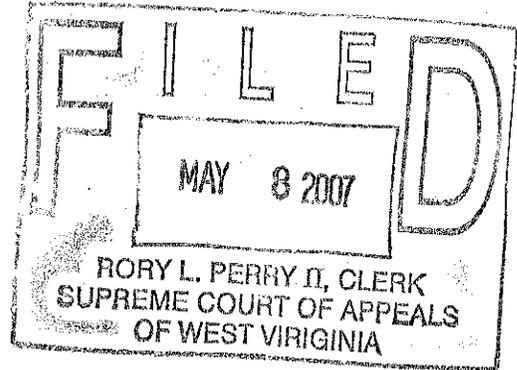


NO. 33308

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA
CHARLESTON



JONATHAN BRIAN WALKER,

Plaintiffs Below/Appellee,

v.

TARA C. SHARMA, M.D.,

Defendant Below/Appellant.

FROM THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

I. Kind of Proceeding and Nature of Ruling in the Trial Court

Plaintiff, Jonathan Brian Walker (hereinafter referred to as "Plaintiff" or "Brian") filed the present action for medical professional liability in the Circuit Court of Cabell County, West Virginia. In his Complaint, Plaintiff alleged that the Defendant was negligent in the performance of a surgical procedure and that such negligence caused severe and permanent injuries to the Plaintiff. Plaintiff's Complaint also presented a claim for lack of informed consent; however, this allegation was withdrawn by agreement prior to trial. On April 10, 2006, a jury trial was commenced before the Honorable Judge John L. Cummings. On April 11, 2006, Plaintiff rested his case-in-chief after the presentation of witnesses and exhibits.

Pursuant to Rule 50 of the West Virginia Rules of Civil Procedure, Defendant then proceeded to move the Court for Judgment as a Matter of Law, arguing that Plaintiff had failed to make a *prima facie* case of medical professional liability for the following reasons: (1) Plaintiff's expert witness failed to produce competent expert testimony on the issue of the standard of care applicable to the surgical procedure in question under the circumstances of the case; (2) Plaintiff failed to establish that the Defendant deviated from that national standard of care; and (3) Plaintiff failed to establish that such deviation was a proximate cause of Plaintiff's injury.

After extensive oral argument, the Trial Court granted defendant's Motion and dismissed the jury. Pursuant to Trial Court Rule 24.01, both parties submitted and exchanged several proposed Judgment Orders for the Trial Court's consideration. Ultimately, on June 21, 2006, the Trial Court entered its Judgment Order, memorializing the granting of defendant's Motion and holding:

1. Because the testimony of Plaintiff's expert witness [Dr. Robert Lewis, a board-certified urologist] did not establish the standard of care or deviation therefrom on a national basis, plaintiff has failed to make a legal showing of medical professional liability by his failure to establish both what constituted the national standard of care and that a deviation from the national standard of care occurred. (Judgment Order, Conclusions of Law, ¶ 6.)
2. The legal foundation for the application of the evidentiary rule of *res ipsa loquitur* was not established by the evidence. ... Plaintiff failed to show that the only inference that could be reasonably and legitimately drawn from the circumstances was negligence on the part of the defendant physician. (Judgment Order, Conclusions of Law, ¶ 7-9.)
3. Because plaintiff failed to meet his burden of proof as to the issue of standard of care and causation, it is unnecessary for the court to consider the remainder of the defendant's motions.

Because there is no jury issue as to standard of care and causation, the Rule 50 Motion was and is hereby GRANTED. (Judgment Order, Conclusions of Law, ¶ 10-11.)

Plaintiff seeks reversal of the Trial Court's Judgment Order of June 21, 2006 and the order of a new trial in this action so that he may receive a determination of this action upon the merits from a jury of his peers.

II. Statement of the Facts of the Case

The parties do not dispute the underlying facts in this action. In 2003, Plaintiff Jonathan Brian Walker was an otherwise healthy 25 year-old single male. His only abnormal medical condition was a history of urethral stricture which is a narrowing or constriction of the urethra, the tubular structure leading from the bladder through the penis through which urine passes. Depending upon the severity of the stricture, it can result in difficulty and even an inability to urinate normally. Brian's stricture was first diagnosed in 1995 in the area of his posterior urethra, near the prostate gland. The cause of the stricture was never determined.

