

2016

Lancer Insurance, v. Lake Shore Motor Coach Lines, Inc.; Janna Crane, Elizabeth Hutchison; Mette Seppi; Tiffany Thayne : Reply Brief of Appellees Crane, Hutchison, Seppi, and Thayne

Utah Supreme Court

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IN THE UTAH SUPREME COURT

LANCER INSURANCE,

Appellant,

v.

LAKE SHORE MOTOR COACH LINES, INC.;
JANNA CRANE, ELIZABETH HUTCHISON;
METTE SEPPI; TIFFANY THAYNE,

Appellees.

Appellate No. 20160244-SC

Federal Case No. 2:14-cv-0785

On questions certified to the Utah Supreme Court by the United States District Court
for the District of Utah

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ORAL ARGUMENT REQUESTED

**FILED
UTAH APPELLATE COURTS**

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COMPLETE LIST OF PARTIES

All parties to the present case are listed in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
I. Lancer has Failed to Address the Dispositive Language of the Medical Emergency Statute.	1
a. Lancer’s Explanation of the Medical Emergency Defense Does Not Address the Dispositive Issue in this Case.	1
b. The <i>Solorio</i> Decisions and <i>State v. Biggs</i> Are Red Herrings.....	3
II. Lancer’s Uncritical Use of the Terms “Cover” and “Coverage” Leads to a Failure to Observe Canons of Statutory Construction.	6
a. Lancer Has Failed to Observe the <i>Inclusio Unius est Exclusio Alterius</i> Principle of Statutory Construction.....	6
b. Lancer’s Construction Produces an Unacceptable Absurd Result.	9
III. Lancer’s Argument Against Strict Liability Misses the Mark.....	10
IV. The Plain Language of the Medical Emergency Statute Contains an Important Cue that the Legislature Intended it to Supplant the Common Law Rule Expressed in <i>Randle, Porter, Hansen, and Green</i>	13
V. Lancer’s Argument that the Injured Parties’ Recovery is Capped at Statutory Minimum Requirements is an Academic Question.....	16
CONCLUSION.....	21
ADDENDUM I	

TABLE OF AUTHORITIES

CASES:

<i>Allstate Ins. Co. v. United States Fidelity & Guaranty Co.</i> , 619 P.2d 329 (Utah 1980).....	18-19
<i>Biddle v. Wash. Terrace City</i> , 1999 UT 110, 993 P.2d 875.....	7
<i>Burton v. Exam Center Indus. & Gen. Med. Clinic, Inc.</i> , 2006 UT 18, 994 P.2d 1261.....	11
<i>Carrier v. Salt Lake Cnty.</i> , 2004 UT 98, 104 P.3d 1208.....	7
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579, 590, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).....	4
<i>Estrada v. Mendoza</i> , 2012 UT App 82, 275 P.3d 1024.....	10
<i>Farmers Ins. Exch. v. Call</i> , 712 P.2d 231 (Utah 1985).....	19
<i>Gottling v. P.R. Inc.</i> , 2002 UT 95, 61 P.3d 989.....	2, 11
<i>Graves v. Northeastern Services, Inc.</i> , 2015 UT 28, 345 P.3d 619.....	11, 12
<i>Green v. Louder</i> , 2001 UT 62, 29 P.3d 638.....	1, 3, 4, 5
<i>Hammontree v. Jenner</i> 20 Cal.App.3d 528 (Cal. Ct. App. 2d Dist. 1971).....	10
<i>Hansen v. Heath</i> , 852 P.2d 977 (Utah 1993).....	1, 3, 5
<i>Jeffs v. West</i> , 2012 UT 11, ¶ 26, 275 P.3d 228.....	14
<i>LeBeau v. State</i> , 2014 UT 39, ¶ 26, 337 P.3d 254.....	13
<i>Mellor v. Wasatch Crest Mut. Ins. Co.</i> , 2009 UT 5, 201 P.3d 1004.....	21
<i>Orlando Millenia, LC v. United Title Servs. Of Utah, Inc.</i> , 2015 UT 55, 355 P.3d 965.....	12

<i>Porter v. Price</i> , 355 P.2d 66 (Utah 1960)	1, 3, 5, 14
<i>Randle v. Allen</i> , 862 P.2d 1329 (Utah 1993).....	1, 3, 5, 14
<i>Roman v. Estate of Gobbo</i> , 791 N.E.2d 422 (Ohio 2003).....	10
<i>Saleh v. Farmers Ins. Exch.</i> , 2006 UT 20, 133 P.3d 428.....	19
<i>Schroeder Invs., L.C. v. Edwards</i> , 2013 UT 25, 301 P.3d 994.....	2, 11, 12
<i>Solorio v. United States</i> , 228 F.Supp.2d 1280, 1281 (D. Utah 2002).....	4, 7
<i>Solorio v. United States</i> , 85 Fed.Appx. 705(10th Cir. 2004).....	5
<i>Speros v. Fricke</i> , 2004 UT 69, ¶ 42, 98 P.3d 28.....	7, 18, 19,
<i>State v. Biggs</i> , 2007 UT App 261, 167 P.3d 544.....	5, 6, 9
<i>State v. Clark</i> , 2011 UT 23, 251 P.3d 829.....	12

STATUTES:

<i>See</i> Utah Code Ann. § 31A-1-301(87).....	7, 10
Utah Code Ann. § 31A-22-303.....	3, 4, 5, 7, 8, 9, 14, 15, 17
Utah Code Ann. § 31A-22-304.....	18
Utah Code Ann. § 41-12a-301.....	9
Utah Code Ann. § 68-3-2.....	2, 14
Utah Code Ann. § 72-9-103.....	16
Utah Code Ann. § 78B-5-201.....	20
Utah Code Ann. § 78B-5-817(2).....	9

RULES:

Fed. R. Ev. 702.....	4
----------------------	---

Utah R. Civ. Pro. 64.....	20
---------------------------	----

ADMINISTRATIVE RULES:

Utah Admin. Code R909-1-3.....	16
--------------------------------	----

Utah Admin. Code R909-1-3.....	16
--------------------------------	----

CODE OF FEDERAL REGULATIONS:

49 CFR § 387.33	17
-----------------------	----

OTHER AUTHORITIES:

Patricia M. Wald, <i>Some Observations on the Use of Legislative History in the 1981 Supreme Court Term</i> , 68 Iowa L. Rev. 195, 214 (1983).....	12
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ARGUMENT

I. Lancer has Failed to Address the Dispositive Language of the Medical Emergency Statute.

a. Lancer's Explanation of the Medical Emergency Defense Does Not Address the Dispositive Issue in this Case.

Initially, the Injured Parties note that they agree, by and large, with Lancer's explanation of the law of the Medical Emergency Defense in Point I of its principal brief. However, it is more accurate to state that *Porter v. Price*, 355 P.2d 66 (Utah 1960), *Randle v. Allen*, 862 P.2d 1329 (Utah 1993), *Hansen v. Heath*, 852 P.2d 977 (Utah 1993), and *Green v. Louder*, 2001 UT 62, 29 P.3d 638 involved the propriety of the so-called unavoidable accident jury instruction. Notwithstanding, unavoidable accident and the Sudden Incapacity Defense are related; the Sudden Incapacity Defense is a sub-specie of unavoidable accident. In the end, the principle that emerges from these cases is that although the unavoidable accident jury instruction is improper, a finding of no liability can still be premised on a theory that a medical paralysis was unavoidable and that the defendant therefore did not breach a duty:

[W]e explicitly direct trial courts to abandon the use of this instruction hereafter. As we said in *Randle*:

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 instruction the elements of negligence and burden of proof*, should find no liability.

Green, 2001 UT 62 at ¶ 18 (emphasis of *Randle* found in *Green*).

The parties do not, however, agree that this common law principle applies in this

case because when the legislature enacts a statute in derogation of a principle of common law, the common law yields. *See Gottling v. P.R. Inc.*, 2002 UT 95, ¶ 7, 61 P.3d 989 (citing Utah Code Ann. § 68-3-2(1999) (“[t]he rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice.”)), *Schroeder Invs., L.C. v. Edwards*, 2013 U : 25, ¶ 25, 301 P.3d 994 (“Given the enactment of the [] statute, we are no longer tasked with advancing public policy as we see it. We instead must implement the particular balance of policies reflected in the terms of [the] statute. Those terms are the law. . . .”).

The dispositive question before the court, then, is whether the enactment of Utah Code Ann. § 31A-22-303(1)(a)(v) effected the sort of preemption referenced by the *Gottling* and *Schroeder* courts and by Utah Code Ann. § 68-3-2. To that end, the Injured Parties reiterate that the controlling statutory terminology here is the term “cover” found in Subsection (1)(a)(v). Thus, this case requires the court to determine if the legislature’s use of the term “cover” stands in derogation of the otherwise correct principle of common law reflected in *Randle*, *Hansen*, *Porter*, and *Green*.

Lancer has not addressed the dispositive language. Instead, it relies on conclusory statements that an unforeseeably incapacitated driver’s liability still hinges on a showing of fault. *See* Lancer’s Opening Brief, P. 17 (stating that “[t]here must still be a showing of fault” without explaining why, and supporting the contention only with a ruling from a

state trial court judge in one of the personal injury lawsuits underlying the instant declaratory action). Lancer also relies on demonstrably incorrect assertions that the Medical Emergency Statute lacks language imputing liability to a medically incapacitated driver. *Compare* Lancer’s Opening Brief, P. 16 (“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.”) *with* Utah Code Ann. § 31A-22-303(1)(b) (“*The driver’s liability under Subsection (1)(a)(v) is limited to the insurance coverage.*”) (emphasis added).

None of these statements attempt to interpret the term “cover” within the context of the Medical Emergency Statute. Instead, Lancer assumes –without explaining why– that the term “cover” means what it says it means. What’s more, Lancer’s conclusory construction of “cover” occurs uncritically, sometimes in the sense of meaning #1 and sometimes in the sense of meaning #3, never distinguishing between the two. Lancer’s uncritical, conclusory use of the dispositive word, therefore, does not help the court.

b. The *Solorio* Decisions and *State v. Biggs* Are Red Herrings.

Lancer also cites to a federal trial court’s ruling and the 10th Circuit’s decision affirming the trial court, contending that these cases establish that the Medical Emergency Statute only requires an auto liability insurer to accept a specified risk. A closer reading of those cases, however, discloses that neither court addressed the question before this court, making their persuasive value dubious here.

Like the present case, *Solorio I* involved a motor vehicle accident where the defendant contended that she experienced an unforeseeable medical paralysis that

resulted in an accident. *Solorio v. United States*, 228 F.Supp.2d 1280, 1281 (D. Utah 2002). Defendant retained multiple expert witnesses to opine that the driver most likely experienced a first-time epileptic event that caused her to lose control of her vehicle and strike the decedent. *Id.* In response, the plaintiff designated a counter-expert who opined that he was 99.9% certain that the driver experienced the seizure *after* the collision and that her seizure was the product of the impact. *Id.* at 1282. The plaintiff's expert, however, conceded that he knew of no support in medical or scientific literature to support his opinion, and conceded that he had never been involved in a similar case. *Id.*

Defendants filed a motion for summary judgment, contending that the plaintiff's expert's opinion did not pass muster under Fed. R. Ev. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *Solorio*, 228 F.Supp.2d at 1284-85. Because the plaintiff's expert's opinion amounted to little more than speculation or *ipse dixit* testimony, the opinion was ruled inadmissible. *Id.* at 1285. Without expert testimony, plaintiffs were unable to raise a triable issue of fact that the seizure occurred post-collision. *Id.* The trial court therefore did the only thing it could do under those circumstances: it granted summary judgment in favor of defendant. *Id.*

Absent from the federal district court in *Solorio* is any discussion of Utah Code Ann. § 31A-22-303(1)(a)(v).¹ In fact, the only statute cited in the entire decision is the

¹ The failure to cite to Utah Code Ann. § 31A-22-303(1)(a)(v) is not surprising in view of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment. The Medical Emergency Statute (then codified at Utah Code Ann. § 31A-22-

Federal Tort Claims Act for the proposition that the United States would be liable for its torts to the extent a private litigant would be liable for the underlying motor vehicle accident. *Id.* at 1282. It is therefore apparent that the trial court in *Solorio* did not consider the Medical Emergency Statute, making the decision inapposite.

The 10th Circuit's decision is similarly unhelpful—which is not surprising inasmuch as the issue in this case was never meaningfully raised in the trial court. The decision turned on *Daubert* and its progeny, and a rejection of plaintiff's due process challenge. *Solorio v. United States*, 85 Fed.Appx. 705, 709-10 (10th Cir. 2004) (unpublished opinion). Ultimately, the 10th Circuit held that summary judgment was proper, for similar reasons as the trial court. *Id.* at 711. Just as with the trial court's decision, the 10th Circuit's decision made no mention of any portion of any the Medical Emergency Statute. Thus, neither *Solorio* decision contributes to the discussion.

Lancer's reliance on *State v. Biggs*, 2007 UT App 261, 167 P.3d 544 is similarly misplaced. The quoted passage from *Biggs* came in response to a criminal defendant's contention on a motion to suppress evidence that Utah Code Ann. § 31A-22-303(1)(a)(ii)(B) authorizes operator's insurance, so the stop based on the vehicle being uninsured was a violation of his rights against unreasonable seizure of his person. *Id.* at ¶ 15. The court rejected that argument, noting 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

303(1)(a)(iv)) was mentioned only in passing in a footnote, and lacked any real analysis of the question before this court. See Addendum I.

companies, and not vehicle owners, and in no way relieves Defendant of any other statutory obligation she has to insure her car [pursuant to Utah Code Ann. § 41-12a-301(2)(a)].” *Id.* That is, § 41-12a-301 puts the onus of providing insurance on the owner of a vehicle, so upon learning that the vehicle was uninsured, a traffic stop was justified. *Id.*

That question is quite different from the one before this court. And while Lancer and the *Biggs* court correctly observe that § 33A-22-303 is directed to insurance companies, that point does not help Lancer’s position because the question here is not to whom the mandate is directed. The question here is more fundamental than that. The question here concerns the substance of the mandate, and not party to whom that mandate is directed.

