NO. 44655-3-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

LONNITA HASKINS, Appellant

vs.

MULTICARE HEALTH SYSTEM, a Washington Corporation d/b/a TACOMA GENERAL HOSPITAL, Respondent

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APPELLANT'S OPENING BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

> The doctrine of res ipsa loquitur spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent.

Curtis v. Lein, 169 Wn.2d 884, 890, 239 P.3d 1078 (2010).

Washington appellate courts have repeatedly upheld the doctrine of res ipsa loquitur as a viable theory for proving negligence in a personal injury action, including medical malpractice claims.[1] The continued and renewed viability of the doctrine of res ipsa loquitur is evidenced by the 2010 revisions to the Washington Pattern Jury Instructions to the res ipsa loquitur instruction, and their comments. The Committee revised the instruction and the comments incorporating recent case law and explaining the elements of the theories in terms of Washington case law. See 6 Washington Practice: Washington Pattern Jury Instructions: Civil 22.01 at 255-259 (6th ed. 2012)(hereinafter WPI 22.01)(WPI 22.01 and comments thereto are attached as Appendix C).

[1] *See e.g., Curtis v. Lein*, 169 Wn.2d 884, 239 P.3d 1078 (2010)(res ipsa loquitur applies reversing summary judgment); *Pacheco v. Ames,* 149 Wn.2d 431, 69 P.3d 324 (2003)(reversing Court of Appeals and reinstating verdict based upon res ipsa loquitur); *Miller v. Jacoby*, 145 Wn.2d 65, 33 P.3d 68 (2001)(reversed summary judgment); *Brown v. Dahl*, 41 Wn. App. 565, 705 P.2d 781 (1985)(reversing trial court's refusal to give instruction).

The trial court in this case should have given plaintiff Lonnita Haskins' proposed res ipsa loquitur instruction taken from WPI 22.01. Lonnita Haskins was severely injured when urinary stents inserted to drain her urine following a urinary diversion procedure were pulled 14 inches out of her body. The urine could not be drained, and instead backed up into her kidneys, causing serious injury to her renal system. At the time, she was recovering from the procedure at Tacoma General Hospital (Multicare) under the exclusive control of the hospital staff and its nurses.

The evidence is undisputed that at 10:00 p.m. on March 11, 2009 when her urine bags were changed, her stents were properly inserted and working to remove urine. She was well on her way to recovery. Within an hour and a half, the stents were found 14 inches outside of her body, and the urine bags had collected no urine since they were emptied at 10:00 p.m. X-rays confirmed that the stents were pulled out 14 inches.

However, no one saw the stents pulled out. Ms. Haskins relied inter alia on the doctrine of res ipsa loquitur ("the thing speaks for itself") to prove that the hospital's negligence was responsible. She introduced expert testimony that this occurrence would not ordinarily occur in these circumstances absent negligence. She proposed a jury instruction taken directly from WPI 22.01, Res Ipsa Loquitur—Inference of Negligence. (Proposed Instruction attached as Appendix A). The trial court, however,

refused to give the proposed instruction. The jury returned a verdict for the defense, finding that Plaintiff had not proved the defendant was negligent. Plaintiff appealed from the jury's verdict.

Whether a res ipsa loquitur instruction should be given is a question of law, subject to de novo review. The trial court here committed reversible error in refusing to give Plaintiff's proposed instruction. The case should be remanded for a new trial.

In addition, at trial Plaintiff challenged the constitutionality of RCW 7.70.080. This statute exempts health care providers in medical malpractice cases from the collateral source rule of evidence applicable to all other personal injury cases. Plaintiff moved in limine to exclude all evidence of collateral source payments. The trial court denied the motion and permitted the defendant hospital, pursuant to the statute, to introduce evidence of collateral source payments, specifically that Medicare and Medicaid were paying a portion of her medical bills.

RCW 7.70.080 is in direct conflict with the collateral source rule, a judicial rule of evidence which has been part of Washington law for one hundred years. The statute violates the constitutional doctrine of separation of powers, most recently articulated by the Supreme Court in *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012); *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009); and *Waples v.*

Yi, 169 Wn.2d 152, 161, 234 P.3d 187 (2010). This Court should hold the statute unconstitutional and instruct the trial court on remand for a new trial that evidence of collateral source payments are inadmissible.

Finally, the trial court sustained an objection to the comments of plaintiff's counsel regarding the burden of proof, and instructed the jury that 51% was not the degree of proof for preponderance of the evidence. Further, the Court allowed defense counsel to argue that it was for the jury to determine the percentage degree of proof. The Court's actions were erroneous under Washington law which defines the preponderance of evidence as "more than 50 percent." *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 608, 260 P.3d 857 (2011). This error was harmful and reversible, and is grounds for a new trial.

Appellant respectfully requests that this Court reverse the trial court, vacate the judgment, and remand the case for a new trial.

ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to instruct the jury regarding res ipsa loquitur as requested in Plaintiff's proposed instructions.

2. The trial court erred in admitting evidence of collateral source payments pursuant to RCW 7.70.080, a statute which is unconstitutional in violation of the separation of powers.