In 1995, the Defendant performed a surgical procedure upon the Plaintiff, known as a cystoscopy and dilation, for the purpose of relieving Brian's obstruction. During this procedure, a cystoscope, a thin, tubular viewing instrument, is passed through the urethra to the area of obstruction. A very thin hollow catheter [also called a filiform] containing a guidewire [known as a stylet] is passed through the scope and through the strictured area into the bladder. A series of hollow, tapered dilators [also known as followers] in increasingly larger diameters are then passed over the catheter, to stretch open the constricted area so as to allow normal urination. This procedure was successful in 1995.

On January 3, 2003, Brian presented to the Emergency Department of St. Mary's Medical Center in Huntington, West Virginia, with an inability to urinate. Efforts to place a catheter through the penis to relieve the urinary retention were unsuccessful. The Defendant was summoned and placed a suprapubic catheter into Brian's bladder through a small lower

abdominal incision to relieve his distended bladder. On January 4, 2003, Defendant took Brian to the operating room for performance of cystoscopy and attempted dilation of the stricture, as had been done in 1995.

Likewise as during the performance of the 1995 procedure, Defendant employed a pre-packaged set of instruments manufactured by the Bard Company, known as the Bard Heyman Urologist Tray for the Obstructed Urethra (Plaintiff's Exhibit 3), and which contained all of the necessary catheters, guidewires, dilators and a sheet of instructions as to its proper use. (Tr. p. 36.)¹ Defendant passed the scope through the urethra to the area of obstruction and attempted to pass the catheter through the constricted area. His dictated and signed Operative Report in the hospital chart recited: "Attempt was made to pass through the other side; the Hymen [sic.] catheter did **not** seem to go into the bladder area. (Emphasis added. A separately signed copy of the Operative Report in defendant's office records is identical.) (The entirety of defendant's office records, and plaintiff's hospital charts from St. Mary's Medical Center were admitted as Defendant's Exhibits 6, 7 and 8, respectively.)

The Defendant removed the scope and then began passing the series of graduated dilators over the catheter. Resistance and the sensation of tearing through tissue were felt. Defendant removed the dilator, re-inserted the scope and injected irrigating fluid through the scope. Defendant observed fluid draining out of the rectum, indicating that a perforation of the rectum had occurred. The procedure was aborted and consultation obtained with a general surgeon. In order to prevent a potentially life-threatening intra-abdominal infection as a result of the rectal perforation, the surgeon performed a diverting colostomy.

Brian continued to live with his diverting colostomy and colostomy bag until August of 2003, when surgery was performed to reverse the colostomy and reconnect the lower portion of

¹ References to the partial Transcript of the testimony and proceedings at trial will be abbreviated as (Tr. p. ____).

his colon. This surgery was complicated by a persistent wound infection. Since the Defendant's procedure had not been completed and the stricture opened at the time the complication was discovered, Brian continued to rely upon the suprapubic catheter to drain his urine into a bag until July of 2003, when he underwent a permanent surgical procedure at the University of Kentucky, known as urethroplasty, which involved the removal of the scarred portion of his urethra.

Plaintiff's factual witnesses during his case-in-chief at trial were the Plaintiff and his parents. It was Plaintiff's primary allegation at trial that in performing the dilation procedure using the Bard instrument system, with its special properties and safety features, the Defendant deviated from the applicable standard of care required of a reasonable, prudent urologist by failing to definitively confirm that the catheter had passed into the bladder before commencing passage of the dilators. This failure was a proximate cause of Plaintiff's rectal perforation and damages.

Plaintiff called Robert I. Lewis, D.O., as his expert witness. Dr. Lewis is a board certified urological surgeon duly licensed to practice medicine in the State of Ohio who devotes in excess of 75% of his professional time to the active clinical practice of urology in Columbus, Ohio. (Tr. p. 25.) (In its Judgment Order, the Trial Court expressly found, pursuant to West Virginia Code §55-7B-7, that Dr. Lewis was competent and qualified to testify as an expert witness regarding the standard of care required of a urologist under the circumstances of this action. [Judgment Order, Findings of Fact, ¶ 6.]

