

OHIO CASE SUMMARIES

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Ohio case summaries will be provided on a continuing basis every Wednesday and Friday of each week (excluding holidays). Summaries include brief descriptions of cases decided in the past week by the Ohio Supreme Court and lower appellate courts on issues related to insurance law. To discontinue receiving this service, please call Jared Wagner at 937-224-3333 or email Jared at jawagner@green-law.com.

Court of Appeals: Supreme Court

Case Name: *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455

Decided: July 19, 2006 (posted July 19, 2006)

Issue(s): Conflicting Deposition Testimony and Affidavits / Summary Judgment

Summary of Opinion: Plaintiff was injured when a car driven by Defendant went left of center and struck the Plaintiff's vehicle. Because the vehicle Plaintiff was operating belonged to his employer, he brought suit against his employer's insurer for Underinsured Motorist Benefits ("UIM"). During the pendency of this litigation, the Supreme Court decided *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 2003-Ohio-5849, which effectively limited UIM coverage under an employers insurance policy to those situations in which the employee was acting in the course and scope of employment. In his deposition, which was prior to the Supreme Court's decision in *Galatis*, Plaintiff testified that he was not acting in the course and scope of his employment at the time of the accident. Based on the decision in *Galatis*, the insurer moved for summary judgment. In response, Plaintiff filed a memorandum in opposition and attached an affidavit stating that he was always acting in the course and scope of employment while operating the company vehicle. The trial court disregarded Plaintiff's affidavit and granted the insurer summary judgment. The court of appeals affirmed the trial court's decision.

Subsequently, the Supreme Court certified and accepted the following question: "[w]hether it is proper for courts to disregard an affidavit inconsistent with or contradictory to prior deposition testimony when ruling on a motion for summary judgment." In reaching its decision, the Court construed Civ.R. 56 and held that "[w]hen determining the effect of a party's affidavit that appears to be inconsistent with the party's deposition and that is submitted either in support of or in opposition to a motion for summary judgment, a trial

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court must consider whether the affidavit contradicts or merely supplements the deposition.” “If an affidavit of a movant for summary judgment is inconsistent with the movant’s former deposition testimony, summary judgment may not be granted in the movant’s favor.” However, “[a]n affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, *without sufficient explanation*, create a genuine issue of material fact to defeat the motion for summary judgment.”

Applying the above law, the Supreme Court reversed the appellate court’s affirmance so that the appellate court could evaluate whether Plaintiff’s affidavit was contradictory or supplemental to his deposition testimony, and, if it was contradictory, whether his explanations for the contradictory testimony are sufficient to create a genuine issue of material fact.

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