3. The trial court erred in voir dire in instructing the jury venire that 51% was not the degree of proof for preponderance of the evidence.

4. The trial court erred in permitting counsel to argue in closing that it could not consider percentages in determining the degree of proof needed for the preponderance of the evidence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court should have instructed the jury on the res ipsa loquitur doctrine when substantial evidence of all three elements of the doctrine was presented.

2. Whether RCW 7.70.080 allowing evidence of collateral source payments in medical malpractice cases is unconstitutional as a violation of separation of powers.

3. Whether the trial court erred in sustaining objections to counsel's reference to preponderance of the evidence as constituting 51%, and allowing counsel to argue in closing argument that it was for the jury to determine the percentage necessary for preponderance of the evidence.

STATEMENT OF THE CASE

1. Facts

On March 9, 2009, Lonnita Haskins went to Tacoma General Hospital for urinary diversion surgery to be performed by Dr. Bahman Saffari. Two years earlier in 2007, Ms. Haskins had been diagnosed with cervical cancer.[2] Supp. RP (1/16/13) at 21; RP (1/22/13) at 10. The radiation treatment she received, left her free of the cancer, but it created a vesicovaginal fistula, a hole or opening between her bladder and vagina. Supp. RP (1/16/13) at 33, 64-65); RP (1/22/13) at 11-16, 33; RP (1/28/13) at 108-09. The fistula diverted urine into the vagina causing constant urinary leaking. Supp. RP (1/16/13) at 33. The fistula also increased her risk of infection because it permitted bacteria from the vagina to easily ascend the urinary tract. RP (1/22/13) at 11-16.

To correct these problems, Dr. Saffari performed a urinary diversion procedure to bypass the bladder and thus the fistula altogether. The procedure involves the creation of an Indiana pouch to function as a new bladder or reservoir for urine. The surgeon fashions the Indiana pouch out of sections of the small and large intestine. Supp. RP (1/16/13) at 25; RP (1/22/13) at 21. The ureters coming out of the kidneys are

[2] Citation to the verbatim report of proceedings will be by RP, followed by volume date in parenthesis followed by page number. Only a partial report of proceedings was ordered, and the pages were not sequentially numbered.

detached from the bladder and sutured to the pouch. Supp. RP (1/16/13) at 25. The pouch itself is sutured to the wall of the abdomen from the inside. RP (1/22/13) at 21-22, 38-39; 57.

The Indiana pouch procedure requires the temporary insertion of urinary stents to drain the kidneys while the patient heals from the surgery. Two stents are inserted into the Indiana pouch from the outside of the patient's body. Each stent is then inserted into a ureter. The stents are extended through ureters to reach the renal pelvis of each kidney using a guide wire. RP (1/22/13) at 67-68. Thus one end of each stent goes into the kidney with the other end extending outside the body where it is attached to a urine collection bag into which it drains. RP (1/22/13) at 49.

These stents are intended to remain for about two weeks, during the immediate post-surgical period when the ureters are most subject to inflammation, especially where they connect to the pouch. They give the ureters time to form a solid connection with the pouch, and give the newly constructed pouch the opportunity to heal.[3] The stents are hollow and ensure that the ureters remain open and draining during the healing period. They prevent strictures or kinking and scarring in the ureters which could cause the system to fail, resulting in acute renal failure. RP (1/22/13) at

[3] As Dr. Oliver Dorigo observed, healing time is needed because "those are very fine sutures between a very fine structure [the ureters] and a rather thick bowel [the Indiana pouch]." RP (1/22/13) at 25.

21-26; Supp. RP (1/16/13) at 28, 36-37. Dr. Dorigo noted: "Keep those ureters open until they are healed up, the swelling is down, and then you can pull the stents out." RP (1/22/13) at 25.

The surgeon also inserts a third tube called a Malecot Tube. The Malecot is used to drain and irrigate the Indiana pouch itself while it is healing. The pouch is made out of bowel, and is still producing mucus during healing, requiring that it be flushed and drained. While the pouch is healing and the stents are in place, the pouch is not used to collect urine. RP (1/22/13) at 114; RP (1/16/13) at 148-49.

Because the stents are only temporary to be removed after two weeks, the stents are not sutured to the body. RP (1/22/13) at 38. The hospital and nursing staff must take care that the stents remain in place, extending to the kidney, in order to properly drain urine from the patient. RP (1/22/13) at 38-39.

In the two days following surgery, it was apparent that every aspect of the surgery had gone well. Supp. RP (1/16/13) at 24. Her urinary output was good, and Dr. Safari believed her Indiana pouch would function for the rest of Lonnita Haskins' life, keeping her continent. Supp. RP (1/16/13) at 25, 28. Her preexisting moderate chronic kidney disease would remain at the moderate level. Supp. RP (1/16/13) at 27.

On March 11, 2009, the urine bags were emptied at 2:00 p.m., and then again at 10:00 p.m. by a nurse's aide. At 10:00 p.m., the nurse's aide collected 400 cc of urine in the right bag and 470 cc in the left for the preceding eight hours, and average of 50 plus cc's per hour in each bag. RP (1/16/13) at 26-27; RP (1/17/13) at 331; RP (1/17/13) at 84. This showed "real good urine output."[4] RP (1/17/13) at 331. After the bags were emptied at 10:00 p.m., however, there was no more urine output. RP (1/16/13) at 36.

