

STATE OF MICHIGAN
COURT OF APPEALS

ERNEST HORVATH,

Plaintiff-Appellee,

v

DON JOHNSON and SUBURBAN MOBILITY
AUTHORITY FOR REGIONAL
TRANSPORTATION, d/b/a SMART,

Defendants-Appellants.

UNPUBLISHED

August 18, 2009

Nos. 283931 & 284842

Wayne Circuit Court

LC No. 07-713287-NI

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

In Docket No. 283931, defendants Don Johnson and the Suburban Mobility Authority for Regional Transportation (SMART) appeal as of right the trial court's order denying their first motion for summary disposition based on plaintiff Ernest Horvath's failure to provide notice of his claim within 60 days as required by MCL 124.419. In Docket No. 284842, defendants appeal as of right the trial court's order denying their second motion for summary disposition based on governmental immunity and other grounds. In denying defendants' motion, the trial court rejected defendants' arguments that the bus was not being operated as a motor vehicle at the time of the accident and that defendant Johnson's conduct was not grossly negligent.¹ For the reasons set forth in this opinion, we affirm.

I. Facts and Procedural History

On November 15, 2006, plaintiff boarded a SMART bus near the intersection of Michigan and Wyoming Streets in Dearborn and headed toward downtown Detroit. Defendant Johnson was driving the bus. When the bus stopped at plaintiff's destination, there was one other passenger, a man, on the bus; the other man was sitting near the back of the bus, and plaintiff was sitting near the front of the bus. When the bus came to a complete stop, both plaintiff and the other got up to disembark. Plaintiff exited from the front door of the bus. According to plaintiff, as he stepped down the steps toward the pavement with his right foot, the

¹ The trial court also ruled that plaintiff established a threshold injury under *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), but defendants do not appeal this ruling.

bus door closed on his left foot, and he fell with his “left foot hanging in the door” and hit his head, shoulder, side and hip on the cement. Plaintiff stated that he started yelling, and defendant Johnson opened the door, apologized and completed an accident report. Plaintiff was 70 years old at the time of the incident.

Defendant Johnson testified that he saw a second bus passenger standing near the rear door of the bus at the same time plaintiff was exiting from the front of the bus. Johnson started to open the rear door for the second passenger, but then saw the second passenger walked toward the front of the bus. According to Johnson, he closed the rear door when the second passenger walked toward the front of the bus. However, when he did so, the front door closed as well. Johnson stated that generally, both doors would not close like they did, and he did not know why they both closed. Plaintiff declined Johnson’s offer to call for medical assistance.

Plaintiff testified that because he was ill and in pain, he only stayed downtown for a few minutes before calling a taxi service to get a ride home. His head, arm, shoulder, ankle and leg were painful; his side and hip were bruised. Plaintiff went to the emergency room the next day and was diagnosed with a concussion and a severely sprained ankle. Plaintiff continued to have problems with his left ankle and sought additional medical treatment. Plaintiff avers that he was on crutches for five months, used a walker for two months, was in traditional casting for 17 weeks, was in a fracture boot for two months, and was in a steel and plastic foot brace for five weeks. Plaintiff eventually underwent surgery on his left foot on August 30, 2007. Plaintiff claims the injury to his left foot affected his ability to work as a professional pianist, shop independently, play with his grandchildren, visit family, walk, and perform everyday chores.

By November 22, 2006, plaintiff was in contact with the ASU Group, SMART’s claims administrator.² On November 28, 2006, plaintiff filled out an application for no-fault benefits that he received from the ASU Group. The application was received by the ASU Group on December 22, 2006. On March 2, 2007, plaintiff’s counsel sent a letter to ASU Risk Management Services stating that counsel was investigating plaintiff’s accident on the SMART bus. Plaintiff filed a complaint against defendants on May 17, 2007. The complaint alleged that defendants’ negligent conduct injured plaintiff and sought money damages.

