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

TAMBRA CURTIS,

Appellant,

vs.

JACK LEIN and CLAIRE LEIN, husband and wife, and the
marital community composed thereof; and WILLOW CREEK
FARM, INCORPORATED, a domestic corporation,

Respondent.

**TAMBRA CURTIS'
PETITION FOR REVIEW
PURSUANT TO RAP 13.4(a)**

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ORIGINAL

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I. IDENTITY OF PETITIONER

Tambra Curtis, plaintiff in the trial court and appellant in the Court of Appeals, asks this Court to accept review of the Court of Appeals decision filed on May 11, 2009. The Court of Appeals decision is published at __ Wn. Ap. __, 206 P.3d 1264 (2009). A copy of the slip opinion is in the Appendix at pages A-2 through A-13.

II. ISSUES PRESENTED

1. Does the doctrine of *res ipsa loquitur* apply to the failure of a wooden structure under the exclusive control of an owner and occupier of land? See Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913). RAP 13.4(b)(1)

2. Did the Court of Appeals err in holding that a premises liability plaintiff who establishes all three elements of *res ipsa loquitur* has the additional burden of proving a fourth element -- that the defect should have been discoverable by the landowner in the exercise of reasonable care? RAP 13.4(b)(1), (4)

III. STATEMENT OF THE CASE

This case concerns the applicability and scope of inferences provided by application of the doctrine of *res ipsa loquitur* in a claim by a

residential tenant against a landlord arising from the collapse of a wooden structure on a common area of the property.

Background Facts

Tambra Curtis is a fifty-four year old mother of two who currently works as Assistant Director of Family Communications at Gatehouse Academy in Wickenburg, Arizona. CP 158, p. 6, ll. 4-6, CP 159, p. 12, ll. 9-23. From December, 2002, through July, 2004, Ms. Curtis lived on the Willow Creek Farm in Sammamish, Washington. She resided there with Michael Stewart, farm manager, and their child, Jacob. CP 158, p. 8, ll. 10-20, CP 159, p. 10, ll. 2-19. Their house was provided by the farm. Willow Creek Farm was in the business of breeding, raising, and sometimes racing thoroughbred horses. CP 106, p. 7, ll. 2-5; CP 159, p. 10, ll. 9-19. Willow Creek Farm was formally incorporated sometime in the mid-1980's. The farm was owned by the Lein family and operated primarily by Claire Lein. She lived on the farm with John Lein, her husband. Their son Michael Lein, his wife Donna Lein, and their children also lived in a house on the farm. CP 106, p. 6, ll. 16-23; CP 127, p. 7, ll. 8-16; CP 134, p. 4, l. 25 – CP 135, p. 5, l. 15.

When the Leins moved onto the Sammamish property in 1980 they enlarged and enhanced a small pond on the property, as part of the landscaping of the farm. CP 108, p. 15, l. 15-CP 109, p. 16, l. 16. The

pond was fed by a stream which at times became swollen with rainwater. In order to regulate the depth of the water in the pond and prevent erosion of the earthen dam forming its banks, the Leins installed an overflow drainage system. It consisted of two standpipes which directed water under the dam and out into the streambed below it. CP 108, p. 16, l. 16 – CP 109, p. 17, l. 6. At times the standpipes became blocked with debris and stopped draining properly, endangering the integrity of the dam. Whenever there was a heavy rain someone had to check the pipes and clear them out if necessary. CP 109, p. 17, ll. 1-9, CP 112, p. 31, l. 23 – p. 32, l. 17; CP 139, p. 22, l. 25 – p. 23, l. 12. At some point in the 1980's a wooden structure (hereinafter "the dock") was built out from the bank of the pond to a point where one could look down into the standpipes and clear them if needed. CP 109, p. 17, l. 17 – p. 18, l. 13. This dock is pictured in Exhibit 1 to Michael Stewart's deposition, CP 154, which is attached hereto at A14.

The primary purpose of the pond was decorative, but it was also used by children living on the farm for recreational activities, including swimming, boating, and fishing. CP 165, p. 33, l. 6 – p. 34, l. 11; CP 137, p. 14, l. 23 – p. 15, l. 6. The pond and the dock were open for the use of all residents of the farm, including Tandra Curtis. CP 112, p. 29, ll. 12-24.

On April 25, 2004, Ms. Curtis was walking on the farm with her son and decided to walk out on the dock. She had never been on it before. She had seen others on the dock in the past. She took one or two steps and suddenly her left leg went right through the dock. The board she had stepped on completely gave way. She became stuck in the dock, with her left leg protruding through it up to her hip. Michael Stewart was summoned and helped get her out of the dock and up to their house. CP 163, p. 26, l. 13 – p. 28, l. 18; CP 121, p. 9, l. 19 – p. 10, l. 16. The next day Donna Lein drove Ms. Curtis to see a doctor about her injured leg. CP 164, p. 29, l. 17 – p. 30, l. 7. It took several months and extensive testing to determine that she had sustained a hairline fracture of her leg. CP 166, p. 38, l. 1 – p. 39, l. 16.

