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No. 72858-0

King County Superior Court No: 13-2-07713-2 SEA

WASHINGTON STATE COURT OF APPEALS  
DIVISION ONE

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JEFFREY BURKE and KIMBERLY BURKE, a married couple,

Appellants,

v.

DALYNNE SINGLETON, as Personal Representative of the ESTATE OF  
CHARLES ELFRINK-THOMPSON, deceased, and THE CITY OF  
SEATTLE, a municipal corporation, and JOHN DOES and JANE DOES 1  
through 10, inclusive,

Respondents.

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**REPLY BRIEF OF APPELLANTS**

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TABLE OF CONTENTS

	<u>Page</u>
I. REPLY TO ASSIGNMENTS OF ERROR .....	6
A. Res ipsa loquitur must be applied to the present case.....	6
B. A question of fact exists regarding whether Elfrink-Thompson acted negligently by violating Washington Rules of the Road, and by driving distracted or too fast for conditions .....	6
C. Dr. Corson was not a treating physician of Elfrink-Thompson, and his testimony should be allowed.....	6
II. ISSUES PERTAINING TO REPLY .....	6
A. Did the Superior Court err by denying the case proceed on res ipsa loquitur, where a vehicle does not commonly fishtail across a road's center line, into oncoming traffic, absent negligence?.....	6
B. Did the Superior Court err by denying the case proceed on res ipsa loquitur, where Defendants violated RCW 46.61 Rules of the road without excuse?.....	6
C. Does a question of fact remain regarding whether Elfrink-Thompson acted negligently by driving distracted or too fast for conditions?.....	6
D. Does Defendant Elfrink-Thompson's alleged heart attack provide a complete defense to negligence, where uncontroverted evidence indicates he was conscious and actively steering the vehicle, and where Dr. Corson testified	

it was “almost inconceivable” that Elfrink-Thompson suffered a heart attack before regaining consciousness?.....6

III.	ARGUMENT .....	7
	A. Res ipsa loquitur must be applied to the present case.....	7
	1. As in <u>Siegler v. Kuhlman</u> and <u>Pacheco v. Ames</u> , this accident would not ordinarily take place without negligence.....	8
	2. Failure to put res ipsa loquitur to the jury was error.....	10
	B. A question of fact exists regarding whether Defendant Elfrink-Thompson acted negligently by driving distracted or too fast for conditions.....	13
	C. Defendants’ defense of an alleged heart attack does not entitle them to summary judgment.....	17
	D. Dr. Corson’s testimony should be allowed, as he was not a treating physician.....	18
IV.	CONCLUSION.....	23

TABLE OF AUTHORITIES

**Washington Cases**

Barrie v Hosts of America, Inc., 94 Wn.2d 640, 618 P.2d 96 (1980).....13  
Bruns v. Paccar, Inc., 77 Wn.App. 201, 890 P.2d 469 (1995).....17  
Cho v. City of Seattle, 195 Wn.App. 10, 342 P.3d 309 (2014) .....16  
Curtis v. Lein, 169 Wn.2d 884, 239 P.3d 1078 (2010) .....7  
Degel v. Majestic Mobile Manor, 129 Wn.2d 43, 914 P.2d 728 (1996) ...14  
Douglas v. Bussabarger, 73 Wn.2d 476, 438 P.2d 829 (1968).....10, 11, 12  
Kalmas v. Wagner, 133 Wn.2d 210, 943 P.2d 1369 (1997) .....23  
Loudon v. Mhyre, 110 Wn.2d 676, 756 P.2d 138 (1988).....20, 21, 22  
Miles v. St. Regis Paper Co., 77 Wn.2d 828, 467 P.2d 307 (1970).....10  
Morris v. McNicol, 83 Wn.2d 491, 519 P.2d 7 (1974).....14  
Pacheco v. Ames, 149 Wn.2d 431, 69 P.3d 324 (2003) .....8, 10, 11, 12  
Pederson v. Dumouchel, 72 Wn.2d 73, 431 P.2d 973 (1967).....10  
Pettit v. Dwoskin, 116 Wn.App. 466, 68 P.3d 1088 (2003) .....14  
Rowe v. Vaagen Bros. Lumber, 100 Wn.App. 268, 996 P.2d 1103  
(2000).....21  
Schooley v. Pinch’s Deli Market, Inc., 134 Wash.2d 468, 951 P.2d 749  
(1998).....17  
Siegler v. Kuhlman, 81 Wn.2d 448, 502 P.2d 1181 (1973)...8, 9, 10, 11, 12  
Skeie v. Mercer Trucking Co., Inc. 115 Wn.App. 144, 61 P.3d 1207  
(2003).....17  
State v. Fjermestad, 114 Wn.2d 828, 791 P.2d 897 (1990) .....20  
Tinder v. Nordstrom, Inc. 84 Wn.App. 787, 929 P.2d 1209 (1997).....7  
Williams v. Leone & Keeble, Inc., 170 Wn.App. 696, 285 P.3d 906  
(2012).....14  
Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81  
Wn.2d 528, 503 P.2d 108 (1973).....14, 18  
Zebarth v. Swedish Hosp. Med. Ctr., 81 Wn.2d 12, 499 P.2d 1  
(1972).....9, 11

