



Lessons on Nuance in Summary-Judgment Law

RICHARD ROSENGARTEN

On Jan. 31, 2018, the U.S. Court of Appeals for the Eleventh Circuit, sitting en banc, decided *United States v. Stein* and held that “an affidavit which satisfies Rule 56 of the Federal Rules of Civil Procedure may create an issue of material fact and preclude summary judgment even if it is self-serving and uncorroborated.”¹ Judge Adalberto Jordan wrote for the court, making it the second time in recent years he’s penned a noteworthy opinion on the nuances of summary-judgment law.

The occasion of *Stein*, then, makes for something of a *body* of precedent on the subject, making it worthy of treatment. This article discusses *Stein* along with another summary-judgment opinion from 2015, *Carlson v. FedEx Ground Package Systems Inc.*² Both Eleventh Circuit opinions, both by Judge Jordan, remind us that summary judgment is not as simple as the text of Rule 56. Nuances of the law, in an appropriate case, may tip a court toward deference to the factfinder.

Stein was a suit by the government against Estelle Stein for outstanding tax assessments, claiming she had not satisfied accrued penalties for tax years 1996, 1999, and 2000, and had not paid any taxes, penalties, or interest for years 2001 and 2002. The government moved for summary judgment, and sought to demonstrate Stein’s outstanding tax assessments with “copies of her federal tax returns, transcripts of her accounts for the tax years in question, and an affidavit from an IRS officer.”³

Stein opposed summary judgment, relying on her own affidavit. She swore that “to the best of [her] recollection, she had paid the taxes and penalties owed for the years in question.” She remembered retaining an accounting firm after her husband died and paying the taxes and penalties. But she had no bank statements, no other evidence to corroborate her memory.⁴

The district court granted the government’s motion for summary judgment. The government’s evidence created a presumption that the assessments were correct; and Stein’s affidavit was uncorroborated, so she failed to overcome the presumption.⁵

Stein appealed and encountered a panel of the Eleventh Circuit bound by its precedent in *Mays v. United States*,⁶ “a summary judgment case holding that self-serving statements in a taxpayer’s affidavit, without more, are insufficient to genuinely dispute the presumption that the government’s tax assessment is correct.”⁷ Bound by *Mays*, the Eleventh Circuit affirmed summary judgment in favor of the government (per curiam), ruling Stein’s “general and self-serving assertions ... failed to rebut the presumption established by the assessments.”⁸

Judge Jordan wrote a concurrence, joined by Judge William Pryor.⁹ Jordan acknowledged that the court was bound by *Mays* but took issue with that precedent. He objected that *Mays*, although a summary-judgment case, relied for its decision on cases “in the post-trial context, where the standard of review is much more deferential than at the summary judgment stage.” “The principle articulated in *Mays*,” Jordan insisted, “has no place in a summary judgment posture.” That’s because at the summary-judgment stage, “[a] single material fact genuinely in dispute makes it the proper province of the jury, and not the court, to decide the outcome.” It may well be that the factfinder ultimately “disregard[s] uncorroborated, self-serving statements as suspect.” But that does not mean “that self-serving statements made by a taxpayer with personal knowledge cannot

create a jury question as to the correctness of the government's assessment."¹⁰

Judge Jordan called for *Mays* to be overruled in vindication of summary-judgment principles: "Though the evidentiary weight of self-serving testimony may warrant discounting by the factfinder at trial, that logic has no place at summary judgment, where 'the judge's function is not . . . to weigh the evidence.'"¹¹

The Eleventh Circuit answered the call, granting rehearing en banc.¹² Judge Jordan wrote for the en-banc court, and the Eleventh Circuit overruled *Mays* "to the extent it holds or suggests that self-serving and uncorroborated statements in a taxpayer's affidavit cannot create an issue of material fact with respect to the correctness of the government's assessments." Like Judge Jordan's panel concurrence, the en banc opinion examined the authority *Mays* relied on and concluded that it did not support what *Mays* had come to stand for.¹³ The court acknowledged an affidavit cannot be *conclusory*.¹⁴ But nothing in Rule 56 prohibits an affidavit from being self-serving—the Eleventh Circuit had recognized as much in past cases.¹⁵ "Nor does Rule 56 require that an otherwise admissible affidavit be corroborated by independent evidence." That *Stein* and *Mays* were tax cases made no difference—the "presumptions" about the correctness of the government's assessments notwithstanding—because the same summary-judgment standard applies in tax cases as in other areas of law.¹⁶

The court cautioned that a self-serving or uncorroborated affidavit won't *always* preclude summary judgment. But the point is that it's wrong to say it *never* can. "A non-conclusory affidavit which complies with Rule 56 *can* create a genuine dispute concerning an issue of material fact, even if it is self-serving [or] uncorroborated." Overruling *Mays*, the en banc court remanded Stein's appeal back to the panel. The panel, in turn, vacated the summary judgment and remanded to the district court, for further proceedings consistent with the en banc opinion.¹⁷

Judge Jordan's insistence on a nuance of summary-judgment law led to the en banc overruling of earlier precedent, reinforcing the deference owed to factfinders at the summary-judgment stage. And it wasn't the first time in recent years that he led a panel to protect and bolster the factfinder's province.