No one had ever inspected the dock during the twenty-plus years it stood in the pond. No one looked at the dock after it gave way under Ms. Curtis' foot to see why it had broken. Was it rotted? No one knows. No one can state with any certainty what type of wood was used to construct the dock. No one had paid any particular attention to it at all. CP 114, p. 37, ll. 1 – 9; CP 130, p. 17, l. 14 – p. 18, l. 3; CP 140, p. 27, l. 25 – p. 28, l. 14; CP 151, p. 30, l. 3 – p. 31, l. 1.

As soon as the Leins heard about Tambra's injury Claire Lein instructed Michael Stewart to remove the dock. This apparently happened

immediately. CP 110, p. 21, ll. 10-15. None of the Leins looked at the broken dock to see what had gone wrong. Michael Stewart does not recall anything about the destruction of the dock. CP 151, p. 31, ll. 2-13. Tambra Curtis did not return to the dock- she was in great pain and essentially immobile for the first three weeks after the incident, and then required crutches to get around. CP 162, p. 23, l. 14 – p. 24, l. 3; CP 166, p. 39, ll. 17-22.

Tambra Curtis and Michael Stewart moved away from the Sammamish farm in July 2004. CP 114, p. 40, ll. 2-4. The Leins were in the process of moving the farm to a new location in Woodinville at that point and fully moved off the property by November 2004. CP 108, p. 14, ll. 16-23. The pond has been demolished, as have most of the buildings, to make way for construction of a school by the new owners. CP 110, p. 24, ll. 11-17. Michael Stewart currently resides in Normangee, Texas. CP 145, p. 6, ll. 21-23.

Procedure

The complaint in this matter was filed on February 9, 2007. Tambra Curtis made claims against Jack Lein, Claire Lein, and Willow Brook Farm for damages caused when the dock gave way beneath her. CP 1-5. The Leins filed an answer on April 10, 2007, placing all claims in dispute. CP 6-10.

On May 9, 2008, the Leins filed a motion for summary judgment of dismissal, asserting that there was no evidence that the condition of the dock was dangerous, no evidence that the Leins knew of any dangerous condition of the dock and failed to warn Ms. Curtis about it, and no evidence that the dangerous condition caused injury to Ms. Curtis. CP 11-29. Ms. Curtis responded to this motion on May 27, 2008, asserting that the doctrine of res ipsa loquitur applied under the facts of this case. Pursuant to that doctrine Ms. Curtis asserted that she had produced sufficient facts to constitute a prima facie case and the motion for summary judgment should be denied. CP 89-102.

The Leins filed a reply on June 2, 2008, arguing that res ipsa loquitur does not apply under the facts presented by Ms. Curtis. CP 174-179. Judge John P. Erlick issued an order granting the motion for summary judgment on June 18, 2008, finding that res ipsa loquitur did not apply. CP 180-182. Ms. Curtis filed a motion for reconsideration on June 26, 2008. CP 183-188. This motion was denied in an order dated July 15, 2008. CP 189. This appeal was then timely filed. CP 190.

On May 11, 2009, the Court of Appeals issued its opinion, affirming the dismissal of Ms. Curtis' complaint. See Curtis v. Lein, Court of Appeals Slip Opinion No. 62168-8-I. The Court held that the doctrine of res ipsa loquitur "provides the commonsense inference that

reasonably safe docks do not ordinarily give way, but it does not follow that dangerous docks ordinarily exhibit discoverable defects.” Id., at 9-10. While acknowledging that the Supreme Court reached a contrary position in Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913)¹, the Court of Appeals purported to distinguish Penson on two grounds:

First, the facts of Penson show that the employer’s agent was building one section of scaffolding, taking that section down, and then building a new section with the same lumber. Accordingly, the employer’s agent had the opportunity to examine both sides of each board shortly before use. Here, the boards were incorporated into a dock that was built 15 to 20 years before Curtis stepped through it, so any opportunity to inspect the structural integrity of both sides of the dock’s boards had long since passed. Although a jury is normally charged with deciding whether a land possessor should have discovered a dangerous condition, no reasonable jury could find that possessors are required to take a dock apart to closely inspect both sides of the dock’s boards when a person who had walked on that dock more times than he could remember did not notice anything wrong with it. Thus, *res ipsa loquitur* does not supply an inference that the dock’s dangerous condition was discoverable.

Additionally, Penson involved workplace injuries, not premises liability. While the duty owed to employees when Penson was decided is the same as the duty owed to invitees now, its applicability is limited by the context in which it was decided. The court decided the case during the height of dissatisfaction with the ability of fault-based adjudication to provide a fair remedy for workplace injuries. In the nearly 100 years since Penson was decided,

¹ In Penson a board in a scaffold erected by an employer gave way when an employee stood on it in the course of painting a ceiling.

neither the courts nor the legislature has done away with fault-dependent recovery for premises liability, and we decline to extend Penson's generous application of *res ipsa loquitur*.

Curtis, Slip Opinion, at 10-11 (footnotes omitted).

Ms. Curtis timely filed this Petition for Review.

