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No. 79927-4-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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*ARTHUR R. SOUCY, an individual*

Appellant/Respondent,

v.

*DAVID L GILBERTSON, DC and*
*MILLCREEK CHIROPRACTIC CLINIC,*

Respondents/Petitioners.

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# PETITION FOR REVIEW

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## TABLE OF CONTENTS

**Page**


A. IDENTITY OF PETITIONERS. .......... 1

B. CITATION TO THE COURT OF APPEALS DECISION. .......... 1

C. ISSUE PRESENTED FOR REVIEW. .......... 1

D. STATEMENT OF THE CASE. .......... 2

1. Soucy had a stroke after receiving chiropractic treatment from Dr. Gilbertson. .......... 2

2. The parties agreed the stroke was the result of a thrombotic embolism, caused by a dissection in Soucy's vertebral arteries, but disagreed about the cause of the dissection and when it occurred. .......... 3

3. The trial court declined Soucy's request for a res ipsa loquitur instruction, and the jury returned a verdict for Dr. Gilbertson. .......... 6

4. The Court of Appeals held that the trial court erred by declining to give a res ipsa loquitur instruction. .......... 7

E. ARGUMENT. .......... 8

1. Where the elements are satisfied, the doctrine of res ipsa loquitur allows the jury to infer negligence and causation from the circumstances of the injury. .......... 8

2. The Court of Appeals erred by holding that the trial court should have given a res ipsa loquitur instruction despite no evidence that the injury is ordinarily caused by negligence. .......... 11

F. CONCLUSION. ........................................................................20

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*Douglas v. Bussabarger*
73 Wn.2d 476, 438 P.2d 829 (1968) ........................................ 17, 18

*Harris v. Robert C. Groth, M.D., Inc.*,
99 Wn.2d 438, 663 P.2d 113 (1983) ................................................ 8

*Horner v. Northern Pacific Beneficial Association Hospitals, Inc.*
62 Wn.2d 351, 382 P.2d 518 (1963) .............................................. 18

*Metro. Mortgage & Sec. Co., Inc. v. Washington Water Power*,
37 Wn. App. 241, 679 P.2d 943 (1984) .......................................... 10

*Mina v. Boise Cascade Corp.*,
37 Wn. App. 445, 681 P.2d 880 (1984), *aff'd*, 104 Wn.2d 696, 710 P.2d 184 (1985) ................................................... 13

*Morner v. Union Pac. R.R. Co.*,
31 Wn.2d 282, 196 P.2d 744 (1948) .............................................. 10

*Pacheco v. Ames*,
149 Wn.2d 431, 69 P.3d 324 (2003) ............................... 9, 10, 11, 17

*Pederson v. Dumouchel*
72 Wn.2d 73, 431 P.2d 973 (1967) ................................................ 18

*Ripley v. Lanzer*,
152 Wn. App. 296, 215 P.3d 1020 (2009) ..................................... 10

*Rounds v. Nellcor Puritan Bennett, Inc.*,
147 Wn. App. 155, 194 P.3d 274 (2008) .......................................... 8

*Tinder v. Nordstrom, Inc.*,
84 Wn. App. 787, 929 P.2d 1209 (1997) ........................................ 10

**Page(s)**

*ZeBarth v. Swedish Hosp. Med. Cen.*,
81 Wn.2d 12, 499 P.2d 1 (1972) ........................................ 16, 17, 18

*Zukowsky v. Brown*,
79 Wn.2d 586, 488 P.2d 269 (1971) .......................................... 9, 11

**STATUTES**

RCW 7.70.040 ........................................................................... 8

## A. IDENTITY OF PETITIONERS.

The petitioners are David L. Gilbertson and Millcreek Chiropractic Clinic, defendants in the trial court and respondents in the Court of Appeals. This petition for review will refer to Dr. Gilbertson and the clinic collectively as "Dr. Gilbertson."

## B. CITATION TO THE COURT OF APPEALS DECISION.

Petitioners seek review of the unpublished decision issued August 17, 2020, by the Washington Court of Appeals (Division 1) in *Arthur Soucy v. David Gilbertson, an individual, and Millcreek Chiropractic Clinic*, Washington Court of Appeals No. 79927-4-I. The decision is in this petition's appendix.

## C. ISSUE PRESENTED FOR REVIEW.

Is it proper to instruct a jury regarding res ipsa loquitur where the evidence permits a finding that the injury could have been caused by negligence but does not permit a conclusion that the injury ordinarily is caused by negligence?

## D. STATEMENT OF THE CASE.

### 1. Soucy had a stroke after receiving chiropractic treatment from Dr. Gilbertson.

This is a medical-negligence action brought by Arthur Soucy against his chiropractor, Dr. David Gilbertson, and Gilbertson's clinic. The jury found for Dr. Gilbertson. Soucy appealed, challenging the trial court's denial of Soucy's request for a res ipsa loquitur jury instruction. The Washington Court of Appeals, Division 1, reversed that ruling and remanded the case for a new trial.

