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Pittman v. Atlantic Realty: Affidavits and the Search for the Genuine Dispute of Material Fact

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PITTMAN V. ATLANTIC REALTY[1]: AFFIDAVITS AND THE SEARCH FOR THE GENUINE DISPUTE OF MATERIAL FACT

by Gwen B. Tromley[2]

I. INTRODUCTION

Scheduling orders, the discovery process and summary judgment: these are among the key elements of Maryland's structured system of civil litigation. Generally, these elements operate in a sequenced fashion to propel cases toward resolution. However, when litigation does not proceed according to the intended paradigm, a case may reach the court-ordered summary judgment phase before all of the material facts have been revealed. In this article, I will discuss the *Pittman* case, Maryland procedure, and the sham affidavit rule of federal caselaw.[3] I also will suggest a change in the Maryland Rules.

In considering a motion for summary judgment, how should a trial court treat affidavits[4] submitted in opposition to the motion that squarely contradict[5] prior deposition testimony? May a trial court strike these affidavits when their factual content varies from what the nonmoving party previously has furnished in discovery and the deadline for discovery under the trial court's scheduling order has passed? Federal and state courts considering these issues have adopted a range of approaches; the Supreme Court has yet to consider the issue. Recently, the Court of Appeals of Maryland addressed these questions in *Pittman v. Atlantic Realty*,[6] an opinion that underscores the dilemma confronting trial courts and parties engaged in the determination of whether, for purposes of summary judgment, there exists a genuine dispute of material fact.[7]

In this lead paint poisoning case, Defendant, Atlantic Realty ("Atlantic"), had deposed three of Plaintiffs'[8] chief witnesses[9] a full year before Atlantic moved for summary judgment in the Circuit Court for Baltimore City. In opposition to the motion, Plaintiffs submitted affidavits from these three witnesses, asserting facts that differed substantially from those claimed in the affiants' prior deposition testimony. Plaintiffs relied on these new facts, enlarging the dates and length of time the minor Terran had visited or resided at Atlantic's property, as the basis upon which to present a revised and, now, favorable

[1] 359 Md. 513, 754 A.2d 1030 (2000).

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[3] As discussed more fully below, this term is a reference to a rule of federal caselaw, pursuant to which a court may disregard an affidavit on the grounds that it is a "sham" that fails to raise a *genuine* dispute of material fact, if the affiant has personal knowledge of the facts but cannot explain a material contradiction between the party's deposition testimony and that party's subsequent affidavit. 359 Md. at 529, 754 A.2d at 1038.

[4] For the purpose of this Note, I will refer to affidavits submitted in opposition to a motion for summary judgment that contradict prior deposition testimony, as "affidavits." Another commentator has termed them "offsetting affidavits." *See* Collin J. Cox, *Reconsidering the Sham Affidavit Doctrine*, 50 DUKE L. J. 261, 262 (2000).

[5] 359 Md. at 527, 754 A.2d at 1037.

[6] *Id.* at 517, 754 A.2d at 1032.

[7] *See* Md. Rule 2-501(a), (b) and (e).

[8] Plaintiff Shari Hall ("Hall") brought suit on behalf of herself and her minor son, Terran Pittman ("Terran"), who is alleged to have sustained lead poisoning as the result of exposure at Atlantic's property.

[9] These witnesses were Plaintiff Shari Hall, her mother, Gladys Hall, and the Plaintiffs' medical expert.

medical expert opinion.

After granting Atlantic's motion to strike Plaintiff's affidavits on the grounds that they were "sham affidavits," the trial court entered summary judgment for Atlantic on the remaining evidence before the court.[10] The Court of Special Appeals of Maryland, adopting the federal sham affidavit rule, affirmed the holding of the trial court.[11] The Court of Appeals of Maryland reversed.[12] Declining to apply the sham affidavit rule, the court of appeals held that the circuit court had erred in striking Plaintiffs' affidavits because the act of striking them had required the trial court to engage improperly in credibility determinations.[13] The court remanded the case with instructions and the case is now set for trial in the fall of 2001.[14]

At first reading, the result in this case may seem unjust. The three dissenting members of the court expressed the view that under the circumstances of this case the trial court had the discretion to strike the affidavits.[15] Although the opinion exhibits a scholarly analysis of the rules governing discovery, summary judgment, scheduling orders, and the cases that interpret these rules, it also exposes the policy problems that exist under the Rules as currently drafted.

