STATE OF MICHIGAN

COURT OF APPEALS

EDWARD JONES,

Plaintiff-Appellee,

V

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION,

Defendant-Appellant,

and

JOHN DOE,

Defendant.

UNPUBLISHED
May 20, 2021

No. 353745
Oakland Circuit Court
LC No. 2019-176288-NI

Before: MARKEY, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

Defendant Suburban Mobility Authority for Regional Transportation (SMART) appeals by right the trial court's order denying SMART's motion for partial summary disposition. SMART contended that it was shielded by governmental immunity with respect to plaintiff Edward Jones's third-party negligence claim.[1] We affirm.

[1] Jones contends that this Court lacks jurisdiction to hear the appeal by right because SMART sought summary disposition under MCR 2.116(C)(10) and not MCR 2.116(C)(7). This argument lacks merit. We have "jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order . . . as defined in MCR 7.202(6)[.]" MCR 7.203(A)(1). And MCR 7.202(6)(a)(v) defines a "final order" as including "an order denying governmental immunity to a governmental party . . . under MCR 2.116(C)(7) *or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity*[.]" (Emphasis

Mr. Jones was a passenger on one of SMART's buses and allegedly suffered injuries when the bus suddenly stopped while Jones was standing at the front of the bus looking for bus fare. There is a video showing the relevant events, which is the only evidence in the record. The video footage shows Jones boarding the bus on a dry day, holding a walking cane. Jones can be seen leaning against a pole or wall at the front of the bus while looking for bus fare as the bus begins to move. About 20 seconds after the bus started moving, the footage depicts a white car passing the bus on the left and then entering the bus's lane and accelerating away from the bus. The white car then appears to slow down. The white car's deceleration gradually begins to be apparent at about the 09:34 to 09:36 mark on the video. Jones can be seen putting something in the fare machine, and the bus driver glances away from the road in the direction of the machine at the 09:35 mark. The bus driver looks back at the road at 09:36. The video footage then shows Jones putting something in the fare machine at 09:37. At 09:38, the bus driver looks toward the fare machine again and reaches out her right hand to touch what appears to be a control panel near the machine.[2] Simultaneously, the white car's deceleration becomes clearer, and the distance between the two vehicles decreases more quickly. At 09:39, the bus driver cries out, the bus begins its sudden stop, and Jones falls. The video also reveals that seated passengers are knocked forward in their seats.

Jones filed a complaint alleging a first-party claim against SMART for no-fault benefits and third-party claims against SMART and the unidentified "John Doe" bus driver.[3] SMART and the bus driver moved for summary disposition regarding the third-party claims, arguing that they were protected by governmental immunity and that no exception to immunity applied. The trial court granted the motion with respect to the bus driver, concluding as a matter of law that she was not grossly negligent. But the trial court denied summary disposition to SMART under the motor-vehicle exception to governmental immunity, ruling that a genuine issue of material fact existed regarding whether the bus driver was negligent and caused Jones's injuries.

SMART argues on appeal that Jones did not submit evidence sufficient to create a genuine issue of material fact concerning whether the bus driver was negligent or whether any assumed negligence caused Jones's fall. Therefore, according to SMART, governmental immunity shielded it from liability as a matter of law. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). "The applicability of governmental immunity is a question of law that is also reviewed de novo." *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 433; 824 NW2d 318 (2012). Summary dismissal of a claim is appropriate when a defendant enjoys "immunity granted by law." MCR 2.116(C)(7). In *RDM Holdings, Ltd v Continental*

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added.) Accordingly, this Court has jurisdiction to entertain SMART's appeal by right. See *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 436; 824 NW2d 318 (2012).

[2] The bus driver can be seen interacting with this same control panel as another customer pays earlier in the footage.

[3] Despite the "John Doe" designation, the bus driver is female.

Plastics Co, 281 Mich App 678, 687; 762 NW2d 529 (2008), this Court discussed (C)(7) motions, explaining:

> Under MCR 2.116(C)(7) . . ., this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.[4]]

In *Moraccini v City of Sterling Hts*, 296 Mich App 387, 391-392; 822 NW2d 799 (2012), this Court recited the well-established principles concerning governmental immunity:

> Except as otherwise provided, the governmental tort liability act (GTLA), MCL 691.1401 et seq., broadly shields and grants to governmental agencies immunity from tort liability when an agency is engaged in the exercise or discharge of a governmental function. The existence and scope of governmental immunity was solely a creation of the courts until the Legislature enacted the GTLA in 1964, which codified several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency. A governmental agency can be held liable under the GTLA only if a case falls into one of the enumerated statutory

[4] Although defendants moved for summary disposition under MCR 2.116(C)(10), the underlying guiding principles for (C)(7) and (C)(10) are quite similar. MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's action. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Pioneer State*, 301 Mich App at 377. "Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

> exceptions. An activity that is expressly or impliedly authorized or mandated by constitution, statute, local charter, ordinance, or other law constitutes a governmental function. This Court gives the term "governmental function" a broad interpretation, but the statutory exceptions must be narrowly construed. A plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity. [Quotation marks and citations omitted.]

