BAR NEWS ITEM

Linda Beard, Prothonotary of Franklin County, Pennsylvania, issued a Memo, on January 8, 1999, concerning computerization for the Prothonotary's Office. According to the Memo, as of January 11, 1999, the said Office will be going on line, with Infocon. This will involve computers, terminals and copiers within the Office, "to make the workload more efficient. It is hoped, stated the Prothonotary, that she would have all indexing information dating back to 1987 to the present time, on the system. If this is not the case, by January 11, 1999, she said, then it will be on the Infocon system, in the very near future. The Prothonotary added that her Office will still have the indexing books with the information in them, for reference, also.

The Prothonotary hopes that the public will benefit from the computer system she will be using, and states that her Office will be glad to train persons interested, on how to use the system within the Office, when it is convenient. There will be four (4) terminals available, for public use.

Also, the Memo states that if, in the future, the Attorneys, Searchers, Banks, Businesses, "Etc.," to whom the Memo was addressed, would be interested in taping into the network, please advise the Prothonotary on this. The Memo also contains some costing information, concerning such taping, and states that those interested may make inquiry of her, about this.

KIMBERLY L. TRACEY, Plaintiff vs. U-HAUL CO., U-HAUL INTERNATIONAL, INC., JIM O'BRIEN, RICK BOWERS, LISLE GRAHAM and SUBURBAN GAS COMPANY, Defendants, C.P. Franklin County Branch, Civil Action - Law, No. A.D. 1995-104

Tracey v. U-Haul Co. et al.

***Factual background**: The Plaintiff's mobile food truck was destroyed by a fire. The Plaintiff contends that the fire was the result of the Defendants' negligence in refueling a propane tank aboard her vehicle. The Plaintiff's vehicle and its contents were taken to a storage facility following the fire. The Plaintiff never paid the storage facility for its service of storing the vehicle for what would have amounted to over four and one-half years. The Defendants made repeated requests to test a propane valve on the tank that was filled. The Plaintiff provided repeated denials to access the valve. The Defendants then obtained a court order requiring the Plaintiff to consent to the testing. Following this Order, the Plaintiff informed the Court that the truck and its contents, including the propane valve, had been sent to a junk-yard and destroyed.*

1. Summary judgment is an appropriate remedy for the spoliation of evidence.

2. A court must consider the following three elements when ruling on a spoliation motion: (1) The degree of fault of the party who altered or destroyed the evidence; (2) The degree of prejudice suffered by the opposing party; and (3) Whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

3. Plaintiff was at fault for the propane valve's loss by failing to adequately compensate a salvager for the service of storing her vehicle. Plaintiff failed to take adequate precautions to avoid the spoliation of evidence.

4. Defendants' inability to test a key piece of evidence (the propane valve) severely prejudiced their potential defense.

5. Further, summary judgment is an appropriate remedy for the Plaintiff's failure to produce any evidence linking the Defendants' alleged negligence to her loss.

Kimberly L. Tracey, Pro Se
John R. Ninosky, Esq., Counsel for Defendants U-Haul Co., U-Haul International, Inc., Jim O'Brien, Rick Bowers and Lisle Graham
Thomas J. McGarrigle, Esq., Counsel for Defendant Suburban Propane and Gas Co.

OPINION AND ORDER

WALSH, J., December 22, 1998:

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff initiated this matter by the *pro se* filing of a Complaint on February 21, 1995, seeking a recovery sounding *entirely* in

negligence.[1] The Plaintiff's vehicle (a custom mobile food vehicle) caught fire on July 9, 1994. It is alleged that the Defendants (U-Haul Co., U-Haul International, Inc., Jim O'Brien, Rick Bowers and Lisle Graham) negligently refueled a propane tank aboard the Plaintiff's vehicle just the day before the conflagration. She further alleges that she returned three times (although the Defendants have denied a third visit) to the U-Haul establishment at 1795 Lincoln Way East in Chambersburg, Pennsylvania, to have a valve on that same propane tank tightened. It is alleged that *each time* she returned, she complained that the valve had burst causing fuel to spill. On the following day, she alleges that the propane valve burst one last time causing her vehicle to be engulfed in flames and destroyed. It is now that same propane valve that presently brings this matter before the Court.

During the parties' pre-trial posturing, the propane valve remained with the truck as it was stored at Rife Motor Co. in Chambersburg, Pennsylvania. By letters dated May 23, 1995, and July 9, 1997, the Defendants requested the Plaintiff's permission to test the propane valve. The Plaintiff failed to respond to either request. Moreover, at an intervening meeting on or about April 9, 1997, at which the

[1] Specific allegations from the Plaintiff's Complaint follow:

"REQUEST & MOTIONS"

(a). The plaintiff states that as a result of U-HAUL Co. employees [sic] negligence to wit; their gross negligence, plaintiff's food truck was caused to catch fire and was caused to burn including all of the food service equipment.

