STATE OF MICHIGAN

COURT OF APPEALS

NICOLA BINNS, by Co-Guardians JEFFREY FRIED and ELI BINNS-COOLEY,

Plaintiffs-Appellees,

v

HOWARD PICKENS,

Defendant,

and

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 354503
Wayne Circuit Court
LC No. 19-002113-NI

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Defendant, City of Detroit (the City), appeals as of right the trial court order denying summary disposition on plaintiffs' claims of negligent operation under the motor vehicle exception to governmental immunity. For the reasons stated in this opinion, we reverse and remand for further proceedings.

I. BASIC FACTS

On March 28, 2016, at approximately 4:15 p.m., Howard Pickens, a bus driver for the City, was driving a bus eastbound on Jefferson Avenue near Parkview when the bus hit something that caused it to lurch upward. Pickens speculated that the right front tire must have struck an object and that, as a result, the bus rose approximately 1 foot in the air. He exited the bus to inspect the surrounding area. At his deposition, he testified that he saw an uncovered manhole and a dislodged manhole cover in his lane of travel, and he surmised that the incident was caused by either the manhole or the manhole cover. The bus Pickens was driving was equipped with internal and

external surveillance cameras that captured the impact. The video footage does not show what the bus hit.

The impact caused major damage to the front windshields of the bus. Additionally, Nicola Binns, a passenger on the bus, was thrown into the air, hit her head on a metal bar above her seat, and landed on the floor with another passenger falling on top of her. Binns sustained injuries as a result, plaintiffs, i.e., Binns's guardian and co-guardian, sued the City for negligent operation of the bus.

The City moved for summary disposition, asserting that plaintiffs had failed to present any evidence that Pickens was negligent in his operation of the bus. The City argued that the surveillance footage showed that Pickens was driving at a normal rate of speed when the bus struck a concealed object. Because there was no visible obstruction, they asserted he could not have avoided the impact. In response, plaintiffs argued that negligence could be presumed in light of the inexplicable nature of the occurrence. Additionally, they argued that Pickens's negligence could be inferred under the doctrine of res ipsa loquitur. Following oral argument, the trial court denied the City's motion for summary disposition, reasoning:

> Well, one should expect to run over potholes or small bumps on any Michigan roadway, a jolt so severe to crack the windshield and to send passengers on the bus flying from their seat and sending a manhole cover flying up, is beyond ordinary risks associated with driving and gives rise to an inference of negligence.
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> It is true that the mere fact that of [sic] any injury does not impute negligence on the part of anyone, but where a thing would happen which . . . would not ordinarily of – [sic] had occurred, if due care had been used, the fact of such happening raises a presumption of negligence in someone.
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> And so—and also the manhole cover here was under the exclusive control of the City, the bus was under the exclusive control of the City, and it's uncontested that the actions of the bus hitting the manhole was [sic] the cause of Plaintiff's injuries. There's been no evidence provided which demonstrates the accident was caused in any way by Plaintiff, Binns, and since the bus was being driven by Mr. Pickens and the manhole on East Jefferson was maintained by the City[,] [it] is more likely that the explanation of the accident was more accessible to the Defendant then the Plaintiff. A[s] such there would be an inference of negligence and summary disposition would be inappropriate.

This appeal follows.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

The City argues that the trial court erred by denying its motion for summary disposition. We review de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

Additionally, the issue of whether the doctrine of res ipsa loquitur is applicable to a particular case is a question of law. *Jones v Porretta*, 428 Mich 132, 154 n 8; 405 NW2d 863 (1987).

B. ANALYSIS

"Under Michigan's governmental tort liability act (GTLA), MCL 691.1401 *et seq*., governmental agencies are immune from tort liability when they are 'engaged in the exercise or discharge of a governmental function.' " *Goodhue v Dep't of Transp*, 319 Mich App 526, 530-531; 904 NW2d 203 (2017), citing MCL 691.1407(1). "However, the act provides several exceptions to this broad grant of immunity." *Id*. at 531. Under MCL 691.1405, "[g]overnmental 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[.]" To establish a prima facie case of negligence, a plaintiff must demonstrate that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the plaintiff suffered damages, and (4) the damages were caused by the defendant's breach of duty. *Composto v Albrecht*, 328 Mich App 496, 499; 938 NW2d 755 (2019).

In order to show that Pickens was negligent in the operation of the bus, plaintiffs rely upon the doctrine of res ipsa loquitor. "The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act. . . ." *Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005) (quotation marks and citation omitted). Our Supreme Court has provided the following standard:

> In order to avail themselves of the doctrine of res ipsa loquitur, plaintiffs must meet the following conditions:
>
> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
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> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
>
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and
>
> (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. [*Id*. (quotation marks and citation omitted).]

Additionally, "[a]lthough plaintiff must establish that the event was of a kind that ordinarily does not occur in the absence of negligence, plaintiff must also produce some evidence of wrongdoing beyond the mere happening of the event." *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 20-21; 930 NW2d 393 (2018).

The doctrine res ipsa loquitor cannot save plaintiffs' lawsuit. The event at issue here is a bus hitting something that caused an impact strong enough to crack the bus's windshields and throw multiple passengers from their seats. Plaintiffs contend that, based on the severity of the damage to the bus and the impact to the passengers, this is the kind of event which ordinarily does

not occur in the absence of someone's negligence. Yet, motor-vehicle crashes—even severe ones—occur with some regularity even in the absence of negligence.

