STATE OF MICHIGAN

COURT OF APPEALS

SANDRA GANTT, Plaintiff-Appellant,	UNPUBLISHED December 18, 2003
v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, Defendant-Appellee.	No. 241237[1] Wayne Circuit Court LC No. 99-929214-NI
SANDRA GANTT, Plaintiff-Appellee,	
v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, Defendant-Appellant.	No. 243284 Wayne Circuit Court LC No. 99-929214-NI

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

In Docket No. 241237, plaintiff appeals as of right from the order granting defendant's motion for directed verdict, or alternatively, judgment notwithstanding the verdict (JNOV). In Docket No. 243284, defendant appeals as of right the order denying defendant's motion for case evaluation sanctions. We affirm.

[1] Docket Nos. 241237 and 243284 arose from one trial court case. The separate appeals were consolidated by this Court upon motion of defendant. *Gantt v SMART*, unpublished order of the Court of Appeals, entered January 2, 2003 (Docket Nos. 241237 and 243284).

In this case, sixty-year old plaintiff took a SMART bus to work on September 24, 1998. When the bus stopped to let her off, plaintiff fell against the handicap seats, broke her knee, and sustained other injuries to her back and shoulder. Plaintiff subsequently filed suit against defendant alleging negligence in the operation of the bus, specifically the driver's "sudden slamming on of the brakes." The bus driver, Martha Calloway, testified that plaintiff jumped out of her seat and fell after the bus was already stopped. The jury returned a verdict in favor of plaintiff. The trial court granted defendant's motion for directed verdict, or alternatively, JNOV.[2]

Plaintiff's first argument on appeal is that the trial court erred in granting defendant's motion for directed verdict/JNOV, where there was sufficient evidence of defendant's negligence for the issue to be heard by the jury. We disagree.

A trial court's decision on a motion for directed verdict/JNOV is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the decision, we must view the evidence and all legitimate inferences arising from it in the light most favorable to the nonmoving party. *Id.*. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Only if the evidence failed to establish a claim as a matter of law is a directed verdict or JNOV appropriate. *Sniecinski*, *supra* at 131.

The law in Michigan is clear that a plaintiff is not entitled to recover for injuries sustained as a result of the sudden stopping of a bus, absent other evidence of negligence in the operation of the vehicle, as these sudden stops are incidents of travel which travelers must reasonably anticipate. *Russ v Detroit*, 333 Mich 505, 508; 53 NW2d 353 (1952) (affirming directed verdict in favor of the defendant); *Sherman v Flint Trolley Coach, Inc*, 304 Mich 404, 416; 8 NW2d 115 (1943) (affirming directed verdict in favor of the defendant); *Zawicky v Flint Trolley Coach Co, Inc*, 288 Mich 655, 658-659; 286 NW 115 (1939) (affirming JNOV in favor of the defendant); *Bogart v Detroit*, 252 Mich 534, 537-538; 233 NW 406 (1930) (affirming directed verdict in favor of the defendant).

In *Getz v Detroit*, 372 Mich 98, 99; 125 NW2d 275 (1963), the case relied on by the trial court, the plaintiff, a fifty-four year old woman, fell on a city bus when the bus accelerated from a stop. The Michigan Supreme Court upheld the trial court's grant of JNOV in favor of the city of Detroit for the reason that sudden jerks or jolts in the stopping and starting of a city bus are common incidents of travel, which must be expected by a passenger, and for the reason that plaintiff did not present any additional evidence of negligence such as excessive speed, repeated lurchings of the bus from side to side, and of following another vehicle too closely. *Id.* at 101-102.

Here, the evidence at trial was that plaintiff was standing, waiting for the bus to stop, when the driver stepped on the brakes, causing plaintiff to fall and injure herself. There was no

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[2] The trial court had deferred a ruling on defendant's motion for directed verdict until after the jury returned its verdict.

direct testimony that the driver was speeding, following another car too closely, driving recklessly, or otherwise operating the bus in a manner that was negligent or unsafe for the conditions. Moreover, there was no circumstantial evidence to this effect; except arguably the sudden stop, which circumstantial evidence does not suffice in and of itself.[3] Without any such additional direct or circumstantial evidence of negligence, beside that of a sudden stop at a bus stop, plaintiff's negligence claim must fail under the well-settled principle enunciated in *Russ*, *Sherman*, *Zawicky*, and *Bogart*, *supra.*

