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STATE OF MICHIGAN

COURT OF APPEALS

MARK KELLAPOURES,

Plaintiff-Appellee,

v

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION,

Defendant-Appellant,

and

WILLIAM LEWIS,

Defendant.

UNPUBLISHED
October 15, 2020

No. 351790
Macomb Circuit Court
LC No. 2019-001778-NF

Before: SWARTZLE, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

In this action arising from injuries plaintiff suffered after boarding a bus owned by defendant Suburban Mobility Authority for Regional Transportation (SMART), SMART appeals as of right the trial court's order denying SMART's motion for partial summary disposition under MCR 2.116(C)(7) and (C)(10), which involved the question of governmental immunity. For the reasons set forth in this opinion, we reverse.

I. BACKGROUND

On May 18, 2018, plaintiff slipped and fell after boarding a bus operated by SMART and driven by defendant William Lewis.[1] The incident occurred at approximately 9:00 a.m., during Lewis's first run of the day. According to plaintiff, he had just boarded the bus behind his wife, paid the fare, and was walking to his seat when the bus "took off." There was one other passenger

[1] Lewis is not a party to this appeal.

already on the bus. Plaintiff testified that Lewis "jerked the bus over, accelerated fast, getting over into the lane of traffic." Plaintiff continued, "And between that and the oily substance on the floor, I slipped and I fell back, hitting my head and my back." Plaintiff testified that he was unconscious for "a few seconds" after he fell and that he injured his head, back, neck, and ankle.

Plaintiff maintained that Lewis had started driving away from the curb while plaintiff was still walking to his seat. Plaintiff testified that he "believe[d] Lewis was driving too fast when he merged into traffic and had "floored it," but plaintiff did not think Lewis was exceeding the speed limit. Plaintiff believed that he slipped on motor oil because Lewis told him the substance on the floor was oil after plaintiff fell and plaintiff could smell motor oil while he was on the floor. Although the SMART accident reports indicate that the floor of the bus was "wet and slippery" and label the substance as "water" in the pictures of the wet area, plaintiff testified that this conclusion was incorrect. Plaintiff stated that he did not see the motor oil on the floor before he slipped because he was not looking at the floor, but he admitted that it was visible after Lewis pointed it out. Plaintiff claimed that his fall was caused by the "[c]ombination of the oil and accelerating and the fast motion and jerking the bus over."

According to plaintiff, Lewis stated that the oil "was something maintenance missed or something" but also that Lewis was not sure how the oil got onto the floor. Plaintiff did not know how long the oil had been present. He testified as follows:

> *Q*. Did [Lewis] notice the oil on the floor before you fell?
>
> *A*. If he did, he sure as hell didn't say anything. Seems like a nice guy, so I would doubt it.
>
> *Q*. Do you have any information about anybody else slipping on it during that day?
>
> *A*. No. He stated that we were the only ones he picked up until that time. There was one person sitting in the back and my wife and I. Just a few passengers.

In his deposition, plaintiff also testified that he believed that the oil had originated from near the driver's area, was pooling in that area, and "cascaded forward and backward as he had driven with it." The pictures in the record show that the floor was wet; the moisture is apparent although not blatantly obvious. Plaintiff stated that he had "no idea" how the oil got onto the floor. Plaintiff was also questioned as follows:

> *Q*. Where did the motor oil come from?
>
> *A*. I don't know. I would imagine from the bus or something, because there was puddles up towards the front. I was kind of skating back and forth.

Plaintiff initiated the instant action alleging, as relevant to the issues on appeal, that his fall and resulting injuries were caused by "a dangerous and unnatural accumulation of an oily

substance on the floor" of the bus "coupled with the fact that said bus driver accelerated the bus in a negligent matter [sic] while the Plaintiff was standing and not seated."[2]

SMART subsequently moved for partial summary disposition under MCR 2.116(C)(7) and (C)(10). SMART first argued that it was entitled to governmental immunity with respect to plaintiff's third-party negligence claim because sudden starts and stops are a normal incident of traveling by bus, not an indication of negligence by the driver, and plaintiff therefore could not show that Lewis had operated the bus in a negligent manner. Next, SMART argued that it was entitled to governmental immunity because the existence of the wet floor that contributed to plaintiff's fall was not part of the "operation" of the bus. For both of these reasons, SMART maintained that the motor-vehicle exception to governmental immunity did not apply and that it was therefore entitled to judgment as a matter of law on the basis of governmental immunity.