Next, there is no evidence that the event was caused by an object that was in the exclusive control of the City. Plaintiffs assert that the bus was in the exclusive control of the City; however, the event was not caused by the bus. Instead, the event was caused by the bus's impact with something outside of the bus. As a result, the proper inquiry turns on whether the City had exclusive control over whatever the bus struck. Based on the record, it is unclear what the bus actually hit. The City surmises that the bus hit an open manhole or a manhole cover near the center of the right-hand lane. Plaintiffs claim that the manhole and its cover were in the exclusive control of the City. Although the City possibly had exclusive control of the manhole's maintenance, it does not follow that the City was the only one to exert control over it. Vehicles traveling on the road may have caused the manhole cover to shift or loosen before the incident at issue in this case. Weather conditions may have done the same. Additionally, as noted by the City, the manhole cover may have been deliberately loosened by individuals not associated with the City in a bid to steal the cover to sell for scrap. Therefore, even if plaintiffs could establish that the bus struck the manhole or the manhole cover, they cannot meet their burden of showing that the manhole and its cover was within the City's exclusive control.[1]

And, although plaintiffs' can establish the third requirement, there is no indication that "evidence of the true explanation of the event" was "more readily accessible" to the City than to plaintiffs. The surveillance footage from the interior and exterior of the bus was made available to all parties, and both the City and plaintiffs were able to view the street where the incident occurred. Furthermore, to the extent that the City had records relating to the street, the manhole, or the curb, plaintiffs' lawyer could have sought access to those records during discovery.

Finally, plaintiffs have not produced "some evidence of wrongdoing beyond the mere happening of the event." *Pugno*, 326 Mich App at 19-20. The surveillance footage shows that before the impact Pickens was driving at a normal rate of speed and that there were no obvious obstructions in the roadway. He did not brake suddenly or swerve. Plaintiffs produced no evidence to counter the evidence that Pickens was not driving negligently and that he was unaware of anything that would have required him to take action to avoid impact with an object, nor have they established wrongdoing beyond the mere happening of the event. Accordingly, plaintiffs have failed to meet their burden to avail themselves of the doctrine of res ipsa loquitor.

Alternatively, plaintiffs rely on this Court's decision in *Bolton v Detroit*, 10 Mich App 589; 157 NW2d 313 (1968) and this Court's decision *Horne v Suburban Mobility Auth for Regional*

[1] Although plaintiffs pleaded in their complaint that the bus hit the manhole, they now argue that the bus "most likely" hit the curb. That conclusion, however, is mere speculation or conjecture—"an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). Although Pickens stated that the right front tires rose approximately 1 foot in the air after the bus hit something, the surveillance footage does not show any impact with the curb and there is no other evidence suggesting that the bus hit the curb. "Speculation cannot create a question of fact." *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 289; 933 NW2d 732 (2019).

Transp, unpublished per curiam opinion of the Court of Appeals, issued May 22, 2014 (Docket No. 312663) for the proposition that unexpected jerking movements of a bus alone may allow a presumption that the driver was negligent. In *Bolton*, the plaintiff presented evidence that as she was exiting a stopped city bus there was a sudden "jerk or jolt" that threw her from the bus. *Id*. at 591. As relevant to this case, the Court reasoned that "it is unusual enough for one of defendant's buses to jerk after stopping if the defendant exercises due care that reasonable men could conclude that the bus carrying [the plaintiff] would not have jerked if defendant had exercised due care." *Id*. Similarly, in *Horne*, the plaintiff was moving to exit a stopped bus when the bus lunged, causing her to be thrown to the ground and suffer an injury. *Horne*, unpub op at 1. Relying in *Bolton*, the *Horne* Court reasoned that "where a bus is stopped, an individual is exiting, and the bus inexplicably lurches causing the individual to fall, negligence is presumed." *Id*. at 2.

Neither *Bolton* nor *Horne* constitute binding precedent. See MCR 7.215(C)(1) (stating that unpublished decisions of the Court of Appeals are not binding) and MCR 7.215(J)(1) (stating that published decisions of the Court of Appeals decided before November 1, 1990, are not binding precedent). Although such decisions may be persuasive, see *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012) (cases decided before November 1, 1990) and *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 n 3; 783 NW2d 133 (2010) (unpublished decisions), we do not find either case persuasive. In both cases, the bus was at a complete stop and the plaintiff was exiting when there was a sudden, unexplained movement of the bus that caused them to be thrown. Although the *Bolton* and *Horne* Courts held that it can be logically inferred that a fully stopped bus would not suddenly move while a passenger was exiting in the absence of negligent operation by the bus driver, the same cannot be said for circumstances in this case. Here, the bus was traveling at a normal rate of speed when it hit an unknown obstacle. Such an event, as explained above, can occur in the absence of negligent operation by the bus driver. And, as a result, the "surrounding facts and circumstances" do not "remove the case from surmise and conjecture and place it within the field of legitimate inferences deduced from the established facts." See *Bolton*, 10 Mich App at 595.

Reversed and remanded for further proceedings. The City may tax costs as the prevailing party. MCR 7.219(A). We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Michael J. Kelly