



2008

# Comments: Is the Sham Affidavit Rule Itself a Sham, Designed to Give the Trial Court More Discretion at the Summary Judgment Level?

Ryan A. Mitchell  
*University of Baltimore School of Law*

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>

 Part of the [Law Commons](#)

## Recommended Citation

Mitchell, Ryan A. (2008) "Comments: Is the Sham Affidavit Rule Itself a Sham, Designed to Give the Trial Court More Discretion at the Summary Judgment Level?," *University of Baltimore Law Review*: Vol. 37: Iss. 2, Article 4.  
Available at: <http://scholarworks.law.ubalt.edu/ublr/vol37/iss2/4>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact [snolan@ubalt.edu](mailto:snolan@ubalt.edu).

## IS THE SHAM AFFIDAVIT RULE ITSELF A SHAM, DESIGNED TO GIVE THE TRIAL COURT MORE DISCRETION AT THE SUMMARY JUDGMENT LEVEL?

### I. INTRODUCTION

The Maryland courts are currently required to disregard affidavits submitted in opposition to a motion for summary judgment if the affidavit materially contradicts the affiant's prior deposition testimony.<sup>1</sup> This practice has been dubbed the "sham affidavit rule."<sup>2</sup> The Court of Appeals of Maryland's Standing Committee on Rules of Practice and Procedure recommended Maryland's adoption of the sham affidavit rule in their One Hundred Fifty-Second Report to the Court of Appeals of Maryland.<sup>3</sup> The Court of Appeals of Maryland accepted the Rules Committee's recommendation, and amended Maryland Rule 2-501 to include the sham affidavit rule.<sup>4</sup> In adopting the sham affidavit rule, Maryland followed in the footsteps of several states as well as every federal circuit that has confronted the issue.<sup>5</sup>

Maryland Rule 2-501(e) currently allows a judge to grant summary judgment despite having an affidavit that presents a dispute as to a material fact.<sup>6</sup> The only exception to this rule is if the testimony in the affidavit is based on new information not known to the affiant at the time of his deposition.<sup>7</sup>

An example will better help explain how Maryland Rule 2-501(e) works in practice. A plaintiff sues alleging that she suffered personal injuries that resulted from defendant's negligence. During her

---

1. MD. R. 2-501(e).

2. *Pittman v. Atl. Realty Co.*, 359 Md. 513, 517, 754 A.2d 1030, 1032 (2000). The phrase "sham affidavit rule" is used when referring to Maryland Rule 2-501(e), but the phrase "sham affidavit doctrine" is used when referring to the federal approach to sham affidavits, which is derived from past court decisions. See *Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 251 (3d Cir. 2007) ("This principle of summary judgment practice is often referred to as the 'sham affidavit doctrine.'" (quoting *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 577-78 (2d Cir. 1969))).

3. 30 Md. Reg. 1907-08 (Dec. 26, 2003).

4. Court of Appeals of Maryland Rules Order, 30 Md. Reg. 1907-08 (Dec. 26, 2003).

5. See Judge Randy Wilson, *The Sham Affidavit Doctrine in Texas*, 66 TEX. B. J. 962, 964-65 (Dec. 2003); *Jiminez*, 503 F.3d at 252.

6. MD. R. 2-501(e)(2)(B).

7. *Id.*

deposition the plaintiff recites facts that indicate she was also negligent. Because Maryland is a contributory negligence state, the defendant files a motion for summary judgment. In opposition to the motion for summary judgment, the plaintiff submits an affidavit that casts a different light on the facts and eliminates the possibility of contributory negligence. Under Maryland Rule 2-501(e), assuming the affidavit is not based on new information, the trial judge must disregard the affidavit and grant summary judgment if the affidavit “materially contradicts” the deposition testimony.<sup>8</sup> The judge is given discretion to decide whether the recollection set forth in the affidavit “materially contradicts” the prior sworn statement, a function usually reserved for the jury.<sup>9</sup>

The origins of the sham affidavit doctrine, the foundation of Maryland’s sham affidavit rule, can be traced back to the Second Circuit’s 1969 decision in *Perma Research & Development Co. v. Singer Co.*<sup>10</sup> The *Perma* opinion stated three justifications for the sham affidavit doctrine.<sup>11</sup> They have been classified: “reliability,” “utility,” and “fairness.”<sup>12</sup> The arguments are that deposition testimony is more reliable than an affidavit; summary judgment’s utility of weeding out false claims can only be preserved by striking inconsistent affidavits; and it would be unfair, to the moving party, to allow summary judgment to be defeated by an inconsistent statement made by the opposing party.<sup>13</sup>

This Comment illustrates how Maryland’s current sham affidavit rule is in violation of the right to have a jury decide issues of fact.<sup>14</sup> This Comment also illustrates how the justifications set forth for the sham affidavit rule can each be achieved in a less restrictive manner.<sup>15</sup> Part II broadly traces the establishment of the sham affidavit doctrine in the federal courts.<sup>16</sup> The federally recognized exceptions to the rule are broadly outlined and examined.<sup>17</sup> Part III describes Maryland’s adoption of the sham affidavit rule through a

---

8. *Id.*

9. *Id.*

10. 410 F.2d 572 (2d Cir. 1969).

11. *Pittman v. Atl. Realty Co.*, 359 Md. 513, 529, 754 A.2d 1030, 1038 (2000) (citing *Perma*, 410 F.2d at 578).

12. *Id.* at 529, 754 A.2d at 1038; Michael Holley, *Making Credibility Determinations at Summary Judgment: How Judges Broaden their Discretion While “Playing by the Rules,”* 20 WHITTIER L. REV. 865, 880–81 (1999).

13. *Perma*, 410 F.2d at 578; *Pittman*, 359 Md. at 529, 754 A.2d at 1038.

14. *See infra* Part V.A.1.

15. *See infra* Part V.

16. *See infra* Part II.

17. *See infra* Part II.A.1.

2004 amendment to Maryland Rule 2-501.<sup>18</sup> Part IV examines the justifications articulated by the proponents of the sham affidavit rule.<sup>19</sup> Finally, Part V explains how Maryland's current rule is unconstitutional and how the justifications supporting the sham affidavit rule can each be achieved in a less restrictive manner.<sup>20</sup> The Comment concludes that Maryland Rule 2-501(e), the sham affidavit rule, allows the trial court to encroach on the jury's fact-finding domain in violation of the Constitution of Maryland.<sup>21</sup> The Comment further concludes that affidavits inconsistent on their face can be submitted to the jury, while still safeguarding the utility of summary judgment and retaining fairness for the moving party; therefore, there is no need for the sham affidavit rule to continue.<sup>22</sup>

## II. THE SHAM AFFIDAVIT RULE IS ESTABLISHED

Federal courts vary in their application of the sham affidavit rule because the "Federal Rules of Civil Procedure do not address situations involving offsetting affidavits."<sup>23</sup> Pursuant to Rule 56, the court may only grant a motion for summary judgment under very narrow circumstances:

The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.<sup>24</sup>

"The plain language of this rule allows affidavits to be considered in summary judgment motions, and affidavits are central to summary judgment practice."<sup>25</sup> A party opposing a motion for summary judgment must submit an affidavit that "set[s] forth specific facts showing that there is a genuine issue for trial."<sup>26</sup> The Federal Rules, however, "do not contain an express prohibition of offsetting

---

18. See *infra* Part III.

19. See *infra* Part IV.

20. See *infra* Part V.

21. See *infra* Part VI.

22. See *infra* Part VI.

23. Collin J. Cox, Note, *Reconsidering the Sham Affidavit Doctrine*, 50 DUKE L.J. 261, 266 (2000).

24. FED. R. CIV. P. 56(c).

25. Cox, *supra* note 23, at 266.

26. FED. R. CIV. P. 56(e); see also Cox, *supra* note 23, at 266.

affidavits; the sham affidavit doctrine has derived instead from the courts.”<sup>27</sup>

A. *The Court’s Role During Summary Judgment is Altered: Perma Research & Development Co. v. Singer Co.*

The sham affidavit doctrine emerged in the Second Circuit’s *Perma Research & Development Co. v. Singer Co.* decision.<sup>28</sup> Perma Research brought suit for fraudulent breach of contract, “alleging that substantial numbers of an automobile anti-skid braking device assembled by the defendant, The Singer Company (“Singer”), were ‘defective due to inadequate quality control.’”<sup>29</sup> After Singer concluded that the product could not be made fail-safe, a recall of the product commenced and “Singer advised Perma that it was abandoning the project until the ‘fail-safe’ problem could be resolved.”<sup>30</sup> Singer’s motion for summary judgment was granted because “Perma failed to produce any evidence showing a fraudulent intent on the part of Singer.”<sup>31</sup> Frank Perrino, the president of Perma, submitted an affidavit opposing summary judgment, in which he stated that a Mr. Person of Singer told him Singer never had any intention of performing the contract.<sup>32</sup> Perrino was deposed for four days and, despite being “repeatedly asked to specify the basis of the fraud he alleged, . . . he made no reference to the alleged conversation” mentioned in the affidavit.<sup>33</sup>

The Second Circuit Court of Appeals stated that “[i]f there is any dispute as to the material facts, it is only because of inconsistent statements made by Perrino the deponent and Perrino the affiant.”<sup>34</sup> The Second Circuit held that “[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*.”<sup>35</sup> “The last four words of the opinion thus gave birth to what has come to be known as the sham affidavit doctrine, *i.e.*, a trial court can disregard an affidavit that offsets the affiant’s prior deposition testimony where the

---

27. Cox, *supra* note 23, at 267.

28. 410 F.2d 572 (2d Cir. 1969).

