

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

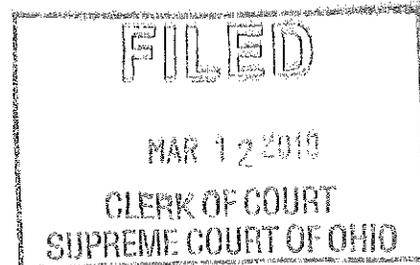
---

PLAINTIFF-APPELLEE BARBARA PETTIFORD'S MERIT BRIEF

---

Lawrence J. White, Esq., (0062363)  
Attorney for Appellee  
2533 Far Hills Avenue  
Dayton, Ohio 45419  
(937)-294-5800

Kevin W. Popham, Esq. (0066335)  
Arnold Todaro & Welch  
Attorney for Appellant  
2075 Marble Cliff Office Park  
Columbus, Ohio 43215



**I. Table of Contents**

I. Table of Contents..... 2

II. Table of Authorities..... 3

III. Statement of Facts..... 4

    A. Factual Background ..... 4

    B. Procedural History ..... 5

    C. The Second District’s Court of Appeals Decision..... 15

IV. Argument: Response to Appellant’s Proposition of Law ..... 15

    A. Summary Judgment Standard ..... 15

    B. Dr. Sickles’ Affidavit Merely Supplements His Prior Deposition and Does Not Provide any Contradictory Opinions of his Prior Deposition Testimony ..... 17

    C. Appellant’s Proposition of Law to Apply the Federal Sham Affidavit Doctrine and the Doctrine in Byrd v. Smith to the case before this Court is Misplaced Because the Doctrine is Inapplicable to the Affidavit of a Non-Party..... 20

V. Conclusion ..... 21

## II. Table of Authorities

### Cases

<i>Anderson v. Liberty Lobby, Inc.</i> (1986), 477 U.S. 242 .....	16
<i>Benjamin v. Deffet Rentals</i> (1981), 66 Ohio St.2d 86.....	16
<i>Byrd v. Smith</i> (2006), 110 Ohio St.3d 24, 2006-Ohio-3455 .....	16
<i>Clemmons v. Yaezell</i> (Dec. 29, 1988), Montgomery App. No. 11132, 1998 WL 142397 .....	21
<i>Dresher v. Burt</i> (1996), 75 Ohio St.3d 280.....	16
<i>Gessner v. Schroeder</i> , Montgomery App. No. 21498 (February 9, 2007) 2007-Ohio-570.....	20
<i>Horton v. Harwick Chem. Corp.</i> (1995), 73 Ohio St.3d 679, 686-87.....	16
<i>Parenti v. Goodyear Tire &amp; Rubber Co.</i> (1990), 66 Ohio App.3d 826, 829 .....	16
<i>Pettiford v. Aggarwal</i> , (July 24, 2009) Montgomery App. No. 22736, 2009-Ohio-3642. ....	20
<i>Roberts v. Ohio Permanente Med. Group, Inc.</i> (1996), 76 Ohio St.3d 483 .....	17
<i>S.W.S. Erectors, Inc. v. Infax, Inc.</i> , 72 F.3d 489 (5 <sup>th</sup> Cir. 1996) .....	17
<i>Vahila v. Hall</i> (1997), 77 Ohio St.3d 421 .....	16
<i>Zhun v. Benish</i> Cuyahoga App. No. 89408 (February 14, 2008) 2008-Ohio-572.....	19

### Rules

Civ. R. 30(E).....	20
Civ. R. 56.....	15
Ohio Rule of Evidence 801(D)(2).....	21

### **III. Statement of Facts**

#### **A. Factual Background**

On or about June 18, 1999, Defendant ordered an MRI and chest x-rays for Plaintiff. He incorrectly reviewed the x-ray and determined that it was clear and normal. **Complaint at P. 1, ¶ 3.** Plaintiff continued to be treated for her complaints related to her chest pain and breathing for approximately three (3) years by Defendant. On July 30, 2002, the Defendant ordered another MRI and chest x-ray. **Complaint, at P. 1, ¶ 4.** A tumor approximately five (5) centimeters at the longest point was detected. **Id.** On August 9, 2002, the Plaintiff was rushed to Good Samaritan Hospital as a result of a collapsed right lung. **Complaint, at P. 1, ¶ 5.** The right lung had to be completely removed on August 16, 2002. **Complaint, at P. 2, ¶ 6.**

After further review of the x-ray film from June 18, 1999, it has been determined that a nodule was present and that it was approximately two (2) centimeters in size. **Plaintiff's Response to Defendant's First Motion for Summary Judgment, p. 3 (March 27, 2006).** Dr. Aggarwal breached his duty of care by (1) as Defendant assumed the responsibility of analyzing x-ray film, (2) that Defendant improperly analyzed the x-ray film and wrongly diagnosed Plaintiff's condition, (3) that Defendant failed to refer Plaintiff and her x-ray film to a proper specialist, (4) that Defendant proceeded to give care and treatment to Plaintiff which was inappropriate given her actual condition, and (5) that Defendant's negligence resulted in the nodule being allowed to double in size, collapse Plaintiff's right lung, and require the removal of Plaintiff's entire right lung. **Complaint, at P. 2 – 3; Dr. Sickles' Deposition at p. 48, lines 9-14.**

## **B. Procedural History**

Appellant originally filed her Complaint for malpractice against Appellee, Dr. Aggarwal on December 24, 2003 (Montgomery County Case No. 2003-CV-9351). Appellee deviated from the standards of care in his care and treatment of Appellant and proximately caused her injuries as a result. Appellant disclosed an expert witness, radiologist Dr. Tarver. Appellant voluntarily dismissed the case without prejudice on June 24, 2004.

Appellant refilled this case on June 15, 2005 alleging the same cause of action. During discovery, Appellant disclosed the same expert, Dr. Tarver, as disclosed during the previous litigation. Dr. Aggarwal then moved for Summary Judgment on February 27, 2006 on grounds that Appellant failed to provide expert testimony regarding the Defendant's standard of care. However, Appellant submitted an Affidavit by Dr. Trent Sickles, M.D. on April 5, 2006 in support of the Appellant. In the Affidavit, Dr. Sickles testified as to the Standard of Care and that the Appellee breached his duty of standard of care by failing to recognize the lung mass. Dr. Sickles' Affidavit (April 5, 2006) at ¶ 7. Consequently, the trial court dismissed the Appellee's Motion for Summary Judgment because Dr. Sickles' First Affidavit created a genuine issue of material fact Decision, Order and Entry Denying Defendant's Motion for Summary Judgment (June 19, 2006), p. 4.

Then, on November 14, 2007, Appellee took the deposition of Dr. Sickles. At no time after the deposition did Appellee file a new motion for summary judgment or file a motion for leave to file a new motion for summary judgment based on the testimony of Dr. Sickles.

Then on January 30, 2008, 14 days before trial, 75 days after the deposition, with Dr. Sickles set to testify live at trial on February 14, 2008, defense counsel raised the issue that Dr. Sickles did not testify in his deposition as to damages.

Off the record, counsel of Plaintiff had always discussed with both prior counsel, John Welch and subsequent counsel Kevin Popham the fact that the limitation on damages AT TRIAL was going to be limited to the 3 year delay in diagnosis and the subsequent emergency collapsed lung and 10 day hospital stay, all as a direct and proximate result of the defendant's negligence.

Very simply, the defendant failed to accurately read and diagnose his own x-ray that he had taken in his own office 3 years before the plaintiff's lung suddenly collapsed due to the tumor's subsequent untreated growth for three (3) years collapsed the lung, thus creating the extreme sudden emergency for the plaintiff.

With regard to damages, the argument had always been whether or not the plaintiff could prove the damages as to "whether or not the lung could have been saved if the proper diagnosis had been made 3 years early by Dr. Aggarwal as to the existence of the tumor in the lung."

For that question the plaintiff did not have an opinion from an expert. From the Beginning when plaintiff's counsel obtained the expert opinions from both Dr. Tarver and Dr. Sickles and discussed them with defense counsel John Welch and then Kevin Popham, the fact that Plaintiff's did not have an opinion as to whether or not the lung could have been saved three (3) years earlier was always the focal point as to the extent of the claim for damages. Likewise it was always clear that AS TO DAMAGES the plaintiff's claim was otherwise limited to the three year delay and corresponding pain during and then the emergency lung collapse and the 10 hospital stay. It was always clear the expert specifically would not form an opinion as to whether or not the lung would have been saved or whether or not the rate of the growth of the tumor would have allowed the lung to be saved 3 years earlier.

