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**EXPLANATION OF WHY THIS CASE IS  
OF PUBLIC OR GREAT GENERAL INTEREST**

This cause presents a single critical issue for the future of litigation in Ohio: whether it is proper for courts to disregard an affidavit inconsistent with or contradictory to prior deposition opinion testimony of a non-party expert witness when ruling on a motion for summary judgment.

The lower courts in this matter reached conflicting results on whether a contradictory affidavit containing opinions of a medical expert witness should be permitted to create a genuine issue of material fact sufficient to defeat summary judgment on what should have been a straightforward causation issue in a medical malpractice lawsuit. This case presents issues of public or great general interest because disparate application of the admissibility of contradictory opinion testimony by a non-party expert witness should not arise. Moreover, the holding of the Second District Court of Appeals in this matter is in conflict with a previous decision by the Eighth District Court of Appeals on the same issue. The vastly differing interpretation by the Montgomery County Court of Common Pleas and the Second District Court of Appeals, as well as between district courts, illustrates the difficulty which parties and courts throughout the state have in applying this concept. Thus, guidance from this Court is needed to properly understand and apply the law on this issue.

In this matter, the Court of Appeals held, in a 2-1 decision, that a contradictory affidavit submitted by a non-party witness, i.e. a medical expert witness, by the party opposing summary judgment in a medical negligence action could be considered by the trial court in determination of whether there existed a genuine issue of material fact sufficient to defeat summary judgment. The Court of Appeals reasoned that, based upon this Court's ruling in *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, the prohibition on contradictory affidavits is applicable only to affidavits submitted by a party to the lawsuit.

In *Byrd* the question certified to this Court was “whether 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.” *Id.* at paragraph 8. This Court narrowed the issue and subsequently held that “An 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.” *Id.* syllabus ¶ 3. (Emphasis added) It was this Court’s use of the term “party” in *Byrd* that the Court of Appeals in this action, as well as other appellate courts, have focused on in narrowly construing the *Byrd* decision. However, to the extent that this Court intended *Byrd* to apply only to parties to an action, the rationale behind the *Byrd* decision is equally applicable to expert witnesses retained by a party because, unlike other non-party witnesses, there is a great deal of control and direction that a party exerts over an expert witness. Therefore, the party should not be permitted to submit a self-serving, contradictory affidavit of expert opinion in opposition to a pending motion for summary judgment.

There is not only a conflict within the lower courts in this matter, but also the majority decision regarding the admissibility of a contradictory affidavit in this matter is inconsistent with the holding of the Eighth District Court of Appeals in *Zhun v. Benish*, 2008-Ohio-572, wherein the Court of Appeals disregarded a contradictory affidavit of a medical expert witness in support of the non-movant’s opposition to summary judgment. These opposing views on the admissibility of contradictory opinion affidavits by medical expert witnesses present a conflicting application of Ohio law and are, therefore, an issue of public or great general interest critical to future litigation in Ohio.

## **I. STATEMENT OF THE CASE**

This lawsuit was originally commenced by Plaintiff/Appellee Barbara Pettiford on December 24, 2003 against Defendant/Appellant Rajendra K. Aggarwal, M.D., alleging medical negligence in the interpretation of a plain film chest x-ray taken on June 18, 1999. Appellant timely filed his answer to Appellee's Complaint on January 15, 2004. On April 16, 2004, Appellee filed a disclosure of expert witnesses identifying various expert witnesses; however, Appellee failed to identify any expert witness qualified to render a standard of care opinion regarding the medical care and treatment rendered by Appellant. Consequently, on May 18, 2004, Appellant filed a motion for summary judgment. Appellee filed a memorandum in opposition to the motion, but on June 24, 2004 filed a notice of voluntary dismissal in the face of the pending motion.

On June 15, 2005, Appellee re-filed her cause of action against Appellant, reasserting the same allegations of medical negligence. On August 3, 2005, Appellant timely filed his answer. On November 14, 2005, Appellee filed her initial disclosure of expert witnesses in the re-filed action. As Appellee's initial expert witness disclosure was identical to that filed in the original action, on February 27, 2006 Appellant again filed a motion for summary judgment supported by his own affidavit. On March 3, 2006, Appellant received Appellee's second disclosure of expert witnesses.<sup>1</sup> Appellee first identified Dr. Trent Sickles in the February 24, 2006 expert disclosure. On March 2, 2006, Appellee filed an additional disclosure of expert witnesses, which was identical to the February 24, 2006 filing.

On March 27, 2006, Appellee filed a response to Appellant's motion for summary judgment. In her March 27, 2006 response, Appellee failed to submit an affidavit or any

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<sup>1</sup> Appellee's second disclosure of expert witnesses in the refiled action was filed on February 24, 2006, but not received until after Appellant filed his motion for summary judgment on February 27, 2006.

evidence contemplated by Civ.R. 56 in opposition to the pending motion. However, on April 5, 2006, Appellee filed an affidavit of Dr. Sickles in opposition to summary judgment. In this affidavit, Dr. Sickles offered a standard of care opinion, but no opinion of the issue of causation. On April 7, 2006, Appellant filed a reply in support of his motion for summary judgment. On June 19, 2006, the trial court issued an entry denying summary judgment. Thereafter, trial was continued to April 2, 2007 and again to October 10, 2007. On October 5, 2007, the trial court once again continued trial to February 11, 2008.

