

ORIGINAL

IN THE SUPREME COURT OF OHIO

Barbara Pettiford,

Plaintiff-Appellee,

vs.

Rajendra K. Aggarwal,

Defendant-Appellant.

Supreme Court Case No. 09-1602

On Appeal from the Montgomery
County Court of Appeals, Second
Appellate District
Case No. CA22736

MERIT BRIEF OF APPELLANT RAJENDRA K. AGGARWAL, M.D.

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STATEMENT OF FACTS

A. Medical Background

This case arises from medical care and treatment rendered to Plaintiff/Appellee Barbara Pettiford ("Pettiford") by Defendant/Appellant Rajendra K. Aggarwal, M.D. ("Aggarwal") on June 18, 1999 when Pettiford presented to Aggarwal with complaints of chest pain, nausea and fatigue. As part of his diagnostic workup, Aggarwal took a chest x-ray that he personally interpreted as normal. Pettiford continued to seek medical treatment from Aggarwal, and on July 30, 2002, she presented to Aggarwal with complaints of difficulty breathing, chest fullness and heart arrhythmia. Pettiford's physical examination was normal, but another chest x-ray demonstrated an approximate three centimeter mass in her right lung. Aggarwal then referred Pettiford to a specialist for further medical care and treatment, which revealed that Pettiford suffered from a benign carcinoid tumor in the middle lobe of her right lung.

On August 16, 2002, Pettiford underwent a right thoracotomy and pneumonectomy. Although the tumor was benign, its location and involvement with surrounding structures necessitated removal of the entire right lung. Pettiford now alleges that Aggarwal 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.

B. Procedural Background

On December 24, 2003 Pettiford originally filed a medical negligence lawsuit against Aggarwal. During the original action, the parties proceeded through the litigation process, although Pettiford failed to identify an expert witness qualified to render a standard of care opinion. Consequently, on May 18, 2004, Aggarwal filed a motion for summary judgment.

Pettiford 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 summary judgment.

On June 15, 2005, Pettiford re-filed her lawsuit against Aggarwal, reasserting the same allegations of medical negligence. On November 14, 2005, Pettiford filed her initial disclosure of expert witnesses in the re-filed action, but failed to identify an expert on the issue of standard of care. Therefore, Aggarwal again filed a motion for summary judgment on issues of both standard of care and causation. The motion was properly supported by Aggarwal's own affidavit opining that his treatment met appropriate standards of care and was not the proximate cause of any injury to Pettiford. On February 24, 2006, Pettiford filed a second disclosure of expert witnesses, wherein she first identified Dr. Trent Sickles as an expert witness.

On March 27, 2006, Pettiford filed a "response" to Aggarwal's pending motion, but Pettiford failed to submit an affidavit or any evidence in opposition to the motion. However, on April 5, 2006, Pettiford supplemented her response and filed an affidavit of Dr. Sickles in opposition to summary judgment. (Supp. 71-74) Although the affidavit of Dr. Sickles only contained an opinion addressing the alleged deviations from the standard of care by Aggarwal, on June 19, 2006, the trial court issued an entry denying summary judgment. The trial court simply did not address the issue of causation. Thereafter, trial was continued to February 11, 2008.

On November 14, 2007, Aggarwal took the deposition of Dr. Sickles, who acknowledged having reviewed everything required to render his opinions in this case and being prepared to express all opinions which he held. (Supp. 41, lines 4-13). Dr. Sickles explained that he would typically review a case such as this to determine whether the defendant/physician met the

standard of care and also to see whether he had any opinions on the subject of causation. (Supp. 42, lines 1-12). The following exchange then took place:

Beginning on deposition page 38, line 22: (Supp. 43)

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 deposition page 56, line 21: (Supp. 61)

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. (*emphasis added*)

Continuing on deposition page 63, line 3: (Supp. 68)

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.

Thereafter, Dr. Sickles waived his right to review the transcript in order to make any corrections to his answers, pursuant to Civ.R. 30. (Supp. 69) Pettiford never advised Aggarwal that Dr. Sickles had changed any of his opinions offered during deposition, nor that Dr. Sickles had formed any new opinions.