Both experts for plaintiff had always stated that they would not have an opinion as to the whether or not the lung could have been saved, but it was always discussed that the statement of the obvious was true:

“If the tumor had been diagnosed, even if the lung had to be removed, she never would have had the horror of a sudden collapse of a lung, the horror of suddenly being unable to breathe, having to be rushed to the hospital and to have to stay 10 days in the hospital.’

The issue of whether or the plaintiff should ever have had to suffer an “emergency” lung collapse if the lung had been discovered three (3) years earlier was always a foregone conclusion. . No, no, no the plaintiff never would have had to suffer that sudden life threatening emergency no matter what if the Dr. Aggarwal had properly read and interpreted his own x-ray of the tumor in her lung 3 years earlier.

That limited measure of damages was always obvious. No matter what, even if the lung did have to be ultimately removed 3 years earlier, the Plaintiff never would have the horror of the sudden and totally unanticipated lung collapse and the emergency disruption of her ability to breathe like she did suffer. The issue of the value of those damages would be up to the trier of fact if they found that the first two questions of Duty and breach of duty exist in the affirmative for the plaintiff.

The fact that the defendant financially would benefit from the expert Dr. Sickles not being able to testify beyond the obvious fact that the emergency lung collapse was a result of medical negligence was a benefit to the defendant and a cost to the plaintiff.

The fact that the plaintiff was limited to the scope of the emergency lung collapse and 10 day hospital stay and corresponding pain and suffering was a cost to the plaintiff.

The issue was never whether or not the emergency collapsed lung would have happened if the tumor had been diagnosed three years earlier.

The issue in this case was always:

“Did Dr. Aggarwal breach the standard of Care in negligently reading and interpreting his x-ray of Barbara Pettiford in 1999?”

If yes, then the emergency pneumonectomy would obviously never have had to happen because the lung would have been evaluated and treated, whether or not it would have had to be subsequently removed, at least Barbara would never have had to go through the horror of sudden collapse of her lung and the agony that the sudden horror and subsequent 10 day hospital stay precipitated.

Thus the issue in this case was always (1) Whether or not Dr. Aggarwal had a duty that he owed to his patient Barbara Pettiford when he took and read his own x-ray and the second question was (2) Whether or not he Breached that duty in failing to properly read and diagnose his own x-ray and should now be held accountable for the damages which followed.

Dr. Aggarwal had denied that the tumor even existed in the x-ray. Dr. Aggarwal blatantly stated under the oath in his deposition that there was no tumor in his x-ray. The fight had always been about the duty and the breach of duty and whether or not the tumor even existed in the x-ray, the fight was never about whether or not the emergency lung collapse would have occurred.

The fact that the emergency collapse of the lung 3 years later under the weight of the burgeoning un-diagnosed tumor was an obvious damage from the lack of diagnosis was never even in question. The fight was always about the issues surrounding duty and breach of duty, with the knowledge that no expert testimony opinion existed as to the question of whether or not

the lung would have been saved three years earlier. The limitation on expert opinion testified to by Dr. Sickles was a limitation on scope of damages, not a limitation on whether or not the whole case could go forward and whether or not the obvious damage of the emergency collapsed lung and pneumonectomy was a damage that was the direct and proximate result of the medical negligence he was testifying to.

Without medical negligence by Dr. Aggarwal and a subsequent 3 year gap in diagnosis, there is no horror and agony of a sudden collapse of a lung and 10 day hospital stay.

Dr. Sickles had always communicated that he would not testify as to whether or not the lung would have been saved three years earlier and he was always clear that was a limitation on his opinion that he would not testify as to such damages and wanted to be clear he had no such opinions as to such damages.

But Dr. Sickles always voiced the statement of the obvious, which he did not even believe was a point of contention if the issue of damages was reached and that was that the emergency lung collapse never should have happened even if the lung would have been removed 3 years earlier.

To have any opinion otherwise would be to say that Dr. Sickles had the opinion that Dr. Aggarwal was negligent, and that Dr. Sickles was willing to testifying to that, but that somehow the standard of care for the form of treatment for the Barbara Pettiford's tumor in her lung would have been to purposefully delay treatment, allow the tumor to grow in the lung for three years wait for the lung to collapse then react with the emergency treatment for the collapsed lung which would then follow.