**Maryland Cases**

Armstrong v. Johnson Motor Lines, Inc., 12 Md.App. 492, 280 A.2d 24  
(1971).....13

Low v. State 705 A.2d 67, 119 Md.App. 413 (Md.App. 1998).....22

**Oklahoma Cases**

Doyal v. Barnhart, 331 F.3d 758 (10<sup>th</sup> Cir. 2003).....21

**Washington Rules**

CR 56(c)..... 13

**Washington Statutes**

RCW 46.61.130 .....14, 18

RCW 46.61.140 .....14, 18

**Federal Statutes**

20 C.F.R. § 416.927.....21

**Other Authorities**

WILLIAM LLOYD PROSSER, LAW OF TORTS 222 (3d ed. 1964).....11

## **I. REPLY TO ASSIGNMENTS OF ERROR**

- A. Res ipsa loquitur must be applied to the present case.
- B. A question of fact exists regarding whether Defendant Elfrink-Thompson acted negligently by driving distracted or too fast for conditions.
- C. Dr. Corson was not a treating physician of Elfrink-Thompson, and his testimony should be allowed.

## **II. ISSUES PERTAINING TO REPLY**

- A. Did the Superior Court err by denying the case proceed on res ipsa loquitur, where a vehicle does not commonly fishtail across a road's center line, into oncoming traffic, absent negligence?
- B. Did the Superior Court err by denying the case proceed on res ipsa loquitur, where Defendants violated RCW 46.61 Rules of the road without excuse?
- C. Does a question of fact remain regarding whether Elfrink-Thompson acted negligently by driving distracted or too fast for conditions?
- D. Does Defendant Elfrink-Thompson's alleged heart attack provide a complete defense to negligence, where uncontroverted evidence

indicates he was conscious and actively steering the vehicle, and where Dr. Corson testified it was “almost inconceivable” that Elfrink-Thompson suffered a heart attack before regaining consciousness?

### III. ARGUMENT

#### A. **Res ipsa loquitur must be applied to the present case.**

Washington’s Supreme Court has noted the doctrine of res ipsa loquitur is applicable, “[W]here the facts and the demands of justice make its application essential.” Curtis v. Lein, 169 Wn.2d 884, 889, 239 P.3d 1078, 1081 (2010); Tinder v. Nordstrom, Inc. 84 Wn.App. 787, 792, 929 P.2d 1209 (1997). In the present case, it is proper and essential.

Neither party would be before this court if evidence incontrovertibly revealed Defendant Charles Elfrink-Thompson (“Elfrink-Thompson”) had been on his phone, drunk, swerved to miss a child or other vehicle in the roadway, had a heart attack just before the accident, or was struck by lightning just before crossing the center line. Without proof of these intervening factors, this is precisely the sort of case for which lawmakers drafted the res ipsa loquitur doctrine, in order to afford a jury the opportunity to render justice. To order otherwise on speculative reactions of a liable defendant is to eviscerate the

doctrine, deny justice in favor of legal finagling, and defy our Supreme Court's holdings in Siegler v. Kuhlman, 81 Wn.2d 448, 502 P.2d 1181 (1973) and Pacheco v. Ames, 149 Wn.2d 431 (2003).

