

STATE OF MICHIGAN
COURT OF APPEALS

PASKA NUCULOVIC,

Plaintiff-Appellant,

v

JOHNNY DEAN HILL and SMART BUS, INC.,

Defendants-Appellees.

FOR PUBLICATION

January 5, 2010

9:10 a.m.

No. 280216

Macomb Circuit Court

LC No. 2006-003647-NI

Advance Sheets Version

Before: FORT HOOD, P.J., and WILDER and BORRELLO, JJ.

WILDER, J.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants. We affirm.

In September 2005, plaintiff was driving a vehicle north on Harper Avenue, at an intersection with a highway entrance ramp, when defendant Johnny D. Hill, driving a bus owned by defendant SMART Bus, Inc. (SMART), turned left in front of her vehicle, causing a collision. Plaintiff sued defendants in 2006, more than 60 days after the accident, alleging injuries resulting from the negligence of defendants.

Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10), on the ground that plaintiff failed to provide notice of her claim within 60 days of the accident, as required by MCL 124.419, a part of the Metropolitan Transportation Authorities Act, MCL 124.401 *et seq.* The trial court granted defendants' motion, and denied plaintiff's motion for reconsideration. This appeal ensued.

We review summary dispositions de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Questions of law, such as construction of a statute, are also reviewed de novo. *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007).

Subrule (C)(7) permits summary disposition where the claim is barred by an applicable statute of limitations. In reviewing a motion under subrule (C)(7), a court accepts as true the plaintiff's well-pleaded allegations of fact, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties, to determine whether a genuine issue of material fact exists. *Id.* These materials are

considered only to the extent that they are admissible in evidence. *In re Miltenberger Estate*, 275 Mich App 47, 51; 737 NW2d 513 (2007).

A motion for summary disposition under subrule (C)(8) tests the legal sufficiency of the pleadings alone. MCR 2.116(G)(5); *Johnson-McIntosh v Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). Where the parties rely on documentary evidence, appellate courts proceed under the standards of review applicable to a motion made under MCR 2.116(C)(10), *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007), or (C)(7).

A motion made under MCR 2.116(C)(10) tests the factual support for a claim, *Campbell v Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2006), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Healing Place*, 277 Mich App at 56. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id.* But again, such evidence is only considered to the extent that it is admissible. MCR 2.116(G)(6); *Campbell*, 273 Mich App at 230. A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *Healing Place*, 277 Mich App at 56.

Here, the trial court considered defendants' motion under MCR 2.116(C)(7), (8), and (10), but did not indicate under which subrule it granted it. Because the trial court considered evidence beyond the pleadings, we review the motion as though it were granted under MCR 2.116(C)(7) or (10).

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.]

“Shall” is mandatory. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 68; 737 NW2d 332 (2007).

The Metropolitan Transportation Authorities Act does not define “claim.” However, in *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 554; 640 NW2d 256 (2002), relying on Black’s Law Dictionary (7th ed), the term “claim” was defined as the aggregate of operative facts giving rise to a right enforceable by a court. The statute at issue in this case requires that a claim be “based upon injury to persons or property” MCL 124.419. Here, it is undisputed

that plaintiff did not provide notice of a court-enforceable right based on a personal injury within 60 days of the date of the accident.

Plaintiff contends that defendants should not have been able to rely on MCL 124.419 in support of their motion for summary disposition, because they did not timely raise reliance on MCL 124.419 as an affirmative defense. Because plaintiff did not challenge below defendants' right to assert this statute as an affirmative defense, on the ground that it was not timely raised, the issue is not preserved. We therefore reject plaintiff's unpreserved claim. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 510; 741 NW2d 539 (2007), quoting *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) (“[i]ssues raised for the first time on appeal are not ordinarily subject to review” in a civil case). This Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353 (2008). We do not find any of these exceptions to be applicable.

We next address plaintiff's various arguments that MCL 124.419 does not apply here. We hold that it does apply.

