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NO. 67466-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANNE E. OMAN and KRAIG G. OMAN, husband and wife, and the
marital community composed thereof,

Plaintiffs/Appellants,

v.

SEAN THORNE and GINA THORNE, husband and wife; NORTHWEST
FINANCIAL GROUP, INC., a/k/a BMW OF BELLEVUE; and BMW OF
NORTH AMERICA, LLC,

Defendants/Respondents.

BRIEF OF APPELLANTS OMAN

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A. INTRODUCTION

Anne and Kraig Oman's brand new 2010 Pontiac Vibe was destroyed when Sean and Gina Thorne's 2007 335xi BMW parked next to it suddenly caught fire at the South Bellevue Community Center on the early morning of November 4, 2009. The domestic BMW distributor, BMW of North America, LLC (BMW NA), asserts it is without liability for the mishap under the Washington Product Liability Act (WPLA). The trial court agreed, and granted BMW NA's motion for summary judgment on April 8, 2011. However, the court's order should be reversed because it misapplied the standard for the *res ipsa loquitur* method of proof of BMW NA's negligence. Even without a negligence claim, the Omans still have a viable claim against BMW NA for breach of express warranty under WPLA.

The Thornes' BMW experienced engine misfires and rough running during the weeks before the incident, including moments before the blaze. On October 26, 2009, Mr. Thorne took his car to BMW of Bellevue to fix the problem. Based on its negligent reliance on the wrong service bulletin, BMW of Bellevue did not make any repairs, having misdiagnosed the symptoms as requiring merely a software update. BMW of Bellevue should have checked for leaks in the high-pressure fuel pump and fuel injectors in the BMW's N54 engine, a model with a history of

fuel system problems. Instead, BMW of Bellevue told Mr. Thorne his car was fine to drive and to return when the software update was available. Nine days later, the BMW spontaneously combusted, taking the Pontiac with it.

Like BMW NA, BMW of Bellevue asserts it has no liability to the Omans for the loss of their new car. The trial court granted BMW of Bellevue's motion for summary judgment on April 8, 2011. The court's order should be reversed because the court did not make all reasonable inferences in the light most favorable to the Omans as required.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court incorrectly applied the res ipsa loquitur method of proof to appellants' theory that BMW NA negligently distributed and supplied the BMW 335xi.

2. The trial court failed to make all reasonable inferences from the evidence in favor of appellants' theory that the fire was caused by a fuel system malfunction which BMW of Bellevue negligently misdiagnosed nine days before the fire.

(2) Issues Pertaining to the Assignments of Error

1. Must a proponent of the res ipsa loquitur method of proof of negligence affirmatively rule out all possible causes of the harmful

instrumentality, other than the defendant's negligence, to successfully defeat defendant's motion for summary judgment? (Assignment of error number one.)

2. Does the exclusive control element of *res ipsa loquitur* always require that the defendant had actual physical control of the harmful instrumentality at the time the harm occurred? (Assignment of error number one.)

3. Is it reversible error when a trial court fails to take all reasonable inferences from the undisputed facts in favor of a non-moving party when ruling on motions for summary judgment? (Assignment of error number two.)

4. Is it reversible error when a trial court fails to take all reasonable inferences in favor of a non-moving party's expert witness opinions when ruling on motions for summary judgment? (Assignment of error number two.)

C. STATEMENT OF THE CASE

On October 4, 2009, appellants Anne and Kraig Oman purchased their first new car in 17 years, a brand new, black 2010 Pontiac Vibe. CP 99. Only a month later, the unlucky couple lost their new car suddenly after a 2007 BMW 335xi parked next to it burst into flames, destroying both the Pontiac and its contents.

Just before six a.m. on the morning of November 4, 2009, Anne Oman parked her new Pontiac Vibe in the first parking space at the South Bellevue Community Center in Bellevue, Washington. *Id.* She entered the building and began teaching an exercise class there. *Id.* Moments after she arrived, Mr. Sean Thorne backed his black 2007 BMW 335xi into the parking space next to Mrs. Oman's car, having driven it for only about one minute from his house nearby. CP 110. He entered the community center, and the next thing he knew, the front of his BMW was fully engulfed in flames with the Bellevue Fire Department on the scene. CP 222.

Additionally, Mrs. Oman's new Pontiac, her laptop computer, computer bag and other personal items were destroyed by the fire emanating from the BMW. Along with the financial losses caused by destruction of their car and personal property, the Omans, already busy raising three children, experienced several months of considerable inconvenience by having to rent another car, deal with their insurance company to obtain the full benefits of their policy, and find legal representation. CP 27.

Like Mr. Thorne, Mrs. Oman was inside the community center working out when the fire started. CP 51, 99. As the Bellevue Fire Department arrived on the scene at 7:01 a.m., 10 foot tall flames from the BMW's engine compartment were blowing onto the Omans' car. CP 109-

110; 418 (Lieut. Todd McLean Declaration). The 10 foot tall flames from the BMW were engulfing the driver's side of the new Pontiac and had broken out the Pontiac's driver's side windows. CP 110. The fire originated in the "engine area, running gear, wheel area" of the BMW. *Id.* The engine compartment of the 335xi was the most likely area of origin. *Id.* "Fire then extended to the tires, exterior, and then ignited the [other] vehicle..." *Id.* The 2007 BMW had approximately 35,000 miles on it at the time. CP 146.

Respondent BMW NA was established in 1975 as the U.S. importer of BMW luxury/performance vehicles. CP 39. On June 28, 2007, BMW NA, headquartered in New Jersey, received Mr. Thorne's 335xi from Germany where it was built. CP 165. The car had a 6-cylinder, 3.0 L engine with feedback fuel system, fuel injection and a three way catalyst. CP 148. When Mr. Thorne leased it brand new on July 7, 2007 from a dealership in Colorado, BMW NA issued a new vehicle limited warranty ensuring the car was free of defects in its workmanship and materials. CP 121-123, 148.

Nine days after the fire, BMW NA Consultant in the Special Product Investigation Department in New Jersey, Steve Kossar, sent a

customer loyalty letter to Mr. Thorne to maintain him as a BMW owner.¹ CP 140. Mr. Thorne received \$1,500 from BMW NA towards purchase of another BMW after describing in a one paragraph email his problems with the car before and after he took it to BMW of Bellevue for repairs, BMW of Bellevue's response to his complaints, and the Bellevue Fire Department's conclusion that the fire started in the BMW. CP 123, 135-140.

Throughout the two years and four months they had the 335xi before the fire, the Thornes never performed their own repairs or maintenance on their BMW. Rather, BMW of Bellevue performed all work needed whenever maintenance was necessary. CP 122. Just days before the fire, the BMW had experienced engine trouble. Mr. Thorne encountered a misfire during initial start-up which caused a rough idle, reduced power and an engine light to come on. *Id.* However, the car ran fine once it was warm. *Id.*

¹ Mr. Kossar's letter stated, "In appreciation for your loyalty to the BMW brand, and in the hope that your unfortunate incident with the above referenced vehicle will not end that relationship, we are providing you with the following goodwill: BMW of North America, LLC will reimburse you \$2,500 upon submission of proof of purchase or lease of a **new BMW vehicle**, or \$1,500 for a **Certified Per-Owned (CPO)**, from an **authorized BMW Center**, at any time within one year from the date of this letter." CP 140.

On October 26, 2009, Mr. Thorne took the car to BMW of Bellevue to fix it. CP 130. Between 1:53 p.m. and 2:42 p.m. that day, the dealership ran a diagnostic test and confirmed the complaints about the misfires. *Id.* BMW of Bellevue then consulted one BMW service information bulletin, SI B12 06 09, and attributed the problem to a software error. *Id.* BMW of Bellevue, “per foreman,” determined it was necessary to wait a week until updated computer software could be obtained. *Id.* Having spent less than an hour assessing the vehicle, BMW of Bellevue gave it back to the Mr. Thorne without making any repairs, telling him there was “...no fix and that the car was fine (sic) to drive until software was available in a week...” CP 138. The dealership never performed any repairs to the car. *Id.*

When assessing the car, BMW of Bellevue consulted SI B12 06 09, **Misfire Faults Are Stored due to a DME Software Error** (hereinafter “Software Error Bulletin.”) CP 450. The Software Error Bulletin is for misfire faults occurring at full operating temperatures – most frequently after driving for an extended period of time. *Id.* It also contains this warning for misfires during cold starts:

IMPORTANT NOTE:

For N54 misfire faults occurring during a cold start, refer to SI B13 04 09 for additional diagnostic information.

CP 451. The BMW service information bulletin SI B13 04 09 is entitled **Diagnosis of Cold Start Rough Running with Misfire Faults** (hereinafter “Cold Start Bulletin.”) CP 453. The first line of the Cold Start Bulletin reads, “The customer may complain that during the cold start in the morning, the engine runs very roughly and the Service Engine Soon lamp is illuminated.” CP 453. It further advises that the engine rough running complaint can be reproduced on a cold start in the workshop. Consistent with the problem described in this bulletin, Mr. Thorne had experienced misfires with his car during initial morning start up. CP 122.

The Cold Start Bulletin warns that the service technician will find, “...the spark plugs, removed from the misfiring cylinders after the problem was reproduced... ..to be soaked (“wet”) with fuel, while the injector tips are covered with a layer of carbon deposit.” CP 453. According to the bulletin, a possible cause of the problem is a high-pressure fuel injector failure (leakage or incorrect spraying pattern) due to internal wear or unfavorable stock of tolerances. *Id.* To correct the problem, the mechanic should replace the high-pressure injectors of the affected cylinders, using improved parts, as well as any spark plugs found to be soaked with fuel. *Id.*

The N54 engine installed in the Thornes’ BMW has a history of high pressure fuel pump failures. In fact, the 2007 BMW 335xi in

particular has experienced a large number of failures with its high pressure fuel pump, which is mounted on the driver's side of the engine. CP 447. On April 28, 2008, the National Highway Traffic Safety Administration (NHTSA) opened an investigation into reports of 2007 BMW 335xis stalling or suddenly losing engine power because of high pressure fuel pump failures. *Id.* Although the NHTSA closed the investigation without issuing a recall, in December of 2010, BMW issued a voluntary recall for the high pressure fuel pump in N54 engines. *Id.*

The Omans' expert concluded the fire started in the driver's side area of the BMW's engine compartment where the high pressure fuel pump was located. CP 621. This conclusion was based on: burn patterns on the BMW; burn patterns on the Pontiac; Lieut. McLean's description of burn patterns on both cars; the high probability of fires starting in engine compartments; and the low probability of fire originating in the left rear area of a front engine vehicle like the Pontiac. *Id.* More probably than not, a malfunction in one of the vehicle components in the driver's side of the BMW's engine compartment caused the blaze. *Id.* Fuel leaking from a malfunctioning high pressure fuel pump and/or malfunctioning fuel injectors are two probable causes of the fire in that part of the vehicle. CP 622.

On December 3, 2010, destructive testing was performed on the BMW 335xi with the parties' experts present. Despite the destructive testing, the extensive fire damage to the BMW makes it impossible to precisely determine the exact cause of the fire. CP 594.

The Omans filed their initial complaint against BMW NA and the Thornes on January 25, 2010, CP 3-7, and filed their first amended complaint adding BMW of Bellevue as a defendant on June 3, 2010. CP 90-95. On March 11, 2011, BMW of Bellevue and BMW NA filed motions for summary judgment. CP 305, 377. The trial court heard oral argument on April 8, 2011, and granted both motions. CP 601, 604. The court's orders specifically dismiss the *res ipsa loquitur* and Washington Product Liability Act causes of action against BMW NA, and generally dismiss all claims against BMW of Bellevue. CP 602, 605. The court acknowledged it considered, and dismissed, a common law claim of negligence against BMW of Bellevue.² VRP 36:24-37:8. The Omans

² When appellants filed the first amended complaint adding BMW of Bellevue as a defendant, counsel incorrectly believed BMW of Bellevue had sold the 2007 BMW 335xi to the Thornes, therefore qualifying it as a product seller under the Act. CP 90-95. In its answer to the first amended complaint on July 30, 2010, BMW of Bellevue also wrongly stated it had sold the car to the Thornes. CP 211. During oral argument on the respondents' motions for summary judgment, counsel clarified that the correct claim against BMW of Bellevue is common law negligence for

moved for reconsideration on April 18, 2011. CP 607. The trial court denied appellants' motion for reconsideration on April 26, 2011. CP 625. The only remaining defendants, the Thornes, were dismissed from the case when the court granted their motion for summary judgment on July 1, 2011. CP 626.

D. ARGUMENT

(1) Standard of Review

This Court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Summary judgment is proper if the court, viewing all facts and reasonable inferences in the light most favorable to the non-moving party, finds no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ellis*, 142 Wn.2d at 458. A material fact is one upon which the outcome of the litigation depends. *Kim v. O'Sullivan*, 133 Wn. App. 557, 559, 137 P.3d 61 (2006), *review denied*, 159 Wn.2d 1018 (2007). When determining whether an issue of material fact exists, all reasonable inferences are construed in favor of the nonmoving party, here tthe

breaching its duty to properly repair the Thornes' BMW, not a WPLA claim against BMW of Bellevue as the product seller.

Omans. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

In order to successfully move for summary judgment, a party must demonstrate a complete lack of evidence of a material fact which cannot be rebutted. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 132, 822 P.2d 1257 (1992). Even when evidentiary facts are not disputed, a motion for summary judgment will be defeated if different inferences may be drawn from the evidence in the record as to ultimate facts. Philip A. Trautman, *Motions for Summary Judgment: Their Use and Effect in Washington*, 45 Wash.L.Rev. 1, 4 (1970). Similarly, a motion must be denied if reasonable minds might draw different conclusions from the undisputed evidentiary facts. *Id.*

(2) Appellants Properly Brought Claims Against BMW NA Under the Washington Product Liability Act.

In *Washington Water Power Co. v. Graybar Electric Co.*, the court held that the Washington Product Liability Act (WPLA or the Act) preempts common law causes of action and remedies for harms caused by product defects. 112 Wn.2d 847, 774 P.2d 1199 (1989). The “centerpiece” of the Act is the product liability claim:

...any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing,

warnings, instructions, marketing, packaging, storage or labeling of the relevant product.

It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act...

Id. at 850 (citing RCW 7.72.010(4)). The court later reiterated the significance of this definition, observing that it links together “the important concepts of ‘claimant’ and ‘harm’ to describe the liabilities of product manufacturers and sellers for product-related injuries.” *Id.* at 854.

The Omans sued BMW NA under WPLA for supplying the defective BMW to Mr. Thorne. The WPLA defines a “product seller” as any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption, including a manufacturer, wholesaler, distributor, or retailer of the relevant product. RCWA 7.72.010(1). “Product” means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. RCWA 7.72.010(3). Since 1975, BMW NA has distributed the high performance/luxury vehicles in the United States, and admits it imported

the 2007 335xi which Mr. Thorne leased. CP 165. BMW NA qualifies as a product seller under WPLA, and the Thornes' now torched and disassembled car is (was) "an object possessing intrinsic value," i.e. a "product" under the statute. Furthermore, the Omans qualify as claimants, as people who suffered "harm," who are now "asserting a product liability claim." RCWA 7.72.010(5).

(3) The Trial Court Erred When It Rejected Appellants' Res Ipsa Loquitur Proof of Negligence Against BMW NA.

Whether res ipsa loquitur applies in a given context is a question of law. *Curtis v. Lein*, 169 Wn.2d 884, 889, 239 P.3d 1078 (2010)(citing *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003)). A plaintiff may rely upon res ipsa loquitur's inference of negligence if (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence. *Id.* at 891 (2010)(citing *Pacheco*, 149 Wn.2d at 436).

Res ipsa loquitur is a method of proof, not a separate and additional form of negligence. *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 789, 929 P.2d 1209 (Div. 1, 1997). A plaintiff that successfully establishes the elements of res ipsa loquitur is entitled to an inference of

negligence. *Id.* Because the method spares the plaintiff the necessity of establishing a complete prima facie case of negligence against the defendant, it is to be used sparingly. *Id.* Nonetheless, res ipsa loquitur is appropriate when supported by the facts and the demands of justice. *Id.*

(a) The Trial Court Mistakenly Applied the First Element of Res Ipsa Loquitur By Holding that the Omans Had to Rule Out All Other Potential Causes of the Car Fires.

In this case, the trial court maintained that to meet the first element of res ipsa loquitur, appellants must affirmatively show that the vehicle fire that destroyed their car could only have been caused by respondents' negligence. Defense counsel had claimed, "...the requirement of res ipsa would be that they have to show that nothing else could have caused this fire, and they cannot say that..." VRP 14:22-24. Counsel hypothesized, without offering any evidence supporting these theories, that other possible causes of the vehicle fire were "...arson, rodents, road hazards, Jiffy Lube messing with an oil line while they were underneath the car." VRP 9:24-10:1.

The trial court accepted this misguided view. It stated, "...in order to have a res ipsa claim, you really have to have the evidence that there's nothing else that could have caused it." VRP 25:9-12. The court accepted defense counsel's speculations about other possible causes:

...there are... ...a number of other possible causes for this fire that would have nothing to do with BMW... ... whether it is the mouse theory or the leaves in the car, or any of those things could have happened.

Id. at 34:9-15. The court reached this conclusion even though there is no evidence in the record, other than respondents' experts' opinions, supporting these alternative theories. In explaining its final ruling, the court rejected the Omans' claims in part for the, "... the lack of proof that the only possible thing that could have caused this to happen was some kind of negligence." *Id.* at 34:18-20.

In *Curtis*, the Washington Supreme Court held the trial court had erred when it found the plaintiff was required to rule out all other causes or inferences for *res ipsa* to apply. Plaintiff Curtis was injured when she walked out onto a dock that collapsed beneath her. *Id.* at 888. Shortly after the accident, the landowner defendants destroyed the dock, and as a result there was no evidence as to the precise cause of its instability. *Id.* at 887-889. The trial court in *Curtis* granted defendants' motion for summary judgment because, "...there are multiple other causes [than negligence] which could have caused the failure of the step on the dock,' such as improper construction or defective wood." *Id.* at 894, quoting VRP at 25-26. Rejecting this reasoning, the Washington Supreme Court

explained that it is not a plaintiff's burden to rule out all other causes beyond a reasonable doubt to successfully advance this theory:

A plaintiff claiming *res ipsa loquitur* is not required to eliminate with certainty all other possible causes or inferences in order for *res ipsa loquitur* to apply. Instead, *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. The rationale behind this rule lies in the fact that *res ipsa loquitur* provides an inference of negligence.

Id. at 894.(Internal citations omitted; emphasis the court's.)

In this case, the trial court improperly usurped the jury's role when it concluded appellants could not meet the first element of *res ipsa loquitur* based on mere speculation that causes other than defendants' negligence started the BMW fire. It did so despite the record's absence of any independent evidence supporting such speculation. In *Curtis*, the court emphasized that a permissive jury is free to disregard or accept the truth of the inferences suggested by *res ipsa loquitur*. *Id.* at 895. "The fact that the defendant may offer reasons other than negligence for the accident or occurrence merely presents to the jury alternatives that negate the strength of the inference of negligence *res ipsa loquitur* provides." *Id.* Here, it was the jury's job to consider and weigh BMW NA's farfetched theories that arson, mice, leaves or Jiffy Lube caused the BMW to burst into flames. The trial court used the same flawed reasoning as the trial court in *Curtis*

regarding the first element of res ipsa loquitur. As a result, its ruling on this element must not stand, and the order granting summary judgment should be reversed.

(b) The Trial Court Erred When It Held the Exclusive Control Element of Res Ipsa Loquitur Required BMW NA to Have Had Actual, not Constructive, Control of the BMW.

The next question is whether the trial court correctly understood the exclusive control element of res ipsa loquitur. It did not. Respondent BMW NA argued the Omans had to prove it had exclusive physical control of the car when it caught fire. VPR 11:19-25 (“As soon as you take the car off the lot, you lose exclusive control... ..The last time [BMW NA] had possession of the car was for a week two years prior to the plaintiffs getting it.”) When ruling on the motion for summary judgment, the trial court cited the lack of physical control over the car at the time of the fire as another reason for its finding that res ipsa did not apply. VRP 34:6-9 (“There is just no argument that BMW of North America had exclusive control over this car. It had been two and half years since BMW of North America even touched the car...”)

A defendant’s physical control of the instrumentality at the time of the harm is not an absolute requirement. Exclusive control may be actual or constructive. *Zukowsky v. Brown*, 79 Wn.2d 586, 595, 488 P.2d 269 (1971)(citing *Hogland v. Klein*, 49 Wn.2d 216, 298 P.2d 1099 (1956)).

The degree of control must be exclusive only to the extent that it supports a legitimate inference that defendant's control extended to the instrumentality causing injury or damage. *Id.* “In its proper sense, this ‘condition’ states nothing more than 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.’” *Id.*(citing Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183, 201 (1940)); *see also* *Tinder v. Nordstrom, Inc.*, 84 Wn.App. 787, 795, 929 P.2d 1209 (Div. 1 1997)(citations omitted)(“Exclusive control does not mean actual physical control, but rather refers to the responsibility for the proper and efficient functioning of the instrumentality that caused the injury.”); *Ewer v. Goodyear Tire & Rubber Co.*, 4 Wn.App. 152, 157, 480 P.2d 260 (Div. 3 1971)(citations omitted)(“This requirement may be satisfied if there is evidence of control by the defendant at the time of the negligent act complained of, i.e., creation of the defect, although the defendant's control is not exclusive at the time of the accident.”); *Kind v. City of Seattle*, 50 Wn.2d 485, 489, 312 P.2d 811 (1957)(citing *Hoglund v. Klein*, 298 P.2d 1099)(“Legal control or responsibility for the proper and efficient functioning of the instrumentality which caused the injury and a superior, if not exclusive, position for knowing or obtaining knowledge of the facts

which caused the injury, provide a sufficient basis for application of the doctrine.”)

As the product distributor, BMW NA had the responsibility for ensuring that the N54 engine, like the one in Mr. Thorne’s 335xi, performed properly and efficiently. When Mr. Thorne leased his car on July 7, 2007, BMW NA issued a new vehicle limited warranty ensuring the BMW was free of defects in its workmanship and materials. CP 121-123, 148. After the company discovered a pattern of malfunctions with high pressure fuel pumps in the N54 engines, BMW offered a voluntary recall to customers experiencing problems with these components. CP 447. The recall gave customers the opportunity for authorized BMW centers to inspect and replace high pressure fuel pumps and other fuel system components, if necessary. *Id.* The recall underscores BMW NA’s responsibility to supply and distribute defect-free vehicles.

Moreover, BMW NA is in a superior position to understand precisely how malfunctions in the high pressure fuel pumps and other fuel system components could have caused the BMW fire. CP 622 (BMW must provide more information about how high pressure fuel pump and fuel injector failures identified in the recall could cause external fuel leaks resulting in fire.) Considering these facts under Washington’s flexible standard for the retained control element of *res ipsa*, as articulated in

Zukowsky, Kind, Tinder and *Ewer*, there is ample basis to allow this method of proof. The trial court incorrectly granted BMW NA's motion for summary judgment due to appellants' inability to meet a rigid interpretation of the retained control element. Since the court held appellants to an incorrect *res ipsa* standard, the court's order dismissing the Omans' negligence-based WPLA claim against BMW NA should be reversed.

(4) Even If Appellants' WPLA Negligence Claim Against BMW NA Fails, Their Breach of Express Warranty Claim Under WPLA Should Survive Summary Judgment.

The Act sets forth specific circumstances when a product seller other than a manufacturer may be held liable to a claimant, including for negligence, breach of an express warranty, and intentional misrepresentation. RCWA 7.72.040(1). Even if a product contains no defects in construction, design or warning, it can create liability on the part of a seller who makes express warranties concerning the performance of the product. David K. DeWolf et al.,¹⁶ Wash. Prac., Tort Law and Practice §16.17, (3d ed.) An express warranty is actionable if "it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue." *Id.* (quoting RCWA 7.72.030(2)(b)).

Therefore, even if the Omans' res ipsa loquitur proof of negligence is still inadequate to overcome summary judgment, they still have a viable claim against BMW NA under WPLA for breach of an express warranty. BMW NA made an express warranty to the Thornes when they leased their brand new car in 2007. In response to the Omans' requests for production, the Thornes produced a document with BMW NA's warranty:

BMW Delivery Quality Assurance

This BMW vehicle had been designed, engineered and manufactured under strict quality control guidelines. It has been prepared and inspected to ensure that it is free of defects in workmanship and materials in accordance with the New Vehicle Limited Warranty issued by BMW of North America, LLC.

CP 148 (Thornes' Response to Request for Production No. 8.) Moments before the fire, Mr. Thorne's 335xi experienced misfire faults consistent with known symptoms for defects in the N54 engine's fuel system. The evidence of his attempt to have the car repaired on October 26, of the two BMW service bulletins, and of the circumstances surrounding the vehicle blaze all support appellants' theory that BMW NA breached its express warranty by supplying the Thornes with a defective car. The trial court's dismissal of appellants' WPLA claim against BMW NA should be reversed for this reason alone.

- (5) The Trial Court Erred When It Dismissed Appellants' Negligence Claim Against BMW of Bellevue Because It Failed to Make All Reasonable Inferences in Their Favor.

The requirements for a plaintiff to prove negligence are well known: she must show that the defendant had a duty to the plaintiff, the defendant breached the duty and this breach was both the proximate cause and cause-in-fact of the harm to the plaintiff. *Jackson v. City of Seattle*, 158 Wn. App. 647, 651, 244 P.3d 425 (Div. 1, 2010). BMW of Bellevue's service department had a duty to the Thornes and Omans to inspect and repair the 335xi under the reasonable person standard of care, i.e. "...the manner in which an ordinary prudent person engaged in the repair of automobiles would have performed the particular work under the same or similar circumstances." *Myers v. Ravenna Motors, Inc.*, 2 Wn. App. 613, 614-615, 468 P.2d 1012 (1970)(citations omitted). BMW of Bellevue breached its duty when it consulted the wrong service bulletin on October 26, 2009 and misdiagnosed the true cause of the cold start misfires in the BMW. As a result of this error, the BMW's engine continued to malfunction, which more probably than not caused the November 4, 2009 fire destroying the BMW and the Pontiac.

The summary judgment standard mandates that the trial court make all inferences in favor of the non-moving party. An inference is a logical deduction or conclusion from an established fact. *Fannin v. Roe*, 62 Wn.2d 239, 382 P.2d 264 (1963)(citing *Peterson v. Betts*, 24 Wn.2d

376, 165 P.2d 95); *see also*, Black's Law Dictionary 781 (7th ed. 1999) (An inference is a conclusion reached by considering other facts and deducting a logical consequence from them.) However, when addressing whether the Omans met their burden to offer prima facie evidence of BMW of Bellevue's negligence, the trial court neglected to make all reasonable inferences in appellants' favor.

(a) The Trial Court Failed to Make All Reasonable Inferences From the Undisputed Facts In Appellants' Favor.

Given the established facts in this case, the trial court should have inferred from the circumstantial evidence that malfunctions in the high pressure fuel pump and/or fuel injectors causing the BMW to run rough during cold starts also caused the car fires. The following facts are undisputed:

- The BMW was experiencing rough starts, reduced power, rough idle and an engine light warning in the days leading up to the fire, CP 122;
- On October 26, 2009, nine days before the fire, Mr. Thorne brought his car into BMW of Bellevue for service to correct these problems, CP 130;
- BMW of Bellevue did not consult the Cold Start Bulletin, which is for rough running cold starts triggering the "service

engine soon” lamp, the same problem the BMW was experiencing, CP 453;

- The Cold Start Bulletin explains that the cause of the rough start misfires is from high pressure fuel pump malfunctions, and recommends replacing high-pressure injectors and any fuel soaked spark plugs, CP 453;
- BMW of Bellevue relied on the Software Error Bulletin, which is for misfire faults occurring at full operating temperatures, most frequently after driving for extended periods of time, which was not Mr. Thorne’s experience with his car, CP 450;
- BMW’s two bulletins reference each other, emphasizing as an “IMPORTANT NOTE” that mechanics should rely on the Cold Start Bulletin for N54 misfire faults occurring during a cold start, CP 451, but should rely on the Software Error Bulletin for misfire fault complaints during normal engine operation, CP 454;
- Relying on the Software Error Bulletin, BMW of Bellevue made an incorrect diagnosis, telling Mr. Thorne there was “...no fix and that the car was fine (sic) to drive until software was available...” CP 138;

- BMW of Bellevue returned the BMW to Mr. Thorne without replacing the fuel injectors, spark plugs or any other parts, CP 130;
- BMW of Bellevue had actual or constructive knowledge that the N54 engine like the one in Mr. Thorne's BMW had a history of high pressure fuel pump and fuel injector failures, CP 447;
- After the fire, BMW NA promptly paid Mr. Thorne \$1,500 in "goodwill" towards purchase of another BMW to retain him as a loyal BMW customer after the "unfortunate incident," CP 135-140.

These facts, when viewed from the perspective most beneficial to the Omans, mandate the reasonable inferences that:

- Malfunctions in the BMW high pressure fuel pump and/or fuel injection system caused Mr. Thorne's car to run rough during cold starts;
- The same malfunctioning high pressure fuel pump and/or fuel injectors that BMW of Bellevue failed to diagnose and repair caused fuel leaks igniting the fire on November 4, 2009; and
- Had BMW of Bellevue made the correct diagnosis and properly repaired the BMW, these fuel leaks from the high

pressure fuel pump and/or fuel injectors would have been fixed and the fire never would have occurred.

Despite the fact that this was a summary judgment hearing with appellants as the nonmoving party, the trial court did not make the required reasonable inferences. The record from oral argument reveals the court's unwillingness to make logical inferences regarding the causal link between a faulty high pressure fuel pump and fuel injectors, fuel soaked spark plugs, leaking fuel and the car fire. It inquired, "What is the connection between that [the bulletin] and a fire hazard?" VRP, at 19:13-14. The court noted it was "having a hard time understanding how we really have evidence that the problem that's identified in the bulletin would lead to a fire." *Id.* at 26:21-22. This statement ignores the obvious fact that gasoline is highly combustible.

The trial court erred in its insistence that appellants provide conclusive evidence that BMW of Bellevue's failure to fix the BMW's fuel system based on the correct service bulletin caused the fire. Circumstantial evidence can adequately establish a basis for recovery under theories of negligence, *res ipsa loquitur* or strict liability. *Ewer v. Goodyear Tire & Rubber Co.* 4 Wn.App. 152, 157, 480 P.2d 260 (1971). *See also Ripley v. Lanzer*, 152 Wn.App. 296, 307, 215 P.3d 1020 (Div. 1 2009)(Negligence and causation, like other facts, may be proved by

circumstantial evidence.)(citations omitted.) In *Ewer*, the court observed that "...the cause of an accident may be inferred from circumstances." *Id.* at 158-159, (citing *Tubb v. Seattle*, 136 Wash. 332, 337, 239 P.1009 (1925)). Noting that a plaintiff's responsibility is only to satisfy the jury by a fair preponderance of the evidence, the court explained:

A plaintiff in this character of case is not obligated to establish the material facts essential to a recovery beyond a reasonable doubt. Such a rule would amount to a denial of justice. It is sufficient if his evidence affords room for men of reasonable minds to conclude that there is a greater probability that the accident causing the injury happened in such a way as to fix liability upon the person charged with such liability, than it is that it happened in a way for which the person so charged would not be liable.

Id. at 159. See also *Klossner v. San Juan County*, 21 Wn .App. 689, 692, 586 P.2d 899 (1978)(citing *Raybell v. State*, 6 Wn. App. 795, 496 P.2d 559 (1972))("Precise knowledge of how an accident occurred is not required to prove negligence and all elements, including proximate cause, can be proved by inferences arising from circumstantial evidence.")

In this case, the court erred by failing to accept the circumstantial evidence as sufficient proof of causation to defeat BMW of Bellevue's motion for summary judgment. It is reasonable to conclude from these facts, taking all inferences in the Omans' favor, that the same high pressure fuel pump problems which caused rough running cold starts also caused the engine to catch fire. Therefore, BMW of Bellevue's failure to

fix the car's faulty fuel system in October of 2009 was also a failure to prevent the November 4, 2009 fire.

Summary judgment is not warranted when different inferences may be drawn from the same evidentiary record. Trautman, 45 Wash.L.Rev. at 4. There is no question that the N54 engine has a history of high pressure fuel pump failures, and that the BMW service bulletin for misfires during startup recommends replacing fuel soaked spark plugs and malfunctioning fuel injectors. There is no question that the BMW was experiencing the same symptoms that the Cold Start Bulletin attributed to malfunctioning high pressure fuel pumps and fuel injectors, and that BMW of Bellevue misdiagnosed the misfires by relying on the Software Error Bulletin instead. Respondents simply maintain that no negligence associated with the fire should be inferred from these undisputed facts.

Appellants met their burden to provide evidence of BMW of Bellevue's failure to diagnose the real problem with the car only days before it caught on fire. A reasonable jury could conclude that the respondent's negligence caused the fire destroying the Omans' car. To dismiss this case at this stage is indeed a denial of justice to this couple.

(b) The Trial Court Failed to Make All Reasonable Inferences From Appellants' Expert Witness Testimony in Their Favor.

The trial court additionally erred by applying too strict a standard when evaluating the expert's declaration supporting appellants' opposition to the summary judgment motions. Specifically, the court based its ruling in part on Mr. Trevor Newbery's omission of the phrase "more probably than not," even though he concluded, to a reasonable degree of engineering and scientific probability, that a malfunction in the BMW's engine compartment caused the fire. When it issued its decision dismissing appellants' product liability claim against BMW of Bellevue, the Court stated,

...there's no expert testimony to show that the problems identified in that service bulletin could lead to the fire, could have led to the fire, and there was certainly no more probably than not kind of testimony here.

VRP 36:5-9. However, in its search for the magical phrase "more probably than not," the court appears to have misunderstood Mr. Newbery's statements that: to a reasonable degree of engineering and scientific probability, a malfunction in one of the vehicle components in the BMW caused the fire; and, to a reasonable degree of engineering and scientific probability, the malfunctions which caused the fire included in the high pressure fuel pump and the fuel injectors, very same problems identified in the service bulletin BMW of Bellevue failed to consult.

In fact, Mr. Newbery intended the qualifier “to a reasonable degree of engineering and scientific probability” to convey his opinions on a more probable than not basis. Attached to appellants’ motion for reconsideration was his declaration supplementing his report, explicitly expressing his opinions using this terminology:

More probably than not, a malfunction of one of the vehicle components in the driver’s side area of the BMW’s engine compartment caused the fire. More probably than not, the specific malfunction that caused the fire was a malfunction of one or more of the following:

- a. Fuel leaking from malfunctioning fuel injectors being ignited by the hot exhaust surface at the back of the engine.
- b. Fuel leaking from malfunctioning high pressure fuel pump being ignited by the hot exhaust surface at the back of the engine.
- c. The positive battery cable arcing against a ground or melting and arcing due to a defect in the cable.

CP 622. Additionally, Mr. Newbery stated that while the fuel injector failure identified in BMW’s service bulletin and/or the high pressure fuel pump failure identified by the recall could have caused this car fire, at this point BMW has not provided enough detailed information about each failure to know for sure. *Id.* At this early stage in the proceedings, before most discovery has even been completed, the defendant should not be

rewarded for withholding all that it knows about the malfunctioning fuel systems in the N54 engines.

The Washington Supreme Court has held that “an affidavit containing expert opinion on an ultimate issue of fact was sufficient to create a genuine issue of fact which could preclude summary judgment.” *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979)(citing *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974), and *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 411, 553 P.2d 107 (1976)). At the summary judgment stage, a court must view the inferences created by all the evidence, including an expert witness’ declaration, in the light most favorable to the nonmoving party. *Id.* at 352-353. *See also Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 34, 991 P.2d 728 (Div. 3, 2000)(quoting *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994)).

Furthermore, when evaluating conflicting affidavits offered in the context of summary judgment, a tribunal should, “carefully scrutinize the affidavits of the moving party and indulge some leniency with respect to the affidavits of the opposing party. The allegations of the opponent are ordinarily not required to be as well-supported as those of the movant.” Trautman, 45 Wash.L.Rev.at 12.

Thus, even before appellants moved for reconsideration with the reworded declaration, the trial court should have understood Mr. Newbery's introductory qualifier "to a reasonable degree of engineering and scientific probability" to mean "more probably than not." It should have accepted as his expert opinion that a preventable malfunction involving the BMW's high pressure fuel pump, fuel injectors and/or battery cable more probably than not caused the fire. Given the court's emphasis on this language during oral argument on the summary judgment motions, it should have later granted the appellants' motion for reconsideration and reversed itself on this issue.

E. CONCLUSION

Summary judgment dismissing appellants' claims against BMW NA and BMW of Bellevue was improper. This Court should reverse the trial court's decisions on summary judgment and remand for trial. Costs on appeal should be awarded to appellants Annie and Kraig Oman.

DATED this 30th day of December, 2011.

Respectfully submitted,



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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
2011 DEC 30 PM 1:48

ANNE E. OMAN and KRAIG G. OMAN, husband and wife, and the
marital community composed thereof,

Plaintiffs/Appellants,

v.

SEAN THORNE and GINA THORNE, husband and wife; NORTHWEST
FINANCIAL GROUP, INC., a/k/a BMW OF BELLEVUE; and BMW OF
NORTH AMERICA, LLC,

Defendants/Respondents.

DECLARATION OF SERVICE

I, Wil John Cabatic, declare and state as follows:

1. I am and at all times herein was a citizen of the United States, a resident of Kitsap County, Washington, and am over the age of 18 years.

2. On the 30th day of December, 2011, I caused to be served true and correct copies, of:

- (1) Brief of Appellants Oman; and
- (2) Declaration of Service, on the following:

I. Via ABC Special Legal Messenger:

Counsel for BMW of BELLEVUE

August G. Cifelli
LEE SMART, P.S., INC.
701 Pike Street, Suite 1800
Seattle, WA 98101

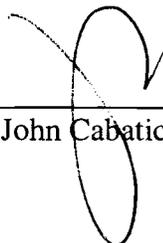
Counsel for BMW of NORTH AMERICA, LLC

Peter Steilberg
MERRICK HOFSTEDT & LINDSEY, P.S.
3101 Western Avenue, Suite 200
Seattle, WA 98121

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 30th day of December, 2011.

BERGMAN DRAPER & FROCKT, PLLC



Wil John Cabatic

COURT REPORTERS
DIVISION ONE
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timely, and good faith effort to rectify the consequences of his misconduct. When Shepard learned from an article in the *Washington State Bar News* that a lawyer's involvement in living trust operations could be improper, he wrote a "very detailed" letter to the Bar seeking guidance. CP at 128-29 (FFCL at 12-13, ¶¶ 78-79). The letter set out a hypothetical situation, which closely resembled the facts of Shepard's arrangement with Cuccia. The Bar ignored this letter. CP at 129 (FFCL at 13, ¶ 80). The majority faults Shepard for not penning a perfect recitation of the facts in his hypothetical situation, but perfection is not required. The point is that Shepard came to realize he might have made a mistake by dealing with Cuccia, and he took action to see if his conduct complied with the Rules. He could have ignored his actions and simply hoped they never came to light. But when it became clear that he had made a poor decision, Shepard wrote a letter to his clients to inform them of the State's investigation of Cuccia, and to urge them to schedule an appointment with him or another attorney. *Id.* (FFCL at 13, ¶ 81). He sent a follow-up letter to clients who did not respond to the first letter. *Id.* In light of these actions, I give Shepard's good faith effort to rectify his misconduct considerable weight.

¶ 49 At the end of the day, mitigators⁶ outnumber aggravators⁷ by a score of six to four. Against the backdrop of the proper presumptive sanction—suspension—I agree with the hearing officer that Shepard should be suspended from the practice of law for six months instead of two years. He has shown genuine remorse and has taken significant steps to make things right. A lengthier suspension will serve no useful purpose as this lawyer has already learned a hard lesson.

¶ 50 I dissent.



6. Mitigating factors included: (1) absence of prior disciplinary record; (2) absence of dishonest or selfish motive; (3) timely good faith effort to make restitution or rectify consequences of misconduct; (4) full and free disclosure to Board or cooperative attitude toward proceedings; (5) character or reputation; and (6) remorse.

Tambra CURTIS, Petitioner,

v.

Jack LEIN and Claire Lein, husband and wife, and the marital community composed thereof; and Willow Creek Farm, Incorporated, a domestic corporation, Respondents.

No. 83307-9.

Supreme Court of Washington,
En Banc.

Argued July 16, 2010.

Decided Sept. 16, 2010.

Background: Tenant who suffered injuries after falling through property owners' wooden dock after step gave way brought negligence action against property owners. The Superior Court, King County, John P. Erlick, J., entered summary judgment in favor of property owners, and tenant appealed. The Court of Appeals, 150 Wash. App. 96, 206 P.3d 1264, affirmed. Tenant appealed.

Holdings: The Supreme Court, Stephens, J., held that:

- (1) tenant could rely upon *res ipsa loquitur* to raise inference of owners' negligent maintenance of the dock, and
- (2) the tenant was not required to eliminate other possible causes than owners' negligence which could have caused the failure of the step on the dock in order for *res ipsa loquitur* to apply.

Reversed and remanded.

Madsen, C.J., concurred and filed opinion.

1. Negligence ⇄ 1695

Whether *res ipsa loquitur* applies in a given context is a question of law.

7. Aggravating factors included: (1) pattern of misconduct; (2) multiple offenses; (3) substantial experience in the practice of law; and (4) vulnerable victims.

2. Negligence ⇌1620, 1624

Generally, *res ipsa loquitur* provides nothing more than a permissive inference of negligence; it is ordinarily sparingly applied, in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.

3. Negligence ⇌1613, 1617, 1620

The doctrine of *res ipsa loquitur* spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent; in such cases the jury is permitted to infer negligence.

4. Negligence ⇌1615, 1620

The doctrine of *res ipsa loquitur* permits the inference of 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.

5. Landlord and Tenant ⇌164(1)

A tenant is an invitee for purposes of determining a landlord's duty of care, as an element of a premises liability claim.

6. Landlord and Tenant ⇌164(1)

Reasonable care, as an element of a landowner's duty of care to a tenant, requires the landowner to inspect for dangerous conditions, followed by such repair, safeguards, or warning as may be reasonably necessary for a tenant's protection under the circumstances.

7. Negligence ⇌1613, 1614, 1617

A plaintiff may rely upon *res ipsa loquitur*'s inference of negligence if (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence.

8. Health ⇌818**Negligence** ⇌1613

For doctrine of *res ipsa loquitur* to be applicable, the requirement that the accident or occurrence producing the injury must be of a kind which ordinarily does not happen in the absence of someone's negligence 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.

9. Negligence ⇌1620

When *res ipsa loquitur* applies, it provides an inference as to the defendant's breach of duty.

10. Landlord and Tenant ⇌169(4)

Tenant who suffered injuries after falling on property owners' wooden dock could rely upon *res ipsa loquitur* to raise inference of owner's negligent maintenance of the dock, given that accident was of type that would not ordinarily happen in the absence of negligence, there was no evidence that the dock was not in the exclusive control of the owners, and tenant did not contribute in any way to the accident.

11. Landlord and Tenant ⇌169(4)

Tenant who suffered injuries after falling on property owners' wooden dock was not required to eliminate other possible causes than owner's negligence which could have caused the failure of the step on the dock, such as improper construction or defective wood, in order for *res ipsa loquitur* to apply.

12. Negligence ⇌1617, 1620

A plaintiff claiming *res ipsa loquitur* is not required to eliminate with certainty all other possible causes or inferences' in order for *res ipsa loquitur* to apply.

13. Negligence ⇒1615, 1621

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, and, 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.

14. Negligence ⇒1695

As with any other permissive evidentiary inference, a jury is free to disregard or accept the truth of the inference of negligence that *res ipsa loquitur* provides; the fact that the defendant may offer reasons other than negligence for the accident or occurrence merely presents to the jury alternatives that negate the strength of the inference.

Jo-Hanna Gladness Read, Law Office of Jo-Hanna Read, Seattle, WA, for Petitioner.

Kathleen Mary Thompson, Gardner Bond Trabolsi, PLLC, Seattle, WA, for Respondents.

STEPHENS, J.

¶1 This case requires us to revisit our body of law involving *res ipsa loquitur*. Petitioner, Tambra Curtis, lived on a farm owned by the respondents, Jack and Claire Lein. Curtis was injured on the farm when a dock on which she was walking gave way beneath her. The Leins had the dock destroyed shortly after the incident, so there is no evidence as to the dock's condition at the time of the accident. Curtis brought a negligence suit against the Leins, who moved for summary judgment. Curtis invoked *res ipsa loquitur* to fill in the evidentiary gaps caused by the dock's destruction. The lower courts held the doctrine did not apply. We reverse the Court of Appeals and hold that at trial, Curtis may rely upon *res ipsa loquitur* as evidence of negligence.

FACTS AND PROCEDURAL HISTORY

¶2 Jack and Claire Lein bought Willow Creek Farm in 1978 and took up residence there around 1980. Claire Lein raised thoroughbred horses on the farm. The property included a small pond, which the Leins enlarged. In the late 1980s the Leins had a wooden dock built over the pond in order to facilitate access to the pond's drainage pipe. The pond and dock were open to the farm's residents and, although the pond was primarily decorative, the Leins' grandchildren sometimes swam in it.

¶3 Around 2001, the Leins sold the farm, though they continued living on it until 2004 along with their son Mike, his wife Donna, and their children. Also living on the farm in housing provided by the Leins was Michael Stewart, who was hired as the farm manager in 2001, and Stewart's girl friend, Tambra Curtis, and their son. Curtis did not work on the farm.

¶4 On April 25, 2004, Curtis walked out onto the dock over the pond for the first time since she began living on the farm. A couple of steps onto the dock, the boards underneath her feet gave way, and her left leg plunged through the dock up to her hip. As a result of the fall, Curtis suffered a hairline fracture to her tibia.

¶5 When Claire Lein learned of the accident, she instructed Stewart to remove the dock. Knowing the farm's new owners planned to level the property to build a school, she saw no reason to replace the dock. As a result of the dock's destruction, there is no evidence as to what about the dock caused Curtis's fall. Claire and Mike Lein testified that they had no reason to believe the dock was in need of repair or unsafe. Curtis does not recall the condition of the dock on the day she stepped out onto it, but in an interrogatory response she noted that her son told her he was instructed by the Leins' grandchildren that the dock was not safe to play on.

¶6 Curtis brought a personal injury action against the Leins and Willow Creek Farms, Incorporated. The Leins moved for summary judgment, which the trial court grant-

ed. The trial court held that *res ipsa loquitur* did not apply because causes other than negligent maintenance of the dock could have been at play in Curtis's fall. On appeal, the Court of Appeals also concluded that *res ipsa loquitur* did not apply, though on different grounds. The Court of Appeals reasoned that, while *res ipsa loquitur* could be invoked as evidence of negligence, it did not relieve Curtis of the burden of proving that the dock's defect was discoverable. Curtis petitioned for review, which we granted.

ANALYSIS

¶7 This case requires us to determine whether summary judgment was properly granted as to the application of *res ipsa loquitur* in a premises liability suit. An overview of these concepts is helpful.

[1-4] ¶8 Whether *res ipsa loquitur* applies in a given context is a question of law. *Pacheco v. Ames*, 149 Wash.2d 431, 436, 69 P.3d 324 (2003). *Res ipsa loquitur* means "the thing speaks for itself." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 243 (5th ed.1984). Generally, it "provides nothing more than a permissive inference" of negligence. *Zukowsky v. Brown*, 79 Wash.2d 586, 600, 488 P.2d 269 (1971). It is "ordinarily sparingly applied, 'in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.'" *Tinder v. Nordstrom, Inc.*, 84 Wash.App. 787, 792, 929 P.2d 1209 (1997) (quoting *Morner v. Union Pac. R.R. Co.*, 31 Wash.2d 282, 293, 196 P.2d 744 (1948)).

The doctrine of *res ipsa loquitur* spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent. In such cases the jury is permitted to infer negligence. The doctrine permits the inference of 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.

Pacheco, 149 Wash.2d at 436, 69 P.3d 324 (citations omitted).

[5, 6] ¶9 According to premises liability theory, a landowner owes an individual a duty of care based on the individual's status upon the land. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wash.2d 121, 128, 875 P.2d 621 (1994). A tenant is an invitee. *Mucsi v. Graoch Assocs. Ltd. P'ship No. 12*, 144 Wash.2d 847, 855, 31 P.3d 684 (2001). This court has adopted the view of the *Restatement (Second) of Torts* § 343 as to a landowner's duty of care to an invitee.

[A] landowner is subject to liability for harm caused to his tenants by a condition on the land, if the landowner (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to tenants; (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect the tenant against danger.

Mucsi, 144 Wash.2d at 855-56, 31 P.3d 684 (citing RESTATEMENT (SECOND) of Torts § 343 (1965)). "Reasonable care requires the landowner to inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [a tenant's] protection under the circumstances.'" *Id.* at 856, 31 P.3d 684 (alteration in original) (quoting *Tincani*, 124 Wash.2d at 139, 875 P.2d 621 (quoting RESTATEMENT, *supra*, § 343 cmt. b)).

¶10 Curtis argues that because the dock was destroyed following her accident, it is impossible to know what precisely about the dock caused her fall. *See* Br. of Appellant at 10-11. She therefore relies upon *res ipsa loquitur*, contending that a wooden dock does not ordinarily give way unless the owner has negligently failed to maintain the structure. *Id.* The trial court granted the Leins' motion for summary judgment, reasoning that *res ipsa loquitur* did not apply to Curtis's claim because the court could conceive of "multiple other causes which could have caused the failure of the step on the dock," such as improper construction or defective materials. Verbatim Report of Proceedings

(VRP) at 25–26. The Court of Appeals affirmed the trial court, reasoning that while wooden docks do not ordinarily give way in the absence of negligence (thus implicating *res ipsa loquitur*), the doctrine could not be used to infer that dangerous docks exhibit *discoverable* defects. *Curtis v. Lein*, 150 Wash.App. 96, 107, 206 P.3d 1264 (2009). Rather, Curtis retained the burden under premises liability of proving the Leins knew or should have known of the dock's faulty condition.

[7, 8] ¶11 We reject this analysis. A plaintiff may rely upon *res ipsa loquitur*'s inference of negligence if (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence. *Pacheco*, 149 Wash.2d at 436, 69 P.3d 324. The first element is satisfied if one of three conditions is present:

“(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.”

Id. at 438–39, 69 P.3d 324 (quoting *Zukowsky*, 79 Wash.2d at 595, 488 P.2d 269 (quoting *Horner v. N. Pac. Beneficial Ass'n Hosps., Inc.*, 62 Wash.2d 351, 360, 382 P.2d 518 (1963))).

¶12 Curtis relies upon the second scenario: general experience and observation teaches that a wooden dock does not give way under foot unless it is negligently maintained. *Curtis*, 150 Wash.App. at 106, 206 P.3d 1264. The Court of Appeals agreed with this argument but concluded that it “does not follow that dangerous docks ordinarily exhibit discoverable defects,” and therefore *res ipsa loquitur* could not apply. *Id.* at 107, 206 P.3d 1264. The Court of Appeals explained that Curtis could not rely

on *res ipsa loquitur* to meet her “burden of showing that the dock's defect was discoverable.” *Id.* at 106, 206 P.3d 1264.

[9] ¶13 The Court of Appeals erred when it parsed out the inference of negligence that can be drawn from *res ipsa loquitur*. When *res ipsa loquitur* applies, it provides an inference as to the defendant's breach of duty. *See Miller v. Jacoby*, 145 Wash.2d 65, 74, 33 P.3d 68 (2001). It therefore would apply an inference of negligence on the part of the Leins generally: what they knew or reasonably should have known about the dock's condition is part of the duty that they owed to Curtis. What the Leins knew or reasonably should have known about the dock is exactly the sort of information that *res ipsa loquitur* is intended to supply by inference, if the inference applies at all. *See Ripley v. Lanzer*, 152 Wash.App. 296, 307, 215 P.3d 1020 (2009) (accident's “occurrence is of itself sufficient to establish *prima facie* the fact of negligence on the part of the defendant, without further direct proof.” (quoting *Metro. Mortgage & Sec. Co. v. Wash. Water Power*, 37 Wash.App. 241, 243, 679 P.2d 943 (1984))). The Court of Appeals erred when it held otherwise.

¶14 *Penson v. Inland Empire Paper Co.*, 73 Wash. 338, 132 P. 39 (1913), is on point. In *Penson*, wooden scaffolding collapsed while a painter was working upon it. This court held that *res ipsa loquitur* supplied the necessary evidence of negligence, noting that the result was to shift the burden to the defendant to prove, through evidence sufficient to rebut the inference arising from application of *res ipsa loquitur*, that the faulty condition of the scaffolding was undiscoverable. *Penson*, 73 Wash. at 347–48, 132 P. 39 (“The burden of explanation . . . was upon the appellant. . . . If the defect which caused it to break was latent and unobservable by the exercise of reasonable care, no evidence was offered to prove it.”).

[10] ¶15 The only question remaining is whether *res ipsa loquitur* applies at all, a premise the trial court rejected. As noted, *res ipsa loquitur* applies where the injury-producing event is of a type that would not ordinarily occur absent negligence, the inju-

ry-producing agency or instrumentality is in the exclusive control of the defendant, and the plaintiff did not contribute to the injury. *Pacheco*, 149 Wash.2d at 436, 69 P.3d 324. The Leins conceded during their motion for summary judgment before the trial court that Curtis was not at fault. VRP at 5. The inquiry has since focused on the first two elements.

¶ 16 Taking the element of exclusive control first, the Leins argue that Curtis “failed to cite any legal authority in which courts have found that a wooden dock on a pond constitutes an ‘instrumentality’ and/or that ownership, alone, of the dock would be considered ‘exclusive control’ of such instrumentality.” Br. of Resp’t at 29. It cannot be seriously debated that the dock was not an injury-producing instrumentality in this instance. As for exclusive control, the Leins do not argue that anyone else had responsibility for the dock. *Id.* at 29–30. The Leins have offered no evidence that the dock was not in their exclusive control prior to Curtis’s accident.¹

¶ 17 That leaves the first element: whether an accident of this sort ordinarily occurs in the absence of negligence. As noted, the Court of Appeals concluded that docks do not normally give way if properly maintained, but Curtis still had to prove the dock had obvious defects. As explained, the latter half of this reasoning was in error. However, the Court of Appeals was correct when it reasoned that general experience tells us that wooden docks ordinarily do not give way if properly maintained. That is, “[i]n the general experience of mankind,” the collapse of a portion of a dock “is an event that would not be expected without negligence on someone’s part.” *Zukowsky*, 79 Wash.2d at 596, 488 P.2d 269.²

1. At times there is a suggestion that Michael Stewart was responsible for premises maintenance and therefore the condition of the dock. See, e.g., Defs./Resp’ts’ Answer to Tandra Curtis’ Pet. for Review at 9 (“According to Michael Stewart, his job was to oversee the operation of the farm.”); Clerk’s Papers at 151 (deposition of Michael Stewart). To the extent this might bear upon the question of exclusive control, it should be noted that Stewart was an agent of the Leins.

[11–14] ¶ 18 The trial court concluded that *res ipsa loquitur* did not apply because “there are multiple other causes [than negligence] which could have caused the failure of the step on the dock,” such as improper construction or defective wood. VRP at 25–26. This analysis misses the mark. A plaintiff claiming *res ipsa loquitur* is “not required to ‘eliminate with certainty all other possible causes or inferences’ in order for *res ipsa loquitur* to apply.” *Pacheco*, 149 Wash.2d at 440–41, 69 P.3d 324 (quoting *Douglas v. Busabarger*, 73 Wash.2d 476, 486, 438 P.2d 829 (1968) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 222 (3d ed.1964))). Instead, “*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.” *Id.* at 439–40, 69 P.3d 324. The rationale behind this rule lies in the fact that *res ipsa loquitur* provides an inference of negligence.

[T]he *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. “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.”

Id. at 441–42, 69 P.3d 324 (quoting *Covey v. W. Tank Lines*, 36 Wash.2d 381, 392, 218 P.2d 322 (1950) (quoting *Hardman v. Younkners*, 15 Wash.2d 483, 493, 131 P.2d 177 (1942))). As with any other permissive evi-

2. In coming to this conclusion, the Court of Appeals relied on *Penson*, stating that *Penson* holds that “*res ipsa loquitur* applies to explain why a wooden structure would give way.” *Curtis*, 150 Wash.App. at 106, 206 P.3d 1264 (citing *Penson*, 73 Wash. at 339–41, 132 P. 39). Whether *res ipsa loquitur* applies “can only be determined in the context of each case.” *Zukowsky*, 79 Wash.2d at 594, 488 P.2d 269. We do not mean to suggest that based upon *Penson*, negligence may be inferred as a matter of law anytime a wooden structure collapses.

dentiary inference, a jury is free to disregard or accept the truth of the inference. The fact that the defendant may offer reasons other than negligence for the accident or occurrence merely presents to the jury alternatives that negate the strength of the inference of negligence *res ipsa loquitur* provides. The trial court therefore erred when it concluded that *res ipsa loquitur* was inapplicable as a matter of law due to the possibility that reasons other than negligence accounted for the dock's collapse.