**1. As in Siegler v. Kuhlman and Pacheco v. Ames, this accident would not ordinarily take place without negligence**

One of the closest cases to this, factually, is Siegler v. Kuhlman, 81 Wn.2d 448, 502 P.2d 1181 (1973). In Siegler, a seventeen-year old girl died when her car burst into flames due to a gas truck's trailer disengaging from its cab, crashing through a chain-link highway fence, and coming to rest upside down on a roadway below. Id. at 450. The girl's estate could not specifically identify what the truck driver or trucking company had done negligently to cause the accident. Id. at 451. The court noted, "The "real causes of what happened will remain something of an eternal mystery." Id. at 449. The truck driver had "inspected the trailer, checking the lights, hitch, air hoses and tires. Finding nothing wrong, he then set out driving the fully loaded truck tank and trailer tank. (It was) dark, but the roads were dry." Id. at 450.

The plaintiff estate "sought to prove both negligence on the part of the driver and owner of the defendant's vehicle and to bring the proven circumstances within the *res ipsa loquitur* doctrine." Id. at 451. The trial and appellate courts

refused to apply the doctrine. Id. at 453. Washington’s Supreme Court reversed, entering judgment in favor of the plaintiff on strict liability statutes (inapplicable here), and remanding on the sole issue of damages. Before doing so, the court held the jury was entitled to an instruction on res ipsa loquitur. “[A]n instruction on res ipsa loquitur should have been given.” Id. at 453.

Defendants would differentiate themselves from Siegler due to the application of strict liability for explosives in that case. To do so misses the point of Siegler, and of res ipsa loquitur. First, the Supreme Court explicitly approved applicability of res ipsa loquitur to that case before addressing the issue of strict liability. “[A]n instruction on res ipsa loquitur should have been given . . . But there exists here an even more impelling basis for liability . . .” Id. Second, to reach such a distinction would mean that the defendants in Siegler would not have been held liable if the trailer that killed the 17-year old girl had been empty. Such a result would be a miscarriage of justice, and was rejected by the court:

“The principal claim of error was directed to the trial court’s refusal to give an instruction on res ipsa loquitur, and we think that claim of error well taken . . . [A]n instruction on res ipsa loquitur should have been given and . . . an inference of negligence could have been drawn from the event. We think, therefore, that plaintiff was entitled to an instruction permitting the jury to infer negligence from the occurrence.” Id. at 453 (citing Zebarth v. Swedish Hosp. Med. Ctr., 81 Wn.2d 12, 499 P.2d 1 (1972));

Miles v. St. Regis Paper Co., 77 Wn.2d 828, 467 P.2d 307 (1970);  
Douglas v. Bussabarger, 73 Wn.2d 476, 438 P.2d 829 (1968); Pederson v. Dumouchel, 72 Wn.2d 73, 431 P.2d 973 (1967)).

The Siegler court then came to a separate conclusion on strict liability, leading to its remand solely on damages to the plaintiff:

“But there exists here an even more impelling basis for liability in this case than its derivation by allowable inference of fact under the *res ipsa loquitur* doctrine, and that is the proposition of strict liability as a matter of law.” Id. at 453.

The important holding, for our purposes, is that the “plaintiff was entitled to an instruction permitting the jury to infer negligence from the occurrence.” Id.

This case is no different than Siegler in the following regard: general experience tells us that a car does not lose control, fishtailing into oncoming traffic, causing a head-on collision, just as a truck does not lose its trailer, crashing onto a roadway below, in the absence of negligence.

## **2. Failure to put *res ipsa loquitur* to the jury was error.**

While not as factually close to this case as Siegler, the Supreme Court’s decision in Pacheco clarified that a defendant may not defeat *res ipsa loquitur* by putting forth *possible* defenses:

“[T]he plaintiff may be entitled to rely on the *res ipsa loquitur* doctrine even if the defendant’s testimony, if believed by the jury, would explain how the event causing injury to the plaintiff occurred.” Pacheco, 149 Wn.2d at 440.