Defendants moved for summary disposition under MCR 2.116(C)(7) and (8), arguing that plaintiff failed to provide notice of his claim within 60 days as required by MCL 124.419. The trial court denied the motion, reasoning that plaintiff’s application for first-party no-fault benefits satisfied the statutory notice requirement and that in light of plaintiff’s application for first-party no-fault benefits, defendants should not have been surprised by plaintiff’s third-party tort claim. Defendants then filed a second motion for summary disposition under MCR 2.116(C)(7), arguing that defendant SMART was entitled to summary disposition because plaintiff did not plead governmental immunity and could not demonstrate that an exception to governmental immunity

² A bus transfer ticket given to plaintiff by defendant Johnson had the phone number for the ASU Group written on it in Johnson’s handwriting. Thus, it appears that defendant Johnson advised plaintiff to contact the ASU Group, although Johnson testified that he did not recall giving the number to plaintiff.

applied and that defendant Johnson was entitled to governmental immunity because his conduct of closing the door of the SMART bus was not grossly negligent. Defendants also argued that summary disposition was appropriate under MCR 2.116(C)(8) and (10) because plaintiff's injury did not occur as a result of the operation of the bus as a motor vehicle and plaintiff failed to establish a threshold injury under *Kreiner v Fischer*, 471 Mich 109; 683 NWd2 611 (2004). The trial court denied defendants' second motion for summary disposition, rejecting defendants' argument that the bus was not operating as a motor vehicle and concluding that there was an issue of fact regarding gross negligence and that plaintiff established a threshold injury under *Kreiner*. This appeal ensued.

II. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

The trial court may grant a motion for summary disposition under MCR 2.116(C)(7) on the ground that a claim is barred because of immunity granted by law. In deciding a motion brought pursuant to MCR 2.116(C)(7), a court should consider all affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If the pleadings or documentary evidence reveal no genuine issue of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Holmes*, *supra* at 706.

When deciding a motion brought under MCR 2.116(C)(8), a court considers only the pleadings. MCR 2.116(G)(5); *Maiden*, *supra* at 119-120. A motion under this subrule "tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden*, *supra* at 119. "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and

the moving party is entitled to judgment as a matter of law.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

This case involves the construction of MCL 124.419. This Court reviews de novo the interpretation of a statute. *Manske v Dep’t of Treasury*, 282 Mich App 464, 468; 766 NW2d 300 (2009).

III. Analysis

A. Notice under MCL 124.419

Defendants argue that the trial court erred in denying their motion for summary disposition based on plaintiff’s failure to give proper notice under MCL 124.419.

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.

In the present case, plaintiff was injured on November 15, 2006. On November 28, 2006, plaintiff filed an application for first-party no-fault insurance benefits with the ASU Group, the claims administrator for defendant SMART. The application was received by the ASU Group on December 22, 2006, well within the 60 day notice requirement in MCL 124.419. The ASU Group, as defendant SMART’s claims administrator, was an agent of defendant SMART. See *St Clair Intermediate School Dist v Intermediate Ed Ass’n/Michigan Ed Ass’n*, 458 Mich 540, 557; 581 NW2d 707 (1998).

The trial court ruled that plaintiff’s application for first-party no-fault benefits satisfies the notice requirement of MCL 124.419. Determining the propriety of the trial court’s ruling in this regard requires this Court to interpret MCL 124.419. The foremost rule of statutory construction is that courts are to give effect to the intent of the Legislature. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). To do this, courts must examine the language of the statute. *Id.* The Legislature is presumed to have intended the meaning it plainly expressed. *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). A court may not read something into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Roberts, supra* at 63.

MCL 124.419 requires “written notice of any claim based upon injury to persons or property” within “60 days from the occurrence through which such injury is sustained” The statute does not contain any specific requirements of elements that must be included in the notice; it plainly and unambiguously requires only “written notice[.]” Cf. MCL 500.3145(1) (which requires notice of a claim for no-fault benefits to “give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.”).

This Court has previously held that the notice provision in MCL 124.419 does not apply to claims for first-party no-fault personal injury protection (PIP) benefits, *Trent v SMART*, 252 Mich App 247, 251-252; 651 NW2d 171 (2002). We acknowledge that, at first blush, construing an application for first-party no-fault benefits as satisfying the notice provision of MCL 124.419 appears to be incongruous with our holding in *Trent*.³ However, a contrary holding would ignore the plain language of MCL 124.419, which clearly does not delineate between notice of a claim for first-party no-fault benefits and notice of a third-party tort claim. As stated above, MCL 124.419 requires, quite simply, “written notice[.]” Furthermore, our holding is consistent with the purpose of the notice provision in MCL 124.419, which, based on the language of the statute itself, is to apprise a common carrier that a claim is being asserted against it based upon injuries to a person or property. Plaintiff’s application for no-fault benefits provided the date, time and location of the accident and described the accident, plaintiff’s fall and the injuries plaintiff sustained in the fall. While the application for no-fault benefits did not specifically mention a third-party tort claim, such specific notice is not required by the plain language of MCL 124.419, and the information contained in plaintiff’s application for first-party no-fault benefits was sufficient to apprise defendants that a claim was being asserted against them based upon injuries plaintiff sustained when defendant Johnson closed the bus door on plaintiff’s left foot. The trial court properly concluded that the application for first-party no-fault benefits that plaintiff submitted to defendant SMART’s claims administrator satisfied the notice provision in MCL 124.419.

