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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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LINDA J. ACOSTA,

Appellant,

vs.

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY  
Cause No. 17-2-06789-5

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BRIEF OF APPELLANT

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**I. INTRODUCTION**

Ms. Acosta, the appellant herein, filed an action against the respondent, State of Washington Department of Corrections (Department) for the delay and negligent treatment she received from DOC medical staff in her attempts to obtain a self-paid MRI for purposes of evaluating the back fracture she received from a fall that occurred in October, 2014. Although Ms. Acosta was injured at that time, and an x-ray revealed a fracture at L1 with a 50% loss of the vertebral body, Ms. Acosta, who was in extreme pain from the time of the fall forward, received little, if any, support related to her request for a self-paid MRI.

As set forth below, although Ms. Acosta requested an MRI in January, 2015, she was not set up for the MRI until November, 2015, a delay, unexplainedly, of ten months. Additionally, after the MRI was conducted, it was reviewed by the medical doctors for purposes of determining whether back surgery was an option, which it was. Again, because of the Department's needless and unexplained delay, Ms. Acosta did not receive back surgery until June, 2016.

The unnecessary delay caused Ms. Acosta's extreme back pain and disability to be unnecessarily extended. Although the Department asserts that Ms. Acosta needed an expert to defeat respondent's summary judgment motion, such is not necessary under these circumstances as the doctrine of *res ipsa loquitur* applies to the Department's negligent conduct. Respectfully, Ms. Acosta urges

this Court to reverse the trial court's order granting summary judgment to the Department.

**II. ASSIGNMENTS OF ERROR**

1. The trial court erred when it granted the respondent's summary judgment motion.

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred when it held that appellant needed expert testimony to defeat respondent's summary judgment motion when the doctrine of res ipsa loquitur supports appellant's negligence action?

(Assignment of Error #1)

#### **IV. STATEMENT OF THE CASE**

##### **A. Procedural History**

On April 4, 2017, Ms. Acosta filed a negligence action against the State of Washington for the negligent treatment she received while an inmate at the Washington Corrections Center for Women. CP 1-17.

On December 14, 2018, respondent filed a summary judgment motion to dismiss appellant's case based upon a lack of expert testimony to establish the respondent's negligence. CP 16-325. On January 14, 2019, plaintiff responded to respondent's motion. CP 326-415.

On January 25, 2019, the court granted the respondent's summary judgment motion. CP 452-453.

On February 1, 2019, appellant filed her notice of appeal (CP 454-458) and this appeal follows.

##### **B. Facts**

On or about October 31, 2014, Ms. Acosta was a resident of the Washington Correction Center for Women. On that date, she tripped on a floor mat, fell backwards onto her buttocks and back, and severely injured her back. As a result of her fall, she experienced extreme pain in her right lower back which radiated to her hip and down to her knee. CP 353.

Ms. Acosta received an X-ray on November 13, 2014 which revealed she suffered a compression fracture of L-1 with over 50% loss of the vertebral body. Over the next year, the loss increased to 60% to 70% and by the time she received her MRI in November, 2015, the loss approached 90%. CP 353-54.

After Ms. Acosta fell, she knew she had been severely injured because her back pain would not go away. Rather, it increased. From the X-ray result, she learned her back was fractured. She asked to see an orthopedic surgeon in November, 2014, and she began requesting an MRI in January, 2015. Between November 2014 and May 2016, she submitted 43 kites asking for an MRI, which she agreed to pay for, the status of my MRI, and the status of my surgery. CP 353-415. A review of the kite responses reveals little, if any, action to assist her, but does reveal the lack of attention she received from the DOC medical staff. Id.

Also, during this time, Ms. Acosta needed the use of a wheelchair for transportation as she could not walk without extreme pain, and a wedge to help relieve my back pain when she slept. Without notice, her wheelchair would be taken from her although medical staff fully knew my condition, and it took over three months for DOC medical staff to provide me a wedge. CP 379, 387-91, 410-11. Again, no reason existed for such delay or the poor treatment she received. Id.

Ms. Acosta saw Dr. Marc Goldman on January 21, 2016. He recommended surgery, but referred her to Dr. Michael Martin for a second opinion, which occurred on March 17, 2016 whereupon her need for surgery was confirmed. Her surgery did not occur until June 6, 2017. Although she understood that scheduling such a surgery can take some time, it takes even longer when the DOC medical staff fails to do their job and constantly lies about what they were doing about scheduling her surgery. CP 354-55, 412, 414-15.