Nurse Shaleeni Fortner was the RN in charge of caring for Ms. Haskins on the 3-11:30 p.m. shift on March 11. RP (1/17/13) at 69. Her entries for the evening of March 11 showed that Ms. Haskins was calm and cooperative without thrashing or hallucinatory or psychotic behavior. RP (1/17/13) at 78-79. Nurse Fortner did not report any leaking urine, such as on Ms. Haskins' bed or bed clothes. RP (1/17/13) at 80. She assessed the urine collection tubes at 4:00 p.m. and found that they were secure. RP (1/17/13) at 89-90.

The bags were emptied at around 10:00 p.m. by a nurse's aide, Ashley Barker. Nurse Fortner was not present when Ms. Barker changed the urine bags at 10:00 p.m. RP (1/17/13) at 86. Ms. Barker ordinarily

[4] A nurse must report a patient who fails to maintain a minimum output of 30 cc per hour. RP (1/17/13) at 331; RP (1/16/13) at 26-27. The output in both of Ms. Haskins' bags exceeded 100 cc per hour.

worked as a transporter at the hospital. She transported patients wherever needed, e.g., for x-rays or imaging, discharge, transfer to another facility and the like. RP (1/17/13) at 7-8. On March 11, she was on duty on evening shift when she was called to assist Nurse Fortney because of the illness of another assistant. RP (1/17/13) at 8.

Ms. Barker had no training in the care of urinary diversion patients. RP (1/17/13) at 11-12. She had no experience or training with the ureteral stents, urostomies, malecot tubes, or other tubes or equipment used with urinary diversion patients. RP (1/17/13) at 13. The stents and tubing for Ms. Haskins, were not comparable to the basic tubes and catheters on which Ms. Barker had trained. For instance, a Foley catheter has an inflatable balloon near the tip at the bladder end, which tethers the catheter in place. RP (1/17/13) at 325. The urinary stent has no similar mechanism to hold it in place. RP (1/17/13) at 325. A nurse's training in the Foley catheter is inadequate for the urinary stents which require "a whole separate training." RP (1/17/13) at 325. Ms. Barker had no training beyond the care involved with a Foley catheter. RP (1/17/13) at 12.

Further, she had no knowledge of how Ms. Haskins' renal system worked in this immediate post-surgical period. She did not know that the urine bags she emptied were connected to the actual stents which went

into the Indiana pouch, and extended into the kidneys where they were needed in order to drain the urine. RP (1/17/13) at 13-15.

At 11:00 p.m., Nurse Rebecca Sumey came on duty to replace Nurse Fortner. She was in charge of Ms. Haskins and several other patients. RP (1/16/13) at 9-10. During the report made at the shift change between 11 and 11:30, Nurse Fortner told her that Lonnita had not put out any urine since the 10:00 p.m. collection. RP (1/16/13) at 18, 23. Nurse Sumey made a contemporaneous notation of Nurse Fortner's report in the chart: "Reported by evening nurse that ureteral stents have had no output since emptied by CNA about 2200." RP (1/16/13) at 23-24.

At 11:45 p.m., Nurse Sumey reported that she could not find any urine from the stents and that Ms. Haskins' urine bags were empty. RP (1/16/13) at 26. When she assessed Lonnita Haskins at 11:45, she found that the stents were about 14 inches out of her body. RP (1/16/13) at 17-18. She made a note in the medical record as follows:

> Exposed stent tubing on both right and left to length of 50 to 60 centimeters compared to about 7 to 10 centimeters the day before."[5]

RP (1/16/13) at 24. While the stents had moved substantially, the Malecot tube had not moved at all. RP (1/16/13) at 20.

[5] Converted to inches, this was 19 to 23 inches of exposed stent tubing, compared to 2 ½ to 4 inches approximately the preceding day. Nurse Sumey testified that

Lonnita Haskins told Nurse Sumey at the 11:45 assessment that the aide had hung the bags over the edge of the bed when she emptied the bags at 10. RP (1/16/13) at 18. At trial, Ms. Barker denied that she had hung the bags over the bed. RP (1/17/13) at 59.

At 6:30 a.m. on March 12, Dr. Saffari visited Ms. Haskins in response to the medical crisis created by the dislodgment of the stents. It was Dr. Saffari's understanding that the stents were dislodged because the bags were hung over the bed, "place[d] to gravity" in the course of collecting urine. Supp. RP (1/16/13) at 51. Ms. Haskins told Dr. Saffari that when the nurse's aide came into the room to empty the bag, she hung the bag over the bed, and that is when the stent was pulled out. Dr. Saffari recorded her comments in her medical record. Supp. RP (1/16/13) at 34-35.[6]

Ms. Haskins had no memory of the observations reported at the time. She remembered asking Dr. Saffari what happened, and he related her earlier statement to him. RP (1/28/13) at 128-130.

X-rays showed that the stents had been pulled completely out of the ureters, and that the end of the stents which originally were in the renal pelvis of the kidney were now in the pouch itself. Supp. RP (1/16/13) at

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her metric skills were not that good, but this was a contemporaneous note. RP (1/16/13) at 24-25.

30. Later measurements of the x-rays showed that the stents had been dislodged 14 inches. RP (1/22/13) at 48.

Dr. Oliver Dorigo testified as an expert witness for Ms. Haskins. Dr. Dorigo is now the chief of gynecological cancer surgery at Stanford University. At the time of his testimony, he was a gynecological oncologist at UCLA. RP (1/22/13) at 6-7. He had never testified as an expert before this case. RP (1/22/13) at 5. Dr. Dorigo has performed numerous urinary procedures of the type performed by Dr. Saffari in this case, as well as other urinary procedures which are similar but slightly different. RP (1/22/13) at 7-8.

Dr. Dorigo opined that the stents in this case could not have become dislodged without negligence. RP (1/22/13) at 40-41. Plaintiff's expert nurse, Karen Huisinga also testified that the stents would not have been dislodged without hospital negligence. RP (1/22/13) at 96-98.

The urine bags were not attached to the patient as they should have been. The standard of care requires that the urinary stent bags be secured to the bed, gown and or body. It is a violation of the standard of care to hang the bags over a bed railing. RP (1/22/13) at 55.

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[6]The record was admitted into evidence as a patient statement regarding medical condition ER 803(a)(3) as well as the statements made by Ms. Haskins to Nurse Fortner.

In this case, the bags were manipulated by the aide, and hung over the side of the bed. This enabled the stents to be pulled out by the force of sheer gravity of the bags. RP (1/22/13) at 40-41. It is a violation of the standard of care for a nurse or aide to drain a bag attached to a stent by hanging the bag over a bed. RP (1/22/13) at 40, 49. The standard of care requires that no pulling tension be exerted on the stents. RP (1/22/13) at 56.

Dr. Dorigo agreed that "theoretically" the stents could have become dislodged in the absence of negligence, but not in this case. RP (1/22/13) at 40-41. The stents were dislodged 14 inches. Although Dr. Dorigo and his group at UCLA regularly perform these procedures, he did not know of any instance in which a stent had been pulled out 10-14 inches. RP (1/22/13) at 8. The end of the stent which had terminated at the kidney in its original position had been pulled all the way into the Indiana pouch. This required a steady pulling which could be explained by the negligent act of hanging the urine bag which would pull steadily on the stents. RP (1/22/13) at 48, 49.

Dr. Dorigo ruled out the likelihood that Ms. Haskins had inadvertently dislodged the stents herself, as did Plaintiff's expert nurse,

Karen Huisinga. RP (1/22/13) at 41-42, 78-80. There is no evidence that Ms. Haskins inadvertently dislodged the stents herself. Again, the stents had been pulled out a great length. The stents had to be slowly and steadily pulled out, until they were retracted all the way into the pouch. Ms. Haskins was reported as coherent, calm, responsive and not under distress. RP (1/22/13) at 41. According to medical records, "[s]he was appropriate, had appropriate behavior before and immediately after this was discovered." RP (1/22/13) at 41, 79. She was not in a condition in which she might have become confused and pulled them out.

Further, if Ms. Haskins had attempted to pull out the stents in an undocumented moment of hallucination, she would likely have pulled out all three lines including the Malecot drain which was also inserted from the outside of her body into the Indiana pouch. The Malecot drain is not connected to a heavy urine bag; there is not a lot of drainage from the Malecot. If a patient had pulled on the Malecot, it would have come out. But it had not moved at all. RP (1/22/13) at 41-42, 78-80, 124-26.

2. **Procedural History**

Plaintiff filed her complaint on September 15, 2010. CP 3-7. The case went to trial before the Honorable John Hickman, Superior Court for Pierce County, on January 14, 2013. CP 430.

On January 15, 2013, Plaintiff submitted her proposed jury instructions pursuant to the pre-trial scheduling order. CP 110-149. Plaintiff's Proposed Instruction No. 17, taken directly from WPI 22.01, set forth Plaintiff's negligence claim under the doctrine of res ipsa loquitur. CP 133 (attached as Appendix A). The hospital's written objection to Proposed Instruction 17 on January 25, 2013, relied upon the argument that the evidence did not support the first element of res ipsa loquitur. CP 342-351. The hospital predicated its argument solely upon the discovery deposition testimony of Dr. Joseph Buell. That testimony was never admitted at trial.[7]

At the close of evidence, the trial court heard argument on Plaintiff's proposed res ipsa loquitur instruction. RP (1/29/13) 142-148 (See argument attached as Appendix C). The Court refused to give Plaintiff's Proposed Instruction 17, to which Plaintiff made her exception. RP (1/29/13) 187, 197, 200 (Rulings and exceptions attached as Appendix C).

In closing argument, the hospital focused on the absence of proof as to what caused the stents to slip.

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[7] The hospital's objection erroneously refers to Plaintiff's res ipsa loquitur instruction as Proposed Instruction #18. CP 346. The res ipsa loquitur instruction was Plaintiff's Proposed Instruction #17, and is referred to as such by Plaintiff and the trial court.