Thus, even though the decisions Lancer cites were rendered after the Medical Emergency Statute’s enactment, they do not involve the legal question before this court. In reality, the question before the court is one on which, as observed by Judge Parrish in her certification order, there exists no controlling Utah law. R. 211. The court must therefore interpret the term “cover” in the Medical Emergency Statute context as a matter of first impression.

II. Lancer’s Uncritical Use of the Terms “Cover” and “Coverage” Leads to a Failure to Observe Canons of Statutory Construction.

a. Lancer Has Failed to Observe the *Inclusio Unius est Exclusio Alterius* Principle of Statutory Construction.

The Injured Parties have explained at length in their principal brief the various meanings of “cover” and “coverage” in the insurance law context, and will not rehash

those here. It is noteworthy, however, that Lancer uses the term interchangeably throughout its principal brief, failing to acknowledge its different meanings in different contexts. *Compare, e.g.*, Lancer’s Opening Brief at P. 14-15 (“ . . . statute at issue only mandates what coverages are necessary for motor vehicle insurance policies.”)(meaning #1) *with* P. 15 (“As such, the Sudden Incapacity Defense bars coverage for the Injured Parties in this case.”)(meaning #3) *and* P. 25 (“This legislative enactment reflects public policy requiring vehicle owners to carry a minimum level of liability coverage to protect innocent victims of automobile accidents.”)(quoting *Speros v. Fricke*, 2004 UT 69, ¶ 42, 98 P.3d 28)(meaning #2). However, despite inadvertently demonstrating that the dispositive statutory term “cover” carries more than one meaning in the context of tort insurance law, Lancer makes no attempt to offer its own interpretation of “cover” or why the court should apply it here.

Lancer’s failure to consider this distinction leads it to its failure to recognize statutory omissions and, in turn, its failure to observe the well-established canon of statutory interpretation that the omission of a term is presumed to be intentional. *See e.g.*, *Carrier v. Salt Lake Cnty.*, 2004 UT 98, ¶ 30, 104 P.3d 1208 (“[W]e should give effect to any omission in [a statute’s] language by presuming that the omission is purposeful.”); *Biddle v. Wash. Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875 (“[O]missions in statutory language should be taken note of and given effect.”)(internal quotations omitted). This principle, the Injured Parties respectfully submit, must apply *a fortiori* in this case because the omitted term “insure” – found in every neighboring sub-subsection in Subsection (1) – is a defined term. *See* Utah Code Ann. § 31A-1-301(87).

Because Lancer does not discuss the meaning of “cover” in this context, its analysis necessarily overlooks the legislature’s choice to depart from the use of the term “insure,” that was already found in the companion subsections to § 31A-22-303 when Subsection (1)(a)(v) was added by amendment. Similarly, Lancer assumes, without explaining why, that “cover” should be construed to be synonymous with “insure” by its repeated assertion that the statute only requires an insurer to accept the risk associated with medically incapacitated drivers. To illustrate: if, as Lancer insists, the Injured Parties must first prove that Lancer’s insureds were at fault before its policy must “cover” their damages as Subsection (1)(a)(v) mandates, then “cover” carries precisely the same meaning as “insure,” found throughout the rest of Subsection (1). Thus, the failure to consider what “cover” might mean in this context has precipitated Lancer’s failure to observe the principle of *expressio unius est exclusio alterius*. This construction, being inconsistent with established canons of statutory construction, should be rejected.

In a closely related analytical flaw, Lancer never addresses the legislative omission of the concept of “liability imposed by law” from Subsection (1)(a)(v). Because that clause appears in the neighboring, pre-existing subsections at the time Subsection (1)(a)(v) was enacted, its omission from Subsection (1)(a)(v) leads to the presumption that the legislature did not contemplate limiting Subsection (1)(a)(v) to situations where liability would be imposed by law. Instead, the Medical Emergency Statute contemplates imposing an obligation on an insurer to cover damages its incapacitated driver causes, whether the insured would be held liable at common law or not. Thus, even though the phrase “strict liability” does not appear, strict liability is precisely what the legislature

described by omitting “liability imposed by law” from Subsection (1)(a)(v). Lancer’s contention to the contrary is another violation of the *expressio unius est exclusio alterius* principle and should be rejected for this reason as well.

b. Lancer’s Construction Produces an Unacceptable Absurd Result.

In its argument that the Medical Emergency Statute only requires that insurers accept the risk of injury flowing from an unforeseeable medical paralysis, Lancer contends that “[t]here must still be a showing of fault.” Lancer’s Opening Brief, P. 17. That is, according to Lancer, a plaintiff injured by an unforeseeably incapacitated driver must prove that the driver was at fault in order to fall under the mandate of Utah Code Ann. § 31A-22-303(1)(a)(v).

The difficulty with this position manifests itself when one considers how the statute might operate *viz-a-viz* an actual claim by an innocent, injured third party. As Lancer explains in Point I of its principal brief, when a driver experiences a sudden medical paralysis, the driver is not at fault because she did not breach her duty. *See also* Utah Code Ann. § 78B-5-817(2) (“Fault means any actionable breach of legal duty. . .”). Consider also that a liability insurer’s obligation to provide coverage (meaning #3) to a third party is derivative of its insured’s legal liability. *See e.g.*, R. 77. So when a driver loses consciousness due to an unforeseeable medical condition and injures an innocent third party as a result, the driver is not at fault as a matter of law. And even though the driver’s insurer provides coverage for damages flowing from the incapacity, the coverage is not triggered unless the driver is at fault, which she is not. *See* Utah Code Ann. § 78B-5-817(2). The Medical Emergency Statute therefore, according to Lancer, mandates a

coverage that covers exactly nothing.

In addition to creating an illusory coverage, this construction is antithetical to the definition of insurance because the risk is not shifted between contracting parties, *viz.*, insured and insurer. Instead, in a rather perverse irony, the risk is actually shifted from the insured driver to a stranger to the contract of insurance: an innocent third party who unfortunately finds herself in the wrong place at the wrong time. *Contra* Utah Code Ann. § 31A-1-301(87). This construction, but for the lack of an underlying common law tort, would more closely resemble a civil conspiracy than it does insurance. *Compare Estrada v. Mendoza*, 2012 UT App 82, ¶¶ 13-14, 275 P.3d 1024 with Utah Code Ann. § 31A-1-301(87). This result is absurd by any measure and should be rejected for this reason as well.

III. Lancer's Argument Against Strict Liability Misses the Mark.

Lancer's third point actually includes two analytically distinct issues. First, Lancer discusses public policy considerations appellate courts analyze when called upon to expand the common law. Specifically, in *Hammontree v. Jenner* 20 Cal.App.3d 528, 530, 531-32 (Cal. Ct. App. 2d Dist. 1971), the court declined to apply principles of strict products liability in a case that involved a driver who experienced an unforeseeable seizure that resulted in an injury-causing motor vehicle accident. This decision was, as are all common law-based decisions, grounded in that court's public policy judgments. *See id.* So too with *Roman v. Estate of Gobbo*, 791 N.E.2d 422, ¶¶ 2, 54 (Ohio 2003), where the court declined to impose strict liability on a driver who experienced an unforeseeable heart attack while driving that resulted in the death of two other third

parties.

