

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

YAN THOU, individually and as	)	
Administrator of the Estates of Oeurn	)	
Mam, Deceased, and Navy Yan,	)	
Deceased, et. al.,	)	C.A. No. 06C-04-246 MMJ
	)	Consolidated with
Plaintiffs,	)	C.A. No. 06C-04-247 FSS
	)	
v.	)	
	)	
MOTIVA ENTERPRISES, LLC,	)	
MOTIVA COMPANY and RICHARD P.	)	
REISTLE, SR., PACK & PROCESS,	)	
INC. AND LAM PERSONNEL	)	
SERVICES, INC.,	)	
	)	
Defendants.	)	

Submitted: March 2, 2009

Decided: May 29, 2009

On Motiva Enterprises, LLC and Richard P. Reistle, Sr.'s Motion for Summary Judgment. **DENIED.**

**MEMORANDUM OPINION**

Yvonne Takvorian Saville, Esquire, Weiss & Saville, P.A., Wilmington, DE;  
Shanin Specter, Esquire, Jonathan M. Cohen, Esquire, Royce W. Smith, Esquire,  
Kline & Specter, A Professional Corporation, Wilmington, DE, Attorney for  
Plaintiffs

Paul M. Lukoff, Esquire, David E. Brand, Esquire, Prickett, Jones & Elliot, P.A.,  
Wilmington, DE, Attorneys for Defendants, Motiva Enterprises, LLC and Richard  
P. Reistle, Sr.

**JOHNSTON, J.**

## **FACTUAL BACKGROUND**

This litigation arises out of a fatal accident. On June 18, 2001, a fifteen-passenger van, containing nineteen people, collided with a tanker truck owned by Motiva Enterprises, LLC (“Motiva”). Motiva’s employee, Richard P. Reistle, Sr., was the driver of the tanker truck. As a result of the accident, five people died and fourteen people suffered serious injuries. The plaintiffs are the occupants of the van or their statutory heirs.

Maly Yan, one of the plaintiffs, was the driver of the van. Ms. Yan was responsible for transporting herself and seventeen of the other plaintiffs to-and-from work on a daily basis. Plaintiffs worked as contract employees for Lam Personnel Services, Inc. (“Lam”). Lam contracted for plaintiffs to work at Pack & Process, Inc. in Delaware. Navy Yan is the sole plaintiff who did not work at Pack & Process. On the day of the accident, Navy Yan was just along for the ride.

When the accident occurred, plaintiffs were traveling north on I-495 from Pack & Process toward destinations in Pennsylvania and New Jersey. At the location of the accident, I-495 is a six lane highway with three northbound and three southbound lanes. The northbound and southbound lanes are separated by a twenty-seven foot grass median. The accident occurred when plaintiffs’ van and the tanker truck made contact in the middle of the northbound lanes.

The Delaware State Police (“DSP”) responded to the scene and investigated the accident. According to the DSP report, at the time of the accident, Ms. Yan was driving in the left northbound lane and the tanker truck was traveling in the middle northbound lane. Ms. Yan was attempting to pass the tanker truck, when the van began to swerve. Each successive swerve became larger than the last until it veered into the center lane. The van collided with the tanker truck, spun out of control, and proceeded to roll across the grass median. As the van rolled, passengers and personal belongings were ejected. Ultimately, the van landed on its tires in the far southbound lane. The tanker truck came to a controlled stop in the left northbound lane.

After the accident, Mr. Reistle informed the DSP that, although he saw the van weaving within its lane, he did not see or feel the van hit his truck. Additionally, Mr. Reistle stated that he did not drift out of his lane. When interviewed a few days following the accident, Ms. Yan informed the DSP that she was unable to recall anything about the crash.

The DSP interviewed several witnesses to the accident. According to William B. Anderson and Michael C. Bright, who were driving behind the tanker truck prior to the accident, the tanker truck never deviated from the middle lane. According to the van’s front seat van passenger, Yan Thou, prior to the collision “people in the back of the van began to yell because they thought the truck was

coming into their lane, at which time Maly Yan turned the wheel but the wheels did not turn.”

The DSP investigated the vehicles involved in the accident for mechanical defects. The DSP determined that both vehicles had been properly maintained. The DSP concluded that the steering apparatus on the van worked properly, even after it sustained damage from the accident. The DSP found no evidence indicating a mechanical defect caused the accident.

### **PROCEDURAL CONTEXT**

On April 27, 2006, plaintiffs filed a complaint against Motiva, Motiva Company, Mr. Reistle, Pack & Process, and Lam. The complaint avers that Ms. Yan was driving the van as an agent of Pack & Process. Plaintiffs assert that Mr. Reistle, acting as an agent of Motiva, operated the tanker truck in a negligent manner. Plaintiffs contend that Mr. Resitle’s actions precipitated Ms. Yan’s loss of control of the van, which culminated in the severe injuries suffered by plaintiffs and death.

### ***Motion for Summary Judgment***

On May 14, 2008, Motiva and Mr. Reistle (“Defendants”) filed a motion for summary judgment. Defendants requested that the Court grant their motion for summary judgment on the grounds that there are no genuine issues of material fact

and the evidence, as a matter of law, fails to support a claim that Defendants negligently caused the accident.

Defendants contended that plaintiffs could not meet their Rule 56 burden of proof relating to a breach of Defendants' duty of care. Defendants asserted that the tanker truck never deviated out of the middle lane prior to the accident.

Defendants claimed that the cause of the accident was solely Ms. Yan's loss of control of the van. Defendants argued that no evidence exists to indicate that the tanker truck precipitated Ms. Yan's loss of control of the van.

Even though discovery was ongoing, Defendants argued that summary judgment was not premature. Defendants asserted that "there is no reason to delay the inevitable under circumstances where there will be no further information ... upon which to predicate a decision on the summary judgment motion."

#### ***Rule 56(f) Motion***

In response to Defendants' motion, on May 22, 2008, plaintiffs filed a Rule 56(f) motion. Plaintiffs requested that the Court grant a continuance of Defendants' Motion for Summary Judgment to enable completion of discovery. Specifically, plaintiffs stated that several individuals involved with the accident had to be deposed, including Mr. Reistle, the tanker truck driver. Additionally, plaintiffs claimed that they needed to obtain records from Motiva regarding its policies, training methods, and truck information.

On May 29, 2008, Defendants filed a submission opposing plaintiffs' motion. Defendants asserted that plaintiffs failed to meet their Rule 56 burden – to either provide an affidavit describing Defendants' negligence or to at least explain why plaintiffs needed more time.

Defendants contended that plaintiffs' assertion – that additional witnesses need to be deposed prior to dispositive motions – is misleading. Defendants asserted that the witnesses listed either could have executed affidavits or their account of the accident could be found within the DSP report. Defendants argued that plaintiffs must do something other than merely suggest that the witnesses should be deposed. Further, Defendants claimed that the additional information plaintiffs sought has no bearing on whether Defendants were negligent at the time of the accident. Defendants assert that “plaintiffs not only have had sole possession of their own knowledge about the accident, but an extraordinary amount of time and opportunity within which to reveal it.”

### ***Request for Additional Discovery***

Plaintiffs' response to Defendants' Motion for Summary Judgment requested that the Court deny Defendants' motion and order a continuance to permit affidavits to be obtained or depositions to be taken, or discovery to be had. Plaintiffs further reiterated their Rule 56(f) claim.

Additionally, plaintiffs asserted that evidence existed to demonstrate that the tanker truck's movement within the center lane precipitated Ms. Yan's loss of control of the van. To support their claim, plaintiffs cited to Mr. Thou's statement given to the DSP. Plaintiffs contended that Mr. Thou's statement illustrates that Ms. Yan lost control of the van because Mr. Reistle was driving in a negligent manner.

### *Initial Affidavits*

Additionally, plaintiffs provided an affidavit executed by Ms. Yan. In her affidavit dated May 29, 2008, Ms. Yan states: "I was driving right next to [Mr. Reistle] on his blind side and then I saw him trying to merge into my lane and then I tried to move away from his vehicle and then I lost control of my vehicle and the next thing I remembered I was in the hospital." However, that affidavit does not offer any explanation as to how Ms. Yan's memory was restored.

Plaintiffs asserted that Maly Yan's affidavit, together with the evidence in the police report, established a genuine issue of material fact as to whether the conduct of Defendants was a substantial factor in causing the accident. Further, plaintiffs reiterated that additional discovery is needed prior to deciding dispositive motions.

On May 30, 2008, Defendants filed an affidavit which averred that Defendants had litigated a declaratory judgment action in the United States District

Court for the District of Delaware concerning the accident on June 18, 2001, in which Ms. Yan was a defendant. Defendants claimed that during that trial, Ms. Yan testified under oath that she had no recollection of the details of the accident. To support their assertions, Defendants provided excerpts from the transcript.

### *Additional Affidavits*

On June 5, 2008, this Court heard oral argument. The Court granted plaintiffs permission to submit additional affidavits of Ms. Yan and Mr. Thou. The Court stayed its final determination pending additional submissions on the Rule 56 motion.

