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NO.: 658492

DIVISION I OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

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DONNARAE LEMCKE and JAMES R. LEMCKE,  
wife and husband and the marital community  
composed thereof, APPELLANTS

v.

LOWE'S HIW, INC., a Washington Corporation,  
d/b/a/ LOWE'S HIW, INC., store #285

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**BRIEF OF APPELLANTS**

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**ASSIGNMENTS OF ERROR AND ISSUES PERTAINING  
THERE TO**

We allege that the trial court erred when it:

1. Ruled as a matter of law that Res Ipsa Loquitor did not apply in this matter and granted Respondent Lowe's motion for summary judgment dismissing Donnaræ Lemcke's complaint for personal injury.

## STATEMENT OF THE CASE

### A. Facts

Appellant Donnarae Lemcke entered the Respondents' place of business, Lowe's store #285 in Lynnwood, Washington, on September 11, 2006. CP 55 (pg. 33:18). She was looking at a display of wire drawers when a box fell from a shelf above striking her on her head and nose, and arm before falling to the ground. CP 58 (pg. 45:7-12). She felt immediate pain. CP 59 (pg. 52:23). Mrs. Lemcke told a Lowe's employee what had happened and left the store. CP 60 (pg. 57:10-23) She woke up the next day with an excruciating headache and observed a mark on her nose where the box had struck her. CP 61 (pg. 62:13-16) Mrs. Lemcke sought treatment from her primary care physician on September 13, 2006 due to her continued headaches. CP 61 (pg. 64:6-13) These headaches have continued to the present day. CP 196.

Mrs. Lemcke and her husband returned to the Lowe's store two days after the incident to inspect the shelving and take photographs but the display had been taken down. CP 58 (pg. 48:2-17) CP 62 (pg. 65:20-24) Throughout the course of discovery Lowe's was unable to provide any information on the display. CP 39.

## **B. Procedural History**

Lowe's motion for summary judgment was argued before the Honorable Linda Krese. After oral argument, Judge Krese granted Lowe's motion for summary judgment dismissing Donnarae Lemcke's complaint for personal injury. CP 7-8. Donnarae Lemcke now appeals the order granting summary judgment in favor of Lowe's.

## **C. Standard of Review**

The standard of review for ruling on a summary judgment motion is de novo. Stewart v. Estate of Steiner, 122 Wn. App. 258, 93 P.3d 919 (2004). Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

## **ARGUMENT**

Whether res ipsa loquitur applies to a particular case is a question of law. Robinson v. Cascade Hardwoods, Inc., 117 Wn. App. 552, 553 (2003) citing Pacheco v. Ames, 149 Wn.2d 431, 436 (2003) See also Curtis v. Lein, 83307-9 (WASC 2010). Res ipsa loquitur is a rule of evidence that allows an inference of negligence from circumstantial evidence to prove a defendants' breach of duty

where (1) the plaintiff is not in a position to explain the mechanism of injury, and (2) the defendant has control over the instrumentality and is in a superior position to control and to explain the cause of the injury. Robinson at 553, 72 P.3d 244 (2003) citing Morner v. Union Pac. R.R., 31 Wn.2d 282, 291-292, 196 P.2d 744 (1948).

Unless the defendant produces evidence of a specific cause rebutting the inference, it is a question for the jury as to the ultimate question of negligence. In considering the case, the jury must infer that the defendant was negligent. The defendant has the burden of proof as to whether or not it was negligent. See Robinson at 552, 553, 72 P.3d 244 (2003) citing Metro. Mortgage & Sec. Co. v. Wash. Water Power, 37 Wn. App. 241, 243, 679 P.2d 943 (1984); see also Zukowsky v. Brown, 79 Wn.2d 586, 601-02, 488 P.2d 269 (1971); Morner, 31 Wn.2d at 291, 196 P.2d 744; Firebaugh v. Seattle Elec. Co., 40 Wash. 658, 664, 82 P. 995 (1905); Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice, § 301.13-14 at 194, 195 (4<sup>th</sup> ed. 1999).

This result is appropriate because the defendant has superior access and control over the material physical evidence. Pacheco v. Ames, 110 Wn. App. 912, 915-916, 43 P.3d 535 (2002) (defendant "is in the best position to explain the cause of injury")

and "should be required to produce evidence to explain" it), rev'd on other grounds, 149 Wn.2d 431, 69 P.3d 324 (2003); Pacheco, 149 Wn.2d at 436, 69 P.3d at 326 (*res ipsa loquitur* applies when "the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person").

In Metropolitan Mortgage, the court held that the nature or circumstances of an accident may be "sufficient to establish prima facie the fact of negligence on the part of the defendant, without further direct proof," thus casting "upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence on his part." Metro. Mortgage, 37 Wn. App. at 243, 679 P.2d 943 (1984). The court held that a prima facie *res ipsa case* "presents a question for the jury." *Id.* at 243, 679 P.2d 943. This burden shifting doctrine is imposed on defendants precisely because of the defendants' superior access to the evidence, which necessarily puts the defendant in a better position to determine the precise cause of the accident.