On November 14, 2007, Appellant took the discovery deposition of Appellee's sole medical expert witness, Dr. Sickles, who testified that he could not give any opinions on the issue of causation. Dr. Sickles acknowledged having reviewed everything required to render his opinions in this case and being prepared to express all opinions which he held relative to Appellant. (Sickles deposition, p. 36, lines 4-13). He explained that he would typically review a case such as this to determine whether the physician met the standard of care and also to see whether he had any opinions on the subject of causation. (Sickles deposition, p. 37, lines 1-12). Thereafter, the following exchange took place:

Beginning on page 38, line 22:

Q. Do you intend to render any opinions concerning the treatment that she may or may not have undergone had a diagnosis been made in June of 1999?

A. No.

Q. Do you intend to render any opinions as to the effect of the alleged three-year delay upon the patient's treatment or course?

A. No.

Q. Do you intend to render any causation opinions in this case?

A. No.

Continuing at page 56, line 21:

Q. Okay. What is your understanding of Miss Pettiford's subsequent diagnosis in 2002? What was she diagnosed with?

A. My general recollection is lung cancer, but I can't even recall the specifics, because after I looked at the records I pretty much determined that I couldn't testify or give any opinions about causation, so I haven't looked at that since a year-and-a-half ago.

Continuing on page 63, line 3:

Q. Have we covered all of the opinions that you've formed in this case and intend to render at trial?

A. Yes.

Q. And the basis for each of those, for that opinion or each of those opinions?

A. Yes.

Q. I would ask you if you modify, alter, change, amend, form any additional opinions or modify the ones that you have given me today, that you let Mr. White know, so I can come back and we can go –

A. We can do this again.

Q. Exactly. Will you agree to do that for me?

A. I will.

At the conclusion of the deposition, Dr. Sickles waived his right to review the transcript in order to make any corrections to his answers.

Thereafter, on January 30, 2008, the trial court conducted a final pretrial conference, during which Appellee's counsel conceded to the trial court that Appellee could not prove an essential element of her claim; that is, Appellee did not have an expert witness to opine on the issue of proximate causation. Rather than inquire about a notice of voluntary dismissal pursuant to Civ.R. 41(A), the trial court instructed Appellant to renew his previously filed motion for summary judgment. The trial court further instructed counsel that a ruling would be issued on the renewed motion during a telephone status conference scheduled for February 7, 2008. Accordingly, on January 30, 2008, Appellant filed a motion to renew his motion for summary judgment based upon Appellee's inability to prove an essential element of her claim, i.e. causation.

On February 6, 2008, at 4:18 pm, Appellee filed "Plaintiff's Motion in Opposition to Defendant's Motion for Summary Judgment." Attached to Appellee's "motion" was an affidavit from Dr. Sickles, who ultimately was Appellee's only expert witness in this matter. In his affidavit, which was coincidentally signed and notarized the same day, February 6, 2008, Dr. Sickles for the first time offered causation opinions in direct contravention to his deposition testimony of November 14, 2007. The affidavit of Dr. Sickles states as follows:

1. My name is Trent Sickles, I am a licensed physician in the state of Ohio and I have given sworn testimony regarding the negligence of Dr. Aggarwal by Barbara Pettiford.
2. I further agree to testify as an expert for the Plaintiff, Barbara Pettiford regarding damages she has suffered as a direct and proximate result of Dr. Aggarwal's negligence.

3. Specifically, I believe that Ms. Pettiford endured pain and suffering for an extensive period of time as a direct and proximate result of Dr. Aggarwal's negligence in failing to diagnose the tumor in her right lung.
4. I further believe that Ms. Pettiford suffered the crisis of a collapsed lung, and extended hospital stay as a direct and proximate result of the negligence of Dr. Aggarwal.
5. I will provide further testimony as to the matters above if needed in the case of Barbara Pettiford.

Appellee, as the non-movant, submitted the contradictory affidavit of Dr. Sickles to create a genuine issue of material fact, as to causation, sufficient to defeat the pending motion for summary judgment, and without which Appellee could not maintain a case in the face of pending summary judgment.

On February 12, 2008, Appellant filed a reply in support of his renewed motion for summary judgment and a motion to strike Dr. Sickles' affidavit. On February 19, 2008, Appellee filed "Plaintiff's motion in opposition to defendant's re-newed (sic) motion for summary judgment." On April 1, 2008, the trial court issued a decision and order granting Appellant's renewed motion for summary judgment.

On April 29, 2008, Appellee filed a Notice of Appeal of the trial court's grant of summary judgment. The case was fully briefed, and on July 24, 2009, the Appellate Court issued an opinion and final entry that reversed the trial court's decision and remanded the case for further proceeding.

## **II. STATEMENT OF FACTS**

On June 18, 1999, Appellee Barbara Pettiford presented to her primary care physician, Appellant Rajendra Aggarwal, M.D., with complaints of chest pain. Appellant ordered a chest x-ray, which was taken in his office, and interpreted the x-ray as normal. Appellant continued to

follow Appellee, and on July 30, 2002 she presented to Appellant with complaints of difficulty breathing, chest fullness, and heart arrhythmia. As part of the diagnostic work-up, Appellant took and interpreted another chest x-ray and thereafter diagnosed an approximate three centimeter mass in Appellee's right lung. Appellant then referred Appellee to a pulmonologist for further workup, which revealed that Appellee had a three (3) centimeter benign carcinoid tumor in the middle lobe of her right lung.

On August 16, 2002, Appellee underwent a right thoracotomy and pneumonectomy. Due to the location of the tumor and its involvement with surrounding structures, Appellee's right lung was removed. Appellee had an uneventful post-operative course and was discharged home on August 20, 2002. Appellee alleges that Appellant was negligent for failing to diagnose the tumor on the June 18, 1999 chest x-ray, thus resulting in a thirty-eight (38) month delay in diagnosis leading to a collapsed lung and an extended hospitalization.

