

# Texas High Court Formally Adopts Sham Affidavit Rule in Summary Judgment Setting

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Current headlines are dominated with accusations of “fake news” and we have been introduced to the unsettling concept of “alternative facts.” In this hyper-politicized climate, will the judicial system serve as the last bastion of a bygone era where facts are definite, lawyers serve as officers of the court and the truth matters? Perhaps so. A recent Texas Supreme Court case dealt with the importance of truth in the civil justice system when the Court addressed the issue of “sham affidavits” in summary judgment proceedings. In *Lujan v. Navistar, Inc.*, the Court rejected a party’s attempt to present an affidavit that was clearly untruthful and viewed as a sham.

The facts of *Lujan* involved a \$3 Million breach of warranty case, which presented conflicting testimony about the ownership of several allegedly defective commercial vehicles. In the case, the Texas Supreme Court formally adopted the sham affidavit rule in summary judgment settings.[1] The Court sustained a grant of summary judgment and dismissal of the plaintiff’s claims and held that the trial court did not abuse its discretion in disregarding contradicting testimony the plaintiff had offered in an affidavit regarding the ownership of the allegedly defective vehicles. The Court disregarded this testimony and deemed it a sham affidavit, because the plaintiff’s deposition testimony contradicted his affidavit on material points involving corporate activities, the plaintiff’s attempt to explain away the inconsistency was insufficient, and the plaintiff’s attorney openly admitted that the affidavit was false.[2]

Before *Lujan*, the sham affidavit rule has long been applied throughout the federal court system under Rule 56 of the Federal Rules of Civil Procedure, which contains language nearly identical to Rule 166a of the Texas Rules. Further, as discussed below, a majority of Texas intermediate appellate courts have recognized the sham affidavit rule as well within a trial court’s authority under Rule 166a to grant summary judgment when no genuine issue as to any material fact exists. This article discusses the following topics related to the sham affidavit rule:

- What is the Sham Affidavit Rule;
- Texas Courts Historical Application of the Sham Affidavit Rule; and
- Considerations Concerning the Application of the Sham Affidavit Rule.

## What is the Sham Affidavit Rule

Under the sham affidavit rule, if a party submits an affidavit that conflicts with the affiant’s prior sworn testimony and does not provide a sufficient explanation for the factual conflict, the trial court may disregard the affidavit. Specifically, the trial court does not have to consider any of the statements in a sham affidavit when deciding whether the party has raised a genuine issue of material fact that would be sufficient to avoid summary judgment.[3]

## Texas Courts Historical Application of the Sham Affidavit Rule

In 1962, the Texas Supreme Court first addressed the argument that an affidavit should be disregarded in the summary judgment context because it conflicted with deposition testimony in *Gaines v. Hamman*.<sup>[4]</sup> In *Gaines*, the plaintiff sued the defendant claiming an interest in an oil and gas lease.<sup>[5]</sup> Early in the case, the plaintiff testified at his deposition there was no express agreement or contract between him and the defendant regarding the ownership of the interests.<sup>[6]</sup> After the defendant filed a motion for summary judgment based upon the plaintiff’s deposition testimony, the plaintiff filed a detailed affidavit setting forth the alleged terms of an agreement on which his claims were based.<sup>[7]</sup> The defendant argued that where an inconsistency exists between the deposition testimony and an affidavit, the deposition testimony should control.<sup>[8]</sup> The Texas Supreme Court disagreed, and held that a fact issue existed:

While admissions on file may be likened to pleadings and considered as written judicial admissions, there is no basis for giving controlling effect to a deposition as compared to an affidavit. Neither does the fact that the deposition is more

detailed in some respects than the affidavit vest it with dominant authority. . . . If conflicting inferences may be drawn from the deposition and from the affidavit of the same party, a fact issue is presented. It is not the purpose of the summary judgment rule to provide either a trial by deposition or a trial by affidavit, but rather to provide a method of summarily terminating a case when it clearly appears that only a question of law is involved and that there is no genuine issue of fact.[9]

The court thus held that the conflicting statements submitted in the affidavit by the party opposing summary judgment created a fact issue and reversed the decision.[10]

More than 25 years later, the Texas Supreme Court next addressed the issue in 1988 in *Randall v. Dallas Power & Light Co.*[11] In *Randall*, the plaintiff in an automobile accident case attested in an affidavit that the defendant's claims agent had made generous promises to him about future damages and compensation.[12] The defendant moved for summary judgment, but the trial court denied that motion.[13] Thereafter, the defendant took plaintiff's deposition, in which he testified that "he could not remember any representations being made by the claims agent regarding future damages or expenses." [14] The trial court granted the summary judgment, and the appeals court affirmed.[15]

In a per curiam opinion, the Texas Supreme Court reversed, reaffirming its holding in *Gaines*:

[A] deposition does not have controlling effect over an affidavit in determining whether a motion for summary judgment should be granted. Thus, 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. In this instance, conflicting inferences can definitely be drawn from the deposition and affidavit testimony. In the affidavit, Randall testified that Moore [the claims agent] made definite representations to him regarding future damages, whereas, in the deposition, he stated that he did not remember any representations pertaining to future damages.[16]

