

[Cite as *Kobak v. Sobhani*, 2011-Ohio-13.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94764

LINDA KOBAK, ET AL.

PLAINTIFFS-APPELLANTS

vs.

TOM SOBHANI, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-681106

BEFORE: Kilbane, A.J., Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: January 6, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Plaintiffs-appellants, Linda and Frank Kobak (“plaintiffs”), appeal from the order of the trial court that granted summary judgment to defendants

Tom Sobhani and Nationwide Mutual Ins. Co. For the reasons set forth below, we affirm.

{¶ 2} The plaintiffs filed this action on January 6, 2009. In their amended complaint, plaintiffs asserted that Tom Sobhani (“Sobhani”) negligently operated his motor vehicle in the Parma Community General Hospital (“Parma Hospital”) parking lot, striking Linda Kobak (“Kobak”) and causing her to sustain personal injuries. Plaintiffs further alleged that Nationwide Mutual Ins. Co. (“Nationwide”) was required to indemnify her for her injuries because Sobhani is an uninsured motorist. Frank Kobak (“Frank”) set forth a claim for loss of consortium.

{¶ 3} Sobhani moved for summary judgment and maintained that he was immune from liability under R.C. 4123.741, the co-employee immunity provision. Nationwide likewise moved for summary judgment and argued that plaintiffs were not “legally entitled to recover” from Sobhani by application of R.C. 4123.741; therefore, they are not entitled to uninsured motorist coverage under the terms of the parties’ policy.

{¶ 4} In opposition, plaintiffs argued that although Kobak and Sobhani both work for Parma Hospital, the co-employee immunity set forth in R.C. 4123.741 is inapplicable, because Sobhani struck Kobak after he had “clocked out” and was no longer in the service of his employer. Plaintiffs additionally argued that because R.C. 4123.741 does not bar a claim against Sobhani, their claim for uninsured motorist coverage is not defeated by the “legally entitled to recover” requirement of the Nationwide policy.

{¶ 5} The trial court awarded summary judgment in favor of Sobhani and Nationwide. In its opinion and judgment entry, the trial court ruled as follows:

“The facts are largely undisputed. Both * * * Kobak and * * * Sobhani were, at all times relevant to this case, employed by Parma Community General Hospital (‘the Hospital’). Both employees parked in the parking garage controlled by the Hospital for which 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.[¹] (Deposition of Linda Kobak at 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. * * *”

“* * * ‘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. [Citation omitted.]

“There is no allegation that * * * 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. * * *.

¹ The record further indicated that parking is free for employees.

“* * *

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

{¶ 6} Plaintiffs now appeal and assign two errors for our review.

Assignment of Error I:

“The trial judge erred, as a matter of law, by granting summary [judgment] in favor of defendant-appellee, Tom Sobhani, on the basis of the fellow employee immunity doctrine, R.C. 4123.741.”

{¶ 7} Plaintiffs assert that the trial court erroneously determined that Sobhani was entitled to summary judgment under R.C. 4123.741, and erroneously determined that they were not “legally entitled to coverage” from Sobhani, for purposes of obtaining uninsured motorist coverage.

I. Summary Judgment

{¶ 8} With regard to procedure, we note that this court reviews the grant of summary judgment de novo using the same standards as the trial court. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995-Ohio-214, 652 N.E.2d 684.

{¶ 9} A trial court may not grant a motion for summary judgment unless the evidence before the court demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment

as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. See, e.g., *Vahila v. Hall*, 77 Ohio St.3d 421, 429-30, 1997-Ohio-259, 674 N.E.2d 1164.

{¶ 10} The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. Id., citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Vahila*.

{¶ 11} In responding to a motion for summary judgment, the nonmoving party may not rest on “unsupported allegations in the pleadings.” Civ.R. 56(E); *Harless*. Rather, Civ.R. 56 requires the nonmoving party to respond with competent evidence that demonstrates the existence of a genuine issue of material fact for trial. *Vahila*. Summary judgment, if appropriate, shall be entered against the nonmoving party. *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52, 567 N.E.2d 1027.

