

STATE OF MICHIGAN
IN THE SUPREME COURT

LAURA K. FUNDUNBURKS,

Plaintiff-Appellee,

-vs-

CAPITAL AREA TRANSPORTATION,
AUTHORITY, a governmental agency,
AND MICHELLE BEARD,

Defendants-Appellants,
_____ /

Supreme Court No. 134408

Court of Appeals No. 274928

Ingham County Circuit Court
No. 06-000062-NI

134408

**DEFENDANTS-APPELLANTS CAPITAL AREA TRANSPORTATION
AUTHORITY AND MICHELLE BEARD'S REPLY BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL**

PROOF OF SERVICE

MURPHY, BRENTON & SPAGNUOLO, P. C.
VINCENT P. SPAGNUOLO (P30350)
MATTHEW C. RETTIG (P67545)
Attorneys for Defendants-Appellants
4572 South Hagadorn Road, Suite 1A
East Lansing, MI 48823
(517) 351-2020

PLUNKETT COONEY
MARY MASSARON ROSS (P43885)
Co-Counsel on Appeal for
Defendants-Appellants
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

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ARGUMENT

A. APPLICATION OF THE MOTOR VEHICLE EXCEPTION TURNS ON WHETHER OPENING OR CLOSING A BUS'S DOORS WHILE IT IS STOPPED AMOUNTS TO NEGLIGENT OPERATION OF A MOTOR VEHICLE.

Fundunburks proposes a two-part inquiry, which is not statutorily based and which results in an expansion the motor vehicle exception. She argues that “the correct standard to apply should be whether there has been direct physical contact between the government vehicle and plaintiff and whether the activity that led to such contact was directly associated with the driving of that vehicle.” (Plaintiff-Appellee’s Answer to Defendants-Appellants’ Application for Leave to Appeal, p 7).

A proper reading of the prior decisions issued in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), *Chandler v Muskegon County*, 467 Mich 315; 652 NW2d 224 (2002), and their progeny requires an analysis focused more closely on the precise statutory language. The question is whether the plaintiff’s injuries result from the negligent operation of a motor vehicle, not whether it is “associated” with it. Parsing this language, courts have rejected claims based on injuries resulting from negligent conduct that does not involve the operation of a motor vehicle. The *Robinson* Court rejected the plaintiffs’ theory that the negligent decision to pursue a wrongdoer caused the injuries. 462 Mich at 316-317. The Court explained that the injuries or damage must result from the negligent operation of a motor vehicle, not some other kind of negligence. *Id.* In the Court’s view, “the decision to pursue a fleeing motorist, which is separate from the operation of a motor vehicle itself, is not encompassed within a narrow construction of the phrase ‘operation of a motor vehicle.’” 462 Mich at 317.

Chandler similarly focused on the statutory language to reject claims where injuries did not result from the “negligent operation of a motor vehicle” but stemmed from some other

claimed negligent conduct. In *Chandler*, the hydraulic bus doors were being used as a means of ingress and egress for workers when a bus was parked inside a parking garage. 467 Mich at 318-319. Relying on several out-of-state decisions, including *Sonnenberg v Eric Metro Transit Authority*, 586 A2d 1026 (Pa Commw, 1991), the Court of Appeals had concluded that the motor vehicle exception applied:

[W]e fail to see why the exception, which would otherwise be applicable to a door-closing injury, should become inapplicable simply because the bus was not on an established route. Also irrelevant is the fact the ultimate object was to clean the bus. The doors of the bus were still being operated for the purpose of exiting the bus (the desired work or effect), an integral part of the use of the bus.

Chandler, 467 Mich at 319 quoting Court of Appeals slip op (Docket No. 220435), pp 10-11. This Court rejected that reasoning because the language of the exception “means that the motor vehicle is being operated *as* a motor vehicle.” 467 Mich at 320 (italics in original). The Court concluded that the Legislature used “operation” in a narrow sense in the legislation, and that it employed other language when it sought to convey a broader construction. *Id.* This Court rejected the test used by the Court of Appeals, an approach which is virtually on all fours with *Fundunburks*’ argument here, because it “would construe the term so broadly that it could apply to virtually any situation imaginable in which a motor vehicle is involved regardless of the nature of its involvement.” 467 Mich at 321. According to the Court, “usage of the term ‘operation’ refers to the ordinary use of the vehicle as a motor vehicle, namely, driving the vehicle.” *Id.* at 321-322.

