STATE OF MICHIGAN

COURT OF APPEALS

MARK SMITH,

Plaintiff-Appellant-Cross-Appellee,

v

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION,

Defendant-Appellee-Cross-Appellant.

UNPUBLISHED
December 16, 2010

No. 294311
Wayne Circuit Court
LC No. 08-113926-NO

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition in this case arising out of an incident in which plaintiff, while on a bicycle, was allegedly forced by one of defendant's buses into a curb, causing plaintiff to crash and suffer injuries. The trial court concluded that plaintiff failed to serve written notice of his claim on defendant within 60 days of the incident as required by MCL 124.419. The trial court also found that plaintiff failed to plead in avoidance of governmental immunity. Although the trial court believed that there was an issue of fact on the question of negligence, it summarily dismissed the case because of the notice and pleading defects. Defendant pursues a cross-appeal relative to the court's ruling on negligence. We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

We hold that plaintiff complied with, or at least substantially complied with, MCL 124.419. Further, estoppel and waiver principles preclude defendant from asserting a failure to comply with MCL 124.419. Additionally, we hold that plaintiff sufficiently pled allegations in avoidance of governmental immunity and that genuine issues of material fact exist regarding whether defendant's bus driver was negligent.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). Issues of statutory construction are also reviewed de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

The day after the accident, plaintiff telephoned defendant's call center and reported that he had been struck by one of defendant's buses. The matter was assigned to Ken McCaffery,

who was employed as a *claims adjuster* by ASU Group, defendant's insurer. McCaffery initially had a brief phone conversation with plaintiff about the accident. The following day, McCaffery conducted an in-person interview of plaintiff, which was recorded, but the recording was not transcribed until after the litigation commenced. The recorded interview addressed the circumstances of the accident, plaintiff's activities following the accident, the nature of plaintiff's injuries, damages to plaintiff's bike, and whether plaintiff had sought medical treatment. Defendant's records indicate that McCaffery emailed defendant after the interview. The record provides in part as follows:

> Ken from AS sends e-mail that he got r/s [recorded statement] from clmt [claimant] . . . that bus swerved into him as he was riding his bike and trying to catch the bus and was knocked off of his bike onto the sidewalk – he has no witnesses – and said the bus kept going. He has scrapes and bruises and damage to his older 10 speed bike. He has no health insurance [n]or do his wife and him own an auto. He apparently made an after the fact PR [police report] with Dearborn Police. . . .

We note the use of the term claimant when speaking of plaintiff. A few days later, defendant contacted plaintiff as reflected in the following notation in one of defendant's records:

> Called *clmt* and discussed *claim* with him as he said he has some bruises and abrasions that might be infected but he has not been to a doctor yet – I explained to him about procedures for *this no-fault claim* and that a doctor would need to complete a form to verify his injuries . . . . [Emphasis added.]

The language clearly indicates that defendant was treating plaintiff's communications as a claim for compensation based on his injuries and damages to his bike. Subsequently, in a letter to plaintiff from the *senior claims examiner* with ASU Group, plaintiff was informed by the examiner that she "must respectfully deny [his] *claim*." (Emphasis added.) At the top of the letter, plaintiff was listed as the "Claimant" and the case had been assigned a "Claim Number."

MCL 124.419 provides:

> All claims that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: Provided, That *written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence through which such injury is sustained and the disposition thereof* shall rest in the discretion of the authority and all claims that may be allowed and final judgment obtained shall be liquidated from funds of the authority: Provided, further, That only the courts situated in the counties in which the authority principally carries on its function are the proper counties in which to commence and try action against the authority. [Emphasis added.]

We find that plaintiff, at a minimum, substantially complied with MCL 124.419. In *Plunkett v Dep't of Transportation*, 286 Mich App 168, 178; 779 NW2d 263 (2009), this Court held that a notice required by statute will not be deemed insufficient because of failure to comply

literally with all of the stated criteria; substantial compliance will suffice. The *Plunkett* panel made these observations in examining MCL 691.1404(1), which requires the service of notice within 120 days of an injury arising from a defective highway, and while acknowledging and still honoring our Supreme Court's decision in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007). *Plunkett*, 286 Mich App at 176-177.

