YOU ARE DEFENDING A LAWSUIT AND have just finished deposing the plaintiff. You feel smug because the plaintiff made a fatal admission to his case during the deposition. You immediately begin preparing your motion for summary judgment and confidently advise your client that, because of your brilliant deposition, summary judgment for defendant is all but assured. After you file the summary judgment motion, you put it out of your mind because victory seems certain. Imagine your surprise when, a week before the summary judgment hearing, the plaintiff files his response and includes an affidavit recanting his prior position at his deposition and swearing, for the first time, to completely new and different facts. What can you do about a summary judgment affidavit that contradicts previous deposition testimony?

THE SHAM AFFIDAVIT DOCTRINE IN TEXAS

Texas courts have wrestled for some years with the question of whether a fact issue is presented by submitting an affidavit that conflicts with previous deposition testimony. Unfortunately, there is a split in the cases, not only among the various courts of appeals, but also between some of the courts of appeals and the Texas Supreme Court.

BY JUDGE RANDY WILSON

ILLUSTRATION BY GILBERTO SAUCEDA

The Texas Supreme Court Standard

The Texas Supreme Court first confronted the issue of a conflict between a deposition and an affidavit in 1962 in *Gaines v. Hamman*.[1] There, the plaintiff first testified in deposition that he had no express contract with the defendant. Later, in response to a motion for summary judgment, the plaintiff swore that such a contract existed. Of course, at the summary judgment stage, the issue is whether "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[2] The court in *Gaines* held that "there is no basis for giving controlling effect to a deposition as compared to an affidavit."[3] So long as the affidavit meets the usual requirements of personal knowledge and is not conclusory, then the mere fact that a deposition is more detailed than an affidavit does not "vest it with dominant authority."[4]

Most recently, in 1988, the Supreme Court reaffirmed *Gaines* in *Randall v. Dallas Power & Light Co.*[5] The court once again held that "if conflicting inferences may be drawn from a deposition and from an affidavit filed by the same party in opposition to a motion for summary judgment, a fact issue is presented"[6] and summary judgment should be denied.

The Sham Affidavit Doctrine In Federal Court and Elsewhere

Shortly after the Texas Supreme Court opinion in *Gaines*, the federal courts began considering the issue of conflicts between an affidavit and the affiant's deposition.[7] The sham affidavit doctrine is usually traced to the Second Circuit opinion in *Perma Research & Dev. Co. v. Singer Co.*[8] There the Second Circuit held that the trial court was permitted to disregard an affidavit that conflicted with prior deposition testimony:

> If there is any dispute as to the material facts, it is only because of inconsistent statements made by Perrino the deponent and Perrino the affiant. ... If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."[9]

The last four words of the opinion thus gave birth to what has come to be known as the sham affidavit doctrine, *i.e.*, a trial court can disregard an affidavit that offsets the affiant's prior deposition testimony where the contradiction is unexplained and unqualified by the affiant. Following *Perma Research*, the federal circuits that have considered the sham affidavit doctrine have adopted it in one form or another.[10]

An offsetting affidavit should not be ignored in all circumstances, however. At least two exceptions have developed. First, a party is permitted to introduce an offsetting affidavit if he can demonstrate he was confused by the questions during the deposition.[11] For example, in *Ramos v. Geddes*,[12] plaintiff's expert tes-

tified in deposition that someone did not violate the standard of care, but there was confusion as to the identify of the person referred to. Subsequently, the expert provided an arguably contrary affidavit concerning the standard of care. On these facts, Judge Kazen concluded that legitimate confusion existed and permitted the affidavit.[13]

The second exception arises when the affiant discovers new evidence that was not available during the deposition.[14] This exception is generally well acknowledged and recognized.[15]

Additionally, the sham affidavit doctrine is generally well recognized in most states.[16] Some states, however, hold, as the Texas Supreme Court held in *Randall*, that a trial court is obliged to consider all evidence in opposition to a motion for summary judgment, including an affidavit that contradicts a prior deposition.[17]

