

MEMORANDUM OF LAW

Defendant, through his/her attorney, Mary R. Cortezzo, hereby submits the following Memorandum of Law stating the law of Maryland and other jurisdictions on the foreseeability of medical emergencies, in particular diabetes related emergencies, and as reason states:

Foreseeability Generally

In Maryland, when a driver causes an accident due to his loss of consciousness, he may use sudden medical emergency as a defense as long as he can establish that 1) he was in fact unconscious at the time of the accident, and 2) that this loss of consciousness was unforeseen. *Moore v. Presnell*, 38 Md. App. 243, 247 (1977). Generally, other jurisdictions have held the same, excusing the unconscious driver from liability. Timothy E. Travers, Annotation, *Liability for Automobile Accident Allegedly Caused by Driver's Blackout, Sudden Unconsciousness, or the Like*, 93 A.L.R.3d 326 (2005). The courts differ as to what constitutes foreseeability, but they have used factors such as medical testimony that the driver could not have foreseen the loss of consciousness, whether or not the driver's doctor had warned him not to drive, witness testimony that the driver lost consciousness suddenly, and the statements of the driver at the scene of the accident. *Id.*

One of the most extensive foreseeability tests comes from Hawaii. In the case of *Cruz v. United States*, a postal worker lost control of his postal truck when he suddenly fainted at the wheel due to a heart blockage. *Cruz*, 987 F. Supp 1299, 1301 (1997). The test requires balancing among the following factors: 1) extent of driver's awareness or knowledge of that condition that caused the sudden incapacity, 2) whether or not the driver sought medical advice or was under a physician's care for the condition at the time of the accident, 3) whether the driver has been prescribed, and has taken medication for the condition, 4) whether or not a sudden incapacity had previously occurred when driving, 5) the number, frequency, extent, and duration of the incapacitating episodes prior to the accident while driving, and otherwise, 6) the temporal

relationship of the prior incapacitating episodes to the accident, 7) a physician's guidance or advice to the driver regarding his ability to drive, and 8) medical opinions regarding the nature of the driver's condition, adherence to treatment, foreseeability of the incapacitation, and any potential advance warning which the driver would have experienced immediately prior to the accident. *Id.* at 1303 (citing to *McCall v. Wilder*, 913 S.W.2d 150, 156 (Tenn., 1995) in which the Supreme Court of Tennessee held that a driver who suffered a seizure and struck another vehicle as a result was not entitled to summary judgment as a matter of law, because a reasonable mind could differ as to whether the seizure was foreseeable). In the *Cruz* case, the District Court of Hawaii used the factor test to find that even though the postal truck driver had not seen a doctor for several years, and despite his risk factors for heart disease (including obesity, family history of heart disease, and smoking), his unconsciousness was not a foreseeable event. *Id.* at 1303.

The courts generally rely on medical testimony as an indicator for whether or not the driver's unconsciousness was foreseeable. Timothy E. Travers, Annotation, *Liability for Automobile Accident Allegedly Caused by Driver's Blackout, Sudden Unconsciousness, or the Like*, 93 A.L.R.3d 326 (2005). For example, in *Martino v. Aetna Casualty and Surety Co.*, the driver suffered a heart attack which caused him to lose control of his vehicle and collide with a parked car. *Martino*, 351 So. 2d 204, 205 (1977). There, the Court of Appeal of Louisiana, Fourth Circuit, relied on the medical testimony of the driver's doctor: "...it was [Dr. Burch's] expert opinion that the attack was sudden and apparently was an acute congestive heart failure." *Id.* Likewise, the Supreme Court of Ohio accepted the deposition of a driver's physician who thought the accident could not have been prevented or avoided, especially given the driver's treatment for his heart disease and unlikelihood that the symptoms would worsen. *Roman v. Estate of Gobbo*, 99 Ohio St. 3d 260, 263, 2003 Ohio 3655, P12 (2003).

