IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gloria Francis,	:	
Appellant	:	No. 825 C.D. 2009
	:	
v.	:	Argued: November 10, 2009
	:	
SEPTA	:	

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: December 16, 2009**

In this negligence action involving injuries sustained by a passenger when a bus accelerated, Gloria Francis (Plaintiff) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court) that granted Southeastern Pennsylvania Transportation Authority's (SEPTA) motion for summary judgment based on the "jerk and jolt" doctrine.

Plaintiff, a standing passenger, sued SEPTA seeking damages for injuries resulting from a fall on a bus. In granting summary judgment, the trial court noted that even viewing the evidence in a light most favorable to Plaintiff, she failed to present evidence indicating an unusual or extraordinary movement of the bus caused her fall. Plaintiff contends the trial court erred in applying the jerk and jolt doctrine in this case. Alternatively, Plaintiff contends the trial court erred in granting summary judgment because an issue of material fact exists as to whether the bus operator's abrupt acceleration constituted such an unusual and extraordinary jerk or jolt. Upon review, we affirm.

I. Background

On an icy, wet morning in December, 2007, Plaintiff boarded a SEPTA bus in downtown Philadelphia. As Plaintiff paid her fare and turned from the fare box, the bus operator, Karl Hutchinson (Operator), accelerated from the stopped position. Plaintiff slipped on the wet floor, lost her balance, twisted her back and fell. Her lower back area struck a metal box behind the driver's seat before she hit the floor. Operator summoned an ambulance, which transported Plaintiff to a local hospital. As a result of her fall, Plaintiff suffered injuries including herniated lumbar discs. For purposes of this appeal, SEPTA does not contest Plaintiff sustained injuries as a result of her fall.

In February, 2008, Plaintiff filed a complaint alleging Operator's negligent operation of the bus caused her fall, which resulted in painful and possibly permanent injuries. Plaintiff's claim for damages fell within the arbitration limit. After a hearing, a board of arbitrators held in favor of SEPTA. Plaintiff appealed the arbitrators' award and requested a jury trial.

Following discovery, SEPTA filed a motion for summary judgment. Asserting the jerk and jolt doctrine, SEPTA urged that a passenger's testimony the bus suddenly jerked, standing alone, is insufficient to establish negligence on the part of a transit authority. Absent evidence of a truly extraordinary jolt, or evidence other passengers were affected in extraordinary or unreasonable ways, SEPTA sought judgment as a matter of law. Asbury v. Port Auth. of Allegheny County, 863 A.2d 84 (Pa. Cmwlth. 2004); Meussner v. Port Auth. of Allegheny County, 745 A.2d 719 (Pa. Cmwlth. 2000).

In her reply to SEPTA's motion, Plaintiff questioned whether the jerk and jolt doctrine applied. Rather, Plaintiff asserted a pure negligence standard applied because Operator did not give Plaintiff, who was standing on a wet floor on an icy day, an opportunity to get to a seat before moving the bus forward. Plaintiff also alleged Operator gave "suspect" testimony at his deposition regarding the speed of the bus and made a false statement regarding the number of chargeable accidents he had. Ultimately, the trial court granted SEPTA's summary judgment motion. Plaintiff appeals.[1]

II. Argument

A. Applicability of Jerk and Jolt Doctrine

Plaintiff first argues the trial court erred in applying the jerk and jolt doctrine. Plaintiff asserts SEPTA, as a common carrier, owes the highest duty of care to its passengers. Williamson by Williamson v. Se. Pa. Transp. Auth., 624 A.2d 218 (Pa. Cmwlth. 1993); LeGrand v. Lincoln Lines, Inc., 384 A.2d 955 (Pa. Super. 1978). This case, Plaintiff contends, is not a case involving a sudden stop to avoid a collision or a case where a vehicle suddenly or unexpectedly cut in front of the bus. To merit the submission of a jerk and jolt case to the jury, a plaintiff must establish a sudden stop or jerk so unusual and extraordinary as to be beyond a passenger's reasonable anticipation. Connolly v. Phila. Transp. Co., 420 Pa. 280, 216 A.2d 60 (1966); Meussner.

[1] Our review of a trial court order granting summary judgment is limited to determining whether the trial court abused its discretion or erred as a matter of law. Kuniskas v. Commonwealth, 977 A.2d 602 (Pa. Cmwlth. 2009). When reviewing a trial court's grant of summary judgment, we examine the record in a light most favorable to the non-moving party, accepting as true all well pleaded facts and reasonable inferences to be drawn from those facts. Id.

Here, Plaintiff maintains, the bus did not suddenly stop or jerk. Rather, Operator, aware of the icy roads and slippery bus floor, carelessly pulled away from the stop at a high rate of speed as Plaintiff took one or two steps from the fare box. The bus's rapid acceleration flung Plaintiff into a metal box behind the driver's seat and then onto the floor, which resulted in her injuries, medical bills and lost wages. Plaintiff therefore asserts the trial court erred in applying the jerk and jolt doctrine.