In this case, Jones pleaded in favor of applying the motor-vehicle exception to governmental immunity, MCL 691.1405, which provides that "[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[.]" Here, the question posed on appeal is whether there is a factual dispute that needs to be resolved by a jury regarding whether Jones's alleged injuries resulted from the negligent operation of SMART's bus by its driver. "It is well settled that, absent evidence of other negligence pertaining to the operation of a bus, a plaintiff bus passenger may not recover for injuries sustained when the bus suddenly stopped because such stops are normal incidents of travel." *Seldon*, 297 Mich App at 437 (holding that it was not negligent for bus driver to drive within the speed limit approaching a green light and then stop suddenly when the light turned yellow).

Jones argues that negligence arose from the fact that the bus driver began driving even though she knew that Jones was still standing at the front of the bus looking for bus fare. In the early case of *Ottinger v Detroit United R*, 166 Mich 106, 107; 131 NW 528 (1911), our Supreme Court observed that "[t]he general rule adopted by the courts is that street railway companies are not required to defer starting cars until all passengers are seated, and that a train or street car may be started without waiting for a passenger to reach a seat after entering a vehicle, unless there is some special and apparent reason to the contrary." (Quotation marks and citation omitted.) Later, in *Getz v Detroit*, 372 Mich 98, 99-100; 125 NW2d 275 (1963), the Michigan Supreme Court applied the rule from *Ottinger* to an injury sustained by a passenger when she fell while standing at the front of a bus waiting for a transfer ticket. The *Getz* Court explained:

> Plaintiff's contention as to . . . negligence is twofold. First, because plaintiff was short, obese, 50-some years of age, and took about a minute to board the bus, it was negligent for the driver to fail to look at her, note her condition, and keep the bus at a standstill until she was seated. Plaintiff cites, in this connection, *Wells v Flint Trolley Coach, Inc*, 352 Mich 35; 88 NW2d 285 [(1958)]. There the plaintiff, a 79-year-old woman, was described by the Court as "old and feeble" and the driver knew of it. It was held to be a question of fact whether the driver was guilty of negligence in failing to give the passenger sufficient time, in alighting from the bus, to clear it and reach a place of safety and in failing to render the assistance necessary to one whose inability to care for herself was apparent. There is no testimony in the case at bar, however, to show that a look at plaintiff by the driver would have disclosed to him that she was frail, weak, infirm or in any wise disabled or in need of assistance. The testimony and the allegations in plaintiff's declaration are, to the contrary, that she was healthy and strong and performed heavy work. Hence, the *Wells* Case is inapt. [*Getz*, 372 Mich at 99-100.]

In this case, Jones was 61 years old, and he boarded the bus with a walking cane. Although we conclude that there exists a genuine issue of material fact regarding the negligence of the bus driver for other reasons discussed below, we additionally find that it is for the trier of fact to resolve whether the circumstances constituted a special and apparent reason such that the bus driver was negligent for driving the bus before Jones was seated. We are not prepared to rule out negligence as a matter of law where a bus driver begins driving while a 61-year-old patron using a walking cane is yet to be seated. See *Wells*, 352 Mich at 40. Reasonable minds could differ on the matter.

The Michigan Supreme Court has held that there was a jury question on the issue of negligence when a bus driver had to brake suddenly after speeding for blocks in an attempt to pass another vehicle. *Adelsperger v Detroit*, 248 Mich 399, 401-402; 227 NW 694 (1929). In another case involving a speeding bus driver, the Supreme Court held that it was for the jury to determine whether the bus driver's negligence in speeding caused a sudden stop that injured a passenger. *Longfellow v Detroit*, 302 Mich 542, 547; 5 NW2d 457 (1942). In *Smith v Dep't of Street Rs, Detroit*, 46 Mich App 291, 296; 207 NW2d 924 (1973), this Court ruled "that the evidence of an unexplained lurch and resulting fall on the bus, coupled with uncontroverted testimony showing icy weather conditions and the bus driver turning the steering wheel fast around the corner, and plaintiff's observation that it felt like the bus hit something is sufficient to provide a basis from which an inference of negligence might have been drawn[.]" In *Routhier v Detroit*, 338 Mich 449, 456-457; 61 NW2d 593 (1953), the Michigan Supreme Court reversed a directed verdict entered in favor of the defendants, a bus driver and the city, explaining as follows:

> In the instant case plaintiff has alleged, and offered proof before the jury tending to show, that defendant Torando, preceding his bringing the bus to a sudden stop, was negligent in driving at an excessive rate of speed and *in failing to make proper observations of traffic* passing through the intersection on Hancock. It is plaintiff's theory here that such negligence rendered necessary the sudden application of the brakes on the bus in order to avoid a collision with another motor vehicle. The judgment entered in the trial court is reversed, and the case is remanded for a new trial. [Emphasis added.]

