

NO. A12-0799

State of Minnesota
In Court of Appeals

Craig A. Kellogg and Kristen B. Kellogg,

Appellants,

v.

Scott D. Finnegan,

Appellant.

**BRIEF AND APPENDIX OF RESPONDENT
SCOTT D. FINNEGAN**

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LEGAL ISSUES

- I. When a motorist unforeseeably has a seizure or loss of consciousness and loses control of his motor vehicle, does he owe a duty to other motorists?

The district court held in the negative.

Echagdaly v. Metropolitan Council Transit Operations, 1999 WL 508661 (Minn. Ct. App. July 20, 1999), *rev. denied* (Minn. Oct. 21, 1999).

- II. Did Appellants produce sufficient facts to create a genuine issue of material fact to defeat summary judgment?

The district court held in the negative.

STATEMENT OF CASE

This appeal follows the Honorable Mary E. Hannon's, Washington County District Court, decision granting summary judgment in favor of Respondent, Scott D. Finnegan.

Appellants commenced a negligence action against Scott Finnegan for injuries arising out of an accident that occurred on November 11, 2009. The accident occurred after Mr. Finnegan had a seizure and either blacked out or lost consciousness and then lost control of his vehicle. Mr. Finnegan's vehicle crossed the center median and struck a vehicle operated by Appellant Craig Kellogg.

Mr. Finnegan denied negligence on the grounds that the accident was unavoidable. (R.A. 1) Respondent suffered an unforeseeable and unpreventable seizure/loss of consciousness diagnosed by his doctors as a seizure that caused him to lose control of his vehicle. (A.A.141) Mr. Finnegan brought a motion for summary judgment on the grounds

that he owed no duty to anticipate this unforeseeable event and therefore could not be negligent as a matter of law.

The Honorable Mary E. Hannon granted the Respondent's motion for summary judgment. Judge Hannon concluded that the accident was unforeseeable and therefore, Mr. Finnegan did not owe Appellants a duty as a matter of law.

STATEMENT OF THE FACTS

The November 11, 2009 accident occurred on Valley Creek Road in the City of Woodbury very near the intersection of Valley Creek and Eagle Creek. Appellant Craig Kellogg was driving a Saturn L300 eastbound on Valley Creek in the left-hand lane. (R. A. 10) Mr. Kellogg saw a vehicle driven by Scott D. Finnegan "coming up the median and then down into the side of [his] vehicle." (R.A. 10). Following the impact, Appellant watched Mr. Finnegan's vehicle continue to travel in a straight path until it stopped next to a tree. (R.A. 10. 11). Mr. Kellogg saw Mr. Finnegan fall over toward the passenger's side after the impact and before the vehicle came to a rest. (R.A. 10, 11).

Coincidentally, Mr. Finnegan's brother-in-law, Scott Lewis, was traveling westbound on Valley Creek heading to the YMCA with his daughter. (R.A. 22). Mr. Lewis did not see Mr. Finnegan's vehicle impact Mr. Kellogg's vehicle, but he witnessed a red Saturn sport utility vehicle cross his path diagonally heading in a northeasterly direction. (A.A. 112). When the Saturn passed in front of him, he noticed that the driver was slumped-over. (A.A. 112). Mr. Lewis made a U-turn and headed back to the Saturn. Upon arriving, he witnessed the driver "convulsing, jerking" ...he had "saliva, spit, foam or something around his mouth". (A.A. 112). He tried to get in

the car when he realized the person was his brother-in-law. *Id.* Mr. Lewis did not even know another car was involved. (R.A.24). Mr. Lewis observed damage to the front window of Respondent's car that appeared to have come from something impacting the window from the outside. (A.A. 112).

When Mr. Lewis looked into the vehicle, Mr. Finnegan looked at him as though he did not know who Mr. Lewis was and he appeared confused. (A.A. 112). A person who was out jogging was the first person to arrive at Mr. Finnegan's car. *Id.* Mr. Lewis did not talk to the EMTs but he observed Mr. Finnegan responding to their questions. (R.A. 24). Mr. Finnegan's condition improved by the time the EMTs arrived. He was no longer unconscious and jerking, but he still appeared confused and shaken. (R.A. 24).