II. Defendant Sobhani

{¶ 12} The trial court found that Kobak’s personal injury suit against Sobhani was barred by the co-employee immunity² statute, R.C. 4123.741, which 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.” (Emphasis added.)

{¶ 13} Thus, there are two questions that must be considered in applying this statute: was the injury caused by another employee, and did the injury occur in the course of and arising out of the plaintiff’s employment? *Sammetinger v. Kirk Bros. Co., Inc.*, Logan App. No. 8-09-15. 2010-Ohio-1500.

A. Injury Caused by Another Employee

{¶ 14} Kobak insists that this statute is inapplicable because, she claims, Sobhani was not in the course and scope of his employment while he was exiting the parking garage. As noted by the trial court, however, Kobak was awarded workers’ compensation benefits from this collision, and, as explained in *Kaiser v. Strall* (1983), 5 Ohio St.3d 91, 449 N.E.2d 1, “[a]n injury need only be found ‘compensable’ for fellow-employee immunity to be activated.” Accord *Pursley v. MBNA Corp.*, Cuyahoga App. No. 88073, 2007-Ohio-1445. (“A co-employee

²This immunity has also been called the “fellow servant rule.”

and employer are statutorily immune from liability when the employee's injury is compensable under workers' compensation.")

{¶ 15} Further, as explained in *Kelleher v. Alvarado* (Dec. 31, 1990), Putnam App. No. 12-89-17:

"We note that neither the statutes (R.C. 4123.741 and 4123.01) nor the case law (* * *; *Bussell v. Mattin* (1981), 3 Ohio App.3d 339; *Kaiser* * * *), require the fellow employee to be 'in the course of his employment.' Instead, and as stated in *Puckett v. Miller* (1980), [Hamilton App. Nos. C-790761, 790762, 790763], 19 O.Op.3d 349, the more appropriate standard to apply is whether the defendant was 'in the service of' the employer. * * *

"The plaintiff's argument construes the defendant's activity too narrowly. The defendant was leaving work. * * * The defendant was on [the employer's] premises and in the process of leaving work. As such, he was a fellow employee."

{¶ 16} In accordance with the foregoing, we conclude that the trial court properly determined that Sobhani was "in the service of" his employer at the time of the incident, within the meaning of R.C. 4123.741. Although he had "clocked out," the undisputed evidence demonstrated that the accident occurred in the hospital's parking garage as Sobhani was exiting for the day. Kobak's deposition testimony clearly established that the lot is not open to the public, is operated exclusively for employees, certain departments are assigned to certain locations, and parking is free to employees. Moreover, the accident occurred within the garage, before Sobhani reached the street or public area. Accord *Overbee v. Sumitomo Sitix Silicon, Inc.* (Mar. 11, 1996), Warren App. No. CA95-12-124. In that case, the plaintiff was struck by a vehicle driven by a

co-worker, who had not yet clocked in, as she walked across an access drive on her employer's property, and under the employer's maintenance and control. The court rejected the plaintiff's claim that at the time of the collision, the co-worker was not an "employee" under R.C. 4123.741, and stated:

“[T]he fact that Hatte had not clocked in or started his shift does not alter his status as an employee. Hatte was on his employer's premises, in the process of arriving at work. Hatte's situation falls within the standards of R.C. 4123.741, thereby precluding appellant from pursuing any additional common law or statutory remedy against a fellow employee.”

{¶ 17} Similarly, in *Donnelly v. Herron*, 88 Ohio St.3d 425, 2000-Ohio-372, 727 N.E.2d 882, the Ohio Supreme Court determined that co-employee immunity applied where a worker backed his automobile into a co-worker as he was exiting the employer's parking lot. The court stated:

“* * * 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.”

