

STATE OF MICHIGAN
COURT OF APPEALS

STEPHANIE MARIE SCHIEPKE,

Plaintiff-Appellee,

UNPUBLISHED
February 24, 2011

V

No. 293192
Macomb Circuit Court
LC No. 2008-005182-NI

LATOYA SMILEY and SUBURBAN MOBILITY
AUTHORITY FOR REGIONAL
TRANSPORTATION,

Defendants-Appellants.

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

Defendants, Latoya Smiley and Suburban Mobility Authority for Regional Transportation (SMART), appeal as of right from the trial court's order denying their motion for summary disposition. We reverse.

On June 5, 2008, the Detroit Red Wings won the Stanley Cup. According to police reports, traffic was very heavy on Gratiot Avenue, and thousands of people were walking on the sidewalk parallel to the avenue. Plaintiff was struck by a SMART bus when she stepped into Gratiot Avenue. Plaintiff admitted that she stepped into the avenue, but she did not know if she examined the traffic conditions because she had no recollection of the moments before the collision. Eyewitnesses to the accident also indicated that plaintiff stepped into the avenue. Police and representatives of SMART came to the scene of the accident. Plaintiff was taken to the hospital for treatment of her injuries, and her blood alcohol level was 0.21 grams per 100 milliliters. On November 18, 2008, a lawyer representing plaintiff sent a letter to SMART indicating that the letter served to provide statutory notice of her claim.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), asserting that plaintiff failed to comply with the statutory notice requirements for filing a claim. Plaintiff opposed the motion, contending that defendant SMART had notice of the accident within 60 days in light of its investigation into the accident and that the legislative intent for the notice provision was satisfied. She also alleged that defendants had to demonstrate actual prejudice arising from plaintiff's failure to provide written notice in the 60-day period. The trial court denied defendants' motion for summary disposition, concluding that "a governmental agency asserting a statutory notice defense must show actual prejudice from the

failure to provide the notice.” The trial court also held that the case law cited by defendants was factually distinguishable. Defendants appeal as of right.

The trial court’s decision regarding a motion for summary disposition is reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). Questions involving statutory interpretation present questions of law subject to review de novo. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). The fundamental purpose of judicial construction of statutes is to ascertain and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). The most reliable evidence of the Legislature’s intent is the words of the statute. *Id.* Once the intention of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary. *In re Certified Question*, 433 Mich 710, 722; 449 NW2d 660 (1989). A clear and unambiguous statute is not subject to judicial construction. *Dep’t of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. *Id.*

The provision at issue in this case, 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 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 *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010), this Court held that the statutory notice provision of MCL 124.419 was mandatory in light of the Legislature’s use of the term “shall.” Further, the *Nuculovic* Court held that the term “claim” meant that a plaintiff had to “provide notice of a court-enforceable right based on a personal injury within 60 days of the date of the accident.” *Nuculovic*, 287 Mich App at 63.

In *Nuculovic*, it was undisputed that the plaintiff failed to provide notice within 60 days of the alleged personal injury. *Id.* However, the plaintiff asserted that proper notice was given because SMART received a copy of the police report for the incident and SMART employees prepared reports regarding the accident. *Id.* at 66. This Court rejected the contention that these documents satisfied the statutory notice requirement, holding that SMART’s possession of these documents did not satisfy the requirement that a plaintiff “serve” notice of any “claim.” *Id.* at 68. Moreover, the plaintiff’s argument failed to distinguish between notice of some kind of an occurrence from notice of a claim. *Id.* at 69. Accordingly, the plaintiff’s failure to serve notice of a claim on the defendant within 60 days of the occurrence was fatal to the claim, and dismissal was appropriate. *Id.* at 69-70.

In the present case, plaintiff admits that she did not serve notice of a claim on defendants within 60 days of the occurrence. MCL 124.419. However, she asserts that defendants obtained the requisite notice from the police reports and its own investigation into the incident. Pursuant to *Nuculovic*, plaintiff's argument is without merit. The statute does not contain a provision for substitute notice, and the deficiency warrants dismissal. *Nuculovic*, 287 Mich App at 69-70.

To avoid summary disposition, plaintiff asserts that defendants must demonstrate actual prejudice arising from the noncompliance with the statutory notice provision, and the trial court agreed, relying on *Trent v Suburban Mobility Authority for Regional Transp*, 252 Mich App 247; 651 NW2d 171 (2002). However, the actual prejudice concept utilized in *Trent* is not the product of statutory language, but rather was a judicial creation set forth in *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996) and *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976). More importantly, the *Brown* and *Hobbs* decision were expressly overruled in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200, 215; 731 NW2d 41 (2007). Plaintiff contends, and the trial court agreed, that *Rowland* was factually distinguishable because it involved a different statute, the defective highway exception to governmental immunity, not the statute at issue here, and therefore, *Trent* remains binding precedent. We disagree. The *Rowland* Court held that imposing the actual prejudice requirement onto the defective highway exception to governmental immunity statute usurped the Legislature's power. *Rowland*, 477 Mich at 213. Additionally, the *Rowland* Court held that "[n]othing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed." *Id.* at 214. Like the defective highway exception, the plain language of MCL 124.419 does not contain an actual prejudice requirement to avoid noncompliance with the notice provision. In light of the Supreme Court's express rejection of a showing of actual prejudice to allow a case to proceed where there is noncompliance with the notice requirements of a statute, the trial court erred in denying defendants' motion for summary disposition.¹

Reversed.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ William C. Whitbeck

¹ On January 20, 2011, the Supreme Court heard oral argument on whether to grant the application for leave to appeal or other preemptory action in *Pollard v Suburban Mobility Authority for Regional Transp*, unpublished opinion of the Court of Appeals, Docket No. 288851, issued November 24, 2009. The issue raised in this appeal is also the subject matter of the *Pollard* decision.