

**THE COMPETENCY OF THE SHAM AFFIDAVIT AS  
SUMMARY JUDGMENT PROOF IN TEXAS**

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#### INTRODUCTION

The following example presents a surprisingly common scenario encountered in summary judgment practice in Texas and throughout the United States. A plaintiff files suit against a silica producer based upon silicosis. The plaintiff was exposed to the silica over the past forty years and began seeing physicians approximately eight years before filing suit. The silica producer files a motion for summary judgment based upon the statute of limitations and attaches an affidavit from one of the plaintiff's treating physicians who stated that she communicated a diagnosis of silicosis to the plaintiff six years before he filed suit. The plaintiff files a response to the summary judgment motion and attaches his affidavit which states that the physician never communicated that diagnosis to him. Previously, however, at his deposition, the plaintiff testified that he did not remember anything about the consultation with the physician, and specifically did not remember any communications to or from the physician. The defendant objects to the plaintiff's affidavit on the basis that it contradicts his previous sworn testimony in the suit and is nothing more than a "sham."<sup>1</sup>

This example raises several issues: (1) does a sham affidavit constitute competent summary judgment proof that can create a fact issue; (2) under what circumstances can a trial court strike a sham affidavit; (3) how contradictory does a statement in an

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1. Merriam-Webster's Dictionary defines the adjective "sham" as meaning "not genuine" or "having such poor quality as to seem false." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1143 (11th ed. 2006). The facts set forth in the example resemble those in *Youngblood v. U.S. Silica Co.*, 130 S.W.3d 461, 463-64 (Tex. App.—Texarkana 2004, pet. denied).

affidavit have to be to make the affidavit a sham; (4) do other legal theories support a trial court's refusal to consider the alleged sham affidavit; and (5) is the fact that an affidavit is a sham a defect of form or substance that can be raised for the first time on appeal?

Part One of this article briefly addresses the historical development of the sham affidavit theory in federal and state courts throughout the United States. Part Two of the article specifically addresses the existence and scope of the sham affidavit theory in the United States Court of Appeals for the Fifth Circuit. Part Three of the article discusses the historical Texas precedent pertaining to inconsistencies between affidavit testimony and previous deposition testimony, while Part Four outlines the introduction of the sham affidavit theory in Texas state courts. Part Five of the article addresses the split of authority that currently exists among Texas courts of appeals regarding the acceptance or rejection of the sham affidavit theory in summary judgment practice. Part Six outlines possible alternative theories on refusing to consider inconsistent affidavits: judicial estoppel and quasi-admissions. Part Seven briefly addresses the preservation-of-error issue of whether a court should consider a party's complaint that an affidavit is a sham as one of form or of substance.

#### I. THE SHAM AFFIDAVIT THEORY ACROSS THE NATION

The Supreme Court of New Jersey has traced the sham affidavit theory to the Second Circuit's decision in *Perma Research & Development Co. v. Singer Co.*<sup>2</sup> In *Perma Research*, the plaintiff did not explain an inconsistency between deposition testimony and affidavit testimony offered to oppose a motion for summary judgment.<sup>3</sup> Specifically, the plaintiff in *Perma Research* alleged that its contract with the defendant had been procured by fraud because the defendant never intended to perform.<sup>4</sup> The basis of this claim was an alleged oral statement made to the plaintiff's president by one of the defendant's representatives wherein the

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2. *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572 (2d Cir. 1969); see *Shelcusky v. Garjulio*, 797 A.2d 138, 144 (N.J. 2002) (tracing the sham affidavit doctrine to the *Perma Research* decision).

3. See *Perma Research*, 410 F.2d at 577-78 (noting and discussing the discrepancies in the plaintiff's affidavit and deposition testimony).

4. *Id.* at 577.

former was ostensibly told that the defendant never had any intention of performing the contract.<sup>5</sup> However, during four days of taking depositions, the plaintiff's president was repeatedly asked to specify his basis for the fraud alleged, but failed to make any reference to the alleged conversation.<sup>6</sup> The court of appeals stated that while the plaintiff's affidavit statement "would appear to raise a triable issue as to fraudulent intent," the trial court properly concluded "that the statement made in the affidavit was less reliable than the contradictory statements in the deposition, and that [the affidavit statement] did not raise a triable issue of fraud."<sup>7</sup> The court then stated that if there was "any dispute as to the material facts, it is only because of inconsistent statements made by [plaintiff] the deponent and [plaintiff] the affiant."<sup>8</sup> The court then stated: "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."<sup>9</sup> In finding that the affidavit was a sham and not competent summary judgment evidence, the court noted that the plaintiff did not explain why his affidavit testimony differed from his previous deposition testimony.<sup>10</sup>

Following the Second Circuit's decision in *Perma Research*, all federal circuits that have considered application of the sham affidavit doctrine have adopted it in some form.<sup>11</sup> In fact, the

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5. *Id.* ("[Perrino] had a conversation with Mr. Person of Singer . . . at which time Mr. Person told [Perrino] that Singer never had any intention of performing the December contract . . .").

6. *Id.* at 578.

7. *Id.* at 577 (citation omitted).

8. *Perma Research*, 410 F.2d at 578.

9. *Id.*

10. *See id.* (stating that the fraud claims were properly dismissed because no genuine issues were raised by the plaintiff's affidavit or deposition).

11. *See, e.g.*, *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996) (noting that a genuine issue of material fact is not created by an affidavit that contradicts previous testimony); *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994) (deciding that a contradictory affidavit should be disregarded when offered after movement for summary judgment); *Darnell v. Target Stores*, 16 F.3d 174, 176 (7th Cir. 1994) (expressing that an affidavit that contradicts prior testimony should not be allowed to create a genuine issue of material fact); *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1297 (7th Cir. 1993) (providing that an affidavit submitted only to contradict prior testimony does not create a genuine issue of material fact); *Sinsky v. Pharmacia Ophthalmics, Inc.*, 982 F.2d 494, 498 (Fed. Cir. 1992) (stating that a genuine issue of

United States Supreme Court has seemingly approved of the doctrine as it applies to legal contentions in ADA claims:

The lower courts, in somewhat comparable circumstances, have found a similar need for explanation. They have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity. . . . When faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the

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material fact cannot be created by submitting an affidavit that merely contradicts earlier testimony); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) (recognizing the general rule within the circuit that a contradictory affidavit does not create a genuine issue of fact); *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir. 1991) (holding the district court was free to not consider an unexplained, contradictory affidavit when determining whether there was a genuine issue of material fact); *Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir. 1991) (recognizing that a triable issue of fact is not created by an affidavit submitted only to contradict prior testimony); *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1352 (6th Cir. 1991) (reinforcing the accepted practice that a contradictory affidavit submitted following a motion for summary judgment does not create a genuine issue of material fact); *Martin v. Merrell Dow Pharms., Inc.*, 851 F.2d 703, 706 (3d Cir. 1988) (agreeing with other courts of appeals that a district court was free to disregard an affidavit that contradicted prior testimony); *Tippens v. Celotex Corp.*, 805 F.2d 949, 953-54 (11th Cir. 1986) (recognizing the existence of the sham affidavit); *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986) (indicating that summary judgment is the proper action when a contradictory affidavit is submitted to create a sham issue of fact); *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986) (upholding the district court's decision to grant summary judgment where a contradictory affidavit was submitted without explanation); *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984) (expressing that an affidavit which contradicts previous testimony cannot be used to defeat summary judgment); *Van T. Junkins & Assocs., Inc., v. U.S. Indus., Inc.*, 736 F.2d 656, 657-59 (11th Cir. 1984) (affirming the district court's summary judgment in the face of a sham affidavit); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984) (stating that the plaintiff's contradictory affidavit was an ineffective attempt to create a genuine issue of material fact); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1364-65 (8th Cir. 1983) (acknowledging the existence of a sham affidavit by upholding the district court's grant of summary judgment); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975) (stressing that the contradictory affidavit submitted by plaintiff created only a sham issue); *see also* Randy Wilson, *The Sham Affidavit Doctrine in Texas*, 66 TEX. B.J. 962, 962-69 (2003) (discussing the sham affidavit doctrine as it exists in Texas and several of the federal courts); Jeffrey L. Freeman, Annotation, *Propriety, Under Rule 56 of the Federal Rules of Civil Procedure, of Granting Summary Judgment When Deponent Contradicts in Affidavit Earlier Admission of Fact in Deposition*, 131 A.L.R. FED. 403, 403-25 (1996) (discussing various federal and state court decisions regarding whether the submission of an affidavit that contradicts prior testimony, following a motion for summary judgment, creates a genuine issue of material fact).

necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodation."<sup>12</sup>

Similarly, most states that have addressed the issue of offsetting affidavits have chosen to adopt a rule that is consistent with the sham affidavit doctrine.<sup>13</sup> However, a minority of states have

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12. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806–07 (1999) (citations omitted).

13. *See, e.g.*, *Robinson v. Hank Roberts, Inc.*, 514 So. 2d 958, 961 (Ala. 1987) (noting that a material issue of fact cannot be created to defeat summary judgment merely by submitting an affidavit that contradicts deposition testimony without explanation); *Wright v. Hills*, 780 P.2d 416, 420–21 (Ariz. Ct. App. 1989) (explaining that when an affidavit is clearly a sham, no evidentiary hearing is required), *abrogated on other grounds* by *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 868 P.2d 329 (Ariz. Ct. App. 1994); *Caplener v. Bluebonnet Milling Co.*, 911 S.W.2d 586, 589–90 (Ark. 1995) (upholding the trial court's decision to disregard a contradictory affidavit submitted merely in an attempt to create an issue of fact); *Nutt v. A.C. & S. Co.*, 517 A.2d 690, 693 (Del. Super. Ct. 1986) (holding that a sham issue is created when an affidavit is submitted to contradict prior testimony without explanation); *Hancock v. Bureau of Nat'l Affairs, Inc.*, 645 A.2d 588, 590–91 (D.C. 1994) (stating that where a contradictory affidavit is not used to clarify previous testimony, the affidavit will not be considered in an attempt to defeat summary judgment); *Inman v. Club on Sailboat Key, Inc.*, 342 So. 2d 1069, 1070 (Fla. Dist. Ct. App. 1977) (holding that a contradictory affidavit may not be used to defeat summary judgment); *Tri-Cities Hosp. Auth. v. Sheats*, 279 S.E.2d 210, 211 (Ga. 1981) (affirming the trial court's decision to disregard a contradictory affidavit submitted in an attempt to defeat summary judgment); *Tolmie Farms, Inc. v. J.R. Simplot Co.*, 862 P.2d 299, 302 (Idaho 1993) (recognizing that sham affidavits work counter to the purpose of summary judgment); *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 390 N.E.2d 60, 64 (Ill. App. Ct. 1979) (stressing that a party cannot submit contradictory testimony following testimony under oath at deposition); *Gaboury v. Ir. Rd. Grace Brethern, Inc.*, 446 N.E.2d 1310, 1314 (Ind. 1983) (reporting that a contradictory affidavit does not create an issue of fact sufficient to defeat summary judgment); *Mays v. Ciba-Geigy Corp.*, 661 P.2d 348, 352 (Kan. 1983) (agreeing with prior courts that an affidavit submitted simply to contradict prior testimony cannot defeat summary judgment); *Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732, 735–36 (Ky. 2000) (expressing that an affidavit which merely contradicts testimony given at an earlier time cannot be used to create an issue of material fact); *Zip Lube, Inc. v. Coastal Sav. Bank*, 709 A.2d 733, 735 (Me. 1998) (noting that summary judgment cannot be defeated merely by generating an affidavit to contradict prior testimony); *Guenard v. Burke*, 443 N.E.2d 892, 898 (Mass. 1982) (acknowledging that there are instances where a contradictory affidavit will not create an issue of fact to defeat summary judgment); *Gamet v. Jenks*, 197 N.W.2d 160, 164 (Mich. Ct. App. 1972) (agreeing that a contradictory affidavit submitted without explanation is not enough to defeat summary judgment); *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 541 n.4 (Minn. 2001) (stating that a contradictory affidavit does not usually create a genuine issue of material fact unless the affidavit

refused to accept the doctrine,<sup>14</sup> and commentators are in disagreement as to the appropriateness of the sham affidavit doctrine.<sup>15</sup>

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clarifies testimony); *Wright v. State*, 577 So. 2d 387, 390 (Miss. 1991) (adopting the law of federal jurisdictions in holding that a plaintiff who submits an affidavit to contradict prior testimony cannot defeat summary judgment); *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 388 (Mo. 1993) (explaining that summary judgment cannot be defeated by introducing an affidavit to contradict earlier testimony); *Rivera v. Trujillo*, 990 P.2d 219, 221–22 (N.M. Ct. App. 1999) (commenting that it is consistent with New Mexico law for summary judgment to be upheld in the face of a sham affidavit); *Greene v. Osterhoudt*, 673 N.Y.S.2d 272, 274 (N.Y. App. Div. 1998) (acknowledging that the submission of an affidavit solely for the purpose of contradicting prior testimony will not defeat summary judgment); *Wachovia Mortgage Co. v. Autry-Baker-Spurrier Real Estate, Inc.*, 249 S.E.2d 727, 732–33 (N.C. Ct. App. 1978) (noting that summary judgment cannot be defeated by submitting an affidavit to contradict prior sworn testimony), *aff'd*, 256 S.E.2d 688 (N.C. 1979); *Delzer v. United Bank of Bismark*, 484 N.W.2d 502, 508 (N.D. 1992) (identifying instances where the only reason why a contradictory affidavit is submitted is to create an issue of fact to defeat summary judgment); *Buckeye Fed. Sav. & Loan Ass'n v. Cole*, No. CA86-01-006, 1986 WL 13274, at \*2 (Ohio Ct. App. Nov. 24, 1986) (per curiam) (mem.) (explaining that the submission of a contradictory affidavit without explanation cannot defeat summary judgment); *Henderson-Rubio v. May Dep't Stores Co.*, 632 P.2d 1289, 1294–95 (Or. Ct. App. 1981) (stating that a contradictory affidavit that does not explain or clarify prior testimony cannot defeat summary judgment); *Price v. Becker*, 812 S.W.2d 597, 598 (Tenn. Ct. App. 1991) (indicating that an affidavit that contradicts prior testimony does not establish a genuine issue of material fact); *Marshall v. AC & S, Inc.*, 782 P.2d 1107, 1109–10 (Utah 1989) (noting that an issue of fact cannot be created to defeat a motion for summary judgment by introducing an affidavit that contradicts prior testimony without explanation); *Webster v. Sill*, 675 P.2d 1170, 1172–73 (Utah 1983) (furthering the idea that an affidavit submitted to contradict prior testimony without explanation cannot defeat summary judgment); *Yahnke v. Carson*, 2000 WI 74, ¶20, 236 Wis. 2d 257, 613 N.W.2d 102 (adopting the federal rule that a sham affidavit cannot defeat summary judgment); *Morris v. Smith*, 837 P.2d 679, 684–85 (Wyo. 1992) (noting that a court may disregard an affidavit that was submitted merely to contradict prior testimony in an effort to create an issue of fact to defeat summary judgment); *see also* Randy Wilson, *The Sham Affidavit Doctrine in Texas*, 66 TEX. B.J. 962, 968 (2003) (“The sham affidavit doctrine is generally well recognized in most states.”).

14. *See, e.g., Pittman v. Atl. Realty Co.*, 754 A.2d 1030, 1041–42 (Md. 2000) (deciding that the sham affidavit rule requires the trial court to make a decision based on credibility, which is typically left to the trier of fact).

15. *Compare* 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.14[1][f] (3d ed. 2008) (“If a party's deposition and affidavit are in conflict, the affidavit is to be disregarded unless a legitimate reason can be given for the discrepancies.”), *and* Randy Wilson, *The Sham Affidavit Doctrine in Texas*, 66 TEX. B.J. 962, 968 (2003) (“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.”), *with* Timothy Patton, *Selected Unsettled Aspects of Summary Judgment Practice and Procedure*, in 1

## II. SHAM AFFIDAVIT THEORY IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The United States Court of Appeals for the Fifth Circuit first addressed the sham affidavit theory in *Kennett-Murray Corp. v. Bone*.<sup>16</sup> In that case, an employer sued a former employee on a promissory note and employment contract.<sup>17</sup> The employee asserted that he was fraudulently induced to enter into the contract and sign the note.<sup>18</sup> The district court granted summary judgment for the plaintiff after giving no weight to the defendant's affidavit supporting his allegations of fraud.<sup>19</sup> The Fifth Circuit reversed the summary judgment and declined to apply the sham affidavit theory which would have allowed the trial court to strike the defendant's affidavit.<sup>20</sup> The court stated that "[i]n considering a motion for summary judgment, a district court must consider all the evidence before it and cannot disregard a party's affidavit merely because it conflicts to some degree with an earlier deposition."<sup>21</sup> The court continued by stating that "a genuine issue can exist by virtue of a party's affidavit even if it conflicts with earlier testimony in the party's deposition."<sup>22</sup>

The defendant in *Kennett-Murray* cited *Perma Research* "for the proposition that a district court may grant summary judgment where an issue raised by affidavit is clearly inconsistent with earlier deposition testimony."<sup>23</sup> The court noted that "[t]he gravamen of the *Perma Research-Radobenko* line of cases is the

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STATE BAR OF TEXAS, 26TH ANNUAL ADVANCED CIVIL TRIAL COURSE ch. 13.1, 9–10 (2003) (arguing against the sham affidavit theory because conflicting testimony may create a fact issue that precludes summary judgment), and EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW & PRACTICE § 8.10 (3d ed. 2006) ("To the extent that a witness's testimony at trial is rendered suspect because of its inconsistency with a deposition, it would seem to present an issue of credibility, traditionally to be resolved by the finder of fact. Rigid rejection of affidavits that are inconsistent with deposition testimony effectively requires judicial resolution of credibility issues.").

16. *Kennett-Murray Corp. v. Bone*, 622 F.2d 887 (5th Cir. 1980).

17. *Id.* at 889.

18. *Id.*

19. *Id.* at 892.

