

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Appellee

v.

Mercy St. Vincent Medical Center and
Kristen M. Tennant, R.N.,

Appellants

) Supreme Court Case No. 2013-0198
)
)
)
)
) On Appeal from the Lucas County
) Court of Appeals,
) Sixth Appellate District
) Court of Appeals
) Case No. L-11-1281
)
) On Appeal from Lucas County
) Court of Common Pleas
) Case No. CIO200907447
)

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE PETER L.
MORAN, ESQ., ADMINISTRATOR OF THE ESTATE OF RICHARD L. ELZAY,
DECEASED

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RECEIVED
MAR 26 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAR 26 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC AND GREAT
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QUESTION

Appellants Mercy St. Vincent Medical Center (MSVMC) and Kristen Tennant (Tennant) argue that this case is of great public interest. It is not. The Sixth District Court of Appeals Decision and Judgment is based upon, and limited to, the very specific facts of this particular case. The appellate court's decision was narrowly based upon a number of different factual criteria as applied to case law that are unique. Moreover, this case fails to establish any legal precedent upon which other claimants could reasonably rely, instead applying existing case law, including a case¹ which presents a virtually identical fact pattern. This Court should not disturb the appellate court's decision simply because Appellants disagree with the result derived from the application of the law to the specific facts of this case, just as they disagreed with the unanimous jury verdict finding negligence on their part.

As Appellants acknowledge, medical malpractice cases, like other tort cases, are decided on a probability standard. What Appellants fail to acknowledge, in attempting to make a convoluted semantic distinction, is that they cannot adjust that probability to suit their purposes, proffering inconsistent and blatantly contradictory opinions in one of their experts' testimony and subsequent back-dated affidavit.²

And, as Appellants further concede, the "probability standard provides experts the ability to offer scientifically reliable opinions on key issues, like proximate cause, *with integrity.*" (*emphasis added*) It does not allow an expert to offer conflicting opinions throughout the pendency of the same case.

¹ *Pettiford v. Aggarwal*, 126 Ohio St. 3d 413, 2010-Ohio-3237, 934 N.E. 2d 913.

² Dr. Sobel's affidavit was dated October 18, 2010, but produced as an attachment to Appellants' Motion for Summary Judgment on November 8, 2010, well after his October 27, 2010 deposition.

Judge Osowik, in writing the unanimous opinion, noted the contradiction:

“...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.”[See Decision and Judgment at ¶6].

As Judge Osowik further explained,

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 in 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. (emphasis added)* In his deposition, Dr. Sobel clearly conceded that Tennant’s standard of IV care of the decedent could have caused the adverse outcome. [See Decision and Judgment at ¶12].

Dr. Sobel’s deposition testimony and subsequent³ affidavit are clearly dichotomous, as both the Court of Appeals and the trial court noted. There was no distinction between “probability” and “possibility,” nor does such a facile and specious distinction have any relevance to the established probability standard.

Appellants posit the illogical argument that the Sixth District Court of Appeals excluded Dr. Sobel’s affidavit testimony while acknowledging that the Court, in comparing his later affidavit with his prior testimony, noted the “clearly and materially inconsistent” nature of the affidavit. The Court could hardly have found the inconsistency had it not reviewed both the deposition transcript and subsequent affidavit.

The Court’s decision was logical and legally sound, irrespective of Appellants’ hyperbolic claim that the foundation of all expert testimony is in jeopardy if the decision is

³ *Ibid.*

allowed to stand. Having applied the law to the specific facts of this case, there is nothing of interest to anyone other than Mr. Elzay's family and the bitterly disappointed Appellants.

Again, the appellate court did not in any way exclude Dr. Sobel's affidavit, as Appellants ask the Court to believe. Rather, it compared it to his deposition transcript and, in applying 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," found that:

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.' [See Decision and Judgment at ¶ 13]

As such, the pertinent principles set forth in *Pettiford* must control in the case sub judice, as both the appellate and trial courts found.