For unknown reasons, she was not allowed to obtain the MRI until November 2015. After the MRI results were known, and her surgery was to be scheduled, she was informed by ARNP Saari that it had been scheduled, but when she checked into this herself, she learned ARNP Saari had lied to her. When she filed her offender complaint and grievance, the response she received was that her surgery was now being scheduled. CP 355, 412, 414-15.

Ms. Saari's conduct of lying to Ms. Acosta about scheduling her surgery was consistent with Ms. Acosta's attempts to obtain the MRI. Absolutely no reason existed for DOC medical staff to ignore her repeated requests for the MRI, particularly since she was paying for it, and no reason existed for DOC medical staff to ignore, and then lie, about whether her surgery had been scheduled. These needless delays extended the time Ms. Acosta was in extreme pain. CP 355.

Ms. Acosta's MRI and surgery were needlessly delayed because of the negligence of the medical staff at the Washington Corrections Center for Women, which included Dr. Colter and ARNP Saari. Both individuals largely ignored Ms. Acosta's pain complaints and requests for medical assistance in obtaining the MRI and scheduling the surgery as outlined in her numerous Health Service Kites. Their response was to give Ms. Acosta more pain medication, which was not helping her condition. CP 355.

Before surgery, Ms. Acosta's back pain was so excruciating she could not do her daily activities such as walking, bathing, dressing herself or using the restroom. She had to rely upon her cellmates and other individuals who were

housed in her unit to assist in her care and wellbeing and often needed emergency assistance because of the extreme pain she was suffering. CP 356, 402-406.

Since her back surgery in June 2016, Ms. Acosta's back pain has substantially diminished to where she is able to walk with a walker. She was not able to do so before surgery. She is also able to take care of her personal needs, such as showering, using the restroom, and dressing herself, whereas before the surgery she needed constant assistance. The needless delay of obtaining the MRI and her surgery caused her to suffer pain for longer than was warranted and all delay is attributable to the DOC medical staff. CP 356.

V. **ARGUMENT**

The purpose of summary judgment is to avoid an unnecessary trial when there are no genuine issues of material fact. Pelton v. Tri-State Mem'l Hosp., Inc., 66 Wn.App 350, 355, 831 P.2d 1147 (1992). A trial is absolutely necessary, however, if there is a genuine issue as to any material fact. Olympic Fish Products, Inc. v. Lloyd, 93 Wn.2d 596, 611 P.2d 737 (1980); Jacobsen v. State, 89 Wn.2d 104, 569 P.2d 1152 (1977). Thus, a court must be cautious in granting summary judgment so that worthwhile causes will not perish short of a determination of their true merit. Smith v. Acme Paving Co., 16 Wn.App. 389, 558 P.2d 811 (1976). If a genuine issue of fact exists as to any material fact, a trial is not useless; rather it is necessary. Lish v. Dickey, 1 Wn.App. 112, 459 P.2d 810 (1969). The Court of Appeals reviews a summary judgment decision de novo. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

**A. EXPERT TESTIMONY IS NOT REQUIRED WHEN RES IPSA LOQUITUR APPLIES TO A MEDICAL NEGLIGENCE CASE.**

Medical expert testimony is not required under the circumstances of this case when the respondent's actions, and lack of actions, constitute negligence.

To prevail on a complaint for negligence, a plaintiff must show duty, a breach of that duty, and injury. Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). In addition, a plaintiff must show that the breach of duty was a proximate cause of his or her injury. Id. In some cases, breach of duty may be proved by circumstantial evidence under the doctrine of res ipsa loquitur. Douglas v. Bussabarger, 73 Wn.2d 476, 482, 438 P.2d 829 (1968).

Under circumstances proper to its application, res ipsa loquitur can apply to physicians and hospitals. ZeBarth v. Swedish Hosp. Med. Ctr., 81 Wn.2d 12, 18, 499 P.2d 1 (1972). For res ipsa loquitur to apply, the following three criteria must be met:

(1) [T]he occurrence producing the injury must be of a kind which ordinarily does not occur in the absence of negligence; (2) the injury is caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the injury-causing occurrence must not be due to any contribution on the part of the plaintiff.

Miller v. Jacoby, 145 Wn.2d 65, 33 P.3d 69 (2001).

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 [v. Ames] 149 Wn.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.'

