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# Recent Developments: Pittman v. Atlantic Realty Co.: Court of Appeals of Maryland Rejects The "Sham Affidavit" Rule and Reinforces the Separate Functions of the Judge and Jury

Amy E. Askew

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***Pittman v. Atlantic Realty Co.:***

**Court of Appeals of Maryland Rejects the “Sham Affidavit” Rule and Reinforces the Separate Functions of the Judge and Jury**

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By Amy E. Askew

The Court of Appeals of Maryland held that an affidavit, submitted for the purpose of withstanding a motion for summary judgment, that conflicts with original deposition statements, should not automatically be rejected, as is the standard practice under the federal “sham affidavit” rule. *Pittman v. Atlantic Realty Co.*, 359 Md. 513, 540, 754 A.2d 1030 (2000). The court further held that a judge’s following of the federal “sham affidavit” rule equates to a determination of the affiant’s credibility, a decision that lies solely with the jury. *Id.* at 540, 754 A.2d at 1045-44.

In 1996, Shari Hall (“Petitioner”) brought an action on behalf of her son, Terran, against Northern Brokerage Company and Atlantic Realty Company (“Respondents”) in the Circuit Court for Baltimore City. Petitioner alleged that Respondents’ lead paint violation at Laurreta Avenue (“subject premises”) resulted in Terran being exposed to lead paint and was a substantial cause of injuries. In lead paint causes of actions, a plaintiff has the burden of proving that the defendant’s conduct was a substantial factor in causing the injuries. Petitioner in this case produced expert testimony in order to prove the requisite causal connection.

During a deposition, Petitioner

testified that she had seen paint chips at the subject premises and that she had seen her son ingest them. During discovery, Petitioner was also given an interrogatory seeking the addresses and dates of the places where she and Terran lived. Petitioner responded that they had lived at the subject premises from 1992 until 1993 and at another location from 1993 to 1996. She also stated that there was a period, although undetermined, that Terran was at the subject premises from 8:00a.m. to 4:00p.m. for purposes of day care. During a deposition, Petitioner gave a variety of responses as to the actual dates she resided on the subject premises. Her inconsistent statements ultimately resulted in the conclusion that she and Terran had lived there for a period of two to four months. Petitioner also testified during a deposition that she and Terran visited the subject premises frequently during the times she was not residing there. Construing the evidence most favorably to the opposing party, the judge hearing the motion concluded that the extent of Terran’s exposure to lead paint was twice a week before residing there and three to four times a week for up to three hours at a time after residing there.

Petitioner’s lead paint expert

testified that due to the vague responses Petitioner gave during the depositions and the interrogatories, he could not say with medical probability that Terran’s interaction with the subject premises was a major contributor to the injuries. However, the expert did say that two months of exposure was an insufficient period to yield a substantial cause in Terran’s injuries.

Respondents moved for summary judgment based on Petitioner’s expert’s deposition which indicated that it would be difficult to render an opinion as to substantial causation. Respondents also cited the expert’s opinion that such causation was unlikely if the basis was a two-month stay at the subject premises. Petitioner responded to the motion with three affidavits. Petitioner’s affidavit contained statements indicating that she resided on the subject premises for five and a half months, a significantly greater period of time than that which was given during depositions and interrogatories. Based on this affidavit, Petitioner’s expert opined that the alleged five and a half months of exposure could be a substantial factor in bringing about the harm.

The respondents moved to strike the affidavits, claiming that they

contradicted Hall's original deposition testimony as to the length of time she and Terran resided at the subject premises in addition to how frequently they visited. No explanation was given as to why the affidavits contained contradicting statements.

The Circuit Court for Baltimore City granted both the motion to strike and summary judgment. The motions were granted due to the significant changes and contradictions in the testimony. The court felt that the discovery process would be subverted if a witness can dramatically alter testimony a year later. The petitioners appealed and the Court of Special Appeals of Maryland affirmed the circuit court's ruling. The court said that the inclusion of the new affidavits would constitute an unfair surprise. The court also adopted the "sham affidavit" rule, derived from federal caselaw. The petitioners appealed to the Court of Appeals of Maryland.

