



Arkansas Association of Defense Counsel

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IT'S A SHAM BABY

An Examination of the Sham Affidavit Doctrine

As defense counsel we are well versed in the use of summary judgment motions in appropriate cases. Dispositive motions are always on our minds as we are preparing for and taking depositions of Plaintiff's witnesses. Occasionally, we leave a deposition thinking we have a good basis for a summary judgment motion.

Recently that happened to me and I filed for motion for summary judgment on the basis that the testimony of the plaintiff's expert in a medical malpractice case was insufficient as a matter of law. Plaintiff filed a response which was entirely based upon an affidavit from the same expert. The expert dramatically changed his opinions in the Affidavit. As an explanation, the expert stated that he had reviewed some additional records and testimony after the deposition which had caused him to change his

mind. I argued in my Reply Brief that the Affidavit should be stricken pursuant to the Sham Affidavit Doctrine.

The Sham Affidavit Doctrine provides that when the affidavit of a witness directly contradicts prior deposition testimony, it is proper for a trial court to disregard it in ruling on a dispositive motion. See Caplener v Bluebonnet Milling Co., 322 Ark. 751, 911 S.W.2d 586 (1995). The Doctrine recognizes the inherent injustice in permitting a witness to submit an affidavit and testify in a way that is completely contrary to prior sworn testimony.

The Sham Affidavit Doctrine was first recognized in Perma Research and Development Co. v Singer Co., 410 S.W.2d 572 (2nd Circuit 1969). In Perma Research, the plaintiff sued defendant for breach of contract and fraud. Plaintiff alleged that the defendant had never intended to perform under the contract. The president of Plaintiff was deposed

for four days and during his entire deposition testimony he could not remember a single instance where any employee of the defendant had behaved in a fraudulent manner. However, later in response to a motion for summary judgment the president submitted an affidavit testifying that an employee of defendant had stated that the defendant never intended to perform under the contract. The court found that the president's inconsistent statements by way of affidavit did not create an issue of fact. The court cited the inherent injustice of allowing a deponent who has been deposed under oath and at length to simply change that testimony by way of affidavit in order to defeat summary judgment. Id.

Since that time, some form of the Doctrine has been endorsed by all federal courts of appeal. The basic justification for the Doctrine is that when an affidavit flatly contradicts prior sworn deposition testimony, an inference of credibility with regard to that testimony is simply not reasonable. Further, many courts have noted that allowing contradictory affidavit testimony would completely eviscerate Rule 56 and our summary

judgment procedure. Radobenko v Automated Equipment Corp., 520 S.W.2d 540 (9th Circuit 1975.) Another justification for the Sham Affidavit Doctrine is that the adversarial nature of the deposition process renders the testimony that is derived thereby more credible than an affidavit crafted by an attorney for the purpose of defeating summary judgment. Jiminez v Rathskellar, Inc. 503 F.3d 247 (3rd Circuit 2007).

In determining whether or not the affidavit of a witness falls under the Sham Affidavit Doctrine, the court will consider whether the contradiction is direct and the circumstances surrounding the change in testimony, including the purported reason for the change. In my case, there was no question that the contradiction was direct. Plaintiff's expert had attempted to explain away the contradiction by stating that he had not reviewed all of the medical records and deposition testimony at the time he gave his sworn deposition. Fortunately, I was able to point to several places in the deposition where the physician had confirmed that he had received the relevant medical records and that he had in fact reviewed the deposition testimony which he later attempted to

rely upon as the reason for changing his testimony.

As defendants, please keep the Sham Affidavit Doctrine in mind when filing replies to your dispositive motions. If a witness on the other side has changed their deposition testimony dramatically without an adequate basis for doing so, it would be appropriate to rely upon the doctrine to ask that the Affidavit be stricken. In my case, the trial court in Sebastian County found that the doctrine justified the striking of the opposing expert's affidavit which resulted in a grant of summary judgment for the Defendant.

The AADC thanks our President, Rebecca Hattabaugh of Ledbetter, Cogbill, Arnold & Harrison for writing this article.



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