

of Rule 56 statements of material fact.”); *Bill Whorff, Inc. v. Breakwater Design & Build, Inc.*, 2008 Me. Super. LEXIS 76, *11–12 (“Motions to strike under Rule 56 are no longer valid.”); *Caraboolad v. Indian Ridge Homeowners Alliance*, 2007 Me. Super LEXIS 156, *5 (“on April 2, 2007, an amendment to Rule 56 went into effect that prohibits motions to strike.”). The rule makes no exception for situations where a party finds new facts after a motion for summary judgment has been filed and fully briefed.

The Town’s motion to strike defies the clear language of Rule 56(i). The Town asserts that “a motion to strike is still appropriate in certain circumstances.” However, this statement is simply incorrect. The authority the Town cites does not reflect nor comply with the 2007 amendments to the rule. The Town’s authority *never even mentions Rule 56(i)* and supports the statement that “a defective affidavit may be stricken in whole or in part on motion”, by citing case law from the 1970’s—roughly thirty years before Rule 56(i) was adopted. *See* 3 Charles Harvey, *Maine Civil Practice* § 56:6 at 245 (3d ed. 2011) (citing *Wescott v. Allstate Ins.*, 397 A.2d 156 (Me. 1979); *Richards Realty Co. v. Inhabitants of Town of Castle Hill*, 406 A.2d 412 (Me. 1979)). Therefore, as the 2007 amendments to the Maine Rules of Civil Procedure unequivocally prohibit such motions in the context of summary judgment, the Town’s motion to strike is wholly inappropriate.¹

II. Prior to the Enactment of Rule 56(i), a Motion to Strike an Affidavit was Limited to Contradicting Statements Made in the Same Case.

Second, although prior to 2007 a motion to strike was used to strike purported contradicting sworn testimony of a witness, the cases cited in the Town’s motion are inopposite. The Town cites cases where a witness makes an admission to fact in a case, then makes a later

¹ If this court denies the Town’s motion to strike, the Town’s request to amend various oppositions should also be denied for failure to cite any rule that would afford it the opportunity to amend. Thus, this Court is limited to the material facts as set forth pursuant to Rule 56(h) in deciding a motion for summary judgment.

sworn statement in the *same case* that directly contradicts the earlier statement in an effort to “create an issue of material fact.” *Zip Lube, Inc. v. Coastal Sav. Bank*, 709 A.2d 733, 735 (Me. 1998). *See also Schindler v. Nilsen*, 770 A.2d 638, 642 (Me. 2001) (“because [defendant’s] claims in her affidavit were directly contrary to her prior sworn testimony [in that case] . . . she was appropriately prevented from creating a dispute as to material facts on that issue.”).

Neither of the above-cited cases dealt with a motion to strike nor are they applicable in this case. The Town’s motion addresses circumstances where affidavits from the same individual were offered in two separate cases with two different sets of facts. This is not a case where the Plaintiffs’ witness made a statement that amounted to an admission and then tried to create an issue of material fact by signing a sworn affidavit in the same proceeding that directly contradicted the previous sworn admission. Rather, the Plaintiffs’ witness, M. Johann Buisman made a statement in one case (the *O’Shea* affidavit) that reflected the unique and individual facts in that case, then signed the GR affidavit, reflecting his expert opinion on the unique and individual facts in this case. Therefore, the Town’s cited cases are inapposite and its motion should be denied.

III. The Town is Barred from Raising New Facts it had Ample Time to Find through Discovery Prior to its Motion for Summary Judgment.

Third, the Town cannot be allowed to challenge a statement made by Mr. Buisman in this case when it had ample time to challenge the assertions made by Mr. Buisman through routine discovery. The Town makes much of the fact that it “had no way of knowing of the *Dee v. O’Shea* decision . . . or the contradictory Buisman affidavit filed in the *Dee v. O’Shea* case.” However, the decision in the *O’Shea* case does not have any relevance to the alleged contradiction between the affidavits. The Town asserts that it could not have known of the Buisman affidavit offered in the *O’Shea* case. However, the Town confirms that the *O’Shea*

Buisman affidavit was filed before his affidavit in this case, roughly two and a half months before the Town filed its Consolidated Opposition and Reply and Opposition and Reply Statements of Undisputed Material Facts. The Town now attempts to persuade this Court that the fact that the Town *did not know* of the Buisman affidavit in the *O'Shea* case supports its conclusion that the Town *could not know*.

