

CITATION: Darlene Olaiya v. Durham Region Transit Commission, 2017 ONSC 3938
DIVISIONAL COURT FILE NO.: DC-971/16
DATE: 20170629

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: Darlene Olaiya, Plaintiff/Appellant

AND:

Durham Region Transit Commission, Defendant/Respondent in Appeal

BEFORE: Kiteley, Wilton-Siegel, Broad JJ.

COUNSEL: Barry Evans, for the Plaintiff/Appellant

James Dakin, for the Defendant, Respondent

HEARD at Oshawa: June 26, 2017

ENDORSEMENT

Kiteley J (Orally):

[1] An incident occurred on a bus on June 6, 2013 and following that the plaintiff sued the Durham Region Transit Commission.

[2] The defendant issued a jury notice. The trial was held on May 16, 2016. The plaintiff gave evidence followed by the bus driver's evidence. At the conclusion of the evidence, the defendant brought a motion for non-suit, which was granted by Glass J. The plaintiff has appealed.

[3] At the trial, the evidence on behalf of the plaintiff did not include expert evidence of standard of care. The plaintiff gave evidence that, after she fell, the driver had stated, "not again". The defendant took the position that the comment, "not again", which the driver denied, was not evidence of standard of care and without evidence, the jury could not make a determination of whether negligence occurred.

[4] The ruling by the trial judge is as follows:

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The motion for a non-suit is granted to the defendant because there is no evidence from which a jury can conclude what the standard of care would be for the defendant. Mr. Clark is an experienced driver for Durham Transit. No prior experience of such seats and people falling was presented in the trial. There is no evidence upon which a jury could make an assessment that Durham should have had a pro-active course of conduct.

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Without evidence showing a standard of care in the industry there is not a foundation for this jury in Ms. Olaiya's case to make a decision. There is no *prima facie* case to go to the jury. Therefore the defence motion is granted and the action is dismissed.

[5] As indicated at page 56 the trial judge identified that the plaintiff need only meet the standard of a *prima facie* case in order to avoid an order for non-suit.

[6] The question before us is whether the decision of the trial judge that the plaintiff did not meet the *prima facie* standard, which is a question of mixed fact and law, was patently unreasonable. (Housen v. Nikolaisen 2002 SCC 33)

[7] Counsel for the appellant argued then and now, that more evidence as to standard of care was not required because the driver had special knowledge as to the expectation by the special needs customer to have the seat the plaintiff happened to occupy and the driver had special knowledge that the special needs customer would flip up the accessible seat to accommodate her walker and, based on that special knowledge, the driver should have warned the plaintiff and she would have avoided falling when the special needs customer flipped up the seat. Counsel for the appellant takes the position that the evidence constituted a *prima facie* case that addressed the standard of care and breach of the standard of care.

[8] In order to establish negligence, the plaintiff must meet the test accepted in Kauffman v. Toronto Transit Commission, 1960 CanLII 4 (SCC) and specifically at page 255 the passage from Paris v. Stepney Borough Council at page 255 of Kauffman, which is as follows:

Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that proof of that fault of omission should be one of two kinds, either to shew that the thing that he did not do is a thing which was commonly done by other persons in like circumstances, or to shew that it was a thing that was so obviously wanted that it would be folly in anyone to neglect to provide it.

[9] In this appeal, counsel for the appellant relies on the latter of the two tests. The evidence of the driver saying, “not again” does not suffice when no further evidence was given as to the context in which that comment was allegedly made. Even assuming the evidence to be true and assigning the meaning most favourable to the plaintiff, we do not agree that the special knowledge of the driver fell into the latter category and was so obviously wanting that it would have been folly to neglect warning the plaintiff.

[10] We do not agree that the trial judge erred in his ruling to grant the motion for non-suit. In any event, had we accepted the submissions of the appellant, we would not have granted a new trial because, even if the evidence before the trial judge could have met the *prima facie* level, it could not have met the balance of probabilities level and a dismissal at the conclusion of the trial was inevitable.

ORDER TO GO:

1. Appeal is dismissed.
2. Plaintiff shall pay the defendant \$2000.00 in costs.

Kiteley J.

I agree

Wilton-Siegel J.

I agree

Broad J.

Date: June 29, 2017