Ohio Supreme Court concluded that:

A central feature of negligence law is that to be found negligent, a defendant must have acted unreasonably. Where there is no unreasonable conduct, there is no fault. To find a defendant liable for the effects of an unforeseen medical emergency that causes sudden unconsciousness would be to impose strict liability, which is inappropriate for this situation.

*Id.* ¶54.

The Ohio Supreme Court reaffirmed the appropriate law to apply:

Where the driver of an automobile is suddenly stricken by a period of unconsciousness which he has no reason to anticipate and which renders it impossible for him to control the car he is driving, he is not chargeable with negligence as to such lack of control.

*Id.* ¶ 56.

The Injured Parties maintain that the Medical Emergency statute establishes strict liability, using legislative intent to support this position. Specifically, they rely on the floor debates. However, the sections that the Injured Parties rely on do not support their position. For example, they cite to Senator Jones' statement<sup>9</sup> regarding the Medical Emergency statute, wherein he states that:

Right now, the law indicates that the only way you can recover damages, either liability or property damage, is to prove that there was negligence involved, and in the case of unforeseen medical problems, the courts have ruled that that is not negligence. It is unforeseen, unpredictable and in some cases unavoidable.

*HTTP://utahlegislature.granicus.com/mediaplayer.php?clip\_id=8198&meta\_id=400552, time stamped at 45:38.*

From this the Injured Parties conclude that the Medical Emergency statute was enacted to require liability carriers to pay bodily injury claims that arise out a sudden, unforeseeable medical emergency of an insured driver without having to prove fault. (*See Senate Floor Debates, Day 23, 1998 General Session, Part I, supra, time stamped 42:02 and 44:16.*) Senator Jones did not add any language to the statute that states that strict liability applies and a showing of fault is not required.

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<sup>9</sup> This statement is counsel for the Injured Parties' transcription from listening to the tape found in their cross-motion for summary judgment and opposition to Lancer's motion for summary judgment. (R. 103)



To lend further support for their position, the Injured Parties also point to subsection (B) of the Medical Emergency statute, which provides that: “The driver’s liability under subsection (1)(a)(v) is limited to the insurance coverage.” This, like the statute itself, does not support the Injured Parties’ position that the statute creates strict liability, meaning that there need not be a finding of fault in order to pay damages up to the policy limits.

More specifically, assuming the statute is ambiguous and it was necessary to resort to legislative history, it would not be proper to use floor debates to show legislative intent. In this case, the Injured Parties selected specific excerpts from the floor debates to support their position. In commenting on the use of legislative history, the Utah Supreme Court in *Grays v. Northeastern Services, Inc.*, 345 P.3d 619, ¶75 (Utah 2015) expressed concerns over the use of legislative history, noting that the search for legislative intent is perilous for the following reasons:

[I]n many cases, it is difficult to discover the motives which may have prompted those who drew up the text; but it is also dangerous to construe upon supposed motives if they are not plainly expressed. Everyone is apt to substitute what his motives would be, or perhaps unconsciously to fashion the supposed motives according to his own interests and views of the case; and nothing is more ready means to bend laws, charters, wills, treaties, etc., according to the preconceived purposes than by their construction upon supposed motives. To be brief, unless motives are expressed, it is exceedingly difficult to find them out except by the text itself; they must form, therefore, in most cases, a subject to be found out by the text, not ground on which we construe it.

In Judge Johnson’s June 6, 2014 ruling on the Injured Parties’ Motion for Summary Judgment in the underlying cases, she addressed the Injured Parties’ use of

floor debates to support their argument that the intent of the statute at issue is to “abolish the sudden medical emergency defense”, noting that:

[t]he use of isolated quotes from floor debates to divine the intent of the legislature as a whole is problematic, at best. Specifically, all testimony of witnesses and individual congressmen, unless very precisely directed to the intended meaning of the particular words in a statute, can seldom be expected to be as precise as the enacted language itself. To permit what we regard as clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to the inadvertent or perhaps even planned undermining of the language actually voted on by congress and signed into law[.]

