JULY 2020

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MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

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Standing to Appeal

Douglas v. W. Union Co.

955 F.3d 662, 2020 U.S. App. LEXIS 11544 (7th Cir. Apr. 13, 2020)

The Seventh Circuit has held that an individual who objected to a class settlement, but who the district court ruled was not a class member and who therefore lacked standing to object or to receive attorney's fees or an incentive award for objecting, also lacked standing to appeal the ruling.

MANDAMUS

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Establishing Petitioner's Right to Relief

In re Trump

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James v. Hale

ASR Hip Implant Prods. Liab. Litig.)

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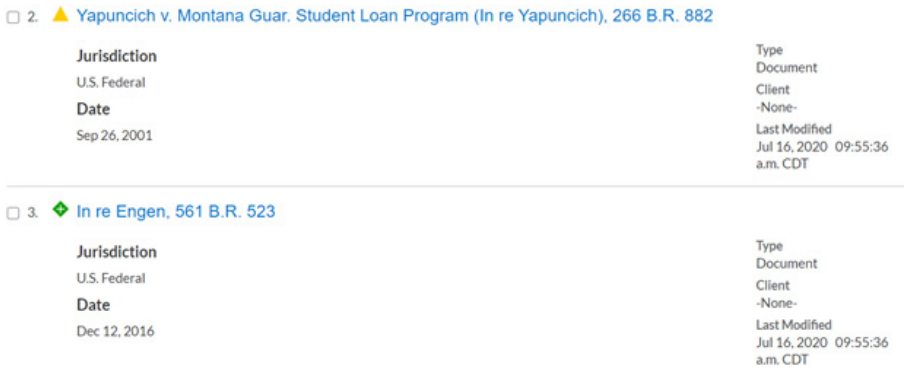

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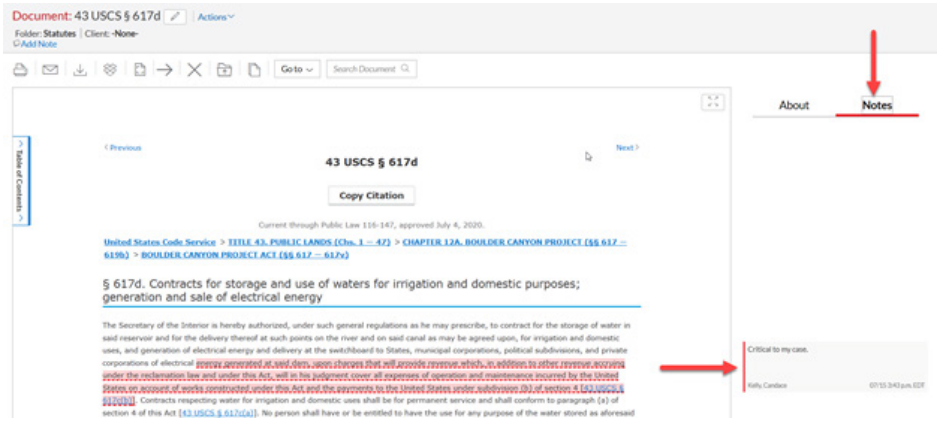

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CLASS ACTIONS

Standing to Appeal

Douglas v. W. Union Co.

955 F.3d 662, 2020 U.S. App. LEXIS 11544 (7th Cir. Apr. 13, 2020)

The Seventh Circuit has held that an individual who objected to a class settlement, but who the district court ruled was not a class member and who therefore lacked standing to object or to receive attorney's fees or an incentive award for objecting, also lacked standing to appeal the ruling.

Background. The class complaint alleged that the defendant, Western Union, violated the Telephone Consumer Protection Act by sending unsolicited text messages to the class members [see 47 U.S.C. § 227]. After a year of litigation, the named parties agreed to settle for $8.5 million. The proposed settlement defined the class as "[a]ll Persons in the United States who received one or more unsolicited text messages sent by or on behalf of Western Union between March 12, 2010 and November 10, 2015."

Four individuals objected to this settlement, including the appellant here. She objected on several grounds, arguing that the settlement inadequately compensated the class, class counsel's fee request was too high, the plaintiff's incentive award was too high, the class definition was imprecise because it did not include her, and the list of class members had errors.

The named parties, however, contested her standing to object. They argued that she could not be a class member because she had filled out a form in which she expressly consented to receiving text messages. During settlement negotiations, the parties had identified two groups that might not have been required to fill out such a form, but the appellant did not fall into either of these groups. Thus, the two text messages she had received were not "unsolicited."

