

# Order

Michigan Supreme Court  
Lansing, Michigan

March 15, 2024

Elizabeth T. Clement,  
Chief Justice

165923

Brian K. Zahra  
David F. Viviano  
Richard H. Bernstein  
Megan K. Cavanagh  
Elizabeth M. Welch  
Kyra H. Bolden,  
Justices

KEVIN ONG,  
Plaintiff-Appellant,

v

SC: 165923  
COA: 361061  
Macomb CC: 2020-002043-NI

CHERYL LEWIS and SUBURBAN  
MOBILITY AUTHORITY FOR REGIONAL  
TRANSPORTATION,  
Defendants-Appellees.

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On order of the Court, the application for leave to appeal the June 8, 2023 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J. (*dissenting*).

I dissent from this Court's order denying leave to appeal. I would peremptorily reverse in part and reinstate the trial court's denial of summary disposition to defendant Suburban Mobility Authority for Regional Transportation (SMART). When reviewing motions for summary disposition under MCR 2.116(C)(10), courts "may not weigh evidence, make determinations of credibility, or otherwise decide questions of fact." *Sabbagh v Hamilton Psychological Servs, PLC*, 329 Mich App 324, 346 (2019). In this negligence case, the Court of Appeals incorrectly converted a factual question into a legal one by conflating the concepts of duty and breach, concluding that there was no duty of care. I agree with Judge PATEL's partial dissent that defendant Cheryl Lewis owed plaintiff, Kevin Ong, a duty of care and that genuine issues of material fact remained as to breach and comparative fault such that the trial court properly denied summary disposition as to SMART. *Ong v Lewis*, unpublished per curiam opinion of the Court of Appeals, issued June 8, 2023 (Docket No. 361061) (PATEL, P.J., concurring in part and dissenting in part), p 1.

In the early morning of March 2, 2020, plaintiff, a city employee, was removing Christmas lights from the median of Old Woodward Avenue in a bucket truck when he was

struck by a northbound SMART bus and was severely injured. The truck was parked in the southbound lane, and the aerial bucket containing plaintiff was approximately 108 inches above the ground and protruded approximately 44 inches into the northbound lane at the time of the collision. To warn drivers, plaintiff and his coworker put cones behind the truck—which had small yellow lights above the headlights and flashing lights on the side of the truck—but did not place signage in the northbound lane. It was dark and raining at around 6:30 a.m., with visible streetlights. The bucket had no lights, but plaintiff was wearing a fluorescent sweatshirt with reflectors. The 110-inch-tall bus was traveling at 21 miles per hour in a 25 miles per hour speed zone with the sun visor down before the collision.

Plaintiff sued under the motor vehicle exception to governmental immunity, asserting claims against Lewis for gross negligence and against SMART as the owner of the bus liable for Lewis’s ordinary negligence. Defendants moved for summary disposition under MCR 2.116(C)(7) and (C)(10) on the theory that Lewis was neither grossly negligent nor negligent and therefore Lewis and SMART were entitled to governmental immunity. MCL 691.1407(1) and (2). Further, defendants argued that plaintiff was more than 50% at fault and therefore was barred from recovering damages. MCL 500.3135(2)(b). The trial court denied the motion. The Court of Appeals reversed and remanded for entry of summary disposition in favor of defendants. *Ong v Lewis*, unpublished per curiam opinion of the Court of Appeals, issued June 8, 2023 (Docket No. 361061), p 14. Judge PATEL concurred as to the claim against Lewis but dissented as to the claim against SMART. *Id.* (PATEL, P.J., concurring in part and dissenting in part) at 1.

Under the motor vehicle exception to governmental immunity, government agencies are liable for bodily injury and property damage resulting from negligent operation of government-owned vehicles by employees. MCL 691.1405. A plaintiff in a negligence action must prove “(1) duty, (2) breach, (3) causation, and (4) damages.” *Henry v Dow Chem Co*, 473 Mich 63, 74 (2005). Duty requires a relationship between the parties and foreseeable harm, see *Hill v Sears, Roebuck & Co*, 492 Mich 651, 661 (2012), and its existence is a question of law that is generally decided by a court if there are no relevant factual disputes, see *Maiden v Rozwood*, 461 Mich 109, 131 (1999). The duty of care applicable to the negligent operation of a vehicle is the same duty that applies to negligence claims generally—the duty to exercise ordinary care under the circumstances. MCL 257.401(1); see also *Composto v Albrecht*, 328 Mich App 496, 499-500 (2019). The duty to exercise reasonable care and caution requires a driver to recognize the conditions and circumstances of travel. See *Ashworth v Detroit*, 293 Mich 397, 400-401 (1940).

