

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| Peter L. Moran, Administrator of the Estate of Richard L. Elzay, Deceased, |) | Supreme Court Case No. 2013-0198 |
| |) | On Appeal from the Lucas County Court of Appeals, Sixth Appellate District |
| Appellee, |) | |
| v. |) | Court of Appeals Case No. L-11-1281 |
| Mercy St. Vincent Medical Center and Kristen M. Tennant, R.N., |) | |
| |) | |
| Appellants. |) | |

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANTS MERCY ST. VINCENT MEDICAL CENTER
AND KRISTEN M. TENNANT, R.N.**

| | | |
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EXPLANATION OF WHY THIS IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST

Like the law, medicine does not lend itself to absolute certainties. That is not a critique. It simply reflects the reality of medicine and science. Nowhere is this tenet more recognized than in our judicial system where, for nearly a century, this Court has used a probability standard for admitting expert testimony. Unlike an absolute certainty requirement (which rarely exists in medicine or science, much less the law), the probability standard provides experts the ability to offer scientifically reliable opinions on key issues, like proximate cause, with integrity.

Abuse of that standard is prevented by prohibiting “inconsistent” and “contradictory” opinions. See *Turner v. Turner*, 67 Ohio St.3d 337, 617 N.E.2d 1123 (1993), paragraph one of the syllabus, and *Pettiford v. Aggarwal*, 126 Ohio St.3d 413, 2010-Ohio-3237, 934 N.E.2d 913, ¶22. However, when a lower court manipulates *Turner* and *Pettiford* to preclude a qualified medical expert from offering a causation opinion to a *probability* simply because that expert admits an alternate *possibility*, it creates a result that is contrary to this Court’s longstanding precedent and Ohio policy.

That is the situation in this wrongful death appeal. In support of Appellants’ motion for summary judgment, defense expert Jack Sobel, M.D. testified by affidavit that the alleged negligence *probably* was not the cause of the decedent’s death, while he acknowledged at deposition that the alleged negligence was a *possible* cause.

Misconstruing Dr. Sobel’s acknowledgment of truth and logic, the Sixth Appellate District characterized Dr. Sobel’s causation testimony as “clearly and materially inconsistent,” excluded his affidavit testimony, and prevented summary judgment for Appellants.

The Sixth District's decision is logically and legally flawed. It represents an unwarranted departure from Ohio precedent that threatens the foundation of *all* expert testimony. This case is therefore a matter of great public interest to plaintiffs and defendants, *both* of whom routinely use medical and scientific experts to address complex issues, like proximate cause, at summary judgment and trial.

By excluding Dr. Sobel's affidavit testimony and denying summary judgment, the Sixth District found that probability and possibility are mutually exclusive concepts. But they are not mutually exclusive. They are congruent.

In Ohio, a medical expert is required to express a proximate cause opinion to a medical probability. It is therefore *consistent* for an expert to offer a causation opinion to a probability (greater than 50%) and still be able to concede an opposing possibility (less than 50%). That is what Dr. Sobel did.¹

Ohio law follows this logic, but the Sixth District did not. The Sixth District ignored the *Pettiford* facts, as well as those in *Turner* – upon which this Court built *Pettiford*. This is evident from the absence of any pertinent case law or cogent reasoning in the Sixth District's two-page decision. That lack of support is not surprising since there are *no Ohio cases* concluding that an expert's opinion to a probability is "inconsistent" with or "contradictory" to an opinion acknowledging the opposite possibility.

In fact, Ohio case law supports exactly what Dr. Sobel did here, and what other medical experts have done before him. In *McWreath v. Ross*, 179 Ohio App.3d 227, 2008-Ohio-

¹ An exception to this general rule is when an expert assigns specific percentages to the probability and possibility portions of the expert's opinions, which Dr. Sobel did *not* do. But even if percentages were somehow retroactively applied to Dr. Sobel's testimony, his opinions show *at the very least* a 51% chance that the alleged negligence was not the cause the decedent's death and *at the very most* a 49% chance that the alleged negligence was a cause. That is consistent testimony, both from a logical and legal perspective.

