[Cite as *Whitt v. Wolfinger*, 2015-Ohio-2726.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

Laymon G. Whitt (Deceased), Deborah Elliott (Widow), Drew Whitt (Son),	:	Case No. 14CA3455
Plaintiffs-Appellants,	:	
v.	:	DECISION AND JUDGMENT ENTRY
Gary Wolfinger, d.b.a. Gary's News Deliveries, et al.,	:	
	:	**RELEASED: 6/30/2015**
Defendants-Appellees.	:	

APPEARANCES:

Shawn M. Wollam, Copp Law Offices, Columbus, Ohio, for Appellants.

Michael DeWine, Ohio Attorney General, and LaTawnda N. Moore, Ohio Assistant Attorney General, Columbus, Ohio, for Appellee Ohio Bureau of Workers' Compensation.

Daniel M. Hall, Preston J. Garvin, and Michael J. Hickey, Garvin & Hickey, LLC, Columbus, Ohio, for Appellee Gary Wolfinger, d.b.a. Gary's News Deliveries.

Harsha, J.

{¶1} Deborah Elliott and Drew Whitt appeal a grant of summary judgment denying their workers' compensation claim, which arose from their husband/father Laymon Whitt's death. The sole issue before the trial court was whether Laymon Whitt was an independent contractor or an employee of Gary Wolfinger, d.b.a. Gary's News Deliveries. The trial court determined that Layman Whitt was an independent contractor, so his surviving dependents could not participate in the workers' compensation fund. Elliot and Whitt appeal the judgment denying their right to participate.

{¶2} Elliott and Whitt contend that the trial court erred in granting summary judgment to the defendants on the issue of whether Laymon Whitt was an independent contractor of Wolfinger and raise five arguments in support of their assignment of error. Three of the arguments address the trial court's ruling that Elliott, Whitt and William Michael Lorenzo's affidavits could not be considered under Civ.R. 56(C) because the affidavits conflicted with earlier deposition testimony, included inadmissible hearsay, or were not based on personal knowledge as required under Civ. R. 56(E). The trial court properly struck Elliott's affidavit because it both conflicted with her prior testimony and was not based on her personal knowledge. The trial court also properly struck the affidavit of Drew Whitt because it was based on hearsay and not made from his personal knowledge. However, the trial court improperly struck Lorenzo's affidavit for conflicting with prior testimony because Lorenzo was a non-party lay witness and the rule governing conflicting prior testimony does not apply to him. However, that error was harmless because Lorenzo's affidavit fails to raise a genuine issue of matter fact.

{¶3} Next, Elliott and Whitt contend that the trial court erred when it determined that a contract existed between Laymon Whitt and Wolfinger. Wolfinger testified that he misplaced the Whitt contract but that all of his carriers signed identical contracts, a copy of which Elliott and Whitt introduced as an exhibit at Wolfinger's deposition. Given the court's duty to construe all facts and reasonable inferences in their favor, Elliott and Whitt argue the court should not have considered the contract because it did not have Laymon Whitt's signature. However, they introduced the contract into evidence at Wolfinger's deposition and used it to argue that it supported a finding that a master-servant relationship existed between Laymon and Wolfinger. Thus, they invited any

error and cannot complain about its admissibility now. So, we consider the contract and related testimony in our review of the summary judgment motion.

{¶4} Elliott and Whitt argue that the summary judgment evidence, which should have included the three affidavits and excluded the written contract, raises genuine issues of material fact about whether Laymon Whitt was an employee of Wolfinger. However, the undisputed evidence which includes Lorenzo's affidavit and the written contract, shows that Laymon Whitt retained the right to control the manner and means of performing his work, i.e. he was an independent contractor. Summary judgment was appropriate in this case.

I. FACTS

{¶5} Laymon Whitt delivered newspapers and serviced newspaper vending machines for Wolfinger's business, Gary's News Deliveries. In 2012, Whitt died in a motor vehicle accident while making deliveries. His wife, Deborah Elliott, and son, Drew Whitt, applied for workers' compensation benefits. After the Industrial Commission/Bureau denied their claim, they appealed to the Ross County Court of Common Pleas under R.C. 4123.512.

{¶6} The only contested issue was whether Laymon Whitt was Wolfinger's employee or an independent contractor. Independent contractors and their surviving dependents are ineligible for workers' compensation benefits. The Bureau of Workers' Compensation presented evidence consisting of Elliott's deposition testimony and exhibits, Wolfinger's deposition testimony and exhibits, and Elliott's Ohio Department of Jobs and Family Services application for assistance, which contained statements that Laymon Whitt was an independent contractor for Wolfinger. The Bureau argued that

there was no genuine issue of material fact concerning Laymon Whitt's status as an independent contractor, and it was entitled to judgment denying Elliott and Whitt's claim for benefits.