IV. ARGUMENT IN SUPPORT OF REVIEW

This Court should grant review because the Court of Appeals' opinion conflicts with this Court's decision in Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913), and because the Court of Appeals' holding that a premises liability plaintiff has an additional burden of proving that the landowner was negligent in failing to discover a defect under his exclusive control deprives plaintiffs of the shifting burden of proof that the doctrine of res ipsa loquitur provides where an instrumentality is under the exclusive control of the defendant. See RAP 13.4(b)(1) & (4).

1. The Court of Appeals' Holding that Under the Circumstances of this Case Res Ipsa Loquitur Applies but the Plaintiff Must Still Affirmatively Prove that the Dock Gave Way Due to a Discoverable Latent Defect Directly Conflicts with Penson v. Inland Empire Paper Co.

The Court of Appeals correctly held that res ipsa loquitur applies under the facts of this case. They cited Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913) in support of this conclusion, stating, "we agree with Curtis's contention that wooden structures do not ordinarily give way under normal use on premises that have been maintained to provide for reasonably safe conditions." Curtis, Slip Opinion, at 9.

As its name ("the thing speaks for itself") implies, res ipsa loquitur provides an inference of breach of duty in situations in which "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." Morner v. Union Pac. R. Co., 31 Wash.2d 282, 290, 196 P.2d 744 (1948). Each of the following three factors must be present for the doctrine to apply: "(1) An event which ordinarily does not occur unless someone is negligent, (2) the agency or instrumentality causing the event within the exclusive control of the defendant(s), and (3) no voluntary action or contribution to the event on the part of the plaintiff." Douglas v.

Bussabarger, 73 Wash.2d 476, 484, 438 P.2d 829 (1968) [citations omitted].

The Liens, as residential landlords, owed a duty to Tambra Curtis, their tenant, to “maintain the common areas of the premises in a reasonably safe condition for the tenants’ use.”² Degel v. Majestic Mobile Manor, Inc., 129 Wash.2d 43, 49, 914 P.2d 728 (1996), citing Geise v. Lee, 84 Wash.2d 866, 529 P.2d 1054 (1975). Ordinarily, in order to prove negligence, a residential tenant “must demonstrate that the landlord had actual or constructive notice of the danger, and failed within a reasonable time to exercise sensible care in alleviating the situation.” Geise, supra, at 871. The Court of Appeals held that even though res ipsa loquitor applies in this matter, “Curtis must prove at trial that a reasonable inspection would have revealed something wrong with the dock,” and that in the absence of such proof, her claim should be dismissed. Curtis, Slip Opinion, at 9. This holding radically restricts the effect of the application of res ipsa loquitor and ignores the holding in Penson, a holding which remains undisturbed after almost 100 years.³

² This duty is rooted in common law and statute, as well as Restatement (Second) of Torts § 343 (1965). See Degel, supra, at 50, and RCW 59.18.060.

³ Penson has been cited in several published Washington appellate decisions, the most recent in 1964, and in several cases in other jurisdictions as well.

Tambra Curtis cannot present any evidence about what a reasonable inspection would have revealed because the Leins directed the dock's destruction very soon after it gave way beneath her. They did not inspect the dock at any time either before or after it collapsed under her. The Liens constructed the dock and exclusively controlled it for over 20 years. No one ever looked at it closely, much less inspected it for latent defects, such as rotting. As can be readily seen from the photograph of the dock, it jutted out from the shore of the pond and there was a significant gap between the bottom of the dock and the water. There is no reason the underside of the dock could not be inspected.

The duty owed by the Liens to Ms. Curtis was to reasonably inspect and maintain the dock. As the Court of Appeals noted, res ipsa loquitur in this case “provides the commonsense inference that reasonably safe docks do not ordinarily give way.” Curtis, Slip Opinion, at 9-10. The Court of Appeals correctly held that the dock was under the exclusive control of the Leins. “[O]nce the plaintiff has produced sufficient evidence to raise the res ipsa loquitur inference, a jury question has been raised unless the defendant produces evidence of an alternate cause rebutting the inference.” Robison v. Cascade Hardwoods, Inc., 117 Wash.App. 552, 563, 72 P.3d 244 (2003), *rev. denied*, 151 Wash.2d 1014,

89 P.3d 712 (2004). The Leins produced no evidence why the dock collapsed and no evidence of any inspection, reasonable or otherwise.

The Court of Appeals recognized that the standards of care applicable in this case and to Penson are identical⁴, and then attempted to distinguish this matter from Penson nonetheless, saying, “The court decided the case during the height of dissatisfaction with the ability of fault based adjudication to provide a fair remedy for workplace injuries.” Curtis, slip opinion at 11.

Nothing in the Penson opinion indicates that the court gave any special consideration to the plaintiffs because they were injured in their workplace. Penson is a straight-forward, classic res ipsa loquitor case. Furthermore, it has never been overruled nor has it been distinguished on the basis of the “context in which it was decided.”

In Penson, supra, at 347-348, this Court opined:

The respondent and the painter who was with him on the scaffold at the time were so injured that they could not inspect the board after the accident. The appellant did not produce it, nor any evidence as to its condition. 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. The prima facie case made by the character of the accident itself was not met in any way. The unexplained facts speak negligence.

⁴ “While the duty owed to employees when Penson was decided is the same as the duty owed to invitees now, its applicability is limited by the context in which it was decided.” Curtis, slip opinion, at 11.

Here, Ms. Curtis was disabled by her injuries and unable to inspect the dock and the Leins tore it out without any inspection. They cannot produce the broken portion of the dock, and have no evidence that the defect which caused the break was latent and unobservable. They have not met the prima facie case made by the character of the accident itself.

The Penson court noted: “The actual occasion of the accident was not a subject of speculation. The staging was being used as intended. The 2x4 support broke. The breaking itself demonstrated to a certainty that it was inadequate either by reason of an open or a latent defect.” Id., at 346. Similarly here the “actual occasion of the accident” is clear: the dock was being used as intended. It broke. The breaking itself demonstrates that for some reason it was not adequate for its intended use. Ms. Curtis should be allowed to proceed to trial on this matter.

2. The Court of Appeals Decision in This Matter Substantially Modifies and Restricts the Doctrine of Res Ipsa Loquitor in the State of Washington.

The Court of Appeals in its opinion gutted a century-and-a-half-old common law doctrine by imposing a burden on Ms. Curtis to produce evidence she cannot produce because the Leins had sole control of the dock and destroyed it immediately after the incident in question. This inability to produce evidence of the “discoverably latent” defect to the

wooden dock is the very thing that gives rise to the application of res ipsa loquitor in this case. Res ipsa loquitor “is a rule of evidence which, when applied in a proper case, warrants the court or jury in inferring negligence, thereby casting upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the inference.” Covey v. Western Tank Lines, 36 Wash.2d 381, 390, 218 P.2d 322 (1950) (citing Morner v. Union Pac. R. Co., 31 Wash.2d 282, 196 P.2d 744 (1948)).

Washington courts have found that a myriad of situations merit application of the doctrine, including collapse of a board in a scaffold, Penson, supra; collapse of a building, Anderson v. McCarthy Dry Goods Co., 49 Wash. 398, 400, 95 P. 325 (1908); failure of an irrigation ditch, Clark v. Icicle Irrigation District, 72 Wash.2d 201, 204, 432 P.2d 541 (1967); “objects falling from the defendant's premises, the fall of an elevator, the escape of gas or water from mains or of electricity from wires or appliances, the derailment of trains or the explosion of boilers,” Metropolitan Mortg. & Securities Co., Inc. v. Washington Water Power, 37 Wash.App. 241, 246, 679 P.2d 943 (1984); taxicab doors flying open “while rounding a curve at a reasonable speed”, Shay v. Parkhurst, 38 Wash.2d 341, 346, 229 P.2d 510 (1951); and the collapse of a seat on a pleasure boat, Zukowsky v. Brown, 79 Wash.2d 586, 488 P.2d 269 (1971).

The point of the doctrine is to address a particular class of cases where the plaintiff cannot prove how the injurious event occurred because the instrumentality is under the exclusive control of the defendant. “The inference which the doctrine permits is grounded upon the fact that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to the defendant but inaccessible to the injured person.” Covey, supra, at 390 [citations omitted]. Further, the application of res ipsa loquitor, provides “an inference as to negligence which operates to cast upon the defendant the duty of going forward with the evidence at the proper time, by furnishing an explanation of how the accident happened and showing that it did not occur by reason of lack of due care on his part.” Id., at 392.

The Court of Appeals correctly reversed the trial court’s holding that res ipsa loquitor did not apply under the facts of this case. That decision should have been determinative and the case remanded for trial. By holding that Ms. Curtis had the additional burden of proving that the dock’s defective condition should have been discovered with the exercise of reasonable care, the Court of Appeals imposed on Ms. Curtis the burden to prove one of the elements of the very negligence to be inferred by the application of res ipsa loquitor.

The Court of Appeals' published decision radically restricts the application of res ipsa loquitur in many contexts. In a typical nonmedical case in which the doctrine applies, the plaintiff has no direct evidence of the exact condition of the injuring instrumentality or the discoverability of defects in it. Most of these cases involve duties to invitees, as does this one. In most of the classic examples outlined above, it is hard to imagine the plaintiff being able to produce actual evidence that there was a discoverable defect.

The Court of Appeals' imposition of an unprecedented fourth element of res ipsa loquitur – that the dock's defective condition should have been discovered in the exercise of reasonable care – is especially egregious where, as here, the defendant has destroyed the very instrumentality that caused plaintiff's injury. Under the holding of the Court of Appeals, the owner or party responsible for an instrumentality causing injury to a person to whom the owner or responsible party owes a duty of care could simply avoid liability by immediately destroying the instrumentality, thereby rendering it impossible for the injured party to produce evidence of the latency or obviousness as well as the discoverability of any defect in it. The inference of negligence provided by res ipsa loquitur would then be rendered functionally meaningless.