Mr. Finnegan does not remember the accident but he remembers the events leading up to his seizure. (A.A.73). Mr. Finnegan planned to drive from his mother's townhome in Woodbury to his sister, Laura Lewis' home in Stillwater. Mr. Finnegan left his mother's townhome located on Eagle Trace Lane. A minute or two after he started his trip, he stopped at the Holiday Station located at the intersection of Eagle Creek and Valley Creek to purchase some items. (A.A. 72). Mr. Finnegan purchased his items and got back into the car. *Id.* Now prepared to continue his trip, he tried to start his car without putting the clutch in. He described this as a "little mental error". (A.A. 73). He then put the clutch in, reversed his car and headed out of the gas station onto Eagle Creek. *Id.* Mr. Finnegan turned left out of the gas station and stopped at the stop sign at Valley Creek. He intended to turn right onto Valley Creek. (A.A. 72.). Respondent testified that he does not recall anything after that point in time. (A.A. 73). In a short distance

from the stop sign, Mr Finnegan lost consciousness due to a seizure, lost control of his car, and struck Appellant Craig Kellogg's vehicle.

When the EMTs arrived, the EMTs noted that "witnesses" advised the EMTs that it appeared that Mr. Finnegan had a seizure. (A.A. 139). Eric DeBaker, EMT, was primarily the driver for the ambulance crew on the day of the accident. Mr. DeBaker testified that he also applied basic life support, i.e. placing the C-Collar on and putting the patient on the backboard. (R.A. 39). Mr. DeBaker recalled Mr. Finnegan mumbling when he asked him questions. (39). Mr Finnegan seemed "out of it" and was leaning to the right. (A.A. 92). Mr. DeBaker testified that shaking, convulsing, disorientation and feeling very tired are common symptoms experienced by a person who had a seizure. (R.A. 47, 48).

Val Huerta, paramedic/EMT/firefighter, prepared the narrative portion of the ambulance report. (R.A. 68, 69). When he arrived on the scene there were a bunch of people that stopped. At least two witnesses reported that Mr. Finnegan appeared to have had a seizure. (A.A. 89). Mr. Huerta testified that Mr. Finnegan was confused and did not respond to questions appropriately. (A.A. 88). Mr. Huerta also testified that Respondent was exhibiting symptoms consistent with a person that suffered a seizure. (R.A. 71). These symptoms included confusion and feeling very tired or like he had fallen asleep. (R.A. 71-72, 154).

Following the accident, Mr. Finnegan was taken by ambulance to Woodwinds Hospital where he was examined. The medical records show that he was diagnosed with a "seizure causing the motor vehicle accident". (A.A. 141). Dr. Jacques, a neurologist,

evaluated Mr Finnegan. Dr. Jacques' record documented that Mr. Finnegan was observed by witnesses to have been shaking and was briefly postical, both consistent with a seizure. (A.A. 144-45). Dr. Jacques ordered an MRI of the brain that revealed mild to moderate cerebellar atrophy¹ with no evidence of cerebral atrophy. (A.A. 146). Mr. Finnegan followed up with Dr. Li who recommended that he not drive until further testing has been completed to evaluate the likelihood of another seizure. (A.A. 76).

It is undisputed that Mr. Finnegan never had a seizure before the motor vehicle accident in question. (A.A. 73, 76, 77). Several years before the accident, he fell asleep at the wheel after driving for about 12 hours when he moved to Colorado. *Id.* Mr. Finnegan's mother, Karen Finnegan, explained that he had not been able to sleep the night before. (R.A. 107). On the day of the accident, Mr. Finnegan traveled a couple of blocks to the scene of the accident within only a matter of minutes.

Appellants commenced this negligence action against Mr. Finnegan alleging that Mr. Finnegan was negligent in his operation of his motor vehicle. In opposition to summary judgment, Appellants argued that Respondent was also negligent for even making the decision to drive on the day of the accident. Appellants argued that it was foreseeable to Mr. Finnegan that he would fall asleep/lose consciousness while driving on the day of the accident.²

¹ Appellant cited Woodwinds Hospital records where Dr. Jacques stated that the CT scan revealed "severe significant cerebellar atrophy". (A.A.144) However, the actual CT scan described "mild cerebral atrophy". (R.A. 96).