When construing a statute, we use well-established principles, and begin by consulting the specific statutory language. *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90, 95; 738 NW2d 770 (2007). This Court gives effect to the Legislature's intent, as expressed in the statute's terms, giving the words of the statute their plain and ordinary meanings. *McManamon v Redford Charter Twp*, 273 Mich App 131, 135; 730 NW2d 757 (2006). “When the language poses no ambiguity, this Court need not look beyond the statute or construe the statute, but need only enforce the statute as written.” *Id.* at 136. “This Court does not interpret a statute in a way that renders any statutory language surplusage or nugatory.” *Id.*

Plaintiff argues that MCL 124.419 is intended to prevent claims by phantom bus passengers, and, therefore, does not apply to claims by persons involved in a motor vehicle accident with a bus, while a passenger or driver of another vehicle. Plaintiff also argues that MCL 124.419 should apply only to claims based on common-carrier liability. We disagree.

Plaintiff's arguments find no support in the language of the statute. The statute applies, unambiguously, to “[a]ll claims that may arise in connection with the transportation authority” MCL 124.419 (emphasis added). There is no language suggesting that it applies only to claims involving bus passengers, or does not apply to claims involving injuries to nonpassengers, or that it only applies to common-carrier liability. To accept plaintiff's interpretation, would render nugatory the “[a]ll claims” language, which we lack authority to do. *McManamon*, 273 Mich App at 136. We apply the statute as written,¹ and reject this claim of error.

¹ Further, in *Trent v Suburban Mobility Auth for Regional Transportation*, 252 Mich App 247, (continued...)

We also reject plaintiff's argument that MCL 124.419 does not apply because the action is premised on SMART's liability as the owner of the vehicle, under the owner liability statute, MCL 257.401, and not on its status as a common carrier. Contrary to what plaintiff suggests, MCL 257.401 and MCL 124.419 are not mutually exclusive. MCL 257.401 provides that the owner of a vehicle may be liable for the negligent operation of that vehicle. MCL 124.419 does nothing to negate the liability established by MCL 257.401; it only prescribes a notice requirement for presenting a claim against a transportation authority. And as previously indicated, MCL 124.419 applies to "[a]ll claims that may arise in connection with the transportation authority" Thus, the fact that SMART may be subject to liability as the owner of a vehicle does not preclude the applicability of MCL 124.419.

Plaintiff also argues that to the extent MCL 124.419 applies, it applies only to claims against common carriers, and, therefore, would not apply to any claim against Hill, individually. In light of the statutory language indicating that the statute applies to "[a]ll claims that may arise in connection with the transportation authority," we must reject this claim as well. The broad language of the statute indicates that it encompasses plaintiff's claim against Hill, because the claim arises from Hill's operation of the bus as an employee of SMART.

Plaintiff also argues that MCL 124.419 does not apply because SMART has excess insurance that provides coverage for claims over \$1 million. Plaintiff observes that MCL 124.419 provides that claims "shall be liquidated from funds of the authority," and that the disposition of claims is within the discretion of the authority. Plaintiff argues that the availability of insurance necessarily limits SMART's authority regarding the disposition of a claim. We find it unnecessary to consider the merits of this argument, because plaintiff failed to show that there was an issue of fact concerning whether her claim might exceed \$1 million, thereby triggering the availability of excess insurance. Further, plaintiff failed to show any potential availability of insurance for defendant Hill that would avoid the applicability of MCL 124.419. For these reasons, we reject plaintiff's arguments that MCL 124.419 is not applicable to this action.

Plaintiff also argues that, even if the notice requirement of MCL 124.419 is applicable, proper notice was given because SMART received a copy of the police report for the incident, and because both Hill and his supervisor prepared reports regarding the accident. We disagree. MCL 124.419 requires that "written notice of any claim based upon injury" be served upon the authority within 60 days of the date of the accident.

