[Cite as *Erie Ins. Co. v. Delmanzo*, 2010-Ohio-1274.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

ERIE INSURANCE COMPANY AS SUBROGEE OF DENISE LYNN HILL,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-095**
- vs -	:	
PAUL E. DELMANZO,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 003803.

Judgment: Affirmed.

Jason M. Sullivan, Javitch, Block and Rathbone, L.L.P., 1100 Superior Avenue, 19th Floor, Cleveland, OH 44114 (For Plaintiff-Appellee).

Paul E. DelManzo, pro se, PID: 541-006, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Paul E. DelManzo appeals from the grant of summary judgment by the Lake County Court of Common Pleas to Erie Insurance Company in a subrogation action, stemming from a March 2, 2007 motor vehicle accident in which Erie's insured, Denise Lynn Hill, was killed. Mr. DelManzo was charged with aggravated vehicular homicide as a result, to which he pleaded guilty in November 2007. We affirm.

{¶2} This action commenced December 3, 2008, when Erie filed its complaint, alleging that Mr. DelManzo had negligently operated a motor vehicle, resulting in the

death of his passenger, Ms. Hill. Erie further alleged that Ms. Hill was its insured; that it had paid $206,000 as a result of the accident, and was subrogated to Ms. Hill's claims; and that Mr. DelManzo owed Erie that sum, with statutory interest from the date of judgment, costs, and other relief.

{¶3} December 17, 2008, Mr. DelManzo filed a pro se answer, substantially denying liability. March 27, 2009, he moved the trial court to stay the action, premised on a motion to withdraw his guilty plea in the criminal case. Erie opposed the motion to stay April 15, 2009. That same day, it moved the trial court for leave to file its summary judgment motion, instanter. By its motion, Erie alleged that Mr. DelManzo's guilty plea to the charge of aggravated vehicular homicide established his negligence for purposes of this civil action. Also on April 15, the trial court denied Mr. DelManzo's motion to stay.

{¶4} May 11, 2009, Mr. DelManzo moved to amend his answer to add a counterclaim, based on newly discovered evidence. He also moved the court for additional time to oppose Erie's summary judgment motion. That same day, the trial court granted Erie's motion to file its summary judgment motion, instanter.

{¶5} May 18, 2009, Erie opposed Mr. DelManzo's motion to amend his answer; and, Mr. DelManzo moved to dismiss the complaint pursuant to Civ.R. 12(B)(6). Erie filed its brief in opposition to the motion to dismiss May 20, 2009.

{¶6} May 29, 2009, the trial court denied Mr. DelManzo's motion to amend his answer. June 15, 2009, it denied his motion to dismiss, but granted him until June 29, 2009, to oppose Erie's summary judgment motion. Mr. DelManzo filed his brief in

opposition June 23, 2009. June 30, 2009, the trial court granted summary judgment in favor of Erie.

{¶7} July 28, 2009, Mr. DelManzo timely noticed this appeal, assigning two errors:

{¶8} "[1.] THE COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT WITHOUT PROPERLY CONSIDERING APPELLANT'S MOTION TO DISMIS (sic) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

{¶9} "[2.] THE COURT COMMITTED REVERSIBLE ERROR IN NOT SUSTAINING APPELLANT'S REQUEST FOR JURY TRIAL WHERE HE PRESENTED FACTUAL ISSUES THAT SHOULD HAVE BEEN DETERMINED BY A JURY."[1]

{¶10} By his first assignment of error, Mr. DelManzo contends the trial court incorrectly denied his motion to dismiss the complaint, filed pursuant to Civ.R. 12(B)(6). He argues that his liability in this civil action is premised solely upon his guilty plea to the charge of aggravated vehicular homicide, which plea, he asserts, he has moved to withdraw. Consequently, he argues that Erie cannot prove he was the driver of the vehicle in which Ms. Hill was killed.

{¶11} "A defendant may move to dismiss a complaint for failure to state a claim upon which relief can be granted, according to Civ.R. 12(B)(6). An appellate court's review of a dismissal under Civ.R. 12(B)(6) is de novo. *West v. Sheets*, 11th Dist. No. 2001-L-183, 2002-Ohio-7143, at ¶9, citing *Mitchell v. Speedy Car X, Inc.* (1998), 127

1. We note that there are slight discrepancies between the phrasing of Mr. DelManzo's second assignment of error in his brief's table of contents, and the body of the brief. In particular, he includes a superfluous article in the assignment of error set forth in the body of the brief. The difference is not substantive: we have set forth the assignment as it appears in his table of contents.

Ohio App.3d 229, 231, ***. In order for a court to dismiss a complaint under Civ.R. 12(B)(6), '" (***) it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery."' *Taylor v. London* (2000), 88 Ohio St.3d 137, 139, ***, quoting *O'Brien v. Univ. Comm. Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, ***, syllabus. '"A complaint should not be dismissed for failure to state a claim merely because the allegations do not support the legal theory on which the plaintiff relies. Instead, a trial court must examine the complaint to determine if the allegations provide for relief on any possible theory."' *Firstmerit Corp. v. Convenient Food Mart, Inc.* (Mar. 7, 2003), 11th Dist. No. 2001-L-226, 2003-Ohio-1094, at ¶7, quoting *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 667, ***. Thus, 'in construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.' *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192." *Andrews v. Lampert*, 11th Dist. No. 2002-L-022, 2003-Ohio-2370, at ¶11; accord, *McMillen v. Trumbull Metro. Hous. Auth.*, 11th Dist. No. 2006-T-0086, 2007-Ohio-3713, at ¶34-35. (Parallel citations omitted.)

