CREATING ISSUES OF MATERIAL FACT BY CHANGING A WITNESS' TESTIMONY

You are driving back to your office after having taken a great deposition of a defendant in a hotly contested case. You have hemmed him in to a position from which he cannot possibly escape. You have him dead to rights. The jury will certainly agree with your argument at trial that he is liable to your client. Suddenly, it occurs to you that, based upon the defendant's deposition testimony, that liability can be summarily decided by the judge. In this day and age,and especially with this case, why risk allowing a jury to excuse the defendant's misconduct for some reason? Instead, let the judge decide the liability, and let the jury decide the damages.

Once the transcript arrives, you draft a very nice motion for summary judgment. It contains all of the proper legal citations and references to the record. You obtain leave of court, and file it. And you wait. Then it arrives—the defendant's memorandum in opposition, and attached to it is the defendant's affidavit which conflicts with the deposition testimony. But you took his deposition. You had him locked in. How can he change his testimony? Can he weasel his way out of it? Can he *manufacture* a genuine issue of material fact to defeat your motion? The answer, my friends, appears to be a qualified yes.

The overwhelming trend in Ohio is to construe conflicts, whether by a party, movant, or nonmovant, as issues...to be resolved by a jury.

A. HOW TO CREATE A GENUINE ISSUE OF MATERIAL FACT:

At his deposition, the plaintiff in *Bowen vs. Kilkare*, Mr. Bowen, admitted he had signed a release and indemnity agreement. The defendant thought he had him, so he moved for summary judgment. The plaintiff filed his memorandum in opposition, and, in his affidavit, denied that he had read the documents before he signed them. The Supreme Court held that there was a genuine issue of material fact. The Court explained:

> Applying the standards of Civil Rule 56(C), we find that the questions whether Bowen signed the Exhibit A release or was denied the opportunity to read the release are questions of fact which, for purposes of summary judgment, must be resolved in appellants' favor. Therefore, appellees are not entitled to summary judgment on the basis of the Exhibit A release since it must be assumed for purposes of summary judgment that Bowen never properly executed the release.[1]

The *Bowen* decision laid the groundwork for procedural wrangling between mother and son, the Turners, over injuries she caused him in a car collision. In *Turner v. Turner*, [2] The Supreme Court had an opportunity to once again construe Civil Rule 56(C), and decide whether a genuine issue of material fact existed by a virtue of a conflict between the movant's deposition testimony and her affidavit. The Supreme Court indicated that the purpose of Civil Rule 56(C) required the matter to be submitted to a jury:

> Since resolution of the factual dispute will depend, at least in part, upon the credibility of the parties or their witnesses, summary judgment in such a case is inappropriate. However, as demonstrated by the case sub judice, credibility questions also arise when an unambiguous statement contained in the affidavit and of the party moving for summary judgment is controverted by that party's earlier deposition testimony. Such a discrepancy over a material fact can be resolved only by the trier-of-fact and, on this basis, the trial court erred in granting Defendant's Motion for Summary Judgment. Accordingly, we hold that when a litigant's affidavit in support of his or her Motion for Summary Judgment is inconsistent with his or her earlier deposition testimony, summary judgment in that parties favor is improper because there exists a question of credibility which can be resolved only by the trier-of-fact. [3]

The *Turner* case had its limits though. It involved a case where a litigant was able to defeat his adversary's motion for summary judgment by pointing out contradictory statements in the movant's own evidence. The question for cases to come later was whether a litigant could defeat his adversary's motion for summary judgment by giving an affidavit that contradicts his own earlier deposition testimony. The answer, it appears, is yes, for most appellate courts that have considered the question.

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Leading the way in appellate courts in the development of case law in this subject, even prior to *Turner*, was the Second District Court of Appeals, which drew a distinction between parties and non-parties. The court held,

> A contradictory affidavit of a *party* witness should be disregarded. The party witness generally has the benefit of counsel to protect him from inadvertent misstatements... However, in a situation where a *non-party witness* has given certain testimony in a deposition and then given contradictory averments in a subsequent affidavit, the same factors are not present… If the affidavit is sufficient to create a genuine issue of material fact, the trial court may not determine as a matter of law, that no jury would believe the witness if he should testify at trial in accordance with his affidavit. It would be within the jury's province to consider the contradictory deposition testimony, if offered to impeach the witness, and then to determine where the truth lies. [4]

After *Turner*, however, courts no longer concern themselves with distinctions between parties and non-parties; rather, the distinction nowadays is between movants and non-movants.