Petitioners argued that the court of special appeals erred, claiming issues of credibility under Maryland law are to be determined by the fact-finder, not the judge. *Id.* at 526, 754 A.2d at 1037. Petitioners also argued that they had a right to file the affidavits or, in the alternative, that the affidavits merely supplement and clarify prior discovery. *Id.* Respondents urged that the court accept the federal "sham affidavit" rule and conclude that the deposition testimony is inherently more reliable. *Id.*

The court of appeals first noted that the caselaw interpreting the

Federal Rules of Civil Procedure (FRCP) 56 does not directly address the issue of an affidavit submitted in response to a motion for summary judgment that contradicts earlier deposition testimony. *Id.* at 527, 754 A.2d at 1037. In *Perma Research & Development Co. v. Singer Co.*, the Second Circuit developed the "sham affidavit" rule, stating:

[i]f an interested party has personal knowledge of the relevant facts, and if that party cannot explain a material contradiction between deposition testimony and a subsequent affidavit by the acquisition of newly acquired evidence, then the trial court may disregard the affidavit as a 'sham,' i.e. as one failing to 'raise any issue which [the trial court] can call genuine.'

*Id.* at 529, 754 A.2d at 1038 (citing 410 F.2d 572 (2nd Cir. 1969)). The *Perma* court stated that a trial court may consider deposition testimony as more reliable than an affidavit because it is subject to cross-examination. *Id.* The court also indicated that the contradictory affidavit may be disregarded to insure the utility of the summary judgment procedure (i.e. to screen out sham claims) and a party should not be allowed to produce a genuine issue of material fact based on inconsistent statements. *Id.*

The Court of Appeals of Maryland first addressed the Respondents' contention that the

Petitioners violated the scheduling order and the discovery cutoff dates by filing supplemental affidavits beyond the court ordered deadline. *Id.* at 533-34, 754 A.2d at 1041. The court rejected this contention because the Maryland rules expressly authorize the filing of an affidavit in response to a motion for summary judgment. *Id.* at 534, 754 A.2d at 1041. This is separate from the discovery dates and the scheduling order. *Id.*

The court then said that the federal "sham affidavit" rule was contrary to Maryland's interpretation of the summary judgment rule. *Id.* The federal rule requires the trial judge to make a credibility determination, finding support in the FRCP 56's phrase "genuine" issue of material fact. *Id.* In contrast, Maryland law has not viewed the function of a summary judgment motion as a proper vehicle for determining credibility. *Id.* at 536, 754 A.2d at 1042. All that the non-moving party needs to produce to prevent a summary judgment motion is evidence from which a reasonable jury could find for the non-moving party. *Id.* at 538, 754 A.2d at 1043. However, if claims are so implausible or ridiculous, a judge may conclude that a rational juror could not reasonably find for the plaintiff. *Id.*

In *Pittman*, the court found that a reasonable juror could believe the affidavits of the Petitioners. *Id.* at 539, 754 A.2d at 1044. The court also said that there were other ways in which a court can deal with what they believe are "sham affidavits." *Id.* The Court of Appeals of Maryland

considered perjury charges and potential sanctions as an effective deterrent to individuals who may produce an inaccurate affidavit for the sole purpose of forestalling summary judgment. *Id.* at 542-43, 754 A.2d at 1046. The court also advocated use of the “catch-all” power under Rule 2-504(b)(2)(G) which allows the court to order “any other matter pertinent to the management of the action.” *Id.* at 543, 754 A.2d at 1046.

The court addressed the dissent’s assertion that an analysis of internally contradictory trial testimony based on the holding in *Kucharczyk v. State*, 235 Md. 334, 201 A.2d 683 (1964) should apply. *Id.* at 543-44, 754 A.2d at 1046-47. The court said that *Kucharczyk*, which states that “testimony that is so contradictory that it lacked probative force ...[make it] ...insufficient to support a finding beyond a reasonable doubt of the facts required to be proven,” does not apply to every situation that involves testimony. *Id.* at 544, 754 A.2d at 1046. The court stated that the analysis only applies when the contradiction goes to the core issues of the case or the criminal agency of the defendant. *Id.* at 545, 754 A.2d at 1047.

The effect of *Pittman* may be detrimental to the court’s policy goals of judicial economy. It appears now that summary judgment motions may be easily defeated by conjuring up an alternative story. The

court indicates that the interests of justice will be better served by allowing the claim to go through, with the hope that the declarant will explain away the misunderstanding. Innocent parties will have to go through the expense, inconvenience and embarrassment of a lawsuit, when the factual basis does not really support one. Additionally, the role of discovery becomes less important when the opponent to summary judgment is permitted to bring forth supposed “facts” that completely surprise the moving party and ultimately leads to an unfair advantage. While the role of the ultimate fact-finder needs to be preserved, the court’s interpretation of the particular roles in the judicial process is far too rigid. By rejecting the “sham affidavit” rule, the Court of Appeals of Maryland has opened the door for false testimony to be paraded in front of the jury, ultimately defeating any hope of judicial economy.