The facts are relatively uncomplicated. Soucy began treating with Dr. Gilbertson in October 1999. (RP (Smith) Vol I at 71.)[1] In December 2013 and January 2014, Soucy sought treatment on six occasions for worsening neck pain. (RP (Smith) Vol. I at 99-101.) When Soucy's neck pain did not improve utilizing a diversified adjustment – which had

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[1] The report of proceedings was prepared by two transcribers. Smith prepared a set number volumes I-V, which were paginated consecutively. Sterns prepared a second set, numbered volumes I-II, which were also paginated consecutively. This petition for review continues the parties' convention used in the Court of Appeals to cite to the RP by identifying the transcriber, plus the volume and page.

provided Soucy relief in the past – Dr. Gilbertson tried an occipital lift adjustment, also known as the Chrane condyle lift. (RP (Smith) Vol. I at 26, 101-04.)

When Dr. Gilbertson performed the adjustment, Soucy felt a "tear, like a small muscle tear." (RP (Smith) Vol. I at 500:9-10.) After Dr. Gilbertson performed the occipital lift adjustment, Soucy became "woozy" and started feeling "weird." (RP (Smith) Vol. I at 500-02.) Soucy then went to the hospital, where he was diagnosed as having had a stroke. (RP (Sterns) Vol. I at 194:2-4, 200:13-17.)

**2. The parties agreed the stroke was the result of a thrombotic embolism, caused by a dissection in Soucy's vertebral arteries, but disagreed about the cause of the dissection and when it occurred.**

Soucy sued Dr. Gilbertson for negligence, alleging Dr. Gilbertson had negligently performed the adjustment, resulting in a stroke. (CP 216.)

The case was tried to a jury. Much of the medical testimony was not in conflict. For example, the experts agreed that post-stroke diagnostic images showed a

dissection[2] in at least one of Soucy's vertebral arteries.[3] (RP (Smith) Vol. V at 687:1-19; RP (Sterns) Vol. I at 199:13-25, 200:1-9; Ex. 202.) The experts agreed that the stroke was caused by a blood clot that had formed following the dissection of a vertebral artery and broken free, traveling to Soucy's brain. (RP (Smith) Vol. V at 690:3-5; RP (Sterns) Vol. I at 200:18-25, 201:1-3.) The experts also agreed that a dissection would not result from a properly performed chiropractic adjustment administered to a person with healthy vertebral arteries. (RP (Smith) Vol. I at 108:9-13; RP (Smith) Vol. V at 698:17-25, 700:4-7; RP (Smith) Vol. II at 157:7-14; RP (Sterns) Vol. II at 655:25, 656:1-3.)

The parties' disagreements centered on when the dissection occurred and what caused the dissection. Soucy theorized that the dissection and resulting stroke were caused by a negligently performed Chrane condyle lift. In

[2] Dissections are explained at RP (Smith) Vol. V at 683-84. In general terms, a dissection is a type of tear in a blood vessel, such as an artery.

[3] The vertebral arteries run up the spinal column to the brain. (RP (Smith) Vol. V at 680-82.)

other words, Soucy argued that the chiropractic adjustment caused a dissection, which created a clot, which broke free and migrated to Soucy's brain, resulting in a stroke. In support of that theory, Soucy presented testimony that his stroke immediately followed his chiropractic adjustment, and that a properly performed Chrane condyle lift cannot cause a vertebral-artery dissection in a person with healthy arteries, giving rise to the inference the adjustment was performed negligently.

Dr. Gilbertson's theory was that Soucy's vertebral arteries were afflicted with fibromuscular dysplasia, a connective tissue disorder of the arterial walls, which made Soucy's arteries susceptible to dissections. Thus, Dr. Gilbertson argued the dissections were caused by Soucy's fibromuscular dysplasia and not by a negligent chiropractic adjustment. In support of that theory, Gilbertson presented expert testimony that (1) vertebral-artery dissections ordinarily are caused by high blood pressure or blunt-force trauma, such as being hit with a baseball bat (RP (Smith) Vol. V at 684:17-24); (2) Soucy had fibromuscular

dysplasia in his vertebral arteries (RP (Smith) Vol. V at 709:5-7); (3) vertebral-artery dissections can occur as the result of a non-negligent chiropractic adjustment in persons having fibromuscular dysplasia in the vertebral arteries (RP (Smith) Vol. V at 699-700, 704-05); (4) it is impossible to know when Soucy's dissection occurred (RP (Smith) Vol. V at 709:8-21); and (5) the dissection could have occurred days or weeks before the stroke, with the chiropractic adjustment merely breaking free the blood clot that had formed following the dissection caused by Soucy's fibromuscular dysplasia (RP (Smith) Vol. V 709:8-21).

### 3. The trial court declined Soucy's request for a res ipsa loquitur instruction, and the jury returned a verdict for Dr. Gilbertson.

Soucy requested a res ipsa loquitur instruction:

> If you find that:
>
> (1) the occurrence producing the injury is of 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.

(CP 192.)

The trial court declined to give the instruction.

(RP (Sterns) Vol. II at 724:4-737:6.)

