NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3907-18

METRO MARKETING, LLC, NATIONAL AUTO DIVISION, LLC, and NATIONAL AUTOMOTIVE FINANCIAL SERVICES, LLC (f/k/a NATIONWIDE AUTOMOTIVE, LLC),

Plaintiffs-Appellants/
Cross-Respondents,

v.

NATIONWIDE VEHICLE ASSURANCE, INC., CHRISTIANO COPPOLA, DANIEL RODD, CHRISTOPHER DOYLE, MICHAEL KAHLBOM, DRIVESMART AUTO CARE, INC., and MOTOR VEHICLE ASSURANCE,

Defendants-Respondents/
Cross-Appellants,

and

DANTE CHRISTENSEN,[1]

APPROVED FOR PUBLICATION

May 12, 2022

APPELLATE DIVISION

[1] This defendant was improperly pled as "Christiansen" in the Amended Complaint.

Defendant-Respondent.

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Argued March 14, 2022 – Decided May 12, 2022

Before Judges Sabatino, Rothstadt and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-2090-16.

James M. Hirschhorn argued the cause for appellants/cross-respondents (Sills Cummis & Gross PC, attorneys; James M. Hirschhorn and Grace Byrd, of counsel and on the briefs; Clifford D. Dawkins, on the briefs).

Matthew N. Fiorovanti argued the cause for respondents/cross-appellants (Giordano, Halleran & Ciesla, attorneys; Matthew N. Fiorovanti, of counsel and on the briefs).

The opinion of the court was delivered by

SABATINO, P.J.A.D.

This litigation pits rival telemarketing firms against one another. Plaintiffs are affiliated companies engaged in selling extended service contracts to motor vehicle owners over the telephone. They claim that defendants hired away key managers and more than forty members of their sales force, siphoned customers, and misappropriated alleged trade secrets. Relying upon several legal theories, plaintiffs filed suit to recover damages and obtain injunctive relief.

In a series of orders, the trial court denied plaintiffs' request for a fifth extension of discovery and granted summary judgment to defendants, dismissing all of plaintiffs' claims now at issue on appeal. However, it denied defendants' motion for frivolous litigation sanctions under Rule 1:4-8.

As discussed infra, we hold that the "sham affidavit" doctrine adopted by the Supreme Court in Shelcusky v. Garjulio, 172 N.J. 185, 199-202 (2002), can extend to a "side-switching" situation. In particular, the doctrine can apply where, as here: (1) a codefendant is deposed, (2) that deponent thereafter obtains a job with the plaintiff, (3) the deponent then aids his new employer by signing certifications recanting his deposition testimony, and (4) the plaintiff offers those certifications in opposing summary judgment motions by the other defendants.[2]

Applying the sham affidavit doctrine to this record, we conclude the trial court appropriately disregarded the side-switching employee's certifications because he failed, as Shelcusky requires, to "reasonably explain[]" why he "patently and sharply" contradicted his earlier deposition testimony. Id. at 201.

However, we conclude the trial court erred in rejecting as evidence a recorded telephone conversation of a different codefendant who was also rehired

[2] For brevity, we will refer to such a situation functionally as "side-switching."

by one of plaintiffs' companies after his deposition. Because the recording should have been considered as evidence weighing against defendants' summary judgment motion, we remand this matter to allow the trial court in the first instance to reconsider its dismissal of the lawsuit in its entirety.

I.

The summary judgment record reflects the following pertinent facts and circumstances. Subject to our discussion of the sham affidavit doctrine in Part II, infra, we consider the record in a light most favorable to plaintiffs. R. 4:46-2; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The Parties

Plaintiffs Metro Marketing, LLC ("Metro"); National Auto Division, LLC ("NAD"); and National Automotive Financial Services, LLC ("NAFS"), which we shall collectively refer to as "National," are affiliated companies in Monmouth and Ocean Counties that operate a telemarketing business. Their business sells aftermarket motor vehicle service contracts.

Defendant Nationwide Vehicle Assurance, Inc. ("Nationwide"), is a company in Ocean County that operates a rival business in the same industry. Defendants DriveSmart Auto Care, Inc., and Motor Vehicle Assurance are Nationwide's affiliates.

The individual defendants included Christopher Doyle, Michael Kahlbom, and Dante Christensen (collectively, "the employee defendants"). They worked at National until early 2015 in positions designated as managerial. Kahlbom and Christensen also served as top-tier salespeople, or "closers." They were together responsible for finalizing about a quarter of National's sales in the year leading up to their departures.

National's Sales Practices

As pertinent here, National's sales occur in two stages. First, entry-level salespersons use National's computer system and leads bought from brokers to make "cold calls" to prospective customers. Guided by a script, the callers engage the recipients in conversation to persuade them to make a service contract purchase. Once a customer appears interested, that prospect is turned over to a "closer" (such as Kahlbom or Christensen), who completes the sale and obtains the necessary payment information. A closer might spend twenty minutes to an hour on that task, and sometimes requires a follow-up call, which the closer places manually, rather than through National's computer system.

