

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

10 JAN -7 AM 9:01

BY RONALD R. CARPENTER

Supreme Court No. 83307-9

Court of Appeals No. 62168-8

*RRC*  
CLERK

---

SUPREME COURT OF THE STATE OF WASHINGTON

---

TAMBRA CURTIS,

Petitioner,

vs.

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

Respondent.

---

SUPPLEMENTAL BRIEF OF PETITIONER

---

Attorney for Petitioner:

Jo-Hanna Read, Esq., WSBN: 6938  
LAW OFFICE OF JO-HANNA READ  
2200 Sixth Avenue, Suite 1250  
Seattle, WA 98121  
(206) 441-1980

FILED AS  
ATTACHMENT TO EMAIL

ORIGINAL

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

I. ASSIGNMENTS OF ERROR..... 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT..... 3

    A. The Court of Appeals Correctly Held that Res Ipsa Loquitur Applies Under the Facts of this Case. .... 3

    B. Because Res Ipsa Loquitur Applies, Tandra Curtis Has Demonstrated a Prima Facie Case of Negligence and Has No Further Burden to Show any Element of Negligence, Including the Reasonable Discoverability of a Latent Defect..... 5

    C. The Recent Division One Holding in Ripley v. Lanzer Is Inconsistent with Their Holding in this Case..... 6

    D. The Holding in Penson v. Inland Empire Should Control this Case and Tandra Curtis Should Be Allowed to Go Forward to Trial.... 10

V. CONCLUSION..... 13

## TABLE OF AUTHORITIES

### Cases

<u>Curtis v. Lien</u> , 150 Wash.App. 96, 206 P.3d 1264, <u>rev. granted</u> , 167 Wash.2d 1004, 220 P.3d 209 (2009).....	passim
<u>Degel v. Majestic Mobile Manor, Inc.</u> , 129 Wash.2d 43, 49, 914 P.2d 728 (1996) .....	5
<u>Douglas v. Bussabarger</u> , 73 Wash.2d 476, 486, 438 P.2d 829 (1968) .....	3
<u>Geise v. Lee</u> , 84 Wash.2d 866, 529 P.2d 1054 (1975) .....	5
<u>Marsland v. Bullitt Co.</u> , 3 Wash.App. 286, 474 P.2d 589 (1970).....	5, 9
<u>Metropolitan Mortg. &amp; Securities Co., Inc. v. Washington Water Power</u> , 37 Wash.App. 241, 679 P.2d 943 (1984).....	7
<u>Morner v. Union Pac. R.R. Co.</u> , 31 Wash.2d 282, 196 P.2d 744 (1948)....	4
<u>Mucsi v. Graoch Associates Ltd. Partnership No. 12</u> , 144 Wash.2d 847, 31 P.3d 684 (2001).....	6
<u>Pacheco v. Ames</u> , 149 Wash.2d 431, 69 P.3d 324 (2003).....	3, 8
<u>Penson v. Inland Empire Paper Co.</u> , 73 Wash. 338, 132 P. 39 (1913) .....	passim
<u>Ripley v. Lanzer</u> , 152 Wash.App. 296, 215 P.3d 1020 (2009).....	6, 7, 10
<u>Tincani v. Inland Empire Zoological Soc'y</u> , 124 Wash.2d 121, 875 P.2d 621 (1994) .....	5
<u>Wilson v. Cain Lumber Co.</u> , 64 Wash. 533, 537, 117 P. 246 (1911).....	13
<u>Zukowsky v. Brown</u> , 79 Wash.2d 586, 488 P.2d 269 (1971).....	8

## I. ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in holding that a premises liability plaintiff who establishes all three elements of res ipsa loquitur has the additional burden of proving that the defect should have been discoverable by the landowner in the exercise of reasonable care.

2. The Court of Appeals erred in declining to apply the holding of this court in Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913), to the present case.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. If a residential tenant in Washington is injured when a portion of a dock in a pond located on a common area of the property collapses under normal use, should the doctrine of res ipsa loquitur establish a prima facie case of negligence against the landlord?

2. Once it is determined that res ipsa loquitur applies in a premises liability case does it not provide a prima facie case of negligence including an assumption that the defect should have been discoverable by the landowner in the exercise of reasonable care?