Carlson v. FedEx Ground Package Systems Inc. was a class action by FedEx drivers in Florida against FedEx alleging several statutory and common-law claims.¹⁸ The Judicial Panel on Multidistrict Litigation consolidated it with similar actions from approximately 40 other states before the Northern District of Indiana (the MDL court). Together "the drivers alleged that, under their respective state laws, they were *employees* of FedEx [as opposed to independent contractors] and sought, among other things, reimbursement of business expenses and back pay for overtime."¹⁹

The MDL court certified a Florida class. After discovery, the Florida drivers and FedEx filed motions for summary judgment—the drivers asserting they were employees under Florida law and FedEx asserting they were independent contractors.²⁰ The MDL court granted FedEx's motion and denied the drivers'. It "ruled that the drivers were independent contractors under Florida law because, under the [drivers'] operating agreement and FedEx's standard practices and procedures, FedEx did not have the right to control the manner, method, and means by which the drivers did their jobs." In a statement that would become important to the Eleventh Circuit's later consideration of the issue, the MDL court concluded that "*the*

only reasonable inference that can be drawn [from the operating agreement and FedEx's standard practices and procedures] is that FedEx hasn't retained the right to control the details of the [Florida drivers'] work methods on a class-wide basis."²¹

The MDL court remanded the case to the Middle District of Florida for resolving the individual common-law claims. FedEx prevailed, and the drivers appealed to the Eleventh Circuit from the final judgment.²²

The Eleventh Circuit reversed summary judgment on the status question. Judge Jordan, writing for a unanimous panel, "conclude[d] that, on this record, the issue [of whether the drivers are employees or independent contractors] is one for a jury to resolve."²³ How the Eleventh Circuit arrived at that decision involved a nuance not often seen operating in an appellate summary-judgment decision.

First, the court's recitation of legal standards was not all boilerplate. It included these remarks:

"If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment. . . ." This is because "the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." Here, as we explain, the underlying facts are largely undisputed, but the inferences that can be drawn from those facts are not.²⁴

The court then turned to the highly fact-specific inquiry of whether someone is an employee under Florida law. The legal standards governing that substantive question included several restatement factors, with emphasis on the terms of the parties' agreement and "the extent of control an employer exercises over the details of the job."²⁵ Under those standards, and on the record before it, the court found much to say in favor of both sides' positions.

On the one hand, the drivers' operating agreement *said* they were independent contractors; the drivers could hire replacement drivers and, if they did, they were responsible over them; the drivers did not have to use their trucks exclusively in the service of FedEx; FedEx did not take the usual employee deductions from the drivers' compensation; the drivers could sell all or part of their service areas to FedEx or acquire service areas from other drivers; and it was not clear whether the drivers were subject to termination at FedEx's complete discretion.²⁶ These facts, among others, suggested a lesser level of control resembling an independent-contractor relationship.

On the other hand, the operating agreement didn't leave entirely up to the drivers the methods to employ in carrying their packages; FedEx had to *approve* any replacement drivers under somewhat exacting standards; FedEx reserved control over the type and details of the truck; and FedEx dictated the details of the tools and instruments used for delivery, as well as the manner employed by the drivers in processing, picking up, and delivering the packages—including how to load their trucks and what clothes to wear.²⁷ These facts suggested a higher level of control resembling an employer-employee relationship.

For guidance in figuring out the drivers' status, the court reviewed several Florida precedents. However, while the precedents helped illuminate governing legal standards, because of their different facts and results, they did not ultimately help the court figure out the drivers' status. The court found most relevant, and most helpful,

an intermediate Florida appellate-court decision called *Del Pilar v. DHL Global Customer Solutions (USA) Inc.*²⁸ Much like the issue before the Eleventh Circuit, *Del Pilar* concerned the question of independent-contractor status in the package-delivery industry—in that case, the question was whether a company called Silver Ink was an independent contractor of DHL, or was an agent of DHL such that DHL could be liable for Silver Ink’s negligence. And like the facts before the Eleventh Circuit, the facts in *Del Pilar* supported a finding of independent-contractor status in some ways, yet in some ways suggested otherwise.²⁹

The *Del Pilar* trial court granted summary judgment in favor of DHL on the status question, apparently relying solely on the provisions of the DHL-Silver Ink contract. The Florida appellate court reversed, finding a genuine issue of material fact. It concluded that “even if the analysis were limited to the terms of the contract itself, the facts” were “susceptible of *reasonably differing inferences* as to the quantum of control reserved by DHL.” Therefore, the appellate court ruled, “the trial court erred in concluding, as a matter of law, that Silver Ink was [DHL’s] independent contractor;” instead, “the question of DHL’s control over Silver Ink operations should go to the jury.”³⁰