20. *Id.* at 894–95.

21. *Kennett-Murray*, 622 F.2d at 893 (citing *Camerlin v. N.Y. Cent. R.R. Co.*, 199 F.2d 698, 701 (1st Cir. 1952); *Adams v. United States*, 392 F. Supp. 1272, 1274 (E.D. Wis. 1975)).

22. *Id.*

23. *Id.*

reviewing court's determination that the issue raised by the contradictory affidavit constituted a sham. Certainly, every discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence."<sup>24</sup> The court held, under the facts of the case, "[t]he affidavit [was] not inherently inconsistent" with the defendant's deposition testimony and that the affidavit was not inconsistent with the defendant's "general theory of defense presented in the deposition."<sup>25</sup> The court expressly refused to decide whether the principles enunciated in *Perma Research* should be adopted, noting instead that while some statements in the deposition differed with those in the affidavit, those conflicts presented questions of credibility which required the jury's resolution.<sup>26</sup> Therefore, the court's decision appears to have allowed a qualified application of the sham affidavit theory. As one commentator has noted, "[r]eactions to *Kennett-Murray* by subsequent courts have been mixed," yet "[it] remains the leading case holding that a litigant's explanation for contradictions between an offsetting affidavit and previous deposition testimony can render the affidavit relevant to a summary judgment motion ruling."<sup>27</sup>

Following *Kennett-Murray*, several opinions seemed to limit or eliminate the sham affidavit theory in the Fifth Circuit. The leading case taking this approach is *Dibidale of Louisiana, Inc. v. American Bank & Trust Co.*<sup>28</sup> where the court refused to strike an affidavit that contained some inconsistencies with prior testimony:

In reviewing a motion for summary judgment the court must consider all of the evidence before it, including affidavits that conflict with deposition testimony. A genuine issue of material fact may be raised by such an affidavit "even if it conflicts with earlier testimony in the party's deposition." Nor, for that matter, is [the affiant's] affidavit necessarily inconsistent with his deposition testimony. Read in the light most favorable to [plaintiff] as the non-movant, both documents assert that [defendant] succeeded in making clear its intentions without flagrantly violating the law. To the extent they exist, discrepancies in those averments present

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24. *Id.* at 894.

25. *Id.* at 894-95.

26. *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 895 (5th Cir. 1980).

27. Collin J. Cox, Note, *Reconsidering the Sham Affidavit Doctrine*, 50 DUKE L.J. 261, 286-87 (2000).

28. *Dibidale of La., Inc. v. Am. Bank & Trust Co.*, 916 F.2d 300 (5th Cir. 1990).

credibility issues properly put to the trier-of-fact.<sup>29</sup>

The *Dibidale* majority then iterated the oft-quoted expression that “[c]redibility assessments are not fit grist for the summary judgment mill.”<sup>30</sup>

More recently, however, the Fifth Circuit has used the sham affidavit theory to strike affidavits where it found that a sufficient inconsistency existed, even noting that the rule is “well settled” that a party may not “defeat a motion for summary judgment using an affidavit that impeaches, without explanation, sworn testimony.”<sup>31</sup> For example, in *Thurman v. Sears, Roebuck & Co.*,<sup>32</sup> the plaintiff in a wrongful termination suit attempted to raise a fact issue as to when he received notice of being discharged by Sears in an effort to avoid summary judgment on limitations grounds.<sup>33</sup> The Fifth Circuit affirmed summary judgment and disregarded the affidavit that contradicted the plaintiff’s prior deposition:

The testimony in Thurman’s [s]econd [a]ffidavit is as follows: “I was not told by Sears or any of Sears’ employees that I had been terminated prior to Sears’ refusal to reinstate me.” Compare that affidavit testimony with Thurman’s deposition testimony that he was expressly told by Susan Blanchard that he had been discharged:

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29. *Id.* at 307 (footnote omitted); *see also* *Clark v. Resistoflex Co.*, 854 F.2d 762, 766 (5th Cir. 1988) (finding that inconsistency was not so great as to justify striking affidavit); *Rekieta v. K-Mart Corp.*, No. 3:96-CV-1142-R, 1998 U.S. Dist. LEXIS 110, at \*14–15 (N.D. Tex. Jan. 5, 1998) (mem.) (holding that inconsistency in affidavit from prior deposition testimony is not a basis to strike affidavit); *Gilbert v. Tex. Mental Health & Mental Retardation*, 919 F. Supp. 1031, 1037 (E.D. Tex. 1996) (deciding that discrepancies in affidavits and depositions are not a basis for excluding evidence in summary judgment). *See generally* *Webster v. Bass Enters. Prod. Co.*, No. 3:00-CV-2109-M, 2002 U.S. Dist. LEXIS 3107, at \*3 n.3 (N.D. Tex. Feb. 22, 2002) (holding that courts should review all testimony in summary judgment proceedings, even conflicting testimony).

30. *Dibidale*, 916 F.2d at 307–08.

31. *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996) (striking affidavit due to inconsistency with prior testimony); *see also* *Copeland v. Wasserstein, Perella & Co.*, 278 F.3d 472, 482 (5th Cir. 2002) (holding that unexplained contradiction in late coming affidavit would not suffice to defeat summary judgment); *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 137 n.23 (5th Cir. 1992) (holding that inconsistent affidavit could not be basis of overcoming summary judgment); *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984) (holding that summary judgment cannot be defeated with an unexplained contradictory affidavit). *See generally* *Crowe v. Henry*, 115 F.3d 294, 298 n.5 (5th Cir. 1997) (acknowledging that an apparent contradiction in deposition testimony could be ambiguous when read in context and should suffice to establish a material issue).

32. *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128 (5th Cir. 1992).

33. *Id.* at 137 n.23.

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## COMPETENCY OF THE SHAM AFFIDAVIT

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Q: On May 18th, you no longer had any job duties at Sears; correct?

A: Yeah.

Q: Who was it that told you that as of May 18, 1987, you were not employed or you didn't have a job at Sears?

A: Susan Blanchard.<sup>34</sup>

The court rejected the plaintiff's explanation for the contradictory statements contained in the second affidavit—that defendant's counsel had "outwitted him" and "made him utter words he did not intend."<sup>35</sup> According to the court, plaintiff's "explanation [was] insufficient to create [any] genuine issues of material fact required to defeat summary judgment."<sup>36</sup>

Similarly, in *Doe ex rel. Doe v. Dallas Independent School District*,<sup>37</sup> the Fifth Circuit affirmed a district court's ruling that an affidavit contradicted a plaintiff's prior deposition testimony and thus failed to create a genuine issue of material fact.<sup>38</sup> In that case, a group of former elementary school students who had been sexually molested by a teacher sued a school district and principal.<sup>39</sup> The plaintiffs alleged that the principal "was a supervisory official with the power to stop the abuse, [that the principal] had actual notice of abuse both in 1984 and in 1986, [but] responded with deliberate indifference in both instances."<sup>40</sup> The defendants moved for summary judgment.<sup>41</sup> The district court granted the motion after discounting one of the plaintiff's affidavits which conflicted with his prior deposition testimony because the plaintiffs failed to create a genuine issue of material fact on the issue of whether the principal had actual notice of the abuse in 1984.<sup>42</sup>

Interestingly, in line with the case law holding that a court may disregard inconsistencies that are unexplained, the *Doe* plaintiff's subsequent affidavit did in fact attempt to explain away the

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380 (5th Cir. 2000).

38. *Id.* at 386.

39. *Id.* at 381.

40. *Id.* at 382.

41. *Id.*

42. *Doe*, 220 F.3d at 383.

inconsistencies with the prior deposition testimony.<sup>43</sup> However, the court rejected the plaintiff's argument.<sup>44</sup> The court noted that the plaintiff had been represented by counsel at his deposition, and "was thoroughly questioned about his communications with school personnel; and [his] testimony was unequivocal"—he had not personally given notice to the principal nor had he put any of his accusations in writing.<sup>45</sup> Furthermore, at his deposition, the plaintiff had "responded to certain questions by stating that he could not answer because he did not recall what had happened," yet he failed to respond with "I do not recall" in response to a direct question about whether he had directly informed the principal about the abuse.<sup>46</sup> Thus, the court concluded that, "in the absence of a dispute of fact, the district court correctly [determined] as a matter of law that [the defendant] did not have actual notice in 1984."<sup>47</sup>

The Fifth Circuit has also applied the sham affidavit theory to any prior sworn testimony, not just deposition testimony.<sup>48</sup>

Several United States district courts in Texas have refused to apply the sham affidavit theory to strike affidavits.<sup>49</sup> Other Texas district courts acknowledge the sham affidavit theory but have held that under the facts of the case the inconsistency between the affidavit and other forms of testimony was not so great as to warrant striking an affidavit.<sup>50</sup> Most federal courts in Texas,

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43. *See id.* at 385–86 (recounting the plaintiff's 1998 and 1999 affidavits and explaining the plaintiff's reasons for their differences).

44. *Id.* at 386.

45. *Id.* at 385–86.

46. *Id.* at 386–87.

47. *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 387 (5th Cir. 2000).

48. *See Copeland v. Wasserstein, Perella & Co.*, 278 F.3d 472, 482 (5th Cir. 2002) (applying the sham affidavit rule to prior sworn testimony); *see also Herrera v. CTS Corp.*, 183 F. Supp. 2d 921, 929 (S.D. Tex. 2002) (holding that plaintiff's affidavit which stated his belief that he could perform essential functions of his job contradicted sworn statements in application for Social Security Disability Insurance and was therefore insufficient to create a genuine issue of material fact).

49. *See, e.g., Rekieta v. K-Mart Corp.*, No. 3:96-CV-1142-R, 1998 U.S. Dist. LEXIS 110, at \*14–15 (N.D. Tex. Jan. 5, 1998) (mem.) (refusing to disregard an affidavit just because it conflicted with deposition testimony); *Gilbert v. Tex. Mental Health & Mental Retardation*, 919 F. Supp. 1031, 1037 (E.D. Tex. 1996) (declining to disregard an affidavit merely because it conflicted with deposition testimony).

50. *See, e.g., Moss v. Cavalry Invs., L.L.C.*, No. 3-03-CV-2653-BD(P), 2004 U.S. Dist. LEXIS 24990, at \*4 n.1 (N.D. Tex. Sept. 20, 2004) (mem.) (finding that supplemental statements were not contradictions of prior testimony); *AMS Staff Leasing v. Starving Students, Inc.*, No. 3-03-CV-0383-BD, 2004 U.S. Dist. LEXIS 26202, at \*10–11 (N.D. Tex.

however, have applied the theory to freely strike affidavit statements that were inconsistent with prior deposition testimony.<sup>51</sup> Overall, if the inconsistency is direct, federal district courts in Texas have been willing to utilize the sham affidavit theory to strike all or a portion of a witness's affidavit.

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Jan. 21, 2004) (mem.) (holding that prior inconsistent testimony was not necessarily a contradiction of a submitted affidavit); *Fields v. Keith*, 174 F. Supp. 2d 464, 475 (N.D. Tex. 2002) (concluding that inconsistent statements in documentary evidence and affidavits cannot be used to establish malice); *Liszt v. Karen Kane, Inc.*, No. 3:97-CV-3200-L, 2001 U.S. Dist. LEXIS 8824, at \*14-17 (N.D. Tex. June 27, 2001) (mem.) (holding that affidavit statements that seemed inconsistent with prior testimony but in which there was no direct contradiction or a sham could not support striking the affidavit); *Ramos v. Geddes*, 137 F.R.D. 11, 12 (S.D. Tex. 1991) (“Not every discrepancy between an affidavit and prior testimony indicates a sham . . .”).

51. *See, e.g.*, *Aguirre v. SBC Commc'ns, Inc.*, No. H-05-3198, 2007 WL 2900577, at \*3 n.2 (S.D. Tex. Sept. 30, 2007) (mem.) (disregarding statements in an affidavit that conflicted with prior sworn testimony); *Tex. Sales & Mktg., Inc. v. Distinctive Appliances, Inc.*, No. H-05-3555, 2007 WL 399292, at \*6 (S.D. Tex. Jan. 31, 2007) (mem.) (choosing to disregard affidavit statements that impeached earlier deposition testimony); *Sunshine Traders of El Paso, Inc. v. Dolgencorp, Inc.*, No. EP-02-CA-439-DB, 2005 U.S. Dist. LEXIS 7615, at \*22 (W.D. Tex. Mar. 29, 2005) (mem.) (declining to consider an affidavit that contradicted deposition testimony); *Campanello v. Anthony & Sylvan Pools Corp.*, No. 303-CV-1884G, 2004 WL 2049313, at \*5 (N.D. Tex. Sept. 14, 2004) (mem.) (disregarding contradictory affidavit); *Valleza v. City of Laredo*, 331 F. Supp. 2d 579, 582-83 (S.D. Tex. 2004) (giving credence to deposition testimony instead of conflicting affidavit statements); *Winter v. Bank of Am., N.A.*, No. 3:02-CV-1591-L, 2003 U.S. Dist. LEXIS 24790, at \*23-24 (N.D. Tex. Dec. 12, 2003) (mem.) (holding that portions of an affidavit that conflicted with deposition testimony could not be considered competent evidence); *Georgen-Saad v. Tex. Mut. Ins. Co.*, 195 F. Supp. 2d 853, 861 n.7 (W.D. Tex. 2002) (refusing to allow for attempts to “patch holes” in deposition testimony); *Hollomon v. O. Mustad & Sons, Inc.*, 196 F. Supp. 2d 450, 459 n.2 (E.D. Tex. 2002) (disregarding affidavit statements that impeached without explanation earlier sworn testimony); *Williams v. Simmons Co.*, 185 F. Supp. 2d 665, 680 (N.D. Tex. 2001) (refusing to give weight to affidavit statements that contradicted earlier depositions); *New Railhead Mfg., L.L.C. v. Vermeer Mfg. Co.*, 219 F. Supp. 2d 751, 757 (N.D. Tex. 2001) (holding that filing an affidavit impeaching, without explanation, previous sworn testimony could not defeat summary judgment motion); *Saudi v. S/T Marine Atl.*, 159 F. Supp. 2d 512, 521 (S.D. Tex. 2001) (using sham affidavit theory to strike affidavit in motion to strike expert proceeding); *Doe v. Grossman*, No. 3:99-CV-1336-P, 2000 U.S. Dist. LEXIS 12233, at \*13 n.3 (N.D. Tex. Aug. 24, 2000) (mem.) (denying use of a self-serving affidavit to defeat summary judgment); *Wayne v. Dallas Morning News*, 78 F. Supp. 2d 571, 579-80 n.10 (N.D. Tex. 1999) (disregarding affidavit statements that were inconsistent with prior deposition testimony); *Bennett v. CompUSA, Inc.*, No. 3:96-CV-0742-P, 1997 U.S. Dist. LEXIS 3735, at \*22 n.4 (N.D. Tex. 1997) (mem.) (disregarding conflicting statements made in an affidavit); *Simon v. Birraporetti's Rests., Inc.*, 720 F. Supp. 85, 89 (S.D. Tex. 1989) (holding that an affidavit supplying the only source of a disputed material fact, not brought up in deposition, could not withstand summary judgment).

### III. HISTORICAL TEXAS PRECEDENT ON INCONSISTENCIES BETWEEN AFFIDAVIT TESTIMONY AND EARLIER TESTIMONY

In 1962, the Texas Supreme Court first addressed the argument that an affidavit should be disregarded because it conflicted with deposition testimony in *Gaines v. Hamman*.<sup>52</sup> In *Gaines*, the plaintiff sued the defendant claiming an interest in an oil and gas lease.<sup>53</sup> Early in the case, the plaintiff testified at his deposition that there was no express agreement or contract between him and the defendant regarding the ownership of the interests.<sup>54</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 agreement upon which his claims were based.<sup>55</sup> The defendant argued that where there is an inconsistency between the affidavit and deposition testimony, the deposition testimony should control.<sup>56</sup> The 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.<sup>57</sup>

The court thus held that the conflicting statements in the affidavit created a fact issue and reversed.<sup>58</sup> One justice dissented, critical of the plaintiff's unsupported general statement in his affidavit as to the nature of the purported agreement: "If the case had been tried in the conventional manner, [the plaintiff's]

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52. *Gaines v. Hamman*, 163 Tex. 618, 624, 358 S.W.2d 557, 561 (1962).

53. *Id.* at 620–21, 358 S.W.2d at 558.

54. *Id.* at 624, 358 S.W.2d at 561–62.

55. *Id.* at 625, 358 S.W.2d at 558–59.

56. *Id.* at 624, 358 S.W.2d at 561.

57. *Gaines*, 163 Tex. at 626, 358 S.W.2d at 562–63 (citations omitted).

58. *Id.* at 626, 358 S.W.2d at 563.

statement of such a conclusion from the witness stand would be entitled to no weight in the face of his deposition testimony regarding the details of the agreement.”<sup>59</sup>

Following *Gaines*, most of the courts of appeals that reviewed cases dealing with contradictory affidavit and deposition statements uniformly held that such a contradiction raised a fact issue.<sup>60</sup> However, in *Stephens v. James*,<sup>61</sup> the Dallas Court of Appeals affirmed a summary judgment based on limitations even though there was a factual discrepancy between the plaintiff’s summary judgment affidavit and his deposition regarding when he knew or should have known about facts giving rise to a cause of action against his doctor for fraudulent concealment.<sup>62</sup> The case clearly indicates that the plaintiff stated in his affidavit that he was not aware of the relevant facts until May 27, 1977.<sup>63</sup> However, the plaintiff’s deposition indicated otherwise.<sup>64</sup> The court detailed all the contrary evidence from the plaintiff’s deposition—and even the plaintiff’s wife’s deposition—before holding that the plaintiff

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59. *Id.* at 627, 358 S.W.2d at 563 (Walker, J., dissenting).

