



## **The Risks of Overestimating the Sham Affidavit Doctrine**

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The sham affidavit doctrine prevents a party who has been deposed from introducing an affidavit that contradicts that person's deposition testimony without explanation because a nonmoving party may not manufacture a dispute of fact merely to defeat a motion for summary judgment.

However, courts have concluded that the sham affidavit doctrine does not bar "embellishment" or "editorializing" and will not bar an affidavit when an issue was not fully explored in the deposition or the deponent's responses were ambiguous. *See Fleming v. Costco Wholesale Corp.*, 2020 U.S. Dist. LEXIS 83541, 2020 WL 2404907.

In *Fleming*, a customer slipped and fell in the bread and produce section while shopping with her niece. The plaintiff's deposition testimony was as follows:

Q: [A]t any time before you left to go downstairs to the cashier, did you look at that area where you slipped?

A: No.

Q: Can you tell me anything about what it looked like in that area that day after your accident before you went downstairs?

A: I didn't look back there.

Q: So you have no observations?

A: No observations.

Plaintiff's niece testified that the plaintiff fell on "something red . . . I'm just assuming it probably was a cake; I don't know."

In opposition to summary judgment, the plaintiff and her niece submitted affidavits executed after their depositions. In the plaintiff's affidavit, she stated that she slipped on "pieces of cake, possibly carrot cake or red velvet cake, and maybe some pieces of red fruit or cake decoration as well." In addition, she stated that an

employee's photograph showed "at least 2 of the pieces of the red cake that were on the floor before and at the time of my accident" although "some of the substance ended up on my clothing after I fell in it and was struggling to get off the floor."

Plaintiff's niece stated in her affidavit that she was "certain" that her aunt slipped on "the same substance that existed on the floor at the time [the plaintiff] complained to the store employee" about the red cake. She further stated that her aunt "slipped and fell on a red substance on the floor that looked like pieces of cake and a partial piece of strawberry."

The Fleming court refused to strike the affidavits, concluding that they embellished rather than contradicted the deposition testimony by giving new detail to plaintiff's previous vague answers and certainty to her niece's former ambivalence.

Even more recently, the United States Court of Appeals for the Fifth Circuit reached a similar conclusion in Seigler v. Wal-Mart Stores Tex., 2022 U.S. App. LEXIS 9146, \_\_ F.4th \_\_, 2022 WL 1010684. In Seigler, the Fifth Circuit reversed and remanded a summary judgment award and held that the district court abused its discretion in applying the sham affidavit doctrine.

Seigler involved a slip and fall in the store's deli section. The amended complaint referred to the cause of the fall as "grease or a similar slick substance." At her deposition, the plaintiff was asked to describe the cause of her fall. She answered, "some sort of greasy liquid." When asked about its color, she answered "yellowish." When asked again about the cause of her fall, she described the spill as a "liquid" that "smelled like chicken or like something baked or cooked" and said the substance was "greasy." She also testified that the substance "was on my tennis shoe." When asked if any other part of her body or clothes was "touched by" the substance, she answered, "I don't know." She also answered, "no" when asked if she had "personal knowledge" or "evidence" of either how the grease got on the floor or how long it was on the floor.

With her response to Wal-Mart's motion for summary judgment, the plaintiff submitted an affidavit which stated "the substance appeared to be chicken grease or chicken residue. When I touched it, the residue was cold and congealed, appearing like it had been there long enough to cool off and thicken up."

In examining the discrepancy regarding the temperature and consistency of the substance, the court disagreed that there was a contradiction, stating:

First, we agree with Seigler that a non-lawyer deponent is not expected to understand the legal significance of the terms "personal knowledge" and "evidence." Second, while the discrepancies between Seigler's deposition and affidavit may call her credibility into question, we do not think they rise to the level of a contradiction or an inherent inconsistency because the testimony can be reconciled.

The court further explained that the descriptions of the substance were not mutually exclusive, nor were they necessarily contradictory since it is possible that "some sort of greasy liquid" could also be "cold," "congealed" and "thicken[ed] up." Thus, the court concluded that "[i]n light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made earlier."

Fleming and Seigler illustrate the importance of fully exploring issues during depositions and clarifying deponents' ambiguous responses. Failing to do so and overestimating the sham affidavit doctrine leaves the door open for plaintiffs to submit affidavits which "embellish" rather than contradict their prior deposition testimony and, thus, defeat summary judgment.