Dr. Lewis testified that he is familiar with the treatment of urethral strictures and treats them in his practice on a weekly basis. (Tr. p. 26.) He explained the various methods employed to dilate urethral strictures (Tr. pp. 27-28) and further explained that, in order to arrive at his

opinions, he reviewed the medical records, the x-rays, the depositions, including that of the Defendant (Tr. p. 30), the anatomy of the male urinary tract (Tr. pp. 31-32), and the particular nature and location of Plaintiff's stricture (Tr. pp. 32-36). Dr. Lewis then demonstrated for the jury the Bard instrument set utilized by the Defendant during Plaintiff's procedure, and the manner in which the dilators will follow the catheter, once it is correctly placed within the bladder. Dr. Lewis analogized the course of the dilators over the catheter as that of a railroad train following its track. (Tr. pp. 36-40.) Dr. Lewis confirmed that each and every opinion he held and would offer at trial was to a reasonable medical probability. (Tr. p. 40.)

Dr. Lewis testified that in using the Bard instrument system, appropriate standards of care required the surgeon to definitively confirm that the catheter is correctly placed in the bladder before passage of the dilators. Dr. Lewis set forth his opinion as follows:

- Q. Doctor, in your opinion, when one is employing this type of system to dilate a urethral stricture, do standards of care – appropriate standards of care require the surgeon to confirm that the filiform catheter is in the bladder before the passage of the dilator?
- A. With this particular instrument that was used, the Heyman dilator, it is incumbent upon the surgeon utilizing the kit **to make sure that they are in the bladder.** (Emphasis added; Tr. pp. 40-41.)

Dr. Lewis then identified the instruction sheet for the proper use of the Bard instrument system (Plaintiff's Exhibit 4), upon which he relied in part in formulating his opinions and which contained reasonably reliable and authoritative information as to that use. (Tr. pp. 41-42, 45-46.) The manufacturer's instructions, as noted by Dr. Lewis, provided alternative means by which bladder placement of the catheter could be definitively confirmed using this instrument system. Specifically, the instructions provided: (1) that either the guidewire could be removed from the catheter allowing observation of a flow of urine through it; or (2) that radiopaque dye could be

injected through the catheter and an x-ray taken confirming its location in the bladder. (Tr. p.

47.) Dr. Lewis testified as follows:

- Q. Now, doctor, in your opinion, would a urologist using this system for the dilation of a urethral stricture be in compliance with acceptable standards of care by not using some method such as we've outlined to in fact confirm the placement of that catheter in the bladder?
- A. This specific device, the Heyman dilator, requires confirmation of being in the bladder. (Tr. pp. 47-48.)
- Q. And you can also confirm placement, can you not – there is a green area on this filiform, isn't there?
- A. Yes.
- Q. And doesn't paragraph six of this instruction or insert identify another method by which you can confirm placement and that is by confirming that this green area is at the end of the penis?
- A. I would disagree, because in the last line, it says, this usually signifies that the distal or closed end is in the bladder. But the word usually does not mean definitely. It suggests that it could be there. But as I indicated earlier, it could have been behind the prostate. Out of the urethra.
- Q. But this is one method that a urologist can use even according to the package insert?
- A. It's not a confirmatory method. I would disagree with that.
- Q. So you disagree with the product insert?
- A. No. I go with number two where it tells you you have to confirm **beyond a shadow of the doubt** that you're in the bladder. (Emphasis added. Tr. pp. 78-79.)

As to Defendant's deviation from the standard of care which would require him to definitively confirm the location of the catheter in the bladder prior to the passage of the dilators, Dr. Lewis observed that Defendant's own dictated Operative Report expressly stated, "... the Hymen [sic.] catheter did not seem to go into the bladder area." (Tr. p. 49.) Furthermore, nowhere in any of Plaintiff's medical records or the Defendant's deposition was there any indication that bladder placement of the catheter was confirmed:

We don't know where it [the catheter] was. There's no confirmation at any time by any of the prescribed methods in the instructions that we were in fact inside the bladder. (Tr. p. 53.)

Q. From your review of this hospital chart and any of the other records you reviewed – by the way, you did have the benefit of Dr. Sharma’s deposition testimony as well?

Yes.

Q. From your review of that, did you see any evidence that Dr. Sharma **did anything to definitively establish conclusively** and confirm that in fact that follower had gotten into the bladder?

