IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SHAUN LESNIK,

Appellant,

v.

DUVAL FORD, LLC, a Florida corporation and BURKINS CHEVROLET, INC., a Florida corporation,

Appellees.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D14-5029

Opinion filed January 28, 2016.

An appeal from the Circuit Court for Duval County.
Karen K. Cole, Judge.

Jessie L. Harrell and Bryan S. Gowdy of Creed & Gowdy, P.A.; Robert Harris, David Dunlap, and Jason Ellis of Harris, Guidi, Rosner, Dunlap & Rudolph, P.A., Jacksonville, for Appellant.

Hinda Klein of Conroy Simberg, Hollywood, for Appellee Duval Ford, LLC.

Shelley H. Leinicke of Wicker, Smith, O'Hara, McCoy & Ford, P.A., for Appellee Burkins Chevrolet, Inc.

BILBREY, J.

Appellant Shaun Lesnik appeals the final summary judgment entered by the trial court upon the trial court's finding no genuine dispute of material fact and that

both Appellees, defendants below, were entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c). As grounds for reversal, Mr. Lesnik challenges the trial court's striking of the affidavit of his expert witness, Alan Moore, P.E., filed after Mr. Moore's deposition was taken and after the filing of the motions for summary judgment. In addition, Mr. Lesnik asserts that genuine issues of material fact precluded summary judgment for the defendants/Appellees.

The undisputed facts in the record are that on August 29, 2007, Appellee Duval Ford sold a new, 2008 Ford F-250 to the original owner, David Sweat. Prior to taking delivery of the truck, Mr. Sweat ordered a 6-inch lift kit, which was installed by a subcontractor of Duval Ford.[1] During his ownership of the truck, Mr. Sweat modified the suspension system with a leaf spring to increase the towing capacity, and replaced the tires. He drove the truck over 30,000 miles during the time he owned it, and never experienced any problem with the steering or suspension. On October 23, 2009, Mr. Sweat sold the vehicle through Larry Burkins, owner of Burkins Chevrolet, to plaintiff Shaun Lesnik. Prior to the sale, Burkins Chevrolet conducted a routine inspection of the truck which revealed no obvious issues.

After experiencing severe shaking in the truck's steering on the evening of October 23, 2009, Mr. Lesnik had the truck repaired and made some additional

[1] The installer of the lift kit was also a defendant before the trial court, but is not a party to this appeal.

modifications, including installing a tool box and fuel tank on the truck bed, installing a steering stabilizer, and replacing the tires. Mr. Lesnik also installed a performance tuner which substantially increased the horsepower of the truck.

On December 16, 2009, as Mr. Lesnik was driving the truck, the steering and suspension suddenly failed, the truck flipped over, and Mr. Lesnik was severely injured in the single-vehicle accident. The tires on the truck at the time of the accident were two inches larger in diameter than the truck specifications called for, but it was unclear from the evidence when this change occurred or which owner made this change to the size of the tires.

We review the trial court's striking of the affidavit of an expert witness, in this case the affidavit of Mr. Moore, for abuse of discretion. "As with other evidentiary matters, the admission and consideration of affidavits is a matter within the sound discretion of the trial court . . . ." Scott v. NCNB Nat'l Bank of Florida, 489 So. 2d 221, 223) (Fla. 2d DCA 1986); see also Martins v. PNC Bank, N.A., 170 So. 3d 932, 937 (Fla. 5th DCA 2015) (denial of motion to strike summary judgment affidavit was abuse of trial court's discretion).

Mr. Moore's deposition was taken on May 7, 2014. Along with his expert opinions on the technical and mechanical evidence in this case, Mr. Moore was asked if he had "any opinions with respect to the conduct of Burkins Chevrolet that you feel caused this accident involving Mr. Lesnik?" Mr. Moore responded, "No, I

do not." Mr. Moore was asked a similar question regarding Mr. Burkins individually, and he responded with the same answer. Mr. Moore also testified that he had no opinion on whether lifted trucks should be sold to the public and he had no opinion whether the truck was defective when Duval Ford sold it to the original purchaser.

