IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JACQUELINE EVANS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
KIRIN DANA LATTOMUS,	)	C.A. No. 08C-08-232 CLS
	)	
Defendant/Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
GEICO GENERAL INSURANCE COMPANY,	)	
	)	
Third-Party Defendant,	)	
	)	
Defendant.	)	

Date Submitted: October 29, 2010
Date Decided: February 8, 2011

On Third-Party Defendant's Motion for Summary Judgment. **GRANTED.**

ORDER

L. Vincent Ramunno, Esq., 903 N. French Street, Wilmington, DE 19801. Attorney for Plaintiff.

Thomas P. Leff, Esq., 405 N. King St., Suite 300, P.O. Box 1276, Wilmington, DE 19899. Attorney for Defendant/Third-Party Plaintiff.

Dawn L. Becker, Esq., 919 Market St., Suite 460, Wilmington, DE 19801. Attorney for Third-Party Defendant.

Scott, J.

Introduction

Before this Court is the Third-Party Defendant's motion for summary judgment pursuant to Super. Ct. Civ. R. 56.[1] The Court has reviewed the parties' submissions and heard argument. For the reasons that follow, the Third-Party Defendant's Motion for Summary Judgment is **GRANTED**.

Facts

On May 3, 2007 an accident occurred between Plaintiff Jacqueline Evans ("Evans") and Defendant Kirin Lattomus ("Lattomus"). Evans was travelling on Pennsylvania Avenue away from the city. The accident occurred at the intersection of Pennsylvania Avenue and Scott Street.

Lattomus was at a stop sign on Scott Street intending to make a left onto Pennsylvania Avenue, requiring her to cross two through lanes of traffic and a left turn lane. While at the stop sign waiting to make the turn, an unidentified SUV driver waved Lattomus forward. In her deposition Lattomus testified that the wave indicated she could pull in front of the SUV and look for other traffic before making her turn.[2] She also testified that if the SUV did not gesture to her she would not have pulled out into traffic.[3] However, Lattomus made it very clear in her deposition that she interpreted the gesture by the unidentified SUV to indicate

[1] It is labeled a motion to dismiss, but it's actually a motion for summary judgment.
[2] Lattomus Dep. 16:2-16:23, Jan. 12, 2010.
[3] *Id.* at 36:17-37:7.

that she was permitted to pull in front of that vehicle only, not that it was safe to travel across all lanes of traffic.[4] She then pulled in front of the SUV, stopped, looked left, looked right, and proceeded forward to make the left turn onto Pennsylvania Avenue when she did not see anyone approaching. Evans tried to swerve when she saw Lattomus turning, but the vehicles collided. Evans now seeks damages for medical expenses, loss of earnings, loss of earning capacity, and property damage.

Lattomus filed a third-party suit against GEICO, Evans' uninsured motorist carrier, alleging that the unknown SUV operator was negligent and seeks contribution and indemnification from GEICO for any damages assessed against Lattomus. GEICO then filed this Motion for Summary Judgment.

Standard of Review

Superior Court Civil Rule 56 allows a defendant to file a motion for summary judgment. Summary judgment is appropriate when the moving party is able to show there are no genuine issues of material fact.[5] Once met, the burden then shifts to the nonmoving party to demonstrate issues of genuine material fact exist.[6] The facts are viewed in the light most favorable to the nonmoving party.[7]

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[4] *Id.* at 16:2-17:7; 37:12-38:5.
[5] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citation omitted).
[6] *Id.* at 681.
[7] *Grabowski v. Mangler*, 938 A.2d 637, 641 (Del. 2007) (*citing Celotex Corp. v. Catrett,* 477 U.S. 317, 325, (1986)).

Discussion

Lattomus is unable to prove that the unidentified driver of the SUV is negligent for the accident that occurred on May 3, 2007. The burden is on the plaintiff to prove that defendant proximately caused the collision by a preponderance of the evidence.[8] Proving negligence alone is insufficient; defendant's actions must be shown to be a proximate cause of plaintiff's injury.[9]

If Lattomus had relied on the unidentified driver's wave as an indication she could safely cross all lanes of traffic, the unidentified driver may have been a proximate cause of the accident that occurred between Evans and Lattomus. When a driver relies on the wave of another driver to enter an intersection, it is normally a question of fact as to whether or not the waving driver was negligent.[10] The jury determines whether a reasonable person would have interpreted the wave "as an indication that it was safe to cross" and whether a duty should be imposed.[11]

The unidentified driver of the SUV is not negligent because Lattomus did not rely on the driver's wave to continue crossing the intersection. In the context of a driver waving another driver into traffic, the first driver is not negligent when the second driver does not rely on the wave to enter traffic.[12] This point is illustrated in *Johnson*, where the defendant, Magee, looked to his left before

[8] *Banks v. Baldwin*, 1987 WL 8700, *2 (Del. Super.).
[9] *Duphily v. Del. Elec. Co-op., Inc.*, 662 A.2d 821, 828 (Del. 1995).
[10] *Singleterry v. H.H. Moore, Jr., Trucking Co., Inc.*, 1996 WL 527313, *2 (Del. Super.).
[11] *Id.*
[12] *Duphily*, 662 A.2d at 828.

entering the intersection, despite the bus driver's wave.[13] Magee was clear that he did not rely on the wave of the bus driver to enter the intersection, but used his own judgment.[14] Therefore, the bus driver was not negligent for the accident that occurred.[15]

Summary judgment is appropriate in this case because there is no genuine issue of material fact that needs to be resolved at trial. The undisputed facts indicate that Lattomus did not rely on the unidentified driver's motion into the intersection. Lattomus admits it several times in her deposition:

> Q. Did you rely upon that driver of the SUV in making the decision to pull out into the Pennsylvania westbound lanes?
> A. No.
> . . .
> Q. So you were not relying on the SUV to indicate to you that it was safe to make that turn. Is that accurate?
> A. Right.
> Q. That's accurate?
> A. Yes.
> . . .
> Q. Did you use your own judgment in making the decision to turn, to start the turn to make the left through the second lane?
> A. Yes.
> Q. So the driver of the SUV did nothing to indicate to you that it was clear to make the left-hand turn 100 percent?
> A. Correct.
> . . .
> Q. Let me be 100 percent clear. You were not relying upon that phantom vehicle's operator to tell you or to indicate to you that it was

[13] *Id.*
[14] *Id.*
[15] *Id.*

> safe to make your left-hand turn. Is that correct? You didn't take that wave out to mean make your left-hand turn, everything is clear?
> [Objection to the form of the question.]
> A. The wave indicated that it was safe for me to move in front of the SUV.
> Q. Okay. No further?
> A. Correct.
> Q. Would you agree you need to use your own independent judgment to see if that other lane of travel was clear, the left-hand lane of travel?
> A. Yes.[16]

As stated, Lattomus did not rely on the judgment of the unidentified driver of the SUV. Therefore, the unknown driver of the SUV cannot be liable for the accident that occurred. Based on this uncontroverted evidence, this Court is obligated to grant GEICO's motion for summary judgment as there are no genuine issues of material fact.

Conclusion

Based on the forgoing, the Third-Party Defendant's motion for summary judgment is **GRANTED.**

IT IS SO ORDERED.

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Judge Calvin L. Scott, Jr.

[16] Lattomus Dep. 16:2-17:7; 37:12-38:5.