On January 30, 2008, the trial court conducted a final pretrial conference, during which Pettiford's counsel conceded to the trial court that Pettiford could not prove an essential element of her claim, that is, she did not have an expert witness to opine on the issue of causation. The trial court then instructed Aggarwal to renew his previous motion for summary judgment. The trial court further ordered that Pettiford file a response on or before February 6, 2008 and instructed the parties 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, Aggarwal filed a motion to renew his motion for summary judgment.

On February 6, 2008, at 4:18 pm, Pettiford filed "Plaintiff's Motion in Opposition to Defendant's Motion for Summary Judgment." (Supp. 1-3) Attached to Pettiford's "motion" was an affidavit from Dr. Sickles, who ultimately was Pettiford's only expert witness. (Supp. 4-5) In his affidavit, Dr. Sickles offered causation opinions in direct contravention to, and inconsistent

with, his deposition testimony of November 14, 2007. The affidavit of Dr. Sickles filed by Pettiford on February 6, 2008, and executed by Dr. Sickles that same date, 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.

(Supp. 4-5)

On February 12, 2008, Aggarwal filed a reply in support of his renewed motion for summary judgment and a motion to strike Dr. Sickles' affidavit. On April 1, 2008, the trial court issued a decision and order granting Aggarwal's renewed motion for summary judgment. (Appx. 22) The court did not address the motion to strike Dr. Sickles' affidavit.

On April 29, 2008, Pettiford 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 Montgomery County Court of Appeals, in a 2-1 split decision, reversed the judgment of the common pleas court. (Appx. 20) The court of appeals ruled that, although contradictions exist between the deposition testimony of Dr. Sickles and his subsequent affidavit, the affidavit could be properly considered and that contradictory affidavits offered by expert witnesses are no different than those offered by other non-party witnesses. (Appx. 12) The court of appeals held that a self-serving,

contradictory affidavit submitted by a party should be disregarded, because the party has counsel to protect against inadvertent deposition misstatements, while contradictory affidavits submitted by an expert witness may properly be considered to create an issue of material fact sufficient to defeat summary judgment. (Appx. 12)

Aggarwal filed his notice of appeal to the Supreme Court of Ohio on September 8, 2009. (Appx. 1, 2) On December 2, 2009, this Court granted jurisdiction to hear the case and allowed the appeal.

ARGUMENT

Proposition of Law No. 1:

IN A MEDICAL NEGLIGENCE ACTION, AN AFFIDAVIT OF A NON-PARTY EXPERT WITNESS SUBMITTED IN OPPOSITION TO SUMMARY JUDGMENT THAT CONTRADICTS OR IS INCONSISTENT WITH FORMER DEPOSITION TESTIMONY OF THAT WITNESS MAY NOT, WITHOUT SUFFICIENT EXPLANATION, CREATE A GENUINE ISSUE OF MATERIAL FACT SUFFICIENT TO DEFEAT THE PENDING MOTION FOR SUMMARY JUDGMENT.

A. STANDARD 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.*; *Cooper v. Sisters of Charity* (1971), 27 Ohio St.2d 242 (reversed on other grounds by *Roberts*); *Price v. Cleveland Clinic Found.* (1986), 33 Ohio App.3d, 301, 304, citing

Evid.R. 601(D). Thus, Pettiford was required to prove by a preponderance of evidence that Aggarwal fell below the recognized standards of medical care for a reasonably prudent family practice physician in his interpretation of Pettiford'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; Littleton v. Good Samaritan Hospital & Health Ctr.* (1988), 39 Ohio St.3d 86; *Cooper*. Upon a party's inability to prove the existence of a genuine, triable issue of material fact, summary judgment is a proper procedural mechanism for termination of the litigation.

Summary judgment is not a "disfavored procedural shortcut", rather it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (quoting Fed.R.Civ.P. 1). 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.*

When Aggarwal renewed his Motion for Summary Judgment, his affidavit satisfied his burden of affirmatively demonstrating that summary judgment was warranted; he further directed the trial court's attention to Dr. Sickles' deposition testimony in which Dr. Sickles stated that that he could not testify about or give causation opinions. In an eleventh-hour attempt to create a genuine issue of material fact sufficient to defeat summary judgment, Pettiford

submitted a newly executed affidavit by Dr. Sickles. However, the affidavit was contradictory to and inconsistent with the affiant's previous deposition testimony. For this reason, the affidavit was properly disregarded by the trial court. The court of appeals, however, reversed the trial court and held that the affidavit should have been considered in accordance with this Court's decision in *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455.