The district court held a fairness hearing (at which the appellant was allowed to participate). The district court then certified the class with minor changes to the class definition, ruled that the appellant was not a class member, approved the settlement, and reduced class counsel's fees. The appellant moved for reconsideration, asking the court to find that she was a member of the class and to redefine the class to include all customers who received text messages, even with consent. The judge denied the motion.

The appellant did not appeal her exclusion from the class and did not seek to intervene. Instead, she sought attorney's fees and an incentive award for her success in reducing attorney's fees and improving the class definition. The district court denied this motion because the appellant had cited no authority for the proposition that a non-class member could recover fees and an incentive award under Rule 23.

Appellant Lacked Standing to Appeal. On appeal, the appellant did not challenge the finding that she was not a class member. Instead, she contended that as a nonparty she could nonetheless seek fees and an award if she benefited the class. This argument, the court of appeals said, ignored a threshold question: whether a nonparty to proceedings in the district court has standing to appeal a decision that the nonparty does not like. Generally, only parties to a lawsuit may appeal an adverse judgment. A nonparty who is dissatisfied with a ruling in the district court must seek to intervene for purposes of appeal (and a denial of a request to intervene is itself appealable). The appellant was not a party to the proceedings below and had not sought to intervene, and therefore lacked standing to appeal.

The court of appeals noted that, in Devlin v. Scardelletti, the Supreme Court had clarified that the right to appeal is not necessarily limited to named parties to the litigation. In class actions, unnamed class members may be parties for purposes of appeal when they have properly objected in the district court [Devlin v. Scardelletti, 536 U.S. 1, 7, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)]. Here, however, the appellant had acquiesced to the court's decision that she was not an unnamed class member. Rule 23(e)(5)(A) provides that only a class member may object to a class settlement, so the rule does not create standing for nonclass members.

Nonparties have sometimes been allowed to appeal when the district court has ordered them to do something (as with a contempt citation issued to nonparty witnesses) or when they are agents of parties to the suit (as with attorneys seeking fees). These circumstances did not apply here. The appellant argued that her appeal was taken from an order denying her motion for attorney's fees, making her an aggrieved party.

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However, because she acquiesced to the ruling that she was not a class member, she had no standing after that ruling and could not be aggrieved by any of the later rulings. To protect any legal interest, she might have appealed the decision that she was not a class member or sought to intervene to become a party, but she had not done so. Accordingly, the appeal was dismissed for lack of jurisdiction.

MANDAMUS

Establishing Petitioner's Right to Relief

In re Trump

958 F.3d 274, 2020 U.S. App. LEXIS 15484 (4th Cir. May 14, 2020) (en banc)

The Fourth Circuit, sitting en banc, has held that President Trump was not entitled to a writ of mandamus directing the district court to certify an interlocutory appeal from an order denying the President's motion to dismiss claims brought against him under the Emoluments Clauses of the Constitution.

Background. The Constitution's Foreign Emoluments Clause provides that no officer of the United States shall "accept" any "present, Emolument, Office, or Title . . . from any King, Prince, or foreign State" [U.S. Const., Art. I § 9, cl. 8]. The Domestic Emoluments Clause provides that the President shall receive "Compensation" for "services" but no "other Emolument" from the United States or any state [U.S. Const., Art. II § 1, cl. 7]. Maryland and the District of Columbia sued the President in his official and individual capacities, contending that his continued interest in the Trump Organization, specifically in hotels and related properties, provides him with millions of dollars in payments, benefits, and other valuable consideration from foreign governments and persons acting on their behalf and from federal agencies and state governments, all of which constitute forbidden emoluments under the two clauses.

The President moved to dismiss the complaint. The district court granted the motion with respect to the operations of the Trump Organization outside the District of Columbia, but the court denied the motion with respect to the operations of the Trump International Hotel in Washington, D.C.

The President moved for certification to take an interlocutory appeal under 28 U.S.C. § 1292(b), which provides that if a district judge who makes an interlocutory order is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the judge must state that opinion in writing in the order. Once the district court has thus "certified" the order in this manner, the court of appeals has discretion to allow an interlocutory appeal [28 U.S.C. § 1292(b)]. In this case, the district court declined to certify the order.

