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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LINDA KOBAK, ET AL
Plaintiff

TOM SOBHANI
Defendant

Case No: CV-09-681106

Judge: BRENDAN J SHEEHAN

JOURNAL ENTRY

96 DISP.OTHER - FINAL

OPINION AND JUDGMENT ENTRY. O.S.J.
COURT COST ASSESSED AS EACH THEIR OWN.

Judge Signature Date

- 96
02/19/2010

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LINDA KOBAK, *et al.*,	)	CASE NO. CV 09 681106
	)	
Plaintiffs,	)	JUDGE BRENDAN J. SHEEHAN
	)	
v.	)	
	)	
TOM SOBHANI, *et al,*	)	**OPINION AND JUDGMENT ENTRY**
	)	
Defendants.	)	

This matter is before the Court on Defendant Tom Sobhani's ("Mr. Sobhani's") Renewed Motion for Summary Judgment and Defendant Nationwide Mutual Insurance Company's ("Nationwide's") Motion for Summary Judgment. The issues have been fully briefed and argued to the Court.

I. FACTS AND ISSUES PRESENTED.

The underlying facts in this matter are largely undisputed. Both Plaintiff Linda Kobak ("Ms. Kobak") and Mr. Sobhani were, at all times relevant to this case, employed by Parma Community General Hospital ("the Hospital"). Both employees parked in a parking garage controlled by the Hospital for which the employees were issued access cards by the Hospital. The parking garage is not open to the public and is provided by the Hospital for the exclusive use of its employees. The Hospital assigns its employees to parking facilities and requires its employees to park in the assigned facility or face possible sanctions. Deposition of Linda Kobak, p. 15-19.

On December 6, 2007, Ms. Kobak arrived at the Hospital parking garage to begin her work shift. While walking to the building, she was struck and injured by the motor vehicle operated by Mr. Sobhani, who was exiting the garage after completing his shift at the Hospital.

Ms. Kobak has received workers' compensation benefits for some of her injuries although the extent of those benefits remains in dispute. Ms. Kobak's workers' compensation claims are not before this Court; rather, Ms. Kobak has sought damages from Mr. Sobhani based on claims of negligence and against Nationwide as her uninsured motorist insurance carrier. Frank Kobak, Ms. Kobak's husband, has asserted a derivative claim of loss of consortium.

Mr. Sobhani seeks summary judgment based on the Fellow Employee Immunity Doctrine. Nationwide seeks summary judgment based on its policy language.

II. STANDARD FOR SUMMARY JUDGMENT

Under Civ.R. 56, summary judgment is appropriate when, (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can only reach one conclusion which is adverse to the non-moving party. *Holliman v. Allstate Ins. Co.* (1999), 86 Ohio St.3d 414; *Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327. When a motion for summary judgment is properly made and supported, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial and may not merely rest on allegations or denials in the pleadings. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. The nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio St.3d 108, 111. Further, to survive summary judgment, a plaintiff must produce more than a scintilla of evidence in support of his position. *Markle v. Cement Transit Co., Inc.* (1997), 1997 WL 578940, 2, *citing Redd v. Springfield Twp. School District* (1993), 91 Ohio App.3d 88, 92.

III. DEFENDANT SOBHANI'S MOTION FOR SUMMARY JUDGMENT

Defendant Sobhani filed his Motion for Summary Judgment on July 6, 2009. In response to Defendant Sobhani's Motion for Summary Judgment, Plaintiffs sought and were granted leave to file an Amended Complaint *instanter* on August 19, 2009. As a result of the amended pleadings, the Court ruled Defendant Sobhani's Motion for Summary Judgment moot, subject to reassertion in response to Plaintiffs' Amended Complaint. Accordingly, the Court considers Defendant Sobhani's renewed Motion for Summary Judgment.

Mr. Sobhani asserts that he is immune from liability under the Fellow Employee Immunity Doctrine. Ms. Kobak asserts that because Mr. Sobhani had clocked out of his shift from work and was leaving the premises, he does not qualify as a fellow servant because he as not "in the service of" the employer as defined by the "coming and going" rule set forth in *Ruckman v. Cubby Drilling, Inc.* (1998), 81 Ohio St. 3d 117, 128. Plaintiffs further argue that Mr. Sobhani's actions do not qualify for immunity under the standard set forth in *Donnelly v. Herron* (2000), 88 Ohio St.3d 425.

The Fellow Employee Immunity Doctrine, as codified, provides:

> No employee of any employer, as defined in division (B) of section 4123.01 of the Revised Code, shall be liable to respond in damages at common law or by statute for any injury or occupational disease, received or contracted by any other employee of such employer in the course of and arising out of the latter employee's employment, or for any death resulting from such injury or occupational disease, on the condition that such injury, occupational disease, or death is found to be compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code.

R.C. § 4123.741

The Ohio Supreme Court as has explained this principle as:

> An employee who, on his way from the fixed situs of his duties after the close of his work day, is injured in a collision of his automobile and that of a fellow employee occurring in a parking lot located adjacent to such situs of duty and owned, maintained and controlled by his employer for the exclusive use of its employees, receives such injury 'in the course of, and arising out of' his employment, within the meaning of that phrase in the Workers' Compensation Act, Section 4123.01(C), Revised Code.

Marlow v. Goodyear Tire & Rubber Co. (1967), 10 Ohio St.2d 18, syllabus.