B. APPLICATION OF BYRD v. SMITH

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. As decided by the Court, the issue was refined to the holding 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.* paragraph 3 of the syllabus. (Emphasis added) It was this Court's use of the term “party” in *Byrd* that the Second District Court of Appeals in this action, as well as have other appellate courts, focused on in narrowly construing *Byrd*. The issue of contradictory affidavits by expert witnesses was not before this Court in *Byrd* but the Court's rationale in *Byrd* is equally applicable to retained experts. Unlike other non-party witnesses, there is a great deal of control and direction that a party exerts over an expert witness, particularly in the context of summary judgment practice and the preparation and submission of affidavits in support of or opposition thereto. As noted by the United States Fourth District Court of Appeals, an expert's affidavit “may not represent the considered opinion of the doctor himself, but rather an effort on the part of the plaintiffs to create an issue of fact.” *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970 (C.A.4, 1990).

In this case, the Second District Court of Appeals, in reversing the trial court's judgment, reasoned that the *Byrd* prohibition on contradictory affidavits is applicable only to affidavits executed by a party to the lawsuit. The court of appeals recognized that contradictions exist between the deposition testimony of Dr. Sickles and his subsequent affidavit, but held that this affidavit could be properly considered by the trial court, because it is testimonial evidence of a non-party witness and, therefore, *Byrd* is not controlling. The court of appeals concluded that a contradictory affidavit submitted by a non-party witness is distinguishable from a contradictory affidavit of a party. The court of appeals reasoned that a self-serving affidavit submitted by a party should be disregarded because the party has counsel to protect against inadvertent misstatements during deposition. 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 basic difference between fact and opinion. The reasoning also fails to recognize the degree of control and direction exerted by a party over an expert witness, as opposed to other non-party fact witnesses, particularly in a medical negligence lawsuit and most importantly in the context of summary judgment practice where the affidavits are drafted by counsel rather than by the expert. It is this degree of control that brings the issue of a contradictory affidavit of a non-party expert witness under the purview of *Byrd*. Just as in *Byrd*, the rule must be that a self-serving, contradictory expert affidavit cannot be considered evidence which creates a genuine issue of material fact sufficient to defeat summary judgment absent sufficient explanation for the contradiction.

This case is not about factual misstatements made by a non-party witness over whom Pettiford had no control. Rather, this case is about the admissibility of a completely contradictory and inconsistent affidavit containing opinions, not factual statements, offered by an expert witness retained and paid by Pettiford for such opinion testimony. The issue is not one of memory or recall, as Dr. Sickles admittedly had all the necessary information available to him at the time of the deposition and was fully prepared to render all of his opinions. Rather, the issue at bar is the formation of contradictory and inconsistent opinions at the behest of Pettiford in the face of a pending motion for summary judgment without any explanation for the contradiction and inconsistency. 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.” (Appx. 17) The issue is whether a party opposing summary judgment, Pettiford, should be permitted to submit an eleventh-hour contradictory and inconsistent affidavit of that party’s expert witness in order to repudiate summary judgment without explanation for the contradiction or inconsistency. In *Byrd*, this Court effectively prevented a party from creating a sham upon the trial court by submitting a contradictory or inconsistent affidavit simply to avoid summary judgment. While most appellate courts have applied *Byrd* only to affidavits executed by a party, the same sham is perpetrated on the court when a party submits an affidavit containing contradictory or inconsistent “opinions” of an expert witness in order to manufacture an issue of fact and thereby defeat a motion for summary judgment when no such issue would otherwise exist.