Should a party who has undertaken and provided full discovery be subjected to learning, only upon filing for summary judgment, that the factual basis of the opposing party's claim has changed in a fundamental way? Why should a party be expected to devote its financial and other resources to litigating a case in accordance with the Rules, only to find that the other side does not appear to be following the same rules? One must ask why, if the facts of the case are as stated in the affidavit in opposition to summary judgment, such facts were not disclosed during the court-ordered discovery phase of the litigation, in Plaintiffs' answers to interrogatories or in deposition, when the questions posed would necessarily have elicited the facts later asserted.

II. FACTUAL BACKGROUND

Terran Pittman was born in December 1990.[16] In 1992, he was diagnosed as having an elevated blood lead level.[17] In 1994, Hall filed suit against Atlantic Realty on behalf of herself and her son, alleging that Terran had sustained injuries as a result of exposure to lead paint on Atlantic's property.[18] In March 1995, the trial court issued its scheduling order, mandating that discovery in the case be completed by March 1996.[19] The order required the parties to conclude expert depositions and further supplementation of discovery by March 1998.[20]

As discovery in the case progressed in accordance with the court's scheduling order, Hall answered Atlantic's

[10] 359 Md. at 524-25, 754 A.2d at 1035-36.

[11] 127 Md. App. 255, 732 A.2d 912 (1999).

[12] 359 Md. at 517, 754 A.2d at 1032.

[13] The Court said: "*The 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.*" *Id.* at 534, 754 A.2d at 1041 (emphasis added).

[14] *See* Case No. 24-C-94-173041, Pre-Trial Scheduling Order, October 17, 2000.

[15] Writing for the dissent, Judge Wilner described the "sham affidavit" rule as a "reasonable and useful approach to protecting both the summary judgment procedure and our case management system against blatant fraud. I would hold, in this case, that the trial court had discretion to strike the two affidavits submitted in opposition to the motion for summary judgment, that it did not abuse its discretion in so doing, and that, on the remaining record presented to the court for purposes of the motion, it did not err in granting the motion." 359 Md. at 553, 754 A.2d at 1051. (Wilner, J., dissenting).

[16] *Id.* at 517, 754 A.2d at 1032.

[17] *Id.*

[18] Although Hall also sued the Housing Authority of Baltimore City ("HABC"), that defendant has been dismissed from the case without prejudice. *Id.* at 517, 754 A.2d at 1032.

[19] *Id.* at 518, 754 A.2d at 1032.

[20] *Id.*

interrogatories and was later deposed by Atlantic's counsel. In answers to interrogatories, Hall stated that she and Terran had moved onto Atlantic's property in "approximately the spring/summer of 1992."[21] She described the period of their residence at the property as "1992-1993."[22] Without specifying a time frame, Hall stated that Terran had been cared for at Atlantic's property from "8:00 a.m. to 4:00 p.m. Monday through Friday."[23]

Hall's deposition testimony, concerning the length of Plaintiffs' residence and visits at Atlantic's property, was "vague, confused and inconsistent."[24] Hall told deposing counsel that two months was the "maximum" period that she had lived at Atlantic's property,[25] and that Terran had visited the property "twice a week before residing there and three to four times a week for up to three hours at a time after residing there."[26]

In his deposition testimony, Plaintiffs' medical expert opined that a two-month exposure to lead during residence at Atlantic's property was not sufficient to constitute a "'substantial factor' in causing Terran's injuries."[27] Lacking a time frame for Terran's visits, the doctor could not state with a reasonable degree of medical probability that exposure to lead at Atlantic's property was a "major contributor" to Terran's injuries.[28]

Subsequently, in April 1998, Atlantic moved for summary judgment relying on the testimony of Plaintiffs' medical expert that he could not render an opinion concerning "substantial factor causation."[29] In response, Plaintiffs filed the three affidavits that gave rise to the dispute in this case. Granting Atlantic's motion to strike the affidavits, the trial court observed, "'[t]he process of discovery can become subverted . . . if by the mere presentation of an affidavit constructed more than a year after the presentation of deposition testimony, a witness can so dramatically alter her evidence."[30] In the absence of the stricken affidavits, Plaintiffs could not meet their burden of establishing that exposure to lead at Atlantic's property was a substantial factor in causing Terran's injuries.[31] With the case in this posture, the trial court entered summary judgment in favor of Atlantic.[32]

III. DISCUSSION

The Court of Special Appeals of Maryland, describing the affidavits as creating unfair surprise, characterized them as containing information that contradicted Hall's interrogatory answers and her deposition testimony.[33] The court further observed that the affidavits, lengthening the child's residence on Atlantic's property to five and one half years, were not filed within the discovery deadline.[34] The Court of Appeals of Maryland granted certiorari in order to determine whether to adopt the sham affidavit rule of federal case law.[35] Before the court of appeals, Plaintiffs contended that application of the sham affidavit rule violates Maryland law prohibiting trial courts from engaging in credibility

[21] *Id.* at 519, 754 A.2d at 1033.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 520, 754 A.2d at 1033.