B. Vehicle Exception to Governmental Immunity

Defendants argue that the trial court erred in ruling that there was an issue of fact regarding whether the accident occurred during the “operation” of the bus as a motor vehicle. Relying on our Supreme Court’s decision in *Chandler v Muskegon Co*, 467 Mich 315; 652 NW2d 224 (2002), and this Court’s decision in *Martin v Rapid Inter-Urban Transit Partnership*, 271 Mich App 492; 722 NW2d 262 (2006), rev’d 480 Mich 936 (2007), defendants argue that a shuttle bus is not engaged in the “operation” of a motor vehicle under the motor vehicle

³ Our decision in this case should not be interpreted as holding that an application for first-party no-fault benefits always satisfies the notice requirement of MCL 124.419. Of critical significance to our holding in this case is the fact that plaintiff filed his application for first-party no-fault benefits with defendant SMART’s claims administrator, who was acting as an agent of SMART for purposes of receiving claims. However, we make clear, that under our holding, a plaintiff who filed a similar application with his or her own no-fault insurer would not satisfy the notice requirement of MCL 124.419 absent some other form of notice to the common carrier of passengers or its agent.

exception to governmental immunity, MCL 691.1405, when it is stopped to allow passengers to board or disembark.

The motor vehicle exception to governmental immunity provides: “Governmental 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” MCL 691.1405. The motor vehicle exception applies when a “motor vehicle is being operated *as* a motor vehicle.” *Chandler, supra* at 320 (emphasis in original). The question in this case is whether the bus was operating as a motor vehicle when it was stopped to allow plaintiff and the other passenger to disembark.

In *Chandler*, the plaintiff had been waiting to clean a bus that was parked in a barn for maintenance with its engine turned off when he saw another man get caught in the doors of the bus as he was exiting the bus. *Id.* at 316. The plaintiff attempted to pry open the doors and injured his shoulder. *Id.* The Supreme Court held that the plaintiff’s injury did not arise from the negligent operation of the bus as a motor vehicle. *Id.* at 322. According to the Supreme Court, “the ‘operation of a motor vehicle’ encompasses activities that are directly associated with the driving of a motor vehicle.” *Id.* at 321. Because “the vehicle was parked in a maintenance facility for the purpose of maintenance” it “was not at the time being operated *as* a motor vehicle.” *Id.* at 322 (emphasis in original). Thus, the Supreme Court held that the motor vehicle exception to governmental immunity was inapplicable. *Id.* at 316, 322.

In *Martin*, the plaintiff slipped and fell down the steps of a shuttle bus as she was disembarking. *Martin, supra* at 494. Relying on *Chandler* and this Court’s opinion in *Poppen v Tovey*, 256 Mich App 351, 355-356; 664 NW2d 269 (2003),⁴ this Court ruled that “when the shuttle bus stopped to allow several passengers to disembark, it ceased to be engaged in activities related directly to driving.” *Martin, supra* at 500. However, our Supreme Court reversed this Court’s holding in *Martin* in an order, ruling, with no elaboration or analysis, that “[t]he loading and unloading of passengers is an action within the ‘operation’ of a shuttle bus. Accordingly, the plaintiff has satisfied the exception to governmental immunity set forth in MCL 691.1405.” *Martin v Rapid Inter-Urban Partnership*, 480 Mich 936; 740 NW2d 657 (2007).

Defendants argue that our Supreme Court’s order in *Martin* did not reverse *Chandler*. It is true that *Martin* did not explicitly overrule *Chandler*. The facts of *Chandler* are distinguishable from the facts of the instant case, however. Although *Chandler* involved a bus, the bus was not transporting any passengers and was instead parked in a barn for maintenance with its engine turned off when the accident occurred. In contrast, *Martin* is factually on point with the present case because it involved a shuttle bus that was in the process of transporting passengers, but was stopped to allow passengers to disembark. According to *Martin*, the loading and unloading of passengers is part of the operation of a shuttle bus. *Martin, supra* 480 Mich

⁴ In *Martin*, this Court stated that the panel in *Poppen* concluded “that once a city vehicle stopped for approximately three to five minutes, its presence on the road was no longer ‘directly associated with the driving’ of that vehicle and the vehicle was not being operated ‘as’ a motor vehicle at the time of the accident[.]” *Martin, supra* at 500-501.