### III. LAW AND ARGUMENT

**PROPOSITION OF LAW: IN A MEDICAL NEGLIGENCE ACTION, IT IS PROPER FOR THE COURT TO DISREGARD AN AFFIDAVIT OF A NON-PARTY EXPERT WITNESS CONTAINING OPINIONS INCONSISTENT WITH OR CONTRADICTORY TO PRIOR DEPOSITION TESTIMONY OF THAT NON-PARTY EXPERT WITNESS WHEN RULING ON A MOTION FOR SUMMARY JUDGMENT.**

It is well settled under Ohio law that in order to meet the burden of proof in a medical negligence claim, a plaintiff must show by a preponderance of the evidence (1) the standard of care recognized by the medical community; (2) the failure on the part of defendant-physician to meet that standard of care; and (3) a causal link between the negligent act and the injury sustained. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127; See also *Roberts v. Ohio Permanente Med. Group, Inc.* (1996), 76 Ohio St.3d 483. It is equally well settled under Ohio law that in order to establish these three elements, a plaintiff must provide competent medical expert

testimony. *Id.*; see also *Cooper v. Sisters of Charity* (1971), 27 Ohio St.2d 242 (reversed on other grounds by *Roberts, supra*); *Price v. Cleveland Clinic Found.* (1986), 33 Ohio App.3d, 301, 304, citing Evid. Rule 601(D). Thus, Appellee was required to prove by a preponderance of evidence that Appellant fell below the recognized standards of medical care for a reasonably prudent family practice physician in his interpretation of Appellee's June 18, 1999 chest x-ray films, and that the injury complained of was a proximate result of this deviation from the standard of care. *Bruni, supra*; *Littleton v. Good Samaritan Hospital & Health Ctr.* (1988), 39 Ohio St.3d 86; *Cooper, supra*.

The party seeking summary judgment has the initial burden of informing the court of the basis for the motion and identifying those portions of the record showing that there are no genuine issues of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The movant must be able to point to some evidence of the type listed in Civ. R. 56(C) that affirmatively demonstrates that summary judgment is warranted. *Id.* If this initial burden is met, the nonmoving party has a reciprocal burden to "set forth specific facts showing that there is a genuine issue for trial and, if the non-movant does not so respond, summary judgment, if appropriate, shall be entered." *Id.* The affidavit of Appellant attached to his February 26, 2007 Motion for Summary Judgment satisfied his burden of affirmatively demonstrating that summary judgment was warranted. When Appellant filed his Motion to Renew his February 26, 2007 Motion for Summary Judgment on the issue of causation supported by the deposition testimony of Appellee's expert, Dr. Sickles, it was then incumbent upon Appellee to meet her reciprocal burden with evidence that any alleged negligence on the part of Appellant was a proximate cause of injury.

In reversing the trial court's grant of summary judgment, the Court of Appeals reasoned that, although contradictions exist between the deposition testimony of Dr. Sickles and his subsequent affidavit, the affidavit can be properly considered because *Byrd* is not controlling, and that expert witnesses are no different than other non-party witnesses. The Court of Appeals went on to distinguish parties from non-party witnesses where the contradictory affidavit is used by a party, in opposition to summary judgment, as a self-serving device to avoid damaging admissions made during a deposition. The appellate court held that a self-serving affidavit submitted by a party should be disregarded because the party has counsel to protect against inadvertent misstatements. The Court continued in its reasoning that, however, in a situation where a non-party witness has given certain testimony in a deposition and then contradictory averments in a subsequent affidavit, the same factors are not present, because neither the party nor the attorney can prevent the non-party witness from deliberately or inadvertently misstating facts during deposition. This reasoning fails to acknowledge the difference in the degree of control and direction exerted by a party over an expert witness, particularly in a medical negligence lawsuit, as opposed to other non-party fact witnesses. It is this degree of control that brings the issue of a contradictory affidavit of opinion by an expert witness under the purview of *Byrd*.

This case is not about factual misstatements made by a non-party witness over whom the party had no control. Rather, this case is about the admissibility of a completely contradictory affidavit containing opinions, not factual statements, offered by an expert witness retained and paid by the party for opinion testimony. The issue is not one of memory or recall, but rather is about the forming, and subsequent contradictory changing of opinions at the control and direction of a party. As stated by Judge Donovan in the dissenting opinion, "in this context, a

retained expert witness is more akin to the party in terms of management by counsel and providing testimony favorable to the claims.” As such, this case presents an issue of public or great general interest in the pursuit of truth throughout litigation and in the preservation of the integrity of the judicial process.

The causation opinions contained in the February 6, 2008 affidavit of Dr. Sickles were not simply inconsistent with his prior testimony; the opinions offered in the affidavit were in direct contradiction to his prior discovery deposition testimony. Where there is a clear contradiction, rather than variations on a theme, such an affidavit should be disregarded by the trial court in reaching its decision on summary judgment. Neither a party, nor an expert witness who is retained and controlled by the party, should be permitted to contradict sworn testimony without sufficient justification, simply to create a genuine issue of material fact in order to avoid summary judgment. Following the deposition there were no new facts or medical information for Dr. Sickles to use as a basis for a changed or contradictory opinion. The only thing that occurred between the date of Dr. Sickles’ deposition and his affidavit was a conversation with counsel regarding that sworn testimony necessary to avoid summary judgment.