{¶7} Elliott and Whitt opposed the motion and submitted their own affidavits, an affidavit from William Michael Lorenzo, a person Laymon Whitt trained as his substitute driver, and Wolfinger's responses to request for admissions. They asked the trial court to strike Elliott's ODJFS application as being hearsay. The Bureau responded and moved to strike Elliott's affidavit as self-serving, contradictory to previous deposition testimony, containing inadmissible hearsay, and not based on personal knowledge. It argued Whitt's affidavit was inadmissible because of concerns with his mental competency and because it contained inadmissible hearsay. Finally, it argued the Lorenzo's affidavit was inadmissible because it contradicted statements made in his signed agreement with Wolfinger.

{¶8} The trial court granted the Bureau's motion for summary judgment. In making its decision the court determined that Elliott's ODJFS application was a party admission and admissible under Evid.R. 801(D)(2). The trial court did not consider the Elliott, Whitt, and Lorenzo affidavits because it concluded they did not comply with the requirements of Civ.R. 56(C). The court found that Elliott's affidavit contained multiple statements that contradicted her earlier deposition testimony and was based on hearsay rather than her personal knowledge. Elliott's affidavit gave no explanation for the contradictions. The court also struck Whitt's affidavit as being based on hearsay rather than personal knowledge, and struck Lorenzo's affidavit as being inconsistent with his prior signed independent contractor agreement.

II. ASSIGNMENT OF ERROR

{¶9} Elliott and Whitt designate one assignment of error for review:

> I. The trial court erred in granting summary judgment to Defendants and deciding, as a matter of law, that Laymon Whitt was an independent contractor for Gary Wolfinger.

III. STANDARD OF REVIEW

{¶10} Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made and (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Chase Home Finance, LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, ¶ 26.

{¶11} The moving party has the initial burden of informing the trial court of the basis for the motion by pointing to summary judgment evidence and identifying parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *Chase Home Finance* at ¶ 27. Once the moving party meets this initial burden, the non-moving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue remaining for trial. *Dresher* at 293.

{¶12} Civ.R. 56(C) sets forth an exclusive list of evidentiary materials that a trial court may consider when ruling upon a summary judgment motion. *Emerson Family Ltd.*

Partnership v. Emerson Tool, LLC, 9th Dist. No. 26200, 2012–Ohio–5647, ¶ 14, citing *Spier v. American Univ. of the Caribbean,* 3 Ohio App.3d 28, 29, 443 N.E.2d 1021 (1st 1981). The rule prohibits a trial court from considering any evidence or stipulation except the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact." Civ.R. 56(C). *Accord Davis v. Eachus,* 4th Dist. No. 04CA725, 2004–Ohio–5720, ¶ 36; *Wall v. Firelands Radiology, Inc.,* 106 Ohio App.3d 313, 334, 666 N.E.2d 235 (6th Dist.1995). Furthermore, when ruling on a summary judgment motion, a court may consider only evidence that would be admissible at trial. *Pennisten v. Noel,* 4th Dist. Pike No. 01 CA669, 2002 WL 254021 (Feb. 2, 2000), at *2.

{¶13} If a party submits evidence that does not fall within Civ.R. 56(C)'s parameters, the opposing party may file a motion to strike the improperly-submitted evidence. The determination of a motion to strike is within a court's broad discretion. *State ex rel. Dawson v. Bloom–Carroll Local School Dist.,* 131 Ohio St.3d 10, 2011–Ohio–6009, 959 N.E.2d 524, ¶ 23. Consequently, absent an abuse of discretion an appellate court will not disturb a trial court's ruling regarding a motion to strike. *State ex rel. Mora v. Wilkinson,* 105 Ohio St.3d 272, 2005–Ohio–1509, 824 N.E.2d 1000, ¶ 10. A decision constitutes an abuse of discretion when it is unreasonable, arbitrary, or unconscionable. *State ex rel. Striker v. Cline,* 130 Ohio St.3d 214, 2011–Ohio–5350, 957 N.E.2d 19, ¶ 11. Moreover, when applying the abuse-of-discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *E.g., Berk v. Matthews,* 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

IV. LAW AND ANALYSIS

{¶14} In their sole assignment of error, Elliott and Whitt assert that the trial court erred in granting summary judgment in favor of the Bureau of Workers' Compensation and Wolfinger on their claim. They raise five issues in five separate arguments in support of their assignment of error.

{¶15} Elliott and Whitt ask us to determine whether the evidence, including the affidavits they contend were improperly rejected by the trial court, supports a finding that genuine issues of material fact exist concerning Laymon Whitt's employment status, and that reasonable minds could conclude that he was Wolfinger's employee at the time of his death. They also argue that the trial court erred in determining that a contract, which was the primary evidence of the parties' contractual relationship, exists between Laymon Whitt and Wolfinger. Because the trial court's decision to exclude the affidavits of Elliott, Whitt, and Lorenzo affects the scope of the evidence the trial court considered when deciding the summary judgment motion, we will address that decision first.