Res ipsa loquitur is even more appropriate in this case in light of defendant's failure to follow their policies and procedures in investigating the injury to the plaintiff. Despite

assertions in Lowe's interrogatory answers that it was not aware of an injury to the plaintiff until two days after the incident, CP 40, the operations manager, Benjamin Bear, stated in his deposition that he was made aware of the incident on the day the plaintiff was injured. CP 50 (pg. 33:2-7) He testified that the cashier on duty did not get a manager on duty, and that he did not follow the procedures outlined on the incident report, namely, determine if there was video, and take photographs. CP 47 (pg. 23:14-15) CP 49 (pg. 29:3-6) The display from which the box fell was dismantled within days of the incident depriving the plaintiff from obtaining her own photographs of the display. CP 62 (pg. 65:15-24) Benjamin Bear also stated in his deposition that he did not recall if he attempted to find out what employee, if any, last inspected, stocked and/or cleaned the area before the incident as required by the incident report. CP 52 (pg. 41:10-19)

The Defendant must not be rewarded for its failure to properly follow its own established guidelines. Had Lowe's done so, there may have been an explanation on what had happened.

**A. Appellants Presented Sufficient Evidence To Make A Prima Face Case For Res Ipsa Loquitur.**

The Supreme Court summarized the *res ipsa loquitur* burden of proof in Pacheco, *infra*, holding,

In our judgment, it makes little sense to deny the doctrine of *res ipsa loquitur* simply because the defendant offers evidence that provides a possible explanation of the event. As noted above, the *res ipsa loquitur* doctrine allows the plaintiff to establish a *prima facie* case of negligence when he cannot prove a specific act of negligence because he is not in a situation where he would have knowledge of that specific act. Once the plaintiff establishes a *prima facie* case, the defendant must then offer an explanation, if he can.

Pacheco, 149 Wn.2d at 441, 69 P.3d at 329. The appellants met the elements required to establish a *prima facie* case for *res ipsa loquitur*.

A *prima facie* case of *res ipsa loquitur* has three requisite elements. The plaintiff need only show:

- (1) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant,
  - (2) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, and
  - (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.
- Pacheco, 149 Wn.2d at 436, 69 P.3d at 327 (quoting Zukowsky, 79 Wn.2d at 593, 488 P.2d 269.

**1. Lowe's Had Exclusive Actual And Constructive Control Over The Merchandise "Box" That Fell From The Overhead Shelf Causing Injury To Donnarae Lemcke**

Generally, under the re ipsa doctrine, the defendant must have exclusive, "actual or constructive control", of the "instrumentality" to the extent that it caused the injury. Zukowsky, 79 Wn.2d at 595, 488 P.2d 269. *Res ipsa loquitur* may apply even "where the specific instrumentality is unknown and that the plaintiffs had designated alternatives that could have caused the injuries." The doctrine is intended to allow an inference of negligence; proof of the specific cause of injury is not required. In fact, a number of different causes or inferences may be left to the final determination

of the trier of fact. The plaintiff is only required to show that the defendants were responsible for all reasonably probable causes to which the accident could be attributed. This reflects the logical requirement that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it. Zukowsky, 79 Wn.2d at 595, 488 P.2d 269 quoting William Lloyd Prosser, *Res Ipsa Loquitur* in California, 37 Cal. L. Rev. 183, 201 (1940).

The appellants contend that Lowe's had a duty to properly stock merchandise on overhead shelves to ensure the safety of its customers. Mrs. Lemcke testified that she did not contribute to this incident and that the box came from an area above her head, which was inaccessible to her. CP 59 (pg. 49:22 to pg. 50:4) Benjamin Bear, the operations manager for Lowe's store #285 at the time, testified that after looking at the display he could not figure out what had happened and that the shelf may have been in an area that was inaccessible to customers, on a "deck" that was designed for extra product. CP 50 (pg. 36:1 to 37:2) The facts created a reasonable inference that the shelf from which the box fell was not designed to be used by customers. Therefore, the shelf from which the box fell from was under the exclusive control of the defendant.

These facts are much different than the facts presented in the Las case cited by defendant. In Las, the merchandise in question was located on the second to bottom shelf of the display clearly in reach of other customers and therefore not within the exclusive control of the defendant. Las v. Yellow Front Stores, 66 Wn. App. 196, 197 (1992)

**2. In The Absence Of Negligence, Properly Stocked Merchandise Does Not Fall From An Overhead Shelf.**

The plaintiffs are not required to specifically identify the negligence that apparently caused the box to fall. Whether an injury supports a reasonable and legitimate (as opposed to conjectural) inference of negligence requires that the context, manner, and circumstances of the injury are "of a kind that do not ordinarily happen in the absence of someone's negligence." The law recognizes three such instances. Zukowsky, 79 Wn.2d at 594, 488 P.2d 269.