After Duval Ford and Burkins Chevrolet filed their motions for summary judgment, Mr. Lesnik filed an affidavit of Mr. Moore dated September 11, 2014. In this affidavit, Mr. Moore recited several sources of information purportedly available to Burkins Chevrolet which Mr. Moore asserted provided the dealership with "trade knowledge" of the dangers of trucks with lift kits, modified suspension systems, oversized tires, and the effects of these modifications on vehicle warranties.[2] He further opined that the service records for the truck in this case were available and that excessive tire wear should have been readily apparent had Burkins Chevrolet inspected the truck prior to selling it to the plaintiff. Mr. Moore's affidavit concluded that Burkins Chevrolet "had information available that indicated a suspension inspection should be performed, but did not do so" and that warning the consumer, namely the plaintiff, could have prevented his "exposure to the above risks" of the vehicle. Mr. Moore's affidavit did not explain why he was now offering these opinions after previously testifying that he had no

[2] Mr. Moore previously discussed at least one of these sources in his deposition, an April 2009 dealer letter.

opinion as to the conduct of Burkins Chevrolet or Mr. Burkins which contributed to the accident.[3]

At the trial level, Mr. Lesnik's counsel made no attempt to explain the difference between Mr. Moore's deposition testimony that he had no opinion regarding the conduct of defendant Burkins Chevrolet or Mr. Burkins personally which might have caused the accident, and Moore's subsequent affidavit indicating that Burkins Chevrolet failed to take actions which could have prevented the accident. Mr. Lesnik's position was that no explanation was necessary because the later-prepared affidavit did not contradict Moore's deposition testimony.[4]

Based on the precedent established by Ellison v. Anderson, 74 So. 2d 680, 681 (Fla. 1954) and subsequent cases, the trial court found Mr. Moore's affidavit irreconcilably inconsistent with his earlier deposition testimony without any explanation for the inconsistency, and granted Burkins Chevrolet's motion to strike Mr. Moore's affidavit. Considering the timing and content of the deposition and

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[3] Mr. Lesnik also filed a separate affidavit of Mr. Moore with regard to Duval Ford. Duval Ford did not move to strike that affidavit, but that affidavit did not assert any new material facts as to preclude the grant of summary judgment against Duval Ford.

[4] We disagree. The dissent asserts that Mr. Moore's initial lack of an opinion is not contradicted by the presence of a subsequent opinion However, we believe, "I have no opinion" contradicts any opinion given. "[A]ll contraries are reducible to being and non-being." Aristotle, Metaphysics IV.2, 1004b, trans. Ross. Consider a lay witness asked in a deposition the color of traffic light and stating, "I don't know" or "I can't say." If that witness intended to testify later that the light was red, yellow, or green, that would contract the witness' earlier testimony.

affidavit at issue, we find no abuse of the trial court's discretion in applying the rule set out in Ellison that "a litigant when confronted with an adverse motion for summary judgment, may not contradict or disavow prior sworn testimony with contradictory sworn affidavit testimony." Ondo v. F. Gary Gieseke, P.A., 697 So. 2d 921, 923 (Fla. 4th DCA 1997) (citations omitted).[5]

Our review of the summary judgment itself is de novo, "to determine whether there are genuine issues of material fact and whether the trial court properly applied the correct rule of law." Futch v. Wal-Mart Stores, Inc., 988 So. 2d 687, 690 (Fla. 1st DCA 2008). While various facts might be in dispute, the *material* facts depend upon the causes of action alleged in the pleadings, namely Mr. Lesnik's third amended complaint, filed September 24, 2013. Mr. Lesnik sought damages against Duval Ford on the legal theories of vicarious liability for the negligence of the subcontractor lift kit installer, direct negligence for selling the vehicle as modified and failing to warn, and strict liability for selling the vehicle as modified and failing to warn. To assert a claim for a defective product, whether the claim is for negligence or strict liability, a plaintiff must show "(1) that a defect was present in the product; (2) that it caused the injuries complained of; and (3)

[5] To adopt a contrary view and allow Mr. Moore — without explanation — to first answer "no opinion" and then wait to offer an opinion in opposition until after Burkins Chevrolet's motion for summary judgment would defeat the purpose of discovery in civil cases and create an easily exploitable way around Ellison.