3. Is there a reasonable basis to decline to apply the reasoning of Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913), to the present case?

### III. STATEMENT OF THE CASE

The basic facts of this case are set forth in the Court of Appeals opinion and the Petition for Review filed herein. See, Curtis v. Lien, 150 Wash.App. 96, 206 P.3d 1264, rev. granted, 167 Wash.2d 1004, 220 P.3d 209 (2009); Petition for Review at 1-8.

The Court of Appeals opinion upheld the trial court's order on summary judgment dismissing Tandra Curtis' claim for damages against her former landlord for injuries caused by the collapse of a wooden structure on the common areas of the property. The Court of Appeals found that the doctrine of res ipsa loquitur applied to the facts of this case pursuant to this court's holding in Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913), and subsequent caselaw, but then held that in order to prevail an invitee in a premises liability case has an additional burden to produce evidence that there was a discoverable latent defect in the structure. This Court granted review.

This supplemental brief principally updates the research and analysis set forth in the petitioner's brief in the Court of Appeals and the petition for review, and analyzes the Court of Appeals opinion below.

#### IV. ARGUMENT

##### A. The Court of Appeals Correctly Held that Res Ipsa Loquitur Applies Under the Facts of this Case.

The Court of Appeals held that Tambra Curtis had produced evidence supporting all of the necessary elements of a res ipsa loquitur claim. Those elements are:

(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.

Curtis, 150 Wash.App. at 104-105 (quoting Pacheco v. Ames, 149 Wash.2d 431, 436, 69 P.3d 324 (2003)).

As to the first element of res ipsa loquitur (the accident or occurrence is of a kind which ordinarily does not happen in the absence of someone's negligence), the Court of Appeals correctly opined that (1) "res ipsa loquitur still applies when the plaintiff cannot eliminate with certainty all other possible causes," Curtis, 150 Wash.App. at 105,<sup>1</sup> (2) "[b]ecause the Leins had a duty to use ordinary care to maintain the premises in a

---

<sup>1</sup> Citing Douglas v. Bussabarger, 73 Wash.2d 476, 486, 438 P.2d 829 (1968), and Pacheco, *supra*, at 440-41.

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,” Curtis, 150 Wash.App. at 105-106, and (3) “there is a Washington case holding that *res ipsa loquitur* applies to explain why a wooden structure would give way.” Curtis, 150 Wash. App. at 106 (citing Penson, *supra*). Thus the court correctly held that “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, 150 Wash.App. at 106.

As to the second element (defendants’ exclusive control of the instrumentality causing the injury) the Court of Appeals observed that the evidence put forward by Ms. Curtis showed exclusive control sufficient to satisfy this element.<sup>2</sup>

The third element of *res ipsa loquitur* (the occurrence is not due to any voluntary action or contribution on the part of the plaintiff) was never in dispute, and is thus clearly satisfied. Curtis, 150 Wash.App., fn.25.

---

<sup>2</sup> [T]he 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*.

Curtis, 150 Wash.App. at 105, citing Morner v. Union Pac. R.R. Co., 31 Wash.2d 282, 291, 196 P.2d 744 (1948)

Thus the Court of Appeals holding that res ipsa loquitur applies in this case is well founded in fact and in law.

**B. Because Res Ipsa Loquitur Applies, Tandra Curtis Has Demonstrated a Prima Facie Case of Negligence and Has No Further Burden to Show any Element of Negligence, Including the Reasonable Discoverability of a Latent Defect.**

As the Court of Appeals recognized, the elements of negligence are (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.” Curtis, 150 Wash.App. at 102-103.<sup>3</sup>

A residential landlord in Washington has “an affirmative obligation to maintain the common areas of the premises in a reasonably safe condition for the tenants' use.” Degel v. Majestic Mobile Manor, Inc., 129 Wash.2d 43, 49, 914 P.2d 728 (1996).<sup>4</sup> The Court of Appeals correctly stated this duty, Curtis, 150 Wash.App., at 104, adding that “possessors must exercise reasonable care to discover dangerous conditions but ‘[t]here is no liability for an undiscoverable latent defect.’” Id., at 103-104.<sup>5</sup> In other words, the duty of the landlord toward his or her tenants is to inspect common areas for discoverable dangerous conditions and take reasonable steps to repair, install safeguards, and/or warn tenants

---

<sup>3</sup> Citing Tincani v. Inland Empire Zoological Soc'y, 124 Wash.2d 121, 127-28, 875 P.2d 621 (1994).