As a condition of their employment, all three employee defendants signed restrictive covenant agreements with non-disclosure provisions.[3] Doyle and Kahlbom signed such covenants in February 2010 and March 2013, respectively. Christensen likewise signed a covenant in April 2014.

By way of illustration, Christensen's agreement with NAD defined "confidential information" as any "data and information relating to the business and management of NAD, including proprietary and trade secrets, technology, accounting and business records, client work product, client lists, business operating data, marketing and development data, customer lists, etc."

The agreement required Christensen, until one year following the termination of his employment, to "keep confidential all [such] information . . . as provided to . . . him" and "not . . . use any confidential information for any purpose which might be directly or indirectly detrimental to NAD or any of its affiliates or subsidiaries." Moreover, all confidential information covered by the agreement would "remain the exclusive property of NAD" and "only be used by Christensen for the purpose of achieving the objectives explained to him by NAD."

[3] In a ruling by the Chancery judge initially assigned to this case, the trial court found the restrictive covenants unreasonable and unenforceable with respect to post-employment conduct. Plaintiffs have not appealed that adverse ruling.

Doyle, Christensen, Kahlbom, and Others Leave National for Nationwide

It is undisputed that the employee defendants successively left National one at a time over a few weeks in early 2015—first Doyle in March and then Christensen and Kahlbom later that month or in early April—and that they all wound up working for Nationwide. A main point of contention, central to all claims at issue on appeal, is whether their involvement with Nationwide began before they admit.

In particular, plaintiffs have alleged that all three employee defendants furtively took part in Nationwide's formation with the formal owners of the company, defendants Christiano Coppola and Daniel Rodd, in early 2015. Plaintiffs further allege Doyle, Christensen, and Kahlbom worked there while still employed by National, thereby breaching their duties of loyalty and "stealing" National's sales script, customers, and employees in the process.

In opposition to plaintiffs' contentions, Coppola certified that he incorporated Nationwide in July 2014 as part of a plan to expand his existing business, a mortgage-lead generation company, into the vehicle service contract industry. Doyle and Rodd had briefly worked at the mortgage business in 2014 but, according to both Doyle and Coppola, left before Nationwide's formation.

Doyle confirmed at his deposition that after working at the mortgage business, he then went on to work for National, but left there sometime the following March. Doyle denied that he had any job lined up with Nationwide before leaving National. Doyle asserted he had not heard of Nationwide until he spoke with Coppola in April 2015 while planning for their softball team's upcoming season.

At their depositions, Christensen and Kahlbom each denied having even heard of Nationwide, much less having secured employment there, until well after they had already left National. Christensen, for his part, explained at his deposition that he simply ceased showing up at National without notifying anyone, with the intention of "liv[ing] off [his] savings for a little bit." He testified he learned of Nationwide only later from his sister, one of its employees, and, without having conducted any other job search that he could recall, applied and began working there either in July 2015 or, in Coppola's recollection, sometime in "early May."

Kahlbom, who started there around the same time as Christensen, likewise testified that he had not heard of Nationwide until "months after" leaving National, either from Christensen's sister or from Coppola and Rodd, with whom he also played softball.

Alleged Misappropriation of National's Sales Script, Employees, and Customers

The parties dispute whether the employee defendants inappropriately took anything or anyone on their way out of National. Coppola and Rodd stated that Nationwide's sales script derived from those Rodd had used at his own former telemarketing business. Moreover, Michael Bococinski, National's director of operations, acknowledged at his deposition that that script was "not identical in verbiage" to National's.

Eight former National employees who eventually went on to work for Nationwide explicitly denied having been solicited by any of the individual defendants. Most of them certified that they left National on their own accord to escape its allegedly "toxic" or "unhealthy" work environment, long hours, or poor compensation, though one explained that he simply found a "better job" elsewhere without expressing any particular dissatisfaction with National. One explained that he ultimately sought a job there merely because it was "the other company in the industry in the area." Some went to work directly for Nationwide, but not all did.

As for customers, plaintiffs maintain that Rodd purposely destroyed most of Nationwide's relevant records that might have shown improper diversion of

customers from National. The parties retained Cornerstone Discovery, LLC, a digital forensic examination firm, to compare the data that did exist from Metro and Nationwide to determine the extent of any overlap between the calls and sales made by the two businesses from October 2014 through May 2015.