Because the defendant had not met "[its] burden of showing that there was no genuine issue as to any material fact," the Supreme Court held that the summary judgment had been improperly granted.[17]

Following these Texas Supreme Court cases in *Gaines* and *Randall*, the law in Texas seemed well-settled through the mid-1990s; if a party's summary judgment affidavit conflicted directly with its deposition testimony, a fact issue existed. These cases precluded a trial court from disregarding a party's affidavit statements in deciding whether a fact issue existed that would bar summary judgment, even where those statements were directly contradicted by the party's own previous deposition testimony.[18] In the mid-1990s, however, this settled precedent—that a fact issue exists where a party's affidavit and deposition testimony conflict—was upended by a court of appeals decision adopting a new sham affidavit theory. The first Texas court to raise the sham affidavit concern was the First Court of Appeals in Houston in *Farroux v. Denny's Restaurants, Inc.*, 962 S.W.2d 108 (Tex. App. - Houston [1st Dist.] 1997, no pet.).

Since then, several other Texas appellate courts either expressly or impliedly adopted the sham affidavit rule.[19] Meanwhile, other appellate courts continued to cite *Gaines* and *Randall*, and declined to recognize the sham affidavit rule.[20] Thus, before the Texas Supreme Court's opinion in *Lujan v. Navistar*, a split of authority existed among the intermediate courts of appeals in Texas regarding contradictory summary judgment evidence.

## Considerations Concerning the Texas Supreme Court's Adoption of Sham Affidavit Rule

In *Lujan*, the Texas Supreme Court resolved the split among Texas appellate courts and adopted the majority view in holding that "if a party submits an affidavit that conflicts with the affiant's prior sworn testimony and does not provide a sufficient explanation for the conflict, a trial court may disregard the affidavit when deciding whether the party has raised a genuine fact issue to avoid summary judgment." [21] The Supreme Court emphasized that the sham affidavit rule does not contravene the long-standing principle that the trial court is "not to weigh the evidence or determine its credibility, and thus try the case on the affidavits." [22] Rather, the Court held that the sham affidavit rule is a tool that may be used to distinguish genuine fact issues from non-genuine fact issues in service of the "underlying purpose of Rule 166a [to] eliminat[e] . . . patently unmeritorious claims or untenable defenses . . . ." [23]

Prior to the Court's opinion in *Lujan*, appellate courts disagreed about the effect of a sham affidavit, and specifically, whether sham affidavits must be disregarded as a matter of law.[24] In *Lujan*, the Supreme Court clarified that the sham affidavit rule does not authorize trial courts to strike every affidavit that contradicts the affiant's prior sworn testimony.[25] Instead, the Court reasoned that "[t]o allow every failure of memory or variation in a witness's testimony to be disregarded as a sham would require far too much from lay witnesses . . . ."[26] Sometimes, the Court noted, a contradictory affidavit is warranted, but an explanation for the contradiction is also warranted.[27] As an example of this limitation, the Court explained that courts have acknowledged that newly discovered evidence may justify a contradictory affidavit,[28] and other times, an affiant "may have been confused about what was being asked" during a deposition and therefore an affidavit, though facially inconsistent, should be considered.[29] Further, the Court adopted the Fifth Circuit's application of the sham affidavit rule to *all prior sworn testimony*, not only deposition testimony.[30] Finally, the Court noted that a trial court's application of the sham affidavit rule in disregarding an affidavit as a sham will be reviewed under an abuse of discretion standard.

## Conclusion

The key takeaways from the Texas Supreme Court's opinion in *Lujan v. Navistar* are: (1) the sham affidavit rule applies to all cases pending in Texas state courts; (2) the sham affidavit rule does not authorize trial courts to strike every affidavit that contradicts the affiant's prior sworn testimony; (3) the sham affidavit rule applies to all prior, inconsistent sworn testimony (not just depositions or testimony in a given case); and (4) the application of the sham affidavit rule by trial courts in disregarding the statements set forth in contradictory affidavits will be reviewed on appeal under the abuse of discretion standard.

A final takeaway is that, in many if not most cases, there is only one clear version of the truth. As a result, the first time a party is asked to state facts on the record, the party needs be accurate and truthful or risk forfeiting any future opportunity to tell a different story that conflicts with this truthful rendition of the facts.

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[1] See *Lujan v. Navistar, Inc.*, No. 16-0588, 2018 Tex. LEXIS 347 (Apr. 27, 2018).

[2] The Texas Supreme Court noted, however, that the conflict between the plaintiff's affidavit and his attorney's statements did not alone dictate the outcome of the case because the sham affidavit rule looks to contradictions in sworn testimony, not in attorney statements. The Court reasoned that other circumstances supporting the trial court's decision to disregard the plaintiff's affidavit as a sham were present. These circumstances include the admitted falsity of the affidavit and the inconsistent statements of the plaintiff's attorney, both of which buttress the trial court's conclusion that the late-filed and contradictory affidavit did not raise genuine fact issues sufficient to survive summary judgment. *Id.* at \*26-27.