C. **APPLICABILITY OF THE “SHAM AFFIDAVIT” DOCTRINE**

The “sham affidavit” rule precludes a party from creating an issue of fact to prevent summary judgment by submitting an affidavit that directly contradicts previous deposition

testimony of the affiant. *Kiser v. Caudill*, 215 W.Va. 403, 599 S.E.2d 826 (W.Va. 2004); *Jiminez v. All American Rathskeller, Inc.*, 503 F.3d 247 (C.A.3, 2007), citing *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 577-78 (C.A.2, 1969), which remains the signal federal case on the issue. In *Perma*, the United States Second District Court of Appeals held that a contradictory affidavit failed to raise a genuine issue of material fact when Perma Research's president testified in deposition that he could not recall any instance in which the adverse party's employees had behaved fraudulently. *Id.* at 577-78. However, he later submitted an affidavit during summary judgment proceedings stating that these same employees "never had any intention" of performing their contract with Perma Research. *Id.* at 577. The court of appeals noted that, "[i]f there is any dispute as to the material facts, it is only because of inconsistent statements made by Perrino the deponent and Perrino the affiant," and that, "[i]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Id.* at 577-78. Since *Perma*, every federal district court of appeals has adopted some form of the sham affidavit doctrine. See *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (C.A.1, 1994); *Martin v. Merrell Dow Pharm., Inc.*, 851 F.2d 703, 706 (C.A.3, 1988); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (C.A.4, 1984); *Albertson v. T.J. Stevenson Co.*, 749 F.2d 223, 228 (C.A.5, 1984); *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489 (C.A.5, 1996); *Reid v. Sears Roebuck and Co.*, 790 F.2d 453, 460 (C.A.6, 1986); *Darnell v. Target Stores*, 16 F.3d 174, 176 (C.A.7, 1994); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1364-65 (C.A.8, 1983) (noting that if testimony under oath can be abandoned many months later by the filing of an affidavit, probably no cases would be appropriate for summary judgment); *Radobenko v. Automated Equip. Corp.*,

520 F.2d 540, 544 (C.A.9, 1975); *Franks v. Nimmo*, 796 F.2d 1230, 1237 (C.A.10, 1986); *Van T. Junkins & Assocs. v. U.S. Indus., Inc.*, 736 F.2d 656, 657-59 (C.A.11, 1984); *Sinskey v. Pharmacia Ophthalmics, Inc.*, 982 F.2d 494, 498 (Fed.Cir. 1992).

In addition to the federal courts, states courts in other jurisdictions have also adopted the sham affidavit doctrine. See *Doe v. Swift*, 570 So.2d 1209 (Ala.1990) citing *Robinson v. Hank Roberts, Inc.*, 514 So.2d 958, 961 (Ala.1987). In *Doe*, the Supreme Court of Alabama held that the trial court did not err in refusing to consider the plaintiff's affidavit in opposition to summary judgment when the explanation for inconsistencies in the affidavit was inadequate. See, also, *Wright v. Hills*, 161 Ariz. 583, 780 P.2d 416 (Ariz.App.Div.21989); *Mays v. Ciba-Geigy Corp.*, 233 Kan. 38, 661 P.2d 348 (1983); *Rollins v. Junior Miller Roofing Co.*, 55 N.C.App. 158, 284 S.E.2d 697 (1981); *Clapp v. Oregonian Publishing Co.*, 83 Or.App. 575, 732 P.2d 298 (1987); *The Moving Co. v. Whitten*, 717 S.W.2d 117 (Tex.Ct.App.1986); *Guardian State Bank v. Humphreys*, 762 P.2d 1084 (Utah 1988); *Anderson v. Lindenbaum*, 160 P.3d 237 (Co. 2007); *Gaboury v. Ireland Rd. Grace Brethren Inc.*, 446 N.E.2d 1310, 1314 (Ind. 1983); *Inman v. Club on Sailboat Key, Inc.*, 342 So.2d 1069, 1070 (Fla. App.1977); *Maryland Cas. Co. v. Murphy*, 342 So.2d 1051, 1053 (Fla.App.1977); *Stefan v. White*, 76 Mich.App. 654, 660, 257 N.W.2d 206, 209 (1977).

The rationale behind the sham affidavit doctrine is rooted in the potential for parties to avoid summary judgment simply by repudiating their prior deposition testimony, which undermines the utility of summary judgment as a means to screen out cases that do not involve genuine issues of material fact. *Wright, supra*. The sham affidavit rule is a reasonable and useful approach to preserve the integrity of the summary judgment process by permitting the trial court to disregard an affidavit that is inconsistent with the affiant's prior deposition testimony.