(b). That U-HAUL Co. employees, namely RICH [sic] BOWERS, MGR. and LISLE GRAHAM were grossly negligent in the manner in which they put the propane gas in the propane gas tank on PORKIES PLACE. To wit: A 100 pounds [sic] propane gas tank. RICK BOWERS and LISLE GRAHAM filled the said 100 pounds [sic] tank with propane gas without "having first removed the tank from the truck and having weighed it". [sic] (emphasis in original).

****

(e). That bad faith and gross negligence was further shown by the named defendants when they failed to remove from PORKIES PLACE (MOBILE TRUCK) the 100 pound propane gas tank for inspection prior to over filling it.

(f). The plaintiff contends that as a result of the gross negligence and bad faith on the part of U-Haul CO. And its employees RICK BOWERS and LISLE GRAHAM, the plaintiff moves the Court to award her in Compensatory Damages the amount of Three Hundred Thousand Dollars.

Plaintiff and Defendants' counsel were present, the Plaintiff again denied a request to perform destructive testing of the valve. Following these informal and unsuccessful attempts, the Defendants filed a Motion to Compel the valve's testing. The Court thereafter issued a rule which, on default of the Plaintiff, was made absolute by Order dated November 26, 1997; and the Plaintiff was ordered to allow the testing. The Defendants again futilely attempted to arrange a time that the testing could be completed. It was not until January of 1998 that the Plaintiff informed Defendants' counsel of the vehicle and propane valve's movement from Rife Motor Co. Finally, in a document the Plaintiff submitted and filed on March 20, 1998, she informed the Court that the propane valve, along with her truck, had been sent to a "junk-yard" in Hagerstown, Maryland, and destroyed.

Before this Court for disposition is the Defendants' unverified[2] Motion for Summary Judgment filed on July 1, 1998. On July 31, 1998, Plaintiff filed a document entitled *"Plaintiff's Response to Defendants* [sic] *Motion for Summary Judgment & Plaintiff's Motion to Strike and Dismiss Defendants* [sic] *Motion for Summary Judgment & Plaintiff's Repeated Motion for Judgment in Her Favor" Submitted in Good Faith "In Forma Pauperis"* (hereinafter referred to as "Plaintiff's Response"). At argument, the Plaintiff noted her filing of a *"Plaintiff's Renewal of Plaintiff's Motion of April 9, 1997 to Accelerate Her Request for for* [sic] *Trial by Jury and Motion to Grant Summary Judgment in Plaintiff's Favor" Submitted in Good Faith In Forma Pauperis* (hereinafter referred to as "Plaintiff's Motion for Summary Judgment"). Although the record copy of this last document does not bear the Prothonotary's stamp, the Court notes that the Defendants filed an *Answer to Plaintiff's Motion* on March 27, 1998. On agreement of the parties at oral argument, the Court will treat the foregoing as Cross-Motions for summary judgment and will dispose of both Motions together.

[2] Local practice requires:

> Motions made, Petitions presented and Rules taken, unless permitted by the Court to be made or taken orally, shall be in writing and shall be verified if the facts do not appear on the face of the record, in the papers on file, or have not been agreed upon by the parties in writing.

39th Jud. Dist. C. R. No. 39-206.2 (emphasis added). The Court notes that to disregard this procedural oversight would not affect the substantial rights of either party. *See* Pa.R.C.P. No. 126.

DISCUSSION

> [S]ummary judgment is properly entered where the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits demonstrate that no genuine, triable issue of fact exists and that the moving party is entitled to judgment as a matter of law. The court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party. Moreover, the burden is on the moving party to prove that no genuine issue of material fact exists.

Long v. Yingling, 700 A.2d 508, 512 (Pa. Super. 1997) (citations omitted); *see also* Pa.R.C.P. No. 1035.2. "Oral testimony alone, either through testimonial affidavits or depositions, of the moving party or the moving party's witnesses, even if uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact." Pa.R.C.P. No. 1035.2, Note (*citing Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932) *and Penn Center House, Inc. v. Hoffman*, 520 Pa. 171, 553 A.2d 900 (1989). "Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law." *Electronic Laboratory Supply Co. v. Cullen*, 712 A.2d 304, 307 (Pa. Super. 1998).

