STATE OF MICHIGAN

COURT OF APPEALS

RUBY SELDON, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED June 26, 2012
v	No. 295748 Wayne Circuit Court LC No. 08-120659-NI
SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, a/k/a SMART, Defendant-Appellant/Cross-Appellee,	
and	
QUEEN PERRY, Defendant.	

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

PER CURIAM.

Defendant Suburban Mobility Authority for Regional Transportation (SMART) appeals as of right the trial court's order denying in part its motion for summary disposition on the basis of governmental immunity. Plaintiff cross-appeals the same order to the extent that the court granted summary disposition for defendant Queen Perry and partially granted summary disposition for SMART. Because SMART had no duty to secure plaintiff in her wheelchair or inform her of the availability of a shoulder restraint, the failure to inform plaintiff did not constitute the operation of a motor vehicle under MCL 691.1405, and plaintiff failed to establish a justiciable question of fact regarding whether Perry operated the bus negligently or acted with gross negligence, we affirm the grant of summary disposition in favor of SMART and Perry and reverse the denial of SMART's motion for summary disposition on the basis of governmental immunity.

Plaintiff instituted this action because of injuries that she sustained in January 2008 while riding on a SMART bus driven by defendant Perry. Plaintiff was ejected from her wheelchair and sustained bilateral ankle fractures when Perry applied the brakes to stop at a yellow traffic signal. Plaintiff alleged claims of negligence and gross negligence against SMART and Perry.

The trial court denied summary disposition for SMART based on governmental immunity and granted summary disposition for Perry on plaintiff's gross negligence claim. SMART now appeals and plaintiff cross-appeals the trial court's decisions.

I. DUTY TO ADVISE

SMART first argues that the trial court erred by denying its motion for summary disposition on the basis that it owed plaintiff a duty to advise her of the availability of a shoulder belt. We review de novo a trial court's decision on a motion for summary disposition. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is barred by immunity granted by law. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). In reviewing a ruling pursuant to subrule (C)(7), "[w]e consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." The applicability of governmental immunity is a question of law that is also reviewed de novo. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

In order to establish a prima facie negligence claim, a plaintiff must prove four elements: (1) duty, (2) breach, (3) causation, and (4) damages. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). "The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff." *Id*. Whether a duty exists is a question of law for the court to decide. *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997).

SMART had no legal duty to advise plaintiff of the availability of a shoulder restraint or belt. Regulations promulgated by the Department of Transportation (DOT) to effectuate the purpose of the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, prohibit a transit operator from requiring wheelchair passengers to use seat belts or shoulder harnesses unless the operator requires the same of all passengers. 49 CFR 37.1; 49 CFR 37.5. Because SMART buses are not equipped with such devices for all passengers, SMART could not have legally required plaintiff to use a shoulder belt. Requiring operators to inform wheelchair passengers of the availability of seat belts or shoulder harnesses, in light of the unavailability of such devices for nonwheelchair passengers, would impose a different duty on operators depending on whether a passenger is able-bodied or wheelchair-bound and runs contrary to the tenet that disabled passengers are to be treated the same as able-bodied passengers.

Further, while 49 CFR part 37, Appendix D, states that an "entity's personnel have an obligation to ensure that a passenger with a disability is able to take advantage of the accessibility and safety features" on a vehicle, this obligation requires only that drivers or other personnel provide assistance with lifts, ramps, and securement devices to secure a wheelchair. No regulation requires a transit operator to advise a wheelchair passenger of the availability of a seat or shoulder belt . Likewise, SMART's internal policy did not require defendant Perry, the bus driver, to advise plaintiff that a shoulder belt was available. Accordingly, SMART owed no

duty to advise plaintiff of the availability of a shoulder belt, and the trial court erred by concluding otherwise.[1]

II. OPERATION OF A MOTOR VEHICLE

SMART next argues that even if it owed plaintiff a duty to inform her that a shoulder belt was available, the failure to do so did not constitute the "operation" of a motor vehicle within the meaning of MCL 691.1405, the motor vehicle exception to governmental immunity. MCL 691.1405 provides that "[g]overnmental agencies shall be liable for bodily injury . . . resulting from the negligent operation . . . of a motor vehicle[.]" In *Chandler v Muskegon Co*, 467 Mich 315, 321; 652 NW2d 224 (2002), our Supreme Court interpreted the phrase "operation of a motor vehicle" to "encompass[] activities that are directly associated with the driving of a motor vehicle." In *Martin v Rapid Inter-Urban Transit Partnership*, 480 Mich 936; 740 NW2d 657 (2007), the Court held, in an order, that "[t]he loading and unloading of passengers is an action within the 'operation' of a shuttle bus." In that case, the plaintiff was injured when she slipped and fell on the bus steps as she was attempting to exit the vehicle. *Id.*

Here, even if SMART owed plaintiff a duty to inform her of the availability of a shoulder belt, the failure to so advise her did not implicate MCL 691.1405. Although the loading and unloading of passengers is an activity within the operation of a motor vehicle, the failure to inform plaintiff that a shoulder belt was available, without more, did not constitute the "operation" of the motor vehicle. Notably, plaintiff's wheelchair was loaded onto the bus and secured without incident, and plaintiff was not injured during the loading or unloading process. Thus, the motor vehicle exception to governmental immunity was inapplicable, and the trial court erred by denying SMART's motion for summary disposition based on governmental immunity.