¶ 19 In sum, Curtis has shown each of the elements necessary for relying upon *res ipsa loquitur* in a jury trial: (1) she has shown the accident is of a type that would not ordinarily happen in the absence of negligence because general experience counsels that properly maintained wooden docks do not give way under foot; (2) there is no evidence before us that the dock was not in the exclusive control of the Leins; and (3) it is uncontested that Curtis herself did not contribute in any way to the accident. We therefore hold that Curtis may rely upon *res ipsa loquitur* in presenting her case to a jury. Whether the inference of negligence arising from *res ipsa loquitur* will be convincing to a jury is a question to be answered by that jury.

CONCLUSION

¶ 20 The injury here was caused by an event that would not normally happen in the absence of negligence, and the Leins have not shown they did not have exclusive control of the dock. Thus, the elements at issue for application of *res ipsa loquitur* to this case are satisfied. We reverse the trial court and the Court of Appeals, and remand this case for trial.

WE CONCUR: CHARLES W. JOHNSON, GERRY L. ALEXANDER, RICHARD B. SANDERS, TOM CHAMBERS, SUSAN OWENS, and MARY E. FAIRHURST, Justices.

MADSEN, C.J. (concurring).

¶ 21 As the majority states, the doctrine of *res ipsa loquitur* is a rule of evidence. "A circumstance necessary to its application is that the injured party, from the nature of the

case, is not in a position to explain the cause, while the party charged is in a position where he is, or if he has exercised reasonable care should be, able to explain and show himself free from negligence." *Penson v. Inland Empire Paper Co.*, 73 Wash. 338, 346, 132 P. 39 (1913). The plaintiff in *Penson* was a painter who was injured in a fall when the timber broke in the scaffolding erected by the defendant. The court affirmed application of the doctrine in that case because, in part, the plaintiff was so injured that he could not inspect the board after the accident and the defendant did not produce the board or any evidence as to its condition. *Id.*

¶ 22 Similar to the plaintiff in *Penson*, the plaintiff here was injured when a timber broke in a dock owned and maintained by the defendants. I agree with the majority that the doctrine should be applied in this case, as it was in *Penson*, to relieve Curtis from establishing whether the defect in the dock was discoverable because the Leins ordered the dock removed, depriving Curtis of evidence with which to meet her burden.

¶ 23 I write because the majority appears to attach no significance to the fact that Jack and Claire Lein had the dock removed. But for the removal of the dock, I would not agree that the doctrine should apply to shift the burden of establishing whether the defect in the dock was discoverable.

WE CONCUR: JAMES M. JOHNSON,
Justice.



Lee H. ROUSSO, Petitioner,

v.

STATE of Washington, Respondent.

No. 83040-1.

Supreme Court of Washington,
En Banc.

Argued May 27, 2010.

Decided Sept. 23, 2010.

Background: State resident brought action for declaratory judgment that state's

ELLIS v. CITY OF SEATTLE

Cite as 13 P.3d 1065 (Wash. 2000)

Wash. 1065

The petitions for review in both of the above styled cases are granted only to review the effect of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The two cases are consolidated for oral argument and decision. All future pleadings should be filed under cause number 69976-3. Petitioners' counsel shall share oral argument time.

2

David A. ELLIS, Respondent,

v.

CITY OF SEATTLE, d/b/a Seattle Center, Appellant.

No. 68252-6.

Supreme Court of Washington, En Banc.

Argued June 20, 2000.

Decided Dec. 14, 2000.

As Amended Jan. 8, 2001.



1

142 Wash.2d 1007

STATE of Washington, Respondent,

v.

Jeremy Mark READ, Petitioner.

No. 70031-1.

Supreme Court of Washington.

Dec. 5, 2000.

ORDER

Department II of the Court considered this matter at its December 5, 2000, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is granted and the cause is remanded to the Court of Appeals Division III for reconsideration in light of *State v. Palomo*, 113 Wash.2d 789, 798-99, 783 P.2d 575 (1989).



Former employee sued city for wrongful discharge in violation public policy after he was fired from job as sound technician for refusing to bypass, without what he deemed proper authorization, an emergency fire microphone sound relay that shut off sports arena's PA system upon activation of fire alarm. The Superior Court, King County, William L. Downing, J., granted summary judgment to city. Employee appealed, and the Court of Appeals, Cox, J., affirmed. Granting review, the Supreme Court, Talmadge, J., held that: (1) in the context of concerns regarding public safety where imminent harm is present, "jeopardy" element of claim for wrongful discharge in violation of public policy test may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action; (2) questions of fact existed as to whether employee had reasonable objective belief that public policy of permitting only certified persons to work on fire alarm systems would be jeopardized if he carried out superiors' request, and as to whether his discharge was justified by an overriding concern on city's part for public safety, precluding summary judgment for city.

Judgment of Court of Appeals reversed; case remanded.

Madsen, J., filed a concurring opinion in which Sanders, J., joined.

1. Master and Servant ⇔30(1.10)

Elements of claim for wrongful discharge in violation of public policy are conjunctive.

2. Appeal and Error Ⓒ837(2)

Rule under which an appellate court, in reviewing a ruling on a motion for summary judgment, will consider only evidence and issues called to the attention of the trial court does not bar appellate court from consulting laws that were not cited to trial court. CR 56(h); RAP 9.12.

3. Municipal Corporations Ⓒ218(3)

To establish retaliation claim under Washington Industrial Safety and Health Act (WISHA), former city employee was not required to prove an actual WISHA violation, but only to prove that city terminated him for making a WISHA complaint. West's RCWA 49.17.160(1).

4. Master and Servant Ⓒ30(1.10)

In the context of concerns regarding public safety where imminent harm is present, "jeopardy" element of claim for wrongful discharge in violation of public policy test may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action.

5. Judgment Ⓒ181(27)

Fact issues existed as to whether city-employed sound technician had reasonable objective belief that public policy of permitting only certified persons to work on fire alarm systems would be jeopardized if he carried out superiors' request to prospectively disable an emergency fire microphone sound relay that shut off sports arena's PA system upon activation of fire alarm, precluding a summary judgment for city on technician's claim against city for wrongful discharge in violation of public policy.

6. Judgment Ⓒ181(27)

Questions of fact existed as to whether city was motivated by an overriding concern for public safety when it fired sound technician who refused to prospectively disable a mechanism that shut down PA system at sports arena when fire alarm was activated, precluding a summary judgment declaring that employee had failed to establish "absence of justification" element of claim against city for wrongful discharge in violation of public policy.

Jeffrey Lowell Needle and Maria C. Fox, Seattle, Amicus Curiae on behalf of Washington Employment Lawyers Assoc.

Daniel Charles Gallagher and Mitchell Alan Riese, Seattle, for Petitioner.

Leight Ann Collings Tift, Seattle, Hon. Mark Sidran, Seattle City Attorney, and Jeffrey Julius, Asst., Seattle, for Respondent.

TALMADGE, J.

We decide in this case if David Ellis, a sound technician at the Seattle Center's Key Arena who refused to disable a public address (PA) component of the Arena's fire alarm system at his employer's insistence, presented sufficient evidence to get to the jury on his claim of wrongful discharge based on public policy. We hold Ellis presented sufficient evidence to withstand a motion for summary judgment. We reverse the Court of Appeals' decision on wrongful discharge based on public policy and remand that portion of Ellis's case, along with his claim of retaliatory discharge pursuant to RCW 49.17.160, to the King County Superior Court for trial.

ISSUE

Has Ellis presented sufficient evidence to get to a jury on his claim of wrongful discharge as against public policy?

FACTS

David A. Ellis was employed as an intermittent sound technician, a casual employee, at the Seattle Center, an agency of the City of Seattle (City), beginning in September 1995. Ellis has a degree in electrical engineering from the University of Michigan. Before he began working at the Seattle Center, he had over 10 years of experience in the repair, installation, and maintenance of professional audio and video equipment.

After several years of refurbishing, the Key Arena opened at the Seattle Center in late 1995 as the home of the Seattle Super-sonics basketball team. The controversy in this case arises from the operation of the fire alarm system at the Key Arena. Upon a

manual or automatic fire alarm being turned in, a three minute delay period occurred. After that interlude, the alarm became audible. By design, this alarm shut off the Arena's PA system. The purpose of shutting off the PA system was to allow the emergency fire microphones located in a separate room at the Arena to become active so emergency officials could give directions to patrons at Key Arena in the event of a fire or other emergency. Thus, Seattle Fire Department personnel could make any necessary crowd control announcements over the PA system without interference from those announcing a game or other activity at Key Arena. Ellis and other sound technicians were specifically told of this system feature by its manufacturer.

Upon the opening of Key Arena, problems ensued with the fire alarm system. The fire alarm system activated near the end of a Sonics basketball game on January 19, 1996, causing the PA system to go off the air, as designed. The sound technician on duty at the time, Matthew Abraham, averred the following:

Within seconds of the PA system being muted, Rob Martin, an official with the Sonics, and Jill Crary, the Events Services Representative (ESR) from Seattle Center, got on the radio and asked what was going on with the PA system and why there was no house sound. I explained to them that it was a function of the fire alarm system mode, and that it was a function of the fire alarm system that the house PA would be cut off, and control over the house PA would be shifted to the emergency fire microphones, for use only by Fire Department officials.

Jill Crary and Rob Martin then told me over the radio to restore the sound, and to do whatever needed to be done. I told them that they were asking me to alter a fire alarm system, and that this was a system approved by the Fire Department, and that it should not be altered without authorization. Crary asked me if I knew how to bypass the relay, and thus restore the house sound. I said yes, I did know how to do it. Rob Martin then got on the radio, and told me to bypass the relay and

restore the sound. I said that I needed proper authorization to do so. Martin then said, "I, Rob Martin, give you authorization to bypass the relay." I then told Martin and Crary over the radio that I would try. I then went to the location where the bypass of the relay would have to be performed, but I did not, in fact, attempt to bypass the relay, because I was not sure that the situation was under control and that in fact, the fire alarm was false, and I did not want to interfere with the design of the fire alarm system and risk making the system not operate in the way that it was designed to.

I was also concerned because when Crary first called me on the radio to ask what was going on and why the sound had cut out, and when I explained that we were in a fire alarm mode, Crary said that she had no idea that the Key Arena was even in a fire alarm mode. Then, less than a minute later, Martin was telling me that he was authorizing me to bypass this relay to restore the house PA sound. This made me even more wary of performing the bypass, since both Crary and Martin had indicated by their comments that they did not understand how the fire alarm system worked at Key Arena. Neither Crary nor Martin ever indicated that the Fire Department had given them any authority to authorize me to alter the fire alarm system, and bypass the relay.

Clerk's Papers at 332-33. Abraham reported this incident to Ellis the following night, so Ellis was aware of the controversy arising from orders to bypass the shunt relay.

Two days after this incident, Ellis and Abraham were both working at Key Arena preparing for another Sonics game. A couple of hours before the start of the game, a grease fire in the kitchen caused the fire alarm to go off, again resulting in a loss of the PA system. Jill Crary was again the ESR on duty and she instructed Abraham to bypass the fire relay until the alarm could be reset by fire officials. Abraham asked Crary for written authorization, which she provided by a hand-written note, whereupon Abraham

bypassed the fire relay and reconnected it when Crary told him to do so.¹

Concerned about potential danger to the public from bypassing the emergency fire microphone relay, as well as the legality of tampering with a fire alarm system, Ellis and Abraham saw their supervisor, Rick Smargiassi, on the following day to express their concerns. Ellis asked Smargiassi to get management involved in the issue. Ellis saw Smargiassi again the very next day to ask if he had done anything about his concerns. Ellis averred:

Smargiassi told me that I had to do whatever I was told to by an event services representative (ESR), such as Jill Crary, even though I believed that tampering with a fire alarm system was illegal. I told Smargiassi that I would be happy to wire around the emergency fire microphone sound relay, as long as I had written authorization or a verbal request from a Fire Department official. I told Smargiassi that I thought that this request from ESRs, who have no training or authority in fire prevention, was not proper. I told

1. Crary's note reads as follows:

Fire in kitchen in [sic] resulting in difficulty resetting fire panel. At this time best estimate is reset will take 1+ hours which is too close to doors—

Matt Abraham is authorized by me to try to wire PA control around fire panel relays so we can proceed with set-up.

When panel is reset, Matt needs to resume control to fire panel relays.

Clerk's Papers at 334.

2. The demand that Ellis follow orders no matter what is problematic as public policy. The following hypothetical illustrates the concern. Suppose an actual fire started during a crowded event at the Key Arena. On orders from a non-Fire Department person, Ellis then bypasses the PA automatic disabling switch, and Fire Department personnel are unable to issue evacuation instructions to the crowd, and loss of life and injuries ensue. Facing possible criminal and civil charges, Ellis attempts to exculpate himself by asserting he was only following orders, even though he knew he was not certified to work on the fire alarm system and believed such work to be unlawful. The "superior orders" defense failed elsewhere in history.

In 1813, Justice Bushrod Washington, sitting as a circuit justice, noted why obedience to unlawful orders of a superior need not be given, even in a military context:

Smargiassi that I wanted written clarification on who could, at what time, ask me to bypass the fire relay.

Clerk's Papers at 365-66. Two days later, Smargiassi told Ellis he had conferred with John Cunningham, the Human Resources Manager for Seattle Center.

Smargiassi said that I needed to understand the "chain of authority" at Seattle Center. He said that if one of my superiors asked me to do something, I had to do it, without written authorization, whether or not I believed it to be legal.^[2] I asked Smargiassi if he had spoken to the Fire Department. He said that he had not. Smargiassi told me that if I was not willing to do whatever I was asked without questioning it, he would have to accept my resignation. I told him that I would not resign, as I had done nothing wrong.

Clerk's Papers at 366. Two days later, at a meeting Smargiassi had called, in the presence of two other intermittent sound technicians and an ESR named Kevin Moore, Ellis said, in response to a question from Smar-

The only remaining question of law which has been raised in this cause is, that the prisoner ought to be presumed to have acted under the orders of his superior officer, which it was his duty to obey. This doctrine, equally alarming and unfounded, underwent an examination, and was decided by this court in the Case of General Bright [Case No. 14,647.] It is repugnant to reason, and to the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse, much less justify the act. Can it be for a moment pretended, that the general of an army, or the commander of a ship of war, can order one of his men to commit murder or felony? Certainly not. In relation to the navy, let it be remarked, that the 14th section of the law, for the better government of that part of the public force, which enjoins on inferior officers or privates the duty of obedience to their superior; cautiously speaks of the lawful orders of that superior. Disobedience of an unlawful order, must not of course be punishable; and a court martial would, in such a case, be bound to acquit the person tried upon a charge of disobedience. We do not mean to go further than to say, that the participation of the inferior officer, in an act which he knows, or ought to know, to be illegal, will not be excused by the order of his superior.

United States v. Jones, 26 F. Cas. 653, 657-58 (C.C.D.Pa.1813) (No. 15,494).

giassi, he would not bypass the emergency fire microphone sound relay with only a verbal request from an ESR, and would require "either written authorization from someone above me at Seattle Center or a written or verbal request from someone at the Fire Department or someone at Seattle Center showing me that this request was a legal one." Clerk's Papers at 367. Matt Abraham also insisted on such authorization.

Ellis knew the Seattle Center had not received a blanket authorization from the Seattle Fire Department to bypass the system because he overheard a voice mail message from Jill Crary on January 26 indicating the Center had not received Fire Department approval for the bypass.

On February 2, 1996, John Cunningham summoned Ellis to a fact-finding meeting at which Ellis repeated his insistence on obtaining what he considered proper authorization before bypassing the relay. Ellis and Cunningham give two very different accounts of this meeting. Cunningham claimed Ellis was insubordinate, while Ellis contended he reiterated his willingness to bypass the system upon verbal authorization from the Fire Department or written authorization from Seattle Center management. At the conclusion of the meeting, Cunningham suspended both Ellis and Abraham.

Three days later, Ellis and Abraham complained to the Washington State Department of Labor and Industries (L & I) about being asked to disable part of the fire alarm system. Subsequently, the Seattle Center suspended Abraham for 15 days for insubordination and shortly thereafter accepted his resignation in lieu of discharge. Ellis was discharged by Seattle Center director Virginia Anderson on February 22, 1996, for "gross insubordination." She listed as causes for the termination Ellis's failure to report for a scheduled shift on February 2 and his "stated refusal to comply with a directive from your supervisor." Clerk's Papers at 329. Anderson later admitted during her deposition that Ellis's failure to report for his shift on February 2, standing alone, would probably not have resulted in his termination.

Ellis subsequently sued the City alleging two causes of action, wrongful termination based on public policy, relying on *Gardner v. Loomis Armored Inc.*, 128 Wash.2d 931, 913 P.2d 377 (1996), and retaliatory discharge in violation of RCW 49.17.160(1) stemming from his L & I complaint (Clerk's Papers at 6). RCW 49.17.160(1) is the whistleblower provision of the Washington Industrial Safety and Health Act (WISHA), and provides, in pertinent part: "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint . . . related to this chapter." The trial court, the Honorable William Downing, granted the City's motion for summary judgment, dismissing Ellis's entire case. The Court of Appeals thereafter affirmed the trial court's dismissal of the wrongful discharge claim, but reversed the trial court's dismissal of the retaliatory discharge claim. *Ellis v. City of Seattle*, No. 42334-7-I, 98 Wash.App. 1006, 1999 WL 225057 (Apr. 19, 1999). We granted review of the decision on wrongful discharge. The City has not sought review of the decision on retaliatory discharge.

ANALYSIS

Because this case is here on an appeal from the Court of Appeals' affirmance of summary judgment in favor of the City, the usual rules for reviewing summary judgments apply:

The standard of review on summary judgment is well settled. Review is *de novo*; the appellate court engages in the same inquiry as the trial court. *Benjamin v. Washington State Bar Ass'n*, 138 Wash.2d 506, 515, 980 P.2d 742 (1999). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wash.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c). All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. *Clements*, 121 Wash.2d at 249, 850 P.2d 1298. "The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Clem-*

ents, 121 Wash.2d at 249, 850 P.2d 1298 (citing *Wilson v. Steinbach*, 98 Wash.2d 434, 656 P.2d 1030 (1982)). However, bare assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence. *White v. State*, 131 Wash.2d 1, 9, 929 P.2d 396 (1997).

Trimble v. Washington State Univ., 140 Wash.2d 88, 92–93, 993 P.2d 259 (2000). Thus, even where there are facts in dispute, as here, we treat the facts and inferences from the facts in a light most favorable to Ellis.

[1] The Court of Appeals analyzed the sole issue in this case under *Gardner*, 128 Wash.2d 931, 913 P.2d 377. Both parties agree *Gardner* controls. *Gardner* sets forth a four-part test for analyzing wrongful discharge claims involving alleged violations of public policy:

- (1) The plaintiffs must prove the existence of a clear public policy (the *clarity* element).
- (2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element).
- (3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the *causation* element).
- (4) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element).

Id. at 941, 913 P.2d 377 (citations omitted). These elements are conjunctive. *Id.* at 942, 913 P.2d 377 (“Each of the public policies . . . must be scrutinized under this four-part test.”).

[2] The Court of Appeals began its analysis with the clarity element. “In determining

3. The Court of Appeals chose not to consider the sections of the Seattle Fire Code Ellis cited in his brief, giving as a reason Ellis’s failure to cite those sections to the trial court. *Ellis*, slip op. at 5. The court relied for its ruling on RAP 9.12, which provides, in part: “On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” The Court of Appeals’ approach seems misguided. A fire code provision is not

whether a clear mandate of public policy is violated, courts should inquire whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.” *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 232, 685 P.2d 1081 (1984). Ellis argued because the Seattle Fire Code requires certification from the Fire Department before an individual may service fire alarm systems, and because he had no such certification, the City’s prospective orders to him to bypass the system were illegal. The Seattle Fire Code states: “No person shall engage in the business of installing, servicing or maintaining fire and life safety systems and equipment unless they have obtained a certificate from the Chief or are specifically exempted from this section.” Seattle Fire Code, App. III B, at 496c. Other fire code sections support Ellis’s contention.³ The Court of Appeals agreed with Ellis, and held he met the clarity element of the four-part *Gardner* test. *Ellis*, slip op. at 6. The City has not asked us to review this holding.

The Court of Appeals next considered the second element, the jeopardy test: “The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy.” The purpose of the jeopardy element is to guarantee “an employer’s personnel management decisions will not be challenged unless a public policy is genuinely threatened.” *Gardner*, 128 Wash.2d at 941–42, 913 P.2d 377.

In considering this element of the *Gardner* analysis there has been some question as to whether a plaintiff must prove an *actual* violation of the public policy or must simply have an objectively reasonable belief the policy may be violated. *Gardner* did not address this issue. In two Court of Appeals cases,

evidence; it is law. CR 56(h), of which RAP 9.12 is obviously a reflection, requires an order granting or denying summary judgment to “designate the documents and other evidence called to the attention of the trial court.” There is no requirement to list every statute, code, or case brought to the attention of the trial court. Nor should there be, as any court is entitled to consult the law in its review of an issue, whether or not a party has cited that law.

Bott v. Rockwell Int'l, 80 Wash.App. 326, 908 P.2d 909 (1996), and *Wlasiuk v. Whirlpool Corp.*, 81 Wash.App. 163, 914 P.2d 102, 932 P.2d 1266 (1996), different divisions of the Court of Appeals held actual violations of law, policy, or regulation were required in situations involving financial misconduct. *Cf. Farnam v. CRISTA Ministries*, 116 Wash.2d 659, 670-72, 807 P.2d 830 (1991) (employee knew employer's conduct did not violate law; no cause of action).

[3] In the retaliatory discharge context, Washington law has recognized a cause of action where an employee has an objectively reasonable belief an employer has violated the law. *See, e.g.*, RCW 49.60.210 (retaliation for discrimination claim); *Kahn v. Salerno*, 90 Wash.App. 110, 130, 951 P.2d 321 (1998); *Graves v. Department of Game*, 76 Wash. App. 705, 712, 887 P.2d 424 (1994). *See also* RCW 42.40.020(5) (state whistleblower statute—good faith belief improper governmental action); RCW 42.41.040(1) (local whistleblower statute). This standard has an analog in federal antidiscrimination law, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). A reasonable belief by the employee, rather than an actual unlawful employment practice, is all that need be proved to establish a retaliation claim. *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir.1994). In fact, to establish his retaliation claim under RCW 49.17.160(1), Ellis is not required to prove an actual WISHA violation. All he has to do is prove the City terminated him for making a WISHA complaint. *See Wilson v. City of Monroe*, 88 Wash.App. 113, 943 P.2d 1134 (1997).

[4] In the context of concerns regarding public safety where imminent harm is present, we hold the jeopardy prong of the *Gardner* test may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action. This comports with our holding in *Gardner* emphasizing the need for swift action to protect human life. We do not, however, at this time disturb the holdings in *Bott* and *Wlasiuk* as to situations not involving immediate harm to life and limb.

[5] The conduct in which Ellis engaged here was to refuse prospectively to bypass the disabling of the PA system without what he considered proper authorization or assurance. His motive was protection of the public. Obviously, disabling the fire alarm system so it did not work as it was designed to work would raise safety concerns in the mind of any conscientious individual, especially here, where Ellis knew the Seattle Fire Department specifically designed the disabling feature. Both Ellis and Abraham expressed their concern about safety and legality to their supervisors. Firing Ellis for raising questions about the legality of what he was told to do jeopardizes the public policy of following the fire code mandate to permit only certified persons to work on fire alarm systems.

The City responds by arguing Ellis was not asked to work on the fire alarm system, asserting he was asked only to work on the public address system, a task not requiring certification. The City cites the declaration of Fire Marshal Jerald A. Birt:

Certification, under Section 103.3.5 of the Seattle Fire Code, can be one area of confusion. Although the Fire Code appears to limit work on fire alarm systems to certified persons, the definition of fire alarm system is subject to interpretation. For instance, ventilation fans are a critical part of the smoke control system at the Key Arena, but the persons who install such fans are not certified. Even more difficult to interpret are some of the hybrid systems in which the fire alarm system is incorporated with other traditional systems, such as public address (PA) systems. This is the type of system which exists at the Key Arena. In those instances, if the PA system were deemed to be a "fire alarm system", in reality, no one would ever be able to work on any portion of the PA system under the Code.

Clerk's Papers at 435-36. The Court of Appeals accepted the City's explanation, concluding Ellis's behavior was not necessary to enforce the public policy because the "SFD explained that such certification was not required since Ellis was ordered to work on the

PA system, not the fire protection aspect associated with it." *Ellis*, slip op. at 7.

We disagree with the Court of Appeals. The automatic disabling of the PA system was an integral part of the design of the fire alarm system at Key Arena. Bypassing the automatic disabling feature of the fire alarm system cannot fairly be characterized as working solely on the PA system. It is certainly not the equivalent of installing ceiling fans. Even more compelling, however, is the fire code's definition of a fire alarm system.

As Fire Marshal Birt averred above, "the definition of fire alarm system is subject to interpretation." The term "fire alarm system" is defined in the Seattle Fire Code:

Fire Alarm System. A system of electrical devices such as flow sensors, heat or smoke detectors which is designed and installed for the purpose of warning building occupants or the Fire Department of a fire or of causing the operations of other fire and life safety equipment. The term shall include *associated electrical wiring*, power supplies, supervisory and control circuits.

Seattle Fire Code, App. III-B, at 496b. (emphasis added). Bypassing the automatic PA disabling feature of the fire alarm system involved manipulating "associated electrical wiring." Thus, it appears *Ellis* would have been working on the fire alarm system, as the Seattle Fire Code defines it, had he actually rewired the circuit to avoid automatic disabling of the PA system. Whether the work *Ellis* was asked to perform involved work on the fire alarm system or purely work on the PA system is a fact question, and should go to a jury for determination.

The Court of Appeals decided against *Ellis* on the jeopardy element for a second reason. It said *Ellis*'s conduct was unnecessary to enforce the policy of allowing only certified persons to work on fire alarm systems because "such work would be ordered only after the City obtained authorization from the SFD." *Ellis*, slip op. at 7. The court

4. Human Resources Manager Cunningham berates *Ellis* for not sharing Captain Denzel's letter: "Had I been aware of this letter, I would have contacted the Fire Department to find out

refers here to several declarations of various fire personnel and Seattle Center officials who averred *after the fact* and after *Ellis* had filed his lawsuit they would authorize bypass only after scrutinizing each situation as it came up and making a decision on the scene. Captain Wick, for instance, said at his deposition that in response to inquiries from Seattle Center personnel about bypassing the fire alarm system: "I think I—I believe my recollection is that I said that if I had the details and at that particular time I felt it was appropriate, I would give them authorization." Clerk's Papers at 218. There is no reason to doubt Captain Wick, but Seattle Center officials never conveyed this information to *Ellis*, despite his persistent requests for official Fire Department authorization for the bypass. They just fired him for insubordination.

Indeed, *Ellis* sought through his union representative the Fire Department's position on the propriety of his working on the fire alarm system. In a letter dated January 30, 1996, Captain W.T. Denzel replied as follows:

This is to confirm that the Seattle Fire Code requires that only persons possessing certification to service automatic fire alarm systems perform alterations to existing systems. Alterations to systems should be approved by the Seattle Fire Department Plan Review Section prior to implementation.

Clerk's Papers at 308. This is the information *Ellis* had when he attended the fact-finding meeting with the Center's human resources manager, Cunningham. Captain Denzel understood what *Ellis* was being asked to do was an alteration to the system, which indeed it was. Captain Denzel said such alterations require approval before implementation. In short, the Court of Appeals wrongly accepted the City's post hoc rationalization that no one would have asked *Ellis* to do something the Fire Department had not approved. *Ellis* did not know that because no City official told him that.⁴ In

why the information Captain Denzel was providing appeared to be contradicting the information we had received from Captains Wick and Nelson that the temporary modification was permissible

summary, there are at least two fact issues as to the second prong of the *Gardner* test, both mandating reversal of the summary judgment.

The Court of Appeals made short shrift of the third element of the four-part *Gardner* test, causation: "The plaintiffs must prove that the public-policy-linked conduct caused the dismissal." Because the court had rejected the jeopardy element, it concluded Ellis could not prove causation. *Ellis*, slip op. at 7. We disagree. There is no dispute the City fired Ellis because of his refusal prospectively to alter the fire alarm system. His dismissal letter from Seattle Center Director Anderson specifically referenced his "gross insubordination" with respect to his refusal. Thus, the causation element is established.

[6] The Court of Appeals likewise did not find the fourth element, absence of justification ("The defendant must not be able to offer an overriding justification for the dismissal"), was present because two prior elements of the four-part *Gardner* test were missing. *Ellis*, slip op. at 7-8. The City claims Ellis's termination was justified by its overriding concern for public safety. It cites to the statement of a retired SFD engineer, who said that on occasion the PA system might be needed to prevent panic in the Key Arena. It also cites to a statement from Fire Marshal Birt that because of better visibility in the Arena, it might be better to make announcements from that location rather than from the fire control room. But these statements appear to be further post hoc rationalizations and are entirely vitiated by Ellis's assertions from the very beginning that he would always follow the verbal orders of Fire Department personnel. Clerk's Papers at 368 (statement to Cunningham at fact-finding meeting) ("I would do the bypass if I had . . . verbal authorization from someone at the Fire Department.").

We find some concern from the record as to the justification element. One City offi-

with Fire Department authorization. Since it was not shared, Seattle Center did not have reason to know of the conflicting information." Clerk's Papers at 439. If indeed Cunningham knew from Captains Wick and Nelson that the

cial admitted he did not know, *at the time they were disciplined*, if Ellis and Abraham were wrong about their safety concerns. Cunningham admitted, at the time he suspended Ellis and recommended firing him, he had no idea of what Captains Wick and Nelson would say about the Fire Department's position on the bypass. He wrote to the Washington State Employment Security Department on April 26, 1996, with respect to Abraham's resignation:

If, in fact, Mr. Abraham was correct in his understanding of the requirements of the statute [that only certified persons could work on fire alarm systems], the dismissal would have been improper and clearly not for good cause. Reaching a finite [he appears to mean definite] determination on the issue would have entailed a lengthy (many months) process leading to arbitration, during which time he would have had to live with a dismissal from employment. He chose to resign instead. As a consequence, no final judicial determination has been made on whether he or the supervisor was correct as to the interpretation of the statute.

Clerk's Papers at 326. Thus, on April 26, 1996, nearly three months *after* Cunningham suspended Ellis for insubordination, Cunningham states he still did not know whether Ellis was correct in his assertion that rewiring the fire alarm system would have been a violation of the Seattle Fire Code because of his lack of certification. Cunningham's statement here brings into serious doubt the City's post hoc rationalizations. Rather than finding out whether Ellis's concerns were legitimate, the City fired him, and only after he sued did the City attempt to justify its actions by obtaining statements from Fire Department personnel.

In summary, Ellis either meets all four elements of the four-part *Gardner* test, or factual questions precluding summary judgment exist with respect to the jeopardy and absence of justification elements. The trial court should not have granted summary

Fire Department would approve bypasses on a case-by-case basis, which is the precise information Ellis had been requesting, he should have shared it with Ellis at the fact-finding meeting.

judgment to the City on the wrongful discharge cause of action.

CONCLUSION

David Ellis became concerned about the potential danger to human life that might occur if he had to alter the designed operation of the fire alarm system at Key Arena as ordered. His concern is reflected in the Seattle Fire Code, which prohibits uncertified personnel from working on fire alarm systems. Public policy should encourage the safe operation of fire alarm systems, and Ellis was furthering that public policy by refusing, as an uncertified electrician, to work on the fire alarm system to alter the way it was designed to operate, in the absence of authority for doing so. He expressed his concerns to his supervisors, told them he needed either written assurance from non-Fire Department officials or verbal assurance from Fire Department officials that it was proper for him to perform the alterations. The City responded by suspending him for gross insubordination and firing him shortly thereafter. There is no hint in the record, or claim by the City, that Ellis was anything but sincerely conscientious in his concerns, or that there were any other reasons for firing him. In *Gardner*, we said: "Society places the highest priority on the protection of human life. This fundamental public policy is clearly evidenced by countless statutes and judicial decisions." *Gardner*, 128 Wash.2d at 944, 913 P.2d 377.

We reverse the Court of Appeals in its affirmance of trial court's summary judgment in favor of the City and remand the case for trial on the issues of wrongful discharge in violation of public policy and retaliatory discharge pursuant to RCW 49.17.160(1).

GUY, C.J., SMITH, JOHNSON,
ALEXANDER, IRELAND, and BRIDGE,
JJ., concur.

MADSEN, J. (concurring).

The majority holds that "[i]n the context of concerns regarding public safety where imminent harm is present, . . . the jeopardy prong of the *Gardner* test may be established if an employee has an objectively rea-

sonable belief the law may be violated in the absence of his or her action." Majority at 1071. This "reasonable belief" standard does not accord with this court's cases addressing the claim for wrongful discharge against public policy. Further, rather than adhering to the admonition that the public policy exception to the terminable at will doctrine is a narrow exception, the majority's approach greatly expands the exception and places this court in the unacceptable position of interfering in day to day business personnel decisions. Moreover, even if one accepts the majority's new reasonable belief standard, I would hold that it is lacking in this case as a matter of law.

The public policy exception to the common law terminable at will doctrine was adopted in *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 685 P.2d 1081 (1984). The court there recognized that the exception applies where application of the common law doctrine would lead "to a result *clearly inconsistent* with a stated public policy and the community interest it advances." *Id.* at 231, 685 P.2d 1081 (emphasis added). The court also said that "[t]he policy underlying the exception is that the common law doctrine cannot be used to shield an *employer's* action which otherwise frustrates a clear manifestation of public policy." *Id.* (emphasis added). Thus, with initial adoption of the public policy exception, this court focused on the *employer's* action as violating clear public policy.

"The employee has the burden of proving his dismissal violates a clear mandate of public policy." *Id.* at 232, 685 P.2d 1081. This mandate may be found where the " 'employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme' " and where prior judicial decisions established relevant public policy. *Id.* (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 631 (1982)). The court emphasized that this "narrow public policy exception . . . properly balances the interest of both the employer and the employee." *Id.*

Subsequent cases bear out the *Thompson* analysis: the focus is on the employer's action, and the exception is a narrow one. In

Dicomes v. State, 113 Wash.2d 612, 782 P.2d 1002 (1989), involving whistleblowing, the court refused to find the public policy exception applied. There, contrary to the plaintiff's belief, there was no violation of statute where certain surplus funds in the Department of Licensing budget were not expended, nor was clear legislative intent contravened. The court noted that the employee was not faced with the choice of violating the law or sacrificing her job; she was instead faced with a difference of opinion, and her "good faith belief in the righteousness of her conduct [was] too tenuous a ground upon which to base a claim for wrongful discharge." *Id.* at 624, 782 P.2d 1002. *Farnam v. CRISTA Ministries*, 116 Wash.2d 659, 807 P.2d 830 (1991) also involved alleged wrongful discharge in violation of public policy for whistleblowing. There, the plaintiff had several times acknowledged that her employee had the legal right to remove nasal-gastric feeding tubes from patients under certain circumstances, but argued nonetheless that she could have believed that removal constituted patient abuse in violation of law because the relevant statutes did not specifically include or exclude nasal-gastric feeding tubes as life-sustaining procedures which could be withheld. *Id.* at 670-71, 807 P.2d 830. The court disagreed, saying that the focus is on the employer's conduct, not the employee's actions. *Id.*

As in these whistleblowing cases, the focus in a case where it is claimed the employee has been directed to engage in illegal conduct should be on the employer's action. This said, I cannot conceive how an employee can be fired for refusing to engage in illegal conduct unless the employer has directed the employee to actually engage in illegal conduct. The employee's good faith belief cannot render illegal what is not actually illegal.

Just as problematic, where this court steps in and decides that public policy is sufficiently violated based upon the employee's reasonable belief, it interferes in business management and alters the balance of interests that the narrow public policy exception in *Thompson* preserved. The line between the conscientious employee and the insubordinate employee is not easily drawn in many

circumstances. Given that the public policy exception is the *exception*, not the rule, the terminable at will doctrine should prevail unless there is an actual violation of a clear mandate of public policy.

Gardner v. Loomis Armored, Inc., 128 Wash.2d 931, 913 P.2d 377 (1996) is also contrary to the majority's pronouncement of a reasonable belief standard. The four-part test stated there is consistent with prior law requiring identification of a clear mandate of public policy and discharge in violation of that policy. The focus again is on the employer's conduct—does the discharge violate the public policy, in *Gardner*, the policy encouraging citizens to save persons from life threatening situations. Nowhere does *Gardner* indicate anything other than actual violation of the policy suffices. To the contrary, *Gardner* indicates, as do all the court's preceding cases, that the policy itself must be actually violated.

In addition to these cases, as the majority correctly observes, the Court of Appeals has refused to accept the premise that a good faith or reasonable belief suffices. *Wlasiuk v. Whirlpool Corp.*, 81 Wash.App. 163, 179, 914 P.2d 102, 932 P.2d 1266 (1996) ("a plaintiff must show either an actual violation, or that the purpose of the law was violated"); *Bott v. Rockwell Int'l*, 80 Wash.App. 326, 335-36, 908 P.2d 909 (1996). The court in *Bott* aptly observed a "good faith" standard undermines this court's "announced policy of protecting against frivolous lawsuits and 'allow[ing] trial courts to weed out cases that do not involve any public policy principle. . . .'" *Bott*, 80 Wash.App. at 336, 908 P.2d 909 (alteration in original) (quoting *Thompson*, 102 Wash.2d at 232, 685 P.2d 1081).

More importantly, a "good faith" standard undermines the principle "of allowing employers to make personnel decisions without fear of incurring civil liability." *Bott*, 80 Wash.App. at 336, 908 P.2d 909 (citing *Thompson*, 102 Wash.2d at 232, 685 P.2d 1081).

The majority's reliance on other employment laws for support of its reasonable belief standard is misplaced. For example, the majority notes that the state whistleblower statute contains a good faith belief standard.

Majority at 1071 (citing RCW 42.40.020(5)). This reliance highlights the fundamental error of the majority. It is one thing for the Legislature to implement a good faith standard. It is quite another thing for this court to do so in the context of the public policy exception to the terminable at will rule.

In my view this court should join other courts that have declined to extend the public policy exception to situations where the employee alleges a reasonable belief that he or she is being directed to engage in illegal conduct in violation of public policy. See, e.g., *Antley v. Shepherd*, 340 S.C. 541, 549, 532 S.E.2d 294 (Ct.App.2000); *Ran Ken, Inc. v. Schlapper*, 963 S.W.2d 102 (Texas App. 1998).

However, even if one accepts the majority's expansion of the public policy exception, this case is a poor vehicle for finding sufficient evidence of an objective reasonable belief. The identified public policy in this case is certification from the fire department before an individual may service fire alarm systems. However, on more than one occasion the employee, Mr. David Ellis, informed his superiors that he would work on the system if he had written authorization from his superiors at Seattle Center. Thus, he would have engaged in the work he was directed to do regardless of any supposed belief in its illegality. Under these circumstances, I would conclude that he has not established an objective reasonable belief that public policy would be violated if he bypassed the fire relay.

While I do not agree with the majority's good faith belief standard, I nevertheless agree with the majority that there is a fact question as to whether an actual violation of public policy occurred. See majority at 1072. Accordingly, I would remand for trial with instructions in accord with this opinion.

For the reasons stated, I concur.

SANDERS, J., concurs.



103 Wash.App. 587

1587 Gregory H. BOWERS, Appellant,

v.

POLLUTION CONTROL HEARINGS BOARD; Southwest Air Pollution Control Authority; Transalta Centralia Generation LLC, Respondents.

No. 44838-2-I.

Court of Appeals of Washington,
Division 1.

Dec. 4, 2000.

Appeal was taken challenging "reasonably available control technology" (RACT) order issued by local pollution control authority that directed coal-fired electric generating plant to reduce its emissions of four pollutants, including sulfur dioxide and nitrogen oxide. The Pollution Control Hearings Board (PCHB) affirmed order. Following appeal to the Superior Court, King County, Robert Alsdorf, J., parties' petition for direct review was granted. The Court of Appeals, Coleman, J., held that: (1) party challenging RACT order did not meet burden in challenging PCHB's findings of fact and conclusions of law; (2) as a matter of first, PCHB did not erroneously interpret Clean Air Act as applied to the requirements for setting RACT; (3) substantial evidence supported findings that addressed scientific underpinnings of emissions limits and cost effectiveness and impact of various control technologies; and (4) PCHB's decision was not arbitrary or capricious.

Affirmed.

1. Health and Environment ⇨25.15(6.1)

Court of Appeals applies Administrative Procedures Act's (APA) standards of review based upon the record before the Pollution Control Hearings Board (PCHB). West's RCWA 34.05.570(3).

2. Health and Environment ⇨25.15(6.1)

With respect to issues of law under provision of Administrative Procedures Act

committing the act "shall in addition to the penalty provided by statute for the crime when committed without use of a firearm, be guilty of a felony * * *." This was the language *Canady* held created a new offense. The 1969 act differs in both structure and content. After first setting forth the forbidden acts, it states "in addition to the penalty provided by statute for the crime committed without use or possession of a firearm, [the offender shall] be imprisoned as herein provided: * * *." (Italics ours). It is only in the portion of the statute discussing the imprisonment that the status of "guilty of a felony" is mentioned.

There were at least three alternatives open to the draftsmen of the legislation which would have clarified their intent. The use of the same sentence structure contained in the 1961 act, as it related to the felony offense, would have left the interpretation clear in light of the decision in *Canady*. The act could have provided "the offender was guilty of a separate felony in addition to the crimes named in the act"¹ or alternately "in addition to the penalty provided by statute for the felony committed or attempted, [he] shall be guilty of a felony for the use of such weapon or device, which shall be a separate offense, * * *."² We find the intent of the legislature unclear for the reasons heretofore indicated and hold the act provides an additional penalty where the original act committed or attempted to be committed is a felony, rather than creating a separate offense.

Under the 1969 statute, where the act committed by the offender is a misdemeanor, the subsequent mention of "guilty of a felony," we believe, can be reasonably interpreted to mean the legislature wished the status of the act, which otherwise would be a misdemeanor, to be elevated to that of a felony. Where the act committed by the offender is already a felony, how-

ever, the intent of the legislature is unclear.

[5] Boyer lastly challenges the constitutionality of action by the legislature which prohibits the court from suspending or deferring the imposition of sentence. While the wisdom of such action may be subject to question, it is, none the less, within the power of the legislature limited only by the Eighth Amendment proscribing cruel and unusual punishment. *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); *United States v. Wallace*, 269 F.2d 394 (3rd Cir. 1959); *United States ex rel. Darrah v. Brierley*, 290 F.Supp. 960 (E.D. Pa. 1968).

The judgment and sentence of the trial court are affirmed as to count one and reversed as to count two.

HOROWITZ, A. C. J., and WILLIAMS, J., concur.



4 Wash.App. 152

Ronald L. EWER, Respondent,

v.

GOODYEAR TIRE AND RUBBER COMPANY, a corporation, Appellant.

No. 79-41245-III.

Court of Appeals of Washington,
Division 3.

Jan. 28, 1971.

Rehearing Denied April 19, 1971.

Action against tire manufacturer by garage employee who was injured when tire exploded while he was trying to mount it on wheel. The Circuit Court, Okanogan County, Robert J. Murray, J., found for plaintiff and defendant appealed. The Court of Appeals, Munson, C. J., held that tire manufacturer's agreement that procedure followed by plaintiff and his employer

1. Laws of Indiana, § 10-4709, p. 713.

2. Laws of Oklahoma, Title 21, § 1287, p. 39 (Supp.1970).

in mounting tires was in accordance with common practice, together with evidence that in no instance would plaintiff exceed 25 pounds per square inch in seating bead of tire which had recommended maximum inflation pressure of 30 pounds per square inch and that manufacturer had received complaints regarding beads breaking in particular line of tires involved was sufficient to get plaintiff, who sought recovery for injuries sustained when tire exploded while he was mounting same on wheel, by motion challenging sufficiency of evidence under doctrine of *res ipsa loquitur*, and that jury under proper instruction could have found defendant negligent in manufacture of tire.

Affirmed.

See also 1 Wash.App. 628, 463 P.2d 183.

1. Pleading ⇨236(2)

Where amended complaint merely specified more particularly those areas of negligence in which plaintiff sought to establish liability, allowing amendment was within court's discretion even though copy was not served until three days before trial.

2. Negligence ⇨121(2), 134(2)

Torts ⇨27

Circumstantial evidence can adequately establish basis for recovery under theory of negligence, *res ipsa loquitur*, or strict liability.

3. Negligence ⇨121(2)

Res ipsa loquitur requirement that injuries be caused by agency or instrumentality within exclusive control of defendant is satisfied if there is evidence of control by defendant at time of negligent act complained of, i.e., creation of defect, even though defendant's control is not exclusive at time of accident, provided plaintiff proves that condition of product had not been changed after it left defendant's control.

4. Automobiles ⇨16

Where tire manufacturer's chief design engineer testified that storage proce-

dures followed by plaintiff's employer would not normally have adverse effect on tire and there was testimony that nothing unusual was observed about tire either when it was received by employer or at time of mounting, for purpose of doctrine of *res ipsa loquitur*, there was sufficient evidence, if believed, to meet requirement that injuries sustained by plaintiff when attempting to mount tire on wheel were caused by agency or instrumentality within exclusive control of tire manufacturer.

5. Negligence ⇨121(2)

Res ipsa loquitur requirement that injury-causing accident occurrence is not due to any voluntary action or contribution on part of plaintiff does not mean that plaintiff must conclusively prove no action on his part contributed to accident but rather that he bring forth sufficient evidence to allow jury to exclude his conduct as reasonable cause.

6. Automobiles ⇨16

Tire manufacturer's agreement that procedure followed by plaintiff and his employer in mounting tires was in accordance with common practice, together with evidence that in no instance would plaintiff exceed 25 pounds per square inch in seating bead of tire which had recommended maximum inflation pressure of 30 pounds per square inch and that manufacturer had received complaints regarding beads breaking in particular line of tires involved was sufficient to get plaintiff, who sought recovery for injuries sustained when tire exploded while he was mounting same on wheel, by a motion challenging sufficiency of evidence under doctrine of *res ipsa loquitur*.

7. Automobiles ⇨16

Tire manufacturer's change in specifications order constituted evidence from which jury could conclude defect in tires existed.

8. Automobiles ⇨16

Evidence in action by garage employee to recover for injuries sustained when tire exploded while he was mounting same on

wheel was sufficient to sustain jury's finding that tire manufacturer was negligent in manufacture of tire.

9. Automobiles ⇨16

Tire manufacturer's failure to test or inspect tire could be found by jury to be proximate cause of injuries sustained by garage employee when tire exploded while he was mounting same on wheel.

10. Negligence ⇨27

Manufacturer usually has no duty to warn of danger which is obvious and known.

11. Automobiles ⇨16

Evidence in action against tire manufacturer by garage employee who was injured when tire exploded while he was trying to mount it on wheel warranted submitting to jury question of manufacturer's breach of duty to warn of danger.

12. Automobiles ⇨16

In order for tire manufacturer to be liable to garage employee who was injured when tire exploded while he was trying to mount it on wheel there would have to be evidence that tire reached garage where employee was working in same condition as it was sold and that it was in same condition from time received until time of accident.

13. Appeal and Error ⇨273(6)

Where exception to court's instructions failed to adequately advise trial court of basis for exception with sufficient clarity, claimed error was not preserved for appeal.

14. Automobiles ⇨16

In action against tire manufacturer by garage employee seeking recovery for injury sustained when tire exploded while he was trying to mount it on wheel, failure of court to instruct on doctrine of assumption of risk as applicable to employee's theory of negligence but giving such instruction as to theory of strict liability was not error.

15. Automobiles ⇨16

Where there was no evidence that injured garage employee was ever aware of

defect in tire which exploded while he was trying to mount it on wheel and injured employee testified he usually inspected tires prior to mounting, doctrine of assumption of risk was not applicable to injured party's theory of negligence or strict liability.

16. Automobiles ⇨16

In action against tire manufacturer by garage employee who was injured when tire exploded while he was trying to mount it on wheel, it was not error, under theory of notice to manufacturer, to permit introduction of evidence of another tire explosion.

17. Appeal and Error ⇨1064(1)
Damages ⇨216(8, 9)

Damage instruction that if jury found for plaintiff their verdict should include hospitalization expenses, medical and drug expenses, loss of wages, and travel expenses, was of questionable propriety in view of dispute as to certain items, but did not have prejudicial effect on overall jury verdict.

18. Trial ⇨186

Damage instruction that if jury found for plaintiff their verdict should include hospitalization expenses, medical and drug expenses, loss of wages, and travel expenses did not constitute unconstitutional comment on evidence. RCWA Const. art. 4, § 16.

William H. Mays of Gavin, Robinson, Kendrick, Redman & Mays, Yakima, for appellant.

Richard B. Price, and James R. Thomas, of Wicks, Thomas & Price, Okanogan, for respondent.

MUNSON, Chief Judge.

Plaintiff, Ronald L. Ewer, brought suit for damages suffered when a tractor tire he was mounting exploded. The jury found for plaintiff and appropriate judgment was entered. Defendant manufacturer, Goodyear Tire and Rubber Company, appealed.

The exploding tire—a new Goodyear 1324, 4-ply nylon replacement tire—was purchased from defendant's distributor by plaintiff's employer in the fall of 1966. The tire was stored in the employer's enclosed warehouse until removed by plaintiff on the day of the accident. The number "13" designates the width (13 inches) from one sidewall to the other, and the number "24" designates the rim diameter (24 inches). Around the circumference on each side of the tire is a circular bead, consisting of a number of strands of high tensile strength wire. The purpose of this bead is to give stiffness to the portion of the tire which will seat against the wheel rim and keep it firmly in place. In the instant tire, the bead structure consisted of 30 strands of wire.¹

Prior to the production of the instant tire a fabric change was made whereby nylon replaced rayon. Defendant's chief design engineer testified that shortly after this change defendant began receiving complaints from the field because of the new nylon construction. Dealers were accustomed to the more firm-feeling sidewall

of a rayon tire, and were concerned that this new tire might not be adequate. He also testified that defendant had experienced kinking of the beads at the factory level due to handling by forklifts.

A modification was made in an attempt to bolster the general acceptance of the tire line to which the instant tire belonged. This was done pursuant to a document entitled "Change in Specifications" dated March 24, 1966 which stated as the reason for the change: "[to] remedy field complaints of beads breaking during mounting".² The modification consisted of one more turn of the six strands thereby increasing the number of strands of bead wire from 30 to 36.

On May 4, 1967, preparatory to mounting the instant tire on a used tractor, plaintiff removed it from his employer's warehouse. He mounted the tire on the wheel rim. While airing the tire so it would seat itself on the rim, the tire exploded throwing plaintiff to the floor injuring him. The tire itself was propelled 15 to 20 feet into the air. After plaintiff

1. The bead is made during the construction of the tire by taking a strand of wire from each of 6 creels (much like fishing creels) and twisting them around each other 5 times to produce a bead of 30 strands of wire. Thereafter the entwined strands are built into the sidewall of the tire.

2. In explaining the reason for the change in specification Mr. Robert W. Ellis, Chief Design Engineer, stated:

"Understand our position in development, when we specify the addition of material to a tire, this costs money. Our management necessarily sees and approves these specifications, when we've got a factory situation which is in the process of being corrected, but which had not necessarily reached complete handling, to put us a reason on a specification of this type that we are in effect attempting to correct a factory problem, and to satisfy our sales personnel in the field, that something is being done, would not be a satisfactory answer. Whereas, to specify that we were correcting a field condition, which is not completely false, we'll get a specification like this through without any hitch. * * * [B]asically the

complaints were, 'We can't market this new line, the beads don't look right,' and we had tires sent back where complaints had been made on the condition of the bead, and there was nothing wrong with the beads at all. We had a witch hunt at the time. 'Do something.' So we did something. * * * Q You say you were aware that beads had broken, but you considered it nothing out of the ordinary in relation to your other products? A Yes, sir. Q How did you arrive at the decision to add six more bead wires? A Wires are wound on a mandrel. Now, the simplest way to add additional wires is simply make one more turn, * * * so that you will find, I think, * * * it will be from five by six to six by six * * * The first number indicates the number of turns. The second number indicates the strands. This is the simplest way to do it. We simply added one turn of wire to every bead in every tire in the Sure-Grip line. * * * We felt no requirement to spend money on these tires at all. We did this because it was the cheapest thing we could do and still say we were doing something, thereby got off the hook."

had been attended to and sent to the hospital, another employee and plaintiff's employer mounted a different tire on the same wheel rim without incident.

Although defendant does not take issue with the procedure employed by plaintiff in mounting the tire, it does claim that the explosion was caused by over inflation. At trial, plaintiff stated he had no recollection of the happening from the moment he started mounting the tire until he awoke in the hospital the following day. However, plaintiff testified, without objection, his normal practice was never to inflate a tractor tire in excess of 25 pounds in order to seat it. Although the normal operating pressure for the tire in question was 14 to 16 pounds, plaintiff testified it was often necessary to inflate the tire to 20-25 pounds per square inch to seat it properly and then deflate it to its normal pressure for operative purposes. Plaintiff's employer, who was 20 feet away from the place where plaintiff was attempting to mount the tire, testified plaintiff was mounting it in a normal fashion and that he had repeatedly inflated and deflated the tire during the mounting in an attempt to seat it.

Defendant sets forth 21 assignments of error which will be handled in the following 4 groupings.

I. TRIAL AMENDMENT

Plaintiff's original complaint set forth a claim based primarily upon negligence, *i.e.*, *res ipsa loquitur*, breach of warranty, and strict liability. However, at the commencement of the trial plaintiff filed an amended complaint which added several specific acts of negligence allegedly committed by defendant as additional bases for recovery. A copy of the amended complaint was mailed to defendant 3 days prior to trial. The trial court allowed the amendment over defendant's objections.

[1] The challenged amendment merely specified more particularly those areas of negligence in which plaintiff sought to establish liability. The trial court was not in error in allowing the amendment; it

should be noted also defendant neither sought a continuance nor claimed surprise or prejudice by the trial court in permitting the amendment. *Clark v. Icicle Irr. Dist.*, 72 Wash.2d 201, 204, 432 P.2d 541 (1967); *Callahan v. Keystone Fireworks Mfg. Co.*, 72 Wash.2d 823, 435 P.2d 626 (1967).

II. NEGLIGENCE

Thirteen of defendant's remaining assignments of error relate to the court's failure to grant defendant's alternative motion for dismissal or directed verdict at the conclusion of all the evidence, and in the giving of various instructions upon the issue of negligence.

Defendant contends there was a complete lack of evidence offered by plaintiff to show (a) defendant's negligence, (b) a defect in the product, (c) the proximate cause of plaintiff's injury, or (d) the actual cause of the accident.

[2] As far as direct evidence establishing either a defect in the tire or cause of the explosion is concerned, defendant's contention is correct. The burden is upon plaintiff under any theory of negligence, *res ipsa loquitur*, or strict liability to prove by a preponderance of the evidence that there was a defect in the tire which proximately caused the explosion and the resulting injury. However, circumstantial evidence can adequately establish a basis for recovery under the theories above mentioned and a review of the record establishes the presence of such evidence.

(A) *Res Ipsa Loquitur*

The three elements of *res ipsa loquitur* are set forth in *Horner v. Northern Pac. Beneficial Ass'n Hosps., Inc.*, 62 Wash.2d 351, 382 P.2d 518 (1963) as follows:

Further proof of negligence is not essential to take a case to the jury or to overcome challenges to the sufficiency of the evidence where (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.

Cf. Stone v. Sisters of Charity of House of Providence, 2 Wash.App. 607, 469 P.2d 229 (1970).

(1) Defendant admits the type of accident which occurred here does not ordinarily occur in the absence of someone's negligence. Thus, this element has been met. Douglas v. Bussabarger, 73 Wash.2d 476, 438 P.2d 829 (1968).

[3,4] (2) The second requirement is satisfied if there is evidence of control by the defendant at the time of the negligent act complained of, *i.e.*, creation of the defect, Hogland v. Klein, 49 Wash.2d 216, 298 P.2d 1099 (1956); Baker v. B. F. Goodrich Co., 115 Cal.App.2d 221, 252 P.2d 24 (1953), although the defendant's control is not exclusive at the time of the accident, *provided* plaintiff proves that the condition of the product had not been changed after it left defendant's control. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344 (1952); 1 Frumer & Friedman, Products Liability § 12.03 at 289. Defendant's chief design engineer, when examined about the effects of plaintiff's employer's storage, testified he would not normally expect such storage procedures to have much adverse effect upon the product. There is also testimony that nothing un-

usual was observed about the tire either when it was received by plaintiff's employer or at the time of mounting. This evidence, if believed by a jury, would be sufficient to establish the second requirement.