Similarly, when a treating physician testifies that he placed no restrictions on the driver's ability to drive, courts often find that the accident was not foreseeable. For instance, the Supreme Court of Oregon relied on the testimony of the driver's physician who had treated the driver for early congestive heart failure, but after medication and several follow-up visits, felt that the driver had no reason to refrain from driving. *Van Der Hout v. Johnson*, 251 Ore. 435, 446 P.2d 99 (1968). The Supreme Court of Wisconsin has also relied on medical testimony: "Doctor Rice who treated [defendant] for a heart attack twelve years prior to the accident testified that [defendant] had had electrocardiograms at prescribed intervals as well as X rays to measure the size of his heart. Doctor Rice placed no limitations on [defendant's] driving..." *Dewing v. Cooper*, 33 Wis. 2d 260, 267-268, 147 N.W. 2d 261, 265 (Wis., 1967). Based on that testimony, the defendant was not found negligent. *Id.*

Diabetes Medical Emergencies

There are few cases concerning diabetes specifically, but in general, if the driver can show that the hypoglycemic event was not foreseeable, then the driver is not negligent. Timothy E. Travers, Annotation, *Liability for Automobile Accident Allegedly Caused by Driver's Blackout, Sudden Unconsciousness, or the Like*, 93 A.L.R.3d 326 (2005). For example, in *Piatt v. Welch*, defendant went into insulin shock, ran a red light, and collided with another vehicle. 974 S.W.2d 786 (1998). The jury found for the defendant at trial, and the plaintiff appealed. *Id.* After reviewing much of the testimony from trial, the Court of Appeals of Texas, Eighth District, held that the jury had sufficient evidence to find the defendant not negligent in maintaining his diabetes. *Id.* at 795. Specifically, the Court noted, "We conclude, however, that the jury was entitled to believe Welch when he testified he had never suffered a blackout before or since, that he took his medication religiously, that he did so on the day of the accident, that he checked his blood sugar on the morning of the accident, and that it was within the 100 to 200 range which

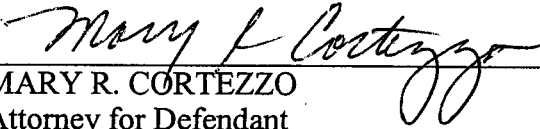
was normal for him.” *Id.* at 795. Thus, the defendant driver was not liable to the injured plaintiff. *Id.*

In the Court of Appeals of South Carolina, a diabetic was held to be negligent when he felt a hypoglycemic episode coming on and failed to stop driving. *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 590, 344 S.E.2d 157, 159 (S.C. Ct. App., 1986). In that case, the defendant had “brittle” diabetes, which requires strict adherence to a meal schedule and injection of insulin. *Id.* at 589 and 159. On the day of the accident, defendant skipped his lunchtime meal, failed to eat candy he kept in his car specifically to stave off hypoglycemia, and testified that he had experienced hypoglycemia before, and knew that his feeling of wooziness before the accident could indicate an episode of hypoglycemia. *Id.* Thus, the Court agreed with the jury’s finding that the episode was foreseeable. *Id.*

In the case at hand, Ms. Williams was under a physician’s care for her diabetes, she had taken her insulin on the day of the accident, and had eaten breakfast and lunch. She was at her doctor’s office immediately before the accident. She had never had a loss of consciousness prior to this accident in the twenty-four years she had been a diabetic. Although she had experienced hypoglycemic events prior to the accident, they were predominantly at night and were accompanied by symptoms of shakiness, sweating and heart palpitations. On the day of this accident, she had none of those symptoms prior to the loss of consciousness. Her treating physician, Dr. Munir, has, in his written opinion, explained by Ms. Mahoney did not have any symptoms before the loss of consciousness on the day of the accident. Additionally, Ms. Mahoney had never been told by any treating physician that she should not drive.

Comparing this case with the cases cited in this Memorandum, Ms. Mahoney’s loss of consciousness was not foreseeable.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, That on this 15th day of July, 2005, a copy of the foregoing Memorandum of Law, was mailed, postage prepaid, to J. Matthew Bodman, Esquire, 7310 Ritchie Highway, Suite 615, Glen Burnie, Maryland 21061, Attorney for Plaintiff.



MARY R. CORTEZZO