5855, ¶¶81, 84, the Eleventh District found that expert medical testimony that the injury *probably* was caused by the defendant to be entirely consistent with that expert's subsequent acknowledgment of the *possibility* that the injury was not caused by the defendant.

The Sixth District's troubling misuse of *Pettiford* distorts this Court's established probability standard for admitting expert medical testimony, both at the summary judgment stage and at trial. Without this probability standard, both plaintiff and defense medical experts would be forced to offer their causation opinions to an absolute certainty (100%). That is neither feasible nor practical, and it would rarely be credible.

Requiring causation testimony to an absolute certainty is contrary to this Court's longstanding probability standard. It essentially bars moving parties in personal injury and medical malpractice cases from using qualified expert testimony to satisfy their Civil Rule 56 burden, which is essentially the *only* way it can be satisfied.

The Sixth District's decision will also have a negative impact on the participation of medical and other scientific experts in cases that *require* expert testimony. This decision, as it stands, threatens to exclude qualified medical and scientific experts from offering professional opinions merely because those experts truthfully recognize that, in medicine as in science, almost anything is possible.

Assuming there are experts willing to "honestly" offer causation opinions to an absolute certainty, which would be suspect, restricting access to so few would undermine the public interest in allowing both plaintiffs and defendants the fair opportunity to pursue justice. Appellants therefore ask this Court to exercise its jurisdiction and rectify this disturbing error.

STATEMENT OF THE CASE AND FACTS

This case arises from medical malpractice and wrongful death allegations surrounding the death of Richard Elzay in December 2008. Appellee alleged that Mr. Elzay received a fatal infection after Appellant Kristen M. Tennant, R.N., an employee of Appellant Mercy St. Vincent Medical Center, negligently handled a cap that had “fallen off” an IV in the decedent’s right arm.

Appellants filed a motion for summary judgment, supported by the affidavit testimony of their causation expert, Dr. Sobel. In his affidavit, Dr. Sobel opined to a *reasonable medical probability* that Nurse Tennant’s care and treatment of the decedent was not a proximate cause of his infection or death. Upon cross-examination at a subsequent deposition, Dr. Sobel acknowledged the *possibility* of Appellee’s theory – that Nurse Tennant’s handling of the IV cap “could have caused” the infection. At no point, however, did Dr. Sobel recant his affidavit testimony or offer any other testimony impugning his causation opinion “to a reasonable medical probability.” Appellee’s causation expert, Dr. Passaretti, was unable to opine that the alleged negligence of the nurse was the probable cause of the infection and death.

The Trial Court denied summary judgment to Appellants because it found an “implicit inconsistency” in Dr. Sobel’s causation opinions. After the case was tried and a jury verdict returned for Appellees, Appellants timely appealed the denial of summary judgment to the Sixth District, which affirmed the Trial Court’s decision.

In a dismissive, two-page analysis, the Sixth District transformed Dr. Sobel’s affidavit testimony of a “reasonable medical probability” into a “sweeping conclusion *foreclose[ing]* proximate cause attributable to the care provided by [Nurse] Tennant.”

(Emphasis added.) App. A, ¶14. After citing an irrelevant *standard of care* issue,² the Sixth District proceeded to frame Dr. Sobel's "could-have-caused-it" deposition testimony as a "significant[] conce[ssion]" on causation. When the Sixth District compared the two, it somehow found that Dr. Sobel's probability opinion was both "clearly and fundamentally incongruous" and "clearly and materially inconsistent" with his possibility opinion.

Although it recited the *Turner* standard noted by this Court in *Pettiford*, the Sixth District attempted no comparison to the facts in *Turner* or *Pettiford*, nor did it cite *any* case law or similar fact scenario to support its illogical analysis. Had it done so, it would have found that: (a) Ohio requires experts to offer their causation opinions to a probability, leaving room for opposing possibilities; and (b) Ohio case law holds that acknowledging an opposite possibility is not inconsistent or contradictory causation testimony, nor does it preclude summary judgment for the moving party.