III. SUDDEN STOPPING

SMART next argues that even if the motor vehicle exception to governmental immunity was applicable, the trial court erred by determining that plaintiff established a question of fact regarding whether Perry's sudden stopping of the bus was negligent or part of the normal

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[1] We know from plaintiff's deposition that she previously worked as a bus driver for SEMTA, now known as SMART, and was familiar with wheelchair passengers, wheelchair restraints, and shoulder belts or harnesses. Although she did not operate the specific kind of bus involved in this accident, a bus designed with a lift and used to transport disabled persons, she testified that she had ridden this type of bus previously and neither used nor was advised of the shoulder belt and did not request to use one. Plaintiff further testified that her wheelchair was equipped with a lap belt, but it did not reach around her circumference. Similarly, Perry testified that the lap belt did not reach around plaintiff and she did not believe that the shoulder belt would fit around her either. Moreover, the record shows that when emergency services arrived, plaintiff was lifted back into her wheelchair and SMART transported her to the same hospital that was her original destination. Notably, emergency personnel used their own restraint rather than the bus's shoulder restraint to secure her in her wheelchair.

incidents of travel. Before addressing the merits of this argument, we first address plaintiff's claim that this Court lacks jurisdiction to decide this issue.

Plaintiff argues that this issue, pertaining to whether plaintiff has presented sufficient evidence to establish a jury question regarding negligence, is not appealable as of right pursuant to MCR 7.203(A) and MCR 7.202(6)(a)(v). Those provisions state that this Court has jurisdiction to decide an appeal of right from an order denying governmental immunity under MCR 2.116(C)(7) or "denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity[,]" but the appeal is limited to "the portion of the order with respect to which there is an appeal of right." In *Walsh v Taylor*, 263 Mich App 618, 625; 689 NW2d 506 (2004), this Court interpreted the provisions and opined that "regardless of the specific basis of the trial court's ruling on a motion for summary disposition, whenever the effect is to deny a defendant's claim of immunity, the trial court's decision is, in fact, 'an order denying governmental immunity[,]'" and is reviewable under MCR 7.203(A) and MCR 7.202(6)(a)(v). Here, the trial court determined that plaintiff established a question of fact regarding whether the sudden stop of the bus was negligent or within the normal incidents of travel. Pursuant to MCL 691.1405, SMART was liable only if plaintiff's injuries resulted from "the negligent operation" of a motor vehicle. Otherwise, SMART was immune from liability. Because the effect of the trial court's ruling was to deny SMART's claim of immunity, we have jurisdiction to address this issue pursuant to MCR 7.203(A) and MCR 7.202(6)(a)(v).

A motion pursuant to MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion under subrule (C)(10), we consider "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621.

The trial court erroneously determined that plaintiff presented evidence establishing a justiciable question of fact regarding whether Perry operated the bus negligently. It is well settled that, absent evidence of other negligence pertaining to the operation of a bus, a plaintiff may not recover for injuries sustained when a bus suddenly stops because such stops are normal incidents of travel. *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). Here, the record contains no evidence that Perry operated the bus negligently. The only evidence of the bus's speed near the time that plaintiff was ejected from her wheelchair shows that Perry was driving within the 35-mile-per-hour speed limit. Plaintiff contends that Perry's operation of the bus was negligent because Perry failed to anticipate that the green light would change to yellow. This argument is untenable, however, because Perry did not act negligently by traveling within the speed limit while the traffic signal was green. Further, the mere fact that an injury occurred does not itself indicate that Perry operated the bus negligently. See *Zawicky*, 288 Mich at 659. Accordingly, plaintiff failed to present evidence establishing a justiciable question of fact regarding whether Perry operated the bus negligently. Thus, summary disposition was appropriate on this basis, and the trial court's decision to the contrary was erroneous.