The consulting firm issued a report (the "Cornerstone Report") in June 2016, concluding that 15,803 of the 791,501 outbound calls placed by Nationwide overlapped with phone numbers called by Metro. Metro had been the initial caller to 14,392 of those numbers and Nationwide the other 1,411. With respect to completed sales, Cornerstone found that thirty-eight of Nationwide's customers had also been contacted by Metro, and, of those, Metro had been the first to call thirty-five of them and Nationwide three. There was often a substantial lag, usually at least a week, between a call from Metro and one from Nationwide to the same customer.

Kahlbom's Return to National and His Recorded Telephone Call with Bococinski

In the interim between the trial court's denial of any preliminary relief on this record as it stood and the filing of the first amended complaint, Kahlbom left Nationwide and went back to work for plaintiffs. Once there, Kahlbom had

a series of conversations with Bococinski, in which he admitted that he, Doyle, and Christensen all had been involved with Nationwide before leaving National.

Bococinski recorded the last such conversation during a phone call he made to Kahlbom in December 2016, just before Kahlbom entered a treatment program. During the call, Bococinski helped Kahlbom arrange his financial affairs in anticipation of that treatment. Kahlbom, who did not know he was being recorded, provided details of his involvement with Nationwide, so that Bococinski could relay that information to counsel while Kahlbom was away.

In particular, Kahlbom confirmed that he, Doyle, and Christensen were "all partners" in Nationwide with Coppola and Rodd, in five equal shares, but they had been advised "not to put it on paper." He explained that Rodd and Coppola formally established the business, "getting together" all the initial "paperwork," but that Doyle helped Rodd "prearrange[] all the companies" that Nationwide was to "sell for and work with." Rodd then visited Kahlbom's home one evening to recruit him, and Kahlbom promptly agreed to join the company. Rodd "hooked [Kahlbom's] laptop up that [same] night to start selling."

On this same call, Kahlbom admitted he worked at Nationwide on odd hours, making calls either from Rodd's basement or from his own apartment on a laptop set up with an automated dialer and headphones, while still collecting

a salary and working for National during the day. He claimed Doyle and Christensen did likewise, recalling one particular occasion when the two "called out" for a "snow day" at National but then worked for Nationwide along with him "in [Rodd's] basement that day" instead. Yet none of them drew a salary from Nationwide until after all three had left National.

Further, although Kahlbom confirmed that Nationwide had the scripts from Rodd's former business, he asserted that Nationwide also "stole" National's script and, after a period of poor performance, also its sales. Regarding the latter, Kahlbom claimed that he and unspecified others from Nationwide "were calling people that we got from [National's] list" and that it had been his idea to "tak[e] sales" from National in that fashion. He did not elaborate further and, with respect to the other individual defendants' involvement, acknowledged having told only Rodd, who encouraged him to "do whatever you have to do" but to do so discreetly.

Kahlbom believed Doyle, even if not initially involved in that scheme, also "did [eventually] steal" sales from National. Kahlbom based that inference on how well Nationwide performed while he was away in treatment.

Kahlbom additionally asserted on that call with Bococinski that "[a]ll of us were instructed to lie [at] our depositions," explaining that Rodd "sat down

and made this whole timeline . . . to follow" at a meeting with the rest of the individual defendants, so that they could all "practice[] the lie."[4] To aid the alleged deception, Kahlbom even filled out a "backdated" employment application for Nationwide the "day before [his] deposition." He asserted that other documents had been fabricated as well, stating that "every piece of paper that you guys [National] needed or you guys asked for was always backdated" and then "sen[t] into the lawyers." Soon after this call, Kahlbom went on to complete his treatment program, but returned to work at Nationwide, rather than National, afterward.

Christensen's Return to National and His Two Post-Deposition Certifications

Later, in September 2018, after discovery had long closed, plaintiffs presented a recently executed certification from Christensen in opposition to defendants' motion for partial summary judgment on the claims alleging the customer-flipping scheme. Christensen certified that he now worked for National, specifically NAFS, rather than Nationwide, and that he did not participate in defendants' motion, had terminated his relationship with counsel

[4] We note the record before us contains no actual evidence that an attorney at defendants' law firm advised any client or witness to lie.

for the other defendants, and would be proceeding pro se. He asserted he voluntarily agreed to provide the initial certification to plaintiffs' counsel with the explicit understanding that it would be used in opposition to the motion, but did not explain why he was giving the certification.

Christensen confirmed in this first certification that he began working for Nationwide "in direct competition with National" around the summer of 2014, and that all five individual defendants were partners in Nationwide, albeit not in writing. He had an agreement with Doyle and Kahlbom, moreover, that none of them would leave National until Nationwide was "fully operational." In the meantime, Christensen continued to collect his paycheck from National, but received commissions for his sales at Nationwide from Rodd in cash.