Plaintiffs assert that, while Ms. Kobak was an employee at the time of the accident as admitted by her workers' compensation claim, Mr. Sobhani was not an employee at the time of the accident. Plaintiffs maintain that *Donnelly v. Herron*, *supra*, stands for the rule that immunity only attaches if the defendants to an action could have obtained workers' compensation benefits if injured. The court in *Donnelly* rejected the rule proposed by Plaintiffs with reasoning that bears repeating in the instant case:

> In *Caygill v. Jablonski* (1992), 78 Ohio App.3d 807, 818, 605 N.E.2d 1352, 1359, the authority upon which Donnelly primarily relies, the court of appeals held that a coemployee is not immune from tort liability under R.C. 4123.741, where, at the time of injury, the coemployee was engaged in horseplay disconnected from his employment. However, in determining whether the tortfeasor-coemployee's actions were employment-related, the court relied on "cases dealing with * * * the rule and rationale pertaining to whether the *injured employee* is entitled to [workers'] compensation when engaged in horseplay." (Emphasis *sic.*) *Id.*, 78 Ohio App.3d at 816, 605 N.E.2d at 1357.
>
> In fact, the *Caygill* court relied on *Puckett v. Miller* (App.1980), 19 O.O.3d 349, 350-351, for the proposition that " '[i]f the employee who commits the tort is in a position and engaged in an activity which, were he the injured party, would be "in the course of his employment" then he is an "employee" as defined in R.C. 4123.01 and is absolved of liability by R.C. 4123.741.' " *Id.*, 78 Ohio App.3d at 817, 605 N.E.2d at 1358. In *Puckett*, the court held that a coemployee is immune from tort liability under R.C. 4123.741, where, at the time of injury, the coemployee was

> parking his car in the employer's parking lot before his own work shift began. Thus, although well reasoned, *Caygill* is not supportive of Donnelly's position.
>
> Moreover, R.C. 4123.741 does not allow for the scope of employment test suggested by Donnelly. The definition of "employee" set forth in R.C. 4123.01(A)(1)(a), as "[e]very person in the service of" a qualifying employer, is equally applicable to both employees who form the subject of R.C. 4123.741. Thus, nothing more is required of the employee seeking immunity to be "in the service of" the employer than is required of the injured employee in obtaining compensation coverage. In addition, any employee who seeks workers' compensation benefits must be in the service of a qualifying employer, and if we held that a coemployee is not in the service of a qualifying employer while driving in the employer's parking lot on his way to and from work, we would put in serious jeopardy the rights of an entire class of injured claimants who seek workers' compensation benefits under similar circumstances.

Donnelly v. Herron (2000), 88 Ohio St.3d 425, 428-429.

There is no allegation that either Ms. Kobak or Mr. Sobhani was engaged in horseplay incident to the accident at issue. Both of them were employees as defined by statutory and case law. Accordingly, Mr. Sobhani is immune from civil liability on the claim raised by Ms. Kobak. Because Mr. Kobak's cause of action based upon a loss of consortium is a derivative action, it is dependent upon the existence of Ms. Kobak's action and cannot be independently maintained. *Messmore v. Monarch Machine Tool Co.* (1983), 11 Ohio App.3d 67, 68-69.

Accordingly, Defendant Sobhani's Motion for Summary Judgment is **GRANTED.**

IV. NATIONWIDE'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs assert that if Mr. Sobhani is found immune from liability, as he has, then they are entitled to compensation from their uninsured motorist insurance policy from Nationwide that provides, in pertinent part:

> We will pay compensatory damages, including derivative claims, that you or a relative are legally entitled to recover from the owner or driver of an uninsured motor vehicle under the tort law of the state where the motor vehicle accident occurred, because of bodily injury suffered by you or a relative and resulting from the motor vehicle accident.

Nationwide Mutual Insurance Policy No. 9234N 259344, p. U1.

The Court finds that the Ohio Supreme Court's holding in *Snyder v. Am. Family Ins. Co.* (2007), 114 Ohio St.3d 239, controls the issues presented. In relevant part, the court in *Snyder* stated:

> In Webb [*State Farm Mut. Auto. Ins. Co. v. Webb* (1990), 54 Ohio St.3d 61], this court held that fellow-servant immunity under R.C. 4123.741 defeated an insured's legal right to recover against the tortfeasor. Likewise, a claim for uninsured-motorist benefits for the damages caused by such an uninsured motorist was precluded when the policy required that the insured must be "legally entitled to collect" from the uninsured motorist. See 54 Ohio St.3d at 62, 562 N.E.2d 132. Based on Webb 's construction of the phrase "legally entitled to recover," we conclude that the phrase in Snyder's policy is both clear and enforceable. Our ruling here, of course, does not prevent insurers from responding to consumer demand by offering uninsured-motorist coverage without precluding recovery because of a tortfeasor's immunity.

Snyder v. Am. Family Ins. Co. (2007), 114 Ohio St.3d 239, 249.

The Nationwide policy at issue is limited to damages the Plaintiffs are legally entitled to recover. Because the Plaintiffs are not legally entitled to recover from Mr. Sobhani as set forth above, they cannot under recover against Nationwide under the current law in Ohio.

Accordingly, Defendant Nationwide's Motion for Summary Judgment is **GRANTED.**

V. CONCLUSION.

Judgment is entered in favor of Defendant Tom Sobhani and against Plaintiffs Linda Kobak and Frank Kobak on Defendant's Motion for Summary Judgment.

Judgment is entered in favor of Defendant Nationwide Mutual Insurance Company and against Plaintiffs Linda Kobak and Frank Kobak on Defendant's Motion for Summary Judgment.

Each party to bear their own costs.

JUDGE BRENDAN J. SHEEHAN

Dated: 2/19/10

RECEIVED FOR FILING

FEB 23 2010

GERALD E. FUERST, CLERK
By B. Conway Deputy

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 19th day of February, 2010:

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