No. 31751 – *James Tolley and Nancy Tolley, his wife v. Carboline Company, a Delaware Corporation; E. I. duPont deNemours and Company, a Delaware Corporation; and Fina Oil and Chemical Company, a Delaware corporation*

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OF WEST VIRGINIA

Starcher, J., dissenting:

I dissent because the circuit court below, and majority here, went too far and made what are essentially findings of fact. Any time a judge decides that a piece of evidence is a "sham," the judge is making a factual credibility determination.

The majority opinion wrongfully finds that Dr. James E. Lockey's affidavit is a "sham" that should have been ignored by the circuit court. In 2002, when this case was previously before this Court, we read Dr. Lockey's deposition and decided that under questioning from defense lawyers, Dr. Lockey gave equivocal testimony that there were "three potential causes" for the plaintiff's injuries. On remand, the plaintiffs submitted an affidavit saying "to a reasonable degree of medical probability" the plaintiff's injuries were caused by three chemicals. The Court now says that Dr. Lockey's affidavit *might* have been acceptable, had it met certain standards which were clearly enunciated by the Court in 2004 in *Kiser v. Caudill*, 215 W.Va. 403, 599 S.E.2d 826 (2004).

There is nothing in the record to suggest that, during his deposition, Dr. Lockey answered "No" when asked, "Do you have an opinion, to a reasonable degree of medical probability, about the cause of the plaintiff's condition?" I see nothing in the affidavit to

show Dr. Lockey contradicted his deposition testimony; the affidavit merely clarified the testimony, and used "magic words" that would defeat summary judgment.

The only lesson I can take away from the majority's punitive opinion is that counsel must, during a deposition, have their expert recite precisely the "magic words" that will allow their case to survive summary judgment. Simply because the expert's opinion is written clearly, in an affidavit, opinion letter or otherwise, is not enough. If opposing counsel sidesteps the issue and doesn't ask any questions designed to elicit the "magic words" during the deposition, using the majority opinion's reasoning *any* affidavit that follows a deposition and clarifies the expert's testimony (and does not plainly state the clarification is necessary because the "magic words" question was never asked) could automatically be ignored by the judge as incredible and a "sham."

This case should have been given to a jury to assess whether Dr. Lockey's testimony was credible. I respectfully dissent.