

In addition to the standards outlined there, however, Texas courts do not permit litigants to file “sham affidavits” that contradict the witnesses’ prior sworn testimony in order to create a sham fact issue to avoid summary judgment: “A party cannot file an affidavit to contradict his own deposition testimony without any explanation for the change in the testimony, for the purpose of creating a fact issue to avoid summary judgment.”³

As explained below, Defendants’ supplemental affidavits repeatedly violate this standard and the standards outlined in Plaintiffs’ First Objections. While they fail to raise genuine material fact issues, they are also incompetent, inadmissible, and should be stricken from the summary judgment record by this Court.⁴

II. OBJECTIONS AND ARGUMENT

A. The December 22, 2014 Affidavit of Jack L. Iker

Plaintiffs object to the admission of the Affidavit of Jack L. Iker (“Defendant Iker”) and ask that the following portions of Defendant Iker’s affidavit be stricken from the summary judgment record.

1. Paragraphs 4, 5, 7, 9-12, 14-15

To be admissible, “statements contained within [a layperson’s] affidavit must be so direct and unequivocal that perjury can be assigned against the affiant if the statement is false.”⁵ These paragraphs contain Defendant Iker’s arguments and inferences based on his construction of certain documents in the record. Such “matter[s] of construction, or deduction from given facts .

³ *Farroux v. Denny’s Restaurants*, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.); *but see Davis v. City of Grapevine*, 188 S.W.3d 748, 756 (Tex. App.—Fort Worth 2006, pet. denied) (“when conflicting inferences may be drawn between a party’s summary judgment affidavit and his deposition on matters of material fact, a fact issue is presented.”). Plaintiffs acknowledge there is a potential split of authority on this issue as shown above and hereby urge and preserve their position that sham affidavits should be disregarded.

⁴ *See, e.g., Tex. Dep’t of Pub. Safety v. Guajardo*, 2010 Tex. App. LEXIS 6000, at *7 (Tex. App.—Corpus Christi July 29, 2010, no pet.) (“When there is a proper objection, a trial court (or an ALJ) can strike inadmissible portions of evidence.”).

⁵ *Draper v. Garcia*, 793 S.W.2d 296, 300 (Tex. App.—Houston [14th Dist.] 1990, no writ); *see also Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

. . . cannot constitute [] perjury” even where (as here) the argument “is erroneous, or is not a correct construction, or is not a logical deduction from all the facts.”⁶ These paragraphs are, therefore, inadmissible.⁷

Further, they are inadmissible because they are not rationally based on any of Defendant Iker’s personal knowledge or sense perceptions,⁸ but, instead, on information learned secondhand (from documents and conversations) by Defendant Iker.⁹ Nor is Defendant Iker qualified by training or professional experience to give the legal opinions offered in these paragraphs.¹⁰ Finally, they are not admissible lay witness opinions.

These paragraphs of the December 22, 2014 Affidavit of Jack L. Iker, therefore, should be stricken.

2. Paragraphs 4, 5, 13-14

Separate and apart from the objections made above, paragraphs four and five directly contradict Defendant Iker’s deposition testimony in an attempt to create sham fact issues. At his deposition, Defendant Iker testified that, as a condition of holding office within The Episcopal Church, he committed to “conform to the doctrine, discipline and worship of The Episcopal Church.”¹¹ He further conceded that he could not identify any provision that would trump this

⁶ *State v. Eversole*, 889 S.W.2d 418, 420 (Tex. App.—Houston [14th Dist.] 1994, no pet.) (quoting *Schoenfeld v. State*, 56 Tex. Crim. 103, 119 S.W. 101 (Tex. Crim. App. 1909)).

⁷ See *E. F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 383 (S.D. Tex. 1969) (“Argument of the facts and the law appropriately should appear in briefs. At best, legal arguments and summations in affidavits will be disregarded by the court.”).

⁸ See Tex. R. Evid. 701.

⁹ *Austin Traffic Signal Constr. Co., L.P. v. Transdyn Controls, Inc.*, 2010 Tex. App. LEXIS 7059, *17 (Tex. App.—Austin Aug. 24, 2010) (“a witness can only testify about those matters, facts, or events that he perceived firsthand”).

¹⁰ See Tex. R. Evid. 702 (a witness “qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.”) (emphasis added); *Mowbray v. State*, 788 S.W.2d 658, 668 (Tex. App.—Corpus Christi 1990, no pet.) (“Opinions of nonexpert witnesses are not admissible if they are legal conclusions . . .”) (citation omitted).

¹¹ Dep. of Def. Iker at 34:1-3; 39:1-9.

commitment.¹² In paragraph four of his recent affidavit, however, he now claims that his commitment was subject to his personal interpretation of other religious mandates.¹³ Similarly, in paragraph five, Defendant Iker openly contradicts his own deposition's interpretation of the phrase the "Church in this Diocese" in the Constitution of the Diocese.¹⁴ Defendant Iker only modified that testimony upon conferring with counsel and admitted under oath that he was changing his testimony to conform to his lawyers' arguments in this case.¹⁵ All of this testimony thus violates the sham affidavit doctrine, and should be stricken by this Court.