[26] *Id.* at 521, 754 A.2d at 1034. The Court summarized Hall's testimony in this manner, noting that the testimony would be viewed in the light most favorable to Plaintiff-Petitioners.

[27] *Id.* at 523, 754 A.2d at 1035.

[28] *Id.* at 522-523, 754 A.2d at 1035.

[29] *Id.* at 523, 754 A.2d at 1035.

[30] *Id.* at 525, 754 A.2d at 1036.

[31] *Id.*

[32] *Id.* at 524, 754 A.2d at 1036.

[33] *Id.* at 525-26, 754 A.2d at 1036-37.

[34] *Id.*

[35] *Id.* at 526, 754 A.2d at 1037.

determinations on review of motions for summary judgment, that Rule 2-501 authorizes the filing of affidavits in opposition to summary judgment motions and that Plaintiffs' affidavits merely "supplement and clarify" their prior discovery responses.[36] Atlantic Realty countered that the sham affidavit rule is consistent with standard summary judgment procedure, that deposition testimony is "inherently more reliable than affidavits," and that the rule preserves the "integrity of scheduling orders."[37] Because the court of appeals provided straightforward guidance regarding the affidavit practices that it will uphold in the summary judgment context, the impact of the court's opinion is not limited to parties in lead paint cases.

The opinion highlights five issues of continuing interest to trial judges and litigators. First, the court reiterated the well-established rule that, in reviewing a motion for summary judgment, a court may not engage in credibility determinations.[38] Next, the court held that Maryland does not adopt the sham affidavit rule presently applied in most federal courts.[39] Third, the court outlined the circumstances under which Maryland courts presently are authorized to disregard the otherwise admissible content of an affidavit in opposition to a motion for summary judgment.[40] Fourth, the court clarified that neither the rule governing scheduling orders[41] nor the scheduling order itself[42] deprive the non-moving party of the right to submit an affidavit in opposition to a motion for summary judgment.[43] Finally, the court offered alternative approaches for dealing with summary judgment affidavits where the factual content varies substantially from information furnished previously in discovery, observing that sanctions and other remedies are available against parties who submit such affidavits in bad faith in order to avoid the entry of summary judgment.[44]

A. Summary Judgment

Neither the Federal Rules of Civil Procedure, nor the Maryland Rules, address the issue of how a court should treat affidavits that contradict prior deposition testimony.[45] Federal Rule 56 authorizes the court to grant summary judgment, "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 judgment as a matter of law."[46] Similarly, Maryland's summary judgment rule provides that "[t]he court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute of material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law."[47]

As noted by the dissent in *Pittman*,[48] federal practice

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[36] *Id.*

[37] *Id.*

[38] *Id.* at 534, 754 A.2d at 1041.

[39] *Id.* at 539, 754 A.2d at 1044.

[40] *Id.*

[41] *See* Rule 2-504.

[42] The Scheduling Order in this case required completion of all discovery, including supplementation, by March 1998.

[43] 359 Md. at 534, 754 A.2d at 1041.

[44] *Id.* at 542-43, 754 A.2d at 1046.

[45] *Id.* at 527, 754 A.2d at 1037. Rule 56 of the Federal Rules of Civil Procedure provides for the required form of affidavits, circumstances in which affidavits are unavailable, and affidavits made in bad faith. Maryland Rule 2-501 imposes minimum requirements for affidavits supporting or opposing a motion for summary judgment, including that they be made upon personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters set forth in the affidavit.

[46] Fed. R. Civ. P. 56 (c).

[47] Rule 2-501 (e).

[48] *Id.* at 555, 359 Md. at 555, 754 A.2d at 1052-53.

and interpretation have nearly always been treated as persuasive because Maryland's summary judgment rule was derived from the Federal Rule. Nevertheless, one distinct difference between the state and federal rules is meaningful in the analysis of this case. Unlike the Federal Rule, Maryland's Rule does not include a provision authorizing a trial court to sanction a party who presents an affidavit in bad faith.[49] Thus, while the rules are substantially similar, this difference may have helped produce the result in this case.