² There is no evidence that Mr. Finnegan actually fell asleep within a few short minutes of leaving the gas station located a couple of blocks from the scene of the accident.

Mr. Finnegan moved in with his mother before the accident at the end of July, 2009. (A.A. 66, 95). Scott Finnegan's mother, Karen Finnegan, explained that her son left his job in Colorado due to economics and the availability of work, not due to any physical condition. (A.A. 95). Ms. Finnegan testified about her observations of her son's physical condition before the accident. Karen Finnegan testified that before the accident, she noticed her son had a little bit of what she now knows to be an ataxic walk. (A.A. 95). She did not attribute his difficulty walking to anything before the accident. (R.A.105). She thought it could be because of the problems he had with his ankles [arthritis]. (R.A.105-106). She did not think it was related to cerebral atrophy. *Id.* While living with her, Ms. Finnegan did not observe Mr. Finnegan having any difficulty with unsteadiness, tremors or spasms with his hands. *Id.* Ms. Finnegan observed that he worsened quite a bit after the seizure he had on the day of the accident. (R.A. 106).

After the accident, Ms. Finnegan learned that Mr. Finnegan had brain atrophy. She explained that the doctor told them that he would not expect to find the amount of brain atrophy in Mr. Finnegan if it was related to alcohol unless he was about 75 years old. (A.A. 99). After this accident, Ms. Finnegan found Mr. Finnegan laying on the floor and described what may have been a "petit mal" seizure but since he was not taking his seizure medication, she simply told him that he needs to take his medications and did not insist that he see a doctor. (R.A. 106). However, after this accident, in the summer of 2011, Mr. Finnegan had a "grand mal" seizure while in Ely, Minnesota. (R.A.106).

None of the witnesses, Karen Finnegan, Paul Lewis or his sister, Laura Lewis observed anything that would cause them to believe Mr. Finnegan would have a seizure

or would lose consciousness while driving before the accident. (A.A. 103). (R.A. 25, 98, 99, 118) Mr. Finnegan was seen by multiple health care providers in the several weeks leading up to the accident. There is no evidence that any of the providers made any observations of Mr. Finnegan that suggested he was having difficulties with his gait or spasms that required a referral to a neurologist. (R.A.127, 128, 136). In addition, the doctors agreed that while taking a history from a patient, they would not expect a patient to mention old injuries unless it was a present concern to them. (R.A 128, 136). It is undisputed that no medical provider ever suggested Mr. Finnegan not drive until after he had the seizure on the day of the accident.

Appellants discussed at length Mr. Finnegan's history of alcohol use. There is no evidence, however, that Mr. Finnegan had even a trace of alcohol in his system on the date of the accident. (R.A. 94). In fact, Mr. Finnegan's blood alcohol level was tested and was negative. *Id.*

Appellants tried to characterize Respondent as sleep deprived and behaving in a confused and disoriented manner on the day of the accident. The evidence shows that Mr. Finnegan had a normal day. He went to bed at 11:00 p.m.; he woke up around 8:00 a.m.³, ate breakfast, reviewed his e-mail, cleaned and spoke to his sister a couple of times. Mr. Finnegan then drove a short distance to the Holiday Station and purchased some items. It was not until he got back into his car and tried to turn it on without engaging the clutch that there was anything out of the ordinary. At that time, Mr. Finnegan simply thought

³ The District Court noted that the emergency room record reported that he woke up at 6:00 p.m. but the accident occurred at around 4:30 making this record an obvious error.

that “it was a little mental error.” (A.A. 73). Mr. Finnegan then drove a very short distance and stopped at the stop sign. Mr. Finnegan has no memory of subsequent events until after his car came to a rest. He had no idea that his vehicle struck Appellants’ vehicle. The accident occurred less than half a mile from the Holiday Station. (R.A. 153, A.A. 89).