[5] (3) The third requirement does not mean that plaintiff must conclusively prove no action on his part contributed to the accident but rather that he bring forth sufficient evidence to allow a jury to exclude his conduct as a responsible cause. United Mut. Sav. Bank v. Riebli, 55 Wash.2d 816, 820, 350 P.2d 651 (1960); Zentz v. Coca Cola Bottling Co., *supra*; Lewis v. United States Rubber Co., 414 Pa. 626, 202 A.2d 20 (1964); 2 Harper & James, The Law of Torts § 19.8 at 87 (Supp.1968); 2 Harper & James, The Law of Torts § 9.18 at 1093 (1956).³

As stated in Tubb v. Seattle, 136 Wash. 332, 337, 239 P. 1009, 1010 (1925), quoting from St. Germain v. Potlatch Lumber Co., 76 Wash. 102, 135 P. 804 (1913):⁴

"While it is a sound rule that to sustain a finding that the appellant's negligence was the proximate cause of the injury, the evidence must present something more than a mere possibility or conjecture, it is equally sound that the cause of an accident may be inferred from circumstances. A plaintiff in this character of case is not obligated to establish the material facts essential to a recovery beyond a reasonable doubt. Such a rule would amount to a denial of justice. *It is sufficient if his evidence*

3. See also Jesionowski v. Boston & Me. R.R., 329 U.S. 452, 458, 67 S.Ct. 401, 91 L.Ed. 416, 169 A.L.R. 947 (1947); 9 Wigmore, Evidence § 2500 (3rd ed. 1940); Prosser, The Law of Torts § 40 at 237 (3rd ed. 1964).

4. " * * * The jury may make the inference of negligence or it may refuse to do so." Pederson v. Dumouchel, 72 Wash. 2d 73, 81, 431 P.2d 973, 979 (1967); Vogreg v. Shepard Ambulance Serv., Inc., 47 Wash.2d 659, 289 P.2d 350 (1955).

See also Weggeman v. Seven-Up Bottling Co., 5 Wis.2d 503, 93 N.W.2d 467, 474, 94 N.W.2d 645 (1953-1959) wherein it states:

480 P.2d—17½

" * * * It is not essential that the possibility of other causes of the accident be altogether eliminated, but only that their likelihood be so reduced that the greater probability [of fault] lies at defendant's door. The evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it." *Cf.* 2 Harper & James, The Law of Torts § 19.7 at 1086 (1956); Prosser, The Law of Torts § 39 at 229 (3rd ed. 1964).

affords room for men of reasonable minds to conclude that there is a greater probability that the accident causing the injury happened in such a way as to fix liability upon the person charged with such liability, than it is that it happened in a way for which the person so charged would not be liable. "There are very few things in human affairs, and especially in litigation involving damages, that can be established to such absolute certainty as to exclude the possibility, or even some probability, that another cause or reason may have been the true cause or reason for the damage, rather than the one alleged by the plaintiff. But such possibility, or even probability, is not to be allowed to defeat the right of recovery, where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as to justify a reasonable juror in concluding that the thing charged was the prime and moving cause." In other words, the plaintiff is only required to satisfy the jury, by a fair preponderance of the evidence, that the accident causing the death occurred in the manner he contends it did."

(Italics ours.). The Oregon Supreme Court, in discussing this requirement, stated in *Powell v. Moore*, 228 Or. 255, 364 P. 2d 1094 (1961):

[E]ven where there is some evidence that plaintiff's failure to exercise care in the use of defendant's equipment was a contributing cause producing the injury, the doctrine is not excluded as a matter of law; rather the case is to be submitted to the jury with proper instructions permitting the jury to draw inference of defendant's negligence if it finds that plaintiff by his own conduct was not responsible for causing his injury.

[6] Both plaintiff and his employer described their normal procedure in mounting

5. "You are instructed that the duty of a manufacturer is to exercise reasonable care in the manufacture of an article which unless carefully made he should rec-

tires. Defendant agrees that plaintiff's mounting procedure was in accordance with common practice throughout the industry. Furthermore, plaintiff testified that in no instance would he exceed 25 pounds per square inch in seating the bead. Defendant introduced testimony that the maximum inflation pressure recommended was 30 pounds per square inch. This, coupled with documentary evidence that defendant had received complaints regarding beads breaking in the particular line of tires involved after they changed from rayon to nylon and in kinks occurring while being transported by forklift trucks, was sufficient to get plaintiff by a motion challenging the sufficiency of the evidence under the doctrine of *res ipsa loquitur*.

[7] The instant case is distinguishable from *Casetta v. United States Rubber Co.*, 260 Cal.App.2d 792, 67 Cal.Rptr. 645 (1968) wherein the court stated at 655:

The lacuna in plaintiff's proof is the absence of testimony to show that any of the defects, the existence of which is suggested by the testimony, was of a type which could have contributed to the explosion.

Here defendant's own "Change in Specifications" order provided the jury with evidence from which they could conclude a defect existed.

(B) *Specific Acts of Negligence*

Defendant contends there is no evidence to support the allegations of specific acts of negligence upon which the court instructed, *i. e.*, negligent manufacture, failure to test or inspect, and failure to instruct or warn.

[8] (1) In light of our holding on *res ipsa loquitur* above, we believe that there is sufficient evidence upon which the jury under proper instruction could find defendant negligent in the manufacture of this tire. The instruction,⁵ based upon Calla-

ognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it was manufactured. If the

han v. Keystone Fireworks Mfg. Co., *supra*, properly submitted this issue to the jury and we find no error.

[9] (2) As for the failure to test or inspect, there is ample evidence from defendant's own expert that no testing or inspecting was conducted following the change from rayon to nylon construction even though field complaints that beads were breaking during mounting and information that kinks were being made in the bead during assembly of tires were received. Although only alluded to in Callahan v. Keystone Fireworks Mfg. Co., *supra*,⁶ it is well established that a manufacturer has a duty to inspect its product. This is a logical inference from the manufacturer's duty to exercise reasonable care throughout the manufacturing process. 1 Hursh, American Law of Products Liability § 2:16 at 137 (1961); Manufacturer's Liability—Inspection, Annot., 6 A.L.R.3d 91 (1966). It was proper for the court to instruct in this area since defendant's failure to test or inspect could be found by the jury to be a proximate cause of plaintiff's injury.

(3) As for defendant's alleged negligence in failing to instruct or warn of the dangerous propensities of its product, its chief design engineer testified that any tire is a potential bomb and improper handling can result in serious injury. Armed with this knowledge, in addition to complaints of bead breaking and kinks being placed in the beads, defendant took no steps to warn anyone handling these particular tires of the possible hazard.

Defendant contends that both the owner of the business and plaintiff already knew of the potential hazard of explosion in the mounting and airing of tires, and that under plaintiff's testimony as to the maximum pressure he would use, any warning would have had little effect. More particularly, defendant contends there is no duty to give a warning to members of a profes-

sion who know of the risks involved. Since the court's instruction did not exclude from the jury's consideration any danger obvious or known to the user as required by Callahan v. Keystone Fireworks Mfg. Co., *supra*, 2 Restatement (Second) of Torts § 388 (1965), defendant's contention is partially correct.

[10, 11] A manufacturer usually has no duty to warn of a danger which is obvious and known. However, a factual question may arise, as we believe it did here, as to the obviousness of the danger involved in these particular tires. Callahan v. Keystone Fireworks Mfg. Co., *supra*. A jury could find the evidence in this case clearly indicates that these particular tires possessed deficiencies of sufficient gravity to cause a change in manufacturing specifications. The jury could also find defendant was derelict in its duty in not giving prompt warning to those handling these tires, since bead breaking during mounting procedures is not contemplated in the normal case of usage by users, consumers, or those in the tire business due to defective sidewall construction. Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W.2d 627, 78 A.L.R.2d 449 (1959). Submission of this issue to the jury was proper.

III. STRICT LIABILITY

The trial of this case began 4 days after the opinion in Ulmer v. Ford Motor Co., 75 Wash.2d 522, 452 P.2d 729 (1969) was filed; both court and counsel had copies of that opinion before them during the trial.

[12] Defendant contends two instructions given by the trial court on this issue were incomplete. They did not include all of section 402A(1), Restatement (Second) of Torts (1965), upon which *Ulmer* is based. That section states:

One who sells any product in a defective condition unreasonably dangerous to

manufacturer fails to exercise this reasonable care, he is liable for bodily harm caused to those who lawfully use the article in a manner and for a purpose for which it was manufactured."

6. In Sutton v. Dimmel, 55 Wash.2d 592, 349 P.2d 226 (1960) the trial court held a manufacturer liable for injuries caused by failure to adequately test and inspect a defective brake system.

the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

The court's instruction did not include subsections (a) or (b) above. Although defendant admits it is engaged in the business of selling tires, it claims there is an issue as to whether or not the tire reached plaintiff's shop in the same condition as it was sold and whether it was in the same condition from the time received until the day of the accident. We agree.

[13] However, our examination of defendant's exception to the court's instructions, particularly instruction No. 19, reveals it did not adequately advise the trial court of the basis for the exception with sufficient clarity to preserve its contention upon appeal. *Bellah v. Brown*, 71 Wash.2d 603, 430 P.2d 542 (1967); *Franks v. Department of Labor & Indus.*, 35 Wash.2d 763, 215 P.2d 416 (1950).

IV. OTHER ASSIGNMENTS OF ERROR

[14, 15] The court refused to instruct upon the doctrine of assumption of risk as applicable to plaintiff's theory of negligence, whereas it did give an instruction on that doctrine as applicable under plaintiff's theory of strict liability. We see no distinction. If plaintiff had discovered the defect and was aware of the danger and proceeded to mount the tire he assumed the risk under either theory. There was no evidence that plaintiff was ever aware of a defect in the tire. Plaintiff testified he usually inspected the tires prior to mounting. Even if his testimony was disbelieved by the jury, it would not mean he had discovered a defect, but rather that he did not inspect the tire prior to mounting. Thus, the doctrine of assumption of risk, under

the facts of this case, is not applicable under either theory. The giving of this instruction under the doctrine of strict liability, however, was more favorable to defendant than to plaintiff and, hence, cannot be urged as prejudicial error.

[16] There was evidence of another tire explosion introduced at the trial to which defendant takes exception. The trial court allowed this testimony under the theory of notice to defendant. After extended argument the court advised counsel they could submit an instruction limiting the jury's consideration to that theory. There is no such proposed instruction on this matter in the record before this court. The admission of such evidence being a matter within the discretion of the trial court, we do not find an abuse thereof. *Blood v. Allied Stores Corp.*, 62 Wash.2d 187, 381 P.2d 742 (1963).

[17] Defendant assigns error to a damage instruction adopted from WPI 30.01 given in part as follows:

If you find for the plaintiff, your verdict *should* include the following items:

- (a) Hospitalization expenses;
- (b) Medical and drug expenses;
- (c) Loss of wages; and
- (d) Travel expenses.

(Italics ours.) The objection is to the word "should". As stated in 6 Wash.Prac. 146, Note on Use (1967), this phrase, set forth therein in brackets, should only be used where the case contains undisputed items of damage. In the instant case some of the above-mentioned items were disputed. Our examination of the entire record, however, compels us to conclude that in the instant case the instruction, although of questionable propriety in part, did not have a prejudicial effect on the overall jury verdict. An instruction should be read in its entirety and although a particular choice of words may not appear to be desirable or even correct, it is still the net effect of the whole instruction which determines its acceptability. *Webley v. Adams Tractor Co.*, 1 Wash.App. 948, 465 P.

2d 429 (1970). While there may have been a dispute as to the amounts recoverable for the items above listed, there can be no dispute that special damages are allowable should the jury find for plaintiff. The challenged instruction informed the jury if they found for plaintiff, they should include special damages; however, it also admonished them that plaintiff still had the burden of proving them by a fair preponderance of the evidence. Thus, the giving of the instruction was not reversible error.

[18] Defendant also contends that the above-quoted portion of the damage instruction constituted an unconstitutional comment on the evidence. Const. art. 4, § 16. The language in *Haaga v. Saginaw Logging Co.*, 169 Wash. 547, 557, 14 P.2d 55 (1932) adequately states the rule in such a situation:

[I]n order to render [a] statement * * * violative of the constitutional mandate, it must be with reference to some fact adverted to by the judge in his instructions either directly or in such a way as to lead, or tend to lead, the jury to infer that such fact was an established one.

Any such conclusion in this case is negated by the court's admonition concerning plaintiff's burden of proof relative to the amount of damages, based on evidence and not guess, conjective or speculative. *Jankelson v. Cisel*, 3 Wash.App. 139, 145, 473 P.2d 202 (1970).

Judgment affirmed.

GREEN and EVANS, JJ., concur.

William FANNIN and Ethel B. Fannin,
his wife, Appellants,
v.

Leo M. ROE, Respondent.
No. 36046.

Supreme Court of Washington.
Department 2.
May 29, 1963.

Action for personal injuries allegedly arising out of automobile accident. The Superior Court, King County, Raymond Royal, J., dismissed the action, and the plaintiffs appealed. The Supreme Court, Hamilton, J., held that question whether grazing collision between defendant's vehicle traveling at 20 to 30 miles per hour and plaintiffs' stationary vehicle parked at an angle with one wheel touching curb resulted in impact sufficient to move plaintiffs' automobile with enough force to throw plaintiff wife and children about causing alleged injuries was for jury.

Order reversed and cause remanded for new trial.

1. Trial \Leftrightarrow 178

By challenging sufficiency of evidence, moving party admits truth of evidence and all inferences which can reasonably be drawn therefrom.

2. Trial \Leftrightarrow 178

In ruling on motion challenging sufficiency of evidence in jury trials, trial court must interpret evidence in light most favorable to party against whom motion is made and most strongly against moving party.

3. Trial \Leftrightarrow 139(1), 142, 178

In passing on motion challenging sufficiency of evidence in jury trial, no element of discretion on part of trial court is involved, and motion may be granted only when it can be held as matter of law that there is no evidence or reasonable inference therefrom to sustain verdict for opposing party.

4. Evidence \Leftrightarrow 595

"Inference" is logical deduction or conclusion from established fact.

See publication Words and Phrases for other judicial constructions and definitions.

5. Negligence \Leftrightarrow 121(5)

Proximate cause may be adduced as inference from other facts proven.

6. Evidence \Leftrightarrow 588

When physical facts are uncontroverted and speak with force that overcomes all testimony to contrary, reasonable minds must follow physical facts and cannot differ.

7. Damages \Leftrightarrow 208(1)

Question whether grazing collision between defendant's vehicle traveling at 20 to 30 miles per hour and plaintiffs' stationary vehicle parked at an angle with one wheel touching curb resulted in impact sufficient to move plaintiffs' automobile with enough force to throw plaintiff wife and children about causing alleged injuries was for jury.

Maslan, Maslan & Hanan, Bernard D. Greene, Seattle, for appellants.

Montgomery, Montgomery & Purdue, Seattle, for respondent.

HAMILTON, Judge.

This is a personal injury action arising out of an automobile accident. Trial was commenced before a jury. At the conclusion of plaintiffs' evidence, the trial court sustained defendant's challenge to the sufficiency of the evidence and dismissed plaintiffs' action. Plaintiffs' appeal, assigning error to the trial court's ruling.

A review of the record reveals the following version of the accident presented by plaintiffs' evidence: On August 14, 1959, at about 8 p. m., plaintiff wife and her two young children were driving south on Bothell Way, between 137th and 138th Streets, in Seattle. Traffic was normal and it was growing dusk. The purpose of the trip was to pick up plaintiff husband, who

was awaiting at a point on the easterly side of Bothell Way. Bothell Way at the point in question is some 59 feet in width, the west half consisting of a 9-foot passing lane, an 8½-foot driving lane, and an 8-foot parking strip. Plaintiff wife entered the block in question at about 20 to 30 miles an hour, traveling in the driving lane. As she approached the point at which she was to meet her husband she observed ample parking space some distance ahead, turned on the right-turn signal, looked in the rear-view mirror and observed no traffic immediately behind her, slowed down, and commenced entering the parking strip at about 5 miles per hour. When the right front tire of plaintiffs' vehicle contacted the curb, and the left point of the rear bumper was extending into the driving lane a distance variously estimated from 1 to 18 inches, she stopped momentarily preparatory to completing her parking maneuver. At that time, defendant, then traveling in the driving lane at 20 to 30 miles an hour, struck and scraped the left rear of plaintiffs' vehicle with the right side of his vehicle. The noise of the impact, over the prevailing traffic sounds, was sufficient to attract the attention of plaintiff husband and two persons he was conversing with, some 80 to 90 feet distant from the scene. The left rear bumper and fender of plaintiffs' vehicle were damaged and the trunk lid sprung, causing \$100 to \$125 depreciation in value. Defendant's vehicle received a scratch or indentation extending the full length of its right side. The force of the impact threw the two children against the dashboard and windshield without serious injury. Plaintiff wife, from the impact and her involuntary action in trying to protect the children, was thrown against the steering wheel and other parts of the vehicle with enough force to cause breakage of a partial denture and injury to her mouth, nose, cervical area, and knees.

Plaintiff wife testified, in substance, that because of the suddenness of the impact, concern for the children, and her contact

with the steering wheel, she could not state whether the impact moved plaintiffs' vehicle. Plaintiff husband and the two persons with him testified, in substance, that they heard but did not see the impact and could not testify as to whether plaintiffs' vehicle was moved thereby.

The premise upon which the trial court acted in dismissing plaintiffs' claim is stated in defendant's motion challenging the sufficiency of the evidence, as follows:

"* * * there is no evidence in this case that the plaintiff's automobile was moved by the contact that was made. Under the physical facts then established, reasonable minds could not differ on whether she would be thrown against the steering wheel and thrown about, to have the injuries of which she complains.

"It would be physically impossible without the automobile itself being moved for the plaintiff to be thrown about and injured."

In short, defendant's motion, and the trial court's ruling, are predicated upon the absence of testimony that the impact between the vehicles occasioned movement of plaintiffs' vehicle.

From this premise it is reasoned: (a) Plaintiffs had the burden of establishing a causal connection between the impact and the injuries; (b) because plaintiffs either presented no direct testimony or equivocated upon the question of vehicular movement, it necessarily follows or must be inferred that plaintiffs' vehicle did not move; (c) under such circumstances physical laws preclude the transmission of force to a body or object within the stationary vehicle; (d) plaintiff wife's testimony that she and the children were thrown about with sufficient force to cause the injuries complained of must be disregarded.

[1, 2] The established rule, governing motions challenging the sufficiency of evidence in jury trials, is stated, in Gregory v.

Shannon, 59 Wash.2d 201, 203, 367 P.2d 152, as follows:

"By challenging the sufficiency of the evidence, the respondents admit its truth, and all inferences that can reasonably be drawn therefrom. In ruling upon the motion, the trial court must interpret the evidence in the light most favorable to the party against whom the motion was made (appellant), and most strongly against the movant party (respondents). * * *"

[3] No element of discretion on the part of the trial court is involved. Such a motion can be granted only when it can be held as a matter of law that there is no evidence or reasonable inference therefrom to sustain a verdict for the opposing party. *Miller v. Payless Drug Stores of Washington*, 161 Wash.Dec. 649, 379 P.2d 932; *Lambert v. Smith*, 54 Wash.2d 348, 340 P.2d 774; *Williams v. Hofer*, 30 Wash.2d 253, 191 P.2d 306.

[4] We have defined an inference as a logical deduction or conclusion from an established fact. *Peterson v. Betts*, 24 Wash. 2d 376, 165 P.2d 95.

[5] Proximate cause may be adduced as an inference from other facts proven. *De-Young v. Seattle*, 51 Wash.2d 11, 315 P.2d 629; *Wilson v. Northern Pac. R. Co.*, 44 Wash.2d 122, 265 P.2d 815.

[6] It is likewise the rule that when "physical facts are uncontroverted, and speak with a force that overcomes all testimony to the contrary, reasonable minds must follow the physical facts, and therefore cannot differ." *Mouso v. Bellingham & Northern R. Co.*, 106 Wash. 299, 303, 179 P. 848.

[7] In the instant case, accepting the evidence introduced as true, such evidence established: (a) A grazing collision between defendant's vehicle traveling at 20 to 30 miles an hour and plaintiffs' stationary vehicle parked at an angle with one wheel touching the curb; (b) an impact sufficient in force to (1) be heard, over prevailing traffic noises, by persons 80 to

90 feet from the scene; (2) cause bumper, fender, and trunk damage to plaintiffs' vehicle; and (3) throw plaintiff wife and the children about in the vehicle with enough violence to inflict some injury.

Viewing this evidence in the favorable light required, and applying thereto the physical laws relied upon by defendant, it appears logical and reasonable to infer that plaintiffs' vehicle moved.

The credibility of plaintiffs' version of the accident and the extent of plaintiff wife's injuries present questions for the jury.

The order of dismissal is reversed and the cause remanded for new trial. Costs of appeal will abide the results of trial.

OTT, C. J., and DONWORTH, FINLEY and HUNTER, JJ., concur.



In the Matter of the Welfare of Steven Douglas DILL and Jennie Shirley Dill.

Francis H. DILL, Petitioner,

v.

The SUPERIOR COURT of the State of Washington FOR KING COUNTY, Robert F. Utter, Judge Pro Tem. of the Juvenile Court, Respondent.

No. 36861.

Supreme Court of Washington.

Department 2.

June 6, 1963.

Rehearing Denied July 25, 1963.

Proceeding by parents for termination of the dependency of their children. The Superior Court, King County, Robert F. Utter, J., entered an order of deprivation as to the daughter and placed her for adoption and ordered that minor son remain in a foster home until further order of the court. The father appealed. The Supreme Court, Stafford, J. pro tem., held

provides additional environmental protection[s]”; and (2) “the County took into consideration that the deducted portion was unbuildable land which a property owner would not have [a] reasonable expectation of developing.” CP at 39. The record supports this conclusion. As we note above, at the GMH Board hearing, Bayfield did not claim “to have a property right to be able to develop the property at it’s [sic] current zoning,” AT at 85; nor did Bayfield object to the County’s affirmative response to the GMH Board’s question about whether a property owner would still be able to build a house on parcel containing “65 percent critical areas.” AT at 84. Similarly, the record demonstrates that when the GMH Board asked the County whether it “would [] be fair” to refer to critical areas property as “unbuildable lands,” the County agreed, “That’s fair.” AT at 85. Bayfield neither objected to this statement nor provided a counterargument on this point.

¶ 56 The record also demonstrates that (1) in identifying lands to rezone, the County included in its criteria lands physically constrained or hazardous to develop and lands of high habitat or environmental value; (2) the public workshop groups prioritized the lands for rezone as those consisting of unbuildable lands, hazardous lands, wetlands, sensitive areas, and conservation areas; (3) the County Planning Commission found that the Innovative Technique decreases “density in areas near sensitive critical areas,” III AR at 1016, and provides an “innovative way to effectively achieve a variety of rural densities,” III AR at 1016; and (4) the Critical Areas Amendment provided that its rezone provisions “will reduce development in environmentally sensitive and hazardous areas . . . thereby helping to protect public health, safety and welfare.” I AR at 23. As the GMA ¹⁶ requires, the Critical Areas Amendment reduces rural density by restricting building development in rural lands, consequently protecting a larger area of rural land from the impacts of building development.¹⁶ These facts support the GMH Board’s finding that the County implemented the Critical Areas Amendment on a rational basis.

16. More specifically, because the Critical Areas Amendment subtracts “certain critical areas,” I AR at 23, from the rural residential district’s

¶ 57 The foregoing evidence is sufficient to persuade an unprejudiced, rational person that the GMH Board appropriately determined that the Critical Areas Amendment provides additional environmental protections and that “the County took into consideration that the deducted portion was unbuildable land which a property owner would not have any reasonable expectation of developing.” CP at 39. Viewing the evidence in the light most favorable to the County and reviewing it against the entire record before the GMH Board, we hold that substantial evidence supports the Board’s finding of fact no. 11 and its denial of Bayfield’s petition for review.

¶ 58 We affirm the superior court’s denial of Bayfield’s substantive due process claim, and we affirm the GMH Board’s denial of Bayfield’s petition to invalidate the County zoning code’s Critical Areas Amendment.

We concur: BRIDGEWATER, P.J., and VAN DEREN, J.



158 Wash.App. 647

**James H. JACKSON and C.R. Hendrick,
a marital community, Appellants,**

v.

**The CITY OF SEATTLE, a Washington
municipal corporation; Plaintiffs,**

and

**Trenchless Construction Services, L.L.C., a
Washington Limited Liability Company,
and QPS, Inc., a Washington corpora-
tion, which does business in Seattle,
King County, Washington as “Quality
Plumbing,” Respondents.**

No. 64244–8–I.

Court of Appeals of Washington,
Division 1.

Nov. 22, 2010.

Background: Homeowners filed suit against construction contractors, alleging

density calculation, it reduces the number of permitted dwelling units, thus, decreasing the total building density in that district.

that they negligently installed a waterline for the previous owner, which caused a landslide that damaged home and landscaping. Contractors filed motions for summary judgment dismissal. The Superior Court, King County, 2009 WL 4571546, Michael Trickey, J., granted motions. Homeowners appealed.

Holdings: The Court of Appeals, Becker, J., held that:

- (1) city stormwater code did not impose any duty on contractors;
- (2) contractors owed a common law duty of care to homeowners when installing waterline; and
- (3) economic loss rule did not apply to preclude homeowners' negligence claim.

Reversed.

1. Negligence ⇔202

To show actionable negligence, plaintiff must establish: (1) the existence of a duty owed to the complaining party, (2) a breach of that duty, (3) a resulting injury, and (4) that the claimed breach was the proximate cause of the injury.

2. Negligence ⇔210

Duty in a negligence action is a threshold question.

3. Negligence ⇔210, 222

A duty may be predicated on violation of statute or of common law principles of negligence.

4. Negligence ⇔1205(7)

City stormwater code, setting forth requirements for erosion control "for all land disturbing activities" as well as construction controls, and providing for enforcement actions for violations of code, did not impose any duty on construction contractors who allegedly negligently installed waterline for prior homeowner that caused a landslide that damaged current homeowners' home and landscaping, as code lacked language expressing a purpose to protect a particular class of persons, and instead stated that one

of its remedial purposes was for the protection of life, property and the environment from erosion, and code contained language specifically disavowing an intention to protect a particular class of persons.

5. Negligence ⇔210, 1550

A plaintiff asserting a negligence claim has the burden of establishing the existence of a duty.

6. Negligence ⇔1025, 1202(1), 1204(1)

Building codes and other similar municipal codes do not typically serve as a basis for tort liability because they are enacted merely for purposes of public safety or for the general welfare.

7. Negligence ⇔1205(7)

Construction contractors who allegedly negligently installed waterline for prior homeowner that caused a landslide that damaged current homeowners' home and landscaping owed current owners a common law duty of care when installing waterline, as installation of waterline created a dangerous condition on the hillside land above the home, the land had previously been designated as a potential landslide area by the city, and it was reasonably foreseeable that drilling and connecting a new waterline would cause damage to third persons if done without sufficient attention to compacting the disturbed soil or stabilizing the newly bored waterline. Restatement (Second) of Torts § 385.

8. Negligence ⇔1205(2, 8)

A builder or construction contractor is liable for injury or damage to a third person as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third person would be injured due to that negligence. Restatement (Second) of Torts § 385.

9. Negligence ⇔1251

Economic loss rule did not apply to preclude homeowners' negligence claim against contractors who allegedly negligently installed waterline for prior homeowner that caused a landslide that damaged current homeowners' home and landscaping, as the waterline itself worked as anticipated, and

homeowners' loss was damage to their home and landscaping, caused by the violent occurrence of a landslide, which was an event allegedly precipitated by the defective condition in which the contractors left the hillside.

10. Torts ⇌118

The economic loss rule marks the fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others; if the rule applies, the party will be held to contract remedies, regardless of how plaintiff characterizes the claims.

11. Negligence ⇌463

Products Liability ⇌156

For purposes of the economic loss rule, an "economic loss" is a defect of quality as evidenced by internal deterioration; but when a loss stems from defects that cause accidents involving violence or collision with external objects, that is a physical injury susceptible of a tort remedy.

See publication Words and Phrases for other judicial constructions and definitions.

12. Products Liability ⇌156

When a defective product injures something other than itself, such as a person or other separate property, the loss is not merely an economic loss and tort remedies are appropriate.

Larry L. Setchell, Benjamin Ta-Shin Shih, Hellsell Fetterman LLP, Seattle, WA, for Appellants.

Kathleen Boyle, Themis Litigation Group, Gregory Fuller, Seattle City Attorney's Office, Seattle, WA, Shellie McGaughey, McGaughey Bridges Dunlap PLLC, Bellevue, WA, for Respondents.

BECKER, J.

¶1 The trial court granted summary judgment dismissal of a homeowner's negligence claims against two construction contractors whose allegedly negligent installa-

tion of a waterline for the previous owner caused a landslide, damaging the landscaping and house. We reverse. This is not a negligent construction case where the economic loss rule would apply and recovery would be limited to contract remedies. The contractors are liable in tort if their negligence caused the landslide.

¶2 "We affirm orders granting summary judgment only when satisfied, after considering the facts in the light most favorable to the nonmoving party, that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Burg v. Shannon & Wilson, Inc.*, 110 Wash.App. 798, 803-04, 43 P.3d 526 (2002).

¶3 The appellant homeowners are James Jackson and his wife, C.R. Hendrick. They bought their house from Corrine Otakie and moved in in November 2006. Earlier that year, Otakie had a problem with a leaking waterline. She contacted respondent QPS, Inc., a plumbing company. After investigating, QPS determined that fixing the old line would be too dangerous because it came down a steep hillside. QPS recommended installing a new waterline using the trenchless method. Otakie took the advice. She contracted with respondent Trenchless Construction Services, LLC, to drill and install the new waterline. She contracted with QPS to connect one end of the line to her house and the other end to the city water main at the top of the hill above her house, and to backfill any excavations.

¶4 Starting near the city water main above Otakie, Trenchless drilled a tunnel 5 inches in diameter and 160 feet long, at an acute angle down the hill to her house. The drilled line began on city property and crossed at least one private lot that did not belong to Otakie. Trenchless installed a one and one quarter inch pipe for the length of the line. QPS dug a trench, 30 feet long and 5 feet deep, along the top of the hill above Otakie's house from the water main to the start of the waterline Trenchless installed. QPS backfilled the connection trench. QPS then connected the pipe to the house, completing the installation in March 2006.

¶5 In November 2006, a large sinkhole formed at the top of the hill above the

house—now owned and occupied by Jackson—near the water main where QPS had dug and backfilled the connection trench. The sinkhole was reported ¹⁶⁵¹by a local homeowner and backfilled by the city. The sinkhole reformed in early December, but it was not reported or filled again.

¶ 6 In December 2006, heavy rains fell on Seattle. On December 14, a city catch basin clogged and water began to pool in the sinkhole. The pooling water burst from the sinkhole, scouring a path down the hill to Jackson's property. The scour path, 15 feet wide by 4 to 5 feet deep, roughly followed the waterline drilled by Trenchless, causing the hillside above Jackson to slide down. The landslide caused considerable damage to the landscaping and house.

¶ 7 Jackson sued the city of Seattle, Trenchless, and QPS. He sued Seattle for negligently inspecting and backfilling the first November sinkhole and for allowing the catch basin to fail. Jackson voluntarily dismissed all claims against Seattle after they reached a mediated settlement.

¶ 8 Trenchless and QPS each moved for summary judgment dismissal. In opposition to the motions, Jackson filed declarations by engineers who opined that the construction by Trenchless and QPS caused the landslide and that it would not have happened if QPS had properly compacted the soil when it backfilled the 30 foot water main connection trench at the top of the hill, or if Trenchless had used a better medium to stabilize the downhill tunnel it bored for the 160 foot long pipe, or if Trenchless and QPS had properly planned and coordinated their project with each other and with the city.

¶ 9 The trial court granted the motions for summary judgment, orally ruling the contractors owed no duty to Jackson. Jackson appeals.

[1-4] ¶ 10 To show actionable negligence, “a plaintiff must establish: (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury.” *Burg*, 110 Wash.App. at 804, 43 P.3d 526. Duty in a negligence action is a threshold question. A

duty may be predicated “on violation of statute or of common law principles of negligence.”⁶⁵² *Burg*, 110 Wash.App. at 804, 43 P.3d 526. Jackson offers both a city ordinance and the common law as predicates for a duty owed by contractors. He relies on *Wells v. City of Vancouver*, 77 Wash.2d 800, 467 P.2d 292 (1970). In *Wells*, a hangar at the municipal airport blew apart in a fierce storm. The plaintiff's leg was broken when he was hit by a flying piece of plywood. According to the experts who testified for the plaintiff, the construction of the hangar fell short of the wind resistance standards in the city building code. The trial court allowed the plaintiff's case to go to the jury on the theory that a violation of the wind resistance standards breached a duty arising from the building code and also on the common law theory of a breach of a property owner's duty to an invitee. The Supreme Court affirmed.

[5] ¶ 11 The plaintiff has the burden of establishing the existence of a duty. *Burg*, 110 Wash.App. at 804, 43 P.3d 526. Jackson first contends the contractors breached a duty created by the Seattle stormwater code, analogous to the building code violations that were held to breach a statutory duty in *Wells*.

¶ 12 “In deciding when violation of a statute or administrative regulation shall be considered in determining liability, this court has relied upon the Restatement (Second) of Torts § 286 (1965).” *Melville v. State*, 115 Wash.2d 34, 36-37, 793 P.2d 952 (1990). Section 286 gives a four factor test:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

¹⁶⁵³¶ 13 The version of the stormwater code in effect at the time the contractors began their work set forth requirements for erosion control “for all land disturbing activities.” Former SMC 22.802.015 (2006). Compliance required the use of construction controls to achieve the following objectives:

b. Before the completion of the project, permanently stabilize all exposed soils that have been disturbed during construction. Methods such as permanent seeding, planting, and sodding may be specified by rules promulgated by the Director.

c. Prevent the transport of sediment from the site. Appropriate use of methods such as, but not limited to, vegetated buffer strips, stormdrain inlet protection, silt fences, sediment traps, settling ponds, and protective berms may be specified in rules promulgated by the Director.

Former SMC 22.802.015(C)(3)(b)-(c). The code authorized certain city agencies to investigate and initiate enforcement action against parties responsible for code violations. Former SMC 22.808.030. An enforcement action could be initiated either through the office of the hearing examiner or in court, potentially leading to an order for corrective action or monetary penalties. Former SMC 22.808.040. The code also included a section on “Violations” making noncompliance with the code a “civil violation” and designating more egregious activities, such as noncompliance with orders, as “criminal violations.” Former SMC 22.808.090. Creating a dangerous condition was specifically designated as a civil violation:

Dangerous Condition. It is a violation of this subtitle to allow to exist, or cause or contribute to, a condition of a drainage control facility, or condition related to grading, stormwater, drainage or erosion that is likely to endanger the public health, safety or welfare, the environment, or public or private property.

Former SMC 22.808.090(A)(5). Jackson contends these provisions of the code demonstrate that its purposes satisfy the Restatement four-part test.

[6] ¹⁶⁵⁴¶ 14 The difficulty for Jackson is the lack of language expressing a purpose to protect a particular class of persons. Build-

ing codes and other similar municipal codes do not typically serve as a basis for tort liability because they are enacted merely for purposes of public safety or for the general welfare. *Halvorson v. Dahl*, 89 Wash.2d 673, 677, 574 P.2d 1190 (1978). *Halvorson* was an exception to the traditional rule because it involved a housing code with a declaration of purpose that specifically mentioned a concern for the welfare of the “occupants” of buildings, not just the welfare of the public as a whole. *Halvorson*, 89 Wash.2d at 677, 574 P.2d 1190. Seattle’s stormwater code, on the other hand, comes within the traditional rule. It declares that one of its remedial purposes is protection of “life, property and the environment” from erosion, flooding, landslides, and other hazards. Former SMC 22.800.020(A)(1). Almost identical language was discussed in *Halvorson* to show how the purpose of a typical building code is to protect the general public rather than a particular class of individuals. *Halvorson*, 89 Wash.2d at 677 n. 2, 574 P.2d 1190. While the court in *Wells* did approve a duty instruction based on the city building code, the parties in that case apparently assumed the wind resistance standards were designed with a purpose to protect a particular class. The issue presented was whether the particular class was limited to persons directly injured by a collapsing building. In deciding that the protected class was broad enough to include anyone injured by flying debris, the court did not address the precise issue presented in this case—whether the code was intended to protect a particular class of persons rather than the general public.

¶ 15 Not only does the Seattle stormwater code employ the general purpose language of a typical building code, it also contains language specifically disavowing an intention to protect a particular class of persons. In the subsection on penalties and damages that can be awarded by the hearing examiner or by a judge, the code specifically states: “It is expressly the purpose of this subtitle to provide for and promote the health, safety and welfare of the general public. This subtitle is not intended to create or ¹⁶⁵⁵otherwise establish or designate any particular class or group of persons who will or should be espe-

cially protected or benefitted by its terms.” Former SMC 22.800.020(B). The subtitle “does not establish a cause of action that may be asserted by any party other than the City. Penalties, damages, costs and expenses may be recovered only by the City.” Former SMC 22.808.060(C).

¶ 16 When a court decides that a violation of a statute shall be considered in determining liability for negligence, the motivation for doing so is to give effect to the will of the legislature:

It is not every provision of a criminal statute or ordinance which will be adopted by the court, in a civil action for negligence, as the standard of conduct of a reasonable person. Otherwise stated, there are statutes which are considered to create no duty of conduct toward the plaintiff, and to afford no basis for the creation of such a duty by the court. The courts in such cases have been careful not to exceed the purpose which they attribute to the legislature. This judicial self-restraint is rooted in part in the theory of the separation of powers.

W. Page Keeton et al., *Prosser and Keeton on Torts* § 36 at 222 (5th ed.1984) (footnote omitted). Jackson does not persuasively explain how we could view the stormwater code as a foundation for a negligence action in spite of the express disclaimer of a purpose to designate a protected class and the express terms making the code enforceable only by the city. We conclude he has not established the existence of a duty arising from the code.

[7] ¶ 17 This does not mean Jackson is without a remedy. Even if a violation of the city stormwater code is not negligence, this case does resemble *Wells* in that the facts support a common law theory of liability. We agree with Jackson that the contractors owed him the common law duty of care recognized in *Davis v. Baugh Industrial Contractors, Inc.*, 159 Wash.2d 413, 417, 150 P.3d 545 (2007).

[8] ¶ 18 In *Davis*, the crew foreman of a concrete company was accidentally crushed to death by falling cement blocks while he was inspecting leaking water pipes. A con-

tractor had installed the pipes, allegedly without using reasonable care. The trial court granted summary judgment to the contractor on the ground that the common law completion and acceptance doctrine relieved the contractor of liability for negligence after the work was completed by the contractor and accepted by the landlord. Abandoning the “ancient” doctrine of completion and acceptance, the court instead employed RESTATEMENT (SECOND) OF TORTS § 385 (1965):

§ 385. Persons Creating Artificial Conditions on Land on Behalf of Possessor: Physical Harm Caused After Work has been Accepted

One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

Under this section of the Restatement, “a builder or construction contractor is liable for injury or damage to a third person as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third person would be injured due to that negligence.” *Davis*, 159 Wash.2d at 417, 150 P.3d 545.

¶ 19 This statement in *Davis* defines the duty that Trenchless and QPS owed to Jackson when they installed the waterline. Viewed in the light most favorable to Jackson, the evidence establishes that the installation of the waterline created a dangerous condition on the hillside land above the residence. The land had previously been designated as a potential landslide area by the city of Seattle, and it was reasonably foreseeable that drilling and connecting the new waterline would cause damage to third persons if done without sufficient attention to compacting the disturbed⁶⁵⁷ soil or stabilizing the newly bored waterline. See *Schneider v. Strifert*, 77 Wash.App. 58, 63, 888 P.2d 1244 (1995) (“Foreseeability is a question of fact

for the jury unless reasonable persons could reach but one conclusion.”).

[9] ¶ 20 Trenchless and QPS argue that *Davis* is factually distinguishable. In *Davis*, the negligently installed water pipes leaked, whereas in this case the new waterline remained intact and functioned as promised. And in *Davis*, the negligence caused bodily injury, whereas in this case there was only property damage. But these are not material distinctions. They do not override the policy concerns that motivated our Supreme Court to cast aside the completion and acceptance doctrine:

The doctrine is also harmful because it weakens the deterrent effect of tort law on negligent builders. By insulating contractors from liability, the completion and acceptance doctrine increases the public's exposure to injuries caused by negligent design and construction of improvements to real property and undermines the deterrent effect of tort law. Illinois long ago abandoned the doctrine specifically for this reason, stating that “[a]n underlying purpose of tort law is to provide for public safety through deterrence of negligent designers and builders. This purpose cannot be accomplished if these persons are insulated from liability simply by the act of delivery.” *Johnson v. Equip. Specialists, Inc.*, 58 Ill.App.3d 133, 373 N.E.2d 837, 843, 15 Ill.Dec. 491 (1978).

Davis, 159 Wash.2d at 419–20, 150 P.3d 545. Similarly here, the deterrent effect of tort law on negligent construction would be diminished by absolving contractors of tort liability so long as they deliver a functional system and do not cause bodily injury. Contractors who install a waterline on a steep slope have to be concerned about the condition in which they leave the slope, not just the condition of the waterline. And liability imposed under Restatement § 385 is “for physical harm”; this includes damage to property, not just personal injury.

[10] ¶ 21 Trenchless and QPS insist that the economic loss rule bars Jackson's negligence action. “The § 385 economic loss rule marks the fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement,

and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others.” *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wash.2d 816, 821, 881 P.2d 986 (1994). “If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.” *Alejandro v. Bull*, 159 Wash.2d 674, 683, 153 P.3d 864 (2007).

¶ 22 In a case involving a claim of negligent misrepresentation by homebuyers against an appraiser hired by their lender, this court stated that it is error to apply the economic loss rule where no contractual relationship exists between the parties. *Borish v. Russell*, 155 Wash.App. 892, 901, 904, 230 P.3d 646 (2010). Citing *Borish*, Jackson contends the economic loss rule has no application in this case because he did not have a contract with Trenchless or with QPS.

¶ 23 The idea that there must be privity between the parties before the economic loss rule comes into play would seem to be at odds with the leading case of *Berschauer/Phillips*. In that case, the court made the economic loss rule the foundation of its decision to deny a tort remedy to a general contractor even though the damages, costly delays in the construction of a school project, were allegedly caused by negligent preparation of architectural plans and negligent inspection of the work by individuals with whom the contractor did not have a direct contractual relationship. The court denied the contractor's tort claims because the damages caused by the construction delays were only economic losses. Notwithstanding *Borish*, we conclude it is appropriate to consider the economic loss rule here, even though Trenchless and QPS did not directly contract with Jackson.

¶ 24 Based on the economic loss rule, Trenchless and QPS argue that any duty they had to install the waterline safely arose solely by means of their contracts with Otakie § 350 and accordingly Jackson must be limited to a contract remedy. We disagree. As discussed above, a duty in tort to use due care in installing the waterline arose from the common law.

¶25 The contractors contend Jackson's claim is precluded by *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 745 P.2d 1284 (1987). In *Stuart*, a condominium homeowners' association, suing on behalf of original and subsequent unit purchasers, attempted to impose tort liability upon the builder and vendor of the units for construction defects that resulted in rotting and impairment of the units. *Stuart*, 109 Wash.2d at 422, 745 P.2d 1284. Applying the economic loss rule, the court refused to recognize a tort cause of action for negligent construction. Beyond the terms expressed in the contract of sale, "the only recognized duty owing from a builder-vendor of a newly completed residence to its first purchaser is that embodied in the implied warranty of habitability." *Stuart*, 109 Wash.2d at 417, 745 P.2d 1284. *Stuart* does not stand for the proposition that a building contractor can only be sued for contract remedies. The court was concerned with preventing the consumer from using a tort theory to obtain compensation for a defective "product" (the condominium) that did not meet the consumer's market-based economic expectations. The court was careful to preserve tort liability for physical damage caused when the "product" does not meet a standard of safety defined in terms of conditions that create unreasonable risks of harm. *Stuart*, 109 Wash.2d at 419, 745 P.2d 1284, quoting *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145 (1965).

[11] ¶26 Under *Stuart*, Jackson's loss was not an "economic" loss. An economic loss is a defect of quality as evidenced by internal deterioration. But when a loss stems "from defects that cause accidents involving violence or collision with external objects," that is a physical injury susceptible of a tort remedy. *Stuart*, 109 Wash.2d at 420, 745 P.2d 1284.¹ If the new waterline ⁶⁶⁰had not functioned properly and had to be reinstalled or fixed, that would be an economic loss. But the waterline itself worked as anticipated. Jackson's loss was damage to his house and landscaping, caused by the violent

occurrence of the landslide—an event allegedly precipitated by the defective condition in which the contractors left the hillside.

[12] ¶27 In short, we agree with the distinction stated in *Stieneke v. Russi*, 145 Wash.App. 544, 556, 190 P.3d 60 (2008), *review denied*, 165 Wash.2d 1026, 203 P.3d 381 (2009): "When a defective product injures something other than itself, such as a person or other separate property, the loss is not merely an economic loss and tort remedies are appropriate." The same is true of a defective installation of a product. The nature of Jackson's loss is injury to property resulting from the allegedly negligent installation of an otherwise functional waterline. Because Jackson establishes that Trenchless and QPS owed him a duty of care under *Davis*, the trial court erred in treating his case as if it were a claim for negligent construction precluded by *Stuart*.

¶28 In addition to arguing lack of duty, QPS contends the dismissal can be affirmed on the alternative ground of lack of proximate cause. This argument was not properly raised below and we will not consider it. *White v. Kent Med. Center, Inc.*, 61 Wash. App. 163, 168–69, 810 P.2d 4 (1991).

¶29 The record shows genuine issues of material fact remain concerning breach of duty. Summary judgment was inappropriate.

¶30 Reversed.

WE CONCUR: SCHINDLER and GROSSE, JJ.



1. See also *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wash.2d 380, 241 P.3d 1256 (2010); *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wash.2d 442, 243 P.3d 521 (2010).

These two decisions, issued after oral argument in this case and cited by Jackson as supplemental authority, confirm our decision and our rationale.

in fire fighter training. The evidence presented, the wording of the relevant administrative code provisions, the language of the relevant statute, and the legislature's purpose in enacting the statute all support denial of the city's claim of error.

IV. Burden of Proof on Statutory Set-Off.

[12] ¶ 39 The city also assigns error to several of the trial court's instructions to the jury. In its first jury instruction challenge, the city focuses on jury instructions 18 and 20, which pertain to the parties' respective burdens of proof on damages. Instruction 18 informed the jury that Locke had the burden of proving damages such as pain and suffering and future economic damages. Instruction 20 stated that the city, in order to establish the amount of the offset, had the burden of proving the amount of benefits received and receivable.

¶ 40 The city argues that instructions 18 and 20 improperly gave inconsistent directions regarding the parties' respective burdens of proof. We disagree.

[13] ¶ 41 The focus of the city's argument is that instruction 20 was incorrect because Locke should have had the burden of proving the amount "received and receivable." However, in its answer to Locke's complaint the city raised the issue of its entitlement to an offset such as that reflected in instruction 20. The city's pleading was proper under CR 8(c), which states that a party shall affirmatively plead any matter constituting an avoidance or affirmative defense. CR 8(c); *Rainier Nat'l Bank v. Lewis*, 30 Wash.App. 419, 422, 635 P.2d 153 (1981). The burden of proof is thereby placed upon the party asserting the avoidance or affirmative defense. See *Gleason v. Metro. Mortgage Co.*, 15 Wash.App. 481, 551 P.2d 147 (1976) (accord and satisfaction); *Tacoma Commercial Bank v. Elmore*, 18 Wash.App. 775, 573 P.2d 798 (1977); 3A LEWIS H. ORLAND & KARL B. TEGLAND, *WASHINGTON PRACTICE: RULES PRACTICE* CR 8 at 138 (4th ed.1992). Because the city's contention that it was entitled to the statutory offset was in the nature

9. *Shinn Irrigation Equip., Inc. v. Marchand*, 1

of an avoidance,⁹ instruction 20 correctly stated the law.

¶ 42 **The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. RCW 2.06.040.**

WE CONCUR: BECKER and GROSSE, JJ.



133 Wash.App. 557

Dong Wan KIM, an individual, and Kwi Sim Kim, an individual, Appellants,

v.

Jay D. O'SULLIVAN, an individual, and Jane Doe O'Sullivan, an individual, and the marital community comprised thereof; and Alan T. Blotch, an individual and Jane Doe Blotch, an individual, and the marital community comprised thereof; and O'Sullivan & Blotch, PLLC, a Washington professional limited liability company, Respondents.

No. 56035-2-I.

Court of Appeals of Washington,
Division 1.

June 19, 2006.

Background: Client brought legal malpractice action against his attorney, and, as part of a settlement agreement with client's adversary in underlying action, adversary had the right to control the malpractice litigation. Attorney moved for summary judgment on ground that action was barred by rule prohibiting assignment of claim of attorney malpractice to adversary in litigation out of which the alleged malpractice arose. The Superior Court, King County, William L. Downing, J.,

Wash.App. 428, 430-31, 462 P.2d 571 (1969).

granted summary judgment for attorney. Client appealed.

Holdings: The Court of Appeals, Becker, J., held that:

- (1) client could not avoid rule prohibiting assignment of malpractice claim to his adversary by agreeing to prosecute claim in his own name for benefit of adversary, and
- (2) client's malpractice claim was subject to dismissal.

Affirmed.

1. Appeal and Error ⅈ863

On review of a grant of summary judgment, the appellate court conducts the same inquiry as the trial court.

2. Appeal and Error ⅈ893(1), 934(1)

On review of a grant of summary judgment, the appellate court views all facts and reasonable inferences in the light most favorable to the nonmoving party, applying de novo review to issues of law.

3. Assignments ⅈ24(1)

Client could not avoid the rule prohibiting assignment of claim of attorney malpractice to his adversary in the litigation out of which the alleged malpractice arose, by agreeing to prosecute the claim in his own name for the benefit of his original adversary; agreement was subject to adversary's right to control the malpractice litigation, making adversary the real party in interest, and rendering the agreement invalid.

4. Attorney and Client ⅈ112

Client's legal malpractice claim, if properly pursued, was subject to dismissal, where he failed to produce evidence of damage caused by his attorney's negligence in underlying suit; client would never have to pay the underlying judgment against him based on his settlement with his adversary, inasmuch as his adversary had promised not to execute on it.

5. Attorney and Client ⅈ105.5

A claim for legal malpractice requires proof of damage to the client.

6. Damages ⅈ15

The purpose of tort damages is to place the plaintiff in the condition he would have been in had the wrong not occurred.

7. Attorney and Client ⅈ129(4)

The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct.

8. Attorney and Client ⅈ129(2)

To ensure that damage awards in legal malpractice actions accurately reflect actual losses and avoid windfalls, the burden is on the plaintiff to show that damages are collectible.

Komron Michael Allahyari, Jaime Michael Olander, Attorney at Law, Seattle, WA, for Appellants.

Steven Anthony Rockey, Eklund Rockey Stratton PS, Seattle, WA, for Respondents.

BECKER, J.

¹559 ¶ 1 A client may not assign a claim of attorney malpractice claim to his adversary in the litigation out of which the alleged malpractice arose. *Kommavongsa v. Haskell*, 149 Wash.2d 288, 67 P.3d 1068 (2003). Appellant Kim has attempted to avoid this rule by agreeing to prosecute the claim in his own name for the benefit of his original adversary and subject to that adversary's right to control the litigation. Because the rationale of *Kommavongsa* renders such an agreement invalid, and because appellant Kim has not offered proof of damages that would support his claim in any event, the trial court properly granted summary judgment to malpractice defendant Jay O'Sullivan.

[1, 2] ¶ 2 After a grant of summary judgment, this court conducts the same inquiry as the trial court. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. A material fact is one upon which the outcome of the litigation depends. The appellate court views all facts and reasonable infer-

KIM v. O'SULLIVAN

Cite as 137 P.3d 61 (Wash.App. Div. 1 2006)

Wash. 63

ences in the light most favorable to the non-moving party, applying de novo review to issues of law. *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wash.App. 677, 682, 50 P.3d 306 (2002).

¶ 3 Viewed in the light most favorable to Kim, this case arose out of a 1997 bar scuffle that injured Thomas Reina. Reina and his wife, represented by attorney Komron Allahyari of the Washington Law Group, sued the bar owners, Kim and his wife. Kim owned \$1 million insurance policies from two insurers, Odyssey Re Limited and Columbia Casualty Company. Odyssey insured Kim against general liability, and Columbia insured him against liability from serving liquor. Kim asked both insurers to provide defense counsel. Both insurers disputed coverage in a single declaratory judgment action, to which Kim, Reina, and the insurers were all parties. Before the coverage action concluded, Columbia and Odyssey each agreed to provide Kim defense counsel subject to a reservation of the insurers' rights to dispute coverage.

¶ 4 Columbia assigned attorney Jay O'Sullivan to defend Kim. Kim also retained his own attorney, Karl Park, who represented Kim in both the coverage dispute and Reina's tort suit.

¶ 5 According to Kim, O'Sullivan's representation was deficient in several ways throughout the case. He failed to inform Kim about the nature of the "reservation of rights" defense. He failed to obtain Kim's informed consent to his alleged conflicts of interest. (Allegedly, O'Sullivan was conflicted because he was being paid by Columbia, but representing Kim.) He limited his efforts to defending the liquor liability claims, even though Reina also raised "premises liability" claims. He failed to adequately conduct discovery and as a result caused both Kim and Columbia to underestimate the strength of Reina's case.

¶ 6 The record reflects that these allegations are subject to considerable dispute, but for purposes of summary judgment we will assume Kim could prove deficient representation at trial. Kim's theory is that if O'Sullivan had accurately represented the strength of Reina's case, Columbia would have made

more funds available for settlement, and Kim could have settled the claim for as little as \$200,000 in December 2002 when Reina offered to accept that sum. Instead, Kim says, the offer expired by its terms in January 2003, after O'Sullivan convinced him not to settle.

¶ 7 After the \$200,000 offer expired, Kim took matters into his own hands. Without consulting O'Sullivan, he authorized Park to settle with Reina. Negotiations produced Kim's consent to a \$3 million judgment in February 2003:

the Kims agree, consent, and stipulate to entry of judgment against them in the amount of \$3 million (\$3,000,000.00), subject to all other terms and conditions of this Settlement Agreement, and provided that the Reinas never enforce nor attempt to enforce the judgment against the Kims personally as hereinafter agreed.

In exchange for Reina's agreement not to enforce the judgment against Kim, Kim assigned to Reina any insurance proceeds he would receive from Odyssey and Columbia to cover his liability in the Reina lawsuit; his claims for bad faith against Odyssey and Columbia; and his claims for malpractice against the attorneys the insurers had provided (including O'Sullivan). Kim promised to cooperate fully with Reina as Reina prosecuted Kim's bad faith and malpractice claims. Reina agreed to hold Kim harmless from the expenses and risks of the litigation.

¶ 8 That same month, Reina (as Kim's assignee) released Kim's claims against Odyssey in exchange for \$125,000. Reina and Kim filed an agreed judgment for \$2,875,000. Shortly thereafter, Reina released Kim's claims against Columbia in exchange for \$672,500. The insurers dismissed their declaratory judgment action.

¶ 9 On May 1, 2003, the Washington Supreme Court decided *Kommavongsa*. In *Kommavongsa*, an attorney representing the defendant in an accident case negligently allowed a default judgment to be entered. In settlement of the claim, the defendant assigned to the injured plaintiff his malpractice claim against the attorney. The court held that such assignments are against public

policy. “In sum, we can see no advantage flowing to the legal system or the public that it serves from permitting assignments of malpractice claims to adversaries in the same litigation that gave rise to the alleged malpractice.” *Kommavongsa*, 149 Wash.2d at 311, 67 P.3d 1068.

¶ 10 Kim and Reina recognized that *Kommavongsa* rendered Kim’s assignment of the malpractice claim void and ⁵⁶²unenforceable. They responded by modifying the original agreement with an addendum signed in May 2004 by Kim, Reina, and Allahyari. In place of Kim’s assignment of his malpractice claim to Reina, in the addendum Kim promised to pursue the malpractice claim to settlement or judgment (with the assistance of Allahyari) and give any proceeds to Reina. Kim, Reina, and Allahyari also entered into a separate contingent fee agreement. In that agreement, Allahyari and Kim promised not to settle the malpractice claim without first consulting Reina. Kim agreed that if he settled the claim without consulting Reina or Allahyari, Kim would pay Allahyari’s attorney fees.