The President then petitioned the Fourth Circuit for a writ of mandamus either to direct the district court to certify an interlocutory appeal, or to order the district court to dismiss the complaint with prejudice [see 28 U.S.C. § 1651; Fed. R. App. P. 21]. A panel of the court of appeals granted the writ and, purportedly exercising jurisdiction pursuant to § 1292(b), held that the plaintiffs lacked standing. The panel therefore reversed the district court's orders and remanded with instructions to dismiss the complaint with prejudice [In re Trump, 928 F.3d 360, 364 (4th Cir. 2019)].

The Fourth Circuit subsequently agreed to hear the case en banc, vacating the panel opinion. In a 9-6 decision, the en banc court denied the President's petition for a writ of mandamus, concluding that he had not established a right to the writ.

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Requirements for Mandamus. The en banc court began with the general proposition that a writ of mandamus is a drastic remedy that is available only in extraordinary situations, such as when a court has exceeded the lawful exercise of its prescribed jurisdiction or refused to exercise its authority when it is its duty to do so [see Kerr v. U.S. Dist. Court, 426 U.S. 394, 402, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976)]. Specifically, a party seeking a writ of mandamus must demonstrate that (1) he or she has a clear and indisputable right, (2) there are no other adequate means to vindicate that right, and (3) the writ is appropriate under the circumstances [Cheney v. U.S. Dist. Court, 542 U.S. 367, 380–381, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)].

The Fourth Circuit added that when the petitioner is the President, a court of appeals must also consider whether the district court's actions constituted an unwarranted impairment of another branch of the government in the performance of its constitutional duties [Cheney v. U.S. Dist. Court, 542 U.S. 367, 390, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)].

The Fourth Circuit noted that given the demanding criteria a petitioner must meet to obtain a writ of mandamus, appellate courts rarely grant mandamus relief, and even more rarely find it appropriate to issue a writ of mandamus to correct acts within the discretion of the district court.

Mandamus Was Not Warranted to Compel District Court to Certify Its Interlocutory Order for Appeal. The Fourth Circuit next addressed the President's main contention—that the court of appeals should issue a writ of mandamus ordering the district court to certify its order for appeal.

The court of appeals observed that in prescribing the procedure for interlocutory appeals by permission, § 1292(b) vests both the district court and the court of appeals with discretion. The district court has discretion to decide whether its interlocutory order merits certification, i.e., whether it involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation [see 28 U.S.C. § 1292(b)]. Then, if the district court certifies its order, the appellate court has discretion to decide whether to permit an appeal [see 28 U.S.C. § 1292(b)].

The President conceded that a district court has broad discretion in deciding whether an order merits certification, but he maintained that the district court in this case made legal errors that amounted to a "clear abuse of discretion" that warranted the issuance of mandamus. The Fourth Circuit pointed out that this argument rested on the contention that the magnitude of the asserted errors transformed the first requirement for mandamus—that a petitioner establish a "clear and indisputable right" to relief—into a requirement that the petitioner show a legal error amounting to a "clear abuse of discretion."

The Fourth Circuit rejected this reasoning, noting that the Supreme Court has rejected the contention that an error of law amounts to an abuse of discretion entitling a petitioner to mandamus relief. "The Supreme Court has never wavered from the view that, while 'a simple showing of error may suffice to obtain a reversal on direct appeal,' it does not permit an appellate court to issue a writ of mandamus" [quoting Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978)]. The Fourth Circuit concluded that the President's allegation of legal error provided no basis to compel the district court to certify its order under § 1292(b). (The court also noted that the President had not presented any independent argument that he met the other criteria for mandamus relief.)

Mandamus Was Not Warranted to Compel District Court to Dismiss Complaint. The Fourth Circuit then turned to the President's second contention—that the court of appeals should issue a writ of mandamus ordering the district court to dismiss the complaint with prejudice.

The en banc court easily disposed of this contention, pointing out that to obtain a writ mandating dismissal with prejudice, the President had to establish that it was not merely likely, but "clear and indisputable," that the entire action could not succeed. Noting that "reasonable jurists can disagree in good faith on the merits of these claims," the court identified several debatable questions presented by the emoluments claims in this case.

The court of appeals explained that "[w]hen assessing whether to issue a writ of mandamus, a court does not balance the respective merits of the parties' arguments but instead determines whether the petitioner has established a clear and indisputable right to the writ." The court of appeals concluded that the President had not made that showing in this case.

