STRIKING AFFIDAVITS: A CHALLENGING CHALLENGE—PART I

John M. McCrum

As parties embark down the road to trial, the crossroads at which defense counsel learns whether that destination is reached– or at least whether the burden of issues is lightened– is summary judgment. Facts gathered during discovery inform the issues for trial and are weighed early on for summary judgment potential. For all of its criticism as a "lethal weapon," summary judgment continues to serve a vital purpose: to end litigation about which there can be no factual dispute. *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). In fact, the U.S. Supreme Court has declared that summary judgment procedure "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Indiana's trial rules espouse the same goal. Ind. Trial Rule 1.

The usual evidentiary support for, and opposition to, summary judgment is found in an affidavit or deposition. Rule 56(E) directs that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Winbush v. Memorial Health System, Inc.*, 589 N.E.2d 1239 (Ind. 1991). The court may allow affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. But the filing of a summary judgment motion is ultimately a "put up or shut up" proposition: the adverse party cannot rest upon the mere allegations or denials in pleadings and must advance specific facts showing that there is a genuine issue for trial. T.R.56(E).

Thus, opposing affidavits are generated to meet the challenge, and defense counsel must be ready to identify in them defects constituting inadmissible evidence. Although the trial court may disregard such evidence on its own motion, we cannot presume that it will: the adverse party must move to strike or otherwise timely object to the defective portions of the affidavit, or waive the right to do so. *Paramo v. Edwards*, 563 N.E.2d 595, 600 (Ind. 1990); *see Doe v. Shults-Lewis Child and Family Services, Inc.*, 718 N.E.2d 738, 749 (Ind. 1999). So what is considered objectionable?

Historically, all evidence that would be ruled inadmissible at trial is subject to being stricken from an opposing affidavit in summary judgment proceedings, including conclusory statements, lay opinion or belief, and hearsay. *See, e.g.*, *Podgorny v. Great Central Insurance Co.*, 160 Ind. App. 244, 311 N.E.2d 640, 647 (1974) (affiant's assertions that he had not been served with process in accordance with Indiana or Illinois procedural rules deemed legal conclusions and therefore incompetent summary judgment evidence); *Coghill v. Badger*, 430 N.E.2d 405, 406-407 (Ind. Ct. App. 1982) (attorney's opinion of the effect of a conversation, rather than statement of facts of conversation, was properly ignored by trial court); *Oak Hill Cemetery of Hammond, Inc. v. First National Bank of Kokomo*, 553 N.E.2d 1249, 1252 (Ind. Ct. App. 1990) (affidavit improper where affiant did not, and probably could not, attest from personal knowledge to truthfulness of third-party's out-of-court assertions set forth in affidavit); *Sequa Coatings Corp. v. Northern Ind. Comm. Trans. Dist.*, 796 N.E.2d 1216, 1228 (Ind. Ct. App. 2003) (affiants' characterization of opponents' conduct viewed as statements of opinion or conclusion and thus inadmissible and insufficient to create genuine issue of fact); *Celina Mutual Ins. Co. v. Forister*, 438 N.E.2d 1007, 1011 (Ind. Ct. App. 1982) (attorney affiant's statement

that he was generally familiar with insurance client's file, and that he offered statements based thereon which he believed to be true held inadmissible and properly disregarded by the court). [In *Celina*, plaintiff sued her homeowner's insurer to collect under a policy for injuries received when she was shot five times by her husband. The suit followed her action against the husband for "negligently and carelessly" shooting and wounding her, and was filed after the insurer declined to assume the husband's defense on the grounds that the act was intentional and therefore excluded by the terms of the policy. In response to the now-ex-wife's motion for summary judgment, the insurer's attorney filed an affidavit in which he related information obtained second-hand from the insurer's file. Although not addressed in the opinion, the affidavit of an attorney can raise "attorney-as-witness" concerns, especially if the matters sworn or affirmed are contested issues and would be so at trial. *See* Rules of Professional Conduct 3.7(a)(1).]

You may be saying, "Give me some credit– I know incompetent evidence when I see it." However, some evidence considered inadmissible at summary judgment may yet be admissible in another form at trial. *Reeder v. Harper*, 788 N.E.2d 1236, 1241-1242 (Ind. 2003). Obviously, an affidavit is not competent evidence at a trial, because it speaks at the time of its preparation and cannot be cross-examined. But that impediment is cured when the affiant testifies to its substance in court, after first establishing his or her personal knowledge of the facts to be disclosed. All of this is contemplated by T.R.56(E), which accepts such evidence in affidavit form. So far, so good. However, in the conclusion to this article, which will appear in the next issue of *Indiana Lawyer*, we will examine the expansive view of the Rule taken by the supreme court in the *Reeder* case.

[*DTCI members who would like the entire text of Mr. McCrum's article before Part II appears in the Indiana Lawyer may e-mail Molly McClellan at* mmcclellan@dtci.org *for a copy*.]

Mr. McCrum is a partner in the Hammond firm of Eichhorn & Eichhorn and serves on the board of directors of the DTCI.

STRIKING AFFIDAVITS: A CHALLENGING CHALLENGE—PART II

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[*This is the conclusion of Mr. McCrum's paper, which began in the October 4 issue of the Indiana Lawyer. DTCI members who would like the entire text of Mr. McCrum's article may e-mail Molly McClellan at* mmcclellan@dtci.org *for a copy*.]