The Honorable Mary E. Hannon’s Rationale

After considering all of the evidence and arguments, Judge Hannon granted Respondent’s motion for summary judgment. Judge Hannon summarized Appellants’ position that the accident was caused by Respondent falling asleep or passing out while driving and Respondent’s argument that the Respondent he had an unforeseeable seizure or loss of consciousness. The court acknowledged that Minn. Stat. § 169.14 provides that a driver has a duty to exercise due care when operating a vehicle. The court explained, however, that a duty does not arise unless the Plaintiff suffers harm that was foreseeable. The court explained that only in close cases, should foreseeability issues ever be resolved by a jury. In this case, the court held that the foreseeability issue was not a close question and therefore, the issue was one of law for the court to decide. (A.A. 52).

The court considered and discussed Appellants’ theories and arguments and concluded that “[t]here is no evidence in the record that a reasonable jury could rely on to find Defendant’s loss of control of the vehicle to be foreseeable.” (A.A.57) The court added that [t]here is nothing in the record to indicate that Defendant knew or should have known he would lose control of his vehicle that day, or that he had any way of knowing that he should have acted differently than he did.” *Id.* The court explained that while it is

inadvisable to take medication other than as directed, “doing so does not make losing consciousness while driving foreseeable.” (A.A. 54) In addition, while the medications warn against using them with alcohol, there was no evidence that he consumed any alcohol on the day of the accident. Moreover, “[e]ven assuming Defendant used alcohol the day before the accident, to expect that mixing alcohol and medication one day will result in a sudden loss of consciousness the following afternoon is beyond what a reasonable person could foresee.” *Id.* Therefore, the court determined, as a matter of law, that the harm suffered by the Appellants was not foreseeable and granted Respondent’s motion for summary judgment. (A..A. 54, 58)

ARGUMENTS

I. **THE DISTRICT COURT PROPERLY HELD THAT RESPONDENT DID NOT OWE A DUTY TO APPELLANTS AS A MATTER OF LAW BECAUSE THE ACCIDENT WAS UNFORESEEABLE.**

A. **This court’s standard of review is *De Novo*.**

To prove negligence, a Plaintiff must prove the following: 1) the existence of a duty of care, 2) breach of that duty, 3) an injury, and 4) that the breach of the duty of care was a proximate cause of the injury. *See Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011) (citations omitted). Generally, the existence of a legal duty is an issue for the court to determine as a matter of law. *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985). On appeal, the district court’s determination on the issue of whether a duty existed is reviewed *de novo*. *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011); *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007).

Whether a duty exists depends upon the relationship of the parties and whether the risk is foreseeable. *Erickson v. Curtis Investment Co.*, 447 N.W.2d 165, 168-69 (Minn. 1989). “The foreseeability issue, as a threshold issue, is more properly decided by the court prior to submitting the case to the jury.” *Alholm v. Wilt*, 394 N.W.2d 488, 491, n.5 (Minn. 1986) (emphasis added). In *Alholm*, the Minnesota Supreme Court noted:

Although not raised on this appeal, we are troubled by the practice of placing foreseeability within the jury’s domain. To the extent our prior case law speaks of ‘foreseeability’ as an element of the cause of action, we were only discussing foreseeability in the context of whether a legal duty arises, not as something on which the jury should be instructed.

Id. Only in close cases should the issue of foreseeability be submitted to the jury. *Id.* (citing *Whiteford ex. Rel. Whiteford v. Yamaha Motor Corp., U.S.A.*, 582 N.W.2d 916, 918 (Minn. 1998)).

“To determine whether an injury was foreseeable, we look to the defendant’s conduct and ask whether it was objectively reasonable to expect the specific danger causing the plaintiff’s injury.” *Domagala*, 805 N.W.2d at 27. In this case, the district court considered the fact that, “[a] driver owes a duty to others to exercise due care in operating his vehicle.” (A.A.51) (citing Minn. Stat. § 169.14.) However, the court held that as a matter of law, it was not foreseeable to Respondent that he would suddenly lose consciousness on the day of the accident. Thus, the court held that Respondent did not owe Appellants a duty. (A.A. 52)

The parties agree that when reviewing an order granting summary judgment, this court must determine whether the district court correctly determined that there are no genuine issues of material fact and that respondent is entitled to judgment as a matter of

law. *See DHL, Inc v. Russ*, 566 N.W.2d 60 (Minn. 1997). A motion for summary judgment should be granted if there are no “genuine issues” of material fact sufficient to defeat summary judgment. When determining whether a genuine issue of material fact for trial exists, “the court is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented.” *Id.* at 70. (emphasis added.)