IV. DUTY TO APPLY SEAT BELTS

On cross-appeal, plaintiff argues that the trial court erroneously determined that SMART did not owe her a duty to secure her in her wheelchair using a personal restraint such as a seat belt or shoulder belt. The trial court correctly determined that SMART owed no such duty. The Federal Transit Administration's (FTA) "Questions and Answers Concerning Common Wheelchairs and Public Transit" provides:

> **Does a wheelchair user have to use the seatbelt and shoulder harness?**
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> Under the broad non-discrimination provisions in Section 37.5 of the DOT's ADA regulations [49 CFR 37.5], *a transit operator is not permitted to mandate the use by wheelchair users of seatbelts and shoulder harnesses, unless the operator mandates the use of these devices by all passengers*, including those sitting in vehicle seats. For example, on fixed route buses, if none of the other passengers are required to wear shoulder belts then neither can the person in the mobility device be required to do so.
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> Transit operators may establish a policy that requires the seatbelt and shoulder harness to be used by all riders, including those who use wheelchairs as well as those who use vehicle seats, if seatbelts and shoulder harnesses are provided at all seating locations. [Emphasis added.]

Thus, where, as here, a transit operator has not adopted a policy requiring all passengers to wear restraints, the operator may not require wheelchair passengers to wear restraints.

Further, 49 CFR 37.165(f) provides that personnel of transit operators "shall assist individuals with disabilities with the use of securement systems" "[w]here necessary or upon request . . . ." Therefore, according to 49 CFR 37.165(f), a regulation promulgated by the DOT, and the FTA's interpretation of the DOT's nondiscrimination regulation, transit operators may not place personal restraints on wheelchair passengers absent some indication by the passenger that she wishes to wear one. Pursuant to 42 USC 12149(a), the United States Congress conferred on the Secretary of Transportation the obligation to issue regulations pertaining to public transportation other than by aircraft and certain rail operations. Congress directed that "[t]he regulations . . . shall include standards applicable to facilities and vehicles[.]" 42 USC 12149(b). "When Congress has . . . [given] an express delegation of authority to [an] agency to elucidate a specific provision of the statute by regulation, . . . any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v Mead Corp*, 533 US 218, 227; 121 S Ct 2164; 150 L Ed 2d 292 (2001) (quotation marks and citation omitted). The FTA is an agency under the direction of the DOT, which Congress has expressly invested with authority to promulgate the relevant public transit regulations at issue here, and plaintiff has not suggested that the DOT regulations are "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Id*. at 227.

Accordingly, we conclude that the trial court properly granted summary disposition for SMART on the basis that it had no duty to secure plaintiff using a personal restraint such as a seat belt or shoulder harness.

V. GROSS NEGLIGENCE

Finally, plaintiff argues that the trial court erroneously granted summary disposition for Perry on plaintiff's gross negligence claim. MCL 691.1407(2) sets forth the standard for governmental immunity pertaining to individual actors and employees of governmental agencies. The statute provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
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> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

The parties do not dispute that Perry was driving the bus within the scope of her authority or that SMART was engaged in the exercise or discharge of a governmental function. Rather, plaintiff argues that Perry acted with gross negligence by failing to secure her using a personal restraint and by suddenly stopping with such force that she was ejected from her wheelchair.

The Legislature has defined gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). "If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury. However, if reasonable minds could not differ, the issue may be determined by a motion for summary disposition." *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010).

Plaintiff's argument that Perry's failure to secure her using a personal restraint constituted gross negligence lacks merit. As previously discussed, SMART had no duty to apply a restraint such as a seat belt or shoulder harness on plaintiff. In fact, if Perry had done so absent plaintiff's request, she would have violated DOT regulations promulgated to effectuate the purposes of the ADA. See 49 CFR 37.1; 49 CFR 37.5. Accordingly, it cannot be said that Perry's failure to apply a restraint constituted "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a).

Moreover, Perry's actions did not constitute "the proximate cause" of plaintiff's injury as required by MCL 691.1407(2)(c). A "determination whether a governmental employee's conduct constituted gross negligence that proximately caused the complained-of injury under MCL 691.1407 is generally a question of fact, but, if reasonable minds could not differ, a court may grant summary disposition." *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007). The phrase "the proximate cause" in MCL 691.1407(2)(c) requires that "the [governmental] employee's conduct . . . be 'the one most immediate, efficient, and direct cause preceding an injury.'" *Curtis v City of Flint*, 253 Mich App 555, 563; 655 NW2d 791 (2002), quoting *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

Here, plaintiff's ejection from her wheelchair occurred when Perry applied the brakes to stop for a yellow traffic signal. Thus, the application of the brakes was "'the one most immediate, efficient, and direct cause preceding [plaintiff's] injury[,]'" *Curtis*, 257 Mich App at 563, quoting *Robinson*, 462 Mich at 459, and Perry's failure to secure plaintiff with a personal restraint was not the proximate cause of plaintiff's injuries. Moreover, the record does not indicate that Perry acted with gross negligence when she applied the brakes. As previously discussed, plaintiff failed to present evidence establishing a justiciable question of fact regarding whether Perry operated the bus negligently. Accordingly, there can be no justiciable question of fact regarding whether Perry operated the bus with gross negligence. The trial court therefore properly granted summary disposition for Perry on plaintiff's gross negligence claim.

Affirmed in part and reversed in part. SMART, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause