

STATE OF MICHIGAN
COURT OF APPEALS

DAN WEISS, as Personal Representative for the
Estate of CATHERINE T. REYNOLDS,

UNPUBLISHED
September 11, 2012

Plaintiff-Appellee,

v

No. 304269
Wayne Circuit Court
LC No. 10-003051-NI

SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORTATION a/k/a SMART,

Defendant-Appellant.

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

Defendant appeals as of right an order denying its motion for summary disposition premised on the claim that governmental immunity barred this negligence action. We affirm in part, reverse in part, and remand for further proceedings.

On January 12, 2010, plaintiff's decedent was a wheelchair passenger on a bus owned and operated by defendant. During the transportation service, the bus driver abruptly applied the brakes causing plaintiff's decedent to be ejected from her wheelchair onto the floor, which resulted in her sustaining a fractured hip. While hospitalized, plaintiff's decedent died from pneumonia. This legal action followed with plaintiff asserting negligence and common carrier liability claims. Plaintiff averred that the action was not barred by governmental immunity because the motor vehicle exception set forth in MCL 691.1405 applied.

Subsequently, defendant filed its motion for summary disposition and argued that plaintiff's claims were barred by governmental immunity. Defendant argued that during the transportation of plaintiff's decedent, the bus driver was faced with an emergency situation when the vehicle traveling in front of the bus unexpectedly stopped. Although plaintiff's decedent's wheelchair was properly secured to the floor of the bus, she slid out of her wheelchair and onto the floor after she declined to wear a shoulder/seat belt that the bus driver had offered. Defendant argued that plaintiff's action was barred by governmental immunity because sudden starts and stops have long been considered normal incidents of travel; thus, its bus driver was not negligent. Further, defendant argued that it had no duty to apply a seatbelt or shoulder belt to plaintiff's decedent and that plaintiff's loss of consortium claims were barred by governmental

immunity as set forth in *Wesche v Mecosta Co Road Comm*, 480 Mich 75; 746 NW2d 847 (2008).

Plaintiff responded to defendant's motion, arguing that the bus driver's own negligence caused her to have to abruptly stop the bus which resulted in plaintiff's decedent being ejected from her wheelchair. That is, the bus driver testified that prior to the incident she saw that the driver of the vehicle traveling in front of the bus "kept touching his brakes," as evidenced by the brake lights going on and off. The bus driver then looked away to "check all three [] mirrors," as she was allegedly taught to do "constantly while you are driving." When the bus driver turned her attention back to the vehicle in front of her, the vehicle "had jammed on the brakes." In an effort to avoid hitting the vehicle, the bus driver "jammed" on the brakes. The bus driver testified, "I hit the brakes hard to keep from hitting him." Plaintiff also claimed that on prior occasions when plaintiff's decedent rode the bus, she was secured by the bus' seat or shoulder belts. However, on this day she was not restrained and her wheelchair did not have its own seatbelt. Under the circumstances of this case, plaintiff argued, defendant was not entitled to governmental immunity. The motor vehicle exception applied because the bus driver operated the bus in a negligent manner. The bus driver followed the vehicle in front of her too closely, was driving too fast under the circumstances, and averted her attention from that vehicle to "check her mirrors" even though that vehicle had been applying its brakes and clearly intended to stop. At minimum, plaintiff argued, there were genuine issues of material facts with regard to the issue whether the bus was being operated in a negligent manner.

After oral arguments on the motion for summary disposition were conducted, the trial court agreed with plaintiff, holding that "[t]here are genuine issues of material facts and therefore the motion is denied." The trial court further denied defendant's request for an order granting partial summary disposition with regard to plaintiff's loss of consortium claims. This appeal followed.

Defendant argues that its motion for summary disposition should have been granted because the bus driver was not negligent; thus, it was entitled to governmental immunity with regard to these claims. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Renny v Dep't of Transp*, 478 Mich 490, 495; 734 NW2d 518 (2007). A motion for summary disposition pursuant to MCR 2.116(C)(7) alleges that a claim is barred because of immunity granted by law. *Chelsea Investment Group LLC v Chelsea*, 288 Mich App 239, 264; 792 NW2d 781 (2010). "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). Documentary evidence is reviewed in the light most favorable to the nonmoving party. *Id.* at 429. If there is no factual dispute, whether a plaintiff's claim is barred by MCR 2.116(C)(7) is a question of law for the court to decide. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). However, if a factual dispute exists, summary disposition is not appropriate. *Id.*

In this case, it is undisputed that defendant is a governmental entity. It is also undisputed that governmental entities are not immune from liability "resulting from the negligent operation"

of a motor vehicle. MCL 691.1405. Defendant argues, however, that its bus driver did not operate the bus in a negligent manner because sudden stops and starts are normal incidents of travel and, here, the driver was forced to abruptly apply the brakes when a vehicle traveling in front of the bus suddenly “jammed on the brakes.” Defendant also argues that “it cannot be negligent to check the mirrors on a vehicle for traffic surrounding the vehicle.”