The term "service" is not defined in MCL 124.419, but the concept of service of process is well clarified in our court rules. Service of process is addressed in MCR 2.102, 2.103, and 2.104. Where service is to be made on a public corporation, MCR 2.105(G) provides that "[s]ervice of process . . . may be made by serving a summons and a copy of the complaint on" various officials, officers, or members. When process is served on an individual, it may be done by "*delivering* a summons and a copy of the complaint" MCR 2.105(A)(1) (emphasis

(...continued)

251-252; 651 NW2d 171 (2002), this Court held that the no-fault act, MCL 500.3101 *et seq.*, supersedes the prescribed time period in MCL 124.419, with respect to first-party, no-fault personal protection insurance benefits, but not for third-party claims of personal injury. The case at bar is a third-party action.

added). The requirements for proof of service include a description of the facts of service, including the time, place, and manner of service. MCR 2.104(A)(3). Thus, under our court rules, where service is not done by mail, service means delivery at a particular time and place. MCR 2.105(A)(1); MCR 2.104(A)(3). And such service is usually done by a process server. MCR 2.103. Plaintiff has no evidence of any delivery of her claim, much less formal delivery such as by a process server. And plaintiff has no “proof of service” as that term is used in the law.

Under MCR 2.105(H)(1), “[s]ervice of process on a defendant may be made by serving a summons and a copy of the complaint on an agent authorized by written appointment or by law to receive service of process.” Under subrule (H)(2), “[w]henever, pursuant to statute or court rule, service of process is to be made on a nongovernmental defendant by service on a public officer, service on the public officer may be made by registered mail addressed to his or her office.” MCR 2.105(H)(2). Here, there is no evidence that SMART received any notice by registered mail.

Furthermore, while the process in which service is made is well-specified in the court rules, the word “service” is not defined in either our court rules or in the statute at issue here. Therefore, we may consult a legal dictionary to define an undefined term that has a specific legal meaning. *Snyder v Advantage Health Physicians*, 281 Mich App 493, 502; 760 NW2d 834, 839 (2008). In Black’s Law Dictionary, the word “service” is defined as “[t]he *formal delivery* of a writ, summons, or other legal process” Black’s Law Dictionary (8th ed, 2008), p 1399 (emphasis added).

As the trial court observed, 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. Therefore, the trial court properly determined that the statutory notice requirement was not satisfied, and properly granted defendants’ motion for summary disposition on this basis.

We disagree with the dissent’s conclusion that our analysis in this case should be affected by the Supreme Court’s order in *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), which denied leave to appeal this Court’s opinion in *Chambers v Wayne Co Airport Auth*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 277900). The Supreme Court had originally reversed the decision of the Court of Appeals, 482 Mich 1136 (2008), but granted reconsideration, vacated its earlier order, and denied leave to appeal. 483 Mich 1081 (2009).

First, this Court’s opinion in *Chambers* was unpublished, and as such, it has no precedential force. MCR 7.215(C)(1); *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 282-283; 769 NW2d 234 (2009). The Supreme Court’s denial of leave to appeal, effectively affirming the result reached in that case, also has no precedential value. MCR 7.302(H)(3); *Tebo v Havlik*, 418 Mich 350, 363 n 2; 343 NW2d 181 (1984).

Second and more substantively, *Chambers* is distinguishable from the present case. In *Chambers*, the plaintiff alleged that he fell in a puddle of water at the LC Smith Terminal of the Wayne County Airport. An officer employed by defendant Wayne County Airport Authority

was flagged down by passersby, and this officer wrote up an incident report. Defendant Wayne County Airport Authority moved for summary disposition, arguing, in part, that the plaintiff failed to provide notice of the occurrence within 120 days as required by MCL 691.1406. The trial court denied the motion, and this Court affirmed.

MCL 691.1406 provides, in pertinent part:

As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a *notice* on the responsible governmental agency *of the occurrence of the injury and the defect*. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the responsible governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. [Emphasis added.]

This Court concluded that the incident report prepared by the airport authority's employee was sufficient *notice of the occurrence* to satisfy the notice requirements of MCL 691.1406.

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.

Plaintiff also argues that the trial court erred by denying her motion for reconsideration. Plaintiff argued below that reconsideration was warranted, for reasons that we have previously addressed and rejected in this opinion. Because plaintiff failed to show that the trial court's original decision granting summary disposition was erroneous, the trial court did not abuse its discretion by denying plaintiff's motion for reconsideration. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

In light of our ruling that plaintiff failed to provide notice as required by MCL 124.419, defendant's alternative argument regarding governmental immunity is moot. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCL 7.219.

/s/ Kurtis T. Wilder

/s/ Karen M. Fort Hood