The Second District Court of Appeals decision in this matter is inconsistent with the holding of the Eighth District Court of Appeals in *Zhun, supra*, wherein the Eighth District disregarded a contradictory affidavit of a medical expert witness in support of the non-movant’s opposition to summary judgment. In *Zhun*, the physician-defendant in a medical malpractice and wrongful death action filed a motion for summary judgment based upon the inability of the plaintiff’s expert to offer a causation opinion as to the probability that the alleged medical malpractice caused the death of plaintiff’s decedent. Thereafter, the non-moving plaintiff filed a motion in opposition supported by a contradictory affidavit from its expert, Dr. Richard Blondell.

Although the trial court's grant of summary judgment was based upon the exclusion of Dr. Blondell's courtroom testimony by grant of a motion *in limine*, the court of appeals reversed the exclusion of the testimony, but also affirmed the defendant's cross-assigned error that summary judgment was proper because Dr. Blondell could not testify as to causation, despite having given an affidavit to the contrary. The court of appeals held that it was proper to disregard Dr. Blondell's contradictory affidavit regarding causation, as the affidavit did not sufficiently explain the contradiction. The holding and reasoning of the Eighth District Court of Appeals on this issue is directly inconsistent with the holding of the Second District Court of Appeals in this matter.

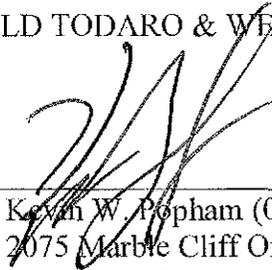
#### **IV. CONCLUSION**

Defendant/Appellant Rajendra K. Aggarwal, M.D. appropriately moved for summary judgment in this case when Appellee failed to produce evidence of causation in support of her allegations of medical negligence. Although Appellee thereafter provided an expert witness' affidavit purportedly to create a genuine issue of material fact sufficient to defeat summary judgment, said affidavit contained opinions which were contradictory of former deposition testimony. The Court of Appeals allowed the affidavit testimony and reversed the trial court's grant of summary judgment. Where contradictory affidavits of opinion testimony are submitted by an expert witness retained by a party, a court should disregard such affidavits when making a determination on summary judgment. To preserve the integrity of the judicial process and affirm this Court's rationale in *Byrd*, Defendant/Appellant Rajendra K. Aggarwal, M.D. respectfully requests that this Court accept jurisdiction of this case and reinstate judgment in his favor

Respectfully submitted,

ARNOLD TODARO & WELCH CO., L.P.A.

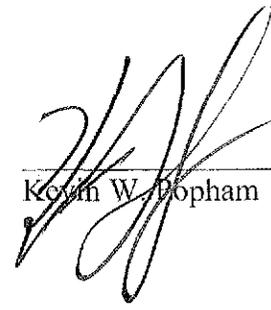
By: \_\_\_\_\_

  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon all parties or counsel of record by regular U.S. mail, postage prepaid, this  day of September, 2009.

Lawrence J. White, Esq.  
2533 Far Hills Avenue  
Dayton, OH 45419  
Counsel for Plaintiff

  
\_\_\_\_\_  
Kevin W. Popham

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

BARBARA PETTIFORD

Plaintiff-Appellant

v.

RAJENDRA K. AGGARWAL

Defendant-Appellee

Appellate Case No. 22736

Trial Court Case No. 05-CV-4831

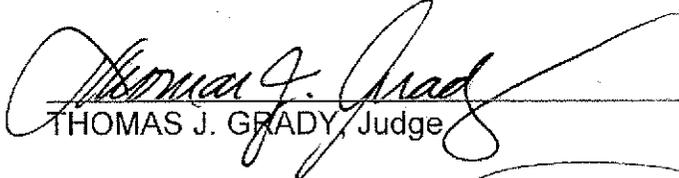
(Civil Appeal from  
Common Pleas Court)

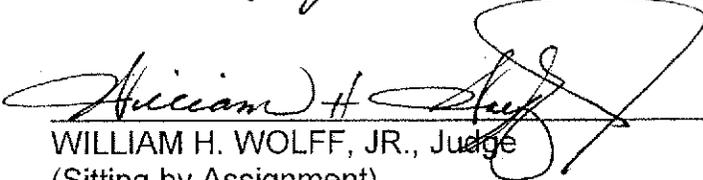
**FINAL ENTRY**

Pursuant to the opinion of this court rendered on the 24<sup>th</sup> day  
of July, 2009, the judgment of the trial court is **Reversed** and **Remanded**.

Costs to be paid as stated in App.R. 24.

\_\_\_\_\_  
MARY E. DONOVAN, Presiding Judge

  
\_\_\_\_\_  
THOMAS J. GRADY, Judge

  
\_\_\_\_\_  
WILLIAM H. WOLFF, JR., Judge  
(Sitting by Assignment)

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IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

BARBARA PETTIFORD

Plaintiff-Appellant

v.

RAJENDRA K. AGGARWAL

Defendant-Appellee

Appellate Case No. 22736

Trial Court Case No. 05-CV-4831

(Civil Appeal from  
Common Pleas Court)

.....  
OPINION

Rendered on the 24<sup>th</sup> day of July, 2009.  
.....

LAWRENCE J. WHITE, Atty. Reg. #0062363, 2533 Far Hills Avenue, Dayton, Ohio 45419  
Attorney for Plaintiff-Appellant

KEVIN W. POPHAM, Atty. Reg. #0066335, Arnold Todaro & Welch, 2075 Marble Cliff  
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Attorney for Defendant-Appellee

.....  
WOLFF, J.

Barbara Pettiford appeals from a summary judgment issued in favor of appellee, Rajendra Aggarwal, M.D., in a medical malpractice case. For the following reasons, the judgment of the trial court will be reversed and remanded for further proceedings.

