

No. 32526 – *Barbara Calhoun, individually, and as the Executrix of the Estate of Robert L. Calhoun v. Jack R. Traylor, Jr., M.D., an individual; Tri-State Surgical Group, a partnership; Robert E. Turner, M.D., an individual; Ultimate Health Services, Inc., a West Virginia corporation d/b/a Huntington Internal Medicine Group; Denise Chambers, an individual; and River Cities Anesthesia, Inc., a West Virginia corporation*

**FILED**

**December 16, 2005**

Starcher, J., concurring, in part, and dissenting, in part:

released at 10:00 a.m.  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

I concur with that portion of the majority’s opinion affirming the circuit court’s decision to allow some of the appellant’s claims against the appellees to proceed to trial. I dissent, however, to the majority’s discussion concerning the “sham affidavit” rule. To the extent portions of the appellant’s claims were dismissed by the circuit court because of the rule, the opinion should have reversed the circuit court.

This case is yet another example of the problems with the “sham affidavit” rule. Upon further reflection, I believe this Court should now abandon the rule as contrary to unambiguous language of the *Rules of Civil Procedure*, and contrary to a citizen’s constitutional right to have their disputes tried before a jury.<sup>1</sup>

---

<sup>1</sup>Article III, § 13 of the *West Virginia Constitution* states, in part:

In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved. . . . No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law.

In a trial, a witness may testify and say something that directly contradicts a statement previously made by the witness under oath. Any party, if they so choose, can then use the prior inconsistent statement to impeach the testimony of the witness.<sup>2</sup> We let juries sort out which of the two statements by the witness is more credible.

But at the summary judgment stage, we have virtually adopted the opposite procedure. Ostensibly, “the ‘sham affidavit’ rule precludes a party from creating an issue of fact to prevent summary judgment by submitting an affidavit that directly contradicts previous deposition testimony of the affiant.” *Kiser v. Caudill*, 215 W.Va. 403, 409, 599 S.E.2d 826, 832 (2004). When a court is faced with an affidavit that is inconsistent with the witness’s deposition testimony, the court can disregard the affidavit as a “sham” that is insufficient to create a genuine issue of fact for trial, unless the inconsistency is adequately explained by the witness. The result is that some allegedly inconsistent affidavits will be stricken from the record; other affidavits may be considered if the judge decides that the inconsistency is the product of an innocent misunderstanding of the question by the witness, nervousness at the deposition, a refreshed recollection or – particularly in the case of an expert – a change in opinion based upon a change in the information available to the witness.

---

<sup>2</sup>For example, Rule 801(d)(1)(A) [1994] of the *Rules of Evidence* states:

A statement is not hearsay if . . . the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition[.]

The problem is that different judges will interpret the “sham affidavit” rule differently in the same circumstances. Different judges will give different reactions to whether the affiant gave a credible explanation for the contradiction between the deposition and the affidavit, or “a satisfactory explanation of why the testimony is changed . . . and why this later assertion should be taken seriously.” 10A Charles A. Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure*, 3d Ed. § 2726 (1998).

Frankly, I believe that the “sham affidavit” rule adds nothing but confusion, unfairness, and absurdity to the summary judgment process. Think of it this way: on the one hand, Rule 56(e) permits a party to file an affidavit in opposition to a motion for summary judgment based “on personal knowledge” of a competent witness and setting forth “such facts as would be admissible in evidence.”<sup>3</sup> Standing alone, so long as the affidavit meets

---

<sup>3</sup>Rule 56(e) of the *Rules of Civil Procedure* [1998] states:

*Form of affidavits; further testimony; defense required.* – Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered

(continued...)

these standards, no matter how incredible or absurd the affidavit may seem when compared against a mountain of extrinsic evidence, the party can defeat an opponent's motion for summary judgment. But on the other hand, if "that same affidavit allegedly conflicts with nothing more than a few lines of arguably inconsistent transcript taken from the middle of a five-day deposition, we are told, the affidavit is a potential 'sham' that may be stricken and utterly disregarded, possibly resulting in dismissal of the action with prejudice, depending entirely on whether the judge deems the putative explanation for the variation to be 'satisfactory' or 'credible.' The incongruity and incoherence of that disparate treatment is ludicrous." James Joseph Duane, "The Four Greatest Myths About Summary Judgment," 52 Wash. & Lee L.Rev. 1523, 1600 (1995).

