

Lorrie Platt

From: Samantha Puckett <spuckett@brandtapply.com>
Sent: Friday, December 18, 2020 11:25 AM
To: RulesComment
Subject: Comment on MSJ rule
Attachments: MAO Signed ltr to counsel and D_s Opp to Mot to Strike etc. 20201026.PDF; Court's order re denied Pltfs Motion to Strike stmt of material facts.pdf

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Hello,

We have found that the Summary Judgment rules leave some room for confusion, specifically pertaining to responses to oppositions and replies to responses. In a recent case, the plaintiff in an opposition to a motion for summary judgment responded to the defendant's material facts with new facts, so we replied to address these new facts. The plaintiff moved to strike, and we opposed. Our opposition is attached. The court granted our opposition in the attached order, stating that the formalities of the rule are less important than an understanding of the material facts.

We would like to see more clarity in the rule as to the procedure for responding and replying after a summary judgment motion has been opposed. Also, we would like to know whether responses beyond "admitted" or "denied" are allowed in objecting to a statement of material facts.

Thank you,

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October 26, 2020

Via First Class Mail

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Re: Chun-Ling Jocelyn Chen v. Pat's Peak, Inc.
Docket No. 217-2019-CV-00413

Dear Counsel,

Enclosed with regard to the above-referenced matter, please find the following:

- 1. Defendant's Opposition to Plaintiff's Motion to Strike Defendant's Filing of October 13, 2020, Described as "Defendant Statement of Material Facts Not in Dispute with Plaintiff's Responses and Defendant's Replies".**

Please contact our office if you should have any questions.

Sincerely,

//Timothy W. Tapply//

Timothy Tapply
ttapply@brandtapply.com

Encs.

STATE OF NEW HAMPSHIRE

Merrimack, SS

SUPERIOR COURT

Docket No. 217-2019-CV-00413

CHUN-LING JOCELYN CHEN

v.

PAT'S PEAK, INC.

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE
DEFENDANT'S
FILING OF OCTOBER 13, 2020, DESCRIBED AS "DEFENDANT STATEMENT OF
MATERIAL FACTS NOT IN DISPUTE WITH PLAINTIFF'S RESPONSES AND
DEFENDANT'S REPLIES

Now comes the Defendant, Pat's Peak, Inc., in the above-captioned action, and hereby opposes the Plaintiff's motion to strike the Defendant's October 13, 2020 pleading "Defendant's Statement of Material Facts Not In Dispute with Plaintiffs Responses and Defendant's Replies."

As grounds therefore, Defendant states the following:

1. On September 1, 2020, Defendant moved for summary judgment regarding Count III of the Plaintiff's Complaint regarding negligent training or supervision. On that date, a copy of the Defendant's Statement of Material Facts Not in Dispute was sent to counsel for the Plaintiff by first class mail and email pursuant to Superior Court Rule 12(g)(2)(b).
2. On September 30, 2020, Plaintiff sent an Opposition to the Defendant's motion for summary judgment to the Defendant. Included with the Plaintiff's Opposition was a document titled "Defendant Pat's Peak, Inc.'s Statement of Material Facts Not in Dispute, with Plaintiff's Responses."

3. Several of the Plaintiff's "responses" incorporated additional facts. For example, in response to Defendant's material fact number 24, the Plaintiff stated as follows:

24. *The Plaintiff waited to signal the lift operator until she reached the sign stating it was safe to lift up the restraint bar and made eye contact with the lift operator. Plaintiff's Deposition, 112:20-24. The Plaintiff testified that she had already raised the bar on the chairlift and was close to the unload area when she signaled the chairlift operator. She claims that she made eye contact with the chairlift operator, but was unable to describe him other than by stating that he was not Asian. Plaintiff's Deposition, 113:20-24, 114:1-10; 121:19-24; 122:1-2.*

Plaintiff's Response: *The Plaintiff signaled the lift operator and started waving and yelling at the moment that she saw him, right at the sign that said it was safe to lift the safety bar up. Plaintiff's Exhibit 3, Deposition, 112:20-24.*

In response to Defendant's material fact number 25, the Plaintiff stated as follows:

25. *The Plaintiff could not describe the lift operator at her deposition other than noting that he was male and under 50 years old. Plaintiff's Deposition, 113:9-13. The Plaintiff testified at her deposition that the accident occurred at night while it was dark out, and she was unable to identify the top of the Peak Double chair when shown a photo of the same because it was dark out when the loss occurred. Plaintiff's Deposition, 119:10-19.*

