NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-931

SARAH A. TANNER[1] & another[2]

vs.

PHYLLIS S. SHERWOOD.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiffs, Sarah A. Tanner and Terry A. Tanner, Jr., individually and as parents and next friends of Shauna M. Tanner[3] (collectively, the Tanners), appeal from summary judgment entered in favor of the defendant, Phyllis S. Sherwood, in a negligence action brought in Superior Court. The action stems from a high-speed crash that occurred on Route 6 in Wellfleet after Sherwood suffered a seizure while driving and lost consciousness and control of her vehicle, which careened into

[1] Individually and as parent and next friend of Shauna M. Tanner.

[2] Terry A. Tanner, Jr., individually and as parent and next friend of Shauna M. Tanner.

[3] Because the plaintiffs share a surname, we will refer to each by their first name where necessary.

Sarah's car. The parties' medical experts agreed that Sherwood suffered a sudden medical emergency while driving. Following the incident, Sherwood, who was in a postictal state, was flown to a hospital where imaging of her brain revealed a previously undiagnosed grade two meningioma -- a tumor on the meninges of her brain (brain tumor), which likely caused the seizure. On appeal, the Tanners contend that summary judgment was improper because there is a genuine dispute of material fact regarding whether, despite the seizure, Sherwood momentarily regained the ability to control her vehicle, and whether Sherwood's seizure was foreseeable. We affirm.

Background. We summarize the undisputed facts in the light most favorable to the Tanners, the nonmovants. See Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). On the clear, dry morning of April 8, 2017, Sherwood was driving her sports utility vehicle (SUV). As she drove, she engaged in conversation with her friend, June Hopf, who was in the passenger seat. When Sherwood ceased responding, Hopf looked at Sherwood and noticed that she had lost consciousness. Hopf described that Sherwood's head was hanging down toward her chest, her body was leaning to the left, and her eyes were closed. Hopf tried unsuccessfully to awaken Sherwood by

grabbing and shaking her arm; Hopf also grabbed the steering wheel and tried to steer the SUV off the road.[4]

Jessica Larsen was driving behind Sherwood's SUV when she observed it move erratically and narrowly miss an oncoming vehicle. Larsen attempted to corral the SUV with her own car. She then observed the SUV pulled to the side of the road.[5] There, the SUV stopped for approximately ten to twenty seconds, during which time Larsen pulled her own car behind the SUV, unbuckled her seatbelt, and started to exit her vehicle. Before she could reach the SUV, however, it took off at high speed, maneuvering a slight bend in the road. Larsen attempted to follow the SUV, but lost sight of the vehicle when it turned a corner.

Sherwood's SUV subsequently collided with Sarah's vehicle. Hopf, who was the only eyewitness to Sherwood's condition, testified at her deposition that she did not observe Sherwood

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[4] In a statement to police following the accident, Hopf stated that she tried to pull the emergency brake; during her deposition, Hopf stated that she did not know where the emergency brake on Sherwood's SUV was located. Contrary to the testimony of Jessica Larsen, discussed infra, Hopf testified that the SUV did not stop until it hit Sarah's vehicle.

[5] In her affidavit, Larsen stated that she saw the driver pull the SUV over. In her witness statement to police, she stated that she saw the passenger (Hopf) steer the car to the side of the road. At the hearing on Sherwood's motion for summary judgment, counsel for the Tanners conceded that Larsen's personal knowledge regarded the movements of the SUV, not observations of the driver.

regain consciousness at any time between the onset of her condition and the collision. Emergency responders who arrived at the scene described that Sherwood's eyes were open, but she was unresponsive and nonverbal. In his medical evaluation report, Sherwood's expert explained that Sherwood was in a postictal state -- "a state of altered sensorium" that occurs "immediately after a generalized seizure." Several skid marks were observed "leaving the area of impact to the final resting spot of both vehicles."

Both Sarah and Shauna, who was a passenger in the rear seat of Sarah's vehicle, sustained serious injuries as a result of the collision. Sherwood, who was also injured, was airlifted to a hospital and, following a magnetic resonance imaging (MRI) scan, was diagnosed with a brain tumor. She underwent surgery to remove the brain tumor.

Prior to the accident, Sherwood (who was seventy-four years old) had last seen a physician in 2011, several years prior to the collision; her last annual examination had been in the 1980s. Sherwood had suffered only a few headaches during her lifetime, including one a few days before the accident; the headache dissipated by the following morning. She did not seek medical attention for the headache.

Both parties' medical experts opined that Sherwood suffered a medical emergency while driving her vehicle, as a result of

the previously undiagnosed brain tumor. The Tanners' expert opined in his report that "the timing of the medical emergency and the degree of control [Sherwood] had over her vehicle [was] questionable," and in his report raised two questions:

> "1. If [Sherwood] was suffering from a seizure in which she lost awareness and/or consciousness, how did her vehicle come to a complete stop, witnessed by [Larsen], for a duration of time sufficient for [Larsen] to stop her own vehicle, change gears to park, remove her safety belt, depress the door latch and nearly exit the car?
>
> "2. If [Sherwood] was suffering from a seizure in which she lost awareness and/or consciousness, how did she re-engage her vehicle from a completely stopped position on the side of the road to one in which she drove off at a high-velocity, around a bend in the road only to create skid marks, collide with another car and ultimately come to rest an additional 100 yards away from the area of impact? I surmise that these series of events require some degree of control over the accelerator, brake and steering column."

The expert provided no answers to these questions, and he did not address Hopf's testimony that she had attempted to steer the SUV as Sherwood was unresponsive and unconscious. He concluded, "[I]t is my opinion, to a reasonable medical certainty, notwithstanding the fact that [Sherwood] sustained the tumor, the events, including the aforementioned witness statements, suggest that [Sherwood] had some opportunity to maintain control of her vehicle."

Both experts agreed that Sherwood's brain tumor could have gone completely undetected until the first seizure event on the day of the accident. Sherwood's expert opined that the sudden

medical emergency was "unpreventable." The Tanners' expert stated that, because Sherwood did not regularly see a physician, no medical records exist to determine "if the tumor could have been clinically detected prior [to the accident]." Neither expert suggested that, had Sherwood seen a physician regularly or sought medical attention for the headache she experienced a few days before the accident, the medically appropriate standard of care would have included imaging or other medical techniques that would have resulted in the detection of the brain tumor.

Discussion. Our review of a motion for summary judgment is de novo, considering all of "the evidence in the light most favorable to the nonmoving party." Galenski v. Erving, 471 Mass. 305, 307–308 (2015). See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002).

1. Control of Sherwood's vehicle. Sherwood's defense to the negligence claim is that she suffered a sudden medical emergency, and thus cannot be liable in negligence, as a matter of law. It is well established that "a sudden and unforeseeable physical seizure rendering an operator unable to control [her] motor vehicle cannot be termed negligence." Ellingsgard v. Silver, 352 Mass. 34, 36 (1967), quoting Carroll v. Bouley, 338 Mass. 625, 627 (1959). Here, it is undisputed that, prior to the collision, Sherwood suffered a sudden medical emergency -- a seizure rendering her unable to control the SUV. Hopf, the only

eyewitness to Sherwood's condition, testified that Sherwood lost consciousness and did not regain it until after the collision. Indeed, immediately following the collision with Sarah's car, emergency responders found Sherwood with eyes open but unresponsive and nonverbal, in a postictal state of altered sensorium consistent with being in the immediate aftermath of a generalized seizure. Moreover, both parties' experts agreed that Sherwood suffered a medical emergency while driving her SUV before the collision.

The Tanners contend that summary judgment was nonetheless improper because a jury could (1) reject Hopf's testimony that Sherwood was unconscious from the onset of her symptoms until the collision, and that Hopf attempted to steer the SUV, and (2) surmise, based on Larsen's testimony that Sherwood's SUV stopped for ten to twenty seconds, that Sherwood became lucid after her seizure and regained control of her SUV, intentionally brought the vehicle to a stop, chose to disregard her seizure and loss of consciousness, and continued to drive, accelerating to ninety miles per hour. Multiple layers of speculation do not present a genuine triable issue. See Orfirer v. Biswanger, 25 Mass. App. Ct. 928, 931 (1987) (summary judgment proper in car collision because jury may not find negligence "based on no more than a guess"). See also Mullins v. Pine Manor College, 389 Mass. 47, 56 (1983) ("inferences must be based on probabilities

rather than possibilities and not the result of mere speculation and conjecture" [quotations and citations omitted]). Here, both experts agreed that Sherwood suffered a sudden medical emergency while driving. Compare McGovern v. Tinglof, 344 Mass. 114, 118-119 (1962) (eyewitness's testimony defendant honked horn and drove in otherwise normal manner prior to accident insufficient to show negligence where no other evidence contradicted finding defendant suffered heart attack before collision and was "completely incapacitated or dead," with his head fallen back at moment of accident), with Carroll, 338 Mass. at 627-628 (evidence insufficient to support directed verdict for defendant where no evidence showed defendant suffered heart attack before collision with plaintiff's vehicle).

Nor can the Tanners avoid summary judgment based on the conjecture of their expert, who "surmises" that Sherwood may have regained control of her vehicle, and posits questions (but provides no answers) as to how that might have occurred. Such speculation does not support a finding that Sherwood regained consciousness, recovered from the seizure, and became capable of controlling her vehicle. See Kennedy v. U-Haul Co., 360 Mass. 71, 73-74 (1971) ("A mere guess or conjecture by an expert witness in the form of a conclusion from basic facts that do not tend toward that conclusion any more than toward a contrary one has no evidentiary value").

2. Headache as a warning sign. The Tanners next contend that Sherwood's seizure was foreseeable based on the headache she experienced a few days prior to the accident. They argue that the foreseeability lies in the fact that Sherwood had only experienced a few headaches in her lifetime. Assuming arguendo that Sherwood's headache was caused by the brain tumor, such a symptom cannot be said to support the conclusion that a sudden seizure leading to a loss of consciousness was imminent or foreseeable. See Ellingsgard, 352 Mass. at 37, 38 (heart attack resulting in "incapacitating physical seizure" not foreseeable due to absence of past symptoms and medical testimony suggesting "next attack was likely to be severe and incapacitating"). Indeed, neither expert suggested that the brain tumor would have been detected if Sherwood sought medical attention for the headache. To the contrary, both parties' experts agreed that, had Sherwood sought medical attention for her headache, or obtained routine physicals beforehand, the brain tumor likely would have gone undetected due to the slow growing and

frequently asymptomatic development of such brain tumors.[6]

Judgment affirmed.

By the Court (Green, C.J., Milkey & Wendlandt, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: October 5, 2020.

[6] To the extent the defendant's other arguments have not been explicitly addressed, they "have not been overlooked. We find nothing in them that requires discussion." Commonwealth v. Brown, 479 Mass. 163, 168 n.3 (2018), quoting Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

[7] The panelists are listed in order of seniority.