A. No.

Q. Is the only reference you saw regarding his quote, “belief?”

A. That is correct. (Emphasis added. Tr. p. 96.)

The injury in this case was the perforation of Plaintiff’s rectum and its consequences. Dr. Lewis opined that a rectal perforation had occurred since irrigation fluid injected into the urethra passed out of the rectum. (Tr. pp. 50-51.) Dr. Lewis testified that the failure of Defendant to confirm catheter placement in the bladder was the proximate cause of that injury.

Q. In other words, what can happen if in fact that catheter is not in the bladder and attempts of dilation occurred?

A. It’s like the train leaving the track. The dilator can develop – can go through a false passage and end up anywhere behind that prostate. And we know by this case that there was a rectal injury, so the catheter did traverse through the rectum. (Tr. p. 48.)

Q. [I]s it your opinion that the most likely mechanism for this injury, to cause this injury was the fact that the catheter, the filiform was not in the bladder?

A. Yes.

Q. In other words, the train tracks were somewhere else?

A. That is correct. (Tr. p. 52.)

Q. Hypothetically, Dr. Lewis, we heard your opinion – and is it your opinion that the most likely mechanism of this injury was the catheter not being in the bladder?

A. Yes. (Tr. p. 53.)

Dr. Lewis further testified that in the unlikely event that the catheter fortuitously did find its way into the bladder, despite the failure of the Defendant surgeon to confirm its placement, one other potential mechanism could cause the same injury. That alternate mechanism of injury, according to Dr. Lewis, would be the use of excessive force. In such event the rectum could be perforated if excessive force was applied in pushing the dilator, thereby causing penetration

through the urethra, the surrounding tissue and into the rectum. (Tr. p. 54.) However, even if this was the mechanism of the injury, it would be the proximate result of a deviation on the part of the defendant from applicable standards of care.

Q. And, doctor, if hypothetically that was the mechanism by way this occurred, would the application of that kind of force also, in your opinion, be below acceptable standards of care?

A. Yes. (Tr. p. 55.)

Finally, the witness emphatically established that Plaintiff's injury was not one which would ordinarily occur in the absence of negligence, given the safeguards of the Bard instrument system.

Q. Now, doctor, is this injury, a rectal perforation, in your opinion, a complication that would be reasonable to occur, if appropriate care is rendered using this system to do this procedure?

A. Absolutely not. (Tr. p. 51.)

Q. In the course of your review of this matter, did you search and look in the medical literature, be it Dr. Webster's chapters in Campbell's and elsewhere in dilating strictures as to whether you could find any reference whatsoever that a perforation of a rectum in performing this particular type of procedure is a known, recognized and accepted complication [which] occurs even though all due care is exercised? Did you look to find that?

A. Even using Google, I could not find any reference to rectal perforation with any type of urethral procedure.

Q. And as being an acceptable complication?

A. That is correct. (Tr. p. 105.)

Being licensed to practice medicine in the State of Ohio, and confining his practice to the Columbus, Ohio area, Dr. Lewis is familiar with the various methods employed for the dilation of urethral strictures at the hospitals in which he practices. As a result, he could not have direct personal knowledge of the **methods** actually employed in Huntington, West Virginia or hospitals in other states. (Tr. p. 70.) However, contrary to the conclusion of the Trial Court in its Judgment Order, he never testified that he was not familiar with the **standard of care** required of a urologist in the performance of the procedure specifically using the Bard instrument system.

His testimony in that regard as to that standard was unequivocal, as noted above. Indeed, he stated:

I can tell you what goes on in Columbus, Ohio, directly because that's where I practice. I've never practiced in West Virginia, but I would assume the standards of practice here are the **same as anywhere else**. (Emphasis added. Tr. pp. 70-71.)

III. Statement to Meet the Alleged Error

The Trial Court erred to the prejudice of Plaintiff in granting Defendant's Motion for Judgment as a Matter of Law.

IV. Points and Authorities Relied Upon

- A. Judgment as a Matter of Law may only be granted when there is no legally sufficient evidentiary basis for a reasonable jury to find in favor of the party against whom the Motion is made.**

West Virginia Rule of Civil Procedure 50(a)(1)

Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E. 2d 152 (1995).

Brannon v. Riffle, 197 W. Va. 97, 475 S.E.2d 97 (1996).

Cale v. Napier, 186 W. Va. 244, 412 S.E.2d 242 (1991).

Kiser v. Caudill, 210 W. Va. 191, 557 S.E.2d 245 (2001).