As in any negligence case, in order to establish a cause of action in a lead paint poisoning case, a party must show that: (1) the defendant was under a duty to protect the plaintiff from injury; (2) the defendant breached that duty; (3) the plaintiff suffered actual loss or injury; and (4) the loss or injury proximately resulted from the defendant's breach of duty.[50] Moreover, to survive a motion for summary judgment in a lead paint case, the plaintiff must present evidence establishing that: (1) the landlord knew or had reason to know of a condition on the premises that posed an unreasonable risk of physical harm to persons in the premises, and (2) the landlord should have realized the risk of lead poisoning.[51] Further, the plaintiff bears the burden to prove specifically that a "'defendant's conduct was a substantial factor in causing the plaintiff's injuries.'"[52] Clearly, evidence tending to prove the amount of time that Terran had spent at Atlantic's property was essential to the viability of Plaintiffs' claim.

In this case, when faced with the motion for summary judgment, Plaintiffs changed the position they advanced in prior discovery.[53] Without the post-deposition affidavits at issue in this case, Plaintiffs could not sustain their burden to prove that exposure on Atlantic's property was a "substantial factor" in causing Terran's injuries.[54]

The rudiments of summary judgment are well settled. To defeat a motion for summary judgment, the non-moving party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence.[55] Generalized allegations that do not show facts in detail and with precision are insufficient to prevent summary judgment.[56] The "mere existence of a scintilla of evidence in support of the plaintiff's claim is insufficient to preclude summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff."[57]

In considering a motion for summary judgment, the court does not decide matters of credibility,[58] and must

[49] Fed. R. Civ. P. 56 (g) authorizes the court to impose sanctions against a party who has submitted an affidavit "in bad faith or solely for the purpose of delay." Interestingly, Maryland's summary judgment rule, codified then as Rule 610, previously has included a bad faith provision. However, as noted by Professor Brown, the former rule did not authorize the court to hold the "offending party" or counsel in contempt or to order an "offending attorney" rather than the party, to pay the expenses incurred by the bad faith conduct. *See* Brown, *Summary Judgment in Maryland,* 38 MD. L. REV. 188, 219 (1978), Copyright 1979 by C. Christopher Brown. All rights reserved.

[50] Richwind Joint Venture 4 v. Brunson, 335 Md. 661, 670, 645 A.2d 1147, 1151 (1994), Bartholomee v. Casey, 103 Md. App. 34, 56-57, 651 A.2d 908, 918 (1994).

[51] Brown v. Dermer, 357 Md. 344, 361-62, 744 A.2d 47, 57 (2000). *See also,* Jones v. Mid-Atlantic Funding, 362 Md. 661, 766 A.2d 617 (2001).

[52] 359 Md. at 521 n.4, 754 A.2d at 1034 (citing Bartholomee v. Casey, 103 Md. App. 34, 56-57, 651 A.2d 908, 918 (1994)).

[53] *Id.* at 523, 754 A.2d at 1035.

[54] *Id.* at 524, 754 A.2d at 1036.

[55] Beatty v. Trailmaster Products, 330 Md. 726, 737, 625 A.2d 1005, 1011 (1993) (expert's affidavit did not provide admissible evidence creating genuine issue of material fact).

[56] *Id.* at 738, 625 A.2d at 1011.

[57] *Id.* at 738-739, 625 A.2d at 1011 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

[58] 359 Md. at 537, 754 A.2d at 1043 (citing Frush v. Brooks, 204 Md. 315, 321, 104 A.2d 624, 626 (1954); Goodwich v. Sinai Hospital of Baltimore, Inc., 343 Md. 185, 206, 680 A. 2d 1067, 1077-78 (1996); Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)).

[59] 330 Md. at 739, 625 A.2d at 1011 (citing Clea v. City of Baltimore, 312 Md. 662, 678, 541 A. 2d 1303, 1311 (1988)).

resolve all reasonable inferences in favor of the party opposing summary judgment.[59] How, then, does a court determine the genuineness of an asserted factual dispute if it is not permitted to examine the circumstances under which a non-movant's affidavit is submitted? Does a trial court's analysis in determining the "genuineness" of an asserted factual dispute necessarily involve a credibility determination? If not, how does a court determine whether an asserted factual dispute is, indeed, "genuine" without invading the jury's province to determine credibility, usurping its role as factfinder?