V. CONCLUSION

This Court should grant review because the Court of Appeals' opinion conflicts with this Court's decision in Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913), and because the Court of Appeals' holding that a premises liability plaintiff has an additional burden of proving that the landowner was negligent in failing to discover a defect under his exclusive control deprives plaintiffs of the shifting burden of proof that the doctrine of res ipsa loquitur provides where an instrumentality is under the exclusive control of the defendant.

DATED this 10th day of June, 2009.


JO-HANNA READ, WSNB: 6938
Attorney for Appellant

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TAMBRA CURTIS,)	
)	No. 62168-8-I
Appellant,)	
)	DIVISION ONE
v.)	
)	
JACK LEIN [†] and CLAIRE LEIN,)	
husband and wife, and the marital)	
community composed thereof; and)	PUBLISHED OPINION
WILLOW CREEK FARM,)	
INCORPORATED, a domestic)	FILED: May 11, 2009
corporation,)	
)	
Respondents.)	
)	

AGID, J.—Tambra Curtis walked onto the Leins’ dock and her left leg went through it, causing her injuries. The Leins’ postaccident dock destruction deprived Curtis of evidence about the dock’s condition. Because Person v. Inland Empire Paper Co.¹ holds that reasonably safe wooden structures do not ordinarily give way under normal use, res ipsa loquitur provides an inference that the Leins breached their duty to provide premises free of unreasonably dangerous conditions. But Curtis must also offer evidence from which a reasonable jury could find that the Leins should have

[†] The caption in the summons and complaint filed in superior court refers to respondent as “Jack” Lein. Thus, that name is used in the case caption above. Respondent’s legal name, John Lein, is used elsewhere in this opinion.

¹ 73 Wash. 338, 132 P. 39 (1913).

discovered the dock's defect. Res ipsa loquitur does not carry that burden for her because everyday experience does not teach that dangerous docks ordinarily exhibit discoverable defects. Although Penson also holds that the defects in an inadequate board are discoverable when the board is put in place soon before it breaks, that kind of inspection was not possible here. Nor is there any evidence that the Leins knew, should have known, or had any reason to suspect there was a defect in the dock. Expanding Penson to include the facts in this case would create the potential for premises liability every time a structure fails regardless of whether a defect was discoverable. We affirm the trial court's summary judgment dismissal.

FACTS

John and Claire Lein bought Willow Creek Farm, Incorporated, in what is now Sammamish, Washington, in 1978.² The Leins moved to the property in the early 1980s. They sold Willow Creek Farm around 2001 but continued to live there until November 2004 along with their son, Mike, his wife, Donna, and their children. Claire bred and raised racehorses on the farm.³ After they bought the farm, the Leins enlarged a pond on the property and installed an overflow drainage system that directed water under the pond's earthen dam. The pond was primarily decorative, but the Leins' grandchildren sometimes swam in it. Because the drainage pipes sometimes clogged, the Leins had a dock built from the bank to a point above the pipes to make unclogging easier.⁴ The dock was finished at some point in the late 1980s. The pond

² The Leins incorporated the farm in the mid-1980s. Willow Creek Farm, Incorporated, is also a defendant to this action.

³ We refer to the Leins by their first names to avoid confusion.

and dock were open to all the farm's residents.

The Leins hired Michael Stewart as farm manager in late 2001 and provided him, his girlfriend, Tambra Curtis, and their son with housing on the farm. Curtis did not work on the farm. On Sunday, April 25, 2004, Curtis was taking turns riding a horse with a friend. While waiting for her friend to finish riding, Curtis decided to walk out on the dock for the first time since she had been on the farm. After a couple steps, Curtis's left leg went through the dock.⁵ Because her leg protruded through the dock past her knee and up to her hip, Curtis was stuck in the dock until Stewart came over and helped her out. The next day, Donna drove Curtis to the doctor. Curtis missed about three weeks of work. Several months after the accident, Curtis's doctors determined she had suffered a hairline fracture of her tibia.

Claire had Stewart remove the dock after he told her that Curtis's leg had gone through it.⁶ Before Curtis's accident, Claire never observed that the dock was in need of repair. She did not inspect the dock after the accident. Stewart walked on the dock more times than he could remember and did not have reason to believe the dock was in poor condition. While helping Curtis out of the dock, Stewart observed that the board Curtis stepped on had cracked and broken, but he does not recall what kind of condition the board or dock was in. He does not remember destroying the dock. Mike

⁴ Claire and Michael Stewart, a previous farm manager, thought that Mike Lein had built the dock, but Mike remembered that a previous farm manager had built it. Mike Lein thought that the wood used to build the dock had been treated with creosote because most of the wood on the farm was.

⁵ When asked to explain whether the board felt weak before she fell through it, Curtis replied: "Walked onto the dock, went down."

⁶ By the time Curtis fell through the dock, the Leins had sold the farm. Knowing that the new owners planned to level the property to build a school, Claire said she saw no reason to replace the dock.

Lein never had any reason to think the dock needed repairs. Donna testified that she was on the dock frequently and never had any reason to believe the dock was unsafe. Curtis remembers Donna describing the dock as “weathered” and believes the Leins were aware the dock was not safe because their grandchildren told her then five year old child so.

