STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF ROBERT WOOLEN, by GAYLE WOOLEN, Personal Representative,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant

and

JOHN DOE,

Defendant.

UNPUBLISHED
May 20, 2021

No. 351921
Wayne Circuit Court
LC No. 18-010866-NI

Before: RONAYNE KRAUSE, P.J., and RIORDAN and O'BRIEN, JJ.

PER CURIAM.

Defendant, the City of Detroit, appeals as of right the order denying its motion for summary disposition in this action regarding the motor-vehicle exception to governmental immunity. We affirm.

I. FACTUAL BACKGROUND

On March 14, 2018, plaintiff[1] was a passenger on defendant's bus, which was operated by Transportation Equipment Operator (TEO) Kashawn Nichols at the time.[2] As the bus was traveling down Grand River Avenue, a black Chevrolet Impala pulled into the road in front of the bus. Nichols moved the bus into the left lane to avoid colliding with the Impala, but the Impala also moved across into the left lane and executed a U-turn in front of Nichols. Nichols slammed on the brakes, causing plaintiff to fall forward out of his seat. Plaintiff stated that he immediately felt "pain in [his] arm." Plaintiff disputes that the Impala briefly stopped in front of the bus. Nichols called EMS and plaintiff was taken to Detroit Receiving Hospital, where x-rays identified multiple fractures in his right arm.

After the accident, Nichols completed an incident report, which stated, in relevant part, as follows:

> [A] black chevy impala was making a left hand turn from the curb right in front of me[.] I was blowing my horn so that he can see that I was coming[.] [T]he driver of the car proceed to turn in front which caused me to go left to keep from hitting[.] [H]e still proceed to turn which caused me to hit my brakes and while doing so a 79 year old man fell and hurt his arm. . . .

Plaintiff sued defendant for negligent operation of the bus that it owned. Defendant moved for summary disposition, asserting entitlement to governmental immunity, the failure of plaintiff to establish negligence, and applicability of the sudden-emergency doctrine. At a hearing on defendant's motion, the trial court, noting that it was "a close call," determined that there was a "question of fact for the jury to decide." The trial court reasoned that it would be "improper for the Court to try to make a determination whether [Nichols] should have come to a slow stop or he should have slammed on his brakes." The trial court thus entered a written order denying defendant's motion, and this appeal followed.

II. STANDARD OF REVIEW

We review de novo a lower court's decision regarding a motion for summary disposition under MCR 2.116(C)(10). *Reed v Reed*, 265 Mich App 131, 140-141; 693 NW2d 825 (2005). The de novo standard of review requires us to review the legal issues at hand without deferring to the trial court. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). "A motion for summary disposition based on MCR 2.116(C)(10) tests the factual support for a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence." *Reed*, 265 Mich App at 140. "When reviewing a motion under MCR 2.116(C)(10), this Court

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[1] Plaintiff Robert Woolen passed away during these proceedings, and the case caption has been amended to reflect Gayle Woolen as the personal representative of his estate. See *Woolen v Detroit*, unpublished order of the Court of Appeals, entered April 30, 2021 (Docket No. 351921). We will nonetheless refer to Robert Woolen as "plaintiff" for the purposes of our opinion.

[2] Plaintiff originally identified "JOHN DOE" as the bus driver and named him as a defendant in his complaint. During the lower court proceedings, Nichols was ultimately identified as the bus driver. We refer to the City of Detroit as the singular defendant for the purposes of our opinion.

'must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in favor of the party opposing the motion.' " *Williamstown Twp v Sandalwood Ranch, LLC*, 325 Mich App 541, 547 n 4; 927 NW2d 262 (2018), quoting *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

We also review de novo the applicability of governmental immunity. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). "A motion for summary disposition pursuant to MCR 2.116(C)(7) tests whether a claim is 'barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties.' " *Miller v Lord*, 262 Mich App 640, 643; 668 NW2d 800 (2004), quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). "To survive a motion for summary disposition brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity." *Miller*, 262 Mich App at 643.

III. LAW AND ANALYSIS

"Governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a governmental agency." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 155-156; 615 NW2d 702 (2000). Under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*., a governmental defendant is generally immune from tort liability when engaged in a governmental function. *Ross v Consumers Power Co*, 420 Mich 567, 591; 363 NW2d 641 (1984). A governmental function is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b).