The Eleventh Circuit found *Del Pilar*’s approach persuasive—particularly in light of the conflicting facts in the case before it and the varying Florida precedent that did not otherwise help it squarely resolve the FedEx drivers’ status.³¹ Mindful, too, of *Erie*, the Eleventh Circuit thought it important for its decision to come out more or less the same as it would have if the matter had been brought before, say, the same Florida court that decided *Del Pilar* (differences in the federal and Florida summary-judgment standards notwithstanding).³²

It’s not simply that there was a genuine issue of material fact. Rather, “there [we]re facts that support[ed] FedEx’s position and there [we]re facts that support[ed] the Florida drivers’ position.” And it was not appropriate for the Eleventh Circuit to weigh those facts. Nor was it the court’s “job to figure out which *inferences* should be drawn from the evidence.”³³ (This latter statement was the specific rebuke of the MDL court, which had concluded “*the only reasonable inference that can be drawn . . . is that FedEx hasn’t retained the right to control the details of the [Florida drivers’] work methods on a class-wide basis.*”).

So the Eleventh Circuit “reverse[d] the MDL court’s grant of summary judgment in favor of FedEx on the Florida drivers’ employment status.” The court concluded its opinion with a final eschewal of summary-judgment inference-making: “The operating agreement and FedEx’s standard practices and procedures, *and the inferences to be drawn from them*, create a genuine issue of material fact as to whether the Florida drivers are employees or independent contractors.”³⁴

In fairness to the MDL court, it may well have agreed with the Eleventh Circuit’s pronouncements on summary-judgment inference-making. The MDL court said the inference it drew was “the *only* reasonable inference that can be drawn.” Considering that, the daylight between the MDL court and the Eleventh Circuit opinions might be better cast as a disagreement over whether more than one inference could have been reasonably drawn on the record, rather than a disagreement over whether a district court may ever draw inferences from undisputed facts. After all, district courts routinely base their summary-judgment decisions on what

a *reasonable* factfinder could decide.³⁵ Presumably if the Eleventh Circuit had agreed that *only one* reasonable inference could have been drawn from the facts, and that inference established the drivers’ independent-contractor status under Florida law, then the Eleventh Circuit would have affirmed the summary judgment without engaging in what it would think is *impermissible* inference-drawing.

In that regard, the *Carlson* opinion can arguably be read with a gloss: When the court says it’s not its “job to figure out which inferences should be drawn from the evidence,” it means *when there are multiple, conflicting inferences that can be reasonably drawn*.

The *Carlson* court had no need to say that *explicitly*, of course. That the facts conflicted was obvious by the end of its discussion. But that raises another question: Why did the court have to discuss inferences at all? Given the court’s identification of “conflicting *facts* on the critical question of control under Florida law,”³⁶ one could imagine the court proceeding directly from that identification to concluding FedEx was not entitled to judgment as a matter of law.

That might have been a more direct way of reasoning—but also less thorough. *Carlson* demonstrates that deciding whether differing inferences can be drawn from undisputed facts is an intermediate step between identifying the facts as undisputed and deciding whether a party is entitled to judgment as a matter of law. (See, too, how *Carlson* paraphrases the Florida appellate court’s holding: “The terms of the DHL contract, in the First District’s view, were ‘susceptible of reasonably differing inferences as to the quantum of control reserved by DHL,’ and the trial court had *therefore* ‘erred in concluding, as a matter of law, that [the delivery company] was [DHL’s] independent contractor’”).³⁷ Analytically, a court can still take that same intermediate step even if it first identifies the facts as undisputed *and conflicting*.

Whether the Eleventh Circuit *had to*, it did have the *opportunity* to discuss inference-making on summary judgment—given the MDL court’s statement about “the only reasonable inference” it thought could be drawn and the Florida appellate court’s statement about the “reasonably differing inferences” to be drawn from the facts before it.³⁸ (After the recent *Stein* decision, it’s a reasonable inference that Judge Jordan’s presence on the panel made a difference in the court’s decision to take that opportunity). Taking it allowed the Eleventh Circuit to make its own clarifying statement on the subject, one of greater resonance than it could have made—while reaching the same result—had it stuck to simply disagreeing with the MDL court that only one reasonable inference could be drawn, or to simply identifying conflicting material facts and concluding that FedEx was therefore not entitled to judgment as a matter of law.