In support of its position on these issues, Appellants present the following propositions of law and argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Under Ohio law, an alleged cause of injury can be excluded to a probability and still be possible.

This Court has persistently held that expert testimony on the issue of proximate cause is governed by a standard of probability. *See Drakulich v. Indus. Comm.*, 137 Ohio St. 82,

² Dr. Sobel was neither retained to nor offered any standard of care opinions. But the Sixth District nevertheless referred to Dr. Sobel's so-called "substantive concerns regarding the *standard of IV care* tendered to decedent by [Nurse Tennant]" in his deposition, as well as his testimony that "as a Monday morning quarterback *** of course you better replace [the IV]." (Emphasis added.) App. A, ¶¶10-11. The Sixth District identified this as an "equivocation by Dr. Sobel with respect to [Nurse] Tennant's *standard of care*," which it then decided was somehow contrary to his "unequivocal[]" affidavit opinion that Nurse Tennant's care probably was not a *proximate cause* of death. (Emphasis added.) *Id.* at ¶12.

88-89, 27 N.E.2d 932 (1940) (“Proof of possibility is not sufficient to establish a fact; probability is necessary.”), and *Shumaker v. Oliver B. Cannon & Sons, Inc.*, 28 Ohio St.3d 367, 369, 504 N.E.2d 44 (1986) (“the establishment of proximate cause through medical expert testimony must be by probability”).

By definition, the various expressions of this probability standard incorporate the opposing possibility. See *Shumaker*, 28 Ohio St.3d at 369 (“more likely than not” caused the injury); *Stinson v. England*, 69 Ohio St.3d 451, 633 N.E.2d 532 (1994), paragraph one of the syllabus (“greater than fifty percent likelihood that it produced the occurrence at issue”). For example: “more likely than not” recognizes both the likely and the unlikely, just as a “greater than fifty percent likelihood” must include a less than fifty percent likelihood of something else. Logically and legally, these expressions prove that a probable cause and an opposing possible cause are not mutually exclusive.³

Yet the Sixth District concluded otherwise when it affirmed the denial of Appellants’ motion for summary judgment. On the issue of *causation*, the only evidence upon which the Sixth District could rely was: (a) Dr. Sobel’s affidavit testimony to a “reasonable medical probability” that Nurse Tennant’s care did not proximately cause the decedent’s death; and (b) Dr. Sobel’s deposition testimony during cross-examination acknowledging that Nurse Tennant’s care “could have caused” the decedent’s death. The Sixth District believed these statements were “clearly and fundamentally incongruous,” even though Dr. Sobel was testifying in accordance with this Court’s probability standard, as well as sound medical science.

³ Compare *Kuhn v. Banker*, 133 Ohio St. 304, 312, 13 N.E.2d 242 (1938) (“It is legally and logically impossible for it to be *probable* that a fact exists, and at the same time *probable* that it does not exist.”) (internal citation omitted; emphases added).

Whether it somehow confused Dr. Sobel's "could have" testimony as a causation opinion to a reasonable probability, which it clearly was not, or simply decided to ignore the logical, legal, and medical consistencies of Dr. Sobel's testimony, the Sixth District's decision fails as a matter of law. Forbidding the appropriate acknowledgment of an adverse possibility devastates the probability standard that this Court has established for admissible expert witness testimony at summary judgment and trial.

Proposition of Law No. II: When supporting a motion for summary judgment, it is neither inconsistent nor contradictory for an expert to exclude the alleged cause of injury to a probability and still acknowledge the alleged cause of injury as a possibility.

In *Turner*, this Court held that a moving party's "inconsistent" or "contradictory" affidavit may not be used to obtain summary judgment. If the Sixth District had examined the facts and analysis in *Turner* (and its subsequent application to non-party experts in *Pettiford*), it would have found that a moving party expert's causation testimony to a probability cannot be inconsistent or contradictory to his acknowledgment of an opposing possible cause because the latter acknowledgment does not conflict with, nor is it contrary to, the former opinion.