<sup>4</sup> Citing Geise v. Lee, 84 Wash.2d 866, 529 P.2d 1054 (1975).

<sup>5</sup> Quoting Marsland v. Bullitt Co., 3 Wash.App. 286, 293, 474 P.2d 589 (1970).

of the danger. Mucsi v. Graoch Associates Ltd. Partnership No. 12, 144 Wash.2d 847, 856, 31 P.3d 684 (2001). This is the “duty” prong of negligence in the present case.

Once a tenant has established all the elements of res ipsa loquitur s/he has met the burden of proving negligence. The burden then shifts to the landlord to produce evidence that s/he in fact exercised reasonable care. The pertinent issue is whether the Leins reasonably inspected and maintained the common areas of the farm. Having held that Tambra Curtis had satisfied all of the elements of res ipsa loquitur, the Court of Appeals should have simply found that she had made a prima facie case of negligence and reversed and remanded the matter for trial.

**C. The Recent Division One Holding in Ripley v. Lanzer Is Inconsistent with Their Holding in this Case.**

In September 2009 Division One of the Court of Appeals issued an opinion in another res ipsa loquitur case which appears to be at odds with Curtis v. Lein in some significant regards. The case is Ripley v. Lanzer, 152 Wash.App. 296, 215 P.3d 1020 (2009). A copy of the opinion is attached hereto.

Ripley is a medical malpractice claim in which a surgeon inadvertently left a scalpel blade in a patient’s knee during surgery. The

trial court in Ripley had granted summary judgment of dismissal because the plaintiff had not presented any expert testimony as to breach of the standard of care, a requirement for most medical malpractice claims in Washington. However, the Court of Appeals held that “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.” Id., at 307, quoting Metropolitan Mortg. & Securities Co., Inc. v. Washington Water Power, 37 Wash.App. 241, 243, 679 P.2d 943 (1984). The Ripley opinion further provides:

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.

Ripley, at 307.

The Court of Appeals decision in the present case eviscerates the effect of res ipsa loquitur as outlined in Ripley and the extensive caselaw cited in both cases. Just as Ripley held that once the elements for res ipsa loquitur were established there was no requirement that the plaintiff provide expert testimony as to violation of the standard of care, Tandra Curtis should not be required to produce evidence of a discoverable latent

defect once she has established the elements of res ipsa loquitur. Once there are findings 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,” then “[t]he 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.” Ripley, at 307-308.<sup>6</sup>

The Court of Appeals in the present case found that all of the elements of res ipsa loquitur had been established, holding that “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 v. Lein, 150 Wash.App. 96, 104, 206 P.3d 1264 (2009). This holding should have been dispositive of the appeal: the summary judgment of dismissal should have been reversed. Instead, the court placed an additional burden on Ms. Curtis, a burden that

---

<sup>6</sup> Quoting 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)).

negates the effect of res ipsa loquitur in almost any premises invitee claim.

Invoking the principle that in a premises liability claim “there is no liability for an undiscoverable latent defect,”<sup>7</sup> the court opined:

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.

Id., at 107.

This makes no sense. The court correctly found that res ipsa loquitur applies under the facts asserted by Ms. Curtis, and in particular made the following observations:

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. [emphasis added]

Id., at 105.

---

<sup>7</sup> Curtis, id., at 106 (citing Marsland v. Bullitt Company, 3 Wash.App. 286, 292, 474 P.2d 589 (1970)).

Just as in Ripley the application of res ipsa loquitur superseded any requirement of providing expert testimony as to the standard of care, res ipsa loquitur should encompass any requirement to prove a discoverable latent defect in the present case. Finding that “wooden structures do not ordinarily give way under normal use on premises that have been maintained to provide for reasonably safe conditions” but then requiring that the injured party prove that there was a discoverable latent defect is logically inconsistent.