Lancer then cites this court's decision in *Graves v. Northeastern Services, Inc.*, 2015 UT 28, ¶ 75, 345 P.3d 619 in support of its criticism of the Injured Parties' citation to legislative history. Lancer then concludes by referring back to *Hammontree* and a law review article on strict liability, arguing that public policy precludes expanding the rule of strict liability to motor vehicle accident cases. *See* Lancer's Opening Brief PP. 17-25.

This argument conflates to analytically distinct points: 1) expansion of the rule of strict liability by common law; 2) the proper use of legislative history in questions of statutory construction. Neither of these points, however, is helpful. The first is unhelpful because the Injured Parties have not requested an expansion of the rule of strict liability to the present context as a matter of common law.² That question is not before the court. So *Hammontree* and *Roman* are inapposite, as Lancer appears to concede: "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." *Id.* at P. 18.

The second point is more deserving of the court's attention. Lancer correctly

² Had the Injured Parties made this argument, it would be appropriate for this court, as the final arbiter of the common law in the State of Utah, to weigh public policy considerations. *See e.g., Burton v. Exam Center Indus. & Gen. Med. Clinic, Inc.*, 2000 UT 18 at ¶ 7, 994 P.2d 1261 ("We must therefore decide whether a public policy exists justifying the creation of a common law cause of action. . . ."). Instead, the Injured Parties maintain that the legislature has enacted a statute in derogation of the common law, so this court's review is constrained to interpreting the statute in question. *See Gottling*, 2002 UT 95 at ¶ 7 (citing Utah Code Ann. § 68-3-2(1999)), *Schroeder Invs* 2013 UT 25 at ¶ 25.

observes this court's skepticism over resorting to legislative history in questions of statutory interpretation, and its preference to ground its decisions in the language of the statute where possible. *See Schroeder Investments*, 2013 UT 25 at ¶ 23 ("In a case like this one where the statute speaks directly to the issue before us. . . , the statute is supreme."), *Graves*, 2015 UT 28 at ¶ 67 ("as our recent decisions have emphasized, the governing law is defined not by our abstract sense of legislative purpose, but by the statutory text that survived the constitutional process of bicameralism and presentment."), *State v. Clark*, 2011 UT 23, ¶ 17, 251 P.3d 829 ("Any suppositions about what the legislature may have intended cannot properly override what it actually did."), *Orlando Millenia, LC v. United Title Servs. Of Utah, Inc.*, 2015 UT 55, ¶ 71, 355 P.3d 965. In essence, Lancer intimates that the Injured Parties have cherry-picked quotations from the floor debates that support their preferred construction. Or, to borrow Judge Leventhal's metaphor, Lancer suggests the Injured Parties have looked over a crowd of people in search of their friends. *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983).

What Lancer has failed to do is substantiate the suggestion of cherry-picking with portions of legislative history suggestive of a contrary intent, possibly because such a contrary intent is not to be found. As discussed in the Injured Parties' principal brief, the bill encountered no meaningful resistance and required very little discussion, either in committee or on the floor of either legislative body prior to being approved by both houses and signed into law. Indeed, the Injured Parties' research into legislative history disclosed no contrary intent, and certainly Lancer has not cited this court to any.

But the more salient point is that the Injured Parties do not cite to legislative history in the hope that the court will impose an intent not manifest in the statute's plain language, nor do the Injured Parties urge that the court use legislative history to influence its plain language construction of the statute. The point is to illustrate legislative intent in the event the court concludes that the Medical Emergency Statute language is ambiguous—which the Injured Parties maintain it should not do for reasons articulated above and in greater detail in their principal brief. However, in cases where the court finds a statute ambiguous, it is proper to resort to means of secondary construction, including legislative history. *LeBeau v. State*, 2014 UT 39, ¶ 26, 337 P.3d 254. Thus, should the court decide that the statute contains an ambiguity that cannot be resolved by an appeal to primary sources (*viz.*, the language of the statute itself, context, neighboring subsections, etc...), an appeal to legislative history is appropriate.

Thus, Lancer's arguments against expanding the common law miss the mark. The Injured Parties have not asked this court to expand the common law rule of strict liability. The plain language of the Medical Emergency Statute discloses that the legislature has imposed strict liability in this context by statute.

IV. The Plain Language of the Medical Emergency Statute Contains an Important Cue that the Legislature Intended it to Supplant the Common Law Rule Expressed in *Randle, Porter, Hansen, and Green*.

Further support for the Injured Parties' construction of the Medical Emergency Statute is found in the challenged jury instruction in *Porter*. But to understand why this portion of the plain language supports the Injured Parties' construction, the court must recall that core of the Sudden Incapacity Defense is a contention that the driver did not

have reasonable notice of the onset of the condition. This is another iteration of the concept of foreseeability in the context of the breach element. *See Jeffs v. West*, 2012 UT 11, ¶ 26, 275 P.3d 228 (noting that foreseeability analysis within the breach element asks whether, under the facts of the case, the defendant conducted herself as a reasonably prudent person would). Thus, when the Sudden Incapacity Defense is in play, the real contention is that the defendant did not breach a duty.

That concept was iterated in *Porter*. Like this case, *Porter* involved an injury that arose from a driver's unforeseeable medical incapacity. *Porter*, 355 P.2d at 67. In addition to the unavoidable accident instruction, the jury was given an instruction on the Sudden Incapacity Defense:

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. at 68 (emphasis added).

This specific instruction was later disavowed in *Randle*. *Randle*, 862 P.2d at 1336. *Randle* did not, however, change substantive law. *Id.* ("Of course, 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."). Thus, the *Porter* instruction indicates that when an unforeseeable medical paralysis occurs, the defendant has not breached a duty

and is not liable. By extension, the defendant's insurer has no obligation to provide coverage (meaning #3) to an injured party. *See e.g.*, Lancer's Opening Brief, P. 15 ("As such, the Sudden Incapacity defense bars coverage for the Injured Parties in this case.").

So under the rule as stated in *Porter*, a liability insurer would have no obligation to pay damages sustained as a result of the insured driver's unforeseeable incapacitating event while driving. *See e.g.*, R. 77. Thus, the insurer would not be required to cover those damages (meaning #3).

With that in mind, it is significant that the Medical Emergency Statute adopts the operative language from the *Porter* instruction that previously defeated the insured driver's liability and, by extension, the insurer's obligation to cover that liability:

a policy of motor vehicle liability coverage . . . shall . . .

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.*

Utah Code Ann. § 31A-22-303(1)(a)(v) (emphasis added). Thus, by mandating that insurers must "cover" a class of damages that they were not required to cover previously under *Porter*, the legislature contemplated that the term "cover" would impose liability where it did not exist previously.