The jury found for Dr. Gilbertson. (CP 28.)

#### 4. The Court of Appeals held that the trial court erred by declining to give a res ipsa loquitur instruction.

Soucy appealed, arguing the trial court erred by declining to instruct the jury regarding res ipsa loquitur. The Court of Appeals agreed, holding that the trial court erred by declining to give the instruction.

The key element of the court's decision was its application of the principle that "[i]n determining whether substantial evidence supports the instruction, [the court] must view the evidence in the light most favorable to the instruction's proponent." (Appendix at 4.)

The court decided that this principle meant that, in assessing whether the injury was ordinarily caused by negligence, the court was required to disregard all possible

causes of the injury other than the plaintiff's proposed cause. Viewing the evidence through that filter, the court decided that, if all other possible causes were disregarded, a jury could conclude a dissection and resulting stroke ordinarily do not occur in the absence of negligence. (Appendix at 8-9.)

## E. ARGUMENT.

### 1. Where the elements are satisfied, the doctrine of res ipsa loquitur allows the jury to infer negligence and causation from the circumstances of the injury.

In a medical-malpractice action, expert testimony is generally necessary to establish the standard of care, that the provider breached the standard of care, and that the breach caused the plaintiff's injury. *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983); *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 162, 194 P.3d 274 (2008); RCW 7.70.040 (requiring plaintiff to prove the defendant's failure to comply with the standard of care proximately caused the injury).

In certain rare cases, however, a plaintiff may rely on the doctrine of res ipsa loquitur to create an inference that the defendant breached the standard of care, and the breach caused the plaintiff's injury.

A res ipsa loquitur instruction is appropriate when three elements exist:

> (1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

*Pacheco v. Ames*, 149 Wn.2d 431, 436-37, 69 P.3d 324 (2003) (internal quotation marks omitted) (quoting *Zukowsky v. Brown*, 79 Wn.2d 586, 593, 488 P.2d 269 (1971)).

The doctrine recognizes that "an accident may be of such a nature, or may happen under such circumstances, that the occurrence is of itself sufficient to establish prima facie the fact of negligence on the part of the defendant,

without further direct proof." *Ripley v. Lanzer*, 152 Wn. App. 296, 307, 215 P.3d 1020 (2009).

Res ipsa loquitur relies on circumstantial evidence to prove negligence and causation: "A res ipsa loquitur case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it." *Metro. Mortgage & Sec. Co., Inc. v. Washington Water Power*, 37 Wn. App. 241, 243, 679 P.2d 943 (1984).

The policy justification for the doctrine is that "the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person." *Pacheco*, 149 Wn.2d at 436.

The doctrine is to be applied sparingly "'in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.'" *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 792, 929 P.2d 1209 (1997) (quoting *Morner v. Union Pac. R.R. Co.*, 31 Wn.2d 282, 293, 196 P.2d 744 (1948)).

Whether the doctrine applies is a question of law. *Pacheco*, 149 Wn.2d at 436.

**2. The Court of Appeals erred by holding that the trial court should have given a res ipsa loquitur instruction despite no evidence that the injury is ordinarily caused by negligence.**

The dispute about the applicability of res ipsa loquitur in this case has focused on the first element: whether the accident or occurrence producing the injury is of a kind that ordinarily does not happen in the absence of someone's negligence. *Id.* The first element is satisfied when one of three conditions exist: (1) when the act causing the injury is so obviously negligent that the negligence may be inferred as a matter of law; (2) when general experience and observation shows that the result would not be expected without negligence; or (3) when experts testifying about an esoteric field create an inference that negligence caused the injuries. *Id.* at 439 (citing *Zukowsky*, 79 Wn.2d at 595).

Here there was conflicting evidence about what caused Soucy's injury. But there was little conflict about what *could* have caused the injury. And there was similarly

little conflict about what "ordinarily" causes a dissection, leading to a stroke.

Dr. Gilbertson's primary expert testified that dissections are most often caused by high blood pressure or blunt force trauma (such as being hit by a baseball bat). There was, however, no evidence that Soucy had high blood pressure or had experienced blunt force trauma. Consequently, the "ordinary" causes of dissections were absent here. That meant the cause in this case—negligent or not—was something out of the ordinary.

There was also general agreement that both Soucy's theory and Dr. Gilbertson's theory of causation were plausible. There was evidence that a negligently performed Chrane condyle lift could cause a vertebral artery dissection. There was also evidence that fibromuscular dysplasia in the vertebral arteries could cause a dissection in the absence of anyone's negligence.

There was no testimony about which of these possible causes was more common, *i.e.*, more "ordinary."

Thus, the jury was left to decide, based on the conflicting testimony, which explanation was more likely the cause of Soucy's injury.

This is precisely how medical malpractice (and most other negligence) cases are supposed to go: after hearing the direct and circumstantial evidence, the jury weighs the evidence and decides whether the plaintiff's case has been proved by a preponderance of the evidence.

But in this case, the Court of Appeals decided that the trial court should have weighted the scales in favor of Soucy by giving a res ipsa loquitur instruction.