In response, plaintiff argued that suddenly accelerating the bus to enter traffic while plaintiff was standing and in combination with the presence of oil on the floor that made the floor slippery constituted negligent operation of the bus such that governmental immunity did not bar plaintiff's claim.

Following a hearing at which both parties made oral arguments consistent with their written filings, the trial court issued a written opinion and order denying SMART's motion with respect to the negligence claim against it.[3] The trial court concluded that under *Martin v Rapid Inter-Urban Transit Partnership*, 480 Mich 936; 740 NW2d 657 (2007), plaintiff's alleged injury arose out of the operation of a motor vehicle for purposes of the motor-vehicle exception to governmental immunity, contained in MCL 691.1405. Next, acknowledging that the motor-vehicle exception also required a showing of negligence, the trial court concluded that there were questions of fact regarding the negligence of SMART and Lewis. Specifically, the trial court ruled that there was a question of fact regarding whether the oil on the floor constituted a special and apparent reason for Lewis to have waited for plaintiff to sit down before starting the bus and that there was a question of fact regarding whether SMART fulfilled its duty to plaintiff by permitting the oil to accumulate on the floor of the bus.

The trial court stayed the matter pending the resolution of this appeal.

II. STANDARD OF REVIEW

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[2] Plaintiff also raised additional claims involving allegations that he was entitled to recoup personal protection insurance (PIP) benefits from SMART as a self-insured entity because he was not covered by any applicable automobile insurance policy; that SMART was negligent in hiring, training, and supervising Lewis as a driver, as well as its general maintenance, operation, and inspection of the bus; and that Lewis was negligent. However, these additional claims are not at issue in this appeal based on the parties' arguments and analysis. We thus confine our discussion to the issues as they have been framed by the parties.

[3] The trial court also granted the summary disposition motion with respect to the negligence claim against Lewis. That ruling is not at issue on appeal.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). This Court also reviews de novo whether governmental immunity applies, which is a question of law. *Wood v Detroit*, 323 Mich App 416, 419; 917 NW2d 709 (2018).

Summary disposition under MCR 2.116(C)(7) is warranted if "relief is appropriate because of . . . immunity granted by law . . . ." A party thus may bring a motion for summary disposition under this subrule on the basis that the claim is barred by governmental immunity. *Hannay v Dep't of Transp*, 497 Mich 45, 58; 860 NW2d 67 (2014). "The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence, the substance of which would be admissible at trial." *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008) (quotation marks and citation omitted). "The contents of the complaint are accepted as true unless contradicted by the evidence provided." *Id*. (quotation marks and citation omitted).

A motion for summary disposition asserting governmental immunity may also be brought under MCR 2.116(C)(10). *Hannay*, 497 Mich at 58. Summary disposition is appropriate under this subrule if "[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." MCR 2.116(C)(10). Under MCR 2.116(C)(10), this Court reviews "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Odom*, 482 Mich at 466-467 (quotation marks and citation omitted). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

> 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. [*Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).]

III. ANALYSIS

This appeal involves only a third-party negligence claim against SMART and does not concern plaintiff's claim for first-party no-fault benefits. See *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707, 718; 822 NW2d 522 (2012) ("A third-party tort claim is distinct from a claim for first-party benefits because a third-party tort claim involves an adversarial process in which the plaintiff must prove fault in order to recover."). However, governmental agencies in Michigan are generally "statutorily immune from tort liability." *Id*. at 714. Section 7 of the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, provides in relevant part that "[e]xcept 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). Nonetheless, under what is often referred to as the motor-vehicle exception,[4] "[g]overnmental agencies shall be liable for bodily injury and property damage resulting from the

[4] See *Hannay*, 497 Mich at 50.

negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ." MCL 691.1405.

The issue presented concerns whether the circumstances of the incident—where plaintiff alleges that he fell after the bus quickly accelerated from a stop and "jerked" back into traffic while plaintiff had been standing in the bus aisle on an area of floor that was wet and slippery—constitute the "negligent operation" of a motor vehicle for purposes of satisfying the motor-vehicle exception to governmental immunity. The parties do not dispute that SMART is a governmental agency that was engaged in a governmental function while providing public transportation services when plaintiff was allegedly injured, and we therefore decline to address those matters. The parties agree that the application of MCL 691.1405 is central to the resolution of this appeal, but they disagree as to whether the factual circumstances of plaintiff's alleged injury satisfy this statutory exception to governmental immunity. Under MCL 691.1405, SMART can be liable "only if plaintiff's injuries resulted from 'the negligent operation' of a motor vehicle" and SMART is protected by governmental immunity if there was no negligent operation of the motor vehicle. *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 436; 824 NW2d 318 (2012).

