

STATE OF MICHIGAN  
COURT OF APPEALS

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RUBY SELDON,  
Plaintiff-Appellee/Cross-Appellant,

UNPUBLISHED  
June 26, 2012  
APPROVED FOR  
PUBLICATION  
July 31, 2012

v

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

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

Defendant-Appellant/Cross-  
Appellee,

Advance Sheets Version

and

QUEEN PERRY,

Defendant.

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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 granting in part 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 seat belt, 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 seat belt to restrain her in 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 passengers in wheelchairs of available seat

belts. However, appendix D, subpart G, § 37.165 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, because a passenger cannot take advantage of a feature of which he or 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 restraint 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 the Michigan Supreme Court's order in *Martin v Rapid Inter-Urban Partnership*, 480 Mich 936 (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 constitutes a component of the loading of passengers in wheelchairs, "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 stopping of the vehicle constituted a negligent act. The only evidence of the bus's speed near the time of plaintiff's ejection from her wheelchair shows that Perry was driving within the posted 35-miles-per-hour speed limit. However, the record does not specify with certainty at what moment or within what distance from the yellow traffic control light 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 light was sudden enough to dislodge plaintiff from her wheelchair to the floor of the bus with enough force to break both her ankles. Consequently, I would permit a jury to determine whether Perry committed a negligent act that caused plaintiff's injury.

Finally, 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 restraint 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