¶ 11 With the addendum in place, Allahyari (now representing Kim) filed Kim’s malpractice suit against O’Sullivan in September 2004. O’Sullivan moved for summary judgment on the grounds that the suit was barred by *Kommavongsa* and additionally that Kim could not raise a genuine issue of material fact as to the existence of damages resulting from the alleged malpractice. The trial court granted summary judgment to O’Sullivan and ordered the case dismissed. Kim appeals.

[3] ¶ 12 Kim contends that his suit is not barred by *Kommavongsa* because it is his own direct action against O’Sullivan rather than an action undertaken by an assignee. *Kommavongsa* did not dismiss the assignor’s malpractice lawsuit altogether, instead remanding to the trial court so that the assignor could, if he chose, be substituted as the real party in interest and “so that the legal malpractice claim may proceed in normal course as between the proper parties thereto.” *Kommavongsa*, 149 Wash.2d at 291, 67 P.3d 1068. The court did not intend for its ruling to be applied so as “protect lawyers

from the consequences of their own legal malpractice.” *Kommavongsa*, 149 Wash.2d at 311, 67 P.3d 1068. The decision permits assignment of judgments or proceeds from legal malpractice suits to the adversary in the underlying case after the litigation has ended:

Prohibiting the assignment of legal malpractice claims to an adversary in the same litigation that gave rise to the legal ⁵⁶³malpractice claim will not prevent clients from pursuing their own legal malpractice claims to judgment, and then assigning their judgments in order to satisfy their own liabilities or submitting to execution upon such judgments. Thus, prohibiting such assignments will not protect lawyers from the consequences of their own legal malpractice.

Kommavongsa, 149 Wash.2d at 311, 67 P.3d 1068 (emphasis added).

¶ 13 Kim contends he has satisfied *Kommavongsa* because he has assigned only the proceeds rather than the claim itself. But as the above excerpts illustrate, the client must be the real party in interest when the malpractice suit is litigated. Under the terms of the addendum to the agreement between Reina and Kim, Kim is not the real party in interest; Reina is. Reina and his attorney are in complete control of the malpractice lawsuit and only Reina will benefit from a settlement or judgment in the lawsuit. Consequently, it remains in substance a suit on an assigned claim of legal malpractice brought by the adverse parties in the underlying litigation in which the alleged malpractice occurred, and it implicates the same policy concerns that motivated the *Kommavongsa* court to bar such assignments.

¶ 14 The Connecticut Supreme Court, endorsing and following the rationale of *Kommavongsa*, concluded that an assignment of proceeds similar to the one contained in the Reina–Kim Addendum was “made merely to circumvent the public policy barring assignments” because the assignee retained control of the litigation. *Gurski v. Rosenblum & Filan, LLC*, 276 Conn. 257, 885 A.2d 163, 178 (2005). See also *Weiss v. Leatherberry*, 863 So.2d 368, 372 (Fla. Dist. Ct. App. 2003). We similarly conclude that *Kommavongsa* bars

Kim's suit in its present posture because the assignment of proceeds that underpins it is in reality an assignment of the claim.

[4] ¶ 15 To the extent that Kim might have a valid malpractice claim that he could pursue as the real party in interest, the correct remedy under *Kommavongsa* would be a remand, not dismissal. However, in this case dismissal is ¹⁵⁴justified because even if Kim would now choose to proceed as the real party in interest, he has not produced evidence of damage caused by O'Sullivan's alleged breach.

[5-7] ¶ 16 A claim for legal malpractice requires proof of damage to the client. *Lavigne*, 112 Wash.App. at 682-683, 50 P.3d 306. The purpose of tort damages is to place the plaintiff in the condition he would have been in had the wrong not occurred. *Tilly v. Doe*, 49 Wash.App. 727, 731-732, 746 P.2d 323 (1987). The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct. *Tilly*, 49 Wash.App. at 731, 746 P.2d 323.

[8] ¶ 17 To ensure that damage awards accurately reflect actual losses and avoid windfalls, the burden is on the plaintiff to show that damages are collectible. *Lavigne*, 112 Wash.App. at 687, 50 P.3d 306. For instance, in *Lavigne*, a Washington company hired a Washington law firm to help it collect an Arizona judgment against Arizona residents. The Arizona residents had no unencumbered assets. The company sued the law firm for malpractice after the firm failed to inform the company of the applicable statute of limitations for enforcing the judgment. The trial court granted summary judgment in the law firm's favor because the company produced no evidence showing the judgment was collectible, *i.e.*, that the Arizona residents had unencumbered assets. This court affirmed: "Absent adequate proof of collectibility, the plaintiff could unjustifiably receive a windfall." *Lavigne*, 112 Wash.App. at 687, 50 P.3d 306.

¶ 18 Kim contends that O'Sullivan should have persuaded him to accept the \$200,000 settlement offer before it expired, and his failure to do so damaged Kim in an amount

measured by the unsatisfied portion of the agreed judgment. His theory is that O'Sullivan prevented him from being able to *avoid* a judgment, whereas in *Lavigne* the malpractice plaintiff claimed that his attorney prevented him from being able to *collect* on a judgment. Nevertheless, the *Lavigne* rationale applies. Kim will never have to pay the unsatisfied amount of the agreed judgment, as Reina has promised not to execute on it. Awarding Kim damages ¹⁵⁵measured by that judgment would give him an unjustified windfall. The agreed judgment is not a loss actually sustained by Kim as a proximate result of the alleged malpractice.

¶ 19 In trying to avoid this outcome, Kim argues that the stipulated judgment should serve as a presumptive measure of damages because that remedy is permitted in insurance bad faith cases. For example, if an insurer refuses in bad faith to settle a claim within policy limits and the insured independently negotiates a settlement, the insurer is liable for the settlement even if it exceeds policy limits, to the extent the settlement is reasonable and paid in good faith. This is true even where the insured has assigned the claim to the injured party in exchange for a covenant not to execute. *Besel v. Viking Ins. Co.*, 146 Wash.2d 730, 737, 49 P.3d 887 (2002).

¶ 20 But *Kommavongsa* unequivocally states that "a stipulated judgment cannot properly serve as an indication of the actual damages, if any there were, as a result of the alleged legal malpractice." *Kommavongsa*, 149 Wash.2d at 308, 67 P.3d 1068. If Kim's claim against O'Sullivan is a legal malpractice claim, he is not entitled to the benefit of the rules that apply in insurance bad faith cases.

¶ 21 Kim contends that he is suing O'Sullivan not just for legal malpractice, but also for a new and distinct species of action in which compensation is awarded for "insurer-retained defense counsel bad faith". He claims that an insurer-retained attorney may be held liable for bad faith to the same extent as an insurer, and is subject to the same remedies as the insurer. For this proposition, he relies on *Tank v. State Farm Fire & Cas. Co.* 105 Wash.2d 381, 388, 715 P.2d 1133 (1986). The Supreme Court held in *Tank* that in a reservation of rights case, the po-

tential conflicts of interest between insurer and insured mandate imposing upon the insurer, as part of its duty of good faith, an even higher standard than in other cases. The court also set forth the distinct duties owed to the insured by retained defense counsel in such cases. *Tank*, 105 Wash.2d at 387–89, 715 P.2d 1133. But in 1566 doing so the court recognized that the responsibilities of attorneys and insurers are distinct, and referred to the former as “defense counsel’s duties as an attorney.” *Tank*, 105 Wash.2d at 390, 715 P.2d 1133 (emphasis added). O’Sullivan owed Kim a duty as his attorney, not as his insurer. There is no cause of action for “insurer-retained defense counsel bad faith.” Harm from O’Sullivan’s alleged negligence will not be presumed. Because Kim has received Reina’s promise not to execute on the agreed judgment, he cannot show he has been harmed by the unsatisfied portion of that judgment.

¶ 22 Kim contends that even if he is not entitled to presumptive damages as measured by the stipulated judgment, O’Sullivan’s alleged malpractice both before and after the Kim–Reina settlement caused damage to his credit rating, reputation, and business opportunities, as well as emotional damages.

¶ 23 A nonmoving party must assert specific facts to defeat summary judgment, not mere speculation. *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wash.2d 1, 13, 721 P.2d 1 (1986). Kim’s declaration provides the sole evidence of these alleged damages:

3. As part of the settlement agreement with Mr. Reina, I was required to sign a judgment in the amount of \$2,875,000 which was filed in Pierce County Superior Court.
4. The judgment damaged my credit rating.
5. During the last ten years I have been a self-employed restaurant and bar owner. The judgment in favor of the Reinas has adversely impacted my business opportunities.
6. I believe that I am known to many if not all of the Korean–American businessmen in South King County and

Pierce County. I believe the judgment in favor of the Reinas has caused damage to my reputation among my peers, and in the community.^{1 11}

¶ 24 There is no indication to what extent the judgment damaged Kim’s credit rating, which business opportunities have been lost, or how Kim lost money as a result of his 1567 damaged reputation. The declaration is too conclusory to support Kim’s claim that he suffered these damages. As to emotional damages, O’Sullivan questions whether they are recoverable at all in attorney malpractice cases. We need not reach that issue here because Kim has provided no evidence that he suffered emotional damages.

¶ 25 Kim finally contends the trial court erred by failing to grant his motion for partial summary judgment on the issues of duty and breach. This claim is moot. Before reaching the claim, the trial court granted O’Sullivan’s motion for summary judgment, and dismissed the case. That correct decision disposed of the entire case.

¶ 26 Affirmed.

WE CONCUR: BAKER and GROSSE,
JJ.



133 Wash.App. 567

STATE of Washington, Respondent,

v.

G.A.H., B.D. 04–29–92, Respondent.

**Department of Social and Health
Services, Appellant.**

No. 57767–1–I.

Court of Appeals of Washington,
Division 1.

June 19, 2006.

Background: In juvenile offender proceedings, the Superior Court, King Coun-

1. Clerk’s Papers at 915–916.

[4] Upon the retrial, evidence with reference to violations of the liquor law or liquor board regulations must be excluded, as it is unrelated and has no probative value as to the offense charged. When the prosecutor made his opening statement, he stated that there would be evidence relating to liquor law violations. Appellant objected to the statement, and moved that the jury be discharged. The motion was denied. The court, in ruling upon the objection, stated:

"The Court: The statement of counsel that it is a violation of the law is stricken from the record and will be disregarded by the jury. * * * Counsel may be permitted to state matters in regard to a violation of Liquor Board regulations but not a violation of the law. The motion is denied.

"Mr. Quigley: Exception."

[5] The ruling of the trial court in denying the motion for dismissal of the jury was proper. The ruling that evidence relating to alleged violations of liquor board regulations would be admitted was not proper, for the reason that such evidence was immaterial and had no probative value in the determination of the guilt or innocence of the accused. Evidence relating thereto was later offered and admitted.

In *State v. Dinges*, 1956, 48 Wash.2d 152, 292 P.2d 361, 362, we said:

"A defendant must be tried for the offense charged in the indictment or information. To introduce evidence of an unrelated crime is grossly and erroneously prejudicial, unless the evidence of the unrelated crime is admissible to show motive, intent, the absence of accident or mistake, a common scheme or plan, or identity."

See, also, *State v. Folsom*, 1947, 28 Wash.2d 421, 183 P.2d 510; *State v. Emmanuel*, 1953, 42 Wash.2d 1, 253 P.2d 386; *State v. Hartwig*, 1954, 45 Wash.2d 76, 273 P.2d 482.

The evidence relating to other offenses did not meet the test of the exceptions to the rule and should not have been offered or admitted.

[6] Further, the evidence concerning the appellant's failure, *after his arrest*, to respond to an investigator's question of whether *he knew* the property had been stolen is not proper and should have been excluded. *State v. Redwine*, 1945, 23 Wash.2d 467, 161 P.2d 205. See *State v. McKenzie*, 1935, 184 Wash. 32, 49 P.2d 1115.

Finally, the statements of the deputy prosecuting attorney, to which appellant assigns error, are not to be commended and border closely upon misconduct. Upon a retrial, such statements should not be made.

For the reasons stated, the judgment and sentence is reversed, and the cause remanded with instructions to grant a new trial.

HILL, C. J., and MALLERY, SCHWELLENBACH, DONWORTH, FINLEY, WEAVER, ROSELLINI, and FOSTER, JJ., concur.



M. Maurice KIND and Saïda Kind, his wife,
and M. Maurice Kind, doing business as
M. Kind Novelty Company, et al., Re-
spondents,

v.

The CITY OF SEATTLE, a municipal
corporation, Appellants.

No. 33897.

Supreme Court of Washington,
En Banc.

June 27, 1957.

Rehearing Denied Sept. 4, 1957.

Action for damages sustained when a city water main burst and flooded plaintiffs' business properties. The Superior Court, King County, Theodore S. Turner, J., en-

tered judgment for plaintiffs and city appealed. The Supreme Court, Rosellini, J., held that where water main was under exclusive control of city, and city failed to explain occurrence of the break, or to prove its freedom from negligence in regard to the break, inference of negligence drawn from the fact the break occurred outweighed city's evidence of due care, entitling property owners to damages.

Judgments affirmed.

Mallery, J., dissented.

1. Negligence \Leftrightarrow 121(2)

Where a plaintiff's evidence establishes that an instrumentality under the exclusive control of the defendants caused an injurious occurrence, which ordinarily does not happen, if those in control of the instrumentality use ordinary care, there is an inference, permissible from the occurrence itself, that it was caused by the defendant's want of care.

2. Negligence \Leftrightarrow 121(2)

Legal control or responsibility for the proper and efficient functioning of an instrumentality which causes an injury, and a superior if not exclusive position for knowing or obtaining knowledge of the facts which caused such injury provide a sufficient basis for application of the doctrine of *res ipsa loquitur*, and when such circumstances are shown, the plaintiff has made a *prima facie* case, and it devolves upon defendant to produce evidence to meet and offset effect of the presumption.

3. Waters and Water Courses \Leftrightarrow 209

Where a water main was under exclusive control of city, and city failed to explain occurrence of a break, or to prove its freedom from negligence in regard to the break, inference of negligence to be drawn from the fact the break occurred outweighed city's evidence of due care, entitling property owners to damages for the loss sustained from the flooding of their property.

A. C. Van Soelen, C. C. McCullough, George H. Holt, Corporation Counsel, Seattle, for appellants.

Solie M. Ringold, Hoof, Shucklin & Harris, George A. Meagher, Moriarty, Olson & Campbell, Jack Steinberg, Clarke, Clarke & Albertson, Seattle, for respondents.

ROSELLINI, Justice.

The plaintiffs in these actions own and operate business properties in the vicinity of First Avenue South and Yesler Way, in Seattle. On January 17, 1954, a twenty-inch cast iron water main owned, maintained and operated by the defendant city burst at the intersection of First Avenue and Yesler Way and flooded the properties of the plaintiffs. Their suits against the city were consolidated and tried to the court, which found that the negligence of the city was not proved. The cause of the break of the water main was not shown. The court concluded that the city was liable, regardless of fault, and entered judgments in favor of the plaintiffs.

The case is before this court on the findings of fact. According to these findings, the pipe in question was laid in the year 1890, and was designed to last one hundred years; it was manufactured according to the best known engineering methods; was installed in accordance with good engineering practices; was laid upon an adequate foundation in original ground; and was subsequently covered over with a fill to a depth of approximately 6.8 feet. Portions of the pipe were inspected whenever they were exposed for other purposes and were found to be in reasonably good condition. The water was shut off as soon as possible after the break occurred. The pipe was strong enough to stand the pressure exerted upon it at the time of the break and was within the standard specifications. The cause of the break was unknown.

The finding of fact most pertinent to this appeal reads as follows:

"No negligent act on the part of the city has been shown. The break of

the water main in question does not ordinarily occur unless some person connected with manufacture, installation or operation has been at fault. The defendant city has endeavored, insofar as reasonably possible to determine the cause of the break, and such investigation so far as it has gone has shown that the city acted with due care in the operations examined."

It is the contention of the appellant that the doctrine enunciated in *Rylands v. Fletcher*, L.R. 1 Exch. 265, decided in 1866, and affirmed two years later in *Fletcher v. Rylands*, L.R. 3 H.L. 330, upon which the trial court based its decision should not be applied to the facts of this case. The defendant in that case had caused a reservoir to be constructed on his land to provide water for his mill. The water seeped through an abandoned mine shaft into the plaintiff's mine, causing damage. Justice Blackburn, speaking for the court of Exchequer Chamber, said:

"The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his

own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench."

This court has applied the doctrine in cases where harm has befallen a plaintiff as a result of blasting operations carried on by the defendant. *Foster v. Preston Mill Co.*, 44 Wash.2d 440, 268 P.2d 645 (strict liability limited to the risks inherent in blasting operations); *Patrick v. Smith*, 75 Wash. 407, 134 P. 1076, 48 L.R.A.,N.S., 740; *Schade Brewing Co. v. Chicago, Milwaukee & Puget Sound R. Co.*, 79 Wash. 651, 140 P. 897. We have found no case in this jurisdiction where liability has been imposed upon a municipal corporation, regardless of fault, for damage resulting from a broken water main. The respondents call our attention to the case of *Bridgeman-Russell Co. v. City of Duluth*, 158 Minn. 509, 197 N.W. 971, 972, wherein the doctrine of *Rylands v. Fletcher*, *supra*, was applied in favor of a plaintiff whose property had been damaged as a result of a bursting water main. In choosing to align itself with the courts which have approved the doctrine (admittedly a minority), the court in that case said:

"* * * If a break occurs in the reservoir itself, or in the principal mains, the flood may utterly ruin an individual financially. In such a case,

even though negligence be absent, natural justice would seem to demand that enterprise, or what really is the same thing, the whole community benefited by the enterprise, should stand the loss rather than the individual. It is too heavy a burden upon one. The trend of modern legislation is to relieve the individual from the mischance of business or industry without regard to its being caused by negligence."

Those courts which oppose the application of the doctrine generally adopt the theory that the imposition of liability without fault discourages enterprise and the most beneficial use of property.

Whether the doctrine of *Rylands v. Fletcher*, supra, should properly be applied to cases of this nature is a question which we need not decide at this time, since the decision of the trial court can be upheld on another ground, namely, that under the findings, the defendant failed to sustain the burden of explaining the cause of the break in the main or showing its own freedom from negligence.

In its memorandum decision, the court indicated that it felt that the doctrine of *res ipsa loquitur* was applicable, but that, under the rule as applied in the courts of this state, the presumption of negligence.

"* * * merely supplied a presumption which enabled plaintiffs to get past a nonsuit, and that it could not take the place of evidence, nor be weighed against defendant's showing that it was free from negligence."

If this were not the case, the court indicated, it would have found the city liable under that doctrine. The court's ultimate finding on the city's negligence, or freedom from negligence, was that the city's investigation, "so far as it has gone, has shown that the city acted with due care in the operations examined." The city, in other words, had shown it was free of negligence in the operations examined, but it

had not yet discovered the cause of the break nor had it shown that it was free of negligence in regard to that cause.

[1,2] Where a plaintiff's evidence establishes that an instrumentality under the exclusive control of the defendants caused an injurious occurrence, which ordinarily does not happen if those in control of the instrumentality use ordinary care, there is an inference, permissible from the occurrence itself, that it was caused by the defendant's want of care. *Nopson v. Wockner*, 40 Wash.2d 645, 245 P.2d 1022. Legal control or responsibility for the proper and efficient functioning of the instrumentality which caused the injury and a superior, if not exclusive, position for knowing or obtaining knowledge of the facts which caused the injury, provide a sufficient basis for application of the doctrine. *Hogland v. Klein*, Wash., 298 P.2d 1099. When these circumstances are shown, the plaintiff has made a *prima facie* case, and it devolves upon the defendant to produce evidence to meet and offset the effect of the presumption. *Hogland v. Klein*, supra.

[3] Here, the water main was under the exclusive control of the defendant city, and the court found as a fact that a break of this sort does not ordinarily occur without the presence of negligence. It further found that the defendant had failed to explain the occurrence, and although it found that the defendant had exercised due care in many respects, the findings reveal that the defendant's evidence fell short of proving its freedom from negligence in regard to the break. It is evident, when the memorandum opinion is read in the light of the findings, that had the court had in mind the proper rule—that the inference of negligence is evidence to be weighed against the defendant's evidence—it would have based its decision on the premise that the inference to be drawn from the fact that the break occurred, outweighed the defendant's evidence of due care. This being the case, the judgments are affirmed.

SCHWELLENBACH, DONWORTH,
OTT and FOSTER, JJ., concur.

MALLERY, J., dissents.

FINLEY, Justice (concurring in the result).

The majority mention the doctrine of the English case of *Rylands v. Fletcher*, L.R. 1 Exch. 265, and the doctrine of *res ipsa loquitur*. It is pointed out that the basic tenet of *Rylands*, liability without fault, has been annunciated in this state under certain circumstances; i.e., in cases involving blasting operations. *Foster v. Preston Mill Co.*, 44 Wash.2d 440, 268 P.2d 645. However, without clearly relying upon the *Rylands* doctrine, the majority affirm the trial court on the basis of an application of the *res ipsa loquitur* doctrine.

I believe the instant case is so closely analogous to *Rylands* as to call for a clear-cut application or rejection of the principle as annunciated therein by the English court.

I would apply the principle of *Rylands* in the instant case. The latter is not distinguishable simply on the factual ground that the defendant is a municipal corporation engaged in a proprietary activity. On this basis I concur in the result.

HILL, Chief Justice (dissenting).

The majority have determined that the doctrine of *res ipsa loquitur* applies, and with that I agree. I agree, too, that the permissible inference of negligence must be weighed against the evidence of the city, and has weight so long as reasonable men can still draw such an inference from the evidence. *Nopson v. Wockner*, 1952, 40 Wash.2d 645, 647, 245 P.2d 1022.

There are two possible bases for the majority opinion:

(1), The majority may have concluded, as a matter of law that the inference of negligence to be drawn from the fact that the break occurred, outweighed the defendant's evidence of due care, and that the tri-

al court could have reached no other result. If that be the basis of the decision, I dissent because it seems to me that reasonable minds could differ on the issue of the city's negligence.

From the break in the pipe, one can, as the trial court suggested in the finding quoted in the majority opinion, infer negligence in the manufacture or installation (and maintenance) of the pipe, or in the operation of the water system. The city seems to have established due care and good engineering practice with regard to installation and maintenance, and likewise to have established due care in the operation of its system. So far as manufacture is concerned, there is a serious question in my mind, as to whether the city can be responsible for any latent defect that could not have been determined by any reasonable inspection, the majority say: "The pipe was strong enough to stand the pressure exerted upon it at the time of the break and was within the standard specifications." Under such conditions I cannot, as a matter of law, conclude that the permissible inference of negligence outweighs the city's evidence of due care, and that the plaintiffs must recover.

(2), The majority may have concluded (and I believe this to be the basis of the decision) that if the trial court had correctly understood and applied the doctrine of *res ipsa loquitur*, it is evident "when the memorandum opinion is read in the light of the findings," that it "would have based its decision on the premise that the inference to be drawn from the fact that the break occurred, outweighed the defendant's evidence of due care."

If that be the basis of the decision, I dissent, because I do not believe we should affirm a judgment by the trial court because of our belief as to what a trial judge would do, gathered from reading his memorandum opinion in the light of the findings. I would remand for findings and conclusions based on the application of the doctrine of *res ipsa loquitur*.

chine in May 1975 was caused by the bending of the machine. If the inoperability of the machine was caused by vandalism, we certainly cannot hold Tyler Reco responsible.

The record also shows that any assurances of the operability of the machine was not made by the representative of Tyler Reco, but rather by the manufacturer Schurtz:

Q And when did that occur?

A [Grobachmit] I would say sometime in September.

Q Okay, and what was the result of that conference?

A Mr. Johnston, who had purchased the Schurtz Company, assured us, meaning Bud Turner and I, that he clearly could see the problem, that he would go back and modify this, and with a modified mechanism speeding it up, the revolutions of the chain would resolve most of the problem, and that he would contact us within two to three weeks.

The above colloquy makes it apparent that the assurance given on that occasion was by the manufacturer only and not Tyler Reco. There is no testimony whatever of any assurances given by Tyler Reco.

CONCLUSION

Undoubtedly timely action by defendant Grobschmit following the advice given by Tyler Reco not to accept the machine would have relieved Grobschmit of all liability to World Wide Lease, Inc.

We hold that the defendants unequivocally signed the equipment acceptance notice waiving all warranties, expressed or implied, as to not only the plaintiff lessor but Tyler Reco, the seller and distributor, as well. We further hold the defendants waited an unreasonable length of time before attempting to revoke their acceptance, and as a matter of law such revocation is prohibited.

The defendants' judgment against the cross-defendant Tyler Reco is set aside in its entirety.

As the Tyler Reco judgment is being set aside, there is no need to consider the defendants' other assignment of errors.

Judgment against Tyler Reco reversed.

FARRIS, C. J., and CALLOW, J., concur.



21 Wash.App. 689

Patricia L. KLOSSNER, Individually, as Executrix of the Estate of Dean L. Klossner, and as Guardian ad litem for Ann M. Klossner, April S. Klossner, Jill L. Klossner, Norman D. Klossner, Laura A. Babin, and Daniel H. Klossner, Jim E. Klossner and Leo F. Babin, Appellants,

v.

SAN JUAN COUNTY, a Municipal Corporation of the State of Washington, Respondent.

No. 5714-L

Court of Appeals of Washington,
Division 1.

Oct. 30, 1978.

Reconsideration Denied Dec. 21, 1978.

Following truck accident, actions for wrongful death and personal injury were filed by executrix of estate of driver against county alleging negligence in the design, construction and maintenance of road, its shoulder area, and adjoining ditch. The Superior Court, San Juan County, Howard A. Patrick, J., granted summary judgment to county, and executrix appealed. The Court of Appeals, Dore, J., held that: (1) material issues of fact existed as to whether negligent maintenance of road and its shoulder and county's failure to adequately warn drivers of danger was proximate cause of accident, precluding summary judgment, and (2) unadopted stepchildren cannot recover damages for the wrongful death of their stepfather.

Affirmed in part; reversed in part.
Anderson, Acting C. J., concurred in result and filed opinion.

James, J., concurred in result.

1. Negligence ⇐134(2)

Precise knowledge of how an accident occurred is not required to prove negligence and all elements, including proximate cause, can be proved by inferences arising from circumstantial evidence.

2. Negligence ⇐136(25)

Question of whether or not defendant's conduct caused plaintiff's harm is generally a question of fact.

3. Negligence ⇐136(25)

It is only when inferences are plain that proximate cause is a question of law.

4. Judgment ⇐181(2)

If any genuine issue of material fact exists, there must be a trial.

5. Judgment ⇐185(2)

In ruling on motion for summary judgment, all reasonable inferences from evidence must be drawn in favor of nonmoving party.

6. Judgment ⇐185(2)

On motion for summary judgment burden is on moving party to show there is no genuine issue as to any material fact and that moving party is entitled to judgment as a matter of law.

7. Judgment ⇐185(2), 185.2(1)

One who moves for summary judgment has burden of proof irrespective of whether he or his opponent has burden of proof at trial; when one meets this burden of proof, it is incumbent upon nonmoving party to submit evidence to trial court, and upon failure to do so, judgment is properly entered for movement; however, upon moving party's failure to meet its initial burden of proof, it is unnecessary for nonmovant to

1. To the extent the complaint purports to be filed by several persons in their individual capacities, we note that a surviving personal injury action and a wrongful death action can only

submit any evidence and motion must be denied.

8. Judgment ⇐181(33)

In action for wrongful death and personal injury arising from truck accident, material issues of fact existed as to whether county's negligent maintenance of road and its shoulder and county's failure to adequately warn drivers of danger was proximate cause of accident, precluding summary judgment.

9. Death ⇐31(8)

Unadopted stepchildren cannot recover damages for wrongful death of their stepfather. RCWA 4.20.010, 4.20.020.

Aiken, St. Louis & Siljeg, Douglas W. McQuaid, Seattle, for appellants.

Owen A. Johnson, Seattle, for respondent.

DORE, Judge.

On August 30, 1974, Dean L. Klossner died as a result of injuries that occurred while he was driving a gasoline truck along "Schaeffer's Stretch" on Orcas Island County Road No. 4. Actions for wrongful death and personal injury were filed by the executrix of his estate, Patricia L. Klossner, against San Juan County after the county rejected her claim for damages.¹ Her unverified complaint alleged negligence in the design, construction and maintenance of the road, its shoulder area and an adjoining ditch. She alleged that said negligence, together with the negligent failure to post warning signs, directly caused the death of the decedent. Two of the alleged beneficiaries of the actions were unadopted stepchildren of the deceased.

Klossner appeals from an order granting summary judgment to the county. In its motion, the county did not submit its own evidence but rather relied upon Klossner's verified answers to interrogatories. In op-

be filed by the personal representative of the estate for the benefit of or in favor of certain designated beneficiaries. RCW 4.20.010, 4.20.020, 4.20.046, 4.20.060.

position, Klossner submitted the county's answers to interrogatories. The county's answers, however, did not give rise to a genuine issue of material fact. In effect, the matter was submitted on the question of whether the county could meet its burden on a motion for a summary judgment by relying on Klossner's answers to interrogatories to obtain summary judgment.

ISSUES

1. Is there any competent evidence which tends to show that the death was proximately caused by the county's negligence?
2. By relying on plaintiff's answers to interrogatories, has defendant negated the material issue of whether or not plaintiff's case can be proven with evidence based upon personal knowledge?
3. Can unadopted stepchildren recover damages for the death of their stepfather?

FACTS

The following alleged facts appear in Klossner's answers to interrogatories, indicating that the negligence of the county caused the death of the decedent: (1) Cracks at the edge of the road were not repaired; (2) There was no shoulder; (3) Brush near the edge of the road was not removed which made it appear as though there were a shoulder; (4) An improperly maintained drainage ditch concealed the danger; (5) There were no guardrails nor warning signs; and (6) There had been at least two prior similar accidents at or near the accident point. In addition, the interrogatories, as answered, described in detail the action of the truck during the accident and the effect of the road's defects on the path of the truck. These answers and accompanying verification were silent on the question of whether the answers were based upon personal knowledge. There were no eyewitnesses to the accident.

DECISION

[1-3] ISSUE 1: The county contends that the record is devoid of evidence on how

the accident occurred, and there can only be speculation or conjecture to connect the condition of the road with the cause of death. Precise knowledge of how an accident occurred, however, is not required to prove negligence and all elements, including proximate cause, can be proved by inferences arising from circumstantial evidence. *Raybell v. State*, 6 Wash.App. 795, 496 P.2d 559 (1972). The question of whether or not the defendant's conduct caused plaintiff's harm is generally a question of fact. *Moyer v. Clark*, 75 Wash.2d 800, 804, 454 P.2d 374 (1969). It is only when the inferences are plain that proximate cause is a question of law. *Leach v. Weiss*, 2 Wash.App. 437, 440, 467 P.2d 894 (1970).

[4, 5] If any genuine issue of material fact exists, there must be a trial. *Costanzo v. Harris*, 71 Wash.2d 254, 427 P.2d 963 (1967). In the application of this rule, Klossner is entitled, as the non-moving party, to the benefit of another rule that all reasonable inferences from the evidence must be drawn in her favor. *Morris v. McNicol*, 83 Wash.2d 491, 494, 519 P.2d 7 (1974). The county contends that the only inferences which can be drawn from the record are purely conjectural and, therefore, insufficient. *Schneider v. Rowell's, Inc.*, 5 Wash.App. 165, 167-68, 487 P.2d 253 (1971). However, the county did not submit its own affidavits and relies on Klossner's answers to interrogatories to support its motion. From the interrogatories one can draw the reasonable inference that the accident was caused by the negligent maintenance of the road and its shoulder and by the failure of the county to adequately warn drivers of the danger. Thus, the motion for summary judgment was improperly granted unless the interrogatories could not be considered by the trial court.

ISSUE 2: The county contends that, even if the answers to the interrogatories permit an inference that the county's negligence was the proximate cause of the accident, the aforementioned evidence is inadmissible because it is not based on the personal knowledge of the witness, Patricia Klossner. CR 56(e). The county argues that

once it shows this lack of personal knowledge by relying on the answers to the interrogatories, it becomes Klossner's duty to controvert it by submitting admissible evidence of the county's actionable negligence. Upon her failure to submit such evidence, the county contends it has shown that no material issue of fact exists because Klossner cannot show a prima facie case.

[6, 7] On a motion for summary judgment the burden is on the moving party to show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wash.2d 195, 199, 381 P.2d 966 (1963). One who moves for summary judgment has this burden of proof irrespective of whether he or his opponent has the burden of proof at trial. *Balise v. Underwood*, *supra*. When one meets this burden of proof, it is incumbent upon the nonmoving party to submit evidence to the trial court, and upon failure to do so, judgment is properly entered for the movant. *W. G. Platts, Inc. v. Platts*, 73 Wash.2d 434, 441-44, 438 P.2d 867 (1968). Upon the moving party's failure, however, to meet its initial burden of proof, it is unnecessary for the nonmovant to submit any evidence and the motion must be denied. *Jacobsen v. State*, 89 Wash.2d 104, 110, 569 P.2d 1152 (1977); *Preston v. Duncan*, 55 Wash.2d 678, 682-83, 349 P.2d 605 (1960).

The county elected to rely solely on Klossner's answers to interrogatories to support its motion.² By so doing the county admits, for the purposes of their motion, the answers and all reasonable inferences that can be drawn therefrom. *Bates v. Grace United Methodist Church*, 12 Wash. App. 111, 115, 529 P.2d 466 (1974).

[8] We conclude that it was not necessary for Klossner to controvert the county's evidence because the county never met its burden of negating the existence of admissible evidence to prove Klossner's case. *Jacobsen v. State*, *supra*, *Preston v. Duncan*,

2. Compare *American Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wash.App. 757, 551 P.2d 1038 (1976) where the moving party at-

supra. Summary judgment was improperly granted to the county.

[9] ISSUE 3: While holding that "child or children" in the wrongful death statute, RCW 4.20.010, 4.20.020, includes illegitimate children, our Supreme Court stated that the term encompassed all natural or adopted children of the decedent. *Armijo v. Wesselius*, 73 Wash.2d 716, 719, 440 P.2d 471 (1968). The statute is not capable of further construction to include unadopted stepchildren. Under statutes similar to Washington's, it is the uniform rule that unadopted stepchildren are not beneficiaries of a wrongful death action. *Steed v. Imperial Airlines*, 12 Cal.3d 115, 115 Cal.Rptr. 329, 524 P.2d 801, 68 A.L.R.3d 1204 (1974), *appeal dismissed*, 420 U.S. 916, 95 S.Ct. 1108, 43 L.Ed.2d 387 (1975), *Jones v. Jones*, 270 Or. 869, 530 P.2d 34 (1974); *Flores v. King*, 13 Md.App. 270, 282 A.2d 521 (1971). Only under a statute allowing recovery for "persons to whom the deceased stood in loco parentis" has recovery for an unadopted stepchild been allowed. *Moon Distributor's, Inc. v. White*, 245 Ark. 627, 434 S.W.2d 56 (1968). See generally Annot., 68 A.L.R.3d 1220 (1976). Washington's survival statute, RCW 4.20.046, 4.20.060, like the wrongful death statute, provides that the action is for the benefit of the surviving "child or children." It should, accordingly, receive an identical interpretation of "child or children."

Klossner stated in her answers to interrogatories that Laura and Leo Babin are the unadopted stepchildren of the deceased. By relying on this evidence, the county has maintained its burden of proof. Klossner does not controvert the evidence so summary judgment is proper insofar as it removes the Babins as beneficiaries of the two causes of action.

The order granting summary judgment to the county is reversed except for that portion of the order granting summary judgment of dismissal against Laura and Leo Babin which is affirmed.

tempted to rely on its own answers to interrogatories with *Preston v. Duncan*, *supra*.

ANDERSEN, Acting Chief Judge (concurring in the result).

This case is not yet ripe for decision. Before a court can apply the law and determine whether liability can be decided on a motion for summary judgment, it must first have an adequate factual basis for doing so. There is no such basis here.

Essentially the only "facts" before the court are each party's answers to the other's interrogatories. We recently held in *American Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wash.App. 757, 551 P.2d 1038 (1976), that although CR 56 neglects to mention that a court may consider answers to interrogatories in ruling on motions for summary judgment, such answers may nevertheless be used. We were, however, careful to point out in that case that before such answers can be relied on to supply facts pertinent to a summary judgment proceeding, they must satisfy the other requirements of CR 56 and contain admissible material.

We held in *American Linen Supply Co.* that answers to interrogatories cannot be considered when they are based on hearsay or on information and belief, nor can conclusory statements of fact be considered in ruling on a summary judgment motion.

In the case before us, we have an unwitting, one-vehicle accident in which the driver was killed. The defendant-county's answers to interrogatories relating to the facts of the accident were verified by the prosecuting attorney "to the best of his information and knowledge." Although the plaintiffs' answers to interrogatories were verified by the executrix of the decedent's estate, they demonstrate on their face that they are based on hearsay. Furthermore, to the extent that such answers state any-

i. For example, the county's interrogatory No. 66, together with the plaintiff-executrix's answer thereto, reads as follows:

"NO. 66: With regard to Paragraph III(a) of the plaintiffs' Statement of Claim and Paragraph 3.1(a) of plaintiffs' complaint, state specifically in what manner you claim the defendant was negligent in failure to properly design said accident site.

thing with respect to the "claims" of negligence (which was the language used in the county's interrogatories to the plaintiffs), they are simply conclusory facts or conclusions of law rather than statements made on personal knowledge of facts which would be admissible in evidence.¹ CR 56(e). A defendant cannot push a plaintiff out of court by swearing that the plaintiff has no case, nor may a plaintiff remain in court by merely swearing that he or she does have a case.

The court therefore cannot use the parties' answers to interrogatories in this case as a basis on which to determine that pursuant to CR 56(b) "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *American Linen Supply Co. v. Nursing Home Bldg. Corp.*, *supra*.

The county was the party moving for summary judgment, therefore, it had the burden of proving that there is no material issue of fact. *Morris v. McNicol*, 83 Wash.2d 491, 494, 519 P.2d 7 (1974). For the reasons just noted, the county failed in its burden with respect to the liability issues, therefore as to those issues, the cause must be reversed and remanded. With respect to two of the plaintiffs, however, Laura and Leo Babin, they have admitted that they are "unadopted stepchildren" of the deceased. The issue of whether they are beneficiaries of an action brought under the wrongful death statute, RCW 4.20.020, or the survival statute, RCW 4.20.060, is therefore an issue which the court may appropriately decide at this point. "Unadopted stepchildren" are not beneficiaries within the terms of the wrongful death and survival statutes, Annot., 68 A.L.R.3d 1220 (1976),

ANSWER: Failure to install guardrails
Failure to post warning signs re:
lack of shoulders
Failure to provide adequate shoulder
on narrow road
Failure to engineer road so as to support truck
Removal of support and shoulder
Other acts to be disclosed following discovery."

(Italics ours.)

therefore, the summary judgment of dismissal as to the plaintiffs Babin must be affirmed.

JAMES, Judge (concurring in the result).

I agree with Judge Andersen's concurring opinion and therefore concur in the result.



21 Wash.App. 681

KING COUNTY, a Political Subdivision of the State of Washington, and Albert G. Ross, King County Personnel Manager, Respondents,

v.

Arlington W. CARTER, Jr., Chairman, King County Personnel Board, Richard Peterson, and William E. Hauskins, Members of the King County Personnel Board, Respondents,

Wells Van Steenberg, Appellant.

No. 5741-I.

Court of Appeals of Washington,
Division 1.

Oct. 30, 1978.

County employee was discharged from his employment following suspension, and he requested hearing before county personnel board. The board entered order reducing his termination to two-week suspension, and the county petitioned for writ of certiorari to review such order naming as respondent three members of the board who had heard the employee's appeal. The employee intervened, and the Superior Court, King County, David W. Soukup, J., reversed the order of the board and upheld the termination, and the employee appealed. The Court of Appeals, Callow, J., held that: (1) function performed by the board was judicial function, and thus superior court review by certiorari was proper, and (2) the

Superior Court was correct in concluding that the personnel board acted contrary to law when it based its decision reinstating the employee upon the incorrect conclusion that once the county had suspended the employee it could not thereafter dismiss him.

Affirmed.

1. Administrative Law and Procedure ⇐ 107

Determination whether administrative body exercises judicial function depends upon: whether court could have been charged in first instance with responsibility of making decisions administrative body must make, whether function administrative agency performs is one that courts historically have been accustomed to performing and performed prior to creation of administrative body, whether action involves application of existing law to past or present facts for purpose of declaring or enforcing liability rather than reflecting response to changing conditions through enactment of new law of prospective application, and whether action resembles ordinary business of courts as opposed to that of legislators or administrators. RCWA 7.16.010 et seq.

2. Counties ⇐ 67

Function performed by county personnel board in disciplinary proceedings which resulted in termination of employment of county employee on ground of willful falsification of work records was judicial function, reviewable by certiorari. RCWA 7.16.010 et seq., 7.16.040.

3. Counties ⇐ 67

Acting under statute governing certiorari, mandamus and prohibition, the Superior Court may review county personnel board decisions of judicial nature to determine if action taken was arbitrary and capricious, or contrary to law. RCWA 7.16.020.

4. Counties ⇐ 67

Under county administrative rules, county was not precluded from terminating

quent contributions to the trust, the award is premature. The basis for this contention is a provision in an agreement between the union and the association to whom appellants had assigned their negotiation rights. The provision states:

in the event . . . the Unions . . . retain legal counsel for the purpose of enforcing the payment of delinquent contributions . . . to the Welfare Fund, the delinquent Employer shall be obligated for all reasonable expenses incurred in connection with the collection effort, including reasonable attorney's fees . . .

The award of attorney fees pursuant to statute or contract is a matter committed to the sound discretion of the trial court. In the absence of a clear showing of abuse of discretion, we will not set aside the trial court's award of attorney fees. *Marketing Unlimited v. Jefferson Chemical Co.*, 90 Wash.2d 410, 583 P.2d 630 (1978).

The contractual language granting attorney fees is broad enough to sustain the exercise of the trial court's discretion in this case. We will not disturb the award.

Respondent trust fund has requested an award of attorney fees on appeal. Since the matter must be remanded to the trial court for further proceedings, we leave the award and the amount of such fees to the judgment of the trial court, to be exercised at the conclusion of all proceedings in that tribunal.

The cause is remanded for further proceedings in accordance herewith.

UTTER, BRACHTENBACH, HOROWITZ and HICKS, JJ., concur.

WRIGHT, C. J., and ROSELLINI, DOLLIVER and STAFFORD, JJ., concur in the results.



91 Wash.2d 345

Vicki L. LAMON, a single woman,
Respondent,

v.

McDONNELL DOUGLAS CORPORATION, a Foreign Corporation,
Appellant.

No. 45619.

Supreme Court of Washington,
En Banc.

Jan. 4, 1979.

Airline stewardess brought products liability suit against aircraft manufacturer, seeking to recover for injuries sustained when the stewardess fell through an open escape hatch while in the course of her preflight duties. The Superior Court, King County, Frank Roberts, J., granted the manufacturer's motion for summary judgment, and the stewardess appealed. The Court of Appeals, 19 Wash.App. 515, 576 P.2d 426, found that a genuine issue of material fact existed and reversed. Appeal was taken, and the Supreme Court, Hamilton, J., held that: (1) the affidavit presented by the stewardess in opposition to the manufacturer's motion for summary judgment created at least one genuine issue of fact that was material to the litigation; i. e., whether the hatch cover, as designed and installed, was or was not reasonably safe, and (2) defendant's failure to move to strike an affidavit produced by plaintiff in opposition to summary judgment waived any deficiency that might have existed in the affidavit.

Judgment of the Court of Appeals affirmed.

1. Appeal and Error ⇐863

On appeal from grant of summary judgment, reviewing court must consider not only whether the affidavits, facts and

record created an issue of fact but also whether any such issue of fact is material to the cause of action. CR 56(c).

2. Products Liability ↔ 8

In determining whether a product is reasonably safe within the reasonable expectations of the ordinary consumer, a trier of fact must consider, along with the intrinsic nature of the product, a number of factors including the relative cost of the product, the gravity of the potential harm from the claimed defect and, in some cases, the cost and feasibility of eliminating or minimizing the risk.

3. Judgment ↔ 181(33)

In products liability suit wherein airline stewardess sought to recover from aircraft manufacturer for injuries sustained when the stewardess stepped into an open emergency hatch, affidavit of expert stating that the design of the escape hatch cover created an unreasonably dangerous condition for cabin attendants created at least one genuine and material issue of fact, precluding summary judgment, i. e., whether the hatch cover as designed and installed was reasonably safe. CR 56(c).

4. Judgment ↔ 185.1(8)

Where defendant did not move to strike affidavit or any portion thereof, defendant's failure to make such motion waived any deficiency in the affidavit, which was produced by plaintiff in opposition to defendant's motion for summary judgment. CR 56(e).

5. Judgment ↔ 185(2)

On motion for summary judgment, trial court must consider all evidence and all reasonable inferences therefrom in light most favorable to nonmovant. CR 56(c).

Lane, Powell, Moss & Miller, G. Val Tolleson, Seattle, for appellant.

Bonjorni, Harpold & Fiori, Duncan Bonjorni, Auburn, Jerry Schumm, Whitefish, Mont., for respondent.

HAMILTON, Justice.

This is a products liability case in which Vicki L. Lamon, plaintiff (respondent), sought to recover for injuries received when she fell through an open escape hatch while in the course of her preflight duties as an airline stewardess. Plaintiff alleged in her complaint against McDonnell Douglas Corporation, defendant (appellant), that the subject airplane was defectively designed and manufactured and that defendant negligently failed to properly warn of a dangerous condition. Defendant's motion for summary judgment was granted by the trial court based on the files and affidavits before it. The Court of Appeals reversed by a less than unanimous decision. *Lamon v. McDonnell Douglas Corp.*, 19 Wash.App. 515, 576 P.2d 426 (1978). The matter was then appealed to this court pursuant to RCW 2.06.030(e).

As we view it, the pivotal question posed by the appeal is whether the record before us reveals a genuine issue of material fact. If so, dismissal by way of summary judgment is inappropriate.

We answer the question in the affirmative. Accordingly, we affirm the conclusion of the Court of Appeals and reverse the trial court.

An agreed statement of facts can be summarized as follows:

On September 3, 1978, plaintiff was working as a stewardess for United Air Lines. Prior to a scheduled flight, plaintiff was among several stewardesses preparing the airplane, a DC-10, for flight. Two stewardesses were assigned work in the galley located beneath the first-class cabin. Those stewardesses proceeded to enter that area by way of the personnel elevator located aft of the first-class section. Subsequently, there was a power failure in the galley. Under these circumstances, stewardesses are instructed to use the emergency exit from the galley. One of the stewardesses in the galley did so use the emergency exit. She opened the hatch cover, which lifts up and is not hinged or attached to the aircraft. The hatch opens onto the aisle of the first-class section. The galley stewardess came partially through the

hatch, announced the power failure, and went back into the galley. Contrary to instructions which she received during training, she left the hatch uncovered and unattended.

At the time the stewardess came through the hatch, plaintiff was visiting with other stewardesses in an area aft of the first-class section. Plaintiff saw the upper half of the stewardess' body emerge, and she heard her announce the power failure.¹

A short time later, plaintiff resumed her preflight duties. In order to distribute menus and earphones, she proceeded to the aisle where the hatch is located and backed down the aisle from the aft to the forward end of the first-class section. When she reached the open hatch, she fell into it and suffered injuries.

Defendant's attorney filed a motion for summary judgment and supported it with a memorandum, his own affidavit, and the affidavit of the Chief Interiors Engineer—Commercial for defendant. The substance of the latter affidavit was that the hatch was designed to afford a rapid and easy egress from the galley in the event normal means of egress were unavailable, and that it was necessary to locate it in an unobstructed area such as an aisle. No explanation relating to the hinging or nonhinging of the hatch cover was tendered.

Plaintiff's attorney submitted a memorandum in opposition to the motion for summary judgment and supported it by the affidavit of an engineer. The affidavit stated the affiant's business association, educational background, and his specialization in reconstruction and analysis of industrial and traffic accidents. The affiant then averred:

On April 5, 1975, I examined the galley escape hatches on a DC-10 and a Boeing 747 airplane. The examination was made at the Seattle-Tacoma airport and the airplanes were part of the United Airlines fleet. Based on this examination it

1. By way of excerpts from a deposition of plaintiff attached to an affidavit of counsel relating to the summary judgment motion, it appears plaintiff was aware that the emerging

is my opinion that the design of the escape hatch cover on the DC-10 created an unreasonably dangerous condition for the cabin attendants. The condition was created because the hatch cover on the DC-10 consists of a loose panel, and in order to close the hatch after use the loose hatch cover has to be manually fitted into the hatch opening. If after using the hatch the user were to forget to replace the hatch cover the open hatch would constitute a serious hazard to cabin attendants who often have to walk backward in the performance of their duties. If when replaced the hatch cover were not properly fitted into the hatch opening it could act as a trap door and endanger the person stepping on it. The dangerous features of the DC-10 hatch cover are not present in the design of the Boeing 747 galley hatch cover. While quite similar in other respects, the Boeing 747 hatch cover is hinged to the floor and is equipped with a spring device which automatically closes and keeps the hatch cover closed when the hatch is not in use.

Based on the agreed statement of facts, the affidavits and the record of the case, the trial court dismissed the case.

In *Balise v. Underwood*, 62 Wash.2d 195, 199, 381 P.2d 966, 968 (1963), we observed:

(1) The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact. *Preston v. Duncan*, 55 Wash.2d 678, 349 P.2d 606.

Pursuant to CR 56(c), a summary judgment is available only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

In *Morris v. McNicol*, 83 Wash.2d 491, 494-95, 519 P.2d 7, 10 (1974), we considered the criteria for granting summary judgment, and determined that

stewardess had returned to the galley and thereafter assumed the hatch had been closed, although admitting she didn't know the latter to be necessarily so.

Cite as, Wash., 586 P.2d 1346

[a] "material fact" is a fact upon which the outcome of the litigation depends, in whole or in part. CR 56; *Balise v. Underwood*, 62 Wash.2d 195, 381 P.2d 966 (1968); *Zedrick v. Kosenski*, 62 Wash.2d 50, 380 P.2d 870 (1968).

Moreover, the burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact and all reasonable inferences from the evidence must be resolved against him. *Barber v. Bankers Life & Cas. Co.*, 81 Wash.2d 140, 500 P.2d 88 (1972); *Welling v. Mount Si Bowl, Inc.*, 79 Wash.2d 485, 487 P.2d 620 (1971). Thus, where a motion for summary judgment is made, it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom in a light most favorable to the nonmovant. *Maki v. Aluminum Bldg. Prods.*, 73 Wash.2d 23, 436 P.2d 186 (1968).

The motion should be granted only if, from all the evidence, reasonable men could reach but one conclusion. CR 56(c); *Meissner v. Simpson Timber Co.*, 69 Wash.2d 949, 421 P.2d 674 (1968). Only when the pleadings, depositions, admissions, and affidavits considered by the trial court do not create a genuine issue of material fact between the parties is the moving party entitled to a summary judgment. *Ferrin v. Donnellefeld*, 74 Wash.2d 283, 444 P.2d 701 (1968).

For the purposes of a summary judgment procedure, an appellate court is required, as was the trial court, to review material submitted for and against a motion for summary judgment in the light most favorable to the party against whom the motion is made. *Yakima Fruit & Cold Storage Co. v. Central Heating &*

Plumbing Co., 81 Wash.2d 528, 508 P.2d 108 (1972); *Robert Wise Plumbing & Heating, Inc. v. Alpine Dev. Co.*, 72 Wash.2d 172, 432 P.2d 547 (1967).

[1] Pursuant to the standard for summary judgment set out by CR 56(c) and decisions of this court, a reviewing court must consider not only whether the affidavits, facts, and record of a case have created an issue of fact, but also whether any such issue of fact is material to a cause of action.

One of plaintiff's theories of liability was that of strict liability, a theory first applied by this court in *Ulmer v. Ford Motor Co.*, 75 Wash.2d 522, 452 P.2d 729 (1969), a case of alleged defective manufacture. In that case, this court adopted the Restatement (Second) of Torts § 402A (1965).² in *Seattle-First Nat'l Bank v. Tabert*, 88 Wash.2d 145, 542 P.2d 774 (1975), we held that section 402A applied to design defects as well as manufacturing defects. We went on to state, at page 154, 542 P.2d page 779:

Thus, we hold that liability is imposed under section 402A if a product is *not reasonably safe*. This means that it must be unsafe to an extent beyond that which would be reasonably contemplated by the ordinary consumer. This evaluation of the product in terms of the reasonable expectations of the ordinary consumer allows the trier of the fact to take into account the intrinsic nature of the product.

(Italics ours.)

[2] Therefore, under *Tabert*, the question of whether a product is or is not reasonably safe within the reasonable expectations of the ordinary consumer would be a material issue of fact upon which the outcome of the litigation depends. Further, in

"(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

"(2) The rule stated in Subsection (1) applies although

"(a) the seller has exercised all possible care in the preparation and sale of his product, and

"(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller." Restatement (Second) of Torts § 402A (1965).

2. "§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

"(a) the seller is engaged in the business of selling such a product, and

making this determination, a trier of fact must consider, along with the intrinsic nature of the product, a number of factors, including:

The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case. In other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue.

Seattle-First Nat'l Bank v. Tabert, *supra* at 154, 542 P.2d at 779.

Bernal v. American Honda Motor Co., 87 Wash.2d 406, 411, 553 P.2d 107 (1976).

[3] In the present case, the affidavit presented by the plaintiff in opposition to the motion for summary judgment created at least one genuine issue of fact which is material to this litigation, *i. e.*, whether the hatch cover, as designed and installed, was or was not reasonably safe within the ambit of *Tabert*.

Such an issue was created by the testimony within the affidavit produced by plaintiff, which stated, by way of purported expert opinion, that the design of the escape hatch cover created an unreasonably dangerous condition for cabin attendants. In previous cases, this court has determined that an affidavit containing expert opinion on an ultimate issue of fact was sufficient to create a genuine issue of fact which would preclude summary judgment. See *Morris v. McNicol*, *supra*; *Bernal v. American Honda Motor Co.*, *supra*.

The issue of whether the galley escape hatch was not reasonably safe was also raised in the affidavit by the comparison of the DC-10 hatch cover and the Boeing 747 hatch cover. In *Tabert*, we noted that feasibility of minimizing risk is a factual consideration germane to the ultimate fact of whether a product is reasonably safe. The comparison of the two hatches in the affidavit raises the inference that a reasonable alternative which poses less risk is feasible.

3. CR 56(e) states, in part:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence,

[4] Defendant contends that the affidavit produced by plaintiff in opposition to summary judgment is not competent evidence to withstand such a motion. Defendant argues that the engineer's affidavit does not comply with CR 56(e)³ because, among others, the statement about cabin attendants being required to walk backward in performance of some of their duties is not based upon personal knowledge. The record before us, however, does not reveal any motion to strike the affidavit or any portion thereof prior to the trial court's action. Failure to make such a motion waives deficiency in the affidavit if any exists. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wash.2d 874, 431 P.2d 216 (1967); 10 C. Wright and A. Miller, *Federal Practice and Procedure* § 2738 (1973).

