No. 99028-0

SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR R. SOUCY, an individual,
Respondent,

v.

DAVID L. GILBERTSON, DC, an individual, and MILLCREEK CHIROPRACTIC CLINIC,
Petitioners,

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is Arthur R. Soucy, plaintiff in the trial court and appellant in the Court of Appeals.

II. ISSUE PRESENTED FOR REVIEW

Whether it is proper to instruct a jury on *res ipsa loquitur* when substantial evidence shows that the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence.

III. STATEMENT OF THE CASE

A. Factual Background

On January 24, 2014, Arthur Soucy visited Dr. David Gilbertson's chiropractic clinic to receive treatment for ongoing neck pain.[1] Because prior treatment had been ineffective, Dr. Gilbertson decided to try something new: the "occipital lift."[2] RP (Smith) Vol. I at 103:20–22. Dr. Gilbertson had never before performed the occipital lift on Mr. Soucy. *Id.* at 6:2–4, 41:22–24.

[1] The reports of proceedings in this case were filed as two separate sets. The first set, numbered I through V, was prepared by Jennifer L. Smith. A second set, numbered I and II, was prepared by Eileen E. Sterns. For clarity, the parties cite to "RP (Smith)" for the volumes by Ms. Smith and to "RP (Sterns)" for the volumes by Ms. Sterns.

[2] The "occipital lift" is also known as the "Chrane condyle lift" or the "occipital condyle lift." RP (Smith) Vol. I at 6:7–9. The Court of Appeals opted to use the term "occipital lift" in its opinion, and Respondents do so here.

When Dr. Gilbertson attempted the occipital lift, Mr. Soucy felt "a tear, like a small muscle tear." RP (Smith) Vol. IV at 500:9–10. About three to six seconds after the first occipital lift, Dr. Gilbertson attempted a second one. *Id.* at 500:11–14. Mr. Soucy felt "the same exact weird . . . [t]ear." *Id.* at 500:15–17.

Afterwards, Mr. Soucy became "woozy" and told Dr. Gilbertson he was feeling "weird." RP (Smith) Vol. IV at 501:5–9. This was the first time Mr. Soucy had ever told Dr. Gilbertson that he felt weird or woozy after treatment. *Id.* at 503:10–17. Even so, Dr. Gilbertson told Mr. Soucy that the feeling was not unusual and had him go out to the waiting room. *Id.* at 501:23–25, 502:20–503:1.

Mr. Soucy's walk to the waiting room was like being on an "amusement ride," *id.* at 503:2–4, and he "had to really concentrate on making . . . [his] right leg move", *id.* at 504:4–5. In the waiting room, Mr. Soucy felt "extremely dizzy," began having cold sweats, and became nauseous. *Id.* at 504:17–505:1. He tried throwing up, but he could not. *Id.* at 505:14–17.

Mr. Soucy told Dr. Gilbertson that he did not feel right and that he thought he was having a stroke. *Id.* at 507:12–14. Mr. Soucy felt like he "was having a hard time speaking," having "a hard time finding [his words]," and that he "was really having to concentrate the same way [he]

did with [his] leg." *Id.* at 506:24–507:8. Dr. Gilbertson shared Mr. Soucy's concern and called 911. RP (Smith) Vol. I at 7:5–6, 106:9–21.

At the hospital, consistent with Mr. Soucy's and Dr. Gilbertson's concerns, Mr. Soucy was diagnosed with having suffered a stroke. RP (Sterns) Vol. I at 194:2–4, 200:13–17. Mr. Soucy's treating vascular neurologist, Dr. William Likosky, concluded that the stroke was caused by blood clots emanating from tears, or dissections, in Mr. Soucy's vertebral arteries. *Id.* at 199:13–201:3. None of the doctors who treated Mr. Soucy that day found any preexisting conditions in Mr. Soucy's vertebral arteries. Ex. 192, 202; RP (Sterns) Vol. I at 261:4–9. Rather, Dr. Likosky concluded that the tears in Mr. Soucy's vertebral arteries were caused by the occipital lifts Dr. Gilbertson attempted on Mr. Soucy. *See* RP (Sterns) Vol. I at 218:8–16, 243:5–15, 268:4–7.