In one camp is the Seventh District Court of Appeals, which firmly adheres to the proposition that the *Turner* holdings is limited to "situations where it is the moving party submitting the conflicting affidavit and deposition testimony."[5] The other camp comprises courts of appeals which have expanded the application of *Turner* to cover movants and nonmovants alike. For example, in *Fiske v. Rooney*, [6] the Fourth District recognized:

> This Court has largely limited the application of *Turner* to those instances where the conflicting deposition and affidavits are those of the summary judgment movants. See *Push v. A-Best Products, Co* (April 18,1996)m Scioto App. No. 94CA2306, unreported, 1996 WL192968, We have generally declined to apply those principles to cases where the conflicting evidentiary materials are submitted by the nonmovant, Id. In so ruling, we held that "the non-moving party cannot defeat a motion for summary judgment by submitting an affidavit which, without explanation, directly contradicts his previous deposition testimony…."Our decision in *Push* left open the possibility that a non–movant could still contradict prior deposition testimony and defeat a motion for summary judgment if his affidavit contained an explanation for the conflict...[7]

Thus the *Fiske* Court found that a genuine issue of material fact existed. The Second, Third, Sixth and Eighth District Courts of Appeals appear to be in accord with the Fourth District. [8]

The overwhelming trend in Ohio is to construe conflicts, whether by a party, non–party, movant, or nonmovant, as issues of material fact to be resolved by the jury. Thus, in your case, if the defendant supplies an affidavit that contradicts his earlier testimony, the judge may rightfully decline to grant your motion for summary judgment.

B. SUMMARY JUDGMENT EVEN IN THE FACE OF CONTRADICTIONS:

While courts in Ohio have differed as to whether a non-movant can create a genuine issue of material fact by issuing contradictory affidavits, courts throughout Ohio are unanimous in holding that, "[w]here the affidavit does not explain the contradiction then a trial court may disregard it." [9]

What remains to be litigated is exactly what constitutes an appropriate explanation for conflicts between depositions and affidavits. [10] In your case, if the defendant provides a contradictory affidavit, but fails to provide a satisfactory explanation for the contradiction, courts are free to reject the supplemental affidavit and decide the motion on the deposition alone. [11]

CONCLUSION

In summary, prior to *Turner*, courts drew a distinction between conflicting testimony of parties and non-parties. Since *Turner*, however, most appellate districts throughout Ohio have expanded its holding to permit nonmovants to defeat summary judgment by giving contradictory affidavits. In such cases, however, the nonmovant must explain the reason for the contradiction. If the affiant fails to offer a sufficient explanation for the contradiction, then summary judgment may be appropriate.

[1] *Bowen v KilKare, Inc.* (1991) 63 Ohio St.3d 84, 89,585 N.E.2d 384, 389.

[2] (1993) 67 Ohio St. 3d 337, 617 N.E. 2d 1123.

[3] Id. at 341-2,1127.

[4] *Clemmons v. Yaezell* (Dec.29,1988), Montgomery App. No. 11132, 1988 WL 142397, unreported.

[5] *Kollmorgan v. V.G. Raghavan* (May 5, 2000), Mahoning App. No. 98 CA 123, 2000 WL 652429, unreported; see also *Harger v. VistaCentre* (January 4, 2001), Columbiana No. 00-CO-4, 2001 WL 15931, unreported("In the case at bar, appellant was not the movant. Therefore, *Turner* does not provide the proper standard.").

[6] (1998), 126 Ohio App. 3d 649, 711 N.E. 2d 239.

[7] Fiske at 660-61, 247.

[8] *See e.g.,K-Swiss, Inc. v. Cowens Sports Center, Inc* (Nov. 9, 1995), Greebe App. No. 95-CA-48, unreported ("Although Turner involved conflicting statements made by a party moving for summary judgment, we find its logic equally applicable in the present case.") *Grant v. City of Marion* (December 28, 1995), Marion App. No. 9-95-37, 1995 WL 771385, unreported (trial court committed non-prejudicial error by not considering litigant's affidavit); *Retterer v. Whirpool Corporation* (1996), 111 Ohio App. 3d 847,677 NE 2d 417. ("absent a trial court's determination of bad faith concerning an affidavit, the affidavit must be construed as truthful"); (citing *Aglinsky v. Cleveland Builders Supply Company* (1999), 68 Ohio App. 3d 810,816, 589 NE 2d 1365, 1369); *Sheidler v. Norfolk* (Sept. 16, 1994), Lucas App NO. L-93-336, 1994 WL 506142, unreported ("the same credibility issues exists when a non-moving party submits an affidavit which is inconsistent with prior deposition testimony.") (citing *Turner,* supra and *McCollough v. Spitzer Motor Ctr. Inc.* (Jan 27, 1994), Cuyahoga App. No. 64465, unreported).

[9] *Zara v. Gabrail* (Dec. 21,1998), Stark App. No. 98-CA–0064, 1999 WL 4497, 1999 WL 4497; see also, *Huberty v. Esber Beverage Co.* (Dec.31 2001), Stark App. No. 2001-CA-00202, 2001 WL 1673749, unreported (affirming summary judgment where affiant/deponent failed to give reason for conflict between deposition and affidavit); *Push v. A-Best Products Co.* (April 18, 1996). Scioto App. No. 94 CA 2306, 1996 WL 192968, unreported (if no explanation between affidavit and deposition no issue of material fact is created).

[10] *Bowen v KilKare, Inc.* (1991) 63 Ohio St.3d 84, 89, 585 N.E.2d 384, 389.

[11] *Zara,* supra; *Huberty,* supra; *Push,* supra; *Fiske,* supra.