IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

CESAR ROMERO, Plaintiff, v. K&K TOWING & RECOVERY, LLC, ET AL., Defendants.	:	CASE NO. 18CV-009310 JUDGE KIM BROWN

DECISION AND ENTRY

GRANTING DEFENDANT K&K TOWING & RECOVERY, LLC'S MOTION FOR SUMMARY JUDGMENT FILED AUGUST 6, 2019

AND

DENYING DEFNENDANT K&K TOWING & RECOVERY, LLC'S MOTION TO COMPEL DISCOVERY FILED SEPTEMBER 5, 2019

Rendered this 16th day of September, 2019

This matter is before the Court upon Defendant K&K Towing & Recovery, LLC's motion for summary judgment. Plaintiff has not filed a response and its time to do so has now run. The motion for summary judgment is now ripe for the Court's consideration.

FINDINGS OF FACT

The Court finds the following facts to be material and uncontested:

1. Defendant K&K Towing & Recovery, LLC ("K&K") did have a truck dispatched to the scene on September 2, 2019. *Affidavit of Arthur Carpenter*, ¶ 4. The K&K truck was being driven that night by Arthur Carpenter, Sr. ("Carpenter") who is the owner of K&K. *Id.* at ¶ 1, 4.

2. There were two tow trucks on site on September 2, 2019, one driven by Carpenter and the other driven by William Kremer. *Id.*, Exhibit 2, City of Columbus Division of Police Preliminary Investigation Report Number: 180742258-001 ("Police Report").
3. The Police Report identifies the tow truck driven by William Kremer as the "second tow truck" in the Police Report. *Id.* The second tow truck was involved in what the Police Report describes as a "hit skip." *Id.* As a result of falling off the truck or being pushed off the truck by William Kremer, Cesar Romero suffered injuries and was transported to Riverside Hospital. *Id.*
4. Carpenter states in his affidavit that William Kremer was not an employee of K&K and was not driving a K&K owned tow truck. *Id.* ¶ 7.
5. Carpenter states in his affidavit that the second tow truck which allegedly caused Plaintiff's injuries is not owned by K&K nor was it operated by an employee of K&K. *Id.* at ¶ 6.

LAW AND ANALYSIS

Motion for Summary Judgment

To prevail upon a motion for summary judgment, the moving party must inform the court of the basis for the motion and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. Ohio Supreme Court precedent explains:

> the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment . . . . These evidentiary materials must 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. . . . If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.

Dresher v. Burt, 75 Ohio St. 3d 280, 292-93, 662 N.E.2d 264 (1996).

In this case Plaintiff has not filed a response to Defendant's motion for summary judgment, however this does not relieve Defendant of its burden on summary judgment.

> There is no 'default' summary judgment under Ohio law. * * *[T]he moving party, carries the burden of establishing that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. It is not the nonmoving party's duty to prove its case on summary judgment; it is the moving party's responsibility to establish the requirements of Civ.R. 56.

Maust v. Palmer, 94 Ohio App.3d 764, 769, 641 N.E.2d 818 (10th Dist.1994).

Furthermore the moving party must provide "specific reasons and evidence" that show movant is entitled to summary judgment. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988). A trial court may consider the types of evidence described in Civ.R. 56(E), i.e., affidavits and papers referred to in the affidavit. *Reed v. Davis*, 995 N.E.2d 1240, 2013-Ohio-3742, ¶ 13 (10th Dist.).

The Claims at Issue

The Court finds that all claims can be disposed of in a single analysis because they all fail for the same dispositive reason. The Complaint brings four claims against Defendant: (1) negligence; (2) negligent infliction of emotional distress; (3) loss of enjoyment of life; and (4) intentional infliction of emotional distress.

First, loss of enjoyment of life is not a cause of action but an element of damages. *Ramos v. Kuzas*, 65 Ohio St.3d 42, 42, 600 N.E.2d 241 (1992). Recovery of damages is contingent on a successful claim. As shown below, all of Plaintiff's claims fail and therefore Plaintiff is not entitled to damages for loss of enjoyment of life.

Plaintiff's other claims share the element of causation. Negligence requires plaintiff to show (1) a duty of care, (2) a breach of that duty; and (3) an injury proximately resulting therefrom. *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶ 1. Intentional infliction of

emotional distress requires plaintiff to show: (1) that defendant had intent to cause emotional distress; (2) defendant's conduct was extreme and outrageous; and (3) defendant's conduct was the proximate cause of the emotional distress. *Phung v. Waste Mgt.*, 71, Ohio St.3d 408, 408, 644 N.E.2d 286 (1994). Negligent infliction of emotional distress has the same elements less the intent element and an additional requirement that plaintiff witness or experience a dangerous accident or appreciate physical peril. *See*, *Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759 (1983) syllabus. Therefore, if Defendant was not the cause of Plaintiff's harm, all of Plaintiff's claims fail.

Specifically, the Complaint alleges that the second tow truck caused his injuries. Complaint, ¶ 4. Proximate cause is ordinarily a question to be determined by the trier of fact, but in situations where reasonable minds could not differ as to the matter of proximate cause, proximate cause may be determined as a matter of law. *Purcell v. Norris*, 10th Dist. No. 04AP-1281, 2006-Ohio-1473, ¶ 21. This case is such a situation because the evidence is uncontested.

The uncontested evidence shows that K&K's truck was not the second tow truck and therefore not the proximate cause of Plaintiff's injuries. K&K does not own and was not operating that second tow truck. There is no evidence indicating that the K&K may own the tow truck or may have an employee that caused Plaintiff's injury. Therefore, reasonable minds can only determine that K&K was not the proximate cause of Plaintiff's injuries because K&K is not the truck that Plaintiff alleges caused him harm. The Court finds no causation linking K&K to Plaintiff's injuries and that K&K is entitled to judgment as a matter of law on all claims.

CONCLUSION

For the reasons above, Defendant's motion for summary judgment is **GRANTED**. Further, the Court finds that granting Defendant's motion for summary judgment renders Defendant's motion to compel filed September 5, 2019 moot and that motion is **DENIED**.

IT IS SO ORDERED.

**** THIS IS A FINAL APPEALABLE ORDER. ****

Franklin County Court of Common Pleas

Date: 09-16-2019

Case Title: CESAR ROMERO -VS- K K TOWING RECOVERY LLC ET AL

Case Number: 18CV009310

Type: ENTRY

It Is So Ordered.

/s/ Judge Kim Brown

Court Disposition

Case Number: 18CV009310

Case Style: CESAR ROMERO -VS- K K TOWING RECOVERY LLC ET AL

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 18CV0093102019-08-0699980000
   Document Title: 08-06-2019-MOTION FOR SUMMARY JUDGMENT - DEFENDANT: K K TOWING RECOVERY LLC
   Disposition: MOTION RELEASED TO CLEAR DOCKET

2. Motion CMS Document Id: 18CV0093102019-08-0699970000
   Document Title: 08-06-2019-MOTION FOR SUMMARY JUDGMENT - DEFENDANT: K K TOWING RECOVERY LLC
   Disposition: MOTION GRANTED

3. Motion CMS Document Id: 18CV0093102019-09-0599980000
   Document Title: 09-05-2019-MOTION TO COMPEL DISCOVERY - DEFENDANT: K K TOWING RECOVERY LLC
   Disposition: MOTION IS MOOT

4. Motion CMS Document Id: 18CV0093102019-08-1299980000
   Document Title: 08-12-2019-MOTION - DEFENDANT: K K TOWING RECOVERY LLC
   Disposition: MOTION RELEASED TO CLEAR DOCKET