A. The Affidavits

{¶16} We review the trial court's decision to exclude the affidavit testimony of Elliot, Whitt, and Lorenzo for abuse of discretion. *State ex rel Mora v. Wilkinson, supra.*

1. Elliott Affidavit

{¶17} The trial court determined that Elliott's affidavit contradicted key testimony in her deposition. The court cited to and quoted several different places in Elliott's deposition where she testified that she had little knowledge of Whitt's business affairs or his business relationship with Wolfinger and that she had not been present when Whitt and Wolfinger discussed business. The court found that this directly contradicted her affidavit testimony, which professes she had detailed knowledge about Whitt's business

and that she overheard conversations between the two men. The trial court also determined that much of the details Elliott testified about came from her discussions with her husband, and therefore was based on inadmissible hearsay rather than personal knowledge.

{¶18} "An affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, paragraph three of the syllabus. In *Byrd*, the Court expressly adopted our rationale in *Lemaster v. Circleville Long Term Care, Inc.*, 4th Dist. Pickaway App. No. 87 CA 2, 1988 WL 17187, *3 (Feb. 22, 1988) where we held, "Ordinarily, under [Civ.R.] 56(C), when an affidavit is inconsistent with affiant's prior deposition testimony as to material facts and the affidavit neither suggests affiant was confused at the deposition nor offers a reason for the contradictions in her prior testimony, the affidavit does not create a genuine issue of fact which would preclude summary judgment."

{¶19} When asked at her deposition about Laymon Whitt's income and tax information, Elliott testified that she "stayed out of his personal business like this because since [sic] he took care of everything." When asked if she had ever met Wolfinger, she testified that she had talked to him on the phone a few times and said "hi" to him, but that she sat out in the car when her husband met with him. When she was asked about whether she knew anything about where the newspapers were to be placed, she reiterated that she was never around when her husband and Wolfinger discussed business:

> A: No. I wasn't in his – I was never around when he talked to Gary. Like I said, when we'd go to Gary's house for him to give Gary the money he collected, I always sat in the car.

During her deposition Elliott was repeatedly unable to give answers to detailed questions about her husband's business. She never reviewed tax returns or supporting documentation. She did not know how her husband had learned of the work opportunity with Wolfinger or what year he started. She did not know whether her husband participated in a training program or if he was required to have specialized training. She did not know the delivery driver who delivered the newspapers to her husband and had never spoken to him. She never saw the labels that were placed on the newspapers and did not know if her husband was required to bind the papers with rubber bands. She did not know where the newspapers or vending machines were to be placed. She did not know whether Laymon informed Wolfinger when he used a substitute driver for the deliveries. She did not know why her husband stored several vending machines at the house, how long he had them, or what he was planning to do with them. When asked if her husband ever brought home any work materials, she testified, "He never showed me nothing, no."

{¶20} Whenever she did testify about details of her husband's work, her information was based upon Layman Whitt's statements to her. Her husband told her when and where the papers had to be delivered, the purpose of the labels, and why he placed the papers in clear bags. Her husband told her he had signed a contract with Wolfinger, but she had never seen the contract because, "He kept his business to himself." In sum, at her deposition Elliott testified that she had very little or no direct contact with Wolfinger and was never present when her husband and Wolfinger

discussed business. Her husband never showed her any work materials, preferring to keep his business matters to himself.

{¶21} In contrast, she testified in her affidavit that she met Wolfinger many times and knows his voice very well. She claims to have observed her husband's work when she assisted with the route from time to time. She testified that she overheard numerous telephone conversations her husband had with Wolfinger, although she does not state the conversations took place on a speaker phone. After laying this foundation for her testimony, the remaining affidavit gives detailed testimony concerning many aspects of her husband's work. Even then, she does not testify how she has come to have knowledge of the details she provides. Her affidavit does not contain a general averment of personal knowledge.

{¶22} Elliott's deposition testimony is inconsistent with her affidavit and she fails to give any explanation for the difference. The trial court compared each paragraph of Elliott's affidavit with Elliott's deposition testimony and found contradictions between her affidavit and her deposition as well as contradictions between paragraphs in her affidavit. Although Elliott might have created a genuine issue of material fact by sufficiently explaining in her affidavit these contradictions, she failed to do so. Thus, citing *Byrd*, the trial court found that her affidavit failed to create a genuine issue of material fact to defeat the Bureau's motion and struck it. Because we see those same unexplained contradictions in our review of Elliott's deposition and affidavit, we find that the trial court did not abuse its discretion when it struck Elliott's affidavit.

{¶23} The trial court also found that Elliott's affidavit was inadmissible on the alternative ground that it was not based on Elliott's personal knowledge. We recently

discussed the Civ.R. 56(E) requirement that an affidavit be made on personal knowledge:

> "To be considered in a summary judgment motion, Civ.R. 56(E) requires an affidavit to be made on personal knowledge, set forth such facts as would be admissible in evidence, and affirmatively show that the affiant is competent to testify to the matters stated in the affidavit." *Fifth Third Mtge. Co. v. Bell,* 12th Dist. Madison No. CA2013–02–003, 2013–Ohio–3678, ¶ 27, citing Civ.R. 56(E); *see also Wesley v. Walraven,* 4th Dist. Washington No. 12CA18, 2013–Ohio–473, ¶ 24. " 'Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirement of Civ.R. 56(E).' " *Bell* at ¶ 27, quoting *Wells Fargo Bank v. Smith,* 12th Dist. Brown No. CA2012–04–006, 2013–Ohio–855, ¶ 16. "Additionally, documents referred to in an affidavit must be attached and must be sworn or certified copies." *Id.,* citing Civ.R. 56(E). "Verification of these documents is generally satisfied by an appropriate averment in the affidavit, for example, that 'such copies are true copies and reproductions.' " *Id.,* quoting *State ex rel. Corrigan v. Seminatore,* 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981); *see also Walraven* at ¶ 31 ("Civ.R .56(E)'s requirement that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit with a statement contained in the affidavit that the copies are true and accurate reproductions.")