Again, contrary to Appellants' convoluted argument, the Sixth District Court of Appeals precisely followed the logic of *Pettiford*, as well as *Turner v. Turner*, 67 Ohio St.3d 337, 617 N.E.2d 1123 (1993), and *Byrd v. Smith*, 2006-Ohio-3455. Appellants also attempt to mislead this Court, baldly stating that the appellate court (while mischaracterizing its nine-page Decision and Judgment as a "two-page decision") did not cite any pertinent case law, apparently ignoring the multiple citations to *Pettiford* [See Decision and Judgment at ¶¶ 13, 14], *Phung v. Waste Mgt.*, 71 Ohio St. 3d 408, 644 N.E. 2d 286 (1994) [*Id.* at ¶ 15,16], *Klem v. Consolidated Rail Corp.*, 191 Ohio App 3d 690, 2010-Ohio-3330, 947 N.E. 2d 687 (6th Dist.) [*Id.* at ¶ 15, 16], and *Blakemore v. Blakemore*, 5 Ohio St. 217, 450 N.E. 2d 1140 (1985) [*Id.* at ¶ 17]

Ohio law does not support experts being allowed to submit affidavits with motions for summary judgment inconsistent with their prior deposition testimony, as Appellants claim.

Pettiford at ¶ 38. The sole case cited by Appellants in support of this proposition, *McWreath v. Ross*, 179 Ohio App 3d 2276, 2008-Ohio-5855 ¶¶ 81, 84, is readily distinguishable from the applicable case law as it pertains to a case in which an expert's testimony "was not inconsistent with his conclusion," and within which defense's cross-examination of the expert "failed to reveal any contradictions, repudiations, inconsistencies or errors in his testimony," unlike in the instant case in which, as the appellate court noted, Dr. Sobel's affidavit was "clearly and fundamentally incongruous" with his prior deposition testimony. [See Decision and Judgment at ¶ 12]

Medical experts are not expected to offer causation opinions to an absolute certainty, as Appellants suggest, but are expected to be consistent and not contradict themselves.

STATEMENT OF THE CASE AND FACTS

This is a medical malpractice and wrongful death case arising out of the death of Richard L. Elzay (Mr. Elzay), who was admitted on November 26, 2008, to Appellant MSVMC for unstable angina, an uncomplicated diagnosis for which he was expected to be hospitalized for a few days. Instead, per his Death Certificate, Mr. Elzay died a month later from Endocarditis, due to Sepsis and secondary to a wound infection at the site of an IV in his right arm which, as Plaintiff proved at Trial, was negligently handled by Appellant Tennant, who failed to adhere to the standard of care and take the necessary steps to prevent infection at the site.

On January 18, 2011, the Trial Court denied Summary Judgment in part to Appellants MSVMC and Tennant.

The matter proceeded to Trial on June 27, 2011.

On June 30, 2011, the jury unanimously found that Appellant Tennant was negligent in her care of Mr. Elzay and also found that her negligence was the direct and proximate cause of

his death. The jury also awarded Six Hundred Thousand Dollars (\$600,000.00) in compensatory damages.

On July 15, 2011, Appellants filed a Motion for New Trial, arguing that they were prejudiced by the trial court's decision to not allow them to call three new witnesses, nurses whom Appellants admitted had no recollection of Mr. Elzay nor the care provided to him. The Trial Court denied this Motion on September 1, 2011, stating that it had allowed Appellants to call one of the three new witnesses so as not to delay the Trial and to avoid cumulative testimony.

Appellants then filed their Notice of Appeal citing four alleged issues for review, which they then reduced to two. One of these was the issue of Dr. Sobel's inconsistent testimony.

On November 8, 2010, Appellants had filed a motion for summary judgment which included an affidavit signed by Dr. Sobel and dated October 18, 2010. This affidavit had not been provided to Appellee's counsel prior to Dr. Sobel's October 27, 2010 deposition, an omission which resulted in a gentle rebuke from the Trial Court, as well as, in part, its ruling.