Yates v. University of West Virginia Board of Trustees, 209 W. Va. 487, 549 S.E.2d 681 (2001).

- B. The Trial Court erred in entering Judgment as a Matter of Law in favor of Defendant on the issue of negligence since the evidence presented by Plaintiff's expert witness was legally sufficient to permit a reasonable jury to conclude that Defendant deviated from the standard of care applicable to the particular medical procedure at issue in this case.**

W. Va. Code §55-7B-3.

W. Va. Code §55-7B-7.

Arbogast v. Mid-Ohio Medical Corp., 214 W. Va. 356, 589 S.E.2d 498 (2003).

Paintiff v. City of Parkersburg, 176 W. Va. 469, 354 S.E.2d 564 (1986).

C. The Trial Court erred in entering Judgment as a Matter of Law in favor of Defendant on the issue of proximate cause since the evidence presented by Plaintiff's expert witness was legally sufficient to permit a reasonable jury to conclude that Defendant's deviation from the applicable standard of care caused Plaintiff's injury and damages.

Mays v. Chang, 213 W. Va. 220, 579 S.E.2d 561 (2003).

Stewart v. George, 216 W. Va. 288, 607 S.E.2d 394 (2004)

D. The Trial Court erred when it failed to submit the case to the jury under the evidentiary doctrine of *res ipsa loquitur*.

Bronz v. St. Jude's Hospital Clinic, 184 W. Va. 594, 402 S.E.2d 263 (1991).

Farley v. Meadows, 185 W. Va. 48, 404 S.E.2d 537 (1991).

Foster v. City of Keyser, 202 W. Va. 1, 501 S.E.2d 165 (1997).

V. Discussion of Facts and Law

A. Judgment as a Matter of Law may only be granted when there is no legally sufficient evidentiary basis for a reasonable jury to find in favor of the party against whom the Motion is made.

Rule 50(a)(1) of the West Virginia Rules of Civil Procedure provides:

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

This Court has noted that the amendment to Rule 50 designating the former motion for directed verdict as a motion for judgment as a matter of law, "did not ... affect either the standard by which a trial judge reviews motions under the rule or the standard by which an appellate court

reviews a trial court's ruling." *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E. 2d 152, 159; Note 7 (1995).

In considering such a motion and whether the evidence could support a verdict for the party against whom the motion is made, a trial court must resolve all reasonable doubts and inferences in favor of the party against whom the verdict is asked to be directed. Syllabus Point 2, *Yates v. University of West Virginia Board of Trustees*, 209 W. Va. 487, 549 S.E.2d 681 (2001).

Upon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence. Syllabus Point 1, *Cale v. Napier*, 186 W. Va. 244, 412 S.E.2d 242 (1991).

When faced with the appeal of the granting of a motion for judgment as a matter of law, this Court has held:

The appellate standard of review for the granting of a motion for [judgment as a matter of law] pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is *de novo*. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of [judgment as a matter of law] when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting [judgment as a matter of law] will be reversed. Syllabus Point 1, *Kiser v. Caudill*, 210 W. Va. 191, 557 S.E.2d 245 (2001); citing Syllabus Point 3, *Brannon v. Riffle*, 197 W. Va. 97, 475 S.E.2d 97 (1996).

B. The Trial Court erred in entering Judgment as a Matter of Law in favor of Defendant on the issue of negligence since the evidence presented by Plaintiff's expert witness was legally sufficient to permit a reasonable jury to conclude that Defendant deviated from the standard of care applicable to the particular medical procedure at issue in this case.

The elements necessary to establish a *prima facie* case of medical professional liability are set forth in W. Va. Code §55-7B-3:

(a) The following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and

(2) Such failure was a proximate cause of the injury or death.

In addition, W. Va. Code §55-7B-7 provides that evidence of these elements must be by competent expert testimony:

(a) The applicable standard of care and a defendant's failure to meet the standard of care, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court. Expert testimony may only be admitted in evidence if the foundation therefor is first laid establishing that: (1) The opinion is actually held by the expert witness; (2) the opinion can be testified to with reasonable medical probability; (3) the expert witness possesses professional knowledge and expertise coupled with knowledge of the applicable standard of care to which his or her expert opinion testimony is addressed; (4) the expert witness maintains a current license to practice medicine with the appropriate licensing authority of any state of the United States: *Provided*, That the expert witness' license has not been revoked or suspended in the past year in any state; and (5) the expert witness is engaged or qualified in a medical field in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient. If the witness meets all of these qualifications and devoted, at the time of the medical injury, sixty percent of his or her professional time annually to the active clinical practice in his or her medical field or specialty, or to teaching in his or her medical field or specialty in an accredited university, there shall be a rebuttable presumption that the witness is qualified as an expert.