Unlike the Court of Appeals majority, I believe that Lewis owed plaintiff a duty of ordinary care and that the pertinent question was whether that duty was breached—a question generally reserved for the jury. The Court of Appeals majority muddled the duty and breach prongs of the analysis and wrongly concluded that Lewis owed no duty to plaintiff. The panel found that Lewis did not have a duty to see, perceive, and avoid hitting

obstacles above the bus. *Ong*, unpub op at 8, 11. But the majority also observed that Lewis had a duty to drive in a reasonably prudent manner while observing the roadway for other motor vehicles and pedestrians as well as to be aware of reasonably foreseeable hazards. *Id.* at 11. The majority framed the question as whether the driver had a “heightened duty” to look for overhead dangers, believing that the danger was not reasonably foreseeable because “Lewis properly drove in a lane in which she had a right to travel and was not aware of the presence of the bucket in the airspace over the driving lane.” *Id.* at 11-12.

But the proper focus, as recognized by Judge PATEL, is whether there is a genuine issue of material fact as to the driver’s breach of the ordinary-negligence standard of care, not whether the driver had a “heightened duty.” As the panel observed, there is a duty to drive in a reasonably prudent manner while observing the roadway for reasonably foreseeable hazards. *Ong*, unpub op at 11; see also *Zarzecki v Hatch*, 347 Mich 138, 141 (1956) (stating that a person must exercise reasonable care and caution when driving a motor vehicle). And I believe that the risks here were reasonably foreseeable as a matter of law and therefore gave rise to a duty. As for whether that duty was breached, there remained disputed questions of fact. Although the hazard was aerial and the incident occurred on a dark and rainy morning, the record shows that streetlights lit the area, plaintiff wore a fluorescent sweatshirt, the bucket truck had flashing lights, there was an (albeit potentially unrelated) work-zone sign, and Lewis had the sun visor down (from which a fact-finder could potentially deduce that her vision was obstructed). *Ong* (PATEL, P.J., concurring in part and dissenting in part), unpub op at 2. Whether Lewis breached the duty of reasonable care is therefore a jury question.

By framing the question as one of duty, the Court of Appeals majority forced a factual question that should be resolved by the fact-finder into a legal question to be resolved by a court. In *Ferriole*, I dissented from this Court’s denial of leave to appeal, asserting that although the correct duty-of-care standard was applied, there remained a genuine issue of material fact as to whether the duty of care was breached. *Ferriole v Detroit*, 511 Mich 990, 990 (2023) (CAVANAGH, J., dissenting). Here, the panel similarly incorrectly found that there is no duty such that the factual questions of breach and comparative fault will never make it to a jury. In both cases, the Court of Appeals overstepped its role to abstain from deciding factual issues.

In addition, the panel reached SMART’s alternative argument that plaintiff was more than 50% at fault. *Ong*, unpub op at 14. Appellate courts cannot usurp a jury’s role and assess comparative fault unless no reasonable juror could find that a defendant was more at fault than a plaintiff. See *Huggins v Scriptor*, 469 Mich 898, 898 (2003). Except in the clearest of circumstances, it is the jury, and not a judge, that determines a party’s particular percentage of fault. SMART has not met its burden to show that reasonable minds could not disagree that plaintiff was more than 50% at fault where the record

evidences that streetlights were present, that plaintiff took several precautions to alert drivers to the hazard, and that the bus's sun visor was down. "Viewing the evidence in the light most favorable to Ong, a reasonable juror could conclude that Ong and the bucket were visible to a driver in Lewis's position, that Lewis breached her duty by failing to see Ong or the bucket," and that Lewis was more than 50% at fault. *Ong* (PATEL, P.J., concurring in part and dissenting in part), unpub op at 4-5.

For these reasons, I would reverse the Court of Appeals' decision and reinstate the trial court's denial of summary disposition as to SMART.

BOLDEN, J., joins the statement of CAVANAGH, J.



a0312

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 15, 2024

Handwritten signature of Larry S. Royster in black ink.

Clerk