that it existed at the time the retailer or supplier parted possession with the product." Cassisi v. Maytag Co., 396 So. 2d 1140, 1143 (Fla. 1st DCA 1981).[6]

There was no evidence in the record that the lift kit was defective or improperly installed by Duval Ford's subcontractor or that it was inherently dangerous, eliminating any claim for vicarious liability against Duval Ford. The record contains no evidence of a design defect in the lifted truck when it was originally purchased from Duval Ford, eliminating any claim for negligence or strict liability against Duval Ford. Finally, Duval Ford had no duty to warn about the truck since there was no evidence that there was anything inherently dangerous about the truck when it was sold by Duval Ford. See Brito v. County of Palm Beach, 753 So. 2d 109, 112 (Fla. 4th DCA 1998) (manufacturer has "a strict duty to warn of its product's dangerous propensities only in those instances where the commodity is inherently dangerous").

Also in the third amended complaint, Mr. Lesnik brought a claim of negligence against Burkins Chevrolet for failing to inspect the truck and failing to warn of the risk of lifted vehicles. As to this claim, the record lacks any evidence

[6] In addition, a manufacturer is not held strictly liable in a products liability action where the product has been "substantially altered" by the time a plaintiff is injured by the product. High v. Westinghouse Elec. Corp., 610 So. 2d 1259, 1262 (Fla. 1992); Rodriguez v. Nat'l Detroit, Inc., 857 So. 2d 199, 201 (Fla. 3d DCA 2003). The trial court found that the truck had been substantially altered. We do not need to reach that issue to affirm the summary judgment.

that Burkins Chevrolet had a duty to inspect the vehicle for latent defects or that the lifted truck actually included any design defects. See Masker v. Smith, 405 So. 2d 432, 434 (Fla. 5th DCA 1981) (seller of used goods is not responsible for discovering latent defects). The undisputed evidence showed that Mr. Lesnik was well aware that the truck was lifted, and in fact this modification was a factor in his decision to purchase the truck. Furthermore, the evidence was undisputed that Burkins Chevrolet was unaware of any latent defects. Burkins Chevrolet looked for patent defects in its inspection and found none. Finally, with Mr. Moore's affidavit stricken, there is no evidence that Burkins Chevrolet had a duty to warn Mr. Lesnik of any defect.

In light of the foregoing, the trial court's final summary judgment for Duval Ford and Burkins Chevrolet is affirmed.

AFFIRMED.

SWANSON, J., CONCURS, and MAKAR, J., CONCURS IN PART AND DISSENTS IN PART WITH WRITTEN OPINION.

MAKAR, J., concurring in part, dissenting in part with opinion.

At the risk of offending Aristotle, I disagree that an expert who has no opinion on a disputed matter when deposed, but later expresses one in an affidavit, has thereby offered "contradictory" opinions that warrant striking his entire affidavit and entering judgment against a party under the principles of Ellison v. Anderson, 74 So. 2d 680, 680-81 (Fla. 1954). Ellison provides a classic example of contradictory testimony by a party. The plaintiff "gave her deposition in which she practically absolved the bus driver of negligence" but later filed an affidavit in opposition to a summary judgment motion that "repudiate[d] a portion of her previous deposition, by alleging that the bus driver did nothing to avoid the accident." Id. Because the plaintiff offered an opinion, but later directly contradicted it, the supreme court said "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, especially when no attempt is made to excuse or explain the discrepancy." Id. at 681. Notably, the supreme court reversed the summary judgment because the plaintiff had provided the "affidavit of the driver of the other vehicle" that raised an issue as to the "speed of the bus under the existing circumstances." Id.

In contrast to Ellison, the expert at issue in this case, Mr. Moore, offered no opinion in his deposition that he later contradicted. When asked generally if he had

an opinion as to whether Burkins Chevrolet's conduct was the cause of injury to Mr. Lesnik, he said he did not. No inquiry was made, or stipulation agreed upon, that would foreclose Mr. Moore from offering an opinion on the topic at a later time. Indeed, when asked whether he had "any opinions, *as you sit here today*, that any conduct of Mr. Burkins and Burkins Chevrolet contributed to the accident involving Mr. Lesnik?" he simply did not have one to offer at that time. (Emphasis added). He also had no opinion when asked whether lifted trucks "should not be sold to the consuming public."

In response to a summary judgment motion, a few months later he provided an affidavit based on a number of industry-related documents, focusing on various failures on the part of Burkins Chevrolet that might establish negligence (but not necessarily causation) on its part. Nothing in his affidavit repudiated his prior testimony; it neither rejected, disclaimed, renounced, denied, retracted, nor disavowed anything he'd ever said. See Futch v. Wal-Mart Stores, Inc., 988 So. 2d 687, 691 (Fla. 1st DCA 2008) ("the *Ellison* rule does not apply because it has not been shown that appellant's affidavit directly contradicts her deposition testimony."). He offered no opinion on causation, which was the focus of two of the questions at his deposition; and he never offered an opinion on whether lifted vehicles should never be sold to the public (he said only that they create significant risks known in the industry about which consumers should know). No need existed

for Mr. Moore to explain a purported change from or discrepancy in his deposition testimony because he had never offered an opinion on the topics. See id. (exception to Ellison allows change or discrepancy in prior opinions if credible explanation is offered). If Mr. Moore had expressed an opinion in his deposition that "practically absolved" Burkins Chevrolet of possible negligence that he later contradicted in his affidavit, we'd have a different case, one like Ellison. Instead, nothing in his affidavit contradicted anything in his deposition.

Striking affidavits and entering judgment based on purported changes in an expert's position is reservedly used for only blatant instances of unexplained, bald contradictions. Experts are permitted to have tentative opinions and to modify their initial opinions, such as where they don't have all relevant records, without running afoul of Ellison. See Croft v. York, 244 So. 2d 161, 165-66 (Fla. 1st DCA 1971) ("It is not unreasonable that a professional opinion initially expressed by an expert and based upon inadequate study or information might later change in the light of a more careful review of the circumstances and study of the subject on which his opinion is elicited."); see, e.g., United Auto. Ins. Co. v. Seffar, 37 So. 3d 379, 381 (Fla. 3d DCA 2010) (trial court's striking of doctor's second affidavit, which was based on review of patient's full medical records, was error where first affidavit was based on incomplete records and his evaluation was subject to change; "any discrepancy in the second affidavit . . . cannot be considered a bald

repudiation in violation of *Ellison.*"). Even ambiguities between an affidavit and prior deposition testimony aren't sufficient to support entry of summary judgment. See, e.g., Siguenza v. Citizens Prop. Ins. Corp., 121 So. 3d 1125, 1126 (Fla. 3d DCA 2013) ("At first glance, there would appear to be a contradiction between Mrs. Siguenza's deposition testimony and her affidavit" but the former did "not necessarily contradict" the latter, precluding summary judgment). Indeed, initially testifying to a lack of knowledge about a relevant matter (such as the brand name of an allegedly defective product) does not foreclose later testimony on the matter. Cary v. Keene Corp., 472 So. 2d 851, 853 (Fla. 1st DCA 1985) (error to exclude affidavit naming defendant's product where witness initially said he "could not recall specific brand names of the products he had used" but "was later able to recall the names of several of Keene's products after a careful review of a products list").

Taking a position is not the same as not taking a position; just like "Yes," "No," "Maybe," "Uncertain," and "I don't know" are possible answers to the same question. Mr. Moore couldn't have taken a contradictory position in his affidavit because he didn't have one in his deposition. And no case has ever struck an affidavit on this basis (i.e., that an affidavit opinion is deemed contradictory where the party/witness did not have an opinion on the topic in a prior deposition). For good reason: the judicial landscape is littered with reversals of summary judgments