There is no question that Plaintiff's expert witness, Dr. Lewis, meets all statutory requirements necessary to qualify him as an expert witness in this action, as the Trial Court correctly determined in its Judgment Order. (Judgment Order, Findings of Fact, ¶ 6.) While Dr. Lewis testified that there were other procedures and methods for the treatment of urethral strictures, such as endoscopic procedures utilizing small cutting blades or lasers, balloon dilators,

solid dilators and the like (Tr. pp. 27-28, 69-70.), none of these types of procedures have anything to do with the particular surgical procedure in this case, which was a urethral dilation employing the Bard instrument system. (Tr. pp. 36-40.)

Long since abolished is the spurious legal theory referred to as the "locality rule." Under this rule, a physician's conduct was measured by what was done in a particular locality and, as a consequence, standards of care among medical communities lacked consistency. Given modern methods of communication and the availability for exchange of knowledge and information everywhere, medical standards of care apply on a national basis. *Paintiff v. City of Parkersburg*, 176 W. Va. 469, 354 S.E.2d 564 (1986); *Arbogast v. Mid-Ohio Medical Corp.*, 214 W. Va. 356, 589 S.E.2d 498 (2003).

There exists no evidentiary basis in the record to support the Trial Court's ruling. A thorough reading of the transcript of Dr. Lewis' testimony reveals that the only possible explanation for the Trial Court's ruling was the following exchange on cross-examination:

- Q. Sir, my question is, with respect to the instrumentation that a surgeon may use – and we'll get to direct vision in a moment. Other than in Columbus, Ohio, and where you practice, you can't say what **methods** are used here in West Virginia or at Duke University or at other institutions; isn't that true?
- A. I can tell you what goes on in Columbus, Ohio, directly because that's where I practice. I've never practiced in West Virginia, but I would assume the **standards of practice here are the same as anywhere else.** (Emphasis added. Tr. pp. 70-71.)

Dr. Lewis never testified that he was unfamiliar with the standards of care applicable to this particular procedure and required of a urologist, on either a nationwide or local basis. In fact, his testimony was to the contrary in no uncertain terms.

- Q. Doctor, in your opinion, when one is employing this type of system to dilate a urethral stricture, do standards of care – appropriate standards of care require the surgeon to confirm that the filiform catheter is in the bladder before the passage of the dilator?

- A. With this particular instrument that was used, the Heyman dilator, it is incumbent upon the surgeon utilizing the kit **to make sure that they are in the bladder.** (Emphasis added; Tr. pp. 40-41.)
- Q. Now, doctor, in your opinion, would a urologist using this system for the dilation of a urethral stricture be in compliance with acceptable standards of care by not using some method such as we've outlined to in fact confirm the placement of that catheter in the bladder?
- A. This specific device, the Heyman dilator, requires confirmation of being in the bladder. (Tr. pp. 47-48.)
- Q. And you can also confirm placement, can you not – there is a green area on this filiform, isn't there?
- A. Yes.
- Q. And doesn't paragraph six of this instruction or insert identify another method by which you can confirm placement and that is by confirming that this green area is at the end of the penis?
- A. I would disagree, because in the last line, it says, this usually signifies that the distal or closed end is in the bladder. But the word usually does not mean definitely. It suggests that it could be there. But as I indicated earlier, it could have been behind the prostate. Out of the urethra.
- Q. But this is one method that a urologist can use even according to the package insert?
- A. It's not a confirmatory method. I would disagree with that.
- Q. So you disagree with the product insert?
- A. No. I go with number two where it tells you you have to confirm **beyond a shadow of the doubt** that you're in the bladder. (Emphasis added. Tr. pp. 78-79.)

While Dr. Lewis may not employ the Bard instrument system in his own practice, that fact could only be considered by the jury in determining the weight to be given to his testimony. It is not a valid basis upon which to grant a Motion for Judgment as a Matter of Law. (Had the trial continued as it should have, Dr. Webster, the defendant's expert, would have stated pursuant to his prior deposition testimony that he doesn't use it either.)