In support of the above, Judge Johnson relied on *Regan v. Wald*, 468 U.S. 222, 237 (1984) for the proposition that: “[s]tatutes are the law, not evidence of law”. It is for this reason that the use of floor debates and similar sources of legislative history are not relied upon when the language of the statute itself is clear. In discussing this statute at issue, Judge Johnson determined that the plain language of the Medical Emergency statute: “is not ambiguous”.

This provision simply directs that insurance policies for motor vehicles must include coverage for damages resulting from drivers who suffer from an unforeseeable unconscious condition. Nowhere does it state that a new form of strict liability has been created. Nowhere does it state that any principles of tort law have been abrogated or supplanted. To adopt [the Injured Parties’] position is to impose a marked change in tort law absent any legislative direction. This the Court is unwilling to do.

(R. 71, pg. 7).

The court also noted that if it were to consider legislative history presented by [the Injured Parties], the citations offered are subject to at least two interpretations:

The first interpretation is the one advocated by [the Injured Parties], that the legislature intended to alter the landscape of tort law and abrogate the “sudden medical emergency” defense. The second is that the legislature intended to provide a new remedy for victims injured in accidents caused by incapacitated drivers—a remedy separate and apart from a cause of action for negligence. The remedy is arguably one which arises from a contract between drivers and their motor vehicle insurance providers. Because subsection (v) is located in the insurance code, together with the other motor vehicle insurance policy coverage requirements, it is more reasonable to interpret the legislative intent as the latter.

(R. 71, pages 7-8)

Public policy dictates that strict liability should not apply to motor vehicle accidents. Rather, the court should adhere to negligence principles as it did in *Hammontree*, i.e. that there must be a finding of fault. “This... is necessary to preserve the autonomy and free movement of the disabled and to avoid imposing extra costs on a disabled person who has exercised all reasonable control over the disability. Until we can determine that the driver failed to exercise reasonable care over his disability or that the risk of getting in the car was excessive in comparison to the importance of the freedom to drive, the activity-based decision of the defendant [is] not the source of legal liability”. “*The Death of Strict Liability*,” 56 Buffalo L. Rev. 245, 259-260 (April 2008).

The “tradeoff between the victim’s harm and the defendant’s freedom of movement is a difficult one, but the social value the court endorsed by choosing the negligence rule—to preserve the defendant’s freedom of movement unless the plaintiff can show negligence—is the justifiable one.” “*The Death of Strict Liability*”*Id.* 260. It would be inappropriate to punish an individual with a disability by assessing strict liability. Instead the focus on an individual who encounters a sudden medical emergency,

such as the individual in *Hammontree*, should still be the reasonableness of the care he took, for example, did he take the medications that day as prescribed.

In sum, it wouldn't be appropriate to apply strict liability, or liability without fault, to motor vehicle accidents where the driver is confronted with a "medical emergency". Nor does the statute at issue create a strict liability cause of action. Rather, this statute only addresses the types of coverages that must be included in an insurance policy.

**POINT IV**  
**THE INJURED PARTIES ARE ONLY ENTITLED TO THE STATUTORY**  
**MINIMUMS IF ANYTHING**

U.C.A. §31A-22-303(1)(a)(v) did not create a cause of action for strict liability nor did it alter tort law, negligent principles still apply. The language in this statute simply specifies what coverage a motor vehicle insurance policy must include to meet the Motor Vehicle Insurance Code Requirements. In the case of a medical emergency under the statute, the Injured Parties are not without a remedy. Under U.C.A. §31A-22-304, they may be entitled to the statutory minimum of \$25,000. This issue was addressed by the Utah Supreme Court in *Speros v. Fricke*, 98 P.3d 28 (Utah 2004). In *Fricke* the court addressed whether the Intentional Act Exclusion is a complete bar to coverage. In addressing this issue the court stated that:

The Utah legislature has enacted a comprehensive statutory scheme mandating minimum liability coverage for motor vehicles. ... This legislative enactment reflects public policy requiring vehicle owners to carry a minimum level of liability coverage to protect innocent victims of automobile accidents. In the case of an owner's liability policy, the statute requires that the policy insure the person named in the policy and any permissive users "against loss *from the liability imposed by law* for

damages arising out of the ownership, maintenance, or use of these motor vehicles within the United States and Canada...in the [dollar] amounts not less than the minimum limits specified.” *Id.* §31A-22-303(1)(a)(ii)

(Emphasis added). *Id.* ¶42. (See also §31A-22-304, which specifies the minimum limits).