Sham Affidavits in Texas

The First Court of Appeals in Houston was the first court in Texas to adopt the sham affidavit doctrine. In *Farroux v. Denny's Restaurants, Inc.*,[18] the plaintiff alleged that he got food poisoning from eating a Grand Slam breakfast from Denny's. In deposition, the plaintiff admitted that his personal physician told him that there were too many possibilities to determine whether the Denny's food caused his illness and that no physician ever told him that the Denny's breakfast caused any of his health problems. In response to Denny's' motion for summary judgment, the plaintiff submitted an affidavit stating that his physician told him his food poisoning was the result of the Denny's meal.

Confronted with such conflicting evidence, the First Court of Appeals concluded that the affidavit was a sham and could be disregarded.[19] Specifically, the Court held:

> A party cannot file an affidavit to contradict his own deposition testimony without any explanation for the change in the testimony, for the purpose of creating a fact issue to avoid summary judgment. If a party's own affidavit contradicts his earlier testimony, the affidavit must explain the reason for the change. Without an explanation of the change in the testimony, we assume the sole purpose of the affidavit was to avoid summary judgment. As such, it presents merely a "sham" fact issue.[20]

The court noted the two often-cited exceptions to the sham affidavit rule, *i.e.*, "an affiant could explain that he was confused in a deposition, or that he discovered additional, relevant materials after the deposition."[21]

Significantly, the *Farroux* court cited only one federal court decision to support its opinion[22] and failed even to mention the Texas Supreme Court decisions of *Gaines* and *Randall* that are directly on point and contrary to *Farroux*.

Following the *Farroux* decision, many of the courts of appeals have similarly adopted the sham affidavit doctrine.

Thus far, the courts of appeals of El Paso,[23] Amarillo[24] Austin[25] Texarkana[26] and Houston (14th District)[27] have cited *Farroux* with approval and adopted the sham affidavit doctrine.

The San Antonio Court of Appeals surveyed the various decisions including the Supreme Court decision in *Randall*, which it characterized as "the most tolerant view of conflicting statements between the same witness's testimony in a deposition and affidavit."[28] After contrasting *Randall* with *Farroux*, the court observed "most differences between a witness's affidavit and deposition are more a matter of degree and details than direct contradiction. This reflects human inaccuracy more than fraud."[29] After reviewing the different lines of cases, the court held:

> We conclude that a court must examine the nature and extent of the differences in the facts asserted in the deposition and the affidavit. If the differences fall into the category of variations on a theme, consistent in the major allegations but with some variances of detail, this is grounds for impeachment, and not a vitiation of the later filed document. If, on the other hand, the subsequent affidavit clearly contradicts the witness's earlier testimony involving the suit's material points, without explanation, the affidavit must be disregarded and will not defeat the motion for summary judgment.[30]

After reviewing the record, the court concluded that any differences between the affidavit and the deposition were minor and could not be characterized as a sham.[31]

In contrast to *Farroux* and the courts that have followed that decision, the Waco[32] and Corpus Christi[33] courts have flatly rejected the doctrine and have adhered to the Supreme Court's decision in *Randall*. Similarly, both the Dallas and Fort Worth Courts of Appeals appear to follow *Randall*.[34] In *Thompson v. City of Corsicana Housing Auth.*,[35] the Waco court criticized *Farroux* for relying on federal authorities for creating the sham affidavit doctrine in Texas, noting that the Supreme Court has expressly disavowed the application of federal procedural standards to summary judgment motions filed under Rule 166a.[36] The court determined it would adhere to its previous position[37] and ruled, "if a party provides inconsistent or conflicting summary judgment proof, that party has created a fact issue for the trier of fact to resolve."[38] As a result, if the resolution of a summary judgment depends on the credibility of affiants or deponents, then "the motion should not be granted."[39] The court recognized that its ruling could permit an unscrupulous party to create a sham fact question to defeat summary judgment by filing false affidavits. However, the court should rely on the attorneys as officers of the court to be candid with the court.[40] If an attorney fails to observe his ethical obligations, then sanctions can be imposed on the attorney[41] or the party.[42] The Corpus Christi Court of Appeals followed *Thompson* and concluded, "any inconsistency or conflict between a party's deposition and affidavit is not a reason to exclude that evidence in a summary judgment proceeding."[43] As a result, if a trial court excludes an affidavit based on an alleged inconsistency with a deposition, the court ruled that the trial court abuses its discretion.[44]

