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# "GENUINE" SUMMARY JUDGMENT ISSUES: THE NEW SHAM AFFIDAVIT RULE AND ITS POTENTIAL RAMIFICATIONS

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## *I. Introduction.*

On April 27, 2018, the Texas Supreme Court issued a unanimous opinion in *Lujan v. Navistar, Inc.*, No. 16–0588, 2018 WL 1974473, at *3 (Tex. Apr. 27, 2018).[1] The *Lujan* opinion adopted a sham affidavit "concept" into Texas summary judgment law. The sham affidavit "concept" is not the sham affidavit rule that has developed in Texas jurisprudence over the past twenty years.

This paper will discuss why you should care about the *Lujan* decision even if you have no intention of filing a sham affidavit. In particular, I will confront two, primary alterations in sham-affidavit thinking post-*Lujan*:

1. There is no longer a bright-line circumstance in which an affidavit may be considered a sham.

2. The sham affidavit rule may now, in operation, be a rule of substance, not a rule of evidence.

## *II. The Old Sham Affidavit Rule.*

### A. A refresher on the Sham Affidavit Rule.

When the First Court of Appeals originally articulated the Texas sham affidavit rule in 1997, the rule looked straightforward enough: A party cannot file an affidavit to contradict his own deposition testimony, without any explanation for the change in the testimony, in an attempt to create a fact issue and avoid summary judgment. *Farroux v. Denny's Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App.–Houston [1st Dist.] 1997, no pet.). Over the years of application, however, the rule needed and received greater

[1] Opinion attached as Appendix A. Petitioner Lujan filed his Motion for Rehearing on June 7, 2018.

definition. The Eastland Court of Appeals provided a multi-part test as structure:

> 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.

*Pando v. Sw. Convenience Stores, L.L.C.*, 242 S.W.3d 76, 79–80 (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.)).

**B. A brief history of sham affidavit rule**.

By most accounts, the sham affidavit doctrine originated in federal court with *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572 (2d Cir. 1969) (stating "[i]f 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"). Since that time, most federal courts have followed the rule in some form. *See* Johnson, David and Regan, Joseph, *The Competency of the Sham Affidavit as Summary Judgment Proof in Texas*, 40 St. Mary's L. J. 205, 208-09 n. 11 (2008) (collecting federal authority adopting the *Perma Research* sham affidavit rule). In fact, some states have incorporated the doctrine into their summary judgment rules.[2]

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[2]For example, in 2004 Maryland amended its Rule 2-501 which now provides:

(1) A party may file a motion to strike an affidavit or other statement under oath to the extent that it contradicts any prior sworn statement of the person making the affidavit or statement. Prior sworn statements include (A) testimony at a prior hearing, (B) an answer to an interrogatory, and (C) deposition testimony that has not been corrected by changes made within the time allowed by Rule 2-415.

(2) If the court finds that the affidavit or other statement under oath materially contradicts the prior sworn statement, the court shall strike the contradictory part unless the court determines that (A) the person reasonably believed the prior statement to be true based on facts known to the person at the time the prior statement was made, and (B) the statement in the affidavit or other statement under oath is based on facts that were not known to the person and could not reasonably have been known to the person at the time the prior statement was made or, if the prior statement was made in a deposition, within the time allowed by Rule 2-415(d) for correcting the deposition.

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