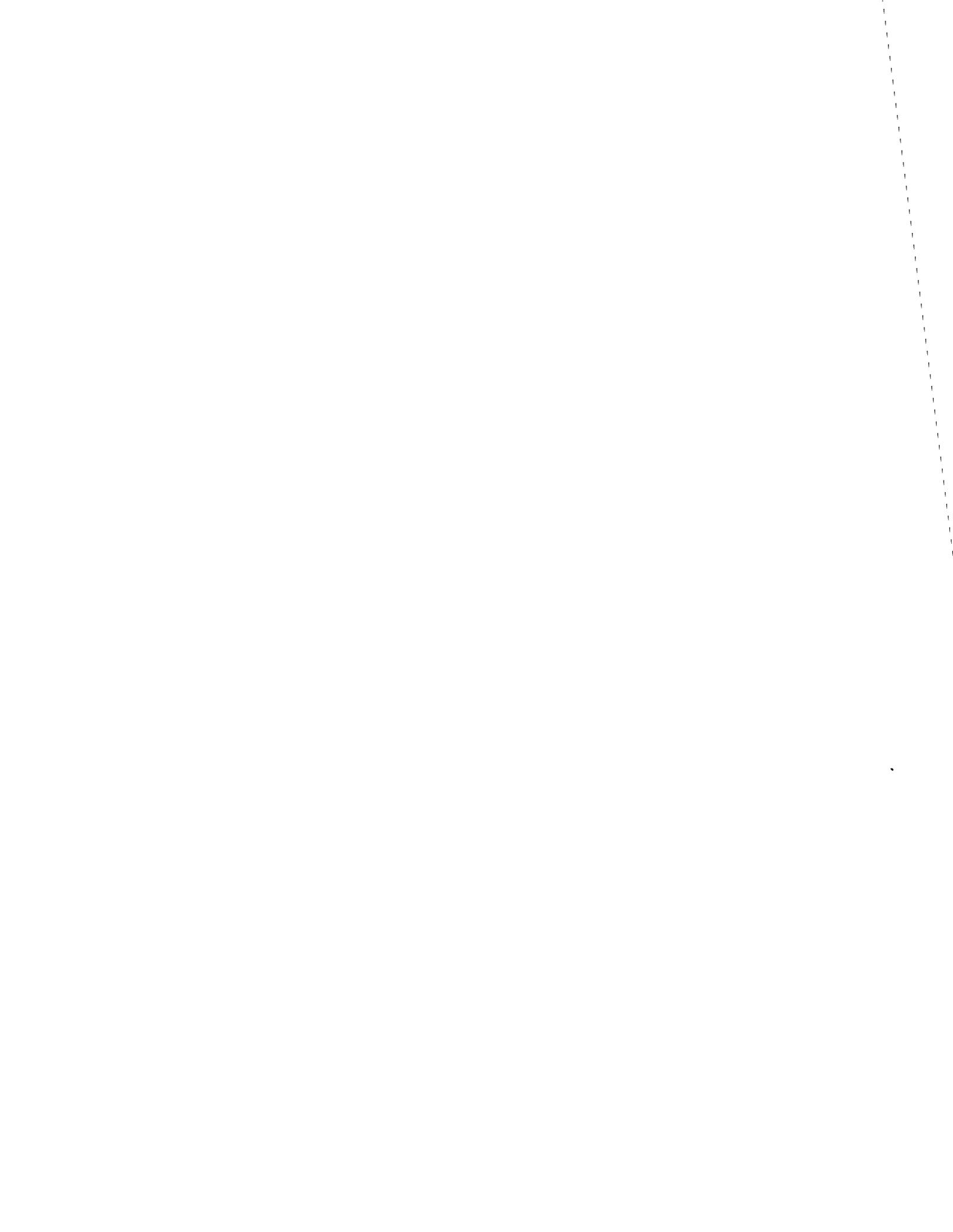
[5] A trial court must "consider all evidence and all reasonable inferences therefrom" in a light most favorable to the nonmovant. (Italics ours.) *Maki v. Aluminum Bldg. Prods.*, 73 Wash.2d 23, 26-27, 436 P.2d 186, 188 (1968). Viewing the inferences created by the affidavit of plaintiff's engineering witness in a light most favorable to plaintiff, we are satisfied it created an issue of material fact which necessitated the denial of summary judgment. For this reason we do not deem it necessary at this stage of the proceedings to discuss or pass upon the policy issues which seemingly divided the Court of Appeals.

We therefore affirm the conclusion of the Court of Appeals. The trial court's dismissal of the action on summary judgment is reversed, and the cause is remanded for further proceedings.

WRIGHT, C. J., and ROSELLINI, STAFFORD, UTTER, BRACHTENBACH, HOROWITZ, DOLLIVER and HICKS, JJ., concur.



and shall show affirmatively that the affiant is competent to testify to the matters stated therein."



2 Wash.App. 613

Ivan MYERS, Jr. and Barbara Myers,
his wife, Appellants,

v.

RAVENNA MOTORS, INC., Respondent.

No. 273-40771-1.

Court of Appeals of Washington,
Division 1, Panel Two.

May 4, 1970.

Action against garageman by automobile owner for injuries sustained when steering mechanism allegedly failed subsequent to overhaul. The Superior Court, King, County, Stanley C. Soderland, J., rendered judgment for defendant and plaintiff appealed. The Court of Appeals, Utter, J., held that failure to instruct on theory of contractual liability or breach of warranty was not error where action arose out of oral contract to overhaul steering and front end of automobile and the court fully instructed on theory of negligence.

Affirmed.

1. Appeal and Error ⇨273(5, 8)

Counsel is required to make known to trial court grounds on which he excepts to giving or refusing to give requested instructions to give trial court an opportunity to keep trial free from error.

2. Appeal and Error ⇨273(8)

Statement that counsel for plaintiff excepted to failure of court to give specified proposed instruction and that that was plaintiff's only exception was inadequate to inform court of grounds of exception and failed to preserve objection for appellate review.

3. Automobiles ⇨368

Under oral contract to overhaul steering and front end of automobile garageman was under duty to perform work only in manner in which an ordinary prudent person engaged in repair of automobiles would have performed particular work under same or similar circumstances.

4. Trial ⇨260(5)

Failure to instruct on theory of contractual liability or breach of warranty in action arising out of oral contract to overhaul steering and front end of automobile was not error where court fully instructed on theory of negligence.

5. Appeal and Error ⇨1067

It is not prejudicial error to refuse an instruction where theory of rejected instruction is covered by other instructions.

6. Evidence ⇨410

Where repair order was prepared solely for use by garageman as a work order and memorandum for its own employees and it was not shown that document was intended by garageman to represent terms of oral agreement to overhaul steering and front end of automobile, instrument was not contractual in nature and parol evidence explaining meaning of agreement was admissible in action for injuries sustained when steering mechanism subsequently failed.

John L. Vogel, Seattle, and B. Franklin Heuston, Shelton, for appellants.

Karr, Tuttle, Campbell, Koch & Campbell, F. Lee Campbell, Seattle, for respondent.

UTTER, Judge.

Ivan Myers, Jr. was injured when the steering mechanism of his car allegedly failed. He brought suit against Ravenna Motors, Inc., who did some repair work on his car. A jury found for Ravenna Motors and Myers appeals.

Myers challenges the failure of the court to instruct the jury on a theory of contractual liability or breach of warranty and the action of the court which allowed testimony to explain a written memorandum made by an employee of Ravenna Motors.

[1,2] We do not consider the assignment of error directed to the court's failure to give the requested instruction. The exception stated, "Your Honor, the plaintiffs

except to the failure of the Court to give plaintiffs' proposed instruction No. 3 which reads, * * * That is our only exception. * * * Counsel is required to make known to the court the grounds upon which he excepts to give the trial court an opportunity to keep the trial free from error. The exception did not so inform the trial judge. *Moore v. Mayfair Tavern, Inc.*, 75 Wash.Dec.2d 413, 451 P.2d 669 (1969).

[3-5] Even if Myers had made known the grounds upon which he excepted to the court's refusal to give his requested instruction No. 3¹, the result would be the same. We are here dealing with an oral contract to overhaul the steering and front end of an automobile. The standard of care for performance of the work under this contract, whether the alleged breach arose from misfeasance or nonfeasance, is the reasonable man standard, *i. e.*, the manner in which an ordinary prudent person engaged in the repair of automobiles would have performed the particular work under the same or similar circumstances. 38 Am.Jur. Evidence, § 20 (1941); *Mesher v. Osborne*, 75 Wash. 439, 134 P. 1092 (1913); *Italia Societa Per Azioni di Navi-*

1. "If you find by a preponderance of the evidence that the defendant, Ravenna Motors, agreed to overhaul the steering and front end of the plaintiff Myers' automobile and that they did not do so, or that the same was not accomplished in a

gazione v. Oregon Stevedoring Co., 310 F.2d 481 (9th Cir.1962); *Westbrook et al. v. Watts*, 268 S.W.2d 694 (Tex.Civ.App. 1954). The trial court fully instructed the jury on the theory of negligence. It is not prejudicial error to refuse an instruction where the theory of the rejected instruction is covered by other instructions given by the trial court.

[6] Testimony was allowed by the trial court to explain the meaning of certain language written by an employee of Ravenna Motors on a repair order he prepared as a result of a phone conversation with Myers. The document was prepared solely for use by Ravenna Motors as a work order and memorandum for its own employee. There is no showing it was intended by Ravenna Motors to represent the terms of the agreement between the parties. Inasmuch as the instrument was not contractual in nature, the parol evidence rule does not apply. *Logsdon v. Trunk*, 37 Wash.2d 175, 222 P.2d 851 (1950).

The judgment is affirmed.

HOROWITZ, Acting C. J., and WILLIAMS, J., concurred.

good and workmanlike manner, and if you further find that the collision was caused because of the failure of the steering mechanism, then you shall return a verdict for the plaintiff."

99 Wash.App. 28

128Austin PAGNOTTA, Appellant,

v.

BEALL TRAILERS OF OREGON, INC.,
a foreign corporation, Respondent.Beall Trailers Of Oregon, Inc., a foreign
corporation, Appellant,

v.

Reyco Industries, Inc., a Delaware corpo-
ration, and Transpro, Inc., a Delaware
corporation and a subsidiary of Reyco
Industries, Inc., Respondent.

Nos. 18139-1-III, 18154-5-III.

Court of Appeals of Washington,
Division 3,
Panel Ten.

Jan. 25, 2000.

Truck driver brought negligence and product liability complaint against trailer manufacturer, alleging trailer came out of alignment and caused tractor of leave road, and manufacturer filed third-party complaint against supplier of trailer's suspension system. On supplier's motion, the Superior Court, Spokane County, Gregory Sypolt, J., granted summary judgment, dismissing both driver's complaint and third-party action. Driver appealed and subsequently manufacturer appealed dismissal of its third-party complaint. The Court of Appeals, Brown, J., held that: (1) state trooper and insurance examiner were competent to testify regarding cause of accident to the extent of their expertise; (2) expert testimony was not required on claim of design defect to establish defect in trailer's suspension under a consumer expectation standard; and (3) manufacturer's appeal was timely filed.

Reversed.

1. Evidence ⇨539

Opinions of state trooper, who had 13 years experience investigating traffic accidents, and insurer's material damage examiner were competent to testify to the extent of their expertise in tractor-trailer driver's neg-

ligence and product liability action against manufacturer of trailer that allegedly came out of alignment and caused tractor of leave road; both trooper and insurance examiner had the education, training and experience giving them insights that were relevant and helpful to the jury. ER 701, 702.

2. Evidence ⇨546

Whether to admit expert testimony is within the discretion of the trial court.

3. Judgment ⇨185.3(21)

In ordinary negligence and products liability cases where obscure medical facts are not involved, generally, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment.

4. Judgment ⇨185.1(4)

Expert's affidavit submitted in opposition to a motion for summary judgment must be factually based and must affirmatively show competency to testify to the matters stated therein.

5. Judgment ⇨185.1(4)

Factual basis of an expert's affidavit submitted in opposition to a motion for summary judgment may consist of information in the record or information not in the record but reasonably relied on by others in the field.

6. Evidence ⇨470

Lay witness may testify as to his or her opinion under circumstances of personal knowledge based upon rational perceptions when it would help the jury understand the witnesses' testimony or a fact in issue. ER 701.

7. Products Liability ⇨83.5

Expert testimony was not required in a design defect products liability action brought by tractor-trailer driver against trailer manufacturer to establish a defect in trailer's suspension under a consumer expectation standard; juror did not need to fully know through expert testimony how trailer's suspension was designed or exactly operated

to understand the alleged defect. West's RCWA 7.72.030(1).

8. Products Liability ⇌11

Elements of proof for a design defect products liability claim require a showing of: (1) a manufacturer's product (2) not reasonably safe as designed (3) causing harm to the plaintiff. West's RCWA 7.72.030(1).

9. Products Liability ⇌11

Showing that the product was not reasonably safe as designed, in action asserting design defect products liability claim, may be tested by either a risk utility or a consumer expectation standard.

10. Products Liability ⇌11

Relevant considerations, in establishing that a product was not reasonably safe as designed, under consumer expectation standard, include the relative cost of the product, the gravity of the potential harm from the claimed defect, and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case.

11. Products Liability ⇌8

If a product is unreasonably dangerous, it is necessarily defective.

12. Products Liability ⇌8, 76

Although the strict liability doctrine does not impose legal responsibility simply because a product causes harm, the type of accident itself may establish a defect using a consumer's expectation test, where the product failed under conditions concerning which an average consumer of that product could have fairly definite expectations.

13. Appeal and Error ⇌343.1

Even though trailer manufacturer's appeal of dismissal of its third-party complaint against supplier of trailer's suspension challenged a ruling other than that involved in tractor-trailer driver's appeal of dismissal of his complaint, manufacturer's appeal was still part of the same "decision" for the purpose of court rule establishing time period for filing notice of appeal; thus, 14-day period within which manufacturer was required to

file notice of appeal began to run from date driver filed his notice of appeal. RAP 5.2(f).

¹²⁹Harry E. Ries, Moses Lake, for Appellant.

James H. Gidley, Bogle & Gates, Portland, OR, ¹³⁰Scott M. Barbara, Barry M. Johnson, Johnson & Martens, Seattle, for Respondents.

BROWN, J.

By summary judgment, the trial court dismissed Austin Pagnotta's negligence and product liability complaint against Beall Trailers and Beall's third-party complaint against Reyco Industries, a component part supplier of a trailer sold to Mr. Pagnotta's employer.¹ The trial court decided Mr. Pagnotta's experts were incompetent to rebut expert testimony favoring Beall and Reyco. We reverse because (1) Mr. Pagnotta's experts were competent to testify to the extent of their expertise, and (2) expert testimony is not required in a design defect products liability case to establish a defect under a consumer expectation standard.

FACTS

On February 10, 1994, Mr. Pagnotta was hauling diesel fuel south from Spokane. He was pulling a Beall trailer sold in October 1993 that used suspension components supplied by Reyco. The road was dry, the weather was clear and cold, the road was straight. Mr. Pagnotta suddenly "felt . . . a tug, [as if] somebody had reached out and pulled on the trailer." Mr. Pagnotta tried to steer against the pull but he had no control. The trailer reportedly went off the road to the right pulling the tractor after it. Approaching and following drivers supported Mr. Pagnotta's account.

¹³¹Trooper Wayne Turner investigated. Trooper Turner's deposition revealed 13 years' experience investigating accidents. In response to an inquiry regarding his training in accident reconstruction, Trooper Turner acknowledged he was not an accident reconstructionist, but related his completion of basic and advanced training. Trooper Tur-

1. The cases have been consolidated for purposes

of this opinion. RAP 3.3(b).

ner averaged 10 accident investigations a week. He saw maybe 30 to 40 truck accidents. Trooper Turner interviewed Carl Fisher, the approaching driver, and Doug Bippes, the following driver. Mr. Fisher said the trailer suddenly jerked to the right, then went off the road. Mr. Bippes said the trailer axle dropped off the highway to the right and then did a complete flip landing on the left side of the tractor and trailer. Trooper Turner called in a weight control officer to inspect and do a work-up on the truck. The weight control officer pointed to rust at break points indicating pre-accident partial breaks in the suspension parts. Trooper Turner indicated the underlying factual bases for his conclusions based upon his personal observations and his witness interviews. Trooper Turner concluded the back end of the trailer came out of alignment causing the trailer to leave the road without any fault on Mr. Pagnotta's part.

Gary Stebner also investigated the accident for Reliance Insurance Company, the insurer for Mr. Pagnotta's employer. At the time of his deposition, Mr. Stebner described himself as a regional examiner/consultant and material damage examiner for Reliance with responsibility for about two-thirds of the United States. While with Reliance, Mr. Stebner received numerous courses in investigation and material damage. Before his 12 years with Reliance, Mr. Stebner sold heavy equipment and trucks for five years, drove trucks for about nine years, and received a technical arts degree as a certified civil engineering technician. Mr. Stebner worked for about three years in the mid-seventies as an engineering technician. Mr. Stebner concluded the claim had subrogation potential due to some kind of failure in the trailer's rear axle. Reliance asked Talbott Associates, Inc., an engineering firm, for its opinion. Talbott Associates 32 did not support Mr. Stebner's view. Reliance decided not to pursue subrogation.

Mr. Pagnotta sued Beall for his injuries, claiming product liability and negligence. Beall brought a third-party complaint against Reyco, the suspension manufacturer. Reyco moved for summary judgment against both Mr. Pagnotta and Beall.

Reyco submitted evidence from Scott Kimbrough, Ph.D. Dr. Kimbrough opined: "In my professional opinion, there is no evidence to suggest a defect in the suspension caused the accident at issue in this case. All of the relevant suspension system parts, . . . exhibit damage that was caused by forces generated during the roll-over accident. There is no evidence to suggest any of the relevant suspension system parts failed prior to the roll-over accident." Dr. Kimbrough further opined the leaf spring did not cause the accident by escaping from its proper position. Reyco also submitted Talbott Associates' reports.

In opposition to the summary judgment motion, Mr. Pagnotta offered the depositions of both Trooper Turner and Mr. Stebner. Mr. Stebner continued to believe that a defect caused the accident despite the contrary evidence:

My opinion based on what I saw on the trailer, and a lot had to do with the eyewitnesses stating that they saw [an axle] come out, is that . . . something broke allowing the axle to exit . . . where I saw the tire marks come up from underneath the trailer causing the trailer axle to shift, which would pull it over to the side and pulling the truck out of control.

Mr. Pagnotta's declaration indicated he had been the sole driver of the trailer, all scheduled maintenance had been done, and no mechanical problems existed prior to the accident. Mr. Pagnotta observed no indication of trailer defects before the accident.

The trial court rejected Trooper Turner and Mr. Stebner as unqualified under ER 702. The court decided the context of a product liability case was "analogous or akin to those cases of medical malpractice." The court reasoned Mr. Pagnotta³³ failed to rebut the defendant's evidence by "producing a competent expert's affidavit alleging specific facts establishing the cause of action."

The trial court concluded the lay testimony consisted of conclusory contentions failing to raise any genuine issue of material fact. The trial court, without discussing the merits of the third-party complaint, granted summary judgment, dismissing both Mr. Pagnotta's

complaint and Beall's derivative third-party complaint. Mr. Pagnotta appealed. Thirty-two days after Mr. Pagnotta's appeal, Beall filed its appeal of the court's dismissal of its third-party complaint.

ANALYSIS

A. Exclusion of Appellant's Experts

[1] The issue is whether the trial court erred by abusing its discretion when deciding Trooper Turner and Mr. Stebner did not qualify to give opinions under the evidence rules in the context of this negligence and products liability case.

[2] The decision whether to admit expert testimony is within the discretion of the trial court. *State v. Ortiz*, 119 Wash.2d 294, 310, 831 P.2d 1060 (1992). In medical negligence cases, special rules have been developed limiting the admission of expert testimony regarding the standard of care of a physician. See *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 227-28, 770 P.2d 182 (1989). Generally, medical expert opinion is required to establish the standard of care and most aspects of causation. *Id.* at 228, 770 P.2d 182. However, the *Young* court also recognized that material facts could be within the expertise of a layman when they are observable by the layman's senses and describable without medical training. *Id.*

In *Young*, the court found a pharmacist incompetent to testify about the standard of care in a medical malpractice case. *Id.* at 230, 770 P.2d 182. Similarly, a medical doctor is incompetent to testify on the standard of care of a pharmacist. *McKee v. American Home Prods. Corp.*, 113 Wash.2d 701, 706-07, 782 P.2d 1045 (1989). These cases reflect the principle that 34when causation involves "obscure medical facts" requiring an ordinary lay person to speculate, expert opinion is necessary. *Bruns v. PACCAR, Inc.*, 77 Wash.App. 201, 214, 890 P.2d 469, review denied, 126 Wash.2d 1025, 896 P.2d 64 (1995).

[3-5] However, in ordinary negligence and products liability cases where obscure medical facts are not involved, traditional rules apply. "In general, an affidavit containing admissible expert opinion on an ulti-

mate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment." *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wash.App. 49, 60-61, 871 P.2d 1106 (1994). An expert's affidavit submitted in opposition to a motion for summary judgment must be factually based and must affirmatively show competency to testify to the matters stated therein. *Lilly v. Lynch*, 88 Wash.App. 306, 320, 945 P.2d 727 (1997). An expert's factual basis may consist of information in the record or information not in the record but reasonably relied on by others in the field. *Riccobono v. Pierce County*, 92 Wash.App. 254, 267, 966 P.2d 327 (1998). "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702.

[6] A lay witness may testify as to his or her opinion under circumstances of personal knowledge based upon rational perceptions when it would help the jury understand the witnesses' testimony or a fact in issue. *Ortiz*, 119 Wash.2d at 308-09, 831 P.2d 1060 (citing E. Cleary, *McCormick on Evidence* 29 (3d ed.1984)); see also ER 701. Experts may at times give lay opinion evidence. See *Ortiz*, 119 Wash.2d at 309, 831 P.2d 1060.

Here, Trooper Turner adequately described his expertise based upon his education, training and practical experience and gave the underlying facts supporting his ultimate conclusions. He may give opinions within the area of his expertise. Although not a professional engineer, Trooper Turner viewed most of the same items as Dr. Kimbrough, plus he was present at the scene and had direct personal 35knowledge of critical facts supporting his opinion. His opinions would be partly helpful in the lay sense of ER 701 and in the expert sense under ER 702. The same is true for Mr. Stebner. The testimony of Trooper Turner and Mr. Stebner, within their respective areas of expertise, is relevant and likely helpful to the jury in deciding whether the trailer performed as expected. For example, neither needs to be a professional engineer or metallurgist to

state an opinion that the trailer left the road prior to the tractor.

In sum, both Trooper Turner and Mr. Stebner have the education, training and experience giving them insights that are relevant and helpful to the jury under ER 701 and ER 702. Because this is not a medical malpractice case where obscure medical knowledge is required on causation or the standard of care, the trial court erred by choosing and applying medical malpractice law. Indeed, in their areas of expertise, Trooper Turner and Mr. Stebner likely have relevant and helpful opinions beyond the expertise of Dr. Kimbrough. The objections related to their qualifications merely go to the weight not the admissibility of the opinions.

B. Summary Judgment

[7] The issue is whether as a matter of law the trial court erred when granting summary judgment to the respondents and concluding expert testimony was required to establish the exact defect in a design defect products liability action.

When reviewing summary judgments under CR 56(c):

We determine whether any genuine issues of material fact exist and if the moving party is entitled to judgment as a matter of law. We consider all facts and reasonable inferences from facts in the light most favorable to the nonmoving party. We review questions of law de novo.

Neighbors of Black Nugget Road v. King County, 88 Wash.App. 773, 776, 946 P.2d 1188 (1997) (footnotes omitted). *Id.* review denied, 135 Wash.2d 1003, 959 P.2d 126 (1998). The moving party bears the initial burden of showing the absence of an issue of fact. *Young*, 112 Wash.2d at 225, 770 P.2d 182. When the defendant, as moving party, meets this burden then the inquiry shifts to plaintiff. *Id.* "If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

To rebut a properly supported summary judgment motion, the nonmoving party must present specific facts showing a genuine issue for trial. *Adams v. Western Host, Inc.*, 55 Wash.App. 601, 607, 779 P.2d 281 (1989). The nonmoving party's burden is not met by responding with conclusory allegations, speculative statements, or argumentative assertions. *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wash.App. 625, 628, 784 P.2d 1288, review denied, 114 Wash.2d 1023, 792 P.2d 535 (1990). We will grant summary judgment when reasonable people could reach but one conclusion from the evidence. *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wash.2d 99, 108, 751 P.2d 282 (1988).

[8] The elements of proof for a design defect products liability claim require a showing of (1) a manufacturer's product (2) not reasonably safe as designed (3) causing harm to the plaintiff. RCW 7.72.030(1); *Bruns*, 77 Wash.App. at 208, 890 P.2d 469.

[9-11] The second element requires a showing that the product was not reasonably safe as designed. *Bruns*, 77 Wash.App. at 209, 890 P.2d 469. This may be tested by either a risk utility or a consumer expectation standard. See *Soproni v. Polygon Apartment Partners*, 137 Wash.2d 319, 326-27, 971 P.2d 500 (1999). Mr. Pagnotta relies on the consumer expectation standard. Accordingly, he must prove the truck was more dangerous than the ordinary consumer would expect. See *Anderson v. Weslo, Inc.*, 79 Wash.App. 829, 837, 906 P.2d 336 (1995). Relevant considerations include "[t]he relative cost [37] of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case." *Seattle-First Nat'l Bank v. Tabert*, 86 Wash.2d 145, 154, 542 P.2d 774 (1975). "If a product is unreasonably dangerous, it is necessarily defective." *Tabert*, 86 Wash.2d at 154, 542 P.2d 774.

[12] The strict liability doctrine does not impose legal responsibility simply because a product causes harm. *Tabert*, 86 Wash.2d at 150, 542 P.2d 774. Nonetheless, Washington courts recognize certain situations exist

where the type of accident itself may establish a defect using a consumer's expectation test:

In the type of case in which there is no evidence, direct or circumstantial, available to prove exactly what sort of manufacturing flaw existed, or exactly how the design was deficient, the plaintiff may nonetheless be able to establish his right to recover, by proving that the product did not perform in keeping with the reasonable expectations of the user. When it is shown that a product failed to meet the reasonable expectations of the user the inference is that there was some sort of defect, a precise definition of which is unnecessary. If the product failed under conditions concerning which an average consumer of that product could have fairly definite expectations, then the jury would have a basis for making an informed judgment upon the existence of a defect.

Bombardi v. Pochel's Appliance & TV Co., 10 Wash.App. 243, 247, 518 P.2d 202 (1973) (quoting *Heaton v. Ford Motor Co.*, 248 Or. 467, 471-72, 435 P.2d 806 (1967)), *review denied*, 83 Wash.2d 1009 (1974); *accord Potter v. Van Waters & Rogers, Inc.*, 19 Wash. App. 746, 755-56, 578 P.2d 859 (1978) (non-expert circumstantial evidence may be admitted to prove defective product).

Mr. Pagnotta, relying on *Potter* and the consumer expectation standard, correctly argues he did not need to offer expert testimony of the exact flaw to maintain his products liability action. In *Potter*, the plaintiff sued for injuries sustained in a fall allegedly caused by a defective rope, and the trial court granted the defendant's motion for summary judgment. *Potter*, 19 Wash.App. at 747-48, 578 P.2d 859. On appeal, the court remanded for trial. *Id.* at 758, 578 P.2d 859. Although the plaintiff apparently provided an expert witness, *id.* at 754, 578 P.2d 859, the court adopted the reasoning of Oregon courts that expert testimony is not always required to establish a defect:

Although expert testimony can usually be a valuable assistance to the court and to the jury in products liability cases, it is not always an indispensable element of plaintiff's case. In *Brownell v. White Motor*

Corp., 260 Or 251, 490 P.2d 184, 51 ALR3d 1 (1971), [the] court held that the trial court correctly denied defendants' motion for a directed verdict even though plaintiff presented no expert testimony of any defect.

Id. at 757, 578 P.2d 859 (quoting *Lynd v. Rockwell Mfg. Co.*, 276 Or. 341, 348-49, 554 P.2d 1000 (1976)).

The *Potter* court favorably cited *Brownell*, a tire blow out case, which is also instructive. There, the plaintiff did not offer expert testimony even though the defense expert found no defect. *Brownell*, 260 Or. at 254, 490 P.2d 184. On appeal, the defendants contended the trial court erred in not finding for them as a matter of law because there was insufficient evidence of any defect in the truck. *Id.* The court held the trial court correctly denied the defendant's motion for a directed verdict by reasoning the plaintiff's evidence negated driver negligence as a cause of the vehicle leaving the road. *Id.* at 256, 259, 490 P.2d 184. The court reasoned this evidence created the inference that a defect caused the incident. *Id.* at 256, 490 P.2d 184. The court concluded:

When the jury reasonably can find that the product is unchanged from the condition it was in when sold and the unusual behavior of the product is not due to any conduct on the part of the plaintiff or anyone else who has a connection with the product, logic dictates that it is a distinct possibility that there is some defect in the product.

Brownell, 260 Or. at 258, 490 P.2d 184.

Beall and Reyco give misplaced emphases to *Bruns* and similar cases. True, the *Bruns* court stated that a plaintiff must offer "reliable and specific expert testimony to establish the nature of the alleged dangerous condition in a products liability case." *Bruns*, 77 Wash.App. at 210, 890 P.2d 469 (citing *Wagner v. Flightcraft, Inc.*, 31 Wash.App. 558, 643 P.2d 906, *review denied*, 97 Wash.2d 1037 (1982)). But a close reading of *Bruns* shows it is distinguishable because this comment regarded an issue requiring testimony about obscure medical facts related to multiple airborne chemicals and their effect in the cab of a truck. Moreover, the *Wagner* court cites back to *Potter* regarding the rules for

expert testimony, and it follows the consumer expectation test. *Wagner*, 31 Wash.App. at 564, 643 P.2d 906.

In short, we conclude the consumer expectation rule applies here to avoid summary judgment as expert testimony of the exact defect is not required as a matter of law. We believe the rules in *Bruns* and *Wagner* are consistent with those stated in *Potter* regarding the need for expert testimony in the present case. A juror does not need to fully know through expert testimony how a trailer suspension is designed or exactly operates to understand the alleged defect. As we held in Part "A", *supra*, the trial court improperly analogized to medical malpractice cases when it ruled Mr. Pagnotta had not rebutted Beall's expert testimony. Trooper Turner and Mr. Stebner are both qualified to discuss the trailer's operation under the conditions here, as well as normal operating requirements.

C. Dismissal of Third Party Complaint

The issue is whether the trial court erred by granting summary judgment dismissing Beall's third-party complaint against Reyco under the circumstances presented here.

[13] Reyco preliminarily argues Beall was untimely filing its appeal of the trial court's order dismissing the third-party complaint because it was filed 32 days after the court's order and not within the 30-day deadline of RAP 5.2(a). RAP 5.2(f) provides in part: "If a timely notice of §40 appeal or a timely notice for discretionary review is filed by a party, any other party who wants relief from the decision must file a notice of appeal or notice for discretionary review with the trial court clerk within . . . 14 days after service of the notice filed by the other party . . ." Even though Beall's appeal challenges a ruling other than that involved in Mr. Pagnotta's appeal, it is still part of the same "decision" for the purpose of RAP 5.2(f). See *Ed Nowogroski Ins., Inc. v. Rucker*, 88 Wash.App. 350, 361, 944 P.2d 1093 (1997), *aff'd*, 137 Wash.2d 427, 971 P.2d 936 (1999). Thus, Beall's appeal was timely under RAP 5.2(f) because it was made within 14 days of Mr. Pagnotta's appeal.

Furthermore, at oral argument the parties focused exclusively on whether Mr. Pagnotta presented sufficient evidence of a defect to create an issue of fact. The parties did not argue the summary judgment merits of the third-party complaint. Moreover, the trial court proceeded as though its ruling on the expert/defect issue preempted any discussion of the third-party complaint. Thus, it did not reach the issue presented here. Generally, we do not address issues not decided by the trial court. RAP 2.5(a). Accordingly, we reverse the order granting summary judgment to Reyco on the third-party complaint.

CONCLUSION

We hold the trial court erred by granting summary judgment of dismissal of Mr. Pagnotta's products liability complaint and Beall's third-party complaint.

Reversed.

KURTZ, C.J., and KATO, J., concur.



99 Wash.App. 41

§41 **Bethany BOWERS, a single woman, Appellant,**

v.

**FARMERS INSURANCE EXCHANGE,
a foreign insurance corporation,
Respondent.**

No. 18306-8-III.

Court of Appeals of Washington,
Division 3,
Panel Five.

Jan. 25, 2000.

As Amended on Reconsideration
March 7, 2000.

Insured brought breach of contract suit against insurer after it refused claim under landlord's insurance policy for mold damage to home caused by marijuana grow operation that had been conducted in basement without insured's knowledge. On cross-motions for

164 Wash.2d 545

RANGER INSURANCE COMPANY,**Respondent,**

v.

PIERCE COUNTY, Pierce County Superior Court Clerk, "John Doe" and "Jane Doe", and the State Of Washington, Petitioners.

No. 80389-7.

Supreme Court of Washington,
En Banc.

Argued May 8, 2008.

Decided Sept. 18, 2008.

Background: Bail bond surety brought action against county, alleging that clerk was negligent in disbursing surety's funds to cover different surety's obligations and in returning forfeited money to bail bond company, not surety. Summary judgment was granted in favor of county. Surety appealed. The Court of Appeals, 122 Wash. App. 1077, 2004 WL 1834650, reversed and remanded. On remand, the Superior Court, Pierce County, Chris Wickham, J. Pro Tem., entered summary judgment in favor of county. Surety appealed. The Court of Appeals, 138 Wash.App. 757, 158 P.3d 1231, reversed and remanded.

Holdings: Upon grant of review, the Supreme Court, Sanders, J., held that:

- (1) fact issues existed as to whether county breached its duty to surety, and
- (2) fact issues existed as to whether company had apparent authority to redirect surety's funds to different surety's obligation.

Court of Appeals affirmed; remanded.

1. Appeal and Error ⇨893(1)

Supreme Court reviews summary judgments de novo.

2. Judgment ⇨181(2)

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c).

3. Judgment ⇨185(2)

When determining whether an issue of material fact exists, on summary judgment, court must construe all facts and inferences in favor of the nonmoving party. CR 56(c).

4. Judgment ⇨185(6)

A genuine issue of material fact exists, for summary judgment purposes, where reasonable minds could differ on the facts controlling the outcome of the litigation. CR 56(c).

5. Judgment ⇨185(6)

Movant is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law. CR 56(c).

6. Judgment ⇨185(6)

Party not moving for summary judgment avoids summary judgment when it sets forth specific facts which sufficiently rebut the moving party's contentions and discloses the existence of a genuine issue as to a material fact. CR 56(c).

7. Judgment ⇨185(5)

Party not moving for summary judgment may not rely on speculation, or argumentative assertions that unresolved factual issues remain. CR 56(c).

8. Negligence ⇨202

In an action for negligence, plaintiff must prove four basic elements: (1) existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.

9. Judgment ⇨185.3(6)

Summary judgment declaration of manager of finance and information services for county department of judicial administration, which stated that county clerk's actions were fully consistent with standard of care concerning receipt, allocation, and disbursement of funds, was insufficient to establish applicable standard of care, in negligence suit brought by bail bond surety against county, alleging that clerk was negligent in disbursing surety's funds to cover different surety's obligations and in returning forfeited money to bail bond company, not surety. CR 56(c).

10. Judgment ⇨181(15.1)

Genuine issue of material fact existed as to whether county, in disbursing surety's funds to cover different surety's obligations and in returning forfeited money to bail bond company, rather than surety, breached its duty to surety, thus precluding summary judgment to county in surety's negligence suit against it. CR 56(c).

11. Municipal Corporations ⇨723

A municipality, to meet duty with which it has been charged, must exercise that care which an ordinarily reasonable person would exercise under the same or similar circumstances.

12. Negligence ⇨1693, 1694

Whether defendant has met the applicable duty is a question for the jury, in a negligence action, unless reasonable minds could not differ.

13. Judgment ⇨181(15.1, 18)

Genuine issues of material fact existed as to whether bail bond company had apparent authority to redirect surety's funds to different surety's obligation, thus precluding summary judgment in surety's suit against county to recover for clerk's alleged negligence in following company's instructions to use surety's payment to cover different surety's obligations. CR 56(c).

14. Principal and Agent ⇨99

An agent has apparent authority to act for a principal only when the principal makes objective manifestations of the agent's authority to a third person.

15. Principal and Agent ⇨99

To create apparent authority, a principal's objective manifestations must cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for a principal and be such that the claimant's actual, subjective belief is objectively reasonable.

16. Principal and Agent ⇨99

Manifestations of authority by a purported agent do not establish apparent authority to act.

Douglas Warren Vanscoy, Attorney at Law, Deputy Pros. Atny., Tacoma, WA, for Petitioners.

Brett Andrews Purtzer, Attorney at Law, Tacoma, WA, for Respondent.

SANDERS, J.

¶1 Pierce County applied money from Ranger Insurance Company (Ranger), at the request of Ranger's agent, to forfeited bonds underwritten by another surety. When the bonds were exonerated, Ranger's funds were not returned. Ranger sued Pierce County for negligence. The trial court granted Pierce County summary judgment of dismissal, holding it met its duty to Ranger as a matter of law. Analyzing the issue as an agency problem the Court of Appeals reversed the trial court. We affirm the Court of Appeals reversal of summary judgment as material issues of fact exist under both duty and agency theories.

FACTUAL AND PROCEDURAL HISTORY

¶2 Signature Bail Bonds (Signature) is a bail bond company authorized to post appearance and appeal bonds in Pierce County. It represents two corporate surety companies, Ranger and Granite State Insurance Company ¶548(Granite State). Signature holds a power of attorney from each to post bonds on their behalf.

¶3 In February 1998 Signature wrote an appearance bond on Ranger paper for \$15,000 on behalf of David J. Rogers in case no. 97-1-05295-7. More than a year later, in November 1999, Signature wrote a second bond for \$10,000 for Rogers in the same case, this time on Granite State paper. Signature wrote another appearance bond for Rogers on Ranger paper for \$20,000 on a second case, no. 98-1-03952-5.

¶4 Two years later, in February 2000, Signature wrote a bond for Brandon Sims on Granite State paper for \$5,800 in case no. 00-1-01029-1. Two days later Signature wrote an additional bond in the same case on Granite State paper for \$4,200.

¶ 5 In March, Sims failed to appear for a pretrial conference and the court ordered the entire \$10,000 bond forfeited. That same month Rogers failed to appear for an omnibus hearing for one of his cases, no. 97-1-05295-7, and the court ordered both appearance bonds, totaling \$25,000, forfeited. This resulted in a total obligation of \$35,000 based on these forfeited bonds, \$15,000 by Ranger and \$20,000 by Granite State. Rogers's \$20,000 bond in case no. 98-1-03952-5 was never forfeited.¹

¶ 6 Signature sent two checks totaling \$35,000 to Pierce County² to satisfy the outstanding obligations for Ranger and Granite State. However Signature stopped payment on 550 those checks. At Signature's request Ranger sent a check for \$35,000 to Pierce County, which Pierce County originally applied to Rogers's second case although the \$20,000 bond had not been forfeited.

¶ 7 Signature called Pierce County asking it to apply Ranger's \$35,000 to the forfeited \$15,000 bond written on Ranger paper. Signature also asked Pierce County to apply Ranger's remaining \$20,000 to the three forfeited bonds written on Granite State paper, covering both Sims's and Rogers's forfeited bonds. The clerk complied.

¶ 8 Sims and Rogers were subsequently apprehended and returned to custody. The orders of forfeiture were vacated, the bonds exonerated, and the bond money returned to Signature, minus \$750 in court costs in each of the two cases. Signature apparently did not forward any of these funds to Ranger.

1. These bonds and their status are summarized below.

Rogers	97-1-05295-7	\$ 15,000	Ranger	Forfeited
Rogers	97-1-05295-7	\$ 10,000	Granite State	Forfeited
Rogers	98-1-03952-5	\$ 20,000	Ranger	Not Forfeited
Sims	00-1-01029-1	\$ 5,800	Granite State	Forfeited
Sims	00-1-01029-1	\$ 4,200	Granite State	Forfeited

2. The defendants in this case are Pierce County and the Pierce County Superior Court Clerk. We refer to the defendants collectively as Pierce County in both its arguments and actions.

3. Ranger also included the State of Washington as a defendant in the amended complaint. As detailed by the Court of Appeals, "Ranger con-

¶ 9 Ranger sued Pierce County alleging the court clerk negligently handled Ranger's \$35,000. In July 2003 the trial court granted Pierce County summary judgment of dismissal on three grounds: Pierce County's repayment resulted in a lack of damage to Ranger, quasi-judicial immunity of Pierce County, and failure to properly serve the State.³ The Court of Appeals reversed the trial court's summary judgment. It held Pierce County did not have quasi-judicial immunity, nor was the State prejudiced by a failure to serve the State as required by RCW 4.92.100. *Ranger Ins. Co. v. Pierce County*, noted at 122 Wash.App. 1077, 2004 WL 1834650 (*Ranger I*). It also held "a genuine issue of material fact exists as to whether the clerk reasonably believed that [James] Barbieri had apparent authority . . ." *Id.* at *5. In his well reasoned dissent Acting Chief Judge Morgan argued Pierce County 551 "discharged its liability" to Ranger when it returned the funds to Signature, Ranger's agent.⁴ *Ranger I*, 122 Wash. App. 1077, 2004 WL 1834650, at *10. Pierce County filed a petition for review, which was denied. *Ranger Ins. Co. v. Pierce County*, 154 Wash.2d 1030, 116 P.3d 399 (2005).

¶ 10 On remand Pierce County again moved for summary judgment, arguing it met the standard of care and therefore was not negligent. In support of this motion, Pierce County submitted a declaration from Joel McAllister, manager of finance and information services for the King County De-

ceded at trial that the State of Washington should be dismissed from this case and raises no argument regarding this issue on appeal." *Ranger Ins. Co. v. Pierce County*, 138 Wash.App. 757, 765 n. 7, 158 P.3d 1231 (2007) (*Ranger II*).

4. The defendants did not request we revisit the Court of Appeals's earlier decision, and we decline to do so sua sponte.

partment of Judicial Administration.⁵ This declaration states, “the actions of the Pierce County Superior Court Clerk’s Office in connection with the Ranger check and the 1997 and 1998 *Rogers* and 2000 *Sims* cases were fully consistent with the standard of care concerning receipt, allocation and disbursement of funds as those exist in clerk’s offices today and in 2000.” Clerk’s Papers (CP) at 77–78. Ranger submitted no evidence to counter McAllister’s assessment.

¶ 11 Based on the McAllister declaration, the trial court granted summary judgment in favor of Pierce County, holding it “resolves the issue in the County’s favor on the question of violation of duty or failure to provide the requisite standard of care” Verbatim Report of Proceedings at 20–21. The Court of Appeals reversed, noting “[n]othing in the record on appeal shows Ranger’s objective manifestations supporting Signature’s apparent authority.” *Ranger Ins. Co. v. Pierce County*, 138 Wash.App. 757, 770, 158 P.3d 1231 (2007) (*Ranger II*). We granted review. 163 Wash.2d 1005, 180 P.3d 784 (2008).

STANDARD OF REVIEW

[1–4] ¶ 12 We review summary judgments de novo. *City of Sequim v. Malkasian*, 157 Wash.2d 251, 261, 138 P.3d 943 (2006). “Summary judgment is appropriate when ‘there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.’” *Locke v. City of Seattle*, 162 Wash.2d 474, 483, 172 P.3d 705 (2007) (alteration in original) (quoting CR 56(c)). When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party, Ranger Insurance. See *Reid v. Pierce County*, 136 Wash.2d 195, 201, 961 P.2d 333 (1998). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982); *Barrie v. Hosts of Am., Inc.*, 94 Wash.2d 640, 618 P.2d 96 (1980).

[5–7] ¶ 13 Summary judgment is subject to a burden-shifting scheme. The moving

party is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law. See *Meyer v. Univ. of Wash.*, 105 Wash.2d 847, 719 P.2d 98 (1986). The nonmoving party avoids summary judgment when it “set[s] forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact.” *Id.* at 852, 719 P.2d 98. To this end the nonmoving party “may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain.” *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wash.2d 1, 13, 721 P.2d 1 (1986).

ANALYSIS

[8] ¶ 14 “In an action for negligence a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.” *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash.2d 43, 48, 914 P.2d 728 (1996) (citing *Tincani v. Inland Empire Zoological Soc’y*, 124 Wash.2d 121, 127–28, 875 P.2d 621 (1994)). If any of these elements cannot be met as a matter of law, summary judgment for the defendant is proper.

[9, 10] ¶ 15 Ranger alleges Pierce County was negligent when it applied Ranger’s money to another surety’s forfeited bond leading to Ranger’s loss. Pierce County brought a motion for summary judgment contending it met its duty as a matter of law. Ranger argued a material issue of fact exists on whether Signature had the apparent authority to direct Pierce County to allocate Ranger’s funds to another surety’s obligations.

[11, 12] ¶ 16 To meet its duty a municipality must exercise “that care which an ordinarily reasonable person would exercise under the same or similar circumstances.” *Berglund v. Spokane County*, 4 Wash.2d 309, 315, 103 P.2d 355 (1940). Whether a defendant has met the applicable duty is a question for the jury, unless reasonable minds could not differ. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wash.2d 265, 979 P.2d

5. According to McAllister, King County’s Department of Judicial Administration includes the

functions performed by the superior court clerks in other counties.

400 (1999). Pierce County argues it acted as a reasonably prudent clerk in similar circumstances and, therefore, was not negligent as a matter of law.

¶ 17 In an effort to establish its adherence to the standard of care, Pierce County submitted Joel McAllister's declaration, which states Pierce County's actions "were fully consistent with the standard of care concerning receipt, allocation and disbursement of funds as those exist in clerk's offices today and in 2000." CP at 77-78. If this declaration demonstrates Pierce County acted as a "reasonably prudent clerk" and did not breach its duty, then summary judgment is appropriate, as Ranger did not submit any evidence to rebut this declaration. *Meyer*, 105 Wash.2d at 852, 719 P.2d 98.

¶ 18 However, a simple statement indicating an individual acted according to the customs of the industry is not always determinative. In the words of Justice Oliver Wendell Holmes, "[w]hat usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Helling v. Carey*, 383 Wash.2d 514, 518-19, 519 P.2d 981 (1974) (quoting *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 470, 23 S.Ct. 622, 47 L.Ed. 905 (1903)). Likewise Judge Learned Hand opined a defendant "never may set its own tests . . . Courts must in the end say what is required. . . ." *Id.* at 519, 519 P.2d 981 (quoting *T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.1932)). McAllister's declaration, asserting the Pierce County clerk acted according to the custom in its industry, does not establish the applicable standard of care as a matter of law.

¶ 19 Summary judgment is inappropriate here because a reasonable jury could find

6. Ranger argues it sent an invoice with the funds, indicating they were to be used only for Rogers's bonds underwritten by Ranger. However, there is no evidence of this invoice in the record. Because there is no evidence of this invoice submitted, its existence is not considered in determining summary judgment. See *Meyer*, 105 Wash.2d at 852, 719 P.2d 98.

7. McAllister's declaration claims verifying the identity of the surety is burdensome. "The clerk's office would not have known [the identity of the

Pierce County did not act as a reasonably prudent clerk and therefore breached its duty. The facts and inferences construed in Ranger's favor demonstrate Pierce County had written notification of which bonds Ranger underwrote, as each bond included the name of the surety on its face and included a copy of its power of attorney with each bond. A reasonable jury could find Ranger notified Pierce County that it acted as surety only for those bonds it underwrote.⁶ Although Pierce County argues verifying a bond was underwritten by a surety before allocating the surety's funds to the forfeited bond is an onerous obligation,⁷ a reasonable jury could find a reasonably prudent clerk is required to verify the obligation nonetheless. Summary judgment is inappropriate on this basis as a material issue of fact concerning the breach continues to exist.

[13] ¶ 20 At the Court of Appeals Ranger argued McAllister's declaration failed to establish Signature had apparent authority to direct Ranger's funds among different surety obligations. If Pierce County established as a matter of law that Signature had apparent authority to redirect Ranger's funds, then Pierce County would have been justified in its actions and met its duty as a matter of law. The Court of Appeals properly determined Pierce County has not demonstrated Signature's apparent authority and summary judgment is inappropriate.

[14-16] ¶ 21 An agent has apparent authority to act for a principal only when the principal makes objective manifestations of the agent's authority "to a third person." *King v. Riveland*, 125 Wash.2d 500, 507, 886 P.2d 160 (1994). To create apparent authority, a principal's objective manifestations "must cause the one claiming apparent authority to actually, or subjectively, believe

surety] without pulling the court files and reviewing the bond documents themselves." CP at 76. "Clerk's offices are not expected to challenge agents of companies that are expressly authorized by the Superior Court to operate." *Id.* If clerk's offices were to verify the identity of the surety, McAllister stated, "I would expect our ability to handle matters such as exoneration of bail and prisoner releases on bail to be materially affected." *Id.* at 77.

that the agent has authority to act for a principal [and] be such that the claimant's actual, subjective belief is objectively reasonable." *Id.* (citing *Smith v. Hansen, Hansen, & Johnson, Inc.*, 63 Wash.App. 355, 363, 818 P.2d 1127 (1991)). Manifestations of authority by the purported agent do not establish apparent authority to act. *Lamb v. Gen. Assocs., Inc.*, 60 Wash.2d 623, 627, 374 P.2d 677 (1962). To prevail Pierce County must prove Ranger made objective manifestations to Pierce County that caused it to subjectively and reasonably believe Signature had the authority to redirect Ranger's funds to non-Ranger obligations.

¶22 The only objective manifestations made by Ranger to Pierce County regarding Signature's authority were in the powers of attorney included with each bond.⁸ These powers of attorney do not indicate Signature had the authority to redirect Ranger's funds to satisfy obligations belonging to other sureties. Moreover, they limit Signature's authority to Ranger's bonds, stating "[t]his power ¹⁵⁵⁶void . . . if used . . . in combination with powers from any other surety company." CP at 15. A reasonable jury could find Ranger's statements did not lead Pierce County to believe Signature had the authority to allocate Ranger's money to Granite State's obligations. Therefore there is a genuine issue of material fact regarding Signature's apparent authority, and summary judgment in favor of Pierce County is inappropriate.

¶23 We affirm the Court of Appeals reversal of summary judgment favoring Pierce County and remand the case for further proceedings consistent with this opinion.

WE CONCUR: GERRY L.
ALEXANDER, C.J., SUSAN OWENS,
CHARLES W. JOHNSON, MARY E.
FAIRHURST, BARBARA A. MADSEN,
JAMES M. JOHNSON, DEBRA L.
STEPHENS, TOM CHAMBERS, JJ.



8. Again Ranger contends it included an invoice limiting the allocation of the funds with the check, but since there is no evidence in the

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Nancy ADAMS and Matthew, Adams,
wife and husband, Appellants,

v.

KING COUNTY, a municipal corporation;
Stanley Medical Research Institute, a
foreign corporation; and E. Fuller Torrey,
Respondents.

No. 81028-1.

Supreme Court of Washington,
En Banc.

Argued March 13, 2008.

Decided Sept. 25, 2008.

Background: Decedent's mother brought action against county and against medical research institute, asserting claims for violation of Washington Uniform Anatomical Gift Act (WAGA), tortious interference with dead body, invasion of privacy, conspiracy, and fraud, alleging that the institute, which had a contractual relationship with county medical examiner to obtain brain tissue from corpses received by medical examiner, obtained the entire brain, and other body samples, from decedent's body, after allegedly consented only to donation of brain tissue. The trial court granted summary judgment to defendants. Plaintiff appealed, and the appeal was transferred from the Court of Appeals.

Holdings: The Supreme Court, Owens, J., held that:

- (1) under the former Washington Uniform Anatomical Gift Act, only a hospital could accept the undesignated anatomical gift;
- (2) former Washington Uniform Anatomical Gift Act did not provide an implied cause of action, for violation of its terms, for family members of organ donors;

record before us, it should not be considered here. See *Meyer*, 105 Wash.2d at 852, 719 P.2d 98.

“rate applicable to civil judgments” for purposes of RCW 10.82.090.

¶ 155 The question here is whether the judgment was “founded on” tort or “founded on” contract. *See e.g., Little v. King*, 147 Wash.App. 883, 887–90, 198 P.3d 525 (2008).

¶ 156 The court’s judgment is based on the agreements as reflected in III Conclusion of Law 2.3 (central issue of dispute was extent of view protections of the agreements and extent of damages from those view protections not being honored); III Conclusion of Law 2.4 (contractual basis under agreements and statutory basis to award to the prevailing party, the Kenagys, their costs and attorney fees jointly and severally against Key Development, Mr. Johnson, and the Homeowners Association).

¶ 157 Enforcement of the agreements was the central issue in this case; there would have been no tort claims otherwise. Thus, for the same reasons that Mr. Johnson is liable for costs and fees under the contract (the agreements), the proper interest rate on the judgment is 12 percent as per RCW 4.56.110(4) (judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020).

¶ 158 The Kenagys also ask for fees on appeal based upon contract. This basis applies only to the parties jointly and severally liable on the contract—Key Development, Jack Johnson, and Key Bay Homeowners Association—not the Taylors.

¶ 159 We award fees on appeal to the Kenagys and remand to the trial court to determine the appropriate amount. RAP 18.1(i).

HOLDING

¶ 160 In sum, we remand for findings of fact and conclusions of law on the question of attorney fees and costs and an award of fees. We affirm the judgment against Key Development Corporation, Jack Johnson, and Key Bay Homeowners Association. We also affirm the trial court’s¹²⁸⁷ denial of the Taylors’ request for attorney fees against the Kenagys. We award fees on appeal to the Kenagys, and direct the trial court to determine the appropriate amount.

gys, and direct the trial court to determine the appropriate amount.

WE CONCUR: BROWN and KORSMO, JJ.



152 Wash.App. 296

Katherine Ann RIPLEY and Daniel Joseph Ripley, husband and wife, and the marital community composed thereof, Appellants,

v.

William LANZER, M.D.; John/Jane Doe, R.N.; King County Hospital District No. 2 d/b/a Evergreen Healthcare d/b/a Evergreen Medical Center Hospital; and Unknown John and Jane Does, Respondents.

No. 61952–7–I.

Court of Appeals of Washington,
Division 1.

Sept. 14, 2009.

Background: Patient and her husband brought action against physician and medical center for medical malpractice and corporate negligence arising out of knee surgery in which scalpel blade was left in patient’s knee. The Superior Court, King County, James E. Rogers, J., granted physician’s and medical center’s motions for summary judgment, and patient and husband appealed.

Holdings: The Court of Appeals, Cox, J., held that:

- (1) *res ipsa loquitur* applied to allow inference, without medical testimony, that surgeon’s act in inadvertently leaving scalpel blade in patient’s knee proximately caused patient damages;
- (2) *res ipsa loquitur* applied to allow inference, without medical testimony, that nurse’s failure to notice that scalpel

blade had detached from handle proximately caused patient damages;

- (3) expert testimony as to the standard of care was required to establish that medical center violated its duty to furnish supplies and equipment free of defects for purposes of corporate negligence claim;
- (4) medical center's destruction of defective scalpel handle was not spoliation of evidence; and
- (5) genuine issues of material fact regarding medical center's liability precluded summary judgment for patient and husband on medical malpractice claim against medical center.

Affirmed in part, reversed in part, and remanded.

1. Health ⇌821(2)

Generally, expert testimony is necessary to establish the standard of care for a health care provider in a medical malpractice action. West's RCWA 7.70.040.

2. Health ⇌821(4)

Expert testimony is not necessary in a medical malpractice action to establish the standard of care when medical facts are observable to a lay person and describable without medical training. West's RCWA 7.70.040.

3. Negligence ⇌1620, 1695

Doctrine of res ipsa loquitur provides an inference of negligence from the occurrence itself which establishes a prima facie case sufficient to present a question for the jury.

4. Negligence ⇌1610, 1621

The doctrine of res ipsa loquitur 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; thus, it casts 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.

5. Negligence ⇌1656, 1676

Negligence and causation, like other facts, may be proved by circumstantial evidence.

6. Negligence ⇌1610, 1620

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.

7. Negligence ⇌1612

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; in such cases the jury is permitted to infer negligence.

8. Negligence ⇌1615, 1620

The doctrine of res ipsa loquitur permits the inference of 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.

9. Health ⇌666

When a surgeon inadvertently introduces into a wound a foreign substance, closes up the wound, leaving that foreign substance in the body, there being no possibility of any good purpose resulting therefrom, that act constitutes negligence.

10. Negligence ⇌1624

Res ipsa loquitur is ordinarily sparingly applied, in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.

11. Health ⇌818

Res ipsa loquitur may apply to both physicians and hospitals.

12. Appeal and Error ⇨893(1)

Whether the doctrine of *res ipsa loquitur* is applicable to a particular case is a question of law reviewed de novo.

13. Health ⇨818

Doctrine of *res ipsa loquitur* applied to allow inference, without medical testimony, that surgeon's act in inadvertently leaving scalpel blade in patient's knee when he first closed surgical incisions proximately caused patient damages; act of leaving blade, which had detached from handle, in patient's knee did not ordinarily happen in the absence of negligence, and surgeon had actual control of the scalpel at the time its blade lodged in patient's knee. West's RCWA 7.70.040.

14. Negligence ⇨1621, 1695

One who properly invokes the doctrine of *res ipsa loquitur* establishes a *prima facie* case sufficient to present a question for the jury; it then casts upon the defendant the duty to come forward with evidence to rebut the inference of negligence from plaintiff's *prima facie* case.

15. Negligence ⇨1620

The doctrine of *res ipsa loquitur* permits a *prima facie* case of causation to be established by the same circumstantial evidence used to create the inference of negligence.

16. Health ⇨818

Doctrine of *res ipsa loquitur* applied to allow inference, without medical testimony, that nurse's failure to notice that scalpel blade had detached from handle, prior to surgeon's act in closing portals to surgical site, proximately caused patient damages; nurse's failure to notice that scalpel did not have blade was not something that the nurse would ordinarily fail to do in the absence of negligence, medical center had responsibility for the proper functioning of the scalpel and blade at the time that it caused patient's injury, nurse shared responsibility with surgeon to determine the condition and location of the surgical instruments before and after they were used, and there was no reason that nurse could not have seen that blade was missing.

17. Health ⇨821(5)

Expert testimony as to the standard of care was required to establish that medical center violated its duty to furnish supplies and equipment free of defects for purposes of patient's corporate negligence claim against medical center arising out of knee surgery in which blade detached from scalpel and remained in patient's knee.

18. Negligence ⇨202

The essential elements of negligence are: (1) the existence of a duty owed to the complaining party, (2) a breach, (3) resulting injury, and (4) proximate cause between the claimed breach and resulting injury.

19. Health ⇨656

The doctrine of corporate negligence imposes on a hospital a nondelegable duty owed directly to the patient, regardless of the details of the doctor-hospital relationship.

20. Health ⇨661

Under the doctrine of corporate negligence, a hospital owes its patients the duty to furnish to the patient supplies and equipment free of defects, among others.

21. Health ⇨656

The standard of care to which the hospital will be held under the doctrine of corporate negligence is that of an average, competent health care facility acting in the same or similar circumstances; this standard is generally defined by the Joint Commission on Accreditation of Hospitals (JCAH) standards and the hospital's bylaws.

22. Evidence ⇨584(1)

In general, expert testimony is required when an essential element in the case is best established by opinion that is beyond the expertise of a lay person.

23. Appeal and Error ⇨170(1), 760(2), 761

Court of Appeals would decline to consider patient's argument on appeal that surgeon's testimony that scalpel's handle was defective constituted the required expert testimony as to the standard of care which supported their corporate negligence claim against medical center arising out of knee surgery in which blade detached from scalpel

and remained in patient's knee, where patient failed to make that argument to the trial court, and, other than the statement in the opening brief, there was no argument or citation to the record on that point.

24. Appeal and Error ⚡170(1)

Court of Appeals would decline to consider patient's argument for the first time on appeal that medical center breached its duty by failing to supply competent staff for knee surgery where scalpel blade was left in patient's knee.

25. Evidence ⚡78

Medical center's destruction of defective scalpel handle was not spoliation of evidence which required summary judgment in favor of patient on claims against medical center arising out of surgery in which scalpel blade detached from handle and remained in patient's knee; it was unclear that handle was important to the litigation in light of testimony from surgeon and others that handle was defective, and, at time nurse discarded the handle, patient had not filed any lawsuit or requested that handle be retained such that bad faith could not be inferred from the decision to destroy the handle.

26. Evidence ⚡78

"Spoliation" is defined as the intentional destruction of evidence.

See publication Words and Phrases for other judicial constructions and definitions.

27. Pretrial Procedure ⚡434

In deciding whether to apply a sanction for spoliation of evidence, courts consider the potential importance or relevance of the missing evidence and the culpability or fault of the adverse party.

28. Appeal and Error ⚡961

The appellate court reviews a trial court's decision regarding sanctions for discovery violations for an abuse of discretion.

29. Judgment ⚡181(33)

Genuine issues of material fact regarding medical center's liability precluded sum-

1. King County Hospital District No. 2 does business as Evergreen Healthcare, which does business as Evergreen Medical Center Hospital.

mary judgment for patient and husband on medical malpractice claim against medical center following surgery during which scalpel blade detached from handle and remained lodged in patient's knee.

30. Appeal and Error ⚡761

Patient and husband assigned error on appeal to final judgment in favor of medical center entered pursuant to rule allowing entry of final judgment on multiple claims or involving multiple parties, but made no separate argument focused on the court rule, and thus Court of Appeals would decline to address that assignment. CR 54(b).

Philip Albert Talmadge, Emmelyn Hart-Biberfeld, Talmadge/Fitzpatrick, Tukwila, WA, George E. Kargianis, Kristen Leigh Fisher, Law Offices of George Kargianis, Seattle, WA, for Appellants.

Mary H. Spillane, William Kastner & Gibbs, Nancy C. Elliott, Dan J. Keefe, Seattle, WA, for Respondent William L. Lanzer, M.D.

Lee Miller Barns, McIntyre & Barns PLLC, Seattle, WA, for Respondent King County Hospital.

COX, J.

1³⁰¹ ¶ 1 Katherine and Daniel Ripley, husband and wife, appeal the summary dismissal of their medical malpractice claims against Dr. William Lanzer, M.D., and Evergreen Medical Center and its employees (collectively "Evergreen").¹ Because the doctrine of res ipsa loquitur applies to their medical malpractice claims against Dr. Lanzer and Evergreen, the Ripleys were not required to provide expert medical testimony in response to the summary judgment 2³⁰² motions of these defendants. There are genuine issues of material fact for trial. Summary dismissal of the medical malpractice claims was improper.

¶ 2 In contrast, the Ripleys' corporate negligence claim against Evergreen requires expert medical evidence to establish the stan-

Here, we use the word Evergreen to include the hospital as well as its nursing staff.

ard of care. Because no such evidence in this record was called to the attention of the trial court, the corporate negligence claim fails.

¶ 3 Finally, there is no showing of spoliation in this record. Thus, there is no showing of abuse of discretion by the trial court in declining to impose the sanction of entry of judgment against Evergreen.

¶ 4 We reverse the summary judgment order dismissing Dr. Lanzer. We affirm the summary dismissal of the corporate negligence claim against Evergreen, but reverse the dismissal of the medical malpractice claim against that defendant. We affirm the denial of summary judgment in favor of the Ripleys against Evergreen.

¶ 5 In reviewing the summary judgment orders before us, we consider the facts in the light most favorable to the respective non-moving parties.² On March 15, 2006, Dr. Lanzer, an orthopedic surgeon, performed arthroscopic medial meniscectomy surgery to repair a medial meniscus tear in Katherine Ripley's left knee. The surgery occurred at Evergreen Medical Center.³ Evergreen supplied and maintained all of the surgical equipment used during the operation.⁴ Evergreen also supplied the nursing and technical staff in the operating room.⁵

¶ 6 Prior to surgery, Teresa Bray, a surgical nurse, assembled a scalpel, which was composed of a Number 11 steel J303 blade and a Number 7 handle.⁶ Dr. Lanzer used that scalpel during the surgery on Ripley on March 15.

¶ 7 During surgery, Dr. Lanzer made two incisions to Ripley's left knee, creating two

portals to provide access to the surgical site within her knee.⁷ During the second incision, the scalpel blade detached from its handle and lodged in Ripley's knee joint.⁸ Neither Dr. Lanzer nor Nurse Bray noticed that the blade had detached from the handle and lodged in Ripley's knee when Dr. Lanzer handed the scalpel's handle back to Bray.⁹ Dr. Lanzer completed the procedure and then closed the two portals made by his initial incisions.¹⁰

¶ 8 After closure of the incisions, Rodney Mora, a surgical technician who joined Bray and the others in the operating room, noted that the Number 11 blade was not in its handle.¹¹ Following a search of the operating room, the blade could not be found.¹²

¶ 9 Dr. Lanzer ordered an x-ray of Ripley's knee, at which time the missing blade was discovered in her knee joint.¹³ While Ripley remained anesthetized, Dr. Lanzer reopened the portals that had previously been sutured closed.¹⁴ After doing so, he located the Number 11 blade within the knee. He then attempted to remove the blade by using a grasping tool.¹⁵ Once he grasped the blade, he attempted to remove J304 it. However, the thin edge of the blade hit soft tissue, bent, and broke into two pieces.¹⁶

¶ 10 Due to the length of time that Ripley had a tourniquet applied to her leg, Dr. Lanzer decided it would be best to close the incisions and terminate attempts to retrieve the broken blade on that day.¹⁷ Before leaving the operating room, Dr. Lanzer and Nurse Bray tested the Number 7 handle with

2. *Tinder v. Nordstrom, Inc.*, 84 Wash.App. 787, 791, 929 P.2d 1209 (1997).

3. Clerk's Papers at 638.

4. Clerk's Papers at 729-30.

5. See Clerk's Papers at 752.

6. Clerk's Papers at 247-48, 933.

7. Clerk's Papers at 731-32.

8. Clerk's Papers at 732.

9. Clerk's Papers at 638, 732.

10. Clerk's Papers at 638-39, 732.

11. Clerk's Papers at 729.

12. Clerk's Papers at 732.

13. Clerk's Papers at 638, 732.

14. Clerk's Papers at 638-39, 732.

15. Clerk's Papers at 227.

16. *Id.*

17. Clerk's Papers at 733-34.

a new blade.¹⁸ When pressure was applied, the new blade came out of the handle. Accordingly, Nurse Bray discarded the defective handle.¹⁹ Dr. Lanzer testified that the handle should not have been used in Ripley's surgery and that it should not be used again.²⁰

¶ 11 Prior to a second surgery the next day, Dr. Lanzer, ordered a CT scan "to find the blade's exact location."²¹ Thereafter, with the assistance of another surgeon, Dr. Lanzer successfully removed the broken blade from the knee joint.²²

¶ 12 Ripley has a fair amount of scarring in her knee from the blade retrieval procedures.²³ She also has persistent problems with pain in the knee, which has limited her walking and weight-bearing activities.²⁴

¶ 13 The Ripleys commenced this lawsuit in June 2006 against Dr. Lanzer, alleging medical malpractice and failure to obtain informed consent. They amended their complaint in April 2007 to join Evergreen, alleging medical malpractice and corporate negligence for failure to furnish supplies and equipment free of defects. In June 2007, Dr. 1305Lanzer moved for summary judgment on the basis that the Ripleys failed to support their claims against him with expert testimony. The Ripleys opposed the motion with expert witness testimony and argued that *res ipsa loquitur* applied. The trial court denied Dr. Lanzer's motion to dismiss the malpractice claim, but dismissed the informed consent claim.

¶ 14 In May 2008, Dr. Lanzer moved a second time for summary dismissal of the Ripleys' remaining claim, following their withdrawal of all disclosed experts as trial witnesses. Evergreen also moved for summary dismissal of the Ripleys' claims. In response to both of these motions, the Ripleys argued that the failure of Dr. Lanzer and Evergreen to account for the missing blade during surgery raised the inference of negligence under the doctrine of *res ipsa*

loquitur. Thus, they were not required to provide expert medical testimony to defeat these motions. Moreover, they also argued that but for this negligence the additional surgery and damages would not have occurred.

¶ 15 The Ripleys also moved for summary judgment against Evergreen. This was based on the theory that spoliation of evidence required the remedy of dismissal.

¶ 16 The trial court granted Dr. Lanzer's motion, concluding that *res ipsa loquitur* did not apply and that expert medical testimony was required. The court granted Evergreen's motion, dismissing the Ripleys' malpractice, corporate negligence, and spoliation claims with prejudice, and entered judgment for Evergreen. The court denied the Ripleys' motion for summary judgment.

¶ 17 The Ripleys appeal.

RES IPSA LOQUITUR

¶ 18 The Ripleys acknowledge that expert medical testimony is generally required to establish the standard of care and causation in medical malpractice cases. But they argue that such expert testimony is not required here because the 1306doctrine of *res ipsa loquitur* supplies the necessary inferences of negligence and causation for their claim against Dr. Lanzer as well as their claim against Evergreen. We agree.

¶ 19 "In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a defendant, this burden may be met by pointing out that there is an absence of evidence in support of the nonmoving party's case. If this initial showing is met, then the plaintiff must present evidence sufficient to raise a material question of fact regarding the essential elements of its claim. This court reviews an order of summary judgment *de novo*, consid-

18. Clerk's Papers at 735.

19. Clerk's Papers at 253.

20. Clerk's Papers at 380, 735.

21. Clerk's Papers at 703.

22. Clerk's Papers at 805-06.

23. Clerk's Papers at 304.

24. *Id.*

ering the facts in the light most favorable to the nonmoving party.”²⁵

*Medical Malpractice Claim
against Dr. Lanzer*

¶20 In Washington, actions for injuries resulting from health care are governed by chapter 7.70 RCW.²⁶ To prevail on their claims, plaintiffs must prove:

- (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
- (2) Such failure was a proximate cause of the injury complained of.^[27]

[1–3] ¶21 Generally, expert testimony is necessary to §307 establish the standard of care for a health care provider in a medical malpractice action.²⁸ Expert testimony is not necessary to establish the standard of care when medical facts are observable to a lay person and describable without medical training.²⁹ For example, “the doctrine of res ipsa loquitur provides an inference of negligence from the occurrence itself which establishes a prima facie case sufficient to present a question for the jury.”³⁰

[4] ¶22 “The doctrine of res ipsa loquitur 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. Thus, it casts

25. *Tinder*, 84 Wash.App. at 790–91, 929 P.2d 1209 (citations omitted).

26. *Miller v. Jacoby*, 145 Wash.2d 65, 72, 33 P.3d 68 (2001).

27. RCW 7.70.040.

28. *Miller*, 145 Wash.2d at 72, 33 P.3d 68 (citing *Harris v. Groth*, 99 Wash.2d 438, 449, 663 P.2d 113 (1983)).

29. *Id.* at 72–73, 33 P.3d 68.

30. *Metro. Mortgage & Sec. Co., Inc. v. Washington Water Power*, 37 Wash.App. 241, 243, 679 P.2d 943, 944 (1984).

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.”³¹

[5, 6] ¶23 “Negligence and causation, like other facts, may of course be proved by circumstantial evidence.”³² “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.”³³

[7] ¶24 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.”^[34]

[8] §308 ¶25 “‘In such cases the jury is permitted to infer negligence.’”³⁵ “‘The doctrine permits the inference of 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.’”³⁶

[9] ¶26 In Washington, courts have long recognized that inadvertently leaving a for-

31. *Id.* (citing *Morner v. Union Pac. R.R.*, 31 Wash.2d 282, 291, 196 P.2d 744 (1948)).

32. *Id.* at 243, 679 P.2d 943.

33. *Id.* (citing RESTATEMENT (SECOND) TORTS § 328 D, Comment b (1965)).

34. *Pacheco v. Ames*, 149 Wash.2d 431, 436, 69 P.3d 324 (2003) (quoting *Zukowsky v. Brown*, 79 Wash.2d 586, 593, 488 P.2d 269 (1971) (internal quotations omitted)).

35. *Id.*

36. *Id.*

foreign object in a patient's body raises the inference of negligence.³⁷

[W]hen a surgeon inadvertently introduces into a wound a foreign substance, closes up the wound, leaving that foreign substance in the body, there being no possibility of any good purpose resulting therefrom, that act constitutes negligence.^[38]

[10-12] ¶ 27 Res ipsa loquitur is ordinarily sparingly applied, "in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential."³⁹ Res ipsa loquitur may apply to both physicians and hospitals.⁴⁰ Whether the doctrine of res ipsa loquitur is applicable to a particular case is a question of law, which we review de novo.⁴¹

[13] ¶ 28 Here, Dr. Lanzer moved for summary judgment with supporting documentation to claim there was no genuine issue of material fact. His motion primarily relied on the fact that the Ripleys no longer had any expert medical witnesses for trial to support their claim of medical negligence.

¶ 29 In response, the Ripleys argued that they did not need a medical expert to support their claim because res ipsa loquitur applies to this case. Specifically, they argued that Dr. Lanzer's failure to notice that a scalpel blade had detached from its handle and remained lodged in Mrs. Ripley's knee joint when he first closed the portals to the surgery site raised the inference of negligence under the doctrine of res ipsa loquitur.

Moreover, they argued that the inference of causation was also shown by the same circumstantial evidence.

¶ 30 Division Three of this court addressed the same questions in *Bauer v. White*.⁴² There, Dr. Travis White, an orthopedic surgeon, unintentionally left a metal positioning pin in the patient's leg after surgery.⁴³ The pin was one of several pins used to hold a drill during surgery, but none of the pins was intended to remain in the patient.⁴⁴ The doctor did not count the pins before closing the surgical wounds.⁴⁵

¶ 31 Following surgery and after the wound was closed, Dr. White x-rayed the patient's leg and discovered the pin inside the tibia.⁴⁶ At that point, the glue holding the prosthesis had already hardened and Dr. White decided to leave the pin in the leg.⁴⁷ The doctor finally removed the pin some seven months later when Mrs. Bauer complained of pain in her tibia.⁴⁸

¶ 32 Following the second surgery, she continued to complain of pain in her leg. Dr. White could not find any objective symptoms other than those that normally flowed from surgery.⁴⁹ Of the seven other physicians to whom Dr. White referred Mrs. Bauer, none found any problem attributable to the pin or the surgery to remove it.⁵⁰

¶ 33 In the suit that followed, the Bauers alleged medical negligence, seeking compensation for the second surgery, pain and suf-

37. *Miller*, 145 Wash.2d at 72, 74, 33 P.3d 68 (holding that expert testimony not needed to assert negligence against the doctor who inadvertently left a portion of a surgical drain in the patient's body after removal); see also *Conrad v. Lakewood General Hospital*, 67 Wash.2d 934, 936-37, 410 P.2d 785 (1966) (holding that doctors were negligent by unintentionally leaving a surgical instrument in the patient's body after surgery); *Bauer v. White*, 95 Wash.App. 663, 976 P.2d 664 (1999) (holding that doctor breached duty of care by leaving foreign object in surgical patient).

38. *McCormick v. Jones*, 152 Wash. 508, 511, 278 P. 181 (1929).

39. *Tinder*, 84 Wash.App. at 792, 929 P.2d 1209 (quoting *Morner*, 31 Wash.2d at 293, 196 P.2d 744).

40. *Miller*, 145 Wash.2d at 72, 33 P.3d 68.

41. *Pacheco*, 149 Wash.2d at 436, 69 P.3d 324.

42. 95 Wash.App. 663, 976 P.2d 664, review denied, 139 Wash.2d 1004, 989 P.2d 1140 (1999).

43. *Id.* at 664, 976 P.2d 664.

44. *Id.* at 665, 976 P.2d 664.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

fering associated with that surgery, and the resulting scar from that surgery.⁵¹ Both parties moved for summary judgment.⁵² Dr. White supported his motion with an expert opinion by Dr. William Lanzer stating there was no standard of care for counting surgical pins.⁵³ The Bauers opposed the motion, but without expert medical testimony regarding the standard of care for orthopedic surgeons in Washington.⁵⁴ The question before the court was whether the Bauers were required to support their medical negligence claim with expert medical testimony on the standard of care to survive summary dismissal.⁵⁵ Based on the lack of such testimony, the trial court summarily dismissed the action.⁵⁶

¶ 34 On appeal, the *Bauer* court observed that this state has long recognized that a surgeon who unintentionally leaves a foreign object in a patient's body is negligent.⁵⁷ Therefore, expert testimony on the standard of care is only necessary if the medical facts are not observable by a lay person.⁵⁸ Under the circumstances of that case, the medical facts were observable to a lay person.⁵⁹ In short:

[W]hen a surgeon inadvertently introduces into a wound a foreign substance, closes up the wound, leaving that foreign substance in the body, there being no possibility of any good purpose resulting therefrom, the act constitutes negligence.⁶⁰

¶ 35 Here, as in *Bauer*, Dr. Lanzer inadvertently left the blade of a scalpel in Ripley's knee when he first closed the surgical incisions. There was no good purpose in

doing so, and Dr. Lanzer has not argued otherwise. The very fact that he reopened the incisions in Mrs. Ripley's leg in his unsuccessful attempts to retrieve the missing blade once he discovered that all sharps had not been accounted for shows that there was no good purpose for leaving the blade in Ripley's knee.

¶ 36 More importantly, as in *Bauer*, the Ripleys have established all three of the requisite elements of *res ipsa loquitur*, relieving them from the requirement to provide expert medical evidence to survive Dr. Lanzer's summary judgment motion. Considering the elements of *res ipsa loquitur* out of order, it is undisputed that the Ripleys satisfied the third element of that doctrine in this case. There is no evidence that the injury-causing accident or occurrence is due to any voluntary action or contribution on Ripley's part.⁶¹ She was anesthetized when Dr. Lanzer failed to notice that the scalpel blade dislodged from the handle and remained in her knee joint when he closed the surgical portals for the first time.

¶ 37 Considering the first element of *res ipsa loquitur*, the question is whether "the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence."⁶² The supreme court in *Zukowsky v. Brown*⁶³ explained this element:

When are the circumstances of an occurrence sufficient to support a reasonable inference of negligence against a particular

51. *Id.* at 666, 976 P.2d 664.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 667, 976 P.2d 664.

58. *Id.*

59. *Id.*

60. *Id.* at 668, 976 P.2d 664 (quoting *McCormick*, 152 Wash. at 510-11, 278 P. 181).

61. *Miller*, 145 Wash.2d at 68, 74-75, 33 P.3d 68 (concluding that a patient undergoing surgery for kidney stones and to repair a malformed right kidney did not contribute to the injury causing event during surgery); *Zukowsky*, 79 Wash.2d at 596, 488 P.2d 269 (concluding that there was nothing so unreasonable or abnormal in the plaintiff's use of a helm seat of a boat to support a claim of her negligence or prevent the inference of defendant's negligence arising in the first instance).

62. See *Pacheco*, 149 Wash.2d at 436, 69 P.3d 324 (quoting *Zukowsky*, 79 Wash.2d at 593, 488 P.2d 269).

63. 79 Wash.2d 586, 488 P.2d 269 (1971).

defendant? We have long recognized that the answer to this question can only be determined in the context of each case. However, some generalities can be gleaned from our cases. The most fundamental of these is that the inference of negligence must be legitimate. That is, the distinction between what is mere conjecture and what is reasonable inference from the facts and circumstances must be recognized. Thus, it is not enough that plaintiff has suffered injury or damage, for such things may result without negligence. *It is necessary that the manner and circumstances of the damage or injury be of a kind that do not ordinarily happen in the absence of someone's negligence.*⁶⁴

¶ 38 Here, as we have already stated, it is undisputed that Dr. Lanzer unintentionally left the blade of the scalpel in the knee when it detached from the handle during the second incision. It is also undisputed that he closed the portals made by the incisions before discovering that the blade was missing. He only discovered the location of the missing blade after he ordered an x-ray that indicated the blade was still inside the knee joint.⁶⁵ Thereafter, Dr. Lanzer "opened up our portals" and found the Number 11 blade that he then unsuccessfully attempted to remove on March 15.⁶⁶ As Dr. Lanzer candidly admitted during his deposition, "[T]he blade came off the handle because the handle would not keep the 313blade on . . . It [the handle] was either defective or worn or a combination of both or whatever."⁶⁷

¶ 39 Dr. Lanzer does not and could not argue that a surgeon who leaves a scalpel blade in a patient without noticing the blade is there and closes the surgical portals is doing something that ordinarily happens in the absence of negligence. Accordingly, the

64. *Id.* at 594–95, 488 P.2d 269 (emphasis added).

65. Clerk's Papers at 948.

66. Clerk's Papers at 799–800.

67. Clerk's Papers at 229.

68. See *Pacheco*, 149 Wash.2d at 436, 69 P.3d 324 (quoting *Zukowsky*, 79 Wash.2d at 593, 488 P.2d 269).

Ripleys have satisfied the first element of the doctrine.

¶ 40 The final question is whether "the injuries are caused by an agency or instrumentality within the exclusive control of the defendant," as the second element requires.⁶⁸ Viewed in the light most favorable to the Ripleys, the evidence shows that Dr. Lanzer had actual control of the scalpel at the time its blade lodged in Ripley's knee.

¶ 41 *Zukowsky* again supplies the relevant standard. There, the supreme court described this element to require:

Of course, to be relevant, the evidence must support a legitimate inference that *defendant* was negligent. This is generally reflected in the requirement that the instrumentality which caused the damage or injury be in the *actual or constructive control* of defendant. To satisfy this requirement, the degree of control must be exclusive to the extent that it is a legitimate inference that defendant's control extended to the instrumentality causing injury or damage. In its proper sense, this "condition" states nothing more than 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."⁶⁹

¶ 42 Here, Dr. Lanzer stated in his deposition that he was the person using the scalpel when the blade lodged in Mrs. 314Ripley's knee.⁷⁰ He testified that he failed to notice that the blade was detached when he handed the handle back to Nurse Bray.⁷¹ She also failed to notice that the blade was missing.⁷²

¶ 43 Notwithstanding Dr. Lanzer's declaration following his deposition, in which he disavowed his control over the scalpel, the evidence viewed in a light most favorable to the Ripleys shows that he had control of the

69. *Zukowsky*, 79 Wash.2d at 595, 488 P.2d 269 (quoting Prosser, *Res Ipsa Loquitur in California*, 37 Cal. L.Rev. 183, 201 (1940)) (emphasis added).

70. Clerk's Papers at 732.

71. Clerk's Papers at 731–32.

72. Clerk's Papers at 732.

scalpel at the time of Ripley's injury. This was sufficient to establish the second element of the doctrine of *res ipsa loquitur*.

[14] ¶44 The other necessary inference of consequence to the application of the doctrine to this case is that of causation. As the *Bauer* court observed, issues of proximate cause and resulting damages are ordinarily jury questions.⁷³ As we have stated, the cases recognize that *res ipsa loquitur* provides an inference of negligence from an event that does not ordinarily occur in the absence of someone's negligence.⁷⁴ Thus, one who properly invokes the doctrine establishes a *prima facie* case sufficient to present a question for the jury. It then casts upon the defendant the duty to come forward with evidence to rebut the inference of negligence from plaintiff's *prima facie* case.⁷⁵

[15] ¶45 Likewise, the doctrine also permits a *prima facie* case of causation to be established by the same circumstantial evidence used to create the inference of negligence.⁷⁶ Here, as in *Bauer*, a *prima facie* case of causation is established by the same circumstantial evidence that establishes a *prima facie* case of negligence: leaving a scalpel blade in Ripley's knee. Thus, Dr. Lanzer is also permitted to present evidence at trial to rebut the inference of causation that the Ripleys established during the summary judgment proceeding.

¶46 Because the Ripleys have presented evidence establishing all the requisite elements of *res ipsa loquitur*, they were not required to present expert medical evidence to avoid summary judgment. Application of the doctrine also gives rise to inferences of negligence and causation, raising genuine is-

73. *Bauer*, 95 Wash.App. at 669, 976 P.2d 664.

74. *Metro. Mortgage*, 37 Wash.App. at 243-44, 679 P.2d 943.

75. *Id.* at 243, 679 P.2d 943.

76. *Id.*

77. *Compare Pacheco*, 149 Wash.2d at 444, 69 P.3d 324 (a patient is entitled to a *res ipsa loquitur* instruction where a defendant dentist drilled on the wrong side of that patient's mouth and the dentist's evidence suggested but did not

issues of material fact for a jury to decide. At trial, the court will decide after the presentation of all the evidence whether an instruction on *res ipsa loquitur* should be given.⁷⁷ Summary dismissal of their claim was inappropriate.

¶47 Dr. Lanzer necessarily concedes that the Ripleys established the third element of *res ipsa loquitur*, that she was not responsible for the injury-causing accident or occurrence, by failing to argue otherwise. But he insists that she failed to establish the first two elements of *res ipsa loquitur*. As explained, we disagree with his assertions.

¶48 First, we note that he does not mention *Bauer* in his briefing. This is a case on which the Ripleys heavily relied below and on appeal. We conclude that Dr. Lanzer's omission of any discussion or attempt to distinguish *Bauer* from this case in his briefing is telling.

¶49 Second, Dr. Lanzer argues that "Ripley does not and cannot tie the temporary closing of the portal incisions during the March 15 arthroscopic surgery to the injuries for which she seeks damages."⁷⁸ But as the *Bauer* court noted, "The question is whether the foreign object was inadvertently³¹⁶ left [in the patient], *not for how long*."⁷⁹ Ripley is entitled to any damages proximately caused by negligence in failing to remove the foreign object, including scarring, pain, and suffering.

¶50 Third, Dr. Lanzer attempts to recast Mrs. Ripley's injury-producing occurrence to the "fact that the scalpel blade came off the handle and lodged in Mrs. Ripley's knee and then broke into fragments when Dr. Lanzer

completely explain how the event causing incident may have occurred) and *Covey v. Western Tank Lines*, 36 Wash.2d 381, 391, 218 P.2d 322 (1950) (if evidence is completely explanatory of how the accident occurred such that no inference is left that the accident may have happened in another way, the doctrine of *res ipsa loquitur* does not operate).

78. Brief of Respondent William L. Lanzer, M.D. at 15.

79. *Bauer*, 95 Wash.App. at 669, 976 P.2d 664 (emphasis added).

attempted to retrieve it.”⁸⁰ But as the Ripleys have argued, the inference of negligence arises from “inadvertently leaving a foreign object [the blade] in a patient’s body [Ripley’s knee] after closing [the] surgical incision[s].”⁸¹ We do not read the attempts by Dr. Lanzer to retrieve the imbedded blade after reopening the portals in Mrs. Ripley’s leg to be the underlying basis for the *res ipsa loquitur* claim. Rather, the focus is on Dr. Lanzer’s failure to notice the missing blade when he handed the Number 7 handle back to Nurse Bray and then closed the incisions before a sharps count was taken following the scheduled procedure. The attempt here to blur the distinction between the completion of the scheduled surgical procedure and the subsequent attempt to retrieve the missing blade is not persuasive.

¶ 51 Fourth, Dr. Lanzer also claims that he did not have exclusive control over the scalpel based on the fact that he “did not own, keep, maintain, service or test” the equipment. But these are not the tests. Rather, “actual or constructive control” is. This record shows that Dr. Lanzer had the scalpel in his hand when the blade came loose and lodged in the patient’s knee. Viewed in the light most favorable to the Ripleys, this constitutes actual control.

¶ 52 Fifth, Dr. Lanzer also claims there is no showing of proximate cause by the Ripleys. We disagree on the bases we have already discussed in this opinion. On this record, the inferences of negligence and causation that arise from § 31, unintentionally leaving a foreign object in Mrs. Ripley’s knee are sufficient to create genuine issues of material fact for trial.⁸²

80. Brief of Respondent William L. Lanzer, M.D. at 20.

81. Brief of Appellants Katherine and Daniel Ripley at 21.

82. See *Metro. Mortgage*, 37 Wash.App. at 243, 679 P.2d 943 (doctrine of *res ipsa loquitur* provides inference of negligence that establishes a *prima facie* case sufficient to present a question for the jury).

83. 152 Wash. 508, 278 P. 181 (1929).

¶ 53 As *McCormick v. Jones*⁸³ and *Bauer* make clear, the Ripleys are entitled to all damages that were proximately caused from such negligence in the event the jury determines that Dr. Lanzer’s failure to notice the missing blade before closing the initial incisions was negligent.⁸⁴ Although Dr. Lanzer claims that the Ripleys cannot prove that the reopening and reclosing of the portals on March 15 caused scarring or pain apart from what otherwise occurred on March 16, that is for a jury to decide, not a judge.⁸⁵

¶ 54 Finally, Dr. Lanzer faults the Ripleys for what they do not argue.⁸⁶ For example, he faults them for not arguing that the blade fell off because of negligence on his part. He also faults them for not arguing that the blade fell in a place within the knee joint where he could have retrieved it had he noticed that it was missing before he closed the portals. And he also faults them for not arguing that the blade fractured because of his negligence in retrieving it.

¶ 55 The simple answer to these arguments is that *res ipsa loquitur* does not require the Ripleys to make any of these arguments. Rather, as we have discussed, it requires that they establish the three elements of the doctrine. Viewing the evidence in the light most favorable to the Ripleys, inferences of negligence and causation are present in this case. Dr. Lanzer is free to present evidence to rebut these inferences at trial.

§ 318 ¶ 56 As this court said in *Tinder v. Nordstrom*,⁸⁷ “‘only where the facts and the demands of justice make its application essential,’” do we apply *res ipsa loquitur*.⁸⁸ Here, Dr. Lanzer left the scalpel blade in his patient’s knee when he closed the incisions

84. See *Bauer*, 95 Wash.App. at 669, 976 P.2d 664 (issues of proximate cause and resulting damages are jury questions).

85. See *id.*

86. Brief of Respondent William L. Lanzer, M.D. at 15–16.

87. 84 Wash.App. 787, 929 P.2d 1209 (1997).

88. *Id.* at 792, 929 P.2d 1209 (quoting *Morner*, 31 Wash.2d at 293, 196 P.2d 744).

during the first surgery. The facts as to what took place that resulted in this failure are peculiarly within the knowledge of Dr. Lanzer and Evergreen. Only after searching the operating room and taking an x-ray of Ripley's leg did he locate the missing blade. These facts and the demands of justice require that a jury determine whether the inferences of negligence and causation that arise from these facts require the imposition of liability on Dr. Lanzer. No expert medical testimony was required to raise the inferences in this case.

*Medical Malpractice Claim
against Evergreen*

[16] ¶ 57 The Ripleys also argue that the trial court improperly dismissed their medical malpractice claim against Evergreen. We agree.

¶ 58 Evergreen does not contest that the Ripleys have established the third element of *res ipsa loquitur*. Mrs. Ripley had nothing to do with causing the injury she suffered.

¶ 59 As for the first element, the Ripleys must show that "the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence."⁸⁹ They produced evidence that the operating room nurses share responsibility with the surgeon to determine the location of the surgical instruments before and after they are used.⁹⁰ Nurse Bray testified at her deposition that she did not notice that the scalpel was missing its blade when Dr. Lanzer handed it back to her ¹³¹⁹after making the incisions in Mrs. Ripley's leg.⁹¹ And Dr. Lanzer testified that he saw no reason why Nurse Bray could not have seen that the blade of the scalpel was missing when he handed it back to her.⁹² In fact, it was not until a surgical technician, Rodney Mora, discovered that the blade was missing

that Dr. Lanzer and others in the operating room searched for the missing blade.⁹³ Dr. Lanzer ultimately determined by the use of an x-ray of the patient's knee that he unintentionally left the missing blade in her knee when he closed the portals to the surgical site the first time. Evergreen does not and could not argue that a surgical nurse who fails to notice that a scalpel handed back to her by the surgeon without its blade is something that the nurse would ordinarily fail to do in the absence of negligence. The Ripleys have established this element.

¶ 60 As for the second element, the question is whether "the injuries are caused by an agency or instrumentality within the exclusive control of the defendant."⁹⁴ Viewed in the light most favorable to the Ripleys, the evidence shows that Evergreen, had responsibility for the proper functioning of the scalpel and blade at the time that it caused Ripley's injury. Moreover, as Dr. Lanzer admitted at his deposition, when he removed the scalpel handle from Ripley's knee, there was no "reason why the nurse [Bray] couldn't have visualized the fact that the blade was missing."⁹⁵

¶ 61 In *Hogland v. Klein*,⁹⁶ our supreme court concluded that the control element of the *res ipsa loquitur* doctrine does not necessarily require "actual physical control" but ¹³²⁰refers instead to the "right of control at the time of the accident."⁹⁷ In explaining this type of control, the court stated:

Legal control or responsibility for the proper and efficient functioning of the instrumentality which caused the injury and a superior, if not exclusive, position for knowing or obtaining knowledge of the facts which caused the injury provide a

89. See *Pacheco*, 149 Wash.2d at 436, 69 P.3d 324 (quoting *Zukowsky*, 79 Wash.2d at 593, 488 P.2d 269).

90. Clerk's Papers at 961.

91. Clerk's Papers at 964.

92. Clerk's Papers at 948.

93. *Id.*

94. See *Pacheco*, 149 Wash.2d at 436, 69 P.3d 324 (quoting *Zukowsky*, 79 Wash.2d at 593, 488 P.2d 269).

95. Clerk's Papers at 732.

96. 49 Wash.2d 216, 298 P.2d 1099 (1956).

97. *Id.* at 219, 298 P.2d 1099.

sufficient basis for application of the doctrine.^{98]}

¶ 62 Here, the Ripleys produced evidence that the operating room nurses share responsibility with the surgeon to determine the condition and location of the surgical instruments before and after they are used.⁹⁹ Moreover, Nurse Bray stated in her deposition that it was her responsibility as the scrub nurse to assemble the equipment and instruments for the case and to assist the surgeon during surgery.¹⁰⁰ Nurse Bray also stated that when Dr. Lanzer handed the instrument back to her after making the incisions she did not examine it or observe the blade was missing.¹⁰¹ This evidence shows that Evergreen had “responsibility for the proper and efficient functioning of the instrumentality which caused the injury” and were in a position to know that the blade had detached from the scalpel handle at relevant times after the incisions. In light of *Hogland*, Evergreen’s argument that neither Dr. Lanzer nor its nurses had exclusive control of the scalpel and blade is unpersuasive.

¶ 63 Evergreen argues that *res ipsa loquitur* does not apply because it is beyond the expertise of a lay person to speculate whether it was negligent for the missing blade to initially go unnoticed. This argument mischaracterizes what a jury is asked to do in a proper *res ipsa loquitur* case. ¹³²¹The cases make clear that if a plaintiff establishes the three elements of *res ipsa loquitur*, an inference of negligence on the part of the defendant arises.¹⁰² The defendant, of course, is entitled to introduce its own evidence to refute the inference. In any event, the jury is not speculating when it is performing its traditional function of deciding whether the inference of negligence supports imposition of liability on Evergreen. The same type of

98. *Id.* at 219, 298 P.2d 1099.

99. Clerk’s Papers at 780, 1156.

100. Clerk’s Papers at 961.

101. *Id.* at 964.

102. See *Metro. Mortgage*, 37 Wash.App. at 243, 679 P.2d 943 (*res ipsa loquitur* doctrine recognizes that occurrence is of itself sufficient to establish prima facie the fact of negligence on the part of defendant).

analysis applies to the inference of causation that also arises from the same circumstantial evidence as that raising the inference of negligence.¹⁰³

¶ 64 Evergreen also argues that it is reasonable, especially in an operating environment that is dark during the procedure, as occurred here, that something will be left behind in the patient during an operation. To the extent that this argument implies that a hospital could never be held liable under the theory of *res ipsa loquitur* for failing to notice that its instruments have been left inside a patient, we simply reject it as obviously incorrect.

¶ 65 Evergreen argues that the purpose of a “sharps count” at the end of the procedure is to locate any items that may have been left behind, which occurred here. When the staff alerted the doctor about the missing blade, he attempted to remove it and stopped only because, in his medical judgment, it was advisable to do so. But Evergreen noticed the missing sharp only *after* the surgeon had closed the incisions. This does not avoid the harm to the patient for failing to notice the missing sharp *before* the incisions were closed.

¶ 66 Evergreen cites two federal cases to support its argument. Neither is persuasive for purposes of this case.

¹³²²¶ 67 In *Callahan v. Cho*,¹⁰⁴ a small fragment of a suturing needle lodged in the plaintiff’s muscle tissue during a hip replacement surgery.¹⁰⁵ The doctor searched for the fragment but was unable to locate it without destroying significant muscle.¹⁰⁶ Based on his experience, the doctor anticipated that the fragment would not cause the plaintiff any harm and decided not to remove

103. See *id.* (“A *res ipsa loquitur* case is . . . 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 defendant’s relation to it.”).

104. 437 F.Supp.2d 557 (E.D.Va.2006).

105. *Id.* at 560.

106. *Id.*

it.¹⁰⁷ The court dismissed the plaintiff's claim for malpractice on summary judgment because the plaintiff failed to present the required medical expert certificate required by West Virginia law and because the doctrine of *res ipsa loquitur* did not apply.¹⁰⁸

¶ 68 Significantly, whatever the law is in West Virginia we are not persuaded that it applies here. In discussing the application of *res ipsa loquitur*, the court noted that the doctrine could only be invoked in cases where the defendant's negligence is the only inference that can reasonably be drawn from the circumstances.¹⁰⁹ But *res ipsa loquitur* applies more broadly under Washington law.¹¹⁰ Moreover, unlike in our case, the *Callahan* court noted that the doctor had not unwittingly or inadvertently done anything.¹¹¹ Here, the contrary facts were established.

¶ 69 In *Wagner v. Deborah Heart & Lung Center*,¹¹² the court dismissed plaintiff's malpractice claim because he failed to produce expert testimony supporting his negligence claim, and *res ipsa loquitur* did not apply. There, the ¹³²³surgeon intentionally left the tip of an awl imbedded in the sternum after surgery because, in his medical judgment, the risks were too high to remove it at that time.¹¹³ Two years later, the awl tip was removed when infection was suspected.¹¹⁴ The court rejected the plaintiff's argument that *res ipsa loquitur* applied, because the doctor had known about the fragment and intentionally left the tip in the sternum, distinguishing it from cases where a foreign object had inadvertently been left and discovered after closing the incision.¹¹⁵

107. *Id.*

108. *Id.* at 564.

109. *Id.* at 563.

110. See *Pacheco*, 149 Wash.2d at 439-40, 69 P.3d 324 (plaintiff may be entitled to rely on *res ipsa loquitur* doctrine even if the defendant's testimony, if believed by the fact finder, would explain how event causing injury occurred).

111. See *Callahan*, 437 F.Supp.2d at 563.

112. 247 N.J.Super. 72, 588 A.2d 860 (1991).

113. *Id.* at 863.

¶ 70 In contrast, Evergreen's surgical team did not inspect the scalpel or notice the blade had become detached until the sharps count after the wound was closed. Thus, Evergreen inadvertently failed to bring to the attention of the surgeon that the blade was missing before the surgeon closed the incisions.

¶ 71 Evergreen next argues that the "foreign body *res ipsa* cases"¹¹⁶ are distinguishable from our case because they represent cases where the "count" did not work as it was supposed to. We disagree.

¶ 72 Neither *Bauer* nor *McCormick* involved count procedures. In fact, evidence presented in *Bauer* suggested that counting positioning pins was not standard procedure for the surgical team.¹¹⁷ Leaving the foreign object in the patient's body and then closing was enough to raise the inference of negligence in both cases. Significantly, nothing in these cases suggests that where a sharps count reveals that a foreign object is retained in the patient's body, negligence is somehow forgiven.

¹³²⁴CORPORATE NEGLIGENCE

[17] ¶ 73 The Ripleys argue the trial court improperly dismissed their corporate negligence claim against Evergreen. We disagree.

[18] ¶ 74 The essential elements of negligence are: (1) the existence of a duty owed to the complaining party; (2) a breach; (3) resulting injury; and (4) proximate cause between the claimed breach and resulting injury.¹¹⁸

114. *Id.* at 861-62.

115. *Id.* at 863.

116. *McCormick*, 152 Wash. 508, 278 P. 181 (no indication when lost sponge detected, but removed up to six weeks after surgery); *Conrad*, 67 Wash.2d 934, 410 P.2d 785 (lost surgical instrument not discovered and removed until approximately six weeks after surgery); *Wharton v. Warner*, 75 Wash. 470, 135 P. 235 (1913) (12-inch spring undetected in patient for 15 days).

117. *Bauer*, 95 Wash.App. at 666, 976 P.2d 664.

118. *Pedroza v. Bryant*, 101 Wash.2d 226, 228, 677 P.2d 166 (1984).

[19–22] ¶ 75 Washington courts recognize the doctrine of corporate negligence, which “imposes on [a] hospital a nondelegable duty owed directly to the patient, regardless of the details of the doctor-hospital relationship.”¹¹⁹ Under this doctrine, a hospital owes its patients the duty to furnish to the patient supplies and equipment free of defects, among others.¹²⁰ The standard of care to which the hospital will be held is that of an average, competent health care facility acting in the same or similar circumstances.¹²¹ This standard is generally defined by the Joint Commission on Accreditation of Hospitals (JCAH) standards and the hospital’s by-laws.¹²² In general, expert testimony is required when an essential element in the case is best established by opinion that is beyond the expertise of a lay person.¹²³

[23] ¶ 76 Here, the Ripleys alleged in their complaint that Evergreen had violated its duty to furnish supplies and equipment free of defects under a corporate negligence theory. As evidence of breach, the Ripleys produced deposition statements by Dr. Lanzer and Nurse Bray that the 325handle of the scalpel used in surgery was defective. But the Ripleys failed to produce any expert testimony for consideration by the trial court that the scalpel failed to meet JCAH standards or other hospital standards adopted by Evergreen or that Evergreen’s alleged lack of equipment policies and procedures somehow breached this duty.¹²⁴ The Ripleys argued at oral argument before this court that Dr. Lanzer’s testimony that the handle was defective is expert testimony supporting their claim. But the record fails to show they pointed this out to the court below.

119. *Id.* at 229, 233, 677 P.2d 166.

120. *Douglas v. Freeman*, 117 Wash.2d 242, 248, 814 P.2d 1160 (1991).

121. *Pedroza*, 101 Wash.2d at 233, 677 P.2d 166.

122. *Id.* at 233–34, 677 P.2d 166.

123. *Harris*, 99 Wash.2d at 449, 663 P.2d 113 (citing 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 300 (1982)).

124. *Cf. Schoening v. Grays Harbor Comm. Hosp.*, 40 Wash.App. 331, 335–36, 698 P.2d 593 (1985) (concluding that where plaintiff’s expert opined

Moreover, other than the statement in the opening brief, there is no argument or citation to the record on this point. Accordingly, we do not consider this argument further.¹²⁵

¶ 77 The Ripleys argue that they presented evidence Evergreen failed to furnish surgical supplies and equipment free of defects, but they cite to no authority to support their position that no expert testimony is required here. In addition, the Ripleys fail to explain how the circumstances here entitle them to the *res ipsa loquitur* presumption that Evergreen failed to provide supplies and equipment free of defects. Notably, in support of the causation element of this claim, the Ripleys produced only a report from Mrs. Ripley’s treating physician that indicates she has had debilitating scarring, pain, and trouble walking since the blade retrieval procedure. Significantly, nothing in the report states the doctor’s opinion that the procedure caused Mrs. Ripley’s problems.

[24] 326 ¶ 78 The Ripleys also argue for the first time on appeal that Evergreen failed to supply competent staff. We do not consider this argument for the reason we previously stated.

SPOILIATION

[25] ¶ 79 The Ripleys argue that the trial court erred in dismissing their claim because Evergreen allegedly intentionally destroyed key evidence when Nurse Bray threw away the defective scalpel handle after the surgery. They contend the scalpel handle was crucial evidence and its destruction severely prejudiced their case. They argue spoliation

hospital violated and failed to maintain required minimum medical standards of care, a question of fact remained and summary dismissal of corporate negligence claim was improper).

125. *See Wagner Dev. Inc. v. Fidelity and Deposit Co. of Maryland*, 95 Wash.App. 896, 898 n. 1, 977 P.2d 639 (1999) (limiting appellate review of a summary judgment order to only those facts in the record that were considered by the trial court); *see also State v. Bugai*, 30 Wash.App. 156, 158, 632 P.2d 917 (1981) (“[C]ases on appeal are decided only from the record, and [i]f the evidence is not in the record it will not be considered.” (quoting *State v. Wilson*, 75 Wash.2d 329, 332, 450 P.2d 971 (1969))).

entitles them to judgment in their favor. They are mistaken.

[26–28] ¶ 80 Spoliation is defined as the intentional destruction of evidence.¹²⁶ In deciding whether to apply a sanction, courts consider the potential importance or relevance of the missing evidence and the culpability or fault of the adverse party.¹²⁷ We review a trial court's decision regarding sanctions for discovery violations for an abuse of discretion.¹²⁸

¶ 81 First, it is unclear that the scalpel handle used in Mrs. Ripley's surgery is important to the litigation. Significantly, the record contains testimony from Dr. Lanzer and others to the effect that the handle would not properly hold a blade and was defective. In view of this admission, it is unclear to this court why the discarded handle is important to this litigation.

¶ 82 Second, at the time that the nurse discarded the broken scalpel handle, the Ripleys' lawsuit had not commenced and no request had been made to retain the handle. On these facts, we see no bad faith or other reason to show that this act was intended to destroy important evidence.

¶ 83 The Ripleys argue the trial court should have sanctioned Evergreen for spoliation by granting judgment in their favor. But the Ripleys fail to show how the trial court's decision to deny summary judgment in their favor—the ultimate sanction—was an abuse of discretion. Moreover, it is unclear how the Ripleys are entitled to this remedy where their claim was properly dismissed for lack of evidence to support it.

*Ripleys' Motion for Partial
Summary Judgment*

[29] ¶ 84 The Ripleys argue they are entitled to summary judgment against Evergreen because *res ipsa loquitur* applies. We disagree.

¶ 85 In their motion below, the Ripleys argued they were entitled to partial summary judgment on the issue of liability for

126. *Henderson v. Tyrrell*, 80 Wash.App. 592, 605, 910 P.2d 522 (1996).

127. *Id.* at 607, 910 P.2d 522.

both claims against Evergreen, permitting a trial on damages.

¶ 86 The trial court did not err in denying their motion. Assuming the Ripleys are entitled to the *res ipsa loquitur* presumption, genuine issues of material fact remain regarding Evergreen's liability for medical malpractice. Furthermore, the Ripleys' corporate negligence claim was properly dismissed for a lack of evidence to support the claim.

[30] ¶ 87 The Ripleys assign error to the final judgment in favor of Evergreen entered pursuant to CR 54(b), but make no separate argument focused on this court rule. Accordingly, we do not address that assignment.

¶ 88 We reverse the summary judgment of dismissal in favor of Dr. Lanzer and the summary dismissal of the medical malpractice claim against Evergreen. We affirm the summary dismissal of the corporate negligence claim against Evergreen and the denial of summary judgment in favor of the Ripleys against Evergreen for spoliation. We also remand for further proceedings.

WE CONCUR: SCHINDLER, C.J., and
ELLINGTON, J.



152 Wash.App. 351

STATE of Washington, Respondent,

v.

Stephanie Leann McCARTY, Appellant.

No. 37693–8–II.

Court of Appeals of Washington,
Division 2.

Sept. 15, 2009.

Background: In prosecution of defendant for manufacture of marijuana, state filed

128. *Id.* at 604, 910 P.2d 522.

84 Wash.App. 787

1997 Cheryl TINDER, Appellant,

v.

NORDSTROM, INC., dba Nordstroms,
Respondent.

No. 37078-2-I.

Court of Appeals of Washington,
Division 1.

Jan. 27, 1997.

Department store customer who was injured when escalator she was riding while carrying packages abruptly stopped brought action against store. Store moved for summary judgment, and the Superior Court, King County, Richard Eadie, J., granted motion. Customer appealed, and the Court of Appeals, Baker, C.J., held that: (1) abrupt stop of escalator was not type of event which would occur in absence of negligence and allow application of res ipsa loquitur, and (2) inference of negligence was not warranted as store was not insurer of customers.

Affirmed.

1. Negligence ⇌ 121.2(3.1)

Doctrine of res ipsa loquitur is applied in exceptional cases, when supported by facts of case and demands of justice.

2. Negligence ⇌ 121.2(2)

Doctrine of res ipsa loquitur is a method of proof, and not a separate and additional form of negligence.

3. Negligence ⇌ 121.2(2, 10)

Plaintiff who successfully establishes elements of res ipsa loquitur is entitled to inference of negligence, and because such plaintiff is, in effect, spared necessity of establishing complete prima facie case of negligence against defendant, doctrine is to be used sparingly.

4. Negligence ⇌ 136(6)

Whether doctrine of res ipsa loquitur is applicable is question of law.

5. Negligence ⇌ 121.2(6)

Doctrine of res ipsa loquitur recognizes that injurious occurrence may be of such a nature that occurrence is of itself sufficient to establish prima facie the fact of negligence on part of defendant, without further or direct proof thereof.

6. Negligence ⇌ 121.2(12)

In deciding whether doctrine of res ipsa loquitur applies, court examines whether reasonable inference of negligence exists, and whether such an inference is supported by circumstances can only be determined in context of each case.

7. Negligence ⇌ 121.2(3.1)

In order for doctrine of res ipsa loquitur to apply, it must be established that (1) accident or occurrence producing injury is of kind which ordinarily does not happen in absence of someone's negligence, (2) injuries were caused by agency or instrumentality within exclusive control of defendant, and (3) injury-causing accident or occurrence was not due to any voluntary action or contribution on part of plaintiff; if elements are not satisfied, no presumption of negligence can be maintained.

8. Negligence ⇌ 121.2(6)

First element of test for application of res ipsa loquitur, which requires that accident or occurrence producing injury is of kind which ordinarily does not happen in absence of negligence, is met if, in the abstract, there is reasonable probability that incident would not have occurred in absence of negligence; mere occurrence of accident and injury does not necessarily infer negligence.

9. Negligence ⇌ 121.2(6)**Physicians and Surgeons ⇌ 13.60**

Three types of situations which result in injury exist which do not normally occur absent negligence, and which will warrant application of doctrine of res ipsa loquitur: included are situations where (1) act causing injury is palpably negligent, such as leaving foreign objects in patient, (2) general experience teaches that result would not be expected without negligence, and (3) proof by ex-

perts in exotic field creates inference that negligence caused injuries.

10. Carriers ⇨316(10)

Sudden and abrupt stop of escalator in department store, without any noises or motions which would indicate obvious malfunction, was not type of event which would not normally occur absent negligence, and thus, doctrine of *res ipsa loquitur* was not applicable to action against store by customer who was injured when escalator stopped.

11. Carriers ⇨316(10)

Negligence ⇨121.2(6)

Mechanical devices, like escalators and elevators, can wear out or break without negligence, and thus, failure of such a device is not event that would not normally occur in absence of negligence, as will warrant application of *res ipsa loquitur*.

12. Negligence ⇨97, 121.2(7, 8)

With advent of comparative fault, elements of *res ipsa loquitur* of absence of plaintiff's contribution in causing accident and defendant's exclusive control over instrumentality causing injury are generally merged, and are analyzed together.

13. Negligence ⇨121.2(7)

Inference of negligence gained by *res ipsa loquitur* must be such that defendant would be responsible for any negligence connected with it.

14. Negligence ⇨121.2(8)

Exclusive control by defendant of agency or instrumentality causing injury, as required for application of doctrine of *res ipsa loquitur*, does not mean actual physical control, but rather refers to responsibility for proper and efficient functioning of instrumentality that caused injury; however, exclusive control is not established merely by showing that defendant has superior ability to investigate and possibly determine causation.

15. Carriers ⇨316(10)

Inference of negligence on part of department store was not warranted, and doctrine of *res ipsa loquitur* was not applicable, in action brought by customer who was in-

jured when escalator she was riding came to sudden and abrupt stop; store was not insurer of safety of customers who chose to ride escalator.

16. Carriers ⇨280(1)

Common carrier owes highest degree of care to its passengers, commensurate with practical operation of its conveyance at time and place in question and consistent with practical operation of its business; however, duty does not make common carrier insurer of its passengers' safety.

17. Carriers ⇨280(4)

Duty of care owed by department store to customers riding escalator did not require store to either refrain from selling customer more goods than she could safely manage on escalator or to assist her when she could not manage escalator, and thus, store was not liable for injuries suffered by customer when escalator abruptly stopped; no prior history of similar accidents existed, and store took precautionary measures by posting warning signs, providing regular maintenance, and providing elevators as alternate means of travel.

1799 Roy G. Brewer, Seattle, for Appellant.

Todd Lawrence Nunn, D. Michael Reilly, Lane, Powell, Spears, Lubersky, Seattle, for Respondent.

BAKER, Chief Judge.

[1-3] The doctrine of *res ipsa loquitur* is applied in exceptional cases, when supported by the facts of the case and the demands of justice. *Res ipsa loquitur* is a method of proof, not a separate and additional form of negligence. A plaintiff that successfully establishes the elements of *res ipsa loquitur* is entitled to an inference of negligence. Because such a plaintiff is, in effect, spared the necessity of establishing a complete *prima facie* case of negligence against the defendant, the doctrine is to be used sparingly.

Cheryl Tinder has failed to allege or prove facts warranting application of *res ipsa loqui-*

tur against Nordstrom, Inc. We affirm summary judgment dismissal of Tinder's personal injury claim against Nordstrom.

FACTS

Tinder was shopping at Nordstrom with her two daughters, ages four and seven. She bought a considerable number of items, enough to be "loaded" with packages. Tinder boarded the down escalator with her hands full of packages, her youngest daughter ahead of her, the older behind. Tinder was not holding the handrail when the escalator came to a sudden stop.

Apart from the sudden stop, nothing indicated that something was wrong with the escalator. Prior to the stop, her youngest daughter got off the escalator and looked up at Tinder, waiting for her to come down. Tinder's alleged injuries occurred when she reached across with her right hand and grabbed the opposite handrail to stop herself from falling.

A regular maintenance examination was performed on the escalator six days before the incident. After the incident, a maintenance specialist examined the escalator and did not find any malfunctions.

Warning signs are placed at the top of all the escalators at Nordstrom, including the one Tinder was riding. The signs warn customers to "attend to children" and to "hold handrails." Tinder does not specifically recall seeing the warning sign at the top of the escalator, however, she knew from experience that escalator riders are warned to hold the handrail and to watch their children. At the bottom of the escalator there is an emergency switch that stops the escalator.

