O F M I C H I G A N

C O U R T O F A P P E A L S

JOSETTE TUCKER, Personal Representative of the ESTATE OF JEANETTE COLLINS, Plaintiff-Appellee, v CAPITAL AREA TRANSPORTATION AUTHORITY, a/k/a CATA, Defendant-Appellant, and JERRY SLEAR and CITY OF LANSING, Defendants.	UNPUBLISHED November 19, 2009 No. 288367 Ingham Circuit Court LC No. 07-001362-NI

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant[1] appeals as of right from the trial court's order denying defendant's motion for summary disposition based on governmental immunity, MCR 2.116(C)(7). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's decedent was injured on November 4, 2006, when her wheelchair fell while defendant's bus driver, Jerry Slear, was loading her onto the bus using the attached lift. He kept his hand on her chair while the lift went up, but then had to let go of her to go inside the bus to pull her on board. As soon as he got up the bus steps and turned, he saw she had fallen. Slear was unable to say how the fall happened exactly, or why. Decedent suffered multiple injuries and ultimately died. The lift was not equipped with a safety belt; this became the crux of plaintiff's claim of negligence. Defendant moved for summary disposition, arguing that the bus

[1] CATA is the only defendant involved in this appeal. Defendant Slear, the driver, was granted summary disposition. The City of Lansing was dismissed by stipulation. Therefore, we use "defendant" in this opinion to refer to CATA.

was not in operation at the time of the accident. According to defendant, this was really a product liability suit, based on a defective lift, and governmental agencies are immune from product liability suits. Plaintiff responded that loading and unloading passengers has been considered "operation" for years in this state, and that defendant knew that the beltless lift was dangerous but did nothing to remedy it.

The trial court concluded that the bus was being used for transportational purposes. "It was operating for purposes of the motor vehicle exception to governmental immunity." Although the trial court granted summary disposition for Slear, the motion was denied for defendant.

In this Court, defendant argues that the bus was not being operated at the time of the accident because it was not being driven. Under *Chandler v Muskegon Co*, 467 Mich 315; 652 NW2d 224 (2002), the bus was not being operated. Just because the engine was running does not make the vehicle in operation; in *Turner v City of Garden City*, unpublished opinion per curiam of the Court of Appeals, issued July 13, 2006 (Docket No. 266610), this Court held a front-end loader was not being operated where it had been parked for at least two or three minutes, even though the engine was running. Defendant also asserts that Slear was not negligent. There is no allegation that he drove negligently or parked negligently. The only possible negligence here was the purchasing decision made by defendant when it decided to buy a lift that lacked a safety belt. This decision is separate from the operation of the vehicle, just like the decision to pursue a fleeing suspect was separate from the operation of the pursuing vehicle in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). Causation also is speculative. No one knows what made the wheelchair fall; it is possible that decedent unlocked the brakes herself or the lift somehow failed. Either of these causes would not be related to negligent operation.

Plaintiff argues that *Chandler* does not apply and that under applicable case law, the bus was being operated, citing *Orlowski v Jackson State Prison*, 36 Mich App 113; 193 NW2d 206 (1971); *Wells v Dep't of Corrections*, 79 Mich App 166; 261 NW2d 245 (1977); *Nolan v Bronson*, 185 Mich App 163; 460 NW2d 284 (1990). In *Orlowski*, the plaintiff, a prisoner, fell out of a truck while it was moving because the tailgate latch was not engaged; in *Wells*, the plaintiff became entangled in the power take-off shield of a stationary farm tractor; and in *Nolan*, a student was killed shortly after alighting from a school bus when the driver allowed her to use the rear emergency exit. These cases impose no requirement that the vehicle be moving for it to be in "operation" and buses do not cease operation during the temporary interruption of driving that results from loading and unloading passengers.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Determination of the applicability of an exception to governmental immunity is a question of law subject to de novo consideration on appeal. *Stevenson v Detroit*, 264 Mich App 37, 40-41; 689 NW2d 239 (2004).

The governmental tort liability act, MCL 691.1401 *et seq*., provides: "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). This grant of immunity is subject to certain statutory exceptions, including the motor vehicle exception, MCL 691.1405, which provides:

> 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, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

This language imposes liability for bodily injury and property damage resulting from a governmental employee's negligent operation of a government-owned motor vehicle. At issue in this case is whether these facts show "negligent operation."

Defendant argues that this case is controlled by *Chandler*, where our Supreme Court held that the motor vehicle exception did not apply to a man who was injured while in the process of cleaning a bus in the bus barn. The Court stated that "the 'operation of a motor vehicle' encompasses activities that are directly associated with the driving of a motor vehicle." *Id*. at 321.