Here, although plaintiff himself never submitted a written notice to defendant, MCL 124.419 does not provide that it must be the plaintiff or injured party that serves the notice. Adjuster McCaffrey delivered an email, which we find qualifies as a writing, to defendant, in which defendant was informed of the nature of the accident and the injuries incurred by plaintiff, who is described as being the claimant. And the email was received within 60 days of the accident. We find compliance with the statute, and even if one disagrees that there was full compliance, there most certainly was substantial compliance given all of the circumstances.

We note that this Court's decision in *Nuculovic v Hill*, 287 Mich App 58; 783 NW2d 124 (2010), did not address a "substantial compliance" argument, nor did it consider estoppel and waiver principles, which we discuss below. One of the arguments posed in *Nuculovic* was that service of a claim was made on the bus company, as it had a copy of the police report pertaining to the accident. *Id.* at 66. This Court first addressed the concept of service under MCL 124.419 and found that proper service was not made, and it then proceeded to rule that the police report, although possibly constituting a notice of an occurrence, did not constitute a notice of a claim, as required by the statute. *Id.* at 66-70. Here, we find that, as opposed to the police report in *Nuculovic*, the email sent by McCaffrey to defendant clearly reflected that a claim was being made by plaintiff against defendant; it was not simply notice of an occurrence. On the issue of how service is made for purposes of the statute, the discussion in *Nuculovic* pertained to the police report and also reports prepared by the bus company's own employees, which the plaintiff had claimed constituted written notice. The Court, in determining the meaning of the word "service," first looked to the court rules addressing service of process, MCR 2.102-2.105, and then, in addition, examined the dictionary definition of the word "service," which contemplated a formal delivery. *Id.* at 66-68. We initially question the soundness of equating service of notice for purposes of MCL 124.419 to service of a summons and complaint under the court rules. Indeed, under MCR 2.103(A), process "may be served by any legally competent adult *who is not a party* or an officer of a corporate party." (Emphasis added.) It would be unreasonable to suggest that a person injured in an accident involving a bus could not himself or herself deliver the notice of claim. *Nuculovic* does not appear to support the proposition that each and every court rule requirement regarding service of process must be considered and satisfied in examining "service" under MCL 124.419. Rather, while its analysis is couched in terms of the court rules, the *Nuculovic* panel also considered a dictionary definition and its overriding conclusion was that some form of delivery or formal delivery must take place. *Nuculovic*, 287 Mich App at 66-68. We conclude that, while emails are not expressly contemplated in MCR 2.102-2.105, the act of defendant's insurer sending the email at issue to defendant constituted a formal delivery or service of a written claim upon defendant. To the extent that *Nuculovic*'s discussion of the court rules requires precise satisfaction with those rules, we find that the delivery of the email constituted *substantial compliance* with the service requirement of MCL 124.419, a concept not addressed in *Nuculovic*.

Furthermore, we can reach no other conclusion than that defendant processed the case within the first 60 days of the accident as a claim for compensation associated with plaintiff's personal injuries and damages to his bike, and that defendant then denied the claim. Despite processing the matter and treating plaintiff's communications as a claim based upon alleged injuries and property damage and then rendering a disposition thereof, defendant now argues that summary dismissal is appropriate because it was not served with a written notice of a claim within 60 days of the occurrence.

A statutory requirement or provision can "be waived . . . by conduct which estops the defendant from interposing it." *Lothian v Detroit*, 414 Mich 160, 165; 324 NW2d 9 (1982) (addressing circumstances in which an applicable statute of limitations can be suspended). A waiver signifies "a voluntary and intentional abandonment of a known right." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). In *Dozier v State Farm Mut Automobile Ins Co*, 95 Mich App 121, 130; 290 NW2d 408 (1980), this Court held that an insurer can waive the adequacy or sufficiency of notice relative to a statutory provision requiring notice.

