No. 31614 – Larry Kiser and Carolyn Kiser, as father and mother, and next of kin for Lora D. Kiser, and Lora D. Kiser, individually v. Carrel Mayo Caudill, M.D., individually

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OF WEST VIRGINIA

Starcher, J., concurring:

I concur with the rule adopted in the majority opinion. In most instances, a witness should not be permitted to say one thing at a deposition, then contradict that testimony at the summary judgment stage with an affidavit. This is particularly the case with a fact witness: a fact witness will rarely have a night-and-day shift in testimony, particularly when the parties have had a chance to extensively depose the witness. If a fact witness offers an affidavit with a statement that is diametrically opposed to something the witness said in a lengthy, exhaustive deposition, then that witness had better list some pretty good reasons in the affidavit why their opinion shifted so dramatically before the circuit court will be obliged to consider it.

A different rule applies with expert witnesses. An expert witness's understanding of a case, and testimony on a legal opinion, can change with time. An expert witness, who is unfamiliar with a particular issue in a deposition, can become familiar with the issue after a deposition by doing additional research or testing. An expert brings experience to the courtroom, and uses that experience to assist the jury in understanding the

facts.[1] If the expert's experience changes, resulting in a change in the expert's opinion or other deposition testimony, then the party offering the expert is entitled to amend the expert's testimony through use of an affidavit. But that affidavit had also better list some pretty good reasons for the change in the expert's testimony.

In the instant case, Dr. Barnes testified that he did not know the standard of care for doctors outside of Columbus, Ohio in 1973; later, one day before the circuit court's hearing on the defendant's summary judgment motion, the plaintiff's attorneys submitted an affidavit from Dr. Barnes indicating he did know the standard of care for doctors in Charleston, West Virginia in 1973. What was missing from Dr. Barnes' affidavit was an explanation of *why* his testimony so dramatically changed. Had Dr. Barnes' affidavit explained the medical literature, textbooks, medical practices and procedures, or techniques that he reviewed after his deposition and that were available to neurosurgeons like the defendant in 1973 in Charleston, West Virginia, and how and why the medical literature, textbooks, medical practices and procedures, or techniques of the time changed and/or supported his opinions, then Dr. Barnes' affidavit would have been acceptable by the circuit court. With the proper supporting information, Dr. Barnes' affidavit would have demonstrated a genuine issue of material fact, and summary judgment could have been denied by the circuit court.

[1]An expert often sits in the courtroom during the trial and listens to testimony, learning additional information that may result in an adjustment of his opinion.

But Dr. Barnes' affidavit did not contain this information, and it was acceptable for the circuit court to choose not to give it any weight.

The lesson to learn from the plaintiff's counsels' mistake in this case, therefore, is that if a witness's deposition testimony is in error, or needs modification, and counsel wishes to correct or alter that testimony by use of an affidavit, counsel cannot create a genuine issue of material fact by simply sticking a conclusory statement in the affidavit that contradicts the deposition testimony. Counsel must make certain that the witness's affidavit fully accounts for the change in testimony.

I therefore concur in the majority's decision.