As the Ripley opinion observed, “The 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. 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.” Ripley, supra, at 321 (footnotes omitted).

**D. The Holding in Penson v. Inland Empire Should Control this Case and Tambra Curtis Should Be Allowed to Go Forward to Trial.**

The Court of Appeals recognized the applicability of Penson to the present matter:

In Penson, a two-by-four supporting a scaffold broke, injuring the worker who had been standing on the scaffold. 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. 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. [footnotes omitted]

Curtis, *supra*, 106.

After saying that Penson clearly controlled, the Court of Appeals went to somewhat tortured lengths to distinguish it, on the basis that the wooden structure in Penson was freshly constructed while the dock in Curtis was old and on the basis that Penson concerned an injury to a workman "during the height of dissatisfaction with the ability of fault-based adjudication to provide a fair remedy for workplace injuries." Curtis, *supra*, 108-109. Neither of these bases stands up to careful scrutiny.

The Penson court opined:

The burden of explanation or at least of showing reasonable care upon the part of the appellant's foreman in the selection and placing of the timber was upon the appellant. No such showing was made or offered. 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.

Penson, supra, 347-348.

The key here is not the age of the wooden structure, it is the control of it and the lack of explanation from the entity with the duty to reasonably inspect and (in the present case) maintain. The Court of Appeals herein said, "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." Curtis, supra, 108. This ignores the duty to inspect and maintain. Tandra Curtis' leg plunged through the dock higher than her knee. As can be observed from the photograph of the dock, there is appreciable space between the dock and the land below it at the end where the collapse occurred. (Petition for Review, A14). The Leins did not inspect the dock before, during, or after having the dock torn out immediately after the collapse. It is for the jury to determine whether their actions were reasonable or not.

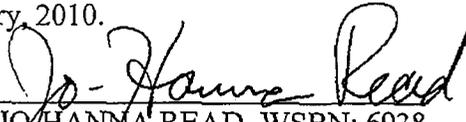
The "context of the times" comments by the Court of Appeals are simply without merit. The court acknowledged that "[a]t the time Penson was decided, workers, like injured invitees now, had the burden of showing that the dangerous condition would have been discovered through reasonable care." Curtis, supra, fn.36 (citing Wilson v. Cain Lumber Co.,

64, Wash. 533, 537, 117 P. 246 (1911)). The fact that workers' compensation laws have changed and premises liability principles have not doesn't change the burden in effect in Penson. A decision in this case consistent with Penson does not have the effect of imposing "an absolute duty to insure the safety of all invitees." Curtis, supra, 109. A decision consistent with Penson places the burden where it belongs under the circumstances of this case: on the landowners to produce evidence that they reasonably inspected and maintained the common areas of the premises for the tenants' use.

## V. CONCLUSION

This Court should reverse the decisions of the Court of Appeals and the trial court and remand this matter for trial. The decisions below conflict with this Court's decision in Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913). Further 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 6th day of January, 2010.

  
JO-HANNA READ, WSNB: 6938  
Attorney for Appellant

“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’s <sup>128</sup>denial of the Taylors’ request for attorney fees against the Kenagys. We award fees on appeal to the Kena-

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

**RIPLEY v. LANZER**

Wash. 1023

Cite as 215 P.3d 1020 (Wash.App. Div. 1 2009)

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.

¶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").<sup>1</sup> 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 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.

dard 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.<sup>2</sup> 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.<sup>3</sup> Evergreen supplied and maintained all of the surgical equipment used during the operation.<sup>4</sup> Evergreen also supplied the nursing and technical staff in the operating room.<sup>5</sup>

¶ 6 Prior to surgery, Teresa Bray, a surgical nurse, assembled a scalpel, which was composed of a Number 11 steel 1303 blade and a Number 7 handle.<sup>6</sup> 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.<sup>7</sup> During the second incision, the scalpel blade detached from its handle and lodged in Ripley's knee joint.<sup>8</sup> 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.<sup>9</sup> Dr. Lanzer completed the procedure and then closed the two portals made by his initial incisions.<sup>10</sup>

¶ 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.<sup>11</sup> Following a search of the operating room, the blade could not be found.<sup>12</sup>

