**IN THE MATTER OF AN UMP ARBITRATION**
**PURSUANT TO Section 148.2(1) of the Revised Regulation to the *Insurance (Vehicle) Act* (B.C. Reg. 447/83) and the *Arbitration Act,* S.B.C. 2020 c.2 (the "Act"), (formerly the *Commercial Arbitration Act,* R.S.B.C., 1996, c.55)**

BETWEEN

D.E.

CLAIMANT

AND

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

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**AWARD ON LIABILITY**

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**ARBITRATOR:** **Vincent R. K. Orchard, K.C., C. Arb.**

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**Dates of Hearing:** **May 23 – 29, 2023**
**Place of Hearing:** **Vancouver, B.C**
**Date of Award:** **August 25, 2023**

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## I. INTRODUCTION

### A. THE ACCIDENT / ISSUES

1. Near midnight on December 8, 2016, the Claimant D.E., a pedestrian in a reasonably large urban intersection controlled by traffic lights, was struck by a hit and run driver (the "Accident"). D.E.'s primary injury was a right knee injury which he claims brought to a premature end his professional career as a soccer player.

2. The story behind this arbitration involves the collision of two realms of human activity: three old friends out for "a night on the town", engaged in a "pub crawl", part of a belated bachelor's party and golfing holiday, intersecting with the reprehensible and likely criminal conduct of a hit and run driver.

3. The issues involved in this UMP arbitration will be determined in three phases: firstly, liability / fault for the Accident; secondly, if I find liability according to Arizona law, D.E.'s entitlement as an insured under s.148 and s.148.1 of the revised Regulation (B.C Reg. 447/83) under the *Insurance (Vehicle) Act*, and thirdly, assuming liability and entitlement as an insured person, I will be determining compensation or damages according to B.C. law under the UMP provisions, specifically s.148.2(6)(b) of the revised Regulation.

4. This award will deal only with liability pursuant to s.148(8) and (9) and s.148.2(6) which mandates the application of the *lex fori*, the law of the place where an insured suffered injury. Both s.148, the uninsured or hit and run accident in the USA section, and s.148.1 and s.148.2, the underinsured motorist protection ("UMP") coverage in Part

10, Division 2 of the revised Regulation, require disputes between an insured and ICBC to be determined by arbitration.

5. Before I delve into the evidence and facts relating to the Accident in order to determine liability of the hit and run driver and contributory negligence of the Claimant, I will address briefly the history of this proceeding.

## B. HISTORY OF THIS PROCEEDING

6. That more than six years have gone by between the date of the Accident and an arbitration hearing which took place in five days, May 23 – 19, 2023 on liability only, deserves some explanation.

7. On October 7, 2019, a Domestic Commercial Arbitration Notice was filed with the BCICAC under BCICAC File No. DCA-2149-UMP pursuant to the Commercial Arbitration Act, R.S.B.C 1996, c.55, by Vancouver lawyer, Marc Kazimirski, on behalf of D.E. It is not entirely clear what happened from a litigation standpoint between the Accident date and the filing of the Arbitration Notice. D.E. has testified that a family friend put her in touch with a lawyer in the U.S. Ultimately, he was referred to Mr. Kazimirski. It does not appear that there were any litigation steps taken in Arizona. That may well be explained by an admission given on behalf of ICBC during the May 2023 arbitration hearing on liability that Arizona state law does not provide the equivalent of an "unsatisfied judgment fund" for victims of uninsured or unidentified motorists nor any similar fund although pleaded in its Statement of Defence. That would have been relevant to ICBC's liability for coverage under s.148(4) which excludes liability to an

insured who has a right of recovery under an unsatisfied judgment fund or similar fund in any jurisdiction. Here the only jurisdiction that is relevant is Arizona. D.E. did not commence any litigation in Arizona. The Scottsdale Police Department which investigated the Accident, never located nor identified the hit and run driver.

8. Following issuance of the Arbitration Notice, BCICAC by letter dated October 7, 2019, deemed the arbitration to have commenced on that date. Ultimately VanIAC replaced BCICAC as the governing arbitration centre. Although the dates make little sense, an Arbitration Statement of Claim was issued dated March 25, 2019 and counsel for the Respondent ICBC, Mary-Helen Wright, issued an Arbitral Statement of Defence on September 28, 2020. There is no explanation why almost an entire year elapsed following the issuance of the Arbitration Notice (and an even earlier Statement of Claim) and the issuance of a Statement of Defence. On December 2, 2020, I was appointed sole arbitrator of this proceeding under a new file number: VanIAC File No. 214-UMP. On January 19, 2021, I convened a first pre-arbitration conference telephone call with counsel. The parties confirmed that the arbitration would be governed by the BCSC Civil Rules. A timetable for exchange of documents and a discovery of the Claimant was set. It was also agreed at this first planning conference that the arbitration would be bifurcated into two phases: Phase I to involve the issues of liability and entitlement to UMP and Phase 2, if necessary, to involve the issues of damages and deductible amounts.

9. Unfortunately, some unanticipated events, including the sudden death of another counsel in the defendant's law firm, the transfer of the Claimant's file to different

counsel and health issues of new counsel, resulted in further delay. There were several additional pre-arbitration management telephone conferences in 2021 and 2022 and certain directions issued in an effort to move the arbitration along. An Amended Statement of Defence was issued on June 24, 2021, pleading certain entitlement defences with greater specificity, including the right of recovery against an unsatisfied judgment fund or similar fund; however, as noted, ICBC resiled from that defence at the hearing. An arbitration hearing date for Phase I, October 3-7, 2022, was adjourned.

10. Leading up to the hearing of May 23-29, 2023, an Arbitration Management Conference was conducted on April 6, 2023, and further directions were issued including a timetable for pre-hearing steps. I also heard an application by the Respondent relating to Arizona hospital records and an Arizona witness to attend the arbitration. The order I granted was in the form of "letters rogatory".

11. Counsel for the Claimant also brought on for hearing an "urgent" application on April 26, 2023, relating to failed attempts to serve subpoenas on certain lay witnesses in Arizona but counsel for the Claimant withdrew the request for an order after the application was heard. One of the witnesses was eventually called by the Respondent via Zoom.

12. Counsel for the Claimant submitted an application to be heard at the outset of the arbitration hearing for a ruling on the admissibility of an Arizona Crash Report prepared by the Scottsdale Police Department. That application became the first order of business on May 23, 2023.

## II. FACTS AND EVIDENCE ON LIABILTY

**The Admissibility of the Accident Investigation File of the Police Department of the City of Scottsdale referred to by counsel as the "Arizona Crash Report" and the testimony of Detective Zachary Weiler, the principal investigating officer and main author of the Arizona Crash Report**.

13. As I have noted, the first order of business on the first day of the arbitration hearing was an application by the Claimant to admit the police file, referred to by counsel as the Arizona Crash Report, compiled by the Scottsdale Police Department and authored by the principal investigating officer, Officer 1475 Weiler. Claimant's counsel also proposed to call Officer Weiler, now Detective Weiler, as a witness who would testify about the facts of his investigation and the contents of the police file. He was not put forward as a witness entitled to give opinion evidence. Claimant's counsel sought to admit the police file as a business record under section 42 of the Evidence Act or alternatively as a principled exception to common law hearsay rule. Counsel for the Respondent opposed the application primarily on the basis of *res judicata*, lateness and prejudice relating to the inability to cross-examine witnesses.

14. I conducted a voir dire to determine the admissibility of the police file. Counsel made submissions. Ultimately, counsel for the Claimant relied only upon s.42 of the Evidence Act and withdrew her argument on an exception to the hearsay rule.

15. The Scottsdale police file, ultimately marked as Exhibit 1, consists of 19 pages of highly relevant information about the Accident. It is identified as Scottsdale Police Incident No. 16630368 and Arizona Crash Report No. 16-27469. Officer Weiler No. 1475 is identified as the reporting officer. The assisting officer was Officer Hartman No. 1479.