Plaintiff's Response: *The Plaintiff made eye contact with the lift attendant, and she and her spouse both saw the lift attendant nod his head toward them. Plaintiff's Exhibit 3, 121:24-125:4.*

4. The Plaintiff included similar "replies" to 19 of the Defendant's material facts.
5. Superior Court Rule 12(g)(3) provides as follows for a non-moving party in opposing a motion for summary judgment:

(a) Response to the Motion and the Statement of Material Facts. The non-moving party shall have 30 days after filing to object to a motion for summary judgment, unless another deadline is established by order of the court. An objection to a motion for summary judgment shall include a response to the moving party's statement identifying the facts the moving party contends are material and undisputed. *In its response, the nonmoving party shall indicate which, if any, of the purported undisputed facts identified in the moving party's statement the nonmoving party contends are in dispute.*

The form of the nonmoving party's response shall be consistent with the requirements of

paragraph b. For purposes of summary judgment, any fact set forth in the moving party's statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph.

6. (c) Statement of Additional Material Facts. Along with its response to the moving party's statement of facts, the nonmoving party may assert an additional statement of material facts with respect to the claims on which the moving party seeks summary judgment, each to be supported with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents.
7. Rule 12(g)(3) clearly contemplates that the response to the moving party's statement of material facts and the statement of additional material facts are distinct documents.
8. Pursuant to Rule 12(g)(3)(a), the non-moving party has the opportunity to admit or deny that the facts are not in dispute. Rule 12(g)(3)(a) does not provide for additional commentary on the moving party's material facts beyond that they are admitted or denied as not in dispute.
9. Pursuant to Rule 12(g)(3)(c), the non-moving party has the opportunity to assert a separate, additional statement of material facts it claims are not in dispute. This separate additional statement of material facts is the procedurally correct manner in which the non-moving party can assert additional facts it believes are material to the moving party's claims for which it has moved for summary judgment.
10. The Plaintiff's September 30, 2020 "Defendant Pat's Peak, Inc.'s Statement of Material Facts Not in Dispute, with Plaintiff's Responses" constitutes a procedurally improper hybrid of the pleadings described in Rule 12(g)(3)(a) and 12(g)(3)(c), given that it

incorporates additional facts rather than merely admitting or denying whether the material facts asserted by the Defendant are not in dispute.

11. Rather than use this court's valuable resources by moving to strike this improper pleading, as Plaintiff's counsel has done here, Defendant elected to respond to the Plaintiff's pleading as drafted.
12. On October 13, 2020, the Defendant filed a document titled "Defendant's Statement of Material Facts Not in Dispute with Plaintiffs Responses and Defendant's Replies." In this pleading, the Defendant noted which facts were commented upon by the Plaintiff but not actually denied as not in dispute. As stated in paragraph five *supra*, "any fact set forth in the moving party's statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph."
13. In the same pleading, in accordance with the format in which the Plaintiff's pleading was drafted, the Defendant replied to several of the Plaintiff's responses which asserted additional material facts in accordance with Superior Court Rule 12(g)(4), which states as follows:

(4) The Moving Party's Reply to Additional Material Facts. The moving party shall reply to the opposing party's additional statement of material facts within 20 days of filing and in the manner required by Paragraph (g)(3), resulting in a final, single consolidated document for the court's consideration, unless the obligation to send the additional statement of material facts in electronic form has been excused. For purposes of summary judgment, any fact set forth in the opposing party's additional statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph.

14. Not only is a reply contemplated by Rule 12(g)(4), it is compulsory under the Rule that the moving party reply to the additional material facts asserted by the non-moving party.
15. The Defendant qualified each such reply with this language “**Defendant’s Reply:** To the extent that the Plaintiff alleged additional facts in this statement, the Defendant replies as follows:” to remain in compliance with this court’s rules.
16. Plaintiff’s responses did incorporate additional material facts, and Defendant was required by Rule 12(g)(4) to respond accordingly.
17. Defendant’s position is that its October 13, 2020 pleading was not procedurally improper despite the fact that the Plaintiff’s September 30, 2020 pleading was procedurally improper. Accordingly, the Defendant requests that the court consider the substance, rather than the form, of these pleadings in ruling on its motion for summary judgment.
18. Further, the New Hampshire Supreme Court recently announced that it is taking comments on the applicability of this very rule. See **Exhibit 1**, Public Hearing Notice dated October 19, 2020. Given that this rule is under review and scheduled for public hearing on December 4, 2020, denying the Plaintiff’s motion to quash would be in the interests of fairness.
19. The interests of fairness would also disfavor an opposing party responding to a moving party’s statement of material facts with additional facts, but then claiming that they have pled no new facts in an effort to stop the moving party from responding.