Christensen further recalled that, in the fall of 2014, he and Kahlbom started "taking" information about National's prospective customers, including the credit card numbers to which they were privy as closers, and using it to complete those sales for Nationwide. He explained that they would target potential customers with whom they had "personally spoken" on National's behalf and therefore knew "were about to close a sale." Prior to closing, they would inform the customer that they would call him or her back and then would do so either from their own homes or Rodd's basement to finalize the sale instead

for Nationwide "during late night hours, weekends[,] and other off-business hours." Coppola and Rodd would then process the sales through various fulfillment companies.

Christensen specified that he never mentioned to customers he was calling on Nationwide's behalf on that second occasion, in order "to make the customer think that [he] was calling back on behalf of National." He simply introduced himself, stated he was calling back to finish the earlier conversation, and then completed the sale. Christensen acknowledged that he "sometimes waited several days[] or a week" before calling back, but he asserted that he required only one call to close the sale "[m]ost of the time" and was "certain" National would have obtained these sales had he not made them on Nationwide's behalf. He was unaware whether any audio recordings were made of the calls or records kept as to who contacted particular customers, but he recalled that only he and Kahlbom ever "flipped" any customers in this manner, estimating the total at about sixty to eighty sales.

Plaintiffs submitted a second certification from Christensen in December 2018 in opposition to defendants' subsequent motion for partial summary judgment on most of the remaining claims. Christensen advised that he had secured counsel, paid for by NAD, since his initial certification, and continued

to work for NAFS. He stated that his agreement to provide this recollection of events was voluntary and made neither as a condition of his continued employment for plaintiffs nor in exchange for any promise by plaintiffs to dismiss the claims against him. Christensen confirmed, moreover, that his first certification had been accurate but, "after further consultation with [his] attorney, . . . now add[ed] the following facts and information."

Specifically, Christensen recounted in his second certification that Rodd and Doyle recruited him in the summer of 2014 to help form Nationwide, but that Doyle subsequently suspended his involvement for several months until the company could gain its footing and generate sufficient business. Christensen explained that he and Kahlbom made the previously discussed calls to "flip[] sales" from National "primarily to generate the $50,000 that Doyle required as quickly as possible to rejoin Nationwide," and that they did so with Rodd's and Coppola's blessings. To that end, Christensen would even call in sick at National to make these calls.

According to Christensen, Doyle rejoined the operation in December 2014, but told Christensen soon after that he intended to remain at National, as well, for the time being, "to have the best opportunity to take [its] information . . . and recruit its employees." Christensen noted that Doyle had "unsupervised

access to National employees" as a manager, particularly "on Sundays[,] when he was the only manager working." Christensen, meanwhile, recruited his brother, another National employee, to work for Nationwide.

Christensen explained that he, Doyle, and Kahlbom "specifically targeted National employees because we knew Nationwide . . . could capitalize on the experience and training those employees received at National and that those employees would be ready to start producing on day one of their employment at Nationwide." Moreover, the employee defendants' own experience as managers at National lent them superior insight into the company's best performers. But Christensen believed that, as time went on, "Doyle and others increasingly targeted [p]laintiffs' workforce to specifically harm National . . . partly in response to Kahlbom rejoining National in the fall of 2016."

Christensen estimated that, by the time he left Nationwide in the summer of 2018 due to the business's mismanagement and disagreement over his compensation, about half the company's workforce consisted of former National employees.

With respect to this litigation, Christensen added that Rodd had destroyed Nationwide's "records reflecting confirmed sales to customers" after the complaint was filed, and that Rodd and Coppola asked him to fill out a job

application and other similar documents. With regard to his own previous deposition testimony and interrogatory answers, he stated only that he "ha[d] found inaccuracies" in them and tersely stated, "To the extent my prior testimony or interrogatory answers conflict in any way with what I have set forth in [my certifications], I hereby retract that prior testimony or those prior answers."

The Litigation

Plaintiffs filed a complaint against defendants in the Chancery Division in September 2015, seeking legal and injunctive relief on claims for violation of the New Jersey Racketeer Influenced and Corrupt Organizations Act ("RICO"), N.J.S.A. 2C:41-1 to -6.2, for breach of their former employees' restrictive covenant agreements, and on various other common-law grounds. Defendants filed an answer denying liability. In July 2016, following an initial period of discovery, the Chancery judge denied a motion by plaintiffs for preliminary injunctive relief, eventually prompting a transfer of the matter to the Law Division.

Plaintiffs then filed an amended complaint in the Law Division in February 2017 on primarily the same bases. Discovery continued, and the parties consented to a fourth—and what wound up being a final—extension for six months in the aftermath of unsuccessful mediation, pushing the discovery

deadline to April 2018. Plaintiffs moved for yet another four-month extension as that deadline approached, but the Law Division judge denied that relief, except to accommodate the exchange of expert reports and the taking of concomitant depositions.