U.S. Bank Natl. Assn. v. Bobo, 4th Dist. Athens No. 13CA45, 2014-Ohio-4975, ¶28; *JPMorgan Chase Bank, Natl. Assn. v. Fallon,* 4th Dist. Pickaway No. 13CA3, 2014–Ohio–525, ¶16.

{¶24} If the affiant fails to state that the affidavit is based on personal knowledge, then personal knowledge may be inferred "if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit." *Bobo,* at ¶30 quoting *Freedom Mtge. Corp. v. Vitale*, 5th Dist. Tuscarawas No.2013 AP 08 0037, 2014–Ohio–1549, ¶ 26 (Ohio law recognizes that personal knowledge may be inferred from the contents of an affidavit if the nature of the facts in the affidavit combined with the identity

of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit").

{¶25} "Personal knowledge" for purposes of a summary judgment affidavit is defined as knowledge of the truth in regard to a particular fact or allegation that does not depend on information or hearsay, i.e. it is knowledge that is original to the affiant. *See Parker Financial v. Matthews*, 4th Dist. Adams No. 97CA652, 1999 WL 74686 (Feb. 3, 1999) (affiant's knowledge was based upon information he received in conversations he had over telephone and therefore was not based on personal knowledge) citing *Brannon v. Rinzler,* 77 Ohio App.3d 749, 603 N.E.2d 1049(2nd Dist. 1991) (personal knowledge must be original and not depend on information or hearsay).

{¶26} In her deposition Elliott claims to have helped on the route a few times and learned a number of details about the business from statements Laymon Whitt made to her. In her affidavit she claims to have overheard Laymon's telephone conversations with Wolfinger. Other than her conversations with Laymon or statements she heard Laymon make while on the telephone with Wolfinger, she does not give any facts from which the trial court could make a reasonable inference that she has personal knowledge of the facts in the affidavit. Thus, the trial court did not abuse its discretion and properly excluded her affidavit on this alternative basis.

{¶27} Because the trial court properly excluded Elliott's affidavit and could do so properly on either of the two alternative grounds, we do not consider her affidavit when making our de novo review of the motion for summary judgment.

2. Whitt Affidavit

{¶28} The Bureau argued that Drew Whitt's affidavit was inadmissible because Elliott's testimony had established serious doubts about his mental competency. Elliott testified that Whitt was still in school at age 19, was "mentally slow," and had been exempted from the state proficiency exam. She believed he would not be capable of independent living in the foreseeable future and that she would need to care for him. The Bureau argued that because Elliott had created serious doubt about her son's mental competency, the court should not consider his testimony until it conducted a competency evaluation, citing Evid.R. 601. Alternatively, it argued that Whitt based much of his testimony on hearsay statements rather than personal knowledge. The trial court did not address the Bureau's competency argument, and instead excluded Whitt's affidavit as being founded on hearsay because much of the testimony was based on statements Laymon Whitt made to him.

{¶29} The trial court did not abuse its discretion when it excluded Whitt's affidavit. First, Whitt's affidavit does not contain a general averment of personal knowledge. Therefore the trial court could only infer Whitt had personal knowledge if the nature of the facts in the affidavit combined with Whitt's identity created a reasonable inference that he had personal knowledge of the facts. As for the identity of the affidavit, Whitt states that he was an 11 or 12-year-old boy at the time his father first started delivering the papers. He was 16 years old at the time of his father's death. His mother has testified that she believes that Whitt is mentally slow and incapable of living independently.

{¶30} Concerning his level of personal knowledge, Whitt states that he has observed his father's delivery operations by living with him and by riding along with him

on his route during the summer or when school was out. However, he also states that he frequently overheard telephone conversations his father had with Wolfinger. He stated he learned certain business details by overhearing his father's conversations. Thus, Whitt may have some personal knowledge as a household observer or by riding along on the route, but his affidavit testimony may also have been based on his father's statements or conversations.

{¶31} There is only one instance in his affidavit that Whitt clearly and affirmatively states that his knowledge comes from his direct observation. The instance occurred when Whitt was 11 or 12 years old and concerns the original delivery route. Whitt states that Wolfinger showed Laymon Whitt the delivery route and told him to let him know if he changes it. He states that his father eventually did change the route and informed Wolfinger of the change, which Wolfinger thought was an efficient one.

{¶32} Elliot and Whitt argue that what Drew Whitt heard Wolfinger say is not hearsay because Wolfinger is a party and the statements fall outside the definition of hearsay as an admission by party-opponent under Evid.R. 801(D). Thus, they contend the trial court should have considered some portions of Whitt's affidavit.

{¶33} We do not believe the trial court created prejudicial error in deciding to exclude Whitt's entire affidavit. The trial court could have concluded that, based on the nature of the facts in Whitt's affidavit combined with Whitt's identity – his young age and father-son relationship, it could not make a reasonable inference that most of Whitt's affidavit was based on personal knowledge. The trial court could have logically concluded that the only reasonable inference it could make was that Whitt's testimony was based upon the "frequently overheard conversations" of his father on the telephone

or from things he learned from conversations he had with his father while living with him. Thus, the trial court did not abuse its discretion when it excluded evidence of the affidavit because it was not made from Whitt's personal knowledge, but was based on upon the hearsay statements of Laymon Whitt.

{¶34} The only time that Drew Whitt specifically states that he was present when his father and Wolfinger were together concerns the original route. However, this testimony, which we will consider because it was admissible, does not create a genuine issue of material fact concerning Laymon Whitt's status as an independent contractor. The testimony concerning the original route supports the Bureau's position and shows that Laymon Whitt was free to establish his own route and did so openly with Wolfinger's knowledge. When Wolfinger learned of the change, he did not require Laymon to resume the old route or otherwise respond in a manner inconsistent with Laymon's status as an independent contractor. Thus, any error in excluding it was harmless as we note below.

{¶35} Because the trial court did not consider Evid. R. 601, lack of competency, as a basis for excluding Whitt's affidavit, we do not address that portion of the parties' arguments.

3. Lorenzo Affidavit

{¶36} Laymon Whitt retained and trained William Michael Lorenzo[1] to help him deliver newspapers. After Laymon died, Lorenzo signed a contract with Wolfinger and took over Laymon's route. Wolfinger testified that Lorenzo signed the standard carrier contract when he took over the route. Elliot's counsel presented a copy of the contract

[1] We note that the parties make various references in the record to "Michael" Lorenzo, "William" Lorenzo and "William Michael" Lorenzo. There appears to be no dispute between parties that they are referencing the same individual.

to Wolfinger and marked it as an exhibit to Wolfinger's deposition. The contract identifies Lorenzo as an independent contractor and sets forth the parties' respective obligations.

{¶37} In their opposition to summary judgment Elliot and Whitt submitted Lorenzo's affidavit, which stated that he knew Laymon Whitt and that after he died, Lorenzo took over his delivery route. Lorenzo then testifies about his own business relationship with Wolfinger. Lorenzo's affidavit does not contain any facts concerning either Laymon Whitt or Laymon's business relationship with Wolfinger. Instead, Lorenzo purportedly raises facts that may place into question his own status as an independent contractor. The trial court excluded Lorenzo's affidavit because it conflicted with his prior written contractual agreement that identified him as an independent contractor. Elliott and Whitt argue that the trial court erred because it did not explain what portions of Lorenzo's affidavit were inconsistent with the agreement or how Lorenzo's written signed agreement can be construed as his "statement."

{¶38} We do not address Elliott and Whitt's arguments because we find the trial court erred for a different reason. The holding in *Byrd* concerning an affidavit that conflicts with prior testimony is limited to a *party's* affidavit. *Byrd* extended the holding in *Turner v. Turner*, 67 Ohio St.3d 337, 617 N.E.2d 1123 (1993), which held that when 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. *Byrd* held "An affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a

genuine issue of material fact to defeat the motion for summary judgment." *Byrd* at paragraph three of the syllabus.

{¶39} In *Pettiford v. Aggarwal*, 126 Ohio St.3d 413, 2010-Ohio-3237, 934 N.E.2d 913, the Court again addressed the issue of what is known as a "sham affidavit" – an affidavit that contradicts prior testimony – and held that the rule in *Turner* and *Byrd* extended to an affidavit of a retained, nonparty expert. However, the Court specifically limited its holding in *Pettiford* to a retained, nonparty expert witness. Recognizing that distinctions exist between nonparty lay witnesses and nonparty expert witnesses, the Court stated, "Because the issue is not before us today, we are not deciding whether the *Byrd* analysis can be applied to a contradictory affidavit of a nonparty lay witness." *Id.* at ¶29.