Moberly, Applying the Sham Affidavit Doctrine in Arizona (2006), 38 Ariz. St. L.J. 995, citing *Shelcusky v. Garjulio*, 797 A.2d 138, 140 (N.J.2002) (“[T]he ‘sham affidavit’ doctrine ... arose as a part of the federal law governing summary judgment practice under Rule 56(C) of the Federal Rules of Civil Procedure.”).

Adoption of the sham affidavit rule reflects the view that because they are not subject to cross-examination, affidavits are inherently less reliable than testimony in a deposition, where the witness is subject to the give and take of examination and the opportunity for cross-examination. *S.G. Supply Co. v. Greenwood Int’l, Inc.*, 769 F.Supp. 1430 (N.D.Ill.1991) [Evidence is of course evidence, whatever form it may take. But anyone with even a modicum of experience knows that the form (if not the content as well) of affidavits is invariably lawyer-prepared, with the opportunity to introduce subtleties of language or meaning or both. Live testimony comes directly from the witness, and the opportunity to cross-examine during a deposition gives opposing counsel the ability to lay bare any areas of doubt or dispute in a manner not available with an affidavit. Indeed, that distinction is at least one reason that supports the familiar summary judgment principle that post-deposition affidavits at odds with earlier sworn testimony will not be credited as creating a genuine issue of fact] *Id.* at 1437-38 n.13. As the United States Court of Appeals for the District of Columbia Circuit noted, “Statements in later-filed affidavits or declarations, often prepared by lawyers, are at the very least less reliable than deposition testimony developed through the crucible of cross-examination and a fuller exploration of issues.” *Reetz v. Jackson*, 176 F.R.D. 412, 415 (D.D.C.1997). As succinctly noted by the Supreme Court of West Virginia, “A conflict in the evidence does not create a ‘genuine issue of fact’ if it unilaterally is induced. For example, when a party has given clear answers to unambiguous questions during a deposition or in answers to interrogatories, he does

not create a trial-worthy issue and defeat a motion for summary judgment by filing an affidavit that is clearly contradictory, where the party does not give a satisfactory explanation of why the testimony has changed.” *Kiser*, at 410.

Courts have considered various factors in determining whether an affidavit seeks to present a sham issue including whether the affiant was cross-examined during the earlier testimony, whether the affiant had access to the pertinent evidence at the time of the earlier testimony or whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain. See, e.g., *Maddy v. Vulcan Materials Co.*, 737 F.Supp. 1528 (D.Kan.1990)

Although the sham affidavit rule has most often been applied to affidavits submitted by parties to an action, the rule has also been applied to non-party witnesses. As in the present case, in *Adelman-Tremblay v. Jewel Cos.* 859 F.2d 517 (C.A.7, 1988), the United States Seventh District Court of Appeals addressed the issue of a plaintiff’s expert submitting a contradictory affidavit on the issue of causation. The *Adelman-Tremblay* court rejected the plaintiff’s contention that her expert’s affidavit, which contradicted his earlier deposition testimony, created an issue of fact. The expert’s affidavit, which was central to the issue of causation, directly conflicted with the expert’s earlier deposition testimony. The plaintiff attempted to explain the conflict by attributing the variation in testimony to newly discovered evidence from a scientific journal. The court found that the journal article did not provide the support claimed by the plaintiff and therefore was an insufficient justification for the clear conflict. Likewise in *Rohrbough, supra*, the United States Fourth District Court of Appeals was faced with a factual situation very similar to the instant case. In *Rohrbough*, the parents of a child who developed a seizure disorder after she was administered a vaccine brought suit against the drug manufacturer.

The plaintiffs' expert was directly questioned regarding whether or not there was a causal link between the vaccine and the child's symptoms. The doctor refused to opine that there was such a link. However, when confronted with the defendant's motion for summary judgment, the doctor submitted an affidavit stating that the vaccine caused the injuries in question. Applying its reasoning from *Barwick, supra*, the appellate court upheld the district court's decision to disregard the expert's affidavit.

Pettiford has attempted to avoid summary judgment in this case by submitting an expert affidavit on the issue of causation. Just as in *Rohrbough*, Pettiford failed to provide any justification for the contradictory and inconsistent affidavit. Therefore, under the rationale of both *Byrd* and the well established "sham affidavit" doctrine, the trial court in this case properly disregarded the affidavit.