where Ellison has been misapplied (see cases cited above and that follow); extending it to situations where no initial opinion has even been proffered is inconsistent with this body of precedent. See also Peterson v. Lundin, 148 So. 3d 784, 787 (Fla. 2d DCA 2014) (error to enter summary judgment where party's "affidavit and her previous testimony can be reconciled."); Carriage Hills Condo., Inc. v. JBH Roofing & Constructors, Inc., 109 So. 3d 329, 338 (Fla. 4th DCA 2013) (reversing summary judgment and opining that testimony must "directly contradict[] or repudiate[] unequivocal prior testimony regarding matters of fact" and the "striking [of] the testimony is necessary in order to protect 'the integrity of the judicial process . . . .'"); Kling v. DiSclafani, 983 So. 2d 648, 655 (Fla. 5th DCA 2008) (reversing where it "appears to us that Dr. Schlachter's deposition testimony and affidavit testimony are consistent."); Ouellette v. Patel, 967 So. 2d 1078, 1083 (Fla. 2d DCA 2007) (trial court "erred in striking and refusing to consider Dr. Kovacs' affidavit" which "did not 'baldly repudiate' his prior deposition testimony."); Lawrence v. Pep Boys Manny Moe & Jack, Inc., 842 So. 2d 303, 305 (Fla. 5th DCA 2003) (error to fail to consider plaintiff's affidavit explaining why he fell despite not providing this explanation in prior deposition); Arnold v. Dollar Gen. Corp., 632 So. 2d 1144, 1145 (Fla. 5th DCA 1994) (plaintiff's deposition "is not as clear and emphatic as her later-filed affidavit, but we cannot say it is 'blatantly' or 'baldly' contradictory, either."); Streeter v.

Bondurant, 563 So. 2d 729, 733 (Fla. 1st DCA 1990) ("Dr. LoCicero's deposition testimony and his affidavit are not in direct contradiction; thus, the rule of *Ellison v. Anderson* has no application."); Kopacz v. Jack Eckerd Corp., 542 So. 2d 469, 469 (Fla. 5th DCA 1989) ("'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."); R & W Farm Equip. Co. Inc. v. Fiat Credit Corp., 466 So. 2d 407, 409 (Fla. 1st DCA 1985) (reversing where initial discovery responses "addressed only the preparation of the initial documents, whereas the subsequent affidavit avers circumstances relating to the redrafted documents"); Willage v. Law Offices of Wallace & Breslow, P. A., 415 So. 2d 767, 769 (Fla. 3d DCA 1982) (affirming summary judgment for defendant where subsequent affidavit provided credible explanation).

No doubt, where a former statement is clearly contradicted by an unexplained, unsubstantiated subsequent statement, the rule of Ellison applies. See, e.g., Baker v. Airguide Mfg., LLC, 151 So. 3d 38, 40 (Fla. 3d DCA 2014) ("statements clearly contradict Baker's deposition testimony, and they evidence an attempt on Baker's part to contravene her prior testimony and create a factual dispute . . . ."); Jordan v. State Farm Ins. Co., 515 So. 2d 1317, 1319 (Fla. 2d DCA 1987) ("it is evident that the statements in the affidavit contradict the testimony in

the deposition and that the trial court was correct in striking the affidavit . . . .”); see also Ondo v. F. Gary Gieseke, P.A., 697 So. 2d 921, 924 (Fla. 4th DCA 1997) (“An unsubstantiated assertion is not sufficient to overcome the effect of the prior testimony, however, and the explanation must appear either in the affidavit itself or, viewed as a whole, the record must support the explanation.”); Elison v. Goodman, 395 So. 2d 1201, 1202 (Fla. 3d DCA 1981) (“[A]n unsubstantiated assertion that such an error has occurred is required to overcome the effect of previous sworn testimony.”).

But here the trial judge struck Mr. Moore’s entire affidavit as being “irreconcilably inconsistent with his earlier deposition testimony” without identifying any contradiction. Absent the type of blatantly contradictory statements that the caselaw deems sufficient to strike an affidavit, Ellison doesn’t apply and litigation continues. See Andrews v. Midland Nat. Ins. Co., 208 So. 2d 136, 137 (Fla. 3d DCA 1968) (“We think that at the danger of prolonging litigation, we must hold that a witness is not irrevocably bound by his first written statement upon the issues of a case.”). Admittedly, gamesmanship can play a role where an expert plays “hide and seek” with his opinions; but nothing in the record shows that Mr. Moore did anything of the kind. At some point the flow of expert opinion must come to an end and adjudication of disputed issues begins. But that point hadn’t been reached in this case, which was terminated prematurely. On this record, the

striking of Mr. Moore's affidavit and entry of summary judgment in favor of Burkins Chevrolet based on Ellison was error; I concur, however, as to affirmance on all other grounds.