Meanwhile, the Law Division judge granted partial summary judgment to defendants on plaintiffs' claims for breach of contract in May 2018. With the benefit of oral argument the judge granted the same relief to defendants on the RICO and related claims in October 2018 and on all but one of the remaining claims in January 2019, issuing an opinion and order in each instance. The judge then issued an order dismissing the complaint with prejudice on February 4, 2019, after plaintiffs failed to appear for trial on the only outstanding claim, and an opinion and order denying defendants' subsequent motion for frivolous litigation sanctions on April 2, 2018.

As we will discuss, infra, the trial court disregarded the Kahlbom recording and Christensen's certifications when evaluating defendants' final two motions for partial summary judgment. Consequently, the court ruled that plaintiffs had presented no "competent" evidence to substantiate any of the subject claims.

Plaintiffs appealed the dismissal of the lawsuit. All defendants, except for Christensen, cross-appealed the denial of frivolous lawsuit sanctions. Christensen has not participated in the appeal.

II.

Because they have novel aspects in this side-switching context, we first address the issues concerning the "sham affidavit" doctrine, and also related issues concerning plaintiffs' evidential reliance on the Kahlbom recording.

The Basic Rationale and Features of the Sham Affidavit Doctrine

The sham affidavit doctrine grows out of our courts' summary judgment jurisprudence. Pursuant to that doctrine, judges who rule on summary judgment motions are not bound to consider "a purely self-serving certification" by a party "that directly contradicts his [or her] prior representations in an effort to create an issue of fact." Winstock v. Galasso, 430 N.J. Super. 391, 396 (App. Div. 2013) (alteration in original) (quoting Alfano v. Schaud, 429 N.J. Super. 469, 475 (App. Div. 2013)).

As the Supreme Court instructed in its seminal opinion in Shelcusky, such a purported factual dispute based on a purely self-serving motion affidavit or certification may be "perceived as a sham" and, to that extent, should "not [constitute] an impediment to a grant of summary judgment." Shelcusky, 172

N.J. at 194. The Court observed it "would greatly diminish the utility of summary judgment," if a "party who ha[d] been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony." Ibid. (emphasis added) (quoting Perma Rsch. & Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969)).

As the Court explained in Shelcusky:

> The very object of the summary judgment procedure . . . is to separate real issues from issues about which there is no serious dispute. Sham facts should not subject a defendant to the burden of a trial. The determination that an offsetting affidavit creates only a sham factual dispute is squarely within the trial court's authority at the summary judgment stage, when the court is required to evaluate, analyze, and sift evidence to determine whether the evidential materials, when viewed in the light most favorable to the opposing party, would permit a rational factfinder to resolve the issue in favor of the opposing party. That rule does not intrude on the function of the jury because it does not require the trial court to determine credibility, or to determine the relative weight of conflicting evidence.
>
> [Id. at 200-01 (citation omitted).]

Even so, the doctrine does not permit a motion judge "mechanistically to reject any and all affidavits that contain a contradiction to earlier deposition testimony." Id. at 201. Instead, the judge must "evaluate whether a true issue

of material fact remains in the case notwithstanding [that] testimony." Ibid. As the Court stated:

> [c]ritical to [the doctrine's] appropriate use are its limitations. Courts should not reject alleged sham affidavits where the contradiction is reasonably explained, where an affidavit does not contradict patently and sharply the earlier deposition testimony, or where confusion or lack of clarity existed at the time of the deposition questioning and the affidavit reasonably clarifies the affiant's earlier statement.
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> [Id. at 201-02 (emphasis added).]

How the Doctrine Arose as an Issue in This Case

Here, the sham affidavit issue first arose when plaintiffs offered Kahlbom's recorded phone call and the first of Christensen's certifications in opposition to defendants' motion for partial summary judgment on the RICO and other claims alleging the customer-flipping scheme. At the time, defendants notably did not initially take the position that the court should disregard the Kahlbom recording pursuant to the sham affidavit doctrine or on any other ground, but they contended only that the recording offered no support for plaintiffs' allegations. They invoked the sham affidavit doctrine solely as to Christensen's certification, and the court did not explicitly invoke it, except to summarize defendants' arguments.

Nonetheless, the trial court did echo the rationale for that doctrine in

concluding that both pieces of evidence should be disregarded. Specifically, the court stated that "both [items had been] made under suspect circumstances at best"—one "on a phone call where the person did not know he was being recorded" and the other "while working under [plaintiffs'] employ"—and, more importantly, that both "completely contradict[ed] sworn testimony given at depositions." Although the court added that these statements were, in any event, substantively insufficient to support the RICO claims, it continued to regard them as "suspect" and imply they were not "competent evidence" in the balance of the opinion.

On defendants' subsequent motion for summary judgment, they reminded the trial court that it had "refused to consider those two pieces of 'evidence' as a basis to find a question of fact" on the prior motion and urged it to "do the . . . same thing" on this one, albeit while mentioning the sham affidavit doctrine only in connection with Christensen's certifications. The court obliged and confirmed that "the secretly recorded Kahlbom conversation and . . . Christensen's certifications contradicting his sworn deposition testimony [were] not competent evidence," though it again declined either to explicitly invoke the doctrine, except in summarizing defendants' arguments, or to point to any other legal authority for that determination. (Emphasis added).

The Arguments on Appeal

On appeal, plaintiffs interpret the court's decision as having rejected both the recording and the certifications pursuant to the doctrine and assert that the court was mistaken on both counts. They emphasize that the scope of the doctrine is limited.

Plaintiffs draw a sharp contrast between the circumstances here and the typical situation warranting the doctrine's application—where a party submits a self-serving certification to rescue his or her own case. Kahlbom and Christensen, plaintiffs argue, were not "bolstering their own case" but instead "switching sides out of perceived self-interest" and had no greater motive to lie in the phone call or certifications than they had at their depositions. Plaintiffs acknowledge that the two re-hired individuals were therefore "hardly models of veracity," but argue that the discrepancies in their accounts therefore presented "classic issues of credibility" that had to be left for trial.

Defendants respond that the doctrine was clearly applicable to Christensen's certifications, reasoning that the certifications flatly contradicted his prior testimony, and that he could offer no reasonable explanation for the discrepancy except to euphemistically admit that he had outright lied. They point, moreover, to plaintiffs' acknowledgement that Christensen had made his

certifications out of "self-interest" rather than for any legitimate reason, and believe that such improper motivation made those certifications the very kind the doctrine was meant to target in the first place. Defendants agreed with the court's rejection of the Kahlbom recording as well, but reiterate on appeal only that it was substantively inadequate to support plaintiffs' claims, not that it amounted to a sham affidavit.

The Sham Affidavit Doctrine's Inapplicability to the Kahlbom Recording

To begin with, we hold the sham affidavit doctrine was plainly inapplicable to the Kahlbom recording. Although statements Kahlbom made during the phone call contradicted his prior deposition testimony, the recording was not an affidavit or a certification and was made well before the summary judgment motion, predating even plaintiffs' first amended complaint in the Law Division. Defendants have never invoked the doctrine as to the recording, either below or on appeal, and neither they nor the court have ever identified any other viable ground for disregarding this ostensibly admissible item of evidence. See State v. Driver, 38 N.J. 255, 287-88 (1962) (discussing standards for the admissibility of audio recordings).

The court stated, at best, the Kahlbom recording was "suspect" or, with reference to defendants' arguments, seemingly not worthy of "credit." At the

time of the recording, Kahlbom was employed by National, and just about to enter an extended treatment program. Kahlbom was reliant on Bococinski, who was asking him for information about Nationwide, not only for his continued employment with National, but also to help him organize his affairs ahead of going into treatment. Plus, Kahlbom was unaware he was being recorded.

Any discrepancy between Kahlbom's recorded statements and prior deposition testimony simply presented a credibility issue requiring submission to trial, Akhtar v. JDN Props. at Florham Park, LLC, 439 N.J. Super. 391, 399 (App. Div. 2015), at least to the extent that proof created any genuine dispute of material fact. Despite the trial court's contrary finding, the recording was "competent" evidence, potentially admissible at trial under the usual rules of relevance, authentication, and other provisions. The trial court should not have disregarded the recording in considering the summary judgment issues.

The Sham Affidavit Doctrine Does Apply to Christensen's Side-Switching Certifications

As for Christensen's certifications, we must consider, as a matter of first impression in this State, whether the sham affidavit doctrine can ever apply to a certification or an affidavit by a deponent who has switched sides by becoming an employee of the opposing party. We hold that it can, and does in this case.

Our case law has not confronted this distinctive side-switching situation. The published New Jersey cases thus far have only applied the doctrine to an offending affidavit or certification made by the same party presenting it in opposition to summary judgment.[5]

Other jurisdictions have addressed circumstances that are somewhat instructive, but not identical to the side-switching scenario presented here.

The Third Circuit Court of Appeals has extended the doctrine's application to the affidavit of a defendant that was on the same side of the lawsuit of the codefendant moving for summary judgment. See Jiminez v. All Am.

[5] See, e.g., Hinton v. Meyers, 416 N.J. Super. 141, 149-50 (App. Div. 2010); Kennelly-Murray v. Megill, 381 N.J. Super. 303, 310 (App. Div. 2005); Harris v. Middlesex Cnty. Coll., 353 N.J. Super. 31, 47 (App. Div. 2002); see also Shelcusky, 172 N.J. at 202-04 (finding a plaintiff's certification inconsistent with his own prior representations, but holding the doctrine did not apply because the certification amounted to a clarification); State v. Blake, 444 N.J. Super. 285, 299 (App. Div. 2016) (holding a criminal defendant could not create a factual dispute warranting an evidentiary hearing on petition for post-conviction relief simply "by contradicting his [own] prior statements without explanation"); Carroll v. N.J. Transit, 366 N.J. Super. 380, 388-89 (App. Div. 2004) (holding a plaintiff's interrogatory response that flatly contradicted his own deposition testimony insufficient to create genuine dispute of material fact); Moisor v. Ins. Co. of N. Am., 193 N.J. Super. 190, 195 (App. Div. 1984) (holding a plaintiff could not "create an issue of fact simply by raising arguments contradicting his own prior statements and representations"); Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 375 n.1 (Law Div. 2002) (holding a plaintiff's "allegations in opposition to . . . [a] motion that contradict her deposition testimony" did not preclude summary judgment).

Rathskeller, Inc., 503 F.3d 247, 254-55 (3d Cir. 2007). At issue there was the affidavit of a bar owner whose establishment was sued along with the local police department, after the death of a person whom his employees forced and held to the ground outside the bar. Id. at 248-50. The plaintiffs in Jiminez, including the decedent's estate, alleged the department had a policy of directing the bar's employees to detain suspected lawbreakers in that manner. Id. at 250. The department moved for summary judgment, in part in reliance on the bar owner's prior deposition testimony that the bar's "restraint policy was in no way related to police operations." Id. at 254. However, the bar owner filed an "eleventh-hour" affidavit asserting that "unidentified" police officers "asked" his employees to detain individuals until law enforcement arrived. Ibid.

The district court acknowledged in Jiminez there was no direct conflict between the affidavit and deposition testimony because the bar's policy could already have been in existence by the time the police gave the purported instructions. Ibid. But the court nonetheless rejected the affidavit, reasoning that it was "entirely unsupported by the record," including the testimony of every deposed police officer and the bar's security personnel, and that the plaintiffs' and bar owner's failure to further investigate the affidavit's vague revelations in the time since its submission "sp[o]k[e] volumes about its veracity." Id. at 254-

55. Moreover, the interests of the bar owner, although he was a fellow co-defendant, were "directly averse" to those of the police department, because a grant of summary judgment to the department would expose the bar to greater liability, and he offered no explanation for the conflict. Id. at 255.

The Third Circuit affirmed the district court's ruling in Jimenez. Ibid. In its opinion, the court added that, "[e]ven if the affidavit were not deemed a sham," no reasonable factfinder could have concluded on that record that the police department had the policy that plaintiffs had alleged. Id. at 255 n.5.

The Sixth Circuit, meanwhile, has approved the use of the sham doctrine in a similar situation: "an affidavit from one defendant, which directly contradicts his prior sworn testimony, submitted by the plaintiffs to defeat summary judgment motions from other defendants." France v. Lucas, 836 F.3d 612, 622-23 (6th Cir. 2016) (emphasis in original). There, the two plaintiffs, targets of what turned out to be a corrupt drug investigation, asserted civil rights violations and various other claims against county and federal law enforcement officials, the county, and a confidential informant. Id. at 616-17, 621. Over the course of the litigation, most defendants settled and nearly all the rest were granted summary judgment by the time the final two also moved for summary judgment. Id. at 621. Only then did the plaintiffs in France introduce an

affidavit from the confidential informant, who died in prison a month later, stating for the first time that certain other individual defendants were aware the informant was framing individuals and fabricating evidence during the investigation. Ibid. The affidavit was in conflict with both his prior testimony and his statement to law enforcement. Id. at 621-22.

Although the Sixth Circuit acknowledged that it ordinarily "appl[ied] the sham affidavit doctrine against a party who attempts to avoid summary judgment by filing his own affidavit that directly contradicts his own prior sworn testimony," it nonetheless affirmed rejection of the informant's affidavit there. Id. at 622-23 (emphasis in original). Finding the Third Circuit's reasoning in Jiminez persuasive, the Sixth Circuit recounted that the document represented the informant's third version of events yet "utterly failed" to offer any explanation at all for the discrepancy, that it had been "submitted for the sole purpose of defeating his codefendants' motions for summary judgment," and that his interests, "while perhaps not directly adverse to his codefendants', were certainly not aligned with them." Id. at 623-24.

The Sixth Circuit in France rejected the notion that the affidavit reflected the confidential informant's decision to finally "come clean," noting that the "only consistent part of [his] ever-changing story [wa]s that he was framing

people," and that the affidavit was "not damning to him in the least bit." Id. at 624 (emphasis in original). Moreover, the informant's death rendered it impossible for the defendants implicated by his new affidavit to subject him to cross-examination at trial as to the discrepancies. Ibid.

Several jurisdictions have permitted the doctrine's application to affidavits of third-party witnesses performing services for a party, such as an expert.[6] The apparent rationale, summed up by the Arizona Court of Appeals after its survey of federal precedent on the issue, was that the doctrine was "properly applied when a nonparty affiant has some motive, emotional or financial, to fabricate sham issues of fact." Allstate Indem. Co. v. Ridgely, 153 P.3d 1069, 1073 (Ariz. Ct. App. 2007) (emphasis added).