At all times relevant, Dr. Rajendra Aggarwal operated a family practice and minor surgery facility in Dayton, Ohio. Barbara Pettiford was a patient of Dr. Aggarwal.

In June 1999, Dr. Aggarwal administered chest x-rays and an MRI to Pettiford. After reviewing the x-rays, Dr. Aggarwal reported that the test results were "clear and normal."

Dr. Aggarwal conducted another MRI in July 2002, and discovered that Pettiford had a large mass in her lungs. Pettiford was hospitalized shortly thereafter for a collapsed lung, and her right lung was removed in August 2002.

In 2003, Pettiford filed a medical malpractice action against Dr. Aggarwal, but dismissed the action without prejudice. Pettiford then refiled the medical malpractice action in 2005, contending that Dr. Aggarwal had breached the applicable standard of care by failing to properly administer and read the 1999 MRI and x-rays, and by failing to diagnose and timely treat the lung mass.

In February 2006, Dr. Aggarwal filed a motion for summary judgment, supported only by his own brief affidavit. Dr. Aggarwal stated that he had reviewed all the medical records in the case. Dr. Aggarwal concluded that he did not deviate from accepted standards of medical care, and that any injury Pettiford had sustained was not caused by any alleged deviations from recognized standards of medical care.

Pettiford's response memorandum was accompanied by letters from two doctors, Dr. Klein and Dr. Sickles, who both stated that Dr. Aggarwal had deviated from accepted standards of care by failing to see a lung mass that was present on the 1999 film. Although these letters were not presented in acceptable Civ. R. 56 format, Pettiford also submitted an affidavit from Dr. Sickles. In the affidavit, Dr. Sickles stated that he was board certified

in family practice and spent more than 75% of his time in the clinical practice of medicine. Dr. Sickles further indicated that he had reviewed Pettiford's medical records, including records from Good Samaritan Hospital and the chest x-rays that were taken in Dr. Aggarwal's office in June 1999, and July 2002. Dr. Sickles stated that:

"7. It is my opinion to a reasonable degree of medical certainty that Dr. Aggarwal deviated from the acceptable standard of care for a family physician by failing to recognize the lung mass on Ms. Pettiford's x-ray as of June 18, 1999. While this film is over penetrated, the mass is still visible on this film.

"8. Of incidental note as I was viewing this x-ray on our view box, one of my partners, unprompted, looking over my shoulder, was also able to recognize that there was an abnormality in the right hilar area.

\*\* \* \*

"10. Dr. Aggarwal could have met the applicable standard of care by either using a hot light to better view the over penetrated areas of the film, although I do not believe that this is absolutely necessary to see the mass in the right hilar area. He further could have repeated the film with less penetration in order to get better images or he could have referred the film out to a radiologist for a reading if he was uncertain what the reading of the film should be.

"11. In any event, it is my opinion that a family physician who undertakes the responsibility for reading chest x-rays should have not missed this lesion.

"12. Failure to recognize this was a deviation of the standard of care of a physician undertaking that responsibility." Affidavit of Dr. Trent Sickles, attached to the Pettiford Response to Motion for Summary Judgment.

Upon reviewing the materials submitted in connection with the motion for summary judgment, the trial court overruled the motion in June 2006. The court stated that "Clearly there is a genuine issue of material fact present. As such, summary judgment is inappropriate." Decision and Entry Overruling Motion for Summary Judgment, p. 5.

The case was set for trial during 2006 and 2007. However, the trial court granted a joint motion for continuance in 2006, and a defense motion for continuance in 2007. The trial ultimately was scheduled to begin on February 11, 2008, with a final pre-trial to be held January 30, 2008. The summary judgment motion deadline was also extended until November 13, 2007.

In November 2007, defense counsel took a discovery deposition of Dr. Sickles. At the deposition, Dr. Sickles stated that he had reviewed everything he needed to form his full and final opinions in the case, and that he was prepared to give those opinions. Dr. Sickles then expressed essentially the same opinions he had mentioned in his earlier affidavit. Dr. Sickles reiterated that Dr. Aggarwal had deviated from acceptable standards of medical care by failing to recognize the lung mass on Pettiford's June 1999 x-ray. See Deposition of Dr. Trent Sickles, p. 48. Sickles also stated that Dr. Aggarwal could have done a number of things to meet the standard of care, including repeating the film, using a hot-light, sending the film out for an "over-read," sending Pettiford for a CAT scan, or referring Pettiford to a specialist if he did not know what caused her symptoms.

During the deposition, Dr. Sickles said that he did not intend to render any opinions about the treatment Pettiford may have undergone if a diagnosis had been made in June 1999. He further stated that he did not intend to render any opinions about the effect of the alleged three year delay upon Pettiford's "treatment or course," and did not intend to

render any causation opinions. *Id.* at pp. 39-40.

On January 30, 2008, Dr. Aggarwal filed a second motion for summary judgment, alleging that Pettiford had conceded that she would be unable to provide expert testimony on causation. This statement and the motion were based on the above causation testimony in the deposition of Dr. Sickles. In response to the motion, Pettiford submitted another affidavit from Dr. Sickles. This affidavit stated as follows:

“1. My name is Trent Sickles. I am a licensed physician and I have given sworn testimony regarding the negligence of Dr. Aggarwal by Barbara Pettiford.

“2. I further agree to testify as an expert for the Plaintiff, Barbara Pettiford regarding damages she has suffered as a direct and proximate result of Dr. Aggarwal's negligence.