Curtis brought a personal injury action against the Leins and Willow Creek Farms, Incorporated, alleging that they knew or should have known about the dangerous condition of the dock and failed to remedy the dangerous condition. The Leins moved for summary judgment, which the trial court granted. The trial court ruled that Curtis failed to present evidence from which a reasonable trier of fact could have found that the Leins knew or should have known about the dock’s allegedly dangerous condition. And the trial court ruled that *res ipsa loquitur* does not apply because causes other than the Leins’ negligence could have contributed to the dock’s failure.⁷ Curtis appealed after the trial court denied her motion for reconsideration.

DISCUSSION

This court reviews summary judgment orders *de novo* and engages in the same inquiry as the trial court.⁸ The reviewing court must construe the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party.⁹ A material fact is a fact upon which the outcome of the litigation depends.¹⁰ The

⁷ (“Because there are other causes that could have resulted in the failure of the dock step other than the negligence of the landlord, that is failure to inspect or maintain, under these facts, the Court concludes that the doctrine of *res ipsa loquitur* does not apply.”)

⁸ Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

⁹ Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

burden is on the moving party to show there is no issue of material fact.¹¹ The nonmoving party must set forth specific facts that demonstrate a genuine issue of material fact and cannot rest on mere allegations.¹² The reviewing court will affirm a summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.¹³

In an action for negligence, a plaintiff must prove (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.¹⁴ The threshold determination of whether a duty exists is a question of law.¹⁵ The existence of a duty may be predicated on statutory provisions or on common law principles.¹⁶ Under Washington common law, a land possessor's duty of care is governed by the entrant's common law status as an invitee, licensee, or trespasser.¹⁷ Residential tenants and their guests are invitees.¹⁸ Here, Curtis was either a tenant or a tenant's guest. In either case, she was an invitee. In general, one who possesses land owes an affirmative duty to invitees to use ordinary care to keep the premises in a reasonably safe condition.¹⁹ But under the Restatement standard followed in Washington, liability

¹⁰ Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963).

¹¹ Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

¹² CR 56(e); Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

¹³ CR 56(c); Huff v. Budbill, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000).

¹⁴ Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994).

¹⁵ Id. at 128.

¹⁶ Bernethy v. Walt Failor's Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1982).

¹⁷ Tincani, 124 Wn.2d at 128.

¹⁸ Siogren v. Props. of Pac. Nw., LLC, 118 Wn. App. 144, 148, 75 P.3d 592 (2003).

¹⁹ Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 49, 914 P.2d 728 (1996).

Applying this rule to landlords and common areas means that landlords have an affirmative obligation to maintain the common areas of the premises in a reasonably safe condition. Geise v. Lee, 84 Wn.2d 866, 871, 529 P.2d 1054 (1975). Both parties agree that the pond

for dangerous conditions on the land attaches only when the possessor knows of the condition or should have discovered the condition upon inspection.²⁰ In other words, possessors must exercise reasonable care to discover dangerous conditions, but “[t]here is no liability for an undiscoverable latent defect.”²¹

Curtis alleges that the Leins breached their duty to maintain reasonably safe premises. Deposition testimony shows that the dock was weathered and roughly 15 to 20 years old at the time of the accident, that the Leins had sold the property, and that they knew the new owners planned on leveling the farm to build a school. Curtis did not put on any direct evidence from which a jury could have concluded that the Leins breached their duty. Instead, Curtis relies on the doctrine of *res ipsa loquitur* for the inference that docks maintained in a reasonably safe condition do not ordinarily give way under normal use. When the doctrine applies, *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

was a common area. Under the Residential Landlord-Tenant Act of 1973, chapter 59.18 RCW, landlords must keep common areas reasonably clean, sanitary and safe from defects increasing the hazards of fire or accident. RCW 59.18.060(3).

²⁰ Tincani, 124 Wn.2d at 138. Restatement (Second) of Torts § 343 (1965) provides: A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(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 such invitees, and

(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 them against the danger.

²¹ Marsland v. Bullitt Co., 3 Wn. App. 286, 293, 474 P.2d 589 (1970). See also Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994) (“actual or constructive notice of the unsafe condition” is a prerequisite for possessor liability).

such cases[,] the jury is permitted to infer negligence . . . on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person.”²²

The question of whether the doctrine applies to a particular case is a question of law.²³ We review questions of law de novo.²⁴ The doctrine 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.”^[25]

The Leins argue that Curtis failed to satisfy the “exclusive control” element of *res ipsa loquitur*. But the evidence shows that the Leins had the dock built on their property so that they could clear the drainpipes in their pond. And the evidence shows that the Leins ordered their employee to take the dock down as soon as they found out about the accident, which he did. Once the dock was removed, any evidence Curtis could have used to prove her case was also destroyed. These facts satisfy the exclusive control element of *res ipsa loquitur*.²⁶

²² Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003) (citations omitted).

²³ Id.

²⁴ Griffin v. W. RS, Inc., 143 Wn.2d 81, 87, 18 P.3d 558 (2001).

²⁵ Pacheco, 149 Wn.2d at 436 (citation omitted) (internal quotation marks omitted) (quoting Zukowsky v. Brown, 79 Wn.2d 586, 593, 488 P.2d 269 (1971)). The Leins concede that the dock’s failure was not due to any voluntary action on the part of Curtis.

