

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

WAYNE D. RAMSDELL,

Plaintiff

v.

CHAD CUNNINGHAM et al.,

Defendants

) CASE NO. 12-CV-781326

) JUDGE PAMELA A. BARKER

) OPINION AND JOURNAL ENTRY ON
) MOTION FOR PARTIAL SUMMARY
) JUDGMENT RE: SPOILIATION CLAIM
) BY DEFENDANT CHAD CUNNINGHAM
)
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This matter is before the Court on the Motion for Partial Summary Judgment Re: Spoliation Claim By Defendant, Chad Cunningham, filed November 7, 2012 (hereinafter "Cunningham's Motion"), and the Brief in Opposition to Defendant Chad Cunningham's Partial Motion for Summary Judgment On Issue Of Spoliation filed by Plaintiff, Wayne Ramsdale on December 28, 2012 (hereinafter "Plaintiff's Opposition Brief").

Civ. R. 56(C) provides in relevant part as follows:

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. 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.

"In order to properly grant a summary judgment motion pursuant to Civ. R. 56(C), a trial court must review the pleadings, deposition testimony, and other evidentiary materials and determine that: **** (1) No genuine issue as to any material fact remains to be litigated; (2) the



moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; ***.” *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless v. Willis Day Warehousing Company, et al.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46, 47. Civ. R. 56(E) requires that the adverse or non-moving party set forth specific facts showing that there is a genuine issue for trial and the non-moving party must so perform if he is to avoid summary judgment. *Id.*, 54 Ohio St.2d at 65.

“Although a party seeking summary judgment must inform the trial court of the basis for its motion, the movant need not necessarily support its motion with evidentiary materials which directly negate its opponent’s claim. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323. Rather, the movant may sometimes meet its burden by pointing out to the trial judge ‘that there is an absence of evidence to support the nonmoving party’s case.’ *Id.* at 325. See, also, *Hodgkinson v. Dunlop Tire & Rubber Corp.* (1987), 38 Ohio App.3d 101, 526 N.E.2d 89.” *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

Civ. R. 56(C) provides that a written admission is sufficient to grant a motion for summary judgment, among other things. A failure to answer to a written request for admission is sufficient to satisfy the requirements of Civ. R. 56 that an admission be made in writing.

Where a party files a written request for admission a failure of the opposing party to timely answer the request constitutes a conclusive admission pursuant to Civ. R. 36 and also satisfies the written answer requirement of Civ. R. 56(C) in case of summary judgment. *Klesch v. Reid*, 95 Ohio App. 3d 664, 643 N.E.2d 571, 1994 Ohio App. LEXIS 3774 (8th Dist. 1994).

It is settled law in Ohio that unanswered requests for admission render the matter requested conclusively established for the purpose of the suit. *Id.*, 95 Ohio App.3d at 674, citing *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 20 OBR 364, 485 N.E.2d 1052. A motion for summary judgment may be based on such admitted matter. *Klesch, supra*, 95 Ohio App.3d at 674. Failure to respond is not excused because the matters requested to be admitted are central or noncentral to the case or must be proven by the requesting party at trial. *Id.*, citing *Youssef v. Jones* (1991), 77 Ohio App.3d 500, 602 N.E.2d 1176.

Attached to Cunningham's Motion is a pleading captioned "Defendant Chad Cunningham's Combined First Set Of Interrogatories And Request For Admissions Propounded To Plaintiff Wayne D. Ramsdell". There is no dispute that this pleading was served upon Plaintiff on September 5, 2012 and that in relevant part, Plaintiff did not timely respond to the Requests for Admissions, to include Request for No. 1, which reads: "You have no evidence establishing that any physical evidence pertaining to this matter was destroyed by Chad Cunningham." (See Plaintiff's Motion For Leave To Respond To Defendants' Admissions Instanter filed December 28, 2012, which was denied by the Court.) Accordingly, for purposes of ruling on Cunningham's Motion, it is conclusively established that Plaintiff has no evidence establishing that any physical evidence pertaining to this matter was destroyed by Defendant Cunningham.

The elements of a claim for spoliation of evidence are: (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts. *Smith v. Howard* (1993), 67 Ohio St.3d 28, 615 N.E.2d 1037, 1993 Ohio LEXIS 1562. Ohio courts have declined to extend spoliation claims beyond the destruction of physical evidence. *Fehrenbach v. O'Malley*, 2011 Ohio 5481, para. 31, 2011 Ohio App. LEXIS 4540 (1st Dist. 2011), *discretionary appeal not allowed by* 2012 Ohio 896, 2012 Ohio LEXIS 575 575 (Ohio, Mar. 7, 2012).

By Plaintiff's failure to respond to Defendant Cunningham's Request for Admission No. 1, and for purposes of Cunningham's Motion, it is conclusively established that Plaintiff has no evidence to prove the third element of a claim for spoliation, i.e., the destruction by Defendant Cunningham of physical evidence designed to disrupt the Plaintiff's case. In Plaintiff's Opposition Brief, he cited to portions of the deposition of Darlene Stone and directed this Court to a "FULL copy" of her deposition filed with the Court, in support of his argument that she "witnessed officers of Defendant VFW caucusing about the attack on the Plaintiff in order to concoct a story about why they had continually permitted defendant Chad Cunningham to enter into the VFW Hall and consume alcohol – while knowing that he was a serious danger to other members of the post"; and that "[t]here is little dispute that the actions of the officials at the VFW Hall were designed to create a fake explanation and/or justification of what happened to the Plaintiff." (Plaintiff's Opposition Brief, at page 1-2.) Even if this Court was to consider the evidence Plaintiff directs this Court to consider, i.e., the deposition

testimony of Darlene Stone, it concerns the actions of the officers of co-defendant VFW Post #2533, and not the actions of Defendant Cunningham. Accordingly, Defendant Cunningham's Motion for Partial Summary Judgment Re: Spoliation Claim is **GRANTED**.

Pamela A. Barker
Judge Pamela A. Barker

RECEIVED FOR FILING

JAN 15 2013

CUYAHOGA COUNTY
CLERK OF COURTS
By [Signature] Deputy