The Court of Appeals began with the twin propositions that a party is entitled to a jury instruction if the party has offered substantial evidence to support the instruction, and "[i]n determining whether substantial evidence supports the instruction, [the court] must view the evidence in the light most favorable to the instruction's proponent." (Appendix at 4.) In support of the latter proposition, the court cited *Mina v. Boise Cascade Corp.*, 37 Wn. App. 445, 681 P.2d 880 (1984), *aff'd*, 104 Wn.2d

696, 710 P.2d 184 (1985), which is not a res ipsa loquitur case.

From that perspective, the Court of Appeals then examined the evidence. It found that Dr. Gilbertson had presented evidence that Soucy had fibromuscular dysplasia in his vertebral arteries, and that fibromuscular dysplasia can cause dissections. (Appendix at 5.) The court also found there was evidence that Soucy did not have fibromuscular dysplasia. (Appendix at 5-6.) Thus, the jury was free to agree or disagree with Dr. Gilbertson's evidence that Soucy had fibromuscular dysplasia.

The court then reviewed the evidence for whether there was a basis for the jury to find that a negligently performed Crane condyle lift could cause a vertebral artery dissection. The court found there was some evidence to support that theory of causation.

But then the court stumbled. After finding that the jury *could* find that Soucy did not have fibromuscular dysplasia, and the jury *could* find that a negligently performed Crane condyle lift can cause a dissection, the

court concluded there was evidence sufficient to establish that a dissection and resulting stroke “ordinarily” do not happen for any reason other than negligence.

The court’s analysis was both flawed and unprecedented. The court’s review of the evidence led to the conclusion that Soucy’s injury *could* have been caused by a negligently performed adjustment, and therefore Soucy had raised an issue for the jury about negligence and causation. Dr. Gilbertson agrees with that much.

But the Court of Appeals went further and decided that evidence that the injury *could* have resulted from Dr. Gilbertson’s negligence meant the jury could find the injury *ordinarily* results from negligence. That was a logical leap too far because there was no evidence that a dissection ordinarily results from negligence. Instead, there was evidence that a dissection can result from negligence—as well as other causes that are at least equally probable.

In that regard, this case was like most other medical-malpractice actions: there were competing theories about

what caused the injury, and the jury was left to decide which was more probable.

No case supports the Court of Appeals' expansive application of res ipsa loquitur here, including the case the court cited, *ZeBarth v. Swedish Hosp. Med. Cen.*, 81 Wn.2d 12, 499 P.2d 1 (1972). In *ZeBarth* the plaintiff received radiation treatment for Hodgkin's disease, then developed paraplegia from injury to his spinal cord. Among the issues was whether radiation can cause paraplegia. The trial court gave a res ipsa loquitur instruction, and this Court affirmed on the basis that common experience, plus expert testimony, allowed the conclusion that paralysis ordinarily does not result from radiation treatment in the absence of negligence. *Id.* at 22.

In *ZeBarth*, this Court did not conduct the type of analysis performed by the Court of Appeals in this case. In other words, it did not first discount all alternative theories of causation before assessing whether the evidence supported a finding that the injury ordinarily did not occur in the absence of negligence. Instead, it reviewed the full

spectrum of evidence and was persuaded by both "the testimony of experts in an esoteric field" as well as "the general and ordinary experiences of mankind that people do not emerge from a course of radiation therapy paralyzed from the waist down unless there has been negligence in the treatment." *Id.*

The holding in *ZeBarth* is consistent with this Court's other applications of res ipsa loquitur, where it has confined the doctrine to instances where negligence is the *ordinary* cause of the injury, and not merely one of many *possible* causes.

In *Pacheco*, for example, this Court held that the first element of res ipsa loquitur was met by a dentist who drilled on the wrong side of a patient's jaw. The Court reasoned that it was within the general experience and observation of mankind that drilling on the wrong side of a patient's jaw does not happen in the absence of negligence. 149 Wn.2d at 439.

Similarly, in *Douglas v. Bussabarger*, this Court held that res ipsa loquitur applied when a plaintiff woke up

paralyzed after undergoing a surgery to repair a stomach ulcer. 73 Wn.2d 476, 484, 438 P.2d 829 (1968). The evidence showed that paralysis does not occur after stomach surgery absent negligence. *Id.*

In *Pederson v. Dumouchel*, this Court held that res ipsa loquitur applied where a patient undergoing jaw surgery awoke from anesthetic a month later with brain damage. 72 Wn.2d 73, 81-82, 431 P.2d 973 (1967). Brain damage, the Court reasoned, was not an injury that occurred in jaw surgery absent negligence. *Id.* at 81-82.

Finally, in *Horner v. Northern Pacific Beneficial Association Hospitals, Inc.*, this Court held that res ipsa loquitur applied where a patient awoke from abdominal surgery with a paralyzed arm, an injury that common knowledge holds does not normally occur in abdominal surgery absent negligence. 62 Wn.2d 351, 360, 382 P.2d 518 (1963).

Unlike the injuries at issue in *ZeBarth*, *Pacheco*, *Douglas*, *Pederson*, and *Horner*, Soucy's injury commonly occurs in the absence of negligence. It can occur because of

negligence, but it does not ordinarily occur because of negligence. Indeed, there was no evidence that a vertebral artery dissection is ordinarily caused by negligence.

In this Court's cases endorsing the use of a res ipsa loquitur instruction, the injury ordinarily did not occur in the absence of negligence. By contrast, here the evidence established only that negligence could be a cause of the injury, along with other possible causes. That was sufficient for Soucy's claim to reach the jury, but it was insufficient to permit the additional boost of a res ipsa loquitur instruction.

This case's importance is obvious. As the foregoing discussion of case law shows, res ipsa loquitur arises frequently, although this Court has not addressed it recently. If uncorrected, the decision threatens to improperly expand the spectrum of cases where res ipsa loquitur applies. No longer will the doctrine be confined to those instances where the injury ordinarily does not occur in the absence of negligence. Instead, res ipsa loquitur instructions will be allowed in cases where, after

discounting all other possible explanations, the jury *could* find that the injury was caused by negligence.

Because that has never been the law in Washington, this Court should grant review.

## F. CONCLUSION.

This Court should grant review of the decision by the Court of Appeals reversing the jury verdict and judgment.

DATED: September 15, 2020

Matthew R. Wojcik, WSBA 27918
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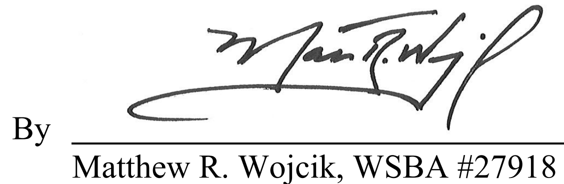

By ______________________________
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| ARTHUR R. SOUCY, an individual,<br><br>Appellant,<br><br>v.<br><br>DR. DAVID GILBERTSON, an individual, and MILLCREEK CHIROPRACTIC CLINIC,<br><br>Respondent. | No. 79927-4-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION |

CHUN, J. — Dr. David Gilbertson provided chiropractic treatment for Arthur Soucy. After the treatment, Soucy suffered a stroke. He sued, alleging that Gilbertson performed a technique that caused dissection of his vertebral arteries, which in turn caused his stroke. At trial, Soucy requested a res ipsa loquitur jury instruction, which the trial court denied. The jury returned a verdict in Gilbertson's favor. Soucy appeals. Because the trial court should have given a res ipsa loquitur instruction and its failure to do so prejudiced Soucy, we reverse and remand.

## BACKGROUND

Soucy visited Gilbertson's clinic to receive treatment for neck pain. Gilbertson had before provided treatment to Soucy for the pain, but the techniques he used had not relieved it. In the session at issue, Gilbertson twice

Citations and pin cites are based on the Westlaw online version of the cited material.

performed an occipital lift on Soucy.[1] It was the first time he had used this technique on Soucy. After each use of the technique, Soucy felt a tear in his neck. Soucy stood up and told Gilbertson he felt “woozy” and “weird.” Gilbertson performed another technique on Soucy. Soucy again told Gilbertson that he felt “woozy” and “weird.” Gilbertson told him to stay in the clinic for a few minutes. While walking to the waiting room, Soucy felt as if he had no control over his legs. After breaking out in a cold sweat and beginning to feel nauseated, Soucy walked to the restroom. He tried to vomit but could not. Soucy left the restroom to find Gilbertson’s assistant, who directed him back to Gilbertson’s office after he told her he was not feeling well. Soucy told Gilbertson he felt like he was having a stroke, and Gilbertson suspected the same. Gilbertson had his staff call 911.

A doctor diagnosed Soucy as having suffered a stroke. A later diagnosis revealed he had also suffered dissections in his vertebral arteries and fibromuscular dysplasia (FMD).[2]

Soucy sued Gilbertson, alleging the occipital lift caused his stroke. He requested a res ipsa loquitur jury instruction, which the trial court denied. The jury returned a defense verdict.

[1] The parties also call this manipulation a “Chrane condyle lift.” This technique is a high-velocity, low-amplitude maneuver intended to decompress the neck.

[2] FMD is a connective tissue disorder that may predispose a person to developing arterial dissections.

## ANALYSIS

Soucy argues the trial court erred in denying his request for a res ipsa loquitur instruction, and that this error prejudiced him. We agree.

When res ipsa loquitur applies, a plaintiff need not prove that the defendant committed any specific act of negligence. Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). The doctrine permits the jury to infer negligence "on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person." Id. Res ipsa loquitur applies when:

> (1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

Jackass Mt. Ranch, Inc., v. S. Columbia Basin Irrig. Dist., 175 Wn. App. 374, 398, 305 P.3d 1108 (2013) (quotation marks omitted) (quoting Horner v. N. Pac. Beneficial Ass'n Hosp., Inc., 62 Wn.2d 351, 359, 382 P.2 518 (1963)). A plaintiff may be entitled to a res ipsa loquitur instruction "even if the defendant's testimony, if believed by the jury, would explain how the event causing injury to the plaintiff occurred." Pacheco, 149 Wn.2d at 440. Indeed, "[e]ven where the defendant offers weighty, competent and exculpatory evidence in defense, the doctrine may apply." Id.