> And that for reasons that happen many times in all hospitals, these stents slipped. And nobody can tell you exactly why that occurred.

RP (1/29/13) at 498 (closing argument). In short, the hospital's response to the claim of negligence was that no one knew what actually happened to cause the dislodgment. The hospital could make this claim without having to respond to the inference of negligence raised by a res ipsa loquitur instruction, because no such instruction was given.[8]

On January 30, 2013, the jury returned a defense verdict. The only question reached by the jury on the special verdict form was Question 1, "Was Multicare Negligent?" which the jury answered in the negative. CP 428-29. The jury reached that decision without a res ipsa loquitur instruction from the trial court regarding the inference of negligence.

The trial court entered judgment on the verdict on February 15, 2013. CP 458-460. Plaintiff timely filed a Notice of Appeal to this Court on March 15, 2013. CP 461-466.

[8]This was also consistent with the cross-examination of Dr. Dorigo which focused closely on the absence of evidence supporting the contention that the bags were hung over the bed. RP (1/22/13) at 58-59. Plaintiff could not properly respond to this attack absent a res ipsa loquitur instruction

ARGUMENT

1. The Trial Court Should Have Instructed the Jury on Res Ipsa Loquitur, Plaintiff's Proposed Jury Instruction #17

The trial court committed reversible error in refusing to give Plaintiff's res ipsa loquitur instruction. CP 133 (Proposed instruction attached as Appendix A). The hospital did not object to the wording of the instruction, which was taken directly from WPI 22.01, but only its application in this case. (WPI 22.01 with comments attached as Appendix B).

Whether res ipsa loquitur applies under a given set of facts is a question of law, reviewable de novo. *Pacheco*, 149 Wn.2d at 436. Further, errors of law in jury instructions are reviewed de novo. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). The standard of review on this issue is de novo.

A. Overview of Res Ipsa Loquitur

The doctrine of res ipsa loquitur permits an inference of negligence absent proof of specific acts of negligence if there is proof of the following elements:

> (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence.

Curtis v. Lein, 169 Wn.2d 884, 891, 239 P.3d 1078 (2010), quoting *Pacheco v. Ames,* 149 Wn.2d 431, 438-39, 69 P.3d 324 (2003). See WPI 22.01 (attached). If these elements are present, then the plaintiff is spared the task of proving specific acts of negligence.

Application of res ipsa loquitur does not preclude plaintiff from pleading or proving specific acts of negligence by the defendant. *Pacheco*, 149 Wn.2d at 441 n. 3; citing *Covey v. Western Tank Lines*, 36 Wn.2d 381, 391, 218 P.2d 322 (1950) ("[E]ven though a party should base his action upon the doctrine of *res ipsa loquitur*, he may plead and prove specific acts of negligence on the part of defendant and may rely upon the presumption of negligence and, also, upon his proof of specific acts of negligence.").

If these three elements are shown, Plaintiff is entitled to the instruction even though defendant's testimony, if believed, would explain how the event causing injury to the plaintiff occurred. *Pacheco*, 149 Wn.2d at 440. The instruction must be given if one expert says the injury more likely than not would not have occurred absent negligence. *Curtis v. Lein*, 169 Wn.2d at 891. If there is a question of fact regarding one of the elements, the "issue should be presented to the fact finder." *Miller v. Jacoby*, 145 Wn.2d 65, 73, 33 P.3d 68 (2001).

The doctrine applies to claims against physicians and hospitals. *Miller v. Jacoby*, 145 Wn.2d at 72; *Ripley v. Lanzer*, 152 Wn. App. 296, 308, 215 P.2d 1020 (2009); *Brown v. Dahl*, 41 Wn. App. 565, 705 P.2d 781 (1985); *ZeBarth v. Swedish Hospital Medical Center*, 81 Wn.2d 12, 18, 499 P.2d 1 (1972)("Under circumstances proper to its application, res ipsa loquitur generally does apply to physicians and hospitals," citing cases applying res ipsa loquitur to medical malpractice cases going back 60 years). Defense counsel's assurances to the trial court that a separate and higher standard applies for res ipsa loquitur in medical malpractices is not supported by law.[9]

B. First Element

The first element of res ipsa loquitur as set out in the WPI 22.01 states that the jury must find:

> (1) the [accident] [or] [occurrence] producing the [injury] [damage] is of a kind that ordinarily does not happen in the absence of someone's negligence; [and]

The first element is satisfied if only "***one*** of three conditions is present:" *Curtis v. Lein*, 169 Wn.2d at 891 (emphasis added).

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[9]"I can assure your Honor that it is applied very very infrequently in medical malpractice cases. . . . I believe, Your Honor, that in order for a jury to be properly instructed on res ipsa in a medical malpractice, it requires substantial evidence, a real powerful, affirmative showing on the part of the plaintiff, that the occurrence cannot happen in the absence of negligence." RP (1/29/13) at 143.

> (1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and ***(3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries***.[10]

Curtis v. Lein, 169 Wn.2d at 890 (emphasis added).