¶ 9 Dr. Lanzer ordered an x-ray of Ripley's knee, at which time the missing blade was discovered in her knee joint.<sup>13</sup> While Ripley remained anesthetized, Dr. Lanzer reopened the portals that had previously been sutured closed.<sup>14</sup> After doing so, he located the Number 11 blade within the knee. He then attempted to remove the blade by using a grasping tool.<sup>15</sup> Once he grasped the blade, he attempted to remove 1304 it. However, the thin edge of the blade hit soft tissue, bent, and broke into two pieces.<sup>16</sup>

¶ 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.<sup>17</sup> 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.<sup>18</sup> When pressure was applied, the new blade came out of the handle. Accordingly, Nurse Bray discarded the defective handle.<sup>19</sup> Dr. Lanzer testified that the handle should not have been used in Ripley's surgery and that it should not be used again.<sup>20</sup>

¶ 11 Prior to a second surgery the next day, Dr. Lanzer, ordered a CT scan "to find the blade's exact location."<sup>21</sup> Thereafter, with the assistance of another surgeon, Dr. Lanzer successfully removed the broken blade from the knee joint.<sup>22</sup>

¶ 12 Ripley has a fair amount of scarring in her knee from the blade retrieval procedures.<sup>23</sup> She also has persistent problems with pain in the knee, which has limited her walking and weight-bearing activities.<sup>24</sup>

¶ 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.”<sup>25</sup>

*Medical Malpractice Claim  
against Dr. Lanzer*

¶20 In Washington, actions for injuries resulting from health care are governed by chapter 7.70 RCW.<sup>26</sup> 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.<sup>[27]</sup>

[1-3] ¶21 Generally, expert testimony is necessary to §20 establish the standard of care for a health care provider in a medical malpractice action.<sup>28</sup> 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.<sup>29</sup> 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.”<sup>30</sup>

[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.”<sup>31</sup>

[5, 6] ¶23 “Negligence and causation, like other facts, may of course be proved by circumstantial evidence.”<sup>32</sup> “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.”<sup>33</sup>

[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.”<sup>[34]</sup>

[8] §23 ¶25 “In such cases the jury is permitted to infer negligence.”<sup>35</sup> “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.”<sup>36</sup>

[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.*

eign object in a patient's body raises the inference of negligence.<sup>37</sup>

[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.<sup>[38]</sup>

[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."<sup>39</sup> Res ipsa loquitur may apply to both physicians and hospitals.<sup>40</sup> Whether the doctrine of res ipsa loquitur is applicable to a particular case is a question of law, which we review de novo.<sup>41</sup>

[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*.<sup>42</sup> There, Dr. Travis White, an orthopedic surgeon, unintentionally left a metal positioning pin in the patient's leg after surgery.<sup>43</sup> 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.<sup>44</sup> The doctor did not count the pins before closing the surgical wounds.<sup>45</sup>

¶ 31 Following surgery and after the wound was closed, Dr. White x-rayed the patient's leg and discovered the pin inside the tibia.<sup>46</sup> At that point, the glue holding the prosthesis had already hardened and Dr. White decided to leave the pin in the leg.<sup>47</sup> The doctor finally removed the pin some seven months later when Mrs. Bauer complained of pain in her tibia.<sup>48</sup>

¶ 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.<sup>49</sup> 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.<sup>50</sup>

¶ 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.<sup>51</sup> Both parties moved for summary judgment.<sup>52</sup> Dr. White supported his motion with an expert opinion by Dr. William Lanzer stating there was no standard of care for counting surgical pins.<sup>53</sup> The Bauers opposed the motion, but without expert medical testimony regarding the standard of care for orthopedic surgeons in Washington.<sup>54</sup> 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.<sup>55</sup> Based on the lack of such testimony, the trial court summarily dismissed the action.<sup>56</sup>

¶ 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.<sup>57</sup> Therefore, expert testimony on the standard of care is only necessary if the medical facts are not observable by a lay person.<sup>58</sup> Under the circumstances of that case, the medical facts were observable to a lay person.<sup>59</sup> 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.<sup>60]</sup>