This Court also concluded in *Turner* that the moving party's testimony that she "had to apply my brakes to avoid the collision" conflicted with her earlier testimony that she "didn't know" if she needed to brake to avoid the collision. (Emphasis added.) 67 Ohio St.3d at 340-341. Similarly, in *Pettiford*, the plaintiff's expert testified at deposition that he "could not give any opinions about causation," but then later offered causation opinions in a new affidavit. 2010-Ohio-3237, at ¶¶6-7, 9-14. Upon remand, the trial court found that the expert's affidavit and deposition testimony were contradictory, as did the Second District. See *Pettiford v. Aggarwal*, 2d Dist. No. 24557, 2011-Ohio-5209, at ¶6. The Second District focused upon the

expert's admission that he "could not" opine about causation, which "*directly conflicts* with the later opinions offered in his affidavit about causation." (Emphasis added.) *Id.* at ¶14.⁴ In other words, the conflicting statements in *Turner* and *Pettiford* were inadmissible because they could not be reconciled.

Other Ohio appellate courts impose this same "contradictory" threshold, which requires there to be some logically contrary testimony. See *Riddle v. Auerbach*, 10th Dist. No. 10AP-508, 2011-Ohio-556, ¶¶27-28 (finding expert's affidavit testimony that chance of recovery could be calculated at 50% throughout certain period contradicted that expert's earlier deposition testimony that chance of recovery could not be calculated at any relevant period); *Starkey v. Am. Legion Post 401*, 3d Dist. No. 9-09-49, 2010-Ohio-2166, ¶¶18-19, 21-23 (finding plaintiff's affidavit testimony that employer had made promises to her about salary and length of employment contradicted her earlier deposition testimony that she did not recall any such statements made to her); and *Galyean v. Greenwell*, 4th Dist. No. 05CA11, 2007-Ohio-615, at ¶¶39-42 (finding appellants' affidavits that spoke to potential harms associated with permitting uncredentialed practice contradicted their earlier deposition testimony that they knew of no situation where a physician without privileges posed some risk to hospital patients).

Prior to its decision here, the Sixth District had been properly employing this threshold analysis. Compare *Behm v. Progress Plastic Prods., Inc.*, 6th Dist. No. H-07-008,

⁴ *Byrd* is the third case in this *Turner-Pettiford* trilogy. In *Byrd*, after this Court remanded the case to the trial court to consider the affidavit at issue, see 2006-Ohio-3455, at ¶¶30-32, the trial court concluded – and the Twelfth District affirmed – that the non-moving party's affidavit testimony that he believed he was working if he was driving the company vehicle merely supplemented his earlier deposition testimony that he was on a personal errand in the company vehicle at the time of the injury. See 2006-Ohio-3455, at ¶¶5-6, 30-32; *Byrd v. Smith*, 12th Dist. No. CA2007-08-093, 2008-Ohio-3597, ¶7, appeal not accepted 120 Ohio St.3d 1456, 2008-Ohio-6813, 898 N.E.2d 969.

2007-Ohio-6357, ¶¶17, 21 (reversing decision that plaintiff’s testimony that she “believe[d]” defendants acted criminally contradicted plaintiff’s testimony that he did not “know” whether defendants’ act was criminal, recognizing that “[o]ne can believe something is true without knowing that it is.”) with *Patterson v. Ahmed*, 6th Dist. No. L-09-1222, 2010-Ohio-4160, ¶¶64-65 (affirming decision that plaintiff’s testimony that she gave notice of paint problem *after* learning about high lead levels “directly contradicts” her later testimony that she gave notice of paint problem *before* she learned of high lead levels).

These cases provide the litmus test that the Sixth District should have utilized in comparing Dr. Sobel’s affidavit and deposition testimony. But, the Sixth District did not apply that test in this case, nor did it cite *any* case that is factually comparable or supportive. Instead, the Sixth District misapplied the threshold terms of “inconsistent” and “contradictory” beyond the confines established by this Court, Ohio appellate courts, and even its own precedent.