The defendant in Pacheco had a stronger defense than the defendant in this case. In Pacheco, an oral surgeon relied upon x-rays marked by the physician who had referred him the client, and as a result, drilled into the wrong side of the client's mouth. Id. at 434. After a judgment for the plaintiff, the Division Three Court of Appeals erroneously reversed. It refused to apply res ipsa loquitur "when there is evidence that the action could occur without negligence on the defendant's part." Pacheco v. Ames, 149 Wn.2d 431, 69 P.3d 324, 11 A.L.R. 6<sup>th</sup> 913 (2003). Citing Siegler and ZeBarth, The Supreme Court reversed Appeals Court, holding potentially non-negligent intervening factors do not remove the res ipsa loquitur inquiry from the jury:

"Even where the defendant offers weighty, competent and exculpatory evidence in defense, the doctrine may apply . . . [T]he plaintiff is not required to 'eliminate with certainty all other possible causes or inferences' in order for res ipsa loquitur to apply." Pacheco, 149 Wn.2d at 440-41 (citing ZeBarth v. Swedish Hosp. Med. Ctr., 81 Wn.2d 12, 22, 499 P.2d 1; Siegler v. Kuhlman, 81 Wn.2d 448, 451-53, 502 P.2d 1181 (1972); Douglas v. Bussabarger, 73 Wash.2d 476, 438 P.2d 829 (1968) (quoting WILLIAM LLOYD PROSSER, LAW OF TORTS 222 (3d ed. 1964)).

To require Plaintiffs to eliminate all other possible causes or inferences with certainty would strip the doctrine of its value.

In Siegler, a roadway case with many potential hazards similar to those in

the present case, the Supreme Court similarly refused to deny justice: “What caused (the trailer) to separate from the truck towing it, **despite many theories offered in explanation**, is still an enigma.” Siegler v. Kuhlman, 81 Wn.2d at 451 (emphasis added). The Supreme Court confirmed this stance in Douglas v. Bussabarger, 73 Wn.2d 476, 328 P.2d 829 (1968) “[W]e do not believe plaintiff should have been denied the aid of the doctrine of res ipsa loquitur [where there are several possible negligent causes of harm, and one potential non-negligent cause].” Id. at 485-86.

Defendants cite several cases establishing there is no *automatic presumption* of negligence in automobile accident cases. For example, in Dodge v. Stencil, 48 Wn.2d 619, 296 P.2d 312 (1956), cited by Defendants, a child wandered into the road and was struck by a passing motorist. Id. at 620. Defendant Stencil did not see the child. Id. at 623. The Supreme Court refused to presume negligence. Id. Res ipsa loquitur does not presume negligence; rather it permits an inference of negligence by the jury, where appropriate. Pacheco v. Ames, 149 Wn.2d at 435. For purposes of the doctrine, Dodge would be analogous if the driver had seen the child, swerved, fishtailed, over-corrected, and then finally struck the child who, by the way, was not in his lane of travel at all. The case is clearly distinguishable from Siegler, and from this case.

That an automobile does not normally leave the roadway, absent negligence, is hardly a novel argument, and is supported by foreign courts addressing automobile accidents:

“There are . . . cases of motor vehicle collisions that warrant application of this doctrine . . . the justice of the doctrine of *res ipsa loquitur* is found in the circumstance that the principal evidence of the true cause of the accident was accessible to the defendant but inaccessible to the victim of the accident.” Armstrong v. Johnson Motor Lines, Inc., 12 Md.App. 492, 498, 280 A.2d 24 (1971).

Such holdings support common sense and justice. Nearly every defendant can theorize potential non-negligent causes of damage to escape liability. The Superior Court erred in refusing its application, and the case should be remanded for trial.

**B. A question of fact exists regarding whether Elfrink-Thompson acted negligently by violating RCW 46.61 Rules of the Road, and by driving distracted or too fast for conditions.**

A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Barrie v Hosts of America, Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving

party. Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wn.2d 528, 530, 503 P.2d 108 (1973). The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. Morris v. McNicol, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974). This is hardly the sort of case where reasonable minds can reach only one conclusion.

To present a prima facie case of negligence, a plaintiff must prove the existence of a legal duty, breach of that duty, injury resulting from the breach, and proximate cause. Degel v. Majestic Mobile Manor, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). The determination of whether a duty exists is a question of law based upon either statutory provisions or common law principles. Id. at 49.