This is a further plain language cue that the legislature's intent was to impose liability where it did not exist previously. And even further support of this construction is found in Subsection (1)(b), which expressly contemplates an insured driver's liability,

and caps her liability at the applicable policy limits in effect at the time of the accident. Lancer's construction to the contrary is therefore inconsistent with the plain language of the statute and should be rejected. The court should instead adopt the construction of the statute propounded by the Injured Parties.

V. Lancer's Argument that the Injured Parties' Recovery is Capped at Statutory Minimum Requirements is an Academic Question.

In the Injured Parties' principal brief, they contended that if the court construed Subsection (1)(b) to limit their recovery to the applicable statutory minimum limits, the court should apply the correct minimums, which the Injured Parties stated to be \$750,000.00.

While the Injured Parties persist in their belief that the court should apply the correct statutory minimum, their citation to \$750,000 is not the correct statutory minimum requirement. That minimum requirement applies to motor carriers not operating for-hire. *See* Utah Admin. Code R.909-1-3. There is no dispute in this case that the motor carrier was operating for-hire. Thus, the Injured Parties concede that R909-1-3(2) does not apply.

The correct minimum statutory requirement is established as follows: The department of transportation is statutorily authorized to incorporate minimum insurance requirements stated in the Code of Federal Regulations. Utah Code Ann. § 72-9-103(a). Pursuant to this grant of administrative authority, such a rule was enacted. *See* Utah Admin. Code R909-1-1 (stating that rule 909-1 is enacted under authority of Utah Code Ann. § 72-9-103), R909-1-2 ("Safety Regulations for Motor Carriers, 49 CFR ... Parts

387 through 399. . . are incorporated by reference. . . .”). The applicable federal regulations require that any vehicle with a seating capacity of 16 passengers or more is required to carry at least \$5,000,000.00 in liability insurance. 49 CFR § 387.33. Thus, if the court is persuaded that minimum statutory insurance requirements apply, the correct minimum insurance amount is \$5,000,000.00. And while the record on appeal does not contain a reference to the policy limits in place for Lancer’s insured driver, the Injured Parties represent to the court that the policy limits in effect on the date of the underlying accident is \$5,000,000.00. Thus, whether the Injured Parties are correct that actual policy limits govern, or whether Lancer is correct that minimum policy limits requirements govern, the result in this case is the same: the proper cap of Lancer’s insured driver’s liability is \$5,000,000.00.

Nevertheless, the Injured Parties submit that Lancer’s contention that an incapacitated driver’s liability is capped at the applicable minimum statutory requirements is not well-taken. In support of this contention, Lancer cites to several cases decided under other portions of Utah Code Ann. § 31A-22-303 and urges this court to draw an analogy from these cases to the present case and cap the Injured Parties’ recovery at statutory minimum requirements. These cases, however, do not support Lancer’s request.

But before considering the analytical flaws manifest in reliance on those cases, it should be observed that Lancer’s argument on Question #2 lacks support in the plain language of the statute, which limits “[t]he driver’s liability under Subsection (1)(a)(v) . . . to the insurance coverage.” Utah Code Ann. § 31A-22-303(1)(b). To accept Lancer’s

construction, the court must construe “the insurance coverage” to refer to the statutory minimum requirements stated in Utah Code Ann. § 31A-22-304, despite the lack of language supportive of that conclusion. The more logical interpretation is that “the insurance coverage” refers to the insured driver’s liability coverage in effect at the time of the accident, if for no other reason than because it exists in a subsection dedicated to the driver’s motor vehicle liability insurance. Furthermore, Subsection (1)(b) contemplates a driver who experiences the unforeseeable medical condition, and her liability under Subsection (1)(a)(v). *Id.* Given that, the clause “the insurance coverage” most logically contemplates the insurance coverage of the driver who experiences the incapacitating event that is in effect when her liability under Subsection (1)(a)(v) arises.

Plain language analysis, therefore, betrays Lancer’s failure to consider what is apparent on the face of the statute, and obviates the need to consider the case law Lancer relies on in its answer to Question #2.

But even if the court considers the cases Lancer cites, Lancer’s position still lacks support. For example, in *Speros* the court relied on the statutory requirement to provide insurance for liability imposed by law and observed that the statute did not distinguish between negligence liability and intentional tort liability. *Speros*, 2004 UT 69 at ¶ 43. Thus, to the extent the policy exclusion was inconsistent with the statute’s mandate, the exclusion was unenforceable. *See id.* at ¶ 44. However, because Utah Code Ann. § 31A-22-304 only mandates the *minimum* policy limits, the intentional acts exclusion was not disturbed for any portion of the policy limits that exceeds the minimum requirements. *Id.*

The holding in *Allstate Ins. Co. v. United States Fidelity & Guaranty Co.*, 619

P.2d 329 (Utah 1980) is functionally identical, only it involved the validity of a named-driver exclusion. *Id.* at 331. The analysis and result are otherwise identical. *Id.* at 333. The analysis and holding was slightly different in *Farmers Ins. Exch. v. Call*, 712 P.2d 231 (Utah 1985), where the court invalidated the household exclusion entirely because the No-Fault Act only authorized exclusions for intentional self-injury and for damages caused while committing a felony. *Id.* at 234. Because the household exemption did not fall in either category, it was held to be an impermissible exclusion and therefore unenforceable. *Id.*

The common thread to these cases is the statutory invalidation of an exclusion from coverage under an insurance contract. *Speros*, 2004 UT 69 at ¶ 43; *Allstate*, 619 P.2d at 332, 33, *Call*, 712 P.2d at 234. The principles stated therein are therefore principles of contract law. *See e.g., Mellor v. Wasatch Crest Mut. Ins. Co.*, 2009 UT 5, ¶ 7, 201 P.3d 1004 (“An insurance policy is a contract between the insured and the insurer.” (citing *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 4, 133 P.3d 428)). This case, by contrast, does not involve a question of contract law. Instead, it involves the statutory modification of principles of tort law, as explained above and in the Injured Parties’ principal brief. Because the law of contract and the law of tort are fundamentally different, there is little in *Speros*, *Allstate*, or *Call* that can or should inform the court’s decision here.

There is, however, a passing similarity between the results in those cases and how the Medical Emergency Statute functions in this case. As a result of Subsection (1)(b), the incapacitated driver’s legal liability imposed by Subsection (1)(a)(v) is capped at her

limits of insurance in effect at the time of the accident. Thus, it is conceivable that a plaintiff's damages could exceed the defendant's liability exposure, allowing the plaintiff to enforce the excess portion of the judgment against the defendant's personal assets through a variety of means. *See, e.g.,* Utah R. Cir. Pro. 64 *et seq.* (writs), Utah Code Ann. § 78B-5-201 *et seq.* (judgment liens). That similarity, however, is superficial because neither *Speros* nor *Allstate* modified the insured driver's underlying tort liability; both cases only modified the insurer's contractual obligations *vis-à-vis* its insured's underlying tort liability.