A qualified expert’s opinion that an act “probably did not” cause an injury is completely reconcilable and consistent with a later acknowledgment that the same act “could” have caused the injury. To find otherwise ignores established case law, logic, and the realities of medical science, and it arbitrarily precludes a moving party’s otherwise legitimate ability to obtain summary judgment through the use of qualified expert medical testimony.

CONCLUSION

This case presents the following question:

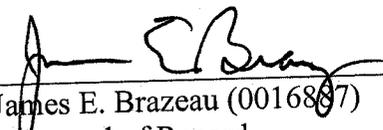
Are the legal causation concepts of “probable” and “possible” mutually exclusive or are they congruent?

Appellants respectfully submit that it is axiomatic that they are congruent. An alleged cause of injury can be excluded “to a reasonable medical probability” yet still be possible.

Because the courts below failed to grasp this fundamental concept and misapplied *Pettiford*, Appellants request this Court to exercise its jurisdiction to correct that error, reverse the judgment for Appellee, and grant judgment for Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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March 7, 2013

The foregoing Memorandum in Support of Jurisdiction was this day mailed to Kyle A. Silvers, Shindler, Neff, Holmes, Worline & Mohler, LLP, 300 Madison Avenue, Suite 1200, Toledo, OH 43604, Attorney for Appellee.


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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Peter L. Moran, Esq., Administrator of
the Estate of Richard L. Elzay, Deceased

Appellee/Cross-Appellant

Court of Appeals No. L-11-1281

Trial Court No. CI0200907447

v.

Mercy St. Vincent Medical Center, et al.

Appellants/Cross-Appellees

DECISION AND JUDGMENT

Decided:

JAN 25 2013

Kyle A. Silvers, for appellee/cross-appellant.

Timothy D. Krugh, James E. Brazeau and Jason M. Van Dam,
for appellants/cross-appellees.

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which denied appellants' motion for summary judgment in the underlying medical malpractice and wrongful death suit, resulting in the case proceeding to trial. Following jury trial, a verdict in favor of appellee was rendered. Appellants' subsequent Civ.R. 59

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motion for a new trial was denied. This appeal ensued. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellants, Mercy St. Vincent Medical Center and Kristen Tennant (“Mercy” and “Tennant”), set forth the following two assignments of error:

The trial court erred in denying summary judgment to appellants because Dr. Sobel’s causation testimony was not inconsistent or contradictory as a matter of law.

The trial court erred in excluding two rebuttal witnesses because their testimony was not cumulative and it would not have unduly delayed the trial.

{¶ 3} The following facts are relevant to this appeal. On November 26, 2008, Richard Elzay (“decedent”) was admitted to Mercy suffering from angina. A brief hospital stay to treat the condition was anticipated. Upon admission, an IV was placed in decedent’s right arm. The utilization of the IV was routine under the circumstances. Several days later, decedent notified Tennant, the Mercy nurse responsible for his care at that time, that the IV cap had fallen onto the floor. Rather than fully replace the potentially compromised IV with a new IV, Tennant swabbed the affected area, replaced the fallen cap, and left the original IV in place.

{¶ 4} Subsequent to this incident, decedent developed a critical wound infection at the site of the right arm IV. Decedent developed sepsis, endocarditis, and passed away several weeks later from complications caused by the infection. A medical malpractice

and wrongful death action was subsequently filed against appellants, alleging that deviations in the standard of IV care proximately caused decedent's infection and death.

{¶ 5} Following several years of litigation in the matter, appellants filed for summary judgment. In support, appellants submitted the affidavit of nonparty expert witness Dr. Sobel. Dr. Sobel specifically swore in the affidavit, in relevant part, "It is my opinion to a reasonable medical probability that Kristen M. Tennant, R.N.'s nursing care and treatment of Mr. Elzay was not a proximate cause of any of the injuries alleged in plaintiff's complaint or amended complaint, including Mr. Elzay's death." However, in direct contrast to the affidavit proclamation on causation, during his prior deposition testimony regarding whether Tennant erred in replacing the IV cap rather than removing and replacing the entire affected IV, Dr. Sobel conversely testified, "Do I think it could have contributed to -- do I think that replacing the cap could have caused it? It could have caused it."