From the above, the court determined that there is no distinction between liability arising out of negligent versus intentional acts. The statutory scheme “simply requires coverage for all liabilities imposed by law. Because the law imposes liability for damages caused negligently *and* intentionally, we conclude that the statute requires coverage of liability...arising out of intentional, as well as negligent acts...” *Id.* ¶43. As such, the court held that the “intentional acts exclusion is unenforceable against accident victims up to the minimum liability limits prescribed by the statute”. *Id.* ¶44. (See also *Allstate Ins. Co. v. United States Fidelity & Guaranty Co.*, 619 P.2d 329 (Utah 1980)”, finding the named driver exclusion was void up to the mandated statutory minimums, and *Farmers Ins. Exchange v. Call*, 712 P.2d 231 (Utah 1985),”Household Exclusion void up to the mandated statutory minimums”).

By definition, under the facts of this case, there is no fault, and therefore the Injured Parties are not entitled to damages. Drawing an analogy, however, from the above cited case law would suggest that under Utah law the Injured Parties may be entitled to the statutory minimums, if anything.

### CONCLUSIONS

Lancer requests this Court find that: (1) the Sudden Incapacity defense, that tort law does not impose liability absent fault, is still good law; (2) the Medical Emergency

statute is not ambiguous and is only a coverage statute, which describes the type of coverages a motor vehicle liability policy must contain; (3) the statute at issue did not create a cause of action for strict liability, but there must be a finding of fault; and (4) if the Injured Parties are entitled to any recovery, it is limited to the statutory minimums.

DATED this 27<sup>th</sup> day of June, 2016.

  
Barbara L. Maw  
*Attorney for Appellant*

#### ADDENDUM

1. *Solorio v. United States of America*, reply memo supporting defendant's motion for summary judgment at 8, ECF No. 37).

#### MAILING CERTIFICATE

I hereby certify that four (4) (two for each Defendant/Appellee) true and correct copies of the foregoing were mailed, first-class postage prepaid, this 27<sup>th</sup> day of June, 2016, to the following:

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UNITED STATES DISTRICT COURT

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DISTRICT OF UTAH, CENTRAL DIVISION

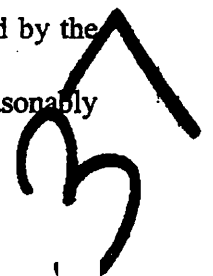
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IGNACIO SOLORIO as personal	)	
representative of the estate of	)	
MIGUEL ORNELAS SOLORIO;	)	<b>REPLY MEMORANDUM</b>
FILIBERTO JIMENEZ and ADELEDA	)	<b>SUPPORTING DEFENDANT'S</b>
ORELAS SOLORIO as heirs of	)	<b>MOTION FOR SUMMARY</b>
decendent MIGUEL ORNELAS	)	<b>JUDGMENT</b>
SOLORIO,	)	Civil No. 2:01CV 00025 DAK
Plaintiffs,	)	
v.	)	Judge Dale A. Kimball
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

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Defendant United States of America submits this reply memorandum in response to Plaintiffs' Memorandum Opposing Defendant's Motion for Summary Judgment ("Pls.' Opp.").

Defendant is entitled to summary judgment because Plaintiffs cannot establish that Defendant was negligent in the motor vehicle accident at issue. In response to Defendant's Motion for Summary Judgment (Defendant's "Motion"), they have brought forward no new evidence to counter expert opinion testimony from Defendant's neurologist that the accident was most likely caused by the driver's losing control of the vehicle because she suffered a seizure-like event that was not reasonably





foreseeable. Rather, they simply offer their neurologist's certainty of his own contrary opinion, which he admits he cannot justify based on authoritative literature or his own clinical experience. Because a private party would not be found liable in these circumstances under Utah law, the United States cannot be found liable under the Federal Tort Claims Act, and Defendant is entitled to summary judgment.

#### STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

1. Plaintiffs' expert neurologist Dr. Savia, a graduate of medical school in Grenada, West Indies, stated that "I can't say" whether the driver's seizure began before or after the accident. (Savia Depo. at Exhibit 3 (curriculum vitae, copy attached), 41:2-4 (copy attached).) He elaborated on his uncertainty: "There's no real way of telling. . . . You have to make some assumptions . . . . So without having any other documentation of anything else happening beforehand, I can't tell that a seizure occurred before the accident." (*Id.* at 41:2-24.) Nevertheless, Dr. Savia decided to assume, with "probably . . . 99.99 percent" certainty, that the seizure began after the accident. (*Id.* at 25:2-9.)
2. Having made this assumption with "no real way of telling," Dr. Savia then assumed that the accident caused the seizure. (*Id.* at 7:22-8:4 "[Ms. Michel] had a seizure shortly after some type of head trauma, so we have to assume that the head trauma [of the accident] caused the seizure.")
3. Although Dr. Savia stated that "I'll bet I could probably dig something up" in medical or scientific literature to support his conclusion that a blow to the head from an airbag could cause a seizure (*id.* at 14:4-7), he has offered no such evidence to support his opinion, even in response to Defendant's motion.

### STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “The mere existence of a scintilla of evidence in support of the nonmovant’s position is insufficient to create a dispute of fact that is ‘genuine’; an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant.” *Planned Parenthood of Rocky Mountains Services, Corp. v. Owens*, 287 F.3d 910, 916 (10<sup>th</sup> Cir. 2002) (citation and quotation omitted). Once the movant shows the absence of a genuine issue of material fact, the nonmovant cannot rest upon his or her pleadings, “but must set forth specific facts showing that there is a genuine issue for trial.” *Cudjoe v. Independent School Dist. No. 12*, 297 F.3d 1058, 1062 (10<sup>th</sup> Cir. 2002). Thus, to defeat Defendant’s Motion, Plaintiffs have the burden of showing specific facts that could persuade a reasonable fact-finder to rule in their favor.

### ARGUMENT

Plaintiffs have not specifically controverted Defendant’s Statement of Undisputed Material Facts as required by applicable rules of this Court, and so they are deemed admitted pursuant to DUCivR 56-1(c). Moreover, Dr. Savia’s testimony that he is “probably . . . 99.99 percent” certain Ms. Michel did not have a seizure before the accident, without any support in medicine, science or logic, cannot create a “genuine” factual issue to defeat Defendant’s Motion. Defendant is entitled to summary judgment because Plaintiffs have not carried their burden of showing specific facts sufficient to support a finding of negligence.

**I. DR. SAVIA'S TESTIMONY DOES NOT DEFEAT SUMMARY JUDGMENT.**

According to applicable Utah law, Plaintiffs have the burden of proving each element of their claim of negligence under a "more likely than not" standard. *See Nelson v. Salt Lake City*, 919 P.2d 568, 574 (Utah 1996) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 265 (5<sup>th</sup> ed. 1984); citation omitted). In opposing Defendant's Motion, Plaintiffs apparently argue that Dr. Savia's testimony, no matter how ill-founded, will carry their burden. They are mistaken as a matter of law. Dr. Savia's opinion is so unreliable that it is inadmissible as expert testimony pursuant to Fed. R. Evid. 702. Moreover, even if it were admissible, it is so speculative that it could not create a "genuine" factual issue to defeat summary judgment.