In *DHL Inc.*, the court further explained the summary judgment standard: “there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” *Id.* at 71.

B. Minn.Stat. § 169.14 does not change the duty owed to Appellants.

Appellants argued that Minn. Stat. § 169.14 includes a duty to ensure that one is physically and mentally fit to drive. Subdivision 1 of Minn. Stat. § 169.14 provides as follows:

Minn. Stat. § 169.14, speed limits, zones; radar

Subdivision 1. Duty to drive with due care. No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions. Every driver is responsible for becoming and remaining aware of the actual and potential hazards then existing on the highway and must use due care in operating a vehicle. In every event speed shall be so restricted as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

Application of this statute and whether the jury should be instructed regarding this statute was addressed in *Lowery v. Clouse*, 348 F.2d 252 (8th Cir. 1965). In *Lowery*, the court discussed Minn. Stat. § 169.14 describing it as a “basic rule of prudence” and noting that the statute specifies speeds which are lawful and requires reduced speed “when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.” *Id.* at 256. Application of the statute assumes that the actual and potential hazards existing on the highway (i.e. slippery roads, pedestrians, road construction, etc.) are ascertainable. This statute does not heighten the duty to require someone to become aware of the unforeseeable. Minnesota has always absolved drivers of negligence for unforeseeable and unpreventable emergencies. Appellants’ proposed duty imposes unreasonable burdens on people to not drive simply because they have a condition that could remotely lead to a disabling physical ailment. For example, under Appellants’ rule, would persons with high cholesterol have a duty not to drive because of the potential for a heart attack? Would the elderly have a duty not drive simply because of their age and the remote possibility they could have a disabling event (i.e. stroke or heart attack)? Would someone with high or low blood pressure have a duty not to drive simply because of the potential for a stroke or vasovagal syncope (fainting or passing out)? Appellants’ proposed duty would impose strict liability on people. This is not the law in Minnesota. Duties only arise when dangers are foreseeable. For a danger to be foreseeable it must be objectively reasonable to expect and not merely “within the realm of conceivable possibility.” *Whiteford by Whiteford v. Yamaha Motor Corp.U.S.A.* 582 N.W.2d 916, 918 (Minn. 1998) (emphasis added)

Appellants cite no case law to support their argument that persons have a duty to ensure that they are physically or mentally fit to drive. Nor do they cite case law that defines that duty. Even if case law supported their position, Minnesota law would still require Appellant to show the harm was foreseeable. For a duty to arise under any circumstances, the risk of harm must be foreseeable and the question of foreseeability is a question for the court to decide; not the jury. *See Alholm v. Wilt*, 394 N.W.2d 488, 491, n.5 (Minn. 1986).

C. Two unpublished decisions of this court addressed the issue of negligence when a motorist loses control of his motor vehicle due to a medical emergency.

Minnesota recognizes the unavoidable accident defense, Act of God defense, and the emergency rule as complete defenses to an action based on negligence. *See e.g. Maanum v. Aust*, 364 N.W.2d 827 (Minn. Ct. App. 1985); *Tuckner v. Chouinard*, 407 N.W.2d 723 (Minn. Ct. App. 1987) (a driver may unavoidably lose control of his vehicle for a number of reasons other than negligence.); *Sayer v. Rural Co-op Power Association*, 225 Minn. 356, 360-61, 31 N.W.2d 15, 17 (1948) (where an act of God is the sole cause of an injury, liability can be placed on no one.)

In an unpublished 1999 court of appeals opinion relied upon by the district court in this case, *Echagdaly v. Metropolitan Council Transit Operations*, 1999 WL 508661 (Minn. Ct. App. July 20, 1999) *rev. denied*, (Minn. Oct. 21, 1999), the court of appeals affirmed the district court's grant of summary judgment to a motorist who lost control of his vehicle noting that "[a]lthough no Minnesota courts appear to have addressed the issue of negligence if a driver unexpectedly blacks out, tort treatises and case law outside