Dr. Gilbertson and each of the chiropractic experts at trial—Dr. Thomas Renninger and Dr. Laurin McElheran—testified that a properly performed chiropractic adjustment, including the occipital lift, cannot cause a tear in a healthy vertebral artery. RP (Smith) Vol. I at 8:11–22 (Dr. Gilbertson); RP (Smith) Vol. II at 157:7–18 (Dr. Renninger); RP (Sterns) Vol. II at 655:25–656:3 (Dr. McElheran). However, Mr. Soucy's experts were limited in their ability to opine on whether Dr. Gilbertson properly performed the occipital lift because there was no visual evidence

of Dr. Gilbertson's treatment of Mr. Soucy. *See* RP (Sterns) Vol. I at 223:23–224:3; RP (Smith) Vol. II at 171:10–20, 181:5–7, 193:15–17. Only Mr. Soucy and Dr. Gilbertson were in the exam room at the time of treatment, and though Mr. Soucy could feel some of what Dr. Gilbertson was doing, he could not see what Dr. Gilbertson was doing to him. RP (Smith) Vol. IV at 499:10–11.

B. Procedural History

Based on this evidence, Mr. Soucy moved the court to issue Washington's pattern jury instruction on *res ipsa loquitur* (WPI 22.01):

> If you find that:
>
> (1) the occurrence producing the injury is of a kind that ordinarily does not happen in the absence of someone's negligence; and
>
> (2) the injury was caused by an agency or instrumentality within the exclusive control of the defendant
>
> then, in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the defendant was negligent and that such negligence produced the injury complained of by the plaintiff.

See CP 192. The trial court ultimately chose not to issue the instruction, and the jury returned a verdict for Dr. Gilbertson on the issue of negligence, not reaching causation or damages. *See* Supp. CP 228–29.

The Court of Appeals reversed the trial court's decision not to issue the instruction and remanded the matter for a new trial.

IV. ARGUMENT

A. Standard of Review.

RAP 13.4(b) identifies four bases upon which this Court will accept a petition for review, none of which are satisfied here:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

B. The Court of Appeals' Decision Does Not Conflict With Any Supreme Court or Other Court of Appeals Decision.

1. The Standard for Issuing a Jury Instruction Is Whether There Is "Substantial Evidence" to Support It.

As the Court of Appeals correctly stated, "[a] party is entitled to a jury instruction only if it has offered substantial evidence to support the instruction." App. 4 (quoting *Cooper v. Dep't of Labor & Indus.*, 188 Wn. App. 641, 647–48, 352 P.3d 189 (2015)).[3] This standard applies whenever a court has to decide whether to give a jury instruction. *See, e.g.*, *Fergen v. Sestero*, 182 Wn.2d 794, 810, 346 P.3d 708 (2015) ("If a

[3] "App." refers to the Petitioners' Appendix to their Petition.

party's theory of the case is supported by substantial evidence, he or she is entitled to have the court instruct the jury on it."); *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002) ("Jury instructions are sufficient if they are supported by substantial evidence . . . .").

The Court of Appeals also correctly stated that it must "view the evidence in the light most favorable to the instruction's proponent" in assessing whether there is substantial evidence. App. 4 (citing *Mina v. Boise Cascade Corp.*, 37 Wn. App. 445, 448, 681 P.2d 880 (1984), *aff'd*, 104 Wn.2d 696, 710 P.2d 184 (1985)). Viewing the evidence in the light most favorable to the instruction's proponent is not something that is unique to *Mina*. This Court has done the same in other cases. *See, e.g.*, *State v. Fernandez-Medina*, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000) ("When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.").

No Washington court has held that a different standard applies to *res ipsa loquitur* instructions. On the contrary, Washington courts have applied the same substantial evidence standard in cases involving *res ipsa loquitur*. *See, e.g.*, *Brown v. Dahl*, 41 Wn. App. 565, 582, 705 P.2d 781 (1985) ("When, as here, each of the elements of res ipsa loquitur are

supported by substantial evidence . . . plaintiffs are entitled to a res ipsa loquitur instruction.").

Moreover, taking the evidence in the light most favorable to the proponent is consistent with how *res ipsa loquitur* has been applied in the face of conflicting evidence. This Court has consistently held that a *res ipsa loquitur* instruction is appropriate even when the defendant offers evidence that, if believed by the jury, would explain how the plaintiff's injury occurred. *Pacheco v. Ames*, 149 Wn.2d 431, 440, 69 P.3d 324 (2003); *ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wn.2d 12, 22, 499 P.2d 1 (1972); *Kemalyan v. Henderson*, 45 Wn.2d 693, 704, 277 P.2d 372 (1954); *see also Douglas v. Bussabarger*, 73 Wn.2d 476, 487, 438 P.2d 829 (1968); *Pederson v. Dumouchel*, 72 Wn.2d 73, 82, 431 P.2d 973 (1967). This is so, even where the defendant offers "weighty, competent and exculpatory" evidence in defense. *Pacheco*, 149 Wn.2d at 440; *ZeBarth*, 81 Wn.2d at 22. Conflicting evidence merely becomes an issue of fact for the jury to resolve. The Court of Appeals, consistent with binding case law, applied the correct standard here.

2. The Court of Appeals Correctly Considered Whether the Accident or Occurrence Producing the Injury Is of a Kind Which Ordinarily Does Not Happen Absent Negligence.

In seeking review of the Court of Appeals' decision, Petitioner specifically challenges the Court of Appeals' analysis of the first element

of *res ipsa loquitur*. *See* Pet. at 11–20. That element has always been articulated as: "the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence." *Pacheco*, 149 Wn.2d at 436 (quoting *Zukowsky v. Brown*, 79 Wn.2d 586, 593, 488 P.2d 269 (1971)); *accord Douglas*, 73 Wn.2d at 482; *Pederson*, 72 Wn.2d at 81; *Horner v. N. Pac. Beneficial Ass'n Hosps.*, Inc., 62 Wn.2d 351, 359, 382 P.2d 518 (1963). As this Court noted in *Horner*, the *res ipsa* elements go all the way the way back to 1863 to the case of *Byrne v. Boadle*, 159 Eng. Rep. 299, 2 H. & C. 722 (1863), the original English opinion announcing the doctrine. *Horner*, 62 Wn.2d at 359, 361.

Contrary to over 150 years of case law, the Petitioners now attempt to rephrase the first *res ipsa* element as whether "the injury ordinarily is caused by negligence." *See* Pet. at 1; *see also id.* at 11, 15, 19. No court has ever articulated the first *res ipsa* element this way, and indeed, the Petitioners fail to cite any cases that do so.

This Court has consistently inquired, not whether the *injury* is ordinarily *caused* by negligence, but whether "the *accident or occurrence producing the injury* is of a kind which ordinarily does *not* happen in the *absence* of someone's negligence." *Pacheco*, 149 Wn.2d at 436 (quoting *Zukowsky*, 79 Wn.2d at 593) (emphases added).

So it was that this Court concluded in *ZeBarth* that "a patient who receives a course of radiation therapy to the area of the lungs and trachea does not come out of the treatment paralyzed from the waist down without the intervention of negligence." 81 Wn.2d at 20. The Court so concluded even though "defendant presented weighty, competent and exculpatory proof of due and reasonable care and prudence." *Id.* at 22.

Likewise, in *Pacheco*, this Court concluded that "the act of drilling on the wrong side of a patient's jaw would not ordinarily take place without negligence." 149 Wn.2d at 439. In reaching this conclusion the Court noted that "[e]ven where the defendant offers weighty, competent and exculpatory evidence in defense, the doctrine may apply." *Id.* at 440, 444.

In *Douglas*, this Court concluded that coming out paralyzed from the waist down after surgery to repair a stomach ulcer "would not occur in the absence of someone's negligence." 73 Wn.2d at 482. The Court so concluded even though there was evidence of a non-negligent cause of the paralysis. *Id.* at 485.