60. *See, e.g.*, *Evans v. Conlee*, 741 S.W.2d 504, 507–08 (Tex. App.—Corpus Christi 1987, no writ) (“It is well settled that a deposition has no controlling effect over an affidavit and, if conflicting inferences may be drawn from the deposition and the affidavit of the same party, a fact issue is presented.”); *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 335 (Tex. App.—Dallas 1986, no writ) (“A deposition is not a judicial admission. It has no controlling effect as compared to an affidavit. Thus, if conflicting inferences may be drawn from two statements made by the same party, one in an affidavit and the other in a deposition, a fact issue is presented.”); *Jones v. Hutchison County*, 615 S.W.2d 927, 930 n.3 (Tex. Civ. App.—Amarillo 1981, no writ) (“There is, of course, no basis for giving controlling effect to a deposition over an affidavit and, if conflicting inferences may be drawn from the deposition and from the affidavit of the same party, a fact issue is presented so as to preclude the granting of summary judgment.”); *Sifford v. Santa Rosa Med. Ctr.*, 524 S.W.2d 559, 563 (Tex. Civ. App.—San Antonio 1975, no writ) (“We are aware of conflicts between plaintiff’s deposition and his affidavit, particularly with respect to the presence of water on the floor. However, under our practice, there is no basis for giving controlling effect to a deposition as compared to an affidavit. The conflict does no more than raise an issue of fact.” (citation omitted)); *Proctor v. Southland Life Ins. Co.*, 522 S.W.2d 261, 265–66 (Tex. Civ. App.—Fort Worth 1975, writ ref’d n.r.e.) (stating that even a contradiction in the evidence of the plaintiff will not aid the party on summary judgment as the discrepancy is a matter for the jury to resolve); *Tyler v. McDaniel*, 386 S.W.2d 552, 562 (Tex. Civ. App.—Dallas 1965, writ ref’d n.r.e.) (“Appellant repudiated part of what he had sworn to in the deposition, and insofar as the contents of his subsequent affidavits differ from what he said on the deposition, a fact issue is presented and that portion of the deposition no longer establishes the absence of a fact issue.”).

61. *Stephens v. James*, 673 S.W.2d 299 (Tex. App.—Dallas 1984, writ ref’d n.r.e.).

62. *Id.* at 300.

63. *Id.* at 302.

64. *Id.*

knew or should have known of the relevant facts prior to the time attested to in the affidavit.<sup>65</sup> It is important to note that the *Stephens* opinion did not even recognize the *Gaines* holding.

The supreme court next addressed the issue in 1988 in the case *Randall v. Dallas Power & Light Co.*<sup>66</sup> In *Randall*, the plaintiff in an automobile accident case swore in an affidavit that the defendant's claims agent made generous promises to him about future damages and compensation.<sup>67</sup> The defendant moved for summary judgment, but the trial court denied that motion.<sup>68</sup> Thereafter, the defendant took plaintiff's deposition, wherein he testified that "he could not remember any representations being made by the claims agent regarding future damages or expenses."<sup>69</sup> The trial judge granted the summary judgment, and the appeals court affirmed.<sup>70</sup>

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.<sup>71</sup>

Because the defendant had not met "[its] burden of showing that there was no genuine issue as to any material fact," the court held that the summary judgment was improperly granted.<sup>72</sup>

Following *Randall*, many courts of appeals continued to hold that a fact issue is raised—for a jury to determine—where an

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65. *Id.* at 302–03.

66. *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4 (Tex. 1988) (per curiam).

67. *Id.* at 4–5.

68. *Id.* at 5.

69. *Id.*

70. *Id.*

71. *Randall*, 752 S.W.2d at 5 (citations omitted).

72. *Id.*

affidavit conflicts with prior testimony.<sup>73</sup> For example, in *Knetsch v. Gaitonde*,<sup>74</sup> the trial court granted summary judgment based in part on several instances where the plaintiff's expert contradicted

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73. See, e.g., *Westchester Enters., L.P. v. Grand Homes, Inc.*, No. 05-98-01829-CV, 2001 Tex. App. LEXIS 5768, at \*15-18 (Tex. App.—Dallas Aug. 23, 2001, pet. denied) (not designated for publication) (finding fact issue existed where engineering expert's deposition and affidavit testimony were contradictory to an article he previously authored); *Kirkwood v. Primacare, Inc.*, No. 05-97-01934-CV, 2000 Tex. App. LEXIS 792, at \*11 (Tex. App.—Dallas Feb. 3, 2000, no pet.) (not designated for publication) (finding fact issue raised by doctor's contradictory statements in deposition testimony and affidavit; however, sham affidavit theory was apparently not raised in the case); *Sosebee v. Hillcrest Baptist Med. Ctr.*, 8 S.W.3d 427, 435 (Tex. App.—Waco 1999, pet. denied) (stating conflicting evidence of a single witness raises a fact issue for the jury to resolve); *Bauer v. Jasso*, 946 S.W.2d 552, 556 (Tex. App.—Corpus Christi 1997, no writ) (paraphrasing *Gaines and Randall*); *Sipes v. Gen. Motors Corp.*, 946 S.W.2d 143, 148 (Tex. App.—Texarkana 1997, writ denied) (“If a nonmovant's deposition and affidavit opposing summary judgment provide a basis for conflicting inferences, a fact issue arises.”); *Bottoms v. Smith*, 923 S.W.2d 247, 252 (Tex. App.—Houston [14th Dist.] 1996, no writ) (“The fact that conflicting inferences may be drawn from the deposition and the affidavit indicates that a fact issue is presented.”); *Knetsch v. Gaitonde*, 898 S.W.2d 386, 388 (Tex. App.—San Antonio 1995, no writ) (stating that inconsistencies between an expert's affidavit and deposition will not negate testimony but will give rise to a fact issue); *Green v. Unauthorized Practice of Law Comm.*, 883 S.W.2d 293, 297 (Tex. App.—Dallas 1994, no writ) (“If conflicting inferences may be drawn from a deposition and from an affidavit filed by the same party in opposition to summary judgment, a fact issue is presented.”); *Cortez v. Fuselier*, 876 S.W.2d 519, 521 (Tex. App.—Texarkana 1994, writ denied) (“Such contradictions do not entitle the defendant to a summary judgment.”); *Oyster Creek Assocs. Joint Venture v. Fort Bend Cent. Appraisal Dist.*, No. 01-90-00903-CV, 1991 Tex. App. LEXIS 1617, at \*10 (Tex. App.—Houston [1st Dist.] June 27, 1991, writ denied) (not designated for publication) (stating that deposition testimony, even when more detailed than an affidavit, is given the same evidentiary weight; and when in conflict, a fact issue exists); *Allen v. Roddis Lumber & Veneer Co.*, 796 S.W.2d 758, 760-61 (Tex. App.—Corpus Christi 1990, writ denied) (stating that a deposition does not control over an affidavit, and a fact issue arises when there is conflict between the two); *Finney v. Baylor Med. Ctr. Grapevine*, 792 S.W.2d 859, 862 (Tex. App.—Fort Worth 1990, writ denied) (stating the deposition does not control over the affidavit in granting summary judgment); *Highlands Ins. Co. v. Currey*, 773 S.W.2d 750, 752 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (stating that controlling effect cannot be given to the deposition testimony over the affidavit); see also *Hassell v. Mo. Pac. R.R. Co.*, 880 S.W.2d 39, 41 n.1 (Tex. App.—Tyler 1994, writ denied) (“Factual conflicts existing between the non-movant's own deposition and affidavit must be resolved in the non-movant's favor.”); *Flores v. Ctr. for Spinal Evaluation & Rehab.*, 865 S.W.2d 261, 265 (Tex. App.—Amarillo 1993, no writ) (stating the established rule that a deposition will not control over an affidavit when there is a conflict between the two); *TAG Res., Inc. v. Petroleum Well Servs., Inc.*, 791 S.W.2d 600, 603-04 (Tex. App.—Beaumont 1990, no writ) (acknowledging the rule from *Randall* but distinguishing from the facts at hand). But see *Esquivel v. Mapelli Meat Packing Co.*, 932 S.W.2d 612, 615 (Tex. App.—San Antonio 1996, writ denied) (finding contradictory affidavits did not create fact issue where they were conclusory and not based on personal knowledge).

74. *Knetsch v. Gaitonde*, 898 S.W.2d 386 (Tex. App.—San Antonio 1995, no writ).

his deposition testimony with a subsequent affidavit.<sup>75</sup> The San Antonio Court of Appeals actually agreed that the expert's testimony appeared inconsistent, but nevertheless reversed the trial court's summary judgment:

This court agrees that the expert's testimony can be argued to be inconsistent, and that instances of conflict can be found between the affidavit and the expert's deposition. More certitude is expressed in the affidavit than under the press of cross-examination in the deposition, but this does not negate the testimony. It is impeachment material. The words in the affidavit do raise a fact issue.<sup>76</sup>

Similarly, in *Allen v. Roddis Lumber & Veneer Co.*,<sup>77</sup> the Corpus Christi Court of Appeals reversed a trial court's granting of summary judgment in favor of the defendants.<sup>78</sup> The plaintiffs (husband and wife) in *Allen* filed their lawsuit in August 1986, asserting a products liability claim stemming from the presence of formaldehyde in products manufactured by the defendants that were used in the construction of the plaintiffs' new home.<sup>79</sup> The defendants moved for summary judgment, arguing that the statute of limitations had run.<sup>80</sup> The plaintiff had testified at his deposition that in June 1984 he believed formaldehyde was in the house and was causing health problems.<sup>81</sup> However, in an affidavit submitted in response to the defendants' summary judgment motion, the plaintiff stated he did not know that formaldehyde was in his house or that it had caused health problems until August 1984.<sup>82</sup> The court of appeals held that "[a] deposition does not have controlling effect over an affidavit in a summary judgment case. Thus, if conflicting inferences may be drawn from a deposition and an affidavit, a fact issue is created."<sup>83</sup> The court then reversed the summary judgment, finding that there

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75. *Id.* at 388.

76. *Id.*

77. *Allen v. Roddis Lumber & Veneer Co.*, 796 S.W.2d 758 (Tex. App.—Corpus Christi 1990, writ denied).

78. *Id.* at 763.

79. *Id.* at 760.

80. *Id.*

81. *Id.*

82. *Allen*, 796 S.W.2d at 760.

83. *Id.* (citation omitted).

was a fact issue as to when the plaintiffs' cause of action accrued.<sup>84</sup>

Following the Texas Supreme Court precedent from *Gaines* and *Randall*, the law in Texas seemed very well-settled; if a party's summary judgment affidavit conflicted directly with its prior deposition testimony, a fact issue existed. In other words, a trial court was not allowed to disregard a party's affidavit statements in granting its opponent's summary judgment motion, even where those statements were directly contradicted by the party's own earlier deposition testimony.

#### IV. INTRODUCTION OF THE SHAM AFFIDAVIT THEORY IN TEXAS STATE COURTS

In the mid-1990s, the seemingly well-settled precedent—that a fact issue exists where a party's affidavit and deposition testimony conflict—was turned upside down by a court of appeals' adoption of the sham affidavit theory. The first Texas court to do so was the First Court of Appeals in Houston. In *Farroux v. Denny's Restaurants, Inc.*,<sup>85</sup> the plaintiff sued a restaurant claiming that it served him bad eggs that made him ill.<sup>86</sup> The restaurant denied that its eggs were bad and asserted that the plaintiff's problem could have been caused by other food that the plaintiff had consumed prior to eating at Denny's.<sup>87</sup> At his deposition, the plaintiff admitted that no doctor had told him why he was ill, nor had any doctor told him that the eggs he ate at the defendant's restaurant made him ill.<sup>88</sup> After the defendant filed a motion for summary judgment, the plaintiff filed an affidavit in which he swore that his doctor had told him that: (1) he had food poisoning; (2) food from other sources was not the cause of his problems; and (3) the food from the defendant's restaurant had caused his food poisoning.<sup>89</sup> The plaintiff made no attempt to explain the contra-

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84. *Id.* at 761.

85. *Farroux v. Denny's Rests., Inc.*, 962 S.W.2d 108 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

86. *Id.* at 109 (“Plaintiff sued Denny’s for breach of implied warranty, negligence, and gross negligence, alleging he suffered from food poisoning caused by the Grand Slam breakfast.”).

87. *Id.* at 110 (“Denny’s asserted that plaintiff’s entire case was based on guesswork because the plaintiff could not prove he suffered from food poisoning to begin with and could only speculate as to whether the food served at Denny’s caused the illness.”).

88. *Id.* at 111.

89. *Id.*

diction of his earlier deposition testimony.<sup>90</sup> The court of appeals stated that the affidavit was “directly contrary to the plaintiff’s deposition testimony” and affirmed the summary judgment:

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 testimony, we assume the sole purpose of the affidavit was to avoid summary judgment. As such, it presents merely a “sham” fact issue.<sup>91</sup>

In a footnote, the court noted that an affiant could explain a contradiction with prior deposition testimony by stating, for example, “that he was confused in a deposition, or that he discovered additional, relevant materials after the deposition.”<sup>92</sup> Interestingly, the court did not cite to or attempt to distinguish the supreme court’s contradictory holdings in *Gaines* and *Randall*.

#### V. THE SPLIT OF AUTHORITY AMONG TEXAS COURTS OF APPEALS REGARDING THE SHAM AFFIDAVIT THEORY

Following *Farroux*, several other Texas courts of appeals have either expressly or impliedly adopted the sham affidavit theory. Meanwhile, other courts of appeals continue to cite *Gaines* and *Randall*, and hold that a fact issue can be raised by the filing of a contradictory affidavit. Thus, a split of authority has developed among the intermediate courts of appeals in Texas. The Texas Supreme Court has not yet specifically addressed the viability of the sham affidavit doctrine following the development of the split among the intermediate courts of appeals.

##### A. *Texas Courts of Appeals That Have Impliedly or Expressly Applied the Sham Affidavit Theory*

The following courts of appeals have either expressly or impliedly accepted the sham affidavit theory in considering inconsistencies between affidavits and prior testimony: El Paso, Amarillo, Austin, Texarkana, San Antonio, and both the Houston

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90. *Farroux*, 962 S.W.2d at 111.

91. *Id.*

92. *Id.* at 111 n.1.

First and Fourteenth Courts of Appeals. This section outlines the various cases from these courts of appeals. The first subsection below discusses those cases where courts disregarded affidavits that were inconsistent with prior testimony. The second subsection discusses cases from these courts of appeals which cited to *Farroux* with approval but held that the inconsistency at issue did not rise to the level of a “sham.”

1. Cases Holding That the Affidavit Constitutes a Sham and Must Be Disregarded

After *Farroux*, the first court to disregard an affidavit under the sham affidavit theory was the Texarkana Court of Appeals in *Burkett v. Welborn*.<sup>93</sup> The plaintiff in that case was a machinist who brought negligence and premises liability claims against a co-employee and the landowner/sole shareholder of his employer for injuries the plaintiff sustained while dismantling a trailer on the defendant’s property.<sup>94</sup> Following his injuries, the plaintiff received workers’ compensation benefits, but in the lawsuit, he “claim[ed] that the circumstances under which he was injured were out of the scope of his employment” and not work-related.<sup>95</sup> The trial court found that the plaintiff’s recovery of workers’ compensation benefits was a bar to any tort recovery and granted summary judgment in favor of all defendants.<sup>96</sup> As an initial matter, the court stated that in response to the defendants’ motions for summary judgment, the plaintiff had submitted an affidavit in an attempt to demonstrate factual disputes.<sup>97</sup> The court noted that “[n]umerous statements in this affidavit contradicted [the plaintiff’s] prior deposition testimony.”<sup>98</sup> Then, citing *Farroux*, the court held that an explanation for the inconsistency must be present in the affidavit in order for the affidavit to be considered by the court:

A party cannot file an affidavit that contradicts that party’s own deposition testimony, without explanation, for the purpose of creating a fact issue to avoid summary judgment. If a party’s own

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93. *Burkett v. Welborn*, 42 S.W.3d 282, 286 (Tex. App.—Texarkana 2001, no pet.).

94. *Id.* at 285.

95. *Id.* at 286.

96. *Id.*

97. *Id.*

98. *Burkett*, 42 S.W.3d at 286.

affidavit contradicts earlier testimony, the affidavit must explain the reason for the change. . . . [Otherwise it] merely presents a “sham” fact issue. [The plaintiff] gave no explanation for the discrepancies between his deposition testimony and affidavit.<sup>99</sup>

Therefore, the court of appeals refused to consider the conflicting affidavit as evidence in analyzing whether summary judgment was appropriate.<sup>100</sup>

The Austin Court of Appeals applied the sham affidavit theory a few months later to affirm a trial court's exclusion of affidavit testimony in *Eslon Thermoplastics v. Dynamic Systems, Inc.*<sup>101</sup> In that case, a building owner and its property insurer sued a water line manufacturer and water line installer for damages that occurred when a water line broke.<sup>102</sup> The plaintiff's contract with its design-builder “included a waiver of all claims for damage arising out of the construction project, allocating such risks to insurers without a right of subrogation.”<sup>103</sup> The design-builder's contract with the defendant installer expressly incorporated the waiver clauses.<sup>104</sup> Once the plaintiff filed suit, the installer filed a motion for summary judgment, which the trial court granted.<sup>105</sup> One of the issues was whether the defendant had installed the water lines under a direct contract with the plaintiff (which would not have contained waiver of claims or waiver of subrogation clauses) or whether the work was performed as part of its subcontract with the design-builder (with waiver of claims and waiver of subrogation clauses).<sup>106</sup> The court of appeals held that the defendant had not proven as a matter of law that the installation had been performed under a contract which included the allocation of risks to insurance and the waiver of subrogation; therefore, the court reversed the summary judgment.<sup>107</sup>

However, the Austin court rejected the plaintiff's argument that

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99. *Id.* (citing *Farroux v. Denny's Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.)).

100. *Id.* at 286–90.

101. *Eslon Thermoplastics v. Dynamic Sys., Inc.*, 49 S.W.3d 891, 901 (Tex. App.—Austin 2001, no pet.).

102. *Id.* at 894.

103. *Id.* at 895.

