

## MEMORANDUM OF LAW

Defendant, through his/her attorney, Mary R. Cortezzo, hereby submits the following Memorandum of Law stating the law of Maryland concerning medical emergency as a defense in motor tort actions, and for reason states:

MARYLAND CIVIL PATTERN JURY INSTRUCTION 18:9 states that while one has the duty to take reasonable actions to ensure that he s/he can safely operate a motor vehicle, that person may defend themselves against liability "by showing that there was a sudden and unforeseen incapacity that rendered him or her unable to avoid or prevent the accident causing the injury." The instruction defines unforeseen capacity as "one that a reasonable person would not have any reason to anticipate."

This proposition was enunciated by the court in *Moore v. Presnell*, 38 Md. App. 243 (1977). There, a driver crossed into a lane of oncoming traffic and caused the accident which resulted in injuries to the other driver as well as her own death. *Id.* at 244. There was evidence that there were no mechanical errors with her vehicle and testimony that she had been driving erratically just prior to the accident and made no apparent effort to avoid it. *Id.* In fact, the witness traveling immediately behind the driver prior to the accident observed her head "fall to the right side, 'just like she passed out.'" *Id.* at 244-245.

Defendant-appellee offered at trial that the driver who caused the accident was not legally responsible due to sudden and unexpected unconsciousness. *Id.* at 245. Her medical records were offered to show that she had a history of health problems, including cardiac trouble, hypertension and swelling of the feet. *Id.* The trial judge denied both parties' motions for directed verdict and submitted the issue of negligence to the jury. *Id.* The jury, having been instructed that the defendant-appellee bore the burden of establishing that she was entitled to enter the opposite lane of travel by a preponderance of the evidence, returned a verdict for defendant-appellee. *Id.*

On appeal, plaintiff-appellant asked whether there was sufficient evidence to justify an instruction that if the jury found that defendant had suffered a sudden and unexpected ailment that made it impossible for her to maintain control of her car, they should return a verdict for defendant. *Id.* The court found that there was sufficient evidence of a sudden, unexpected lapse of consciousness to submit the issue to a jury and to support the jury's verdict. *Id.* at 249. The court was persuaded by the driver's medical records, which revealed a history of cardiovascular disease and hypertension which made her "not an unlikely candidate for sudden lapses of consciousness," despite apparently not having blacked out before. *Id.* at 248.

The *Moore* court noted the "overwhelming weight of authority" holding that one who operates a motor vehicle and is suddenly and unforeseeably physically or mentally incapacitated is not liable for injuries resulting from the operation of his or her vehicle while so incapacitated.<sup>1</sup> *Id.* at 246. The court also acknowledged that an exception to this rule exists where one is aware of an illness which is likely to cause a loss of consciousness. *Id.*

In support of its holding, the court referenced that the rationale for allowing for this medical emergency defense is that "the driver was suddenly deprived of his senses by 'blacking out' so that he could not comprehend the nature and quality of his act, and thusly, is not responsible therefor[sic]." Harper and James, 2 THE LAW OF TORTS § 16.7 (1956). The court also cited the RESTATEMENT (SECOND) OF TORTS (1965), saying that "[i]f the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." *Id.* at § 283C.

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<sup>1</sup> The court cited another Maryland case, *Shirks Motor Express v. Oxenham*, 204 Md. 626 (1954), among a number of cases from other jurisdictions in support of this tenet. In *Shirks Motor Express*, the court found that had there been unchallenged evidence that the incapacitated driver's medical emergency occurred prior to the accident, a verdict would have been directed in his favor. The court found, however, that the plaintiff had offered "a very effective challenge to the appellant's position as to the time of the onset of the unexpected illness." *Id.* at 635. Thus the court reasoned that a reasonable jury could differ as to whether the driver's incapacitation occurred before or after the accident occurred. *Id.*

Thus the court concluded that in order to establish said defense, the defendant must show (1) loss of consciousness and (2) that this loss of consciousness was unforeseen. *Moore*, 38 Md.App. at 247. The court noted that the appellee was “entitled to rely on circumstantial evidence and needed only to establish a reasonable certainty that the decedent was unconscious at the time of the accident.” *Id.* at 248. Concerning foreseeability, the court noted that the fact defendant-appellee had been receiving medication for hypertension did not render her loss of consciousness foreseeable. *Id.* at 249.

Therefore, a defendant may rebut liability in a motor tort case by showing (1) a loss of consciousness (2) that was unforeseen. The *Moore* court noted that only circumstantial evidence need be adduced to establish a reasonable certainty of unconsciousness at the time of the accident for the issue to be submitted to the jury. The *Shirks* court, as referenced in footnote 1, stated in dicta that if a defendant can offer unchallenged evidence that the medical emergency occurred before the accident, a verdict should be directed in his or her favor. *Id.* at 634.