Plaintiff next argues that there was sufficient evidence at trial to infer that the bus driver was speeding immediately before the stop which resulted in plaintiff's injuries. The general speed limit on Eureka Road at plaintiff's bus stop was forty-five miles per hour. The bus driver testified that the construction zone started on Eureka Road, just south of Allen Road, and ended at plaintiff's building, which is located on Eureka Road at Hip Street,[4] and that she got into the far left lane because the right two lanes were closed due to this construction. The bus driver testified that she had been traveling thirty-five miles per hour on Eureka Road south of Allen Road before she stopped the bus to let plaintiff off in front of her building. Plaintiff points to the bus driver's testimony that she was traveling nonstop before reaching plaintiff's bus stop as indicating that the bus driver had time to pick up enough speed to be traveling at or over the posted speed limit of forty-five miles per hour. Plaintiff infers from the fact that the bus driver had enough time to get over the speed limit, that the bus driver *was* traveling over the speed limit for a construction zone at forty-five miles per hour, although the bus driver specifically testified that she was traveling at thirty-five miles per hour. Plaintiff's reading of this testimony calls for making an inference from an inference. The Michigan Model Civil Jury Instructions provide as follows regarding circumstantial evidence:

> A fact may be proven indirectly by other facts or circumstances, from which it usually or reasonably follows according to common experience and observation of mankind. [M Civ JI 3.10.]

It does not usually or reasonably follow that a person who has time to get up enough speed to go over the speed limit, then does so. Plaintiff's inference that the bus driver was speeding because she had the time to do so, is not a reasonable inference.

Plaintiff also cites the following colloquy at trial as evidence that the bus driver was traveling the normal speed limit (forty-five miles per hour) in a construction zone, which usually calls for reduced speed, and that therefore, the bus driver was speeding:

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[3] We emphasize that we are not precluding a negligence cause of action in all cases where the sole evidence is that a bus came to a sudden stop. If the sudden stop is particularly and unnecessarily violent, which was not shown here, a cause of action may exist, as opposed to sudden stops that are an incident of bus travel which a passenger must reasonably anticipate. See discussion infra at 6-7.

[4] There was no evidence presented as to the distance between Allen Road and plaintiff's bus stop.

Q. So you traveling at 45, you didn't even know there was a reduction in speed limit, correct?

A. No.

But this excerpt is misleading in that it is taken out of context and gives the impression that the bus driver was unaware that she needed to reduce her speed. The full excerpt, which involved the bus driver being questioned about her prior deposition testimony, is as follows:

Q. [R]emember my asking you and you having given this answer, Ms. Cal[lo]way. "What was the speed limit on Eureka Road." And do you remember saying 45, "In the construction part or in the regular part where there was not construction, the speed limit on that whole street there in the area is 45." Do you remember giving that answer?

A. Yes.

Q. Okay. Forty-five. "Now, where the construction zone was, was the speed limit there less, was the speed limit less?" Do you remember giving this answer, "There were no signs posted for less." Do you remember saying that?

A. Yes.

Q. Okay. So you traveling at 45, you didn't even know there was a reduction in speed limit, correct.

A. No.

Q. Do you remember being asked this question: "Okay. Is it your understanding that normally construction zones require you to go slower than you normally would if there were no construction? If there were no construction, yes." Then going to 13, "Repeat that please." she said. Question, "Did you understand that you had to slow up some at some point to go through this construction zone? Yes. When did you realize that? When I saw a sign saying construction with an arrow pointing to get over to the left which was right at Allen Road and Eureka bus stop area." Now, Mrs. Cal[lo]way, that's at Mrs. Gantt's stop, isn't that correct?

A. No.

Q. Isn't that right where you had to get over, as you just indicated, to let Mrs. Gantt off? That's when you realized that you were supposed to reduce your speed, correct?

A. No.

The above testimony indicates that the bus driver was aware that she needed to reduce her speed from the time she first noticed the construction at Eureka Road and Allen Road. The bus driver testified, without qualification, that she had been traveling thirty-five miles per hour

on Eureka Road south of Allen Road before she stopped the bus to let plaintiff off in front of her building, which street is normally posted at forty-five miles per hour. There was no evidence, circumstantial or direct, that the bus driver was speeding through the construction zone.

Plaintiff next argues that she presented sufficient evidence of a particularly violent or sudden jolt of the bus such as to establish a prima facie case of negligence. Plaintiff cites *Getz, supra* at 101-102, which quoted *Zawicky, supra,* and stated:

> "While a carrier may be held liable if a passenger is injured because a jerk or jolt of its vehicle was unnecessarily sudden or violent, ordinarily sudden jerks or jolts in stopping to let off and take on passengers are among the usual incidents of travel which the passenger must reasonably anticipate."