In *Reeder v. Harper*, 788 N.E.2d 1236 (Ind. 2003), the supreme court held admissible for summary judgment purposes the affidavit of a deceased affiant on the grounds that the substance of the affidavit could conceivably be supplied by somebody else at trial. The facts are these: plaintiffs alleged that several physicians failed to diagnose and treat the decedent's breast cancer. After her death, the estate pursued wrongful death and survivorship claims in a proposed medical malpractice complaint against the physicians. The medical review panel found that two of the doctors deviated from the standard of care, but that the deviations were not a factor in altering the course of her disease or in hastening her death.

Armed with the panel opinion, the two defendant physicians filed a motion for summary judgment in the ensuing state court action. Plaintiff obtained an opposing affidavit from a physician who reviewed the case and reached an opinion contradicting the panel's conclusion on causation. The court denied defendants' summary judgment motion after hearing. Later, the plaintiff's expert affiant died. Defendants renewed their summary judgment motion, after which plaintiffs again designated the now-deceased doctor's affidavit in opposition to the motion. This time the trial court granted the defendant physicians' motion.

The trial court's decision to strike the affidavit was initially upheld on appeal, on grounds

that because the affiant was now dead, his recorded statement would be hearsay and, therefore, inadmissible. *Reeder v. Harper*, 732 N.E.2d 1246, 1251 (Ind. Ct. App. 2000), relying upon *Spier v. City of Plymouth*, 593 N.E.2d 1255 (Ind. Ct. App. 1992) (summary judgment entered for municipality reversed given affiant's death prior to entry of summary judgment). However, the supreme court took a different view on transfer, noting that "to embrace the view that the death of an affiant renders an affidavit a nullity would result in summary judgment where the opposing party had the misfortune to select the one short-lived witness from among the many who may be able to testify to the same thing." 788 N.E.2d at 1242. It held that because the content of the affidavit could likely be expressed by another expert witness at trial, the affidavit could properly be considered in opposition to the defendants' summary judgment motion.

This seems a peculiar result, particularly given the remedies available under T.R.56(F) or (I), which allow the court to order continuances or alter time limits to permit other affidavits to be obtained or depositions taken in aid of opposing a summary judgment motion. In short, if an expert witness dies untimely, another can be obtained to submit a similar affidavit before the court rules on the motion. As Justice Boehm observed in dissent, the death of an affiant "requires the opposing party to file a new affidavit or concede that the motion no longer can be opposed by competent testimony at trial." 788 N.E.2d at 1245. The scope of the majority opinion in *Reeder* would seem to invite hearsay-laden affidavits that could withstand a motion to strike and, in turn, the motion for summary judgment. To put it in perspective, Justice Boehm commented further:

> "Just as it would be improper to seek summary judgment based on an affidavit that says 'I wasn't there but Sally told me the light was red,' so also it is insufficient to oppose an affidavit from a competent witness with such a filing. An affidavit from the person

> who told the affiant the reported fact would presumably do the job because that person could testify at trial. But Rule 56 requires an affidavit from that person, who can testify to the fact, not the affiant who cannot. The same problem exists with affidavits from a person who cannot testify at all."

Id. at 1246.

In a separate dissent, Chief Justice Shepard commented upon the effect the majority opinion might have upon the very purpose of Rule 56:

> "Under the facts of the present case, of course, the majority's decision means that the parties and the court will proceed to the trial of a case in which so far as is known now the claimant does not have admissible evidence in support of the elements of the claim. While it seems easy to surmise that the plaintiffs will ultimately be able to find a medical witness that will make this possible, it is the very office of Rule 56 to provide early resolutions of whether this is so or not. That is why Rule 56 says that a responding party is not entitled simply to stand on the pleadings."

Id. at 1244. Note the use of the word *surmise*, which does not seem at all compatible with summary judgment requirements. Although the majority determined there was "nothing in the record before us suggesting that the substance of the affidavit would not be admissible at trial in another form– most likely, the testimony of another expert witness," there is no indication that there was something in the record that would. *Id*. at 1242. If another expert witness is indeed prepared to supply the same substance at trial, it should be incumbent upon the party opposing the motion to come forward with proof of that fact prior to the summary judgment hearing.

Since the *Reeder* opinion, there have been at least two appellate court decisions in which the question of striking hearsay statements within affidavits opposing summary judgment have been addressed. In *Lytle v. Ford Motor Co.*, 814 N.E.2d 301, 316-317 (Ind. Ct. App.2004), a products liability action based upon a roll-over accident, the court of appeals upheld the striking

of affidavits containing inadmissible hearsay and statements made outside the affiant's personal knowledge regarding seat belt use. And in *City of Gary v. McCrady*, 851 N.E.2d 359, 363-364 (Ind. Ct. App. 2006), the court of appeals reversed the trial court's grant of a partial summary judgment for the plaintiff in part because inadmissible hearsay statements of an affiant relying on another's investigation should have been disregarded. In so holding, the court noted that "the requirements of T.R.56(E), including the requirement that supporting and opposing affidavits shall be made on personal knowledge, are mandatory."

It is difficult to reconcile *Reeder* with the Rule's requirement that affidavits be based on personal knowledge, for hearsay is by definition knowledge gained second-hand. If the affiant is not an expert–who of necessity obtains information from others as a predicate to forming an opinion– the opposing affidavit should still be scrutinized for hearsay statements, as well as inadmissible speculation or opinion; and motions to strike should still be considered prior to any summary judgment hearing, in order to avoid the possibility of waiving objections to questionable "evidence."

Mr. McCrum is a partner in the Hammond firm of Eichhorn & Eichhorn and serves on the board of directors of the DTCI.