{¶ 6} Faced with a motion for summary judgment on behalf of Mercy and Tennant supported by a nonparty expert witness affidavit contradicting earlier deposition testimony of that expert on causation, the trial court concluded it would be improper to grant summary judgment under these facts and circumstances. On January 18, 2011, the trial court held, in relevant part, in denying summary judgment, "The court finds that the affidavit of Dr. Sobel and the deposition testimony implicitly create a question of credibility with respect to Dr. Sobel's testimony, and, therefore, it would be inappropriate to grant summary judgment on that issue."

{¶ 7} Summary judgment was denied and no voluntary settlement was reached. On June 27, 2011, the case proceeded to trial. On June 28, 2011, appellants requested permission to call three previously undisclosed rebuttal witnesses. These witnesses were all Mercy nurses who had provided care to decedent during his hospitalization. However, none of these rebuttal witnesses possessed any recollection of the decedent or any recollection of the care they provided to decedent. Accordingly, the trial court permitted the live testimony of one of the three witnesses and denied the live testimony of the other two witnesses. The trial court concluded that allowing the live testimony of each of these three similarly situated witnesses would have been cumulative resulting in unnecessary delay. In addition, notably, the records of the care provided to decedent by the additional two witnesses who were not permitted to furnish live testimony were already in possession of the jury and available to them.

{¶ 8} On June 30, 2011, the jury unanimously found Tennant and Mercy negligent in the care of decedent. The jury further concluded that this negligence proximately caused his death. Based upon these holdings, the jury awarded \$600,000 in compensatory damages to appellee. On July 15, 2011, appellants filed a Civ.R. 59 motion for new trial alleging reversible prejudice in the denial of live testimony from two of the three nurse rebuttal witnesses. On September 1, 2011, the motion was denied. The trial court emphasized that none of the rebuttal witnesses, the one permitted to testify or the two not permitted to testify, possessed any actual recollection of decedent or of the care that they provided to him. Accordingly, the trial court held that the denial of such

testimony could not have constituted prejudice to appellants so as to have prevented appellants from having a fair trial. This appeal ensued.

{¶ 9} In the first assignment of error, appellants assert that the trial court erred in denying their motion for summary judgment. In support, appellants contend that Dr. Sobel did not testify inconsistent with his affidavit. Rather, appellants assert, Dr. Sobel merely, “conceded the obvious.” We do not concur.

{¶ 10} The transcript of the deposition testimony clearly reflects Dr. Sobel’s substantive concerns regarding the standard of IV care tendered to decedent by Tennant. Dr. Sobel stated at one point regarding the IV care, “You know, as a Monday quarterback would, oh, of course you better replace it.” It was not replaced.

{¶ 11} Upon further questioning, Dr. Sobel significantly conceded, “I’m not sure what I would have done. Do I think it could have contributed to-- do I think that replacing the cap could have caused it? It could have caused it.”

{¶ 12} Despite his prior deposition testimony reflecting causation concerns and equivocation by Dr. Sobel with respect to Tennant’s standard of IV care, Dr. Sobel subsequently unequivocally attested his affidavit, “It is my opinion to a reasonable medical probability that Kristen M. Tennant, R.N.’s nursing care and treatment of Mr. Elzay was not a proximate cause of any of the injuries alleged in plaintiff’s complaint or amended complaint, including Mr. Elzay’s death.” This sweeping conclusion forecloses proximate cause attributable to the care provided by Tennant. It is clearly and fundamentally incongruous with Dr. Sobel’s prior deposition testimony. In his

deposition, Dr. Sobel clearly conceded that Tennant's standard of IV care of the decedent could have caused the adverse outcome.

