

ORIGINAL

IN THE SUPREME COURT OF OHIO

BARBARA PETTIFORD

Plaintiff-Appellee

vs.

RAJENDRA K. AGGARWAL

Defendant-Appellant

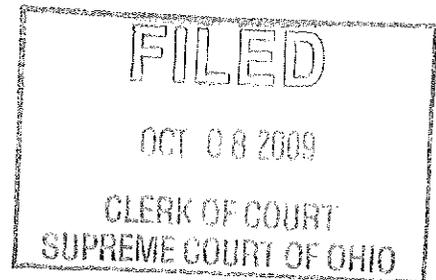
Supreme Court Case No. 2009-1602

ON APPEAL FROM THE MONTGOMERY
COUNTY COURT OF APPEALS, SECOND
APPELLANTE DISTRICT
No. CA 22736

**PLAINTIFF-APPELLEE BARBARA PETTIFORD'S MEMORANDUM IN
OPPOSITION OF JURISDICTION**

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MEMORANDUM

Now comes Plaintiff-Appellee, BARBARA PETTIFORD, pursuant to Rule III, Section 2(D) of the Rules of Practice of the of the Supreme Court of Ohio, respectfully submits her memorandum in opposition to claimed jurisdiction of this discretionary appeal for the following reasons:

1. This case does not present a question which is either of public or great general interest; and
2. The proposition of law suggested in the Memorandum filed by the Appellant should not be adopted by this Court.

1. Lack of Public or Great General Interest

Contrary to Appellant's Memorandum, this case is neither of public or great general interest for the following reasons:

- A. There are several significant facts in this case that distinguish it in such a fashion that it is not an appropriate vehicle for this Court to use to adopt a proposition of law for cases which do not share the peculiar circumstances of this lawsuit;
- B. The universe of cases which present an expert witness with a contradictory affidavit executed subsequent to prior deposition testimony is not sufficiently large to usurp this Court's limited resources for the sole purpose of evaluating whether it is proper for an apparently contradictory affidavit to be stricken.

A. The Facts of this Case are Inappropriate Vehicle for Appellant's Proposition of Law.

The nature of the relevant facts of this case are inappropriate for Appellant Proposition of Law requiring that this Court's holding in *Byrd v. Smith* apply to expert witnesses. (2006) 110 Ohio St.3d 24, 2006-Ohio-3455. If this Court were to accept jurisdiction, this Court would have to address several issues that are of no public or general interest. First, this Court would have to determine whether a contradiction even exists in the first place. The perceived contradiction

alleged by Appellant relates specifically to whether Dr. Sickles would provide opinions on causation and damages in addition to opining on the standard of care. As noted in Appellant's Memorandum, Dr. Sickles originally testified in his deposition on the Appellant's standard of care. Then, in his affidavit, Dr. Sickles opined on causation, a completely different issue from the Appellant's standard of care. Dr. Sickles was not contradicting his prior opinions as to the relevant standard of care; he was merely supplementing his prior testimony by providing additional opinions on causation and damages. Appellant's argument that Dr. Sickles' Affidavit contradicts his prior deposition is solely based on Dr. Sickles' statement during his deposition that he would not provide any opinions on causation, which has nothing to do with any of the substantive issues of this case. Moreover, as noted in Judge Grady's concurrence, Dr. Sickles' statement that he did not intend to testify was not evidentiary in nature, and wholly irrelevant to any claim for relief or defense to it in the litigation.

Second, this Court, if it accepted jurisdiction, would have to make the determination that Appellee satisfied her burden to overcome Appellant's Motion for Summary Judgment. As noted by Appellant, to establish a claim of medical negligence appellant must establish: (1) what the standard of care is within the medical community; (2) that the physician breached the standard; and (3) that the physician's breach is the proximate cause of the plaintiff's injury. The Second district held that Dr. Sickles' testimony created genuine issues of material fact for the Appellant's breach of acceptable standards of medical care, and whether such breach was the proximate cause of Appellee's Damages.

Based on the relevant facts of this case, this case is not of the public or great general interest.

B. The Universe of Relevant Case Law is not of Sufficient Size to be of Public or Great General Interest.

The issue of applying this Court's holding in *Byrd v. Smith* to expert witnesses has seldom reached the appellate level. Moreover, Appellant only can cite *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. However, those facts are distinguishable from the facts before this Court. In *Zhun*, the expert witness originally testified that in regards to particular intervention methods, the expert could not testify that he could state with any certainty whether an intervention would have prevented the decedent's death. Said expert then signed an apparently contradictory affidavit wherein he testified that his prior statements in his deposition were in response to questions concerning the use of one intervention method versus multiple methods. The court in *Zhun* did not find the expert's explanation sufficient. In the *Zhun* case, the expert made one opinion about regarding causation and then signed a subsequent affidavit wherein he changed his opinion on causation.

However, the facts in this case are considerably different from the facts that Appellee is relying on in the *Zhun* case. Here, Dr. Sickles originally testified in his deposition on the Appellee's standard of care. Subsequently, in his affidavit, Dr. Sickles opined on causation, a completely different issue from the Appellee's standard of care. Therefore, Dr. Sickles is providing additional or supplemental opinions about causation in addition to his prior opinions on the standard of care.

2. Appellant's Proposed Proposition of Law is Inappropriate.

Appellant has proposed a proposition of law that would create much disruption within trial courts in Ohio. Appellant's proposition of law to extend this Court's holding in *Byrd v.*

Smith to non-parties will create an additional requirement for the sufficiency of affidavits provided by expert witnesses by requiring an explanation for the expert's change in his opinion, which typically is relevant toward the weight of the evidence. Moreover, based on the facts of this case, Appellant's proposition of law would further require that an expert witness would provide an explanation in his subsequent affidavit even in the event that the expert is merely supplementing his prior testimony.

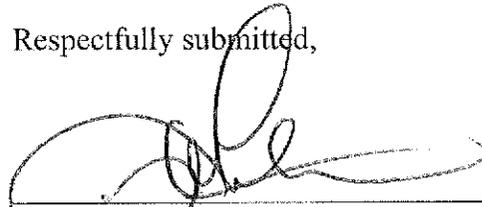
While Appellant claims that the Second District is in conflict with the prior *Zhun* case, the Second District is actually reinforcing its prior decision in *Gessner v. Schroeder*, 2007-Ohio-570. In that case, the Second District determined that "[n]either the litigant nor his attorney can prevent the non-party 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." *Gessner*, 2007-Ohio-570 at ¶56. When the witness in question is an expert witness those same factors relied on in *Gessner* are present. The attorney does not have the same level of control over an expert witness (as with any other witness) as in the case of the actual party. In this case, the Second District reaffirmed its prior decisions holding that Dr. Sickles' statements were not in the nature of judicial admissions, and Appellee's counsel was not functioning as the attorney for the expert at the deposition; therefore the expert is in the position as any other non-party witness.

Moreover, Appellant's proposition of law would needlessly place an additional burden upon a party's counsel to control and manage non-party witnesses.

CONCLUSION

The Opinion of the Court of Appeals in this case has followed this Court's holding in *Byrd v. Smith*. Its opinion is well reasoned and should be permitted to stand. Based on the foregoing Memorandum, Appellee prays for an order from this Court declining jurisdiction and dismissing this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on September 8, 2009, a copy of Appellee's Memorandum in Opposition of Jurisdiction was sent by regular U.S. mail, postage prepaid, to the following persons:

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