In construing the Maryland Rules, the court relies upon principles similar to those used to interpret statutes, looking first to the text of the Rule and giving its words their ordinary meaning.[60] If the words are unambiguous, the inquiry ends.[61] The term "genuine" has been defined as: "1. possessing the alleged or apparent attribute or character; 2. not spurious or counterfeit; authentic; 3.a. honestly felt or experienced; b. actual; real; 4. free from hypocrisy or dishonesty; sincere."[62]

Although there does not appear to be any ambiguity as to the meaning of the word "genuine," it is also useful to consider the history of the summary judgment rule, first adopted in 1947 as section IV of the Law and Equity Rules of the General Rules of Practice and Procedure. Maryland Code (1939, 1947 Cum. Supp.), at 2044.[63] The Rules Committee Reporter's explanatory notes at that time described the purpose of the Rule:

> The court does not, of course attempt to decide any issue of fact or of credibility, but only whether such issues exist. If the affidavits or other evidence show a genuine conflict, the court must deny the motion. Thus, the proposed procedure is not a substitute for a trial, but only a hearing to decide whether a trial is necessary. But the party opposing the motion must show by *facts* that there is a real dispute.[64]

A similar purpose is reflected in Maryland Rule 1-201(a), which provides that, "These rules shall be construed to secure simplicity in procedure, fairness in administration, *and elimination of unjustifiable expense and delay.*[65]

With this perspective in mind, it is helpful to examine the method by which the court ruling on a motion for summary judgment determines whether there exists a genuine dispute of material fact. Describing the test for this determination as "highly analogous" to whether a motion for judgment should be granted in a case tried to a jury,[66] the court explained that to prevent the entry of summary judgment, the non-moving party must present "such evidence upon which the jury could reasonably find for the plaintiff."[67] In other words, "the evidence presented by the nonmovant[68] must be such as 'would allow a reasonable factfinder to conclude' that, in actuality, the

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[60] Wilson v. NBS, Inc., 130 Md. App. 430, 746 A.2d 966 (2000). (trial court had inherent authority, although not rule-based authority, to dismiss minor lead paint plaintiff's cause of action for failure to comply with order for examination).

[61] *Id.* at 441, 746 A.2d at 971.

[62] The American Heritage College Dictionary, Third Edition, 1997.

[63] 359 Md. at 537, 754 A.2d at 1042-43.

[64] *Id.* at 537, 754 A.2d at 1043.

[65] MD. RULE PROC. §1-201(a) (2000) (Emphasis added).

[66] 359 Md. at 537, 754 A.2d at 1043.

[67] *Id.* at 537-38, 754 A.2d at 1043 (citing Beatty v. Trailmaster Prods., Inc., 330 Md. at 739, 625 A.2d at 1011-12).

[68] Maryland's summary judgment rule authorizes the court to enter judgment in favor of *or against* the moving party if the motion and response show that there is no genuine dispute of material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

[69] 359 Md. at 538, 754 A.2d at 1043 (citing Chesapeake Pub. Corp. v. Williams, 339 Md. 285, 299, 661 A.2d 1169, 1176 (1995), Seaboard Sur. Co. v. Richard F. Kline, Inc., 91 Md. App. 236, 245, 603 A.2d 1357, 1361 (1992)).

facts were those most favorable to the nonmovant."[69]

The Sham Affidavit Rule

In *Pittman*, the court of appeals' description of the Plaintiffs' affidavits illustrates the dilemma facing the trial court considering the motion for summary judgment and Plaintiffs' opposition:

> These affidavits were signed on May 7, 1998, and filed the next day in court, more than one year after Hall's deposition and almost two months past the scheduling order's deadline for concluding all supplementation of discovery and all expert discovery. Gladys Hall...in her affidavit....tripled or quadrupled the 'couple of months' to which she had testified on deposition.[70]
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> Furnished with the then stationary factual platform of five and one-half months residence, plus over three years of visiting 'on an every day basis' for seven to eight hours a day, Dr. Klein, expressly assuming the truth of the new affidavits, opined in his May 7 affidavit that exposure at the subject premises was a substantial causal factor in Terran's lead poisoning.[71]
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> Neither the Hall nor the Gladys Hall affidavits presented any explanation for the variances from the prior evidence given by the respective witnesses.[72]