The "sham affidavit" rule that we adopted in *Kiser v. Caudill* is contradicted by the unambiguous language of Rule 56(e) of the *Rules of Civil Procedure*. Rule 56(e)

. . . outlines a number of detailed requirements for supporting and opposing affidavits but contains no requirement that they be "consistent with all prior statements made by the witness." Under normal principles of statutory construction . . . the specification of certain detailed requirements normally implies the deliberate exclusion of all others. Indeed, Rule 56 affirmatively states that affidavits may include "such facts as would be admissible in evidence," which would include all statements of a witness who claims to have first-hand knowledge, even if the judge knows in advance that those statements are inconsistent with what the witness has said before.

---

<sup>3</sup>(...continued)  
against the adverse party.

This Court should simply abandon the ridiculous fiction of the “sham affidavit” rule, and stop putting judges in the position of feeling compelled to deprive citizens of their constitutional right to have their claims heard, on their merits, in court and before a jury. Instead of using the “sham affidavit” rule, courts should use affidavits in summary judgment proceedings in the following way:

When a judge ruling upon a summary judgment motion is confronted with an affidavit in opposition that is at least arguably inconsistent with prior testimony or statements by that same witness on a material question, the judge need not, and should not, “assume the truth” of the affidavit nor even worry about what the truth is. . . . Nor should he try to make any findings concerning whether there is an inconsistency, whether he is satisfied with the explanation for the variation, or which version is more credible (as virtually all of the lower courts have done). Rather, . . . the judge should ask himself one simple question: “Assuming that all of the witnesses would testify at a trial just as they have in their most recent affidavits, that they are cross-examined about the allegedly inconsistent statements they made at their depositions, and that the jury hears the same explanation I have been given (if any) about the variation, is there any genuine possibility that the jury might find in favor of the adverse party?”

This simple solution, unlike the three approaches currently taken by the federal courts, is simple in application, coherent, and correct. It eliminates the current need for worthless and time-consuming motion practice over whether the alleged “sham” affidavit should be stricken or whether the defect was waived by the failure of the moving party to also file a written motion to strike the affidavit. It preserves and safeguards the constitutionally guaranteed role of the jury as arbiters of disputable factual issues. And it still permits the judge to weed out those truly sham affidavits that have no possibility of being accepted by any jury.

Duane, 52 Wash. & Lee L.Rev. at 1603-04.

I believe that, in this case, we should have abandoned the rule we adopted in *Kiser v. Caudill*. In his deposition, Dr. Paul vonRyll Gyska would not say that there was a deviation from the standard of care in the post-surgical treatment of the plaintiff's decedent, Robert Calhoun. But after reviewing the deposition testimony of one of the decedent's treating physicians, Dr. Gyska signed an affidavit that indicated that, in fact, a deviation from the standard of care in the post-surgical treatment had occurred.

When the circuit judge was faced with the affidavit by Dr. Gyska that was at variance with a prior statement he made in a deposition, the judge should not have interjected credibility determinations into the summary judgment process. The judge should not have ignored Dr. Gyska's supplemental affidavit as a "sham." The judge should instead have asked one question: assuming that Dr. Gyska testifies at trial just as he has in his most recent affidavit, and he is cross-examined about the allegedly inconsistent statement he made at his deposition, and the jury heard the same explanation for the variation, is there any genuine possibility that the jury might find in favor of the plaintiff?

I therefore dissent to the majority opinion's use of the "sham affidavit" rule in this case.