{¶40} It does not appear that the Supreme Court of Ohio has yet had an opportunity to decide whether the *Turner, Byrd,* and *Pettiford* "sham affidavit" analysis extends to affidavits of nonparty lay witnesses. Prior to the decision in *Pettiford*, we limited the "sham affidavit" analysis to party affidavits:

> "The limitation on affidavits that conflict with prior depositions applies only when: (1) the affiant is a party to the litigation, (2) her affidavit is inconsistent with her own prior deposition, and (3) the affidavit neither suggests that the affiant was confused at the deposition nor offers a reason for the contradiction in her prior testimony." *Vanderpool v. Southern Ohio Medical Center,* Scioto App. No. 01CA2777, 2001-Ohio-2434, citing *Push v. A-Best Prods. Co.* (Apr. 18, 1996) Scioto App. No. 94CA2306; see, also, *Clemmons v. Yaezell* (Dec. 29, 1988), Montgomery App. No. 11132.
>
> The affidavits challenged by appellee in the case sub judice are not those of a party witness, but those of expert witnesses, *not parties* to the action. Thus, the limitation sought by SOMC is not applicable to the facts presently before us, and the affidavits should be considered in our determination of whether summary judgment was proper. See *Clemmons,* supra.

(Emphasis in original), *Hull ex rel. Hull v. Lopez,* 4th Dist. Scioto App. No. 01CA2793, 2002-Ohio-6162; *contra Duck v. Cantoni,* 4th Dist. Washington App. No. 11CA20, 2012-Ohio-351, ¶32 ("A trial court may strike a retained, nonparty expert's affidavit submitted in opposition to a summary judgment motion when the affidavit contradicts that expert's prior deposition testimony and when the expert fails to sufficiently explain the reason for the contradiction."). Although *Hull's* application to a retained nonparty expert witness is no longer the law after *Pettiford*, its application to nonparty lay witnesses is still good law.

{¶41} *Clemmons,* cited in *Hull,* involved a nonparty lay witness and explained the distinction between a party witness and a nonparty lay witness in that case:

> However, in a situation where a *non-party witness* has given certain testimony in a deposition and then given contradictory averments in a subsequent affidavit, the same factors are not present. Neither the litigant nor his attorney can prevent the non-party witness from deliberately or inadvertently misstating facts during the deposition, at least not to the same extent that the litigant as witness can be protected from inadvertent misstatements during a deposition. Moreover, statements made by the non-party witness in his deposition are not in the nature of judicial admissions.
>
> Therefore, we conclude that the contradictory affidavit of a non-party witness cannot be disregarded by the trial court in ruling upon a motion for summary judgment. If the affidavit is sufficient to create a genuine issue of material fact, the trial court may not determine, as a matter of law, that no jury would believe the witness if he should testify at trial in accordance with his affidavit. It would be within the jury's province to consider the contradictory deposition testimony, if offered to impeach the witness, and then to determine where the truth lies.
>
> Accordingly, the amended affidavit of non-party witness Madden should not have been disregarded by the trial court

Clemmons v. Yaezell, 2nd Dist. Montgomery App. No. 11132, 1988 WL 142397, *5-6 (Dec. 1988); *contra Bailey v. Topline Restaurants, Inc.,* 10th Dist. Franklin No. 11AP359,

2012-Ohio-1759, ¶25 (applying *Byrd* analysis to nonparty lay witness and affirming trial court's decision to strike inconsistent nonparty lay witness's affidavit).

{¶42} Here, Lorenzo was a nonparty lay witness and the "sham affidavit" rule developed in *Turner, Byrd and Pettiford* did not apply to his affidavit. The trial court erred when it excluded Lorenzo's affidavit on the grounds that it conflicted with his prior written agreement. However, as we discuss below, we find that error harmless because Lorenzo's affidavit was not sufficient to create a genuine issue of material fact.

{¶43} Because we find that the trial court erred when it excluded Lorenzo's affidavit, we will consider it when making our de novo review of the motion for summary judgment.

B. The Contract

{¶44} Elliott and Whitt ask us to review whether the trial court erred in deciding that the contract was the primary evidence of the contractual relationship between Laymon Whitt and Wolfinger. They admit that at the time Laymon started delivering papers, he signed a contract with Wolfinger. However, they argue that because Wolfinger lost the signed copy of the contract and had not seen it since the day that Laymon Whitt died, the parties did not have a contractual relationship. Thus, they argued that the trial court erred in determining a contract existed and that it was the primary evidence of their contractual relationship.

{¶45} The Bureau did not submit a copy of Whitt's signed agreement to support its summary judgment motion presumably because Wolfinger was never able to locate the signed copy. However, at Wolfinger's deposition, Elliott's counsel and the Bureau's counsel each had copies of Wolfinger's standard contract, marked as Plaintiff's Exhibit

D and Defendant's Exhibit 4, respectively. Elliott's counsel asked Wolfinger, "Is this basically how all the agreements looked with your carriers?" and Wolfinger testified, "Yes . . . All my carriers signed this basic agreement. Yes." Elliott's counsel then asked a number of questions concerning a carrier's responsibilities under the contract and Wolfinger responded. The Bureau's Exhibit 4 was dated 2009 and Elliott's Exhibit D was dated 2012. Both contracts contain identical terms and, with the exception of a font style change and the individual carrier's names, are entirely identical agreements. The Bureau asked Wolfinger if the contract changed at all and he said he was "pretty sure not."

{¶46} Even though Elliott's counsel introduced the carrier contract Wolfinger used in his business and solicited testimony concerning it, Elliot and Whitt now argue that the trial court should not have considered any of that evidence when it was analyzing Laymon and Wolfinger's business relationship. However, they invited a potential error that might exist in this regard.