By contrast, under the Medical Emergency Statute, "the driver's liability under Subsection (1)(a)(v) is limited to the insurance coverage." Utah Code Ann. § 31A-22-303(1)(b). Subsection (1)(b) therefore modifies the insured driver's legal liability—in potentially enormous ways, given the catastrophic nature of the type of accidents that can result from a driver's sudden incapacity, and given how many drivers on Utah's roads carry only statutory minimum policy limits. So despite the superficial similarity in the results, the legal principles in operation are quite different.

The end result is that Lancer's attempt to limit the Injured Parties' recovery is an artificial attempt to impose a restriction on the Injured Parties' rights of recovery in a manner contrary to the plain language of the statute. The statute's plain language therefore caps the Injured Parties' recovery at the policy limits in effect at the time of the accident in question, and not the statutory minimum \$25,000/\$65,000.

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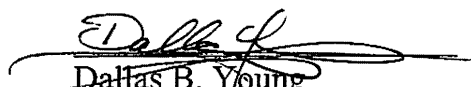
CONCLUSION

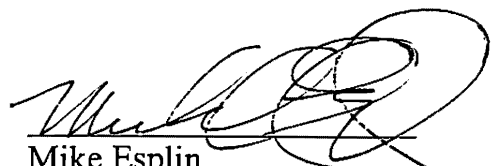
Lancer's analysis does not address the dispositive statutory language. It instead relies on conclusory statements and case law that does not address the question before the court. Additionally, the statute contains additional plain language cues that support the Injured Parties' construction of the statute. The court should therefore answer Question #1 in the affirmative.

With respect to Question #2, Lancer's position is not well-taken. It relies on case law that produces a facially similar result, but does so for significantly different legal reasons. Lancer overlooks the different legal reasons, resulting in an attempt to apply principles of contract law to a statute that modifies principles of tort law. Rather than entertain this construction, the court should follow the plain language of Subsection (1)(b) and hold that the Injured Parties' maximum recovery is the policy limits in effect on the date of the accident.

Finally, if the court is persuaded on Question #2 that statutory minimum requirements govern the Injured Parties' maximum recovery, it should apply the correct minimum insurance requirement, which happens to be the same as the actual policy limits in effect at the time of the accident underlying this case.

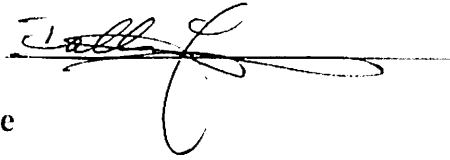
Respectfully submitted on this, the 3rd day of August, 2016.


Dallas B. Young
PETRO & ASSOCIATES


Mike Esplin
Trent Cahill
Laura Cabanilla
ESPLIN/WEIGHT

Certificate of Compliance With Rule 24(f)(1)

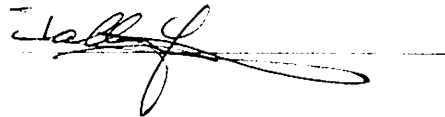
I do hereby certify that the foregoing brief complies with Utah R. App. Pro. 24(f)(1) in that it contains 5,928 words and 482 lines, as counted using the word count utility of my word processing software.

A handwritten signature in black ink, appearing to be "J. L. F.", written over a horizontal line.

Certificate of Service

I do hereby certify that on the 3 day of August, 2016, I did cause to be mailed two (2) true and correct copies of this Reply Brief of Appellees Crane, Hutchison, Seppi, and Thayne, along with a searchable electronic brief in .pdf format stored on a CD to the following, addressed as follows:

Barbara Maw
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A handwritten signature in black ink, appearing to be "J. L. F.", written over a horizontal line.

Addendum 1

ADDENDUM I

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DISTRICT OF UTAH

BY: ME
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

IGNACIO SOLORIO as personal
representative of the estate
of MIGUEL ORNELAS SOLORIO;
FILIBERTO JIMENEZ and ADELEDA
ORELAS SOLORIO as heirs of
decedent MIGUEL ORNELAS
SOLORIO,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Civil No. 2:01-CV-00025K

Magistrate Judge Ronald N. Boyce

Introduction

The defendant United States of America has moved this court for summary judgment. It asserts that the plaintiffs have not established any negligence; that the undisputed facts show that its employee was not negligent; and, that a private party would not be held negligent under the same circumstances. It is mistaken.

The plaintiffs have stated a clear prima facie negligence case. Moreover, there is a classic factual dispute as to the defendant's defense of sudden incapacitation. Finally, in Utah,

30

given the identical circumstances, a private party would be liable to the plaintiffs in this action.¹ Thus, there are no circumstances under which summary judgment is appropriate.

Disputed and Undisputed Facts

In its statement of undisputed facts, the United States has gone far beyond a statement of facts. A significant portion of its statement is factual argument that goes completely to the weight of the testimony rather than being undisputed fact. Thus, rather than responding to separate factual arguments in a closing argument style, the plaintiff disputes the defendant's statements ¶8-18.

Undisputed Facts

1. On April 16, 1999, a van owned by the Bureau of Land Management, United States Department of Interior, was driven by its employee Susan L. Michel in the course and scope of her employment. (The defendant's admitted answers, Answer to Complaint ¶ 9-12, Exh. 1).
2. While driving north on State Street, Ms. Michel veered to the right, out of the travel lane, and into a sidewalk construction zone where she struck and killed Miguel Solorio. (The defendant's admitted answers, Answer to Complaint ¶ 10-12 Exh. 1).
3. Following the collision, Ms. Michel was found in her car

¹ In 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. U.C.A. §31A-22-303(1)(a)(iv).

having what appeared to be a seizure. (Deposition of Richard Fobert at pg 9-12).

Disputed Facts

4. Dr. Fumisuke Matsuo, a board-certified neurologist and expert witness for the defendant has opined that Ms. Michel had an epileptic seizure-like event while driving which caused the accident. (Matsuo deposition at pg. 7, Exh. 2).
5. Dr. Phillip Savia, a board-certified neurologist and expert witness for the plaintiff testified that he is 99.99% certain that Ms. Michel did not have a seizure while driving. Rather, he opines that the trauma from the collision caused her seizure. (Savia Deposition at pg. 25, Exh. 3).

Argument

POINT I

The Plaintiff Has Established Prima Facie Negligence

In its motion, the United States asserts that the plaintiff has not established each element of a prima facie negligence case. Its premise is that a plaintiff must prove a negligent reason for a defendant's negligent conduct. This mistaken assertion, if accepted, would add an additional element of negligence that does not exist.

As the defendant pointed out, in Utah, the only elements of negligence are duty, breach of duty, causation, and damages. Braithwaite v. West Valley City Corp., 921 P.2d 997, 999 (Utah 1996).

DUTY

The defendant has admitted that it owed a duty of care to the plaintiff:

14. The United States admits that the United States, the Bureau of Land Management, and Susan L. Michel owed Mr. Solorio a duty of care... (Defendant's Answer to Complaint, Exh. 1).

However, in order to examine the defendant's conduct, it is necessary to establish what duties were owed. These duties are imposed by both statute and the common-law. Statutes that are intended to protect plaintiffs from a particular type of harm create a duty of care. Day v. State Ex Rel. Dept. of Public Safety, 980 P.2d 1171 (Utah 1999). Additionally, the common law imposes a general duty of reasonable care on all people. Hadley v. Wood, 345 P.2d 197 (Utah 1959).