The fact that the plaintiff was limited in the scope of damages to the issue of three year difficulty breathing, pain and ultimate horror of the emergency lung collapse was open and obvious if the threshold issue of duty and breach of duty were crossed.

January 30, 2008 counsel for Plaintiff and Defendant and Judge McGee were in chambers discussing the final pre-trial issues when this issue of damages and the deposition of Dr. Sickles were first broached by Defendant. Plaintiff's counsel then reiterated once again to Judge McGee that the limitation on the scope of damages which had always been the same in all prior discussions with the Judge Jack Davis before he had to step down due to illness was isolated to the 3 year gap in diagnosis and emergency lung collapse not as to the issue of whether or not the lung could have been saved.

Judge McGee then allowed 7 days for plaintiff's counsel to put on evidence that the expert was willing to specifically testify as to "damages" and also allowed defendant the ability to subsequently renew the motion for summary judgment.

The expert was always going to come in live.

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

A. No.

"Causation" opinion was the question presented to the doctor. The term causation is legal term of art.

Causation in on a legal context is a question of what are the damages which follow.

Lawyers use causation primarily in a tort context related on to the general questions of Duty, breach of Duty, proximate cause of the damages which follow.

Doctors use the term “causation” in terms of what caused an ailment or condition. Dr. Sickles never held himself out as an oncologist willing to testify as to causation of a tumor growing inside Barbara Pettiford’s lung.

Doctor Sickles never held his opinion out as the opinion of a Pulmonologist as to whether or not the lung could have been saved.

Doctor Sickles held out his opinion as family practice doctor who was testifying about why a woman suffered a collapsed lung after a tumor had been growing in her lung for more than three years. Dr. Sickles was testifying about the fact the tumor was even in her lung, like the x-ray showed three years earlier.

Dr. Aggarwal, the defendant was denying the tumor was even present in the lung three years earlier.

Dr. Sickles said the tumor was present.

Dr. Aggarwal said the tumor couldn’t be seen from his three year old x-ray.

Dr. Sickles said that the tumor could be seen on the three year old x-ray.

The “causation” of the tumor, or the tumor’s cause on whether or not the tumor would have “caused the need for the removal of the lung three years earlier or not” was not a causation question he was willing to opine.

The time for summary judgment didn’t pass until three days after the deposition. The appellants didn’t file for a motion for summary judgment until after the time period for filing a motion had passed.

The appellants didn’t raise the issue of “causation” or damages until after even the time for perpetuation depositions had even passed because Dr. Sickles was always going to testify live. He certainly should have been allowed to proceed to testify at trial. At trial, Dr. Sickles

could have been cross examined under oath as to whether his opinions as to damages and “causation” matched the interpretation of the defendant and as to whether or not he meant that the three year delay in diagnosing the tumor in the lung were directly and proximately related to a reasonable degree of medical probability to the emergency that Barbara Pettiford suffered during that period of his life IF THAT ISSUE OF HIS OPINION WAS TRULY IN QUESTION.

IF the Defendant had asked Doctor Sickles if the emergency lung collapse was related to the missed diagnosis and he had said “NO, THE EMERGENCY LUNG COLLAPSE WAS NOT RELATED TO THE MISSED DIAGNOSIS BY DR. AGGARWAL THREE YEARS EARLIER” then that would have been contradictory or inconsistent.

Dr. Sickles opined the tumor was present. Dr. Sickles opined the tumor was visible in the x-ray three years earlier and that it was negligence not to read it. The negligence in not reading the x-ray properly was the reason for the delay in diagnosis and the delay in diagnosis was the reason the lung eventually collapsing.

To now impute What Dr. Sickles meant by his understanding of the term used by the defendant’ counsel when he was asked the question on November 13, 2007 of “causation” never should have been Construed by the trial court Judge in a light most favorable to the non-moving party. The testimony and opinions of Dr. Sickles should have been construed in the light most favorable to the non-moving party, not imputed in a vacuum to mean what defendant’s counsel says he meant when he now proposes what Dr. Sickles meant when answering a question termed “causation” of a medical condition.

The appellant used the term isolated term “causation” without qualifying the nature in which he was asking the question. Appellants should not be able to substitute their opinion after the fact to construe the opinion or meaning of Dr. Sickles answer to a question of

“causation” in a light that makes the answer inconsistent or contradictory instead of ADDITIONAL given the nature and context in which THE DOCTOR’S RESPONSE HAS subsequently been interpreted. Clearly, if the defendant wanted to ask whether or not the emergency lung collapse was a direct and proximate result of the failure to diagnose the tumor’s presence three from the x-ray (3) three years earlier COUNSEL WOULD HAVE ASKED SUCH A QUESTION.