29. *Id.* at 573.

30. *Id.* at 574.

31. *Id.*

32. *Id.* at 573, 577.

33. *Id.* at 578.

34. *Id.*

35. *Id.* (emphasis added).

contradiction is unexplained and unqualified by the affiant.”<sup>36</sup> The *Perma* decision requires the trial court to “engage in two separate inquiries, first [to] determin[e] if a contradiction exists and then [to] determin[e] whether the contradiction is justified.”<sup>37</sup> Following the decision in *Perma*, every Federal Circuit which has considered the issue has adhered to the sham affidavit rule in some form.<sup>38</sup>

### 1. Exceptions to the Sham Affidavit Rule Recognized by the Federal Circuits

The Federal Circuits do not allow trial judges to disregard inconsistent affidavits in all circumstances.<sup>39</sup> “Presuming that an offsetting affidavit is a sham can disadvantage respondents to summary judgment motions who have legitimate reasons for contradicting prior deposition testimony.”<sup>40</sup> Thus, two exceptions to the sham affidavit doctrine have developed in the federal courts.<sup>41</sup> The leading federal case addressing exceptions to the sham affidavit doctrine is *Kennett-Murray Corp. v. Bone*.<sup>42</sup> In *Kennett-Murray*, the court allowed the defendant to submit an offsetting affidavit in response to a motion for summary judgment.<sup>43</sup> The court allowed the offsetting affidavit because it “explain[ed] certain aspects of his deposition testimony.”<sup>44</sup> The affiant explained that he was confused by the questions during his depositions.<sup>45</sup> Furthermore, the court held that the affidavit should be considered because the affiant’s “assertion [was] at least plausible.”<sup>46</sup> The *Kennett-Murray* court carved out a significant exception to the sham affidavit doctrine: “a

---

36. Wilson, *supra* note 5, at 964.

37. Cox, *supra* note 23, at 269.

38. Wilson, *supra* note 5, at 964, 968 n.10.

39. See, e.g., *Adelman-Tremblay v. Jewel Cos.*, 859 F.2d 517, 520 (7th Cir. 1988).

40. Cox, *supra* note 23, at 284.

41. Wilson, *supra* note 5, at 964.

42. 622 F.2d 887 (5th Cir. 1980).

43. *Id.* at 894 (“Certainly, every discrepancy contained in an affidavit does not justify a district court’s refusal to give credence to such evidence.”). The district court “expressly discounted the issue raised by Bone’s affidavit on the ground that it was inconsistent with his deposition testimony.” *Id.* at 892.

44. *Id.* *Kennett-Murray* brought suit against Bone “seeking recovery on a promissory note and an employment contract.” *Id.* at 889. Bone argued that he was “fraudulently induced” into signing the contract. *Id.* During Bone’s deposition, questions shifted “between the promissory note and the employment contract with a degree of confusion on the parts of both Bone and the attorneys.” *Id.* at 894. The affidavit submitted by Bone served to explain his confusion. *Id.*

45. *Id.*

46. *Id.*

party is permitted to introduce an offsetting affidavit if he can demonstrate he was confused by the questions during the deposition."<sup>47</sup>

A second exception to the sham affidavit doctrine was established by the Seventh Circuit in *Adelman-Tremblay v. Jewel Cos.*<sup>48</sup> The *Adelman-Tremblay* court held that "[a] contradictory supplemental affidavit is also permissible if it is based on newly discovered evidence."<sup>49</sup> The evidence is not considered new if it was available to the affiant at the time of the deposition; it must truly be evidence discovered after the deposition was taken and unknown to the affiant.<sup>50</sup> The newly-discovered evidence exception carved out by the *Adelman-Tremblay* court is a generally accepted justification for contradictions between a deposition and a subsequent affidavit.<sup>51</sup>

#### B. *The Absence of Direct Supreme Court Support for the Sham Affidavit Doctrine*

The sham affidavit doctrine has not been directly addressed by the Supreme Court.<sup>52</sup> However, "language from Justice White's majority opinion in *Anderson v. Liberty Lobby* suggests that the doctrine is consistent with the Court's modern approach toward summary judgment."<sup>53</sup> The *Anderson* majority stated that "summary judgment should be granted where the evidence is such that it would

47. Wilson, *supra* note 5, at 964, 968 n.11 (citing *Kennett-Murray*, 622 F.2d at 894).

48. 859 F.2d 517 (7th Cir. 1988). Cathy Adelman-Tremblay filed suit against Jewel Companies, Inc. and Pacific World Corp. to recover for injuries suffered from her application of an artificial fingernails kit assembled by Pacific World and sold by a store owned and operated by Jewel. *Id.* at 518. Adelman-Tremblay alleged strict products liability. *Id.* The physicians who treated Adelman-Tremblay "characterized her reaction as allergic contact dermatitis." *Id.* at 519. Because Adelman-Tremblay testified in her deposition that she was "allergic to many substances," Jewel and Pacific World moved for summary judgment, asserting they were not "liable when an unusually susceptible consumer suffers a rare allergic reaction to a product not — previously known to cause such a reaction." *Id.* Adelman-Tremblay responded by submitting an affidavit of a doctor who characterized the cause of the injuries as "a toxic, not an allergic, reaction to the glue." *Id.* During a subsequent deposition, the doctor stated that he "no longer believed that the plaintiff suffered a toxic reaction." *Id.* Adelman-Tremblay then filed a supplemental affidavit in which the doctor stated Adelman-Tremblay was currently allergic to the glue but may not have been allergic to it at the time of the injury. *Id.* The court held that because the physician's supplemental affidavit was not based on "newly discovered evidence," it "could not be used to create a factual issue." *Id.* at 520.

49. *Id.* at 520.

50. Cox, *supra* note 23, at 288–89.

51. *Id.* at 288.

52. *See id.* at 276.

53. *Id.* (footnote omitted).

require a directed verdict for the moving party.”<sup>54</sup> The Supreme Court further noted that:

[T]he genuine issue summary judgment standard is very close to the reasonable jury directed verdict standard: [“]The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.[”]<sup>55</sup>

The test for summary judgment, therefore, is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”<sup>56</sup>

At least one legal commentator has proffered that “[t]his rule allows for the existence of the sham affidavit doctrine. If an affiant contradicts previous deposition testimony without explanation, the trial judge can rightly hold that a judgment in his favor would not be reasonable.”<sup>57</sup> This argument is persuasive when used to justify the sham affidavit doctrine in courts that employ a flexible test for determining whether an affidavit is a “sham.” A majority of the Federal Circuits allow district judges to strike some inconsistent affidavits, but not all.<sup>58</sup> These courts recognize, in addition to the exceptions discussed above,<sup>59</sup> that “not every prior inconsistency is devastating to the credibility of a witness; there is always the possibility that the apparent change was the product of an innocent misunderstanding of a question, nervousness at a deposition, or maybe a suddenly refreshed recollection.”<sup>60</sup> Such a flexible sham affidavit rule is fair because the court is looking at the party’s explanation and deciding whether a “reasonable jury” would believe it. That is, the court determines whether the explanation offered is so

---

54. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) (quoting *Sartor v. Ark. Gas Corp.*, 321 U.S. 620, 624 (1944)).

55. *Id.* at 251 (quoting *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 745 n.11 (1983)).

56. *Id.* at 251–52.

57. *Cox*, *supra* note 23, at 276.

58. James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1598 (1995).

59. *See supra* Part II.A.1.