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No Separation-of-Powers Basis for Writ of Mandamus. Lastly, the en banc court turned to the question of whether separation-of-powers concerns required the issuance of a writ of mandamus.

The court rejected an argument that this lawsuit subjected the Executive Branch to intrusive discovery. Any discovery in the case would not impair the functioning of the Executive Branch; rather, discovery of business records as to hotel stays and restaurant expenses, sought from private third parties and low-level government employees, would implicate no executive power. And the court of appeals found no basis in precedent for a writ of mandamus designed simply to immunize the President from judicial process [see Clinton v. Jones, 520 U.S. 681, 705–706, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997) ("[T]he doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office")].

The court of appeals also rejected an argument that the Emoluments Clauses somehow vest the President with a discretionary duty that the judiciary cannot direct or interfere with. The court explained that the restraints imposed by the Clauses are positive law that the President must obey, and the duty to obey neither constitutes an official executive prerogative nor impedes any official executive function. And even if obeying the law could be viewed as an official executive duty, that duty would not include an unreviewable power to interpret the meaning of "emolument." To hold otherwise, the court said, would mean that the President alone has the ultimate authority to interpret what the Constitution means. Accordingly, the court concluded that its holding—that the President was not entitled to mandamus requiring the dismissal of this suit—affirms the constitutional separation of powers principles established "by centuries of foundational jurisprudence."

Conclusion and Disposition. Because the President had not established a clear and indisputable right to the relief sought, the Fourth Circuit denied his petition for mandamus.

Dissent. Circuit Judges Wilkinson and Niemeyer filed dissenting opinions, with a total of four other circuit judges joining one or both. The dissenting opinions both emphasized that the Emoluments Clauses do not provide a cause of action or judicial remedy. Judge Wilkinson would have issued a writ of mandamus directing the district court to dismiss the action. Judge Niemeyer would have issued a writ directing the district court to certify its order for interlocutory appeal.

SUMMARY JUDGMENT

Sham Affidavits

James v. Hale
ASR Hip Implant Prods. Liab. Litig.)

959 F.3d 307, 2020 U.S. App. LEXIS 15490 (7th Cir. May 14, 2020)

The Seventh Circuit holds that, under the sham-affidavit rule, a party may not submit an affidavit that contradicts the party's prior deposition or other sworn testimony in order to create a genuine issue of fact to defeat summary judgment.

Background. On the evening of January 11, 2015, Dustin James, a pretrial detainee in the St. Clair County Jail in Illinois, was assaulted by another inmate and sustained severe facial injuries. He was taken to the jail infirmary and then transported that same evening to the emergency room of a hospital. He received a CT scan and was diagnosed with a left zygomatic arch fracture and facial laceration. He received two morphine injections for pain, and the laceration was sutured. The ER doctor's discharge instructions required removal of the stitches in five days and recommended a follow-up visit with an "ENT" specialist. The doctor also referred James to Dr. Paul Szewczyk, an ophthalmologist, for follow-up care. James arrived back in the jail infirmary early the next morning.

Nursing staff cared for James until he was seen on January 13 by a jail physician, who prescribed Motrin for 10 days and kept him in the jail infirmary. Three days later James was transported to see Dr. Szewczyk, who examined him and determined that no treatment was then required. Back at the jail, a nurse removed the sutures in James's eyebrow on January 19. She also noted his complaint of facial numbness. On January 24 she documented James's request for an extension of his pain medication. James later complained of recurring facial pain to a different nurse, and a jail physician prescribed 10 more days of Motrin.

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James was examined by an ENT on January 26, who recommended a referral to a plastic surgeon. Two days later at a follow-up appointment with Dr. Szewczyk, he noted that James's vision, alignment, eye movements, retina, and optic nerve were all doing well. He also recommended a referral to a plastic surgeon for a complaint of cheek numbness.

On February 19, James asked to see Deborah Hale, the jail's Health Services Administrator. He requested more pain medication, but Hale told him that there was no current order for ibuprofen and he would need to see a doctor to obtain a new prescription. She noted facial swelling and planned to refer him to a doctor, but the on-site physician was not at the jail that day. James had an appointment scheduled with an off-site specialist the next day, so Hale did not submit a physician referral. The following morning, James was transported to a clinic, where a plastic surgeon examined him. At the examination, James denied having any visual disturbances or eating difficulties. The exam revealed an elevated temperature, facial swelling, and pain; however, the surgeon noted no overt evidence of infection other than the facial swelling. He ordered another CT scan, so James was taken to radiology for that test. James was supposed to see the surgeon after the scan was completed, but he never returned to the clinic.