A. OPERATION

In *Chandler v Muskegon Co*, 467 Mich 315, 319-320; 652 NW2d 224 (2002), our Supreme Court construed the term "operation" within MCL 691.1405 and held that for purposes of this statute, "the language 'operation of a motor vehicle' means that the motor vehicle is being operated *as* a motor vehicle." The Court further concluded that "the 'operation of a motor vehicle' encompasses activities that are directly associated with the driving of a motor vehicle." *Id*. at 321. In *Chandler*, the plaintiff was injured while attempting to pry open the doors of a bus that the plaintiff had been assigned to clean and that was parked in the transit system's "bus barn." *Id*. at 316. Our Supreme Court in *Chandler* held that the defendant county was entitled to summary disposition on the basis of governmental immunity because "the injury did not result from the negligent 'operation' of the vehicle within the meaning of the motor vehicle exception, codified at MCL 691.1405." *Id*. at 316, 322. The *Chandler* Court reasoned that the "plaintiff was not injured incident to the vehicle's operation as a motor vehicle" because 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*. at 322.

Further elucidation of what constitutes "operation" of a motor vehicle for purposes of the motor-vehicle exception may be gleaned from our Supreme Court's order in *Martin*, 480 Mich 936. In *Martin*, "the plaintiff allege[d] that she slipped and fell down the steps of a shuttle bus owned and operated by the defendants as she was attempting to exit the bus," and the Supreme Court held that the plaintiff satisfied the requirements of the motor-vehicle exception to governmental immunity because the "loading and unloading of passengers is an action within the 'operation' of a shuttle bus." *Id*. The Supreme Court in *Martin* reversed the judgment of this Court in leu of granting leave to appeal and remanded the matter to the circuit court for reinstatement of its order denying the defendants' motion for summary disposition. *Id*. Although succinct, the Supreme Court's order in *Martin* is binding precedent because it was "a final disposition of an application and contains a concise statement of the applicable facts and reasons

for the decision." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 371; 817 NW2d 504 (2012).

Throughout the course of the instant litigation, SMART has attempted to essentially "compartmentalize" the two factual circumstances that allegedly contributed to plaintiff's fall—the sudden start of the bus and the wet floor—and has argued that because (in SMART's view) neither circumstance in isolation can satisfy the motor-vehicle exception to governmental immunity, plaintiff necessarily cannot show that the motor-vehicle exception applies. SMART does not contend that the act of driving the bus away from the curb does not come within the meaning of "operation" for purposes of MCL 691.1405,[5] nor could it seriously advance such an argument since the act of driving is the very epitome of operating the vehicle "*as* a motor vehicle." *Chandler*, 467 Mich at 320-321.

However, while plaintiff's theory of the case relies on demonstrating negligence through the manner in which Lewis drove the bus away from the curb *in combination* with the existence of the wet and slippery floor, SMART fails to fully recognize this theory and attempts to limit the ultimate scope of consideration solely to Lewis's driving by arguing that the wet floor was merely a maintenance issue and not part of the bus's "operation" as a motor vehicle. SMART also argues that *Martin* is distinguishable because plaintiff had already finished entering the bus and fell on the floor of the bus rather than on the steps.

Nonetheless, it is clear from our Supreme Court's opinion in *Chandler* that the proper analytical focus in determining whether an injury stemmed from the operation of a motor vehicle as a motor vehicle for purposes of MCL 691.1405 is on *the manner in which the motor vehicle itself is being operated* at the time of the alleged injury—i.e., the action of operating or driving the motor vehicle—and the connection between this action and the theory of injury, not on the *conditions* of the motor vehicle in isolation—i.e, the wet floor in the instant case or the bus doors in *Chandler*.[6] See *Chandler*, 467 Mich at 320-322. The *Chandler* Court's reasoning makes this evident:

> 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

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[5] SMART instead argues that this act was not done *negligently* in this case. The negligence issue will be addressed below.