Having established the standard of care based upon the particular characteristics of the Bard instrument system, Dr. Lewis testified that the Defendant deviated from that standard by failing to definitively confirm placement of the catheter in the bladder. The Operative Report,

dictated by the Defendant himself, expressly stated, "... the Hymen [sic.] catheter did not seem to go into the bladder area." (Tr. p. 49.) No other method was employed to confirm placement.

A. We don't know where it [the catheter] was. There's no confirmation at any time by any of the prescribed methods in the instructions that we were in fact inside the bladder. (Tr. p. 53.)

Q. From your review of this hospital chart and any of the other records you reviewed – by the way, you did have the benefit of Dr. Sharma's deposition testimony as well?

A. Yes.

Q. From your review of that, did you see any evidence that Dr. Sharma **did anything to definitively establish conclusively** and confirm that in fact that follower had gotten into the bladder?

A. No.

Q. Is the only reference you saw regarding his quote, "belief?"

A. That is correct. (Emphasis added. Tr. p. 96.)

C. The Trial Court erred in entering Judgment as a Matter of Law in favor of Defendant on the issue of proximate cause since the evidence presented by Plaintiff's expert witness was legally sufficient to permit a reasonable jury to conclude that Defendant's deviation from the applicable standard of care caused Plaintiff's injury and damages.

The Trial Court's Judgment Order makes passing reference to Plaintiff also failing to meet his burden on the issue of proximate cause (Judgment Order, Conclusions of Law, ¶ 10, 11), in complete contradiction to that Court's Findings of Fact (Judgment Order, Findings of Fact, ¶ 18, 19). Indeed, Dr. Lewis testified that Defendant's negligence in failing to confirm bladder placement of the catheter proximately caused the rectal perforation by one of two potential mechanisms.

Q. In other words, what can happen if in fact that catheter is not in the bladder and attempts of dilation occurred?

A. It's like the train leaving the track. The dilator can develop – can go through a false passage and end up anywhere behind that prostate. And we know by this case that there was a rectal injury, so the catheter did traverse through the rectum. (Tr. p. 48.)

Q. [I]s it your opinion that the most likely mechanism for this injury, to cause this injury was the fact that the catheter, the filiform was not in the bladder?

A. Yes.

Q. In other words, the train tracks were somewhere else?

A. That is correct. (Tr. p. 52.)

Q. Hypothetically, Dr. Lewis, we heard your opinion – and is it your opinion that the most likely mechanism of this injury was the catheter not being in the bladder?

A. Yes. (Tr. p. 53.)

The second potential mechanism of injury, also as a result of negligence, would be the application of excessive force to the dilator, penetrating the urethra and perforating the rectum. (Tr. pp. 54-55.)

While the Trial Court determined there was no evidence to establish proximate cause, it is unclear as to what the Trial Court based its conclusion upon. If it was due to Dr. Lewis' opinion that two potential mechanisms of injury could cause Plaintiff's injuries, the Trial Court's ruling cannot be sustained. This Court has held that a plaintiff is not required to prove that the negligence of a defendant is the *sole* cause of his injury. Syllabus Point 2, *Mays v. Chang*, 213 W. Va. 220, 579 S.E.2d 561 (2003). The Court in *Mays* observed that questions of proximate cause are fact based issues reserved for jury determination, where reasonable jurors could draw different conclusions from the evidence. *Mays, Supra.*, at 213 W. Va. 220, 224-225.

Likewise, in *Stewart v. George*, 216 W. Va. 288, 607 S.E.2d 394 (2004), this Court reversed a summary judgment in favor of the defendant where the plaintiff's expert witness could not identify the precise cause of the infection causing the plaintiff's ultimate injury.

The Appellees emphasize that Dr. O'Grady also observed that he could not identify the precise cause of the infection and that other factors could not be excluded as contributing causes. As explained above, however, the possibility that other causes contributed to the ultimate injury does not warrant a summary judgment [or in this case, judgment as a matter of law] in favor of the Appellees. This Court has consistently observed that a plaintiff is not required to prove that the negligence in question was the *sole* proximate cause of an injury. ...

This Court has also consistently recognized that questions of proximate cause are often fact-based issues best resolved by a jury. The uncertainties

implicit in this medical record are prime territories for jury determination. *Stewart, Supra.*, at 216 W. Va. 288, 293.