After reviewing the results of the CT scan later that day, the surgeon called the jail and left a message with the medical department recommending that James be put on an antibiotic. In a follow-up call on the following Monday morning, the surgeon again recommended an antibiotic, and James received the first dose that evening during the next scheduled medication pass. He was released from custody the next day.

In December 2015 James filed a pro se civil-rights complaint against Hale seeking damages under 42 U.S.C. § 1983 for denial of medical care in the jail. He claimed that on or about January 20, he reported to Hale that his eye was nearly swollen shut, his face was numb, and he was hardly able to open his mouth on one side. He alleged that she gave him a "sick call form" with instructions to fill it out, and he did so repeatedly between January 20 and 28 but "was never seen by any medical staff." He alleged that his mother, Patricia Powell, called the jail the following week and spoke to Hale, but he "still received no medical attention to the problems at hand or was even seen by medical staff." He further alleged that he woke up on February 20 with pain and facial swelling and requested to see Hale, but when she saw him, she "stated to him he was fine." He alleged more generally that between January 20 and February 28 he suffered from vision loss, pain, facial swelling, and an inability to eat due to Hale's "medical neglect." The complaint sought $100,000 in compensatory damages and $5,000 in punitive damages.

James acquired counsel in January 2017, and counsel obtained James's jail infirmary and outside medical records through discovery. The records contradicted or clarified the allegations in the complaint in numerous respects. In July 2017, James, through his counsel, obtained leave to file an amended complaint in which he simply repeated the factual allegations from his original complaint. In his February 2018 deposition, James directly contradicted many of the allegations in the amended complaint.

When Hale moved for summary judgment, James responded by swearing out an affidavit incorporating by reference the allegations in the amended complaint, many of which directly contradicted his deposition testimony and the infirmary and outside medical records. The magistrate judge disregarded the affidavit and recommended that the district court grant the motion. The district judge excluded the affidavit under the sham-affidavit rule and entered summary judgment for Hale. Relying on Ford v. Wilson [90 F.3d 245, 247 (7th Cir. 1996)], the judge determined that the affidavit was not impermissible merely because it simply swore to the truth of allegations in the amended complaint. The judge instead excluded the affidavit under the sham affidavit rule and entered summary judgment in Hale's favor. James appealed, challenging the exclusion of the affidavit and the judge's decision on the merits.

Clarification of *Ford v. Wilson*. Before turning to the sham-affidavit rule, the Seventh Circuit addressed the district court's application of Ford v. Wilson. The district court judge assumed that Ford generally authorizes a plaintiff to convert allegations in a complaint into an affidavit that is capable of defeating summary judgment. In other words, if James's affidavit had not turned out to be a sham, the district judge would not have adopted the magistrate judge's recommendation to disregard it. Still, the judge disapproved of James's use of this "conversion" technique, particularly since he was represented by counsel. He suggested that the tactic "makes a mockery of how summary judgment is supposed to work."

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In Ford, the plaintiff filed a verified pro se civil-rights complaint against a police officer who arrested him after a traffic stop. The officer moved for summary judgment, and the judge granted the motion because Ford had not submitted an affidavit or other evidence in opposition. Although the Seventh Circuit ultimately affirmed the judgment, the court reasoned that because Ford had verified his complaint, some of its contents "were affidavit material." The court acknowledged the general principle that a plaintiff may not rely on mere allegations or denials in the complaint when opposing a properly supported motion for summary judgment. However, a verified complaint, signed, sworn, and submitted under penalty of perjury, can be considered "affidavit material" provided the factual allegations otherwise satisfy the affidavit criteria specified in Rule 56 of the Federal Rules of Civil Procedure and the declarant complies with 28 U.S.C. § 1746, which sets forth the requirements for verification under penalty of perjury.

The Ford court cautioned, however, that this tactic is not recommended because it undermines the function of Rule 56. The court explained that Rule 56 requires "the submission of evidentiary material in response to a motion for summary judgment as a means of sharpening the issues, so that the judge can determine just what if anything must be tried." Merely pointing to assertions in a verified complaint "is bound to make the identification of genuine issues of material fact difficult, complicating the work of the judge." Still, the court felt that this "departure from proper practice" was not so egregious as to warrant automatic summary judgment in Ford's case, especially since he was litigating pro se and had not been warned against this approach.