While defendant had a right to the notice outlined in MCL 124.419, it failed to demand compliance by plaintiff, assuming a lack thereof, when its adjuster proceeded to interview plaintiff and gather information, when it effectively acted as if it was processing a claim, and when it formally denied the claim. It defies logic to allow defendant to successfully assert that notice of a claim was inadequate after defendant essentially processed and denied a claim. Assuming a lack of compliance, defendant waived compliance with MCL 124.419 by way of conduct which estopped it from interposing the statute.[1]

The trial court also ruled that plaintiff failed to plead in avoidance of governmental immunity for purposes of MCL 691.1405, which is the motor-vehicle exception to governmental immunity. "A plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity." *Odom v Wayne Co*, 482 Mich 459, 478-479; 760 NW2d 217 (2008). MCL 691.1405 provides that "[g]overnmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner[.]" Here, plaintiff's complaint alleged that the bus was owned by defendant, that plaintiff was physically injured when the bus "made a sudden move towards him, causing him to

[1] We acknowledge that an estoppel-waiver argument is not presented by plaintiff, but this does not preclude the panel from addressing the matter. In *Mack v Detroit*, 467 Mich 186, 206; 649 NW2d 47 (2002), our Supreme Court addressed and analyzed a governmental immunity issue that was neither raised, nor briefed by the parties. The *Mack* Court adamantly opposed the "position that although a controlling legal issue is squarely before this Court, . . . the parties' failure . . . to offer correct solutions to the issue limits this Court's ability to probe for and provide the correct solution." *Id.* at 207. The Court continued by noting that "[s]uch an approach would seriously curtail the ability of this Court to function effectively . . . ." *Id.*

hit the curb and fall from his bicycle," that plaintiff suffered a serious impairment of bodily function, that defendant had a duty to operate its vehicles in a reasonably safe, careful, and prudent manner, that defendant breached these duties, and that plaintiff's injuries were "a direct result of defendant's negligence." We hold that these allegations encompass all of the elements in MCL 691.1405 necessary to invoke the motor-vehicle exception; therefore, plaintiff sufficiently pled in avoidance of governmental immunity.

Finally, on the cross-appeal issue, we agree with the trial court that genuine issues of material fact exist with respect to whether the bus driver was negligent. Plaintiff testified that he was pedaling his bike alongside the bus, but staying as close to the curb as physically possible. He indicated that he felt comfortable riding next to the bus because the bus was seven to ten feet away from him to his left. However, according to plaintiff, the bus then suddenly veered several feet to its right and so close to plaintiff that it forced him into the curb, causing the accident. The bus driver testified that she never saw plaintiff and that, in general, she would operate her bus in a manner so as to avoid a cyclist's path of travel. Defendant's focus on the claim that there was no evidence that the bus driver observed plaintiff misses the point. If she had seen plaintiff, the bus driver would likely have avoided him and there would have been no accident. The question is whether she should have seen plaintiff under the circumstances. Also, defendant's argument that plaintiff himself was at fault because of the manner in which he was cycling goes to the issue of comparative negligence and allocation of fault. Viewing the evidence in a light most favorable to plaintiff, issues of fact abound, requiring resolution at trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Having prevailed in full, plaintiff is awarded taxable costs pursuant to MCR 7.219.

/s/ /William B. Murphy
/s/ Douglas B. Shapiro

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METER, J. (*dissenting*).

Because I find that the trial court properly concluded that plaintiff failed to serve written notice of his claim on defendant within 60 days of the incident giving rise to this case, as required by MCL 124.419, I respectfully dissent.

