

COURT WATCH

FROM THE OFFICES OF FLAHERTY, SENSABAUGH & BONASSO, PLLC.

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Walker v. Sharma, Appeal No. 33308

Appeal from the Circuit Court of Cabell County to the West Virginia Supreme Court of Appeals

TOPIC: Whether the trial court properly granted the defendant judgment as a matter of law by determining that the plaintiff did not present standard of care and causation testimony?

In *Walker v. Sharma*, the plaintiff brought a medical malpractice suit against a urologist alleging that the urologist deviated from the standard of care in his performance of a surgical procedure and thereby caused permanent injury to the plaintiff. The case proceeded to trial. After the plaintiff presented and rested his case-in-chief, defendant moved for judgment as a matter of law, pursuant to Rule 50 of the West Virginia Rules of Civil Procedure.¹ The trial court granted the physician's motion and dismissed the action during the middle of trial. The trial court granted the motion to dismiss because it found that the plaintiff failed to present adequate expert testimony regarding standard of care and causation.²

The plaintiff appealed the trial court's ruling to the West Virginia Supreme Court of Appeals. On September 19, 2007, the Supreme Court of Appeals heard the parties' arguments. Plaintiff contends that his expert urologist testified regarding the national standard of care and the defendant's deviation from that standard. In addition, plaintiff asserts that his expert testified that the defendant's deviation from the standard of care caused the plaintiff's injury. Finally, plaintiff claims that his case should have proceeded to the jury on the doctrine of *res ipsa loquitur*.³

Defendant physician interprets plaintiff's expert's testimony differently, and, therefore, defendant asserts that plaintiff did not present evidence regarding standard of care or causation. Specifically, defendant argues that the plaintiff's expert testified that he was not familiar with the standard of care in West Virginia, but "assumed" that it would be the same as "anywhere else." In addition, defendant argues that plaintiff's expert testified that he had never used the surgical method that the defendant used in this case and could not offer any deviation opinion because he lacked fundamental knowledge of the procedure. Finally, defendant asserts that the doctrine of *res ipsa loquitur* does not apply because the plaintiff did not establish the elements of *res ipsa loquitur*.⁴

¹ "Judgment as a matter of law" means "[a] judgment rendered during a jury trial – either before or after the jury's verdict – against a party on a given issue when there is no legally sufficient basis for a jury to find for that party on that issue." *Black's Law Dictionary*, 847 (7th ed. 1999).

² Section 55-7B-3 of the MPLA requires a plaintiff to offer proof of a deviation from the standard of care and causation to prove a prima facie case of medical negligence.

³ "*Res ipsa loquitur*" means "[t]he doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case." *Black's Law Dictionary*, 1311 (7th ed. 1999).

⁴ According to defendant, to prove *res ipsa loquitur*, the plaintiff must establish that (1) the event is the kind which ordinarily does not occur in the absence of negligence, (2) other responsible causes, including the conduct of the

Besides considering the parties' arguments, the West Virginia Supreme Court of Appeals will review the trial transcripts before rendering its decision. Additional Court Watch summaries will be provided as this case develops.

plaintiff and third persons, are sufficiently eliminated by the evidence, and (3) the indicated negligence is within the scope of the defendant's duty to the plaintiff. *Kyle v. Dana Transport, Inc.*, -- S.E.2d --, 2007 WL 1461163 (W. Va. 2007).