B. Injury Occurring in the Course of and Arising Out of the Plaintiff's Employment

{¶ 18} With regard to the additional requirement that the actionable conduct occurs “in the course of, and arising out of,” the co-employee’s employment, within the meaning of that phrase in the Workers’ Compensation Act,³ we note that Ohio’s workers’ compensation statute defines compensable injuries as “any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee’s employment.” R.C. 4123.01(C).

{¶ 19} As a general rule, an employee with a fixed place of employment, who is injured while traveling to or from his place of employment, is not entitled to participate in the Workers’ Compensation Fund because the requisite causal connection between the injury and the employment does not exist. *MTD Prod., Inc. v. Robatin* (1991), 61 Ohio St.3d 66, 572 N.E.2d 661.

{¶ 20} The general rule, however, does not operate as a complete bar to an employee who is injured commuting to and from work if the injury occurs within the “zone of employment.” *Id.* This is “the place of employment and the area thereabout, including the means of ingress thereto and egress therefrom, under control of the employer.” *Marlow v. Goodyear Tire & Rubber Co.* (1967), 10 Ohio St.2d 18, 225 N.E.2d 241, quoting *Merz v. Indus. Comm.* (1938), 134 Ohio St. 36, 15 N.E.2d 632. See, also, *Tucker v. Michael’s Stores, Inc.*, Allen App.

³*Donnelly.*

No. 1-03-52, 2004-Ohio-1855 (applying *Marlow*); *Jobe v. Conrad* (Jan. 26, 2001), Montgomery App. No. 18459 (applying *Marlow*).

{¶ 21} Additionally, the *MTD* Court noted that the injury may be compensable under the workers' compensation statute if "there is a causal connection between his injury and his employment based on the totality of the circumstances surrounding the accident." *Id.* The following factors are relevant under this test: (1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee's presence at the scene of the accident. *Id.*, citing *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 277, 551 N.E.2d 1271; *Lord v. Daugherty* (1981), 66 Ohio St.2d 441, 423 N.E.2d 96, at syllabus.

{¶ 22} In *Marlow*, the court held that where the claimant was injured as the result of an automobile accident in the employer's parking lot while leaving work, the injury occurred in the zone of employment and was compensable. In that case, the employer owned, maintained, and controlled several parking lots located adjacent to its plant for the exclusive use of its employees. The claimant paid three dollars per month for parking privileges and was assigned a permanent stall in a parking garage located on the parking lot. At the end of the claimant's shift, while driving out of the parking garage, he was struck by an automobile of a fellow employee who was also leaving the parking facility. In concluding that the

claim was compensable under the workers' compensation system, the court stated:

“When Marlow was injured, he was in that zone and his injury was proximately caused by a natural hazard of the zone. It was not self-inflicted or as a result of an act of nature or of an occurrence inconsistent with his employment, its activities, conditions or environments.

“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* at 22.

This holding was reaffirmed by the *Donnelly* Court.

{¶ 23} Similarly, in *Pursley*, the plaintiff attended a work-related picnic and parked at a nearby lot owned by her employer. There was no charge for parking, and no other parking was available. After exiting the garage in her car, a security guard for MBNA America Bank backed his vehicle into her car. The trial court awarded summary judgment to both the fellow employee and the employer. Upon the employee's appeal, this court affirmed and stated that the injury was exclusively compensable under the workers' compensation statute as it occurred in the plaintiff's zone of employment and was causally connected to the plaintiff's employment under the totality of the circumstances.

{¶ 24} By application of the foregoing, the undisputed facts of record clearly indicate that the injury occurred in the “zone of employment” as the undisputed

evidence establishes a causal connection between the injury and Kobak's and Sobhani's employment based on the totality of the circumstances. Considering the first factor set forth in *Robatin*, it is undisputed that the accident happened in the employer-controlled, employee-only parking area, near the area of ingress and egress to the place of employment, and therefore, was in close proximity to the place of employment.