Detective Weiler testified as to how he compiled and authored Exhibit 1 which includes the Arizona Crash Report, a number of witness collision statements and an Incident Investigation Report.

16. It is very common in road accident cases in B.C. courts that the police file is admitted as an exhibit. Such police files often contain witness statements and narrative summaries as does the police file in this case. I was satisfied that the evidence disclosed proof of the required prerequisites of s.42 of the Evidence Act including s.42(2)(a) and (b), that the statements in the file were made or kept in the usual course of business and it was the usual course of business to record the statements of fact. See also *Cambie Surgeries Corporation v. British Columbia (Attorney General)* 2018 BCSC 859, at para. 16.

17. I was not persuaded by the arguments of counsel for the Respondent concerning *res judicata* and prejudice by virtue of lateness and inability to cross-examine witnesses. It is true I granted Ms. Wishart's request to have an urgent telephone conference on April 26, 2023 with counsel concerning difficulties in contacting witnesses despite a number of attempts by Arizona agents. However, after a discussion concerning possible adjournment, Ms. Wishart withdrew seeking any relief in the arbitration concerning such witnesses. I made no decision, therefore *res judicata* does not apply. Nor did Ms. Wishart altered position amount to an issue estoppel or waiver. Most importantly, I did not accept that the Claimant should be barred from presenting highly relevant evidence because of his counsel's delay in pursuing a proper method to have documentary evidence admitted. Counsel for the Respondent was not prevented from arguing the

weight to be given to such evidence. Finally, I did not accept the Respondent was prejudiced by the statements of lay witnesses contained in the police file on which she could not cross-examine. Counsel for the Claimant identified in particular two witnesses she was trying to "subpoena" to testify at the arbitration. Counsel for the Respondent actually at some point lined up one of the said witnesses to be called as a witness and did indeed call that witness, the driver of a "golf cart" in which the Claimant was for a time a passenger prior to the Accident. Furthermore, it is trite law that there is no property in a witness. The other lay witnesses who signed collision statements in the police file as witnesses to the Accident were equally available to both parties to call as witnesses. I would not draw an adverse inference against the Claimant for failure to call two witnesses, whom I would refer to by therein initials R.M.P. and J.G.S., both of whom occupied another golf cart at the intersection in question. Nor would I deny the admission into evidence of the police file containing their statements where these independent witnesses would have been equally available for the Respondent to call as witnesses at the hearing. Moreover, if one or both of the witnesses were shown to be hostile witnesses, the rules of evidence permit counsel to cross-examine their own witness. Finally, in balancing the interests of the parties, the interests of justice favour the Claimant on the question of admissibility of the entire police file, which after being initially marked as Exhibit "A" for identification was marked as Exhibit 1. That leads me to the evidence of Detective Weiler.

18. Detective Weiler of the Scottdale Police Department testified via Zoom. I was impressed with the straightforward way in which he gave evidence. I found him to be a reliable and credible witness. He had decent independent recall of the Accident partly I

would think because of its rather unusual nature. When he did not know something or could not recall something he readily admitted it. He did not overstate or embellish his testimony. He was both articulate and careful in giving his evidence.

19. The combination of the contemporaneous police file, Exhibit 1 completed on December 9, 2016, and the oral testimony of Detective Weiler, provides a thorough synopsis of the Accident. The file contains brief handwritten witness statements signed and witnessed by Officer Weiler 1475. The file contains a statement of the Claimant, a statement of the driver of the golf cart in which he had been a passenger and statements of two witnesses in a golf cart stopped at the intersection of North Marshall Way and East Indian School Road. These last two witnesses, R.M.P. and J.G.S., were in the inside lane facing east on East Indian School Road. There was a black SUV to their right stopped beside them in the curb lane. Both the inside lane and the curb lane were for traffic heading across North Marshall Way. Both statements of R.M.P. and J.G.S. were given on the night in question. Both witnesses state they were stopped at a red light with the SUV also stopped beside them as a pedestrian was either in the east crosswalk or walking southbound in the intersection across East Indian School Road. The traffic light turned to green for eastbound traffic but the witness R.M.P., who was the driver of the golf cart with the witness J.G.S. as his passenger, did not proceed into the intersection as he waited for the pedestrian in the crosswalk to finish crossing from north to south. Unfortunately, the driver of the black SUV accelerated into the intersection, in disregard of the pedestrian, hit the pedestrian and then fled the scene immediately.

20. Detective Weiler attended the scene while the Claimant and witnesses were still at the scene and at a location of safety on the southeast corner of the intersection on a sidewalk area. Detective Weiler was wearing a "bodycam" and at the hearing the video recording of his interaction with the Claimant and witness immediately following the Accident was played and marked as Exhibit 2. The camera recording also had audio. Detective Weiler confirmed authenticity of the video recording. In fact, no one questioned its authenticity or admissibility. The Claimant and his friends, A.S. and N.L. in testimony identified themselves on the videotape. Both A.S. and N.L. confirmed their concern with the condition of the Claimant. No explanation was offered as to why neither A.S. nor N.L. gave a statement to Officer Weiler at the scene. The statement of the Claimant in Exhibit 1 was provided at the Emergency Clinic of the HonorHealth Osborn Medical Center facility. The only other witness who gave a contemporaneous statement to Officer Weiler was the driver of the golf cart, in which the Claimant and his friends were passengers, prior to the Accident. The witness, C.L.B. who is now married and now has initials C.L.N., had been westbound on East Indian School Road and proceeded into the left turning lane to go southbound on North Marshall Way. She had a green light as she made her left turn. She states that the Claimant jumped out of the golf cart before she completed her turn and was "in the street where he was hit by a black SUV, maybe an Escalade." In her statement she says, "I only saw my passenger in the road and a black SUV hitting him." She did not catch the SUV's licence plate number or other identifying information. C.L.N.'s testimony at the hearing was in certain respects markedly different than her statement to Officer Weiler. I will have more to say about those troubling inconsistencies.

21. I found it interesting that an individual wearing a hat on the videotape Exhibit 2 says in an audible way that the driver of the SUV punched the gas when the light turned green in disregard of the pedestrian still in the intersection, struck the pedestrian, and then "punched the gas" again, leaving scene quickly. Although not specifically identified, the recorded words are most similar to the words recorded in the statements of R.M.P. or possibly his passenger J.G.S.

22. A golf cart is seen in the videotape, Exhibit 2, parked at the curb. C.L.N. believes it is the golf cart she was driving on the night in question but possibly may be a different golf cart owned by her employer Quicksilver Transportation.

23. For the sake of clarity, while I have been referencing "golf carts" involved in the incident, other terms have been used in the reports and testimony of witnesses and by counsel, including mini-cabs, pedi-cabs, mini-taxies and livery conveyance vehicles.