104. *Id.*

105. *Id.*

106. See *Eslon Thermoplastics*, 49 S.W.3d at 898 (relating the defendant's theories for non-liability).

107. *Id.* at 900.

the trial court erred in striking parts of an affidavit submitted in support of the summary judgment response because the affidavit statements conflicted with the affiant's prior deposition testimony.<sup>108</sup> Specifically, the trial court struck statements from the design-builder's project manager that the defendant's installation was "not done as a change order to the original construction contract . . . . [Moreover, t]he tool hook-up was considered a separate contract made directly with [the plaintiff]."<sup>109</sup> In the project manager's previous deposition testimony, he testified that:

- Q. But do you know if there was any other different contract? You're not offering testimony today about the[re] being some other different contract between [plaintiff] and [defendant], are you?  
A. Not that I'm aware of. I don't know.  
Q. You don't know? You have no personal knowledge?  
A. I don't.<sup>110</sup>

The Austin court cited *Farroux* in support of the proposition that "[a]n individual '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.'"<sup>111</sup> Thus, the court applied the sham affidavit rule in support of its holding that the trial court had not abused its discretion in striking the affidavit testimony.<sup>112</sup>

Four years later, the Austin court again applied the sham affidavit theory in *Goeth v. Craig, Terrill & Hale, L.L.P.*<sup>113</sup> In that case, the plaintiffs filed a legal malpractice lawsuit, and the defendants filed a motion for summary judgment asserting that the plaintiffs did not have standing to raise the claims because the law firm represented a living trust, not the plaintiffs.<sup>114</sup> The plaintiffs filed a response to summary judgment and attached affidavits

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108. *Id.* at 900–01.

109. *Id.* at 901.

110. *Id.* at 901 n.7.

111. *Eslon Thermoplastics v. Dynamic Sys., Inc.*, 49 S.W.3d 891, 901 (Tex. App.—Austin 2001, no pet.) (citing *Farroux v. Denny's Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.)).

112. *See id.* (noting that portions of the project manager's affidavit failed to show personal knowledge of contracts between plaintiff and defendant and were merely legal conclusions that could not support summary judgment as a matter of law).

113. *Goeth v. Craig, Terrill & Hale, L.L.P.*, No. 03-03-00125-CV, 2005 WL 850349, at \*3 (Tex. App.—Austin Apr. 14, 2005, no pet.) (mem. op.).

114. *Id.* at \*1.

stating that they were shareholders of the company “at all times material to the suit.”<sup>115</sup> The defendants objected to these affidavits, as they contradicted prior deposition testimony whereby the plaintiffs stated that they had sold all of their shares in the company to a trust in 1993.<sup>116</sup> Moreover, the defendants attached authenticated records proving that the stock was sold in 1993.<sup>117</sup> The trial court struck the affidavit testimony under the sham affidavit theory and granted the defendants’ motion for summary judgment.<sup>118</sup> On appeal, the court of appeals affirmed the striking of the affidavit testimony:

The exclusion of evidence rests within the sound discretion of the trial court. The trial court abuses its discretion only when it acts in an unreasonable or arbitrary manner, or acts without reference to any guiding principles. 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.” Such an affidavit presents no more than a “sham” fact issue. Without any reasonable explanation provided by the [plaintiffs] for their alteration in testimony, the trial court did not abuse its discretion by excluding the summary judgment affidavits. Thus, the [plaintiffs] were properly prevented from asserting their shareholder status in [the company].<sup>119</sup>

In *Trostle v. Trostle*,<sup>120</sup> the Amarillo Court of Appeals also cited *Farroux* with approval.<sup>121</sup> In that case, a surviving son of a decedent sued his stepmother for breach of fiduciary duty and fraud.<sup>122</sup> The underlying basis of the plaintiff’s claim was that his stepmother had settled a wrongful death lawsuit against a nursing

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115. *Id.* at \*3.

116. *Id.*

117. *Id.*

118. *Goeth*, 2005 WL 850349, at \*3.

119. *Id.* (citations omitted); *see also* *Martinez v. Daughters of Charity Health Servs.*, No. 03-05-00264-CV, 2006 WL 3453356, at \*5-6 (Tex. App.—Austin Nov. 30, 2006, no pet.) (mem. op.) (stating that plaintiff’s affidavit regarding alleged illegal age discrimination contradicted deposition testimony without explanation and therefore constituted a sham affidavit; trial court did not err in entering summary judgment in favor of defendant).

120. *Trostle v. Trostle*, 77 S.W.3d 908 (Tex. App.—Amarillo 2002, no pet.).

121. *Id.* at 915 (“[A]n affidavit which conflicts with deposition testimony may not be used to raise a fact issue with respect to a motion for summary judgment without an explanation.” (citing *Farroux v. Denny’s Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.))).

122. *Id.* at 911.

home without including him as a party and misrepresented to him that he was included as a party.<sup>123</sup> The trial court granted the stepmother's motion for summary judgment, and the court of appeals affirmed.<sup>124</sup> The court of appeals noted that the plaintiff had testified in his deposition that he knew he had not been included as a party to the wrongful death lawsuit a month before the lawsuit went to trial because of a telephone conversation he had with the attorney handling the suit.<sup>125</sup> However, in his affidavit in response to the stepmother's motion for summary judgment, the plaintiff stated that he did not know he was not a party or otherwise entitled to any of the lawsuit proceeds until after the case went to trial and that the trial attorney had not informed him that he was not included in the lawsuit.<sup>126</sup> The Amarillo court cited *Farroux* for the proposition that "an affidavit which conflicts with deposition testimony [without an explanation] may not be used to raise a fact issue with respect to a motion for summary judgment."<sup>127</sup> However, although the trial court sustained the stepmother's objections to the affidavit, the plaintiff failed to challenge this ruling on appeal.<sup>128</sup>

Most recently, in *Pando v. Southwest Convenience Stores, L.L.C.*,<sup>129</sup> the Eastland Court of Appeals applied the sham affidavit doctrine to affirm the exclusion of contradictory affidavit testimony.<sup>130</sup> The plaintiff in that case sued a convenience store under the Dram Shop Act, alleging that the store "sold alcoholic beverages to [him] while he was obviously intoxicated and was, therefore, liable for the wreck" he was involved in.<sup>131</sup> The defendant filed a motion for summary judgment and argued that the summary judgment evidence showed that the plaintiff "was not obviously intoxicated at the time of the purchase."<sup>132</sup> The defendant specifically relied on the plaintiff's deposition, in which

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123. *See id.* (discussing plaintiff's allegations and bases for his causes of action against his stepmother).

124. *Id.* at 911, 918.

125. *Trostle*, 77 S.W.3d at 915.

126. *Id.*

127. *Id.* (citing *Farroux*, 962 S.W.2d at 111).

128. *Id.*

129. *Pando v. Sw. Convenience Stores, L.L.C.*, 242 S.W.3d 76 (Tex. App.—Eastland 2007, no pet.).

130. *Id.* at 80.

131. *Id.* at 77.

132. *Id.* at 78.

the plaintiff “admitted that at the time of the purchase he had no trouble walking, asking directions to the restroom, following those directions, grabbing the beer, or paying for the beer.”<sup>133</sup> He also testified that “he did not know if his speech was slurred, if his eyes were squinted or bloodshot, if he was staggering, or if he smelled of alcohol.”<sup>134</sup> However, in response to the summary judgment, the plaintiff submitted his own affidavit made after the defendant’s motion was filed.<sup>135</sup> In the affidavit, the plaintiff stated: “The employee of [the defendant] who sold me beer knew I was twenty years of age and knew I was intoxicated. I told her I was drunk and I was slurring my words, I had bloodshot eyes and I was staggering.”<sup>136</sup> The plaintiff argued that this created a material issue of fact as to whether he was obviously intoxicated.<sup>137</sup>

The Eastland Court of Appeals held that the trial court had not erred in ruling that the affidavit created a sham issue.<sup>138</sup> The court first noted that: “Generally, a deposition does not have controlling effect over an affidavit in determining whether a motion for summary judgment should be granted.”<sup>139</sup> Thus, the general rule is that “when conflicting inferences may be drawn from a deposition and an affidavit made by the same person and filed in a summary judgment proceeding, a fact issue is presented that will preclude summary judgment.”<sup>140</sup> However, the court then held that “when (1) the affidavit is executed after the deposition and (2) there is a clear contradiction on (3) a material point (4) without explanation, the ‘sham affidavit’ doctrine may be applied and the contradictory statements in the affidavit may be disregarded.”<sup>141</sup> Because the plaintiff “did not include any explanation for his direct contradiction,” the court held that the affidavit did not create a material fact issue and the trial court did

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133. *Id.* at 79.

134. *Pando*, 242 S.W.3d at 79.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 80.

139. *Pando v. Sw. Convenience Stores, L.L.C.*, 242 S.W.3d 76, 79 (Tex. App.—Eastland 2007, no pet.) (citing *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988) (per curiam)).

140. *Id.*

141. *Id.* (citing *Del Mar Coll. Dist. v. Vela*, 218 S.W.3d 856, 862 n.6 (Tex. App.—Corpus Christi 2007, no pet.)).

not err in granting the motion for summary judgment.<sup>142</sup>

2. Cases Adopting the Sham Affidavit Theory While Concluding the Affidavit at Issue Did Not Rise to the Level of a Sham

Several cases after *Farroux* and *Burkett* cite to both cases in support of the general proposition that a party's affidavit which contradicts, without explanation, that party's own deposition testimony cannot be used to defeat summary judgment, even though the courts then held that the inconsistency at issue did not rise to the level of a "sham."

For example, in *Duffield v. Periman*,<sup>143</sup> a plaintiff sued a department store for false imprisonment based upon the defendants' investigation of an alleged theft by the plaintiff.<sup>144</sup> The defendants filed a no-evidence motion for summary judgment.<sup>145</sup> The plaintiff filed a response and an affidavit wherein she stated that she was forced back into the store and that she had no choice but to remain in the store during the investigation.<sup>146</sup> The plaintiff's prior deposition testimony indicated at various times "that she had 'voluntarily' returned to the store to prove that she was innocent"; but plaintiff also made other deposition statements which indicated that she did not voluntarily go back into the store or remain there.<sup>147</sup> The trial court granted the defendants' motion for summary judgment, and the plaintiff appealed.<sup>148</sup> On appeal, the defendants argued that the plaintiff's affidavit was a sham and therefore not competent summary judgment evidence.<sup>149</sup> The court of appeals distinguished *Farroux* because in that case, the plaintiff had "made a new statement for the first time in his affidavit that directly conflicted with his deposition."<sup>150</sup> That was not the case with the plaintiff in *Duffield*; rather, the affidavit at issue did not contradict

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142. *Id.* at 80.

143. *Duffield v. Periman*, No. 01-98-01131-CV, 1999 WL 1018180 (Tex. App.—Houston [1st Dist.] Nov. 10, 1999, no pet.) (not designated for publication).

144. *Id.* at \*1.

145. *Id.*

146. *Id.* at \*2.

147. *Id.*

148. *Duffield*, 1999 WL 1018180, at \*1.

149. *Id.* at \*2.

150. *Id.*

her prior deposition testimony about having been involuntarily detained.<sup>151</sup> The court held that the plaintiff's deposition testimony alone raised a genuine issue of material fact and reversed the summary judgment.<sup>152</sup>

In *Youngblood v. U.S. Silica Co.*,<sup>153</sup> the plaintiff filed claims against various silica manufacturers.<sup>154</sup> The defendants filed a motion for summary judgment based on the statute of limitations and attached an affidavit from one of the plaintiff's physicians stating that the physician informed the plaintiff that he had silicosis six years prior to the filing of suit.<sup>155</sup> In response, the plaintiff filed an affidavit stating that his former physician had only diagnosed him with lung cancer and did not say anything about silicosis.<sup>156</sup> The defendants objected to the affidavit as a sham due to the plaintiff's prior deposition testimony whereby he stated that he could not recall the substance of any of his conversations with the doctor.<sup>157</sup> The trial court granted the defendants' motion for summary judgment and thereafter granted the defendants' objections to the plaintiff's affidavit.<sup>158</sup> On appeal, the court of appeals cited *Farroux* and *Burkett*, but reversed the trial court, finding that the plaintiff's affidavit was proper summary judgment evidence.<sup>159</sup> The court of appeals stated:

Looking at [the affidavit and deposition] in a vacuum, it would be easy for us to agree with [the defendants'] position. We cannot, however, examine mere fragments of a deposition. We are required . . . to determine if, in context, the [entire] deposition and the affidavit are not apposite so as to raise a fact issue that would preclude summary judgment.<sup>160</sup>

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151. *Id.*

152. *Id.* at \*4.

153. *Youngblood v. U.S. Silica Co.*, 130 S.W.3d 461 (Tex. App.—Texarkana 2004, pet. denied).

154. *See id.* at 463–64 (discussing the plaintiff's various claims).

155. *See id.* at 466 (explaining the defendants' contention that the suit was barred by the statute of limitations).

156. *Id.* at 469.

157. *Id.* (“U.S. Silica contends Youngblood’s sudden and unexplained ability to remember his 1992 conversation with [Dr.] Stockman . . . directly conflicts with his deposition testimony.”).

158. *Youngblood*, 130 S.W.3d at 467.

159. *See id.* at 471–72 (recognizing the decisions of other courts when making its own determination).

160. *Id.* at 469–70.

The court of appeals thus reviewed all of the plaintiff's deposition excerpts and found that, because the plaintiff's deposition testimony as a whole indicated that he had never been told he had silicosis more than two years before filing suit, it did not contradict his later affidavit testimony.<sup>161</sup> The court then held that even if it were to conclude that there were subtle differences between the plaintiff's deposition and his affidavit, those differences were not so egregious that the affidavit should be disregarded. The court held that "any such inconsistencies or conflicts" would be such that a fact issue would be created that should be resolved by a jury.<sup>162</sup>

Another court that appears to have adopted the sham affidavit theory is the San Antonio Court of Appeals. In *Cantu v. Peacher*,<sup>163</sup> the defendant in a medical malpractice case filed a motion for summary judgment arguing that the plaintiff could not prove that his conduct was negligent.<sup>164</sup> The plaintiff filed an expert affidavit stating the expert's factual assumptions and opinions on the standard of care, breach of that care, and proximate cause.<sup>165</sup> The defendant argued that the expert's affidavit should be disregarded as a sham due to its factual assumptions being inconsistent with the expert's prior assumptions as espoused at his deposition.<sup>166</sup> In the expert's deposition, he assumed that the injury at issue was caused when the defendant sutured the plaintiff through a nerve.<sup>167</sup> When a subsequent surgery was performed by a different doctor, no sutures were found in the nerve, despite the fact that the defendant always used permanent sutures which would have been present and visible during the subsequent surgery.<sup>168</sup> In response to the motion for summary judgment, the plaintiff's expert submitted an affidavit wherein he assumed that the suturing was near the nerve and that

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161. *See id.* at 470 (illustrating that the court's decision took the plaintiff's entire deposition into consideration).

162. *Id.*

163. *Cantu v. Peacher*, 53 S.W.3d 5 (Tex. App.—San Antonio 2001, pet. denied).

164. *See id.* at 7 (relating the defendant's argument that he did not fail to meet the proper standard of care during his treatment of the plaintiff).

165. *See id.* at 8–9 (discussing the expert's opinions as recorded in his affidavit).

166. *See id.* at 8–11 (explaining the defendant's argument that the expert's opinions on the medical procedure were different in his affidavit and deposition testimony).

167. *See id.* at 8 (describing the expert's opinion that defendant mistakenly placed a suture in the wrong place following surgery on the plaintiff).

168. *Cantu*, 53 S.W.3d at 8.

pulling from the suture caused the plaintiff's injury.<sup>169</sup>

The trial court granted the summary judgment, but the court of appeals reversed.<sup>170</sup> The court framed the issue as "the legal effect of variations between the deposition testimony and the affidavit testimony of the same witness."<sup>171</sup> The court recognized at the outset that there were "two lines of cases": the first in line with *Randall*, which "holds that the conflicting inferences from the deposition and the affidavit create a fact issue that will defeat a motion for summary judgment"; and the second in line with *Farroux*, which "holds that if a witness's own affidavit contradicts the earlier deposition testimony then the affidavit must explain the reason for the change or the court will consider the affidavit an attempt to create a 'sham' fact issue which will not defeat a motion for summary judgment."<sup>172</sup> The court recognized that each of the prior cases that had examined the sham affidavit issue were very fact-specific.<sup>173</sup> The court then concluded that "at the expense of a bright-line definition," Texas courts should "examine the nature and extent of the differences in the facts asserted in the documents to determine what effect a conflict should be given in a particular case."<sup>174</sup> The court found that whether inconsistencies in an affidavit rose to the level of requiring the court to disregard it depended upon the severity of the inconsistency:

[W]e conclude that a court must examine . . . 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.<sup>175</sup>

The *Cantu* court found that the expert's affidavit did vary to some extent from his prior deposition testimony, but it did not rise

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169. *See id.* (detailing the expert's affidavit testimony, which differed from his prior deposition testimony as to the defendant's conduct during surgery on the plaintiff).

170. *Id.* at 12.

171. *Id.* at 6.

172. *Id.* at 6-7.

173. *Cantu v. Peacher*, 53 S.W.3d 5, 7 (Tex. App.—San Antonio 2001, pet. denied).

174. *Id.*

175. *Id.* at 10-11 (emphasis added).

to the level required to disregard the affidavit. Rather, the inconsistencies were merely fodder for impeachment and cross examination:

Miller's affidavit testimony is not the type that can be characterized as simply being a "sham" to defeat a summary judgment motion. We recognize some variances between Miller's deposition testimony and his affidavit, but we do not consider the differences to be so material that we must disregard the affidavit.<sup>176</sup>

One justice concurred, but disagreed with the majority's reliance on *Farroux* as authority for the sham affidavit theory. Specifically, the concurring opinion expressed the view that the court need look no further than the supreme court's decision in *Randall* if it determined that the deposition and affidavit testimony conflicted.<sup>177</sup> The concurring justice noted that *Farroux* failed to even reference *Randall* and was "directly contrary" to supreme court precedent.<sup>178</sup> Moreover, the concurring justice expressed the view that the majority opinion had mischaracterized the existence of "two lines of cases," since *Randall* was a supreme court case and *Farroux* was a court of appeals decision.<sup>179</sup> The concurrence expressed the view that the court of appeals was duty-bound to follow the holdings of the Texas Supreme Court and not those of sister courts of appeals.<sup>180</sup>

In *Blan v. Ali*,<sup>181</sup> the Houston Fourteenth Court of Appeals seemed to indicate in dicta that it agreed with the *Farroux* line of cases with regard to sham affidavits.<sup>182</sup> However, in a more recent case which will be discussed below, the court cast some doubt as to whether the sham affidavit approach was viable in the Fourteenth Court of Appeals.<sup>183</sup> *Blan* was a medical malpractice case in which the plaintiffs' expert attempted to opine on the applicable standard of care for "any physician treating a patient

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176. *Id.* at 11.

177. *Id.* at 12 (Angelini, J., concurring).

178. *Cantu*, 53 S.W.3d at 12.

179. *Id.* at 12 n.2.

180. *Id.*

181. *Blan v. Ali*, 7 S.W.3d 741 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

182. *See id.* at 746 n.3 (noting that while a trial court is precluded "from considering an affidavit that contradicts deposition testimony without an explanation for the change in testimony," the facts in the case at bar did not give rise to such a situation).

183. *El Sabor de Mi Tierra, Inc. v. Atascocita/Boone JV*, No. 14-06-00652-CV, 2007 WL 2417921 (Tex. App.—Houston [14th Dist.] Aug. 28, 2007, pet. denied) (mem. op.).

suffering from a stroke and lupus.”<sup>184</sup> The trial court granted summary judgment to both defendants.<sup>185</sup> On appeal, one of the defendants argued that the trial court could not consider a supplemental affidavit where the plaintiffs’ expert allegedly made an inconsistent statement.<sup>186</sup> In a footnote, the court of appeals “agree[d] that *Farroux v. Denny’s Restaurants, Inc.*, precludes the trial court from considering an affidavit that contradicts deposition testimony without an explanation for the change in testimony.”<sup>187</sup> However, the court stated that the supplemental affidavit at issue did not contradict prior deposition testimony, and in fact reiterated the opinions enunciated in previous sworn testimony.<sup>188</sup>

Eight years later, the Fourteenth Court of Appeals revisited the issue in *El Sabor de Mi Tierra, Inc. v. Atascocita/Boone JV*,<sup>189</sup> where a former tenant sued its former landlord (and others) for failing to disclose a known problem with the property’s sewer lines prior to execution of the lease agreement.<sup>190</sup> In response to the defendants’ motion for summary judgment, the plaintiff submitted an affidavit from its principal and another affidavit from its manager.<sup>191</sup> The defendants argued that both affidavits were “conjured shams created solely in a failed attempt to create a fact issue to preclude summary judgment.”<sup>192</sup> Before addressing whether the affidavits constituted a sham, the court recognized that several of its sister courts of appeals had “adopted and applied the *Farroux* sham affidavit rule, while [several] others [had] expressly rejected it.”<sup>193</sup> The court then cast some doubt on the application of the rule in the Fourteenth Court of Appeals by stating in a footnote that “[e]xcept once in dicta, the Fourteenth Court of Appeals has apparently not taken a side on the issue in a published opinion.”<sup>194</sup> The court then stated:

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184. *Blan*, 7 S.W.3d at 746.

185. *Id.* at 744.

186. *Id.* at 746 n.3.

187. *Id.* (citation omitted).

188. *Id.*

189. *El Sabor de Mi Tierra, Inc. v. Atascocita/Boone JV*, No. 14-06-00652-CV, 2007 WL 2417921 (Tex. App.—Houston [14th Dist.] Aug. 28, 2007, pet. denied) (mem. op.).

190. *Id.* at \*1.

191. *Id.* at \*2.

192. *Id.* at \*6.

193. *Id.*

194. *El Sabor*, 2007 WL 2417921, at \*6 n.8 (referring to *Blan v. Ali*, 7 S.W.3d 741, 747 n.3 (Tex. App.—Houston [14th Dist.] 1999, no pet.)).

The Texas Supreme Court has yet to specifically address the sham affidavit rule but has previously held that “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.”<sup>195</sup>

Finally, the court also cited *Cantu* for the San Antonio Court of Appeals’ attempt to explain the *Farroux* and *Randall* cases “as falling along a continuum based on the level of contradiction between the affidavit and deposition statements rather than being in direct conflict with one another.”<sup>196</sup> Without deciding which approach was the correct one, the court stated: “We hold that regardless of which reasoning is applied—*Farroux*, *Randall*, or *Cantu*—any conflict between [the submitted] affidavit statements and [prior] deposition testimony does not rise to the level that renders the affidavits mere shams.”<sup>197</sup> The court then explained how the supposedly conflicting affidavits acted as more clarification of the deposition testimony when taken as a whole, rather than direct refutations of prior testimony, as had occurred in *Farroux*.<sup>198</sup>

B. *Texas Courts of Appeals That Have Not Applied the Sham Affidavit Theory*

The following courts of appeals have rejected the sham affidavit theory: Waco, Fort Worth, and Tyler. The Corpus Christi Court of Appeals has expressly declined to adopt the sham affidavit theory; however, it has used the doctrine to disregard a contradictory affidavit and recently recognized that the sham affidavit approach does have “some limited viability or application.”<sup>199</sup> The Dallas Court of Appeals has neither accepted nor rejected the doctrine, but has cited *Randall* with consistency and may reject the doctrine

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195. *Id.* at \*7 (quoting *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988) (per curiam)).

196. *Id.* (citing *Cantu v. Peacher*, 53 S.W.3d 5, 9–11 (Tex. App.—San Antonio 2001, pet. denied)).

197. *Id.*

198. *Id.*

199. *Del Mar Coll. Dist. v. Vela*, 218 S.W.3d 856, 862 n.6 (Tex. App.—Corpus Christi 2007, no pet.).

when faced squarely with the issue.<sup>200</sup> This section outlines the various cases from these courts of appeals. The first subsection discusses the cases from the courts of appeals which hold that an inconsistent affidavit creates a fact issue and cannot be disregarded. The second subsection addresses the cases from the Dallas Court of Appeals. Finally, the third subsection discusses the Corpus Christi Court of Appeals decisions and that court's recognition of the limited usefulness of the sham affidavit doctrine.

1. Cases Rejecting the Sham Affidavit Theory and Refusing to Disregard Inconsistent Affidavits

In *Thompson v. City of Corsicana Housing Authority*,<sup>201</sup> the Waco Court of Appeals rejected the sham affidavit theory in a premises liability case where an apartment tenant and her guest sued the defendant housing authority for personal injuries allegedly sustained when a portion of the ceiling in the apartment fell on them.<sup>202</sup> The trial court granted the defendant's motion for summary judgment without specifying the grounds.<sup>203</sup> The Waco Court of Appeals reversed.<sup>204</sup> The issue of the sham affidavit arose with respect to the tenant's guest, who as a licensee had the burden to "show that the [defendant] had actual knowledge of the alleged defective condition and that [the guest] did not."<sup>205</sup> In her deposition, she testified that "she advised the [tenant (her co-plaintiff)] to call the [defendant's office] about the crack in the ceiling because 'anybody could look at it and tell it was going to fall sooner or later.'"<sup>206</sup> However, in her affidavit attached to the summary judgment response, she stated: "I was not aware that the crack in the ceiling was dangerous or that the ceiling could fall

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200. See *Shaw v. Maddox Metal Works, Inc.*, 73 S.W.3d 472, 478 (Tex. App.—Dallas 2002, no pet.) (citing *Randall*, 752 S.W.2d at 5) ("[A] deposition does not have controlling effect over an affidavit in determining whether a motion for summary judgment should be granted.").

201. *Thompson v. City of Corsicana Hous. Auth.*, 57 S.W.3d 547 (Tex. App.—Waco 2001, no pet.).

202. See *id.* at 557 (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).

203. *Id.* at 551.

204. *Id.* at 558.

205. *Id.* at 556.

206. *Thompson*, 57 S.W.3d at 556.

prior to January 24, 1995 when I was hurt.”<sup>207</sup> The defendant argued that the affidavit was improper because it was made “in bad faith in violation of Rule of Civil Procedure 166a(h) and because [the guest] made it to raise a “sham” fact issue.”<sup>208</sup>

The court examined Rule 166a(h) and noted that its previous decisions had determined that while this rule “provides penalties for the making of affidavits in bad faith, the striking of the offending affidavit or pleading is not made one of them.”<sup>209</sup> The court then rejected the defendant’s reliance on *Farroux*, stating that the Houston First Court of Appeals’ opinion had “relied solely on federal summary judgment authorities to reach this conclusion,” but that the Texas “Supreme Court had expressly disavowed the application of federal procedural standards to summary judgment motions filed under Rule 166a.”<sup>210</sup> Thus, the court held that “[i]f a party provides inconsistent or conflicting summary judgment proof, that party has created a fact issue for the trier of fact to resolve.”<sup>211</sup> Interestingly, the court rejected the idea that its approach to conflicting sworn testimony would allow “unscrupulous part[ies] to file summary judgment affidavits solely for the purpose of creating ‘sham’ fact issues,” stating that attorneys, as officers of the court, were obligated “to honor their duty of candor toward the court” and “[a]n attorney’s failure to observe this duty constitute[d] professional misconduct for which sanctions [could] be imposed.”<sup>212</sup>

The Fort Worth Court of Appeals likewise rejected the sham affidavit doctrine in *Davis v. City of Grapevine*.<sup>213</sup> In that case, a firefighter who developed multiple sclerosis brought disability and age discrimination claims against the defendant alleging “that his supervisors refused to reassign him to another position and refused

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207. *Id.*

208. *Id.*

209. *Id.* at 556–57 (quoting *Toliver v. Bergmann*, 297 S.W.2d 208, 210 (Tex. Civ. App.—San Antonio 1956, no writ)).

210. *Id.* at 557 (citing *Casso v. Brand*, 776 S.W.2d 551, 555–56 (Tex. 1989)).

211. *Thompson v. City of Corsicana Hous. Auth.*, 57 S.W.3d 547, 557 (Tex. App.—Waco 2001, no pet.).

212. *Id.* at 558 (citing TEX. DISCIPLINARY R. PROF’L CONDUCT 3.03, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9)).

213. *Davis v. City of Grapevine*, 188 S.W.3d 748, 756 (Tex. App.—Fort Worth 2006, pet. denied).

to offer any other accommodation.”<sup>214</sup> The defendant moved for summary judgment, and the plaintiff submitted an affidavit which the defendant alleged contradicted prior deposition testimony.<sup>215</sup> The trial court overruled the defendant’s objection to the affidavit, but granted summary judgment on all the plaintiff’s claims.<sup>216</sup> On appeal, the defendant presented a cross-issue arguing that the trial court had erred in refusing to strike the plaintiff’s affidavit.<sup>217</sup>

“In his affidavit, . . . [the plaintiff] stated that ‘when he walk[ed] fast or trie[d] to run he [would] fall. [The plaintiff] further stated that he had these conditions in the [s]pring of 2002.’”<sup>218</sup> In his deposition, in response to questions identifying the time period as being March through June 2002, the plaintiff testified as follows:

Q. Your walking was okay at that period of time. At least the doctors note that you did that without difficulty.

A. Yes, walking is okay.

. . . .

Q. From that period of time say from June 2002 to today’s date have any of those things changed that we’ve just talked about, all of those basic like functions?

A. The dressing, the hygiene activities, the walking, sitting, all those?

Q. Yes.

A. If I walk fast or run, I’ll fall, stumble and fall, but walking in a normal pace, it’s okay.<sup>219</sup>

The defendant, citing *Farroux*, argued that the plaintiff’s statement in his affidavit contradicted his deposition because during the deposition plaintiff testified that “walking is okay” from March to June 2002.<sup>220</sup> Thus, the defendant asserted “that the trial court should have assumed that the affidavit was produced solely to avoid summary judgment and should have refused to consider the contradictory portions as evidence.”<sup>221</sup>

The Fort Worth Court of Appeals rejected the defendant’s

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214. *Id.* at 754.

215. *Id.* at 755.

216. *Id.* at 753.

217. *Id.* at 755.

218. *Davis*, 188 S.W.3d at 755.

219. *Id.*

220. *See id.* at 755–56 (contending plaintiff’s affidavit did not mention the ability to walk).

221. *Id.* at 756.

argument and “held that the trial court did not err in overruling the [defendant’s] objection to [the plaintiff’s] affidavit.”<sup>222</sup> The court first cited *Randall* for the well-established rule regarding conflicting depositions and affidavits:

[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.<sup>223</sup>

The court recognized that, “[f]ollowing *Farroux*, many courts of appeals ha[d] adopted the sham affidavit doctrine, . . . [resulting in] a conflict among Texas courts of appeals.”<sup>224</sup> However, the court distinguished *Farroux* by finding it notable that the Houston court “cited only one federal court decision to support its opinion and failed even to mention the Texas Supreme Court decisions of *Gaines* and *Randall* that are directly on point and contrary to *Farroux*.”<sup>225</sup> Accordingly, the Fort Worth court stated that it would adhere to its earlier precedent of *Hale v. Pena*,<sup>226</sup> and would also “continue to apply the rule set forth by the Texas Supreme Court in *Randall* that when conflicting inferences may be drawn between a party’s summary judgment affidavit and his deposition on matters of material fact, a fact issue is presented.”<sup>227</sup>

Interestingly, in *Hale* the Fort Worth court used the *moving party*’s own affidavit against him to affirm the denial of summary judgment.<sup>228</sup> The plaintiff in *Hale* sued a police officer for injuries she sustained when a police car collided with hers while running a red light to respond to an emergency call.<sup>229</sup> The defendant police officer moved for summary judgment based on the affirmative

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222. *Id.*

223. *Davis v. City of Grapevine*, 188 S.W.3d 748, 755 (Tex. App.—Fort Worth 2006, pet. denied) (citations omitted).

224. *Id.* at 756.

225. *Id.*

226. *See Hale v. Pena*, 991 S.W.2d 942, 947 (Tex. App.—Fort Worth 1999, no pet.) (concluding a genuine fact issue was created when an officer stated conflicting facts in the summary judgment affidavit and deposition on matters of a material fact).

227. *Davis*, 188 S.W.3d at 756.

228. *See Hale*, 991 S.W.2d at 946–47 (referencing the officer’s affidavit when determining whether a genuine issue of material fact had been raised).

229. *Id.*

defense of official immunity.<sup>230</sup> In order to establish the defense of official immunity, the defendant was required to “establish as a matter of law that he proceeded through the intersection, against the red light, in good faith.”<sup>231</sup> In his affidavit attached to the summary judgment motion, the defendant stated “that he was decreasing his speed as he approached the intersection.”<sup>232</sup> In his deposition, however, the defendant acknowledged “that he did not know how fast he was traveling.”<sup>233</sup> The trial court denied the summary judgment, obviously concluding that the defendant had not established as a matter of law that he had acted in good faith.<sup>234</sup> The court of appeals affirmed the denial of summary judgment in part because of the inconsistency.<sup>235</sup> Citing *Randall*, the court held that: “When conflicting inferences may be drawn between a party’s summary judgment affidavit and his deposition on matters of material fact, a genuine fact issue is created.”<sup>236</sup> The court in *Hale* did not cite to *Farroux* or otherwise specifically address the viability of the sham affidavit doctrine.

The Tyler Court of Appeals recently rejected the sham affidavit theory in *Pierce v. Washington Mutual Bank*.<sup>237</sup> The defendant bank in that case filed an abstract of judgment in October 2000, asserting a lien on the plaintiff’s property located in Canton, Texas.<sup>238</sup> Years later, the plaintiff filed a lawsuit against the defendant to remove the cloud of title on his home, claiming that the home was his homestead.<sup>239</sup> “During the course of discovery, [the defendant] propounded interrogatories”—one of which asked plaintiff to describe “every homestead [he has] had since January 1, 1990, to the present, giving the dates between which [he] claimed each such homestead.”<sup>240</sup> The plaintiff responded with a sworn response indicating that his homestead was in Rockwall,

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230. *Id.* at 943.

231. *Id.* at 945.

232. *Id.* at 946.

233. *Hale*, 991 S.W.2d at 946.

234. *Id.* at 943–44.

235. *Id.* at 946–47.

236. *Id.* (citing *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988) (per curiam)).

237. *Pierce v. Wash. Mut. Bank*, 226 S.W.3d 711, 717–18 (Tex. App.—Tyler 2007, pet. denied).

238. *Id.* at 712.

239. *Id.* at 713.

240. *Id.* at 712–13.

Texas from February 1998 to March 2002, and then was in Canton from March 2002 to the present.<sup>241</sup> The defendant moved for summary judgment on the basis that the evidence “proved [as a matter of law] that the Canton property was not plaintiff’s homestead on the date the abstract of judgment was filed.”<sup>242</sup> In response to the summary judgment, plaintiff attached his own affidavit which swore to the following facts:

1. That . . . [the Canton property] has been my home since December, 1992.
2. That during any period of time when I did not reside at the [Canton property], it was temporary in nature, and it was always my intention to return to my home.
3. That I never abandoned the [Canton property] as my home.
4. That I have, at times since purchase, made improvements to the [Canton property], maintained the property and used the property.<sup>243</sup>

The trial court granted the defendant’s motion for summary judgment, and the plaintiff appealed.<sup>244</sup>

One of the defendant’s arguments on appeal was “that [the plaintiff’s] affidavit was a ‘sham affidavit,’ . . . [that] could be properly disregarded by the trial court when making its ruling.”<sup>245</sup> The Tyler Court of Appeals recognized the emergence of the sham affidavit rule by some of its sister courts.<sup>246</sup> However, the court rejected this approach and instead cited *Davis* and *Thompson* in support of its holding that “any inconsistency or conflict between a party’s interrogatory answers and affidavit is not a reason to exclude that affidavit evidence in a summary judgment proceeding.”<sup>247</sup> Instead, “these inconsistencies and conflicts [operated to] create a fact issue that should be resolved by a jury.”<sup>248</sup> The court stated: “It is not the role of the trial court, at

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241. *Id.*

242. *Pierce*, 226 S.W.3d at 713.

243. *Id.*

244. *Id.*

245. *Id.* at 717.

246. *Id.*

247. *Pierce v. Wash. Mut. Bank*, 226 S.W.3d 711, 717–18 (Tex. App.—Tyler 2007, pet. denied) (citing *Davis v. City of Grapevine*, 188 S.W.3d 748, 756 (Tex. App.—Fort Worth 2006, pet. denied); *Thompson v. City of Corsicana Hous. Auth.*, 57 S.W.3d 547, 556–58 (Tex. App.—Waco 2001, no pet.)).

248. *Id.* at 718.

summary judgment, to evaluate the credibility of affiants or weight of the evidence.”<sup>249</sup> The court thus held that “the trial court had no authority to disregard [the plaintiff’s] affidavit.”<sup>250</sup> Faced with conflicting inferences to be drawn from the plaintiff’s interrogatory answer and his affidavit, the court reversed the trial court’s granting of summary judgment.<sup>251</sup> The defendant filed a petition for review to the Texas Supreme Court, which raised as one issue the sham affidavit theory. The petition has been denied.

2. Dallas Court of Appeals Relies on *Randall v. Dallas Power & Light Co.* but Leaves Open the Possibility of Adopting Sham Affidavit Doctrine

In *Shaw v. Maddox Metal Works, Inc.*,<sup>252</sup> the Dallas Court of Appeals addressed the sham affidavit theory in a suit involving a claim to enforce an alleged oral contract to pay an annuity to the plaintiff, who was the widow of a former longtime employee of the defendant.<sup>253</sup> The defendant moved for summary judgment on the basis that the alleged oral contract was not supported by legally sufficient consideration.<sup>254</sup> The plaintiff stated in an affidavit attached to her summary judgment response that the alleged oral contract was supported by her husband’s past employment *and* a promise of continued employment in the future until his death.<sup>255</sup> However, during her deposition, the plaintiff testified “that the only consideration for the agreement was [her husband’s] past performance.”<sup>256</sup> The trial court granted defendant’s objection to the inconsistent portion of the plaintiff’s affidavit and granted the summary judgment motion.<sup>257</sup> The Dallas Court of Appeals reversed.<sup>258</sup> The court recognized the Waco Court of Appeals’ holding in *Thompson* “that *Farroux* had been wrongly decided and that inconsistent or conflicting summary

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249. *Id.* (citing *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965)).

250. *Id.*

251. *Id.*

252. *Shaw v. Maddox Metal Works, Inc.*, 73 S.W.3d 472 (Tex. App.—Dallas 2002, no pet.).

253. *Id.* at 476.

254. *Id.*

255. *Id.* at 477.

256. *Id.*

257. *Shaw*, 73 S.W.3d at 477.

258. *Id.* at 482.

judgment proof creates a fact issue for the trier of fact to resolve.”<sup>259</sup> However, the court dodged the issue of whether it should apply the sham affidavit theory in all cases, stating that: “We need not determine if *Farroux* is wrongly decided because, assuming it is correct, we nevertheless conclude the conflicts in this case are not so egregious as to conclude the fact issue is a ‘sham’ to be disregarded.”<sup>260</sup> Thus, the court held that the trial court erred in sustaining the defendant’s objections and disregarding the plaintiff’s affidavit.<sup>261</sup>

Since declining to accept or reject the sham affidavit theory in *Shaw*, the Dallas court has cited *Randall* on several occasions to reject objections to inconsistent affidavits,<sup>262</sup> leading to the notion that perhaps Dallas would follow the Waco, Fort Worth, and Tyler Courts of Appeals’ rejections of the doctrine.<sup>263</sup> However, in a few subsequent cases, the court cited to the *Burkett* case’s holding that a party cannot use a sham affidavit to avoid summary judgment.<sup>264</sup> While the court has yet to find that an allegedly inconsistent affidavit rises to the level of a sham, its reliance on *Burkett* has certainly left open the possibility that it could join its sister courts in El Paso, Amarillo, Austin, Texarkana, San Antonio, and Houston in adopting the sham affidavit doctrine.

In *Skiles v. Jack in the Box, Inc.*,<sup>265</sup> a plaintiff sued his employer for alleged negligence after sustaining an on-the-job injury

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259. *Id.* at 478 n.4 (citing *Thompson v. City of Corsicana Hous. Auth.*, 57 S.W.3d 547, 557 (Tex. App.—Waco 2001, no pet.)).

260. *Id.*

261. *Id.* at 478.

262. *See, e.g.*, *Belmonte v. Baxter Healthcare Corp.*, No. 05-00-01579-CV, 2002 WL 560996, at \*2 (Tex. App.—Dallas Apr. 16, 2002, no pet.) (not designated for publication) (explaining that a fact issue is presented when conflicting statements are filed from the same person’s deposition and affidavit); *Sigler v. Durbec*, No. 05-98-01207-CV, 2001 WL 432620, at \*4 (Tex. App.—Dallas Apr. 30, 2001, no pet.) (not designated for publication) (giving an example of a situation where a witness’s deposition testimony differs from her affidavit).

263. *See, e.g.*, Randy Wilson, *The Sham Affidavit Doctrine in Texas*, 66 TEX. B.J. 962, 966 (2003) (“[B]oth the Dallas and Fort Worth Courts of Appeals appear to follow *Randall*.”).

264. *See Broadnax v. Kroger Tex., L.P.*, No. 05-04-01306-CV, 2005 WL 2031783, at \*5 n.3 (Tex. App.—Dallas Aug. 24, 2005, no pet.) (mem. op.) (citing *Burkett v. Welborn*, 42 S.W.3d 282, 286 (Tex. App.—Texarkana 2001, no pet.)) (“When there is no explanation, it is assumed that the sole purpose of the affidavit was to avoid summary judgment, and as such, the affidavit merely presents a ‘sham’ fact issue.”).

265. *Skiles v. Jack in the Box, Inc.*, 170 S.W.3d 173 (Tex. App.—Dallas 2005), *rev’d on other grounds per curiam*, 221 S.W.3d 566 (Tex. 2007).

involving the use of a ladder.<sup>266</sup> The defendant filed a motion for summary judgment alleging, among other things, that there was no evidence that it breached a duty to the plaintiff.<sup>267</sup> The plaintiff filed a response to the motion for summary judgment and attached an affidavit wherein he stated that he had informed his supervisor that “he intended to use a step ladder to get up over the left gate, and the supervisor responded, ‘[g]ood.’”<sup>268</sup> In his deposition, the plaintiff testified that “he did not recall the substance of his conversations with the supervisor.”<sup>269</sup> “[The defendant] filed a motion to strike [the plaintiff’s] affidavit as a ‘sham affidavit’ and a bad faith affidavit under Texas Rule of Civil Procedure 166(a).”<sup>270</sup> The trial court denied the defendant’s motion, but on appeal the defendant reurged the objection.<sup>271</sup> Citing to *Burkett*, the court recognized that “[a] party cannot file an affidavit that contradicts that party’s own deposition testimony, without explanation, for the purpose of creating a fact issue to avoid summary judgment. When there is no explanation, . . . the affidavit merely presents a ‘sham’ fact issue.”<sup>272</sup> However, under the facts of the case before it, the court of appeals held that the trial court did not err in overruling the defendant’s objection to the plaintiff’s affidavit:

In his deposition, [plaintiff] stated that he did not recall the substance of his conversation with his supervisor, but after the no evidence motion for summary judgment was filed, his affidavit stated that when he discussed using a ladder to climb into the bed of the truck instead of waiting for the repair personnel, the supervisor said, “Good.” We recognize that there are variances between [plaintiff’s] deposition testimony and his affidavit testimony. However, we cannot conclude these differences are so egregious that the trial court abused its discretion in refusing to strike the affidavit.<sup>273</sup>

The court of appeals then reversed the summary judgment based

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266. *Id.* at 177–78.

267. *Id.* at 178.

268. *Id.* at 182–83.

269. *Id.* at 182 n.1.

270. *Skiles*, 170 S.W.3d at 182 n.1.

271. *Id.*

272. *Id.* (citing *Burkett v. Welborn*, 42 S.W.3d 282, 286 (Tex. App.—Texarkana 2001, no pet.)).

273. *Id.*

upon the plaintiff's affidavit testimony.<sup>274</sup>

Similarly, in *Broadnax v. Kroger Texas, L.P.*,<sup>275</sup> the court held that the defendant's objection that the plaintiff's affidavit was a sham had not been preserved for appeal.<sup>276</sup> In a footnote, the court again cited *Burkett* for the premise that "[a] party cannot file an affidavit that contradicts that party's own deposition testimony, without explanation, for the purpose of creating a fact issue to avoid summary judgment."<sup>277</sup> The court then recognized that there were variances between the plaintiff's deposition testimony and affidavit testimony in that case; however, as in *Skiles*, "[the court] decline[d] to conclude these differences [were] so egregious that the trial court abused its discretion."<sup>278</sup>

Most recently, the Dallas court again refused a defendant's attempt to urge the court to adopt the sham affidavit doctrine but left open the possibility that it might do so under the right circumstances.<sup>279</sup> In *Johnston v. Kruse*,<sup>280</sup> the plaintiff submitted an affidavit in response to the defendant's motion for summary judgment, in which he opined on the reasonable value of services he had allegedly performed on behalf of the defendant's company.<sup>281</sup> During his deposition, "he testified he had not calculated the value of his services and he was not sure he had the expertise to make the calculation."<sup>282</sup> The court cited *Farroux* and recognized that "[s]ome courts have concluded that in certain egregious cases, an affidavit, prepared after a deposition and clearly contradictory to the earlier testimony, should be disregarded if the discrepancy is not explained and it appears the affidavit was drafted as a sham for the sole purpose of avoiding summary judgment."<sup>283</sup> However, the court held the plaintiff's affidavit in *Johnston* "[did] not directly contradict his deposition testimony."<sup>284</sup> "Although the friction between [plaintiff]'s

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274. *See id.* at 185.

275. *Broadnax v. Kroger Tex., L.P.*, No. 05-04-01306-CV, 2005 WL 2031783, at \*5 (Tex. App.—Dallas Aug. 24, 2005, no pet.) (mem. op.).

276. *Id.*

277. *Id.* at \*5 n.3 (citing *Burkett*, 42 S.W.3d at 286).

278. *Id.*

279. *Johnston v. Kruse*, 261 S.W.3d 895, 902 (Tex. App.—Dallas 2008, no pet.).

280. *Johnston v. Kruse*, 261 S.W.3d 895 (Tex. App.—Dallas 2008, no pet.).

281. *Id.* at 901.

282. *Id.*

283. *Id.* at 902.

284. *Id.*

affidavit and deposition testimony might affect the credibility of his estimate,” the affidavit was not to be disregarded and thus provided “more than a mere scintilla of evidence showing [the plaintiff] rendered valuable services to [the defendant].”<sup>285</sup>

### 3. Corpus Christi Court of Appeals Rejects the Sham Affidavit Theory While Recognizing Its Limited Usefulness

In the Corpus Christi Court of Appeals’ first opinion addressing the sham affidavit theory, it rejected the doctrine’s application.<sup>286</sup> Interestingly, three years later, the court cited *Farroux* in an unpublished opinion to disregard affidavit testimony that was inconsistent with prior deposition testimony.<sup>287</sup> Most recently, however, the Corpus Christi court expressly declined to adopt the sham affidavit doctrine; yet, in the same opinion, the court recognized that the “doctrine does have some limited viability or application.”<sup>288</sup>

The first case to address the sham affidavit doctrine in the Corpus Christi Court of Appeals was *Larson v. Family Violence & Sexual Assault Prevention Center of South Texas*.<sup>289</sup> In that case, the plaintiff appealed the trial court’s granting of summary judgment dismissing her causes of action against multiple defendants after she was terminated as executive director of a women’s shelter.<sup>290</sup> In one of her issues on appeal, the plaintiff argued that the trial court erred by sustaining the defendants’ objection to her affidavit—specifically, she asserted “that the trial court erred in ruling that there were conflicts and inconsistencies between [her] deposition testimony and [her] affidavit” attached

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285. *Johnston*, 261 S.W.3d at 902.

286. See *Larson v. Family Violence & Sexual Assault Prevention Ctr. of S. Tex.*, 64 S.W.3d 506, 513 (Tex. App.—Corpus Christi 2001, pet. denied) (“[W]e conclude any inconsistency or conflict between a party’s deposition and affidavit is not a reason to exclude that evidence in a summary judgment proceeding.”).

287. See *Barth v. Royal Ins. Co.*, No. 13-02-688-CV, 2004 WL 2904306, at \*3 n.5 (Tex. App.—Corpus Christi Dec. 16, 2004, no pet.) (mem. op.) (disregarding plaintiff’s affidavit, which claimed a later date of discovery of the injury than was originally claimed in his deposition).

288. *Del Mar Coll. Dist. v. Vela*, 218 S.W.3d 856, 862 n.6 (Tex. App.—Corpus Christi 2007, no pet.).

289. *Larson v. Family Violence & Sexual Assault Prevention Ctr. of S. Tex.*, 64 S.W.3d 506 (Tex. App.—Corpus Christi 2001, pet. denied).

290. *Id.* at 510.

to her summary judgment response.<sup>291</sup> The court of appeals noted that the defendants were relying on *Farroux* for the argument “that [the plaintiff] had created a ‘sham fact’ issue by the alleged inconsistencies . . . in an effort to delay or thwart the summary judgment ruling.”<sup>292</sup> However, the court rejected *Farroux* and instead cited to *Thompson’s* holding that “any inconsistency or conflict between a party’s deposition and affidavit [was] not a reason to exclude that evidence in a summary judgment proceeding” and that “inconsistencies and conflicts create a fact issue that should be resolved by a jury.”<sup>293</sup> Thus, the court stated that “if the trial court excluded [plaintiff’s] affidavit based on any inconsistency or conflicts between the affidavit and [her] deposition, the court abused its discretion.”<sup>294</sup> However, the record failed to show that the trial court sustained the objection on this specific basis, and that the defendants had numerous other objections to the plaintiff’s affidavit “which the trial court could have sustained.”<sup>295</sup> Accordingly, the court held there was no abuse of discretion in sustaining the objections to the affidavit.<sup>296</sup>

Three years later, in *Barth v. Royal Insurance Co.*,<sup>297</sup> the Corpus Christi Court of Appeals applied the sham affidavit rule in an unpublished opinion.<sup>298</sup> The plaintiff in *Barth* sued a defendant over insurance benefits in January 1999.<sup>299</sup> The defendant filed a motion for summary judgment based on the defense of the two-year statute of limitations and attached the plaintiff’s deposition regarding when the plaintiff knew or should have discovered the nature of his injury—i.e., by the summer of 1996.<sup>300</sup> The plaintiff filed a response to the defendant’s motion for summary judgment and attached his affidavit, which stated that he first discovered his claim on or about August 8, 1997.<sup>301</sup> Citing

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291. *Id.* at 513.

292. *Id.*

293. *Id.*

294. *Larson*, 64 S.W.3d at 513.

295. *Id.* at 513–14.

296. *Id.* at 514. The Corpus Christi court later reiterated its position through dicta in *Smith v. Mosbacher*, 94 S.W.3d 292, 296 (Tex. App.—Corpus Christi 2002, no pet.).

297. *Barth v. Royal Ins. Co.*, No. 13-02-688-CV, 2004 WL 2904306 (Tex. App.—Corpus Christi Dec. 16, 2004, no pet.) (mem. op.).

298. *Id.* at \*3 n.5.

299. *Id.*

300. *Id.*

301. *See id.* (“Because Barth’s subsequently-filed affidavit, without explanation,

*Farroux*, the court of appeals disregarded the plaintiff's affidavit testimony because it conflicted with his earlier deposition testimony.<sup>302</sup> The court then affirmed the summary judgment.<sup>303</sup>

In another unpublished opinion, *Office of the Attorney General v. Murillo*,<sup>304</sup> the Corpus Christi court acknowledged the holding in *Farroux* but affirmed the trial court's overruling of objections to an affidavit.<sup>305</sup> The *Murillo* case was a Texas Whistleblower Act lawsuit brought by a former employee who alleged that she was improperly terminated by the defendant for reporting a violation of law.<sup>306</sup> The defendant filed a plea to the jurisdiction, asking the court to dismiss the action on the basis that the plaintiff had not made a "good-faith report" of a "violation of law."<sup>307</sup> The trial court ruled against the defendant and the defendant appealed.<sup>308</sup> One of the issues was whether the plaintiff actually believed that she was reporting a violation of law when she reported another employee's actions to her superiors.<sup>309</sup> In her deposition, the plaintiff's testimony suggested a lack of knowledge regarding a law having been violated:

Q: Now, you said that you reported a violation of law in December of 2002?

A: I[—]all I reported was that Ms. Diaz was taking home a case screen.

Q: Okay. But do you understand in the pleadings in this lawsuit you're alleging that a violation of law has occurred?

A: Yes.

Q: Okay. Now, what law are you alleging has been violated?

A: That's going to have to be referred to my attorney on that.

Q: Okay. So you don't know? You don't have a[—]you don't have knowledge as to what law you're saying is being[—]was being violated by Belinda Diaz?

A: Oh, okay. Belinda[ ]I don't know anything about Belinda Diaz,

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contradicts his earlier testimony involving the date he should have discovered the injury, we must disregard the affidavit. It will not defeat the motion for summary judgment.").

302. *Barth*, 2004 WL 2904306, at \*3 n.5.

303. *Id.* at \*4.

304. *Office of the Attorney Gen. v. Murillo*, No. 13-05-598-CV, 2006 WL 3759716 (Tex. App.—Corpus Christi Dec. 21, 2006, no pet.) (mem. op.).

305. *Id.* at \*3–4.

306. *Id.* at \*1.

307. *Id.*

308. *Id.*

309. *Murillo*, 2006 WL 3759716, at \*2–3.

sir.

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Q: And do you believe that when Ms.[—]when Norma Elsik reported that Belinda Diaz was taking home case screens, do you believe that that was a violation of law?

A: The way I saw it, it was something that was not right, so I needed to report it.<sup>310</sup>

In response to the defendant's plea in intervention, the plaintiff attached her own affidavit executed approximately one year after her deposition.<sup>311</sup> In the affidavit, the plaintiff was much more unequivocal, stating that she "knew" her co-employee had violated the law and then identifying the law and confidentiality policies that were allegedly violated as the basis for reporting the conduct to her superiors.<sup>312</sup> The court held that the plaintiff's affidavit did "not clearly contradict her deposition," and "[f]urthermore, [it did] not find that affidavit's discussion of applicable law and policy in conflict with the deposition."<sup>313</sup> While the court recognized that there were variances between deposition and affidavit testimony, it held that the differences were not "so egregious that the complained-of statements should be disregarded."<sup>314</sup> Therefore, the Corpus Christi court once again appeared to apply the sham affidavit theory, but unlike *Barth*, in *Murillo* the conflicts simply failed to meet the standard for application of the doctrine.

Most recently, however, the Corpus Christi Court of Appeals expressly declined to adopt the sham affidavit theory. However, the court also recognized that the doctrine does have "some limited viability or application."<sup>315</sup> In *Del Mar College District v. Vela*,<sup>316</sup> the defendant college district appealed the trial court's denial of its motion to dismiss on the ground that the court had no jurisdiction over the plaintiff's employment discrimination claims because the plaintiff "did not file [her] administrative complaint

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310. *Id.* at \*3.

311. *Id.*

312. *Id.*

313. *Id.* at \*4.

314. Office of the Attorney Gen. v. Murillo, No. 13-05-598-CV, 2006 WL 3759716, at \*4 (Tex. App.—Corpus Christi Dec. 21, 2006, no pet.) (mem. op.).

315. Del Mar Coll. Dist. v. Vela, 218 S.W.3d 856, 862 & n.6 (Tex. App.—Corpus Christi 2007, no pet.).

316. Del Mar Coll. Dist. v. Vela, 218 S.W.3d 856 (Tex. App.—Corpus Christi 2007, no pet.).

within 180 days of the alleged unlawful employment practice as required by . . . the Texas Labor Code.”<sup>317</sup> In her verified charge of discrimination, the plaintiff stated that the latest date that discrimination took place was March 27, 2003, when she was allegedly verbally assaulted by a manager.<sup>318</sup> At her deposition, the plaintiff testified that she was verbally assaulted not on March 27, 2003, but instead on February 17, 2003.<sup>319</sup> She then later “executed a Change/Signature page stating that she did not recall if the verbal assault . . . actually occurred on February 17, 2003 or February 25, 2003.”<sup>320</sup> In response to the defendant’s motion to dismiss, the plaintiff submitted an affidavit in which she stated she was verbally assaulted on February 27, 2003; however, she also alleged that “two incidents occurred in March 2003.”<sup>321</sup> The court rejected the defendant’s argument not to consider plaintiff’s affidavit because it contradicted her own deposition testimony:

This Court follows the pronouncements of the Texas Supreme Court in *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988), as in *Larson v. Family Violence & Sexual Assault Prevention Ctr. of S. Tex.*, 64 S.W.3d 506 (Tex. App.—Corpus Christi 2001, pet. denied), and concludes that, as a general rule, 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, and we do not disregard the affidavit as a sham.<sup>322</sup>

While the court declined to follow *Farroux*, in a footnote it opined that the doctrine might not necessarily be absolutely precluded, recognizing that “the sham affidavit doctrine does have some limited viability or application.”<sup>323</sup> Specifically, the court indicated that it may be applied where: “(1) the affidavit is executed after the deposition and (2) there is a clear contradiction on (3) a material point (4) without explanation.”<sup>324</sup>

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317. *Id.* at 858.

318. *Id.*

319. *Id.* at 859.

320. *Id.* at 859 n.3.

321. *Vela*, 218 S.W.3d at 860.

322. *Id.* at 862.

323. *Id.* at 862 n.6.

324. *Id.* (citing *Barth v. Royal Ins. Co.*, No. 13-02-688-CV, 2004 WL 2904306, at \*7 n.5 (Tex. App.—Corpus Christi Dec. 16, 2004, no pet.) (mem. op.)).

## VI. ESTOPPEL AND QUASI-ADMISSIONS AS ALTERNATIVE THEORIES

Even in a district where the court of appeals has expressly rejected the sham affidavit theory, one may still argue that the doctrines of estoppel and/or quasi-admissions prevent the offending party from taking a new and inconsistent position in the judicial proceeding.

The doctrine of judicial estoppel dictates that a party will be “estopped in a subsequent proceeding by having alleged or admitted in . . . former proceeding[s], under oath, the contrary of the assertion sought to be made in the subsequent proceeding, in the absence of proof that the averment in the former proceeding was made inadvertently or by mistake, fraud, or duress.”<sup>325</sup> “Once a party ha[s] petitioned the court and has prevailed upon the court to rule in his favor he cannot thereafter be permitted to take a contrary stand.”<sup>326</sup> “The purpose of the doctrine of judicial estoppel is to uphold the sanctity of the oath, and to eliminate the prejudice which would result to the administration of justice if a litigant were to swear one way one time and a different way another time.”<sup>327</sup> The doctrine of judicial estoppel has been described as “estoppel by deed”<sup>328</sup> and “is designed to protect the integrity of the judicial process by preventing a party from ‘playing fast and loose’ with the courts to suit its own purposes.”<sup>329</sup> Unlike

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325. *Highway Contractors, Inc. v. W. Tex. Equip. Co.*, 617 S.W.2d 791, 793 (Tex. Civ. App.—Amarillo 1981, no writ); *see also* *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988) (providing a general explanation of the common law doctrine of judicial estoppel); *Morgan v. Straub*, No. 08-00-00191-CV, 2001 WL 925760, at \*2 (Tex. App.—El Paso Aug. 16, 2001, no pet.) (not designated for publication) (describing the purposes of judicial estoppel and its required elements); *In re Estate of Huff*, 15 S.W.3d 301, 308–09 (Tex. App.—Texarkana 2000, no pet.) (providing a detailed explanation of judicial estoppel); *Miles v. Plumbing Servs. of Houston, Inc.*, 668 S.W.2d 509, 512 (Tex. App.—Houston [14th Dist.] 1982, writ ref’d n.r.e.) (“Under the doctrine of judicial estoppel, a party may be estopped by alleging or admitting under oath in his pleadings a position contrary to the assertion sought to be made.”).

326. *May v. Wilcox Furniture Dntown, Inc.*, 450 S.W.2d 734, 738 (Tex. Civ. App.—Corpus Christi 1969, writ ref’d n.r.e.).

327. *Miles*, 668 S.W.2d at 512.

328. *Lesser v. Allums*, 918 S.W.2d 81, 85 (Tex. App.—Beaumont 1996, no writ).

329. *Andrews v. Diamond, Rash, Leslie & Smith*, 959 S.W.2d 646, 649 (Tex. App.—El Paso 1997, writ denied) (citing *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982); *In re Phillips*, 124 B.R. 712, 720 (Bankr. W.D. Tex. 1991)). Texas adopted the doctrine of judicial estoppel by following the Tennessee Supreme Court’s decision in *Sartain v. Dixie Coal & Iron Co.*, 266 S.W. 313 (Tenn. 1924), where the Tennessee court

equitable estoppel, judicial estoppel is not grounded on elements of detrimental reliance or injury in fact, but instead “arises from positive rules of procedure based on justice and sound public policy.”<sup>330</sup> “[J]udicial estoppel does not require prejudice to the adverse party but rather prevents prejudice to the administration of justice.”<sup>331</sup>

The elements of judicial estoppel are: (1) a sworn, inconsistent statement made in a previous judicial proceeding; (2) the party who made the statement successfully maintained the previous position; (3) the previous statement was not made inadvertently or by mistake, fraud, or duress; and (4) the statement was deliberate, clear, and unequivocal.<sup>332</sup>

Further, the doctrine of judicial estoppel applies to any sworn statement in a judicial proceeding, not just oral statements.<sup>333</sup> Additionally, although many judicial estoppel cases address testimony under oath in separate, prior proceedings, there is some authority that a sworn statement in the same proceeding can support the enforcement of judicial estoppel.<sup>334</sup> More recently, the Texas Supreme Court has clarified that for judicial estoppel to apply, the prior inconsistent statement must have occurred in a prior proceeding, not in the same proceeding.<sup>335</sup> “Contradictory positions taken in the same proceeding may raise issues of judicial

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stated that judicial estoppel should be termed “estoppel by oath” since the doctrine is based on “public policy which upholds the sanctity of an oath.” *Id.* at 317.

330. *Davidson v. State*, 737 S.W.2d 942, 948 (Tex. App.—Amarillo 1987, writ ref’d) (quoting *Long v. Knox*, 155 Tex. 581, 585, 291 S.W.2d 292, 295 (1956)).

331. Roger M. Baron & Melissa M. Martin, *The Application of Judicial Estoppel in Texas*, 41 BAYLOR L. REV. 447, 449 (1989) (citation omitted).

332. *In re Estate of Loveless*, 64 S.W.3d 564, 578 (Tex. App.—Texarkana 2001, no pet.) (citing *In re Estate of Huff*, 15 S.W.3d 301, 309 (Tex. App.—Texarkana 2000, no pet.)).

333. *Miller v. Gann*, 842 S.W.2d 641, 641 (Tex. 1992) (per curiam).

334. *See, e.g., Lesser v. Allums*, 918 S.W.2d 81, 85 (Tex. App.—Beaumont 1996, no writ) (explaining that Tennessee courts apply the doctrine of judicial estoppel to prevent contradiction of sworn statements by other sworn statements given in previous proceedings, as well as in the same proceeding); *Pitts v. State*, 734 S.W.2d 117, 118 (Tex. App.—Waco 1987, no writ) (ruling that appellant was estopped from claiming a bond was invalid after appellant had earlier persuaded the judge that the bond was valid); *May v. Wilcox Furniture Downtown, Inc.*, 450 S.W.2d 734, 738–39 (Tex. Civ. App.—Corpus Christi 1969, writ ref’d n.r.e.) (holding that when a party petitioned the court for an audit to verify a financial statement and agreed to accept whatever amount a proper audit would determine, that party was judicially estopped from taking a different position after the court-appointed auditor issued an unfavorable result).

335. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008).

admission but do not invoke the doctrine of judicial estoppel.”<sup>336</sup>

On occasion, the doctrine of judicial estoppel can interplay with the sham affidavit theory, as in the case of *Morgan v. Straub*.<sup>337</sup> In that case, a plaintiff sued the defendant for alleged conversion of two airplanes and some miscellaneous parts, tools, and equipment.<sup>338</sup> The plaintiff responded to the defendant’s interrogatories by stating that: (1) he owned the airplanes at issue, which he acquired in the 1950s and 1960s, but did not have the documents to prove ownership because they were “either destroyed by his divorce attorney or in a fire in his home”; and (2) the total value of the parts, tools, and equipment equaled \$55,500, and that he had acquired them in the 1960s, but he was unable to produce documentation concerning the same due to a fire in his home.<sup>339</sup> Interestingly, in the plaintiff’s divorce proceedings in 1981, he was asked about assets owned by him at the time of his divorce—specifically, whether he owned “‘any automobiles, motorcycles, boats, airplanes, trailers, or other vehicles,’ to which he answered, ‘no’ but did admit to owning miscellaneous airplane parts, of a probable value of approximately \$250.”<sup>340</sup> The defendant moved for summary judgment based on the doctrine of estoppel.<sup>341</sup> In response, the plaintiff submitted his own affidavit, in which he attempted to claim that “his answers to the divorce interrogatories were true and correct”—“that he was not the owner of the airplanes at the time of the divorce” but believed he had become the owner after his parents’ deaths in the mid-1980s.<sup>342</sup> There was no mention of the parts and equipment.<sup>343</sup> The trial court granted summary judgment and the El Paso Court of Appeals affirmed.<sup>344</sup>

The court held that the defendant had proven the affirmative defense of judicial estoppel as a matter of law: (1) the “sworn statements given during the divorce proceedings were successfully

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336. *Id.*

337. *Morgan v. Straub*, No. 08-00-00191-CV, 2001 WL 925760 (Tex. App.—El Paso Aug. 16, 2001, no pet.) (not designated for publication).

338. *Id.* at \*1.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Morgan*, 2001 WL 925760, at \*1.

343. *Id.*

344. *Id.* at \*2, \*4.

maintained” since, in the conversion lawsuit after the divorce, he was claiming that he had to move the airplanes and other contents of his hangar into another hangar; (2) there was no evidence in the record that the answers in the divorce proceedings were made “inadvertently or by mistake, fraud, or duress”; (3) the responses to the interrogatory questions in the divorce proceedings were “deliberate, clear, and unequivocally ‘no’” as to whether he owned any airplanes and parts.<sup>345</sup> Thus, the burden shifted to the plaintiff to come forward with competent controverting evidence that proved there was an issue of material fact concerning the affirmative defense.<sup>346</sup> The court cited to *Farroux* for the proposition that 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.”<sup>347</sup> Moreover, the court considered the plaintiff’s attempt to explain the contradiction as being “weak . . . without any proof offered to back up his beliefs” and was “unsupported by any facts such as ownership documents or probate records.”<sup>348</sup> Further, the plaintiff had not tried to clear up the apparent contradiction by stating that, for example, “he had been confused at the time of the first set of interrogatories or that he had discovered additional, relevant materials after making his previous sworn statements.”<sup>349</sup> Accordingly, the El Paso Court of Appeals held that the affidavit was not proper summary judgment proof that could create a genuine issue of material fact regarding ownership and/or the value of the airplanes, parts, tools, and equipment.<sup>350</sup> Therefore, the plaintiff was judicially estopped from taking a contrary position in the lawsuit, and the trial court had properly granted the motion for summary judgment.<sup>351</sup>

An alternative argument that might be raised in districts which reject the sham affidavit theory is that the person’s prior testimonial declaration, contrary to his position, constitutes a

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345. *Id.* at \*3.

346. *Id.*

347. *Morgan v. Straub*, No. 08-00-00191-CV, 2001 WL 925760, at \*3 (Tex. App.—El Paso Aug. 16, 2001, no pet.) (not designated for publication) (quoting *Farroux v. Denny’s Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.)).

348. *Id.* at \*4.

349. *Id.* (citing *Farroux*, 962 S.W.2d at 111).

350. *Id.*

351. *Id.*

“quasi-admission” that rises to the level of a judicial admission.<sup>352</sup> A “true judicial admission . . . is a formal waiver of proof usually found in pleadings or the stipulations of the parties. A judicial admission is conclusive upon the party making it, and it relieves the opposing party’s burden of proving the admitted fact, and bars the admitting party from disputing it.”<sup>353</sup> A quasi-admission, on the other hand, is merely some evidence, and not conclusive, upon the person making the admission.<sup>354</sup> The trier of fact determines the amount of weight to be given to such admissions.<sup>355</sup> On occasion, “as a matter of public policy, a party’s testimonial quasi-admission” will be treated as a true judicial admission if it meets the requirements reiterated by the Texas Supreme Court in *Mendoza*.<sup>356</sup> Specifically:

A quasi-admission will be treated as a true judicial admission if it appears:

- (1) That the declaration relied upon was made during the course of a judicial proceeding.
- (2) That the statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person giving the testimony.
- (3) That the statement is deliberate, clear, and unequivocal. The hypothesis of mere mistake or slip of the tongue must be eliminated.
- (4) That the giving of conclusive effect to the declaration will be consistent with the public policy upon which the rule is based.
- (5) That the statement is not also destructive of the opposing party’s theory of recovery.<sup>357</sup>

“The public policy underlying this rule is that it would be unjust to permit a party to recover after he has sworn himself out of court

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352. See *Mendoza v. Fid. & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980) (explaining that testimonial declarations are quasi-admissions that will be treated as judicial admissions if they meet specified conditions); *Aguirre v. Vasquez*, 225 S.W.3d 744, 756 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing the Texas Supreme Court’s explanation of testimonial declarations as outlined in *Mendoza*).

353. See *Mendoza*, 606 S.W.2d at 694 (explaining that the trier of fact determines the amount of weight given to quasi-admissions).

354. *Id.*

355. See *id.* (explaining that “a party’s testimonial quasi-admission will preclude recovery” if the requisite requirements are met).

356. *Id.*

357. *Id.* (ellipses omitted) (quoting *U.S. Fid. & Guar. Co. v. Carr*, 242 S.W.2d 224, 229 (Tex. Civ. App.—San Antonio 1951, writ ref’d)).

by clear, unequivocal testimony.”<sup>358</sup>

Some cases have found that the testimony at issue met the requirements of *Mendoza* and thus eliminated what would have otherwise been a fact issue. For example, in *Cortez v. Weatherford Independent School District*,<sup>359</sup> the parents of a deceased child brought an action for wrongful death and negligence against a school district, a bus driver, and a bus monitor after their child was killed by a motorcyclist while crossing the street after being let off of the bus.<sup>360</sup> The plaintiffs alleged that the defendants had been negligent in part by “failing to activate warning lights on the rear of the bus.”<sup>361</sup> The defendants moved for summary judgment, which the trial court granted.<sup>362</sup> On appeal, the plaintiffs contended that the trial court erred because a fact issue existed concerning whether the rear warning lights of the bus were on.<sup>363</sup> The Fort Worth Court of Appeals noted that “there appear[ed] to be a conflict in the record on this question,” because while the motorcyclist had testified that the warning lights were off, the defendant bus driver testified that they were on.<sup>364</sup> “Normally,” the court said, “this conflict would create a fact question for the jury”; however, the court next examined the deposition testimony of one of the plaintiffs (the deceased child’s mother).<sup>365</sup> In her deposition, this plaintiff “expressly testified . . . that at the time of the incident, she saw both sets of lights . . . on” before her children exited the bus.<sup>366</sup> The court thus held that the plaintiff’s testimony satisfied the *Mendoza* requirements, thereby eliminating “what otherwise would have been a disputed fact issue regarding

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358. *Mendoza*, 606 S.W.2d at 694 (citing *Carr*, 242 S.W.2d at 229); see also *Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707, 720 (Tex. App.—Austin 2000, pet. dismissed w.o.j.) (noting that the policy underlying the general rule is that it would be unjust for a party to recover after clear and unequivocal evidence has been given by them that is contrary to their current position).

359. *Cortez v. Weatherford Indep. Sch. Dist.*, 925 S.W.2d 144 (Tex. App.—Fort Worth 1996, no writ).

360. *Id.* at 146.

361. See *id.* (stating appellant’s allegations supporting a wrongful death and negligence cause of action against a school district).

362. *Id.*

363. *Id.* at 150.

364. See *Cortez*, 925 S.W.2d at 150 (explaining a conflicting question of fact in the trial testimony).

365. See *id.* (indicating how the plaintiff’s deposition testimony affected a normal question of fact for the jury).

366. *Id.*

the use or nonuse of the bus's warning lights."<sup>367</sup> Accordingly, the court affirmed the summary judgment.<sup>368</sup>

#### VII. THE SHAM AFFIDAVIT OBJECTION—DEFECT IN FORM OR SUBSTANCE?

One important issue regarding preservation of error on complaints about summary judgment proof is whether the complained of defect is one of form or substance. For preservation purposes, an appellate court treats a party's objections to defects in the "form" and "substance" of a document differently.<sup>369</sup> "Defects in the form of the affidavit must be objected to, and the opposing party must have the opportunity to amend the affidavit. The failure to obtain a ruling on an objection to the form of the affidavit waives the objection."<sup>370</sup> "For example, objections to defects in the form of an affidavit include: (1) lack of personal knowledge; (2) hearsay; (3) statement of an interested witness that is not clear, positive, direct, or free from contradiction; and (4) competence."<sup>371</sup>

Substantive defects in an affidavit will not be waived by the failure to obtain a ruling from the trial court on the objection, and may be raised for the first time on appeal.<sup>372</sup> "Substantive defects

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367. See *id.* (concluding that because plaintiff's testimony satisfied the *Mendoza* requirements, a question of fact did not exist for the jury regarding the issue of whether or not the bus's warning lights were on at the time of the accident).

368. *Id.* at 151; see also *Hodges v. Braun*, 654 S.W.2d 542, 544 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (describing a situation where a plaintiff alleged that he and the defendant were partners and that the defendant owed him fiduciary duties). The plaintiff's testimonial declarations that the defendant and plaintiff were not partners satisfied the requirements of *Mendoza*, and thus constituted a judicial admission that the parties were not partners, so the defendant did not owe the plaintiff any fiduciary duty. *Hodges*, 654 S.W.2d at 544.

369. *Choctaw Props., L.L.C. v. Aledo Indep. Sch. Dist.*, 127 S.W.3d 235, 241 (Tex. App.—Waco 2003, no pet.).

370. *Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App.—Dallas 2004, pet. denied) (citations omitted).

371. *Broadnax v. Kroger Tex., L.P.*, No. 05-04-01306-CV, 2005 WL 2031783, at \*4 (Tex. App.—Dallas Aug. 24, 2005, no pet.) (mem. op.) (citing *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.); *Choctaw*, 127 S.W.3d at 241; *Rizkallah v. Conner*, 952 S.W.2d 580, 585–86 (Tex. App.—Houston [1st Dist.] 1997, no writ), *superseded by statute* TEX. R. CIV. P. 166a, *as recognized in* *Landers v. State Farm Lloyds*, 257 S.W.3d 740 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

372. See *Stewart*, 156 S.W.3d at 207 (acknowledging that "defects in the substance of the opposing party's evidence" are not deemed waived and may still "be raised for the first time on appeal").

are those that leave the evidence legally insufficient, and include affidavits which are nothing more than legal or factual conclusions.”<sup>373</sup> Some representative examples of objections one can raise regarding an affidavit’s substantive defects are that the statements are merely conclusory in nature, or the affidavit lacks of an appended jurat.<sup>374</sup>

Most of the courts that have reviewed the issue of whether a party must preserve error as to a sham affidavit objection have held that a party waives any complaint if it does not raise an objection with the trial court and obtain a ruling.<sup>375</sup> For example, in *Douglas v. Dayton Hudson Corp.*,<sup>376</sup> the court held:

Marshall Fields claims that Douglas’s affidavit was a sham and that the trial court properly disregarded it. The record does not reflect that Marshall Fields objected to the affidavit or that the trial court struck or disregarded it. Marshall Fields cannot object to Douglas’s affidavit for the first time on appeal. This Court will consider the Douglas affidavit.<sup>377</sup>

Most of these courts, however, did not delve into a deep discussion or analysis of whether a sham affidavit complaint is more appropriately classified as a form or substance defect. The only cases that have done so to date are from the Dallas Court of Appeals. In *Broadnax*, for example, the court stated:

Kroger’s general objection that Broadnax’s affidavit is a sham affidavit because it contradicts his deposition testimony is an

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373. *Id.* (citing *Hou-Tex, Inc., v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.)).

374. *Broadnax*, 2005 WL 2031783, at \*5.

375. *See, e.g., Browne v. Kroger Co.*, No. 14-04-00604-CV, 2005 WL 1430473, at \*3 (Tex. App.—Houston [14th Dist.] June 21, 2005, no pet.) (mem. op.) (concluding that a sham affidavit issue was waived where party failed to raise objection in trial court); *Hope’s Fin. Mgmt. v. Chase Mortgage Serv., Inc.*, No. 05-01-00751-CV, 2002 WL 1895268, at \*3 (Tex. App.—Dallas Aug. 19, 2002, pet. denied) (not designated for publication) (explaining that a sham affidavit will be considered waived if there is no ruling by the trial judge on the objection); *Bexar County v. Lopez*, 94 S.W.3d 711, 715 (Tex. App.—San Antonio 2002, no pet.) (acknowledging that failure to object to a sham affidavit would amount to a waiver of the complaint upon appeal); *Douglas v. Dayton Hudson Corp.*, No. 05-98-00005-CV, 2000 WL 246256, at \*2 n.3 (Tex. App.—Dallas Mar. 6, 2000, pet. denied) (not designated for publication) (reiterating that one cannot object to a sham affidavit for the first time on appeal if he has previously failed to object to the evidence and did not obtain a ruling from the trial court).

376. *Douglas v. Dayton Hudson Corp.*, No. 05-98-00005-CV, 2000 WL 246256 (Tex. App.—Dallas Mar. 6, 2000, pet. denied) (not designated for publication).

377. *Id.* at \*2 n.3 (citations omitted).

objection complaining of a defect in the form of his affidavit.

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We conclude Kroger's objections that Broadnax's affidavit is a sham affidavit, is not within his personal knowledge, is hearsay, and contradicts his deposition testimony have not been preserved for appellate review because Kroger did not obtain an express or implied ruling on these objections and they allege defects of form.<sup>378</sup>

Accordingly, the court held that an objection asserting a sham affidavit complaint was an objection that could be waived.<sup>379</sup>

A year later, in *Hogan v. J. Higgins Trucking, Inc.*,<sup>380</sup> the Dallas court again held that a sham affidavit objection was one of form rather than substance.<sup>381</sup> In that case, the court granted summary judgment in favor of the defendants, and the plaintiff appealed.<sup>382</sup> On appeal, the defendants argued that the court could not consider a certain affidavit attached in response to the motion for summary judgment because it was "nothing more than a 'sham affidavit' attempting to create a fact issue."<sup>383</sup> The defendants had objected to the affidavit, but there was no evidence in the record to indicate that the trial court had expressly sustained their objection.<sup>384</sup> The court of appeals recognized the split of authority regarding "whether . . . an objection to summary judgment evidence can be preserved by an implicit ruling without a written, signed order."<sup>385</sup> The court reiterated its statement in *Broadnax*, that the "better practice is for the trial court to disclose, in writing, its ruling on all evidence before the time it enters the order granting or denying summary judgment."<sup>386</sup> The court determined that, on the record before it, it could not conclude that the trial court had implicitly ruled on the "sham" affidavit objection; therefore, the court turned to whether the defendants had properly preserved the objection on appeal:

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378. *Broadnax*, 2005 WL 2031783, at \*5 (citation omitted).

379. *Id.*

380. *Hogan v. J. Higgins Trucking, Inc.*, 197 S.W.3d 879 (Tex. App.—Dallas 2006, no pet.).

381. *Id.* at 883.

382. *Id.* at 882.

383. *Id.* at 883.

384. *Id.*

385. *Hogan*, 197 S.W.3d at 883.

386. *Id.* (quoting *Broadnax v. Kroger Tex., L.P.*, No. 05-04-01306-CV, 2005 WL 2031783, at \*1-2 (Tex. App.—Dallas Aug. 24, 2005, no pet.) (mem. op.)).

[Defendants'] general objection that [the] affidavit is a sham affidavit because it contradicts his earlier deposition testimony is an objection complaining of a defect in form of his affidavit. Therefore, because it is a defect in form and [defendants] failed to obtain a ruling on the objection, their arguments are not properly preserved for appellate review. Accordingly, we may consider [the] affidavit in our review of the merits of this appeal.<sup>387</sup>

The problem with the holdings in these cases is that a sham affidavit complaint is not really a complaint about an interested witness's statements that are not "clear, positive, direct, or free from contradiction."<sup>388</sup> The complaint is that the witness's statement *is* clear and that it contradicts an earlier statement. Moreover, the sham affidavit objection can be raised against any witness, whether interested or not. Therefore, it cannot be pegged into the "form" objection hole solely on the basis that occasionally the objection is raised against an interested witness.

Without directly addressing whether a sham affidavit objection is a form or substantive complaint, other cases have seemingly held that it is a substantive objection that can be argued for the first time on appeal. For example, in *Barth*, without discussing preservation of error, the court of appeals disregarded a plaintiff's affidavit that contradicted his earlier deposition testimony.<sup>389</sup> Although the opinion is not clear as to whether the defendant filed objections and had those objections ruled upon, the dissenting opinion indicates that the affidavit was not struck from the record by the trial court.<sup>390</sup> Accordingly, the *Barth* opinion is some precedent that would support a conclusion that the court of appeals can use the sham affidavit theory for the first time on appeal to disregard affidavits which contradict prior deposition testimony without explanation. Similarly, in *Youngblood*, the defendants filed various objections, which appear to have included a sham affidavit objection.<sup>391</sup> The trial court did not expressly

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387. *Id.* (citation omitted).

388. *Id.* (citing *Choctaw Props., L.L.C. v. Aledo Indep. Sch. Dist.*, 127 S.W.3d 235, 241 (Tex. App.—Waco 2003, no pet.)).

389. *See Barth v. Royal Ins. Co.*, No. 13-02-688-CV, 2004 WL 2904306, at \*3 n.5 (Tex. App.—Corpus Christi Dec. 16, 2004, no pet.) (mem. op.) (noting that if affidavits contradict earlier testimony, the evidence will be disregarded).

390. *See id.* at \*9 n.9 (Castillo, J., dissenting) (explaining that the court must consider all evidence that is still on file and that has not been struck from the record).

391. *See Youngblood v. U.S. Silica Co.*, 130 S.W.3d 461, 467–70, 467 n.4 (Tex. App.—

grant the objections until after it granted the summary judgment motion.<sup>392</sup> The plaintiff appealed, and the court of appeals held that the defendants' objections to form were waived.<sup>393</sup> Nevertheless, the court went on to address the merits of defendants' sham affidavit objection, thereby indicating that a sham affidavit objection was a substantive objection as opposed to a form objection.<sup>394</sup>

#### CONCLUSION

Texas courts should adopt the sham affidavit doctrine because the sham affidavit theory is a useful procedural tool to be employed by trial courts in summary judgment practice. One problem with picking sides on the issue is that most of the litigants in the cases addressing the doctrine seem to think that whether to adopt the theory is an all-or-nothing affair. In other words, most proponents of the doctrine seem to argue that if the affidavit differs at all, the affidavit must be disregarded, and then the summary judgment would appear to be conclusive due to the lack of competent evidence to raise a fact issue. On the other side of the coin, opponents of the doctrine argue that the sham affidavit doctrine has not been authorized by the Texas Supreme Court. But what this opposing view fails to recognize is the fact that an affidavit that differs from deposition testimony does not alone make it a sham—rather, whether an affidavit is a sham is truly a matter of degree. A court's finding that an affidavit contradicts prior deposition testimony without explanation (i.e., that it meets the definition of a "sham affidavit") does not necessarily mean that there is no fact issue created elsewhere in the deposition or through other summary judgment evidence so as to merit the automatic granting of summary judgment.

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Texarkana 2004, pet. denied) (explaining that one of the defendant's objections was a sham affidavit objection, but it had been waived because the defendant failed to obtain a ruling from the trial court).

392. *See id.* at 467 (explaining that the trial court ruled on the summary judgment motion prior to addressing a ruling on the objections).

393. *Id.* at 469.

394. *Cf. id.* at 469–70 (discussing that the court reviewed the entirety of objections submitted, held that the failure to state that the objections were based on personal knowledge amounted to a defect of form rather than substance, and then turned its attention to a discussion of the sham affidavit issue without expressly indicating whether the sham affidavit objection was one of the objections submitted).

Moreover, the Texas Supreme Court's prior precedent in *Gaines* and *Randall* should not preclude the adoption of the sham affidavit theory. In those cases, the court did not address the mountain of precedent from across the nation that supports the application of the sham affidavit doctrine. Additionally, the court did not address the seemingly applicable legal theories of judicial estoppel and judicial admissions. Certainly, like our society, the law is entitled to grow and change when new theories and policies are presented. Apart from a statement from the Texas Supreme Court authorizing its use, however, it seems there can be no real bright-line rule on the consideration of what is "clearly inconsistent" to the point of constituting a sham affidavit. Because the cases that examine sham affidavits are by definition fact-intensive and fact-specific, trial courts should be allowed to consider sham affidavit objections on a case-by-case basis. As the San Antonio Court of Appeals recognized in *Cantu*, trial courts should examine the "nature and extent of the differences" of the facts asserted within the varying documents in order "to determine what effect a conflict should be given in a particular case."<sup>395</sup> The Eastland court seems to have identified a workable test to determine when and under what circumstances a sham affidavit may be disregarded: "(1) the affidavit is executed after the deposition and (2) there is a clear contradiction on (3) a material point (4) without explanation."<sup>396</sup>

Furthermore, courts should be allowed to examine the extent of the inconsistency by considering the prior deposition as a whole and the subsequent affidavit as a whole. That said, as in other circumstances, courts should not be forced to scour the entire records on their own.<sup>397</sup> Instead, it is the attorney's job, as the

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395. *Cantu v. Peacher*, 53 S.W.3d 5, 7 (Tex. App.—San Antonio 2001, pet. denied).

396. *Pando v. Sw. Convenience Stores, L.L.C.*, 242 S.W.3d 76, 79 (Tex. App.—Eastland 2007, no pet.) (citing *Del Mar Coll. Dist. v. Vela*, 218 S.W.3d 856, 862 n.6 (Tex. App.—Corpus Christi 2007, no pet.)).

397. See, e.g., *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003) (stating that a district court is under no "duty to sift through the record in search of evidence to support a party's opposition to summary judgment" (quoting *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998))); *Escobar v. City of Houston*, No. 04-1945, 2007 WL 2900581, at \*13 (S.D. Tex. Sept. 29, 2007) (mem.) ("[A] judge analyzing a summary judgment motion need not scour the record in search of evidence to support the positions."); *Jackson v. Comerica Bank-Tex.*, No. 05-05-01358-CV, 2007 WL 926401, at \*1 (Tex. App.—Dallas Mar. 29, 2007, no pet.) ("[W]e are not required to scour the record looking for unidentified fact issues that may be genuine or material."); see also *De la O v.*

advocate, to demonstrate how and to what extent the affidavit and deposition are inconsistent or alternatively in the case of those defending the sham affidavit, why they are consistent. Further, it is practical, fair, and consistent with the case law that a party be allowed to explain the apparent inconsistency—perhaps by demonstrating the honest discrepancy, by pointing to newly discovered evidence or later discovered facts, showing that the party was confused or was misunderstood at the deposition, demonstrating the affiant’s lack of access to material facts, or other potentially mitigating reasons. This may require a non-movant to file supplemental affidavits in response to objections. Trial courts should freely allow the filing of these supplemental affidavits under Texas Rule of Civil Procedure 166a(f).

Furthermore, policy reasons support adoption of the sham affidavit rule. Judge Wilson was correct in his analysis that:

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.<sup>398</sup>

It makes little sense to have a system wherein one party can avoid summary judgment by simply submitting a sham affidavit that clearly contradicts previous testimony on a material fact without explanation. Such a view would seem to leave the process of summary judgment easily undermined, and without question the availability of the summary judgment “as a useful trial-avoiding procedure would be diminished.”<sup>399</sup> This would further add to the cost of litigation in unmeritorious cases that should be disposed of before trial, which is contrary to the rules governing summary judgments. The snowball effect of permitting sham

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Hous. Auth. of El Paso, 417 F.3d 495, 501 (5th Cir. 2005) (“Judges are not like pigs, hunting for truffles buried in briefs.” (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991))).

398. Randy Wilson, *The Sham Affidavit Doctrine in Texas*, 66 TEX. B.J. 962, 968 (2003).

399. Michael Hoenig, *Summary Judgment and the Anti-‘Sham’ Rule*, N.Y.L.J., Mar. 11, 1996, at 3.

affidavits would punish litigants defending against unmeritorious claims by either forcing them to bear the expense of taking the case to trial, or to bite the bullet and settle the case before trial to avoid the risk of an uncertain jury result. Adoption of the sham affidavit theory in Texas would be a reasoned and sensible addition, to the extent it does not already exist, to summary judgment practice throughout Texas.