60. Duane, *supra* note 58, at 1598; *see also Cox*, *supra* note 23, at 289–90 (discussing that some federal courts have adopted a “reasonableness test” for assessing unique explanations for contradictory affidavits).



implausible that no reasonable jury could believe it. If it is implausible, such that no reasonable jury would believe it, then the affidavit should be stricken. However, the argument does not work when a court adheres to a bright line rule, like Maryland Rule 2-501(e),<sup>61</sup> that does not take into account an affiant's explanation for an inconsistency.<sup>62</sup>

### III. MARYLAND FOLLOWS THE FEDERAL COURTS' LEAD: MARYLAND'S ADOPTION OF THE SHAM AFFIDAVIT RULE

Many states have followed the lead of the federal courts and now recognize the sham affidavit doctrine.<sup>63</sup> In 2003, the Maryland Rules Committee proposed an amendment to Maryland Rule 2-501<sup>64</sup> that encompassed the sham affidavit doctrine.<sup>65</sup> According to the note following the Rules Committee's proposal, the amendment was suggested in "respon[se] to the invitation of the Court of Appeals in *Pittman v. Atlantic Realty Co.* . . . for the Rules Committee to study the issue of 'sham affidavits.'"<sup>66</sup> On December 8, 2003, the Court of Appeals of Maryland ordered the Rules Committee's amendment to Maryland's summary judgment rule to take effect on July 1, 2004.<sup>67</sup> Maryland Rule 2-501 was amended to state:

---

61. See MD. R. 2-501(e).

62. See *infra* Part III (discussing how Maryland Rule 2-501(e) does not allow for an affiant to explain an inconsistency; as such, the court has no basis for determining whether a reasonable jury could find for the party).

63. See Wilson, *supra* note 5, at 965 n.16. The sham affidavit doctrine has not been adopted by every state. *Id.* at 965. There are states that hold "that a trial court is obliged to consider all evidence in opposition to a motion for summary judgment, including an affidavit that contradicts a prior deposition." *Id.*; see also *Junkins v. Slender Woman, Inc.*, 386 N.E.2d 789, 790 (Mass. App. Ct. 1979) ("For purposes of summary judgment it is sufficient that the plaintiff's later affidavit, if believed, indicated that the contrary is true."); *Delzer v. United Bank*, 484 N.W.2d 502, 508 (N.D. 1992) ("There are no doubt cases where contradictions in a party's discovery testimony will result in summary judgment because they are so extreme or farfetched as to be unbelievable.").

64. Maryland Rule 2-501 governs motions for summary judgment. The Rule states that "[a]ny party may make a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." MD. R. 2-501(a).

65. 30 Md. Reg. 1125 (Aug. 22, 2003).

66. *Id.*

67. MD. R. 2-501; Court of Appeals of Maryland Rules Order, 30 Md. Reg. 1907-08 (Dec. 26, 2003). The Court of Appeals of Maryland adopted the amendment to Rule 2-501 that was proposed by the Court of Appeals of Maryland's Standing Committee on Rules of Practice and Procedure. *Id.*

(e) **Contradictory Affidavit or Statement.** (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.<sup>68</sup>

The 2004 Amendment allows the trial court to disregard any part of an affidavit that contradicts a prior sworn statement.<sup>69</sup> The Rules Committee and the Court of Appeals of Maryland defined a prior sworn statement to 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.”<sup>70</sup>

---

68. Md. R. 2-501(e).

69. *Id.* *But see* *Junkins v. Slender Woman, Inc.*, 386 N.E.2d 789, 790 (Mass. App. Ct. 1979). The *Junkins* court held that a party is not bound by his prior deposition testimony. *Id.* “For purposes of summary judgment it is sufficient that the plaintiff’s later affidavit, if believed, indicated that the contrary is true. The conflict presents a question of credibility, which is not to be resolved by the judge on a motion for summary judgment.” *Id.* (citations omitted); *see also* *Stefan v. White*, 257 N.W.2d 206, 208–09 (Mich. Ct. App. 1977) (holding that a trial court must consider a plaintiff’s affidavit filed in answer to a summary judgment motion); *Delzer v. United Bank*, 484 N.W.2d 502, 508 (N.D. 1992) (concluding that the trial court “must consider the pleadings, admissions, affidavits, depositions, and interrogatories, as well as all possible inferences therefrom, in the light most favorable to the party opposing summary judgment”).

70. Md. R. 2-501(e). Maryland Rule 2-415(d) allows the deponent to make form or substance changes to his or her deposition within thirty days after receiving the deposition transcript. MD. R. 2-415(d). The deponent must note why each change is being made. *Id.* Rule 2-415 was amended, effective July 1, 2004, to allow a

Maryland's sham affidavit rule, Rule 2-501(e), gives the trial court broad power to strike contradictory parts of an affidavit submitted in opposition to a motion for summary judgment.<sup>71</sup> There is only one exception to Maryland's sham affidavit rule.<sup>72</sup> The contradictory affidavit may not be disregarded if the affiant "reasonably believed the prior statement to be true based on the facts known" and the statement made in the affidavit is "based on facts that were not known . . . and could not reasonably have been known to the [affiant] at the time [of] the prior statement."<sup>73</sup> This exception is analogous to the federal "newly discovered evidence" exception discussed in *Adelman-Tremblay v. Jewel Cos.*<sup>74</sup> The Maryland Rules Committee did not suggest, and the Court of Appeals of Maryland did not require, the inclusion of the federally recognized exception that allows a contradictory affidavit to be submitted if the affiant was confused by the questions during his or her deposition.<sup>75</sup>

Additionally, the amendment to Rule 2-501 does not allow for unique explanations of contradictions in subsequent affidavits.<sup>76</sup> Some federal courts disagree on their treatment of situations in which a party offers a "unique explanation for contradictions" between his deposition and subsequent affidavits.<sup>77</sup> One way to handle unique explanations is to take them on a case-by-case basis and determine whether the contradiction is "reasonably justified."<sup>78</sup> The reasonableness test recognizes there are many conceivable justifications for why a party's subsequent affidavit contradicts their deposition testimony and allows the court to "evaluate each excuse for contradiction on its own merits."<sup>79</sup> However, Maryland Rule 2-501(e) does not take into account unique explanations for

---

deponent to make substantive changes, rather than just corrections, to his deposition. Court of Appeals of Maryland Rules Order, 30 Md. Reg. 1906-07 (Dec. 26, 2003).

71. MD. R. 2-501(e).

72. *Id.* at 2-501(e)(2).

73. *Id.*

74. Compare *Adelman-Tremblay v. Jewel Cos.*, 859 F.2d 517, 520 (7th Cir. 1988) with MD. R. 2-501(e)(2).

75. Compare *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980) and *Wilson*, *supra* note 5, at 964, with Court of Appeals of Maryland Rules Order, 30 Md. Reg. 1908 (Dec. 26, 2003) and MD. R. 2-501(e).

76. See MD. R. 2-501(e)(2).

77. *Cox*, *supra* note 23, at 289-90.

78. *Id.* There are also federal courts that reject any alternative excuses for contradictions. *Id.* That is, contradictions not based on new evidence or contradictions due to confusion at the deposition. See *id.*

79. *Id.* at 290.

contradictions; the rule allows the court to rely on contradictory affidavits only when the contradiction is based on new evidence.<sup>80</sup>

#### IV. WHY THE SHAM AFFIDAVIT DOCTRINE: RATIONALE FOR THE SHAM AFFIDAVIT DOCTRINE

The objective of summary judgment is to distinguish “real and genuine issues” of fact from those that are false.<sup>81</sup> The argument in support of the sham affidavit doctrine is that an affidavit submitted in opposition to a motion for summary judgment, and that contradicts the affiant’s prior sworn statements, does not create a genuine issue of fact.<sup>82</sup> It is argued that contradictory affidavits are precluded “by the affiant’s unambiguous deposition admissions.”<sup>83</sup> “[W]hen parties admit in a deposition to certain conduct, they place the material facts of a case out of dispute, and a transparent subsequent denial of such admissions should not be considered.”<sup>84</sup> The crux of the argument is that in the absence of the sham affidavit doctrine, parties would have an incentive to submit fraudulent affidavits in an effort to force a settlement.<sup>85</sup> Courts that have adopted the sham affidavit doctrine believe that “if litigants could, without penalty, offer affidavits that contradict previous testimony, summary judgment would be eviscerated.”<sup>86</sup>

The *Perma* court discussed three justifications<sup>87</sup> for the establishment of the sham affidavit doctrine, the basis for Maryland Rule 2-501(e).<sup>88</sup> First, the *Perma* court relied on *Moore’s Federal Practice* for the proposition that deposition testimony is more reliable than an affidavit because deposition testimony is subject to cross

---

80. MD. R. 2-501(e)(2).

81. *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975).

82. *See Cox, supra* note 23, at 279.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 268; *see also* *Buckner v. Sam’s Club, Inc.*, 75 F.3d 290, 293 (7th Cir. 1996) (“The concern in litigation . . . is that a party will first admit no knowledge of a fact but will later come up with a specific recollection that would override the earlier admission.”).

