

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RICK J. URBAN, GUARDIAN OF LOREN E. GRAVES,
A MINOR, AND BROOKE A. GRAVES, A MINOR, and
RICK J. URBAN, AS ADMINISTRATOR AND
PERSONAL REPRESENTATIVE OF THE ESTATE
OF CORINNE E. URBAN, DECEASED,

ORDER

07-cv-646-bbc

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Following the March 11, 2008 preliminary pretrial conference, the government asked the court to clarify the sequencing of expert disclosures. *See* dkt. 8. Plaintiffs did not file a response.

I agree with the government that plaintiffs must offer their damages experts first, with the government's responsive experts to follow. However, I reject the government's premise that plaintiffs must go first with an expert relating to the government's claim that its driver fainted before the accident.

For the purpose of its clarification request the government is willing to concede, *arguendo*, that the doctrine of *res ipsa loquitur* might apply here, and cites *Lambrecht v. Estate of Kaczmarczyk* 241 Wis.2d 804, 820 (2001) for the proposition that the government already has met its burden of offering an explanation of the accident which is satisfactory to the fact finder. But this proposition is quoted from a jury instruction and it is simply a qualifier to the instruction's principle point: a defendant's negligence can be inferred from an automobile collision if defendant had exclusive control of the automobile car and the accident is of a type that ordinarily does not occur when a driver uses ordinary care. In *Lambrecht*, the court actually determined that summary judgment was properly denied to the estate of the (deceased) defendant driver even though defendant proved that the driver had suffered a heart attack

before, during or after the vehicle he was driving struck three other vehicles on a straight road in good weather. The court determined that even in the face of defense expert opinions of a fatal heart attack while driving, the fact-finder still was entitled to conclude that the driver's negligence was the more probable cause of the collision. *Id.* at 836-38.

Lambrecht does not hold that a driver's mere claim that he fainted constitutes a "satisfactory explanation" of the collision that negates a finding of negligence. To the contrary, the court in *Lambrecht* found that even after expert testimony established that the driver who caused an accident died of acute cardiopulmonary arrest (*see* 241 Wis.2d at 812), there remained a jury issue on negligence.

The government correctly observes that neither side in this case is required to call an expert on this point. If, however, the government wishes to corroborate the testimony of its driver and his passenger with medical evidence, it must disclose this evidence first because the government has the burden to establish a satisfactory non-negligent explanation for the car veering into oncoming traffic. The government cannot simply assert that its driver fainted then wait to see if plaintiffs disclose an expert's contrary opinion before deciding that it wishes to call an expert in rebuttal.

It is ORDERED that the government's motion to modify the scheduling order is GRANTED IN PART and DENIED IN PART.

Entered this 26th day of March, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge