

## Texas Supreme Court Formally Recognizes the Use of the “Sham Affidavit Rule” in Trial Courts

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In *Albert Lujan d/b/a Texas Wholesale Flower Co. v. Navistar, Inc.*, the Texas Supreme Court held that Texas trial court's may disregard affidavits that conflict with prior sworn testimony without sufficient explanation for the conflict as proper evidence to avoid summary judgment. Essentially, the Court held the sham affidavit rule is a valid component of a trial court's authority under Rule 166(a) to distinguish genuine fact issues from non-genuine fact issues.

The facts in *Lujan* center around the purchase and transfer of allegedly defective trucks. At his deposition, Albert Lujan testified he purchased the trucks in his individual capacity then transferred ownership to his corporation, Texas Wholesale Flower Co., Inc. However, in response to Navistar, Inc.'s motion for partial summary judgment, Lujan submitted an affidavit with his response in which he stated he did not transfer ownership of the trucks to the company. Lujan's attorney represented to the court, at the summary judgment hearing, that even though the affidavit contained false statements, "everything in the affidavit is true." Displeased with the explanation for the contradictory statements, the court requested briefing on striking Lujan's affidavit as a sham. Ultimately, the court struck the affidavit as a sham and granted partial summary judgment. The Fourteenth Court of Appeals affirmed and "adopt[ed] the sham affidavit doctrine." Lujan then filed a petition for writ of certiorari in the Texas Supreme Court, which was subsequently granted.

After a review of the material similarities of Rule 56 of the Federal Rules of Civil Procedure and Rule 166a of the Texas rules, the Texas Supreme Court reasoned that the key word in both rules is "genuine." Even though a trial court should not weigh evidence, the court is required to determine whether a proffered fact issue is "genuine," which means "authentic or real," or a "sham," which by definition is "not genuine." The Court determined that "Rule 166a obligates trial courts to distinguish genuine fact issues, which must proceed towards trial, from non-genuine fact issues, which should not survive summary judgment." Within this framework, the Court upheld applying the sham affidavit rule in those instances where a party submits sworn testimony that materially conflicts with the same witness's prior sworn testimony, unless there is a sufficient explanation for the conflict. The Court acknowledged the sham affidavit rule as a tool to assist trial court's in distinguishing between genuine fact issues and non-genuine fact issues, which is in line with the underlying purpose of Rule 166a.

The ruling in *Lujan*, makes it harder for a party to overcome the hurdle of prior sworn testimony (i.e., any testimony, not just deposition) when attempting to survive summary judgment. The ability to use the sham affidavit rule in Texas trial courts increases the significance of proper preparation of witnesses before testifying in depositions or otherwise. This includes reviewing Interrogatory responses, which have to be given under oath, and any other potential evidence where the applicable witness has made a factual statement.

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