87. *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572 (1969); *Pittman v. Atl. Realty Co.*, 359 Md. 513, 529, 754 A.2d 1030, 1038 (2000).

88. *Compare Perma*, 410 F.2d 572 (holding that an affidavit that contradicts prior deposition testimony can be disregarded when deciding a motion for summary judgment), *with* MD. R. 2-501(e) (stating that a trial court can disregard an affidavit that materially contradicts prior sworn statements in considering a motion for summary judgment).

examination.<sup>89</sup> This has been referred to as the “reliability” justification for the sham affidavit doctrine.<sup>90</sup> The second justification set forth by the *Perma* court is that disregarding contradictory affidavits ensures that “the utility of summary judgment as a procedure for screening out sham issues of fact” is not defeated.<sup>91</sup> This is described as the “utility” justification for the sham affidavit doctrine.<sup>92</sup> Lastly, the *Perma* court held that it would be unfair to allow a party to generate a dispute of material fact through “inconsistent statements made by [that party] the deponent and [that party] the affiant.”<sup>93</sup> Although the *Perma* court “did not use the word fairness”<sup>94</sup> to describe the third rationale, it is often referred to as the fairness justification for the sham affidavit doctrine.<sup>95</sup> The next part of this Comment will address an inherent problem with Rule 2-501(e), and then will address each of the justifications for the sham affidavit rule.<sup>96</sup> Furthermore, it will show how reliability, utility, and fairness can each be attained without Maryland Rule 2-501(e).<sup>97</sup>

## V. WHY MARYLAND SHOULD ABANDON THE SHAM AFFIDAVIT RULE: THERE ARE LESS RESTRICTIVE MEANS AVAILABLE FOR DEALING WITH SHAM AFFIDAVITS

### A. *An Inherent Problem with Maryland’s Current Sham Affidavit Rule*

#### 1. The Right to Have a Jury Decide Factual Issues in Civil Proceedings

“The right to a trial by jury is deeply embedded in the American democratic ethos.”<sup>98</sup> The right to a trial by jury is guaranteed by the

89. 410 F.2d at 578 (“The deposition of a witness will usually be more reliable than his affidavit, since the deponent was either cross-examined by opposing counsel, or at least available to opposing counsel for cross examination.”) (quoting 6 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 56.22[1] at 2814 (2d ed. 1965)); accord *Pittman*, 359 Md. at 529, 754 A.2d at 1038.

90. Holley, *supra* note 12, at 880.

91. 410 F.2d at 578; accord *Pittman*, 359 Md. at 529, 754 A.2d at 1038.

92. *Pittman*, 359 Md. at 529, 754 A.2d at 1038; Holley, *supra* note 12, at 880.

93. *Pittman*, 359 Md. at 529, 754 A.2d at 1038 (quoting *Perma*, 410 F.2d at 578).

94. *Pittman*, 359 Md. at 529, 754 A.2d at 1038.

95. Holley, *supra* note 12, at 881 (noting the *Perma* court’s fair play rationale).

96. See *infra* Part V.

97. See *infra* Part V.

98. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 31 (1986).

U.S. Constitution,<sup>99</sup> as well as in every state constitution.<sup>100</sup> The Constitution of Maryland guarantees “[t]he right [to a] trial by Jury of all *issues of fact* in civil proceedings . . . where the amount in controversy exceeds the sum of \$10,000.”<sup>101</sup> The Court of Appeals of Maryland has held that “like the [S]eventh [A]mendment to the Constitution of the United States, [the Constitution of Maryland] requires that enjoyment of the right . . . be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.”<sup>102</sup>

In a jury trial, the jury has the responsibility of finding facts and settling disputes of facts.<sup>103</sup> It is the “province of the jury to decide or determine the facts of the case from the evidence adduced and to render a verdict in accordance with the instructions given by the court.”<sup>104</sup> It is the jury’s duty to “weigh[] the evidence, judg[e] the credibility of witnesses, and reach[] a verdict.”<sup>105</sup> “The right to determine the credibility of witnesses is at the core of the jury’s fact-finding function.”<sup>106</sup> Maryland’s sham affidavit rule encroaches on the jury’s fact-finding domain by allowing the trial judge to make a credibility determination.<sup>107</sup>

---

99. The Seventh Amendment to the United States Constitution guarantees the right to a jury trial. U.S. CONST. amend. VII. The Seventh Amendment states:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

100. HANS & VIDMAR, *supra* note 98, at 31.

101. MD. CONST. art. 23 (emphasis added).

102. *State v. Johnson*, 282 Md. 274, 291, 385 A.2d 57, 67 (1978) (quoting *In re Peterson*, 253 U.S. 300, 310 (1920)), *overruled on other grounds*, *Newell v. Richards*, 323 Md. 717, 594 A.2d 1152 (1991).

103. CHARLES W. JOINER, *CIVIL JUSTICE AND THE JURY* 16 (Greenwood Press 1972) (1962); SIR PATRICK DEVLIN, *TRIAL BY JURY* 61 (1988) (1956) (“‘[T]he facts are for you and the law is for me.’ That is the theme which with variations will be found at or near the beginning of every charge to a jury.”); *Holley*, *supra* note 12, at 865 (“Judges decide questions of law, while juries decide questions of fact.”).

104. 47 AM. JUR. 2D *Jury* § 2 (2006).

105. *Id.* (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 625 (1991)).

106. *Holley*, *supra* note 12, at 875 (quoting 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2527 (2d ed. 1995)).

107. *See infra* Part V.A.2.

## 2. Function of Summary Judgment

A motion for summary judgment is governed by Maryland Rule 2-501, which states that a motion for summary judgment may be filed “on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law.”<sup>108</sup> The Court of Appeals of Maryland held that “[s]ummary judgment is not a substitute for trial. Stated differently, its purpose is not to try the case or resolve factual disputes.”<sup>109</sup> The court’s role in deciding a motion for summary judgment does not include weighing the evidence.<sup>110</sup> Instead, the role of the court in deciding a motion for summary judgment is to determine whether there is a genuine factual dispute.<sup>111</sup>

It has been held in Maryland that “[c]redibility is not an issue to be determined on summary judgment.”<sup>112</sup> Allowing a trial judge to disregard an inconsistent affidavit on the ground that the affiant’s deposition testimony is more reliable enables the trial judge to make a credibility determination. This deprives the affiant of the right to have a jury decide questions of fact. The judge is essentially saying the affiant is lying because her affidavit is inconsistent with her deposition testimony. Rule 2-501(e) allows the trial judge to answer the question: Is the party’s statement in the affidavit a lie, or was the party able to relate her recollection with greater clarity than she was able to at her deposition?<sup>113</sup> Only a jury can make that determination because it is a question of credibility.<sup>114</sup>

---

108. Md. R. 2-501(a); *accord* *Georgia-Pacific Corp. v. Benjamin*, 394 Md. 59, 73, 904 A.2d 511, 519 (2006).

109. *Goodwich v. Sinai Hosp. of Balt.*, 343 Md. 185, 205–06, 680 A.2d 1067, 1077 (1996).

110. *Id.* at 206, 680 A.2d at 1077–78.

111. *Fishman Constr. Co. v. Hansen*, 238 Md. 418, 421–22, 209 A.2d 605, 607 (1965).

112. *Coffey v. Derby Steel Co.*, 291 Md. 241, 247, 434 A.2d 564, 568 (1981); *accord* *Berkey v. Delia*, 287 Md. 302, 326, 413 A.2d 170, 181–82 (1980) (stating that credibility is not decided on summary judgment); *Wolfe v. Lamar & Wallace, Inc.*, 261 Md. 174, 274 A.2d 121 (1971) (“The court does not attempt to decide any issue of fact or of credibility, but only whether such issues exist.” (quoting *Strickler Eng’g. Corp. v. Seminar, Inc.*, 210 Md. 93, 100, 122 A.2d 563, 567 (1956))); *Whalen v. Mayor & City Council of Baltimore*, 164 Md. App. 292, 306, 883 A.2d 228, 237 (2005) (holding that the trial court may not determine the credibility of witnesses when deciding a motion for summary judgment), *rev’d on other grounds*, 395 Md. 154, 909 A.2d 683 (2006).

113. *See Anthony’s Pier Four, Inc. v. Crandall Dry Dock Eng’rs, Inc.*, 489 N.E.2d 172, 178 (Mass. 1986) (holding that an affidavit that conflicts with deposition testimony may be the result of being able to recollect the facts with greater clarity).

114. *See Coffey*, 291 Md. at 247, 434 A.2d at 568.

