

IN THE SUPREME COURT OF OHIO

ORIGINAL

Barbara Pettiford,	:	
	:	
Plaintiff-Appellee,	:	Supreme Court Case No. 09-1602
	:	
vs.	:	On Appeal from the Montgomery
	:	County Court of Appeals, Second
Rajendra K. Aggarwal,	:	Appellate District
	:	Case No. CA22736
Defendant-Appellant.	:	
	:	
	:	
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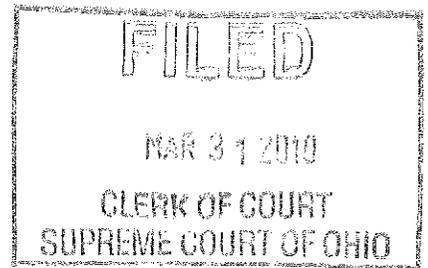
**REPLY BRIEF OF APPELLANT RAJENDRA K. AGGARWAL, M.D.**

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## Introduction

In her “Statement of Facts” and “Procedural History” Plaintiff/Appellee Barbara Pettiford (“Pettiford”) makes a number of incorrect assertions, confusing misstatements, and statements of fact not supported in evidence. Pettiford refers this Court to her Complaint as evidence of facts in this case. Pettiford’s Complaint is not evidence and should not be construed as such.

Next, Pettiford repeatedly confuses the concepts of proximate causation and damages as they apply to a medical negligence lawsuit. Pettiford asserts that on January 30, 2008, “defense counsel raised the issue that Dr. Sickles did not testify in his initial deposition as to damages.” (Appellee Brief, p. 5 ¶ 4) It is true that Dr. Sickles did not testify as to Pettiford’s damages. However, during a final pretrial conference held on the January 30, 2008, Defendant/Appellant Rajendra K. Aggarwal (“Aggarwal”) rightfully brought to the trial court’s attention the fact that Pettiford could not meet her burden on the essential element of causation. Throughout her merit brief, Pettiford repeatedly ignores the element of proximate causation, i.e. in referring to “whether or not plaintiff could prove the damages” (Appellee Brief, p. 6 ¶ 3); “AS TO DAMAGES the plaintiff’s claim was otherwise limited to the three year delay and corresponding pain \* \* \*.” (Appellee Brief, p. 6 ¶ 4); that it was a “foregone conclusion” that she would not have suffered a collapsed lung if the “lung” (sic) had been discovered three years earlier. (Appellee Brief, p. 7 ¶ 3); that “\* \* \* beyond the obvious fact that the emergency lung collapse was a result of medical negligence \* \* \*.” (Appellee Brief, p. 7 ¶ 5); that “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.” (Appellee Brief, p. 8 ¶ 6); and that “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 10 day hospital

stay.” (Appellee Brief, p. 9 ¶ 2) There is simply no evidentiary foundation for these self-serving, conclusory statements. What may be a “foregone conclusion” in Appellees’ counsel’s mind is not evidence, and Appellees had no evidence that any of these claimed damages were caused by the alleged negligence of Dr. Aggarwal in not diagnosing this benign lung mass at an earlier date.

Pettiford makes yet another bold and unsupported statement on causation. On page 7, beginning at line 1, Pettiford states “Both experts for plaintiff had always stated that they would not have an opinion as to 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.’” First, Pettiford never provided two experts for deposition. Second, the only testimonial evidence in this case is from Dr. Trent Sickles, who never testified as quoted by Pettiford. Although Pettiford places this statement in quotations, there is absolutely no such testimony in this case.

Pettiford attempts to distinguish causation in terms of what was asked of Dr. Sickles during his deposition and what opinions Dr. Sickles held at the time. Pettiford argues that if counsel had crafted a more artful question specifically regarding causation in terms that she now wants to present, Dr. Sickles would have provided the same opinions as those contained in his affidavit. However, Pettiford completely ignores Dr. Sickles’ deposition testimony and concession at the close of the deposition that he had covered all opinions formed in the case. (Sickles Deposition, p. 63, line 3, Supp. 68) It would not be possible for non-physician counsel to make inquiry into every bit of medical data considered by a physician expert in a case such as

this. Therefore, the purpose of the wrap-up question is to ensure that all relevant opinions on the issues of duty, breach, causation and damage are covered during the deposition. Dr. Sickles had every opportunity to respond as to the effect of a 3 year delay on Pettiford's medical course, but he chose not to offer such a causation opinion during his deposition. Why? Most likely because he had not considered such an opinion and, therefore, did not hold that opinion at the time of his deposition.

Notwithstanding the aforementioned lack of evidentiary support for many of Pettiford's statements contained within the "Statement of Facts", the issue *sub judice* is whether, 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, without sufficient explanation, create a genuine issue of material fact sufficient to defeat the pending motion for summary judgment. Pettiford's argument concerning damages is irrelevant to the issue before this Court.