SEPTA counters the jerk and jolt doctrine clearly applies to "acceleration" cases such as Asbury (plaintiff fell when the bus accelerated before she sat down), not just "sudden stop" cases such as Meussner (plaintiff's husband fell down while walking to the front of the bus when it jerked to a sudden stop). It asserts the facts here are very similar to those in Asbury, the latest in a long line of cases applying the jerk and jolt doctrine. We agree.

In Asbury, the pregnant plaintiff boarded a public bus carrying about four or five other passengers, walked toward a seat and put her belongings down. However, before she sat down, the bus pulled away from the bus stop. The bus "lurched with a sudden force," and the plaintiff lost her balance and fell in the aisle. 863 A.2d at 87. As a result, the plaintiff severely fractured the femur bone in her left leg. Thereafter, the plaintiff filed suit against the transit authority alleging negligence on the part of the bus driver in putting the bus in motion before she sat down.

At the conclusion of the plaintiff's case, the trial court granted the transit authority's motion for compulsory nonsuit. Applying the jerk and jolt doctrine, the trial court determined the plaintiff failed to present sufficient evidence

of negligence as a matter of law. In particular, the trial court ruled the plaintiff failed to establish that the alleged jerking or jolting of the bus "had a disturbing effect on other passengers or that the nature of the accident inherently established the unusual character of the jolting movement." 863 A.2d at 88 (emphasis added).

On appeal to this Court, the plaintiff in Asbury argued the bus driver had a duty to wait until she was seated, and he breached that duty by pulling away before she sat down. In rejecting this argument, we reasoned the bus driver did not owe the plaintiff a heightened duty of care because the plaintiff did not appear to have any disability. The plaintiff had no trouble ascending the stairs or walking down the aisle, she did not request assistance, and she might not have appeared pregnant through her heavy winter coat.

Our decision in Asbury controls. Plaintiff here knocked on the stopped bus's door and boarded it at an intersection. Operator put the bus in motion before Plaintiff reached a seat or grabbed support. In her complaint, Plaintiff alleged Operator "accelerated the bus in such a sudden and quick manner, that it caused [ ] Plaintiff to fall and suffer the losses listed hereinafter below." Pl.'s Compl. at ¶7. When asked at her deposition to explain exactly how the accident occurred, Plaintiff testified, "I entered the bus, I was going to my seat, I was thrown to the floor by the acceleration of the bus." Dep. of Gloria Francis, 04/08/08 (Francis Dep.), at 12. Given these facts, the trial court properly found the jerk and jolt doctrine applicable here.

B. Summary Judgment

Summary judgment is only appropriate where the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as

a matter of law. Wolfe by Wolfe v. Stroudsburg Area Sch. Dist., 688 A.2d 1245 (Pa. Cmwlth. 1997). With this standard in mind, Plaintiff alternatively contends an issue of material fact exists as to whether Operator's quick acceleration constituted such an unusual and extraordinary jerk or jolt as to be beyond a passenger's reasonable anticipation. Because a factual issue exists, summary judgment is inappropriate.

Plaintiff asserts this was not an ordinary or moderate jerk. See Meussner (it is not unusual for persons to lose their balance while standing or walking in a bus if an ordinary or moderate jerk occurs). No passenger could reasonably anticipate that on such a wet and icy day Operator would accelerate so that a passenger would be thrown into the back of the driver's seat and onto the floor causing severe injuries. Plaintiff asserts that if the jerk and jolt doctrine applies here, Operator's sudden acceleration, without warning, was of such an inherently unusual character that it met the requirements for submission of the case to a jury.

SEPTA counters that Plaintiff's testimony is insufficient to establish an unusual or extraordinary jerk or jolt. Plaintiff could not determine the speed at which the bus accelerated, and she gave no testimony characterizing the movement of the bus as extraordinary or unusual. Although Plaintiff relies on inclement weather conditions to establish negligence, she does not indicate how those weather conditions affected the movement of the bus.

Further, SEPTA cites other cases rejecting similar testimony as insufficient to establish negligence under the jerk and jolt doctrine. See Uffelman v. Phila. Rapid Transit Co., 253 Pa. 394, 98 A. 574 (1916) (plaintiff boarded a non-

moving streetcar that violently started and jerked; no presumption of negligence arises from the use of the words "violently started"); McClusky v. Shenango Valley Traction Co., 161 A. 424 (Pa. Super. 1932) (while proceeding to empty seat on streetcar, plaintiff was thrown to floor and injured on a wet and slippery aisle when the car started with a sudden violent jolt; plaintiff's testimony failed to establish the extraordinary character of the jerk or jolt).