²⁶ See Morner v. Union Pac. R.R. Co., 31 Wn.2d 282, 291, 196 P.2d 744 (1948) (“The doctrine of *res ipsa loquitur* is based in part upon the theory that the defendant, having the sole and exclusive charge of the agency or instrumentality which caused the injury, knows the cause of the accident, or injurious occurrence, or has the best opportunity of ascertaining it, and should, therefore, be required to produce the evidence in explanation thereof, while, on the other hand, the plaintiff has no such knowledge and is, therefore, compelled to allege negligence in general terms and to rely upon proof of the happening of such occurrence to establish negligence.”).

The Leins claim that improper construction or defective wood could cause docks to give way in the absence of negligence, meaning that *res ipsa loquitur* would not apply in this case.²⁷ This argument is unpersuasive for three reasons. First, *res ipsa loquitur* still applies when the plaintiff cannot eliminate with certainty all other possible causes.²⁸ Second, the alternative explanations offered by the Leins do not necessarily suggest the absence of negligence. Because the Leins had a duty to use ordinary care to maintain the premises in a reasonably safe condition, keeping a dangerous dock on the premises breaches that duty whether the danger was caused by rot, defective wood, or improper construction.²⁹ Finally, there is a Washington case holding that *res ipsa loquitur* applies to explain why a wooden structure would give way. In Penson,³⁰ a two-by-four supporting a scaffold broke, injuring the worker who had been standing on the scaffold.³¹ The worker relied on *res ipsa loquitur* for a prima facie inference of negligence, and the Washington Supreme Court held that the doctrine applied because the breaking of the two-by-four by itself demonstrated that it was inadequate.³²

²⁷ See Zukowsky v. Brown, 79 Wn.2d 586, 595, 488 P.2d 269 (1971) (the absence of negligence element is satisfied when “the general experience and observation of mankind teaches that the result would not be expected without negligence”) (quoting Horner v. N. Pac. Beneficial Ass’n Hosps., Inc., 62 Wn.2d 351, 360, 382 P.2d 518 (1963)).

²⁸ Douglas v. Bussabarger, 73 Wn.2d 476, 486, 438 P.2d 829 (1968). See also Pacheco, 149 Wn.2d at 440-41 (*res ipsa loquitur* instruction should be given even when the defendant offers some evidence of how the injury would have occurred without negligence).

²⁹ As discussed later, the possible causes of failure are relevant to the question of whether the Leins should have discovered the defect.

³⁰ The Leins do not address or attempt to distinguish Penson.

³¹ Penson, 73 Wash. at 339-41. At the time Penson was decided, employers had a duty to provide employees with reasonably safe working conditions, but “the master [was] not liable for an injury to his servant from the giving way of such a structure . . . unless the master knew, or by the exercise of reasonable inspection might have known, of the defect therein.” Wilson v. Cain Lumber Co., 64 Wash. 533, 537, 177 P. 246 (1911) (quoting 4 Thompson, *Laws of Negligence* §§ 3952, 4396).

³² Penson, 73 Wash. at 345-48 (“The unexplained facts speak negligence.”).

Accordingly, we agree with Curtis's contention that wooden structures do not ordinarily give way under normal use on premises that have been maintained to provide for reasonably safe conditions.

Because "there is no liability for an undiscoverable latent defect,"³³ Curtis also has the burden of showing that the dock's defect was discoverable.³⁴ Deposition testimony shows that the Leins did not actually know that the dock was defective and that Stewart, their employee, regularly walked on the dock and did not notice any problems. Curtis did not notice anything obviously wrong with the dock before she walked out on it and does not remember anything about the dock's condition, other than the fact that her leg went through it. Stewart testified that Curtis's foot broke through a board, but he does not remember anything else about the condition of the dock. From this evidence, a reasonable jury would not be able to conclude that the dock's dangers were obvious or known. Although none of the evidence rules out the possibility of a nonobvious defect that could have been discovered upon a closer inspection, Curtis must prove at trial that a reasonable inspection would have revealed something wrong with the dock. Because she fails to offer evidence from which a reasonable jury could find without speculating that the defect was discoverable, she cannot make out a prima facie case for premises liability.

Res ipsa loquitur provides the commonsense inference that reasonably safe

³³ Marsland, 3 Wn. App. at 293.