Plaintiffs have presented a prima facie case of negligence based upon Elfrink-Thompson's loss of control of his vehicle. The violation of a statute is evidence of negligence. Williams v. Leone & Keeble, Inc., 170 Wn.App. 696, 285 P.3d 906 (2012); Pettit v. Dwoskin, 116 Wn.App. 466, 68 P.3d 1088 (2003). RCW 46.61.140(1) requires a vehicle be driven "as nearly as practicable entirely within a single lane." Testimony by Burke bolsters the negligence case. He testified to watching Elfrink-Thompson swerve into his lane, twice, while fishtailing. (CP 58-59) RCW 46.61.130(1) prohibits driving in the left lane, in a non-passing zone, as Burke witnessed Elfrink-Thompson doing just prior to the

accident. (CP 58-59) Each of these violations supports a finding of negligence.

Burke saw the accident. (CP 58-59) He saw Elfrink-Thompson trying to correct his vehicle's trajectory. (CP 58-59) He saw Elfrink-Thompson's vehicle enter his lane, twice, fishtailing. (CP 58-59) Elfrink-Thompson's wheels were turned to the right, toward his own lane, on impact, supporting Burke's testimony that Elfrink-Thompson was very much aware of his loss of control. (CP 35, 126) A jury is entitled to consider these facts. This court must consider them as true, for purposes of summary judgment.

Steve Harbinson, a professional accident Reconstructionist, further supported Burke's testimony. He testified that, based upon Burke's testimony, and upon the fact that at the point of impact Elfrink-Thompson's front wheels were turned to the right, toward his own lane, he believes Elfrink-Thompson had lost control of his vehicle due to excessive speed or inattention, on a more likely than not basis. (CP 126, 130) The Superior Court erred by discounting this evidence.

Defendants attempt to discredit Harbinson, asking that the court consider his testimony too speculative. They cite cases involving plaintiffs attempting to prove a governmental entity's liability in automobile accidents where the government was not operating the vehicle. These are distinguishable because res

ipsa loquitur is not implicated, and because, by nature, arguing a city's liability for hazardous roads is not on par with city employees driving into oncoming traffic.

Defendants cite Cho v. City of Seattle, 195 Wn.App. 10, 342 P.3d 309 (2014), arguing Harbinson's testimony is too speculative to be allowed. In Cho, a defendant driver with a blood-alcohol content of 0.29 struck and injured several pedestrians in a crosswalk. Id. at 13. The court refused to hold the City liable. Cho is distinguishable because it involved speculation with what the City allegedly *should* have done to prevent an accident, and not what it actively did to cause it. "Cho's theory of liability against the City consists of only speculation as to what the City should have done to prevent the accident." Id. at 17. "[H]ad there been a pedestrian island, she would have used it, stopped, and waited for all the traffic to pass through the crosswalk." Id. at 18. This case would be analogous to Cho if Harbinson had testified regarding a center line barrier that should have protected against the accident, or if he had based his opinions on the *hypothetical* positioning of Elfrink-Thompson's wheels or his over-correction in fishtailing. We know these facts to be true. Cho is not controlling.

Defendants define "speculation," noting it is the "art of theorizing about a matter as to which evidence is not sufficient for certain knowledge."

“Certainty,” however, is not the standard for testimony in civil litigation. An expert must only testify a thing is “more likely than not” to be true. Bruns v. Paccar, Inc., 77 Wn.App. 201, 203, 214-15, 890 P.2d 469 (1995). Harbinson’s opinion, based upon his careful evaluation of the positioning of the vehicles, condition and nature of the roadway, photographs of the scene, testimony of police, testimony of Burke, behavior of Elfrink-Thompson, is reasonable: On a more probable than not basis, Elfrink-Thompson was distracted or traveling too fast for wet conditions. (CP 124-130)

A court’s analysis of the issue of causation focuses on whether, as a matter of policy, the connection between the ultimate injury and the act of the defendant is too remote or insubstantial to impose liability. Skeie v. Mercer Trucking Co., Inc. 115 Wn.App. 144, 148, 61 P.3d 1207 (2003) (citing Schooley v. Pinch’s Deli Market, Inc., 134 Wash.2d 468, 478-79, 951 P.2d 749 (1998)). Here, the connection is not remote or insubstantial. A jury is entitled to consider the testimony of the lay and expert witnesses, the angle of Elfrink-Thompson’s tires, his actions in trying to control his vehicle, his entering Burke’s lane, twice, his perceived over-correction, his speed, his consciousness, and his violations of Washington statutes. These are questions of fact, and the jury should be allowed to consider all of the evidence.