Governmental immunity, while broad, is not absolute. See *Nawrocki*, 463 Mich at 158. There are several statutory exceptions to governmental immunity. *Id*. at 156. Relevant here, MCL 691.1405 provides for the motor-vehicle exception to governmental immunity:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . .

Defendant argues it is immune from liability under the GTLA and that plaintiff has failed to establish Nichols's negligence, rendering the motor-vehicle exception inapplicable.[3]

A finding of negligence requires establishment of the following elements: "(1) duty, (2) breach, (3) causation, and (4) damages." *Hannay v Dep't of Transp*, 497 Mich 45, 63; 860 NW2d

[3] There is no dispute that defendant was performing a governmental function in this case. See MCL 691.1401(b).

67 (2014) (quotation marks and citation omitted). The pertinent issue here concerns the second element, whether Nichols breached the standard of care when operating defendant's bus. "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). It is usually a question for the jury to determine whether the defendant's conduct fell below this standard. *Id*.

Plaintiff argues that the sudden braking after changing lanes constituted negligent operation of the bus. He maintains that Nichols's statement that there was no immediate danger of collision when the Impala first pulled into the road means that Nichols negligently caused the incident and could have safely stopped the bus when the Impala pulled into the path of the bus. Plaintiff claims that a reasonably prudent person would have simply slowed down and stopped rather than switch lanes. In addition, plaintiff notes a discrepancy between the incident report completed by Nichols, which does not indicate the Impala stopped or hesitated in front of the bus, and Nichols's deposition testimony indicating his actions were the result of such a stop by the Impala. Therefore, argues plaintiff, there is at least a genuine issue of material fact as to whether his injuries were caused by Nichols's negligent operation of the bus.

On one hand, there are multiple facts in the record supporting the conclusion that Nichols did not act negligently. Nichols slowed down as soon as the Impala pulled in front of the bus. Nichols was not speeding, and his conformance with the speed limit does not necessarily imply or prove that he could have stopped in time to avoid colliding with the Impala. Nichols also honked the bus horn at the Impala to alert the driver of the situation and testified at his deposition that the driver acknowledged the bus's presence. The fact that Nichols honked the horn to alert the other driver weighs against a finding of negligence, since it shows that Nichols was alert to the situation and warned the other driver of their possible collision as soon as he saw the Impala.

On the other hand, as plaintiff contends, Nichols's acknowledgement that he would have been able to come to a complete stop without hitting the Impala might mean that he should have stopped and that changing lanes was not a reasonable action, at least where the Impala would be expected to change lanes as well in response to the bus horn. In addition, the fact that Nichols failed to mention in his incident report that the Impala stopped or slowed in front of the bus indicates that this detail, if it occurred, was not a significant contribution to the overall urgent circumstances. That is, a jury could find that Nichols was not compelled to change lanes in response to the Impala and that the reasonable response would have simply been to remain in the same lane and apply the brakes if the Impala remained in the same lane as well. Therefore, although it is certainly a close call, as noted by the trial court, we conclude that it correctly ruled that there was a question of fact regarding Nichols's alleged negligence, and by extension, the applicability of the motor-vehicle exception to the GTLA.

We acknowledge that a finding of negligent operation is unlikely "absent evidence of other negligence pertaining to the operation of a bus, [and] a plaintiff bus passenger may not recover for injuries sustained when the bus suddenly stopped because such stops are normal incidents of travel." *Seldon v Suburban Mobility Auth for Regional Trans*, 297 Mich App 427, 437; 824 NW2d 318 (2012). For example, in *Seldon*, which involved a similar situation in which a bus passenger was injured after a sudden stop, we found that the governmental entity was immune from liability because there was no evidence the bus driver had been negligent when she rapidly decelerated once oncoming the traffic light turned yellow. *Id*. In this case, however, given the existence of a

factual dispute involving whether the Impala stopped while in the pathway of the bus, and the actions allegedly necessitated by that disputed fact, the trial court did not err in denying defendant's motion for summary disposition.[4]

For the reasons discussed above, plaintiff has established a genuine issue of material fact as to whether the motor-vehicle exception is applicable to defendant's assertion of governmental immunity under the GTLA. Therefore, the trial court did not err in denying defendant's motion for summary disposition on that basis.