The uncertainties implicit in the record of the present case warrant the same conclusion.

D. The Trial Court erred when it failed to submit the case to the jury under the evidentiary doctrine of *res ipsa loquitur*.

This Court established the requirements for the application of the evidentiary doctrine of *res ipsa loquitur* in the case of *Foster v. City of Keyser*, 202 W. Va. 1, 501 S.E.2d 165 (1997), at Syllabus Point 4 as follows:

Pursuant to the evidentiary rule of *res ipsa loquitur*, it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

The Trial Court erroneously based its decision that *res ipsa loquitur* was unavailable in this action upon the prior case of *Farley v. Meadows*, 185 W. Va. 48, 404 S.E.2d 537 (1991), where in Syllabus Point 2, the Court stated:

The doctrine applies only in cases where defendant's negligence is the **only** inference that can reasonably and legitimately be drawn from the circumstances. (Emphasis added.)

In so doing, the Trial Court failed to recognize that the holding in *Farley*, as well as all other prior cases involving *res ipsa loquitur*, was explicitly modified by this Court in its opinion in *Foster*:

The holdings of prior West Virginia cases involving *res ipsa loquitur*, including **but not limited to** Syllabus Point 2 of *Royal Furniture*, should be viewed in light of and in conformity with the holding in this opinion, and to the extent that the holding of any case is contrary, such holding is hereby modified. *Foster, Supra.*, at 202 W. Va. 1, 20-21. (Emphasis added.)

As further explained:

According to Prosser, Torts, 4th Ed., § 39, p. 211, in order to establish exclusive control it is not necessary for the plaintiff to eliminate all other possible causes of the accident. All that is required is that the plaintiff produce sufficient evidence from which a reasonable man could say that on the whole it was more likely than not that there was negligence on the part of the defendant. If the evidence establishes that it was at least equally probable the negligence was that of another, the court should refuse to submit to the jury the negligence of the defendant on the theory of *res ipsa loquitur*. *Foster, Supra.*, at 202 W. Va. 1, 16; citing *Bronz v. St. Jude's Hospital Clinic*, 184 W. Va. 594 at 598, 402 S.E.2d 263 at 267 (1991).

The expert testimony of Dr. Lewis supplied the necessary element that the injury in this case was one which would not ordinarily occur in the absence of negligence:

Q. Now, doctor, is this injury, a rectal perforation, in your opinion, a complication that would be reasonable to occur, if appropriate care is rendered using this system to do this procedure?

A. Absolutely not. (Tr. p. 51.)

Q. In the course of your review of this matter, did you search and look in the medical literature, be it Dr. Webster's chapters in Campbell's and elsewhere in dilating strictures as to whether you could find any reference whatsoever that a perforation of a rectum in performing this particular type of procedure is a known, recognized and accepted complication [which] occurs even though all due care is exercised? Did you look to find that?

A. Even using Google, I could not find any reference to rectal perforation with any type of urethral procedure.

Q. And as being an acceptable complication?

A. That is correct. (Tr. p. 105.)

As to the remaining elements, it was undisputed, and the Trial Court correctly found, that Plaintiff could not have caused his own injury since the Defendant was in sole control of the surgery at the time of the rectal perforation. (Judgment Order, Findings of Fact, ¶ 20.) Finally, it cannot be disputed that the alleged negligence of the Defendant was within the scope of his duty to Plaintiff, as every physician has the duty to exercise appropriate standards of care in the treatment of his or her patient as a matter of law. Accordingly, the Trial Court erred in granting the Motion for Judgment as a Matter of Law, as sufficient evidence in the form of expert

testimony was presented to warrant submission of the case to the jury under the evidentiary doctrine of *res ipsa loquitur*.

VI. Relief Prayed For

For the reasons set forth above, and for other reasons apparent and obvious from a review of the record, the Plaintiff Below/Appellant respectfully prays that this Court reverse the Judgment Order of the Trial Court and order of a new trial in this action so that Appellant may receive a determination of this action upon the merits from a jury of his peers.

Respectfully submitted,



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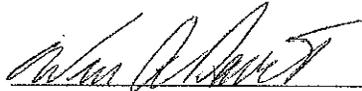
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following counsel of record via ordinary U.S. mail, postage prepaid, this 7th day of May, 2007.

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