The Defendants seek a favorable entry of summary judgement based upon their allegation that the Plaintiff failed to preserve crucial evidence. They claim an extreme prejudice because of their inability to test a key piece of evidence, the propane valve. Their position is advanced upon the standard set forth in *Schroeder v. Com., Dept. of Transp.*, Pa. , 710 A.2d 23 (1998). In assessing an appropriate sanction for the spoliation of evidence, our Supreme Court found relevant the following three factors:

> (1) The degree of fault of the party who altered or destroyed the evidence;
>
> (2) The degree of prejudice suffered by the opposing party;
>
> (3) Whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where

> the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Schroeder at , 710 A.2d at 27 (citation omitted) *citing Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3d Cir. 1994). Appropriate sanctions range from a negative inference jury instruction to summary judgment. *See Schroeder, supra.*

Specifically, in *Schroeder*, the Supreme Court denied the entry of summary judgment despite the plaintiff's spoliation of evidence. Although resolving the first factor in the defendants' favor, the Court denied summary judgment because the plaintiff's claim was based upon a *design defect* as opposed to a product malfunction case. Therefore, the Court reasoned, the defendants were not severely prejudiced by the spoliation of evidence because the defendants "can comparably test and examine other trucks for the alleged design defect." *Schroeder* at , 710 A.2d at 27-28.

Turning to the case at bar, it is asserted that the Plaintiff is solely responsible for the destruction of the vehicle and propane valve. This argument is bolstered by a claim that three letters were allegedly sent to the Plaintiff informing her of the impending removal of her vehicle from Rife Motor Co. and its final destruction. However, the Court notes that the Plaintiff has specifically denied receipt of any of the letters. *See* Plaintiff's Response ¶¶ 6, 7 and 8.[3] In fact, the third letter, a notice allegedly sent by the Pennsylvania Department of Transportation, does not even indicate that it was addressed to the Plaintiff. *See* Exhibit F to Defendant's Motion for Summary Judgment.[4]

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[3] While it is acknowledged that the mail-box rule may permit the inference that a properly addressed letter was received despite a recipient's denial of receipt, *see Samaras v. Hartwick*, 698 A.2d 71 (Pa. Super. 1997), this inference cannot be utilized in the context of this Motion for Summary Judgment. To do so would contravene the principleestablished by *Nanty-Glo, supra*, because the credibility of these witnesses would be based, not upon their demeanor from a witness stand, but rather upon cold affidavits.

[4] This exhibit is a letter dated December 1, 1995, from the Department of Transportation. The letter advises the recipient that the Plaintiff's vehicle has been declared abandoned by the Chambersburg Police Department. The letter further goes on to outline a procedure that the vehicle's owner must comply with to reclaim the vehicle. Unfortunately, the addressee of this letter is Rife Motor Co.; the Plaintiff's name and address only appear in a section entitled OWNER. The letter does not indicate in any way that the Plaintiff received a copy.

During argument, the Plaintiff suggested that she had done all that was required of her to preserve her vehicle. To Plaintiff's Response, she attached a document indicating that she paid a fee "to stop abandoned vehicle papers." *See* Plaintiff's Response Exhibit No. 3. Although the Plaintiff did pay the nominal fee, she failed to present any evidence that she was paying any storage fees for the vehicle. Twenty-Five Dollars ($25.00) seems to this Court to be an entirely inadequate fee for what would now amount to almost four and one-half years of storage.[5] It is only reasonable to expect, absent any evidence to the contrary, that a merchant be compensated for such services. The Plaintiff must bear the responsibility for failing to take greater precautions to avoid the evidence's loss and/or destruction by inadequately compensating the storage facility. *See generally Smitley v. Holiday Rambler Corp.*, 707 A.2d 520 (Pa. Super. 1998) (Vehicle destroyed by salvager despite plaintiff's instruction to save; Superior Court agreed that plaintiff's failure to take greater precautions to preserve vehicle is a factor to consider for dismissal; case remanded to permit plaintiff to respond to the summary judgment motion on the spoliation claim). During argument, the Plaintiff alluded to an agreement reached between her and Rife Motor Co. concerning the vehicle's storage. Without any further evidence of this alleged agreement, it cannot be considered by the Court. The Plaintiff's alleged receipt of any letters is not material because if she wanted her case to successfully proceed, she should have unilaterally taken greater precautions to preserve key evidence without the need of any reminders. *See Smitley, supra.*

Turning now to the second prong, the Court must consider the degree of prejudice suffered by the Defendants following the loss and/or presumed destruction of the propane valve. To mount a proper defense, the Defendants must be able to test the valve for any product malfunctions, product alterations or possible product abuse to name a few possible scenarios. Without the valve, their defense undoubtably grinds to a halt. Unlike in a case where a design defect is alleged, to properly prepare a defense the Defendants can only test ***this*** propane valve and not a number of others produced from the same "mold." Because the propane valve has been destroyed, the

[5] On July 9, 1994, following the fire, the Plaintiff's vehicle was towed to Rife Motor Co. *See* Defendants' Motion for Summary Judgment at ¶ 20; Plaintiff's Response at ¶ 6.