In his initial deposition, Dr. Sobel testified that Mr. Elzay had no infection upon his November 26, 2008 admission to Appellant MSVMC, that his Endocarditis (which Dr. Sobel characterized as "unequivocal") was acquired during his stay at Appellant MSVMC, that such Endocarditis was at least a contributing factor to Mr. Elzay's death, and that the source of this infection was a right arm IV.

Dr. Sobel further testified that he would not have characterized Mr. Elzay as immunocompromised at any point, and stated that Mr. Elzay would have lived beyond his hospitalization but for the Endocarditis he contracted under the care of Appellant MVSMC employees.

In his deposition testimony, Dr. Sobel was also forthcoming as to the deficiencies in Appellant Tennant's provision of care to Mr. Elzay:

Appellee's Counsel: She testified, pages twenty-five through twenty-eight, that she did not see Mr. Elzay's cap actually come off his IV, but she did see him bringing it up from the floor. Would that create the potential for --

Dr. Sobel: Yes. If the cap had been on the floor it's going to become contaminated.

Counsel: And would the -- not only the cap itself, but the patient fumbling around, reaching to the floor, back up, could that create the potential contamination of that line?

Dr. Sobel: Possibly, possibly.

Appellee's Counsel: And in that set of facts, what should happen? Should the IV be switched out?

Dr. Sobel: Well, you're asking a very interesting thing because I hadn't thought about this before. What would I have done if I had been walking up the corridor and the nurse opened the door and said, hey, Dr. Sobel, glad to see you, you're from infectious diseases. Mr. Elzay's cap has come off and it's been on the floor, what should I do. If it had not been put back, it was totally open, I would have said if it's been on the floor, that's a contaminated thing, let's not contaminate his whole thing, let's not put it back on, let's change it. If it was already on and it's already been placed and it was a peripheral vein as opposed to a central line, I probably would have said let's watch him carefully.

Appellee's Counsel: In what event would you have --

Dr. Sobel: You know, as a Monday quarterback would, oh, of course you better replace it. But probably human nature is I probably would have said if it looks -- if it hasn't been -- let's just watch it very carefully.

Appellants' Counsel: I loath to object, but I must object for a couple reasons. One, of course, in retrospect is not the standard. Number two, he hasn't read the depositions so I'm not sure which hypothetical you're working with, and therefore the question is ambiguous and vague.

Appellee's Counsel: OK. Understood. Let's go with Dr. Sobel's example. Nurse grabs and says IV came off. As we sit here today you said probably at that moment, but having reviewed Mr. Elzay's chart, is there anything that gives you an opinion one way or the other as to whether his IV should have been switched out?

Appellants' Counsel: Objection for the retrospective. It's not the standard of care. But go ahead, if you can answer that question.

Dr. Sobel: You know, not, not -- since I'm not quoting on the thing, standard of care, 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.

Yet, in the subsequently-produced affidavit, Dr. Sobel stated:

Based upon my review of the aforementioned records and documents, and based upon my 30-plus years of knowledge, skill, experience, training and education in the field of Infectious Diseases, 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.

Based upon my review of the aforementioned records and documents, and based upon my 30-plus years of knowledge, skill, experience, training and education in the field of Infectious Diseases, it is my opinion to a reasonable degree of medical probability that none of the care and treatment provided to Mr. Elzay by any agent or employee of Mercy St. Vincent Medical Center was a proximate cause of any of the injuries alleged in Plaintiff's Complaint or Amended Complaint, including Mr. Elzay's death.

The trial court noted the "implicit inconsistency" between the affidavit and testimony, as well as Appellants' tactics in denying Appellee the opportunity to address these contradictions. As the trial court noted, citing a "trilogy" of cases (*Pettiford*, *Turner*, and *Byrd*), and weighing everything in the non-movant's favor, a question of credibility was created as to Dr. Sobel's testimony, and thus it would be inappropriate to grant summary judgment on that issue.