The Court of Appeals of Maryland held in *Berkey v. Delia*<sup>115</sup> “that credibility is not an issue to be decided on summary judgment.”<sup>116</sup> “The function of the summary judgment procedure is not to try the case or to decide issues of fact. It is merely to determine whether there is an issue of fact to be tried, and if there is none, to cause judgment to be rendered accordingly.”<sup>117</sup> As recently as 2005, the Court of Special Appeals of Maryland held that “the trial court may not determine the credibility of witnesses” in deciding whether to grant a motion for summary judgment.<sup>118</sup> Maryland Rule 2-501(e), the sham affidavit rule, gives the court the ability to determine the credibility of the affiant. According to the Court of Appeals of Maryland, “[t]he sham affidavit rule is contrary to the way in which this Court’s rule on summary judgment traditionally has been applied, because, in application, the sham affidavit rule requires a credibility judgment by the trial court.”<sup>119</sup> The sham affidavit doctrine enables the court to strip the party opposing a motion for summary judgment of their right to have a jury determine all issues of fact. One legal commentator has said, “the sham doctrine is, for all practical purposes, making precisely the same credibility determination that the credibility rule prohibits. That is, the sham doctrine explicitly permits courts to exercise apparently forbidden discretion.”<sup>120</sup>

a. *The credibility rule and Maryland’s unconstitutional violation of it with Rule 2-501(e)*

Maryland courts adhere to the credibility rule when deciding a motion for summary judgment.<sup>121</sup> The credibility rule requires that a jury, not a judge, make credibility determinations.<sup>122</sup> Legal commentator Michael Holley has stated:

---

115. 287 Md. 302, 413 A.2d 170.

116. *Id.* at 326, 413 A.2d at 181–82.

117. *Id.* at 326, 413 A.2d at 181 (quoting *Tellez v. Canton R.R.*, 212 Md. 423, 430, 129 A.2d 809, 813 (1957)).

118. *Whalen*, 164 Md. App. at 306, 883 A.2d at 237.

119. *Pittman v. Atl. Realty Co.*, 359 Md. 513, 534, 754 A.2d 1030, 1041 (2000).

120. Holley, *supra* note 12, at 887.

121. See discussion *supra* Part V.A.1–2 (discussing that a jury makes findings of fact); *Coffey v. Derby Steel Co.*, 291 Md. 241, 247, 434 A.2d 564, 568 (1981) (holding that credibility is not an issue for summary judgment because the judge makes no findings of fact).

122. Holley, *supra* note 12, at 873.



Because the existence of a falsehood in testimony is a question of fact, only jurors, who have looked the witness in the face, can disregard personal testimony as dishonest. Consequently, the judge generally cannot disregard personal testimony on credibility grounds after simply reading the witness' [sic] affidavit at the summary judgment stage. This is the "credibility rule."<sup>123</sup>

The purpose of the credibility rule is to "prevent a judge from using his discretion over the outcome of a plaintiff's case, rather than to simply facilitate adjudication."<sup>124</sup> Holley has proffered that the core rationale supporting the credibility rule is that by allowing the jury to make credibility determinations, it ensures the legitimacy of the judgment.<sup>125</sup> The argument is that the jury deliberates and then decides who is lying.<sup>126</sup> Subsequently, no questions can be asked as to how the jury made its determination; therefore, "the parties are forced to live with the jury's conclusions . . . ."<sup>127</sup> "This method does not guarantee, or even hardly encourage, accurate results, but the prevailing belief is that it protects the legitimacy of judgments because it at least 'hides the source of any inaccuracy from the public's gaze.'"<sup>128</sup>

Although Holley's argument is persuasive, the most significant rationale for the credibility rule is the constitutional rationale—without the credibility rule, the jury cannot adequately judge the law and the facts.<sup>129</sup> Credibility is a question of fact for the jury,<sup>130</sup> and the Constitution of Maryland preserves the right to have a jury determine all questions of fact.<sup>131</sup> The only way that a sham affidavit rule can be constitutional—not in violation of the credibility rule—is if the rule is severely limited. The standard for striking an inconsistent affidavit must require that no "reasonable jury"<sup>132</sup> would rely on the testimony; therefore, the person is incredible as a matter of law.

---

123. *Id.* at 865.

124. *Id.* at 873.

125. *Id.* at 876.

126. *Id.*

127. *Id.*

128. *Id.* at 876–77 (quoting in part George Fisher, *The Jury's Rise as Lie Detector*, 107 *YALE L.J.* 575, 578–79 (1997)) (footnote omitted).

129. *See* MD. CONST. art. 23.

130. Holley, *supra* note 12, at 875; *see also supra* note 112 and accompanying text.

131. *See* MD. CONST. art. 23.

132. *See* discussion *infra* Part V.B. (discussing how the test for deciding a motion for summary judgment is analogous to the reasonable jury test used for deciding a motion for judgment).

Testimony is incredible as a matter of law if it “attempts to establish something physically impossible within common knowledge and experience, or something contrary to the laws of nature or indisputable scientific principles within the court’s judicial knowledge.”<sup>133</sup> The Court of Appeals of Maryland has held that the test to determine whether a party’s testimony is incredible as a matter of law is whether the “undisputed . . . facts . . . demonstrate that the evidence is false beyond a reasonable doubt.”<sup>134</sup> If the testimony given in an affidavit is found to be incredible as a matter of law then there is no longer a jury question, and the judge may disregard the affidavit in deciding a motion for summary judgment.<sup>135</sup> Maryland Rule 2-501(e), in its current form, circumvents the credibility rule; therefore, it is unconstitutional.

Maryland Rule 2-501(e) does not require that an affidavit be incredible as a matter of law before being stricken.<sup>136</sup> Rule 2-501(e) does not enable the affiant to explain the inconsistency; therefore, the trial judge has no way of determining whether the affidavit is incredible as a matter of law. Rather, Rule 2-501(e) allows an affidavit to be stricken if it contradicts prior sworn testimony and the contradiction is not based on new information unknown at the time of the prior sworn statement.<sup>137</sup> The standard utilized in Rule 2-501(e) allows the trial judge to make credibility determinations,<sup>138</sup> a function reserved for the jury through the credibility rule and the Constitution of Maryland.<sup>139</sup> Maryland’s sham affidavit rule invites the trial judge to abrogate the right to a jury trial on the issue of credibility; therefore, the rule violates Maryland’s constitutionally guaranteed right to have a jury decide questions of fact.<sup>140</sup> Maryland Rule 2-501(e) could be amended to conform to the Constitution of

---

133. *Campbell v. Dix*, 203 Md. 338, 345, 100 A.2d 798, 802 (1953); *see Holley, supra* note 12, at 875 (“The only exception [to the credibility rule] seems to be where the plaintiff’s testimony defies the laws of physics.”).

134. *York Motor Express Co. v. State*, 195 Md. 525, 535, 74 A.2d 12, 16 (1950); *Campbell*, 203 Md. at 345, 100 A.2d at 802; *see also Pittman v. Atl. Realty Co.*, 359 Md. 513, 539, 754 A.2d 1030, 1044 (2000) (“Reasonable persons, based on their real life experiences, may not be persuaded that Hall’s failure to be consistent in dealing with the length of periods of time and when they began means that the testimony most favorable to the Petitioners cannot be believed.”).

135. *York*, 195 Md. at 534, 74 A.2d at 16.

136. *See* MD. R. 2-501(e).

137. *Id.*

138. *See supra* Part V.A.2 (discussing how Rule 2-501(e) allows the trial judge to make a credibility determination at the summary judgment stage).

139. *See supra* Part V.A.1–2.

140. MD. CONST. art. 23.

Maryland, but the justifications for the sham affidavit rule can each be achieved in a less restrictive way.<sup>141</sup>

B. *Questions of Reliability Caused by Inconsistencies in a Party's Testimony Should be Addressed on Cross-Examination Before a Jury*

*Perma's* "reliability" justification for the sham affidavit doctrine is based on the assertion that deposition testimony is more reliable than an affidavit because deposition testimony is subject to cross examination.<sup>142</sup> However, the remainder of the passage relied on from *Moore's Federal Practice* goes on to state: "[I]f a witness has made an affidavit and his deposition has also been taken, and the two in some way conflict, the court may not exclude the affidavit from consideration in the determination of the question whether there is any genuine issue as to any material fact."<sup>143</sup> Nevertheless, the *Perma* court held that the trial court "could properly conclude that the statement made in the affidavit was less reliable than the contradictory statements in the deposition, . . . and that it did not raise a triable issue of fraud."<sup>144</sup>

The reliability justification discussed by the *Perma* court is undercut by the argument that the sham affidavit rule "shift[s] the credibility determination from the trier of fact at trial, where the trier of fact would have the benefit of observing the witness's demeanor on cross-examination, to the trial court on summary judgment, where the trial court would be limited to a paper record."<sup>145</sup> Proponents of the sham affidavit rule argue that "sham affidavits do not introduce issues of credibility, because they are precluded from consideration by the affiant's unambiguous deposition admissions."<sup>146</sup> This argument is inconsistent because, although it is true that a sham affidavit cannot create a genuine dispute, the only way to determine that an affidavit is a sham is to weigh the affiant's credibility.<sup>147</sup> The fact finder should be allowed to determine which version of the facts to believe.<sup>148</sup> There are some inconsistent affidavits that are not

---

141. See *infra* Parts V.B–C.

142. *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969) (quoting 6 MOORE, *supra* note 89, at 2814).