The Second Circuit was first[73] to consider the issue of a trial court's treatment of an affidavit submitted in response to a motion for summary judgment in the case of *Perma Research & Development Co. v. Singer Co.*[74] Perma filed suit against Singer alleging that Singer did not intend to perform the parties' contract for certain product assembly services.[75] In his deposition, Perma's president failed to specify the facts evidencing Singer's alleged fraud, and even acknowledged that the two companies had been working together to resolve problems in the product until Singer stopped performing.[76] Nevertheless, when Singer moved for summary judgment, Perma's president submitted an affidavit in opposition, claiming that one of Singer's agents had told him that Singer never intended to perform.[77]

After the district court granted summary judgment, the Second Circuit affirmed on grounds characterized by the *Pittman* court as "the reliability, utility, and fairness rationales."[78] The *Perma* court reasoned that the district court properly could have concluded that deposition testimony, having been subjected to cross-examination, was more reliable than an affidavit.[79] Moreover, the court contended, disregarding a contradictory affidavit preserved the utility of the summary judgment process as a device to

[70] 359 Md. at 523, 754 A.2d at 1035.

[71] *Id.* at 524, 754 A.2d at 1036.

[72] *Id.*

[73] *Id.* at 527, 754 A.2d at 1037.

[74] 410 F.2d 572 (2d. Cir. 1969).

[75] *Id.* at 574.

[76] 359 Md. at 513, 527, 754 A.2d at 1037 (citing Perma, 410 F. 2d at 576).

[77] *Id.* (citing Perma, 410 F.2d at 577).

[78] 359 Md. at 529, 754 A.2d at 1038.

[79] *Id.* at 528, 754 A.2d at 1038.

[80] *Id.*

eliminate sham claims.[80] In sum, the "*Perma* rule" stands for the proposition that a trial court may disregard as a sham, failing to raise an issue of material fact, an affidavit that contradicts a party's prior deposition testimony, where the party has personal knowledge of relevant facts and cannot explain a material contradiction between deposition testimony and a subsequent affidavit.[81]

Since the Second Circuit's opinion in *Perma*, state and federal courts have considered the sham affidavit issue with a variety of results. For example, in *Rohrbaugh v. Wyeth Laboratories, Inc.*,[82] the Fourth Circuit affirmed the district court's disregard of an expert's post-deposition affidavit, concluding:

> Given the conflicts between Dr. Cox's affidavit and his deposition testimony, the District Court was left not with a genuine issue of material fact but with trying to determine which of several conflicting versions of Dr. Cox's testimony was correct. (citations omitted). We hold that the District Court was justified in disregarding the affidavit. Without the affidavit Plaintiffs have not met their burden to come forward with enough evidence that a jury could find that Defendant's vaccine probably caused Plaintiff's injuries.[83]

State courts have rejected the rule more frequently than have federal courts.[84] The *Pittman* opinion exemplifies the chief criticism of the *Perma* rule: that its application forces a court to assess credibility. Even the dissent in *Pittman* expressed concern "that adopting that approach would improperly allow the court, on summary judgment, to resolve conflicting evidence and make credibility assessments, which are matters for the trier of fact to determine."[85] When may a Maryland court, which is considering summary judgment, strike an opposing affidavit that contradicts or alters the affiant's prior deposition testimony? Under *Pittman*, if the court concludes that "a rational jury would reject as incredible" the facts set forth in the affidavit, the court is authorized to disregard the otherwise admissible content of the affidavit.[86]

One legal commentator has identified three approaches, which he describes as "all wrong,"[87] adopted by courts in the treatment of post-deposition affidavits submitted in opposition to summary judgment.[88] In the first approach, all inconsistencies are deemed to generate a fact question that should go to the jury.[89] Professor Duane describes this approach as consistent with the Supreme Court's repeated insistence that opposing evidence must be believed.[90] The second approach, a theoretical and functional opposite of the first, advocates striking *all* contradictory affidavits on the policy grounds (as enunciated in *Perma*) of preserving the "utility" of summary judgment.[91] Finally, in the third or intermediate approach, the judge draws a distinction "between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to

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[81] *Id.* at 529, 754 A.2d at 1038.

[82] 916 F.2d 970, 976 (4th Cir. 1990).

[83] *Id.*

[84] *See* Collin J. Cox, *Reconsidering the Sham Affidavit Doctrine,* 50 DUKE L.J. 261, 272-75 (2000).

[85] 359 Md. at 556, 754 A.2d at 1053. (Wilner, J., dissent).

[86] *Id.* at 539, 754 A.2d at 1044.

[87] *See* J. J. Duane, *The Four Greatest Myths About Summary Judgment,* 52 WASH. & LEE L. REV. 1523, 1596 (1995).