Here, there are numerous statutes and common-law doctrines that create specific duties of care. For example:

The operator of a vehicle shall exercise care to avoid colliding with any pedestrian. U.C.A. § 41-6-80.

No person shall drive any vehicle on a sidewalk or sidewalk area. U.C.A. § 41-6-106.1

On a roadway divided into two or more clearly marked lanes for traffic...(1) a vehicle shall be operated as nearly as practical entirely within a single lane until the operator has determined that the movement can be made safely. § 41-6-61.

One must use reasonable care to keep [her] car under control. Wardel v. Jerman, 423 P.2d 485 (1976).

BREACH OF DUTY

In Utah, a violation of the standards of safety set by statute or common-law is prima facie evidence of negligence. Klafta v. Smith, 404 P.2d 659, 661 (1965). This widely held principle has also been accepted by the Federal Court interpreting Utah law. Platis v. United States, 288 F.Supp. 245 (D. Utah 1968). The Pennsylvania Supreme Court eloquently described the principle at work here:

...No matter how the defendant found herself in the wrong lane, she was where she had no right to be, and it was her obligation to explain what she was doing there, and how she got there... When a motorist is on his right side of the highway, obeying all the rules of the highway, being careful, cautious and considerate of the rights of others, and suddenly he sees coming toward him like a gargantuan genie, a destroying force, it is not for him to explain how and why the invader got into his way. Certainly a pedestrian on the sidewalk, when he is struck by a car which skids from the highway onto the sidewalk, injuring him, is not required by the law to employ mechanics to inspect the invading vehicle, surveyors to measure the distances, and to look for witnesses to testify to the undue speed, mechanical difficulties or other causes for the intruder's violent trespassing. Campbell v. Fiorot, 191 A.2d 657, 659 (Pa 1963) (emphasis added).

Here, the prima facie breach of duty is clear. In its answer to the plaintiff's complaint, the United States admitted to the conduct which breached the duties. In addition, it also cited that conduct in its memorandum in support of its motion:

The United States admits that Susan L. Michel was an employee of the Bureau of Land Management and was driving a van owned by the United States government and that the van veered to the right into the construction zone, striking the decedent. (Defendant's Answer ¶ 10, Exh. 1). (Emphasis added).

* * *

The United States admits that the van continued through the construction cite and dragged Mr. Solorio after hitting him. (Defendant's Answer ¶ 11, Exh. 1).

* * *

According to Ms. Warnick, the van 'looked like [it] was going to make a sudden turn' to the right, and ended up hitting a dirt pile, a cement barrier, and Mr. Solorio. (Defendant's Memorandum Pg. 3, ¶ 5).

This conduct clearly breached the statutory and common-law standards of care cited above. Ms. Michel lost control of the van. She allowed it to leave the marked lane and drive into the sidewalk construction area. There she hit and killed a Miguel Solorio. Based on the applicable duties and the admitted evidence, the plaintiffs have established a prima facie case of negligence.

POINT II

The Defendant Has the Burden to Prove Its Affirmative Defense

Although the plaintiff has stated a prima facie negligence case, a defendant's negligent conduct may be subject to an excuse or justification. Platis at 262, quoting Klawfta at 661. Excuse or justification for a negligent act is an affirmative defense. Leigh Furniture and Carpet v. Isom, 657 P.2d 293, 302 (Utah 1982).

By alleging that Ms. Michel had a seizure that caused an accident, the United States has raised an affirmative defense which asserts that her negligent acts should be excused. This is an important sequence because the United States bears the burden of

both pleading and proving its affirmative defense. Seal v. Gowan, 923 P.2d 1361,1363 (Utah 1996). Moreover, it has the burden of proving each element of its defense. Id.

The United States has claimed that Ms. Michel had a seizure that caused the accident. This is a well known, common-law affirmative defense to negligence. Throughout the United States, it is known by a variety of names: the loss of consciousness defense, Malcolm v. Patick 147 So2d 188 (Fla. App. 1962); the sudden incapacity defense, Smith V. Garrett, 230 SE2d 775 (NC 1977); the act of god defense, Christensen V. Gammons, 197 A2d 450 (DC 1964); and also, the unavoidable accident defense, Porter V. Price, 355 P.2d 66 (Utah 1960).

In order to establish the defense the United States must prove that: (1) Ms. Michel suffered a loss of consciousness or medical condition that prevented her from controlling the van. Goodrich v. Blair, 646 P.2d 890 (Ariz. App. 1982), VanderHout v. Johnson, 446 P.2d 99 (Oregon 1968). Id. at Malcom. (2) That the loss of consciousness occurred before the alleged negligent act. Arthur v. Royse, 574 SW2d 22 (Mo App 1978), Kohler v. Sheffert, 96 NW2d 911 (Iowa 1959). (3) That the unconsciousness was unforeseeable. Walker v. Cardwell, 348 So2d 1049 (Ala. 1977).

Thus, by introducing deposition testimony of Dr. Matsuo, the United States has offered evidence in support of its affirmative defense. Based on its analysis of the case law, it concludes that this evidence satisfies its burden and that it is entitled to summary judgment. However, it's analysis and conclusions are in

error because it has misread both the context of the cases and the required burdens of proof.

The United States relies heavily on Porter v. Price, 355 P.2d 66 (Utah 1960). In alluding to Porter, the United States makes an unsupported and errant statement of Utah law. It asserts that:

Under Utah law, a sudden and unforeseeable loss of consciousness rendering a driver unable to control a motor vehicle does not constitute negligence, because it involves circumstances beyond the control of the reasonable person. Defendant Memorandum at pg.9.

This is not the law in Utah. Porter actually stands for the proposition that sudden unconsciousness may relieve a tortfeasor from responsibility for his negligent actions. In Porter, the Utah Supreme Court upheld a jury verdict. In response to a prima facie negligence case, the defendant raised the affirmative defense of a diabetic seizure and the case was submitted to a jury. The jury found there was no negligence and the case was appealed because of a jury instruction. In Utah this case could not be settled on summary judgment.

Interestingly, Porter was the first in long line of Utah cases dealing with unavoidable accidents and jury instruction.² However, in Randall v. Allen, 862 P.2d 1329 (Utah 1993), the Utah Supreme

² Kusy v. K-Mart Apparel Fashion Corp., 681 P.2d 1232, 1237 (Utah 1984); Anderson v. Toone, 671 P.2d 170, 174 (Utah 1983); Anderton v. Montgomery, 607 P.2d 828, 833 (Utah 1980); Stringham v. Broderick, 529 P.2d 425 (Utah 1974); Ellis v. Hathaway, 493 P.2d 985, 986 (1972); Wagner v. Olsen 482 P.2d 702, 705 (1971); Calahan v. Wood, 465 P.2d 169 (1970); Woodhouse v. Johnson, 436 P.2d 442, 444-45 (1968); Wellman v. Noble, 366 P.2d 701, 702 (1961); Porter v. Price, 355 P.2d 66, 67-68 (1960); Steele v. Wilkinson, 349 P.2d 1117, 1119 (1960); Alvarez v. Paulus, 333 P.2d 633, 635 (1959); Best v. Huber, 281 P.2d 208, 209 (1955).