**A. Dr. Savia's "opinion" is not admissible as expert testimony under Fed. R. Evid. 702.**

Plaintiffs, as proponents of Dr. Savia's evidence, have the burden of demonstrating admissibility of his "opinion" under Fed. R. Evid. 104(a). *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 n. 10 (1993). The Supreme Court has clearly charged the trial judge with "ensur[ing] that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589-93. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999) (objective of *Daubert*'s gatekeeping requirement "is to ensure the reliability and relevancy of expert testimony"); *Hollander v. Sandoz Pharmaceuticals Corp.*, 289 F.3d 1193, 1203-04 (10<sup>th</sup> Cir. 2002) (applying *Daubert* analysis to affirm district court's decision to exclude evidence from medical experts as not sufficiently reliable to be admissible); *Goebel v. Denver and Rio Grande Western Railroad Co.*, 215 F.3d 1083, 1087 (10<sup>th</sup> Cir. 2000) (district court must perform its gatekeeper function (relying on *Kumho Tire*, Scalia, J., concurring)). The *Daubert* standard excludes evidence that is no more than "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. In

particular, “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The Tenth Circuit has held that “an expert, no matter how good his credentials, is not permitted to speculate.” *Goebel*, 215 F.3d at 1088 (citation omitted). Moreover, “merely possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue.” *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10<sup>th</sup> Cir. 2001) (citation omitted). In *Ralston*, the district court’s decision to exclude medical testimony was affirmed where an orthopedic surgeon admitted that she was not an expert regarding the particular surgical technique at issue and had never researched the medical device at issue. *Id.* at 969-970. Similarly, the Seventh Circuit affirmed a district court’s decision to exclude testimony from a doctor who admitted that “her view was merely a ‘curbside’ observation based solely on a temporal relationship [between taking ibuprofen and suffering renal failure],” and from another doctor who acknowledged that no scientific studies or data supported his opinions. *Porter v. Whitehall Lab., Inc.*, 9 F.3d 607, 611-614 (7<sup>th</sup> Cir. 1993) (evidence was properly excluded “because it was not well-grounded in the scientific method”).

Dr. Savia’s evidence should also be excluded as not well-grounded in the scientific method. He has admitted he is not an expert on epilepsy (Facts ¶ 11) and that his “opinion” that a seizure did not cause the accident is based upon two assumptions: (1) that Ms. Michel’s seizure began after the accident, and (2) that it was caused by her head striking the airbag. (Statement of Additional Undisputed Facts (“Addnl. Facts”) ¶¶ 1-2.) He has further admitted that he has no basis for these assumptions. (*Id.* ¶¶ 1, 3.) Apparently trying to bolster his speculative testimony, Dr. Savia asserts that he is “probably . . . 99.99 percent” certain of his otherwise unsupported opinion. (*Id.* ¶ 1.)

Dr. Savia has admitted that he knows of no support in medical or scientific literature for his opinion that Ms. Michel suffered a seizure because her head struck the airbag, and that he has not faced a similar situation in his years of clinical practice. (Facts ¶ 8 (“I don’t have anything offhand showing that, but I’ll bet I could probably dig something up on that.”).) Even in response to Dr. Matsuo’s report and deposition testimony, and Defendant’s Motion for Summary Judgment, Dr. Savia has failed to “dig up” any scientific or medical literature to support his opinion.

Dr. Savia’s “opinion” is based on admittedly unfounded assumptions and is unsupported by either scholarly literature or clinical experience. It is precisely the sort of “curbside observation,” or unreliable “subjective belief or unsupported speculation” that the Court is charged with excluding from evidence. *See Daubert*, 509 U.S. at 590; *Porter*, 9 F.3d at 611, 614.<sup>1</sup>

B. Even if admissible, Dr. Savia’s testimony is too speculative to defeat summary judgment.

Even if the Court admitted Dr. Savia’s “opinion” as expert testimony, Plaintiffs’ case would fail as a matter of logic and common sense. Plaintiffs and Dr. Savia would have the factfinder—the Court, in this case—believe the following, unlikely series of events: Ms. Michel was fully conscious and pressing on the gas pedal as she veered off State Street at full speed and hit a dirt pile, a cement barrier and then Mr. Solorio, and that she continued pressing her foot on the gas pedal all the while. Although Dr. Savia has never seen anything similar in his studies or his clinical practice, he would have the Court believe that the driver had a grand mal seizure from hitting her head on the airbag, and that she kept pressing the gas pedal until Mr. Fobert dislodged her foot with great difficulty.