143. *Id.* (quoting 6 MOORE, *supra* note 89, at 2814).

144. *Id.* at 577 (citing 6 MOORE, *supra* note 89, at 2814).

145. *Pittman v. Atl. Realty Co.*, 359 Md. 513, 540, 754 A.2d 1030, 1045 (2000); see *supra* Part V.A. (discussing how shifting the credibility determination is unconstitutional).

146. *Cox*, *supra* note 23, at 279.

147. See *Duane*, *supra* note 58, at 1599–1600.

148. See *Anthony's Pier Four, Inc. v. Crandall Dry Dock Eng'rs, Inc.*, 489 N.E.2d 172, 178 (Mass. 1986).

fraudulent;<sup>149</sup> yet Rule 2-501(e) directs the court to “strike the contradictory part” of any affidavit, not falling within the one exception,<sup>150</sup> that “materially contradicts the prior sworn statement”—in essence, classifying the affidavit as a sham.<sup>151</sup>

In an attempt to narrow the sham affidavit doctrine the Eleventh Circuit held:

To allow every failure of memory or variation in a witness’s testimony to be disregarded as a sham would require far too much from lay witnesses and would deprive the trier of fact of the traditional opportunity to determine which point in time and with which words the witness (in this case, the affiant) was stating the truth. Variations in a witness’s testimony and any failure of memory throughout the course of discovery create an issue of credibility as to which part of the testimony should be given the greatest weight if credited at all.<sup>152</sup>

A sham affidavit is an “act of desperation”;<sup>153</sup> therefore, the inconsistency in the party’s statements should be brought up during cross-examination to attack the party’s credibility.<sup>154</sup> If the evidence presented in the affidavit is rejected by the trier of facts and the judge is convinced the affidavit is a sham, then the affiant and their attorney can face severe sanctions.<sup>155</sup>

*C. The Utility Function of the Summary Judgment Procedure, as a Process for Screening Out Sham Claims, Will Not Be Defeated in the Absence of Maryland Rule 2-501(e)*

The purpose of summary judgment “is not to try the case or resolve factual disputes. Rather, the procedure is designed to determine whether a factual controversy exists requiring a trial.”<sup>156</sup> In

---

149. Cox, *supra* note 23, at 280.

150. Md. R. 2-501(e)(2).

151. *Id.*

152. Tippens v. Celotex Corp., 805 F.2d 949, 953–54 (11th Cir. 1986).

153. Pittman v. Atl. Realty Co., 359 Md. 513, 541, 754 A.2d 1030, 1045 (2000).

154. *Id.* (“[T]he principal deterrent to the sham affidavit is its substantial undermining of the credibility of the nonmovant when testifying at trial and the increased risk to the nonmovant of losing the case on the merits.”).

155. See Pittman, 359 Md. at 542–43, 754 A.2d at 1045–46; see also *infra* Part V.D.1.a–b.

156. Goodwich v. Sinai Hosp. of Balt., 343 Md. 185, 205–06, 680 A.2d 1067, 1077 (1996) (citations omitted); see also Sadler v. Dimensions Healthcare Corp., 378 Md. 509, 534, 836 A.2d 655, 669–70 (2003) (“[T]he purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide

Maryland, to prevent the entry of a motion for summary judgment, the nonmoving party must present evidence that “‘would allow a reasonable fact-finder to conclude’ that, in actuality, the facts were those most favorable to the nonmovant.”<sup>157</sup> The judge should essentially ask:

Assuming that all of the witnesses would testify at a trial just as they have in their most recent affidavits, that they are cross-examined about the allegedly inconsistent statements they made at their depositions, and that the jury hears the same explanation . . . given (if any) about the variation, is there *any* genuine possibility that the jury might find in favor of the adverse party?<sup>158</sup>

One legal commentator wrote, “a factual question will not reach a jury ‘merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such character that it would warrant the jury in finding a verdict in favor of that party.’”<sup>159</sup> Accordingly, Maryland courts are presently authorized to disregard content of an affidavit that is so implausible that no reasonable<sup>160</sup> jury would believe the statements.<sup>161</sup> This allows the courts to keep truly sham affidavits out while allowing the questionable affidavits to go to the jury. This method safeguards the

---

whether there is an issue of fact, which is sufficiently material to be tried.” (quoting *Taylor v. NationsBank, N.A.*, 365 Md. 166, 173, 776 A.2d 645, 650 (2001); *Jones v. Mid-Atlantic*, 362 Md. 661, 675, 766 A.2d 617, 624 (2001))).

157. *Pittman*, 359 Md. 513, 538, 754 A.2d 1030, 1043 (quoting *Chesapeake Publ’g Corp. v. Williams*, 339 Md. 285, 299, 661 A.2d 1169, 1176 (1995)); *see also* *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 739, 625 A.2d 1005, 1011 (1993) (“[T]here must be evidence upon which the jury could reasonably find for the plaintiff.”).

158. *Duane*, *supra* note 58, at 1604.

159. *Id.* at 1582 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)).

160. The *Pittman* opinion uses the phrases “rational jury,” “rational jury,” “reasonable fact-finder,” and “reasonable persons” interchangeably to describe the test used by Maryland courts to adjudicate a motion for summary judgment. *Pittman*, 359 Md. at 538–39, 754 A.2d at 1043–44. The phrase rational jury, however, can have a different connotation than the phrase reasonable jury, which is the correct description of Maryland’s test. *See id.* at 537–38, 754 A.2d at 1043. It must be inferred that, when the court uses the phrase rational jury, it means reasonable jury, because the court states that the test for deciding a motion for summary judgment is analogous to the reasonable jury test used for deciding a motion for judgment. *Id.* at 537, 539, 754 A.2d 1043, 1044.

161. *Id.* at 538, 754 A.2d at 1044; *see also* *Duane*, *supra* note 58, at 1581. (“[T]here are certain basic claims that witnesses might make that are not provably false but are so wildly implausible and unbelievable that no rational jury would be allowed to return a verdict on the basis of such testimony.”).

“role of the jury as arbiters of disputable factual issues” while still allowing “the judge to weed out those truly sham affidavits that have no possibility of being accepted by any jury.”<sup>162</sup>

It has been argued that the reasonable jury test for ruling on a motion for summary judgment provides direct support for the sham affidavit doctrine.<sup>163</sup> If an affidavit contradicts previous testimony without an explanation, then it would be unreasonable for a judge or jury to believe the affidavit or make a finding based on it.<sup>164</sup> This argument, however, cannot be used to justify Maryland’s sham affidavit rule because Maryland adopted a bright line rule on contradictory affidavits.<sup>165</sup> Maryland Rule 2-501(e)(2) states the court “shall strike” contradictory parts of an affidavit unless the contradiction is based on new evidence unknown at the time of the prior sworn statement.<sup>166</sup> Maryland’s Rule, in its current form, does not allow a party filing a contradictory affidavit to offer an explanation for the inconsistency.<sup>167</sup> Rule 2-501(e)(2) does not allow the party to submit an explanation; therefore the judge has no way of determining whether a “reasonable jury” could find for the party.<sup>168</sup>

Were the courts to disregard Maryland’s inflexible sham affidavit rule, the reasonable jury test, discussed in *Pittman v. Atlantic Realty Co.*,<sup>169</sup> could screen out sham claims at the summary judgment stage of litigation. The trial judge, when faced with an affidavit that contradicts a prior sworn statement, could listen to the party’s explanation and determine whether a reasonable jury could find for that party.<sup>170</sup> This approach would ensure that the utility function of the summary judgment procedure,<sup>171</sup> as a process for screening out sham claims, is not defeated, while also ensuring that a jury decides reasonably disputed facts.

---

162. Duane, *supra* note 58, at 1604.

163. *See supra* Part II.B.

164. Cox, *supra* note 23, at 276.

165. *Pittman*, 359 Md. at 547–48, 754 A.2d at 1049.

166. MD. R. 2-501(e)(2).

167. *Pittman*, 359 Md. at 547–48, 754 A.2d at 1049.

168. *Id.* at 539, 754 A.2d at 1044.

169. 359 Md. 513, 538, 754 A.2d 1030, 1043 (2000).

