

NO. 33308

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA
CHARLESTON

JONATHAN BRIAN WALKER,

Plaintiffs Below/Appellee,

v.

TARA C. SHARMA, M.D.,

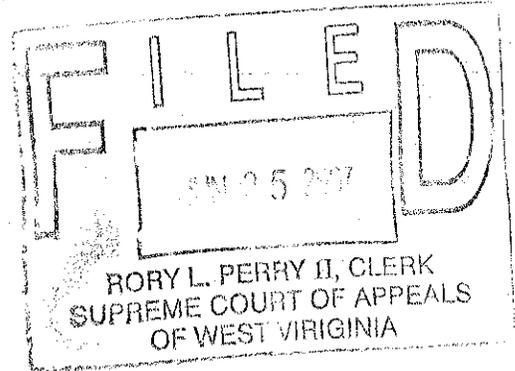
Defendant Below/Appellant.

FROM THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

Now comes Plaintiff Below/Appellant Jonathan Brian Walker, by and through counsel, and hereby respectfully submits his Reply Brief to the Brief filed by Appellee in this Appeal. In summary, Appellee's Brief consistently misstates and misrepresents the evidence of record in the Trial Court, thereby advancing arguments and drawing conclusions unsupported by the evidence. These inaccuracies, misstatements and the erroneous conclusions drawn will be discussed in concise fashion below.

A. The Statement of Facts in Appellee's Brief Misstates the Evidence Presented in the Trial of this Action.

Appellee's Statement of Facts contains a number of significant misstatements and inaccuracies regarding the evidence of record at trial. To begin with, the "Appendix" attached to Appellee's Brief contains three pages of medical illustrations purporting to illustrate the anatomy involved and surgical procedure employed to release a urethral stricture. Not only are none of these illustrations part of the record of evidence presented at trial, but Appendix A 2, purporting to illustrate surgical technique, has nothing to do with the actual technique involved in this case, namely, the use of the Bard Heyman instrument system for the obstructed urethra. As no explanatory text is provided, it is unclear what this illustration is demonstrating, but it appears to show a cystoscope, containing some type of stent, traversing a urethral stricture. The evidence in case was undisputed that Dr. Sharma never passed his cystoscope through Brian Walker's stricture.

Appellee's Statement of Facts attempts to describe the placement of the catheter [filiform] into the bladder guided by the cystoscope, "successful" placement of the catheter into the bladder, "release" of the scar tissue, passage of the cystoscope into the bladder for injection of saline and tearing of scar tissue into the rectum. (Statement of Facts, p. 4.) None of these

contentions are supported by the record. In fact, defendant's own dictated Operative Report, which he signed on two separate occasions for both the hospital chart and his office chart and never corrected, as well as his discovery deposition, document to the contrary. The Report states unequivocally that the "catheter did not seem to go into the bladder." While defendant conveniently claims the same typographical error, the use of the word "not," afflicts both reports (Statement of Facts, p. 5), no evidence of such an error appears in the record.

While the catheter was passed through the cystoscope, the scope was never passed beyond the beginning of the stricture and the catheter was simply passed into each of two apparent openings by feel. No evidence exists that the catheter was "successfully" passed into the bladder; Dr. Lewis' testimony and the ultimate result of rectal perforation establish that failure without dispute. The tearing sensation described was the perforation of the dilator [follower] into the rectum, and when the cystoscope was advanced, as described by defendant into a "cavity" with no "bladder landmarks," that cavity was the interior of the rectum, as evidenced by the irrigating fluid seen exiting the anus. As per the surgeon's Operative Report from the colostomy and defendant's own deposition testimony, no question exists that there was a perforation of the rectum.

B. Contrary to Appellee's Assertions, Plaintiff's Expert Witness Did Not "Assume" the Standard of Care Required for the Performance of Plaintiff's Surgery. Plaintiff's Expert Witness Testified Unequivocally that the Standard of Care in the Use of the Bard Instrument System Required Definitive and Objective Confirmation of Catheter Placement Within the Bladder.

In an attempt at persuasion by repetition, Appellee's Brief repeatedly claims that the Plaintiff's expert witness Dr. Lewis could only "assume" what the national standard of care in the use of the Bard instrument system required, since he did not personally employ this particular

instrument system in his own practice. (Appellee's Brief, pp. 5, 6, 11-12.) Nothing could be further from the truth.

Appellee's assertion is based solely upon one excerpt from the cross-examination of Dr.

Lewis:

- 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.)

The Trial Court expressly and correctly found 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 pursuant to W. Va. Code §55-7B-7. (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 confirmed that each and every opinion he held and would offer at trial was to a reasonable medical probability. (Tr. p. 40.)