Appellants, at that time asserting a different argument that Dr. Sobel had merely "conceded the obvious," appealed the case to the Sixth District Court of Appeals, where briefing and oral arguments commenced. In its January 25, 2013 Decision and Judgment, Judge Osowik was meticulous in explaining the Court's logic, citing the numerous inconsistencies between the testimony and the affidavit, and noting that the two were "clearly and fundamentally incongruous" and as such summary judgment could not be granted. [See Decision and Judgment at ¶¶ 12,13 and 14]. And again, contrary to Appellants' incredible claim that the appellate court cited no case law or similar fact scenario, it in fact cited *Pettiford*, which has a nearly identical fact pattern, as well as other relevant cases.

The Sixth District Court of Appeals' well-reasoned analysis, and comparison of the facts in this case to those in the nearly-identical *Pettiford*, does not transform this case into one of great general public interest.

ARGUMENT IN RESPONSE TO APPELLANTS' PROPOSITIONS OF LAW

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

Of course Ohio law provides that expert testimony on the issue of proximate cause is governed by a probability standard, as Appellants blithely assert. That has no bearing on the issue before the Court. Appellants neglect to mention that while probability and possibility may not be mutually exclusive, two wholly distinct and contradictory opinions by the same expert in the same case certainly are.

The issue is not one of hair-splitting the definitions of "possible" and "probable."

Rather, as Justice O'Connor explained in *Pettiford*, citing *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. 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. *Pettiford* at ¶ 24.

Justice Lanzinger, in writing the majority opinion in *Byrd*, also addressed the nuanced distinction that a deposition and affidavit do not have to be explicitly contradictory, as Appellants appear to be trying to suggest. Rather, as she also explains, the issue is one of a subtler "appearance of impropriety:"

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..... 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. *Turner*, 67 Ohio St.3d 337, 617 N.E.2d 1123; see, also, *Wright v. Honda of Am. Mfg., Inc* (1995), 73 Ohio St.3d 571, 575-576, 653 N.E.2d 381 (when a movant makes substantive changes to deposition testimony,

an issue of credibility of the deponent is created and summary judgment is inappropriate). *Byrd* at ¶ 26.

Thus, appellants' argument concerning the limited purpose of depositions and the manner in which they are taken does not excuse a deponent's cavalier treatment of facts established through deposition testimony. Sham affidavits are subject to a motion to strike and motions for sanctions. *Byrd* at ¶ 27.

As a matter of law, the Sixth District Court of Appeals could reach no decision other than the one it did, properly relying upon *Pettiford* and its predicate cases, *Byrd* and *Turner*.

Appellant's 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 an injury and still acknowledge the alleged cause of injury as a possibility.

In properly applying *Turner*, Justice Lanzinger in *Byrd* found that the affidavit and earlier deposition need not be explicitly contradictory:

This court has already held that a moving party's contradictory affidavit may not be used to obtain summary judgment. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 617 N.E.2d 1123. In *Turner*, even though the mother's affidavit and earlier deposition about whether she had had to brake to avoid the auto collision that injured her passenger son were not explicitly contradictory, summary judgment in favor of the mother as the moving party was inappropriate when, by her own statements, an issue of fact was created. *Turner* held that "[w]hen a litigant's affidavit [850 N.E.2d 53] in support of his or her motion for summary judgment is inconsistent with his or her earlier deposition testimony, summary judgment in that party's favor is improper because there exists a question of credibility which can be resolved only by the trier of fact." *Byrd* at ¶ 22.