“3. Specifically, I believe that Ms. Pettiford endured pain and suffering for an extensive period of time as a direct and proximate result of Dr. Aggarwal's negligence in failing to diagnose the tumor in her right lung.

“4. I further believe that Ms. Pettiford suffered the crisis of a collapsed lung, and extended hospital stay as a direct and proximate result of Dr. Aggarwal.” Sickles Affidavit, attached to Plaintiff's Motion in Opposition to Defendant's Motion for Summary Judgment.

The affidavit did not set forth an explanation for adding these opinions.<sup>1</sup> In response, Dr. Aggarwal filed a memorandum and a motion to strike the affidavit, contending that affidavits contradicting former deposition testimony may not, without

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<sup>1</sup>The memorandum Pettiford filed in the trial court did offer some explanation, including the fact that Dr. Sickles was not an oncologist and interpreted the causation questions to refer to the rate of growth of the tumor from 1999 to 2002, and the lost chance to save the lung due to the delay. However, these comments were not submitted in the form of an affidavit, and we have not considered them in ruling on this matter.

sufficient explanation, be used to create genuine issues of material fact and defeat summary judgment. Subsequently, in a one-paragraph decision, the trial court granted Dr. Aggarwal's motion for summary judgment, without elaborating on its reasoning.

Pettiford timely appealed, and raises one assignment of error.

II

Pettiford's single assignment of error is as follows:

"THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT THAT SHOULD PROCEED TO TRIAL. (DECISION ORDER AND ENTRY GRANTING DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT, APRIL 1, 2008)."

Under this assignment of error, Pettiford contends that she met the burden of providing expert testimony regarding Dr. Aggarwal's negligence and the causal relationship between the negligence and her injuries. Pettiford further contends that the rule against submitting contradictory affidavits applies only to parties, not non-party witnesses.

"We review summary judgment decisions de novo, which means that we apply the same standards as the trial court." *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 133, 2007-Ohio-2722, at ¶ 16. "A trial court may grant a moving party summary judgment pursuant to Civ. R. 56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." *Smith v. Five Rivers MetroParks* (1999), 134 Ohio App.3d 754, 760.

According to the Ohio Supreme Court:

"In order to establish medical malpractice, it must be shown by a preponderance of evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct and proximate result of such doing or failing to do some one or more of such particular things." *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, syllabus. Accord, *Moore v. Kettering Mem. Hosp.*, Montgomery App. No. 22054, 2008-Ohio-2082, ¶ 20-21.

The evidence in the present case complies with these requirements and establishes genuine issues of material fact concerning Dr. Aggarwal's breach of care and damages proximately resulting from the breach. However, Dr. Aggarwal contended below, and maintains on appeal, that the affidavit of Dr. Sickles contradicts his prior deposition testimony, and cannot be considered under the Ohio Supreme Court decision in *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455.

In *Byrd*, the Ohio Supreme Court considered a certified conflict on the issue of "whether a party's affidavit that is inconsistent with or contradictory to the party's deposition testimony should be considered by the trial court in deciding a motion for summary judgment." 2006-Ohio-3455, at ¶ 1 (emphasis added).

The plaintiff in *Byrd* had been injured while driving a van owned or leased by his employer. *Id.* at ¶ 2. The plaintiff's deposition testimony clearly indicated that he was on a personal errand and was not within the scope of his employment while driving the van.

Consequently, the employer's insurer filed a summary judgment motion based on that fact. Id. at ¶ 4 and 14.

In responding to the motion, the plaintiff filed an affidavit outlining facts that contradicted his earlier deposition testimony – or were at least inconsistent – and argued that he was within the scope of his employment at the time of the collision. Id. at ¶ 5 and 15-19. The trial court did not refer to the affidavit, but granted the insurer's summary judgment motion, based on the plaintiff's admission that he was driving home from his father-in-law's house at the time of the accident. Id. at ¶ 6.

In answering the certified question, the Ohio Supreme Court noted that it had "already held that a moving party's contradictory affidavit may not be used to obtain summary judgment." Id. at ¶ 22, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337. The court noted that dispute existed regarding the rule's potential application to non-moving parties. Id. at ¶ 23. In discussing this point, the Ohio Supreme Court observed that moving and non-moving parties occupy somewhat different positions with regard to their burden on summary judgment. Whereas movants must show the absence of material fact, non-movants receive the benefit of all favorable inferences. Id. at 25. Accordingly, the court stated that:

"We first hold that when 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 court must consider whether the affidavit contradicts or merely supplements the deposition. Unless a motion to strike has been properly granted pursuant to Civ. R. 56(G), all evidence presented is to be evaluated by the trial court pursuant to Civ. R. 56(C) before ruling. 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. \* \* \*

"With respect to a nonmoving party, the analysis is a bit different. If an affidavit appears to be inconsistent with a deposition, the court must look to any explanation for the inconsistency. We do not say that a nonmoving party's affidavit should always prevent summary judgment when it contradicts the affiant's previous deposition testimony. After all, deponents may review their depositions and correct factual error before the depositions are signed. \* \* \*

"We hold that an 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 a motion for summary judgment." *Id.* At ¶ 26-28 (emphasis added).

In the present case, contradictions do exist between the deposition of Dr. Sickles and his subsequent affidavit. However, we conclude that *Byrd* does not control, because *Byrd* deals with contradictory affidavits of parties, not non-party witnesses. See *Walker v. Bunch*, Mahoning App. No. 05-MA-144, 2006-Ohio-4680, at ¶ 33 (distinguishing *Byrd* because it deals only with affidavits of a "*party*") (emphasis in original). Accord, *Gessner v. Schroeder*, Montgomery App. No. 21498, 2007-Ohio-570, at ¶ 53-57.