In *Pederson*, this Court identified the issue as whether the injury "ordinarily would not have been reached unless someone was negligent," and it concluded that the inference was permitted when the patient did not "awaken from a general anesthetic for almost a month, and then with

apparent brain damage[.]" 72 Wn.2d at 81–82. Again, the Court did so despite evidence of an alternative cause of the injury. *Id.* at 82 (acknowledging that "plaintiff had been in a serious automobile accident").

Finally, in *Horner*, this Court concluded that paralysis following surgery "would not have been produced but for the negligent acts or overt omissions of someone acting for the [defendant] in the performance of this operation." 62 Wn.2d at 361. Once again, the Court so concluded despite the defendant's explanations "of the many ways in which such paralysis might be induced." *Id.* at 360.

Following the analytical framework set forth by this Court, the Court of Appeals correctly concluded that substantial evidence showed that performing the occipital lift ordinarily does not cause vertebral artery tears or dissections in the patient absent negligence. The first *res ipsa* element is satisfied as a matter of law when "proof by experts in an esoteric field creates an inference that negligence caused the injuries."[4] *Pacheco*, 149 Wn.2d at 438–39 (quoting *Zukowsky*, 79 Wn. 2d at 595).

[4] *Res ipsa*'s first element can be proved in other ways, but it is not necessary to do so. *See Pacheco*, 149 Wn.2d at 438–39. The Court of Appeals therefore did not err in declining to consider other ways of proving this first element.

At trial, Dr. Gilbertson and both chiropractic experts agreed that a properly performed occipital lift cannot cause a tear in a healthy vertebral artery. RP (Smith) Vol. I at 8:11–22; RP (Smith) Vol. II at 157:7–18; RP (Sterns) Vol. II at 655:25–656:3. Dr. Gilbertson agreed that a "[p]roperly performed chiropractic manipulation on a healthy person cannot cause a tear in the neck arteries" and that it is "impossible for a properly performed Chrane condyle lift to tear a vertebral artery." RP (Smith) Vol. I at 8:14–22. Mr. Soucy's chiropractic expert, Dr. Renninger, asserted that if the occipital lift is "performed correctly, it should not cause a tear" of the vertebral arteries. RP (Smith) Vol. II at 157:7–12. Dr. Gilbertson's chiropractic expert, Dr. McElheran, agreed that the occipital lift cannot cause a vertebral artery dissection. RP (Sterns) Vol. II at 655:25–656:3. The Court of Appeals correctly concluded that the experts' unanimous agreement created an inference that performing the occipital lift ordinarily does not produce vertebral artery tears or dissections in the patient absent negligence. *See* App. 7.

To the extent the Petitioners had evidence supporting an alternative explanation for Mr. Soucy's injuries, that was a factual dispute for the jury to decide. *See Pacheco*, 149 Wn.2d at 441–42; *ZeBarth*, 81 Wn.2d at 22; *Douglas*, 73 Wn.2d at 487; *Pederson*, 72 Wn.2d at 82.

In sum, there is no conflict between the Court of Appeals' decision and other decisions by this Court or another Court of Appeals that requires granting review.

C. The Court of Appeals' Decision Does Not Raise Any Constitutional Issues or Issues of Substantial Public Interest.

The doctrine of *res ipsa loquitur* is well-settled, and its elements have been in place for over 150 years. There is nothing new about applying the doctrine in the health care context, so long as the elements are met. This case is a straightforward application of *ZeBarth*, *Pacheco*, *Douglas*, *Pederson*, and *Horner*. This is presumably why the Court of Appeals decided not to publish its opinion.

The Court of Appeals consulted this robust body of case law and applied it faithfully to the case before it. Nothing in the Court of Appeals' decision raises any constitutional issues or issues of substantial public interest.

For the foregoing reasons, this Court should deny review.

V. CONCLUSION

This Court should deny the petition for review.

Respectfully submitted this 15th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2020, a true and correct copy of the foregoing document was served on the following via appellate court e-filing/e-service system, and the original was filed with the Washington Court of Appeals, Division I, via e-filing:

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