### **Law and Argument**

Pettiford argues that Dr. Sickles' affidavit does not contradict his prior deposition testimony, but rather merely supplements the former testimony. Pettiford argues that the affidavit serves to complete or makes an addition to the deposition. However, Pettiford concedes that Dr. Sickles testified "that he would not opine on causation or damages. (Appellee Brief, p. 18 ¶ 2, citing "Sickles Deposition, p.38, line 28-p.39, line 8) Pettiford rightfully points out that Dr. Sickles testified during his deposition as to the standard of care, but incorrectly argues that, because his subsequent opinions on causation do not contradict his former opinions on standard of care, the causation opinions cannot be construed as contradictory. Pettiford ignores the fact that Dr. Sickles' subsequent affidavit opinions on causation are contradictory to his opinion that

he could not give any opinions on causation and that he did not intend to render any causation opinions in this case. (Sickles Deposition, p. 38, line 22, and p. 56, line 21, Supp. 43, 61) Pettiford further argues that the subsequent causation opinions are additional and, therefore, not contradictory. Although the causation opinions are additional to the standard of care opinions offered during deposition, the subsequent causation opinions are certainly contradictory to Dr. Sickles' explicit and repeated statements that he held no causation opinions in this case. Dr. Sickles specifically testified that "after [he] looked at the records [he] pretty much determined that [he] couldn't testify or give any opinions about causation \* \* \* ." (Sickles Deposition, p. 56, line 21, Supp. 61) Any subsequent causation opinion would be contradictory to his opinion offered during deposition.

Moreover, Pettiford fails not only to provide a sufficient explanation for the contradiction, she fails to provide any explanation. There was absolutely no additional evidence or medical facts that came to light following the deposition. There was no additional evidence upon which for Dr. Sickles to form contradictory causation opinions. In his deposition, Dr. Sickles testified that his normal practice is to review a case to determine first whether there was any deviation from the standard of care and second whether he had any opinions about causation, i.e. whether the deviation contributed to an adverse outcome for the patient. (Sickles Deposition, p. 37, line 7, Supp. 42) As such, Dr. Sickles was well acquainted with the legal concept of causation when he reviewed the case and when he gave his deposition testimony, opining repeatedly that he held no causation opinions. As such, the trial court properly disregarded Dr. Sickles' affidavit submitted in opposition to summary judgment.

Pettiford next in essence argues, *assuming arguendo*, Dr. Sickles' affidavit is contradictory, that *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, vis-à-vis the "Sham

Affidavit Doctrine” should not apply, because Dr. Sickles is a non-party witness. Pettiford suggests that the distinction between party and non-party witnesses is that the benefit of counsel afforded to a party witness justifies a disregard for a party’s subsequent contradictory affidavit. Pettiford reasons that, where an affidavit is used by a party as a self-serving device to avoid damaging admissions, the affidavit is properly excluded. Pettiford argues that neither a litigant nor his attorney can prevent a non-party witness from deliberately or inadvertently misstating facts during the deposition.

While a litigant ordinarily cannot prevent misstatements of fact by a non-party witness, this case is not about misstatements of fact. At issue *sub judice* is opinion testimony. This case is obviously not about whether Dr. Sickles recalls the traffic light to have been red or yellow. This case is about the totality of Dr. Sickles’ medical opinions formed after review of all pertinent and relevant medical records. Moreover, this case is not about misstatements of fact made by Dr. Sickles during his deposition; his opinion testimony on causation was quite clear. This case is about the degree of control that a party exerts over his or her own expert witness so as to craft an affidavit sufficient to defeat summary judgment. 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)

Pettiford does not dispute that her counsel discussed the affidavit issue and drafted the same for Dr. Sickles’ execution. It is this degree of control exhibited by Pettiford over her expert witness that brings this case within the ambit of *Byrd*. As such, 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

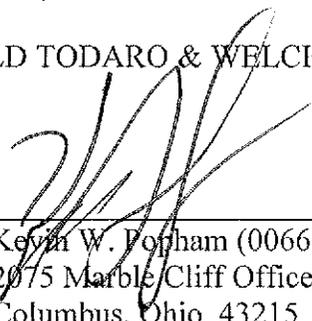
sufficient explanation, create a genuine issue of material fact sufficient to defeat the pending motion for summary judgment.

For all of the foregoing reasons, and for the reasons previously set forth by Appellant, this Court should reverse the judgment of the Second District Court of Appeals, and reinstate the summary judgment granted by the trial court.

Respectfully submitted,

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

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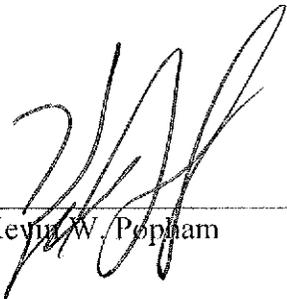


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CERTIFICATE OF SERVICE

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 3/5 day of March, 2010.

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