IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ROBERT CASEY	:	**JULY TERM, 2016**
	:	
vs.	:	**No. 02028**
	:	
XPEDX, XPEDX, VERITIV, VERITIV CORP. FORD MOTOR CO., and FORD	:	**CONTROL No. 18051107**

MEMORANDUM ORDER

AND NOW, this 13th day of November, 2018, upon consideration of the motion for summary judgment filed by Defendant Ford Motor Company and the responses thereto, it is hereby **ORDERED** and **DECREED** that the Motion is **GRANTED** and the Plaintiff's claims against Ford Motor Company are **DISMISSED with prejudice**. The Plaintiff's general denials admitted the factual averments of Ford's summary judgment motion and Plaintiff did not carry his burden to specifically identify the actual evidence in the record that supported his causes of action.

Plaintiff alleges he was injured when a cardboard box containing a replacement car hood, tore as he was unloading it from his delivery van. Ford's motion sought summary judgment based on the failure of the Plaintiff to produce factual evidence that established a prima facie case against Ford under any theory of liability. Motion ¶ 28. Ford also asserted that Plaintiff spoliated the allegedly defective carton or box which Plaintiff claims contained the hood. The motion "challenge[d] the ability of the non-moving

party to adduce evidence of facts material to establishing a claim or defense." ***Lance v. Wyeth***, 624 Pa. 231, 258, 85 A.3d 434, 450 (2014).[1]

The burden was thrust upon the Plaintiff to come forth with actual evidence showing the existence of the facts essential to his causes of action and spoliation defense. *See* Pa.R.C.P. 1035.3, and Philadelphia Civil Rule *1035.2(a)(4). Plaintiff's answer to this summary judgment motion was devoid of any evidence that supported his causes of action.[2]

> When a motion for summary judgment is based on insufficient evidence to support the factual basis for the cause of action or defense, the non-moving party must come forward with *sufficient* evidence essential to preserve the cause of action. The evidence adduced by the non-moving party must be of such a quality that a jury could return a favorable verdict to

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[1] Defendant Ford's motion alleged in part:

- "there is no evidence of record that the box Plaintiff alleges was involved in the incident at Rocco's Collision was even delivered by Plaintiff to Rocco's on the date of the incident," ¶ 26, and that Plaintiff failed to provide any evidence regarding the box or any defect in the box. ¶¶ 27, 28.
- Plaintiff failed to present any factual or expert evidence necessary to establish a prima facie failure to warn claim under any theory, against Ford. ¶ 29.
- Plaintiff failed to produce any evidence to establish a prima facie breach of warranty claim, including any evidence to establish the date of tender of the box allegedly involved in the incident. ¶ 30.
- Summary judgment should be granted on all of Plaintiffs claims as a sanction for Plaintiffs spoliation of the box and all related evidence. ¶ 31.

[2] Plaintiff's response to the motion was also devoid of any legal analysis and citation to case or other authority. *See,* ***Lackner v. Glosser***, 892 A.2d 21, 29-30 (Pa. Super. 2006) ("Arguments not appropriately developed include those where the party has failed to cite any authority in support of a contention."); ***Estate of Haiko v. McGinley,*** 799 A.2d 155, 161 (Pa. Super. 2002) (party must provide the court with citations to supporting authorities and "a reasoned discussion of the law against which to adjudge the" party's claims).

the non-moving party on the issue or issues challenged by a summary judgment request.

InfoSAGE Inc v. Mellon Ventures L.P., 2006 PA Super 68, 896 A.2d 616, 625 (Pa. Super. 2006) (emphasis in the original, citation omitted). "Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law." ***Keffer v. Bob Nolan's Auto Service, Inc.***, 59 A.3d 621, 636 (Pa. Super. 2012) (citation omitted).

Plaintiff's answer to this summary judgment motion claimed that Plaintiff "has testified under oath" to facts contrary to those set forth by Ford, and that Ford's facts do "not represent the totality of the" Plaintiff's testimony. However, the Plaintiff did not cite to *any* specific pages in his deposition, and did not attach his deposition as an exhibit (although Ford did). Based solely on his unsupported general denials of the facts set forth by Ford, Plaintiff claimed that his "testimony created a genuine issue of fact which precludes a grant of summary judgment."

Plaintiff attached five expert reports totaling 60 pages of exhibits which he produced after the deadline in the case management order.[3] He did not cite to any specific pages in any of those reports. Instead, he stated, "Defendants are not entitled to summary judgement as plaintiff has produced the expert report of Douglas C. Moyer, PhD, attached here to as Exhibit 'A', to support the claims set forth in the Amended Complaint." *Cf.*, ***Rose v. Annabi,*** 2007 Phila. Ct. Com. Pl. Lexis 34, *30 (it is improper

[3] The Defendants filed motions to strike each late report. Those motions were assigned to the Team Leader and not to this Judge. They had not been ruled upon as of the date of this Order.

to cite to an experts' entire testimony instead of the specific pages that bear on the issue), *aff'd*, 934 A.2d 743 (Pa. Super. 2007).

Plaintiff erroneously believed that it was the court's responsibility to read all 134 pages of his deposition and 60 pages of his experts' reports, in order to discover the testimony and evidence that supported his claims. It is not the trial court's duty to scour the record to unearth facts that would defeat summary judgment.