{¶47} A party cannot take advantage of an error it encouraged the court to create. *State v. Hardie*, 4th Dist. Washington App. No. 14CA24, 2015-Ohio-1611, ¶ 11 ("Under the invited-error doctrine, a party is not entitled to take advantage of an error that he himself invited or induced the trial court to make"). Moreover, they did not move to have the two contract exhibits or Wolfinger's related testimony stricken from the record. In their response to the motion for summary judgment they argued that "large sections of the 'similar' agreements, when read in congruence with legal factors established by the common-law of Ohio, tend to show a master servant, not an independent contractor, relationship. . . ." Because Elliott and Whitt made no motion to

strike, the trial court considered the contracts along with the other evidence it reviewed and there is no evidentiary ruling for our review. It is axiomatic that a litigant's failure to raise an issue at the trial court level waives the litigant's right to raise that issue on appeal. *Shover v. Cordis Corp.,* 61 Ohio St.3d 213, 220, 574 N.E.2d 457 (1991), overruled on other grounds. Thus appellate courts generally will not consider any error a party failed to bring to the trial court's attention at a time when the trial court could have avoided or corrected the error. *Schade v. Carnegie Body Co.* 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982). *See also Enviro–Flow Cos., Ltd. v. Chauncey,* 4th Dist. No. 07CA5, 2008–Ohio–698, ¶ 14 (declining to address argument not initially raised by appellant in response to motion for summary judgment). Because Elliott and Whitt failed to raise this argument in their response to the motion for summary judgment, they have waived the issue on appeal.

{¶48} Thus, we will consider this evidence, along with a portion of Whitt's affidavit, Lorenzo's affidavit and all the other evidence the trial court reviewed.

C. Summary Judgment

{¶49} Elliott and Whitt argue that the trial court erred when it found, as a matter of law, Laymon Whitt was an independent contract because there was some evidence that he was an employee.

{¶50} To determine whether an individual is an independent contractor or an employee, courts look to see who exercises "'the right to control the manner or means of performing work.'" *Pusey v. Bator,* 94 Ohio St.3d 275, 278–279, 762 N.E.2d 968 (2002), quoting *Bobik v. Indus. Comm.,* 146 Ohio St. 187, 64 N.E.2d 829 (1946), paragraph one of the syllabus. If the employer reserves such a right, the relationship

created is that of employer and employee, but if the manner or means of performing the work is left to one who is responsible to the employer only for the result, an independent contractor relationship results. *Pusey* at 279, 762 N.E.2d 968.

{¶51} "The determination of who has the right to control must be made by examining the individual facts of each case." *Bostic v. Connor,* 37 Ohio St.3d 144, 146, 524 N.E.2d 881 (1988). These factors include, but are not limited to, "who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools and personnel used; who selects the routes traveled; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts." *Id.*

{¶52} "Generally, where the evidence is not in conflict or the facts are admitted, the question of whether a person is an employee or an independent contractor is a matter of law to be decided by the court." *Id*. However, the issue becomes a question for the jury where the claimant offers some evidence that the individual was an employee rather than an independent contractor. *Id*. at 146–147, 524 N.E.2d 881. The trial court must submit an essential issue to the jury where there is sufficient evidence to allow reasonable minds to reach different conclusions. *Id*; *Snyder v. Stevens,* 4th Dist. Scioto App. No. 12CA3465 2012-Ohio-4120, ¶18-20.

{¶53} It is undisputed that Laymon Whitt signed a written contract when he started delivery services for Wolfinger, but that Wolfinger lost the signed copy of the contract sometime after Laymon's death. Wolfinger testified that he used the same contract for all of his carriers and that the agreement did not change substantially over the years. At his deposition Wolfinger identified two copies of his standard carrier

contract that show that the contract terms on the standard contract he used in 2009 were identical to the contract terms he used in 2012. Elliott and Whitt did not present any facts that disputed Wolfinger's testimony concerning the terms of the standard carrier contract used by Wolfinger. They failed to present any facts from which we could reasonably infer that Laymon Whitt's contract terms were different from the standard carrier contract Wolfinger used in his business.

{¶54} The contract states that the carrier is an independent contractor. The contractor agrees to deliver copies of newspapers in a timely manner in a dry readable condition. It states, "Contractor may deliver in any order and by whatever manner, means, method or mode Contractor chooses." Thus, the terms of the contract give Laymon Whitt the right to control the manner or means of performing the delivery work. The contract also gives the carrier the responsibility to develop newspaper sales and to use best efforts to keep news racks clean and in working order. Wolfinger agrees to provide a list of new locations that have requested delivery service and to provide a federal tax Form 1099. It further states:

> Contractor agrees that Contractor will be acting as an independent contractor for all purposes. Contractor is not an employee of GARY'S NEWS. Under no circumstances will Contractor be included in any employee benefit plan of GARY'S NEWS and Contractor waives any right to be so included. Contractor has the right to engage in any other business that does not interfere with the performance of this Agreement, including the delivery of other publications or products. Contractor will operate as an independent contractor including, but not limited to: using motor vehicles and personnel to perform the obligations set forth in this Agreement; obtaining necessary insurance; paying all fees and taxes; and complying with all applicable law and federal, state and local rules and regulations pertaining to Contractors business – all at Contractor's own expense. GARY'S NEWS and Contractor shall each incur and pay their respective costs and expenses associated with the performance of this Agreement. Contractor shall be solely responsible for the payment of any federal, state or local income, Social Security and/or self-employment taxes with respect to the services provided under this Agreement.

> Contractor is free to purchase Contractors own equipment and supplies wherever Contractor chooses.
>
> Although this Agreement is with Contractor exclusively, it is not a personal service contract. Contractor may employ or contract with other persons to assist in the performance of this Agreement, but Contractor shall be solely responsible for the performance of this Agreement and for all legal obligations, liability and expenses arising therefrom. If for any reason Contractor cannot or chooses not to distribute copies of the newspaper on any given day or otherwise not to perform any obligation under this Agreement, Contractor shall engage a substitute at Contractor's expense. Any substitute shall be under the exclusive control of Contractor and Contractor shall be responsible for each substitute. In no event shall GARY'S NEWS be responsible for obtaining any substitute or any act or omission of any substitute.

{¶55} The record has Wolfinger's federal income tax returns from 2009 through 2011, which include federal tax Form 1099 from Wolfinger to Laymon Whitt, instead of a W-2, as evidence of Laymon's status as an independent contractor. Furthermore, Elliott and Laymon Whitt applied for assistance from the Ohio Department of Jobs and Family Services in December 2011, three months prior to Laymon's death. In the application, they held Laymon out as an independent contractor and provided supporting documentation.

{¶56} Wolfinger testified that the newspapers were delivered to Laymon Whitt daily by USA Today's agent and USA Today set the deadline for delivery times. Laymon determined what his delivery route would be. Laymon would report back to Wolfinger the number of unsold papers and the amount of money collected. Laymon was paid a flat rate of $40 per day. USA Today provided vending machines, vending machine parts, bags, and rubber bands at its own expense and Wolfinger forwarded those on to Laymon and other carriers. Laymon was free to determine whether he fixed a vending machine and the method of the repair as well as whether to bag newspapers due to inclement weather. Laymon determined how he would deal with customers and was not

supplied any tools used to repair vending machines. Wolfinger did not require Laymon to roll coins collected from vending machines. Laymon purchased equipment to roll coins at his own expense. If Laymon could not deliver the newspapers on any given day, he would find his own substitute driver.

{¶57} Elliott testified that Laymon used his own vehicle to deliver the newspapers and maintained all insurance and maintenance on the vehicle. She testified that Laymon was not personally required to make the deliveries and she had filled in for him occasionally, delivering part of the route. Laymon was not reimbursed for mileage or vehicle maintenance associated with the delivery services and was free to deliver newspapers for other publishers. Laymon was not given a benefit package, uniform, or identification badge. Elliott testified that her husband had trained Lorenzo to perform the delivery services so that Lorenzo could fill in for him and that the only tool she understood Laymon needed to fix vending machines was a mallet that he already owned.

{¶58} The only additional evidence that Elliott and Whitt submitted to the trial court, but was erroneously excluded, was a portion of the Whitt affidavit and the affidavit of William Michael Lorenzo. However, Lorenzo's affidavit contained no facts concerning Laymon Whitt's business relationship with Wolfinger. The facts set forth in Lorenzo's affidavit concerned only Lorenzo's own business dealings with Wolfinger. Under Civ.R. 56(C), we must construe the evidence and stipulations most strongly in Elliott and Whitt's favor. But here, because Lorenzo's affidavit provided no testimony about Laymon Whitt's business, we find that it raises no genuine issue of material fact about

Laymon's status as an employee or independent contractor and the trial court's decision to exclude it was harmless.

{¶59} Likewise, the exclusion of that portion of Whitt's affidavit that was based on his personal knowledge was erroneous but harmless. Whitt's affidavit actually bolstered the Bureau's position.

{¶60} The record shows that Laymon Whitt controlled the manner and means of performing his delivery services. Within the time constraints set by USA Today for the daily delivery of newspapers, Laymon determined the hours and established his own delivery route. He used his own vehicle and paid for all expenses associated with his delivery duties. He determined when and how to repair vending machines and supplied his own tools for the work. He decided whether to roll coins from his collections and purchased his own coin rolling equipment. He hired and trained his own substitute drivers. He was paid a flat fee of $40 per daily delivery. Furthermore the contract, tax returns, and Laymon's own application for assistance from the Ohio Department of Jobs and Family Services all show that Laymon and Wolfinger considered Laymon an independent contractor.

IV. CONCLUSION

{¶61} There is no genuine issue of material fact in this case and the Bureau and Wolfinger are entitled to judgment as a matter of law. We overrule Elliott and Whitt's assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellants shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.