D. THE AFFIDAVIT SUBMITTED BY APPELLEE IN OPPOSITION TO SUMMARY JUDGMENT IS BARRED BY THE SHAM AFFIDAVIT DOCTRINE

Byrd is in essence Ohio's recitation of the sham affidavit doctrine. Although in *Byrd* the contradictory affidavit was the party's own affidavit, the policy, purpose and rationale underpinning the *Byrd* decision should be applied to contradictory or inconsistent affidavits submitted by 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. In the case at bar, the affidavit of Pettiford's expert witness was contradictory and inconsistent with his prior sworn testimony. In applying the various factors set forth hereinabove that other courts have looked to in making a determination as to the admissibility of such affidavits, clearly the trial court properly excluded Dr. Sickles' affidavit when ruling on summary judgment.

In his February 6, 2008 affidavit, Dr. Sickles did not state that he was confused by the earlier deposition cross-examination questioning, nor did he explain that he did not have access to all the pertinent medical information necessary to form a causation opinion. In fact there was no explanation for the contradiction and inconsistent testimony. To the contrary, Dr. Sickles acknowledged during his deposition that he had everything required to render his opinions and that he was prepared to render all of his opinions in the case. (Supp. 41) This is entirely consistent with the fact that all of the medical care and treatment from both the standard of care and causation perspectives took place prior to Dr. Sickles' deposition, so one would fully expect Dr. Sickles to have all of the necessary information available at the time of his deposition. Likewise, there was no change in Pettiford's medical condition between the November 2007 deposition and February 6, 2008 affidavit that would justify a change in opinion. The record is simply devoid of any evidence that Dr. Sickles' February 6, 2008 affidavit was based on newly discovered medical information.

Dr. Sickles conceded during his deposition that he typically looks at the causation issues in a case to see if he has any opinions on the causation issue. (Supp. 42) As such, the concept of causation in the context of a medical negligence lawsuit was not foreign to Dr. Sickles, nor was it beyond his comprehension. After he initially reviewed the pertinent medical records Dr. Sickles determined that he could not offer a causation opinion. Dr. Sickles made this determination eighteen months prior to the deposition. (Supp. 62) Dr. Sickles was unequivocal on this point. Quite simply, the record is also devoid of any evidence that would support a finding that Dr. Sickles was confused during his deposition, that his causation opinions were based on newly discovered information, or that his affidavit was anything more than a self-serving attempt by Pettiford to craft an eleventh-hour affidavit sufficient to defeat summary

judgment. The differences between Dr. Sickles' testimony and subsequent affidavit are not mere subtleties. As noted by Judge Donovan, on most occasions the differences "are more a matter of degree and details, than direct contradiction as here." (Appx. 15) If it were a matter of minor variations, then one could argue for impeachment of the expert rather total disregard of the affidavit. But that is not the case with Dr. Sickles' affidavit, which is a complete contradiction. In applying to this case the various factors that other courts examine in determining whether or not a contradictory affidavit is a sham attempt to repudiate summary judgment, it is clear that the trial court properly disregarded Dr. Sickles' affidavit as a sham affidavit simply crafted to avoid summary judgment.

In applying this Court's reasoning in *Byrd*, it is equally as clear that Dr. Sickles failed to offer any explanation as to why he suddenly had differing and inconsistent opinions on the issue of causation. The February 2008 affidavit did not merely supplement Dr. Sickles' deposition testimony; Sickles the deponent testified that he could not offer a causation opinion while Sickles the affiant subsequently opined as to causation via an affidavit that was not subject to cross-examination. The subsequent opinion(s) are completely contradictory to and inconsistent with the affiant's previous inability to offer such an opinion. The affidavit does not contain mere clarifications or supplements to prior testimony, rather the affidavit at issue raises entirely new opinions that Dr. Sickles previously testified that he did not hold and could not form.