Authority of Courts to Disregard Offsetting Affidavits

Courts that disagree with the sham affidavit doctrine usually argue that a court is precluded under the summary judgment rules from making a determination of the credibility of the witnesses. Specifically, both the federal and Texas rules preclude a court from weighing a witness' credibility at the summary judgment stage.[45] "The trial court's duty is to determine if there are any fact issues

to try, not to weigh the evidence or determine its credibility and try the case on affidavits."[46] Thus, the argument goes, if a court gives preference to a deposition and disregards a conflicting affidavit, the court is necessarily making an impermissible credibility determination.[47]

Courts that have approved the sham affidavit doctrine, however, have concluded that sham affidavits do not truly raise issues of credibility because the affidavit is precluded from the witnesses' previous unambiguous admissions.[48] The court is not weighing the credibility of two different witnesses. Rather, the court is ignoring an impermissible affidavit because it was fraudulently filed.

Ironically, both opponents and proponents of the sham affidavit doctrine point to Rule 166a of the Texas Rules of Civil Procedure to support their respective positions. Opponents of the doctrine argue that Rule 166a(h) only empowers a court to impose sanctions for filing an affidavit "in bad faith or solely for the purposes of delay."[49] The San Antonio Court of Appeals noted:

> While this section [166a] provides penalties for the making of affidavits in bad faith, the striking of the offending affidavit or pleading is not made one of them. We think it rather apparent that the trial judge was of the opinion that appellants were evasive and equivocal of statement and were trifling with the court by raising frivolous and groundless defenses. But such conclusions necessarily involve fact questions relating to the credibility of witnesses, which under our system of jurisprudence must be determined by a jury (when demanded) in actions to determine civil liability.[50]

Proponents of the sham affidavit doctrine, however, also point to the language of Rule 166a to support their argument that a court is empowered to ignore an affidavit submitted in bad faith. By its very terms, Rule 166a(c) authorizes a summary judgment when "there is no *genuine* issue of material fact."[51] By ignoring an affidavit submitted in bad faith, the court is making a determination that the fact dispute is not genuine, a determination that is expressly permitted by the rule. Commenting on the virtually identical federal rule, the Seventh Circuit observed:

> Federal Rule of Civil Procedure 56 empowers a court to make a threshold determination of whether a factual issue is "genuine." This power does not emanate from the court's role as a fact-finder, a role which lays dormant during the summary judgment process. Rather, this power emanates from a court's ability to make an initial assessment of any evidence. A district court exercises its prerogative to assess evidence at trial by determining whether any evidence is admissible. The court is not acting as a fact-finder when it makes such determinations. A district court also exercises its prerogative to assess evidence at the summary judgment stage by determining whether an alleged factual conflict is "genuine."[52]

Where Do We Go From Here?

The Texas courts of appeals have gotten ahead of the Supreme Court on the issue of conflicts between summary judgment affidavits and depositions. More than 15 years have elapsed since the Texas Supreme Court has addressed the question of the so-called sham affidavit. Since that time, the federal courts have fully developed the sham affidavit doctrine and many of the Texas intermediate courts have followed suit. However, a strange split of authority has developed within the Texas state court decisions. Not only are the various Texas courts of appeals split on sham affidavits, but at least six of the courts of appeals seem to conflict with prior Supreme Court authority. The Supreme Court needs to weigh in and clarify the issue.

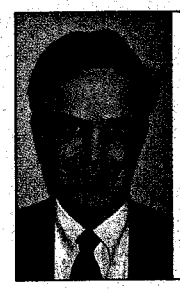
Summary judgments are intended to provide a useful tool to narrow issues and screen cases that have no merit as a matter of law. If legitimate summary judgments can be defeated by simply filing an affidavit, regardless of the truth of the facts contained in the affidavit, the summary judgment rules in Texas would be thwarted. Trial courts in Texas need to have the ability to disregard an affidavit submitted in bad faith solely for the purpose of defeating a motion for summary judgment.

Notes

1. 163 Tex. 618, 358 S.W.2d 557 (1962).
2. TEX. R. CIV. P. 166a(c).
3. 358 S.W.2d at 562.
4. *Id.*
5. 752 S.W.2d 4 (Tex. 1988).
6. *Id.* at 5.
7. The history of the sham affidavit cases is fully explored in Collin J. Fox, *Reconsidering the Sham Affidavit Doctrine*, 50 DUKE L.J. (2000).
8. 410 F.2d 572 (2d Cir. 1969).
9. *Id.* at 578.
10. *See* Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1, 4-5 (1st Cir. 1994); Martin v. Merrell Dow Pharm., Inc., 851 F.2d 703, 706 (3d Cir. 1988); Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984); Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 228 (5th Cir. 1984); Reid v. Sears Roebuck and Co., 790 F.2d 453, 460 (6th Cir. 1986); Darnell v. Target Stores, 16 F.3d 174, 176 (7th Cir. 1994); Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1364-65 (8th Cir. 1983); Radobenko v. Automated Equip. Corp., 520 F.2d 540, 544 (9th Cir. 1975); Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986); Van T. Junkins & Assocs. v. U.S. Indus. Inc., 736 F.2d 656, 657-59 (11th Cir. 1984); Sinskey v. Pharmacia Ophthalmics, Inc., 982 F.2d 494, 498 (Fed. Cir. 1992), *cert. denied*, 508 U.S. 912 (1993).
11. *Kennett-Murry Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980). *See also RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399 (8th Cir. 1995).
12. 137 F.R.D. 11 (S.D. Tex. 1991).
13. *Id.* at 12.
14. Adelman-Tremblay v. Jewel Cos., 859 F.2d 517, 520 (7th Cir. 1988).
15. 50 Duke L.J. at 288.
16. *See* Shelcusky v. Algarjulio, 172 N.J. 185, 797 A.2d 138 (2002), for a detailed discussion of the states that recognize the doctrine. *See* Robinson v. Hank Roberts, Inc., 514 So.2d 958, 961 (Ala. 1987); Wright v. Hills, 161 Ariz. 583, 780 P.2d 416, 420-21 (Ariz. Ct. App. 1989), *abrogated on other grounds*, James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing and Fire Prot., 177 Ariz. 316, 868 P.2d 329 (Ariz. Ct. App. 1994); Caplener v. Bluebonnet Milling Co., 322 Ark. 751, 911 S.W.2d 586, 589-90 (1995); Nutt v. A.C. & S. Co., 517 A.2d 690, 693 (Del. Super. Ct. 1986); Hancock v. Bureau of Nat'l Affairs, Inc., 645 A.2d 588, 590-91 (D.C. App. 1994); Inman v. Club on Sailboat Key, Inc., 342 So.2d 1069, 1070 (Fla.Dist.Ct.App. 1977); Tri-Cities Hosp. Auth. v. Sheats, 247 Ga. 713, 279 S.E.2d 210, 211 (1981); Tolmie Farms, Inc. v. J.R. Simplot Co., 124 Idaho 607, 862 P.2d 299, 302 (1993); Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 71 Ill.App.3d 562, 28 Ill. Dec. 78, 390 N.E.2d 60, 64 (1979); Gaboury v. Ireland Rd. Grace Brethren, Inc., 446 N.E.2d 1310, 1314 (Ind. 1983); Mays v. Ciba-Geigy Corp., 233 Kan. 38, 661 P.2d 348, 352 (1983); Lipsteuer v. CSX Transp., Inc., 37 S.W.3d 732, 735- 736 (Ky. 2000); Guenard v. Burke, 387 Mass. 802, 443 N.E.2d 892, 898 (1982); Zip Lube, Inc. v. Coastal Sav. Bank, 709 A.2d 733, 735 (Me. 1998); Gamet v. Jenks, 38 Mich. App. 719, 197 N.W.2d 160, 164 (1972); Hoover v. Norwest Private Mortgage Banking, 632 N.W.2d 534, 541 n. 4 (Minn. 2001); Wright v. State, 577 So.2d 387, 390 (Miss. 1991); ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 388 (Mo. 1993); Rivera v. Trujillo, 128 N.M. 106, 990 P.2d 219, 221-22 (N.M. Ct. App.), *cert. denied*, 128 *N.M.* 148, 990 P.2d 822 (1999); Greene v. Osterhoudt, 251 A.D.2d 786, 673 N.Y.S.2d 272, 274 (N.Y. App. Div. 1998); Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 S.E.2d 727, 732-33 (1978), *aff'd*, 297 N.C. 696, 256 S.E.2d 688 (1979); Delzer v. United Bank of Bismarck, 484 N.W.2d 502, 508 (N.D. 1992); Buckeye Federal Sav. and Loan Assoc. v. Cole, 1986 WL 13274 at *2 (Ohio Ct. App. Nov. 24, 1986); Henderson-Rubio v. May Dep't Stores Co., 53 Or. App. 575, 632 P.2d 1289, 1294-95 (1981); Price v. Becker, 812 S.W.2d 597, 598 (Tenn. Ct. App.), *appeal denied* (Tenn. 1991); Webster v. Sill, 675 P.2d 1170, 1172-73 (Utah 1983); Marshall v. AC & S, Inc., 56 Wash. App. 181, 782 P.2d 1107, 1109-10 (1989); Yahnke v. Carson, 236 *Wis.*2d 257, 613 N.W.2d 102, 108-09 (2000); Morris v. Smith, 837 P.2d 679, 684-85 (Wyo. 1992).
17. *See* Junkins v. Slender Woman, Inc., 386 N.E.2d 789, 790 (Mass. App. Ct. 1979); Stefan v. White, 257 N.E.2d 206, 208-09 (Mich. App. Ct. 1977); Delzer v. United Bank, 484 N.W.2d 502, 508 (N.D. 1992).
18. 962 S.W.2d 108 (Tex. App. — Houston [1st Dist.] 1997, no pet.).
19. *Id.* at 111.
20. *Id.*
21. *Id.* at 111 n. 1.
22. Bank of Illinois v. Allied Signal Safety Restraint Sys., 75 F.3d 1162, 1168-69 (7th Cir. 1996).
23. Morgan v. Straub, 2001 WL 925760 (Tex. App. — El Paso 2001).
24. Trostle v. Trostle, 77 S.W.3d 908 (Tex. App. — Amarillo 2002, no pet.).
25. Elson Thermoplastics v. Dynamic Systems, 49 S.W.3d 891 (Tex. App. — Austin 2001, no pet.).
26. Burkett v. Welborn, 42 S.W.3d 282 (Tex. App. — Texarkana 2001, no pet.).
27. Blan v. Ali, 7 S.W.3d 741, 746 n.3 (Tex. App. — Houston [14th Dist.] 1999, no pet.)("while we agree that *Farroux* [cite] precludes the trial

court from considering an affidavit that contradicts deposition testimony without an explanation for the change in testimony, the supplemental affidavit does *not* contradict Dr. Reisbord's deposition testimony").

