

STATE OF MICHIGAN  
COURT OF APPEALS

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RUBY SELDON,

Plaintiff-Appellee/Cross-Appellant,

v

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

Defendant-Appellant/Cross-  
Appellee,

and

QUEEN PERRY,

Defendant.

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UNPUBLISHED  
June 26, 2012

No. 295748  
Wayne Circuit Court  
LC No. 08-120659-NI

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

STEPHENS, J. (*concurring in part and dissenting in part*)

I respectfully concur in part and dissent in part. While I agree that the trial court properly granted summary disposition regarding the claim of gross negligence, I disagree that the trial court erred in only partially granting SMART's motion for summary disposition. Because I conclude that the trial court properly determined that defendants owed plaintiff a duty to advise her of the availability of a seatbelt, that there is a genuine issue of material fact relating to whether a sudden stop caused plaintiff's injuries and that the motor vehicle exception to governmental immunity applies, I would affirm in whole.

The majority correctly notes that federal regulations precluded defendants from *requiring* plaintiff to utilize a seatbelt to restrain her wheelchair. However, I am not persuaded that the federal prohibition in question eliminated a duty to inform plaintiff that a shoulder restraint was available for wheelchair users so that she could decide whether she wished to use it. The federal regulations do not prohibit, restrict, or comment in any specific way about a transportation provider's responsibility to advise wheelchair passengers of available seatbelts. However, Appendix D, Subpart G to 49 CFR, part 37, which represents the Department of Transportation's interpretation of 49 CFR, part 37, exhorts the public transportation authority's personnel to

“ensure that a passenger with a disability is able to take advantage of the accessibility and safety features on vehicles.” This arguably includes apprising the passenger of the existence of the accessibility features, as a passenger cannot take advantage of a feature of which she is unaware. The record reveals that plaintiff had requested to be positioned behind the driver’s seat to minimize her mobility and limit the risk of being discharged from her wheelchair. It further indicates that Perry had attempted to secure the wheelchair with a lap belt, which proved to be too small. Under those circumstances, Perry would have been aware that plaintiff would have likely welcomed information regarding the availability of a shoulder restraint. Consequently, I do not share the majority’s concern that to provide plaintiff with information regarding the shoulder constraint would be “contrary to the tenet that disabled passengers are to be treated the same as able-bodied passengers.”

Likewise, I disagree with the majority’s conclusion that the motor vehicle exception to governmental immunity is inapplicable under the facts of this case. My disagreement with the majority regarding the motor vehicle exception arises from our differing interpretations of the term “loading.” The parties in this case cite and discuss at some length the significance of a subsequent Michigan Supreme Court order in *Martin v Rapid Inter-Urban Transit Partnership*, 480 Mich 936; 740 NW2d 657 (2007). After quoting the relevant language of MCL 691.1405, the Supreme Court concluded that the plaintiff had alleged the occurrence of an injury resulting from the negligent operation of a motor vehicle, explaining:

In this case, the plaintiff alleges that she slipped and fell down the steps of a shuttle bus owned and operated by the defendants as she was attempting to exit the bus. *The loading and unloading of passengers is an action within the “operation” of a shuttle bus.* Accordingly, the plaintiff has satisfied the exception to governmental immunity set forth in MCL 691.1405. [*Id.* (emphasis added).]

In this case, the purported negligence of SMART, through Perry, involves the failure to mention the availability of a seat belt capable of strapping plaintiff into her wheelchair. I conclude that this comprises a component of the loading of wheelchair passengers, “an action within the ‘operation’ of a shuttle bus.” *Martin*, 480 Mich at 936. Plaintiff is essentially arguing that in failing to apprise her of the available restrains, defendants prevented her from being properly and completely loaded into the vehicle, which subsequently led to her injury. I would hold that “plaintiff has satisfied the exception to governmental immunity set forth in MCL 691.1405.” *Id.*

Further, I disagree with the majority’s conclusion that plaintiff failed to present a genuine issue of material fact regarding whether Perry’s alleged sudden stop of the vehicle constituted a negligent act. The only evidence of the bus’s speed near the time of plaintiff’s ejection from her seat shows that Perry was driving within the posted 35-mile-per-hour speed limit. However, the record does not specify with certainty at what moment or within what distance from a yellow traffic signal Perry began applying the bus’s brakes. While Perry estimated that she began braking within approximately three car lengths of the traffic signal, I conclude that an inference of negligence reasonably arises from the fact that Perry’s braking of the bus at a traffic signal was sudden enough to dislodge plaintiff from her chair to the floor of the bus with enough force

to break two of her legs. Consequently, I would permit a jury to determine whether Perry committed a negligent act that caused plaintiff's injury.

Finally, I note that I join the majority's holding regarding plaintiff's issues on cross-appeal. As stated above, though I do believe that defendants had a duty to inform plaintiff of the availability of the shoulder restraint, defendants did not have a duty to actually apply that seatbelt absent a request. Additionally, while I have concluded that plaintiff adequately set forth evidence to support her claim of negligence, I do not believe that the record demonstrates sufficient evidence to maintain an action for gross negligence against Perry.

/s/ Cynthia Diane Stephens