24. Before turning to the evidence of other witnesses, I quote from the Incident Investigation Report in Exhibit 1, as authored by Detective Weiler. It reads in part:

> *Once at the hospital, [D.E.] was brought over to trauma where he had X-Rays conducted and shortly after went in for a CT scan. There were no broken bones or any signs of a major injury at this time. Once the medical staff was done evaluating [D.E.], I spoke with him again. [D.E.] stated he had been out drinking that night and was headed to a new bar in the golf cart headed westbound on E. Indian School Rd when the golf cart began to make a left turn. When the golf cart made its left turn, [D.E.] stated he fell from the golf cart and into the roadway. [D.E.] stated he was sitting in the rear passenger side seat of the golf cart before falling out. [D.E.] did not state how he fell out of the golf cart and whether or not he was had* ***(sic)*** *leaned out before falling or just happened to fall during the turn. Once he was in the roadway, [D.E.] stated he saw a vehicle coming in his direction so he tucked his head and tried to protect himself. [D.E.] was struck but was able to get up out of the roadway and sit down where I had found him upon my arrival. [D.E.] had a sore right knee as well as pain in the lower back. [D.E.]*

*was unable to get a description of the vehicle. There seemed to be confusion amongst everyone as to whether or not the light was green beforehand or if it had just changed from red. Based on the golf cart making a left turn, it would seem there was a green light for east and westbound traffic on E. Indian School Rd. [R.M.P.] and [J.G.S.] did seem adamant that the light was red and turned to green just before the collision. The only other description for the vehicle other than a black SUV was the possibility the vehicle was an Escalade. There was no license plate that had a return through MVD. No other information was given except that the vehicle had fled eastbound on E. Indian School Rd. This concludes my involvement in this matter.*

25. In oral testimony, Detective Weiler confirmed:

1. He was the primary investigating case officer;
2. He created the Arizona Crash Report [Exhibit 1];
3. The driver of the black SUV committed a moving violation "failing to stop" – "hit and run" but the driver was never identified;
4. He made sure witnesses read and signed the statements contained in Exhibit 1;
5. He obtained the statement of D.E. in hospital which Detective Weiler filled out and was signed by D.E. and witnessed by Detective Weiler;
6. The statements of the golf cart driver C.L.N. and the witnesses R.M.P. and J.G.S. were obtained at the scene of the Accident and are in the handwriting of the witnesses who signed them, and which were witnessed by Detective Weiler;
7. He recorded no observations of sobriety and conducted no sobriety tests;
8. The Entertainment Zone in Old Town Scottsdale has a lot of bars and golf carts in that area have license plates to be able to use the roads;
9. Prior to testifying, he reviewed the police file including the bodycam recoding (Exhibit 1 & 2], and while he admits that he doesn't have an independent recall of everything in the police file, he does recall this incident, being at the scene and generally "who said what" after reviewing the file. For example, he recalls speaking to D.E. at the scene while he was seated on the street corner, but he does not recall if a blood sample was ever taken;

10. He does not recall if Officer Hartman spoke to the witnesses A.S. and N. L. but if Hartman kept notes they are not part of the police file he created;

11. The golf cart driver C.L.N. was not charged with any violations.

**THE CLAIMANT D.E.**

26. D.E. is currently employed as a professional soccer coach. In 2016, he was under contract as a player for the Vancouver Whitecaps. Before signing with the Whitecaps he had played professional soccer mainly in the U.K. for nine years. He was on teams with the witnesses A.S. and N.L. and became close friends with them. All had played on teams representing Canada internationally. D.E. had 42 "caps" appearing for Canada. A.S. played profession soccer mainly in Germany but he also played for Canada earning 43 "caps". He is currently managing a clothing store in Victoria, B.C. The witness N.L. is currently coaching soccer after a 15 year playing career mostly in Europe, principally in Germany. N.L. earned 50 "caps" playing for Canada. All three individuals remained very close friends over the years. N.L. had recently married but D.E. and A.S. were unable to make his wedding in Edmonton, Alberta. Since December is the off-season for professional soccer in Canada, the three friends planned a belated Bachelor party and golf trip to Scottsdale, Arizona. None had been there before. They flew into Phoenix from different cities in Canada and met at the Phoenix airport on December 8, 2016. There is some conflict in the evidence concerning the order of their arrivals, but nothing turns on that fact. It is agreed that the friend had drinks together at the airport before leaving to go to their hotel in Scottsdale. D.E. had 1-2 pints of beer at the airport with his friends. This was the start of imbibing alcohol beverages by the three companions over the course of the day and evening.

27. Before delving more deeply into the narrative. I had a good opportunity to assess D.E. as a witness giving testimony, in person, over parts of two days at the hearing. I found him to be a credible, careful witness who gave his evidence, in chief and under cross-examination, in a measured way without embellishment or undue defensiveness. Although I accept D.E. was intoxicated at the time of the Accident, I do not believe his state of sobriety affected a truthful account of the relevant events. Since the Respondent raises D.E.'s drunkenness or impairment as a causative factor in considering D.E.'s own negligence, I will review some of the testimony about D.E.'s drinking history and his drinking on the day and night in question.

28. The Respondent called an expert toxicologist, Audrey Jakus, as a witness, whose expert report, dated May 6, 2022, was admitted into evidence as Exhibit 8. She wrote and testified, *inter alia*, about D.E.'s likely blood alcohol content ("BAC") at the time of the Accident and the effects of consumption of alcohol upon three general categories of people who drink alcohol: social drinkers, moderate drinkers and experienced drinkers. Suffice it to say, generally speaking, an experienced drinker has a higher tolerance to the effects of alcohol and shows less discernable signs of intoxication than a moderate or social drinker. The same can be said for a moderate drinker compared to a social drinker. Now, I do not know how tight these categories are, nor whether they have much forensic value; however, D.E., as a professional athlete, seems to have been someone who drank almost daily but somewhat less while in training. He admits that at the time he drank quite regularly in the afternoon and in the evening. Dinner with his in-laws typically included wine sometimes followed by brandy. For the most part, he was a beer drinker. He does have an uncle who owns a pub where he currently lives, and he often

has a couple beers at the pub most days. He started drinking early in his career in England where there was a pub culture. He primarily drank beer on a daily basis. He perceives himself as someone who can handle his alcohol. He admits “he was a drinker”. On the day and night in question, D.E. consumed a significant amount of alcohol, mostly beer, likely over a 10–12 hour period; he says he was “tipsy” but not drunk. I believe D.E. was an experienced drinker or at the very least a moderate drinker. I believe his drinking experience made him more tolerant to the effects of alcohol. He did not appear outwardly intoxicated to me on the video (Exhibit 2) post-Accident but at that point he was seated. His speech was not slurred. His friend A.S. says they all were intoxicated but were not “out of control”. D.E. did not recall the number of drinks he had from the time he and his friends arrived at the Phoenix airport to just before the Accident but he admits to starting with beer at the Airport, likely another beer at lunch, several beers at bars in the Entertainment District and wine at dinner before getting in the golf cart to go to a bar outside the Entertainment District. It seems their “night on the town” was not yet over when the Accident occurred. However, they had arranged a golf game for the next day.

29. I will now turn to the evidence of the lay witnesses concerning the Accident and the events leading up to it. As D.E., A.S. and N.L. continued their “pub crawl” or as N.L. described it as a night “on the town” in the Entertainment District, they decided to try an establishment in another part of downtown Scottsdale. According to A.S., they could not find a taxi so they decided to try one of the golf carts available for hire. The golf cart driver by C.L.N. was available. The friends were unfamiliar with Scottsdale and told C.L.N. what they wished to do. C.L.N. knew a bar outside the Entertainment

District but getting there required driving on arterial roads, specifically East Indian School Road and North Marshall Way. C.L.N. was aware of a bar called the Coach House nearby that would have been open. The bar C.L.N. had in mind was within the permitted radius for golf carts withing the city of Scottsdale.

30. The evidence did not disclose that the golf carts in general use had any special safety features, other than lap belts, for the occupants despite being licensed to travel the streets of Scottsdale in a circumscribed area. C.L.N. testified that it was company policy to advise their customers that they should wear the lap seatbelts provided; however, the company policy was not enforced. C.L.N. says there were seatbelts in the golf cart she was driving on the night in question. There was no evidence given that there was a state or municipal law requiring occupants of golf cards permitted to travel on roads to wear seatbelts. Not surprisingly none of the passengers on this trip wore seatbelts and none gave any evidence confirming they were advised to wear seatbelts. Common sense suggest, passengers in golf carts usually travel short distances at low speeds, apparently a maximum speed of 18 mph for gas powered carts, and if no law obligates them to wear seatbelts, they likely would likely not wear them.