Dr. Aggarwal contends that *Byrd* should apply to expert witnesses, like doctors, who are retained by the parties and whose affidavits are drafted by counsel. However, experts are no different in that regard than other non-party witnesses. As we previously explained:

"The party witness generally has the benefit of counsel to protect him from inadvertent misstatements. Therefore, when a party witness has given certain detrimental

answers in a deposition, but subsequently, upon advice of counsel, sets forth averments in an affidavit in order to 'clarify' or 'correct' what was said in the deposition, the subsequent affidavit should be disregarded. The affidavit is being used as a self-serving device to avoid damaging admissions made by the party witness during his deposition.

"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. Neither the litigant nor his attorney can prevent the nonparty witness from deliberately or inadvertently misstating facts during the deposition, at least not to the same extent that the litigant as witness can be protected from inadvertent misstatements during a deposition. Moreover, statements made by the non-party witness in his deposition are not in the nature of judicial admissions." *Clemmons v. Yaezell* (Dec. 29, 1988), Montgomery App. No. 11132, 1998 WL 142397, \*\* 5-6.

In the present case, Dr. Sickles's statements were not judicial admissions, and Pettiford's counsel was not acting as the attorney for Dr. Sickles at the deposition. From that standpoint, Dr. Sickles was in the same position as other non-party witnesses who are called to offer testimony.

Accordingly, *Byrd* does not apply and the absence of an explanation for the alleged contradiction was not required before the trial court could consider Dr. Sickles's testimony. The testimony as given creates genuine issues of material fact for purposes of Dr. Aggarwal's alleged breach of accepted standards of medical care, and whether the breach proximately resulted in damages to Pettiford. We note that the jury would be capable of hearing the testimony at trial and deciding the weight it should receive.

Based on the preceding discussion, Pettiford's assignment of error is sustained.

III

Having sustained the assignment of error, the judgment of the trial court will be reversed and the matter remanded for further proceedings.

Judgment reversed and cause remanded.

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GRADY, J., concurring:

A court may strike an affidavit offered in support of or opposition to a motion for summary judgment when it is inconsistent with the affiant's prior deposition or other sworn testimony and the inconsistency is evidentiary in nature and sufficiently unambiguous to deny the subsequent affidavit the presumption of credibility afforded evidentiary materials in a summary judgment proceeding. *Turner v. Turner* (1993), 67 Ohio St.3d 337.

The statements of opinion in Dr. Sickles' affidavit regarding Defendant's alleged negligence are not unambiguously inconsistent with his prior deposition testimony that he did not intend to offer such opinions, because that prior declaration did not necessarily foreclose the possibility that Dr. Sickles, after a further review of the medical records, would form an opinion that would permit him to testify for the Plaintiff, as he apparently did. Furthermore, his statement that he did not intend to testify was not evidentiary in nature, being wholly irrelevant to any claim for relief or defense to it in the litigation. Therefore, the trial court erred when it struck Dr. Sickles' affidavit and granted Defendant's motion for summary judgment.

That is not to say that I in any way disagree with the majority's view that, on the holding in *Smith v. Byrd*, 110 Ohio St.3d 24, 2006-Ohio-3455, the rule of *Turner* is limited

to the affidavits of parties to the litigation and therefore cannot apply to Dr. Sickles. I fully concur. I simply believe that the standard Civ.R. 56(C) imposes, that doubts be resolved in favor of the non-movant, likewise apply to whether or not a genuine inconsistency exists, and that on this record there is not one. Furthermore, because physicians are often reluctant to testify until they know their own malpractice coverage won't be affected, the course of events before us suggests a possible "sandbagging" we ought not endorse.

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DONOVAN, P.J., dissenting:

I dissent. In Dr. Trent Sickles' deposition, there were several unequivocal statements that he did not intend to offer any opinions on causation, a necessary element of a medical malpractice claim:

"Q: Do you intend to render any opinions concerning the treatment that she may or may not have undergone had a diagnosis been made in June of 1999?

"A: No.

"Q: Do you intend to render any opinions as to the effect of the alleged three-year delay upon the patient's treatment or course?

"A: No.

"Q: Do you intend to render any causation opinions in this case?

"A: No."

(Dep. Tr. at 38)

"Q: What is your understanding of Miss Pettiford's subsequent diagnosis in 2002? What was she diagnosed with?

"A: My general recollection is lung cancer, but I can't even recall the specifics, because after I looked at the records I pretty much determined that I couldn't testify or give any opinions about causation so I haven't looked at that since a year-and-a-half ago." (Id. at 56) (emphasis added).

Thereafter, the affidavit of Dr. Sickles was filed on February 6, 2008, the same day the Appellant filed its memorandum contra defendant's motion for summary judgment and just six days before the judgment of the trial court was rendered. The affidavit, in completely contradicting the prior statements made in the deposition, stated "I further agree to testify as an expert for the Plaintiff, Barbara Pettiford regarding damages she has suffered as a direct and proximate result of Dr. Aggarwal's negligence."

Nothing in the record even remotely suggests that Dr. Sickles did not initially want to testify as to causation because physicians are often purportedly reluctant to testify until they know their own medical malpractice coverage will not be affected. In fact, the record is completely void of any explanation as to why Dr. Sickles changed his testimony in an affidavit submitted the same day as the Appellant's memorandum in opposition to summary judgment.