The *Chandler* Court identified the cases cited by the Court of Appeals, including *Orlowski*, *Wells*, and *Nolan*, and disagreed with this Court's conclusion that a vehicle is in operation "as long as it is being used or employed in some specific function or to produce some desired work or effect":

> In the context of a motor vehicle, the common usage of the term "operation" refers to the ordinary use of the vehicle as a motor vehicle, namely, driving the vehicle. In this case, the injury to plaintiff did not arise from the negligent operation of the bus as a motor vehicle. The plaintiff was not injured incident to the vehicle's operation as a motor vehicle. Rather, the vehicle was parked in a maintenance facility for the purpose of maintenance and was not at the time being operated as a motor vehicle. [*Id*., 321-322.]

According to defendant, *Chandler* is indistinguishable from the present case and it implicitly overruled the cases relied on by the Court of Appeals, citing *Martin v Rapid Inter-Urban Transit Partnership*, 271 Mich App 492; 722 NW2d 262 (2006), *Puroll v Gaylord Community School Dist*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2003 (Docket No. 234445), and *Poppen v Tovey*, 256 Mich App 351, 355; 664 NW2d 269 (2003). However, the *Chandler* Court did not expressly overrule *Orlowski*, *Wells*, or *Nolan*, even though it named them specifically. We conclude that even though the *Chandler* Court disagreed with the broad definition those cases employed, it agreed with their conclusions that the vehicles were in operation at the time of the injuries. It is notable that the *Chandler* Court focused on the purpose of the vehicle at the time: "The plaintiff was not injured incident to the vehicle's operation as a motor vehicle. Rather, *the vehicle was parked in a maintenance facility*

for the purpose of maintenance and was not at the time being operated as a motor vehicle." *Chandler*, *supra* at 322 (emphasis added).

Defendant also cites this Court's decision in *Martin*, 271 Mich App 492. However, our Supreme Court reversed this Court's decision in that case in a peremptory order. *Martin v Rapid Inter-Urban Transit Partnership*, 480 Mich 936; 740 NW2d 657 (2007). The Court stated, "The loading and unloading of passengers is an action within the 'operation' of a shuttle bus." *Id*. Supreme Court peremptory orders are binding precedent when they can be understood. See *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993). Defendant asserts that *Martin* is "materially distinguishable" because it involved a slip and fall on icy bus steps and that this case is more like *Hinz v Almy*, unpublished opinion per curiam of the Court of Appeals, issued May 7, 2009 (Docket Nos. 285125, 285126), and *Poppen*, because the driver parked the vehicle and had gotten out, as had occurred in those cases. However, *Poppen* involved a water truck and *Hinz* involved an electrician's pick-up truck. *Hinz* notes, "In its short opinion, the Michigan Supreme Court was specifically speaking to the operation of shuttle buses, the purpose of which is to load people onto the bus, drive them to their destination, and unload them; making the loading and unloading of people part of the operation of the shuttle bus." The operation of shuttle buses is identical to the operation of the bus in this case.

Thus, the trial court correctly found that plaintiff was injured while the bus was being operated. However, defendant raises other issues, requiring further analysis. Defendant argues that plaintiff has not proven causation because decedent might have caused her own injury by unlocking the wheelchair's brakes, or the lift itself could have unexpectedly failed. This ignores the basis of plaintiff's claim: that the injury would not have occurred had the lift been equipped with a safety belt. Even if these other factors had played a role, if decedent's chair had been secured with a safety belt, it would not have tipped over, rolled off, fallen, or whatever it was that happened. Plaintiff has shown facts exist from which a jury could infer that the absence of a safety belt caused the injury.

Defendant also argues that the heart of this suit is a product liability claim. Defendant points to the National Highway Transportation Safety Administration rules, which it is required to follow, that do not require safety belts on wheelchair lifts. In negligence claims, the relevant inquiry is whether the "defendant exercised reasonable care, not whether the procedures used by [the] defendant could have been made safer." *Boyt v Grand Trunk Western RR*, 233 Mich App 179, 186; 592 NW2d 426 (1998). However, purchasing a lift without a safety belt was not plaintiff's only basis for negligence. Plaintiff further alleged that defendant knew that the lift on this bus was not safe, but permitted it to be used anyway. Even though the trial court made no express finding that plaintiff showed there was *negligent* operation of the bus, the evidence on record is sufficient for us to conclude that plaintiff established negligence. Plaintiff supported her allegations that defendant knew this lift on this bus was not safe with documentary evidence showing that, on earlier occasions, other drivers of the same bus noted the unsafe lift in their pre-trip inspection reports. These reports stated such comments as: "Lift will not always go down 'flat.' Now it's crooked. And people have always complained that there is no belt"; and "Lift 'hicups' [sic] stops–beeps–on loading mainly with power chairs–let it down–then it will run all the way up. Also a number of clients have asked for a belt to feel safe. Thanks." At the motion hearing, counsel described some of the other reports as saying things like, "Lift could use seat belt for safety. Scary. This is scary," and, "Some clients are scared of this lift. It doesn't have a

safety belt." From this evidence, a jury could conclude that defendant knew the lift was unsafe and could have remedied the problem, but did not.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis