

IN THE SUPREME COURT OF OHIO

Case No. 2024-1212

**CHERI SHEREE MOORE, individually and in her capacity as Parent, Natural Guardian,
and Next Friend of P.C.M., a minor,
*Plaintiff-Appellant,***

-vs-

**MERCY MEDICAL CENTER, DR. ALBERT T. DOMINGO, DR. GOWIN I. MENIRU,
and OHIO DEPARTMENT OF MEDICAID,
*Defendants-Appellees.***

**ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT
STARK COUNTY, OHIO, CASE NO. 2023 CA 00145**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Association of Civil Trial Attorneys’ (“OACTA”) wide array of members includes attorneys, corporate executives, and claims professionals dedicated to the defense of tort litigation and other civil actions throughout Ohio. For over 50 years, OACTA has provided a forum where professionals work together to improve the administration of justice in Ohio. OACTA promotes fairness, excellence, and integrity in the civil justice system. The decisions of the courts below align with OACTA’s mission by making our justice system fairer and more predictable. Excluding new contradictory expert opinions offered in an affidavit opposing summary judgment not only correctly applies Civ.R. 26(B)(7) by precluding testimony “on matters not disclosed in [the expert’s] report” but also promotes timely disclosure and discovery of expert opinions.

STATEMENT OF THE CASE AND FACTS

OACTA refers to the statement of the case and facts offered by Defendant-Appellee in this case. However, OACTA wishes to emphasize facts showing Dr. Martin Gubernick’s (“Dr. Gubernick”) affidavit was not based on newly discovered or previously unavailable evidence and, therefore, did not constitute a “supplemental” report pursuant to Civ.R. 26(B)(7)(c). Rather, in an attempt to overcome summary judgment, Dr. Gubernick’s affidavit introduced entirely new opinions and theories of liability separate and apart from those outlined in his previously produced expert report.

On January 11, 2022, Plaintiff-Appellant Cheri Sheree Moore (“Appellant Moore”), individually and on behalf of P.C.M. (collectively, “Appellants”), brought this medical malpractice action *pro se* against Albert Domingo, M.D. (“Dr. Domingo”) and Defendant-Appellant Godwin I. Meniru, M.D. (“Dr. Meniru”). Specifically, Appellants challenged the care rendered in the labor and delivery of P.C.M. On May 11, 2022, after engaging counsel, Appellants amended their

complaint to add Mercy Medical Center and the Ohio Department of Medicaid, as well as to assert specific allegations against Dr. Meniru, which were non-existent in their original complaint.

Pursuant to a court-ordered extension of their expert-report deadline, Appellants produced the report of their sole OB/GYN standard of care expert, Dr. Gubernick, on December 12, 2022. Dr. Gubernick's report opined that, due to the development of signs of fetal intolerance to labor and excessive uterine activity *by 6:00 p.m. on May 28, 2015*, the standard of care required delivery of P.C.M. *by 7:00 p.m. that evening*. Dr. Gubernick further opined that the failure to deliver P.C.M. *by 7:00 p.m. on May 28, 2015*, proximately caused the injuries in this case. Although Dr. Gubernick's report contained the general assertion that "Dr. Domingo, Dr. Meniru, and [Mercy Medical Center] nursing staff all deviated from good and acceptable practice by not advocating for a c[esarian] section on the evening of 5-28-2015," his report also acknowledges that, both at the time the decision to perform a cesarean allegedly should have been made and when the injuries were consequently sustained, Appellants were not in the care of Dr. Meniru.

Based on Appellants' failure to present an expert report sufficient to establish that Dr. Meniru breached the standard of care and that such breach proximately caused injury or damage to Appellants, Dr. Meniru moved for summary judgment on March 6, 2023. In support of their opposition to Dr. Meniru's motion for summary judgment, Appellants attached the affidavit of Dr. Gubernick, which explicitly incorporated his previously produced expert report while simultaneously contradicting its opinions and theories of liability. Specifically, it brought forth a new standard of care criticism against Dr. Meniru - that he did not perform a cesarian section in a timely fashion - which allegedly occurred nearly 12 hours after the time of injury as defined in Dr. Gubernick's report. Moreover, there was no new evidence upon which to base this criticism. Despite referring to the deposition transcripts of Dr. Meniru, Kamerie Allen, RN, and Leslie

Pettay, RN, there is no explanation as to what, if anything, is contained in those depositions that is newly discovered evidence.

While Dr. Gubernick's original report does not speak to Dr. Meniru breaching any standard of care by not timely performing a cesarean section, his affidavit offers a new and contradictory opinion as to Dr. Meniru's failure to meet the standard of care. Specifically, in reliance on Dr. Meniru's deposition testimony that nurses notified him of fetal distress *the morning of May 29, 2015, at 7:27 a.m. and 7:32 a.m.*, Dr. Gubernick's affidavit opined that the standard of care required Dr. Meniru to start a cesarean section within half an hour of the receipt of said reports. However, despite the testimony of Dr. Meniru, it remains undisputed that he was not notified of the patient's condition prior to when Dr. Gubernick's report claims the decision to perform a cesarean section allegedly should have been made, nor prior to when it asserts the injuries occurred: by *7:00 a.m. on May 28, 2015*. Due to this undeniably new and contradictory opinion, Dr. Meniru moved to strike Dr. Gubernick's affidavit as a sham.

In a straightforward application of the well-established sham-affidavit rule, both the trial court and intermediate appellate court struck Dr. Gubernick's affidavit, characterizing it as untimely and a sham affidavit improperly and exclusively designed to defeat summary judgment.

ARGUMENT

PROPOSITION OF LAW NO. I: THE SHAM-AFFIDAVIT RULE APPLIES, AND AN AFFIDAVIT MAY BE STRICKEN, WHERE THE SWORN TESTIMONY INCORPORATES AND CONTRADICTS A PRIOR EXPERT REPORT IN AN ATTEMPT TO AVOID SUMMARY JUDGMENT.

This case involves the general and direct application of the sham-affidavit rule. This rule preserves the integrity and utility of Civ.R. 56. "The purpose of summary judgment motions is to weed out unfounded claims, specious denials, and sham defenses." *Pettiford v. Aggarwal*, 2010-Ohio-3237, ¶ 36. When there is no genuine issue of material fact, a party is entitled to judgment

as a matter of law. Civ.R. 56. The sham-affidavit rule prevents parties from creating sham issues of fact through affidavits that contradict prior sworn testimony without sufficient explanation.

When analyzing an inconsistent affidavit presented in support or in opposition to a motion for summary judgment, a trial court must consider whether the affidavit contradicts or merely supports the affiant's earlier sworn testimony. *Byrd v. Smith*, 2006-Ohio-3455, ¶ 29. "A nonmoving party's contradictory affidavit must sufficiently explain the contradiction before a genuine issue of material fact is created." *Id.* at 29. In 2010, the Ohio Supreme Court extended the holding of *Byrd* to contradictory affidavits of nonparty expert witnesses. Specifically, the Court held that the affidavit of a retained, nonparty witness that contradicts former testimony and is submitted in opposition to a pending motion for summary judgment generally does not create a genuine issue of material fact. *Pettiford* at ¶ 3. However, like in *Byrd*, if an expert satisfactorily explains the reason for the contradiction, the new opinions may create a genuine issue of material fact. *Id.* at 3.

This rule aligns with Ohio's civil rules, which stress the importance of the disclosure of expert reports. Applying the sham affidavit rule does not inhibit the supplementation of expert reports pursuant to Civ.R. 26. Civ.R. 26(B)(7)(c) only permits the supplementation of expert reports "no later than thirty (30) days prior to trial" in limited circumstances - specifically to address new facts and events or clarify the original report - not to provide entirely new opinions and theories of liability without explanation. *See Riverside Drive Enters., LLC v. Geotechnology, Inc.*, 2023-Ohio-583, ¶ 16 (1st Dist.), quoting *Ullman v. Auto-Owners Mut. Ins. Co.*, 502 F.Supp.2d 737 (S.D. Ohio 2007) ("It is not mere supplementation when a party submits a manifestly incomplete report lacking analysis or a supporting rationale, waits for the summary judgment deadline to pass, and then submits a fuller report that contains actual reasoning."). The whole

point of exchanging expert witness reports under Civ.R. 26(B) is to give opposing parties notice of all opinions the expert holds. Hence, the rule bars an expert from testifying as to any opinion not disclosed in the report. Civ.R. 26(B)(7)(c).

Accordingly, the notion that one can avoid the sham-affidavit rule by characterizing an affidavit that incorporates an expert report while presenting new opinions and theories of liability that contradict that report as an “unsworn report” would run afoul of both the sham-affidavit rule and the principles underlying Civ.R. 26(B).

PROPOSITION OF LAW NO. II: AN INCONSISTENCY OR CONTRADICTION WITHIN THE FOUR CORNERS OF AN AFFIDAVIT GOES TO ADMISSIBILITY AND JUSTIFIES AN ORDER STRIKING THE AFFIDAVIT FOR PURPOSES OF SUMMARY JUDGMENT.

Appellants should not be permitted to avoid the sham-affidavit doctrine under the guise of using an “unsworn report” incorporated into a sworn affidavit to fabricate credibility issues in order to create a jury question. There is no question that Dr. Gubernick’s affidavit contradicts his previous report. Additionally, Dr. Gubernick failed to provide a sufficient reason for the contradiction, as he based his report and affidavit on the same medical records that were available when he drafted his initial report. There was no newly discovered evidence upon which he relied. Thus, while Dr. Gubernick avers that he read the deposition transcripts of Dr. Meniru, Kamerie Allen, RN, and Leslie Pettay, RN, he does not explain what, if anything, in those depositions was previously unavailable and supports the new, contradictory opinion and theory of liability as to Dr. Meniru.

Despite the contrary assertion contained in the Ohio Association for Justice’s amicus curiae brief in support of Appellants, the trial court and intermediate appellate court both considered Dr. Gubernick’s report and, consequently, found it insufficient to avoid summary judgment. Subsequent to striking Dr. Gubernick’s affidavit, the trial court found that “no expert testimony

exists to show that Dr. Meniru breached the standard of care [and] caused or contributed to [P.C.M.'s] injuries.” Ultimately, even considering Dr. Gubernick’s report, Appellants failed to present sufficient evidence demonstrating that there were issues of fact regarding Dr. Meniru’s care in the labor and delivery of P.C.M.

In reviewing the trial court’s decision to award summary judgment in favor of Dr. Meniru under the *de novo* standard of review, the intermediate appellate court found that the trial court did not err in awarding summary judgment in favor of Dr. Meniru because Dr. Gubernick’s report simply contained a general claim against Dr. Meniru without specifically detailing how he breached the standard of care. As noted above, Dr. Gubernick’s report was silent as to the care rendered by Dr. Meniru, other than containing the catchall statement that “Dr. Domingo, Dr. Meniru, and [Mercy Medical Center] nursing staff all deviated from good and acceptable practice by not advocating for a c[esarian] section on the evening of 5-28-2015.”

To permit a blanket statement, such as that contained in Dr. Gubernick’s report, to create a genuine issue of material fact for purposes of deciding whether to award summary judgment would be functionally the same as allowing an affidavit of merit, designed solely to meet the notice pleading requirements for a medical malpractice claim under Civ.R. 10, to defeat summary judgment. Mere speculation and unsupported conclusory assertions are insufficient to meet the non-movant’s reciprocal burden under Civ.R. 56 to set forth specific facts to show that genuine issues of material fact remain to be litigated. *Wilmington Trust N.A. v. Boydston*, 2017-Ohio-5816, ¶ 31 (8th Dist.). As such, the trial court did not err in striking Dr. Gubernick’s affidavit and awarding summary judgment in favor of Dr. Meniru when Dr. Gubernick’s report failed to specifically detail how Dr. Meniru breached the standard of care.

Ultimately, applying the sham-affidavit rule to an expert report and subsequent affidavit encourages parties to produce clear and consistent expert testimony from the outset, absent a showing of newly discovered evidence. Allowing experts to submit affidavits like the one in question encourages gamesmanship when confronted with a motion for summary judgment. Based on the record, Dr. Gubernick's affidavit is a sham designed to overcome summary judgment. The sham affidavit rule is essential in preventing individuals, such as Appellants, from fabricating false issues of fact that undermine the integrity of the summary judgment process.

CONCLUSION

For these reasons, this Court should affirm the intermediate appellate court's decision and find that Dr. Gubernick's affidavit constituted improperly submitted evidence exclusively designed to avoid summary judgment. Finding otherwise would ultimately encourage the eleventh-hour introduction of new opinions and theories of liability contrary to the principles underlying Civ.R. 26.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and accurate copy of the foregoing

Amicus Brief was served via email on April 8, 2025, upon the following:

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