Plaintiff met the first element by presenting expert testimony that under the circumstances of this case, the event causing the injury, the dislodgement of the stents 14 inches into the Indiana pouch, would not have occurred in the absence of negligence. See testimony of Oliver Dorigo, RP (1/22/13) at 40-43; and Karen Huisinga, RP (1/22/13) at 96-98 Plaintiff relied upon the highlighted third alternative set out in the quotation from *Curtis v. Lein, supra.*

The trial court, however, declined the proposed instruction because Plaintiff failed to prove the first alternative set out in *Curtis v. Lein.* The trial court stated:

> I'm going to decline to give a res ipsa loquitur instruction. I don't find this to be the sponge-in-the-stomach type of obvious negligence that they recommend they use this for in types of medical malpractice cases.

[10] See also WPI 22.01 cmt at 257, quoting this language from *Curtis v. Lein.* (Appendix B). Plaintiff provided the trial court a copy of the comments at the instruction conference. RP (1/29/13) at 145.

RP (1/29/13) at 187. The trial court erred as a matter of law in this ruling. As *Curtis v. Lein* makes clear, res ipsa loquitur instructions are not limited in medical malpractice cases to sponge-in-the-stomach type cases. Res ipsa loquitur is not limited to obvious negligence. There are three ways to prove the first element of res ipsa loquitur, but the trial court only recognized one such method in medical malpractices cases. The trial court imported limitations on the doctrine, limitations suggested by defense counsel, which have no foundation in law.

The second basis of the trial court's ruling was the existence of evidence that this event could have occurred without negligence. The court stated:

> I think there's been plenty of evidence to indicate that this could have occurred without negligence, and I'm—again, don't believe that this is the type of fact pattern that res ipsa loquitur would be used in. . . . I think there's plenty of evidence for them to rule that there was not negligence in this particular case and that the hospital wasn't actively involved in having this slippage occur.

RP (1/29/13) at 187. The trial court here erred by ruling that the existence of a question of fact barred the use of the res ipsa instruction.[11]

So long as Plaintiff submits substantial evidence supporting the elements of res ipsa loquitur, Plaintiff is entitled to the instruction, even if the defendant submits "strong evidence of alternative non-negligent

explanations."[12] WPI 22.01, cmt at 259, citing *Curtis v. Lein*, *supra*; and *Pacheco v. Ames*, *supra*.

> In particular, a res ipsa loquitur instruction should not be denied to a plaintiff when all of the elements for application of the doctrine are present although there is evidence offered to explain the incident. *Brown v. Dahl,* 41 Wn.App. 565, 582, 705 P.2d 781 (1985) (citing *ZeBarth v. Swedish Hosp. Med. Ctr.,* 81 Wn.2d 12, 499 P.2d 1 (1972)). Even where the defendant offers weighty, competent and exculpatory evidence in defense, the doctrine may apply. *ZeBarth,* 81 Wn.2d at 22, 499 P.2d 1; *see also Siegler v. Kuhlman,* 81 Wn.2d 448, 451–53, 502 P.2d 1181 (1972). In sum, the plaintiff is not required to "'eliminate with certainty all other possible causes or inferences'" in order for res ipsa loquitur to apply. *Douglas v. Bussabarger,* 73 Wn.2d 486, 438 P.2d 829 (quoting WILLIAM LLOYD PROSSER, LAW OF TORTS 222 (3d ed.1964)).

Pacheco v. Ames, 149 Wn.2d at 440-441. The existence of non-negligent explanations of an event create a fact question for the jury under proper instructions. It is error to withdraw those instructions because a fact question exists.

Further, Washington law is clear that res ipsa loquitur applies even when the plaintiff cannot eliminate with certainty all other possible causes.

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[11] The law does not require, as defense counsel represented to the trial judge, a "real powerful affirmative showing." RP (1/29/13) 143.

[12] The substantial evidence test for res ipsa loquitur instruction is no different than the substantial evidence test used to assess whether the evidence supports a jury's verdict or a court's instructions on any issue. Thus, for instance, a negligence theory supported by substantial evidence must be submitted to the jury under proper instructions. *First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94 Wn. App. 602, 612, 971 P.2d 953 (1999). Substantial evidence is simply that evidence which would convince "an unprejudiced, thinking mind". *Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520 (1990).

Pacheco at 440-41; *Douglas v. Bussabarger*, 73 Wn.2d 476, 486, 438 P.2d 829 (1968). As the WPI and the case law establishes, res ipsa loquitur only requires proof that the event "ordinarily" does not happen in the absence of negligence.

The expert's testimony is sufficient if the expert testifies that the event is not likely to occur in the absence of negligence. In *Brown v. Dahl*, 41 Wn. App. 565, 705 P.2d 781 (1985), the trial court was reversed for failure to give a res ipsa instruction in the face of this type of expert testimony. The expert testified on the basis of "reasonable medical probability," and that "[t]hese things more likely than not do not occur unless someone is negligent." *Id.*, 41 Wn. App. at 582 n. 12. The trial court agreed that the doctor "in effect testified something along the lines of that in the absence of negligence this would not normally occur." *Id.*, 41 Wn. App. at 582 n. 13. Nevertheless, the trial court refused to give the res ipsa loquitur instruction.