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<sup>1</sup> Plaintiffs urge the Court to find that Dr. Matsuo’s and Dr. Caravati’s opinions are “also clearly speculative, and thus inadmissible.” (Pls.’ Opp. at 12-13.) However, Plaintiffs provide no facts or legal authority to support their conclusory argument.

Plaintiffs apparently argue that the Court could find that the accident “more likely than not” occurred in the improbable manner just described, even though common sense alone suggests that a fully conscious driver would not continue to press on the gas pedal through these events. However, the Court need not rely on common sense alone, because Dr. Matsuo’s studied, reasoned analysis, backed by clinical experience and scholarly literature, provides reliable evidence that Ms. Michel was not fully conscious, but rather suffered an unforeseeable seizure-like event that caused the accident. Moreover, Dr. Savia has admitted that he is not an expert on seizures and that Dr. Matsuo is. (Facts ¶ 11.) Dr. Savia’s unfounded opinion is no more than the classic “scintilla of evidence” that does not create a genuine issue of material fact. Accordingly, Defendant is entitled to summary judgment. *See Planned Parenthood of Rocky Mountains v. Owens*, 287 F.3d at 916 (10<sup>th</sup> Cir. 2002).

**II. PLAINTIFFS HAVE NOT CARRIED THEIR BURDEN OF SHOWING SPECIFIC FACTS TO SUPPORT A FINDING OF NEGLIGENCE.**

**A. Utah has rejected a strict liability or “negligence per se” standard.**

Plaintiffs seem to argue that the Court could find negligence here simply because the government van left the roadway while Ms. Michel drove. (Pls.’ Opp. at 4-6.) However, the Utah Supreme Court has soundly rejected a strict liability or “negligence per se” standard, which would find a party who had violated a safety statute negligent regardless of fault. *See Klufta v. Smith*, 404 P.2d 659, 661 (Utah 1965). Calling such a standard “completely discordant to reason and justice,” the court instead held to “one of the oldest and most basic precepts of tort law: that generally liability is based upon fault.” *Id.* Simply put, violation of a statutory safety standard may be evidence of negligence, but it does not establish negligence. Thus, Plaintiffs’ recitation of various statutes Ms. Michel may have violated does not establish negligence.

B. Plaintiffs' arguments about the legal standard for negligence in Utah are simply wrong.

Plaintiffs argue that a private party in Utah would be liable in these circumstances (Pls.' Opp. at 1-2 and n. 1), that the case cannot be decided on summary judgment (*id.* at 8-9), and that Defendant has the burden of proving that this accident occurred without negligence. All of these arguments fail.

Plaintiffs' statement at note 1 of their memorandum, that "[i]n Utah, a driver is liable to an injured party even where that injury is caused by some sudden incapacitating event such as a heart attack, seizure, etc.," is both wrong and misleading. The statute that Plaintiffs cite for this proposition, U.C.A. § 31A-22-303(1)(a)(iv), says nothing of the sort. Rather, this section of Utah's insurance code addresses insurance policy coverage limits and does not apply to this case.<sup>2</sup>

Plaintiffs are also wrong in suggesting, based on Utah case law, that this case cannot be decided on summary judgment. The cases that they cite, *Porter v. Price*, 355 P.2d 66 (Utah 1960), and *Randle v. Allen*, 862 P.2d 1329 (Utah 1993), do not support Plaintiffs' argument. In *Randle*, the Utah Supreme Court held that an "unavoidable accident" jury instruction was not necessary, and that "the same result may be reached by a proper application of the elements of a cause of action for negligence." 862 P.2d at 1335. The court specifically noted that "[e]xcept for intentional torts and strict products liability, modern tort law does not generally impose liability for personal injury absent fault or negligence on the part of the defendant." *Id.* Far from requiring that all cases be sent to juries,

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<sup>2</sup> The statute states, in relevant part:

(1)(a) . . . a policy of motor vehicle liability coverage under Subsection 31A-22-302(1)(a) shall: . . .