Again citing Asbury, SEPTA asserts Plaintiff's failure to proffer evidence establishing an unusual or extraordinary movement of the bus is fatal to her claim. Plaintiff also failed to show an extraordinary effect on any other passenger. SEPTA argues the trial court did not err or abuse its discretion.

We agree. The jerk and jolt test is very difficult to meet. Asbury; Meussner. Here, the facts are substantially less compelling than those in Asbury, where the trial court entered a nonsuit despite the fact a pregnant plaintiff, before reaching her seat, fell hard enough to shatter her femur.[2] The plaintiff in Asbury advanced arguments similar to those here. Thus, she argued the jury could infer from the extent of her injury that the jolt of the bus was so unusual or extraordinary as to be beyond her reasonable anticipation and thus the trial court erred by not letting her case proceed to the jury. We rejected this argument, concluding

[2] We note the facts here are akin to those in McClusky v. Shenango Valley Traction Co., 161 A. 424 (Pa. Super. 1932), where plaintiff, after placing her ticket in the box, fell on a slippery floor when the streetcar started with a sudden violent jerk. The Superior Court determined the words "sudden jerk," "unusual jerk," "a jump of the car" and "it threw me violently on the floor" as used by plaintiff in describing the jerk, when not accompanied by testimony inherently establishing the extraordinary character of the starting of the car, are insufficient to sustain a finding of negligence. 161 A. at 425. "Under all our cases, such descriptive language is not sufficient proof of negligence." Id.

medical evidence of a forceful injury, by itself, is insufficient to establish an extraordinary jerk or jolt.

Asbury compels the same result here. Plaintiff, the only passenger not seated, fell down when the bus accelerated away from the bus stop. Operator abruptly started moving the bus after Plaintiff took only one or two steps from the fare box. Although Operator moved the bus before Plaintiff reached a seat or grabbed anything to support her, this does not by itself support a negligence claim. Plaintiff did not appear to be in need of assistance, and she did not request that Operator wait until she sat down to proceed. Therefore, Plaintiff did not prove Operator breached a duty of care by starting the bus before she sat down. Asbury.

Further, the occurrence itself does not establish the unusual character of the bus's acceleration. Plaintiff did not know how fast the bus was moving when she fell. Francis Dep. at 13. She acknowledged she did not see any of the other passengers, all of whom were seated, affected by the sudden acceleration. Thus, the accident affected only a standing passenger. As we discussed in Meussner while addressing this issue, it is common knowledge that one's balance is more easily lost when walking in a moving bus than when seated. Compare Sanson v. Phila. Rapid Transit Co., 239 Pa. 505, 86 A. 395 (1916) (unusual or extraordinary jerk where sudden increase in speed of trolley car threw plaintiff through open doorway); Buzzelli v. Port Auth. of Allegheny County, 674 A.2d 1186 (Pa. Cmwlth. 1996) (plaintiff injured when bus, traveling 35-40 miles per hour (mph) in a 25 mph zone, slammed on its brakes and came to a complete stop, thereby throwing a crush of other standing passengers into plaintiff; plaintiff presented evidence of an extraordinary effect on other passengers).

Also, Plaintiff's injuries here do not, by themselves, support an inference of an extraordinary or unusual jerk or jolt. Asbury. An unusual or extraordinary jerk or jolt requires evidence of the physical events which occurred in the accident. Id. The mere location, type and extent of the injury is insufficient to reconstruct the physical events of the accident. Id.

Consequently, even viewing the evidence in a light most favorable to Plaintiff, the character of the movement of the bus does not appear to be beyond the reasonable anticipation of passengers on a downtown SEPTA bus. As such, Plaintiff failed to offer evidence sufficient to overcome the jerk and jolt doctrine and compel submission to a jury.[3]

Discerning no error in the trial court's order, we affirm.

ROBERT SIMPSON, Judge

[3] Plaintiff also suggests in her brief that the trial court erred in granting summary judgment because SEPTA did not pay Claimant any first-party benefits. SEPTA argues Plaintiff waived this issue by not raising it before the trial court. SEPTA also claims Plaintiff, who lives with her parents, is a covered insured on her parents' automobile policy and must recover first-party benefits from that policy. 75 Pa. C.S. §1713(a)(2).

We agree with SEPTA that Plaintiff waived this issue by not raising it before the trial court in her response to SEPTA's summary judgment motion. Pa. R.A.P. 302(a). We also note Plaintiff did not develop a first-party benefits question in her brief here, but merely noted the trial court, in granting summary judgment, did not mention SEPTA's obligation to pay first-party benefits irrespective of a tort claim.

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O R D E R

AND NOW, this 16th day of December, 2009, the order of the Court of Common Pleas of Philadelphia County is **AFFIRMED**.

ROBERT SIMPSON, Judge