Court overruled all these previous cases, and stated that the jury must properly apply the elements of negligence. Id. at 1335-36.

The United States also relies on Cruz v. United States of America, 987 F.Supp. 1299 (D. Haw. 1997). There, a postal worker injured a pedestrian when he lost control of his truck because of a heart attack. Yet there, the plaintiff did not allege negligent operation of the car. Rather, he alleged that the defendant was negligent in not seeing a doctor and that he should have pulled over before his heart attack.

Moreover, like Porter, the critical distinction in Cruz is that it was not a summary judgment. The Cruz decision was the court's trial decision as the fact finder based on completely different allegations of negligence.

Finally, the United States cited and attached Langland v. United States of America, 2002 WL 225937 (D. Mass. 2002). In Langland, the undisputed facts established that the defendant had a brain tumor and that the tumor caused his symptoms and the accident. The only thing at issue was the third element of the unconsciousness defense: was the undisputed unconsciousness foreseeable?

Foreseeability is an element of duty and/or proximate causation. Unforeseeable Consequences, pg. 280, Prosser and Keeton on Torts 5th Edition (1988). Viewed as an element of duty, it is usually examined by a court as a matter of law. Id. In Langland, the court examined the evidence as it related to foreseeability and the undisputed unconsciousness and entered

summary judgment.

Here, in contrast, the unconsciousness is disputed. Moreover, the plaintiff established a prima facie negligence case. In response, the defendant offered some evidence on its affirmative defense of sudden incapacitation. Yet, that speculative offering is directly contradicted by the plaintiffs evidence. The defendant's offering is not enough to warrant summary judgment. It is merely a factual argument to be submitted to the fact finder at trial as happened in Porter and Cruz.

POINT III

There Is a Question of Fact As to When Susan Michel Had a Seizure

On summary judgment, a court must view all the facts and justifiable inferences from those facts in a light most favorable to the nonmoving party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986).

In its motion, the defendant offered the deposition testimony of Dr. Matsuo to support its contention that Ms. Michel suffered a seizure prior to the accident. Unfortunately, the defendant neglected to inform the court of the opposing evidence offered by the plaintiff's expert neurologist:

Ms. Swent: How certain are you that Susan Michel did not have a seizure before the accident?

Dr. Savia: I'm fairly certain that she did not have a seizure prior to the accident.

Ms. Swent: I'm going to ask you to put a number on it.

Dr. Savia: Over 50 percent.

Ms. Swent: Do you have a precise number?

Dr. Savia: I would probably say 99.99 percent.

Ms. Swent: You're pretty certain?

Dr. Savia: Yes.

(Deposition of Dr. Philip S. Savia M.D. Pg. 25, Exh. 3)

The defendant's neurologist says that Ms. Michel had a seizure before the accident and that the seizure caused the accident.

On the other hand, the plaintiff's neurologist says that she had a seizure because of the trauma in the accident and that the accident caused the seizure.

This is a classic question of fact on the defendant's affirmative defense. Summary judgment must be denied.

POINT IV

Dr. Philip Savia Is Qualified to Testify As an Expert Witness

The United States has suggested that Dr. Savia is not qualified to testify as an expert witness. This suggestion is erroneous.

The United States asserts that Dr. Savia is not qualified to testify because he stated in his deposition that he was not an expert on epilepsy. This argument is misplaced for many reasons. First, the fact that an expert witness indicates that he is not an expert on a topic, or that another person is more of an expert on the topic, has no bearing on the admissibility of the testimony. The medical definition of the word expert, and the legal definition of the word expert, are significantly different.

Moreover, a court cannot delegate to an expert its duty to determine the law. Molecular Technology Corp. v. Valentine, 925 F.2d 910, 919 (CA6 1991). Thus, the court, not Dr. Savia or Dr. Matsuo, must decide whether Dr. Savia is a qualified expert witness.

Second, there is no evidence in this case that Ms. Michel has epilepsy or a seizure disorder. Even the defendant's expert refers to the alleged seizure as a *seizure-like event*. The issue is one of a potential seizure. The logical medical specialty to consult would be neurology. Thus, any board-certified neurologist possesses the knowledge, skill, training, experience, and education required by the Federal Rules to render an opinion about seizures.

Both Dr. Savia and Dr. Matsuo are board certified neurologists. Both are qualified to treat patients that have seizures and seizure disorders. Both do in fact treat seizure patients. The fact that they have chosen different sub-specialties within neurology is irrelevant to admissibility. Payton v. Abbott Labs, 780 F. 2d. 147, 155 (1st Cir. 1985). Specialization goes to the weight of the testimony, not admissibility. Id. Thus, Dr. Savia is qualified to render his opinion on the alleged seizure.

POINT IV

**If Dr. Savia's Testimony Is Speculative, So Too Is Dr. Matsuo's
and Dr. Caravati's.**

The defendant asserts that the Dr. Savia is speculating when he opines that the seizure was caused by impact trauma. However,

this assertion is unsupported. The defendant offers no evidence, discussion, or analysis for its claim. Thus, the court should ignore the defendant's claim entirely.

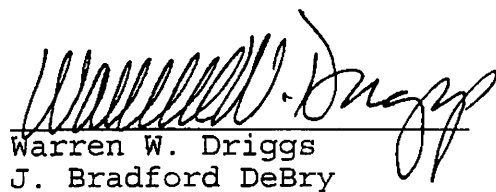
However, if the court considers the argument, it should also view Dr. Matsuo and Dr. Caravati's opinions using the same standards. If Dr. Savia's testimony is speculative, then both of the defendant's expert opinions are also clearly speculative, and thus inadmissible.

Conclusion

This is a case where the plaintiff has established a prima facie case of negligence. In response, the defendant has raised an affirmative defense of sudden incapacitation. It has now asked this court to enter a summary judgment on that defense. However, summary judgment cannot be entered because there is a classic factual dispute as to that affirmative defense.

Respectfully submitted this 28 day of August 2002,

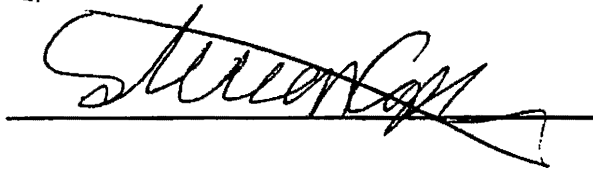
ROBERT J. DEBRY & ASSOC.


Warren W. Driggs
J. Bradford DeBry

CERTIFICATE OF HAND DELIVERY

I hereby certify that a true and correct copy of the foregoing PLAINTIFF'S
MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT (Solorio, et al. v. United States of America) was hand delivered this 28th day of
August, 2002, to the following:

Jeannette F. Swent
Assistant U. S. Attorney
185 South State Street, #400
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "Jeannette F. Swent", is written over a horizontal line.

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Exhibits/
Attachments
to this document
have **not** been
scanned.

Please see the
case file.