936. We are not free to disregard a decision of our Supreme Court that is factually on point. This Court is bound by the doctrine of stare decisis to follow decisions of our Supreme Court. *Shember v Univ of Mich Med Ctr*, 280 Mich App 309, 327; 760 NW2d 699 (2008). Accordingly, in light of our Supreme Court's order in *Martin*, we conclude that the bus in this case was in "operation" when it was stopped to allow plaintiff and the other passenger to disembark. *Martin, supra* 480 Mich 936. Therefore, the trial court properly denied defendants' motion for summary disposition based on the motor vehicle exception to governmental immunity, MCL 691.1405.

C. Gross Negligence

Defendants finally argue that the trial court erred in denying their motion for summary disposition because defendant Johnson's conduct in closing the door of the bus was not grossly negligent.

In denying defendants' motion, the trial court stated that there was some evidence of possible gross negligence and that whether defendant Johnson's conduct was grossly negligent was a question of fact.

Governmental employees acting within the scope of their authority are generally immune from tort liability except in cases in which their actions constitute gross negligence. MCL 691.1407(2)(c); *Maiden, supra* at 121-122. Gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Gross negligence involves "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden, supra* at 122-123.

We find that the trial court properly concluded that under the facts of this case, there was a question of fact regarding whether defendant Johnson's conduct was grossly negligent. Defendant Johnson testified that there was a single lever to operate both the front and back doors on the bus. He stated that the lever could open and close the front and back doors simultaneously or that the front and back doors could be opened independent of the other. In order to open one door, the other would have to be shut, however. At the time of the accident, defendant Johnson was operating the front and back doors separately. When the passenger in the rear started moving toward the front of the bus, defendant Johnson closed the rear door, and the front door closed too. Generally, both doors would not close that way, and defendant Johnson did not know why the front door closed too.

Defendant Johnson observed that when plaintiff boarded the bus, "he appeared to be a little intoxicated" and his speech was slurred. Johnson observed that plaintiff moved slowly and was staggering and stumbling. He observed:

Well, normally, people get on—elderly get on, and they are slow, so you take your time for them. But then you have people that is under the influence. They

want to get on, and then they want to try and start a conversation, and then they digging around and whatever, and just, you know, time consuming.

Johnson believed that plaintiff was intoxicated, in part, because of his speech:

Just the way he was speaking, you know, like I am saying. You have to tend to your business so we can move on. As long as they are in a certain position, the bus really can't be moved without them being in danger. So when someone get on and start a conversation and then, you know, you attempt movement, whatever, and he have a seat and gets up again and come back, so he isn't just handling his business so I can roll.

Defendant Johnson did not write in his accident report that he believed plaintiff was intoxicated "because the report isn't necessary for it to be that extensive when there isn't any seriousness to it."

The reasonableness of an actor's conduct under the standard is generally a question for the fact finder, not the court, but if reasonable minds could not differ, then a motion for summary disposition should be granted. *Jackson v Saginaw County*, 458 Mich 141, 146; 580 NW2d 870 (1998). Under these facts, there is a factual question regarding whether defendant Johnson became impatient with the elderly plaintiff's slow movements and closed the door before plaintiff had fully disembarked the bus without regard to plaintiff's safety.⁵ Defendant Johnson's inability to explain why the front door closed coupled with his comments about plaintiff being "time-consuming" and Johnson's inability to "roll" because plaintiff was not "handling his business" create an issue of fact regarding whether Johnson's conduct was grossly negligent. Thus, the trial court properly concluded that there was a question of fact regarding whether defendant Johnson's conduct was grossly negligent.

IV. Holding

For the reasons stated above, we hold that the trial court properly concluded that plaintiff's application for first-party no-fault benefits, submitted to defendant SMART's claims administrator, satisfied the notice provision of MCL 124.419. We further hold that the trial court properly concluded that the bus was being operated as a motor vehicle when it was transporting passengers and was stopped to allow passengers to disembark and that there was a question of fact regarding whether defendant Johnson's conduct of closing the door of the bus on plaintiff's foot was grossly negligent.

⁵ But see *Fundunburks v Capital Area Transportation Authority*, 481 Mich 873; 748 NW2d 804 (2008) (holding that there was no genuine of fact regarding whether the defendant bus driver's conduct of closing a bus door as the plaintiff was exiting a bus was grossly negligent when the plaintiff did not present any evidence to show that the defendant's action was anything more than ordinary negligence).

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Stephen L. Borrello