{¶ 25} Secondly, as established by the deposition testimony, the employer controlled the scene of the accident as it provided the facility to employees at no charge, required employees to park there, and did not allow the public to park there. The employer provided key cards to the employees, and required that employees register their vehicles with the hospital's parking staff. Further, the employer designated specific areas in which employees may only park, and ticketed employees who use the garage but park outside their designated areas.

{¶ 26} Thirdly, the employer received a benefit from the employees' use of the garage as this kept employees from parking in the other spots available to visitors. The injury therefore occurred in the zone of employment and was causally connected to the plaintiff's employment under the totality of the circumstances. Additionally, the record demonstrates that although Kobak had not punched in yet, she was entitled to workers' compensation benefits in connection with this matter. The inverse would be true that Sobhani, who had just punched out, would also be entitled to workers' compensation if, on the date of the accident, he had also been injured leaving work.

{¶ 27} We acknowledge that in *Watkins v. The Metrohealth Sys.*, Cuyahoga App. No. 80567, 2002-Ohio-5961, a divided panel of this court held that an employee who was injured in the employer's parking garage was not in the "zone of employment." In *Watkins*, the employee was dissatisfied with the way she had parked her car and struck another vehicle as she attempted to back out. In that case, however, the plaintiff sustained her injuries in a garage that was also available to the public, she was not required to park there, and she had several parking options available to her, including parking on a public street, and these facts distinguish that matter from the instant case.

{¶ 28} Additionally, we conclude that the instant matter is distinguishable from *Johnston v. Case W. Res. Univ.* (2001), 145 Ohio App.3d 77, 761 N.E.2d 1113. In that case, the decedent was not in the "zone of employment" when she was struck by an out-of-control vehicle as she walked on a public sidewalk, owned by the city of Cleveland, toward the facility where she chose to park her car, and the employer did not have control over the public sidewalk. Accord *Vincent v. Ohio Bur. of Workers' Comp.* (May 27, 1999), Cuyahoga App. No. 75414, where injuries occurred as plaintiff was in the process of crossing a public street, they were not sustained in the zone of employment.

{¶ 29} In accordance with the foregoing, the trial court properly determined that there were no genuine issues of material fact and that Sobhani was entitled to judgment as a matter of law pursuant to R.C. 4123.741.

III. Defendant Nationwide Mutual

{¶ 30} Kobak asserts that she was entitled to uninsured motorist benefits under her personal automobile insurance policy that Nationwide issued to her.

{¶ 31} Pursuant to R.C. 3937.18(A)(1) and (I), a policy of insurance may require that insureds must be “legally entitled to recover” from their tortfeasors in order to obtain uninsured motorists coverage. *Snyder v. Am. Family Ins. Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, 871 N.E.2d 574; *Crabtree v. 21st Century Ins. Co.*, 176 Ohio App.3d 507, 2008-Ohio-3335, 892 N.E.2d 925.

{¶ 32} In this matter, the policy of insurance contains a provision that states:

“We will pay compensatory damages, including derivative claims, that you or a relative are legally entitled to collect 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[.]”

{¶ 33} Further, it is well settled that where the plaintiff cannot maintain a claim against the driver due to the application of the co-employee rule, R.C. 4123.741, the plaintiff is not “legally entitled to recover” under the uninsured motorist provision. *McLaughlin v. Residential Communications, Inc.*, 185 Ohio App.3d 515, 2009-Ohio-6789, 924 N.E.2d 891. See, also, *Nova v. State Farm Mut. Auto. Ins. Co.*, Summit App. No. 21885, 2004-Ohio-3419, citing *State Farm Mut. Ins. Co. v. Webb* (1990), 54 Ohio St.3d 61, 562 N.E.2d 132. Accord *Cottrill v. Wayne Mut. Ins. Co.*, Summit App. No. 05CA0018, 2005-Ohio-4937.

{¶ 34} In accordance with the foregoing, the trial court properly awarded Nationwide summary judgment as a matter of law. Plaintiffs are not “legally

entitled to recover” against Sobhani under R.C. 4123.741, and they cannot obtain uninsured motorist coverage herein.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR