

# Trial Law TIPS

Roy D. Wasson's  
TIP #30

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## Avoiding Summary Judgment with Affidavits that Conflict with Prior Deposition Testimony

### Introduction

Let's see a show of hands on this one: how many of you out there have *never* come away from your own client's deposition shaking your head in amazement and dismay at just how different the Plaintiff's testimony was from your pre-depo conference? I see just one hand being raised there in the back row by an associate who was sworn into the Bar yesterday. The rest of us know what I'm talking about, don't we?

In the pre-deposition conference, the Plaintiff told you just how the accident occurred, describing in some particular detail the foreign object that caused her to slip and fall. Or perhaps she explained to you persuasively why she had no reason to suspect any

sort of medical malpractice until just before the lawsuit was filed, even though it had been more than five years since the defendant botched her surgery.

Then at the deposition itself, all that you discussed was suddenly forgotten! Suddenly, the Plaintiff has no idea what caused her to fall, and testifies somewhat convincingly that she does not remember seeing *anything* on the floor. Your malpractice Plaintiff explains to the defense attorney that she suspected medical negligence from the day after the surgery, and suddenly remembers a string of lawyers who had corroborated her suspicions to her before she came to see you.

Once you get over the initial pain of that deposition experience, the real trouble begins. You soon receive in the mail Defendant's Motion for Summary Judgment supported largely by "Exhibit A," your client's deposition transcript. Now what?

### **The General Rule of *Ellison* and Its Progeny**

Beginning almost fifty years ago in the case of *Ellison v. Anderson*, 74 So. 2d 680 (Fla. 1954), it has been the law in Florida that a party may not ordinarily contradict his or her prior deposition testimony with an affidavit filed solely to defeat summary judgment. In *Ellison*, a personal injury action brought by a bus passenger against the bus owner, the plaintiff "gave her deposition in which she practically absolved the bus driver of negligence." *Id.* at 680. In her deposition, the plaintiff testified that the bus driver entered on the green light, and made an effort to avoid the collision, but was struck by another vehicle near the center of the intersection. The defendant filed a motion for summary judgment, which the plaintiff attempted to oppose by way of her "affidavit [which] sought to repudiate a portion of her previous deposition, by alleging that the bus driver did nothing to avoid the accident." *Id.* The Supreme Court held "that a party when met by a Motion for Summary Judgment should not be permitted by his own affidavit, or by that of another, to baldly repudiate his previous deposition so as to create a jury issue . . ." *Id.* at 681.<sup>1</sup>

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<sup>1</sup> Although the Court in *Ellison* held that the plaintiff's affidavit was improper because it repudiated her prior

Following the Supreme Court's lead in *Ellison*, the district courts of appeal of Florida have frequently held that a party may not avoid summary judgment by executing an affidavit which contradicts his or her previous deposition testimony. *See, e.g., Jordan v. State Farm Ins. Co.*, 515 So. 2d 1317 (Fla. 2d DCA 1987)(affirming trial court's striking of plaintiff's inconsistent affidavit). As recently as this year, courts have reaffirmed *Ellison* with statements to this effect: "It is well established that a litigant when confronted with an adverse motion for summary judgment, may not contradict or disavow prior sworn testimony with new and starkly different sworn affidavit testimony, solely to avoid summary judgment." *Lawrence v. Pep Boys—Manny, Moe & Jack, Inc.*, 842 So. 2d 303, 305 (Fla. 5<sup>th</sup> DCA 2003).

The *Ellison* Rule also applies to preclude a party from contradicting other forms of testimony by a later affidavit, such as earlier interrogatory answers, responses to requests for admissions, or other affidavits. *See Williams v. Garden City Claims, Inc.*, 796 So. 2d 586, 588 (Fla. 3d DCA 2001("a party may not, after having given an affidavit in a cause, subsequently change his testimony in order to create an issue on his opponent's motion for summary judgment"). *See also, e.g., Ondo v. F. Gary Gieseke, P.A.*, 697 So. 2d 921, 923 (Fla. 4<sup>th</sup> DCA 1997)(party may not contradict prior answers to interrogatories with a later affidavit).

### **Exceptions to the *Ellison* Rule**

So, what are you supposed to do when placed in this miserable situation by your unthinking client and faced with a motion for summary judgment which seems to require contradiction of her deposition testimony? Are you going to curl up in a ball and give up? No, you're not! There are ways to avoid the effects of the *Ellison* Rule and generate affidavits which should not be stricken and are sufficient to defeat summary judgment, even in the face of your client's sorry showing at deposition.

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testimony, the Court reversed the summary judgment based upon the affidavit of the other driver, which created an issue whether the bus driver was traveling too fast.

The two main areas of exception to the *Ellison* rule are: 1.) Where your client's post-deposition affidavit does not directly contradict something within her deposition, but augments or supplements that deposition by addressing a subject which was not fully explored at deposition; 2.) Where your client offers a credible explanation for executing an affidavit that is directly contradictory to her prior deposition testimony.

First, a party may avoid summary judgment by filing an affidavit which "supplements" his or her prior deposition testimony on a material issue, as opposed to "contradicting" the deposition on that point. For example, in *Bell v. Bailey*, 639 So. 2d 1063 (Fla. 3d DCA 1994), the defendant moved for summary judgment which the plaintiff opposed by filing her affidavit. The trial court struck the affidavit, finding that it contradicted the plaintiff's prior deposition, but the Third District reversed on the ground that the material issue of fact contained in the affidavit was not the subject of express questions or answers during the deposition.