¶ 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.<sup>61</sup> 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."<sup>62</sup> The supreme court in *Zukowsky v. Brown*<sup>63</sup> 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.*<sup>[64]</sup>

¶ 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.<sup>65</sup> Thereafter, Dr. Lanzer "opened up our portals" and found the Number 11 blade that he then unsuccessfully attempted to remove on March 15.<sup>66</sup> As Dr. Lanzer candidly admitted during his deposition, "[T]he blade came off the handle because the handle would not keep the blade on . . . It [the handle] was either defective or worn or a combination of both or whatever."<sup>67</sup>

¶ 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.<sup>68</sup> 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."<sup>[69]</sup>

¶ 42 Here, Dr. Lanzer stated in his deposition that he was the person using the scalpel when the blade lodged in Mrs. Ripley's knee.<sup>70</sup> He testified that he failed to notice that the blade was detached when he handed the handle back to Nurse Bray.<sup>71</sup> She also failed to notice that the blade was missing.<sup>72</sup>

¶ 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.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup>

[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.<sup>76</sup> 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 <sup>316</sup>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-

ssues 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.<sup>77</sup> 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."<sup>78</sup> But as the *Bauer* court noted, "The question is whether the foreign object was inadvertently<sup>316</sup> left [in the patient], *not for how long.*"<sup>79</sup> 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).

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

attempted to retrieve it.”<sup>80</sup> 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].”<sup>81</sup> 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 §17unintentionally leaving a foreign object in Mrs. Ripley’s knee are sufficient to create genuine issues of material fact for trial.<sup>82</sup>

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*<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup>

¶ 54 Finally, Dr. Lanzer faults the Ripleys for what they do not argue.<sup>86</sup> 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.

§18 ¶ 56 As this court said in *Tinder v. Nordstrom*,<sup>87</sup> “‘only where the facts and the demands of justice make its application essential,’” do we apply *res ipsa loquitur*.<sup>88</sup> 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."<sup>89</sup> 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.<sup>90</sup> 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 § 319 after making the incisions in Mrs. Ripley's leg.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup> 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."<sup>94</sup> 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."<sup>95</sup>

¶ 61 In *Hogland v. Klein*,<sup>96</sup> our supreme court concluded that the control element of the *res ipsa loquitur* doctrine does not necessarily require "actual physical control" but § 320 refers instead to the "right of control at the time of the accident."<sup>97</sup> 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.<sup>198]</sup>

¶ 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.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> 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. <sup>1321</sup>The 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.<sup>102</sup> 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.<sup>103</sup>

¶ 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.

<sup>1322</sup>¶ 67 In *Callahan v. Cho*,<sup>104</sup> a small fragment of a suturing needle lodged in the plaintiff's muscle tissue during a hip replacement surgery.<sup>105</sup> The doctor searched for the fragment but was unable to locate it without destroying significant muscle.<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup>

¶ 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.<sup>109</sup> But *res ipsa loquitur* applies more broadly under Washington law.<sup>110</sup> Moreover, unlike in our case, the *Callahan* court noted that the doctor had not unwittingly or inadvertently done anything.<sup>111</sup> Here, the contrary facts were established.

¶ 69 In *Wagner v. Deborah Heart & Lung Center*,<sup>112</sup> 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 §323 surgeon 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.<sup>113</sup> Two years later, the awl tip was removed when infection was suspected.<sup>114</sup> 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.<sup>115</sup>

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"<sup>116</sup> 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.<sup>117</sup> 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.

#### §324 CORPORATE 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.<sup>118</sup>

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.”<sup>119</sup> Under this doctrine, a hospital owes its patients the duty to furnish to the patient supplies and equipment free of defects, among others.<sup>120</sup> 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.<sup>121</sup> This standard is generally defined by the Joint Commission on Accreditation of Hospitals (JCAH) standards and the hospital’s by-laws.<sup>122</sup> 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.<sup>123</sup>

[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 handle 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.<sup>124</sup> 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.<sup>125</sup>

¶ 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 scaring, 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] § 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.

### SPOLIATION

[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.<sup>126</sup> 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.<sup>127</sup> We review a trial court's decision regarding sanctions for discovery violations for an abuse of discretion.<sup>128</sup>

¶ 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.