Most differences between a witness' affidavit and deposition are more a matter of degree and details, than direct contradiction as here. If the differences fit into a category of variations on a theme, this is ground for impeachment and not a vitiation of the later filed document. If, on the other hand, the subsequent affidavit is a clear contradiction and indeed a new expert opinion involving material issues in the suit, without explanation, the affidavit must be disregarded and should not defeat the motion for summary judgment.

The majority, acknowledging that contradictions exist between the deposition of Dr. Sickles and his subsequent affidavit, concludes that *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, does not control in this case because they conclude that *Byrd* is inapplicable to non-party witnesses. I do not agree with such a narrow reading of *Byrd*. Throughout the *Byrd* opinion, the Supreme Court never conclusively holds that it applies only to parties to the litigation.

Although I would agree that *Byrd* should not apply to some non-party lay witnesses, I do not agree with the majority that it should not apply to a retained expert witness. In *Clemmons v. Yaezell* (Dec. 29, 1988), Montgomery App. No. 11132, at \*\*5-6, we explained the difference between a party witness and a non-party witness:

"The party witness generally has the benefit of counsel to protect him from inadvertent misstatements. Therefore, when a party witness has given certain detrimental answers in a deposition, but subsequently, upon advice of counsel, sets forth averments in an affidavit in order to 'clarify' or 'correct' what was said in the deposition, the subsequent affidavit should be disregarded. *The affidavit is being used as a self-serving device to avoid damaging admissions* made by the party witness during his deposition.

"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. Neither the litigant nor his attorney can prevent the nonparty witness from deliberately or inadvertently misstating facts during the deposition, at least not to the same extent that the litigant as witness can be protected from inadvertent misstatements during a deposition." (emphasis added)

When the deposition testimony of a non-party witness involves a lay witness' recall of factual events and circumstances, I agree that *Byrd* may not apply. However, the issue at bar involves new "opinions" of an expert witness, retained by Appellant, for his testimony. In fact, expert witnesses are regulated by more demanding and restrictive discovery rules. In this context, a retained expert witness is more akin to the party in terms of management by counsel and providing testimony favorable to the claims. The issue isn't one of memory or recall, it is one of the forming, and subsequent contradictory changing of opinions. Here, the affidavit of Dr. Sickles is being used in the same way prohibited by *Clemmons*: as a self-serving device to avoid damaging testimony given during that deposition. Only after the Appellee had filed his motion for summary judgment, stating that Appellant had not adduced any evidence as to causation and damages, did the Appellant obtain an eleventh-hour affidavit from Dr. Sickles.

In *Byrd*, the Supreme Court ruled that a three-step analysis must be followed in determining whether to disregard an affidavit inconsistent with or contradictory to prior deposition testimony when ruling on a motion for summary judgment. First, the trial court must consider whether the affidavit contradicts or merely supplements the deposition.

Here, as noted above, the attestation in Dr. Sickles' last-minute affidavit is a complete contradiction to the testimony in his deposition. In Dr. Sickles' deposition, he unequivocally indicated that he would not be rendering any opinions as to causation. He stated that since he couldn't give any opinions on causation, he hadn't looked at the plaintiff's file for a year and a half. Furthermore, he agreed that if he were to change his opinion, he would contact the defendant so the defendant could conduct an additional deposition. Thereafter, Dr. Sickles submitted an affidavit that stated: "I further agree to

testify as an expert for the Plaintiff, Barbara Pettiford regarding damages she has suffered as a direct and proximate result of Dr. Aggarwal's negligence.”

The second step of the *Byrd* analysis requires the trial court to consider if an affidavit appears to be inconsistent with a deposition, the court must look to any explanation for the inconsistency.

Here, there is nothing in the record that provides an explanation for the inconsistency. Dr. Sickles testified that he had no opinion as to causation at his deposition on November 14, 2007. He also agreed that if he were to modify, alter, change, amend, for any additional opinions or modify the ones given the day of the deposition that he would contact Appellant's counsel so an additional deposition could be held. After the Appellee moved for summary judgment on January 30, 2008, the Appellant filed Dr. Sickles' contradictory affidavit on February 6, 2008, the same day the memorandum contra Appellee's motion for summary judgment was filed.

The final step of the *Byrd* analysis requires that “ [o]rdinarily, under [Civ.R.] 56(C), when an affidavit is inconsistent with affiant's prior deposition testimony as to material facts and the affidavit neither suggests affiant was confused at the deposition nor offers a reason for the contradictions in her prior testimony, the affidavit does not create a genuine issue of fact which would preclude summary judgment.” *Byrd*, 110 Ohio St.3d at 30. The Court thereby suggests that, in this third step, a trial court must examine the depositions and affidavits to determine if there is a valid reason for the inconsistencies. If there is not a valid reason for the inconsistencies, the Court held, “an 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 a motion for

summary judgment." *Id.*

An unsubstantiated assertion is not sufficient to overcome the effect of prior unequivocal testimony under oath. Dr. Sickles had access to the pertinent information at the time of his earlier testimony. He chose not to use the pertinent information because, in his words, "I can't even recall the specifics, because after I looked at the records I pretty much determined that I couldn't testify or give any opinions about causation so I haven't looked at that since a year-and-a-half ago." (Tr. at 56.) There is no indication his opinion on causation is based on newly discovered evidence nor does the earlier testimony suggest any confusion which the affidavit seeks to explain. Dr. Sickles does not give us a credible explanation based upon further review, careful study, or even fear of loss of insurance as the separate concurring opinion suggests.

I would hold that the *Byrd* analysis applies in this case, where an expert witness – hired by the plaintiff – contradicts his unequivocal sworn deposition testimony with an unsubstantiated, and last minute, affidavit. Accordingly, I would affirm the trial court's grant of summary judgment.

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(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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