Counsel never asked such a question in what was only a discovery deposition because he would have removed all doubt as to what the expert’s opinion was as to the opinion of the doctor on that issue.

Defense counsel is using the discovery deposition after the fact to substitute for the opinions of an expert who was coming in live to testify at trial and imputing the meaning of questions posed in a isolated context, which reasonable minds could interpret in multiple different ways, to mean what defense counsel wants to impute to them now.

Two weeks before trial, with no perpetuation depositions even scheduled, in chambers at the final pre-trial to raise this issue and then substitute the meaning of defense counsel and to then dismiss this very meritorious case, in this manner, with no explanation on how the court arrived at the ruling, on these facts with this level of damages is not a good predicate for ruling that the subsequent affidavit by Dr. Sickles was anything other than ADDITIONAL, OR AT LEAST WORTHY OF BEING EVALUATED BY THE TRIER OF FACT AND NOT ADMINISTRATIVELY DISMISSED ON SUMMARY JUDGMENT. ANY DOUBT ABOUT THE INTENT OF MEANING OF THE DOCTOR’S RESPONSES TO DEFENDANT’S COUNSEL AS THE NON-MOVING PARTY SHOULD HAVE BEEN EVALUATED IN THE LIGHT MOST FAVORABLE TO PLAINTIFF AS THE NON-MOVING PARTY.

Dr. Sickles' Deposition at p. 39, lines 6-8. In Response, Appellant filed her Memorandum in Opposition with another accompanying affidavit executed by Dr. Sickles, wherein Dr. Sickles' testified to the following:

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.

Dr. Sickles' Affidavit (February 6, 2008), ¶¶ 1-5.

Dr. Aggarwal then filed his Reply in Support of Defendant's Renewed Motion for Summary and Motion to Strike on February 12, 2008. The Appellee argued that the trial court should strike and not consider Dr. Sickles' February 6, 2008 Affidavit because the affidavit allegedly contradicts his statement that Dr. Sickles did not intend to provide any subsequent opinions on causation or damages.

On April 1, 2008, the trial court issued its Decision, Order and Entry Granting Defendant's Renewed Motion for Summary Judgment wherein the trial court held:

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.

Trial Court's Order Granting Judgment (April 1, 2008), at ¶1.

**C. The Second District's Court of Appeals Decision.**

Plaintiff-Appellee Barbara Pettiford then appealed the trial court's decision granting summary judgment on April 29, 2008. The case was fully briefed, and on July 24, 2009 the Second District Court of Appeals issued its 2-1 decision reversing the common pleas court. (Appellant's Appx. 20). The Court of Appeals ruled that the doctrine of *Byrd v. Smith* is not applicable to non-party witnesses. However, the Court did not hold that Dr. Sickles' Affidavit contradicts his prior deposition. The concurring opinion had determined that the statements in Dr. Sickles's prior deposition that Dr. Aggarwal relies on were not testimony in nature and wholly irrelevant to any claim for relief or defense to the litigation.

**IV. Argument: Response to Appellant's Proposition of Law**

Appellee respectfully submits that Dr. Aggarwal's contention that the statements made by Dr. Sickles in his deposition indicating that he was not providing any opinions as to causation contradict his subsequent affidavit are not Appellee also proposes that This Court uphold the Second District's application of *Byrd v. Smith* as only limited to non-parties for the following reasons.

**A. Summary Judgment Standard**

Pursuant to Civ. R. 56, Summary Judgment is appropriate when there are no genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829. In applying this standard, evidence is construed in favor of the nonmoving party, and summary judgment is appropriate if reasonable minds could only conclude that judgment should be entered in favor of

the movant. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686-87. The moving party "bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, quoting *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The nonmoving party then has a reciprocal burden to set forth specific facts, by affidavit or as otherwise provided by Civ. R. 56(E), which demonstrate that there is a genuine issue for trial. *Byrd v. Smith* (2006), 110 Ohio St.3d 24, 2006-Ohio-3455, at ¶10.