this jurisdiction support finding the driver not negligent.” (A.A. 148). In *Echagdaly*, the defendant believed he had suffered a seizure. Plaintiff believed defendant had blacked out due to his drug abuse. Defendant had cocaine and marijuana in his system which could have been consumed up to two days before the accident. The district court granted defendant’s motion for summary judgment holding that the defendant could not have known or prevented himself from either blacking out or having a seizure. The Plaintiff appealed arguing that there were fact issues as to whether defendant was negligent in using cocaine and marijuana before driving and whether the defendant’s blackout was caused by a seizure or his drug abuse. The defendant argued that although his blackout might have been caused by his drug use, it was still not predictable or preventable. The court of appeals affirmed. The court found no genuine issue of material fact for the jury as to whether Defendant’s blackout was caused by his own negligence.

Minnesota also addressed the issue of a sudden medical emergency/sudden loss of consciousness in another unpublished opinion, *Gaarder v. Estate of Ostlie*, 2000 WL 254330 (Minn. Ct. App. March 7, 2000). In *Gaarder*, Ortwin Oslie failed to stop at a stop sign at a rural intersection and his vehicle collided with a vehicle driven by Mark Gaarder, who had the right-of-way. Ostlie died from heart complications at some point in the occurrence. A critical issue was whether Ostlie’s heart complications and death preceded the accident. Ostlie had a remote history of heart problems but showed no symptoms of a heart ailment or an impending heart attack in the weeks, days or moments immediately prior to the accident. The plaintiff requested the jury to be instructed that if a motorist knows he is subject to heart attacks and loss of consciousness, the motorist is

negligent if an accident occurs when he has a heart attack. The court refused to give the instruction. The jury found Ostlie was not negligent.

On appeal, the court held that it was not error to refuse to give the requested instruction explaining:

We have examined the record and have found no evidence that reasonably supports the proposition that Ostlie knew he was currently subject to heart attacks or loss of consciousness.

(R. A. 164)

The court also affirmed the district court's refusal to give another instruction that would have told the jury that "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.* The court reasoned that "[a]lthough this appears to be the law in Wisconsin and Louisiana, it is not the law in Minnesota." *Id.* (emphasis added)

In Annotation, *Liability for Automobile Accident Allegedly Caused by Driver's Blackout, Sudden Unconsciousness, or the like* 93 A.L.R. 3d 326 (1979 and Supp. 2002), the author cited the majority rule that an operator of a motor vehicle who, while driving, becomes suddenly stricken by a fainting spell or loses consciousness from an unforeseen cause and is unable to control the vehicle is not chargeable with negligence or gross negligence in the majority of the states. The author's survey of the United States revealed that 36 states and the District of Columbia have decided that a sudden loss of consciousness while driving is a complete defense to an action based on negligence or gross negligence, if such loss of consciousness was not foreseeable and no jurisdiction

follows a contrary rule. *See also Roman v. Estate of Gobbo*, 99 Ohio St. 3d 260, 791 N.E.2d 422, 428 (Ohio 2003). This rule incorporates the tort principle that only the blameworthy should be liable for the consequences of their actions. Thus, unless the physical ailment was foreseeable, a motorist who is suddenly incapacitated while driving is not negligent. *Id.* at 427. (citing 2 Restatement of the Law 2d, Torts (1965) 18, Section 283 C, Comment c.)

It is Appellants' burden to prove that Respondent Scott Finnegan was negligent and the cause of the accident. As stated in *Gardner*, it is not Mr. Finnegan's burden to prove through conclusive evidence that he had a seizure or loss of consciousness. Even if it were, however, it is undisputed that witnesses who observed Mr. Finnegan reported to EMTs that it appeared that Mr. Finnegan had a seizure based upon his behavior and appearance. The symptoms Mr. Finnegan exhibited were consistent with a person who just had a seizure. Mr. Finnegan's discharging diagnosis from the hospital was "seizure causing motor vehicle accident." It is undisputed that Mr. Finnegan had not suffered a seizure in the past. The evidence showed that the seizure took place after Mr. Finnegan drove away from the gas station and before the impact occurred. Mr. Finnegan's last memory was when he was stopped at the stop sign to turn onto Valley Creek. The accident occurred shortly after he turned onto Valley Creek. There is no evidence that Mr. Finnegan should have foreseen that he would have a seizure.