28. Cantu v. Preacher, 53 S.W.3d 5, 9 (Tex. App. — San Antonio, 2001, pet. denied)
29. *Id.* at 10.
30. *Id.*
31. *Id.* at 11.
32. Thompson v. City of Corsicana Housing Auth., 57 S.W.3d 547 (Tex. App. — Waco 2001, no pet.).
33. Larson v. Family Violence & Sexual Assault Prevention Center of South Texas, 64 S.W.3d 506, 513 (Tex. App. — Corpus Christi 2001, pet. denied).
34. Belmonte v. Baxter Healthcare Corp., 2002 WL 560996, *2 (Tex. App. — Dallas April 16, 2002) (NO. 05-00-01579-CV)(not designated for publication); Sigler v. Durbec, 2001 WL 432620, *4 (Tex. App. — Dallas April 30, 2001) (not designated for publication); Hale v. Pena, 991 S.W.2d 942, 947 (Tex. App. — Fort Worth 1999, no pet.).
35. 57 S.W.3d at 557.
36. *Id.*, *citing* Casso v. Brand, 776 S.W.2d 551, 555 (Tex. 1989); City of Lancaster v. Chambers, 883 S.W.2d 650, 657 (Tex. 1994), Bexar County v. Giroux-Daniel, 956 S.W.2d 692, 698 n.5 (Tex. App. — San Antonio 1997, no pet.).
37. Sosebee v. Hillcrest Baptist Med. Center, 8 S.W.3d 427 (Tex. App. — Waco, 1999, pet. Denied); *see also* Toliver v. Bergman, 297 S.W.2d 208 (Tex. Civ. App. — San Antonio 1956, no writ).
38. 57 S.W.3d at 557.
39. *Id.*
40. *Id.* at 558.
41. *Id.*, *citing* TEX. R. DISCIPLINARY P. 1.06(Q)(1), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 1998)
42. TEX. R. CIV. P. 166a(h).
43. Larson v. Family Violence & Sexual Assault Prevention Center of South Texas, 64 S.W.3d 506, 513 (Tex. App. — Corpus Christi 2001, pet. denied); *See also* Smith v. Mosbacker, 94 S.W.3d 292 (Tex. App. — Corpus Christi 2002, no pet.); Bauer v. Jasso, 946 S.W.2d 552, 556 (Tex.App. — Corpus Christi 1997).
44. *Id.*
45. Green v. Unauthorized Practice of Law Committee, 883 S.W.2d 293 (Tex. App. — Dallas 1994).
46. *Id.* at 297. *See also* Dibidale of Louisiana, Inc. v. American Bank & Trust Co., 916 F.2d 300, 307-08 (5th Cir. 1990)("[c]redibility assessments are not fit grist for the summary judgment mill").
47. *See* Junkins v. Slender Woman, Inc., 386 N.E.2d 789 (Mass. App. Ct. 1979)("[I]t is sufficient that the plaintiff's later affidavit, if believed, indicated that the contrary is true. [cite] The conflict presents a question of credibility, which is not to be resolved by the judge on a motion for summary judgment").
48. *See* 50 Duke L.J. at 279. *See also* Babrocky v. Jewel Food Co., 773 F.2d 857, 857 (7th Cir. 1985)("Plaintiffs confuse credibility issues with the district court's duty to ignore sham issues in determining the appropriateness of summary judgment. ... Otherwise, the very purpose of the summary judgment motion — to weed out unfounded claims, specious denials, and sham defenses — would be severely undercut").
49. TEX. R. CIV. P. 166a(h).
50. Toliver v. Bergmann, 297 S.W.2d 208, 210 (Tex. Civ. App. — San Antonio 1956, no writ). *See also* Thompson v. City of Corsicana Housing Auth., 57 S.W.3d 547, 557 (Tex. App. — Waco 2001); De Los Santos v. Southwest Tex. Methodist Hosp., 802 S.W.2d 749, 755 (Tex. App. — San Antonio 1990, no writ).
51. TEX. R. CIV. P. 166a(c).
52. Unterreiner v. Volkswagen of America, Inc., 8 F.3d 1206, 1212 (7th Cir. 1993).



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