On June 30, 2008, plaintiffs submitted three affidavits. The first affidavit was prepared by Ms. Yan. In Ms. Yan's affidavit, she offers an explanation for her memory recovery.<sup>1</sup> Ms. Yan asserts that her memory has recovered because she is no longer as sad as she once was. The second affidavit was prepared by Mr. Thou. Mr. Thou further elaborates on his prior DSP statements. The third affidavit was

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<sup>1</sup> The relevant portions of Ms. Yan's affidavit, which proffer an explanation for her memory recovery read as follows:

3. The accident was very traumatic for me, having lost my mother and my brother. For years, I used to think about them a lot. I would get very upset and I wouldn't remember what happened.
4. When I testified in court, I said I could not remember because I did not remember what happened at that time. I couldn't remember because it made me too upset.
5. I started being able to remember the accident years later, in the winter of 2007. At that time, I was not thinking about my mom and brother as much, I was not as sad. And my memory started to come back. At first, I did not tell anyone – I did not want to upset my family. The first thing I remembered was about the truck. I can see it; I have a clear picture in my head.



prepared by Thuha Son. Mr. Son's affidavit was neither solicited nor permitted by the Court; and, as such, will not be considered.

### *“Sham” Affidavits*

On July 1, 2008, Defendants wrote to the Court, arguing that Ms. Yan's affidavit is a “sham”.

On August 21, 2008, the Court held a teleconference with counsel. The Court concluded that discovery should continue and the record should be further developed prior to determining any dispositive motions.

On February 2, 2009, Defendants submitted supplemental briefing to support their Motion for Summary Judgment. Defendants requested that the Court apply the “sham affidavit doctrine” to the affidavits prepared by Ms. Yan and Mr. Thou.

Defendants assert that Ms. Yan's affidavit directly contradicts her previous testimony that she could not recall anything about the accident. Defendants contend that because Ms. Yan does not proffer an adequate explanation for her recovered memory, her affidavit should be stricken as a sham.

Defendants assert that Mr. Thou's affidavit also should be stricken. Defendants contend that Mr. Thou's affidavit is merely “rank speculation and inadmissible hearsay.”<sup>2</sup> Defendants assert that Mr. Thou's affidavit improperly attempts to expand on his statement to the DSP. Defendants argue that Mr. Thou

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<sup>2</sup> The Court will not consider defendants' hearsay argument at this time. This issue was raised for the first time in the supplemental briefing. Such evidentiary issues are not dispositive of the present issue – whether a genuine issue of material fact exists.

had no factual basis for making the statement because he was seated in the front of the van and he does not state that he personally observed anyone yelling.

On March 2, 2009, the Court received plaintiffs' supplemental brief. Plaintiffs request that the Court deny summary judgment and allow discovery to continue. Plaintiffs contend that they have been repeatedly denied the opportunity to conduct full discovery by defense counsel and the Court. Plaintiffs assert that summary judgment is still premature.

Plaintiffs contend that the "sham affidavit doctrine" does not apply to either Ms. Yan's or Mr. Thou's affidavit. Plaintiffs argue that Ms. Yan has provided the Court with an adequate explanation for her memory recovery. Plaintiffs contend that neither medical nor psychological evidence is required to meet the "adequate explanation" requirement. In regards to Mr. Thou's affidavit, plaintiffs assert that expansions are permissible under the "sham affidavit doctrine." Plaintiffs conclude that when the facts are viewed in the light most favorable to the non-moving party, independently, both Ms. Yan and Mr. Thou's affidavits create a genuine issue of material fact as to whether the negligence of Motiva and Mr. Resitle caused the accident.

## ANALYSIS

### *Summary Judgment Standard*

This Court will grant summary judgment only when no material issues of fact exist. The moving party bears the burden of establishing the nonexistence of material issues of fact.<sup>3</sup> Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.<sup>4</sup>

Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.<sup>5</sup> If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, summary judgment must be granted.<sup>6</sup>

A court deciding a summary judgment motion must identify disputed factual issues whose resolution is necessary to decide the case, but the court must not decide those issues.<sup>7</sup> The court must evaluate the facts in the light most favorable to the non-moving party.<sup>8</sup> Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in

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<sup>3</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

<sup>4</sup> *Id.*

<sup>5</sup> Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

<sup>6</sup> *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. denied*, 504 U.S. 912 (1992); *Celotex Corp.*, 477 U.S. at 322-23.

<sup>7</sup> *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

<sup>8</sup> *Id.*

dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.<sup>9</sup>

### *Sham Affidavit Doctrine*

Under the sham affidavit doctrine, the Court may strike or disregard an affidavit that is submitted in opposition to a motion for summary judgment where the affidavit contradicts the affiant's prior sworn testimony.<sup>10</sup> "[T]he core of the doctrine is that where a witness *at a deposition* has previously responded to *unambiguous questions* with clear answers that negate the existence of a genuine issue of material fact, that witness cannot thereafter create a fact issue by submitting an affidavit which contradicts the earlier deposition testimony, without an *adequate explanation*."<sup>11</sup> The same principles applicable to deposition testimony apply with equal force to testimony given under oath at a trial.