Moreover, in paragraphs 13 and 14, Defendant Iker openly contradicts sworn testimony he set forth in order to obtain summary judgment in a prior case before a Fort Worth court. Defendant Iker presents no basis for this contradiction other than to assert that he was previously perjuring himself upon the advice of counsel. "The doctrine of judicial estoppel precludes a party from adopting a position inconsistent with one that it maintained successfully in an earlier proceeding."¹⁶ Defendant Iker is thus barred from advancing this testimony under both the sham affidavit and the judicial estoppel doctrines.

Paragraphs 4, 5, 13 and 14 of the December 22, 2014 Affidavit of Jack L. Iker, therefore, should be stricken.

B. The December 22, 2014 Affidavit of Walter Virden, III

Plaintiffs object to the admission of the Affidavit of Walter Virden, III ("Virden") and ask that the following portions of Virden's affidavit be stricken from the summary judgment record.

¹² Dep. of Def. Iker at 128:1-12.

¹³ December 22, 2014 Iker Aff. at ¶ 4.

¹⁴ Compare Dep. of Def. Iker at 170:16-171:16, 173:20-174:21 (interpreting the "Church in this Diocese" and the "Church in the Diocese" as references to The Episcopal Church) with December 22, 2014 Iker Aff. at ¶ 5.

¹⁵ Dep. of Def. Iker at 178:2 – 180:1.

¹⁶ *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2013).

1. Paragraph 4

Paragraph 4 of Virden’s affidavit consists of a series of contradictions of his sworn deposition testimony in this case. For example, at his deposition, Virden straightforwardly admitted that “the Corporation of the Episcopal Diocese of Fort Worth claimed its tax exemption through the umbrella of The Episcopal Church” and that this “was beneficial to the Corporation.”¹⁷ In his affidavit, however, Virden testifies conclusorily that “the Corporation and the Diocese did not actually receive any benefits as a result of the group exemption.”¹⁸ In addition, at deposition Virden conceded that, in this case, there are “plaintiff congregations and defendant congregations” “both claiming to be the continuing congregation of what existed before the split in 2008.”¹⁹ His recent affidavit contradicts this as well, arguing that he “said only that I knew there were some plaintiffs who claimed to represent some of the Defendant Congregations.”²⁰ Virden also conceded in his deposition that the phrase the “Church in this Diocese” meant “The Episcopal Church,”²¹ but now offers the same modified definition of that term in his recent affidavit as Defendant Iker’s changed testimony upon direction by counsel.²² Finally, at his deposition, Virden admitted, without qualification, that “the bylaws of the Corporation must be consistent with the rules of the diocese.”²³ His affidavit testimony, however, seeks to contradict this testimony, arguing that he “cannot find any provision in the governing documents . . . that says that.”²⁴

¹⁷ Dep. of Walter Virden at 119:5-18.

¹⁸ December 22, 2014 Affidavit of Walter Virden, III ¶ 4.

¹⁹ Dep. of Walter Virden at 78:5-15.

²⁰ December 22, 2014 Affidavit of Walter Virden, III ¶ 4.

²¹ Dep. of Walter Virden at 155:2-156:1.

²² December 22, 2014 Affidavit of Walter Virden, III ¶ 4.

²³ Dep. of Walter Virden at 64:18-20.

²⁴ December 22, 2014 Affidavit of Walter Virden, III ¶ 4.

Virden's open contradiction of his deposition testimony in this paragraph of his affidavit amounts to sham testimony and should be stricken by this Court.

2. Paragraph 5

Paragraph 5 of Virden's affidavit purports to opine on whether The Episcopal Church has made contributions to certain pension funds. Virden, however, has not shown how he could have acquired personal knowledge of whether The Episcopal Church made such contributions. "A witness can only testify about those matters, facts, or events that he perceived firsthand."²⁵ Moreover, "opinions of nonexpert witnesses are not admissible if they are legal conclusions."²⁶

Virden's legal conclusions about the governing documents of the pension funds and his secondhand opinions about whether The Episcopal Church donated to them are thus inadmissible. This paragraph should be stricken.

C. The December 22, 2014 Affidavit of Chad Bates

Plaintiffs object to the admission of the Affidavit of Chad Bates ("Bates") and ask that the following portions of Bates's affidavit be stricken from the summary judgment record.

1. Page 4

On page 4 of his affidavit, Bates offers a series of contradictions of his prior deposition testimony. At his deposition, Bates agreed that it would not have been legal for the Corporation to claim the benefits of The Episcopal Church's group tax exemption under false pretenses.²⁷ He agreed that the Corporation was "a subordinate unit of [the] Protestant Episcopal Church in the United States of America."²⁸ In his affidavit, however, Bates attempts to contradict both of those statements in order to mount an argument that the Corporation was not a subordinate entity to

²⁵ *Austin Traffic*, 2010 Tex. App. LEXIS 7059 at *17.