The contradictory affidavit offered by Dr. Sickles was not only executed on the deadline established by the trial court, February 6, 2008, it was also notarized by Pettiford's counsel. (Supp. 5) This clearly establishes that Pettiford's counsel and Dr. Sickles had a face-to-face conversation regarding the affidavit contents and presumably the necessity of a proximate cause opinion. It is exactly this type of wordsmith practice in a last minute attempt to repudiate

summary judgment that the sham affidavit rule was designed to prevent. Interestingly, Dr. Sickles' previous affidavit of April 5, 2006 was notarized by someone other than Pettiford's counsel. (Supp. 73)

Dr. Sickles' February 2008 affidavit was not only contradictory and inconsistent with his prior sworn deposition testimony, but also with his affidavit executed on April 4, 2006, wherein he did not offer any causation opinion. (Supp. 71-74) This is further support for the proposition that Dr. Sickles did not hold the causation opinions as of the November 2007 deposition, but rather executed the second affidavit only after a discussion with counsel as to what opinion was necessary to manufacture an issue of fact on causation regardless of his prior sworn testimony. This is precisely the scenario sought to be avoided by the sham affidavit doctrine and is sufficient to invoke this Court's application of *Byrd* to this case. In order to preserve the integrity and utility of summary judgment as a procedure for screening out sham issues of fact, Ohio courts must be free to disregard a conflicting affidavit. See, generally, *Kiser, supra*.

Other Ohio courts have analyzed the issue and have held that absent sufficient explanation, a non-party's contradictory or inconsistent affidavit may not create an issue of fact sufficient to defeat summary judgment. See *Zuhn v. Benish*, 2008-Ohio-572; *Zanesville Truck Ctr. v. Burech & Crowl*, 2004-Ohio-6278. In *Zuhn*, plaintiff's expert failed to testify within a reasonable degree of medical certainty that the defendant's alleged negligence was a proximate cause of the death of plaintiff's decedent. In a subsequent affidavit of the expert submitted by the plaintiff in opposition to summary judgment, the expert attempted to explain that his previous testimony was in response to a different scope of questioning. The trial court disagreed and granted summary judgment. On appeal, the Eighth District Court of Appeals closely examined the nature of the deposition questions and affirmed the trial court judgment. In *Zuhn* unlike the

case at bar, the plaintiff attempted to explain the inconsistent affidavit. However, in examining the evidence neither the trial court nor the court of appeals accepted the plaintiff's explanation. Here, Pettiford has not even attempted to explain the contradiction and inconsistency. It is anticipated that Pettiford will argue that a contradiction does not exist; that Dr. Sickles merely added a causation opinion where none existed previously. This argument is disingenuous, as even the Court of Appeals' majority recognized that contradictions exist between Dr. Sickles' deposition and his affidavit.

In *Zanesville Truck Ctr.*, the issue in the context of a legal malpractice claim was whether or not a contradiction existed between an expert's deposition testimony and subsequent affidavit where the expert added opinions on the issue of standard of care. Plaintiffs argued that the affidavit did not contradict the testimony, but rather merely supplemented and clarified the prior testimony. Both the trial court and Fifth District Court of Appeals disagreed.

The determination of whether an expert's affidavit merely clarifies and supplements, or contradicts, prior deposition testimony, and if contradictory or inconsistent, whether the party offered a sufficient explanation for the contradiction or inconsistency is a case-by-case issue. But where a party offers completely a contradictory expert affidavit without a scintilla of explanation, as in this case, the law must hold that such affidavits do not create a genuine issue of fact and may be disregarded by the trial court in reaching a decision on summary judgment.

CONCLUSION

In the present case, the Second District Court of Appeals failed to apply Ohio's sham affidavit rule, as set forth in *Byrd*, to non-party expert witnesses. The Court failed to consider various factors recognized by federal courts and other state courts that justify extending this Court's reasoning behind *Byrd* to contradictory or inconsistent affidavits of non-party expert

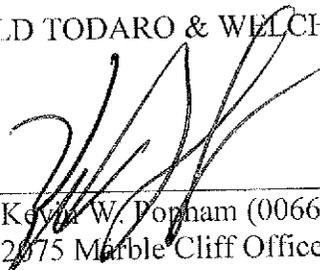
witnesses. This case presents an important opportunity to clarify the confusion existent in lower courts over the application of *Byrd* and unquestionably extend the sham affidavit rule to non-party expert witnesses. It is equally important to Aggarwal that this Court correct an injustice propounded upon him by Pettiford's submission of a sham affidavit which the appellate court found sufficient to defeat summary judgment.