How many judges have granted summary judgment after finding the material facts undisputed, when they might have deferred to the factfinder had the advocates before them pointed out the differing *inferences* to be drawn from the concededly undisputed facts? How many judges have discarded an affidavit as self-serving or uncorroborated when they might have respected such an affidavit had the advocates before them sung the summary-judgment-busting *virtues* of self-serving, uncorroborated affidavits—so long as they’re not *conclusory*? The attention to these nuances in *Carlson* and *Stein* are noteworthy contributions, both by the same author, to the law of summary judgment. *Carlson* may prove seminal in its treatment of the employee/independent-contractor question, and

Stein may be a welcome clarification for tax litigators. But even more practitioners can take lessons on nuance in summary-judgment law from these two opinions. In the right hands, in the appropriate case, they could help turn an action the factfinder's way. ☺



Richard Rosengarten is an associate attorney at Weiss Serota Helfman Cole & Bierman in Miami. He works on a wide array of civil litigation and appeals, including business and contract disputes and labor and employment defense. Formerly he served as a judicial law clerk for Hon. James Lawrence King, Southern District of Florida. He is a 2013 graduate of the University of Miami School of Law. © 2018 Richard Rosengarten.

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Endnotes

¹*United States v. Stein*, 881 F.3d 853, 854 (11th Cir. 2018)

[hereinafter *Stein En Banc Op.*].

²*Carlson v. FedEx Ground Package Sys. Inc.*, 787 F.3d 1313 (11th Cir. 2015).

³*Stein En Banc Op.*, at 855.

⁴*Id.*

⁵*Id.* at 856.

⁶*Mays v. United States*, 763 F.2d 1295 (11th Cir. 1985).

⁷*United States v. Stein*, 840 F.3d 1355, 1357 (11th Cir. 2016)

(Jordan, J., concurring), *reh'g en banc and opinion vacated by* 864 F.3d 1258 (11th Cir. 2017), *and overruled en banc by Stein En Banc Op.*, 881 F.3d 853.

⁸*Id.* at 1357 (per curiam).

⁹*Id.* (Jordan, J., concurring).

¹⁰*Id.* at 1357-59 (emphasis added).

¹¹*Id.* at 1360 (quoting *Anderson v. C.I.R.*, 250 F.2d 242, 249 (5th Cir. 1957)).

¹²*United States v. Stein*, 864 F.3d 1258, 1259 (11th Cir. 2017).

¹³*Stein En Banc Op.*, at 857-58.

¹⁴*Id.* at 857 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). *See, e.g., Evans v. Books-A-Million*, 762 F.3d 1288, 1295 (11th Cir. 2014) (holding the district court did not abuse its discretion in striking statements of a summary-judgment affidavit

that were “conclusory and speculative”).

¹⁵*Stein En Banc Op.*, at 857 (citing *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1253 (11th Cir. 2013)).

¹⁶*Id.*

¹⁷*United States v. Stein*, 889 F.3d 1200, 1202 (11th Cir. 2018).

¹⁸*Carlson*, 787 F.3d 1313, 1316.

¹⁹*Id.* (alterations in original; emphasis added).

²⁰*Id.*

²¹*Id.* at 1317 (alterations in original, emphasis added, and internal quotation marks omitted) (quoting *In re FedEx Ground Package Sys. Inc., Emp't Practices Litig.*, 758 F. Supp. 2d 638, 658 (N.D. Ind. 2010), *rev'd in part sub nom. Carlson*, 787 F.3d 1313 (11th Cir. 2015)).

²²*Id.*

²³*Id.* at 1316.

²⁴*Id.* at 1318 (citations omitted).

²⁵*Id.* at 1318-19.

²⁶*Id.* at 1320-25.

²⁷*Id.*

²⁸*Id.* at 1320-23 (discussing *Del Pilar v. DHL Global Customer Solutions (USA) Inc.*, 993 So. 2d 142 (Fla. 1st DCA 2008)).

²⁹*Del Pilar*, 993 So. 2d at 145, 147.

³⁰*Id.* (emphasis added).

³¹*Carlson*, 787 F.3d at 1324-25.

³²*Id.* at 1326-27.

³³*Id.* at 1326 (emphasis added).

³⁴*Id.* at 1328-29 (emphasis added).

³⁵*See, e.g., Kuhne v. Florida Dep't of Corr.*, 745 F.3d 1091, 1097 (11th Cir. 2014) (reversing summary judgment because “a reasonable jury could find” facts entitling the plaintiff to relief on his Eighth Amendment claim under 42 U.S.C. § 1983) (emphasis added); *Schweitzer v. Comenity Bank*, 866 F.3d 1273, 1279 (11th Cir. 2017) (reversing summary judgment because a “reasonable jury could conclude” facts supporting the plaintiff's TCPA claim) (emphasis added).

³⁶*Carlson*, 787 F.3d at 1326 (emphasis added).

³⁷*Id.* at 1324 (emphasis added; alteration in original).

³⁸*Del Pilar*, 993 So. 2d at 147.



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