1. *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989).

2. *Young*, 112 Wash.2d at 225 n. 1, 770 P.2d 182 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986)).

3. *Young*, 112 Wash.2d at 225, 770 P.2d 182.

4. *Young*, 112 Wash.2d at 225-26, 770 P.2d 182.

I

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact.¹ If the moving party is a defendant, this burden may be met by pointing out that there is an absence of evidence in support of the nonmoving party's case.² If this initial showing is met, then the plaintiff must present evidence sufficient to raise a material question of fact regarding the essential elements of its claim.³ This court reviews an order of summary judgment de novo, considering the facts in the light most favorable to the nonmoving party.⁴

Nordstrom, as the moving party, introduced evidence that it was not negligent; evidence establishing regular maintenance of the escalator, as well as the service report made after the incident that found no malfunction. Nordstrom therefore met its burden of pointing to an absence of evidence in support of Tinder's case, and the burden shifted to Tinder to make a prima facie showing of the essential elements of her negligence claim.⁵

II

[4, 5] Tinder argues that she is entitled to the inference of negligence established by *res ipsa loquitur*. Whether *res ipsa loquitur* is applicable is a question of law.⁶ The doctrine recognizes that an injurious occurrence may be of such a nature "that the occurrence is of itself sufficient to establish *prima facie* the fact of negligence on the part of the defendant, without further or direct proof thereof."⁷

[6, 7] In deciding whether the doctrine applies, the court is to examine whether a

5. *Young*, 112 Wash.2d at 225 and n. 1, 770 P.2d 182.

6. *Zukowsky v. Brown*, 79 Wash.2d 586, 592, 488 P.2d 269 (1971); see also *Marshall v. Western Air Lines, Inc.*, 62 Wash.App. 251, 259, 813 P.2d 1269, review denied, 118 Wash.2d 1002, 822 P.2d 287 (1991).

7. *Morner v. Union Pac. R.R. Co.*, 31 Wash.2d 282, 291, 196 P.2d 744 (1948).

"reasonable inference of negligence" exists.⁸ Whether or not the circumstances of an occurrence are sufficient to support this "reasonable inference of negligence" can only be determined in the context of each case.⁹ For the doctrine to apply, it must be established that:

(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.¹⁰

If the elements of *res ipsa loquitur* are not satisfied, no presumption of negligence can be maintained.¹¹ *Res ipsa loquitur* is ordinarily sparingly applied, "in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential."¹²

[8] The first element of the *res ipsa loquitur* formulation is met if, in the abstract,

8. *Marshall*, 62 Wash.App. at 259, 813 P.2d 1269 (citing PROSSER & KEATON ON THE LAW OF TORTS, *RES IPSA LOQUITUR* § 40, at 261 (5th ed. 1984)).

9. *Zukowsky*, 79 Wash.2d at 594, 488 P.2d 269; *Nopson v. City of Seattle*, 33 Wash.2d 772, 785, 207 P.2d 674 (1949) ("Whether or not the doctrine is applicable in a specific instance depends upon the peculiar facts and circumstances of the individual case.") (quoting *McClellan v. Schwartz*, 97 Wash. 417, 420-21, 166 P. 783 (1917)).

10. *Zukowsky*, 79 Wash.2d at 593, 488 P.2d 269 (quoting *Horner v. Northern Pac. Beneficial Ass'n Hosps., Inc.*, 62 Wash.2d 351, 359, 382 P.2d 518 (1963)).

11. *Hughes v. King County*, 42 Wash.App. 776, 784, 714 P.2d 316, review denied, 106 Wash.2d 1006 (1986); see *Swanson v. Brigham*, 18 Wash. App. 647, 650, 571 P.2d 217 (1977) (trial court warranted in holding that the doctrine did not apply in the absence of one of the necessary elements).

12. *Morner*, 31 Wash.2d at 293, 196 P.2d 744.

13. *Marshall*, 62 Wash.App. at 259, 813 P.2d 1269 (quoting *Calabretta v. National Airlines, Inc.*, 528 F.Supp. 32, 35 (E.D.N.Y.1981) (concluding that ear damage associated with an airplane flight ordinarily does not occur absent negligence)).

there is a "reasonable probability" that the incident would not have occurred in the absence of negligence.¹³ The mere occurrence of an accident¹³ and an injury does not necessarily infer negligence.¹⁴

[9] The courts have described three types of situations which do not normally occur absent negligence: "(1) the act causing injury is palpably negligent, such as leaving foreign objects in a patient; (2) when general experience teaches that the result would not be expected without negligence; (3) when proof by experts in an exotic field creates an inference that negligence caused the injuries."¹⁵

[10, 11] While *Tinder* was riding the escalator it stopped suddenly and abruptly, without any noises or motions that would indicate an obvious malfunction. *Nordstrom* provided for regular maintenance of the escalator, and it had been recently serviced. Mechanical devices, like escalators and elevators, can wear out or break without negligence.¹⁶ Examination of the escalator the

14. *Las v. Yellow Front Stores, Inc.*, 66 Wash.App. 196, 201-02, 831 P.2d 744 (1992).

15. *Hughes*, 42 Wash.App. at 783, 714 P.2d 316.

16. See *Adams v. Western Host, Inc.*, 55 Wash.App. 601, 606, 779 P.2d 281 (1989). In *Adams* the plaintiff was injured when stepping from an elevator that had misleveled. The elevator had received regular maintenance. *Adams*, 55 Wash. App. at 603-04, 779 P.2d 281. The elevator serviceman stated that the sole cause of the misleveling was a broken shunt, and that there is no way to anticipate when metal fatigue will cause such a break. *Adams*, 55 Wash.App. at 603, 779 P.2d 281. In opposition to the elevator company's motion for summary judgment, the plaintiff submitted the declaration of an electrical engineer to the effect that the most likely reasons for an elevator to mislevel are preventable by proper maintenance. *Adams*, 55 Wash.App. at 604, 779 P.2d 281. The court concluded "[t]his is not a case of an unexplained accident of the type where *res ipsa loquitur* has been applied." The court continued: "This is not a case where the malfunction is so unusual that we can say it does not ordinarily occur in the absence of negligence. Elevators are mechanical devices of some complexity. Materials can wear out or break without negligence being involved." *Adams*, 55 Wash. App. at 606, 779 P.2d 281. The court held that *res ipsa loquitur* was not applicable. *Adams*, 55 Wash.App. at 606, 779 P.2d 281. In *Adams* the

day after the sudden stop revealed no evidence of a malfunction, and the stop remains an unexplained event.

The sudden stop of the escalator in this case was not the type of unusual situation which normally does not occur in the absence of negligence. There was no palpably negligent act, common experience does not suggest that 1794 escalators only make sudden stops when there has been negligence, and there was no expert testimony offered to establish the inference that negligence caused Tinder's injuries.¹⁷ The evidence presented is insufficient to establish the first element necessary for the application of res ipsa loquitur.

In *Otis Elevator Co. v. Chambliss*¹⁸ a Florida court concluded that the plaintiff totally failed to carry its burden of showing by appropriate evidence that negligence was the probable cause of an escalator's sudden stop.¹⁹ Defense witnesses testified that "several factors, none of which implicated negligent maintenance, can cause the escalator to stop during normal operations."²⁰ One factor considered by the court was the presence of safety switches that could manually be operated to shut down the escalator in emergencies.²¹ Since factors other than Nordstrom's negligence could have caused the escalator to suddenly stop, res ipsa loquitur does not apply.

court relied on the fact that the elevator company had produced substantial evidence to explain how the misleveling occurred without negligence on its part. *Adams*, 55 Wash.App. at 607, 779 P.2d 281.

17. See *Hughes*, 42 Wash.App. at 783, 714 P.2d 316.

18. 511 So.2d 412 (Fla.App.1987).

19. *Otis Elevator*, 511 So.2d at 414. *But cf. Barretta v. Otis Elevator Co.*, 41 Conn.App. 856, 677 A.2d 979, 981, review granted, 239 Conn. 909, 682 A.2d 997 (1996) ("Ordinarily, an escalator does not suddenly stop while people are riding on it unless someone has been negligent.").

20. *Otis Elevator*, 511 So.2d at 413.

21. *Otis Elevator*, 511 So.2d at 413.

22. See *Brown v. Crescent Stores, Inc.*, 54 Wash. App. 861, 866, 776 P.2d 705 (1989) ("Were we to apply the doctrine here, operating elevators without creating an inference of negligence would be impossible."); see also *Ellis v. Sears Roebuck &*

To conclude that the sudden, unexplained stop of an escalator is the type of occurrence that does not ordinarily occur in the absence of negligence, and to permit an inference of negligence based on such an event, would in effect make Nordstrom the insurer of all who use the escalator.²² We decline to adopt such a rule.

[12] 1795 We turn now to a discussion of the second and third elements of res ipsa loquitur. In *Marshall* the court noted that with the advent of comparative fault, the third element, the absence of the plaintiff's contribution in causing the accident, is generally merged into the second element, the defendant's exclusive control over the instrumentality causing the injury.²³ These elements are therefore analyzed together.

[13, 14] The inference of negligence gained by res ipsa loquitur must be such that the defendant would be responsible for any negligence connected with it.²⁴ Exclusive control does not mean actual physical control, but rather refers to the responsibility for the proper and efficient functioning of the instrumentality that caused the injury.²⁵ However, exclusive control is not established merely by showing that the defendant has a superior

Co., 193 Ga.App. 797, 388 S.E.2d 920, 921 (1989) (finding that because mechanical devices, like escalators, sometimes get out of working order without negligence on the part of anyone, the trial court properly directed a verdict in favor of the defendant escalator company).

23. *Marshall*, 62 Wash.App. at 261, 813 P.2d 1269. Prosser and Keaton claim that the advent of comparative fault should logically eliminate the element of the absence of the plaintiff's contribution to the accident from the doctrine, unless the plaintiff's negligence appears to be the sole proximate cause of the event. PROSSER & KEATON ON THE LAW OF TORTS, RES IPSA LOQUITUR § 39, at 254 (5th ed. 1984).

24. See *Zukowsky*, 79 Wash.2d at 595, 488 P.2d 269.

25. *United Mut. Sav. Bank v. Riebli*, 55 Wash.2d 816, 821, 350 P.2d 651 (1960). Nordstrom does not argue that the element of exclusive control is absent because it contracted with another company for the maintenance of the escalator, as Tinder claims.

ability to investigate and possibly determine causation.

[15] The facts do not justify an inference of negligence against Nordstrom. Nordstrom is not an insurer of the safety of its customers who choose to ride an escalator under circumstances similar to the facts of this case. Tinder is not entitled to the inference of negligence that is provided by the application of *res ipsa loquitur*.

III

In her complaint, Tinder claimed negligence against Nordstrom based on the following theories: (1) the duty owed by a business to its invitees, (2) the duty owed as operator of an escalator, a common carrier, and (3) general negligence. Tinder alleges that Nordstrom was negligent in either selling her more goods than she could safely manage on the escalator, or in not assisting her when she could not manage the escalator because of the number of her purchases.

[16] Tinder argues that an escalator owner/operator cannot ignore the unique circumstances of escalator users in fulfilling its non-delegable duty to its passengers. A common carrier owes the highest degree of care to its

26. *Houck v. University of Wash.*, 60 Wash.App. 189, 194, 803 P.2d 47, review denied, 116 Wash.2d 1028, 812 P.2d 103 (1991) (elevator).

27. *Rathvon v. Columbia Pac. Airlines*, 30 Wash.App. 193, 202, 633 P.2d 122 (1981), review denied, 96 Wash.2d 1025 (1982) (airplane).

28. See *Dabroe v. Rhodes Co.*, 64 Wash.2d 431, 433, 392 P.2d 317 (1964).

29. *Rathvon*, 30 Wash.App. at 202, 633 P.2d 122 (citing *Kaiser v. Suburban Transp. Sys.*, 65 Wash.2d 461, 468, 398 P.2d 14, 401 P.2d 350 (1965)). Tinder's argument that lack of actual knowledge of the passenger's condition does not relieve a common carrier from liability also fails for this same reason. Tinder notes that: "While such an actual knowledge requirement may be understandable in a situation involving attended common carrier facilities, it cannot apply to unattended, self-service facilities." *Houck*, 60 Wash.App. at 197-98, 803 P.2d 47. *Houck* involved injuries sustained when an intoxicated college student fell after jumping from an elevator that stopped between floors. *Houck*, 60 Wash.App. at 191, 803 P.2d 47. Nordstrom had a duty to use "the highest degree of care consis-

passengers, "commensurate with the practical operation of its conveyance at the time and place in question"²⁶ and "consistent with the practical operation of its business."²⁷ This standard of care has been applied to escalator operators.²⁸ This duty, however, does not make a common carrier an insurer of its passengers' safety.²⁹

[17] Tinder argues that a store's duty as a common carrier is commensurate with knowledge of its customers' age, size and physical conditions.³⁰ In *Brown* a group of elderly women had regularly attended luncheons at the store for approximately six years.³¹ *Brown* presented evidence of prior accident reports made to the store involving elderly passengers in its elevators.³² The court found that these facts raised a question of whether the store should have reasonably anticipated that an accident might occur, and whether it was therefore obligated to take precautionary measures.³³

Brown is distinguishable, and does not support Tinder's argument. Tinder has not established that a prior history exists creating a duty on the part of Nordstrom to anticipate accidents like that which Tinder alleges caused her injuries.³⁴ Furthermore,

tent with the practical operation of its escalator." *Houck*, 60 Wash.App. at 196, 803 P.2d 47 (citing *Dabroe*, 64 Wash.2d at 434-35, 392 P.2d 317). Extending this duty to overloaded customers who know the potential hazards of riding escalators without holding the handrail would be to establish Nordstrom as an insurer of all similarly situated customers who choose to ride the escalator. The common carrier duty does not extend that far. See *Rathvon*, 30 Wash.App. at 202, 633 P.2d 122.

30. See *Brown*, 54 Wash.App. at 868, 776 P.2d 705.

31. *Brown*, 54 Wash.App. at 863, 776 P.2d 705.

32. *Brown*, 54 Wash.App. at 868-69, 776 P.2d 705.

33. *Brown*, 54 Wash.App. at 869, 776 P.2d 705.

34. The record contains the declaration of a Nordstrom employee who worked major sales events for a few years at both the downtown and Northgate stores. She remembered the escalators not working on more than a couple of occasions. This evidence simply does not equate the

Nordstrom took precautionary measures by posting warning signs for escalator use, providing for regular maintenance and providing an alternate means of travel through the store via elevators. The high degree of care Nordstrom owes to customers using its escalators does not extend as far as alleged by Tinder.³⁵

We decline to hold that the question of Nordstrom's l duty in this case presents a question of fact. Because Tinder failed to make out a prima facie case of negligence against Nordstrom by alleging specific, non-conclusory facts, summary judgment was proper.³⁶

Affirmed.

COLEMAN and BECKER, JJ., concur.



relevance of the accident reports relied on by the *Brown* court. Furthermore, as pointed out by Nordstrom at oral argument, physical conditions, such as being elderly or intoxicated, are readily distinguishable from a temporary, self-controlled condition such as being overloaded with packages while shopping.

35. Tinder also argues that in common carrier operation, if an extraordinary event occurs, a presumption of liability exists, and that summary judgment was improper because Nordstrom did not meet its initial burden to rebut this presumption. See *Hedges v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 61 Wash.2d 418, 379 P.2d 199 (1963) (supporting a presumption of negligence against defendant train company). This argument is faulty, and appears to confuse the application of common carrier liability with *res ipsa loquitur*. Furthermore, this court has held, in an airplane case, that no such presumption of liability exists against common carriers. The court cited with approval 3 Am.Jur.2d. AVIATION § 118, at 747-48 (1963):

84 Wash.App. 733

l PERKINS COIE, a law partnership,
Respondent,

v.

Stephanie WILLIAMS, a single person;
and Richard Williams and Chris
Williams, husband and wife, and the
marital community thereof, Petitioners.

No. 36964-4-I.

Court of Appeals of Washington,
Division 1.

Jan. 27, 1997.

Law firm that brought action to recover from parents and child for representation of child in personal injury action requested trial de novo only as to parents following mandatory arbitration proceeding in which arbitrator made award for firm against child only. The Superior Court, King County, R. Joseph Wesley, J., denied parents' motion to strike firm's request. Parents filed petition for discretionary review. The Court of Appeals, Cox, J., held that: (1) firm could not limit request for trial de novo to less than all of issues arbitrated; (2) firm's request for trial de novo only as to parents afforded trial court jurisdiction to conduct trial de novo as

Apart from the doctrine of *res ipsa loquitur*, negligence will not be presumed or inferred from the mere occurrence of an airplane accident, or from the fact of injury, and this principle is not altered by the fact that the defendant is a common carrier of passengers. The mere fact of a plane accident or of injury to a passenger is not sufficient to raise a presumption that the carrier was negligent.

Rathvon, 30 Wash.App. at 204, 633 P.2d 122. *Rathvon* calls into question the precedential value of *Hedges*. See *Rathvon*, 30 Wash.App. at 202-04, 633 P.2d 122.

36. See *Adams*, 55 Wash.App. at 607, 779 P.2d 281. We conclude that there is no specific factual support for Tinder's argument that without negligence on the part of Nordstrom, her injuries would not have occurred. This explains why Tinder's case necessarily boils down to an argument that *res ipsa loquitur* should apply. Because we hold that the doctrine does not apply under these facts, the trial court did not err in summarily dismissing her personal injury claim against Nordstrom.

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Cite as 774 P.2d 1199 (Wash. 1989)

balance of the meeting. They learned of the meeting from the minutes and from those who were present. This charge also fails to state what conduct amounted to misfeasance, malfeasance or violation of the oath of office. Indeed appellants are uncertain whether or not collective bargaining strategies were discussed by the council members during the executive session. Such a discussion would seem proper by council members under RCW 42.30.140(4). As held in *Estey v. Dempsey*, 104 Wash.2d 597, 602, 707 P.2d 1338 (1985) (quoting *Chandler v. Otto*, *supra* 103 Wash.2d at 274, 693 P.2d 71): "[A]n elected official cannot be recalled for appropriately exercising the discretion granted him or her by law."

Charge 3

[6] The third charge alleges that the announced purpose of the executive session of September 20, 1988, was to discuss the City's legal liability with regard to the closure of Sixth Avenue South West, that the charged officials did so without legal counsel present, and that such a discussion is not exempt from the Open Public Meetings Act of 1971.

¹³³⁰This charge does not specify some wrongdoing. We have held that "[m]isfeasance means the improper doing of an act an officer might lawfully do; or, in other words, it is the performance of a duty in an improper manner." (Citation omitted.) *Berge v. Gorton*, 88 Wash.2d 756, 760, 567 P.2d 187 (1977). Malfeasance has been defined as:

"'Evil doing; ill conduct; the commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which the person ought not to do at all; the doing of what one ought not to do; the performance of some act which ought not to be done; the unjust performance of some act which the party had no right, or which he had contracted not, to do.'"

(Citation omitted.) *Berge*, at 761, 567 P.2d 187, quoting *State v. Miller*, 32 Wash.2d 149, 152, 201 P.2d 136 (1948). The appellants were present at the meeting but not the executive session and have no knowledge, other than conjecture, of what oc-

curred during the short executive session. No minutes, recording, or statements of participants of what occurred during the 5-minute executive session have been provided. "In a recall case, recall petitioners should at least have knowledge of facts which indicate an *intent* to commit an unlawful act." *Estey*, 104 Wash.2d at 605, 707 P.2d 1338.

The appellants are seeking to expose public officers to recall, who, in their view, took unpopular positions. "[T]he authors of the constitutional recall provisions sought to limit application of the recall to the removal of wrongdoers occupying elective office." *Estey*, at 601, 707 P.2d 1338. The appellants candidly admit that their actions are directly related to a "political dispute" between themselves and the two council members. Furthermore, only two of the council members are singled out for recall, whereas the other council members who also participated in the executive sessions have not been brought up on recall charges.

¹³³¹The dismissal of all charges of the recall petition as insufficient is affirmed.



112 Wash.2d 847

¹³⁴⁷**Certification From the United States District Court For the Eastern District of Washington in the WASHINGTON WATER POWER COMPANY, a Washington corporation, Plaintiff,**

v.

GRAYBAR ELECTRIC COMPANY, a foreign corporation; and A.B. Chance Company, a foreign corporation (a Division of Emerson Electric Company), Defendants.

No. 55182-1.

Supreme Court of Washington,
En Banc.

June 29, 1989.

Power company brought action in federal district court against manufacturer

and distributor of insulators to recover damages incident to failure of, and expected failure of, electric deadend insulators used in power company's electrical distribution system. The United States District Court for the Eastern District of Washington, Alan A. McDonald, J., certified questions of whether Product Liability Act excluded economic loss from its remedial scheme and preempted common-law tort remedies. The Supreme Court, Durham, J., held that: (1) Act preempted common-law tort remedies; (2) "economic loss" is not recoverable in action for product-related harms; and (3) "economic loss" is determined by utilizing risk of harm analysis.

Questions answered.

Dore, Acting C.J., concurred in result only.

1. Products Liability ⇐20

Under common law, lack of privity between injured party and manufacturer would not bar recovery from manufacturer under strict liability theory.

2. Sales ⇐267, 426

Although limitations of damages and disclaimers of warranty have no effect on plaintiff's recovery under common-law strict liability theory, they may pose complete bar to recovery in contract action. West's RCWA 62A.2-316, 62A.2-718, 62A.2-719.

3. Limitation of Actions ⇐95(1)

In common-law tort action for defective product, limitation period does not commence until defect is discovered, or by reasonable diligence should have been discovered.

4. Common Law ⇐11

Absence of exclusive clause preempting common-law claims does not defeat case that statute preempted common-law claims.

5. Products Liability ⇐1

Product Liability Act preempted common-law causes of action for harms caused by product defects, even though Act did

not contain express preemption clause. West's RCWA 7.72.010(4).

6. Products Liability ⇐1

Product Liability Act, which stated that previous existing applicable laws of state on product liability is modified only to extent set forth in chapter, did not prevent Act from preempting common-law causes of action for harms caused by product defects. West's RCWA 7.72.010(4), 7.72.020(1).

7. Products Liability ⇐1

Product Liability Act preempted equitable claims for harms caused by product defects, even though statutory preemptive language extended only to claims or actions previously based on any substantive legal theory except fraud. West's RCWA 7.72.010(4).

8. Products Liability ⇐17

"Economic loss" in product liability action describes diminution of product value that resulted from product defect.

See publication Words and Phrases for other judicial constructions and definitions.

9. Products Liability ⇐17

Under Product Liability Act, plaintiffs are not entitled to award of economic loss, and thus are restricted to contract remedies for economic loss. West's RCWA 7.72.010(6).

10. Products Liability ⇐17

Provision of Product Liability Act, which stated that term "harm," for which damages were recoverable, did not include direct or consequential economic loss under Uniform Commercial Code, did not show that economic loss was recoverable under Act; reference to Code, in context of economic loss exclusion, did nothing except add confusion, and would be ignored. West's RCWA 7.72.010(6).

11. Products Liability ⇐17

"Direct economic loss" attendant to failure and loss of use of product is damage based on inadequate product value and

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may be measured by costs of repairing and replacing defective products.

See publication Words and Phrases for other judicial constructions and definitions.

12. Products Liability ⇐17

"Indirect" or "consequential economic loss" attendant to failure and loss of use of product refers to other damages proximately caused by loss of use of product.

See publication Words and Phrases for other judicial constructions and definitions.

13. Products Liability ⇐17

"Economic loss," within meaning of Product Liability Act, which states that it does not afford remedy for "economic loss," is determined by employing risk of harm analysis. West's RCWA 7.72.010(6).

¹⁸⁴⁸Bogle & Gates, Ronald E. McKinstry, Erik R. Lied, Christopher N. Weiss, Seattle, for defendants.

Paine, Hamblen, Coffin, Brooke & Miller, Richard D. McWilliams, Richard W. Kuhlring, Diane M. Hermanson, J. Christopher Lynch, Spokane, for plaintiff.

Bryan P. Harnetiaux, Spokane, Winston & Cashatt, Robert H. Whaley, Spokane, amicus curiae for plaintiff on behalf of Washington State Trial Lawyers Ass'n.

Bassett & Morrison, Margaret A. Morgan, Seattle, amicus curiae for defendants on behalf of Washington Defense Trial Lawyers Ass'n.

DURHAM, Justice.

Washington Water Power Company (WWP) commenced this action in federal district court to recover damages incident to the failure of, and expected failure of, approximately 162,000 electric deadend insulators in use in WWP's electrical distribution system. Defendants are A.B. Chance Company (Chance), which manufactured the insulators between 1962 and 1984, and Graybar Electric Company (Graybar), the distributor from whom WWP pur-

chased Chance insulators between 1973 and 1984.

The insulators are in place throughout WWP's service area in eastern Washington and northern Idaho. They sit between live electric lines and the utility poles over which the lines are suspended, isolating the flow of electricity from the utility pole. Their expected useful life is considered to be about 50 years.

¹⁸⁴⁹Since 1976, approximately 3000 Chance insulators in use in WWP's distribution system have experienced performance failures, creating several types of hazards. In some instances, live lines have fallen to the ground. In others, electricity has leaked from the insulators to the surrounding equipment, causing pole and crossarm fires. Insulator performance failure also has caused radio and television interference in WWP's distribution area.

Between 1977 and 1983, WWP returned damaged insulators to Chance for testing. Chance in each instance advised WWP that the failures were caused by something other than the insulators themselves. In 1985, however, Chance advised that insulators manufactured after 1970 were defective. Following Chance's testings, WWP obtained a recommendation from the British Columbia Hydro & Power Authority that the insulators presented a safety hazard and should be removed from service.

WWP estimates that its damages from incidents of insulator failure through October 1987 include at least \$2 million of damage to WWP property, \$2,500 of damage to the property of third parties, and \$100 in damages for personal injuries. WWP estimates as well that it will cost around \$9 million to replace insulators that have not yet failed, including those manufactured before 1970.¹

WWP's complaint states claims against Graybar for breach of contract and warranty, against Chance for violation of the federal racketeer influenced and corrupt organizations act (RICO), 18 U.S.C. § 1964, and

deemed unsafe would cost about \$5 million.

1. Replacement of only the post-1970 insulators that British Columbia Hydro & Power Authority

the Washington product liability act (WPLA), RCW 7.72, and against both Graybar and Chance for negligence, strict liability, fraud, negligent misrepresentation, estoppel, and violation of the Washington Consumer Protection Act, RCW 19.86. Defendants moved for partial summary judgment on WWP's tort claims, contending that the costs of WWP's insulator replacement program constitute economic loss¹ recoverable "only under the Uniform Commercial Code because the Washington Product Liability Act excludes economic loss from its remedial scheme and preempts common law tort remedies". As the result of a certification from the federal district court, we must determine what merit there may be to this contention.²

I

The Washington product liability act (WPLA) is one piece of a broad legislative effort during the past decade directed at reforming various aspects of the law of torts. Like other tort reform statutes, the WPLA is designed to address a liability insurance crisis which could threaten the availability of socially beneficial products and services. See RCW 7.72.010 Preamble; see also Laws of 1986, ch. 305, § 100.

The centerpiece of the WPLA is the "product liability claim". The statute broadly defines this concept to include any product-related claim "previously based on . . . any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW." RCW 7.72.010(4). The substantive liabilities of product manufacturers and sellers towards individuals or entities asserting product liability claims are specifically delineated in the statute. Manufacturers are liable for negligence in product design or in the provision of warnings concerning potential product

hazards. RCW 7.72.030(1). Manufacturers also are strictly liable for unsafe product conditions resulting from construction defects and breaches of warranties. RCW 7.72.030(2).¹ Product sellers not involved in a product's manufacture have the same liabilities as manufacturers in certain circumstances, and additionally bear liability for negligence, breach of express warranty and misrepresentation. RCW 7.72.040. A product liability claim may be maintained against a manufacturer or other product seller notwithstanding an absence of contractual privity. RCW 7.72.010(5).

In addition to delimiting the substantive liabilities of manufacturers and product sellers, the WPLA describes the damages that persons or entities asserting product liability claims may recover. Such damages include "any damages recognized by the courts of this state", but not "direct or consequential economic loss under Title 62A RCW." RCW 7.72.010(6). Damages for direct or consequential economic loss are not prohibited to product liability claimants, but are simply made unavailable within the scheme of the WPLA. See RCW 7.72.020(2) ("Nothing in this chapter shall prevent the recovery of direct or consequential economic loss under Title 62A RCW.").

Two aspects of the WPLA are at issue in this case. First is the extent to which the WPLA preempts traditional common law remedies for product-related harms. Also at issue is the question of what sorts of damages the WPLA permits product users to recover from manufacturers and other product sellers with whom they have no contractual privity.

II

[1] The reasons why product liability plaintiffs such as WWP would wish to bring their claims under common law theo-

2. The parties have notified us that they have reached a settlement. Nevertheless, in light of the important and likely recurrent nature of the issues presented, and considering the genuine adverseness of the parties and the exceptional quality of the briefing, we believe publication of the decision we reached before being apprised of the settlement is appropriate. See *Hart v.*

Department of Social & Health Servs., 111 Wash.2d 445, 448, 759 P.2d 1206 (1988); *Mall, Inc. v. Seattle*, 108 Wash.2d 369, 386, 739 P.2d 668 (1987); *Purchase v. Meyer*, 108 Wash.2d 220, 229-30, 737 P.2d 661 (1987); *Sorenson v. Bellingham*, 80 Wash.2d 547, 558, 496 P.2d 512 (1972).

ries, rather than under the WPLA, are readily apparent. As discussed more fully below, the WPLA restricts recovery for "economic loss" to the law of sales. Thus, under the WPLA, several significant obstacles to recovery may arise. One of these is the rule of privity. See *Baughn v. Honda Motor Co.*, 107 Wash.2d 127, 152, 727 P.2d 655 (1986). WWP is especially concerned to avoid this rule because, ¹having purchased no insulators directly from Chance, it will be unable to recover damages from Chance if the sales law privity rule applies.² Under Washington common law, however, lack of privity would not bar WWP's recovery from Chance. See *Berg v. General Motors Corp.*, 87 Wash.2d 584, 555 P.2d 818 (1976) (economic loss held recoverable in tort from manufacturer with whom plaintiff was not in privity).

[2] A second obstacle facing product liability plaintiffs is the set of contract sales rules relating to limitations of damages and disclaimers of warranties. See RCW 62A.2-316, 62A.2-718, 62A.2-719. Such limitations and disclaimers have no effect on a plaintiff's recovery under common law strict liability theory, but may pose a complete bar to recovery in a contract action. Because of the presence of liability limitation and warranty disclaimer clauses in the sales documents executed by WWP and Graybar, therefore, WWP understandably would prefer to avoid the sales law rules.

[3] Also problematic for many product liability claimants is the sales law rule of repose. See RCW 62A.2-725. The 4-year sales law limitation period commences when the contract breach occurs (usually when tender of delivery is made), "regardless of the aggrieved party's lack of knowledge of the breach." RCW 62A.2-725(2). In a common law tort action, by contrast, the limitation period does not commence until the defect is discovered, or by reasonable diligence should have been discovered.

3. Indeed, WWP argues that, if we hold that sales law governs its claims, we should abolish contract privity requirements. While we are aware that other courts have taken steps in this direction, see, e.g., *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985),

Sahlie v. Johns-Manville Sales Corp., 99 Wash.2d 550, 663 P.2d 473 (1983). Thus, with respect to those insulators WWP received 4 years or more before it filed its complaint, the common law might afford a remedy that under the law of sales would be barred as untimely sought.

¹In light of these considerations, it is understandable why WWP is anxious to preserve the option of bringing product liability claims for economic loss under common law tort theories. We cannot, however, find a legal basis for this position. For the WPLA means nothing if it does not preempt common law product liability remedies.

[4, 5] To be sure, the Legislature might have stated its intent to preempt common law product liability claims more certainly than it has in the WPLA—for example, by means of an express preemption clause. See, e.g., Conn.Gen.Stat. Ann. § 52-572n (West 1960 & Supp.1988); Ohio Rev.Code Ann. § 2307.72(A) (Page 1981 & Supp. 1987); Model Uniform Product Liability Act § 103(A), 44 Fed.Reg. 62,713, 62,720 (1979). The absence of such a clause does not defeat the case for preemption, however. Clear statutory language and corroborative legislative history leave no doubt about the WPLA's preemptive purpose.

Included within the definition of "product liability claim" is

any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresenta-

we decline to consider the matter, as it falls outside the scope of the federal district court's order of certification. See RCW 2.60.01(6), 2.60.020 (supreme court opinion should answer "the local law question submitted" by the federal court).

tion, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW.

RCW 7.72.010(4). The scope of the statute could not have been stated more broadly. Further evidence of legislative intent to preempt common law remedies is found in the explanatory analysis of the WPLA prepared by the Senate Select Committee on Tort and Product Liability Reform¹⁹⁸⁵ contemporaneously with the Legislature's consideration of the measure.

Historically, one of the most confusing areas of product liability tort law involves the variety of causes of actions—such as negligence, warranty and strict liability—available to the plaintiff seeking recovery for injuries allegedly resulting from a defective product. Testimony before the Select Committee reflected general agreement that the creation of a single cause of action, termed a “product liability claim” . . . , eliminates this confusion and should be adopted.

Senate Select Comm. on Tort & Product Liability Reform, *Final Report* 16 (Jan. 1981); see also Senate Journal, 47th Leg. (1981), at 616.

Washington State Trial Lawyers Association (WSTLA), appearing here as amicus curiae, discounts the preemptive effect of RCW 7.72.010(4) on the basis that that section is merely “definitional”. WSTLA argues also that WPLA's reservation clause, RCW 7.72.020(1), evidences an intent to preserve common law remedies, rather than to preempt them.

Although they are well presented, we find these arguments unconvincing. WSTLA offers inadequate reasons to ex-

plain why the “definitional” nature of RCW 7.72.010(4) should diminish that provision's preemptive effect. The WPLA's definition of “product liability claim”, as we have noted, is the operative centerpiece of the statute, linking together the important concepts of “claimant” and “harm” to describe the liabilities of product manufacturers and sellers for product-related injuries. We cannot dilute this definition without frustrating the entire scheme of the statute. If the “definitional” nature of RCW 7.72.010(4) is of any significance in assessing the WPLA's preemptive effect, therefore, it counsels in favor of preemption, not against it.

[6,7] In the context of the statute, WSTLA's interpretation of RCW 7.72.020(1) as preservative of common law remedies also is not persuasive. This provision states:

¹⁹⁸⁵The previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter.

We cannot see how this defeats the preemptive effect of RCW 7.72.010(4). The definition of “product liability claim” includes “any claim or action previously based on” a nonexclusive list of product liability theories. Thus, the definition modifies “previous existing applicable law” by displacing common law causes of action.⁴ RCW 7.72.020(1) recognizes and respects this modification.

We might decry the absence from the WPLA of a provision expressly stating the statute's intended preemptive effect on common law remedies. And we might discover among the many canons of statutory construction an arsenal of technical rules that could be deployed to defeat the cause of preemption. However, “[o]verriding all

4. Our holding that the WPLA preempts the variety of common law causes of action for harms caused by product defects applies also to all equitable claims for such harms. While the statutory preemptive language extends only to claims or actions “previously based on any . . . substantive *legal* theory except fraud”. (italics ours), RCW 7.72.010(4), we do not believe the Legislature intended by this language to draw the careful, and to a great extent antiquated,

distinction between actions at law and equity. Cf. *Black's Law Dictionary* 803 (5th ed. 1979) (“With the merger . . . of law and equity courts [effective in Washington since territorial times, see former RCWA 4.04.020, Historical Note, at 7], this distinction generally no longer exists.”). Thus, we reject WWP's contention that it may maintain a cause of action outside the WPLA under sections 76 and 115 of the Restatement of Restitution (1937).

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technical rules of statutory construction must be the rule of reason upholding the obvious purpose that the legislature was attempting to achieve." *State v. Coffey*, 77 Wash.2d 630, 637, 465 P.2d 665 (1970).

The WPLA would accomplish little if it were a measure plaintiffs could choose or refuse to abide at their pleasure. WSTLA concedes that if the statute is held not to preempt common law product liability remedies, it will become a "white elephant remedy" that "few, if any, plaintiffs would choose to invoke". Whatever the deficiencies in the statute's construction (and we do not believe they are significant on the question of preemption), we should be very reluctant to exacerbate them by rendering the statute a nullity.

III

Having determined that WWP's claims are governed by the WPLA, we must next determine whether the damages WWP seeks are the sort for which the WPLA affords a remedy. The "harm" for which the WPLA holds product manufacturers and sellers liable is defined by the statute to include

any damages recognized by the courts of this state: *Provided*, That the term "harm" does not include direct or consequential economic loss under Title 62A RCW.

RCW 7.72.010(6). The parties raise two issues concerning the applicability of this definition to this case. First, does the WPLA establish any remedy for "economic loss"? Second, what does the statute mean by "economic loss"?

A

[8] Like the preemption issue, the question of whether or not the WPLA provides a remedy for economic loss arises out of concern for contract law rules of privity.

5. Generally speaking, "economic loss" describes the diminution of product value that results from a product defect. The meaning of the term is discussed more fully in the next section.
6. RCW 7.72.010(5) provides: "A claim may be asserted under this chapter even though the claimant did not buy the product from, or enter

Before the WPLA was enacted in 1981, privity rules posed no barrier to product liability plaintiffs. Washington law permitted plaintiffs a tort remedy for any damages they suffered, including damages commonly characterized as "economic loss".⁵ See *Berg v. General Motors Corp.*, 87 Wash.2d 584, 555 P.2d 818 (1976). Plaintiffs similarly are free from privity rules under the WPLA, see RCW 7.72.010(5),⁶ but in a more limited set of circumstances than under the common law. The interpretive question is how broadly or narrowly the WPLA defines this limitation.

The limitation arises from the WPLA's definition of "harm", quoted above. But for the qualification "under Title 62A RCW"—or, "under [the U.C.C.]—the exclusion of "economic loss" from the statutory definition of "harm" would be readily understandable. The economic loss exclusion was "taken substantially" from a definition of "harm" contained in the Model Uniform Product Liability Act (MUPLA), 44 Fed.Reg. 62,713. Senate Select Comm. on Tort & Product Liability Reform, *Final Report* 30 (Jan. 1981). Indeed, the two exclusions are identical, except that MUPLA's ends after the word "loss". MUPLA § 102(F), 44 Fed.Reg. 62,717. Thus, the scope of the MUPLA exclusion provides useful guidance on the intended scope of the WPLA exclusion.

[9] Commentary on the MUPLA exclusion prepared by MUPLA's drafters explains that the exclusion reflects the position of the majority of common law jurisdictions that restrict product liability plaintiffs to contract remedies for economic loss. See 44 Fed.Reg. 62,719. The common understanding of Washington commentators is that the WPLA also operates this way, overruling this court's decision in *Berg v. General Motors Corp.*, 87 Wash.2d 584, 555 P.2d 818 (1976).⁷ See Comment,

into any contractual relationship with, the product seller [or manufacturer]."

7. The *Berg* decision placed Washington in the company of a steadily dwindling minority of jurisdictions that permit tort-based actions for economic loss. See, e.g., *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965)

Recovery of Pure Economic Loss in Product Liability Actions: An Economic Comparison of Three Legal Rules, 11 U. Puget Sound L. 1988Rev. 283, 290 (1988); Washington State Bar Ass'n, *Commercial Law Deskbook* §§ 32.7(3), 32.7(6) (1987); Talmadge, *Washington's Product Liability Act*, 5 U. Puget Sound L.Rev. 1, 10 (1981). We agree that this is a proper interpretation of the statute.

[10] The additional reference in the WPLA exclusion to "Title 62A RCW" does not appear to require a different construction. It is difficult to account for this language, which, as mentioned, does not appear in the MUPLA, nor for that matter in any other product liability statute that employs an economic loss limitation. See Conn.Gen.Stat. Ann. § 52-572m(d) (West 1960 & Supp.1988) ("As between commercial parties, 'harm' does not include commercial loss."); Ind.Code Ann. § 33-1-1.5-2 (Burns 1985 & Supp.1988) ("Physical harm ... does not include gradually evolving damage to property or economic losses from such damage."); Kan.Stat. Ann. § 60-3302(d) (1983) ("Harm ... does not include direct or consequential economic loss."); Ohio Rev. Code Ann. § 2307.71(B), (G) (Page 1981 & Supp.1987) ("Harm is not 'economic loss' and '[e]conomic loss is not 'harm.'"). The difficulty in understanding the reference to the U.C.C. is that it is ungrammatical; a verb or adjective connecting "economic loss" with "under Title 62A RCW" appears

(leading case for this position). The opposing majority view, which *Berg* rejected as "specious", see *Berg*, at 592, 555 P.2d 818, distinguishes "economic loss" from physical damage to persons or property, permitting only contract remedies for those damages that constitute "economic loss". "The distinction", in the majority view,

rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands.

inadvertently to have been omitted. But none of the legislative materials addressing the WPLA provides any indication of what the missing word might be.

A few possibilities have been suggested. One commentator has explored the possibility that the U.C.C. reference is intended to incorporate a U.C.C. definition of "economic loss". Unfortunately, the U.C.C. contains no such definition. See Washington State Bar Ass'n, *Commercial Law Deskbook* § 32.7(2) (1987). WWP suggests that the omitted connecting word is "recoverable": only economic loss that is actually recoverable under the U.C.C. is excluded from the 1988WPLA's definition of "harm". The word "recoverable" does not appear in the statute, however, and for us to interpolate it would be both improper and unwise. Under WWP's construction, product liability plaintiffs would *always* be able to recover damages for economic loss—under the U.C.C. when they can do so (when they are in privity with the defendant) and under the WPLA in all other circumstances. Rather than giving the exclusionary clause a sensible meaning, therefore, WWP's proposed construction would render the clause a nullity.⁸

In the final analysis, we must agree that the phrase "under Title 62A RCW", in the context of the WPLA's economic loss exclusion, "does nothing except add confusion, and should be ignored." Washington State Bar Ass'n, *Commercial Law Deskbook*

Seely v. White Motor Co., 63 Cal.2d 9, 18, 403 P.2d 145, 45 Cal.Rptr. 17 (1965); see also *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) (adopting this position in the law of admiralty).

8. On this point, the MUPLA commentary is again instructive in its description of the increased insurance costs that result when consequential economic losses are recoverable from a non-contracting party. See MUPLA, 44 Fed. Reg. 62,713, 62,719 (1979). In light of the WPLA's underlying concern with insurance costs, it is reasonable to conclude that the Legislature intended that there be *some* limit on economic loss recovery. See also RCW 7.72-020(2) (provision preserving availability of damages for economic loss under the U.C.C., suggesting that the WPLA limits such damages).

§ 32.7(5) (1987). Our best guess is that the phrase is mere surplusage, perhaps unintentionally carried over as a stylistic parallel to RCW 7.72.020(2). We do not casually choose to neglect the Legislature's words. See *United Parcel Serv., Inc. v. Department of Rev.*, 102 Wash.2d 355, 361-62, 687 P.2d 186 (1984) ("Statutes are to be construed, wherever possible, so that 'no clause, sentence or word shall be superfluous, void, or insignificant.'"). In this instance, however, we believe a proper understanding of the exclusionary clause in the "harm" definition, and of the WPLA as a whole, requires us to do so. Cf. 2A N. Singer, *Statutory Construction* § 47.37 (4th ed. 1984) (surplusage in a statute may be ignored in order to subserve legislative intent).

B

¹⁹⁸⁰To summarize our discussion thus far: We have held that the WPLA creates a single cause of action for product-related harms that supplants previously existing common law remedies. We have held also that this cause of action does not afford a remedy for "economic loss". Now we must determine what this "economic loss" is that is not remediable under the WPLA.

[11-13] Neither the WPLA nor any other legislative materials related to the statute define "economic loss", and the term has no singular meaning in the law. The broadest definition, favored by defendants in this case, encompasses all damages attendant to the failure and loss of use of a product.⁹ See, e.g., *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986); Ohio Rev.Code Ann. § 2307.71(B) (Page 1981 & Supp.1987) ("economic loss" includes "damage to the product in ques-

tion"). WWP favors a more restrictive definition, which holds that a product's self-inflicted injury should not be characterized as economic loss if the injury results from a hazardous defect. See, e.g., *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir.1981); *Sanco, Inc. v. Ford Motor Co.*, 579 F.Supp. 893, 898-99 (S.D.Ind.1984), *aff'd*, 771 F.2d 1081 (7th Cir.1985) (dicta suggesting this definition for Indiana product liability act); cf. Conn.Gen.Stat. Ann. § 52-572m(d) ("['h]arm' includes damage to property, including the product itself"). In this litigation, WWP describes this definition as based on a "risk of harm" analysis.

This court recently indicated support for risk of harm analysis in *Stuart v. Coldwell Banker Comm'l Group, Inc.*, 109 Wash.2d 406, 417-22, 745 P.2d 1284 (1987). *Stuart*¹⁰ involved a claim for negligent construction brought by a homeowners association against the builder-vendor of a condominium complex. The trial court had allowed the claim, but this court reversed, finding a tort remedy inappropriate for the damages pleaded. In reaching this conclusion, the court adopted the definition of economic loss set forth in *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, *supra*:

[W]here only the defective product is damaged, the court should identify whether the particular injury amounts to economic loss or physical damage. In drawing the distinction, the determinative factor should not be the items for which damages are sought, such as repair costs. ["]Rather, the line between tort and contract⁽¹⁰⁾ must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of

9. Such damages are of two sorts. Direct economic loss is damage based on inadequate product value and may be measured by the costs of repairing and replacing the defective product. Indirect or consequential economic loss refers to other damages proximately caused by the loss of use of the product (e.g. lost profits). See generally Note, *Economic Loss in Products Liability Jurisprudence*, 66 Colum.L.Rev. 917, 918 (1966).

10. As discussed in note 7, the term "economic loss" is a conceptual device used to distinguish damages thought properly remediable only in contract from damages for which a tort remedy is deemed permissible. Thus, under the *Pennsylvania Glass Sand* analysis, economic loss describes those damages falling on the contract side of "the line between tort and contract".

tort law or the expectation-bargain protection policy of warranty law is most applicable["] to the claim in question. *Pennsylvania Glass Sand*, at 1173.

Stuart, 109 Wash.2d at 420-21, 745 P.2d 1284.

Defendants criticize *Stuart* for failing to acknowledge the flat rejection of the risk of harm approach by the United States Supreme Court. In *East River Steamship Corp. v. Transamerica Delaval, Inc.*, *supra*, the plaintiffs sued in tort to recover the costs of repairing defective supertanker turbines, and income lost when the turbines failed to operate properly. Two lower federal courts dismissed the plaintiffs' claims, and the Supreme Court affirmed. Exercising its authority to determine the substantive admiralty law, the Court examined the policy justifications pro and con permitting a tort cause of action, and ultimately concluded that "a manufacturer in a commercial relationship has no ¹⁹⁸²duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." *East River*, 476 U.S. at 871, 106 S.Ct. at 2302.

In its opinion, the Court assessed the relative merits of several different conceptions of economic loss. For purposes of the law of admiralty, it chose the conception that defendants urge us to adopt under the WPLA. When a product damages only itself, and not persons or other property, the Court held, the proper remedy lies in contract, not in tort, no matter what risk of harm the product defect poses, and no matter how the product injury occurred. Citing directly to *Pennsylvania Glass Sand*, the Court rejected the risk of harm approach, deeming it "too indeterminate to enable manufacturers easily to structure

their business behavior." *East River*, 476 U.S. at 870, 106 S.Ct. at 2302. In an apparent response to *Pennsylvania Glass Sand*'s suggestion that the risk of harm the product defect presents, rather than nature of the damages actually suffered, should determine whether a given product injury properly can be characterized as economic loss compensable only in contract, or property damage remediable as a tort, *see Pennsylvania Glass Sand*, at 1173, the Court declared:

We realize that the damage [a product suffers] may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law.

(Citations omitted.) *East River*, 476 U.S. at 870, 106 S.Ct. at 2301.¹¹

¹⁹⁸³The Supreme Court's *East River* opinion has persuaded a number of courts to abandon risk of harm analysis. The Third Circuit, which had imputed the risk of harm approach into Pennsylvania law in *Pennsylvania Glass Sand*, now predicts that because *East River* is "so persuasive", the *East River* definition "will be followed by Pennsylvania courts." *Aloe Coal Co. v. Clark Equip. Co.*, 816 F.2d 110, 117 (3d Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 156, 98 L.Ed.2d 111 (1987). A federal district judge has predicted that California and Illinois will do likewise.¹² *See PPG*

11. On this view, the Court in *East River* treated as economic loss damages incurred when a turbine had failed at sea in a storm, notwithstanding that this particular product failure "posed a serious risk to persons, property, and the product itself in the event the power failure occurred when there was some unrelated danger at sea that required a vessel with full power." *East River Steamship Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903, 915 (3d Cir.1985) (en banc) (Becker, J., concurring and dissenting) (arguing that, under *Pennsylvania Glass Sand*, tort claim should lie for these damages).

12. The predicted California reversal is especially significant, as Chief Justice Traynor's landmark opinion in *Seely v. White Motor Co.*, 63 Cal.2d 9, 403 P.2d 145, 45 Cal.Rptr. 17 (1965), provided the basis for the risk of harm approach. *See Seely*, at 18, 403 P.2d at 146 ("[A manufacturer] can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm.").

Indus., Inc. v. Sundstrand Corp., 681 F.Supp. 287, 291 (W.D.Pa.1988). Similarly, defendants urge us to abandon the approach we embraced in *Stuart* and join the courts that have accepted the *East River* view.

Of special relevance to our present task of ascribing meaning to "economic loss" in the context of the WPLA is *East River's* observation that the risk of harm approach is "too indeterminate". An essential purpose of tort reform in Washington was to address "[u]ncertainties within the tort system [that] have resulted in increasing insurance costs for product manufacturers, wholesalers, retailers and other parties in the chain of distribution of a product . . ." S.Res. 140, 46th Leg., 1st Ex.Sess. (1979); see Talmadge, *Washington's Product Liability Act*, 5 U. Puget Sound L.Rev. 1, 5-6 (1981). To the extent risk of harm analysis increases uncertainty in tort litigation, therefore, the analysis may be ill suited to provide the missing statutory definition. See generally Brief of Amicus Washington Defense Trial Lawyers Association, at 3-15.

¹³The *East River* approach, on the other hand, appears to provide more certainty. First, by restricting product injury claims to contract theories, the approach gives manufacturers the means to limit their liabilities to predictable plaintiffs and manageable sums. See *East River*, 476 U.S. at 874, 106 S.Ct. at 2303. Second, by replacing awkward assessments of such imponderables as "the type of risk" with a bright-line rule, *East River* reduces uncertainty in judicial decisionmaking.

In our opinion, however, this increased certainty comes at too high a price. If manufacturers can contract successfully

13. Safety long has been an important concern of Washington product liability law. See *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913); *Ulmer v. Ford Motor Co.*, 75 Wash.2d 522, 452 P.2d 729 (1969); see generally Comment, *Product Liability Reform Proposals in Washington—A Public Policy Analysis*, 4 U.Puget Sound L.Rev. 143, 146 (1980).

14. Responding to Dean Keeton's contention that "a damaging event that harms only the product should be treated as irrelevant to policy considerations directing liability placement in tort",

around liabilities for product injuries, a principal deterrent to unsafe practices—the threat of legal liability—will be lost. See *Cloud v. Kit Mfg. Co.*, 563 P.2d 248, 250-51 (Alaska 1977); *Salt River Project Agricultural Imp. & Power Dist. v. Westinghouse Elec. Corp.*, 143 Ariz. 368, 694 P.2d 198, 211 (1984); *Mid Continent Aircraft Corp. v. Curry Cy. Spraying Serv., Inc.*, 572 S.W.2d 308, 316-18 (Tex.1978) (Pope, J., dissenting). We do not believe this is what the Legislature intended when it enacted the WPLA. Like the common law actions they displaced, the causes of action authorized by the WPLA place liability for injuries resulting from hazardous product defects on the manufacturers and distributors who are best positioned to avoid those injuries. In this respect, the WPLA preserves the common law's concerns with product safety.¹³ Cf. Model Uniform Product Liability Act, 44 Fed.Reg. 62,713, 62,715 (1979) (identifying safety promotion as a formative concern of product liability legislation).

The Court's analysis in *East River*, we believe, unjustifiably dismisses the safety concerns attendant to product injuries caused by hazardous defects. For this reason, we find *East River's* approach to economic loss unsuited to what the Legislature intended under the WPLA. Product ¹⁴injuries, the Court says, do not raise safety concerns, but are "essentially" a performance problem. *East River*, 476 U.S. at 870, 106 S.Ct. at 2302. It does not say why this is so, however. Cf. *Mid Continent Aircraft Corp. v. Curry Cy. Spraying Serv., Inc.*, *supra* at 316-17 (Pope, J., dissenting).¹⁴ Also unsupported is the Court's assertion that "[t]he tort concern with safe-

Keeton, *Annual Survey of Texas Law, Torts*, 32 Sw.L.J. 1, 5 (1978), Justice Pope asks: "Why?" The case of a hazardous defect that causes an accident injuring the defective product presents "the same defect, the same unreasonableness, the same dangerousness, and the same accident that would have supported an action for damages for personal injuries and to 'other' property. The elimination of those criteria as to the product itself is at best an arbitrary distinction, and I find no policy reason to justify it." *Mid Continent Aircraft Corp.*, at 316-17.

ty is reduced when an injury is only to the product itself." *East River*, 476 U.S. at 871, 106 S.Ct. at 2302. Listing the types of losses product injury generates, and remarking that "[l]osses like these can be insured", *East River*, at 871-72, 106 S.Ct. at 2302-03, the Court says nothing to explain why safety concerns are not implicated.¹⁵

In contrast to the *East River* approach, risk of harm analysis appropriately accommodates the safety and risk-spreading policies that underlie the law of product liability, and "provides a workable and accurate distinction between accidents that should be actionable in tort and losses that should remain in the domain of warranty law." Comment, *Asbestos in Schools and the Economic Loss Doctrine*, 54 U.Chi.L.Rev. 277, 300 (1987). Under this analysis, the fact that a hazardous product defect has injured only the product itself, and not persons or other property, is properly regarded as a "pure fortuity". *Consumers Power Co. v. Curtiss-Wright Corp.*, 780 F.2d 1093, 1099 (3d Cir.1986). Thus, the same remedy is made available for this sort of injury as would be available if the product defect had injured something or someone else. See, e.g., *Consumers Power Co. v. Curtiss-Wright Corp.*, *supra* at 1099; *Cloud v. Kit Mfg. Co.*, *supra*. "[N]o logical distinction" exists between these circumstances to justify different treatment under the law. *Seely v. White Motor Co.*, 63 Cal.2d 9, 22, 403 P.2d 145, 45 Cal.Rptr. 17 (1965) (Peters, J., concurring and dissenting). And no evidence exists that the Legislature intended to create the distinction that logic does not sanction.

To say that the WPLA incorporates the risk of harm approach to economic loss does not fully answer the question certified by the federal court, however. Further refinement of the analysis is necessary to

determine the sort of remedy that is available to WWP with respect to its insulator replacement plans. A majority of courts that follow the risk of harm approach apply a "sudden and dangerous test", distinguishing economic loss from other damages principally according to the manner in which the product failure has occurred. If the failure is the result of a sudden and dangerous event, it is remediable under tort principles. If no such event has occurred, the product failure is deemed economic loss. See, e.g., *Cloud v. Kit Mfg. Co.*, *supra* at 250-51; *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1171-73, 1174-75 (3d Cir. 1981); cf. *Stuart v. Coldwell Banker Comm'l Group, Inc.*, 109 Wash.2d 406, 421, 745 P.2d 1284 (1987) (tort recovery for balcony rotting unavailable for this reason). Opposed to this "sudden and dangerous" test is a more evaluative approach that proceeds on the theory that a product user should not have to suffer a calamitous event before earning his remedy. See, e.g., *Stuart v. Coldwell Banker Comm'l Group, Inc.*, *supra* at 425, 745 P.2d 1284 (Callow, J., concurring in part, ~~1987~~ dissenting in part); *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill.2d 69, 97-98, 61 Ill.Dec. 746, 435 N.E.2d 443 (1982) (Simon, J., specially concurring); *Seely v. White Motor Co.*, 63 Cal.2d 9, 22 n. 2, 403 P.2d 145, 45 Cal.Rptr. 17 (1965) (Peters, J., concurring and dissenting). See generally *Kishwaukee Comm'ty. Health Servs. Ctr. v. Hospital Bldg. & Equip. Co.*, 638 F.Supp. 1492, 1497-98 (N.D.Ill.1986) (describing "actual" and "potential" versions of risk of harm formula).

We do not now decide which of these approaches is appropriate under the scheme of the WPLA. Neither the parties nor the amici curiae have addressed this

¹⁵ We are not the first court *East River* has failed to persuade against the risk of harm approach. In *Bancorp Leasing & Fin. Corp. v. Augusta Aviation Corp.*, 813 F.2d 272, 277 (9th Cir.1987), the Ninth Circuit predicted that, *East River* notwithstanding, Oregon will adhere to the risk of harm approach it adopted in *Russell v. Ford Motor Co.*, 281 Or. 587, 575 P.2d 1383 (1978). And in *Greenville v. W.R. Grace & Co.*,

827 F.2d 975, 976-78 (4th Cir.1987), the Fourth Circuit predicted that South Carolina would follow risk of harm analysis in asbestos cases. See also *Board of Educ. v. A. C. & S. Inc.*, 171 Ill.App.3d 737, 121 Ill.Dec. 643, 525 N.E.2d 950 (1988) (applying risk of harm analysis in asbestos case; no substantive discussion of *East River*).

STATE v. JACKSON

Wash. 1211

Cite as 774 P.2d 1211 (Wash. 1989)

issue, and, insofar as the case is moot and a definitive answer is not necessary to assist the federal court, we defer the question to a future case.

IV

In response to the questions certified from the federal court, we hold that the WPLA preempts common law remedies; that the statute provides no remedy for "economic loss"; and that "economic loss" within the context of the statute is determined by a risk of harm analysis.

CALLOW, C.J., and UTTER, BRACHTENBACH, DOLLIVER, PEARSON, ANDERSEN and SMITH, JJ., concur.

DORE, Acting C.J., concurs in result only.



112 Wash.2d 867
STATE of Washington, Respondent,

v.

Destin JACKSON, Petitioner.

No. 55278-9.

Supreme Court of Washington,
En Banc.

June 29, 1989.

As Charged July 28, 1989.

Defendant was convicted of attempted second-degree burglary by the Superior Court, King County, Richard M. Ishikawa, J., and he appealed. The Court of Appeals, Coleman, J., 51 Wash.App. 100, 751 P.2d 1248, affirmed, and defendant petitioned for further review. The Supreme Court, Callow, C.J., held that: (1) no inference could be drawn that defendant was attempting to enter building with attempt to commit crime therein, within meaning of attempted burglary statute, merely because he had repeatedly kicked door prior

to police officer's approach; (2) malicious mischief was not lesser-included offense of attempted burglary; but (3) State did not, as matter of due process, have to specifically plead the crime which defendant intended to commit inside building in order to charge defendant with attempted burglary.

Reversed and remanded.

Durham, J., dissented and filed opinion in which Brachtenbach, J., concurred.

1. Burglary ¶29

No inference could be drawn that defendant was attempting to enter building with intent to commit crime therein, within meaning of attempted burglary statute, merely because defendant had repeatedly kicked door to building prior to police officer's approach. West's RCWA 9A.52.040.

2. Criminal Law ¶306

"Presumption" is assumption of fact which law requires to be made from another fact or group of facts, and it deals with legal processes.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ¶306

"Inference" is logical deduction or conclusion from an established fact, and it deals with mental processes.

4. Criminal Law ¶306

Inference may be drawn from proven facts only if inference is rationally related to proven facts.

5. Criminal Law ¶307

Criminal statutory presumption is constitutional only if presumed fact follows beyond a reasonable doubt from proven fact.

6. Criminal Law ¶1172.2

Instructional error, which permitted jurors to infer element of crime charged from facts that could reasonably support other conclusion, was prejudicial.

7. Indictment and Information ¶191(2)

Malicious mischief is not lesser-included offense of attempted burglary, as one

In summary, the vouching and hearsay testimony of Bennett and S, when combined with the prosecutor's improper questions and closing remarks, prevented Alexander from obtaining a fair trial. *Coe*, 101 Wash.2d at 789, 684 P.2d 668; *State v. Oughton*, 26 Wash.App. 74, 85, 612 P.2d 812, review denied, 94 Wash.2d 1005 (1980). Accordingly, we reverse the judgment and remand for a new trial.

GROSSE, C.J., and KENNEDY, J., concur.



64 Wash.App. 128

1128 Wanda WEATHERBEE, Appellant,

v.

Lennart K. GUSTAFSON and Judi A. Gustafson, his wife; Gustafson Builders Corp., a Washington corporation; and Pittway Corp., a foreign corporation, Respondents.

No. 26742-6-I.

Court of Appeals of Washington,
Division 1.

Feb. 3, 1992.

Homeowner brought action against manufacturer of smoke detector and builder that installed it to recover injuries resulting from fire, and builder moved for summary judgment. The Superior Court, King County, James Dore, J., granted the motion, and homeowner appealed. The Court of Appeals, Kennedy, J., held that evidence presented fact issue as to whether failure of smoke alarm to sound proximately caused injuries, thus precluding summary judgment.

Reversed and remanded.

1. Judgment ⇐181(2), 185(2)

Motion for summary judgment should be granted if there is no genuine issue of material fact or if reasonable minds could reach only one conclusion on that issue based upon the evidence construed in the light most favorable to nonmoving party.

2. Judgment ⇐185(6)

Granting of summary judgment is proper if nonmoving party, after motion is made, fails to establish any facts which would support essential element of its claim.

3. Judgment ⇐185(2)

Burden is on nonmoving party to make out prima facie case concerning essential element of claim, if party moving for summary judgment first shows that there is absence of evidence to support nonmoving party's case.

4. Judgment ⇐185.3(21)

Summary judgment motion by manufacturer and installer of allegedly defective smoke detector did not eliminate competent evidence in the record from which finder of fact could draw reasonable inferences in support of essential elements of homeowner's claim that defective smoke detector proximately caused injuries resulting from fire, and thus did not shift burden of proof to nonmoving homeowner.

5. Judgment ⇐185.3(21)

Evidence that smoke from burning pillow awakened person in bed created genuine issue of material fact as to whether failure of smoke alarm to sound proximately caused injuries resulting from exploding pillow, thus precluding summary judgment in suit against manufacturer and installer of alarm.

1129 Kirk R. Wines, Seattle, for appellant.

Lish Whitson, Helsell, Fetterman, Martin Todd & Hokanson, Merrick Hofstedt & Lindsey, Thomas V. Harris, Seattle, for respondents.

KENNEDY, Judge.

Appellant Wanda Weatherbee appeals the trial court's grant of summary judgment to the manufacturer and installer of a smoke alarm which she claims was defective and that the defect was a proximate cause of injuries she received during a fire in her home. We reverse.

I

On the night of December 25, 1984, appellant was at her home with a companion, Mr. Chase. Sometime that night the appellant lit a votive candle and placed it in the headboard of her waterbed. The appellant's pillow apparently came into contact with the candle and began to burn. Appellant testified that she believed that this occurred when she shifted her position and the pillow was moved. Appellant testified that she was awake at this time, and that her companion was also awake. However, Mr. Chase stated in deposition that he had been asleep and that he was awakened by the presence of smoke.

Upon noticing appellant's pillow in flames, Mr. Chase testified that he attempted to move the pillow, and it exploded. Molten fragments landed on the appellant, and as a result she was burned. Although she was awake before the pillow exploded, appellant testified at deposition that she did not feel any heat or smell or see any smoke until after the pillow exploded. Appellant testified that she did smell smoke when she stood up and after she had been burned, but that generally, her sense of smell was not very good.

Prior to this incident, appellant had contracted with respondent Gustafson Builders Corp., owned by respondents Lennart and Judi Gustafson, to perform substantial remodeling of her house. The remodeling occurred in September and October of 1984. A new smoke detector, a "First Alert" model manufactured by respondent Pittway Corp., was installed at this time.

Appellant filed the instant suit on August 14, 1987, alleging negligence on the part of the manufacturer and the installer of her smoke detector. Appellant claims that the smoke detector was not installed

or tested properly and was non-functioning at the time of the fire. The smoke detector was located in the hallway across from the appellant's bedroom door, and the bedroom door was open at the time of the fire.

On June 11, 1990, respondent Gustafson filed a motion for summary judgment claiming that the allegedly defective installation of the smoke alarm could not be considered the proximate cause of the appellant's injuries. On June 12, 1990, respondent Pittway filed a similar motion, also claiming that the allegedly defective smoke alarm could not be considered the proximate cause of the appellant's injuries. Summary judgment was granted to Gustafson on July 2, 1990, and to Pittway on July 3, 1990. Appellant filed a motion for reconsideration and filed with it a personal declaration regarding several of the facts pertinent to the incident. The motion for reconsideration was denied on July 27, 1990. This appeal followed.

II

[1-3] In determining whether an order of summary judgment is correct, this court is to engage in the same inquiry as the trial court. *Rhea v. Grandview Sch. Dist. J.T. 116-200*, 39 Wash.App. 557, 559, 694 P.2d 666 (1985). A motion for summary judgment should be granted if there is no genuine issue of material fact or if reasonable minds could reach only one conclusion on that issue based upon the evidence construed in the light most favorable to the non-moving party. *Sea-Pac Co. v. United Food and Comm'l Workers Local Union 44*, 103 Wash.2d 800, 802, 699 P.2d 217 (1985). The granting of summary judgment is proper if the non-moving party, after the motion is made, fails to establish any facts which would support an essential element of its claim. *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). The burden is on the non-moving party to make out a prima facie case concerning an essential element of the claim if the moving party

first shows that there is an absence of evidence to support the non-moving party's case. *Young, supra*; see also *Hash v. Children's Orthopedic Hosp.*, 110 Wash.2d 912, 915, 757 P.2d 507 (1988).

[4] Respondent claims that appellant failed to establish any facts which would support a finding that the allegedly defective smoke alarm was the proximate cause of her injuries, and thus under *Young* the burden shifted to her and summary judgment was properly entered. In *Young* this state's Supreme Court adopted the reasoning in *Celotex Corp.*, 477 U.S. at 325, 106 S.Ct. at 2553-54, by explicitly stating that if the moving party in a summary judgment action shows the absence of an issue of material fact on an essential element ¹³²of a claim, the burden shifts to the non-moving party to demonstrate the existence of an issue of material fact in order to avoid summary judgment. *Young*, 112 Wash.2d at 225, 770 P.2d 182.

Finding that a pharmacist's testimony can never be competent evidence as to the proper standard of care of a physician practicing a medical specialty, and that the only evidence as to the proper standard of care which plaintiff had presented was in the form of an affidavit from a pharmacist, the *Young* court ruled that the plaintiff had failed to establish a material fact as to breach of duty and affirmed the summary judgment. *Young*, 112 Wash.2d at 227-28, 770 P.2d 182.

Although the test of summary judgment was approached somewhat differently, neither the *Celotex* court nor the *Young* court altered the historic rules regarding summary judgment. As reasoned by the court in *Young*, where a party fails to demonstrate an issue of material fact, "there can be 'no genuine issue as to material fact,' [under CR 56] since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Young*,

1. There is some dispute as to whether this court should consider the declaration of the appellant filed with her motion for reconsideration to be part of the factual record, since this affidavit was not presented at the time the court considered the original motion. According to the

112 Wash.2d at 225, 770 P.2d 182 (quoting *Celotex Corp.*, 477 U.S. at 322-23, 106 S.Ct. at 2552-53).

The *Young* court simply clarified that to successfully move for summary judgment a party must demonstrate a lack of evidence or a material fact which cannot be rebutted. *Young*, 112 Wash.2d at 225, 770 P.2d 182. The evidence and all reasonable inferences therefrom must still be examined in the light most favorable to the nonmoving party to determine if there are genuine issues of material fact for trial. *Young*, 112 Wash.2d at 226, 770 P.2d 182. In the present case, unlike *Young*, the claims of the moving parties did not eliminate competent evidence in the record from which a finder of fact could draw reasonable inferences in support of the essential elements of appellant's claim. Therefore, the burden of proof in the present case did not shift to the appellant, and summary judgment in favor of respondent was incorrect.

[5] Respondents Gustafson and Pittway contend that the appellant failed to provide any competent evidence that ¹³³even if the smoke alarm were not properly working, this was a proximate cause of her injury and that this lack of evidence on a prima facie portion of her claim defeated her claim under *Young*. Respondents make a sweeping conclusion that there was a lack of evidence showing prima facie proximate cause, by merely claiming that there was no evidence establishing that the smoke alarm would have gone off had it been working or that Mr. Chase would have acted any differently in throwing the pillow had the alarm gone off.¹ We disagree.

The respondents claim that the smoke alarm would not have gone off before the pillow exploded because Ms. Weatherbee testified that she noticed no smoke or felt no heat until after the explosion, and therefore there would have been no smoke to set

trial court's order dismissing the motion for reconsideration, it was considered by the trial court, and this court considers all of the evidence before the trial court. See *Rhea, supra*. However, the declaration of the appellant in no way changed the evidence below.

off a functioning alarm. However, such conjecture does not eliminate the reasonable inference that a working smoke alarm would have gone off. The respondents introduced no evidence that smoke alarms are ever less sensitive to smoke than human beings or that this alarm would have been in the present case. Furthermore, respondents ignore the fact that appellant's companion Mr. Chase testified that he was asleep, and that smoke actually awakened him and alerted him to the fire danger.

It certainly is a reasonable inference that if there was sufficient smoke to wake Mr. Chase there would have been sufficient smoke, particularly in the upper part of the house where smoke travels, to activate the alarm, even if Ms. Weatherbee did not see or smell the smoke. Although Mr. Chase did not claim that he would have responded differently had the alarm gone off, it is also a reasonable inference that had the alarm alerted Ms. Weatherbee, she could ¹¹³⁴have moved before Mr. Chase grabbed her pillow which then exploded.

Thus, contrary to respondents' contention, there is evidence of material facts which support proximate causation in the present case. *Young* does not stand for the proposition that the respondents can make a bald assertion unsupported by factual evidence and thereby shift the burden of proof to appellant, when there is evidence giving rise to questions of material fact in all parts of her claim. As noted above such evidence is present in this case. Therefore, we reverse the judgment of the trial court and remand for trial.

WEBSTER, A.C.J., and PEKELIS, J.,
concur.



64 Wash.App. 158

¹¹⁵⁸FIRST INTERSTATE BANK OF WASHINGTON, N.A., a national banking association and Washington Mutual Savings Bank, a State chartered bank, Plaintiffs,

v.

NELCO ENTERPRISES, INC., a Washington corporation, Jack L. and Valarie J. Nelson, husband and wife, Max S. and Nita Burrup, husband and wife, Milo L. and Labarbara G. Stanfield, husband and wife, Demar and Dorothy N. Gale, husband and wife, BNS Associates, a partnership, Respondents,

Western Frontiers, Inc., (now called Hagadone Hospitality Co., an Idaho corporation), Magnuson Washington, Inc., a Washington corporation, Magnuson Limited Partnership, an Idaho limited partnership, Appellants,

Harry F. and Jane Doe Magnuson, husband and wife, Jerald J. and Jane Doe Jaeger, husband and wife, Henry W. and Jane Doe Taylor, husband and wife, Richland Associates, a Washington limited partnership, Nelson and Gale, Inc., a Washington corporation, Old National Leasing Co., a Washington corporation, Holiday Inns, Inc., a foreign corporation, Micro-Cable Communications Corporation, (formerly Tri-Cities Cable Systems, Inc.), a Washington corporation, Ceiling and Interior Systems Supply, Inc., a Washington corporation, Mamoun and Jane Doe Sakkal, husband and wife, d/b/a Restaurant and Hotel Design, Tempco Heating and Air Conditioning, Inc., a Washington corporation, Chinook Construction, Inc., a Washington corporation, State of Washington, Department of Revenue, United States of America, Federal Tax Liens, Thyddloughs Corporation, a Washington corporation, Creative Travel Inc., a Washington corporation, Robert W. and Jean McKee, husband and wife, d/b/a Career Services, F.H. Burnham, Lessor of personal property, General Data, Inc., a Washington corporation, Pepsi-Cola Bot-

79 Wash.2d 586

Clement ZUKOWSKY and Crystal Zukowsky,
husband and wife, Appellants,

v.

George BROWN and Marilyn Brown, hus-
band and wife, Respondents.

No. 41420.

Supreme Court of Washington,
En Banc.

Sept. 2, 1971.

Rehearing Denied Nov. 5, 1971.

Action by husband and wife against boat owners to recover for injuries wife sustained when helm seat she was occupying on defendants' pleasure boat collapsed during cruise on waters of Puget Sound. The Superior Court, Pierce County, entered judgment on jury verdict for defendants, and plaintiffs appealed. The Court of Appeals, Harold J. Petric, J., 1 Wash. App. 94, 459 P.2d 964, reversed and remanded, and petition for review was granted. The Supreme Court, Neill, J., held that it was reversible error to instruct on contributory and comparative negligence where there was evidence from which jury could find negligence on part of boat owners and only evidence of conduct of guest which could be considered as having contributed to accident was her sudden turning on seat, accompanied by possibility that she had kicked supporting post while turning, and it could not be said with certitude that jury did not base its general verdict for defendant on conjectured negligence of plaintiff as an independent intervening cause.

Remanded for new trial.

Hill, J. pro tem., concurred in result; Finley and Hunter, JJ., concurred in result and filed opinion; Rosellini, J., filed dissenting opinion in which Hale, J., concurred; Wright, J., did not participate.

1. Admiralty ⚓1

Where collapse of helm seat on pleasure boat, with resultant injury to guest passenger, occurred in the waters of Puget Sound, substantive law to be applied in

action to recover from boat owner was that which would have been applicable had the action been brought in federal district court under that court's admiralty jurisdiction; however, in applying that law, the rules of pleading, practice and evidence were those of state law. (Per Neill, J., with three judges concurring and three judges concurring in result.) 28 U.S.C.A. § 1333.

2. Shipping ⚓79

Under federal maritime law, no distinction between invitee and licensees is applied in personal injury action. (Per Neill, J., with three judges concurring and three judges concurring in result.)

3. Shipping ⚓79

Owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances. (Per Neill, J., with three judges concurring and three judges concurring in result.)

4. Shipping ⚓80

Boat owner owed to guest, who sustained injury when helm seat in which she was sitting collapsed while boat was cruising on waters of Puget Sound, the duty of exercising reasonable care under the circumstances. (Per Neill, J., with three judges concurring and three judges concurring in result.)

5. Negligence ⚓97

Under the federal maritime doctrine of comparative negligence, contributory negligence, however gross, does not bar recovery, but only affects the amount recoverable. (Per Neill, J., with three judges concurring and three judges concurring in result.)

6. Appeal and Error ⚓1064(1)

Negligence ⚓138(4)

Shipping ⚓86(3)

It was reversible error to instruct on contributory and comparative negligence, in action to recover from boat owner for injuries guest sustained when helm seat collapsed, where there was evidence from which jury could find negligence on part

of boat owners and only evidence of conduct of guest which could be considered as having contributed to accident was her sudden turning on the seat, accompanied by possibility that she had kicked supporting post while turning, and it could not be said with certitude that jury did not base its general verdict for defendant on conjectured negligence of guest as an independent intervening cause. (Per Neill, J., with three judges concurring and three judges concurring in result.)

7. Negligence \Leftrightarrow 136(6)

Applicability and procedural effect of doctrine of *res ipsa loquitur* are questions of law. (Per Neill, J., with three judges concurring and three judges concurring in result.)

8. Negligence \Leftrightarrow 121(2)

To support application of doctrine of *res ipsa loquitur* the inference of negligence must be legitimate, that is, the distinction between what is mere conjecture and what is a reasonable inference from the facts and circumstances must be recognized and it is not enough that plaintiff has suffered injury or damage, as it is necessary that the manner and circumstances of the damage or injury be of a kind that do not ordinarily happen in the absence of someone's negligence. (Per Neill, J., with three judges concurring and three judges concurring in result.)

9. Negligence \Leftrightarrow 121(2)

Instrumentality which caused the damage or injury must have been in the actual or constructive control of defendant before doctrine of *res ipsa loquitur* may be applied; to satisfy such requirement, degree of control must be exclusive to the extent that it is a legitimate inference that defendant's control extended to the instrumentality causing injury or damage. (Per Neill, J., with three judges concurring and three judges concurring in result.)

10. Negligence \Leftrightarrow 121(2)

To justify resort to doctrine of *res ipsa loquitur* it is not necessary that plaintiff's evidence both support a reasonable

inference that defendant was negligent and preclude the possibility that defendant can establish a defense based on plaintiff's conduct. (Per Neill, J., with three judges concurring and three judges concurring in result.)

11. Shipping \Leftrightarrow 86(2 $\frac{3}{8}$)

Where guest on pleasure boat established that she was injured when helm seat on which she was sitting collapsed and that defendant was in ownership and control of boat and had removed and replaced helm seat several times and there was nothing so unreasonable or abnormal in her use of seat as to support a claim of contributory negligence, or prevent inference of defendant's negligence from arising in the first instance, doctrine of *res ipsa loquitur* was applicable. (Per Neill, J., with three judges concurring and three judges concurring in result.)

12. Negligence \Leftrightarrow 121(2)

When the manner and circumstances of an event causing injury or damage provide circumstantial evidence giving rise to legitimate inference of negligence, plaintiff should not be denied the effect of that evidence for the sole reason that he has also provided direct evidence of specific cause; however, permissible scope of the inference may be limited where plaintiff's evidence of a specific cause is conclusive as a matter of law. (Per Neill, J., with three judges concurring and three judges concurring in result.)

13. Negligence \Leftrightarrow 121(2)

In a given case, the procedural effect of *res ipsa loquitur* depends on the strength of the inference to be drawn from the circumstances in evidence and the strength of the inference varies not only according to the manner of the particular occurrence, but also with the standard or degree of care which defendant owed to plaintiff in connection with the occurrence. (Per Neill, J., with three judges concurring and three judges concurring in result.)

14. Negligence \Leftrightarrow 138(2)

Res ipsa loquitur is properly treated the same as any other circumstantial evidence

in instructions to the jury. (Per Neill, J., with three judges concurring and three judges concurring in result.)

15. Negligence ⇨138(2)

A *res ipsa loquitur* instruction should not be given in addition to other circumstantial evidence instructions. (Per Neill, J., with three judges concurring and three judges concurring in result.)

16. Negligence ⇨138(4)

Instruction that neither negligence nor contributory negligence could be assumed merely because the evidence showed that an accident happened was erroneously given where there was no substantial evidence of contributory negligence; instruction also could have amounted to a "special quirk" requiring counterbalancing "pinpoint" instruction on *res ipsa loquitur* inference. (Per Neill, J., with three judges concurring and three judges concurring in result.)

17. Negligence ⇨138(2)

Appropriate instruction, where doctrine of *res ipsa loquitur* was applicable, would have been, in substance, that negligence could not be assumed merely because damage or injury had occurred but that it was required to be proved and that such proof could be shown either by direct evidence or by reasonable inference from the manner and circumstances of the event causing injury or damage. (Per Neill, J., with three judges concurring and three judges concurring in result.)

18. Witnesses ⇨282

When a party is called as a witness by the adverse party, the witness is adverse, thus permitting the calling party the leeway of leading questions on direct examination; conversely, on cross-examination of that witness by his own counsel, the witness remains adverse to the calling party and leading questions are not permitted. (Per Neill, J., with three judges concurring and three judges concurring in result.)

Neal, Bonneville, Hughes & Viert, William G. Viert, Tacoma, for respondents.

NEILL, Associate Justice.

Plaintiffs appealed from a judgment of dismissal following a verdict for defendants in this personal injury action. The court of appeals reversed and remanded for a new trial. *Zukowsky v. Brown*, 1 Wash. App. 94, 459 P.2d 964 (1969).

We granted defendants' petition for review which challenges two of the conclusions of the court of appeals. However, plaintiffs' answer to that petition raises for review each assignment of error set forth in their opening brief in the court of appeals. By reason of this answer, we have considered all assignments of error presented there.

Plaintiff wife was injured while a guest on defendants' pleasure boat during a cruise on waters of Puget Sound. She was invited by defendant husband, operator of the boat, to sit on a seat across the passageway from his position at the helm. The seat was too high to permit her feet to touch the deck; so her legs were either dangling or wrapped around the supporting post. She had been seated 5 to 20 minutes when she turned rather suddenly on the seat to speak to her husband. The seat collapsed, throwing her to the deck, and causing the injuries for which redress is sought.

The seat was a bench type (nonswivel) with folding back. It was attached to the bulkhead by hinges permitting it to fold against the bulkhead when not in use. To use the seat, it is lifted to a horizontal position and supported by a telescoping metal post. This post is in two sections: one section, permanently attached to the underside of the seat, is designed to slip into the section attached to the deck by two screws through a flange on the base of the post. This flange is connected to the post by a hinge device which permits the post to be placed in a horizontal position when not in use. In its useable position, the seat is 40 inches above the deck of the passageway and 23 inches above the

McCormick, Hoffman, Rees & Arnold, Paul Hoffman, Jr., Tacoma, for appellants.

decking on which it is supported—there being a 17-inch rise from the passageway deck to the top of the locker on which the seat rested.

Immediately following Mrs. Zukowsky's fall, it was observed that the head of one screw of the supporting flange was broken off, with the body of the screw remaining in the wooden decking. The other flange screw had pulled out of the wood.

Testimony indicated that the defendant husband had removed the flange and supporting post on several occasions, but each time had replaced it with larger steel screws to insure a firm connection. Shortly prior to this accident, plaintiff husband had folded the seat against the bulkhead to obtain access to the supporting locker, but he had replaced it in its position for use.

There is no certainty as to the cause of the collapse of the seat. Experts testified concerning what may have happened. For example, if Mrs. Zukowsky lifted up on the seat, the telescoping joint of the post would separate upon a rise of 2 inches. However, if the seat were improperly assembled by reason of the post joint meeting flush instead of telescoping, the resulting angle of the seat (the inboard portion of the seat would be about 2 inches higher than the outboard side attached to the bulkhead) would be quite noticeable to a person sitting thereon. The breaking of the screw and the pulling from the wood of the other

screw indicates a side or angle force incompatible with the downward pressure created by the weight of the person using the seat. Despite the varying theories of the experts, there is testimony from which a jury could find negligence of the defendants in either failing to properly set the supporting post in a telescoped position or failing to properly inspect and maintain the supporting flange at its connection with the deck.

The only evidence of conduct of the plaintiff which could be considered as having contributed to the accident is her sudden turn on the seat, accompanied by the possibility that she kicked the supporting post while turning.

[1-5] The trial court instructed the jury on negligence, contributory negligence, and comparative negligence.¹ We are in accord with the decision of the court of appeals that there was not sufficient evidence of contributory negligence to support a contributory negligence instruction and that, lacking evidence of contributory negligence, a comparative negligence instruction should not have been given.

Defendant, having injected the contributory and comparative negligence elements into the instructions, now contends that any error in these instructions was rendered moot by the defense verdict. This contention is based upon *Nehrbass v. Bullan*, 169

1. As the accident occurred in the waters of Puget Sound, the substantive law to be applied is that which would have been applicable had the action been brought in the admiralty court. 28 U.S.C. § 1333. *Scudero v. Todd Shipyards Corp.*, 63 Wash.2d 46, 385 P.2d 551 (1963). In applying that law, the rules of pleading, practice and evidence are those of this court. *Madruga v. Superior Court of Cal.*, 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924); *Maxwell v. Olsen*, 468 P.2d 48 (Alaska 1970).

Under federal maritime law, no distinction between invitees and licensees is applied in personal injury actions. The applicable standard of care is set forth

in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632, 79 S.Ct. 406, 410, 3 L.Ed.2d 550 (1959):

We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.

Plaintiffs, as invited guests on defendants' vessel, were entitled to the benefit of the above rule.

Under the federal maritime doctrine of comparative negligence, contributory negligence, however gross, does not bar recovery, but only affects the amount recoverable. *Scudero v. Todd Shipyards Corp.*, *supra*, and cases cited.

Wash. 377, 379, 13 P.2d 482 (1932), where we said:

If the charge of negligence is refuted by the jury's verdict, then the question of contributory negligence becomes immaterial, and the instructions thereon inconsequential.

In that case, the jury was instructed against considering contributory negligence as to one of three plaintiffs. The jury returned a defense verdict as to all plaintiffs. Under the particular facts, we were able to positively state that the jury had not proceeded beyond the question of defendant's negligence to consider any question of contributory negligence by the other two plaintiffs. The facts presented an exceptional situation.

[6] In the case at bar, the exceptional circumstances of *Nehrbass, supra*, are not present. We cannot positively state, from the existence of a general verdict for the defendants in this case, that the jury must have determined that defendant was free from negligence and that its verdict was reached sans any influence of the erroneous instructions. The instructions spoke in comparative terms, thus encouraging the jury to consider alleged contributory negligence in conjunction with its consideration of plaintiff's alleged negligence, rather than distinct from and subsequent to that determination. Further, we cannot say with certitude that the jury did not base its conclusion on a finding that, although defendant was negligent, the conjectured negligence of plaintiff was an independent intervening cause which released defendant from liability. Under these circumstances, the rule that it is prejudicial error to instruct a jury on an

issue not raised in the evidence applies. *Jablinsky v. Continental Pac. Lines, Inc.*, 58 Wash.2d 702, 364 P.2d 793 (1961), and cases cited therein; *Tergeson v. Robinson Mfg. Co.*, 48 Wash. 294, 93 P. 428 (1908); see generally *Wiehl*, *Instructing a Jury in Washington*, 36 Wash.L.Rev. 378 (1961). The instructions on contributory and comparative negligence constitute reversible error.

Plaintiffs are entitled to a new trial at which the jury should consider only the issues of defendants' negligence, proximate cause, and damages. However, two further matters require our attention, without which we would merely affirm the court of appeals by the simple statement that the petition for review had been improvidently granted.

[7] The trial court refused plaintiffs' requested instruction on *res ipsa loquitur*.² The court of appeals agreed on the basis that a necessary element of that doctrine is not present. We agree that the instruction should not have been given, but for a different reason. In discussing our conclusion on this point, we reexamine the applicability and procedural effect of the doctrine. These issues are questions of law. See *Nelson v. Murphy*, 42 Wash.2d 737, 258 P.2d 572 (1953).

We are concerned with a phrase born to the law of torts in 1863. *Byrne v. Boadle*, 159 Eng.Rep. 299, 2 H. & C. 722 (1863). Literally translated, the words mean "the thing itself speaks," and as first used by courts they meant nothing more than that the particular manner and circumstances of an accident might "speak" sufficiently to support an inference of neg-

2. The requested instruction reads:

It is for you the jury to determine whether the manner of injuries sustained by Crystal Zukowsky, and the attendant circumstances connected therewith, are of such a character as would in your judgment, warrant an inference that the injury would not have occurred had due diligence in care been exercised by the defendant.

The rule is that when an agency or instrumentality which produces injury

is under the control of a defendant or persons under defendant's supervision or control and the injury which occurred would ordinarily not have resulted if those in control had used proper care, then, in the absence of satisfactory explanation, you are at liberty to infer, though you are not required to so infer, that the defendant was at some point negligent and the negligence produced the injury complained of by the plaintiffs.

ligence by the trier of fact, enabling the injured plaintiff to avoid nonsuit on that issue. Thus, the phrase initially expressed a common-sense recognition of the potential efficacy of circumstantial evidence. Unfortunately, in the generations since the concept was first enshrined in Latin, the phrase has developed an almost impenetrable crust.

From that casual utterance, dignified and magnified by the cloak of the learned tongue, there has grown by a most extraordinary process the "doctrine" of *res ipsa loquitur*. It is a thing of fearful and wonderful complexity and ramifications, and the problems of its application and effect have filled the courts of all our states with a multitude of decisions, baffling and perplexing alike to students, attorneys and judges.

Prosser, *Res Ipsa Loquitur in California*, 37 Cal.L.Rev. 183 (1949).

We in Washington have not been spared this development. It would be unwieldy and of little use to attempt a complete review of our prior case law on the subject. However, some discussion is necessary to explain our conclusions: first, that *res ipsa loquitur* is applicable in this case; and, second, that an instruction on the doctrine was properly refused.

We first deal with the applicability of *res ipsa loquitur*. In prior cases,³ we have made use of a formula first stated by Wigmore (4 Wigmore, *Evidence* § 2509 (1st ed. 1905), repeated in 9 Wigmore, *Evidence* § 2509 (3d ed. 1940)) and set forth by Prosser as the "conditions usually stated." (Prosser, *Torts* § 42 (2d ed. 1941) at 201, and § 39 (3d ed. 1964) at 218.)

Further proof of negligence is not essential to take a case to the jury or to overcome challenges to the sufficiency of the evidence where (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.

Horner v. Northern Pac. Beneficial Ass'n Hosps., Inc., 62 Wash.2d 351, 359, 382 P.2d 518 (1963).

Dean Prosser has criticized this statement of conditions:

With this statement in our greatest legal text, *res ipsa loquitur* was reduced to a formula—a catchword easy to repeat as a substitute for consideration of the evidence. Unhappily the proof of facts by facts is not capable of reduction to a formula; it has an inconvenient habit of depending always upon the facts. Text writers have much to answer for in this world. The strict and literal application of Wigmore's formula has led to such absurd results as the Rhode Island case in which, in the defendant's department store, the plaintiff sat down in a chair that collapsed, and a directed verdict for the defendant was affirmed upon the ground that both "user" and "control" of the chair were in the plaintiff "at the time of the injury."

(Footnote omitted.) Prosser, *Res Ipsa Loquitur in California*, 37 Cal.L.Rev. 183, 187 (1949).

The comment by Dean Prosser is apropos, as here the court of appeals held that the third element of the Wigmore formula is not satisfied in that Mrs. Zukowsky's turning on the seat constituted "voluntary action or contribution" by plaintiff. There is no indication that plaintiff's conduct was anything other than a reasonable, normal, natural and foreseeable act. Nonetheless, under a strict and literal application of the third element in the formula, Mrs. Zukowsky is not entitled to the benefit of *res ipsa loquitur*. Reason im-

3. *Horner v. Northern Pac. Beneficial Ass'n Hosps., Inc.*, 62 Wash.2d 351, 382 P.2d 518 (1963). *Accord*: *Miles v. St. Regis*

Paper Co., Inc., 77 Wash.2d 828, 467 P.2d 307 (1970); *Douglas v. Bussabarger*, 73 Wash.2d 476, 438 P.2d 829 (1968).

portunes a contrary result; so we reexamine the formula.

[8] When are the circumstances of an occurrence sufficient to support a reasonable inference of negligence against a particular defendant? We have long recognized that the answer to this question can only be determined in the context of each case. *E. g.*, Dalton v. Selah Water Users' Ass'n, 67 Wash. 589, 122 P. 4 (1912); Morner v. Union Pac. R. R. Co., 31 Wash. 2d 282, 196 P.2d 744 (1948). However, some generalities can be gleaned from our cases. The most fundamental of these is that the inference of negligence must be legitimate. That is, the distinction between what is mere conjecture and what is reasonable inference from the facts and circumstances must be recognized. Hufford v. Cicovich, 47 Wash.2d 905, 290 P.2d 709 (1955). Thus, it is not enough that plaintiff has suffered injury or damage, for such things may result without negligence. It is necessary that the manner and circumstances of the damage or injury be of a kind that do not ordinarily happen in the absence of someone's negligence. *E. g.*, Anderson v. Harrison, 4 Wash.2d 265, 103 P.2d 320 (1940); Haydon v. Bay City Fuel Co., 167 Wash. 212, 9 P.2d 98 (1932).

In Horner v. Northern Pac. Beneficial Ass'n Hosps., Inc., 62 Wash.2d 351, 360, 382 P.2d 518, 524 (1963), we itemized three such situations:

(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.

Accord, Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967).

[9] Of course, to be relevant, the evidence must support a legitimate inference

that *defendant* was negligent. This is generally reflected in the requirement that the instrumentality which caused the damage or injury be in the actual or constructive control of defendant. *E. g.*, Hogland v. Klein, 49 Wash.2d 216, 298 P.2d 1099 (1956). To satisfy this requirement, the degree of control must be exclusive to the extent that it is a legitimate inference that defendant's control extended to the instrumentality causing injury or damage. In its proper sense, this "condition" states nothing more than 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." Prosser, *Res Ipsa Loquitur* in California, 37 Cal.L.Rev. 183, 201 (1940).

[10] A claim of negligence based upon circumstantial evidence, like one based on direct evidence, is subject to defenses. On occasion, an affirmative defense such as assumption of the risk or contributory negligence may be shown by plaintiff's evidence. If so, plaintiff's evidence refutes his case by showing his own "voluntary action or contribution" in the event. It is in this context that the third-stated "condition" to application of *res ipsa loquitur* has appropriate meaning. But it is erroneous to read into those words the broader notion that plaintiff's evidence must not only support a reasonable inference that defendant was negligent, but also preclude the possibility that defendant can establish a defense based on plaintiff's conduct. *See* Miles v. St. Regis Paper Co., *supra*. Thus, it is incorrect to speak of evidence of plaintiff's conduct as proof of lack of defendant's negligence. If, at the close of plaintiff's case or 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" or by operation of some other defense, then plaintiff's case should not go to the jury, whatever his direct or circumstantial evidence of negligence of defendant. But this result does not obtain because sufficient proof of defendant's negligence has not been presented. It occurs because the evi-

dence wholly refutes plaintiff's right to recover for any such negligence.

[11] Here, Mrs. Zukowsky has shown that she was injured when a helm seat on which she was sitting collapsed. In the general experience of mankind, the collapse of a seat is an event that would not be expected without negligence on someone's part. Plaintiff's evidence showed that defendant was in ownership and control of the boat and had removed and replaced this helm seat several times. This evidence was sufficient to support a legitimate inference that defendant's control extended to the instrumentality causing injury. We find nothing so unreasonable or abnormal in Mrs. Zukowsky's use of the seat as to support a claim of contributory negligence, or prevent the inference of defendant's negligence from arising in the first instance. *Accord*, *Rose v. Melody Lane of Wilshire*, 39 Cal.2d 481, 247 P.2d 335 (1952).

Plaintiffs' evidence as to the manner and circumstances of this event are sufficient to support a reasonable inference that defendant was negligent. Since that inference was not refuted as a matter of law, plaintiffs were entitled to the benefits of the inference of negligence arising from the circumstances.

Having determined that *res ipsa loquitur* applies, there remains the question of its procedural effect. In meeting this question, we enter what has been called "a

quagmire of confusion which, taken in the aggregate, makes no conspicuous amount of sense." Dean Prosser lists Washington as one of "a dozen or more jurisdictions in which the language used by the courts is so uncertain or conflicting that it is virtually impossible to say what position they have taken as to the effect of *res ipsa loquitur*." Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 Minn.L.Rev. 241, 251 (1936).⁴ In the time since that assessment, no definitive pattern has emerged in the cases. In 1948, after an extensive review of prior case law, we stated that the inference of negligence in a *res ipsa* case has the effect of "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." *Morner v. Union Pac. R. R. Co.*, 31 Wash.2d 282, 291, 196 P.2d 744, 749 (1948). This language could support the conclusion that *res ipsa* shifts either the burden of going forward with the evidence or the burden of persuasion. We pointed out in *Morner* that no fixed rule of universal applicability is possible, resort being necessary to the facts and circumstances of each case. Then in 1950, we said that *res ipsa* does not shift the burden of proof, but is an inference which places on the defendant the duty of coming forward with exculpatory evidence. *Covey v. Western Tank Lines*, 36 Wash.2d 381, 218 P.2d 322 (1950). Nine years later in *Chase v.*

4. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 Minn.L.Rev. 241, 253 n. 68 (1936):

"The cases are in confusion. *Beall v. City of Seattle*, (1902) 28 Wash. 593, 69 Pac. 12, 61 L.R.A. 593, 92 Am.St. Rep. 892 (presumption?); *Anderson v. McCarthy Dry Goods Co.*, (1908) 49 Wash. 398, 95 Pac. 325, 16 L.R.A. (N.S.) 931, 126 Am.St.Rep. 870 (inference?); *Graaf v. Volcan [Vulcan] Iron Works*, (1910) 59 Wash. 325, 109 Pac. 1016 (inference); *Gibson v. Chicago, M. & St. P. [Puget Sound] Ry.*, (1911) 61 Wash. 639, 112 Pac. 919 (burden of proof shifted?); *Wodnik v. Luna Park Amusement Co.*, (1912) 69 Wash. 638, 125 Pac. 941, 42 L.R.A.

(N.S.) 1070 (inference); *Briglio v. Holt & Jeffery*, (1915) 85 Wash. 155, 147 Pac. 877 (burden of proof not shifted; language indicating both presumption and mere permissible inference); *Poth v. Dexter Horton Estate*, (1926) 140 Wash. 272, 248 Pac. 374 (burden of proof shifted?); *Johnson v. Grays Harbor R. & Light Co.*, (1927) 142 Wash. 520, 253 Pac. 819 (burden of proof shifted?); *Highland v. Wilsonian Inv. Co.*, (1932) 171 Wash. 34, 17 P.2d 631 (inference). It seems clear that the Washington court never has seriously considered the question."

See also Comment, *The Doctrine of Res Ipsa Loquitur in Washington*, 18 Wash.L.Rev. 215 (1938).

Beard, 55 Wash.2d 58, 67, 346 P.2d 315, 320 (1959), we stated:

In cases in which the so-called "doctrine" is applicable, its primary purpose is to withstand the challenge of the defendant's motion for a nonsuit. It did so here. There was no necessity for any instruction.

This prompted one writer to state that we had finally "put the so-called 'doctrine' in its proper place." Note, 35 Wash.L.Rev. 249, 252 (1960). Since then, two variant lines of authority have emerged. In one line of cases, we have said that jury instruction on *res ipsa loquitur* should be given. *E. g.*, Miles v. St. Regis Paper Co., *supra*; Douglas v. Bussabarger, *supra*; Horner v. Northern Pac. Beneficial Ass'n Hosps., Inc., *supra*. In the other, we have applied the reasoning of Chase v. Beard, *supra*, that *res ipsa* jury instructions are not necessary. *E. g.*, Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964); Dabroe v. Rhodes Co., 64 Wash.2d 431, 392 P.2d 317 (1964); *also see* 6 Wash.Prac.W.P.I. 22.01 (1967).

It has been suggested that an underlying distinction in the cases can be found in whether the causal connection is shown by direct evidence (no instruction) or by circumstantial evidence (instruction should be given); a distinction which the author considers tenuous.⁵

There is contradiction between a general denial of *res ipsa* instructions on the ground that a specific cause has been identified and our other holdings that the benefit of *res ipsa* is not removed by allegation and proof of specific acts of negligence. *E. g.*, Bolander v. Northern Pac. Ry., 63 Wash.2d 659, 388 P.2d 729 (1964); Morner v. Union Pac. R. R., *supra*; Mahlum v. Seattle School Dist. 1, 21 Wash.2d 89, 149 P.2d 918 (1944). Causation is, of course, a necessary element to a *prima facie* case in tort; but it is distinct from the element of negligence to which *res ipsa* applies. This is especially true in light of our

recent holdings that causation is a question of fact, with foreseeability and its policy considerations being treated in line with defendant's duty of care. Wells v. Vancouver, 77 Wash.2d 800, 467 P.2d 292 (1970); Rikstad v. Holmberg, 76 Wash.2d 265, 456 P.2d 355 (1969).

[1,2] When the manner and circumstances of an event causing injury or damage provide circumstantial evidence giving rise to a legitimate inference of negligence, the plaintiff should not be denied the effect of that evidence for the sole reason that he has also provided direct evidence of a specific cause. Of course, the permissible scope of the inference may be limited where plaintiff's evidence of a specific cause is conclusive as a matter of law. An analysis which may explain most of our prior cases is based on the strength of the plaintiff's evidence. *E. g.*, when plaintiff's direct evidence of a specific cause shows defendant negligent as a matter of law, then the *res ipsa* inference is unnecessary; plaintiff is entitled to a directed verdict. Conversely, when plaintiff's evidence shows conclusively that defendant is not responsible, any inference of negligence is refuted and defendant is entitled to a nonsuit. At these extremes *res ipsa* is denied, not because of the type of proof by which a specific cause is shown, but by reason of the effect of this showing on the issue of negligence. It is thus seen that the type of evidence of causation is not a correct basis of distinction as to the procedural effect of *res ipsa* in a given case.

[13] Once the trial court has determined as a matter of law that *res ipsa* is applicable, he must then determine the procedural effect. In a given case, the procedural effect of *res ipsa loquitur* depends upon the strength of the inference to be drawn from the circumstances in evidence. Nopson v. Wockner, 40 Wash. 2d 645, 245 P.2d 1022 (1952); Prosser, Torts § 40 at 234 (3d ed. 1964). The

5. Stritmatter, Presumptions in the Washington Supreme Court, 5 Gonzaga L.Rev. 198, 224-32 (1970).

strength of the inference varies not only according to the manner of the particular occurrence, but also with the standard or degree of care which defendant owed to plaintiff in connection with the occurrence. Circumstances may strengthen the inference in another sense, in that the situation may give rise to policy considerations placing an added explanatory burden on the defendant. Such considerations may arise from the relationship of the parties, the nature of the occurrence and the relative access to explanatory information. In summary, the procedural effect of a *res ipsa* inference will in each case be a consequence of its strength which, in turn, depends upon the degree of probability of its truth together with the appropriate, stated policy considerations.

The potential effects of the *res ipsa* inference are the same as those of other circumstantial evidence. In the usual case, where defendant owes a duty of ordinary care, where the inference of negligence is but one of the inferences that reasonably could be drawn from the evidence and where there is no further reason for placing an added burden of explanation on the defendant, the effect of *res ipsa* is as stated in Prosser, Torts § 40 at 232-233 (3d ed. 1964):

In the ordinary case, absent special circumstances or some special relation between the parties, the great majority of the American courts regard *res ipsa loquitur* as nothing more than one form of circumstantial evidence. * * * This means that the inference of negligence to be drawn from the circum-

stances is left to the jury. They are permitted, but not compelled to find it. The plaintiff escapes a nonsuit, or a dismissal of his case, since there is sufficient evidence to go to the jury; but the burden of proof is not shifted to his [defendant's] shoulders, nor is any "burden" of introducing evidence cast upon him, except in the very limited sense that if he fails to do so, he runs the risk that the jury may, and very likely will, find against him.

(Footnotes omitted.)

Generally, *res ipsa loquitur* provides nothing more than a permissive inference. The facts giving rise to it should be submitted as is any other circumstantial evidence. A second possible effect occurs if the strength of the inference of defendant's negligence is such that, absent exculpatory evidence by defendant, plaintiff is entitled to a directed verdict on the issue. In such circumstances, *res ipsa* has the effect of creating a presumption which shifts the burden of producing evidence to the defendant. A third possible effect occurs when the inference of negligence is so strong that defendant must show by a preponderance of the evidence that he was not negligent or lose on the issue, thus giving *res ipsa* the effect of a legal presumption which shifts the burden of persuasion. Finally, the circumstantial evidence may be such that the negligence of defendant is shown to exist as a matter of law. In that case, *res ipsa* has the effect of a conclusive presumption. Each of these potential effects finds a counterpart in the Washington Pattern Jury Instructions.⁶

6. 6 Wash.Prac., Washington Pattern Jury Instructions (1967). In ordinary cases, the proper effect is adequately conveyed by the pattern instruction on circumstantial evidence, WPI 1.03, with a slight modification to conform with our statement in *Horner v. Northern Pac. Beneficial Ass'n Hosps., Inc.*, 62 Wash.2d 351, 382 P.2d 518 (1963).

WPI 1.03 Circumstantial Evidence

Evidence is of two kinds—direct and circumstantial. Direct evidence is that given by a witness who testifies directly of his own knowledge concerning facts to be proved. Circumstantial evidence

consists of proof of facts or circumstances which according to the common experience of mankind [and/or other source of legitimate inference] give rise to a reasonable inference of the truth of the fact sought to be proved.

One kind of evidence is not necessarily more or less valuable than the other.

Appropriate instructions are also available to convey a presumption which affects the burden of going forward with the evidence (WPI 24.02 or 24.03), or which shifts the burden of proof on the issue of negligence (WPI 24.04 or 24.05), or which is conclusive (WPI 24.01).

In the case at bar, defendant owed to plaintiffs a duty of reasonable care under the circumstances. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 3 L.Ed.2d 550, 79 S.Ct. 406 (1959). The manner and circumstances of the accident support the reasonable inference that defendant breached his duty of care and was negligent. As we noted at the beginning, the inference of negligence is not the only inference that may be legitimately drawn from this evidence; nor does that inference, on its face, stand out as having particular strength under the facts of this case. There is nothing in the relationship between these parties from which it can be said that defendant has any greater explanatory burden than that which normally exists. Thus, we have here an "ordinary case." The jury may, but is not compelled to, accept the inference of negligence that arises from the circumstances. Defendant runs the risk of losing on this issue if he fails to produce evidence showing that he was not negligent, but he is under no legal burden to do so. Plaintiff's case is sufficient to survive a motion for nonsuit, and plaintiff is entitled to an instruction informing the jury on circumstantial evidence.

[14, 15] *Res ipsa* is properly treated the same as other circumstantial evidence in instructions to the jury. The remaining question is whether, instead of or in addition to these instructions, the so-called "res ipsa instruction" should be given. We are of the opinion that such instructions should not be given. To do so is to emphasize one particular inference over others which may be, and usually are, in the case. When added to other, general instructions which inform the jury of what they may or should do with the evidence before them, such particularized instructions are unnecessary and redundant. We agree with the statement that "in keeping with the modern thinking on the subject, giving slanted or formula instructions should be avoided wherever possible. They should be given only where a general instruction would clearly be inadequate or would confuse or

mislead the jury." *Wiehl*, *Instructing a Jury in Washington*, 36 Wash.L.Rev. 378, 385 (1961). See *Barracliff v. Maritime Overseas Corp.*, 55 Wash.2d 695, 701, 349 P.2d 1080 (1960); *De Koning v. Williams*, 47 Wash.2d 139, 286 P.2d 694 (1955); *O'Brien v. Seattle*, 52 Wash.2d 543, 327 P.2d 433 (1958). The reasoning behind this conclusion is well stated by *Wiehl*, *supra*, at 401:

Proposed instructions advising the jury that it may or should consider certain specific evidence in arriving at certain conclusions or findings or in arriving at a verdict should ordinarily be rejected. They are often proposed in negligence cases where one party wish to call attention to certain facts in evidence as indicative of distance or speed. While such instructions may be legally correct and, if worded properly, may not technically be a comment on the evidence, they approach "comment" since they intimate to the jury that the judge thinks that particular evidence commands special attention or has more weight than the other evidence. They tend to "highlight" or "pinpoint" certain evidence to the detriment of other evidence in the case. In that way they do constitute "comment." Such instructions are ordinarily needless since the jury will consider all evidence not stricken by the court, and it is the attorneys' function to (and they undoubtedly will) call attention to such evidence in their argument. The only time they should be given is when some other instruction or some special quirk in the case may lead the jury to believe that it should ignore such evidence, even though not specifically told to do so.

[16, 17] Plaintiff excepted to and here challenges instruction No. 3 as given. That instruction states:

Neither negligence nor contributory negligence can be assumed merely because the evidence shows that an accident happened.

The instruction is erroneous in this case. First, as there is no substantial evidence of contributory negligence, the instruction should not refer to it. Second, the above instruction, as stated, could amount to a "special quirk" spoken of by Wiehl, *supra*, which would occasion a counterbalancing "pinpoint" instruction on the *res ipsa loquitur* inference. A more appropriate instruction would tell the jury in substance that negligence cannot be assumed merely because damage or injury has occurred, but must be proved, and that such proof may be shown either by direct evidence or by reasonable inference from the manner and circumstances of the event causing injury or damage.

On remand, an instruction conveying this substance should be given to avoid any need of a "balancing" instruction which highlights and emphasizes the *res ipsa loquitur* inference.

We have said in the past that there is no magic in the words "*res ipsa loquitur*." *Case v. Beard, supra*; *Vogreg v. Shepard Ambulance Serv., Inc.*, 47 Wash.2d 659, 289 P.2d 350 (1955). The considerations properly called to mind by that term should be treated for what they are: matters pertaining to one type of circumstantial evidence and its procedural effect.

Plaintiffs also assign error to the ruling of the trial court permitting leading questions during cross-examination of the defendant who had been called as a witness by the plaintiffs.

[18] When a party is called as a witness by the adverse party, the witness is adverse, thus permitting the calling party the leeway of leading questions on direct examination. Conversely, on cross-examination of that witness by his own counsel, the witness remains adverse to the calling party and leading questions are not permitted. *Jones on Evidence*, § 903 (5th ed. 1958) at 1690. See *Bishop v. Averill*, 17 Wash. 209, 49 P. 237, 50 P. 1024 (1897).

On the remaining issues we are in accord with the opinion of the court of appeals.

The cause is remanded for a new trial.

HAMILTON, C. J., and STAFFORD and SHARP, JJ., concur.

HILL, Justice pro tem., concurs in the result.

FINLEY, Associate Justice (concurring in the result).

I concur with the majority in remanding this case for a new trial because under the circumstances of this case, instructing the jury on contributory and comparative negligence was reversible error. I agree with the views of the majority, as I understand them, that the circumstances of negligence in this case were such as to merit an instruction to this effect, and to take the case past a non-suit, to the jury. Such an instruction, and withholding instruction No. 3 on remand would, as stated by the majority, obviate any necessity for giving an instruction on "*res ipsa loquitur*" labelled as such. I cannot agree with the majority that the *res ipsa* instruction, even labelled as such, should never be given in any case because it seems to me the propriety of such an instruction must, of necessity, be judicially determined on a case-by-case basis.

HUNTER, Associate Justice (concurring in the result).

I concur in the result of the majority but disagree with its disposition of the doctrine of *res ipsa loquitur*. I am in agreement with the statement of Justice Rosellini in his dissent:

" * * * I find it impossible to conceive of the doctrine [*res ipsa loquitur*] having any value to the jury unless the jury is instructed upon it. Where certain facts are found by the jury, the law permits it to draw an inference. But, unless the jury is told that if it finds these facts it can draw this inference, the jury itself is left in a quagmire of confusion."

ROSELLINI, Associate Justice (dissenting).

In my opinion, this case is one in which any verdict for the plaintiff must rest upon

speculation and conjecture. Putting aside any question of possible contributory negligence on the part of the plaintiff, we are nevertheless confronted with the fact that the failure of the chair could well have been due to faulty design, faulty manufacture, or latent defects in the materials. All of these are possibilities, if none is a probability. For none of these causes would the boat owner be responsible, since he is not an insurer.

To me, the conclusion is inevitable that the jury had nothing to proceed upon except several conjectural theories, under one or more of which the defendant would be liable and under at least one of which he would not be liable. Under any view of *res ipsa loquitur*, it does not come into play unless the evidence shows that the occurrence in question is one which does not *ordinarily* happen unless the *defendant* has been negligent. Since there was no proof that an accident of this kind does not ordinarily happen unless the boat *owner* has been negligent, I do not see how any inference of negligence can arise from the happening of the accident.

But, whether or not the jury is instructed on *res ipsa loquitur*, it is invited to speculate if it must render a verdict on such insubstantial evidence. If there is no evidence that the accident was more probably caused by one thing than another (and it seems to me that expert testimony is needed to establish causation in a case of this kind), the case should not go to the jury. *Mason v. Turner*, 48 Wash.2d 145, 291 P.2d 1023 (1956).

The jury recognized that there was no proof that the defendant's negligence, if there was such negligence, caused this accident. It gave the proper verdict and that verdict was properly upheld by the trial court when it entered judgment upon it.

1. Is the accident one which does not ordinarily happen without negligence? Was the instrumentality which caused the accident under the control of the defendant? (Here, the instrumentality was under the control of the defendant as far as its maintenance was concerned but not as far

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The doctrine of *res ipsa loquitur* is not rescued from the alleged quagmire of confusion which supposedly surrounds it by a decision which makes it applicable to the factual situation presented here. I would keep my judicial boots out of that quagmire until we have before us a case in which the doctrine is legitimately and necessarily involved.

Upon the merits of that question, however, I find it impossible to conceive of the doctrine having any value to the jury unless the jury is instructed upon it. Where certain facts are found by the jury,¹ the law permits it to draw an inference. But, unless the jury is told that if it finds these facts it can draw this inference, the jury itself is left in a quagmire of confusion.

The present case, in my judgment, should be quietly remanded with directions to reinstate the verdict.

HALE, J., concurs in the dissent.



79 Wash.2d 607

Leonard TONASKET, Appellant,

v.

The STATE of Washington and the Supervisor of the Tax Commission of the State of Washington, Respondents.

No. 41640.

Supreme Court of Washington,
En Banc.

Sept. 2, 1971.

Rehearing Denied Nov. 15, 1971.

Action by full-blooded Indian, who engaged in retail cigarette business on allotted Indian land held in trust by federal government without affixing tax stamps to cigarettes sold as required by state law, for

as its manufacture was concerned. Since the accident was not shown to have been more probably caused by defective maintenance than by defective manufacture, the jury could not properly consider the question.)