In this case, there was no evidence of speeding, but the bus driver twice looked away from the road in the direction of the fare machine and reached out to do something on a control panel near the machine in the seconds before the sudden stop. A reasonable juror viewing the video could conclude that the bus driver was attending to the operation of the fare machine while driving. "The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law." MCL 257.401(1). "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). We conclude that evidence of distracted driving by the bus driver can support a finding of negligence. See *Kasza v Detroit*, 370 Mich 7, 9; 120 NW2d 784 (1963) (there existed jury questions on negligence and proximate cause when a bus driver stopped suddenly upon noticing a pedestrian right in front of the bus and there was no good reason the driver should not have noticed the pedestrian sooner given the traffic conditions); *Sargeson v Yarabek*, 24 Mich App 577, 580-581; 180 NW2d 474 (1970) (jury question on gross negligence when a car driver leaned down and took his eyes off the road for more than two seconds); *Martinelli v Chicago*, 2013 IL App (1st) 113040; 371 Ill Dec 112, 122; 989 NE2d 702 (2013)

("run-of-the-mill distracted driving clearly can supply a basis for calling a driver negligent or careless").

We conclude that there is a genuine issue of material fact regarding whether the bus driver failed to exercise ordinary care while driving given the evidence that she twice looked away from the road and may have been paying attention to something unrelated to driving safely in the seconds leading up to her sudden application of the brakes. See *Sargeson*, 24 Mich App at 580. Viewing the video footage in a light most favorable to Jones, we agree it could reasonably be inferred that the bus driver was distracted for four to five crucial seconds from the time Jones first put something in the fare machine to the time that the driver braked. It was during that same period of time that the bus began to rapidly approach the white car that was directly in front of the bus.

A juror could also reasonably infer from the evidence that the bus driver's inattention caused the need to brake suddenly, which in turn caused Jones to fall. SMART's reliance on *Milbourne v Jongeward*, 28 Mich App 494, 495; 184 NW2d 477 (1970), in support of its causation argument is unavailing. First, the procedural context of that case involved a bench trial in which the trial court found no cause of action relative to a motor-vehicle accident, and the plaintiff then argued in favor of a new trial on the basis that the court's findings were clearly erroneous. *Id.* at 494-495. We are, however, simply addressing whether there is sufficient evidence of negligence to survive summary disposition. Furthermore, in *Milbourne*, the plaintiff's decedent was killed when the car in which he was a passenger drove through a stop sign and struck the defendants' vehicle, which was traveling five miles per hour below the posted speed limit. The plaintiff claimed that the defendants should be held liable because no evasive action was taken to avoid being hit by the car running the stop sign. *Id.* Such circumstances are vastly different from the instant case rendering it inapposite here. Indeed, the plaintiff's case in *Milbourne* bordered on the nonsensical. Finally, in holding that there was no clear error with respect to the trial court's findings, this Court quoted the lower court's findings:

> "It is my opinion that the plaintiff's theory that the defendant-driver was negligent is nothing more than conjecture. The Court cannot guess or speculate as to how the accident happened and that is what is being asked of the Court here. Assuming that defendant could have seen the plaintiff-vehicle, there is no showing when it became obvious or should have become obvious that the other car was going to contest his right of way. There is also no showing what defendant could have done nor distance he had in which to take action when this became obvious. There is nothing to show that defendant had sufficient time to stop nor that by trying to stop, he could have avoided the accident." [*Id.* at 495.]

In sharp contrast, here there is video evidence allowing a jury to assess when the bus driver should have become aware of the need to stop, the distance to the car in front of the bus, the driver's actions leading up to her sudden braking, and to ultimately assess whether there was negligence that caused Jones to fall. We hold that a reasonable juror could conclude on the basis of the video "that more likely than not" the bus driver's inattention or negligence caused Jones to fall. See *Skinner v Square D Co*, 445 Mich 153, 165; 516 NW2d 475 (1994).

We affirm. Having fully prevailed on appeal, Jones may tax costs under MCR 7.219.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Brock A. Swartzle