Defendant argues, in the alternative, that the trial court erred in denying its motion for summary disposition because the evidence shows Nichols was presented with a sudden emergency. While our conclusion that plaintiff established a genuine issue of material fact as to Nichols's negligence arguably negates the necessity of our addressing this argument,[5] we nonetheless conclude, for the reasons discussed above, that summary disposition would not be appropriate under this doctrine.

The sudden-emergency doctrine has been described by our Supreme Court as follows:

> One who suddenly finds himself in a place of danger, and is required to act without time to consider the best means that may be adopted to avoid the impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence. [*Walker v Rebeuhr*, 255 Mich 204, 206; 237 NW 389 (1931) (quotation marks and citation omitted)].

The doctrine applies to situations that are "unusual or unsuspected." *Barringer v Arnold*, 358 Mich 594, 599; 101 NW2d 365 (1960). An "unusual" situation is one in which "the factual background of the case varies from the everyday traffic routine confronting the motorist." *Vander Laan v Miedema*, 385 Mich 226, 232; 188 NW2d 564 (1971). An "unsuspected" situation, "on the other hand[,] connotes a potential peril within the everyday movement of traffic. . . . [I]t is

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[4] Defendant argues that this case is controlled by *Getz v Detroit*, 372 Mich 98; 125 NW2d 275 (1963), in which our Supreme Court stated that "[s]udden jerks or jolts . . . are among the usual incidents of travel on trolley buses which every passenger must expect and mere fact that a passenger is injured thereby will not of itself make out a case of negligence which will render the carrier liable although carrier may be liable if the jerk or jolt is unnecessarily sudden or violent." *Id*. at 102. (quotation marks and citation omitted). In *Getz*, however, the "sudden jerk or jolt" was the result of a stop to take on passengers, which the Court held was not actionable because it was not "unnecessarily sudden or violent." *Id*. at 99, 102. Here, in contrast, the stop was arguably "unnecessarily sudden or violent."

[5] "The doctrine of sudden emergency is a logical extension of the 'reasonably prudent person' rule." *Szymborski v Slatina*, 386 Mich 339, 341; 192 NW2d 213 (1971) (cleaned up). Because we have concluded that plaintiff established a genuine issue of material fact as to whether Nichols satisfied this standard, the sudden-emergency doctrine would seemingly be a question for the jury when considering this element of negligence.

essential that the potential peril had not been in clearview for any significant length of time, and was totally unexpected." *Id.* A person is not negligent when he or she "chooses one reasonable, nonnegligent course of action over another reasonable, nonnegligent course of action that would have resulted in a more favorable outcome when viewed in hindsight." *White v Taylor Distrib Co, Inc*, 275 Mich App 615, 623; 739 NW2d 132 (2007), aff'd 482 Mich 136 (2008).

In this case, defendant argues that it is not liable under the sudden-emergency doctrine because Nichols was faced with an emergency situation occasioned by the Impala's hesitation or stopping in the pathway of the bus after it pulled out into oncoming traffic. Plaintiff, however, noting that it has been well-established our Supreme Court that the issue of whether a driver experienced a sudden emergency is a question of fact for the jury, *White v Taylor Distrib Co*, 482 Mich 136, 143; 753 NW2d 591 (2008), argues that the issue of whether Nichols faced a sudden emergency should be reserved for the jury in this case.

Having found that a genuine issue of material fact exists regarding Nichols's negligence, and more specifically whether an emergent situation was presented because of the dispute regarding the Impala's hesitation, the applicability of the sudden-emergency doctrine requires resolution by a jury. In other words, the question here is whether a sudden emergency existed in the first instance, not whether Nichols acted non-negligently as a matter of law in responding to that emergency. Arguably, if the Impala did not significantly slow or stop in the bus's lane, then Nichols was not presented with a sufficient sudden emergency to warrant application of the sudden-emergency doctrine. Consequently, defendant is not entitled to summary disposition on this basis.

IV. CONCLUSION

The trial court did not err by denying defendant's motion for summary disposition. Accordingly, we affirm.

/s/ Amy Ronayne Krause
/s/ Michael J. Riordan
/s/ Colleen A. O'Brien