The morning after the July 30, 2007, incident involving the bus, plaintiff noticed pain and stiffness in his neck. Plaintiff testified that he reported the incident to defendant by telephone that same day. Plaintiff admitted to having provided no written notice to defendant. Defendant's records indicate that it received the telephone call and forwarded the information to ASU Group, its insurer. ASU Group interviewed plaintiff by way of a recorded telephone conversation on August 2, 2007. In this conversation, plaintiff said he suffered "all sorts of scrapes and cuts on [his] arms, chest, legs, hands." He reported his "current symptoms" as a punctured thumbnail, a smashed thumb, a large abrasion on his left arm and elbow, a large abrasion on his right knee, a bruise on his left shin, and a big bruise on his right palm that had gravel in it. He did not mention any stiffness or pain in his neck. ASU Group emailed defendant with information about plaintiff's "scrapes and bruises." Defendant's records indicate that on August 6, 2007, its agent called plaintiff to discuss the incident. Plaintiff again reported bruises and abrasions, and defendant's notes indicate that it sent him a letter and no-fault claim forms. Plaintiff's neck pain got progressively worse, and he saw his family physician on October 23, 2007. Eventually, he went to an emergency room because of his pain. However, he never completed or returned the claim forms. On October 16, 2007, after receiving nothing further, defendant sent plaintiff a letter denying the potential claim.

I find that this case is squarely controlled by *Nuculovic v Hill*, 287 Mich App 58; 783 NW2d 124 (2010). In *Nuculovic*, *id*. at 68, this Court affirmed the trial court's grant of summary disposition for the defendant, holding that a police report was insufficient to satisfy the notice requirement of MCL 124.419 because it had not been served on the defendant. The Court stated, "while SMART had in its possession the police report and the reports prepared by Hill and his supervisor, plaintiff did not 'serve' (formally deliver to) SMART notice of plaintiff's claim for injury as service is defined in our court rules." *Id*. Moreover, there was no written notice of a *claim*. *Id*. at 69-70. The Court stated:

> In the instant case, rather than requiring notice of an *occurrence*, MCL 124.419 specifically requires that notice of a *claim* be served on the SMART authority within 60 days of the accident. Therefore, even if the police reports in defendant SMART's possession constituted notice of some kind of an occurrence, they did not constitute notice of a *claim* to defendants. Plaintiff has failed to show that, from the police reports, the defendant authority had *any* way of knowing that plaintiff intended to file a *claim* for injury to her person or her property because of the 2005 collision, much less what the *claim* would actually be. Thus, factually and as a matter of law, plaintiff has failed to satisfy the notice requirements of MCL 124.419. [*Id*. at 69-70 (emphasis in original).]

In the present case, plaintiff admitted that he did not send written notice to defendant. I conclude that the telephone call, follow-up telephone interview, and vague email did not constitute written notice of a claim served within 60 days. A "claim" has been defined by our Supreme Court as:

> "1. The aggregate of operative facts giving rise to a right enforceable by a court . . . . 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional . . . . 3. A demand for money or property to which one asserts a right . . . ." [*CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 554-555; 640 NW2d 256 (2002), quoting Black's Law Dictionary (7th ed).]

See also *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 100; 718 NW2d 784 (2006) (CAVANAGH, J., dissenting), overruled by *Regents of University of Michigan v Titan Ins Co*, 487 Mich 289; ___ NW2d ___ (2010) (summarizing the Court's historical treatment of "claim" and concluding, "In short, then, a claim means a 'demand[] of a pecuniary nature,' a 'right to payment,' and a 'demand for money'"), and *Central Wholesale Co v Chesapeake & O R Co*, 366 Mich 138, 149; 114 NW2d 221 (1962) ("Claim" is defined to be "a demand of a right or alleged right; a calling on another for something due or asserted to be due; as, a claim of wages for services" [internal citations and quotation marks omitted]).

Plaintiff had initially refused medical treatment. Despite his assertion in his deposition that he felt stiffness in his neck the day after the incident, he did not describe this to defendant. Nor did he complete and return the claim forms, even though he stated his neck pain became progressively worse, that it was "very noticeable" at the end of August, and "through September it progressively got worse." Defendant simply did not receive the notice required by statute. Indeed, the vague communication transmitted to defendant merely notified it of "scrapes and

bruises" incurred by plaintiff and did not adequately inform it of a formal "claim based upon injury" as required by MCL 124.419.

Further, I disagree that defendant's conduct of merely gathering information regarding the incident served to estop it from later asserting a defense under MCL 124.419.

I would affirm the trial court's decision.

/s/ Patrick M. Meter