170. *Id.* at 538, 754 A.2d at 1044; Duane, *supra* note 58, at 1581.

171. *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (1969); *accord Pittman*, 359 Md. at 529, 754 A.2d at 1038.

*D. It is Not Unfair to Allow a Party to Submit an Affidavit In Opposition to a Motion for Summary Judgment, Which Contradicts Prior Sworn Deposition Testimony.*

1. *Pittman v. Atlantic Realty Co.*<sup>172</sup>

Prior to Maryland's adoption of Rule 2-501(e), *Pittman* was the leading Maryland case on the sham affidavit doctrine. The central issue in *Pittman* was "whether a trial court has discretion to strike affidavits, submitted in response to a motion for summary judgment . . . when the factual content of those affidavits varies from what the nonmoving party previously had furnished in discovery."<sup>173</sup> Sheri Hall filed suit against Atlantic Realty Company on behalf of her minor child, Terran Pittman.<sup>174</sup> Hall alleged that Pittman suffered injury due to exposure to lead paint at the premises owned by Atlantic Realty.<sup>175</sup> The main factual issue in the *Pittman* case was the amount of time Pittman spent at the subject property.<sup>176</sup> In her Answers to Interrogatories, Hall stated she and her son moved into the premises in the spring or summer of 1992.<sup>177</sup> Hall further stated that Pittman was cared for at the premises "during the hours of 8:00 a.m. through 4:00 p.m., Monday through Friday."<sup>178</sup> However, at her deposition, "Hall's answers concerning how long she and Terran resided . . . at the subject premises, and how often she visited there with Terran, were vague, confused, and inconsistent."<sup>179</sup> During her deposition, Hall gave the following measures of time her son spent at the subject premises:

"[a]bout a month"; "[a]bout two weeks. Two months I mean"; "[f]or about two months"; for a time "in the fall, probably"; for a time beginning when her son "was two . . . [o]r getting ready to turn two. It was somewhere around that area"; for a time ending "close to a holiday because I had to buy [Terran] an outfit. . . . It might have been Easter or the Fourth of July. I'm trying to think. Because it was spring when I was around there. Easter is in the spring,

---

172. 359 Md. 513, 754 A.2d 1030.

173. *Id.* at 517, 754 A.2d at 1032.

174. *Id.* at 517-18, 754 A.2d at 1032.

175. *Id.* at 518, 754 A.2d at 1032.

176. *Id.* at 519, 754 A.2d at 1033; *see also* Jeffrey S. Gauges, Recent Development, *Pittman v. Atlantic Realty Co.: The Court of Appeals of Maryland Refuses to Adopt the Federal "Sham" Affidavit Rule*, 7 U. BALT. J. ENVTL. L. 176, 176 (2000).

177. *Pittman*, 359 Md. at 519, 754 A.2d at 1033.

178. *Id.*

179. *Id.*

right? Right”; for a time beginning “before [Terran’s] birthday [in December 1992]”; for a time comprising “January, February [1993], because it wasn’t too bad outside”; “[a]bout two months”; “about two months, because I know how many times I gave [Porter] some money for rent money.” Finally, in response to the question whether “two months is the maximum that you lived with [Porter],” Hall answered, “Right, yes.”<sup>180</sup>

The only, arguably, definitive answer Hall gave during her deposition was that she and her son lived at the subject premises for two months.<sup>181</sup> However, it could also be inferred that they lived at the subject premises from December 1992 until Easter 1993.<sup>182</sup> Furthermore, Hall’s deposition testimony with respect to visiting the subject premises differed from her answers to interrogatories.<sup>183</sup> The best possible inference that can be made from Hall’s deposition is that Terran “visited the subject premises twice a week before residing there and three to four times a week for up to three hours at a time after residing there.”<sup>184</sup>

In response to Atlantic Realty’s motion for summary judgment, Hall submitted an affidavit which varied from her deposition and her answers to interrogatories.<sup>185</sup> Hall stated in her affidavit that she and her son visited the subject property seven to eight hours everyday, and that they lived in the subject premises for five and half months.<sup>186</sup> Hall offered no explanation for the variances from the prior evidence given.<sup>187</sup>

Even though faced with an inconsistent affidavit,<sup>188</sup> the Court of Appeals of Maryland refused to adopt the federal sham affidavit

---

180. *Id.* at 519–20, 754 A.2d at 1033 (alterations in original).

181. *Id.* at 520, 754 A.2d at 1033.

182. *Id.*

183. *Id.* at 520–21, 754 A.2d at 1034. Hall testified that “‘here and there, [Porter] baby-s[a]t [Terran]’; ‘[Porter] lived right around the corner from us, so I would stop in there quite often. . . . [P]robably like twice out of a week or something like that, out of a month, who knows. I’d just drop in, you know.’” *Id.* (alterations in original).

184. *Id.* at 521, 754 A.2d at 1034.

185. *Id.* at 523–24, 754 A.2d at 1035.

186. *Id.*

187. *Id.* at 524, 754 A.2d at 1036.

188. Given the back and forth nature of Hall’s testimony, it could be argued that Hall’s affidavit is an example of testimony that is incredible as a matter of law. The *Pittman* Court, however, stated reasonable persons could believe Hall’s testimony despite the inconsistencies. *Id.* at 539, 754 A.2d at 1044.



doctrine.<sup>189</sup> In refusing to adopt the sham affidavit doctrine, the Court of Appeals of Maryland identified several methods in which the trial court could deal with inconsistent affidavits, other than striking the affidavit.<sup>190</sup> Each of the methods discussed by the *Pittman* court ensures fairness for the party opposing the affidavit.<sup>191</sup> Furthermore, each of the methods discussed serves to prevent some of the obvious problems caused by sham affidavits,<sup>192</sup> *i.e.*, cluttering up the courts, increasing the cost of litigation, and causing emotional exhaustion of the parties.<sup>193</sup>

*a. Perjury*

If the trial court believes a knowingly false affidavit has been filed, they may “refer the matter to the prosecutor for possible perjury charges.”<sup>194</sup> Maryland Code, Criminal Law, § 9-101(a) states that “[a] person may not willfully and falsely make an oath or affirmation as to a material fact . . . in an affidavit made to induce a court or officer to pass an account or claim; . . . [or] in an affidavit or affirmation made under the Maryland Rules.”<sup>195</sup>

---

189. *Id.* One concern the *Pittman* court had about the sham affidavit rule was that if it was adopted:

[I]n order to address what may be a relatively small number of cases in which sham affidavits are presented, the downside possibly would be an increase in the filings of summary judgment motions that are based on an attempt to convince the trial court that some variation in the nonmovant’s affidavit was completely and inexplicably contradictory, and that the variation was not simply a clarification or elaboration.

*Id.* at 541–42, 754 A.2d at 1045.

190. *Id.* at 542–43, 754 A.2d at 1045–46.

191. *See id.*

192. The three methods discussed by the *Pittman* court and addressed in this Comment are not the only methods available to a trial judge to deal with a sham affidavit, other than striking it. *See* Duane, *supra* note 58, at 1605–10. The argument has been made that the power of the trial judge to grant a new trial may serve as an effective method of dealing with sham affidavits without striking them completely. *Id.* at 1609–10. However, granting a new trial may present an excessively long process for dealing with a plaintiff who offers testimony that is inconsistent with her deposition. *See id.* Additionally, a new trial does not attack the problems caused by sham affidavits; instead, a new trial exacerbates the problems. *See id.* A new trial is essentially a redo; the court must rehear the case, the parties must pay for a new trial, and the lawyers must endure the emotional cost of a new trial.

193. *See Pittman*, 359 Md. at 542–43, 754 A.2d at 1045–46; *see also* Duane, *supra* note 58, at 1610–11 (discussing problems caused by sham affidavits).

194. *Pittman*, 359 Md. at 542, 754 A.2d at 1045.

