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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 IN RE: PHENYLPROPANOLAMINE
8 (PPA) PRODUCTS LIABILITY
9 LITIGATION,

ORDER DENYING CHATTEM, INC.
AND THE DELACO COMPANY'S
MOTION FOR SUMMARY JUDGMENT

10 This document relates to:

11 Miller v. Thompson Medical
12 Company, Inc., et al.,
13 No. 02-917

14 THIS MATTER comes before the Court on defendants Chattem,
15 Inc. and The Delaco Company's (collectively, "defendants") motion
16 for summary judgment. Having reviewed the pleadings filed in
17 support of and in opposition to this motion, the Court finds and
18 rules as follows:

19 I. BACKGROUND

20 Plaintiff Veronica Miller sued Chattem, Inc. ("Chattem") and
21 The Delaco Company ("Delaco") (collectively, "defendants")
22 seeking damages for injuries allegedly resulting from her inges-
23 tion of "Vitamin C Dexatrim Maximum Strength Appetite Supressant"
24 ("Dexatrim") in February, 2000. At her deposition, plaintiff
25 produced the box of Dexatrim she claims to have purchased in
26 January, 2000 at a Wal-Mart in Garland, Texas. Plaintiff identi-
fied this box as the one containing the Dexatrim she claims to

1 have taken in February, 2000. The box plaintiff produced bears a
2 product lot # SEDC10782C. Plaintiff maintains that the Dexatrim
3 she took in February, 2000 caused her February 26, 2000 stroke.
4 According to the plaintiff's deposition testimony, she purchased
5 Dexatrim only twice- in 1995¹ and in January, 2000. Miller Dep
6 at 71-72.

7 Chattem and Delaco moved for summary judgment on the basis
8 that the plaintiff could not show a causal link between the box
9 of Dexatrim she produced, which she identified as the box at
10 issue, and her stroke. Chattem's shipment records reveal that the
11 first shipment to any location bearing lot #SEDC10782C was on
12 August 24, 2000, six months after plaintiff's injury. Further,
13 the distribution center that supplies the Wal-Mart where Ms.
14 Miller allegedly purchased the Dexatrim received only two ship-
15 ments bearing the lot number at issue: one on September 13, 2000
16 and the other on September 27, 2000, seven months after Ms.
17 Miller's stroke. Therefore, if the plaintiff indeed took Dexatrim
18 from the box she identified, it could not have caused her stroke,
19 because she would have taken it in the fall of 2000, not Febru-
20 ary, 2000.

21 Plaintiff now concedes that the box she identified and
22 produced could not have been purchased prior to her stroke.
23 However, she argues that she indeed took Dexatrim in February,
24

25 ¹Plaintiff's claims do not relate to the Dexatrim she claims
26 to have purchased and ingested in 1995.

1 2000 and that the issue should go to a jury. In support of her
2 opposition to defendants' motion, plaintiff submitted a declara-
3 tion in which she affirmed that she took Dexatrim in the days
4 preceding her stroke. Plaintiff's declaration, however, also
5 directly contradicts her deposition testimony. She claimed in her
6 declaration that she purchased Dexatrim multiple times between
7 1995 and 2000, not just twice as she maintained in her sworn
8 deposition testimony. Plaintiff also asserted in her declaration
9 that she might have purchased Dexatrim in the late summer or
10 early fall of 2000, although she noted that she did not specifi-
11 cally recall doing so.

12 Defendants argue in support of their motion that plaintiff
13 cannot create a genuine issue of material fact to defeat summary
14 judgment by submitting an affidavit contradicting her prior sworn
15 testimony that the box produced was the box that contained the
16 Dexatrim she alleged was linked to her stroke. Defendants take
17 the position that allowing a non-moving party to create an issue
18 of fact by submitting an affidavit contradicting her prior sworn
19 testimony subverts the purpose of summary judgment.

20 21 II. DISCUSSION

22 Under FRCP 56(c), a district court shall grant a motion for
23 summary judgment where the pleadings, depositions, answers to
24 interrogatories, admissions on file and affidavits, if any, show
25 that there is no genuine issue of material fact and the moving
26 party is entitled to judgment as a matter of law. Where a party

1 tries to overcome a motion for summary judgment by submitting an
2 affidavit contradicting that party's earlier deposition testi-
3 mony, a court may grant the motion notwithstanding the contradic-
4 tion. Kennedy v. Allied Mutual Insurance Co., 952 F. 2d 262, 266-
5 67 (9th Cir. 1991).

6 A conflicting affidavit must be carefully considered by the
7 court, and should be disregarded only where it presents a sham
8 issue. Id. "[E]very discrepancy contained in an affidavit does
9 not justify a district court's refusal to give credence to such
10 evidence. In light of the jury's role in resolving questions of
11 credibility, a district court should not reject the content of an
12 affidavit even if it is at odds with statements made in an
13 earlier deposition." Id. at 266 (internal quotation marks omit-
14 ted). For example, a "non-moving party is not precluded from
15 elaborating upon, explaining or clarifying prior testimony
16 elicited by opposing counsel on deposition; minor inconsistencies
17 that result from an honest discrepancy, a mistake, or newly
18 discovered evidence afford no basis for excluding an opposition
19 affidavit." Messick v. Horizon Indus., Inc., 62 F. 3d 1227, 1231
20 (9th Cir. 1995) (citation omitted). In this case, the Court
21 cannot say with certainty whether the inconsistencies contained
22 in the plaintiff's declaration are due to a lapse of memory, or
23 whether they constitute a sham. Therefore, in deference to the
24 jury's role in evaluating the credibility of witnesses, the Court
25 is of the opinion that defendants' motion for summary judgment
26 should be denied.

ORDER

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III. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is DENIED.

DATED at Seattle, Washington this 10th day of February, 2004.

s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE