

NO. A120799

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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Craig A. Kellogg and  
Kristin B. Kellogg,

*Appellants,*

v.

Scott D. Finnegan,

*Respondent.*

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**REPLY BRIEF OF APPELLANTS  
CRAIG A. KELLOGG AND KRISTIN B. KELLOGG**

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## INTRODUCTION

This case has competing theories as to what caused Respondent Scott Finnegan to lose control of his vehicle and crash into Appellant Craig Kellogg's vehicle, causing him very serious and permanent injuries. These theories are **both** supported by facts and evidence. These disputed facts and evidence should properly be presented to a jury—the deciders of facts and weighers of evidence—and **not** decided by summary judgment.

If ever there was a case that merited a jury trial to weigh the evidence and decide who, if anyone, was responsible for causing Appellant Craig Kellogg's injuries, **it is a case with facts like this**. Why? Because summary judgment effectively and completely closes the door for an absolutely innocent party to ever recover any compensation for his injuries.

## ARGUMENT

- I. **Respondent wrongly claims that there is conclusive evidence that he suffered a seizure while driving, which is a necessary predicate to a complete defense under the doctrine of sudden incapacity.**

Respondent's defense, in significant part, relies on a conclusive factual finding that Respondent suffered a seizure while driving. Respondent insinuates that it is undisputed that he suffered a seizure. (Respondent's Br., p. 17) (stating that "Appellant's set forth two theories of liability that require the court to reject Respondent's treating doctor's diagnosis of a seizure causing the accident). Contrary to Respondent's suggestion, however, the record is full of evidence that disputes whether Respondent actually experienced a seizure while driving.

Respondent relies on four sources of evidence to conclude that he experienced a seizure: (1) Mr. Lewis' testimony; (2) EMT<sup>1</sup> Huerta's testimony; (3) EMT DeBaker's testimony; and (4) medical records. (Respondent's Br., pp. 2-5). None of the evidence, however, conclusively establishes that Respondent suffered a seizure. This evidence merely suggests the possibility of Respondent **maybe** having a seizure or something that looked like it **may** have been a seizure.

First, Mr. Lewis, Respondent's brother-in-law, testified that he arrived on the accident scene, by mere happenstance, and allegedly witnessed Respondent "convulsing, jerking" and observed that Respondent had "saliva, spit, foam or something around his mouth." (Respondent's Br., p. 2) (A.A. 112). Mr. Huerta and Mr. DeBaker, however, the two trained and experienced EMTs to arrive on-scene, did **not** observe Respondent jerking, nor did they observe spit, saliva, or foam on or around Respondent's mouth.

Likewise, the fact that one person, who happens to be married to Respondent's sister, thought Respondent was "convulsing, jerking" is not conclusive evidence of a seizure. In any event, Mr. Lewis, as a layperson, is unqualified to provide a conclusive medical diagnosis that Respondent indeed experienced a seizure. Rather, he can only testify about what he saw. Minn. R. Evid. 701. That kind of evidence is fair game for a jury to consider but not evidence upon which to grant a motion for summary judgment.

Second, EMT DeBaker's testimony actually does not conclusively support the affirmative defense that Respondent suffered a seizure. Respondent suggests EMT DeBaker's testimony that disorientation is a common post-seizure symptom along with his

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<sup>1</sup>EMT means "emergency medical technician."

testimony that Respondent seemed “out of it” leads to the definitive conclusion that Respondent had a seizure. (Respondent’s Br., p. 4) (A.A. 92) (R.A. 47-48). Yet, one would expect a motorist who fell asleep at the wheel and was subsequently involved in a motor-vehicle collision to be disoriented and “out of it.” Put differently, this evidence supports two reasonable conclusions—something jurors, not a judge, should resolve.

Third, EMT Huerta’s testimony and narrative report is not conclusive evidence that Respondent suffered a seizure. EMT Huerta noted in his narrative report that unidentified “witnesses” stated they “thought” Respondent had a seizure. (A.A. 89). Importantly, however, these mystery “witnesses” did not report observing symptoms consistent with a seizure. Rather, they provided a conclusory statement, as laypersons, that they thought it may have looked like Respondent had a seizure.

**More importantly**, EMT Huerta observed that Respondent had only one symptom consistent with a seizure—that Respondent “was not aware of what was going on.” (A.A. 87). But, being in a state of confusion is not unusual for a person who fell asleep while driving, only to be woken by a motor-vehicle collision.

And, Mr. Huerta also notes that “unless you’ve – we physically see someone having a seizure, it’s – it’s – we can’t really say they had a seizure. **It could be anything[, including] [m]edication.**” (A.A. 88-89).

