

FILED  
Court of Appeals  
Division II  
State of Washington  
11/25/2019 3:33 PM

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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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REPLY BRIEF OF APPELLANT

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## I. STATEMENT OF THE CASE

Appellant relies upon the statement of facts set forth within her opening brief.

To the extent that respondent sets forth facts that are materially different and contradict facts set forth by appellant, the State's recitation of facts, itself, constitutes a basis for this Court to reverse the trial court's order granting summary judgment dismissing this case.

## II. ARGUMENT

### A. Expert Testimony is Not Required Under the Doctrine of *Res Ipsa Loquitur*.

As set forth in appellant's opening brief, medical expert testimony is not required under circumstances where the respondent's actions, or lack of actions, constitute negligence. Rather, under such circumstances, breach of duty can be proved by circumstantial evidence under the doctrine of *res ipsa loquitur*, *Douglas v. Bousabarger*, 73 Wn.2d 476, 482, 438 P.2d 829 (1968).

Although respondent argues that Ms. Acosta's complicated medical history presented issues for respondent, her medical complications unrelated to her back were not a basis or reason to delay Ms. Acosta's treatment. Rather, over 10 months passed between the time that Ms. Acosta requested her self-paid MRI until she received it. The delay was solely due to respondent's actions and inactions. As set forth originally, Ms. Acosta's claimed injury, in the form of prolonged pain and disability, was exclusively within respondent's control as it had absolute control over Ms. Acosta's movement and medical treatment.

Respondent references issues surrounding Ms. Acosta's hip, knee, lower extremity pain, hip replacement, osteoarthritis, and multi-level degenerative disc disease, which ailments are completely incidental and irrelevant to why respondent delayed Ms. Acosta's MRI. The issue in this case surrounds the respondent's failure to timely schedule the MRI, for which Ms. Acosta was paying. The respondent simply references medical conditions that are irrelevant to this issue. A medical expert is not necessary to delineate, to a jury, the medical facts in this case. Rather, the pertinent medical facts are that the respondent, needlessly, and without excuse, failed to allow Ms. Acosta to get the appropriate medical treatment that she needed before her back surgery could be completed, and this failure needlessly prolonged Ms. Acosta's pain.

**B. Ms. Acosta Did Not Need Expert Testimony To Prove Causation.**

Respondent, without citation, argues that Ms. Acosta needed medical, expert testimony to prove causation, i.e., to establish her extensive pain and disability. Respectfully, such claim lacks merit. Ms. Acosta, and Ms. Acosta alone, can testify about her pain and disability experienced between the time she first requested the MRI until she had back surgery. No expert is needed to testify that respondent's needless delay extended Ms. Acosta's pain and suffering.

Respondent references Ms. Acosta's other medical conditions, which she has not complained as a reason a delay in treatment occurred. But, Ms. Acosta's complaints surround respondent's delay in obtaining the MRI. No expert is required to explain why such delay occurred. Further, Ms. Acosta can testify that

her back pain was alleviated after she had surgery. Why this fact requires expert testimony is unknown.

Further, respondent argues that Ms. Acosta relies on a logical fallacy to meet her burden of proof. Such argument is misplaced. By analogy, if Ms. Acosta had a toothache for 10 months, but had been needlessly delayed in contacting a dentist, and the dentist removes the bad tooth and the toothache is gone, such example illustrates that the prolonged pain is clearly caused by the delaying party . . . here, the respondent.

Here the same analysis applies. Ms. Acosta had specific back pain that she sought an MRI for, which she was entitled to receive on a self-paid basis, yet respondent needlessly delayed Ms. Acosta receiving this diagnostic tool. Once the diagnostic tool was used, back surgery was scheduled, and after the back surgery occurred, Ms. Acosta's pain diminished. Respectfully, the unknown and unreasonable reasons respondent failed to schedule her surgery after needlessly delaying her obtaining the MRI provides ample evidence of the neglect that Ms. Acosta suffered at the hand of respondent. Respectfully, no rational reason exists as to why the delay occurred. Accordingly, and based upon the evidence submitted, respondent was negligent and this negligence is the kind that the doctrine of *res ipsa loquitur* seeks to address.

C. The Doctrine of *Res Ipsa Loquitur* Applies in This Case.

Respondent seeks to avoid liability by saying that the doctrine of *res ipsa loquitur* does not apply primarily because Ms. Acosta had some control over her circumstance. Respectfully, such claim is unfounded. As both parties are aware,

Ms. Acosta is a prisoner within the Department of Corrections. She has no control over how her medical treatment is governed. Rather, she sought to have a self-paid MRI, yet was needlessly delayed in obtaining the MRI. Respondent suggests that because Ms. Acosta had some ability to control the arrangement of her treatment, her “voluntary action” nullifies the doctrine. That is simply not the case. Ms. Acosta did all that she could do for purposes of arranging the MRI. Since she had no control over respondent following through with its requirements, she cannot be penalized for respondent’s tardiness in acting promptly. The need for her surgery was a decision for Ms. Acosta to make and she elected for surgery as soon as she knew it was an option. She did not know it was an option until after the MRI was obtained and had met with the orthopedic surgeons. At that time, she asked that the surgery occur, and, after the surgery occurred, her pain was lessened. Accordingly, respondent had control over Ms. Acosta’s extended pain and suffering, and, therefore, given that the other factors are met as set forth in appellant’s opening brief, Ms. Acosta respectfully urges this Court to reverse the trial court’s summary judgment order.

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**III. CONCLUSION**

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 25<sup>th</sup> day of November, 2019.

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By: 

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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this reply brief to be served on the following in the manner indicated below:

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Signed at Tacoma, Washington 25th day of November, 2019.



Kathy A. Herbstler

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

**November 25, 2019 - 3:33 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52953-0  
**Appellate Court Case Title:** Linda J. Acosta, Appellant v. Dept of Corrections, Respondent  
**Superior Court Case Number:** 17-2-06789-5

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