Before ruling on a motion for summary judgment, the trial court read the *evidence* most favorably for the nonmoving party to see if there is a "genuine issue of material fact" to be resolved. Only if there is none does the court then decide whether the movant deserves judgment as a matter of law. "The material issues of each case are identified by substantive law. As the United States Supreme Court has explained, '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Byrd v. Smith*, (Ohio 2006) 110 Ohio St.3d 24, 850 N.E.2d 47, 51 quoting *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

In a negligence action, a plaintiff must produce "specific facts" showing negligence on the part of the named defendants. *Benjamin v. Deffet Rentals* (1981), 66 Ohio St.2d 86, 88. In an action for medical negligence, the plaintiff must meet this burden of proof by means of expert testimony establishing the accepted standard of care for physicians under circumstances the same or similar to those presented in the care and treatment of the Plaintiff. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127. A plaintiff must show that the defendant fell below the accepted standard of care and that the injury complained of was the result of this deviation from the standard of care.

*See Roberts v. Ohio Permanente Med. Group, Inc.* (1996), 76 Ohio St.3d 483. That is, a non-moving party must show specific facts that there is a genuine issue of material fact as to negligence, causation or damages for trial in order to defeat the moving party's motion for summary judgment.

**B. Dr. Sickles' Affidavit Merely Supplements His Prior Deposition and Does Not Provide any Contradictory Opinions of his Prior Deposition Testimony**

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 first consider whether the affidavit contradicts or merely supplements the deposition. *Byrd*, 850 N.E.2d at 54. Then, if the affidavit of a non-moving party is contradictory, then the court must consider whether the contradicting affidavit sufficiently explains said inconsistency. A subsequent affidavit is merely supplemental when it clarifies, resolves any ambiguities or provides additional information not discussed during the prior deposition. *See Byrd*, 110 Ohio St.3d at ¶26; *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489 (5<sup>th</sup> Cir. 1996).

Assuming arguendo that this Court would depart from its holding in *Byrd* and adopt the Dr. Aggarwal's interpretation of the *Byrd v. Smith*, and the Federal "sham affidavit" doctrine and hold that the Affidavit of a non-party witness would be subject to the doctrine in *Byrd*, Appellant's reliance on this doctrine is misplaced because Dr. Sickles affidavit does not contradict his prior deposition testimony and merely provides additional or supplemental testimony on additional material facts that were not testified to by Dr. Sickles in his prior deposition. Under the this Court's decision in *Byrd*, "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.” *Byrd*, 110 Ohio St.3d, ¶1 of Syllabus. “Supplemental” generally means “serving to complete or make an addition.” supplemental. (n.d.). Merriam-Webster's Dictionary of Law. Retrieved February 28, 2009, from Dictionary.com website: <http://dictionary.reference.com/browse/supplemental>. Clearly, Dr. Sickles’ affidavit merely supplements or provides additional testimony on additional matters.

From the deposition testimony of Dr. Sickles that Appellant relies on in his brief, it is apparent that Dr. Sickles’ subsequent affidavit merely supplements his prior deposition testimony. In Dr. Sickles’ deposition, he testified that he would not opine on causation or damages. (**Sickles Deposition, p.38, line 28-p.39, line 8.**) As noted in both parties’ briefs, Dr. Sickles testified in his deposition as to the standard of care. Subsequently, in his affidavit, Dr. Sickles provided supplemental opinions on causation and damages, which do not change or contradict his prior opinions on the Appellee’s standard of care. (**Sickles Affidavit, ¶¶2-4.**) For Dr. Sickles’ affidavit to arguably be contradictory, Dr. Sickles would have to provide a different opinion as to the Appellee’s standard of care as Dr. Sickles testified to in his prior deposition. Also, the portions of Dr. Sickles’ affidavit where Dr. Sickles indicated that he was not going to opine on causation or damages is not inconsistent with his subsequent affidavit because his subsequent affidavit does not alter or change the actual opinions necessary to make a prima facie case for medical negligence.

Consequently, Appellant’s reliance on *Zhun v. Benish* as well as in reliance on the case law from the federal courts is also misplaced in that the facts are distinguishable from the facts before this Court. Cuyahoga App. No. 89408 (February 14, 2008) 2008-Ohio-572. 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. *Zhun*, 2008-Ohio-572 at ¶5. 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. *Id.*, at ¶5. 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 Appellant is relying on in the *Zhun* case. Here, Dr. Sickles originally testified in his deposition the 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. Therefore, Dr. Sickles is providing additional or supplemental opinions about causation in addition to his prior opinions.