{¶12} Application of the foregoing standards clearly shows the trial court correctly denied Mr. DelManzo's motion to dismiss. Construing Erie's complaint in its favor, as we must, indicates it sufficiently makes out a claim for subrogation: Mr. DelManzo negligently operated a motor vehicle, resulting in the death of Erie's insured, Ms. Hill; and, Erie paid monies on behalf or to its insured as a result. The mere assertion that Mr. DelManzo has moved the trial court to withdraw his guilty plea in the

related criminal action (of which there is no evidence in the record before us), does not change the fact that Erie's complaint states a cognizable claim at Ohio law.[2]

{¶13} The first assignment of error lacks merit.

{¶14} By his second assignment of error, Mr. DelManzo attacks the grant of summary judgment in favor of Erie. He asserts he presented two factual issues to the trial court which required decision by a jury. First, he again argues that, since Erie premises liability on his plea of guilty to aggravated vehicular homicide, his purported motion to withdraw that plea removes any factual basis for the trial court's judgment. Second, he asserts that Ms. Hill's family has brought an action against the Ohio Department of Transportation for improper design and/or maintenance of the highway on which the accident occurred. He contends the filing of this action indicates he could not be solely liable for Ms. Hill's death.

{¶15} "'Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, ***. 'In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party.' Id. citing Civ.R. 56(C). Further, the standard in which we review the granting of a motion for summary judgment is de novo. Id. citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, ***.

2. We respectfully note that Erie failed to attach a copy of the subject insurance policy to its complaint. This failure to comply with the requirements of Civ.R. 10(D) could have made its complaint subject to dismissal under Civ.R. 12(B)(6). However, since Mr. DelManzo failed to follow the established practice of challenging this deficiency by filing a motion for a more definite statement, Civ.R. 12(E), prior to answering the complaint, the error was waived. See, e.g., *State Farm Mut. Auto Ins. Co. v. Loken*, 5th Dist. No. 04-CA-40, 2004-Ohio-5074, at ¶21-22.

{¶16} "Accordingly, '(s)ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden of informing the trial court of the basis of the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. 'Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.' Id., citing *Dresher* at 293.

{¶17} "***

{¶18} "***

{¶19} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its

case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, ***.

{¶20} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, ***, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*. (Emphasis added.)

{¶21} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as 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 which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' Id. at 276. (Emphasis added.)" *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶36-37, 40-42. (Parallel citations omitted.)

{¶22} In the related criminal proceding, Mr. DelManzo pleaded guilty to aggravated vehicular homicide, in violation of R.C. 2903.06(A)(2)(a). By entering a guilty plea, a defendant necessarily admits he committed the specific acts of which he is accused. *Nationwide Mut. Fire Ins. Co. v. Kubacko* (1997), 124 Ohio App.3d 282, 289. Further, "[g]uilty pleas in criminal proceedings are traditionally treated as admissions in civil causes of action predicated on the same underlying facts." *Mays v. Taylor* (Dec. 14, 2001), 7th Dist. No. 00-C.A.-209, 2001 Ohio App. LEXIS 5798, at 9. The requisite mental state for aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a) is recklessness. The definitions for recklessness and negligence in the criminal sphere, see, e.g, R.C. 2901.22(C), (D), and (E), are substantially similar to those operative in the civil sphere. Cf. *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, at ¶73-74. Consequently, by admitting to acting with the heightened state of culpability encompassed by the term "recklessly," for purposes of liability under R.C. 2903.06(A)(2)(a), regarding Ms. Hill's death, Mr. DelManzo necessarily admitted to acting "negligently" for purposes of liability in this civil action.

{¶23} We are unpersuaded that Mr. DelManzo's filing of a motion to withdraw his guilty plea, or the possibility that Ms. Hill's estate or family are pursuing an action against ODOT, militate against the trial court's grant of summary judgment to Erie. As Erie points out, the Supreme Court of Ohio has held that a trial court abuses its discretion in staying a civil case against a defendant convicted on criminal charges based on the same conduct, merely due to the possibility that the criminal case may be reversed on appeal. See, e.g., *State ex rel. Verhovec v. Mascio* (1998), 81 Ohio St.3d 334, 336. Similarly, the mere possibility that Mr. DelManzo may be allowed to withdraw

his guilty plea in the related criminal case, or that some finding of liability against ODOT for Ms. Hill's death may be found in the future, is insufficient to undermine Erie's presently established right to judgment against Mr. DelManzo.

{¶24} The second assignment of error lacks merit.

{¶25} The judgment of the Lake County Court of Common Pleas is affirmed.

{¶26} It is the further order of this court that appellant is assessed costs herein taxed.

{¶27} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concurs.