- (1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law (i.e., leaving a foreign object, sponge, 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, 69 P.3d at 328 (quoting Zukowsky, 79 Wn.2d at 595, 488 P.2d 269). The facts here fit the first and second situations.

We know from general experience and observation that, absent evidence of an act of God, or some other extraordinary event beyond the reasonable control of the owner or operator, boxes do not ordinarily fall from overhead shelves unless someone has been negligent in the storing, stocking, or placing of the boxes.

If the defendant cannot eliminate the possibility that the falling merchandise was its own negligence, the *res ipsa loquitur* plaintiff need not eliminate all reasonable non-negligent causes of his or her injury. The plaintiff is not bound by the testimony of the defendant or their witnesses. The plaintiff may be entitled to rely on the *res ipsa loquitur* doctrine even if the defendant's testimony, if believed by the jury, would explain how the event causing injury to the plaintiff occurred.

In sum, the plaintiff is not required to eliminate with certainty all other possible causes or inferences in order for *res ipsa loquitur* to apply. Douglas v. Bussabarger, 73 Wn.2d 476, 486, 438 P.2d 829 (1968) (quoting William Lloyd Prosser, *Law of Torts* 222 (3d ed. 1964)). See also Zukowsky, 79 Wn.2d at 595, 488 P.2d 269.

See also Restatement *supra*, § 328D(1)(b) (requiring evidence to sufficiently eliminate other responsible causes). In other words, the plaintiff need not eliminate all reasonable non-negligent causes when there are competing factual inferences. Pacheco, 149 Wn.2d at 441, 69 P.3d at 329 (need not "eliminate with certainty all other possible causes or inferences. It is for the trier of fact to choose between reasonable possibilities.")

If the doctrine of *res ipsa loquitur* was inapplicable when a defendant offered a possible explanation that was not completely explanatory of the cause of the injury, and the plaintiff could not establish a prima facie case of negligence because he or she does not know how the injury was caused, then the defendant could avoid liability by simply submitting evidence of a possible cause of the injury. This would be the case, notwithstanding the fact that the plaintiffs have shown all of the above-stated elements of the doctrine of *res ipsa loquitur*. Such a result would allow the defendant to escape responsibility where an inference of negligence is the only tool with which the plaintiff may prove his or her case. Pacheco, 149 Wn.2d at 442, 69 P.3d at 329-30.

### 3. Plaintiff Is Without Fault.

The third prong of the *res ipsa loquitur* test does not require a plaintiff to produce evidence that "precludes the possibility that defendant can establish a defense based on plaintiffs' conduct." Zukowsky, 79 Wn.2d at 596, 488 P.2d 269. Rather, it bars the doctrine only if, "after all evidence is in, it can be said as a matter of law that plaintiff is precluded from recovery by his own voluntary action or contribution," because, the evidence wholly refutes plaintiffs' right to recover for any such negligence. Zukowsky, 79 Wn.2d at 596, 488 P.2d 269. The third requirement does not mean that plaintiff must conclusively prove no action on her part contributed to the accident but rather that the plaintiff bring forth sufficient evidence to allow a jury to exclude her conduct as a responsible cause.

In this case, Mrs. Lemcke testified that she did not do anything out of the ordinary to cause this incident. She was simply standing in front of a kitchen display, and had pulled out a wire drawer when the box fell from above and hit her. She testified that the display did not move or tilt forward when she pulled on the drawer. CP 58 (pg. 45:7 to 46:15) Other jurisdictions have held that a retailer is charged with knowing that customer inspection of

merchandise is a foreseeable part of their business and have “the responsibility of taking this into consideration when establishing and maintaining displays.” Fleming v. Wal-Mart, Inc., 595 S.W. 2d 241 (1980) In Fleming, the court held that the *res ipsa* doctrine applied where a display of cabinets fell on the plaintiff and there was evidence that an unidentified customer had been opening and closing the cabinets shortly before the incident thereby creating an issue as to retailer’s exclusive control.

Where the elements of *res ipsa loquitur* are satisfied, a plaintiff is entitled to the benefit of the doctrine, even if the defendants’ evidence suggests, but does not completely explain how the event causing injury to the plaintiff may have occurred. Pacheco, 149 Wn.2d at 440-442, 69 P.3d at 329-30.

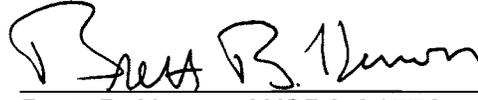
### **CONCLUSION**

There are genuine issues of material fact that preclude the granting of Lowe’s motion for summary judgment and the dismissal of Donnarae Lemcke’s complaint for personal injury.

### **REQUEST FOR EXPENSES**

Appellants should be awarded their costs incurred on this appeal if they prevail. RAP 14.2, 18.1.

RESPECTFULLY SUBMITTED this 20th day of December,  
2010.

A handwritten signature in black ink, appearing to read "Brett B. Herron". The signature is written in a cursive style with a large initial "B".

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Brett B. Herron, WSBA 31573  
Attorney for Appellants