[6] We do not decide whether the analysis and conclusion in this case could potentially be different if plaintiff's injury had arisen solely from the wet-floor condition without any alleged causal nexus with the manner in which Lewis drove the bus as that issue is not before us. Rather, plaintiff claims that he was injured by the combination of the bus's sudden start and the wet condition of the bus floor. Our analysis is limited accordingly.

facility for the purpose of maintenance and was not at the time being operated *as* a motor vehicle. [*Id*. at 321-322.]

Thus, in *Chandler*, the determining factor was that the "the vehicle was parked in a maintenance facility for the purpose of maintenance" at the time the injury occurred, not that the injury was caused by a problem with the functioning of the vehicle's doors. *Id*. at 322. This understanding of the underlying rationale in *Chandler* is supported by the holding in *Martin*, that the "loading and unloading of passengers is an *action* within the 'operation' of a shuttle bus." *Martin*, 480 Mich at 936 (emphasis added). This understanding is also supported by decisions of this Court. See *Strozier v Flint Community Sch*, 295 Mich App 82, 87-88, 91; 811 NW2d 59 (2011) (holding that "stopping to pick up garbage is necessarily included within the 'operation' of a garbage truck" for purposes of MCL 691.1405 because "it is impossible for a garbage truck to perform the function for which it was designed without periodically stopping to pick up garbage"); *Wood*, 323 Mich App at 418, 421 (holding, in a case where the plaintiff pedestrian was injured by a wheel that had fallen off a van owned by the city of Detroit, that the van's driver "was operating the van *as* a motor vehicle at the time that the accident occurred" because "he was driving at 20 to 25 miles per hour when the driver's side rear tire came off his vehicle").

Accordingly, the bus in this case was being operated as a motor vehicle because it was being driven as it provided transportation services to the public, specifically driving away from the curb after picking up plaintiff and his wife, when plaintiff allegedly fell as the bus suddenly accelerated while plaintiff was standing on a wet and slippery portion of the bus floor.

B. *NEGLIGENT* OPERATION

The next question is whether the alleged the bus was operated *negligently*.

SMART, ignoring the existence of the wet area and focusing only on the portion of plaintiff's claim involving the bus's quick acceleration and "jerk[ing]" motion as it rejoined traffic after having stopped to pick up plaintiff, maintains that the bus was not operated negligently because a sudden start by a common carrier vehicle does not demonstrate negligence as a matter of law.

"Sudden jerks or jolts in stopping to let off and take on passengers and in starting, are among usual incidents of travel on street cars which every passenger must expect and mere fact [sic] that a passenger is injured thereby will not of itself make out a case of negligence which will render the carrier liable although carrier may be liable if the jerk or jolt is unnecessarily sudden or violent." *Sherman v Flint Trolley Coach*, 304 Mich 404, 414; 8 NW2d 115 (1943) (quotation marks and citation omitted); accord *Seldon*, 297 Mich App at 437 ("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."). Additionally, "[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." *Ottinger v Detroit United Ry*, 166 Mich 106, 107; 131 NW 528 (1911) (quotation marks and citation omitted).

In this case, however, the issue presented is whether negligence can be shown by the sudden start *in combination with the presence of the wet and slippery floor hazard* where plaintiff alleges that these combined circumstances caused his fall.

In *Selman v Detroit*, 283 Mich 413, 417; 278 NW 112 (1938), our Supreme Court addressed an analogous factual situation. In *Selman*, the plaintiff was a passenger on the defendant's street car, and one of the other passengers sitting near the plaintiff had a large suitcase that was sticking out from under the passenger's legs and into the aisle. *Id*. at 415-416. The plaintiff stood up and held onto the street car's passenger straps in preparation to exit the street car as it was approaching a stop when "the street car jerked suddenly," throwing the plaintiff toward the front of the street car and pulling her hands loose from the straps. *Id*. at 416-417. The plaintiff attempted to brace herself with her foot, but her foot struck the other passenger's large suitcase and the plaintiff fell to the floor. *Id*. at 417. The plaintiff "claim[ed] the combination of the jerk of the street car and the striking of plaintiff's foot against the suitcase caused her to fall to the floor, with the resulting injuries." *Id*.