Moreover, Dr. Sickles's statements in his prior deposition that he did not at the time intend to opine on causation at the deposition also do not contradict but merely supplements his prior testimony because the statements in his deposition that Dr. Aggarwal claims is contradictory are not testimonial in nature and do not contain any actual material facts, namely, any opinion indication that Dr. Aggarwal's failure to correctly read Barbara Pettiford's x-ray was the direct an proximate cause of her injuries. Moreover, during Dr. Sickles's deposition, Dr. Aggarwal's attorney indicated that Dr. Sickles could provide additional opinions in this case and conduct further discovery on those opinions. (Appellant's Supp. 68) Therefore, Dr. Aggarwal's own allegation that these statements are contradictory is disingenuous because his affidavit provided additional opinions, which was contemplated as clearly indicating to Dr. Sickles and to Plaintiff's counsel that Dr. Sickles could provide additional opinions on material facts not

discussed during his prior deposition. Also, Dr. Aggarwal's reliance on Civ. R. 30(E) is misguided because it would apply to corrections of existing testimony not new opinions.

**C. Appellant's Proposition of Law to Apply the Federal Sham Affidavit Doctrine and the Doctrine in *Byrd v. Smith* to the case before this Court is Misplaced Because the Doctrine is Inapplicable to the Affidavit of a Non-Party.**

Appellee proposes that the doctrine in *Byrd v. Smith* (as Appellant points out is Ohio's version of the "sham affidavit" doctrine) should not be applied to non-parties because of the differing interests between parties and non-parties. Moreover, the differing nature between the testimony of a party and a non-party under the Rules of Evidence creates the need for the differentiation in the applicability *Byrd v. Smith* and the "sham affidavit" doctrine.

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. At a deposition, 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. *See Pettiford v. Aggarwal*, (July 24, 2009) Montgomery App. No. 22736, 2009-Ohio-3642.

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

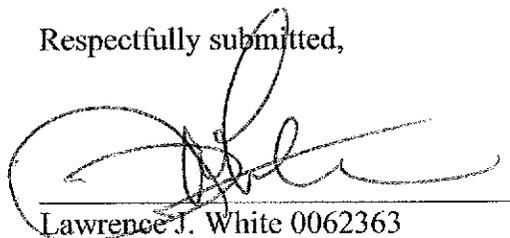
that the litigant as witness can be protected from inadvertent misstatements during a deposition. *See Gessner v. Schroeder*, Montgomery App. No. 21498 (February 9, 2007) 2007-Ohio-570.

Pursuant to Ohio Rule of Evidence 801(D)(2), a party's prior statements may generally be offered against him. However, statements made by the non-party witness in his deposition are not in the nature of judicial admissions. *See Pettiford* at ¶40 citing *Clemmons v. Yaezell* (Dec. 29, 1988), Montgomery App. No. 11132, 1998 WL 142397, \*\* 5-6. In the present case, Dr. Sickles's statements as a non-party expert were not judicial admissions. Therefore, under ORE 801 the Appellee would be limited in how he could use Dr. Sickle's subsequent prior deposition as far as submitting said deposition for the truth of the matter.

#### **V. Conclusion**

For the foregoing reasons the Second District's decision should be Affirmed and this matter should be remanded for further proceedings.

Respectfully submitted,



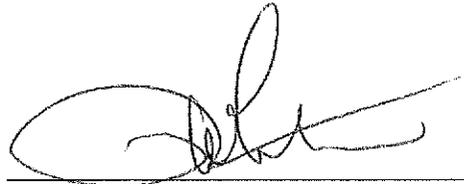
---

Lawrence J. White 0062363  
Attorney for Plaintiff  
2533 Far Hills Avenue  
Dayton, Ohio 45419  
937-294-5800

CERTIFICATE OF SERVICE

I certify that on March 12, 2010 a copy of Appellee's Merit Brief was sent by U.S. mail, postage prepaid, to the following persons:

Kevin W. Popham, Esq.  
Attorney for Appellee  
2075 Marble Cliff Office Park  
Columbus, Ohio 43215

A handwritten signature in black ink, appearing to read 'L. White', written over a horizontal line.

Lawrence J. White, 0062363