

FILED

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Chief Justice concurring:

I am writing separately to express my agreement with the result and the reasoning contained in the majority opinion, as well as my concern with the addition of new Syllabus points 4 and 6. The standard of *res ipsa loquitur* is well-settled in this State as demonstrated by our prior holdings. Thus, the new syllabus points are unnecessarily duplicative and should *not* have been included in the majority's opinion.

As the majority correctly stated, the elements of the *Foster* test have not been satisfied. Consequently, the decision of the circuit court should be affirmed. Specifically, the appellant has not satisfied the first prong of showing the event is of a kind which ordinarily does not occur in the absence of negligence, because the evidence in the record does not establish the injury occurred from negligent conduct of the plaintiff. Rather, other conditions may have contributed to the electrocution of the appellant. Also, the appellant has not satisfied the second prong of sufficiently eliminating other responsible causes, including the conduct of the appellant and third persons. The evidence produced does not show how the electrical panel was maintained nor who had previously worked on the panel.

The circuit court correctly decided these issues considering the evidence

presented. Simply put, the prongs of the *Foster* test were not satisfied by the appellant. The syllabus points that address standards and rules regarding summary judgment and *res ipsa loquitur* as mentioned in prior cases decided by this Court are legally sound and necessarily applicable in formulating the majority's decision. However, the addition of new Syllabus points 4 and 6, which also address the application of *res ipsa loquitur* and summary judgment are merely restatements of this Court's prior holdings. In this respect, new Syllabus point 4, addressing circumstantial evidence, restates Syllabus point 2 of *Farley v. Meadows*, 185 W. Va. 48, 404 S.E.2d 537 (1991), which the majority quotes in its Syllabus point 5. Similarly, new Syllabus point 6 basically reiterates the three-part standard for establishing *res ipsa loquitur* enumerated by this Court in Syllabus point 4 of *Foster v. City of Keyser*, 202 W. Va. 1, 501 S.E.2d 165 (1997), to which the majority cites in Syllabus point 3 of its opinion. This is unnecessary duplication and does nothing to clarify the law.

In conclusion, I agree with the majority's decision and reasoning as to the affirmance of the circuit court's ruling. However, I do not believe the inclusion of new Syllabus points 4 and 6 are necessary to the resolution of this case. Most importantly, I am concerned that the new Syllabus points 4 and 6 set out in the majority opinion may be utilized to cause confusion to a well-settled area of the law.

As such, I respectfully concur.