Robinson and *Chandler* limit the exception to litigation in which the injuries result from negligent operation, that is negligent driving, of a motor vehicle as a motor vehicle. Accidents involving negligent conduct in opening and closing doors while the vehicle is not in operation, or negligent operation in failing to clear snow and ice from steps of the vehicle, or negligent

operation in the latching of a door or gate of a vehicle, do not fall within the exception because the injuries result from conduct other than driving. In *Martin v Rapid Inter-Urban Transit Partnership*, 271 Mich App 492; 722 NW2d 262 (2006), for example, the Court of Appeals held that the vehicle was not being operated as a motor vehicle because “when the shuttle bus stopped to allow several passengers to deboard, it ceased to be engaged in activities directly related to driving.” 271 Mich App at 501. Even though the installation of step heaters or scraping of ice and snow from bus steps on which passengers deboard is “integral” to the ability of passengers to get on and off, these activities do not amount to driving. *Id.* See also, *Helfner v Center Line Public Schools*, 477 Mich 931; 723 NW2d 459 (2006) (overturning unpublished court of appeals decision and adopting dissent holding that bus driver’s alleged negligence in deactivating bus lights while student crossing street at driver’s direction fell outside motor vehicle exception); *Burgie v Lileikis*, 2005 WL 320822 (Mich App, 2005) (injuries allegedly resulting from bus driver’s stopping on street in manner obscuring pedestrian’s vision did not result from operation).¹

Fundunburks argues that the CATA bus driver negligently closed hydraulic bus doors too quickly, causing injuries to her. But this activity, as Fundunburks concedes, took place before the bus was operational since when the doors “are open the drive shaft is automatically locked.” (Fundunburks’s Motion for Reconsideration, p 7). Claimed negligence in opening and closing the doors cannot, therefore, pertain to the negligent operation of a motor vehicle as a vehicle.

¹ The Legislature limited a litigant’s ability to recover from the government for injuries arising out of the use, but not operation. MCL 691.14. In doing so, the Legislature was undoubtedly aware that a pedestrian may recover personal protection benefits under the No Fault Act for accidental bodily injury “arising out of the ownership, operation, maintenance, or use of a motor vehicle....” MCL 500.3105. See also MCL 500.3114.

B. RESOLUTION OF THE QUESTION PRESENTED IS OF CRITICAL IMPORTANCE SINCE THE COURT’S ANSWER WILL DETERMINE THE SCOPE OF PROTECTION AVAILABLE FOR ALLEGEDLY NEGLIGENT CONDUCT INVOLVED IN THE EMBARKING AND DISEMBARKING FROM GOVERNMENT-OWNED VEHICLES.

Fundunburks urges the Court to deny the application on the basis that its position and the Court of Appeals ruling below were correct. But this argument does nothing to undermine CATA’s contention that bus drivers, and bus authorities need guidance concerning the scope and limits of immunity for injuries occurring when passengers are boarding or disembarking from a bus. Hundreds of bus passengers get on and off buses every day. Many of the cases involving busses arise out of claimed injuries, which are related to the boarding or disembarking process. Guidance is needed to clarify the applicability in these circumstances. This case, where Fundunburks’s claim is based on the alleged premature closing of bus doors when an interlock is on and prevents operation, offers the Court an illustrative example for deciding the issue.

Fundunburks also urges this Court to deny leave to appeal because the Court gave sufficient instruction to bench and bar through its order embracing Judge Whitbeck’s dissent in *Helfner*. This Court’s need to reverse in *Helfner*, and the Court of Appeals decision in this case, underscore the ongoing confusion concerning the parameters of the motor vehicle exception. Review is therefore warranted.

C. REVIEW IS ALSO REQUIRED TO CLARIFY THAT A BUS DRIVER’S ALLEGEDLY PREMATURE CLOSING OF BUS DOORS DOES NOT AMOUNT TO GROSS NEGLIGENCE.

The Court should also grant review to decide whether a “gross negligence” claim may be brought against a bus driver for allegedly momentary conduct such as negligently closing bus doors too quickly. According to Fundunburks, the bus driver closed the doors too quickly hitting a part of her body, and causing her to fall forward. (Fundunburks Dep, pp 32, 40-42). To establish gross negligence, a plaintiff must focus on the actions of the individual governmental

employees, not on the result of those actions. *Maiden, supra* at 127 n 10, 597 NW2d 817. Even if a serious injury or death results from the defendants' actions, it does not prove that the defendants were grossly negligent. *Id.* Similarly, “[s]imply alleging that an actor could have done more” is insufficient to prove gross negligence because, “with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result.” *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Although the statutory definition of gross negligence does not require an intent to injure, MCL 691.1407(7)(a), gross negligence suggests almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge. *Tarlea, supra* at 90, 687 NW2d 333.

Fundunburks's testimony does not suggest “gross negligence” that was “so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). The undisputed testimony of the plaintiff shows, at best, a momentary lapse of the driver's attention resulting in the closing of bus doors before a passenger had completely disembarked. This is insufficient to establish a jury-submissible gross negligence case.² This case presents the Court with the opportunity to clarify the parameters of “gross negligence” within the meaning of the statute.

Fundunburks argues against review because Beard's deposition was not taken, asserting that without it the Court lacks adequate knowledge of the facts. Fundunburks's assertion that

² Fundunburks also suggests that the bus driver should not have started to drive away after she fell to the ground. (Plaintiff-Appellee's Answer to Defendants-Appellants Application, p 11). But Fundunburks's speculation regarding the driver affords no basis for finding a jury-submissible case since the conduct she points to occurred after her claimed fall, and her injuries did not result from it. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

this case is not a suitable candidate for review because the bus driver's deposition had not been taken cannot withstand scrutiny in light of *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). *Maiden* taught that an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. 461 Mich at 120. A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial. *Id.* Fundunburks failed to do so. (Motion for Reconsideration, pp 10-11). This reasoning was explicitly rejected as a basis for denial of a motion when the *Maiden* court overruled *Rizzo*. 461 Mich at 120-122.

Fundunburks asserts that the bus driver's deposition was not taken because her identity was not known until later. But this does not account for Fundunburks's failure to depose her in the month between the filing of the second amended complaint, and the filing of defendants' motion for summary disposition. Nor does Fundunburks advise the court of precisely when she became aware of the driver's identity; she only notes that the complaint adding her was not filed until July 2006. Since the motion was not filed until September 15th, Fundunburks had more than adequate time for discovery, including time to have deposed Beard. Fundunburks's counsel supplied no affidavit pursuant to MCR 2.116(H), which required him to explain why Beard's testimony could not be procured, to state the nature of her probable testimony, and to explain the reason for his belief that she would testify to those facts. The basis for plaintiff's claim is plaintiff's own testimony, which defendant is not challenging because it must be taken in the light most favorable to her. Thus, this argument should have been rejected below and offers no grounds for denying review by this Court.

RELIEF

WHEREFORE, Defendants-Appellants Capital Area Transportation Authority and Michelle Beard respectfully request this Court to peremptorily reverse the November 15, 2006 order denying summary disposition and the May 31, 2007 Court of Appeals decision to uphold that denial, or to grant leave to appeal the denial of summary disposition, and to grant them such other relief as is warranted in law and equity.

Respectfully submitted,

PLUNKETT COONEY

BY: 

MARY MASSARON ROSS (P43885)
Co-Counsel on Appeal for
Defendants-Appellants
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

VINCENT P. SPAGNUOLO (P30350)
MATTHEW C. RETTIG (P67545)
Attorneys for Defendants-Appellants
4572 South Hagadorn Road, Suite 1A
East Lansing, MI 48823
(517) 351-2020

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