{¶ 13} We are guided in our consideration of the merits of appellants' first assignment of error by the recent, highly relevant Supreme Court of Ohio case of *Pettiford v. Aggarwal*, 126 Ohio St.3d 413, 2010-Ohio-3237, 934 N.E.2d 913. In its consideration of the propriety of summary judgment when a nonparty medical malpractice expert witness gives deposition testimony that is inconsistent with a subsequent summary judgment affidavit of that witness, the court stated in pertinent part, "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." Consistent with this principle, the court similarly held that an affidavit in support of a nonmoving party inconsistent with prior testimony likewise cannot be construed as creating a genuine issue of material fact so as to prevent summary judgment in favor of the moving party. *Pettiford*, ¶ 38.

{¶ 14} We find that the pertinent principles set forth in *Pettiford* are controlling in this case. We find that the causation deposition testimony of Dr. Sobel was clearly and materially inconsistent with his subsequent affidavit in support of summary judgment. As such, summary judgment could not be granted to appellants. The denial of summary judgment was proper. Wherefore, we find appellants' first assignment of error not well-taken.

{¶ 15} In appellants' second assignment of error, they maintain that the trial court abused its discretion in denying their Civ.R. 59 motion for a new trial. In support, appellants rely upon Ohio caselaw upholding the principle that a party is prejudiced when a trial court refuses to permit the calling of rebuttal witnesses who are the only witnesses with the knowledge and capability of testifying about the relevant events at issue. *Phung v. Waste Mgt.*, 71 Ohio St.3d 408, 644 N.E.2d 286 (1994). In addition, a party may be found to have been prejudiced by a trial court's refusal to permit the calling of rebuttal witnesses with the knowledge necessary to furnish testimony that directly rebuts the opponent's witnesses. *Klem v. Consolidated Rail Corp.*, 191 Ohio App.3d 690, 2010-Ohio-3330, 947 N.E.2d 687 (6th Dist.).

{¶ 16} We do not concur in appellants' contention that the trial court's disputed decision to permit the calling of only one of three analogous rebuttal witnesses is comparable to or controlled by the above-cited cases. In contrast to the scenarios facing the court in *Phung* and *Klem*, none of the three rebuttal witnesses in the instant case had any recollection of the decedent, the dates in question, or any recollection of IV care furnished to the decedent. As such, we are not persuaded that these witnesses actually possessed any requisite knowledge so as to furnish substantive testimony capable of rebutting the opposing party's witnesses.

{¶ 17} Our review of a trial court's disputed judgment on a Civ.R. 59 motion for a new trial is conducted pursuant to the abuse of discretion standard. An abuse of discretion connotes more than a mere error of law or judgment. It mandates

demonstration that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1985).

{¶ 18} In applying these controlling principles to this case, we find no objective or persuasive evidence in support of the notion that the trial court's determination to allow only one of the three proposed rebuttal witnesses to testify was in any way arbitrary, unreasonable or unconscionable. The record clearly reflects that these witnesses possessed no actual recollection of decedent, of the care they provided to him, or of any of the specific events relevant to this case. Accordingly, the trial court acted well within its discretion in permitting only one of these three similarly situated witnesses to give live testimony. We find appellants' second assignment of error not well-taken.

{¶ 19} Lastly, we will consider appellee/cross appellant's assertion on cross-appeal that the trial court erred in denying the motion for prejudgment interest against appellants.

{¶ 20} In order to warrant an award of prejudgment interest, R.C. 1343.03 requires sufficient evidence to demonstrate that the party against whom prejudgment interest is sought failed to act in good faith.

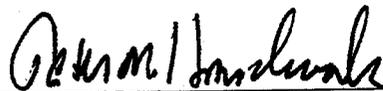
{¶ 21} We find that rejections of demands submitted by appellee during litigation and appellants' decision to not submit settlement offers to appellee may reflect stringent tactical positions, but it does not constitute objective evidence of a failure to act in good faith in the course of this case so as to justify an award of prejudgment interest. We find appellee/cross appellant's assignment of error on cross-appeal not well-taken.

{¶ 22} Wherefore, we find substantial justice has been done in this matter. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellants and appellee are ordered to pay equal shares of the cost of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.



JUDGE

Arlene Singer, P.J.



JUDGE

Thomas J. Osowik, J.
CONCUR.



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.