195. MD. CODE ANN., CRIM. LAW § 9-101(a)(3),(5) (LexisNexis Supp. 2007).

Section 9-101(b) of the Maryland Code makes filing a false affidavit a misdemeanor crime, punishable by up to ten years in prison.<sup>196</sup> Although Maryland courts have been reluctant to enforce the crime of perjury upon those filing sham affidavits in civil cases,<sup>197</sup> the courts have the power to charge parties filing sham affidavits with perjury.<sup>198</sup> If trial courts became more willing to enforce section 9-101 of the Maryland Code,<sup>199</sup> the threat of imprisonment would be an adequate deterrent to the filing of sham affidavits.<sup>200</sup>

If the trial court is faced with a truly sham affidavit, which was filed only to defeat a motion for summary judgment, the court can recommend that the affiant be brought up on perjury charges.<sup>201</sup> Section 9-101 of the Maryland Code, perjury, ensures that a party submitting an inconsistent affidavit does not gain an unfair advantage over their opponent by imposing a penalty for the submission of a knowingly false affidavit.<sup>202</sup> The power of the trial judge to recommend perjury charges could serve to prevent most problems caused by sham affidavits because the threat of being charged with perjury would eliminate the filing of such affidavits.<sup>203</sup>

*b. Bad faith defense*

In the absence of the sham affidavit rule, if, at trial, the fact finder (usually a jury) rejects the facts set forth in the affidavit, and “the court is convinced that the affidavit was a sham, designed merely to forestall summary judgment and to prolong the possibility of effecting some settlement,” then the offending party may be subject to sanctions under Maryland Rule 1-341.<sup>204</sup> Maryland Rule 1-341 imposes sanctions upon a party who makes a defense in bad faith.<sup>205</sup> Maryland Rule 1-341 states:

---

196. *Id.* § 9-101(b).

197. As of this writing, March 17, 2008, a search of reported Maryland perjury opinions returned no result for a conviction stemming from a sham affidavit submitted in a civil case.

198. CRIM. LAW § 9-101(b).

199. *See supra* note 195 and accompanying text.

200. *See supra* note 198 and accompanying text.

201. *Pittman*, 359 Md. at 542, 754 A.2d at 1045.

202. CRIM. LAW § 9-101(b).

203. *Id.*

204. *Pittman*, 359 Md. at 542–43, 754 A.2d at 1046.

205. MD. R. 1-341.

In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it.<sup>206</sup>

The language of Rule 1-341 eliminates the need for the sham affidavit doctrine.<sup>207</sup> If an affidavit, submitted in opposition to a motion for summary judgment, "is demonstrated to be clearly a sham, a claim or defense asserted therein which has been rejected by the fact-finder would be a claim or defense asserted in bad faith or without substantial justification."<sup>208</sup>

Maryland Rule 1-341 enables the jury to look at the affidavit and the prior inconsistent statement and determine which recollection of the facts they find more reliable.<sup>209</sup> Additionally, Rule 1-341 protects the opposing party because if the jury rejects the affidavit and the trial court is convinced it was a sham, the party who filed the affidavit may be required to pay for the cost associated with opposing the affidavit.<sup>210</sup> This prevents a party from running up the cost of litigation by filing a sham affidavit, because, under Rule 1-341, the filing party may be held liable for her opponent's attorney's fees.

This rule has the same effect as the sham affidavit rule—it just adds another layer to the analysis. That is, the sham affidavit rule disregards an affidavit that is in contradiction with a prior statement.<sup>211</sup> Rule 1-341 allows for the same result, but first requires that the jury be given an opportunity to evaluate all of the evidence and only if the jury rejects the affidavit can the court decide that the affidavit was a sham.<sup>212</sup> The trial court may impose sanctions upon the affiant and her attorney for asserting a claim or defense in bad faith.<sup>213</sup> This added layer of analysis ensures that the jury's role of making credibility determinations is not circumvented.

---

206. *Id.*

207. *See Pittman*, 359 Md. at 542–43, 754 A.2d at 1046.

208. *Id.* at 543, 754 A.2d at 1046.

209. *See id.* at 542–43, 754 A.2d at 1046.

210. MD. R. 1-341.

211. MD. R. 2-501(e).

212. *See Pittman*, 359 Md. at 542, 754 A.2d at 1046.

213. MD. R. 1-341. The court may order the affiant or his/her attorney to pay "the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees,

c. *Sever the issue, so there is not the expense of a full trial*

Another alternative to striking an inconsistent affidavit under Rule 2-501(e) is to “sever the issue of material fact involved in the contradictory statements.”<sup>214</sup> Maryland Rule 2-504 contains a catchall power that “permits the court to order ‘any other matter pertinent to the management of the action.’”<sup>215</sup> One of the objectives of “the [s]ummary [j]udgment [r]ule is to prevent the necessity and expense of preparing for trial on the merits when there is no genuine dispute of fact in the case and the moving party is entitled to judgment as a matter of law.”<sup>216</sup> Maryland Rule 2-504 is consistent with the summary judgment rule’s objective because severing the material issue involved in the contradictory statements could potentially avoid the time and cost associated with a full trial.<sup>217</sup> Additionally, the mini-trial spares the parties the emotional hardship of a full trial.

Instead of striking an inconsistent affidavit that is submitted in opposition to a motion for summary judgment, Rule 2-504 permits the trial judge to order a mini-trial.<sup>218</sup> The judge can order a trial in which the only issue is the disputed fact created by the inconsistent affidavit.<sup>219</sup> This mini-trial allows a jury to weigh the prior statement and the inconsistent affidavit, then make a factual determination based on credibility.<sup>220</sup> Following the mini-trial, if the jury finds in favor of the moving party, the trial judge in the main case may grant summary judgment.<sup>221</sup> Additionally, the judge may impose sanctions upon the non-moving party if the jury rejected the evidence in the

---

incurred by the adverse party in opposing [the claim or defense asserted in bad faith].” *Id.*

214. *Pittman*, 359 Md. at 543, 754 A.2d at 1046.

215. *Id.* at 543, 754 A.2d at 1046 (quoting MD. R. 2-504(b)(2)(G)).

216. *Whitcomb v. Horman*, 244 Md. 431, 443, 224 A.2d 120, 126 (1966); *see Cheney v. Bell Nat’l Life Ins. Co.*, 70 Md. App. 163, 166, 520 A.2d 402, 404 (1987) (“The purpose of Rule 2-501 is to prevent the unnecessary expenditure of time and money in preparing for trial when there is no genuine dispute of material facts, and the moving party is entitled to judgment as a matter of law.”), *aff’d*, 315 Md. 761, 556 A.2d 1135 (1989).

217. *Pittman*, 359 Md. at 543, 754 A.2d at 1046.

218. *Id.*

219. *Id.*

220. *Id.*

221. If the jury in the severed portion of the trial finds in favor of the party who moved for summary judgment, then there is no longer any genuine dispute as to that material fact. If no other material facts are in dispute, the trial judge may grant summary judgment. *See* MD. R. 2-501(f).

contradictory affidavit and the trial judge is convinced the contradictory affidavit was a sham.<sup>222</sup>

## VI. CONCLUSION

Although the sham affidavit rule has not yet received much attention in Maryland, the rule has drastically changed Maryland's summary judgment procedure. Most importantly, Maryland Rule 2-501(e) unconstitutionally encroaches on the jury's function of determining a witness's credibility.<sup>223</sup> Rule 2-501(e) does not require that an affidavit be incredible as a matter of law—thus eliminating the question of fact for the jury—before allowing a judge to disregard it in deciding a motion for summary judgment. Rule 2-501(e) does not allow a judge to hear an affiant's explanation for the contradiction;<sup>224</sup> therefore, the judge has no way of determining whether the affidavit is incredible as a matter of law. An amendment to Rule 2-501(e) would remedy the constitutional problem, but there are other means available to achieve the justifications set forth for the sham affidavit rule.

It is an important goal of summary judgment to weed out fraudulent claims. This goal, however, can be achieved in the absence of even a constitutional sham affidavit rule. Maryland courts have the power to grant a motion for summary judgment when no reasonable jury could find for the non-moving party.<sup>225</sup> If a judge finds that the content of an affidavit is so implausible that no reasonable jury could believe it, the judge can disregard the affidavit. A trial judge, therefore, in the absence of the sham affidavit rule, has the power to weed out fraudulent claims.

Additionally, imposing sanctions for submitting a sham affidavit, rather than striking the affidavit, would promote fairness at the summary judgment level and would solve many of the problems posed by sham affidavits themselves.<sup>226</sup> Recommending perjury charges against a party who submits a sham affidavit could all but eliminate the problems associated with sham affidavits because the threat of perjury should eliminate the filing of such affidavits. Sanctions would also prevent a party from running up the cost of litigation by knowingly submitting a false affidavit in opposition to a motion for summary judgment. Furthermore, severing the issue

---

222. See *supra* Part V.D.1.a–b.

223. See *supra* Part V.A.1–2.

224. See MD. R. 2-501(e).

225. See *supra* Part V.C.

226. See *supra* Part V.D.

created by the contradictory affidavit would save lawyers the stress and hardship of a full trial.

There are several options available to the trial court when faced with a sham affidavit. Each of these options ensures that frivolous claims are not allowed to proceed; the jury is the body making credibility determinations; and the party submitting the contradictory affidavit does not gain an unfair advantage. The Court of Appeals of Maryland should consider striking Maryland Rule 2-501(e) because, even if the Rule was amended to meet the constitutional requirement, there are less restrictive means available for dealing with truly sham affidavits.

*Ryan A. Mitchell*