**THE EVIDENCE OF THE CLAIMANT D.E. CONCERNING THE ACCIDENT**

31. After time spent at a few bars and having dinner at a restaurant in Old Town Scottsdale's Entertainment District, D.E. and his friends got in a golf cart, a.k.a a pedi-cart or mini-taxi, available for hire to continue drinking at a bar outside Old Town. N.L. sat on the front bench seat of the cart, the passenger side next to the driver. D.E. sat on the second bench seat directly behind N.L. also on the passenger side. He did not know their

destination or intended route but eventually became aware that they were turning left from a larger roadway outside of Old Town. D.E. was looking to his right as the golf cart turned to the left. He was unprepared for the turn and his body weight shifted to the right. The golf cart had been stopped before it proceeded to make its right turn. The golf cart moved forward at a slow speed before turning left. Since D.E. was unprepared for the turn and as he was looking to his right, he was not holding onto the handrail to his right. He felt momentum cause his body to shift right. As he began to move to the right, he tried to grasp the handrail but missed. As momentum shifted his weight right, he stepped out of the golf cart to maintain his balance but didn't do so and did an "army roll", rolling on to his right shoulder on the road. After taking a tumble, D.E. rose from his hands and knees to a ¾ standing position. There, before he was standing up fully, he saw headlights coming right at him. He instinctively covered his head. A moving vehicle struck him on his right side. He did not lose consciousness and, no doubt with adrenaline flowing, when he heard voices by the curb he ran towards the voices, specifically those of his friends.

32. D.E. minimized his injuries at the scene, thinking he might avoid costly medical services in Arizona and get cheaper treatment in Canada. He said his right leg felt like spaghetti and he confided to N.L. that he felt his right knee was "done".

33. Ultimately, he went to the hospital emergency clinic from the scene, was examined and underwent x-rays and a CT scan and was discharged. At the hospital he gave a brief oral statement to Detective Weiler, which Detective Weiler wrote out and D.E. signed. The statement read: *"was in a golf cart heading west and was making a left turn. As the*

*golf cart turned, I fell from the golf cart and onto the roadway. Saw car coming and tucked head. Pain in the right knee and lower back."*

34. D.E. denied in cross-examination that he voluntarily stepped out of the golf cart when it was stopped, did not fall to the ground and was walking across the roadway when struck. He denies he said words to the effect to the golf cart driver "you are going too slow". He denied jumping out of the golf cart before it reached the crosswalk on the east side of the intersection.

**THE EVIDENCE OF A.S.**

35. I found A.S. to be a credible and truthful witness. He is currently 32 years of age and runs a clothing store in Victoria, B.C. He is no longer involved in professional soccer. D.E., N.L. and A.S. are very good friends. They sometimes did vacation trips together if their off seasons lined up. In 2016 A.S. was back in Canada, on a winter break from playing professional soccer. The friends organized a trip to Scottsdale as a "bachelor trip" and golf holiday.

36. A.S. flew into Phoenix from Victoria. The evidence is conflicting as to what order they arrived on their flights. In any event, they had a pint or two of beer at the airport, went directly to their hotel and proceeded to go to several bars and a restaurant for dinner in Old Town, a.k.a. the Entertainment District of Scottsdale. They had several drinks together over several hours. They drank about the same amount. A.S. estimates he had 6-7 drinks before the Accident. He thought all three friends were intoxicated but in control.

37. A.S. does not recall giving a statement to the Scottsdale police. Following the Accident, he and N.L. went to see D.E. in the hospital. D.E. was in a lot of pain; his right knee was swollen.

38. A.S. watched Exhibit 2, the bodycam video, during his testimony. He identified himself as the person wearing a cream-colored shirt; N.L. was wearing a black t-shirt.

39. After dinner, not much before 11:45pm, the time of the Accident according to Exhibit 1, the three friends got in a golf cart to go to a bar outside of Old Town but nearby. He does not recall the name of the bar. He had never been to Scottsdale before. He got onto the second bench row behind the driver on the left side. D.E. was to his right; N.L. was on the front seat passenger side. He does not remember any seat belts in the golf cart.

40. At some point, the golf cart turned left from one street to another. He does not recall if the golf cart came to a full stop before its left turn. Neither he, D.E. nor N.L. said to the driver of the golf cart "you are going too slow", followed by D.E. stepping out of the golf cart. He does not recall how fast the golf cart was going.

41. A.S. did not see D.E. exit, fall out or step out of the golf cart. He denies sitting in a third-row seat facing backwards. He only recalls two rows of seats. However, the bodycam video shows the golf cart with a third seat at the back of the golf cart. Nothing turns on where A.S. was siting because he did not see D.E. exit the golf cart nor did he see the impact as D.E. was hit. He could not identify the point of impact. However, with reluctance, he did mark on Exhibit 6, a Google aerial photograph of the intersection where he believes D.E. was in the intersection when he exited the golf cart and where

he was after the collision. For reasons I will explain later, I attached little weight to that evidence.

42. A.S. does not remember holding onto a handrail as the golf cart turned. He became aware that D.E. was no longer in the golf cart when he heard D.E. yelling. He then saw D.E. lying in the road. He turned his attention to the driver of the golf cart so that she would pull over. She did.

**THE EVIDENCE OF N.L.**

43. N.L. is the most important eyewitness because he actually saw D.E. tumble out of the golf cart and he saw the hit and run driver strike him and then flee the scene.

44. N.L. flew from Edmonton to Phoenix to meet his good friends D.E. and A.S. for a belated “bachelor party” and golf trip. They had no specific plans for the rest of the day but intended to “go out on the town”, see where the locals went, go from pub to pub. They consumed 3-4 drinks before dinner and drank more with dinner. They decided to try somewhere different and asked a pedi-cab driver if she could take them to another bar in a different part of Scottsdale.

45. It turned out, the route to the other establishment to which their driver was taking them, involved driving on a busy two-way street which I would call an arterial road. The golf cart was headed westbound and then entered a left turning lane to go south. N.L. was in the front passenger seat next to the driver. D.E. was right behind him in the second row. As the golf cart turned left it appeared that momentum caused D.E. to tumble out of the

right side of the golf cart and fall. He described seeing D.E. initially step out of the golf cart and start to move forward to keep up with the moving golf cart but he then tumbled and rolled onto the roadway as the golf cart proceeded with its turn through the intersection. N.L. said it was like watching a "blooper video". N.L. looked back, saw D.E. getting up from his tumble and roll, then he was struck by a black SUV when he was about ¾ full standing, squatting somewhat. He was struck on his right side and in a rag doll effect he went over the hood of the vehicle and rolled off. His watch flew off and his cell phone broke. The noise of the impact was like a giant thud. D.E. hobbled and limped over to us. He moved to the south side of the intersection. As D.E. came towards them, N.L. saw the brake lights of the black SUV and then it took off very quickly.

46. N.L. recalls speaking to a police officer at the scene but does not recall being asked to write and sign a statement. In viewing Exhibit 2, the bodycam video, he recalls D.E. saying "my knee is a bit sore" and that he wanted to go home. He also said "something's wrong…my knee is done."

47. N.L. testified that it would be very difficult to pinpoint the point of impact, other than to say D.E. seemed to be in the crosswalk area in the first lane. Nor could N.L. say with certainty what lane the black SUV was in. One can understand that six years after an event which occurred in a fleeting moment one might not recall with any precision the location of a point of impact. That is even more likely when there was no contemporaneous statement nor any effort by the authorities to identify a point of impact.

48. On the bodycam, an individual confirmed that he was in a vehicle going eastbound right next to the black SUV. When the light turned green, the SUV driver "punched it", hit the pedestrian and "punched it again". The speaker is most likely either R.M.P or J.G.S.