Curtis v. Lein, 169 Wn.2d 884, 891-2, 894, 239 P.3d 1078, (2010).

When res ipsa loquitur applies, it provides an inference as to the defendant's breach of duty. Id. at 892. Res ipsa loquitur is inapplicable only where the defendant's evidence completely explains the plaintiff's injury. Brugh v. Fun-Tastic Rides Co., 437 P.3d 751 (2019).

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." Id.

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." Metro. Mortgage & Sec. Co., Inc. v. Washington Water Power, 37 Wn.App. 241, 243, 679 P.2d 943, 944 (1984) (citing Morner v. Union P. R.R., 31 Wn.2d 282, 291, 196 P.2d 744 (1948)).

"Negligence and causation, like other facts, may of course be proved by circumstantial evidence." Id. at 243, 679 P.2d 943. "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."

Ripley v. Lanzer, 152 Wn.App. 296, 215 P.3d 1020, (Div. 1 2009)

Although Ms. Acosta began requesting the self-paid MRI in January, 2015, she did not receive the MRI until November, 2015. The kites submitted by Ms. Acosta clearly establish the negligence on behalf of DOC in obtaining this needed diagnostic exam. Suffice it to say that had Ms. Acosta been on the outside, there would not have been a delay in obtaining the MRI, and clearly the injury that Ms. Acosta received, in the form of prolonged pain and disability, was exclusively within the control of the respondent as it has absolute control of Ms. Acosta's movement.

Ms. Acosta establishes that the unnecessary and unexplained delay in obtaining the MRI was caused solely by the actions, or more appropriately, the inactions, of the DOC medical staff. The medical staff was solely responsible for facilitating Ms. Acosta's MRI and surgery as Ms. Acosta had no ability, because of her incarceration, to arrange the MRI and surgery herself. As set forth in the kites and grievances Ms. Acosta filed, the medical staff was simply dishonest with Ms. Acosta when seeking to explain the reasons for the various delays. CP 354-55, 412, 414-15. Finally, no evidence exists to suggest that Ms. Acosta contributed to the injury-causing occurrence. As such, the final criteria of the doctrine is satisfied. As such, all *res ipsa loquitur* requirements are satisfied.

Even though DOC policy 600.020 authorizes self-paid medical care, CP 346-352, the negligent activity of DOC staff precluded a timely MRI from being conducted and, therefore, it extended the period of time in which Ms. Acosta was in pain. As such, and under the circumstances of this situation, the doctrine of *res ipsa loquitur* applies.

Dr. Martin, who conducted the surgery, stated that the surgery was warranted, CP 62. Although respondent's expert stated that conservative care was appropriate, Ms. Acosta complained of severe back pain as early as January, 2015, but did not receive surgery until June, 2016. Ms. Acosta, and Ms. Acosta alone, has the ability to make the decision as to whether to opt for surgery, and after she met with Dr. Goldman and Dr. Martin, she opted for the surgery to alleviate her pain and disability. Accordingly, expert testimony was not necessary to defeat the respondent's summary judgment motion as the respondent's negligence and its failure to respond to Ms. Acosta in a timely manner, particularly when Ms. Acosta was paying for the MRI, caused the delay in her treatment and continual back pain she experienced.

**C. RESPONDENT'S ACTIONS AND INACTIONS CONSTITUTE NEGLIGENCE.**

As respondent is well aware, the Offender Health Plan sets forth medical services applicable to Department of Correction's inmates and authorizes care to be paid for by inmates pursuant to DOC policy 600.020. DOC policy 600.020, states as follows:

The Department will provide the opportunity for offenders to purchase health care services not provided per the Offender Health Plan.

CP 346-352.

Here, after Ms. Acosta fell and hurt her back, she began requesting an MRI and advised that she would pay for the MRI as allowed pursuant to this policy. For unknown and unexplained reasons, even though Ms. Acosta sought a self-paid MRI in January, 2015, she was not allowed to obtain the MRI until

November, 2015. Then, another unnecessary delay of several months occurred before Ms. Acosta received the back surgery that, for the most part, alleviated the pain that she suffered from.

As set forth within Dr. Colter's declaration, Dr. Colter was aware of the L1 compression fracture that indicated that Ms. Acosta had over 50% loss of the vertebral body height. CP 211. From that point further, Ms. Acosta's condition did not improve. She continually complained of significant back pain, needed a wheelchair to mobilize, needed the assistance of her cellmates and other inmates within her unit, and was in extreme discomfort. CP 356.

As noted within respondent's motion for summary judgment:

On January 23rd, Dr. Colter followed-up with Ms. Acosta concerning her complaint of severe right lower back pain. Dr. Colter continued the prescriptions for pain and muscle spasms and ordered up X-rays of the lumbar and sacral spine. Dr. Colter also requested a consult and patient review by DOC's orthopedist, Dr. Kenneth Sawyer. Dr. Sawyer responded on January 24th recommending additional imaging of the Lumbar Sacral spine and further examination of the right hip area.

On January 26th, Ms. Acosta had X-rays of her lumbar spine. The findings from the X-rays found worsening of the L1 compression fracture with vertebral plana appearance and mild retropulsion, moderate degenerative disc disease L2-L3 with mild disc degeneration at L3-L4 and L4-L5, and moderate L4-L5 facet arthropathy associated with grade 1 degenerative spondylolisthesis.

CP 22.

After those x-rays were taken, Ms. Acosta began requesting an MRI that would be paid for at her expense. Unfortunately, her request fell on deaf ears

although DOC policy 600.020 allows such medical services on a patient paid process.

For unknown reasons, although Ms. Acosta began requesting the MRI in January 2015, it appears it was not until April 22<sup>nd</sup> that ARNP Saari responded to Ms. Acosta on her self-pay request. CP 24. Respondent presents no cogent reason for its delay in timely responding to Ms. Acosta's requests, and such refusal needlessly continued the pain and disability Ms. Acosta experienced.

Ultimately, Ms. Acosta obtained the MRI on November 24<sup>th</sup> and ARNP Saari made a request for an outside surgical consult with the recommended treatment to follow. CP 25-26.

On March 17th, Ms. Acosta saw Nicholas Harrison, PA-C, and Dr. Michael Martin, for an initial consultation and second surgical opinion. It was noted that Ms. Acosta had a chief complaint of one year worsening low back pain with radiating pain, paresthesias, and weakness in the bilateral lower extremities. A recommendation for a laminectomy T12-L3 and fusion T11-L3 was made. It was further noted that Ms. Acosta had spinal stenosis of the lumbar region, wedge compression fracture of unspecified lumbar vertebra, subsequent encounter for fracture with routine healing, and congenital spondylolisthesis. On March 25th, Ms. Acosta was seen in the medical clinic by ARPN Saari and Dr. Colter in follow-up to her visit to Dr. Martin's office. ARPN Saari called Dr. Martin's office and sent an e-mail for the scheduling of Ms. Acosta's back surgery.

CP 27.

Although Ms. Acosta wanted the surgery, again, for unknown reasons, DOC medical staff failed to schedule her surgery. Although surgery was recommended in March, 2016, the surgery did not occur until June 6, 2016. A

review of the kites Ms. Acosta sent illustrates the neglect by the DOC staff in ignoring the arranging of her surgery on a timely basis. CP 346-352, 354-55.

After the surgery occurred, Ms. Acosta's condition improved significantly. Her pain was largely diminished, and she was able to take care of her daily activities. CP 356. Again, no reason existed for the delay in care and treatment. Respectfully, respondent's negligence in delaying Ms. Acosta's diagnostic MRI and back surgery caused her needless injury.

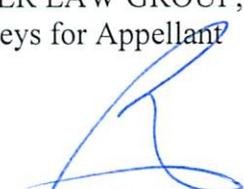
**VI. CONCLUSION**

But for the unexplained delay of obtaining the MRI and subsequent surgery, Ms. Acosta's pain would have been significantly reduced because she would have had the surgery sooner than later. As such, and based upon the aforementioned, Ms. Acosta respectfully urges this Court to reverse the trial court's summary judgment order as the res ipsa loquitur doctrine applies to appellant's case as evidence of a breach of the duty owed to appellant while under respondent's care and control.

DATED THIS 22<sup>nd</sup> day of July, 20119.

HESTER LAW GROUP, INC., P.S.  
Attorneys for Appellant

By:

  
\_\_\_\_\_  
Brett A. Purtzer  
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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of the document to which this certificate is attached to be served on the following in the manner indicated below:

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Signed at Tacoma, Washington this 22<sup>nd</sup> day of July, 2019.

  
\_\_\_\_\_  
Lee Ann Mathews

**HESTER LAW GROUP, INC., P.S.**

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