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## Plaintiff's Testimony Too Incredible to Defeat Summary Judgment

Amy Mattson – May 25, 2018



A court may make credibility determinations on a summary judgment motion where the facts alleged are so contradictory as to be inexplicable in light of evidence in the record, according to the [U.S. District Court for the District of](#)

[Connecticut](#). In *Gill v. Teva Respiratory, LLC*, the court granted the defendants' motions for summary judgment, reasoning that the plaintiff, in relying exclusively on her own testimony, failed to rebut the defendants' evidence or correct discrepancies in the record. Although the U.S. Court of Appeals for the Second Circuit has previously held that a credibility determination is warranted where a plaintiff relies on incomplete and contradictory testimony, some [ABA Section of Litigation](#) leaders believe this case may spur courts and practitioners to alter their methodology.

### Evidentiary Record Undermines the Plaintiff's Testimony

The plaintiff sued the maker and the retailer of her asthma inhaler after breathing in a thumb tack that became lodged inside the device. The plaintiff claimed she had stored the inhaler in her car's glove compartment and had aspirated the tack after using the product, which had been in its original packaging. Doctors removed a tack from her lungs several days later.

In support of their motion for summary judgment, the manufacturer submitted evidence of its production processes, which reflected that a tack could not have been introduced into the inhaler while in its control. The retailer relied upon the plaintiff's admission in her deposition testimony that the inhaler was in its

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original packaging prior to use, maintaining it could not have tampered with the device. Both defendants also relied upon the plaintiff's medical records which reflected the plaintiff had kept the inhaler in her purse, its cap had become dislodged, and her children had inserted a push pin into its mouthpiece.

The plaintiff did not provide any evidence to carry her burden in opposing summary judgment. When deposed, the plaintiff admitted she did not know how the tack got into her inhaler and could not explain the statements in her medical records. Nor could she explain why the dosage counter indicated the inhaler had been sprayed thirty-four times when she had not used the inhaler since the incident. The plaintiff also conducted no discovery and did not submit a statement of material facts as required by local rules.

### **Court Makes Rare Credibility Determination on Summary Judgment**

The court deemed the defendants' facts to be true and granted the defendants' motions for summary judgment on the grounds there was no genuine issue of material fact. Though the court acknowledged that its role generally did not encompass making credibility determinations, it relied upon the Second Circuit's decision in *Rojas v. Roman Catholic Dioceses of Rochester* in concluding that where "the facts alleged are so contradictory that doubt is cast upon their plausibility, the court may pierce the veil of the complaint's factual allegations and dismiss the claim." The district court further reasoned that to hold otherwise would "license the mendacious to seek windfalls in the litigation lottery."

In this case, the district court specifically criticized the plaintiff's inability to explain the contradiction between the medical records, which indicated the inhaler was uncapped in her purse and accessible to her children, and her own declaration that it was unopened in her vehicle's glove compartment. The court also noted the discrepancy between evidence that the inhaler's dosage count reflected thirty-four uses and the plaintiff's testimony that she had used the inhaler once.

Finding the plaintiff's account unworthy of belief, the court ultimately rested on the plaintiff's repeated admissions that she did not know how the thumbtack got into the inhaler. Because of these disavowals, it concluded the plaintiff was "in no position to claim or prove at trial that the defendants were responsible or liable."

### **A One-Time Result or a Slippery Slope?**

Although [ABA Section of Litigation](#) leaders concede that the plaintiff's case was out of the ordinary, they are divided as to the decision's broader impact. "It is rare to find a credibility determination about a relatively discrete fact at the summary judgment stage," explains [Paula M. Bagger](#), Boston, MA, vice-chair of the Section of Litigation's Commercial & Business Litigation

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Committee. "Was the inhaler package open or closed? When courts start to make these determinations, they head down a slippery slope. What is considered a bright line rule becomes a little murkier," she says.

However, not all Section leaders agree the decision has resonance. "Practitioners should take note of the fact that the court emphasized this was a rare and extraordinary matter. I don't foresee this extending to many other circumstances," opines [Michael S. LeBoff](#), Newport Beach, CA, cochair of the Section's Commercial & Business Litigation Committee.

Ultimately, the ruling may be a teachable moment. "This is a cautionary tale for plaintiffs," states [Mark A. Romance](#), Miami, FL, member of the Section's Commercial & Business Litigation's Practice Points Subcommittee. "You need to have evidence in the record that supports your theory of the case beyond your client's own testimony," he advises.

*Amy Mattson is a contributing editor for Litigation News.*

**Hashtags:** #SummaryJudgment #CivilProcedure  
#ManufacturingDefects

### Resources

- Eric N. Macey, "[How to Prepare a Winning Motion for Summary Judgment](#)," *Pretrial Practice and Discovery* (March 2, 2017).
- James A. King, "[Summary Judgment Evidence 101](#)," *Trial Evidence* (June 19, 2013).
- Andrew J. Kennedy, "[Lawyer Sanctioned for Pursuing Baseless Case to Summary Judgment](#)," *Litigation News* (June 30, 2016).
- *Rojas v. Roman Catholic Dioceses of Rochester*, 660 F.3d 98, 105 (2d Cir. 2011) (quoting *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005))

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