

[Cite as *Denolf v. New*, 2006-Ohio-2550.]

IN THE COURT OF CLAIMS OF OHIO
www.cco.state.oh.us

STEVEN J. DENOLF, Admr., :
et al. :
 :
Plaintiffs : CASE NO. 2005-08573-PR
 : Judge J. Craig Wright
 :
v. : DECISION
 :
ROBERT J. NEW, et al. :
 :
Defendants/Third-Party :
Plaintiffs :
 :
v. :
 :
OHIO DEPARTMENT OF :
TRANSPORTATION, et al. :
 :
Third-Party Defendants

: : : : : : : : : : : : : : : :

{¶ 1} On November 1, 2005, third-party defendant, Eric C. Badas (Badas), filed a motion for summary judgment. On November 18, 2005, this court granted the motion of defendants/third-party plaintiffs, Robert J. New, et. al. (New), for an extension of time to respond to the motion for summary judgment and scheduled a non-oral hearing date of January 28, 2006. New did not file a response.

{¶ 2} However, on February 23, 2006, New filed a motion for leave to file an amended answer asserting the defense of sudden emergency.

{¶ 3} On March 7, 2006, plaintiffs filed a response to the motion for leave to amend. On March 17, 2006, New filed a reply memorandum in support of the motion for leave to amend.

{¶ 4} Additionally, on February 23, 2006, New filed a motion for admission of attorney Ronald DeWaard to practice pro hac vice. That motion is unopposed.

{¶ 5} Upon review, the court makes the following determinations.

{¶ 6} Civ.R. 56(C) states, in part, as follows:

{¶ 7} "**** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. ****" *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing, *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 8} This case involves a motor vehicle collision that occurred on January 31, 2002. At the time, Susan DeNolf, wife of plaintiff Steven DeNolf, was operating a 1994 Dodge Caravan in a southerly direction on Centennial Road in Lucas County, Ohio. James DeNolf, their son, was also present in the vehicle. As Susan approached

the intersection of Centennial Road and Central Avenue (US Route 20), intending to turn east, she and James noticed that the traffic signal was malfunctioning. As a result, and in accordance with Ohio law, motorists were treating the intersection as a four-way stop. Eric Badas, who had approached the intersection at about the same time as Susan, motioned for her to proceed. When Susan entered the intersection her vehicle was struck by a tractor-trailer being driven by New, who did not stop at the intersection. Susan died ten days later as a result of the injuries she sustained in the collision.

{¶ 9} The Tenth District Court of Appeals has stated:

{¶ 10} "The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of fact on a material element of one or more of the nonmoving party's claims for relief. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. If the moving party satisfies this initial burden by presenting or identifying appropriate Civ.R. 56(C) evidence, the nonmoving party must then present similarly appropriate evidence to rebut the motion with a showing that a genuine issue of material fact must be preserved for trial. *Norris v. Ohio Standard Oil Co.* (1982), 70 Ohio St.2d 1,2. The nonmoving party does not need to try the case at this juncture, but its burden is to produce more than a scintilla of evidence in support of its claims. *McBroom v. Columbia Gas of Ohio, Inc.* (June 28, 2001), Franklin App. No. 00AP-1110." *Nu-Trend Homes, Inc., et al. v. Law Offices of DeLibera, Lyons & Bibbo, et al.*, Franklin App. No. 01AP-1137, 2003-Ohio-1633.

{¶ 11} The essential elements of any negligence action are duty, breach of duty, proximate cause and injury; the failure of any of which will defeat the action. *Keister v. Park Centre Lanes* (1981), 3 Ohio App.3d 19, 22-24. In this case, New has alleged that Badas acted negligently when he motioned Susan to proceed and that Badas is liable to him under the theory of indemnity and/or contribution for any damages sustained by plaintiffs. Thus, the burden is on New to identify a duty owed by Badas and whether he has done so is a question of law. *Id.* at 22.

{¶ 12} In support of the motion for summary judgment, Badas submitted his own affidavit and the deposition testimony of James DeNolf. In his affidavit, Badas states that he motioned to Susan to acknowledge her presence at the intersection and to indicate that he was yielding to her. In his deposition, James DeNolf states that he and his mother arrived at the intersection before two other vehicles who were westbound (drivers' identities unknown to James at the time of the deposition), and that one of those drivers motioned to them before Susan pulled into the intersection.

{¶ 13} Under Ohio law, a motioning motorist owes no duty to a turning motorist to exercise due care in determining safe passage. See *Duval v. Mears* (1991), 77 Ohio App.3d 270, 273 citing *Van Jura v. Row* (1963), 175 Ohio St. 41, 44.

{¶ 14} In light of the standard of review, the court finds that the only reasonable conclusion to be drawn from the undisputed evidence set forth above is that Badas owed no duty to plaintiffs under the circumstances of this case. Consequently, there are no genuine issues of material fact and Badas is entitled to judgment as a matter of law as to New's claim for indemnity and contribution.

{¶ 15} Turning to New’s motion for leave to amend the answer to assert a defense of sudden emergency, the court finds said motion to be well-taken. For the reasons set forth in both the motion and the reply, the motion for leave to amend is GRANTED. The tendered second amended answer is deemed filed instanter.

{¶ 16} Finally, upon review, New’s motion for admission of co-counsel, Ronald DeWaard, to practice pro hac vice is GRANTED. Gov. Bar R. I. Section 9(H). A resident attorney shall sign all pleadings, motions and appear at all conferences and hearings.

IN THE COURT OF CLAIMS OF OHIO
www.cco.state.oh.us

STEVEN J. DENOLF, Admr., :
et al. :

Plaintiffs

: CASE NO. 2005-08573-PR
Judge J. Craig Wright

v. :

: JUDGMENT ENTRY

ROBERT J. NEW, et al. :
Defendants/Third-Party :
Plaintiffs :

v. :

OHIO DEPARTMENT OF :
TRANSPORTATION, et al. :
Third-Party Defendants

: : : : : : : : : : : : : : :

A non-oral hearing was conducted in this case upon third-party defendant’s, Eric C. Badas, motion for summary judgment. For the

reasons set forth in the decision filed concurrently herewith, the motion for summary judgment is GRANTED and judgment is rendered in favor of third-party defendant Eric C. Badas.

J. CRAIG WRIGHT
Judge

Entry cc:

Kevin M. Ferguson
Brandon G. Schnorf, Jr.
5217 Monroe Street, Suite A
P.O. Box 23156
Toledo, Ohio 43623

Attorneys for Plaintiffs

Patrick McCaffrey
Audrey E. Varwig
2109 Stella Court
Columbus, Ohio 43215

Attorneys for Defendants/Third-Party Plaintiffs

Ronald G. DeWaard
P.O. Box 352
Grand Rapids, Michigan 49501-0352

Teresa G. Stanford
55 Public Square, Suite 725
Cleveland, Ohio 44113

Attorney for Third-Party Defendant, Eric C. Badas

Peter E. DeMarco
Assistant Attorney General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

Attorney for Third-Party Defendant, Ohio Department of Transportation

LH/cmd
Filed May 4, 2006
To S.C. reporter May 23, 2006