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UNPUBLISHED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.

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