COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS. SUPERIOR COURT

C.A. NO. 1772CV268

SARAH A. TANNER and TERRY A. TANNER, JR., individually, and a Parents And Next Friends of SHAUNA M. TANNER,

Plaintiffs

Vs.

PHYLLIS S. SHERWOOD,

Defendant

MEMORANDUM OF DECISION AND ORDER

ON

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This action arises from a motor vehicle accident that occurred on April 8, 2017 on Route 6 in Wellfleet, MA. A vehicle operated by the defendant collided with a vehicle operated by the plaintiff Sarah Tanner in which her daughter Shauna Tanner was a passenger. The defendant suffered from a seizure just prior to the accident. The defendant moves for summary judgment based upon the sudden medical emergency doctrine. For the following reasons, the defendant's motion is **ALLOWED**.

FACTUAL BACKGROUND

On April 8, 2017 the defendant Phyllis S. Sherwood was operating her motor vehicle westbound on Route 6 in Wellfleet, MA. Her friend June Hopf was her passenger, and the two were going antiquing for the day. Ms. Sherwood picked Ms. Hopf up from her home in Truro at approximately 10:30 a.m. and they headed west along Route 6.

As Ms. Sherwood drove she was engaged in conversation with her passenger. When Ms. Sherwood failed to respond to a comment, Ms. Hopf turned toward her driver to observe her unconscious in the driver's seat with the car still moving. The vehicle was accelerating and swerving. Ms. Sherwood was slumped forward with her head on her chest, tilting to the left, with her eyes closed. Ms. Hopf tried to arouse her friend by screaming her name and shaking her arm, but Ms. Sherwood did not respond. The passenger's efforts to gain control of the vehicle were unsuccessful, and the vehicle continued until the impact with the plaintiffs' vehicle.

Witness Jessica Larsen, following behind the defendant, saw the vehicle swerve into the eastbound travel lane and back, narrowly avoiding a black SUV. Ms. Larsen called 911 and attempted to use her vehicle to corral the defendant's vehicle to the side of the road. She observed the vehicle move to the side of the road and come to a complete stop. Ms. Larsen pulled in behind the vehicle, put her car in park, and removed her seatbelt. As she placed her hand on the door handle to exit her vehicle Ms. Larsen saw the defendant's vehicle start moving again at a high rate of speed. The defendant's vehicle was stopped for 10 – 20 seconds before it accelerated off down the road.

Ms. Larsen attempted to pursue the defendant's vehicle, which continued at a high rate of speed. She lost sight of the vehicle when it turned a corner. When she next saw the vehicle the collision with the plaintiffs' vehicle had already occurred.

The defendant did not have a practice of having regular physical examinations. She was in her usual state of health and only sought medical attention for emergencies, of which she had very few. On June 8, 2011 she was seen for a tick bite on her left temple with no other physical complaints. In January, 2009 she had a normal throat culture, and on November 2, 2007 she was seen for bronchitis with no other complaints. Ms. Sherwood had no other medical complaints for many years preceding the accident. She recalled a headache a few days before the accident that did not prompt her to seek medical attention and that resolved on its own by the next day.[1]

After the accident it was determined that Ms. Sherwood suffered a seizure due to an undiagnosed brain tumor known as a meningioma. Meningiomas become fairly sizeable tumors, are slow-growing, and often do not manifest overt clinical symptoms. The medical experts agree Ms. Sherwood suffered a medical emergency in the form of a seizure while operating her vehicle on April 8, 2017. It is possible, if not likely, this seizure was the first overt symptom of the Grade II meningioma in the defendant's brain.

June Hopf is the only person who observed Ms. Sherwood's condition inside the vehicle prior to and at the time of the collision. Jessica Larsen made observations of the path of travel of the Sherwood vehicle from inside her own vehicle, but she did not make any direct observations

[1] There is no medical expert opinion that suggests had Ms. Sherwood had an annual physical or other routine health maintenance the brain tumor would have been discovered prior to the accident. Both medical experts opine that the meningioma is frequently asymptomatic until a seizure. Without any symptoms there is no opinion or suggestion that Ms. Sherwood would have been referred for a brain MRI even if she had undergone a physical.

of Ms. Sherwood's state of consciousness, or any actions undertaken by Ms. Hopf to control the Sherwood vehicle.

