STATE OF MICHIGAN

COURT OF APPEALS

PHILIP TERRANOVA, Personal Representative of the ESTATE OF JACLYN TERRANOVA, Deceased, and Next Friend of NICOLE TERRANOVA and AMY TERRANOVA, Minors,

Plaintiffs-Appellants/Cross-Appellees,

v

DANIEL EDWARD BUKOWSKI,

Defendant,

and

CHARTER TOWNSHIP OF SHELBY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 29, 2004

No. 247729
Macomb Circuit Court
LC No. 2001-002379-NI

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's order granting defendant township summary disposition pursuant to MCR 2.116(C)(10). Defendant-cross appeals the circuit court's order vacating its earlier grant of sanctions against plaintiff. We affirm.

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. Plaintiffs filed this action against Bukowski and the township, asserting a vicarious liability claim and a claim pursuant to 42 USC 1983 against the township. The circuit court denied the township's first motion for summary disposition, finding it premature. The motion was later renewed, the township arguing that it could not be held vicariously liable because Bukowski was not acting within the scope of his employment or during the course of his employment at the time of the accident, and that plaintiffs failed to establish a § 1983 claim because they failed to show that Bukowski was acting under color of law, and failed to establish that the death and injuries were the result of customs or policies of the township or its deliberate indifference to

plaintiffs' constitutional rights. Plaintiffs conceded that the township could not be held vicariously liable, although on a different basis, but argued that there were genuine issues regarding their § 1983 claim. The court granted the township's motion and granted sanctions in the form of costs incurred by the township after the date of the hearing on the first motion for summary disposition. Plaintiffs sought reconsideration, which the court granted in part, vacating the portion of the opinion and order that had awarded sanctions.

We first address plaintiffs' claim that the court erred in granting the township summary disposition regarding plaintiffs' § 1983 claim. We review this issue de novo. *Mouradian v Goldberg*, 256 Mich App 566, 570; 664 NW2d 805 (2003).

Section 1983 provides a federal remedy against any person who, acting under color of state law or custom having the force of law, deprives another of constitutional rights or rights protected by federal law. *Payton v Detroit,* 211 Mich App 375, 398; 536 NW2d 233 (1996), citing *Monell v Dep't of Social Services of New York,* 436 US 658, 690-691; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Where a municipality's policies violate the United States Constitution, it can be held liable under § 1983; however, no respondeat superior liability is permitted. *Id*. Thus, to establish a cause of action under § 1983, a plaintiff must show that an "action pursuant to official municipal policy of some nature caused a constitutional tort." *Payton, supra*, 398, quoting *Collins v Harker Heights*, 503 US 115, 121; 112 S Ct 1061; 117 L Ed 2d 261 (1992).

Plaintiffs assert that Bukowski had eight automobile accidents and/or speeding tickets before his employment and during his training and probationary period with the township. Plaintiffs argue that the township violated its own policies by failing to review Bukowski's driving record and deny him employment on the basis of that record, violated plaintiffs constitutional rights by hiring Bukowski and failing to train him, by retaining him after his probationary period, and by having a policy and custom of not enforcing traffic laws as to township police officers.

We first observe that Bukowski was driving his own vehicle, was not on duty, and was not performing, or purporting to perform, any police functions at the time of the accident. Thus, plaintiffs have failed to link any hiring, training or employment decisions to the accident. Further, in 1997, the township terminated Bukowski's employment based on poor performance, including his poor driving. He was returned to his employment in 1998, following an arbitration decision. Plaintiffs have shown no driving infractions subsequent to his reinstatement. The accident here occurred in 2001.

Regarding plaintiffs' assertion that defendant township had a custom of failing to ticket fellow township officers, plaintiffs failed to present evidence that such a policy or custom exists. While there was evidence that officers were rarely issued tickets, the only evidence to support that there was a departmental custom or practice to that effect was found in the expert affidavits (one unsworn) of persons without personal knowledge. Although defendant Bukowski testified in his deposition that he has never ticketed a fellow township officer, he also testified that no township policy exists that would prevent him from doing so. The various officers testified that an officer has discretion whether to issue a ticket to a person stopped for a traffic infraction, whether the person is a police officer or not. The township's police chief testified that he had never seen or heard of a custom or policy of officers not ticketing other officers. The deposition

excerpts actually submitted to the court do not support that there was such a policy, nor do the materials appended to plaintiffs' brief on appeal.

Plaintiffs further contend that defendant township's policy of failing to adequately train defendant Bukowski resulted in their injuries. In *Canton v Harris*, 489 US 378, 388; 109 S Ct 1197; 103 L Ed 2d 412 (1989), the United States Supreme Court held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality – a 'policy' as defined by our prior cases -- can a city be liable for such a failure under § 1983." *Id*., 389. Thus, where a municipality consciously chooses not to train an officer it may be susceptible to liability under § 1983.

Here, defendant township did not elect not to train defendant Bukowski. The evidence presented reflects that defendant Bukowski's probationary period was extended, that he was required to complete a course on operating police cars two times, and that, when his performance failed to meet township police standards, he was fired. Plaintiffs failed to present evidence of a conscious choice by defendant township not to train defendant Bukowski.

Accordingly, because plaintiffs failed to present evidence creating a genuine issue of fact that this tragic and senseless accident was the result of some official municipal policy, or deliberate indifference on the part of the municipality, rather than of defendant Bukowski, we conclude that the circuit court did not err in granting summary disposition to defendant township.

On cross-appeal, defendant township argues that the circuit court abused its discretion when it vacated an order awarding defendant sanctions. Reviewing this issue for an abuse of discretion, *Churchman v Rickerson,* 240 Mich App 223, 233; 611 NW2d 333 (2000), we disagree.

MCL. 600.2591, the statute that permits an award costs and fees where a court finds a civil action frivolous, defines "frivolous" as follows:

> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

Here, there is no indication that plaintiffs filed suit to harass, embarrass, or injure defendant township.

Regarding their vicarious liability claim, plaintiffs' initial position was that defendant Bukowski was acting within the scope of his employment at the time of the accident because he was in full uniform, in possession of a gun, and was required to be "on-duty" twenty-four hours a

day. Because little if any case law exists addressing whether a uniformed police officer on his way to work is "acting in the scope of his employment," one could conclude that there was a reasonable basis to believe the facts underlying plaintiffs' position were true or that there was arguable merit to their claims. Accordingly, we find that the circuit court did not abuse its discretion in failing to sanction plaintiffs for alleging the vicarious liability claim. Nor did plaintiffs' subsequent decision to abandon this claim warrant sanctions.

Regarding plaintiffs' § 1983 claim, there was significant discovery regarding defendant Bukowski's driving record, his performance and training as a police officer, and the fact that few if any township officers were ever cited for traffic violations. Although plaintiffs' claim ultimately failed, it was not apparent when they filed suit or during discovery that plaintiffs "had no reasonable basis to believe that the facts underlying their position were true" or that their legal position "was devoid of arguable legal merit." Plaintiffs presented the court with case law showing that others have successfully asserted a § 1983 claim for a municipality's failure to train its police officers, as well as for inadequate screening practices. We conclude that the circuit court did not abuse its discretion when it vacated its previous award of sanctions on the ground that plaintiff's claims were not frivolous.

Affirmed.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kirsten Frank Kelly