The most extreme characterization of the stop was plaintiff's testimony that the bus driver "slammed on the brakes." However, there was no testimony showing that the stop was so sudden or violent as to place it outside the normal course of operation for the bus. Plaintiff's testimony that two other passengers were standing up when the bus stopped but did not fall, undercuts plaintiff's assertion that the stop was unnecessarily sudden or violent. The trial court did not err in finding there was not enough evidence to go to the jury on this theory of negligence.

We find plaintiff's next assertion, that defendant should be barred from asserting what she terms "the sudden stop" defense because defendant failed to include it as an affirmative defense, thereby waiving it, similarly without merit. Plaintiff relies on *Lawrence v Will Darrah & Associates, Inc*, 445 Mich 1, 5; 516 NW2d 43 (1994), *O'Neill v Northern Assurance Co of London, England*, 155 Mich 564, 566; 119 NW 911 (1909), and MCR 2.112(D)(2)(b). A review of these authorities reveals them to be inapposite to the issue on appeal. MCR 2.112(D)(2) sets forth what defenses in an action on a policy of insurance must be stated specifically and with particularity, and *Lawrence* and *O'Neill, supra,* discuss the defense of proof of loss in insurance cases.

In addition to relying on irrelevant authority, plaintiff frames the argument incorrectly. An affirmative defense does not controvert the plaintiff's prima facie case; it concedes that the plaintiff had a cause of action but otherwise denies relief to the plaintiff. *Amerisure Ins Co v Graff Chevrolet, Inc*, 257 Mich App 585, 590; 669 NW2d 304 (2003). It is a defense which by reason of an affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, or which, if not raised in the pleading, would be likely to take the adverse party by surprise. MCR 2.111(F)(3)(b) and (c); *Harris v Vernier*, 242 Mich App 306, 311; 617 NW2d 764 (2000). Defendant, in arguing that plaintiff could not recover upon evidence of a sudden stop of the bus, did not assert an affirmative defense but highlighted the fact that plaintiff failed to carry the burden of proof in this motor-vehicle negligence action. Defendant, in no way, conceded that plaintiff had a cause of action. As the trial court stated at the hearing on plaintiff's motion for reconsideration:

> [M]y ruling, if I recall was that this was not an affirmative defense. . . . [I]t was plaintiff's burden to establish some evidence of negligence in the case and that really wasn't done.

* * *

> [T]his is not an affirmative defense . . . It's the lack of negligence which is your burden and not his burden.

Defendant's argument that plaintiff failed to provide evidence of negligence beyond evidence of a sudden stop at plaintiff's bus stop does not constitute an affirmative defense.

Next, we disagree with plaintiff's assertion that the doctrine of *res ipsa loquitur* applies here and relieves plaintiff of the burden of presenting evidence of defendant's negligence beyond the sudden stop. Plaintiff cites *Mitcham v Detroit*, 355 Mich 182; 94 NW2d 388 (1959), at length, which states that the plaintiffs in passenger carrier cases are not prevented from invoking *res ipsa loquitur*, although the invoking of this doctrine depends on the situation of the parties, and *Bolton v Detroit*, 10 Mich App 589; 157 NW2d 313 (1968), which states that negligence on a carrier's part may be inferred from circumstantial evidence where the circumstances are such as to remove the case from conjecture and place it in the arena of legitimate inferences deduced from established facts.[5] The doctrine of *res ipsa loquitur* in Michigan requires: 1) that the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; 2) the event must be caused by an agency of 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 must be more readily accessible to the defendant than to the plaintiff. *Jones v Porretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987).

While *Mitcham* and *Bolton* indicate that the doctrine of *res ipsa loquitur* can be applied in passenger-carrier cases, plaintiff has failed to demonstrate that the circumstances of this case call for the doctrine's application. Plaintiff presented no evidence that the stopping of the bus in this case was anything more than the occasional but expected sudden stop that is a regular incident of travel. In *Bolton, supra* at 595, the movement of the bus was unexpected and unusual. In *Mitcham, supra* at 187, the Court stated that "we think that something more than a mere sudden swerve and stop was shown by plaintiffs in the present case[.]" Indeed, the plaintiffs in *Mitcham* testified as to extremely erratic driving by the bus driver just prior to the accident. Without such evidence here, plaintiff's reliance on *res ipsa loquitur* to establish a prima facie case of negligence is misplaced. Moreover, there was evidence that plaintiff contributed to the injury by standing before the bus had stopped, and indeed the jury found her to be twenty-five percent comparatively negligent. This further precludes application of *res ipsa loquitur*. See *Jones, supra.*

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[5] In *Bolton, supra* at 595, this Court held that, because it was so unusual for the bus to jerk after stopping, a reasonable person could conclude that the bus carrying the plaintiffs would not have jerked if the defendant had exercised due care. The Court further found that it was therefore not necessary for the plaintiffs to establish precisely what the defendant did or failed to do that caused the bus to jerk to complete their proofs. *Id.*

Plaintiff's next issue on appeal is that the trial court erred in denying plaintiff's post-trial motion to amend the complaint to conform to the evidence through the addition of a count predicated on the doctrine of *res ipsa loquitor*. In light of our ruling above that the doctrine was not applicable based on the evidence presented at trial, there is no need to address this issue. See MCR 2.118(C)(1).