Appellants have failed to produce evidence that it was foreseeable to Mr. Finnegan on November 11, 2009, that if he drove that day he would have a seizure while driving and end up being involved in a car accident. Since Appellants have failed

to sustain their burden of providing evidence that it was foreseeable to Mr. Finnegan that if he drove his car on the day of the accident, he would have had a seizure, the district court properly granted Defendant's motion for summary judgment as a matter of law.

II. APPELLANTS' MERE ALLEGATIONS THAT RESPONDENT FELL ASLEEP AT THE WHEEL OR THAT HE SHOULD HAVE KNOWN THAT HE HAD A MEDICAL CONDITION THAT WOULD CAUSE HIM TO LOSE CONSCIOUSNESS ON THE DAY OF THE ACCIDENT ARE INSUFFICIENT TO DEFEAT SUMMARY JUDGMENT.

Appellants set forth two theories of liability that require the court to reject Respondent's treating doctor's diagnosis of a seizure causing the accident. Appellants' unsupported theories are that Respondent either fell asleep at the wheel due to medication and/or sleep deprivation or that he lost consciousness and then control of his vehicle due to known physical symptoms of an undiagnosed medical condition. Since 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.

Before addressing Appellants' mere allegations and unsupported arguments, it is important to review the undisputed material facts, including the following:

- Prior to the motor vehicle accident, Respondent never had a seizure;
- Prior to the motor vehicle accident, Respondent never treated with a doctor for seizures;
- Prior to the motor vehicle accident, Respondent was never diagnosed with seizures;

- Prior to the motor vehicle accident, Respondent had never been treated with a seizure medication;
- Other than the one occasion years before, the Respondent had never fallen asleep while driving and never had he ever fallen asleep within minutes of starting to drive.
- Prior to the motor vehicle accident, Respondent had no trouble driving while taking Celexa and Trazodone;
- The medical evidence proves that Respondent had no alcohol in his system before the motor vehicle;
- Respondent had a valid driver's license with no medical restrictions on the day of the accident;
- No doctor told Respondent that he should not drive because of medical ailments prior to the accident;
- Prior to the accident, Respondent sought medical attention due to ankle pain. The doctor evaluated Mr. Finnegan's walk but did not observe an abnormal gait that required a referral to a neurologist,
- Not one witness, medical or lay witness, offered any evidence that Respondent should not have driven on the day of the accident because he could lose consciousness, fall asleep or have a seizure.
- Respondent suffered head injuries as a child but was not aware of any ongoing problems from those injuries.

Appellants first argue that Mr. Finnegan created an “actual and potential hazard” by driving an automobile while experiencing troubling and ongoing medical symptoms without having sought a medical diagnosis. Appellants allege that Mr. Finnegan’s post-accident condition existed before the accident and was of such a concern that it created a foreseeable risk to Mr. Finnegan if he drove. Interestingly, Respondent was evaluated by doctors and nurses in the weeks before the accident. None of those medical providers observed any deteriorating neurological condition (i.e. signs of spasticity or ataxic-like symptoms that would cause them to be concerned) let alone a condition that required immediate cessation of driving or referral to a neurologist. (R. A. 127, 128 136)

Appellants argue that Respondent was negligent because he failed to disclose his ataxic-like symptoms to medical professionals he met with in the month before the accident. Appellants also allege that Mr. Finnegan was negligent for not disclosing his alcohol use or his prior closed head injuries. As outlined above, Mr. Finnegan did not believe he was having symptoms of a neurological deficit that would cause him to suddenly and unexpectedly have a seizure or lose consciousness. He had difficulty walking and that is the exact reason he sought medical attention – he specifically sought treatment for his ankles. When asked about his alcohol use, he disclosed that he had a history of alcohol use. He was not asked about prior head injuries and since he was unaware of any problems related to prior head injuries, it is not surprising he wouldn’t mention them. Moreover, none of the doctors or nurses asked him if he had prior head injuries.

Another theory proposed by Appellants was that Mr. Finnegan may have had a reaction to medication he had been taking for weeks before the accident. However, Mr. Finnegan was prescribed medication two to three weeks earlier and had driven on multiple occasions having taken this medication before this accident happened. (A.A. 73-74). Mr. Finnegan had no reason to believe that if he had driven on this particular day, he would have had some sort of unanticipated reaction. If he had an unanticipated reaction to medication, Mr. Finnegan is not liable for this unforeseeable event.