Once, through use of res ipsa loquitur, the plaintiff establishes a prima facie case of negligence, "the defendant must then offer an explanation, if [they]

can. 'If then, after considering such explanation, on the whole case and on all the issues as to negligence, injury and damages, the evidence still preponderates in favor of the plaintiff, plaintiff is entitled to recover; otherwise not.'" Pacheco, 149 Wn.2d at 441–42 (internal quotation marks omitted) (quoting Covey v. Western Tank Lines, 36 Wn.2d 381, 392, 218 P.2d 322 (1950)).

"A party is entitled to a jury instruction only if it has offered substantial evidence to support the instruction." Cooper v. Dep't of Labor & Indus., 188 Wn. App. 641, 647–48, 352 P.3d 189 (2015). Evidence is substantial if it could "persuade a fair-minded person of the truth of a declared premise." Nationscapital Mortg. Corp. v. Dep't of Fin. Inst., 133 Wn. App. 723, 738, 137 P.3d 78 (2006). In determining whether substantial evidence supports the instruction, we must view the evidence in the light most favorable to the instruction's proponent. 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).

We review de novo a trial court's decision on a jury instruction if based on a matter of law, or for abuse of discretion if based on a matter of fact. Kappelman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). Whether res ipsa loquitur applies is a question of law. Pacheco, 149 Wn.2d at 436. And we will reverse a trial court's error on jury instructions only if the error is prejudicial. Stiley v. Block, 130 Wn.2d 486, 498–99, 925 P.2d 194 (1996).

A. Res Ipsa Loquitur Instruction

1. Relationship between FMD and vertebral artery dissection

Gilbertson's primary argument on all three elements of res ipsa loquitur is that vertebral artery dissections occur in persons, like Soucy, who have FMD in their vertebral arteries. Thus, he argues, the dissection and stroke are of a kind that ordinarily happen without negligence, the instrumentality causing the injury was not within Gilbertson's exclusive control, and Soucy voluntarily contributed to his injuries.[3] But interpreting the facts about FMD in the light most favorable to Soucy—as Mina requires—substantial evidence suggests he did not have FMD in his vertebral arteries at the time of the treatment at issue.

A defense expert testified at trial that spontaneous vertebral artery dissection and strokes can occur among people who have FMD. This defense expert also testified that Soucy had FMD in his vertebral arteries when the dissection occurred, but not in the segment of the vertebral arteries where the dissection occurred.

A plaintiff-side expert testified there was no evidence of FMD in Soucy's vertebral arteries at any time.

Soucy's treating physician found evidence of FMD in his renal arteries,[4]

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[3] The parties did not dispute that the arterial dissection led to the stroke.

[4] A renal artery is "any of the branches of the abdominal aorta that supply the kidneys being in man one to each kidney, arising immediately below the origin of the superior mesenteric artery, dividing into four or five branches which enter the hilum of the kidney, and giving off smaller branches to the ureter, adrenal gland, and adjoining structures." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1921 (2002).

but not in the "precerebral vessels."[5] That physician stated that the FMD in Soucy's renal arteries put him at risk for future dissections. Another treating physician stated that the contours of Soucy's left vertebral artery—including at the time of treatment—were subtly irregular, "which may reflect underlying [FMD] though this is not clearly apparent on the angiogram." Soucy's medical record from the day of his stroke does not mention FMD. His record from the next day notes FMD in his renal arteries.

Interpreting these facts in the light most favorable to Soucy, substantial evidence suggests he did not have FMD in his vertebral arteries at the time of treatment. And Gilbertson does not point to evidence suggesting that arterial dissections might occur in areas unaffected by FMD—indeed, his own expert's testimony suggests that dissections are more likely to occur in areas affected by FMD. Because Soucy "is not required to 'eliminate with certainty all other possible causes or inferences' in order for res ipsa loquitur to apply," he need not conclusively show that he did not have FMD in his vertebral arteries at the time of treatment. Pacheco, 149 Wn.2d at 440–41 (quoting Douglas v. Bussabarger, 73 Wn.2d 476, 486, 438 P.2d 829 (1968)).[6] We thus evaluate whether the trial court

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[5] Neither the parties nor the medical records define "precerebral vessels," but Soucy's briefing implies—and his counsel stated at oral argument—that a vertebral artery is a precerebral vessel.