This Court reversed and held:

> But, although defendant presented weighty, competent and exculpatory proof of due and reasonable care and prudence, the ultimate issue of fact was one for the jury to decide. *ZeBarth v. Swedish Hosp. Med. Center,* 81 Wash.2d at 22, 499 P.2d 1. Here, the fact that defendants "presented weighty, competent and exculpatory proof of due and reasonable care and prudence" does not prevent plaintiffs from presenting their theory of res ipsa loquitur. *ZeBarth, supra.* When, as here, each of the elements of res ipsa loquitur are supported by substantial evidence, including an

> inference from expert medical testimony that negligence caused the injury to the patient, plaintiffs are entitled to a res ipsa loquitur instruction

Id., at 582. *Brown v. Dahl* remains good law. It was cited with approval by the Supreme Court in its 2003 *Pacheco* decision. *Pacheco*, 149 Wn.2d at 440. It is one of three cases cited by the WPI committee on the first element of res ipsa loquitur.

Plaintiff presented proof satisfying the third way of proof expert testimony. Plaintiff was not required to present proof that the event could never occur without negligence. The standard of proof is that required for expert testimony in general, that the event more likely than not could not occur without negligence. This standard applies in medical malpractice cases where res ipsa applies. The trial court committed reversible error in refusing to give the instruction.

C. Second Element

The second element of res ipsa loquitur in WPI 22.01 states:

> (2) the injury was caused by an agency or instrumentality within the exclusive control of the defendant; [and]

The hospital did not challenge the res ipsa loquitur instruction based upon the second element, nor did the trial court reject the instruction on this basis. The injury-producing instrumentalities in this case were the stents themselves and the urine bags. Lonnita Haskins was a patient at the hospital, and while she was at the hospital, the hospital and its agents had

exclusive control over the bags and the stents. No one else had the right or responsibility to exercise control over the stents. *See Curtis v. Lein*, 169 Wn.2d at 893 (finding exclusive control over a dock where no one else had responsibility for the dock.).

D. Third Element

The third element of res ipsa loquitur in WPI 22.01 states:

> [(3) the injury-causing [accident] [or] [occurrence] was not due solely to a voluntary act or omission of the plaintiff;]

The third element appears in brackets. The Committee noted: "The bracketed third element will rarely be used; see discussion in the Comment." WPI 22.01 Cmt at 258. The reason is explained by the committee in a comment which also succinctly explains the element itself, and is quoted here in full:

> The committee added the third element because the element is routinely included in case law statements of the elements. The element appears in brackets, however, because it will rarely be needed in a jury instruction. Several reasons underscore this point. "[T]he advent of comparative fault should logically eliminate the element of the absence of the plaintiff's contribution to the accident from the doctrine, unless the plaintiff's negligence appears to be the sole proximate cause of the event." *Tinder v. Nordstrom, Inc.*, 84 Wn.App. at 795 fn. 23 (citing Prosser & Keaton on Torts, at 254 (5th ed. 1984)). Thus, the third element is often merged into the second. *Tinder v. Nordstrom, Inc.*, 84 Wn.App. at 795; *Marshall v. Western Airlines*, 62 Wn.App. 251, 261, 813 P.2d 1269 (1991). See also DeWolf & Allen, 16 Washington Practice § 1.53 at n. 25 ("so long as the plaintiff's fault does not affect the inference that the accident was probably caused (in part) by the defendant's

> negligence, this third element should be disregarded"). In some cases, the third element is not needed in light of the instruction's subsequent phrase "in the absence of satisfactory explanation." Finally, the third element is not needed unless it involves a material issue of fact that requires the jury's consideration. Most jurisdictions that have considered this issue have modified the third element by adopting the view that under the principles of comparative negligence, a plaintiff's contributory negligence does not bar reliance on the doctrine of res ipsa loquitur. See *Emerick v. Raleigh Hills Hosp.*, 133 Cal.App.3d 575, 585–86, 184 Cal.Rptr. 92 (1982); *Terrell v. Lincoln Motel, Inc.*, 183 N.J.Super. 55, 443 A.2d 236, 239 (1982); *Cramer v. Mengerhausen*, 275 Or. 223, 550 P.2d 740, 744 (1976).

WPI 22.01 cmt at 258-59.

The testimony of Dr. Dorigo and Nurse Huisinga established that Lonnita Haskins did not negligently cause the stents to dislodge 14 inches. This evidence at the least created a fact question for the jury as to whether Lonnita Haskins was solely responsible for the dislodgement of the stents. In fact, there is no testimony or evidence that Ms. Haskins did anything to cause the stents to slip 14 inches, only surmise, speculation and innuendo. At best, defendants' evidence was limited to testimony that it could not be ruled out that she inadvertently caused the stents to slip. Supp RP (1/16/13) at 54. The hospital's argument in closing that "nobody can tell you exactly why that occurred" contradicts any suggestion that there is evidence that Ms. Haskins was responsible. RP (1/29/13) at 498 (closing argument). Thus, it was not even necessary to include the third element of

proof at all, since there was no issue of fact as to her responsibility. "[T]he third element is not needed unless it involves a material issue of fact that requires the jury's consideration.[13]

But assuming that such evidence existed, the resolution of that issue was a fact question to be resolved by the jury under proper res ipsa loquitur instructions. Again as the committee comment notes, the third element is needed only if there is "a material issue of fact that requires the jury's consideration." WPI 22.01 Cmt at 259. If there is a question of fact regarding one of the elements, the "issue should be presented to the fact finder." *Miller v. Jacoby*, 145 Wn.2d at 73. An issue of fact does not cause the res ipsa loquitur theory to disappear. Rather, the fact issue is the reason for submitting the issue to the jury under a proper res ipsa loquitur instruction.