On the plaintiff's appeal from the directed verdict granted in favor of the defendant, our Supreme Court stated the general rule as follows: "The rule is, that a street railway cannot be held liable for resulting injuries to passengers due to sudden jerks in starting, stopping, or operating such conveyances if they are maintained in a serviceable condition and operated in the customary manner." *Id*. at 420. Our Supreme Court stated that an obstruction in the aisle over which a passenger stumbles does not by itself "raise a presumption of negligence" on the part of the common carrier. *Id*. at 423. Furthermore, the Court specifically explained that "[p]laintiff does not claim she is entitled to recover solely by reason of the jerking of the car, but relies upon that fact in connection with other circumstances" with "[t]he other circumstance upon which plaintiff relies [being] the fact a suitcase was in the aisle of the street car." *Id*. at 420. The Court stated the rule governing the factual circumstances in that case, and which also is directly pertinent to the factual circumstances present in the instant case, as follows:

> The liability of a carrier for an injury to a passenger caused by obstruction of a car aisle or platform by property of another passenger arises only in case the carrier has been negligent in permitting the obstruction. Ordinarily, *the carrier is liable only where one of its employees in charge of the car knows of the obstruction in time to have it removed before it can cause injury; or where the obstruction exists for such a length of time that an employee, in the proper discharge of his duties, should know of its presence*." [*Id*. at 422 (emphasis added).]

Our Supreme Court in *Selman* went on to affirm the trial court's grant of a directed verdict in the defendant's favor, specifically noting that there was no evidence that the street car conductor knew about the suitcase in the aisle before the plaintiff's fall or that the suitcase had been

obstructing the aisle for such a length of time that the conductor should have known about it. *Id*. at 423-424.[7]

In this case, there similarly is no evidence that Lewis or SMART knew about the wet and slippery area of floor on the bus before plaintiff fell and there is no evidence that the floor had been wet and slippery for such a length of time that Lewis or SMART should have had notice or knowledge of its existence. Although the record evidence reflects that the incident occurred at approximately 9:00 a.m. and on the first run of that bus for the day, there was no evidence introduced about when or how the floor became wet with oil or any other substance. Plaintiff failed to introduce any evidence in response to SMART's motion for summary disposition to create a genuine issue of material fact regarding defendants' knowledge of the condition or the length of time the condition had been present.

Because there was no evidence that Lewis knew about the wet condition or that the condition had existed for such a length of time that Lewis should have known about it, plaintiff could not as a matter of law establish that the combination of the sudden start and wet floor that allegedly caused his injuries constituted negligent operation of the bus. *Selman*, 283 Mich at 422-424. The trial court therefore erred by presuming a question of fact regarding SMART's negligence solely from the existence of the wet condition and plaintiff's fall. *Selman*, 283 Mich at 423.

The trial court's reliance on *Ottinger* for the proposition that there was a question of fact regarding whether the was a special or apparent reason for Lewis to have waited for plaintiff to sit down before staring the bus was erroneous because *Ottinger* is distinguishable. In *Ottinger*, the plaintiff boarded a street car, the car started before the plaintiff found a seat, and the plaintiff fell when the street car stopped suddenly while the plaintiff was still standing in the aisle. *Ottinger*, 166 Mich at 106-107. In concluding that there was no evidence of negligence by the street car company, the Supreme Court reasoned that there was no evidence that the plaintiff's fall was caused by anything other than the sudden stop. *Id*. at 108, 110. Accordingly, there was no "special or apparent reason" that would have required the driver to wait for the plaintiff to sit down and the case fell within the line of authority involving ordinary sudden starts and stops. *Id*. at 107-110.

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[7] Plaintiff argues that *Selman* is inapplicable to this case because it "turned on whether plaintiff proved freedom from contributory negligence." Plaintiff is correct that our Supreme Court in *Selman* also stated in its conclusion that "[i]f plaintiff saw the suitcases when she entered the car, one of them sticking out in the aisle, she barred herself from a right to recover upon the ground of contributory negligence." *Selman*, 283 Mich at 424. However, the Court offered little discussion or analysis on this point and it appears to have been an alternative ground for affirmance. In contrast, as described above in the body of our opinion, the *Selman* Court devoted a significant portion of its discussion and analysis to the issue of the alleged negligence by the defendant and the legal principles applicable to this issue, *id*. at 419-424, and we understand its ruling on this issue to have been the primary basis for its decision. Accordingly, *Selman* provides controlling authority relevant to this case despite that it also briefly discussed the principle of contributory negligence.

In this case, although the trial court correctly concluded that there was evidence of a special condition or reason in the form of the wet floor, the trial court erred by neglecting to next consider whether there was evidence that Lewis or SMART knew or should have known about the wet condition before plaintiff's fall. The trial court essentially concluded that a presumption of negligence automatically followed from the existence of the condition and plaintiff's injury. However, there is nothing in *Ottinger* to support such an analysis.