Accordingly, the Appellant, Rajendra K. Aggarwal, M.D., respectfully requests this Court to reverse the Second District's decision in this case and reinstate the summary judgment that had been granted in Appellant's favor by the trial court.

Respectfully submitted,

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

By: _____

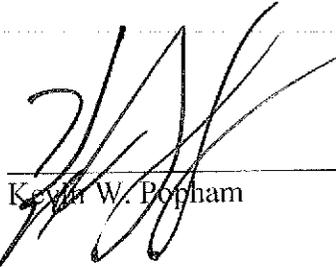


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CERTIFICATE OF SERVICE

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 27th day of January, 2010.

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Counsel for Plaintiff-Appellee



Kevin W. Popham

APPENDIX

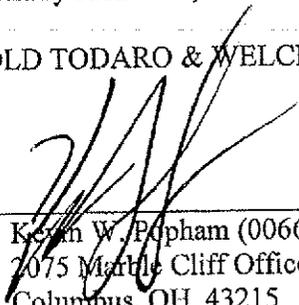
Notice of Appeal of Appellant Rajendra K. Aggarwal, M.D.

Appellant Rajendra K. Aggarwal, M.D. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals case No. 22736 on July 24, 2009.

This case is one of public or great general interest.

Respectfully submitted,

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

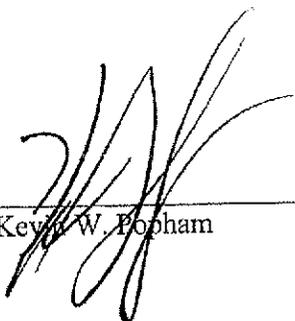
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CERTIFICATE OF SERVICE

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.
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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)

.....
OPINION

Rendered on the 24th day of July, 2009.
.....

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KEVIN W. POPHAM, Atty. Reg. #0066335, Arnold Todaro & Welch, 2075 Marble Cliff
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.....
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.¹ In response, Dr. Aggarwal filed a memorandum and a motion to strike the affidavit, contending that affidavits contradicting former deposition testimony may not, without

¹The 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.

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.

.....

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.

.....

(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).

Copies mailed to:

Lawrence J. White
Kevin W. Popham
Hon. Frances E. McGee

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

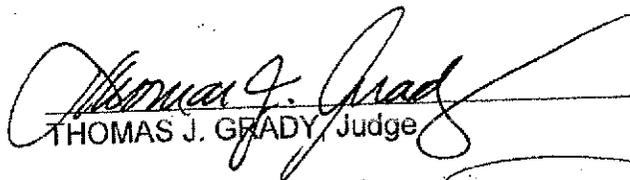
(Civil Appeal from
Common Pleas Court)

FINAL ENTRY

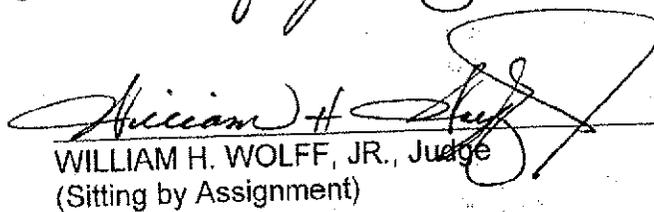
Pursuant to the opinion of this court rendered on the 24th day
of July, 2009, the judgment of the trial court is **Reversed** and **Remanded**.

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 COMMON PLEAS, MONTGOMERY COUNTY, OHIO

BARBARA PETTIFORD,

Plaintiff,

vs.

RAJENDRA K. AGGARWAL, M.D.

Defendant.

Case No. 05 CV 04831

Judge McGee

**DECISION, ORDER AND ENTRY GRANTING DEFENDANT'S RENEWED
MOTION FOR SUMMARY JUDGMENT**

This matter came to be heard on Defendant's renewed Motion for Summary Judgment originally filed February 27, 2006 and renewed January 30, 2008. Upon review of the motion and Plaintiff's response, it is hereby ORDERED that Defendant's Motion to Renew is GRANTED, that Defendant's Motion for Summary Judgment is GRANTED, and judgment is hereby rendered in favor of Defendant as a matter of law.

Frances E. McGee

JUDGE FRANCES E. MCGEE

Copies to:

Kevin W. Popham, Esq.
Lawrence J. White, Esq.