²⁶ *Mowbray*, 788 S.W.2d at 668.

²⁷ Dep. of Chad Bates at 30:24-31:21.

²⁸ *Id.* at 31:11-21.

The Episcopal Church and that, even so, it acted legally in telling the IRS that it was such an entity.²⁹

This testimony amounts to a sham affidavit and should be stricken from the summary judgment record. Further, Bates is not qualified to give these opinions, and they should be stricken for this reason as well.

2. Page 1 - 3

Throughout the remainder of his affidavit, Bates offers secondhand testimony and legal opinions about actions taken by Jude Funding, Inc. Chad Bates is not an expert witness and “[o]pinions of nonexpert witnesses are not admissible if they are legal conclusions.”³⁰ Moreover, an affidavit must contain direct and unequivocal facts—not legal or factual arguments.³¹ Chad Bates’ abstract opinions and legal conclusions about facts he did not witness firsthand violate these requirements and should, therefore, be stricken.

D. The December 22, 2014 Affidavit of Jane Parrott

Plaintiffs object to the admission of the Affidavit of Jane Parrott (“Parrott”) and ask that the affidavit be stricken in its entirety. Summary judgment affidavits must be based on personal knowledge.³² “Personal knowledge” means “knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.”³³

Parrott’s affidavit, however, concedes that her testimony is not based on her personal knowledge. Instead, Parrott concedes that her statements are based on her examination of financial and other records of the Diocese.³⁴ Her testimony thus fails the personal knowledge

²⁹ December 22, 2014 Affidavit of Chad Bates at 4.

³⁰ *Mowbray*, 788 S.W.2d at 668.

³¹ *Draper*, 793 S.W.2d at 300.

³² TEX. R. CIV. P. 166a(f).

³³ *Austin Traffic*, 2010 Tex. App. LEXIS 7059, *17 (quoting BLACK’S LAW DICTIONARY, 951 (9th Ed. 2009)).

³⁴ December 22, 2014 Affidavit of Jane Parrott ¶ 2.

requirement and should be stricken in its entirety.³⁵ Additionally, Parrott is not an expert witness and “[o]pinions of nonexpert witnesses are not admissible if they are legal conclusions.”³⁶

Further, Parrott’s testimony that the funds transferred to Louisiana “have been used for ordinary operations of the Diocese and for no other purpose”³⁷ contradicts her deposition testimony in this case, which admitted that the funds were being used to pay for legal expenses.³⁸ Similarly, her testimony that the money transferred to the Louisiana account has “never been hidden at any time” contradicts her deposition testimony that the Defendant Diocese put the money in an out-of-state account to keep it from this Court’s reach.³⁹ This testimony amounts to a sham affidavit, and should be stricken from the record.

E. The December 22, 2014 Affidavit of Stanley Maneikis

Plaintiffs object to the admission of the Affidavit of Stanley Maneikis (“Maneikis”) and ask that the affidavit be stricken in its entirety. The affidavit relates Maneikis’s interpretation of various records purportedly found in the offices of the Diocese of Dallas.

Summary judgment affidavits must be based on personal knowledge.⁴⁰ “Personal knowledge” means “knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.”⁴¹ Maneikis’s interpretation of certain Diocesan records fails this personal knowledge requirement for affidavits, is inadmissible, and should be stricken from the summary judgment record. Moreover, Maneikis is

³⁵ See *Villareal v. State*, 826 S.W.2d 621, 623 (Tex. App.—Houston [14th Dist.] 1992, pet. denied) (finding testimony to fail the personal knowledge requirement where it the knowledge came from “notes and memoranda” in the affiant’s records, instead of firsthand observation).

³⁶ *Mowbray*, 788 S.W.2d at 668.

³⁷ December 22, 2014 Affidavit of Jane Parrott ¶ 5.

³⁸ See Parrott Dep. at 179:11-180:13.

³⁹ Parrott Dep. at 93:18-22. (“Q. So you thought that that money would be harder for a court to reach out of state? A. That is not what I said, but that was the thought of the Diocese, not of me, but of the Diocese, that was the decision that was made.”).

⁴⁰ TEX. R. CIV. P. 166a(f).

⁴¹ *Austin Traffic*, 2010 Tex. App. LEXIS 7059 at *17.

not qualified by training or professional experience to offer the legal opinions stated in these paragraphs.⁴² Finally, they are not admissible lay witness opinions.

III. CONCLUSION AND PRAYER

For the foregoing reasons, Plaintiffs ask this Court to strike the identified portions of Defendants' Supplemental Summary Judgment Affidavits and Evidence and grant to Plaintiffs any and all other relief to which they are entitled.

⁴² See Tex. R. Evid. 702 (a witness "qualified as an expert by knowledge, *skill, experience, training, or education* may testify thereto in the form of an opinion or otherwise.") (emphasis added); *Mowbray*, 788 S.W.2d at 668 ("Opinions of nonexpert witnesses are not admissible if they are legal conclusions") (citation omitted).

Respectfully submitted,

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