**THE EVIDENCE OF C.L.N., FORMERLY C.L.B., THE DRIVER OF THE GOLF CART**

49. In December 2016, C.L.N. drove a golf cart, aka pedi-cab, for a commercial operation, Quicksilver Transportation, to supplement her income as she became an elementary teacher, a K-6 specialized teacher. She was 28 years of age and had only been driving a golf cart for hire for approximately four months. She drove a golf cart for Quicksilver Transportation on a part-time basis for about one year. The golf carts were only allowed to drive on the streets of Scottsdale within a certain radius of Old Town in the Entertainment District.

50. C.L.N. recalls some of the facts related to the Accident. Her evidence is consistent with some of evidence of D.E., A.S. and N.L. but is starkly inconsistent in some material respects. I would not say her testimony was deliberately untruthful but in some material respects her testimony was illogical and not reliable.

51. She admits that she did not see D.E. actually exit the golf cart or in what manner he came to be out of the golf cart and in the intersection of East Indian School Road and North Marshall Way, nor did she see the black SUV actually strike D.E., yet reading the statement that she gave to Officer Weiler following the Accident, one might think she did. The statement states that she was turning left on a green light at about 10mph to go south on North Marshall Way from going West on East Indian School Road when

her “passenger jumped out [of the golf cart] and was in the street where he was hit by a black SUV, maybe an Escalade.” She claims she was about 50 feet from the collision and was drawn to it by the “black Escalade near the victim”.

52. She signed off on a statement which says in part “my passenger was walking across Marshall Street when he was hit by a black SUV.”

53. She also claims that before she turned left on North Marshall Way and when she was in the left land of East Indian School Road, turn facing westbound, one of her passengers said “she was not going fast enough” and that they were going to jump out of the golf cart. Although she admits she never saw D.E. or anyone else exit the golf cart, she believes D.E. actually jumped out before she even commenced her left-hand turn. She claims she said words to the effect that “no one gets out of my pedi-cab”. D.E., A.S. and N.L. deny vehemently that one of them made the remarks C.L.N. suggests were made to her. I find it utterly illogical that anyone, even after drinking alcohol, would jump out in the middle of an intersection of arterial roads in a city they had never been in before and on their way to a bar of which only C.L.N. as the driver knew the route and ultimate destination. It seems C.L.N. has engaged in a reconstruction of events to perhaps to avoid personal and corporate blame.

54. I accept the evidence of D.E., A.S. and N.L. that the conversation as described by C.L.N., which is alleged to have occurred in the golf cart, never took place. Moreover, when I consider C.L.N.’s evidence in contrast to the evidence of the other lay witnesses, I view the reliability of her evidence with considerable doubt. For example, the witness with the best vantage point in the front passenger seat, N.L. actually saw D.E. tumble

and roll out of the golf cart as it was turning left and actually saw D.E. get hit by the black SUV. In testimony at the hearing C.L.N. admitted, contrary to what is suggested in her signed police statement, that she did not see her passenger jump out of the golf cart nor did she see D.E. get hit by the black SUV. C.L.N. states that her passenger had stepped out of the golf cart while it was stationary in the left turn lane before she actually started her left turn. That evidence is at odds with the testimony of D.E., A.S. and N.L. One is left to wonder why she turned left at all if one of her passengers was in the travelled portion of the road. But even more peculiar is her evidence that the black SUV went forward eastbound in front of the golf cart and struck her passenger after she had made her turn. Other evidence indicates that the traffic lights for eastbound and westbound traffic would be green both ways. So C.L.N. places the SUV passing through the intersection before she starts to cross the eastbound lanes. Such a reconstruction makes little sense. The intersection is quite wide accommodating two turning lanes for eastbound and westbound traffic. According to the witnesses in the golf cart going eastbound in the inside lane, the driver of the SUV in the eastbound curb lane accelerated quickly into the intersection when the light changed to green. If the SUV travelling at speed crossed in front of C.L.N.'s golf cart, it would have been well past the intersection before any collision occurred even if it moved from the curb lane to the inside lane. I agree with counsel for the Claimant that C.L.N.'s testimony is implausible. Her evidence that the SUV passed in front of her doesn't square with her evidence that she was looking southbound as she made her turn, and then looked back towards the intersection she had passed through because one of her passengers was shouting and she heard someone say, "he jumped out". Her written statement given to Officer Weiler,

after she spoke to her boss, suggests she saw the passenger in the road and a black SUV hitting him. But under oath, she denied she actually saw the collision. Her story that the SUV went into the intersection eastbound before she turned is inconsistent with her testimony that she had essentially completed her turn where she was alerted to the SUV hitting D.E. behind her. The SUV would have been long gone past the intersection if it proceeded at speed before the golf cart entered its turn.

55. I accept the evidence of the other witnesses to the effect C.L.N. made her left turn before the SUV entered the intersection and struck D.E. as he was getting up from his tumble out of the golf cart.

56. The bodycam video, Exhibit 2, shows that D.E., his friends and likely the witness R.M.P. and J.G.S. or one of them, were collected together on the southeast corner of the intersection in what I would call a small plaza. This makes sense as it is apparent that D.E. must have moved from a point in or near the eastbound crosswalk to the nearest point of safety. He is seen sitting on a concrete rise obviously in considerable distress. Officer Weiler is seen speaking to him and the witnesses. C.L.N. is not seen in the video as perhaps she left to discuss matters with her boss. She identified a golf cart at the curb in the video as the one she was driving or another company golf cart driven by a fellow driver. At the end of her examination in chief C.L.N. gave evidence that her boss was angry that a passenger jumped out of one of their golf carts in traffic causing him to be worried that the company would get in trouble. She admits she was angry and stressed that she had to leave her shift early. Perhaps her story of what occurred, which I do not accept, is rooted in anger, worry about liability and lack of apparent concern for an

injured passenger. However, no one has argued that she was liable in the operation of her commercial conveyance.

## THE EVIDENCE OF THE EXPERT WITNESSES ON ACCIDENT RECONSTRUCTION AND ALCOHOL IMPAIRMENT

### Accident Reconstruction

### Craig Luker, P. Eng., Senior Forsenic Engineer

57. Craig Luker prepared a Crash Reconstruction Report dated July 28, 2022, for the Claimant concerning the Accident. His report was marked as Exhibit 7 and he testified via Zoom. I accepted him as a professional engineer and accident reconstruction expert entitled to give opinion evidence in his field. There was no challenge to the admissibility of his expert report. Mr. Luker is registered as a professional engineer in both British Columbia and Arizona. Mr. Luker's oral testimony was delivered primarily under cross-examination. Mr. Luker was provided with 10 factual assumptions. One erroneous assumption was that the Quicksilver golf cart was not equipped with seatbelts but according to the testimony it was equipped with lap belts. However, I would point out that there was no evidence if they were in working order. Another assumption he was given was that R.M.P., the driver of the eastbound golf cart stopped on East Indian School Road at its intersection with North Marshall Way was first in line in the left through lane, the inside lane, and next to his golf cart to his right, also stopped first in line in the curb lane was a black SUV. When the traffic light turned green for the eastbound traffic, at the intersection, R.M.P., seeing a pedestrian crossing the street north to south in the intersection, did not proceed. In fact both R.M.P. and his passenger J.G.S. observed a pedestrian in the far crosswalk on the other side of the intersection

with the result that R.M.P. did not proceed on the green light but waited for the pedestrian to clear the eastbound lanes. However, the black SUV accelerated into the intersection and struck the pedestrian D.E. while he was in the crosswalk in front of the eastbound curb lane.

58. In addition to relying on both Exhibit 1 and 2, Mr. Luker relied upon the traffic lighting sequence for the intersection as provided by the city of Scottsdale.