In *Ottinger,* this Court held that the lack of any "special or apparent reason," and the driver's knowledge was not at issue because there was no additional special condition of which the driver could have been aware. Conversely, in this case, there was evidence of a special condition to take the case outside the ordinary sudden-start-and-stop cases. But the analysis does not stop there; instead, such circumstances clearly implicate the rule applied in *Selman*. As previously discussed, plaintiff's failure to establish a genuine issue of material fact that Lewis or SMART knew or should have known about the wet condition was fatal to plaintiff's claim that his injury arose out of the negligent operation of the bus.

Plaintiff resists this conclusion on three grounds. First, plaintiff argues that governmental immunity is an affirmative defense and that SMART therefore bore the burden to prove by a preponderance of the evidence that it was not negligent, which plaintiff contends SMART failed to do. Such an argument necessarily fails because it is premised on an inaccurate understanding of the proper application of governmental immunity.

Plaintiff cites MCR 2.111(F)(3)(a), which provides in pertinent part: "Affirmative defenses must be stated in a party's responsive pleading . . . . Under a separate and distinct heading, a party must state the facts constituting . . . an affirmative defense, such as . . . immunity granted by law . . . ." Nonetheless, with respect to the governmental immunity of a governmental agency,[8] our Supreme Court has specifically held that governmental immunity is a "characteristic of government," not an affirmative defense, and that a *plaintiff* therefore must "plead and prove facts in avoidance of immunity." *Mack*, 467 Mich at 197-199, 201-203, (quotation marks and citation omitted). "[I]t is the responsibility of the party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions." *Id*. at 201. Thus, plaintiff's characterization of the parties' burdens with respect to governmental immunity is contrary to clear Supreme Court precedent that this Court is bound to follow. *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-193; 880 NW2d 765 (2016).

Next, plaintiff argues that the trial court's ruling should be affirmed because SMART, as a common carrier, is held to the highest standard of care. A negligence claim requires the following elements to be established: (1) that "the defendant owed a legal duty to the plaintiff;" (2) that "the defendant breached or violated the legal duty it owed to the plaintiff;" (3) that "the plaintiff suffered damages;" and (4) that "the defendant's breach of duty was a proximate cause of the damages suffered by the plaintiff." *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96 n 10; 485 NW2d 676 (1992). Our Supreme Court has also set forth the elements of a negligence claim as

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[8] For purposes of the GTLA, "governmental agency" means "this state or a political subdivision." MCL 691.1401(a). The definition of "political subdivision" includes a "transportation authority." MCL 691.1401(e).

follows: "(i) duty, (ii) general standard of care, (iii) specific standard of care, (iv) cause in fact, (v) legal or proximate cause, and (vi) damage." *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). It seems that these two frameworks coexist and complement each other, as Chief Justice MCCORMACK has explained:

> *Moning* defined "general standard of care" as "reasonable conduct 'in light of the apparent risk,' " differentiating it from duty, which it defined as a "legal obligation." *Moning*, 400 Mich at 438. Modern negligence doctrine (including our own) more commonly uses the term "duty" to refer to the general standard of care. See, e.g., *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992) (explaining that "[o]nce a defendant's legal duty is established, the reasonableness of the defendant's conduct under that standard is generally a question for the jury"). And *Moning*'s reference to the "specific standard of care," or whether the defendants' specific conduct met the "general standard of care," is more commonly referred to as "breach." *Moning*, 400 Mich at 438, 443. [*Blackwell v Franchi*, ___ Mich ___, ___; 940 NW2d 58, 59 (2020) (MCCORMACK, C.J., concurring).]

"Ordinarily, carriers of passengers for hire, while not insurers of absolutely safe carriage, are held to the exercise of the highest degree of care and skill and diligence practically consistent with the efficient use and operation of the mode of transportation adopted." *Moore v Saginaw, T & HR Co*, 115 Mich 103, 108; 72 NW 1112 (1897) (quotation marks and citation omitted); accord *Trent v Pontiac Transp Co*, 281 Mich 586, 588; 275 NW 501 (1937) (stating that the defendant "engaged in the transportation of passengers for hire, owed to plaintiffs the exercise of a high degree of care . . . and should be held responsible for a lack of exercise of such diligence as would ordinarily be used by a common carrier in the inspection of its equipment for defects"); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988) (stating that there generally "is no duty that obligates one person to aid or protect another" but that "[s]ocial policy . . . has led the courts to recognize an exception to this general rule where a special relationship exists between a plaintiff and a defendant[,]" including that "a common carrier may be obligated to protect its passengers").