We reject plaintiff's final argument that the trial court erred in denying her motion for reconsideration. We review a trial court's denial of a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Id.*

MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

In her motion for reconsideration, plaintiff presented the same arguments as those asserted in response to defendant's motion for directed verdict/JNOV. Plaintiff questioned the trial court's reasoning in failing to find that defendant waived the right to assert a "sudden stop" defense and questioned the court's interpretation of the authority that was discussed in defendant's motion and in plaintiff's response to that motion. Plaintiff presented no new ideas, evidence, or authority, and failed to demonstrate a palpable error by which the court had been misled. Because plaintiff's motion for reconsideration only questioned the trial court's reasoning on the law in its granting of defendant's motion for directed verdict/JNOV, the trial court did not abuse its discretion in denying the motion. *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 83; 669 NW2d 862 (2003).

Finally, we reject defendant's assertion that the trial court erred in denying its motion for case evaluation sanctions, where plaintiff rejected the case evaluation award and judgment was subsequently entered in favor of defendant pursuant to defendant's motion for directed verdict/JNOV. We review a trial court's refusal to award actual costs pursuant to MCR 2.403(O)(11) for an abuse of discretion. *Haliw v City of Sterling Heights*, 257 Mich App 689, 694; 669 NW2d 563 (2003).

In *Haliw, id.* at 706, this Court discussed the "interests of justice" exception to MCR 2.403(O)(1), found in MCR 2.403(O)(11), and took direction from *Luidens v 63rd Dist Court*, 219 Mich App 24; 555 NW2d 709 (1996), which addressed the term "interests of justice" found in MCR 2.405(D)(3), which creates an exception to the imposition of sanctions for rejecting an

offer of judgment. This Court found *Luidens* instructive because both MCR 2.403(O) and MCR 2.405(D) serve the purpose of deterring protracted litigation and encouraging settlement. *Haliw, supra* at 706. The *Haliw* panel, citing and quoting *Luidens*, expressed the following regarding the "interests of justice" exception:

> This Court further held that factors normally present in litigation, such as a refusal to settle being viewed as "reasonable," or that the rejecting party's claims are "not frivolous," or that disparity of economic status exists between the parties, are insufficient "without more" to justify not imposing sanctions in the "interest of justice." Rather, the unusual circumstances necessary to invoke the "interest of justice" exception may occur where a legal issue of first impression is presented, or
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> > "where the law is unsettled and substantial damages are at issue, where a party is indigent and an issue merits decision by a trier of fact, or where the effect on third persons may be significant[.]"
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> > "The common thread in these examples is that there is a public interest in having an issue judicially decided rather than merely settled by the parties. In such cases, this public interest may override MCR 2.405's purpose of encouraging settlement. These examples involve unusual circumstances under which the "interest of justice" might justify an exception to the general rule that attorney fees are to be awarded. We recognize, of course, that the factors suggested here as relevant to the "interest of justice" exception are not exclusive. We offer them only as examples. Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception."
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> [*Haliw, supra* at 707-708 (citations omitted).]

Here, there was no issue of first impression, nor any indication of misconduct on defendant's part. Additionally, there is no indication of any significant effect on a third party and no issue involving larger issues of public policy. What is present in this case is economic disparity as between plaintiff, sixty years old at the time of trial, with a temporary job and no medical insurance, and defendant, a governmental entity. Also, plaintiff's claim cannot be deemed frivolous. Although relevant, these considerations are not enough to qualify for the interest of justice exception. The question is whether these considerations coupled with defendant's failure to bring a motion for summary disposition before trial is enough to justify the trial court's imposition of the interests of justice exception. The trial court's position was that plaintiff should not have had to pay the costs of trial where a motion for summary disposition upon the close of discovery would have disposed of the case. Defendant's argument, that it did not want to give plaintiff time to submit an affidavit with testimony which would help her "avoid these legal principles," is not persuasive. A party cannot vary or contradict his or her deposition

testimony by a self-serving affidavit prepared after the fact. *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 233-234; 477 NW2d 146 (1991). Considering that our review is for an abuse of discretion, we decline to reverse the trial court's denial of case evaluation sanctions under the "interest of justice" exception.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ Richard A. Bandstra