**C. Defendants' defense of an alleged heart attack does not entitle them to summary judgment.**

While this issue was not decided by the trial court, if the Court decides to consider this issue, the Burkes discuss it in this Reply.

Defendants argue Elfrink-Thompson was unconscious just prior to the accident due to a heart attack, despite Burke's testimony, despite Harbinson's forensic analysis, despite the position of his wheels, and despite Dr. Corson's testimony that a heart attack was highly unlikely. (CP 189-190) They ask the Court to ignore Burke's, Harbinson's, and Corson's testimony, as well as Elfrink Thompson's clear violations of RCWs 46.61.130(1) and 46.61.140(1), and rule in their favor as a matter of law. These are questions of fact for a jury.

The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wn.2d 528, 530, 503 P.2d 108 (1973). Factual evidence indicates Elfrink-Thompson was very much conscious and capable of driving his vehicle in a non-negligent manner at the time of the accident.

**D. Dr. Corson's testimony should be allowed, as he was not a treating physician**

While this issue was not decided by the trial court, if the Court decides to

consider this issue, the Burkes discuss it in this Reply.

Dr. Corson is a physician. Defendants have not put forth a citation or supportable argument as to why he should be considered a *treating* physician. If Dr. Corson had ever treated Elfrink-Thompson, advised on a course of treatment, or prescribed medication, rendering his opinions inadmissible would be fair. His testimony could, in such an instance, could impinge upon public policy concerns related to treating physicians, such as compromising of the doctor-patient privilege. But he did not treat Elfrink-Thompson; he did nothing akin to treatment. He simply read a data report:

“It was in the course of (reviewing 100 or more daily ECG tracings) that I check-read the three ECG tracings obtained on Mr. Elfrink-Thompson on April 21 and 22, 2010. Although I do see patient names on the ECG records, I am nearly always unaware of the patients’ clinical situation (as in this case), and I simply check that the data in the software-generated interpretation report is correct. I had no direct interaction with Mr. Elfrink-Thompson or anyone from his HMC trauma team beyond interpreting the data contained in his ECG tracings, and knew nothing about his circumstances. I was not contacted by any of Mr. Elfrink-Thompson’s HMC trauma providers to render cardiology assistance to the trauma team’s care, nor did I provide any consultation to anyone from the trauma team, or write any reports regarding Mr. Elfrink-Thompson. I would not consider myself a treating physician for the purposes of the present review.” (CP 187)

Dr. Corson could not have picked Elfrink-Thompson out of a lineup. Nothing he nor Plaintiffs’ counsel did prejudiced the Defendants. Dr. Corson read a report

and gave an objective opinion which, absent badly-bent legal rules, lends further credence to Burke's testimony that Elfrink-Thompson was attempting to regain control of his vehicle at the time of the accident. Any other non-treating physician could have come to the same conclusion. Dr. Corson, then Chief Cardiologist at Harborview, is a perfectly capable and reasonable witness. To dismiss Dr. Corson's opinion, where no advantage was sought or earned, purely based upon legal gamesmanship, is to strain to reach an absurd result.

In State v. Fjermestad, Washington's Supreme Court stated, "We interpret statutes to avoid absurd results." State v. Fjermestad, 114 Wn.2d 828, 839, 791 P.2d 897 (1990). While not based upon a statute, interpreting the rule against ex-parte communication with treating physicians to include non-treating physicians is to create an absurd result. The rule stems from Loudon v. Mhyre, 110 Wn.2d 676, 756 P.2d 138 (1988). In Loudon, an Oregon man received treatment for liver and kidney damage from two Washington doctors following an accident, was released, returned to Oregon, sought further treatment from two Oregon doctors, and subsequently died. Id. at 676. The Court held that ex-parte contact with Loudon's treating physicians in Oregon was prohibited. Id. at 682. The case is clearly distinguishable from the present case. Defendants have not and cannot cite a case extending Loudon to include non-treating physicians.