The district court concluded that Respondent's medical history did not make the collision foreseeable. "Despite the fact that Defendant suffered numerous head injuries over the course of his life, a reasonable person would not consider himself disqualified from driving because of that history." (A.A. 55) The court also rejected Appellants' argument that Respondent's difficulty with inserting I.V.s or keeping his hand still would alert the reasonable person that it is no longer safe to drive a vehicle. *Id.* Since there was no evidence that Respondent's ataxic gait impaired his ability to drive, the court refused to conclude that his ataxic gait made the accident foreseeable. (A.A. 56) Finally, the court refused to impose a duty on persons to reveal their entire medical history every time he or she speaks with a nurse or doctor. (A.A.57) Even if a person were to report a condition that would make the doctor refer the person to a specialist, that does not mean the reasonable person would have ceased driving. In this case, even if the doctor or nurse would have referred Respondent to a neurologist, Appellants offered absolutely no evidence that those medical professionals would have told him to not drive.

Appellants alleged that Respondent's history of head injuries, alcohol use and irregular use of Celexa/Trazodone can cause a seizure, black out, loss of consciousness or cause a person to fall asleep at the wheel. Appellants also suggest that had Respondent discussed his history of head injuries, alcohol use and irregular use of Celexa/Trazodone with his doctors, the doctors would have told him not to drive. But Appellants offered no expert testimony making those causal connections. To make such causal connections, an expert's opinion is required. *See Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 762 (Minn. 1998). To the contrary, the doctors testified that they would have referred him to a neurologist.

None of Mr. Finnegan's family members observed symptoms to cause them concern until after the accident as well. Laura Lewis explained it the best when she said that before the accident she thought his difficulty walking was due to his prior injuries to his ankles. (R.A. 119). After the accident and learning that he had cerebral atrophy and a seizure, she believed that his difficulty walking may have been a balance problem. *Id.* A week before the accident a neighbor suggested to Ms. Lewis that she thought Scott may a balance problem. This was the first indication to her that it could be something more than his prior ankle injuries. *Id.* But, it did not cross her mind that he could have a seizure/black out and cause an accident. There was nothing that she ever observed about the use of his hands that was unusual before the accident. *Id.* After the accident (after he had a seizure), she noticed that his hand trembles and does not go in a straight line when he attempts to pick things up. *Id.* Appellants ignored that despite having seen multiple medical providers before the accident, none of them noticed any symptoms that caused

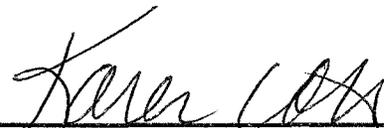
them any concern or caused them to believe he could not drive. Appellants' cited post-accident facts and suggested that they existed prior to the accident to argue that it was negligent for Mr. Finnegan to even drive. Appellant's evidence was purely speculative and insufficient to support summary judgment. Even after the accident, when asked to stretch out his arms to evaluate whether he had any tremors, his neurologist, Dr. Jacques, noted that he showed only a "little bit of tremulousness." (R.A. 145) He also had "some ataxia" and his gait was poor although the doctor was unclear how much his gait had worsened since the seizure. (A.A. 145) Moreover, his difficulty walking was the reason he sought medical attention in the first place.

CONCLUSION

Appellants failed to show that the district court erred in its determination as a matter of law that Mr. Finnegan's seizure/loss of consciousness was unforeseeable and that therefore, Mr. Finnegan did not owe a duty to Appellants as a matter of law. The undisputed facts supported the district court's decision. Appellants' mere allegations were not sufficient to defeat summary judgment. Therefore, this court must affirm the district court's decision.

Dated: 7-2-12

DAVID M. WERWIE & ASSOCIATES



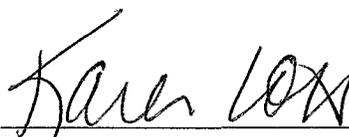
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief does not exceed 45 pages and contains words. This brief was prepared using Microsoft Word 2007.

Dated: 7-2-12

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