The Town had every opportunity to question Mr. Buisman as to the statements in his affidavit before filing its Consolidated Opposition and Reply but did not do so. After Mr. Buisman's affidavit offered in this case was made available to it, the Town could have requested the court grant it permission under Rule 56(f) to depose Mr. Buisman but did not do so. The Town's failure to check any of the facts, engage in any discovery, or otherwise question Mr. Buisman as to his expert conclusions, with the ample and flexible timeframe available under the Rule 56, cannot be an excuse to file a motion to strike or otherwise oppose his affidavit in this case, based on a statement made by Mr. Buisman in a different case approximately seven months after the statement was made (the *O'Shea* affidavit). Therefore, the Town's motion to strike or any other action sought by the Town in footnote two of its motion to strike should be denied.

IV. There is Absolutely No Direct Contradiction Between Mr. Buisman's *Goose Rocks* Affidavit and Mr. Buisman's *O'Shea* Affidavit.

Finally, the Town's motion to strike is simply an inappropriate attempt to question the credibility of a witness through a motion the Town must know is expressly prohibited by the Rules of Civil Procedure. However, the Town chooses to sacrifice a frivolous motion in a desperate hope that this Court will consider their argument and question the credibility of Mr. Buisman at the summary judgment stage. For all of the reasons stated herein, the Town should not be permitted to do so.

The Town is essentially asking the court to read and understand the factual background of two different cases to determine whether Mr. Buisman’s affidavits contain contradicting statement. Of course, Plaintiffs disagree with the Town’s characterization of the two affidavits as “directly contrary.” In both cases, Mr. Buisman offers opinions to determine the intent of the grantor of the subdivision properties to include or exclude a beach from private ownership of beachfront property. The Town intentionally omits language and material facts from Mr. Buisman’s *O’Shea* affidavit in an effort to bolster its argument that the statements directly contradict one another.


In order to determine whether Mr. Buisman’s affidavits were contradictory, the court would have to spend valuable time evaluating the facts in this case and the facts in a strikingly distinguishable case. A motion to strike contradicting statements—even when available before the adoption of Rule 56(i)—was never applied to statements made in two different cases because courts have long recognizing the challenges to judicial efficiency and the legal difficulties presented by such a request.

CONCLUSION

For all the reasons stated herein, the Town’s motion to strike Paragraph 9 of Mr. Buisman’s affidavit should be denied. The Town cannot cure its failure to reveal facts through proper discovery by submitting a motion—less than one month before a hearing on summary judgment—that is *expressly prohibited by the Rules of Civil Procedure*. In making a determination based on a motion for summary judgment, the reviewing court will only “consider portions of the record referred to and the material facts set forth in the Rule 7(d) statements, now the Rule 56(h) statements.” 3 Charles Harvey, *Maine Civil Practice* § 56:5 at 236, n. 2 (3d ed. 2011) (citing *Lalumiere v. Miller*, 722 A.2d 46 (Me. 1998)) (emphasis added). Therefore,

Plaintiffs respectfully request this Court deny the Town's motion to strike and consider the Plaintiffs' motions for summary judgment based solely on the record before it and contained in the Statement of Material Facts and supporting documents attached thereto.

Dated: November 9, 2011


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November 9, 2011

Dianne Hill, Clerk
York County Courthouse
45 Kennebunk Road
P. O. Box 160
Alfred, Maine 04002-0160

RE: Robert F. Almeder, et al. v. Town of Kennebunkport, et al.
Docket No. RE-09-111

Dear Ms. Hill:

Enclosed for filing in the above referenced case, please find the following document titled:

Plaintiffs' Opposition to Town's Motion to Strike
Plaintiffs' Affidavit of M. Johann Buisman ¶ 9
from the Summary Judgment Record

A copy of the enclosed was served via U. S. Mail post-prepaid and addressed to counsel noted below.

Thank you for your assistance.

Sincerely,



Benjamin M. Leoni

BML/rar

Enclosure

Copy to (w/encl):

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