Having pondered these concepts of motive, and case law from other courts, we conclude the sham affidavit doctrine should be applicable in New Jersey to a codefendant such as Christensen who presents one version of the facts at his deposition refuting a plaintiff's claims, who thereafter recants that testimony after taking employment with that plaintiff. The adoption of this

[6] See, e.g., Adelman-Tremblay v. Jewel Cos., 859 F.2d 517, 521 (7th Cir. 1988) (expert witness); Garnac Grain Co. v. Blackley, 932 F.2d 1563, 1567-68 (8th Cir. 1991) (same); Pettiford v. Aggarwal, 934 N.E.2d 913, 919 (Ohio 2010) (same); Kiser v. Caudill, 599 S.E.2d 826, 832-34 (W. Va. 2004) (same); Yahnke v. Carson, 613 N.W.2d 102, 108-09 (Wis. 2000) (same).

principle in a side-switching employment context aligns with the policy underpinnings of the doctrine set forth in Shelcusky and other cases. A litigant should not be able to woo away an opposing party who already has been deposed and then, having taken that party under its fold and presumptive control by hiring or rehiring him, obtain from that party a contradictory affidavit to defeat summary judgment.

Although Christensen was not formally realigned in the lawsuit and remains a defendant in the pleadings, he clearly joined plaintiffs' side of the contest after they rehired him. He ceased being represented by defendants' law firm, and although he retained independent counsel, NAFS has paid his legal fees. Unlike Kahlbom, who was unaware he was being recorded, Christensen purposefully executed sworn repudiations of his deposition testimony, in an effort to aid plaintiffs in this lawsuit. Manifestly, Christensen had "some motive, emotional or financial, to fabricate sham issues of fact." Ridgely, 153 P.3d at 1073. The sham affidavit doctrine sensibly should extend to party affiants such as Christensen as well as nonparty affiants.

A side-switching situation is inherently suspect unless the recanting certification or affidavit "reasonably explain[s]" why the witness changed his or

her sworn account, as required by Shelcusky, 172 N.J. at 201-02. Here, the record is bereft of such a reasonable explanation.

In his first certification, Christensen does not even address his deposition testimony. In his second certification, Christensen simply says that he has reviewed the transcript of his deposition, as well as his answers to interrogatories, and has "found inaccuracies." In conclusory fashion, he "retracts that prior testimony or those answers" which "conflict in any way" with the information he has since provided in his previous and current certifications. He provides no further elaboration. His unexplained about-face fails to meet the requirements of Shelcusky.

In sum, the trial court was justified in rejecting the Christensen certifications as proper evidence to support plaintiffs' opposition to summary judgment. By contrast, the court did err in disregarding the Kahlbom recording, which is unaffected by the sham affidavit doctrine.

The trial court's improper disallowance of the Kahlbom recording, which was highly critical of defendants' business practices and revealed many harmful alleged facts about defendants, had the capacity to taint the court's entire analysis of the summary judgment record. R. 2:10-2 ("Any error . . . shall be

disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . .") (emphasis added).

Without deciding the full impact ourselves, the inclusion of the Kahlbom recording as part of the summary judgment record may affect all or some of the various counts of the complaint, viewing the record in a light most favorable to plaintiffs. Brill, 142 N.J. at 540.[7] For instance, it appears the recording, at the very least, is supportive of plaintiffs' claims that the individual defendants breached their duties of loyalty while they were working for plaintiffs' companies. The recording also seemingly bolsters plaintiffs' claim of unfair competition. We need not comment further, and leave it to the trial court's careful consideration of the impact on other claims.

As a consequence, we vacate summary judgment in all respects and remand defendants' motion to the trial court for further consideration—this time with the Kahlbom recording as part of the merits assessment. We do not prescribe how the court should rule on remand, and whether some counts should

[7] Apart from the liability issues, we recognize there are substantial issues concerning damages and to what extent, as Kahlbom intimated in his recorded conversation, prospective customers were siphoned from plaintiffs to defendants.

be reinstated, and others should not. As part of the remand, the court shall have the discretion to reopen discovery as may be warranted.

Lastly, the court's denial of counsel fees to defendants is provisionally affirmed, subject to the outcome of the remand.

III.

For all of the above reasons, we affirm the trial court's rejection of the Christensen certifications under the sham affidavit doctrine, reverse the court's disallowance of the Kahlbom recording, and vacate the entry of summary judgment without prejudice. The matter is therefore remanded for reconsideration and further proceedings in light of this opinion. A case management conference shall be convened in thirty days.

Affirmed in part, reversed in part, and remanded in part. We do not retain jurisdiction.