The Seventh Circuit pointed out that every out-of-circuit case relied on for support in Ford dealt with a litigant who was not represented by counsel when he verified his complaint. Not once in the 24 years since Ford was decided had the court allowed a represented party to resist summary judgment by submitting an affidavit swearing to the allegations in the complaint after significant discovery. Ford struck a delicate balance between issue clarification and equity. In this case, the court refused to accept an affidavit that "reaches back past extensive discovery conducted with the assistance of counsel to repeat assertions in a pro se complaint." That approach obscures rather than clarifies the determination of material factual issues. In addition, the equities are quite different when a party is represented by counsel. In sum, Ford should not be understood as a general authorization for a represented plaintiff to defeat summary judgment after extensive discovery by the simple expedient of swearing in an affidavit that the allegations in the complaint are true.

Sham-Affidavit Rule. The Seventh Circuit reiterated that the principal function of summary judgment is to prevent unnecessary trials by screening out factually unsupported claims. Rule 56(c)(4) serves this screening function by permitting a party to use an affidavit or declaration to support or oppose a motion for summary judgment only if (1) the affiant has "personal knowledge" of the facts set out in the affidavit, (2) the affidavit sets out facts that would be admissible in evidence, and (3) the affiant or declarant is competent to testify on the matters stated. Similarly, Rule 56(h) permits a judge to sanction a party who presents an affidavit "in bad faith or solely for delay." Rule 56 thus requires a judge to scrutinize the substance of an affidavit offered in response to a summary-judgment motion to determine whether a reasonable jury could rely on the factual statements it contains.

Under the sham-affidavit rule, a judge may disregard an affidavit that contradicts prior sworn testimony, typically deposition testimony. In the Seventh Circuit, the sham-affidavit rule prohibits a party from submitting an affidavit that contradicts the party's prior deposition or other sworn testimony. The court also may disregard an affidavit that contradicts a statement made under penalty of perjury, even if the statement was not made in the course of litigation. In other words, a sham affidavit cannot be used to create a genuine issue of material fact.

The court found that, by incorporating by reference the assertions from his amended complaint, James's affidavit contradicted his deposition testimony in numerous respects. In essence, the amended complaint alleged that James was "never seen by any medical staff" for long periods of time, but his deposition testimony acknowledged that he saw nurses in the jail infirmary "daily"; he "had the opportunity" to speak to them; and he was seen by outside physicians a total of five times between January 11 and February 24. In addition, a number of dates in the complaint were contradicted by his deposition testimony.

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The court found that these contradictions "do not concern minor details." The gravamen of James's constitutional claim was that Hale's response to his medical needs was objectively unreasonable. The claim entailed a context-sensitive, fact-bound inquiry into the intentionality of the defendant's conduct and the totality of the circumstances. The contradictory dates mattered because the timing of the events was central to James's contention that Hale failed to adequately address his medical needs. When James requested to see Hale and whether he was seen by medical professionals over a particular period between his injury in late January through his release from the jail in late February 2015 were factual issues that would be focal points in any subsequent trial.

James argued that the judge relied on contradictions between his affidavit and the contents of records from the infirmary and outside medical providers. He insisted that this could not establish any contradiction between sworn statements made by him. He also asserted that the sham-affidavit rule is narrow and should be applied with caution.

The Seventh Circuit agreed that the sham-affidavit rule applies to contradictions between an assertion in a party's summary-judgment affidavit and the party's prior sworn testimony. However, the contradictions between James's affidavit and his deposition testimony fell squarely within the core of the sham-affidavit rule.

The court also noted that it has recognized three exceptions to the sham-affidavit rule. First, an affidavit that contradicts prior testimony but contains newly discovered evidence is allowed. Second, because a deponent may be confused by a question and memory may fail, a judge may also consider an affidavit that contradicts a statement in a deposition if the statement is demonstrably mistaken. Third, an affidavit that clarifies ambiguous or confusing deposition testimony is permitted. However, none of these exceptions applied in this case. Thus, James's affidavit was properly excluded as a sham.

Conclusion. The Seventh Circuit concluded that not only was James's affidavit a sham, it was an improper attempt to convert the allegations in the complaint into sworn testimony to avert summary judgment. In addition, the appellate court found that the district court properly granted summary judgment on the merits. Therefore, the Seventh Circuit affirmed the summary judgment in favor of the defendant.