[88] *Id.*

[89] *Id.*

[90] *Id.* at 1597.

[91] *Id.*

[92] *Id.* at 1598 (citing Tippens v. Celotex Corp., 805 F.2d 949, 953 (11th Cir. 1986) and, *inter alia*, Rohrbaugh v. Wyeth Laboratories, Inc. 916 F.2d 970, 975 (4th Cir. 1990)).

[93] 52 WASH. & LEE L.REV. at 1604.

the weight of the evidence."[92]

In Professor Duane's view, the court need not strike an affidavit even if it appears to be a sham.[93] Rather, the judge should pose "one simple question": "'Assuming that all of the witnesses would testify at 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 I have been given (if any) about the variation, is there any genuine possibility that the jury might find in favor of the adverse party?'"[94] He offers this approach as a "simple solution . . . simple in application, coherent, and correct."[95] Is Professor Duane's proposal the analytical equivalent of Maryland's test, i.e., whether the non-moving party has presented such evidence upon which a jury could reasonably find for the plaintiff?

B. Scheduling Orders vs. Summary Judgment: Rules in Conflict?

After a lead paint case is filed, the circuit court issues a scheduling order tailored to the proof requirements in such cases.[96] In *Pittman*, the Plaintiffs had three years from the date of the court's scheduling order to furnish all information responsive to the Defendants' discovery requests.[97] Atlantic argued that Plaintiffs violated the scheduling order's discovery deadline by submitting a post-discovery period affidavit that altered the facts Plaintiffs had asserted in depositions.[98] Although Plaintiffs claimed that they merely had supplemented and clarified their prior discovery with the new affidavits,[99] the new information had substantive legal meaning for both sides. The "supplementation" included an affidavit from Plaintiffs' medical expert in which, based upon the newly-provided information in the Plaintiffs' affidavits, the expert opined that the length of time Terran either resided at or visited Atlantic's property was sufficient to constitute a "substantial factor" in causing his injuries.

According to the court of appeals' analysis, neither the rule governing scheduling orders nor the scheduling order for a specific case deprives the non-moving party of the right to submit an affidavit in opposition to a motion for summary judgment.[100] Therefore, a trial court's authority to strike affidavits that contradict prior deposition testimony must be found in Rule 2-501.[101] Based upon this analysis, the court relied upon the traditional rule that prohibits trial courts from making credibility determinations in ruling on motions for summary judgment.

However, the court's analysis does not explore in detail the potential for conflict arising from the interplay of the summary judgment rule and the rule governing scheduling orders as they are applied together. Rule 2-504 mandates the issuance of a scheduling order in every

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[94] *Id.*

[95] *Id.*

[96] In Baltimore City, the standard scheduling order was developed through the sustained efforts of Judge Ellen M. Heller, in ongoing meetings with members of the "lead paint Bar," representing the views of both plaintiffs and defendants in these actions. The comprehensive nature of the orders is a testament to Judge Heller's determination to assure that the parties have every opportunity to prepare their cases.

[97] 359 Md. at 518, 754 A.2d at 1032. The scheduling order, issued in March 1995, required that discovery be completed by March 1996, and that further supplementation and expert depositions be completed by March 1998. *Id.*

[98] *Id.* at 533-34, 754 A.2d at 1041.

[99] *Id.* at 526, 754 A.2d at 1037.

[100] *Id.* at 534, 754 A.2d at 1041. The Court observed that "Rule 2-504's sequencing contemplates that the facts will be developed during discovery and that, based on that discovery record, the court will be able to determine whether a trial is necessary if a party seeks summary judgment." *Id.*

[101] *Id.* With this premise in mind, the Court held that the affidavits should not have been stricken because the trial court's action in striking them necessarily involved a credibility determination.

[102] Rule 2-504.

civil action and sets forth the required format of each order. Practically speaking, this scheduling order is the roadmap of the litigation. Under Rule 2-504, the required contents of each order include assignment to the appropriate scheduling category of a differentiated case management system, as well as deadlines for identification of experts, notification of computer-generated evidence, completion of discovery, and filing of dispositive motions.

The language of Rule 2-504 expressly requires that the scheduling order circumscribe the discovery period,[102] underscoring the indispensable role that discovery plays in civil litigation.[103] Without reference to the discovery deadline imposed by Rule 2-504, Rule 2-501(b) authorizes the filing of an affidavit in opposition to a motion for summary judgment where the motion is supported by affidavit or other statement under oath. The Court of Appeals Standing Committee on Rules of Practice and Procedure ("the Rules Committee") enacted all of the rules at issue here: the summary judgment rule, the discovery rules, and the scheduling order rule. The Rules Committee, like a legislature, is presumed to know the law, including what rules it has enacted. Nevertheless, when it enacted Rule 2-504, it chose not to modify Rule 2-501(b). For this reason, it could be argued that the Committee intended to preserve a party's right to submit new information in opposition to summary judgment, even after the close of discovery.