Fourth, Respondent suggests that medical records conclusively establish that Respondent experienced a seizure. That is a misrepresentation along the same lines as the way the EMTs testimony is misrepresented. Respondent was admitted to Woodwinds Hospital following the motor-vehicle collision and did receive treatment in the event he had

suffered a seizure. (A.A. 141-143). This is because physicians at Woodwinds Hospital reviewed Mr. Huerta's narrative report, which indicated the **possibility** of seizure. (A.A. 138-39). It would have been bad medicine for physicians to ignore that possibility. In any event, Dr. Jacques, Respondent's treating neurologist, unmistakably writes that "[a]t this time the gentleman [referring to Respondent] presents with a possible seizure . . . ." (A.A. 145). In short, medical reports of Respondent's post-collision treatment do not conclusively establish that Respondent suffered a seizure. These records, at most, offer an alternative "possibility" as to what caused Scott Finnegan to lose control of his car.

Finally, it should be noted that Respondent alleges that he experienced two seizures subsequent to the collision, which is used, presumably, to suggest that it was more likely than not that he suffered a seizure while driving. (Respondent's Br., p. 6). The only evidence offered to support that Respondent experienced additional, subsequent, seizures, however, is his own mother's testimony.

Close scrutiny of Mrs. Finnegan's testimony, however, reveals that she did not observe the purported seizures from start-to-finish. (*See* R.A. 106). Instead, her testimony is based on what other people told her (which is inadmissible hearsay) and her limited observations of Respondent, namely that she saw his eyes roll back, which is not determinative of a seizure. (R.A. 106). And, interestingly, this was the only symptom she observed. She, for instance, never saw him shaking or convulsing or foaming from the mouth. (R.A. 106).

Moreover, Respondent has not provided medical documentation regarding these two alleged, subsequent, seizures. Even more importantly, Respondent has provided **no expert**

**medical affidavits containing opinions** concluding that Scott Finnegan suffered a seizure, which caused him to lose control of his vehicle.

**II. Respondent wrongly claims there is no evidence that Respondent merely fell asleep while driving.**

Respondent writes, “Appellants’ unsupported theories are that Respondent either fell asleep at the wheel . . . or that he lost consciousness and then control of his vehicle due to known physical symptoms of an undiagnosed medical condition.” (Respondent’s Br., p. 17). Respondent then states that “[s]ince **neither theory is based upon the evidence and mere allegations are insufficient to defeat summary judgment**, this court should affirm the district court’s decision.” (Respondent’s Br., p. 17).

As discussed in great length in Appellants’ principal brief, abundant evidence supports that Respondent merely fell asleep. (Appellants’ Br., pp. 18-19). To be brief, Appellants redirects this court to two key pieces of evidence.

**First, Scott Finnegan admitted to Mr. Huerta that he fell asleep.** (A.A. 88). This statement occurred at the scene immediately following the collision. This is not speculative evidence; it is Respondent’s own statement. It is substantive and highly persuasive evidence. Surely, jurors could use this evidence to conclude that Respondent meant what he said: he fell asleep while driving. It is simply wrong to assert that there is no evidence that Respondent fell asleep behind the wheel.

Second, at the scene Respondent admitted to EMTS that he had fallen asleep behind the wheel on another occasion, just three years before this collision. (A.A. 77). Scott

Finnegan was quite familiar with the whole experience of (a) falling asleep while driving (b) losing control and crashing and (c) what it felt like upon waking up after the crash.

Respondent, however, notes that in the prior instance he had been driving for about twelve (12) hours, but in this instance he had been on the road for a matter of minutes before falling asleep. (Respondent's Br., p. 5). The suggestion is that it is improbable that one could fall asleep shortly after driving. That insinuation, however, overlooks evidence that Respondent was sleep deprived during the weeks before the collision, was consuming prescription medications erratically and contrary to prescribed doses (medications that may cause **drowsiness**), and was in a state of confusion just before getting into his car. (A.A. 73; 98-99; 110; 112; 141). In short, jurors could easily conclude that Respondent fell asleep in a matter of minutes.

More importantly, for purposes of summary judgment, there is material and admissible evidence that counters and disputes Respondent's contentions.

**III. Applying the proper standard of review, Respondent does have the burden of conclusively establishing his affirmative defense of sudden, unforeseen medical incapacity; Respondent has merely offered an alternative theory as to what happened, which falls short of meeting the onerous burden of proof under the strict standard for summary judgment review.**

Respondent argues: "it is not Mr. Finnegan's burden to prove through conclusive evidence that he had a seizure or loss of consciousness." (Respondent's Br., p. 16). In support of this proposition, Respondent cites *Gardner v. Estate of Ostlie*, 2000 WL 254330 (Minn. Ct. App. March 7, 2000). **Significantly, however, *Gardner* went to trial, and thus was not disposed of at summary judgment.** As background, one disputed factual issue in

*Gaarder* was whether the at-fault motorist died from a heart attack before or after the collision.