Wherefore, the Defendant respectfully requests that the court deny the Plaintiff’s motion to strike the Defendant’s October 13, 2020 pleading “Defendant’s Statement of Material Facts Not in Dispute with Plaintiffs Responses and Defendant’s Replies.”

Respectfully submitted,
Pat's Peak, Inc.
By Its Attorney,

/s/ Timothy W. Tapply

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, I served a copy of the foregoing pleading via first class mail upon all counsel of record as follows:

Theodore R. Whittenberg, Esq.
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Hampton NH 03842

Randy M. Hitchcock, Esq.
Whitfield Sharp & Hitchcock LLC
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Marblehead, MA 01945-2840

/s/ Timothy W. Tapply

Timothy W. Tapply

Clerk's Notice of Decision
Document Sent to Parties
on 11/16/2020

STATE OF NEW HAMPSHIRE

Merrimack, SS

SUPERIOR COURT

11-16-2020

Docket No. 217-2019-CV-00413


DENIED. The court can easily understand what facts are disputed and what facts are contested. While one can debate the formalities of the rule, what is important is the ability to end up with a clear understanding of the undisputed material facts.

CHUN-LING JOCELYN CHEN and

KAI CHEN

v.

PAT'S PEAK, INC.


Honorable Andrew R. Schulman
November 16, 2020

**PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S
FILING OF OCTOBER 13, 2020, DESCRIBED AS "DEFENDANT STATEMENT OF
MATERIAL FACTS NOT IN DISPUTE WITH PLAINTIFF'S RESPONSES AND
DEFENDANT'S REPLIES**

The Plaintiff moves this Court to strike, in its entirety, the Defendant's filing on October 13, 2020, labelled as, "Defendant's Statement of Material Facts Not In Dispute with Plaintiff's Responses and Defendant's Replies". As grounds, the Plaintiff states that the procedure and process of filing a Statement of Facts in conjunction with a Motion for Summary Judgment is set forth in the N.H. Rules of the Superior Court, Rule 12(g). The rule states that the non-moving party should submit a response to any purported facts which the non-moving party contends are in dispute. See Rule 12(g)(3)(a). In addition, the non-moving party "may" assert an additional statement of material facts in addition to their responses. See Rule 12(g)(3)(c).

On September 30, 2020, the Plaintiff filed a single document with the Court with the allowed responses to the Defendant's purported facts. See Rule 12(g)(3)(d). There was no additional statement of facts submitted by the Plaintiff.

The only allowed "reply" by the moving party under Rule 12(g)(4), is if the non-moving party has submitted an additional statement of material facts.

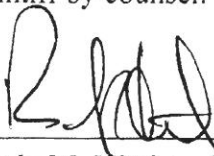
The Plaintiff has not submitted any additional Statement of Material Facts in response to

the Defendant's Motion for Summary Judgment, and has only responded to those facts which she contends are in dispute within the Defendant's Statement of Facts.

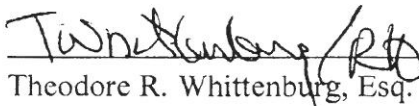
There are no provisions in Rule 12(g) for the Defendant to submit "replies" to the Plaintiff's responses, and the Plaintiff respectfully requests that the Defendant's filing of October 13, 2020, be stricken for failure to comply with the Rule. The Plaintiff requests also that the Defendant's Motion for Summary Judgment be denied.

Respectfully Submitted,
Plaintiff by counsel:

Date: October 23, 2020



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CERTIFICATE OF SERVICE

I certify that on October 23, 2020 a copy of the Plaintiff's Motion to Strike Defendant's Filing of October 13, 2020, Described as Defendant Statement of Material Facts Not in Dispute with Plaintiff's Responses and Defendant's Replies, was sent via first class mail to Timothy Tapply, Esq.

/s/ Theodore R. Whittenburg

Theodore R. Whittenburg, Esquire

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