³⁴ See Ingersoll, 123 Wn.2d at 652. The trial court articulated Curtis's burden during the motion hearing: "So what you would have to show is that a reasonable inspection would have disclosed a dangerous condition." And "you would have to show that had they inspected the dock, they would have discovered a condition like rotten wood and therefore they were negligent in failing to discover rotten wood."

docks do not ordinarily give way, but it does not follow that dangerous docks ordinarily exhibit discoverable defects. Instead, general experience teaches that the discoverability of a wooden structure's flaw depends on the type of structure and the type of defect. For example, if rotting wood ordinarily signals impending failure, other defects—such as improper construction or defective wood—are not necessarily obvious or discoverable. Here, the testimony, limited as it is, suggests that the board cracked underfoot. That is the type of defect which can occur suddenly and without any opportunity for discovery. Curtis asks the court to extend *res ipsa loquitur* beyond the realm of everyday experience: applying the doctrine here would require the jury to speculate about the structural properties of wood and the location of the defect.³⁵

Although Penson held that the fact of a scaffold's collapse provides an inference that two-by-four supporting the scaffold was discoverably inadequate,³⁶ it does not control the question of whether the condition of this dock was discoverable. First, the facts of Penson show that the employer's agent was building one section of scaffolding, taking that section down, and then building a new section with the same lumber.³⁷ Accordingly, the employer's agent had the opportunity to examine both sides of each board shortly before use. Here, the boards were incorporated into a dock that was built 15 to 20 years before Curtis stepped through it, so any opportunity to inspect the structural integrity of both sides of the dock's boards had long since passed. Although

³⁵ See Cain Lumber, 64 Wash. at 542 ("Neither the witnesses nor the jury are permitted to guess as to whether the defect was hidden or not, or to presume negligence from the happening of the accident.").

³⁶ At the time Penson was decided, workers, like injured invitees now, had the burden of showing that the dangerous condition would have been discovered through reasonable care. See Cain Lumber, 64 Wash. at 537.

³⁷ 73 Wash. at 339-40.

a jury is normally charged with deciding whether a land possessor should have discovered a dangerous condition,³⁸ no reasonable jury could find that possessors are required to take a dock apart to closely inspect both sides of the dock's boards when a person who had walked on that dock more times than he could remember did not notice anything wrong with it. Thus, *res ipsa loquitur* does not supply an inference that the dock's dangerous condition was discoverable.

Additionally, Penson involved workplace injuries, not premises liability. While the duty owed to employees when Penson was decided is the same as the duty owed to invitees now,³⁹ its applicability is limited by the context in which it was decided.⁴⁰ The court decided the case during the height of dissatisfaction with the ability of fault-based adjudication to provide a fair remedy for workplace injuries.⁴¹ We note that in the nearly 100 years since Penson was decided, neither the courts nor the legislature has done away with fault-dependent recovery for premises liability, and we decline to extend Penson's generous application of *res ipsa loquitur*. Expanding the doctrine to

³⁸ See O'Donnell v. Zupan Enters., Inc., 107 Wn. App. 854, 860, 28 P.3d 799 (2001), review denied, 145 Wn.2d 1027 (2002). See also Cain Lumber, 64 Wash. at 537 (want of care imputed when jury finds that latent defect would have been discovered through ordinary diligence); Fredrickson v. Bertolino's Tacoma, Inc., 131 Wn. App. 183, 189, 127 P.3d 5 (2005) (jury must decide whether a "defective condition existed long enough so that it would have been discovered by an owner exercising reasonable care"), review denied, 157 Wn.2d 1026 (2006).

³⁹ See Cain Lumber, 64 Wash. at 537.

⁴⁰ Penson has not been cited since 1964.

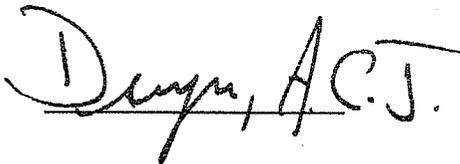
⁴¹ See State v. Clausen, 65 Wash. 156, 210, 117 P. 1101 (1911) ("For the greater number of injuries the common law affords no remedy at all. For this unscientific system, it is proposed to substitute a system which will make an award in all cases of injury, regardless of the cause or manner of its infliction; limited in amount, it is true, but commensurate in some degree to the disability suffered. The desirability of this substitution is unquestioned, and we believe that the Legislature had the power to make it without violating any principle of the fundamental law.").

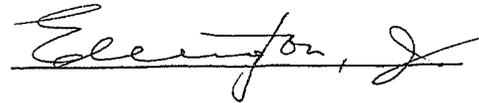
cover these facts would create the potential for liability every time a structure collapses regardless of whether the defect was discoverable. Unless the possessor is able to offer convincing exculpatory evidence, as the employer failed to do in Penson,⁴² liability would flow automatically from the inference of negligence provided by *res ipsa loquitur*.⁴³ Penson's outcome reflects the efforts of its era to mitigate the harsh results of preworker's compensation workplace injury litigation.⁴⁴ But premises liability has not developed along a similar track, and the case law makes it clear that landowners do not have an absolute duty to insure the safety of all invitees.⁴⁵

We affirm.



WE CONCUR:





⁴² 73 Wash. at 348 (upholding jury verdict in favor of employee based solely on inference of negligence provided by *res ipsa loquitur* where the employer failed to meet *prima facie* case).

⁴³ Zukowsky, 79 Wn.2d at 602 (When *res ipsa loquitur* applies, "[t]he 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.").

⁴⁴ See Clausen, 65 Wash. at 210 (upholding Washington's workmen's compensation act of 1911).

⁴⁵ See Degel, 129 Wn.2d at 54.



EXHIBIT /
SP4474
DATE 1-24-08
Kathy Hauck CCR