There are many different legal definitions of “treating physician,” in different states and different contexts. None comes close to defining a treating physician as a non-treating physician. The 10<sup>th</sup> Circuit Federal Court in Oklahoma noted:

“The regulations define a non-treating physician as one ‘who has examined you but does not have, or did not have, an ongoing treatment relationship with you.’ 20 C.F.R. § 416.902. By contrast, a treating physician is defined as someone who provides you, or has provided you, with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with you. Generally, we will consider that you have an ongoing treatment relationship with [a physician] when the medical evidence establishes that you see, or have seen, the source with a frequency consistent with accepted medical practice for the type of treatment and/or evaluation required for your medical condition(s).” Doyal v. Barnhart, 331 F.3d 758, 762 (10<sup>th</sup> Cir. 2003); 20 C.F.R. § 416.927.

Oklahoma clearly would not consider Dr. Corson a treating physician.

Rowe v. Vaagen Bros., cited by Defendants, considered five physicians who “examined or treated” an industrial insurance claimant:

First, Mr. Rowe visited Dr. Ronald Frederickson, the only chiropractor he could find who would see him on short notice. He immediately switched to Dr. Dwight Erickson, who was more conveniently located. When Dr. Erickson's treatment failed to produce results, he referred Mr. Rowe to an orthopedist, Dr. Warren Adams. When Dr. Adams could not determine the reason for Mr. Rowe's continuing pain, he referred him to other specialists for neurological tests and an MRI. One of these specialists, Dr. Roger Cooke, referred Mr. Rowe to yet another chiropractor. Rowe v. Vaagen Bros. Lumber, 100 Wash. App. 268, 271, 996 P.2d 1103, 1106 (2000).

These were clearly treating physicians, and within the rule and reasoning in Loudon. None of the cases cited by the Defendants support their contention that Loudon extends, by rule or in spirit, to a non-treating physician.

Much stronger physician-patient relationships than Dr. Corson's have come up short of "treating physician" status. In Maryland, a doctor was found not to be a treating physician where:

[H]er standard operating procedure of taking an oral history from the patient's parent, meeting with the patient, and asking the child patient if he or she knew why he or she was there does not in and of itself qualify her as a treating physician . . . No mention was made by the doctor of potential treatment . . . Put in general terms, the mere ability to render treatment does not automatically give rise to the inference that one is categorically a "treating physician" as Rule 5-803(b)(4) contemplates the term. Something more is needed than the mere possibility that further treatment could be rendered. If that were not the case, then any DHHS doctor who examines a child would qualify as a treating physician within 5-803(b)(4). Or, taken to its utmost extreme, any doctor who examines an individual could arguably "treat" that individual if necessity called for it. Would, then, every doctor who examines a person qualify as a "treating physician?" Certainly not, or the rule would be rendered utterly meaningless."

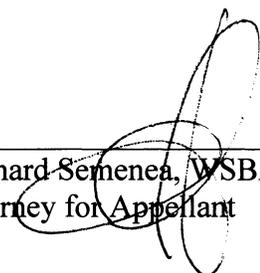
Low v. State 705 A.2d 67, 72, 119 Md.App. 413 (Md.App. 1998). The rule to which the court was referring to related to hearsay exceptions. Nevertheless, its definition is apt. No court has defined a "treating physician" as one who reads hundreds of faceless patient records without ever meeting or treating the patient.

#### IV. CONCLUSION

Res ipsa loquitur must be applied to this case. Elfrink-Thompson had control of his vehicle, negligently lost control, and struck the Plaintiff. Furthermore, summary judgment is improper unless reasonable minds can reach only one conclusion. Kalmas v. Wagner, 133 Wn.2d 210, 215, 943 P.2d 1369 (1997). This is not the case here. The trial court erred in ordering summary judgment. This case should be reversed and remanded for trial on the merits.

Respectfully submitted this 10<sup>th</sup> day of July, 2015.

SEMENEA LAW FIRM

  
\_\_\_\_\_  
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