The court in *Bell* held: "The plaintiff's affidavit, at least arguably, supplemented her deposition testimony and did not expressly contradict it. Accordingly, the trial court erred in striking the plaintiff's affidavit." *Id.* at 1064.

Similarly, in the *Lawrence* case, *supra*, the court held that the affidavit was improperly disregarded, because it contained matters which were not expressly inquired about during the deposition:

In the present case we cannot say that the affidavit of Mr. Lawrence "baldly" contradicted his earlier deposition testimony. ***He was never asked about shadows, or specific lighting conditions,*** and nothing that he said in his deposition is in direct or blatant contradiction to the affidavit. He was only asked if he could see the area that he asserts caused him to trip if he had looked, and he responded that he did not know.

842 So. 2d at 305(emphasis added).



Perhaps in the example given above of your client testifying that she did not know what caused her to fall, an affidavit could be prepared establishing that—whatever the unknown object may have been—the floor still was dangerously slippery and *something* which should not have been on the walking surface caused the accident and injuries. Perhaps as in *Lawrence* the defense did not inquire into an area which the Plaintiff’s affidavit can address. A word to the wise: the affidavit should contain the explanation as to why the issue was not addressed in the deposition.

For example, the affidavit might state something like: “Although in my deposition I testified that I did not know what caused me to fall, the lighting conditions were too dark for me to see the floor and the question was never asked why I did not see what I tripped on. Whatever the item was, it was something that caused me to lose my footing which I did not expect to encounter.”

There are many ways deposition testimony can be supplemented so that a fact issue is created without expressly contradicting prior deposition testimony. But if supplementing the plaintiff’s deposition will not do the trick—either because your client was asked every conceivable question about the subject matter or because nothing else can be done to avoid summary judgment other than to contradict her testimony—then the affidavit itself needs to contain a detailed and credible explanation why the inconsistency exists in the Plaintiff’s accounts of the facts.

Where there is a credible explanation offered with the plaintiff’s affidavit to explain discrepancies between prior testimony and the affidavit, the court can and should consider the affidavit and deny summary judgment. See *Borders v. Liberty Apartment Corp.*, 407 So. 2d 232 (Fla. 3d DCA 1981). Cf. *Ellison v. Goodman*, 395 So. 2d 1201 (Fla. 3d DCA 1981)(noting exception to *Ellison* Rule which arises when there is a credible explanation by the affidavit as to discrepancies between earlier and later testimony); *Tri-County Produce Distributors, Inc., v. Northeast Production Credit Ass’n.*, 160 So. 2d 46 (Fla. 1<sup>st</sup> DCA 1963)(affidavit must contain explanation of conflict between it and deposition testimony).

In *Willage v. The Law Office of Wallace and Breslow, P.A.*, 415 So. 2d 767, 769 (Fla. 3d DCA 1982), the court held: “[A] party

may give a subsequent affidavit for the purpose of explaining testimony given in a prior affidavit or deposition, so long as the explanation is credible, even though it creates an issue on the opponent's motion for summary judgment." If a credible explanation is made in an affidavit explaining why it is inconsistent with the Plaintiff's prior deposition, "then the rule of exclusion is no longer applicable and the latest statement may be considered in determining whether it creates a genuine issue of fact to be resolved only by the jury on trial." *Croft v. York*, 244 So. 2d 161, 165 (Fla. 1<sup>st</sup> DCA 1971).

If you are faced with the situation of having to file an affidavit which contradicts prior deposition testimony, be sure to include the explanation for the contradiction within the affidavit itself, unless it already appears of record. Do not rely upon your own persuasive abilities to explain to the trial court why the discrepancy exists but is excusable. "An unsubstantiated assertion is not sufficient to overcome the effect of the prior testimony . . . , and ***the explanation must appear either in the affidavit itself*** or, viewed as a whole, the record must support the explanation." *Ondo, supra*, 697 So. 2d at 924(emphasis added).

Among the possible credible explanations for contradicting prior deposition testimony is the one presented in the case of *Kopacz v. Jack Eckerd, Corp.*, 542 So. 2d 469 (Fla. 5<sup>th</sup> DCA 1989), that the plaintiff was confused by the questioning at her deposition and did not fully understand what was being asked. The court in that case reversed a defense summary judgment, holding: "it is our considered judgment that the 'Ellison Rule' is not applicable here because a full reading of the deposition of the plaintiff shows she very likely was confused and unsure of her answer and thus should not be held strictly to it by granting summary disposition of her claim." *Id.* at 469.

Another alternative not addressed in the cases is that of changing the plaintiff's prior deposition testimony through the use of an Errata Sheet. The pros and cons and pitfalls concerning use of Errata Sheets to make substantive changes to your client's deposition testimony were addressed in Trial Law Tip of the Week #9. Those issues appear to be equally applicable to the use of contradictory affidavits, so be aware of them.

## **Conclusion**

One way or the other, when your client's deposition fails to tell the whole story of the case, due to your client's confusion, the failure of the defense attorney to ask all the necessary questions, or due to a simple mistake, you need to take some action to set the record straight in order to avoid summary judgment. Focus on explaining in the affidavit how you are supplementing, rather than contradicting, prior testimony, or include in the affidavit a credible explanation why contradicting that deposition is necessary and proper.

See why I gave up participating in discovery? Have fun, and:

***Keep Tryin!***

***Roy***