[3] *Id.* at \*1.

[4] David F. Johnson, *The Competency of the Sham Affidavit as Summary Judgment Proof in Texas*, 40 St. Mary's L. J. 205, 218 (2008) (citing *Gaines v. Hamman*, 358 S.W.2d 557, 561 (1962)).

[5] *Id.* (citing *Gaines*, 358 S.W.2d at 558).

[6] *Id.* (citing *Gaines*, 358 S.W.2d at 561-62).

[7] *Id.* (citing *Gaines*, 358 S.W.2d at 558-59).

[8] *Id.* (citing *Gaines*, 358 S.W.2d at 561).

[9] *Id.* (citing *Gaines*, 358 S.W.2d at 562-63 (omitting citations)).

[10] *Id.* (citing *Gaines*, 358 S.W.2d at 563).

[11] *Id.* at \*220 (citing *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4 (Tex. 1988) (per curiam)).

[12] *Id.* (citing *Randall*, 752 S.W.2d at 4-5).

[13] *Id.* (citing *Randall*, 752 S.W.2d at 5).

[14] *Id.*

[15] *Id.*

[16] *Id.* (citing *Randall*, 752 S.W.2d at 5 (omitting citations)).

[17] *Id.*

[18] *Id.* at \*223.

[19] Eight intermediate Texas courts of appeals have recognized the sham affidavit rule. See *Fred Loya Ins. Agency, Inc. v. Cohen*, 446 S.W.3d 913, 927 (Tex. App.—El Paso 2014, pet. denied); *Pando v. Sw. Convenience Stores, LLC*, 242 S.W.3d 76, 79 (Tex. App.—Eastland 2007, no pet.); *Trostle v. Trostle*, 77 S.W.3d 908, 915 (Tex. App.—Amarillo 2002, no pet.); *Eslon Thermoplastics v. Dynamic Sys., Inc.*, 49 S.W.3d 891, 901 (Tex. App.—Austin 2001, no pet.); *Burkett v. Welborn*, 42 S.W.3d 282, 286 (Tex. App.—Texarkana 2001, no pet.); *Cantu v. Peachier*, 53 S.W.3d 5, 10-11 (Tex. App.—San Antonio 2001, pet. denied); *Farroux v. Denny's Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.); *Lujan v. Navistar, Inc.*, 503 S.W.3d 424, 439 (Tex. App.—Houston [14th Dist.] 2016, pet. granted).

[20] Four intermediate Texas courts of appeals have not recognized the sham affidavit rule. See *Pierce v. Wash. Mut. Bank*, 226 S.W.3d 711, 717-18 (Tex. App.—Tyler 2007, pet. denied); *Del Mar Coll. Dist. v. Vela*, 218 S.W.3d 856, 862 (Tex. App.—Corpus Christi 2007, no pet.); *Davis v. City of Grapevine*, 188 S.W.3d 748, 756 (Tex. App.—Fort Worth 2006, pet. denied); *Thompson v. City of Corsicana Housing Auth.*, 57 S.W.3d 547, 557 (Tex. App.—Waco 2001, no pet.).

[21] See *Lujan*, No. 16-0588, 2018 Tex. LEXIS 347, at \* 1.

[22] *Id.* at \*15 (citing *Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952)).

[23] *Id.*

[24] Cf. *Burkett v. Welborn*, 42 S.W.3d 282, 286 (Tex. App. - Texarkana 2001, no pet.) (holding contradictory affidavit must be disregarded); *Cantu v. Peachier*, 53 S.W.3d 5, 7 (Tex. App. - San Antonio 2001, pet. denied) (holding contradictory affidavit must be disregarded); *Thompson v. City of Corsicana Hous. Auth.*, 57 S.W.3d 547, 557 (Tex. App. - Waco 2001, no pet.) (explaining summary judgment cannot be granted based upon plaintiff's credibility as evidenced by a sham affidavit because it is an issue of fact for the trier of fact); *Davis v. City of Grapevine*, 188 S.W.3d 748, 755 (Tex. App. - Fort Worth 2006, pet. denied) (holding that "[A] deposition does not have controlling effect over an affidavit in determining whether a motion for summary judgment should be granted. Thus, when a deposition and an affidavit filed by the same party in opposition to a motion for summary judgment conflict, a fact issue is presented that will preclude summary judgment.").

[25] *Lujan*, No. 16-0588, 2018 Tex. LEXIS 347, at \* 10.

[26] *Id.* (citing *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986)).

[27] *Id.*

[28] *Id.* (citing *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986)).

[29] *Id.* (citing *Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123, 288 U.S. App. D.C. 157 (D.C. Cir. 1991)).

[30] See *Copeland v. Wasserstein, Perella & Co.*, 278 F.3d 472, 482 (5th Cir. 2002) (applying the sham affidavit rule to prior sworn testimony other than deposition testimony); see also *Lujan*, No. 16-0588, 2018 Tex. LEXIS 347, at \* 1.