59. I digress here to say that on the engineering analysis provided by Mr. Luker supports his opinion that the driver of the SUV, even if he or she did not notice the pedestrian until entering the intersection, had enough time and distance available to stop before hitting the Claimant. Cross-examination did not damage that conclusion. The reality is that the Claimant was there to be seen before the SUV driver proceeded. R.M.P. saw the pedestrian and conducted himself appropriately by not proceeding but yielding to the pedestrian in the intersection on the travelled part of the road whether in the crosswalk or not. R.M.P. behaved as a reasonable driver would: one avoids risking injury to a pedestrian if able to do so and the motorists were obviously able to do. Either the driver of the SUV was not keeping a proper lookout for hazards apparent within the intersection or he went ahead in callous disregard of the health of others in acting upon an apparent right of way. Given that the driver fled the scene in cold disregard of the plight of the pedestrian who was struck, I am inclined to think the actions of the SUV driver were callous and morally reprehensible.

60. I see no point in analyzing the Respondent's many factual criticisms of Mr. Luker's analysis, some of which were put to Mr. Luker and some were not. Mr. Luker did

explain, in answer to my questioning, how centrifugal force can be created by the momentum of a turning or stopping vehicle sufficient to cause a passenger to shift position and lose one's balance. He gave an example of bus passengers falling forward out of their seats when a bus brakes unexpectedly. He also agreed that the carts were equipped with raised handrails that may assist an occupant from sliding due to centrifugal force and momentum. I do not doubt there may be some conflict in the testimony of the witnesses and Mr. Luker's analysis of the traffic light sequencing but it really does not matter. I accept that both the driver of the black SUV and C.L.N. in the golf cart entered the intersection on green lights but an alert and prudent driver, R.M.P., who also has a green light, yielded to a pedestrian clearly visible within the intersection, whether or not in violation of a traffic signal. A callous indifferent motorist did not.

**Alcohol Impairment**

**The Evidence of J.T. Audrey Jakus, Forensic Toxicologist**

61. Ms. Jakus was called by the Respondent as an expert forensic toxicologist. I accepted Ms. Jakus as an expert entitled to give opinion evidence concerning blood alcohol content ("BAC") testing as well as signs and symptoms of impairment and intoxication caused by alcohol.

62. Ms. Jakus in responding to questions both in chief and in cross-examination gave a lot of scientific and medically related information on various testing methods, including blood and urine analysis, and the effort of alcohol consumption upon different categories of drinkers, social, moderate and experienced. It is not necessary for me to

repeat it. I will focus on her conclusions which, in the main, were not impugned on cross-examination.

63. Based upon her analysis of hospital records, including a blood sample take at 12:25am, December 9, 2016, D.E. had a BAC of 238mg/100ml. That is within less than one hour after the Accident. His BAC at the time of the Accident would depend, in part, on when he had his last drink. His minimum BAC was 213-221 mg/100ml, well above any applicable legal limit to drive, and enough to show some signs and some symptoms of impairment but on somewhat of a sliding scale whether he could be considered a social, moderate or experienced (heavy) drinker. Based on his own testimony, I believe that D.E. was at least a moderate drinker and more likely an experienced drinker. According to Ms. Jakus at a BAC of 213-221mg/100ml he would likely be experiencing mild intoxication with outward indicina discernable by a police officer or medical doctor. I note that there is nothing in the police file nor the hospital records detailing signs of intoxication. Officer Weiler admits he was not investigating impaired driving but rather a hit and run; yet nonetheless, if D.E. was obviously drunk, I suspect Officer Weiler would have made a note of it. My impression of D.E. and his friends as observed on Exhibit 2 is that none of them showed obvious signs of intoxication. They were speaking in normal voices and acting rationally. The most I could say was that D.E. appeared distressed. I do not put any additional weight on the observations of Ms. Jakus of D.E.'s conduct as shown on Exhibit 2 because she is a forensic toxicologist. As she notes, D.E. was only visible for one to two minutes seated on a sidewalk area. Ms. Jakus admits his speech was audible, clear and not slurred. He was asked for and located his identification without any apparent difficulty. Ms. Jakus was unable to assess D.E.'s

body movements such as standing, turning, or walking. She concluded that the video suggests at the very least mild intoxication by alcohol, if not more, but it is not clear upon what evidence she based that conclusion. She did mention D.E.'s repeating of words at the start of a couple of sentences and his comment he would rather go home to sleep rather than be checked over. But those minor signs are equally consistent with being in distress after trauma. I would not put any weight on a conclusion based on minimal observation and lacking in any scientific explanation. I have no doubt that D.E. was likely feeling somewhat intoxicated; he called it "tipsy", but I do not accept that he was exhibiting signs of impairment. Whether or not, intoxication contributed to his injuries is another matter.

## IV. CONCLUSIONS / FINDINGS OF FACT

64. It has been said often by courts deciding liability issues in accident cases that the outcome is determined by the unique facts of each and every case. Although much evidence, lay and expert, was put before me about how the Accident likely happened and counsel focused much of their submissions on accident reconstruction it is my view that it is unnecessary for me to decide the precise chain of events which led up to the black SUV striking and injuring the Claimant D.E. This is so because I am only asked to decide: (i) whether the hit and run driver was negligent and caused injury to D.E.; ii) whether D.E. was contributory negligent; and, iii) apportionment of fault. It is not my task to find or not find C.L.N., the driver of the golf cart, was negligent. Therefore, consideration of the precise driving conduct of C.L.N. is not frankly necessary to reach my conclusions on the issues that I need to decide. Much of the work of counsel in

dealing with the evidence and making submissions was devoted to establishing a theory of the precise factual matrix of the Accident; the location and movement of vehicles and D.E. when he went from golf cart passenger to pedestrian and then when he was struck; time, distance and speed of the vehicles and D.E.; and an estimate of point of impact, none of which was determined by the Scottsdale Police Department with any precision during their investigation. The police investigation did not involve a traffic analyst's report with measurements and photographs, presumably because the focus was upon trying to identify and locate the hit and run driver. None of the witnesses was confident in estimating the point of impact. Like most people, counsel are creatures of habit. It is customary for counsel, out of abundance of caution, to focus on detailed reconstruction of an accident. This case was no exception; however, the limited scope of my decision-making concerning negligence of the hit and run driver and contributory negligence of the Claimant, limits the need for me to make precise findings of the concatenation of events that resulted in the Accident. I am confident in finding the necessary facts and drawing the necessary inferences to determine liability and apportionment.

65. I am mandated by the UMP provisions, specifically s.148.2(6)(b) of the Regulation to determine liability under Arizona law. To establish foreign law counsel put in evidence as Exhibit 10 a legal opinion in letter form dated January 11, 2023, authored by a lawyer and retired Chief Justice of the Arizona Supreme Court. After counsel agreed upon certain redactions to the opinion letter setting out Arizona law on negligence, contributory negligence and comparative fault the letter was entered as an exhibit without the necessity of the author, Stanley Feldman, being called as a witness. For the

record, I was satisfied that Mr. Feldman had the qualifications and expertise in the area of Arizona tort law upon which his opinion is based.

## A. LIABILITY OF THE HIT AND RUN DRIVER

66. Counsel appear to agree that, with one exception, the applicable principles of negligence, contributory negligence and allocation or apportionment of fault, in the state of Arizona and the province of British Columbia, are strikingly similar. Respondent's counsel submits that Arizona law as in British Columbia, requires the Claimant to prove, on a balance of probabilities, that the driver of the black SUV was negligent and that the Respondent must prove, on a balance of probabilities that the Claimant was contributorily negligent. Mr. Feldman has set out Arizona law by referencing Arizona statue law, the Arizona state Constitution, Arizona Rules of Evidence and of Civil Procedure, decisional law and standard jury instructions. In his letter dated January 11, 2023, Mr. Feldman wrote: … "Under Arizona law: … Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. Negligence is the failure to act as a reasonably careful person would act under the circumstances…Negligence causes injury, if it helped produce the injury, and if the injury would not have happened without negligence. There may be more than one cause of an injury."