[6] In support of his argument that res ipsa loquitur does not apply, Gilbertson cites Morner v. Union Pac. R.R. Co., 31 Wn.2d 282, 196 P.2d 744 (1948). In discussing whether res ipsa loquitur applied to a claim of negligence, Morner states that "'[i]f it appears that two or more instrumentalities, only one of which was under defendant's control, contributed to or may have contributed to the injury, the doctrine cannot be invoked.'" Id. at 296 (quoting 38 AM. JUR. 997 Negligence, § 300). But in deciding that the plaintiff was not entitled to a res ipsa loquitur instruction, the court reasoned that the instruction "imposed upon [the defendant] the unjust burden of producing evidence upon some unknown, uncertain, conjectural cause which neither party had, or could have had,

should have given a res ipsa loquitur instruction assuming that Soucy did not have FMD in his vertebral arteries.

2. Was the occurrence causing Soucy's injury of a kind that does not ordinarily happen in the absence of negligence?

This first element of res ipsa loquitur is satisfied when one of three conditions exist:

> (1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.

Pacheco, 149 Wn.2d at 438–39 (internal quotation marks omitted) (quoting Zukowsky v. Brown, 79 Wn.2d 586, 595, 488 P.2d 269 (1971)).

Soucy argues that because proof by trial chiropractic experts supported an inference that negligence caused his injury, he has met the first element of res ipsa loquitur. As referenced above, Gilbertson counters that because Soucy suffers from FMD in his vertebral arteries, and vertebral artery dissections can occur in such persons, his injuries are of a kind that may ordinarily happen without negligence. We conclude that Soucy has satisfied this element through expert testimony.[7]

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in mind." Id. at 299. This aligns with the reasoning of later cases, such as Pacheco, which states that "res ipsa loquitur is inapplicable where there is evidence that is *completely* explanatory of how an accident occurred and no other inference is possible that the injury occurred another way." 149 Wn.2d at 439–40; see also Kemalyan v. Henderson, 45 Wn.2d 693, 705, 277 P.2d 372 (1954). Because evidence conflicts as to the extent of Soucy's FMD, the evidence does not completely explain how the accident occurred, so res ipsa loquitur may apply.

[7] Soucy argues in the alternative that general experience teaches that his injuries could not have occurred without negligence. Since we conclude Soucy has established

In ZeBarth v. Swedish Hosp. Med. Cen., the plaintiff sued a hospital when he became paralyzed after receiving radiation treatment there. 81 Wn.2d 12, 13, 499 P.2d 1 (1972). Our Supreme Court held that testimony by radiation therapy experts that paralysis does not ordinarily occur from radiation therapy in the absence of negligence constituted "testimony of experts in an esoteric field" sufficient to satisfy the first element. ZeBarth, 81 Wn.2d at 22.

Here, at trial, Gilbertson agreed that an occipital lift, properly performed on a healthy person, cannot cause a tear in their vertebral arteries. Soucy's chiropractic expert testified that a properly performed occipital lift should not cause a vertebral artery dissection. Gilbertson's chiropractic expert testified that an occipital lift *could not* cause vertebral artery dissection. But his testimony just before this statement appears to imply that it is a "properly administered" occipital lift that could not cause vertebral artery dissection.[8] Interpreting all the above

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res ipsa loquitur's first element through expert testimony, we do not consider this argument.

[8] The testimony provides:

> [Defense chiropractic expert]: What I found the most interesting about this particular study was that, number one, that a *properly administered* chiropractic treatment, the high-velocity/low-amplitude, could not cause a vertebral artery dissection or disruption to that vertebral artery, but also simply range of motion and things like mobilization actually put more strain on the vertebral artery than did a chiropractic treatment.
>
> [Defense counsel]: And this article made the conclusion, did it not, that under normal circumstances, a typical, high-velocity, low-amplitude spinal manipulative thrust is unlikely to disrupt the VA, the vertebral artery; correct?
>
> [Defense chiropractic expert]: Correct.
>
> [Defense counsel]: And it doesn't say Chrane condyle lift, it doesn't say diversified, it says high-velocity, low-amplitude. Is that what the Chrane condyle is?
>
> [Defense chiropractic expert]: Yes, it is.

(Emphasis added).

testimony in the light most favorable to Soucy, performing an occipital lift on a healthy person does not ordinarily cause vertebral artery dissection absent negligence. And assuming Soucy had no FMD in his vertebral arteries, this testimony supports an inference that Gilbertson improperly performed the occipital lift, leading to dissection of Soucy's vertebral arteries. Substantial evidence supports res ipsa loquitur's first element.

3. Was the injury caused by something within the Gilbertson's exclusive control?

Soucy argues he has met this element since Gilbertson had exclusive control over the occipital lift. We agree.

Gilbertson again cites Morner v. Union Pac. R.R. Co. for the proposition that "if it appears that two or more instrumentalities, only one of which was under defendant's control, contributed to or may have contributed to the injury, the doctrine cannot be invoked." 31 Wn.2d 282, 296, 196 P.2d 744 (1948) (quoting 38 AM. JUR. 997 Negligence § 300). He argues that because Soucy's FMD may have contributed to the injury and was outside his control, the injury was not caused by something within Gilbertson's exclusive control. But again, later decisions hold that a trial court should not give a res ipsa loquitur instruction if a cause is *completely* explanatory of the plaintiff's injuries. Pacheco, 149 Wn.2d at 439–40. Given conflicting evidence about the extent of Soucy's FMD, Gilbertson's theory does not completely explain Soucy's injuries.

