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STATE OF MICHIGAN

COURT OF APPEALS

LOTUS SMITH,

Plaintiff-Appellee,

v

HENRY FORD HEALTH SYSTEM, MASSAR BEYDOUN, M.D., and GINA FUNDARO, M.D.,

Defendants,

and

KARMANOS CANCER CENTER and ZEYNEP YILMAZ-SAAB, M.D.,

Defendants-Appellants.

UNPUBLISHED
December 28, 2021

No. 354223
Wayne Circuit Court
LC No. 15-013846-NH

Before: BOONSTRA, P.J., and GLEICHER and LETICA, JJ.

GLEICHER. J. (*concurring*).

I concur with the majority opinion and write separately only to expand on the majority's discussion of the supplemental affidavit signed by Dr. Gerald Sokol. The majority correctly observes that in general, a party or witness may not attempt to avoid summary disposition by submitting an affidavit contradicting the damaging testimony. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001). However, this Court has recognized that this rule may be tempered when the affiant provides an "explanation . . . or . . . a showing of mistake or improvidence." *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972).

Here, Dr. Sokol was deposed before defendants took the deposition of plaintiff's expert radiologist, Dr. Hurwitz. Dr. Sokol averred in his supplemental affidavit that he reviewed Dr. Hurwitz's deposition testimony and learned that plaintiff's mammogram films reflected that she had intraductal carcinoma (DCIS) in February 14, 2013. On the basis of Dr. Hurvitz's testimony

regarding the presence of DCIS in 2013, Dr. Sokol opined that at that time, plaintiff would have had a higher survival rate and would have been subject to less invasive treatments:

> On August 27, 2019, I was deposed by Defense Counsel. I have reviewed my deposition. During the deposition, as evidenced by the transcript, there was no discussion nor inquiry regarding intraductal carcinoma (DCIS). Based upon testimony from Radiologist S. Robert Hurwitz, MD, radiological findings suggestive of DCIS were present without change from 2010 through 2013. DCIS is considered Stage Zero cancer and is a highly curable disease. DCIS is treated by lumpectomy and radiation therapy plus or minus hormonal therapy. DCIS has a 90 percent plus cure rate with little, if any, chance of recurrence.

Dr. Sokol's affidavit did not contradict his earlier testimony, in my view, and should have been considered. In medical malpractice and other cases requiring expert testimony, the underlying evidence sometimes becomes clearer when new medical records or other documentary evidence comes to light, or when an expert in one field testifies and sheds light on a question falling outside of the expertise of another witness. Discovery is intended to shed light on facts and opinions—and sometimes, that light reveals new things. In such circumstances, a supplemental affidavit submitted *with an explanation* that qualifies as both reasonable and factually accurate should be admitted in avoidance of summary disposition. See also *Hazelton v Lustig*, 164 Mich App 164, 168; 416 NW2d 373 (1987) ("At the time of the deposition, plaintiff was simply unsure of the facts.").

The federal courts approach the issue in a similar manner. The United States Supreme Court has observed that the federal courts "have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) *without explaining the contradiction or attempting to resolve the disparity*." *Cleveland v Policy Mgt Sys Corp*, 526 US 795, 806; 119 S Ct 1597; 143 L Ed 2d 966 (1999) (emphasis added). When an explanation exists, the Supreme Court held in *Cleveland*, it should be considered. *Id*. at 806-807.

In my view, Dr. Sokol's supplemental affidavit was not made in bad faith and did not introduce a sham fact or conclusion that had already been subjected to cross-examination at his deposition. See *Franks v Nimmo*, 796 F2d 1230, 1237 (CA 10, 1986) (suggesting factors that should be considered including "whether the affiant was cross-examined during his earlier testimony, whether the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain"). Under my analysis, it should have been considered. But as the majority opinion explains, the affidavit was unnecessary because plaintiff otherwise created genuine issues of material fact regarding causation.

/s/ Elizabeth L. Gleicher