Nonetheless, a common carrier "fulfills the requirement of due care when it exercises that skill, diligence, and foresight for the safety of its passengers consistent with the practical conduct of its business" and there must be evidence that the carrier or its employee knew or should have known of the condition that caused injury to a passenger in order for the carrier to be held liable in negligence. *Selman*, 283 Mich at 422. This rule expressed in *Selman* is consistent with the rule stated in the case cited by plaintiff here, *Takacs v Detroit United Ry*, 234 Mich 42, 51; 207 NW 907 (1926),[9] in which our Supreme Court stated that "[d]efendant could only be charged with

[9] Although plaintiff relies on this case on appeal, it is not directly on point because the Supreme Court affirmed the trial court's grant of a directed verdict in defendant's favor on the ground that there was no proximate causal connection between the conduct of defendant's agents and the plaintiff's injury that was caused by an unexpected and intervening tort of another passenger. *Takacs*, 234 Mich at 43, 45, 49, 50-51.

neglect by the conductor of some duty owed to plaintiff *arising from facts known to him, or which in the discharge of his duties he ought to have known*." (Emphasis added.) Here, because there was no evidence that defendants knew or should have known about the wet area, there was no evidence to create an issue of material fact regarding negligence by SMART despite the higher standard of care applicable to common carriers. *Id.*; *Selman*, 283 Mich at 422.

Next, plaintiff asserts that Lewis should have known about the wet condition because he had a duty to know. In support of this contention, plaintiff relies on two cases that involved the wheel of a vehicle falling off as it was driving. In *Trent*, 281 Mich at 587, the plaintiffs were injured when they were passengers on the defendant's bus and one of the rear wheels of the bus came off as the bus was driving. In *Wood*, 323 Mich App at 418, the plaintiff was injured while crossing the street on foot when he was struck by a wheel that had come off a van owned by the city of Detroit.

However, both of these cases are distinguishable from the instant case. In *Trent*, there was evidence "that at the time the wheel came off the bus and immediately prior thereto there was a large amount of smoke in the bus originating from the rear of the vehicle, together with an unusual increasingly noticeable odor described by one witness as smelling 'like something burning' and by another as 'like the heated motor of a car.' " *Trent*, 281 Mich at 588-589. In *Wood*, the plaintiff's response to the defendants' summary disposition motion included an affidavit from a traffic-crash reconstructionist who averred that the "chafing marks on the inside of the tire 'correlate[d] with the wheel wobbling prior to becoming separated from the vehicle,' which 'would not [have been] possible if lug nuts had been affixed to the bolts of the hub,' " and that " '[t]he extent of chaffing [sic] and scarring to the tire from the unsecured wheel demonstrates the Defendant operator would likely have experienced significant wobbling thus warning him of the unsecured wheel and the danger of continuing to drive the vehicle.' " *Wood*, 323 Mich App at 421 (second, third, and fourth alterations in original). In this case, there was no such evidence relative to the wet area of any fact that would have given Lewis or any other SMART employee prior notice or warning of the potential for the existence of a hazardous wet area on the floor before plaintiff's fall. Accordingly, plaintiff's reliance on *Trent* and *Wood* do not advance his argument.

Plaintiff asks this Court to infer that Lewis should have known about the condition based on the presence of the wet condition without any further evidence related to Lewis's actual knowledge, the source of the wetness, the length of time the condition was present, or the existence of any prior warning signals of the condition of the type that were present in *Trent* and *Wood*. Plaintiff's contention amounts to an argument that negligence should be presumed from the existence of the condition and the fact that injury occurred. Such an approach has been rejected by our Supreme Court. *Selman*, 283 Mich at 423.

Because plaintiff failed to establish a genuine question of material fact that his injuries arose from the *negligent* operation of the bus, plaintiff did not satisfy the requirements of MCL 691.1405 and the trial court erred by denying SMART's motion for partial summary disposition on the basis of governmental immunity. *Seldon*, 297 Mich App at 436. The trial court's order is reversed.

Reversed and remanded for further proceedings consistent with this opinion. We do not

retain jurisdiction. We decline to award costs. MCR 7.219(A).

/s/ Brock A. Swartzle
/s/ Stephen L. Borrello
/s/ Deborah A. Servitto