No. 33183 *David R. Kyle v. Dana Transport, Inc., a New Jersey corporation authorized to do business in West Virginia, and Ronnie Doddrill*

FILED
June 11, 2007
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

I join in the well-reasoned majority opinion and write separately to emphasize two points.

First, a plaintiff is not required to *prove* the elements of *res ipsa loquitur* to a trial court in the context of a summary judgment motion. Rather, the plaintiff must *point to some evidence* that would permit a reasonable jury to find that the elements of *res ipsa loquitur* had been established. The credibility and weight to be given to such evidence, and the inferences to be drawn from the evidence, are entirely within the province of the jury.

In the instant case, there was *no* evidence proffered upon which a jury could make the requisite finding. However, had the plaintiff been able to call an expert who could testify that accidents of this sort are likely the result of superior negligence by the person who owned and operated the breaker box, and not third parties or the plaintiff, then a sufficient evidentiary proffer would have had to have been be laid for the jury to receive a *res ipsa loquitur* instruction.

Second, I want to point out that this Court's opinion in *Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (1997) made it clear that to apply *res ipsa loquitur* in West Virginia, the "sufficient elimination" of a plaintiff's conduct as a cause of the accident does not require evidence tending to show that the plaintiff had *no* responsibility for the

accident. Rather, in a modified comparative negligence state like West Virginia, it is necessary for the plaintiff to adduce evidence that tends to show that the plaintiff's negligence was less than 50% of the causation of the accident. *See Foster*, 202 W.Va. at 19, n.11, 501 S.E.2d at 183, n.11.

Accordingly, I concur.