However, in construing court rules, the court reads the rules so as to harmonize them and to avoid an unintended or unreasonable result.[104] From the language of Rule 1-201(a), it is apparent that the Rules Committee intended to create a system of judicial administration that would promote procedural simplicity and fairness in administration, and that would eliminate unjustifiable expense and delay. The scheduling order is an essential element of this system. Certainly creation and implementation of the scheduling order, including resolution of discovery disputes, occupies a major portion of a court's personnel and financial resources. Thus, the filing of post-discovery affidavits such as were filed in *Pittman*, that contradict information provided during the discovery phase, severely limits the utility of the scheduling order and discovery process. Such filing undercuts the court's efforts to generate an appropriate scheduling order. It wastes the time of judges hearing motions on discovery disputes. It wastes the time of counsel who, believing that all of the requested material facts have been disclosed, are surprised in the summary judgment phase to learn that they have not. Without a change in the rules, a party may simply wait until discovery closes and the opposing party moves for summary judgment to "supplement or clarify" the facts or to take seriously the obligation to furnish accurate and full information.

There may be times when the ability to file a post-deposition affidavit may be necessary. For example, a party may discover new evidence, or may have been under a disability at the time of first deposition. Nevertheless, such circumstances warrant some justification for deviating from the scheduling order's deadline for completing and supplementing discovery.

The *Pittman* Court outlines three measures "for dealing with that which the court is convinced is a sham affidavit."[105] These include sanctions under Rule 1-341, but also include prosecution for perjury. Third among these, by authority of the "catchall" power of court under Rule

[103] This role of the discovery rules was described by the Court of Appeals in Baltimore Transit Co. v. Mezzanotti, 227 Md. 8, 174 A.2d 768 (1961): "One of their fundamental and principal objectives is to require disclosure of *facts* by a party litigant to all of his adversaries, and thereby to eliminate, as far as possible, the necessity of any party to litigation going to trial in a confused or muddled state of mind, concerning the facts that gave rise to the litigation. (Emphasis in original). *Id.* at 13, 174 A.2d at 771.

[104] *See* Curran v. Price, 334 Md. 149, 172, 638 A.2d 93, 105 (1994).

[105] 359 Md. at 542, 754 A.2d at 1045.

[106] *Id.* at 543, 754 A.2d at 1046.

2-504(b)(2)(G), the court "could sever the issue of material fact involved in the contradictory statements for trial as a separate issue, thus presumably sparing the moving party the expense of a full trial.[106] Unfortunately these measures are neither swift nor certain. Moreover, they further occupy the very time and resources that summary judgment was intended to preserve.

In these circumstances, discovery sanctions are not efficacious because the court-ordered discovery phase has closed. Time-consuming perjury prosecutions rely for their success on the abilities of the local prosecutor to prove the perjury beyond a reasonable doubt. Are these truly meaningful remedies for a party who relied in good faith upon the accuracy, and the truthfulness, of the other party's discovery responses? Ultimately, the necessity of enduring the full course of the litigation may be so expensive that a later-imposed sanction may not be a sufficient remedy.

IV. CONCLUSION

Pittman was litigated pursuant to a scheduling order that, in accordance with Rule 2-504, established precisely the dates by which certain milestones, including completion of all discovery, were to be reached. The conduct that sparked the controversy leading to appeal was the Plaintiffs' post-deposition affidavits, transforming their claim from one that would most likely have been defeated on summary judgment into one that, ultimately, has survived to be presented to jury.

In determining whether there exists a *genuine* dispute of material fact, trial courts often are faced with such contradictory assertions made, without explanation, after the close of discovery. Unless they meet the test set by the court in *Pittman* - that a rational jury would reject them as incredible - the moving party is forced to trial. This is because there is no requirement to explain why newly disclosed information was not disclosed earlier and, otherwise, there is no authority for a trial court to evaluate whether the assertions contained in an affidavit can be viewed as "genuine." The interplay of Rules 2-401, 2-501(b) and 2-504 presents a dilemma of breadth and complexity that deserves thorough consideration by the Rules Committee.

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