Pertinent to this case, however, two jury instructions were at issue before the Minnesota Court of Appeals in *Gaarder*. The plaintiff requested the following instructions, both of which district court denied: (1) “a motorist who knows he is subject to heart attacks and to loss of consciousness is negligent if an accident occurs when he has a heart attack;” and (2) “once an inference of negligence arises, the defendant must establish to a certainty, through conclusive evidence, that another non-negligent cause, such as a heart attack, precipitated the accident.” *Id.* at \*4.

The Court of Appeals upheld the denial of the first instruction; the trial court denied the instruction because there was “no evidence that reasonably supports the proposition that Ostlie [the at-fault driver] knew he was currently subject to heart attacks and loss of consciousness.” *Id.* In this case, for reasons discussed at length in Appellants’ principal brief, evidence supports that it was foreseeable that Respondent’s then undiagnosed medical condition, i.e., cerebellar brain atrophy, would cause or contribute to him losing control of his vehicle, and that he should have been aware of this. (Appellants’ Br., pp. 21-23). The only reason he was not explicitly aware is that he purposefully ignored his symptoms and refused to seek a diagnosis. Should a court reward such cavalier conduct when it poses extreme danger to other motorists on our roadways?

Perhaps more importantly, *Gaarder* **did not** find that the first jury instruction was contrary to law; rather it was contrary to fact. *Gaarder*, 2000 WL 254330, at \*4.

Conversely, the court upheld the denial of the second instruction because it lacked support in Minnesota law. *Id.* The court, in summary fashion, wrote that “[a]lthough this appears to be the law in Wisconsin and Louisiana [referring to the second instruction], it is not the law in Minnesota.” *Id.* What the law in Minnesota is, the court does not reveal. And, since *Gaarder* is an unpublished opinion, its authority is greatly dampened.

Whatever questions *Gaarder* left unanswered with respect to the second instruction is ultimately not of great concern because Appellants are challenging the grant of summary judgment, not a jury instruction.<sup>2</sup> Perhaps Respondent would not have to establish “to a certainty, through conclusive evidence” that a seizure befell him to be entitled to the sudden incapacity defense **at trial**; however, the standard is different at summary judgment.<sup>3</sup> For a court to properly grant summary judgment **the evidence, when viewed most favorably to the non-movant, must support but one conclusion.** Absent a plaintiff’s failure to present sufficient evidence supporting its case, a defendant **must** produce **conclusive** evidence in support of its defense; otherwise there would be a materially disputed fact, making summary judgment inappropriate.

Importantly, and contrary to Respondent’s insinuation, the standard for the sudden incapacity defense is not well established in Minnesota. While Minnesota has had occasion

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<sup>2</sup> The instruction may have been contrary to law because the defendant’s high burden was triggered upon the plaintiff meeting an incredibly low burden of showing an “inference” of negligence. Of course, **at trial**, the plaintiff must prove its case—it must do more than show an “inference” of negligence. But, at summary judgment, where a plaintiff has introduced a *prima facie* case of negligence, like Appellants have, then the defendant, to be entitled to summary judgment, must do more than present **some** evidence in support of their defense.

<sup>3</sup> Although, allowing a defendant to avoid liability without conclusively establishing a defense would be a very peculiar and troubling standard, unless, of course, the plaintiff was unable to prove its own case.

to reflect on other types of sudden emergency defenses, case law on sudden **medical** emergencies is sparse. Indeed, Appellants and Respondent cite only *Echagdaly* and *Gaarder* to demonstrate that Minnesota appears to recognize the defense, which it should.

Appellants refer this court to pages 29-30 of its principal brief for analysis regarding how the sudden incapacity defense works in practice. Specifically, note the concept of burden shifting. If a plaintiff establishes a *prima facie* case of negligence, i.e., that a motorist caused a crash when he lost control of his vehicle after falling asleep at the wheel due to sleep deprivation, the onus then shifts to defendant to establish its theory with conclusive evidence to be granted summary judgment. Put another way, where a plaintiff has met its burden for summary judgment, a defendant should not be entitled to relief by merely showing **some** evidence of its defense. What that creates is a classic material factual/evidentiary dispute that is meant for a jury—**not** the court—to decide.

In short, Respondent's reliance on *Gaarder* is misplaced.

### Conclusion

For all the foregoing reasons, and those reasons set forth in its principal brief, Appellants respectfully request that the Minnesota Court of Appeals reverse District Court's grant of summary judgment.

Respectfully submitted,

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