

[J-166A & B-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

PATRICIA QUINBY, EXECUTRIX OF THE ESTATE OF JOHN QUINBY, DECEASED	:	No. 20 MAP 2005
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	:	Appeal from the Order of the Superior
	:	Court entered on April 23, 2004, at No.
v.	:	2382 EDA 2003, reversing the Order
	:	entered on June 17, 2003 by the Court of
PLUMSTEADVILLE FAMILY PRACTICE, INC., D/B/A PLUMSTEADVILLE FAMILY PRACTICE, AND CHARLES BURMEISTER, M.D., AND MILLIE WELSH, R.N.	:	Common Pleas of Bucks County, at No.
	:	98-0000-32-20-2 and remanding for
	:	further proceedings.
	:	
	:	850 A.2d 667 (Pa. Super. 2004)
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	:	ARGUED : May 18, 2005
APPEAL OF: MILLIE WELSH, R.N.	:	RESUBMITTED: September 28, 2006
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APPEAL OF: CHARLES BURMEISTER, M.D.	:	ARGUED: May 18, 2005
	:	RE-SUBMITTED: September 28, 2006
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CONCURRING AND DISSENTING OPINION

I join the disposition of evidentiary matters in Part III of the majority opinion, and I agree with the majority's holding that the trial court erred by denying Mrs. Quinby's request for a charge permitting negligence to be inferred under the doctrine of res ipsa loquitur. I respectfully differ, however, with the majority's conclusion that there was no reasonable dispute at trial concerning whether Mr. Quinby's fall was due to negligence, see Majority Opinion, slip op. at 14-15, and with its holding that judgment notwithstanding the verdict should be entered on the negligence question, see id. at 22.

The majority aptly describes the governing legal principles. Of particular importance here are the general functioning of res ipsa loquitur as an evidentiary rule supporting a permissive inference of negligence, accord Gilbert v. Korvette, Inc., 457 Pa. 602, 611, 618, 327 A.2d 94, 99, 103 (1974), and its enhanced role as effectively establishing a mandatory presumption in exceptional circumstances, where the question of negligence is not reasonably subject to competing conclusions, see id. at 618, 327 A.2d at 103. My primary difference with the majority concerns whether the circumstances in this case fall within the general rule, or the narrow category of exceptional circumstances.

In this regard, the Court has previously explained that, to rebut the inference of negligence in a res ipsa case (and thus to advance a factual question), the defendant need not identify the cause of the accident giving rise to litigation, but instead, may rely on evidence supporting a conclusion that he exercised due care. See, e.g., Miller v. Hickey, 368 Pa. 317, 332, 81 A.2d 910, 917 (1951); Bender v. Welsh, 344 Pa. 392, 395, 25 A.2d 182, 184 (1942). At the trial of this case, several defense witnesses testified that Mr. Quinby was positioned on his back in the center of the examination table, and a defense expert testified that Dr. Burmeister complied with the standard of care in this

placement, with no reason to expect that the patient would be able to move himself or to fall. See N.T. February 4, 2003, at 750. In these circumstances, while again, I agree that Mrs. Quinby was entitled to a res ipsa instruction and the associated, permissible inference of negligence, I do not believe that the matter should be removed entirely from the province of the jury as fact-finder. See generally Moure v. Raeuchle, 529 Pa. 394, 402, 604 A.2d 1003, 1007 (1992) (explaining that, in reviewing a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the verdict winner, affording it the benefit of every reasonable doubt and resolving conflicts in testimony in its favor).

Indeed, in my view, the majority's decision impliedly discounts the testimony of fact witnesses and/or the defense evidence concerning the applicable standard of care. As to the former, I would follow the general approach leaving credibility assessments to the fact-finder; as to the latter, the evidence seems better suited to review under the standards governing the admissibility of expert testimony than to rejection under res ipsa theory.

For the above reasons, I would reverse entirely the Superior Court's entry of judgment notwithstanding the verdict in favor of Mrs. Quinby and remand for a new trial on liability and damages.