Our Supreme Court's amendment of the summary judgment rules in 1996, and the promulgation of new Pa.R.C.P. 1035.3, negated prior cases that required an independent review of the record before the trial court could grant summary judgment. ***Harber Philadelphia Ctr. City Office Ltd. v. LPCI Ltd. P'ship,*** 764 A.2d 1100, 1104 (Pa. Super. 2000). *See e.g.,* ***Kelly v. Ickes***, 629 A.2d 1002, 1005 (Pa. Super. 1993) ("the trial judge is under a duty, regardless of whether the non-movant files a response, to review the entire record to determine whether a genuine issue of material fact exists, and whether the moving party is entitled to judgment").

> By contrast, under Rule 1035.2 and its corollary, Rule 1035.3, the non-moving party bears a clear duty to respond to a motion for summary judgment. See Pa.R.C.P. 1035.3(a)(1), (2) (requiring non-moving party to file a response "within thirty days after service of the motion identifying ... one or more issues of fact arising from evidence in the record controverting the evidence cited [by the movant] in support of the motion or ... evidence in the record establishing the facts essential to the cause of action"). If the non-moving party does not respond, the trial court may grant summary judgment on that basis. See Pa.R.C.P. 1035.3(d).

Harber, 764 A.2d at 1104 (case citations omitted).

"Clearly, Rule 1035.3 substantially attenuates the duty of the trial court as it existed under former Rule 1035 to conduct an independent review of the record. Accordingly, the trial court's failure to scour the record for every conceivable ground on which to deny

summary judgment cannot serve as a basis for appellate review. ***Id.,*** 764 A.2d at 1105 (citations omitted). "This Court will not act as counsel and will not develop arguments on behalf of [a litigant]. ... It is not this Court's responsibility to comb through the record seeking the factual underpinnings of [a party's] claim." ***Irwin Union Nat. Bank & Trust Co. v. Famous***, 4 A.3d 1099, 1103 (Pa. Super. 2010), *citing* ***Commonwealth v. Mulholland,*** 549 Pa. 634, 648 n. 5, 702 A.2d 1027, 1034 n. 5 (1997) ("this Court will not search every page" of the record "to substantiate a party's incomplete argument").

Pages 2-3 of Ford's Reply Brief objected that Plaintiff's answer consisted only of improper general denials of the motion's factual averments, resulting in Plaintiff admitting the factual averments in the motion. Ford is correct. Philadelphia Civil Rule *1035.2(a)(4), like Pa.R.C.P. 1035.3(a), "forbids the use of general denials and requires specific denials *with reference to the record*" where support for the answer's factual averments or denials may be found. ***Welsh v. Nat'l R.R. Passenger Corp.,*** 154 A.3d 386, 392-393 (Pa. Super. 2017) (emphasis added). Summary judgment may be granted when the non-moving party fails to comply with those rules. *See e.g.,* ***Welsh,*** 154 A.3d at 392-394; ***Sandler v. Nunez,*** 2009 Phila. Ct. Com. Pl. Lexis 188, *3-*4, 2009 WL 3712756 (Sept. 22, 2009), *affirmed mem.*, 15 A.3d 542 (Pa. Super. 2010); ***Dawson v. Utica First Ins. Co.,*** 2011 Phila. Ct. Com. Pl. Lexis 164, *7, *12-*13 & n.3; 2009 WL 8232857 (April 4, 2011) *affirmed mem. sub nom.*, ***Chocolateers, Inc. v. Utica First Ins. Co***, 47 A.3d 1235 (Pa. Super. 2012).

> General denials admit the facts in the motion. "Allegations of fact contained in a motion must be substantively and appropriately responded to except for limited circumstances in which the factually true responsive answer is unknown." ***Sandler v. Nunez***, 2009 Phila.Ct.Com.Pl. Lexis 188 *3, 2009 WL 3712756, *affirmed mem.*, 15 A.3d 542 (Pa. Super. 2010). Consequently, the failure to properly deny the factual averments in a

> summary judgment motion as required by local Rule *1035.2(a)(4), results in the admission of those facts. ***Id.*** at *3-*4. *See* ***Dawson v. Utica First Ins. Co.***, 2011 Phila.Ct.Com.Pl. Lexis 164 *7 (April 4, 2011) ("any allegations of fact not properly responded to will be deemed admitted").

Welsh v. Nat. R.R. Passenger Corp., 2015 WL 13236901 at *4 (C.P. Phila. Oct. 6, 2015). The Superior Court affirmed the summary judgment entered in ***Welsh*** because none of the plaintiff's general denials or explanations were accompanied by a citation to a page in the record that supported those denials or explanations.

Similarly, the Plaintiff's answer to the present summary judgment motion also failed to identify any specific pages in his deposition or expert reports that supported his factual averments and general denials. The Plaintiff had the duty to identify the precise pages in Plaintiff's deposition testimony and in the expert reports that supported his claims. ***Welsh,*** 154 A.3d at 392-393.

Plaintiff admitted the factual averments of Ford's summary judgment motion and did not carry his burden to specifically identify the actual evidence in the record that supported his causes of action. Consequently, Defendant Ford Motor Company is entitled to judgment as a matter of law. ***Keffer,*** 59 A.3d at 636.

BY THE COURT:

LACHMAN, J.