Defendants are greatly prejudiced by their inability to prepare an adequate defense.[6]

Considering the Plaintiff's degree of fault, the prejudice suffered by the Defendants and that no material issues of fact exist, the Court believes that the only appropriate sanction is to grant summary judgment. Without this vital piece of evidence, the Defendants cannot know in which direction to proceed. Although the Defendants may have breached a duty they owed to the Plaintiff in refueling her propane tank, it may also be conjectured that the Plaintiff herself altered the valve's connection between her two, and possibly three return visits to the U-Haul establishment; or the valve may have been abused to such a degree that is was left it in a hazardous condition. Given the several plausible permutations that could have occurred, any order requiring the Defendants to continue to defend this action would be entirely unreasonable. Even a negative inference jury instruction could not cure the Defendants' inability to inspect the valve. While the Court could instruct a jury that it may infer that the valve would have been harmful to the Plaintiff's case, this sanction overlooks the possibility that the Plaintiff's own intervening misuse or superseding abuse caused her loss.

The record, viewed in the light most favorable to the non-moving party, indicates that (1) the Plaintiff failed to take adequate precautions to avoid the propane valve's destruction; (2) the Defendants have been severely prejudiced by its destruction because they are unable to prepare an appropriate defense; and (3) granting summary judgment is the only sanction that will avoid substantial unfairness to the Defendants. Upon the forgoing analysis, the Defendant's Motion for Summary Judgment will be **GRANTED**.

The Court will now turn to the Plaintiff's Motion for Summary Judgment. Throughout her Motion, the Plaintiff recapitulates the circumstances surrounding the propane valve's disappearance and presumed destruction. It is only in her final two paragraphs that she sets forth her request for summary judgment. Those paragraphs follow:

[6] Moreover, it is important to note, that the Defendants were earlier prejudiced (during the valve's ***existence***) by the Plaintiff's repeated denials to access the valve for testing.

(g). That it is regretable [sic] that such actions has [sic] taken place, yet the same should not be prejudiced to the plaintiff because the plaintiff has established her case and has proven that she is so entitled to the relief sought in the original complaint.

Wherefore [sic] the plaintiff respectfully moves this Court that an order will issue forthwith secun dum [sic] legum [sic] ordering that the motion heretofore submitted April 9, 1997 requesting accelerating and acceleration of her motion for a jury trial and or judgment to wit; Summary Judgment be rendered in her favor be granted.

Plaintiff's Motion for Summary Judgment. Although requested, the Plaintiff has failed to state any basis that would establish her entitlement to a judgment as a matter of law. *See* Pa.R.C.P. No. 1035.2. Having neglected to do so, this Court has no choice but to **DENY** her Motion.

In an attempt to decide all outstanding Motions, the Court acknowledges that within Plaintiff's Response, she has included a repeated motion for "judgment in her favor." It is noted that the only relief that the Plaintiff sought is that the Defendants' Motion be denied. For the reasons set forth previously in this Opinion, the request for "judgment in her favor" included within the Plaintiff's Response will be **DENIED**.

As a supplementary comment, this Court also notes that summary judgment may be granted:

> if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2 (2). Without the truck, the propane tank or the propane valve, the Plaintiff is unable to establish her case by a preponderance of the evidence. *See Smitley* at 526 (Summary judgment against a negligence allegation appropriately entered where plaintiff's expert "was unable to determine the cause of the fire with a reasonable degree of certainty.") Because this case is one based

entirely upon the Defendants' alleged negligence, it would have been proper to grant summary judgment against the Plaintiff for her failure to produce any expert report or other evidence linking the Defendants' negligence to her loss.[7] Without such evidence she would be unable to sustain her burden at trial and therefore, summary judgment is an appropriate remedy.

The Court will enter an appropriate Order.

ORDER OF COURT

December 22, 1998, upon consideration of the Plaintiff's and Defendants' cross-motions for summary judgment, **IT IS HEREBY ORDERED**

(1) that the Defendants' Motion for Summary Judgment is **GRANTED**;

(2) that the Plaintiffis Motion for Summary Judgment is **DENIED**; and

(3) that the request for "judgment in her favor" contained within the Plaintiff's Response is **DENIED.**

[7] Following argument on November 5, 1998, the Plaintiff filed in the Prothonotary's office a document entitled "CHAMBERSBURG FIRE DEPARTMENT ¾ INCIDENT REPORT." Within this document, the cause of the fire is directed to a propane cylinder but unfortunately, the writer does not describe how he arrived at this conclusion. One possibility is that he simply spoke with the Plaintiff who conveyed her belief and suspicion. For this reason, this document cannot be equated to an expert report.