(iv) cover damages or injury resulting from a covered driver of a motor vehicle who is stricken by an unforeseeable paralysis, seizure, or other unconscious condition . . .

the court stated:

Accidents do occur which might be unavoidable or for which the defendant or defendants are not negligent. In such cases, if the state of the evidence warrants it, the trial judge should direct a verdict, or the jury, applying proper instructions on the elements of negligence and burden of proof, should find no liability.

*Id.* at 1336 (emphasis added). The Utah Supreme Court recently quoted precisely this passage from *Randle* as the legal standard in an auto collision case. See *Green v. Louder*, 29 P.3d 638, 644 (2001).

The *Green* and *Randle* decisions make clear that in Utah, the theory that an accident occurred without negligence is presented through “the elements of negligence and burden of proof,” rather than through an affirmative defense. See also *Martinez v. Cheyenne*, 791 P.2d 949, 961-62 (Wyo. 1990) (“act of God” theory “is not an affirmative defense but, simply, addresses the essential elements of the cause of action in tort”); *Cox v. Vernieuw*, 604 P.2d 1353, 1357-59 (Wyo. 1980) (“an Act of God is no more than another way of saying that the defendants were not negligent . . . . [T]he case really ends with the finding of no negligence . . . .”) (cited in *Randle v. Allen*, 862 P.2d at 1336). Thus, Plaintiffs’ assertions about the claimed burden of Defendant to prove what Plaintiffs characterize as the “affirmative defense” of sudden loss of consciousness (Pls.’ Opp. at 6-10) mis-state Utah law. *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982) (cited in Pls.’ Opp. at 6), discusses burdens of proof in cases of intentional torts, not negligence. *Seale v. Gowans*, 923 P.2d 1361 (Utah 1996) (cited in Pls.’ Opp. at 6-7), refers to the affirmative defense of asserting a statute of limitations. Rule 8(c), Fed. R. Civ. P., which has an extensive list of affirmative defenses, does not refer to “sudden loss of consciousness” or anything equivalent. Research by counsel for Defendant has revealed no applicable authority for Plaintiffs’ proposition that Defendant has any heightened burden either to plead or to prove sudden loss of consciousness in a negligence case.



As stated above, Plaintiffs have the burden of proving each element of their negligence claim under a "more likely than not" standard. *See Nelson v. Salt Lake City*, 919 P.2d 568, 574 (Utah 1996). Because their evidence cannot establish that Ms. Michel was more likely negligent than not, Defendant is entitled to summary judgment.

C. The Court should not find negligence here as a matter of both law and policy.

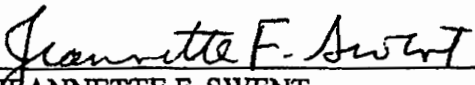
To the extent that tort law serves to deter negligence and encourage reasonable prudence, such goals would not be served by finding negligence in these circumstances. An event like the unforeseeable seizure-like event Ms. Michel suffered cannot be anticipated, avoided, or prevented. Thus, a finding of liability here could not have any conceivable effect to deter another, similarly unforeseeable and tragic event. Rather, it would simply punish Defendant and, indirectly, the driver, for not foreseeing the unforeseeable.

**CONCLUSION**

There is no question that this is a tragic case. However, as set forth above and in Defendant's earlier memorandum, the Court can and should find that Plaintiffs cannot carry their burden of establishing that Defendant was negligent. Accordingly, Defendant respectfully requests the Court to enter summary judgment in its favor and dismiss Plaintiffs' Complaint with prejudice.

DATED this 12th day of September, 2002.

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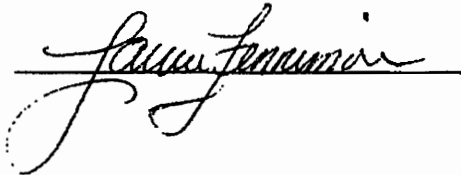
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and that a true and accurate copy of the foregoing REPLY MEMORANDUM SUPPORTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was mailed, first-class postage prepaid this 12<sup>th</sup> day of September, 2002, to:

Warren W. Driggs, Esquire  
Robert J. DeBry & Associates  
4252 South 700 East  
Salt Lake City, Utah 84107

A handwritten signature in cursive script, appearing to read "Warren W. Driggs", is written over a horizontal line.