While Dr. Lewis may not have employed 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. Indeed, the defendant's own expert witness did not use this instrument system either. In addition to his education, training, experience and knowledge of the pertinent anatomy, Dr.

Lewis researched the use of the Bard instrument system, and obtained and studied the instrument set (Plaintiff's Exhibit 4), including the manufacturer's instructions for its proper use, 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.) Those instructions specifically set forth several methods for the surgeon to confirm catheter placement in the bladder, such as: (1) either the guidewire could be removed from the catheter allowing observation of a flow of urine through it; or (2) radiopaque dye could be injected through the catheter and an x-ray taken confirming its location in the bladder. (Tr. p. 47.)

Dr. Lewis 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. He clearly testified that appropriate standards of care in the use of this particular instrument system required the surgeon to definitively and objectively confirm the presence of the catheter within the bladder before advancing the dilators over that catheter through the stricture.

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.)

C. Contrary to Appellee's Assertions, Plaintiff's Expert Witness Testified Without Any Reservation that the Defendant Deviated From the Required Standard of Care in the Use of the Bard Instrument System by his Failure to Definitively and Objectively Confirm Catheter Placement Within the Bladder.

Appellee claims that Plaintiff presented no evidence that the defendant deviated from appropriate standards of care and offered only hypothetical opinions. Such a claim ignores the evidence in the record. Dr. Lewis 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). Since he of course was not present at the time of the surgery, proper trial procedure required questions to elicit his opinions be posed in the form of hypothetical questions, assuming that the information contained in the medical records and other materials reviewed to be true.

Dr. Lewis testified without any equivocation that defendant deviated from acceptable standards of care due to his failure to definitively confirm by any method that the catheter in fact had been placed in Plaintiff's bladder before blindly passing the dilators up the urethra. As previously noted, Dr. Lewis pointed out 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.) This written admission by defendant alone would be sufficient for the jury to find negligence.

Plaintiff's expert testified that 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.)

In summary, defendant was negligent in doing nothing to confirm that the catheter was in the correct location:

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.)

D. Contrary to Appellee's Assertions, Plaintiff's Expert Witness Testified that the Defendant's Deviation From the Required Standard of Care in his Failure to Definitively and Objectively Confirm Catheter Placement Within the Bladder Caused Plaintiff's Rectal Perforation.

Appellee further claims that Plaintiff presented no evidence that a deviation by defendant from appropriate standards of care caused Plaintiff's injury and offered only hypothetical opinions. Such claim again ignores the evidence in the record. Dr. Lewis stated:

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.)

E. Contrary to Appellee's Assertions, the Concept of "Multiple Methods of Treatment" is Irrelevant to this Action.

While it is correct that where multiple acceptable methods of treatment exist to treat a particular condition, a defendant in a medical negligence action may properly adopt one of those methods, the "multiple methods" doctrine has nothing to do with this case or the issues in this Appeal. This case did not involve the use of other techniques or instruments to relieve a urethral stricture; it involved the proper use of the Bard instrument system. Plaintiff's expert witness testified that the defendant deviated from appropriate standards of care in failing to employ the instrument set in the proper manner by failing to do anything to confirm bladder placement of the catheter. No evidence of any other proper method of using these instruments exists in the record.

If defendant wished to present evidence that the technique he employed in the use of these particular instruments was an acceptable alternative, such evidence might be considered by the jury, but the erroneous ruling of the Trial Court intervened.

F. Contrary to Appellee's Assertions, Ample Evidence Exists in the Record for the Trial Court to have Instructed the Jury on the Evidentiary Doctrine of *Res Ipsa Loquitur*.

Plaintiff will not belabor this issue, as the fact that the Trial Court erred in failing to alternatively submit this case to the jury under the evidentiary doctrine of *res ipsa loquitur* has

been fully discussed in his original Brief. Not only did Plaintiff's expert witness testify that defendant deviated from appropriate standards of care in failing to confirm proper catheter placement, but he also testified that with the proper use of this particular instrument system, rectal perforation is not a complication that would 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.)

Accordingly, the elements for the application of the doctrine set forth in *Foster v. City of Keyser*, 202 W. Va. 1, 501 S.E.2d 165 (1997), have been met, as evidence was admitted in the record that:

- (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, as 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.); and
- (c) the indicated negligence was within the scope of the defendant's duty to the 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.

Appellee's claim that Dr. Lewis "Googled" his opinion in this regard is a complete misstatement of the evidence of record. The witness simply testified that after an exhaustive search of the medical literature, including an internet search, in an attempt to find some reference that this injury was an acceptable complication of this surgery under these circumstances, he could find none:

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.)

THEREFORE, for the reasons set forth above and in the original Brief of Appellant, 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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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 20th day of June, 2007.

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