Appellants also cite a number of cases which actually support the appellate court's ruling in this matter. In *Riddle v. Auerbach*, 10th Dist. No. 10AP-508, 2011-Ohio-556, ¶¶ 27-28, as one example, the Tenth District Court of Appeals, in reviewing a contradictory affidavit, found:

Appellant argues that Dr. Wayne's affidavit did not contradict his deposition testimony, but instead merely supplemented and explained the testimony. We disagree. In his deposition, Dr. Wayne stated that Mr. Riddle's chance of recovery or survival at the time of appellee's alleged negligent act could not be calculated at any of the relevant points in time from the time Mr. Riddle presented himself at Holzer Medical Center until the time of his death, but in the affidavit, Dr. Wayne stated that this percentage could be calculated, and that Mr. Riddle's chance of

recovery or survival was 50 percent throughout this period of time. Dr. Wayne's affidavit also does not include any explanation for the contradiction between his deposition testimony and the affidavit. Instead, the affidavit states that it had always been Dr. Wayne's opinion that Mr. Riddle had a 50 percent chance of recovery or survival if an anticoagulant had been administered at any point prior to his death. *Consequently, we cannot say the trial court erred in refusing to consider Dr. Wayne's affidavit in deciding the motion for summary judgment. (emphasis added)*

Similarly, in *Starkey v. Am. Legion Post 401*, 3d Dist. No 9-09-49, 2010-2166, ¶¶ 18, 19, 21-23, another case cited by Appellants, the Third District Court of Appeals reviewed deposition testimony and a subsequent affidavit of a non-moving party to determine if the affidavit supplemented or contradicted the deposition. In citing *Byrd*, the Court found, as was the case with Dr. Sobel, that it must use a framework to examine the effect of an affidavit which contradicted prior deposition testimony. If the affidavit appears inconsistent with the deposition, again as has occurred in this case, the Court must look to any explanation for the inconsistency. Finding none, summary judgment simply could not be granted.

Appellants then presume to advise the Sixth District on some of its prior rulings which they found more palatable. In *Behm v. Progress Plastic Prods, Inc.*, 6th Dist. No H-07-008, 2007-Ohio-6357, a wrongful discharge case, Appellants cling to the Court's decision regarding a deponent who mistakenly spoke of something he believed to be true – not a revised expert opinion concocted for the purpose of obtaining summary judgment. The other, *Patterson v. Ahmed*, 6th Dist. No. L-09-1222, 2010-Ohio-4160, pertains to a deponent's lack of knowledge of a chronology. Both cases are inapposite.

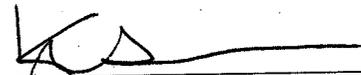
CONCLUSION

For the foregoing reasons of law and fact, this case does not involve matters of public and great general interest nor a substantial Constitutional question. Thus, this Court should decline

jurisdiction to hear the discretionary appeal in this case. Nothing in the Sixth District's opinion ignores any binding precedent arising from this Court's decisions in *Pettiford*, *Byrd* and *Turner*. Nor does Appellants' academic attempt to distinguish "probable" and "possible" as mutually exclusive have any bearing on the probability standard, nor, frankly, does it make any sense.

This Court should not strike down the appellate court's decision simply because the Appellants do not like the result derived from the application of the law to the facts. To the contrary, both the Sixth District Court of Appeals and the trial court, relying on and correctly applying case law set by this Court as recently as 2010, reached the same conclusion – that Dr. Sobel's deposition testimony and subsequent, pre-dated affidavit were inherently contradictory, meaning that summary judgment could not have been granted. Appellee respectfully requests that this Court deny jurisdiction herein.

Respectfully submitted,



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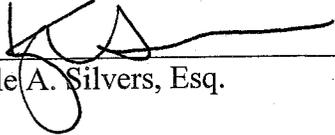
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CERTIFICATE OF SERVICE

The foregoing Memorandum in Opposition was mailed this 22nd day of March, 2013, to James E. Brazeau, Timothy D. Krugh, and Jason Van Dam, Robison, Curphey & O'Connell, LLC., Four Seagate, Ninth Floor, Toledo, OH 43604.



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