That summary of Arizona law is in essence the "but for" test in tort law as established by the Supreme Court of Canada in cases such as *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 17 and *Clements v. Clements*, 2012 S.C.C. 1950 at paras 8-9.

67. The one unique feature in Arizona law that has no counterpart in British Columbia law concerns contributory negligence. Not only must a jury [or trier of fact] decide if a

plaintiff was at fault, under Arizona law the jury must also decide whether the fault proved should reduce the plaintiff's full damages. British Columbia law on apportionment does not allow a trier of fact to disregard a factual finding of contributory negligence and to decide that the plaintiff's full damages will not be reduced by the percentage of blame attributed to the plaintiff.

68. Turning to the question of the negligence of the hit and run driver, I have no hesitation in determining that the unidentified motorist utterly failed, in the circumstances, to act as a reasonably careful person would act. The circumstances of the Accident loudly and clearly establish what a reasonably careful motorist would do in seeing a person in the middle of an intersection even if one has a green light. The witness R.M.P. is that reasonably careful motorist; he saw what was there to be seen, a man, D.E., a pedestrian in the intersection. Even though R.M.P. had a green light he waited for the pedestrian to finish crossing the road. The witness, J.G.S., a passenger in R.M.P.'s golf cart, supports R.M.P.'s statement. J.G.S. wrote:

> "[A] man was walking across Indian School Rd. We were stopped by a traffic light heading east. The light changed. The car next to us hit the gas hard and hit the pedestrian and drove away."

Whether D.E. was walking, stumbling, or rolling in or outside the crosswalk just before he was hit does not matter to my assessment of the liability of the driver of the black SUV.

69. D.E. was a pedestrian there to be seen as a potential hazard by a motorist entering the intersection from the west heading eastbound. There was no evidence there was anything obstructing a clear view of D.E. in the intersection. A reasonable, careful

motorist either would not have proceeded into the intersection at all, as R.M.P. chose to do, or would have proceeded slowly into the intersection allowing the pedestrian the choice to clear the intersection or to let the pedestrian stop at a place of relative safety within the intersection such as the raised median just east of the crosswalk and south of the right turn lane for westbound traffic on East Indian School Road. The witness A.S., somewhat reluctantly, marked the Google aerial photograph of the intersection, Exhibit 6, approximately where he saw D.E. before and after the collision. A.S. put him close to the east crosswalk and within the intersection. Since A.S. testified by Zoom, a white cursor was used to identify locations. I have some doubt about the reliability of A.S.'s "marking" of Exhibit 6 given the passage of more than six years and the fact that A.S. saw neither D.E. exit the golf cart nor did he see D.E. when he was hit. N.L., who actually saw D.E. exit the golf cart (like a "blooper video"), saw D.E. tumble and roll on the roadway and then witnessed the collision, did not mark any Google aerial photograph exhibits attempting to show D.E.'s locations in the intersection when he came out of the golf cart nor when he was hit. I put little weight on A.S.'s markings on the Exhibit.

70. I find it an unnecessary exercise to delve into the factual thicket of the timing of the light sequence as the Accident unfolded. Counsel disagree on a reconstruction of the unfolding of events in relation to the traffic light sequencing. I am prepared to accept that C.L.N. proceeded to make her left turn while having a green light. I do not for reasons previously stated accept her evidence that the SUV proceeded going eastbound into the intersection passing in front of her. Her evidence is illogical and implausible on that point. Mr. Luker has an explanation of the light sequencing that may be plausible

and explains how both the golf cart and the eastbound black SUV could have proceeded on a green light. But I am not going to tie myself in knots in theorizing about the cycling of the traffic lights.

71. In considering Mr. Luker's conclusions, one does not need to be an engineer to come to similar conclusions as he did that: i) D.E. was visible in the intersection for a substantial period of time and that is consistent with the witness R.M.P. observing D.E. in the intersection [at or near the east crosswalk] and deciding not to proceed on a green light, and; ii) the driver of the black SUV could have avoided the collision by choosing not to accelerate into the intersection but could have waited for D.E. to clear his path. I also accept, although it is not necessary to my conclusions of negligence on the part of the SUV driver, that even if the driver of the SUV did not notice D.E. until he entered the intersection, which in my view he should have, he had enough time and distance available to stop before hitting D.E. Mr. Luker's expert opinion supports that as a reasonable inference.

72. I conclude this part of my award by saying, not only do I find the driver of the black SUV negligent and that his or her negligence caused D.E. injury, I find the unidentified motorist's conduct to be callous and reprehensible in being grossly indifferent to D.E.'s presence and in fleeing the scene after causing injury to another person.

## B. CONTRIBUTORY NEGLIGENCE OF THE CLAIMANT

73. The Respondent argues that the Claimant was entirely the author of his own misfortune or his failure to take reasonable care for his own safety was due to a number of factors,

including intoxication, failure to wear a seatbelt, failure to use the handrail in the golf cart when the golf cart was turning left which he should have anticipated and failure, once out of the golf cart, to go to a place of relative safety when he ought to have appreciated a moving vehicle entering the intersection, heading eastbound toward him. The Respondent accepts that it has the onus, on a balance of probabilities, to prove the Claimant was entirely or contributorily negligent and his negligence caused his injury. Other than the above unique feature of Arizona law dealing with a discretion whether a plaintiff's fault should reduce full damages, it seems to me there is no significant difference between Arizona law and British Columbia law when it comes to contributory negligence and apportionment of fault.

74. I will first deal with the argument that the Claimant could have avoided grief altogether by having the good sense to immediately go to the nearby meridian, more like a raised curb, to the left of the right turning lane from which C.L.N. make her left turn once he was out of the cart and in the roadway. Counsel argues D.E. should have had the presence of mind to anticipate danger once out of the golf cart and had he done so the Accident would have been avoided. There are a number of faults with this theory. First, Mr. Luker testified that the median or meridian was not a "refuge island" intended for the safety of pedestrians, including those crossing the street in a wheelchair. Such a meridian or median would have ramps for those with mobility issues and would be one and one half to two meters wide to accommodate pedestrians who may have made it only half-way across the street. The narrow meridian in question, according to Mr. Luker, was intended to separate the lanes of traffic. In addition, I accept the evidence of D.E. to the effect that his exit out the right side of the golf cart was unexpected

resulting in a tumble and roll as he lost his balance. He just had enough wits about him to try to stand when the black SUV was upon him. The Respondent presented no objective evidence that he had the time and space to remove himself from harm's way. Lastly the Respondent's argument harkens back to a bygone era in the law of negligence and causation. The argument is one of "last clear chance" which creates an all-or-nothing approach to contributory negligence. As Mr. Feldman summarizes, Arizona law requires the fact finder to allocate the relative degree of fault of all parties found to be at fault and to set the relative degrees of fault adding up to 100%.

75. Apportionment, according to relative blameworthiness, has replaced "last clear chance". The British Columbia Court of Appeal in confirming the demise of "last clear chance" noted that relative or comparative fault requires the courts to view a multiple fault situation as a "web" rather than a "chain" of events and actions. See *Enviro West v. Copper Mountain Mining* (2012), 317 B.C.A.C. 23 at para. 46. I therefore reject the argument that D.E. was the author of his own misfortune and was contributory negligent in failing to go to some place of safety in the intersection to avoid a collision.

76. I also reject the argument that D.E. was negligent for failing to wear an available lap belt, which it is argued would have been effective in preventing him from exiting the golf cart. The Respondent has not tendered any cogent evidence to prove a seatbelt defence. It seems Arizona law leaves the question to the sole discretion of the jury to determine whether a defendant has proven whether a plaintiff was at fault for not wearing a seatbelt and, under all the circumstances of the case, whether such fault should reduce the plaintiff's full damages.

