DORIS LEE WILLIAMS,	*	IN THE DISTRICT COURT
	*	
Plaintiff,	*	OF MARYLAND FOR
	*	
v.	*	ANNE ARUNDEL COUNTY
	*	
MELISSA ANN MAHONEY,	*	CASE NO.: 0702-0003814-2004
	*	
Defendant.	*	
	*	

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PLAINTIFF'S RESPONSE TO DEFENDANT'S MEMORANDUM OF LAW

Plaintiff, through her attorneys, J. Matthew Bodman, and Miller & Zois, LLC, hereby submits the following Memorandum requesting that the court award judgment her favor. In support, Plaintiff states as follows:

I. STATEMENT OF THE FACTS

As the Court may recall, this case involves the sudden incapacity defense. The Defendant, Melissa Ann Mahoney exited Route 97 North onto Quaterfield Road and struck the side of Plaintiff's car, which was sitting at a traffic light.

As we learned from the Defendant's testimony, she has, regrettably, suffered from diabetes for the last 24 years. Defendant's diabetes is so advanced that she regularly tests herself up to 10 times a day, carrying her test kit with her wherever she goes. Defendant's routine is to test two hours after each meal. While inconvenient, the test itself takes only about five seconds. Defendant testified that she takes on this burden and tests at these standardized intervals because she knows the risks associated with low blood sugar (hypoglycemia). Defendant has a history of dizziness of hypoglycemia, which is defined as blood sugar falling below 70. In fact, she experienced an episode of hyperglycemia three months *before* the accident when her blood sugar count fell below 31.

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On the day of the accident, Defendant ate lunch at 12:00 p.m. She went to her doctor's appointment at approximately 1:30. She left the doctor's office at 3:00. According to the appropriate standard of care that she articulated, she should have tested her blood sugar at 2:00 p.m., two hours after her lunch. She did not test, apparently because she forgot to bring her gel packet with her. The gel packet contains a substance that is designed to help her regain a higher blood sugar level in a short amount of time if necessary. The trip from the doctor's office to her home takes 25 to 30 minutes. According to her, she was due to arrive home between 3:30 p.m. and 4:00 p.m. Because Defendant failed to follow the appropriate standard of care (as defined by Defendant) in testing her blood sugar level before getting into an automobile, she *admits* she suffered a hyperglycemic episode and collided into Plaintiff's vehicle.

II. APPLICABLE LAW

Where, as here, the Plaintiff has established a prima facie case of negligence, the burden of proof shifts to the defendant to demonstrate that 1) a sudden illness or attack occurred and that 2) it could not have been anticipated. *Beahm v. Shortall,* 279 Md. 321, 368 A.2d 1005, 1006 (1977).

The elements Defendant must show to meet her burden of proof are articulated in *Moore v. Presnell,* 38 Md. App. 243 (1977). In *Moore,* a woman with a medical history of hypertension allegedly blacked out while at the wheel and her car went crossed the centerline into the opposite lane of traffic where it struck another car. After a defense verdict, Plaintiff appealed. In affirming the trial court's ruling, the Court of Special Appeals found that Defendant's burden at trial was twofold. *Id* at 247. First, the Defendant must show loss of consciousness, and second, that loss of consciousness was unforeseen. *Id.*

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A. **Plaintiff Loss of Consciousness Was Clear Foreseeable and Could Have Been Avoided With the Exercise of Reasonable Care**

1. Defendant did not offer medical testimony to meet its burden of proof

The *Moore* court found that the burden is on the defendant to demonstrate that a sudden illness or attack could not have been anticipated. Id. at 246. Defendant offered no medical testimony to support the notion that this attack could not be anticipated. Defendant's 10-104 demonstrated only that she suffered a hypoglycemic attack; it did not address its burden of unforseeability. In fact, in the ALR cited by Defendant, Timothy E. Travers, Annotation, *Liability for Automobile Accident Allegedly Caused by Drivers, Blackout, Sudden Unconsciousness, or the Like*, 93 A.L.R.3rd 326 (2005), the author gives a word of advice to defense counsel that concrete medical evidence is necessary to show unforeseeability:

"Counsel representing a client who is being sued for an automobile accident which allegedly occurred when the driver lost consciousness **should therefore be prepared to introduce competent and persuasive medical testimony to establish that the driver's loss of consciousness was unforeseeable**." (emphasis added).

Unlike **every single case** cited by Defendant, she offered no medical testimony to support her contention that this episode was unforeseeable. Accordingly, she has not met her burden of proof.

2. Plaintiff's testimony makes it clear that the accident was not only foreseeable but that it was caused by Defendant's own negligence

Defendant's testimony makes plain that it was foreseeable that she could suffer a hyperglycemic episode. Defendant admitted that she should test within two hours of eating a meal and that she did not test. Defendant testified that knew this test, which takes mere seconds, would provide the necessary information to know if she was at risk for a hyperglycemic attack. She further testified that she understood the risks of driving during a

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hyperglycemic episode. Consequently, not only was it foreseeable that Defendant would suffer an attack, it was her negligence that led to the attack.

The South Carolina Court of Special Appeals was faced with a similar fact pattern where Defendant's negligence failed to prevent an attack in *Howle v. PYA/Monarch, Inc.*, 344 S.E.2d 157, *(S.C. Ct. App. 1986)*. In *Howle*, the defendant was, like the instant case, involved a long time diabetic that did not take the necessary precautions before getting behind the wheel of an automobile. In this case, the defendant skipped lunch and neglected to stop and eat or take candy he kept to abate such episodes, then passed out and crossed centerline. The jury rejected the Defendant's argument that such an episode was unforeseeable and the South Carolina court affirmed the jury's finding.

III. CONCLUSION

The Defendant was not caught off-guard by this attack. Had she met the reasonable standard of care – as defined by Defendant – by properly testing her hypoglycemic levels consistent with her regular practice before getting into an automobile and posing a risk to all Maryland drivers, Plaintiff would not have been injured. Maryland law reflects this common sense notion that Defendant should not have been behind the wheel of a car by putting the burden on Defendant to show that this attack was unforeseeable. Because Defendant has offered no medical testimony to support unforeseeability and because Defendant's own testimony makes plain that her incapacity was foreseeable, Plaintiff respectfully requests that this Court enter judgment on behalf on the Plaintiff for $10,000 or some other amount this Court deems adequate to compensate Plaintiff for her medical bills and pain and suffering.

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Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing was sent via U.S. Mail, first-class, postage prepaid, this 21st day of July, 2005, to:

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J. Matthew Bodman