It is well-settled that sudden jerks and stops are considered normal incidents of travel which, alone, do not give rise to liability. See, e.g., *Russ v Detroit*, 333 Mich 505, 508; 53 NW2d 353 (1952); *Sherman v Flint Trolley Coach, Inc*, 304 Mich 404, 416; 8 NW2d 115 (1943); *Zawicky v Flint Trolley Coach Co*, 288 Mich 655, 658-659; 286 NW 115 (1939). However, a sudden jerk or stop precipitated by negligent behavior is not considered a normal incident of travel. See, e.g., *Getz v Detroit*, 372 Mich 98, 101-102; 125 NW2d 275 (1963); *Kasza v Detroit*, 370 Mich 7, 9; 120 NW2d 784 (1963). Negligence in the operation of a motor vehicle consists of a violation of a statute or of the ordinary care standard required by common law. MCL 257.401(1). “Ordinary care means the care that a reasonably careful person would use under the circumstances.” *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000). Accordingly, this duty to exercise reasonable care and caution is commensurate to the conditions and circumstances of travel. *Ashworth v Detroit*, 293 Mich 397, 400-401; 292 NW 345 (1940).

With regard to this incident, the bus driver testified in her deposition as follows:

I was on Greenfield. There was a gentleman in front of me and he kept touching his brakes, his brake lights were going off and on. I have a habit of checking my three mirrors constantly while I’m driving.

* * *

You can see the traffic out of all three mirrors. This is why in training, we were taught you check all three of your mirrors constantly while you are driving. As I went to check my mirrors, directed my vision in front of me, the car in front of me had jammed on the brakes. So to keep from hitting his behind, I jammed on mine and this is when [plaintiff’s decedent] came out of her wheelchair.

* * *

I hit the brakes hard to keep from hitting him.

Then the bus driver was asked: “Is that something that is a normal type of stop during an ordinary bus ride?” And the bus driver replied: “No.” When the driver was asked how she knew a man was driving the vehicle ahead of her she replied: “I could tell from his head. He was partially bald on top.” The bus driver also explained that she looked in her mirrors “just checking to see how traffic was flowing, was anybody close to the bus.” This discussion followed:

Q. Then when your attention went back to the car in front of you, you realized that you were getting extremely close and needed to jam on your brakes?

A. Yes. Like I said, the pavement was somewhat wet. It was starting to dry up. I was at least a car length behind him, but those buses do not stop on a dime. They are like trucks. So I jammed on my brakes to keep from sliding into him.

The bus driver had a duty to operate the bus with the degree of “reasonable care that would be exercised by a person of ordinary prudence under all the existing circumstances,” *Case*, 463 Mich at 6-7, and in a manner prescribed by the motor vehicle code. One of the provisions of the motor vehicle code is MCL 257.627(1) which states:

A person operating a vehicle on a highway shall operate that vehicle at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing. A person shall not operate a vehicle upon a highway at a speed greater than that which will permit a stop within the assured, clear distance ahead.

Similarly, MCL 257.643(1) states:

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon, and the condition of, the highway.

In this case, viewing the evidence in a light most favorable to plaintiff and considering the different standards of care imposed, we conclude that reasonable minds could disagree about whether the bus driver negligently operated the bus. That is, a genuine issue of material fact exists as to whether the sudden stop was precipitated by the negligent driving behavior of the bus driver. A finding of negligence could arise from a conclusion that the bus driver failed to exercise ordinary care and caution in light of the conditions and circumstances existing, including the wet road conditions, the braking behavior of the driver traveling in front of the bus, and the stopping distance required of a bus. Generally speaking, whether a party acted reasonably presents a question of fact. *Case*, 463 Mich at 7.

A finding of negligence could also arise from a conclusion that the bus driver violated MCL 257.627(1) by (1) failing to operate the bus at “a careful and prudent speed . . . having due regard to the traffic, surface” and other conditions existing and (2) operating the bus at a speed that would not permit her to stop safely “within the assured, clear distance ahead.” That is, the jury could conclude that the bus driver, even if she drove within the posted speed limit, was driving too fast in light of the wet and slippery pavement and the braking behavior of the driver of the vehicle traveling ahead of the bus. Further, the jury could conclude that the bus driver did not maintain a proper lookout ahead, i.e., that she failed to exercise the amount of observation that a normal, prudent driver would have under the circumstances. The bus driver admitted that, although she saw the braking behavior of the preceding vehicle, she averted her attention from that vehicle to “just check[] to see how traffic was flowing,” an unnecessary distraction from a potentially more dangerous existing condition. And the jury could conclude that the bus driver was not driving at a speed consistent with the existing traffic conditions and that would allow her to stop the bus safely within an assured, clear distance, i.e., without “jamming” on the brakes when there were passengers on the bus.

A finding of negligence could also arise from a conclusion that the bus driver violated MCL 257.643(1) by following the braking vehicle too closely, so closely that the bus driver could see that the man driving the vehicle was “partially bald on top.” That is, in light of the behavior of the other driver and wet road conditions, a jury could conclude that the bus driver, who testified that she was following about a car length behind, was following too closely to the vehicle whose driver was repeatedly applying the brakes in a manner that warned of an imminent stop.

Defendant’s reliance on the case of *Zawicky*, 288 Mich at 655, in support of its claim that sudden stops are normal incidents of travel is misplaced. Here, clearly the bus driver did not suddenly stop to let off or take on passengers “which every passenger must reasonably anticipate.” *Id.* at 658-659 (citation omitted). Rather, as the bus driver admitted, she “jammed” on the brakes to avoid hitting the preceding vehicle after she averted her attention from that braking vehicle to check her mirrors.

The facts presented in this case are more similar to those in the case of *Mitcham v Detroit*, 355 Mich 182; 94 NW2d 388 (1959). In that case, the motor coach passenger was pitched forward against a metal stanchion when the bus suddenly swerved to the left and stopped abruptly without warning and not at a bus stop. *Id.* at 184-185. The *Mitcham* Court held that there was at least a question of fact as to whether the bus driver “may have been operating his bus at a speed or in a manner unsafe for the conditions present.” *Id.* at 186. The defendant claimed an emergency existed and prompted the bus driver’s actions, but the *Mitcham* Court held that “whether there was an excusable emergency or instead whether any emergency which may have existed was all or partially created by the defendant’s bus driver himself, was properly a question of fact for the jury.” *Id.* at 193. Similarly, in *Kaszat*, 370 Mich at 9, our Supreme Court held that a question of fact existed for the jury’s consideration with regard to the alleged negligence of a bus driver who was forced to suddenly stop the bus after a pedestrian ran in front of the bus. The Court noted that the bus driver “offered no explanation of why he had not seen her earlier.” *Id.* See, also, *Routhier v Detroit*, 338 Mich 449, 456-457; 61 NW2d 593 (1953).

In summary, we conclude that genuine issues of material facts exist as to whether the bus driver operated the bus in a negligent manner. That is, we cannot conclude that all reasonable jurors would agree that the bus driver acted as a reasonably prudent bus driver would have acted under the same or similar circumstances. See *Case*, 463 Mich at 7; *Fiser v Ann Arbor*, 417 Mich 461, 469-470; 339 NW2d 413 (1983), overruled in part on other grounds *Robinson v Detroit*, 462 Mich 439, 445; 613 NW2d 307 (2000). Accordingly, the trial court properly denied defendant’s motion for summary disposition premised on the claim of governmental immunity.

Next, defendant argues that it owed no duty to apply a seatbelt or shoulder strap to plaintiff’s decedent. Although this issue was raised in the trial court, it was not specifically decided; thus, the issue is not preserved for appellate review and we decline to consider it. See *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 524; 679 NW2d 106 (2004).

Finally, defendant argues that plaintiff’s damage claims based on loss of consortium are barred by governmental immunity. We agree.

As argued by defendant, our Supreme Court in *Wesche*, 480 Mich at 84-85, held that the motor-vehicle exception to governmental immunity, MCL 691.1405, does not waive immunity for loss of consortium claims, but only waives immunity for claims of bodily injury and property damage. Thus, governmental immunity bars a plaintiff's loss of consortium claims. *Id.* at 87. The Court further held that "the wrongful-death act does not expand the waiver of immunity set forth in the motor-vehicle exception to include loss-of-consortium claims." *Id.* at 92. Accordingly, to the extent that plaintiff pleaded loss of consortium claims such claims are barred by governmental immunity. Thus, the trial court's denial of defendant's motion for partial summary disposition in this regard is reversed.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Mark J. Cavanagh