

STATE OF MICHIGAN
COURT OF APPEALS

DANIEL BUKOWSKI and PHILIP
TERRANOVA, Individually and as Personal
Representative of the ESTATE OF JACLYN
TERRANOVA, Next Friend of AMY
TERRANOVA, a minor, and Next Friend of
NICOLE TERRANOVA, a minor,

Plaintiffs-Appellants,

v

MICHIGAN TOWNSHIP PARTICIPATING
PLAN,

Defendant-Appellee.

UNPUBLISHED
October 18, 2005

No. 262564
Macomb Circuit Court
LC No. 2004-000362-CK

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendant's motion for summary disposition under MCR 2.116(C)(10) on plaintiffs' declaratory action and denying their cross-motion for summary disposition. We affirm.

I. Basic Facts and Proceedings

This action for declaratory relief arises out of an underlying suit plaintiff Philip Terranova filed against plaintiff Daniel Bukowski following a March 20, 2001 fatal motor vehicle accident. This Court previously summarized the facts of the underlying case in *Terranova v Bukowski*, unpublished opinion per curiam of the Court of Appeals, issued June 29, 2004 (Docket No. 247729), p 1:

While driving his own car approximately twenty-five minutes before he had to report to work, defendant Bukowski, a Shelby Township police officer, at the time off-duty, sped through a red light and collided with plaintiffs' car, fatally injuring plaintiffs' decedent Jaclyn Terranova and causing severe and permanent injuries to minor plaintiffs Nicole and Amy Terranova.

Following the accident, Bukowski submitted a claim to defendant seeking coverage, and, on June 14, 2001, Bukowski received a “reservations of rights” letter from defendant, which stated in part:

We will provide a defense to you under a Reservation of Rights. If it is determined that you were not acting in an official capacity as a [sic] officer of the Shelby Township police department we will have to withdraw our defense at that time.

On July 11, 2001, after conducting its own investigation into the accident, defendant mailed a letter to Bukowski notifying him that it was not going to defend him because it had determined he was not acting in his official capacity at the time of the accident, and therefore not a named insured under the policy.

As a result, plaintiffs filed this action for declaratory relief seeking a determination of Bukowski’s right to a defense and indemnification under three separate forms of defendant’s contract of insurance with Shelby Township. Defendant moved for summary disposition alleging it was entitled to judgment as a matter of law on all three forms because Bukowski was not acting within the course and scope of his employment at the time of the accident. Defendant also asserted summary disposition was appropriate under one of the forms because Bukowski, not Shelby Township, owned the car Bukowski was driving at the time of the accident. Plaintiffs filed a cross-motion for summary disposition claiming defendant was estopped from asserting any other exclusions in the policy other than those asserted in the reservation of rights letter. The trial court granted defendant’s motion for summary disposition and dismissed plaintiffs complaint for declaratory relief.

II. Course and Scope of Bukowski’s Employment

We address first plaintiffs’ argument that Bukowski was acting within the course and scope of his employment at the time of the accident even though he was off-duty.

A. Standard of Review

This Court reviews a trial court’s grant of summary disposition de novo. *Dressel v Ameribank*, 468 Mich 577, 561; 664 NW2d 151 (2003). Summary disposition may be granted when “there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The non-moving party has the burden of showing by evidentiary materials that a genuine issue of disputed facts exists, *AFSCME Council 25 v Detroit*, ___ Mich App ___, ___ NW2d ___ (Docket No. 253592, issued July 5, 2005), slip op p 4, and the disputed factual issue must be material to the dispositive legal claims. *Auto Club Ins Ass’n v State Automobile Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley, supra*, 470 Mich 278. Further, the proper interpretation and application of an insurance policy is a question of law that is reviewed de novo. *Cohen v Auto Club Ins Ass’n*, 463 Mich 525, 528; 620 NW2d 840 (2001).

B. Analysis

Plaintiffs claim that Bukowski was acting within the course and scope of his employment at the time of the accident even though he was off-duty because (1) the Shelby Township police department regulations required him to be on-duty even while not on his regular eight hour shift, and because (2) Bukowski was providing a benefit to and serving the interest of Shelby Township at the time of the accident, i.e., deterring criminal activity, by wearing his uniform, carrying a weapon, and being on the lookout for suspicious activity. We disagree.

Generally, an employee who is merely driving to work is not considered to be within the scope of his employment. See e.g. *Camburn v Northwest School Dist/Jackson Community Schools (On Remand)*, 220 Mich App 358, 365; 559 NW2d 370 (1996) (worker's compensation context). Plaintiffs, however, rely on *Chambo v Detroit*, 83 Mich App 623; 269 NW2d 243 (1978), to suggest that because police officers are required to be on duty all day, this general rule does not apply to cases involving police officers. In *Chambo*, a Detroit police officer was on his way to work when he was involved in a car accident in Dearborn. *Id.* at 624-625. At the time of the accident, the officer was wearing his uniform and was driving his own vehicle. *Id.* at 624. Detroit police officers were mandated to "carry their weapon at all times," "to respond to a crime whether on duty or not" and to keep themselves "physically and mentally alert at all times to respond to a call for 'help.'" *Id.* at 625. This Court noted that a number of jurisdictions have allowed recovery of benefits because by the very nature of their jobs police officers are required to be on duty twenty-four hours a day. *Id.* at 627. Also, that "one of the considerations relevant to determining whether an injury to an employee on the way to work was sufficiently employment related was whether the employer derived a special benefit from the employee's activities at the time of the injury." *Id.* (internal quotations omitted). This Court concluded that Detroit did not derive a benefit because the officer was outside of the jurisdiction where the officer could exercise its authority as a police officer. *Id.* at 628. However, this Court specifically limited its holding to the facts of the case, stating that "if [the officer] was within the City limits of Detroit . . . [t]he benefits to the city might weigh in [the officer's] favor for compensation" *Id.*

Although a worker's compensation case, *Chambo, supra*, is instructive in the determination of whether Bukowski was in the course and scope of his employment at the time of the accident as specified in the insurance policy. For the reasons that follow, we conclude he was not. Unlike the officer in *Chambo*, officer Bukowski was not mandated to respond to situations requiring police intervention when he was off-duty. Similarly, unlike the officer in *Chambo*, officer Bukowski was not required to carry his weapon while off-duty. The Shelby Township "Off-Duty Weapons Policy" states:

It is *traditionally* held that an officer is always on duty and that he/she *should* respond to serious situations requiring police intervention, even though the incident does not occur during a regular tour of duty.

All regular, sworn, full-time police officers (does not include cadets) may carry concealed firearms off-duty if they *choose*, consistent with this directive. It is *not the intent* of this directive to *impose* on any Shelby Township officer, [sic] the responsibility to carry a weapon but rather, to guide those who *choose* to do so. [Emphasis added.]

Further, Shelby Township did not derive a special benefit from the employee's activities at the time of the injury. Bukowski explained that he was on his way to work when he collided with the Terranova vehicle. He stated that he noticed the light change from green to yellow and that the truck in front of him began to slow down. Rather than stopping himself, Bukowski explained that he veered into the right lane, stepped on the gas and attempted to beat the light. Bukowski testified that as he approached the intersection, he was not engaged in any law enforcement activity. There is simply nothing about officer Bukowski's conduct at the time of the accident that can be understood as providing a benefit to Shelby Township. Accordingly, the trial court did not err in finding Bukowski was not acting in the course and scope of his employment at the time of the accident.

Because of our resolution of this issue on appeal, we need not address plaintiffs' cross-claim seeking to estop defendant from asserting exclusions to the policy that were not asserted in the reservation of rights letter.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra