

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

20-P-424

COMMONWEALTH

vs.

VALERIE J. SEMENSI.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This case arises out of a fatal accident in which John Buckley (victim) was killed. According to trial evidence that could have been credited by the jury, the defendant was backing her sport utility vehicle (SUV) into a parking space at the Brockton District Court when the SUV accelerated while in reverse. The SUV backed over a six inch curb and traveled up a grassy embankment, across an access road, over a second curb, up another grassy embankment, through bushes, and across a sidewalk where the SUV hit the victim while he walked. The victim was projected in the air and landed on the ground. The SUV then drove over him, and the victim was found fifty-three feet from the sidewalk he was walking on. The vehicle continued into a parking lot and came to a stop only after crashing into a building. In all, the defendant traveled 192 feet in reverse.

It took at least seven and one-half seconds for the defendant to go from the District Court parking lot to where her SUV crashed into the building.

Following a jury trial, the defendant was convicted of one count of motor vehicle homicide by negligent operation in violation of G. L. c. 90, § 24G (b). She now appeals.

The defendant first argues that there was insufficient evidence to support the jury's finding of negligence. In assessing this claim, we must view the evidence in the light most favorable to the Commonwealth. See Commonwealth v. Latimore, 378 Mass. 671, 677 (1979).¹ Viewing the evidence in that light, the jury could have concluded that there were no mechanical or other operational problems with the vehicle and that the rapid acceleration of the vehicle in reverse was caused by pedal misapplication, that is, the defendant mistakenly stepping on the gas pedal instead of the brake. The jury could have found that such pedal misapplication violated the relevant standard of due care. See Commonwealth v. Angelo Todesca Corp., 446 Mass. 128, 137 (2006) ("A finding of ordinary negligence suffices to establish homicide by motor vehicle in violation of

¹ The Commonwealth asserts that this claim was not preserved below. However, insufficiency of the evidence to support the conviction will in any event always create a substantial risk of a miscarriage of justice, see Commonwealth v. Melton, 436 Mass. 291, 294 n.2 (2002), such that the defendant would be entitled to reversal of her conviction if the evidence were inadequate even if the issue was raised for the first time on appeal.

G. L. c. 90, § 24G (b). Negligence . . . 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 . . . the person of ordinary caution and prudence ought to exercise under the particular circumstances" [quotations and citations omitted]).

The defendant next argues that, as a matter of law, pedal misapplication does not amount to negligence. In support of it, the defendant cites to a document from the National Highway Traffic Safety Administration (NHTSA) that in turn cites two academic studies relating to pedal misapplication. See K.H. Lococo, L. Staplin, C.A. Martell, & K.J. Sifrit, Pedal Application Errors, National Highway Traffic Safety Administration (March 2012). The defendant cites the NHTSA document for the proposition that "[d]rivers age seventy six or older are most likely to be involved in pedal misapplication crashes due to poor executive function caused by the relevant areas of the brain declining with advanced age." The defendant describes circumstances in which an individual may choose the correct response -- that is stepping on the brake -- but may, due to deficiencies "in an individual's motor system at a functionally low level of the central nervous system," without intention or awareness, step on the accelerator. Because the "highest central nervous system" has correctly intended to step

on the brake, the feedback system within the nervous system may prevent the individual from detecting his or her error. The driver may have "a subjective feeling that one's foot is on the brake." The unexpected acceleration of the vehicle may thus be perceived as a mechanical or other operational failure of the car, and the instinctual response of the driver in such circumstances may be to press what he or she believed to be the brake harder, which, because his or her foot is actually on the gas pedal, only increases the acceleration.

Even assuming that the NHTSA article put forward by the defendant accurately articulates the circumstances surrounding the accident in this case, the defendant's claim would be unavailing. The premise of her argument, that a driver's "belief that his/her foot was on the brake, when it was actually on the accelerator," would "negat[e] negligence," is mistaken.

In order to obtain a conviction of motor vehicle homicide by negligent operation in violation of G. L. c. 90, § 24G (b), the Commonwealth must prove that the defendant operated a motor vehicle upon a public way "negligently so as to endanger human life or safety, . . . thereby causing the death of a person."

Commonwealth v. Geisler, 14 Mass. App. Ct. 268, 276 (1982).

"The operator of a motor vehicle has a duty to exercise ordinary care for the safety of others while operating the vehicle."

Angelo Todesca Corp., 446 Mass. at 137. "[T]he negligence

standard is an objective, not subjective, one." Id. at 149 n.13 (Cordy, J., dissenting). See Meyer v. Wagner, 429 Mass. 410, 424 (1999) ("An attorney's negligence is based on an objective standard"); Riley v. Davison Constr. Co., Inc., 381 Mass. 432, 436 (1980) ("A finding of contributory negligence result[s] from the application of an objective standard"); Commonwealth v. Ferreira, 70 Mass. App. Ct. 32, 34 (2007), citing Galliher v. Stewart, 310 Mass. 77, 80 (1941) (negligence determined by "reasonable man objective tort standard" [quotation omitted]).

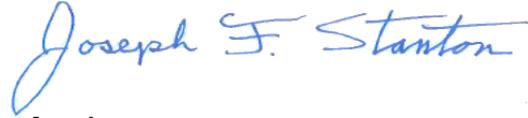
The jury were entitled to conclude that under the due care standard, a reasonably prudent person would not step on the gas pedal instead of the brake and then continue to do so while her vehicle accelerated in reverse for 192 feet for over seven and one-half seconds, causing the vehicle to stop only after striking and driving over a person and crashing into a building. The fact that one or another individual might be unable to take the care a reasonably prudent person would does not relieve them of the obligation not to operate a motor vehicle in a manner that does not comply with the due care standard, even where that inability to take due care is the unfortunate result of age or infirmity. Put another way, it may be that one or another individual has taken all the care he or she can, but, due to his or her limitations, has still operated a motor vehicle without taking the care a reasonably prudent person would. See Keith v.

Worcester & Blackstone Valley St. Ry. Co., 196 Mass. 478, 482-483 (1907) (a person who is "impaired in capacity . . . must put forth a greater degree of effort than one not acting under any disabilities in order to attain that standard of care, which the law has established for everybody").

Finally, the defendant argues that we should adopt a standard of gross negligence for determining when negligent homicide by motor vehicle has been committed. It is, however, well-settled that "[a] finding of ordinary negligence suffices' to establish homicide by motor vehicle in violation of G. L. c. 90, § 24G (b)." Angelo Todesca Corp., 446 Mass. at 137, quoting Commonwealth v. Jones, 382 Mass. 387, 389 (1981).

Judgment affirmed.

By the Court (Rubin, Sacks & Ditkoff, JJ.²),



Clerk

Entered: June 18, 2021.

² The panelists are listed in order of seniority.