77. Accordingly, as the trier of fact, I must determine, in exercising my discretion and using my "common sense", whether the Respondent has met its onus that D.E. was negligent in not wearing an available and functioning seatbelt which would have prevented or lessened his injuries. In a case such as this involving rather anomalous vehicles driving on arterial streets, I am reluctant to make any assumptions about the safety features and injury prevention systems of a vehicle designed to be operated on golf courses or in low traffic zones. While I might be willing to draw certain inferences about the safety features (including seatbelts) and operational function of vehicles intended to be driven on public highways, I am not willing to draw any inferences about seatbelts in a golf cart. In these circumstances, the onus is upon the Respondent to prove a functioning seatbelt was available to D.E. that would have prevented his injuries. Neither D.E. nor A.S. nor N.L. were aware of seatbelts for occupants of the golf cart. No photographic or documentary evidence clearly shows available seatbelts. C.L.N. testified that there were seatbelts in the golf cart, and, as a matter of custom, she told the occupants that Quicksilver advises occupants to wear seatbelts but allows them to ride without their need to use them. I do accept that the golf carts were equipped with seatbelts, but I am not prepared to accept they were visible to the occupants in question and I am not prepared to find that C.L.N. told them about a company policy recommending their use. If that truly were the invariable practice of the company, then it would take only a few seconds to show the customers the location of the belts and show a lap belt fastened. I reject the seatbelt defence has been proven; there is no convincing evidence there was an available and functioning seatbelt that D.E. should have used that would have

prevented his injuries. I will turn now to other aspect of possible contributory negligence including the effect of alcohol use.

78. I will now consider other aspects of the conduct of D.E. alleged by the Respondent to be causative factors showing that he failed to take reasonable care for his safety. Specifically, I must consider D.E.'s consumption of alcohol and whether his conduct in the golf cart prior to his exit constitutes a proximate cause of failure to take reasonable care considering the circumstances of the incident. It is not surprising that D.E. had at the time of the Accident a significantly elevated BAC as calculated by Ms. Jakus after the consumption of a consideration quality of alcohol over the better part of the day and evening. Nor is it surprising given his past drinking habits and apparent tolerance to the effects of alcohol that he did not show any obvious signs of intoxication at the scene of the Accident nor while examined in the hospital by medical personnel no doubt used to dealing with individuals who have consumed varying quantities of alcohol. Even though D.E. did not, assuming he was an experienced drinker, show signs of mild intoxication discernable to Officer Weiler or physicians at the hospital as predicted by Ms. Jakus, he knew what he had consumed in the way of several pints of beer and some wine before he embarked upon the trip in the golf cart. I am prepared to draw the inference that he was likely experiencing some less visible forms of intoxication including adverse effects on his judgment and decision making, coordination, complex reaction time, balance, perception of risk, an increase of self-confidence and a diminished appreciation of risk to personal safety. By his own admission, he was feeling "tipsy" which implies a feeling of unsteadiness and an adverse effect on balance.

79. Thus, I picture three young men on a holiday, after drinking significant quantities of alcohol and no doubt having harmless fun, wanting to continue their night on the town as midnight approached. They had never been to Scottsdale before or hired a motorized livery vehicle like a golf cart to drive on city streets. It seems none of them appreciated any increased risk to personal safety by riding in such a conveyance. They specifically asked that they be taken to a bar outside the immediate area of Old Town Scottsdale. Their driver obliged and off they went. D.E. knew he was not completely sober and he knew he was "tipsy". As the ride proceeded, D.E. realized the golf cart was on a main road about to turn left from a left turning lane. This was a new experience for D.E. and he acknowledged that being in a golf cart in urban traffic is more dangerous generally than being in a golf cart on a golf course. Nonetheless, as the golf cart moved forward in the turning lane and commenced its turn, D.E. had changed his direction of vision to looking to his right from looking forward and over the driver's shoulder to his left. The momentum of the turn, for which he had not prepared himself as he was looking to his right, caused his body to move to the right. He knew there was a handrail on the golf cart but as he was unprepared for the turn, he was not holding on to it. Upon realizing his body shift to the right he attempted to grab the handrail but missed it. I am left to conclude that a professional athlete would not in the usual course, lack the hand-eye coordination to grab a rather large handrail as shown in the photographic evidence unless his coordination and ability to react were affected by alcohol. It would seem D.E. was taken by surprise by the effect on him of the turn. He said on discovery "I remember thinking whoa, and having a little jerk and then we turned left." He also admitted on discovery not "really paying attention" to the golf cart turning left. He then remembers

stepping out of the golf cart but was unable to keep his balance and did an "army roll" on his right side. He admits he was unprepared for the turn. It is not clear for how long he may have been on his feet before his tumble and roll. He does not recall where in the intersection he was deposited on the road but says it was "in the middle of the intersection". Nor is it clear how far he may have rolled or if he moved some distance within the intersection before he was struck. He suggests that as he was getting to a standing position from rolling on the street, he saw the headlights of a vehicle coming at him, at which point he protected his head and then was struck. I would also add that N.L. was seated on the front bench of the golf cart and had no difficulty staying seated in the golf cart.

80. I therefore conclude that D.E.'s conduct in: i) failing to appreciate the need to be alert to the risk to his personal safety in the circumstances: ii) failing to pay attention to the movements of the golf cart while turning left on an arterial road; iii) knowing he was experiencing some unsteadiness from alcohol consumption, all in the context of a likely increase of self-confidence and a diminished appreciation of risk to personal safety by consuming significant amount of alcohol, constitutes negligence in failing to take reasonable care for his own safety. I find such negligence contributed to his injuries.

**APPORTIONMENT OF FAULT**

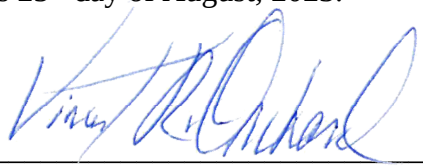
81. Under Arizona law it is left for the jury or trier of fact to determine the relative degrees of fault of those found at fault adding up to 100%. In this case I have found the hit and run driver of the black SUV negligent and D.E. contributorily negligent.

82. In determining relative fault, I have used as a commonsense guide legal principles concerning apportionment of fault in British Columbia. Appellate authority is clear that fault means blameworthiness not the degree to which each tortfeasor's fault has caused damage: *Cempel v. Harrison Hot Springs Hotel Ltd.*, (1997) 43 B.C.L.R. (3d) 219 (C.A.). I also note a useful summary of the relevant factors at play in determining degrees of fault in *Matkin v. Hogg*, 2015 BCSC 560 at paras. 65-67. One important factor in assessing the relative degrees of blameworthiness is the magnitude of departure from an expected standard of care. As I stated at the onset of this Award, the Accident and the harm it caused came out of a collision of two spheres of human behaviour. On the one hand, there is the world of three good friends on holiday "out on the town" for a belated bachelor's party and, on the other hand, there is what I would describe as the criminal conduct of a hit and run driver who I view to have been grossly negligent in proceeding into an intersection, striking a clearly visible pedestrian and then reprehensibly fleeing the scene. The magnitude of departure from the expected standard of care is clear on the facts when there is evidence of what a prudent and careful motorist decided to do, i.e., wait until the pedestrian had cleared the intersection and was no longer an obvious hazard one could avoid. However, I have also concluded on an analysis of the evidence that D.E.'s conduct as discussed was sufficiently blameworthy to support a finding of a degree of contributory negligence. I have concluded that a fair allocation of fault is 80% against the driver of the black SUV and 20% against the Claimant D.E.

83. If counsel wish to speak to the matter of costs at this stage I am willing to hear further submissions, or they may wish to defer such submissions until we conclude Phase 2,

entitlement to coverage, or after both phases 2 and 3, phase 3 being damages and deductible amounts, are concluded.

Dated at Burnaby, British Columbia this 25th day of August, 2023.



Vincent R.K. Orchard, K.C., C. Arb.
ARBITRATOR