When determining whether to strike an affidavit, the Court should consider: (1) whether the affiant was cross-examined at the time of the earlier testimony; (2) whether the affiant had access to the pertinent evidence at the time of the earlier testimony or whether the affidavit was based on newly-discovered evidence; and (3) whether the earlier testimony reflects confusion, which the affidavit attempts to explain.<sup>12</sup> A distinction must be made between discrepancies that create shams

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<sup>9</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

<sup>10</sup> See *In re Asbestos Litigation*, 2006 WL 3492370 (Del. Super.).

<sup>11</sup> *Id.* at \*5 (emphasis in original) (quoting *Cain v. Green Tweed & Co., Inc.*, 832 A.2d 737, 740 (Del. 2003)).

<sup>12</sup> *In re Asbestos Litigation*, 2006 WL 3492370, at \*5.

and discrepancies that create an issue of credibility or that go to the weight of the evidence.<sup>13</sup> “Issues concerning the credibility of witnesses and weight of the evidence are questions of fact which require resolution by the trier of fact.”<sup>14</sup>

### *Maly Yan’s Affidavit*

The sham affidavit doctrine applies to Ms. Yan’s affidavit. Ms. Yan’s affidavit conflicts with her previous sworn testimony, which she gave while subject to cross-examination. Ms. Yan previously testified that she had no recollection of the accident. Once presented with the Motion for Summary Judgment, Ms. Yan provided an affidavit detailing for the first time that the tanker truck was the cause of the accident. Obviously, this is not newly-discovered evidence. Additionally, the prior testimony does not reflect confusion, which would be susceptible of explanation.

After oral argument, plaintiffs were permitted to file a supplemental affidavit to explain Ms. Yan’s sudden memory recovery. In plaintiffs’ supplemental proffer, Ms. Yan avers: “I started being able to remember the accident years later, in the winter of 2007. At that time, I was not thinking about my mom and brother as much, I was not as sad. And my memory started to come back.”

The Court finds that plaintiffs have failed to provide an adequate explanation for Ms. Yan’s conflicting testimony and affidavit. While the Court does not

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<sup>13</sup> *Bank of Illinois v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1169-170 (7th Cir.1996).

<sup>14</sup> *Id.*

require medical or psychological evidence to explain an individual's memory recovery, plaintiffs must provide some type of independent evidence to corroborate the conflicting affidavit.<sup>15</sup> Here, Ms. Yan simply asserts that she is no longer as sad, and as a result, she can clearly remember the accident in detail. Such an explanation is inadequate. The Court finds that Ms. Yan's affidavit is a sham and, as such, the Court will not consider it.

### *Yan Thou's Affidavit*

The sham affidavit doctrine does not apply to Mr. Thou's affidavit. Mr. Thou gave his statement to the DSP in response to questions the DSP asked as part of their investigation of the accident. At that time, Mr. Thou was not under oath and he was not subject to cross-examination. Further, Mr. Thou's affidavit does not contradict his earlier statements. Mr. Thou's affidavit merely expands upon his earlier statements. Later affidavits, which expand upon previous testimony, are acceptable and will be considered by the Court.<sup>16</sup> Therefore, the Court finds that Mr. Thou's affidavit is not a sham and will be considered by the Court in determining Defendants' Motion for Summary Judgment.

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<sup>15</sup> See *Walker v. City of Wilmington*, 579 F. Supp.2d 563, 576 (D. Del. 2008) (finding that the affidavit, which conflicted with previous sworn testimony, was a sham where affiant failed to provide any "independent evidence" to support her explanation that the previous statement was a mistake).

<sup>16</sup> See *Cain*, 832 A.2d at 741 (holding that the sham affidavit doctrine was inapplicable where the affidavit supplemented and expanded upon the affiant's previous testimony.)

## CONCLUSION

The Court finds that Ms. Yan's affidavit is a sham and strikes the affidavit from the record. The Court finds the sham affidavit doctrine inapplicable to Mr. Thou's affidavit. Together, Mr. Thou's affidavit and the DSP report create a genuine issue of material fact. In the DSP report and within his affidavit, Mr. Thou asserts that at the time of the accident, passengers in the back of the van were yelling because the tanker truck was moving toward the van. While Defendants offer contrary testimony that the tanker truck never deviated out of its lane, the Court is not permitted on a motion for summary judgment to make credibility determinations or to weigh conflicting evidence.<sup>17</sup> Such determinations are for the finder of fact. Viewing the facts in the light most favorable to the non-moving party, a factual issue exists as to whether at the time of the accident Mr. Reistle drove in a manner that caused Ms. Yan to lose control of the van. Plaintiffs have provided sufficient evidence to establish that a genuine issue of material fact exists as to whether Defendants were negligent.

**THEREFORE**, Defendants' Motion for Summary Judgment is hereby **DENIED**.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston

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<sup>17</sup> See *Merrill*, 606 A.2d at 99.