STANDARD OF REVIEW

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56; Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

DECISION

The parties' medical experts agree that Ms. Sherwood suffered a medical emergency while driving her car on April 8, 2017. The plaintiffs contend Ms. Sherwood was negligent in the operation of her vehicle, and her negligence was the cause of damages to them. At the time of this accident, however, Ms. Sherwood was not an active, knowing participant in the operation of her vehicle. Due to the lack of consciousness that resulted from the undiagnosed brain tumor, the defendant was unable to exercise any degree of care. "Negligence, without qualification and in its ordinary sense, is the failure of a responsible person, either by omission or by action, to

exercise that degree of care, vigilance and forethought which, in the discharge of the duty then resting on (her) the person of ordinary caution and prudence ought to exercise under the particular circumstances." Altman v. Aronson, 231 Mass. 588, 591 (1919) The defendant in this case did not act at all, and her failure to act was beyond her control. "By the great weight of the authority a sudden and unforeseeable physical seizure rendering an operator unable to control (her) motor vehicle cannot be termed negligence." Carroll v. Bouley, 338 Mass. 625, 627 (1959)

The alleged stopping of the defendant's vehicle for 10 – 20 seconds does not permit an inference that Ms. Sherwood regained consciousness and control of her vehicle. "A permissible inference is one that is reasonable and possible; it need not be necessary or inescapable. Whether an inference is warranted or is impermissibly remote must be determined, not by hard and fast rules of law, but by experience and common sense." Commonwealth v. Roy, 464 Mass. 818, 824 (2013, citing Commonwealth v. Casale, 381 Mass. 167, 173 (1980) and Commonwealth v. Lao, 443 Mass. 770, 779 (2005), S.C. 450 Mass. 215 (2007) and 460 Mass. 12 (2011) The evidence and permissible inferences must be sufficient to bring minds of ordinary intelligence and sagacity to the persuasion of proof by a preponderance of the evidence. *See* Commonwealth v. Casale, 381 Mass. 167, 172 (1980) Jessica Larsen, the witness who saw the vehicle stop and then continue, had no view of Ms. Sherwood inside her vehicle. She can speak to the movement of the vehicle, but not to the condition of its occupants. A stop of the vehicle for 10 – 20 seconds does not permit a reasonable inference that Ms. Sherwood regained consciousness, recovered from her seizure, and became capable of controlling her vehicle for any period of time. The only direct evidence of the defendant's condition is the observations made by the passenger, June Hopf, who saw the defendant remain unconsciousness and unresponsive

through the accident. If the fact finder were to disbelief Ms. Hopf and disregard her testimony, we are left with no information as to what occurred within the vehicle.

"(I)nferences must be based on probabilities rather than possibilities and not the result of mere speculation and conjecture." Mullins v Pine Manor College, 389 Mass. 47, 56 (1983, citing Alholm v. Wareham, 371 Mass. 621, 627 (1976) While "(u)sually the question of negligence is one of fact for the jury (,). . . when no rational view of the evidence warrants a finding that the defendant was negligent" the issue may "be taken from the jury." Mullins v. Pine Manor College, 389 Mass. 47, 56 (1983),citing Luz v. Stop & Shop, Inc. of Peabody, 48 Mass. 198, 203-204 (1964); Beaver v. Costin, 352 Mass. 624, 626 (1967); Zezuski v. Jenny Mfg. Co., 363 Mass. 324, 327 (1973) There is no evidence from which a fact finder could find a probability that Ms. Sherwood regained control of her vehicle, and a possibility is insufficient to meet the plaintiffs' burden of proof. Id. @ p. 627 The medical experts agree that the sudden medical emergency occurred, with no prior symptoms to alert Ms. Sherwood to the presence of a brain tumor. However, neither has provided an admissible opinion regarding an ability to control the vehicle after the initial undisputed loss of consciousness and before the collision. The "opinion" on this issue, offered by plaintiffs' medical expert Dr. Coppa, is at best speculation, based upon the speculation of Jessica Larsen. In fact, in the portion of his report entitled **Medical Opinion**, Dr. Coppa poses unanswered questions regarding the movement of the vehicle leading up to the accident, and then surmises "that these series of events require some degree of control over the accelerator, brake and steering column." (Plaintiffs' Exhibit G) The only person in a position to answer the questions posed by Dr. Coppa regarding what went on inside the defendant's vehicle is June Hopf, and she saw a continuous loss of consciousness. There is no other source of information that does not involve speculation, conjecture and surmise. While the observations of

Ms. Hopf can be ignored, neither Dr. Coppa nor the fact finder can substitute a different explanation that is not supported by admissible evidence.

The plaintiffs have no reasonable expectation of proving an essential element of their case at trial. See Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991) There is no direct evidence or permissible inference to support a finding of negligence on the part of the defendant. Ms. Sherwood's sudden medical emergency is undisputed, and the plaintiffs will be unable to prove the defendant breached a duty of care owed to them after she suffered a seizure on April 8, 2017.

ORDER

The defendant Phyllis Sherwood suffered a sudden medical emergency that cannot be termed negligence. The plaintiffs will be unable at trial to establish a breach of duty by the defendant. The defendant's motion for summary judgment is **ALLOWED.**

Date: March 19, 2019

Susan E. Sullivan
Associate Justice of the Superior Court

A true copy, Attest: Scott W. Nickerson
Clerk