Gilbertson had exclusive control over the occipital lift, which Soucy claims caused his injuries. Viewing the evidence in the light most favorable to Soucy, we conclude that substantial evidence supports this element.

4. Was the injury-causing occurrence not due to any voluntary action or contribution by Soucy?

Soucy argues he did not contribute to Gilbertson's performance of the occipital lift. Gilbertson argues this element is not satisfied because Soucy's FMD contributed to his dissection and stroke.

Gilbertson argues that Soucy cannot meet this element because he had FMD in his vertebral arteries, which contributed to his dissection and stroke. But even assuming FMD in Soucy's vertebral arteries, a plaintiff's pre-existing condition does not negate satisfaction of this element. See Marshall v. W. Air Lines, Inc., 62 Wn. App. 251, 261, 813 P.2d 1269 (1991). And even if it could so negate, viewing the evidence in the light most favorable to Soucy, he did not have FMD in his vertebral arteries, so substantial evidence would support a conclusion of no contribution.

We thus conclude that substantial evidence supports all three elements of res ipsa loquitur.

B. Prejudice

Soucy argues that the trial court's failure to give a res ipsa loquitur instruction prejudiced him. We agree.

If evidence supports a party's proposed instruction, a trial court's omission of that instruction "will be 'reversible error where it prejudices a party.'" Millican v.

N.A. Degerstrom, Inc., 177 Wn. App. 881, 901, 313 P.3d 1215, 1225 (2013) (quoting Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 267, 96 P.3d 386 (2004)). Jury instruction error "is prejudicial if it substantially affected the outcome of the case," but not if it "is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case." Magana v. Hyundai Motor Am., 123 Wn. App. 306, 316, 94 P.3d 987 (2004) (internal quotation marks omitted) (quoting State v. Townsend, 142 Wn.2d 838, 848, 15 P.3d 145 (2001)).

Had the trial court given a res ipsa loquitur instruction, the jury could have inferred that Gilbertson negligently performed the occipital lift. Then, Gilbertson would have still been allowed to offer his explanation that FMD caused Soucy's injuries, not his performance of the occipital lift. The jury would then have decided whether the evidence favored Soucy or Gilbertson.

But without such an instruction, Soucy bore the burden of establishing that Gilbertson had performed the lift negligently, where no recording of its performance existed. Soucy's chiropractic expert could not specifically testify about whether Gilbertson had performed the lift negligently.[9] Soucy did not see Gilbertson perform the manipulation. Soucy did testify that Gilbertson's use of the technique was not "especially strong or violent" as compared to other techniques Gilbertson had used. But since Gilbertson had not performed the lift on Soucy before, Soucy could not testify about whether the force used differed

[9] [Question]: In fact, you can't sit here and testify exactly how he did the condyle lift in this particular case; correct?

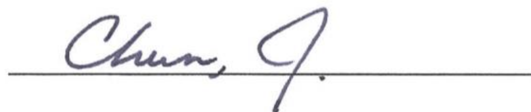
[Answer]: Correct.

from normal performance of the occipital lift technique. Nor could Soucy testify whether the rotation or technique used differed from normal performance of the lift.

Res ipsa loquitur may apply if, as here, "the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person." Pacheco, 149 Wn.2d at 436. Gilbertson argues these are not such circumstances because neither he nor Soucy was aware of Soucy's FMD. But assuming that Soucy did not have FMD in his vertebral arteries, the question is whether Gilbertson exclusively has knowledge as to the nature of his performance of the occipital lift technique—and he does.

Because, without a res ipsa loquitur instruction, Soucy bore a greater burden of proof, and Soucy had no practical access to evidence of the cause of his injuries, the trial court's failure to give the instruction substantially affected the outcome of the case.

We conclude that trial court's error prejudiced Soucy, and thus reverse and remand.



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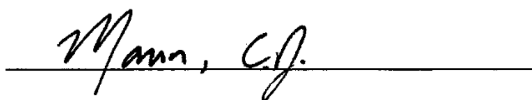

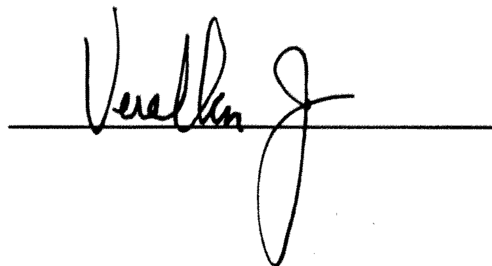

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I hereby certify that on September 15, 2020, a true and correct copy of the foregoing document was served on the following via the appellate court e-filing/e-service system, and the original was filed with the Washington Court of Appeals. Division 1, via e-filing:

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## Transmittal Information

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| **Appellate Court Case Number:** | 79927-4 |
| **Appellate Court Case Title:** | Arthur R. Soucy, Appellant v. Dr. David Gilbertson, et ano, Respondents |
| **Superior Court Case Number:** | 16-2-01967-4 |

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