2. The Trial Court Erred in Admitting Evidence of Collateral Source Payments Pursuant to RCW 7.70.080, an Unconstitutional Statute under Separation of Powers

The trial court, over objection raised in Plaintiff's Motions in Limine, permitted the hospital to submit evidence of collateral source payments pursuant to RC 7.70.080. Supp CP__; RP (1/15/12) at 1-15

[13] Of course, the hospital can hardly complain of the third element's inclusion in the instruction since this language simply places an additional burden on the plaintiff, but places no burden of any sort on the hospital.

(Argument on Motion in Limine); RP (1/24/13) at 87-89 (Ruling); RP (1/28/13) at 104-05 (Haskins' testimony).

"The collateral source rule is an evidentiary principle that enables an injured party to recover compensatory damages from a tortfeasor without regard to payments the injured party received from a source independent of a tortfeasor." *Mazon v. Krafchick*, 158 Wn.2d 440, 452, 144 P.3d 1168 (2006). Washington courts have judicially applied the collateral source rule for at least 100 years. See *Heath v. Seattle Taxicabs Co.*, 73 Wash. 177, 185-87, 131 Pac. 843 (1913) (applying collateral source principle to pension fund benefits); *Stone v. Seattle*, 64 Wn.2d 166, 172, 391 P.2d 179 (1974)(Social Security or veterans' pensions); *Ciminski v. SCI Corporation*, 90 Wn.2d 802, 804-07, 585 P.2d 1182 (1978) (Medicare benefits). *Sutton v. Shufelberger*, 31 Wn. App. 579, 583, 643 P.2d 920 (1982). The rule applies even if the Plaintiff has not purchased the benefit. *Ciminski, supra*, 90 Wn.2d at 805.

The collateral source rule is a "rule of strict exclusion," excluding collateral source evidence even if the evidence would be admissible for other purposes. *Boeke v. International Paint Co.*, 27 Wn. App. 611, 618, 620 P.3d 103 (1980). *Cox v. Spangler*, 141 Wn.2d 431, 440, 5 P.3d 1265 (2000) ("even when it is otherwise relevant, proof of such collateral

payments is usually excluded, lest it be improperly used by the jury to reduce the Plaintiff's damage award.");

RCW 7.70.080 provides:

> Any party may present evidence to the trier of fact that the plaintiff has already been compensated for the injury complained of from any source except the assets of the plaintiff, the plaintiff's representative, or the plaintiff's immediate family. In the event such evidence is admitted, the plaintiff may present evidence of an obligation to repay such compensation and evidence of any amount paid by the plaintiff, or his or her representative or immediate family, to secure the right to the compensation. Compensation as used in this section shall mean payment of money or other property to or on behalf of the plaintiff, rendering of services to the plaintiff free of charge to the plaintiff, or indemnification of expenses incurred by or on behalf of the plaintiff. Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider.

RCW 7.70.080 cannot be harmonized with the collateral source rule of evidence. The statute is expressly intended to change the rule of evidence in medical malpractice cases. The 100 year old rule of evidence did not apply in this case because of the statute.

Under the separation of powers doctrine, the Washington Supreme Court has made clear that it will protect its rules, including its rules of evidence, from conflicting legislation. *See generally Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 980 (2009); *Waples v. Yi*, 169 Wn.2d 152, 161 (2010). In *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012) the Washington Supreme Court made clear that RCW

7.70.080 is a rule of evidence, and that if it conflicts and cannot be harmonized with an evidentiary rule, the statute must yield to the court's rules of evidence.

> Under our separation of powers jurisprudence, when a statute appears to conflict with one of our evidence rules and they cannot be harmonized, the statute must yield to the rule on a procedural issue such as the admissibility of evidence. *Id.* Given the conflict between ER 408 and the trial court's interpretation of RCW 7.70.080, the statute should have yielded to the evidence rule. Thus, the trial court erred by admitting the evidence.

Id. at 471.

Diaz dealt with the conflict between RCW 7.70.080 and ER 408; the conflict with the collateral source rule was not an issue before the Court. Nevertheless, the Court held that RCW 7.70.080 was a rule of evidence for purposes of separation of powers analysis. Further, the Court noted that RCW 7.70.080 supersedes and thus conflicts with the common law collateral source rule. "RCW 7.70.080 supersedes the common law collateral source rule." *Id.* at 465.

It was not unnecessary for *Diaz* to consider whether RCW 7.70.080 was unconstitutional because it conflicted with the collateral source rule, since the application of RCW 7.70.080 was in conflict with ER 408 and thus unconstitutional on that ground. This case, however, squarely present separation of powers issue created by the clear conflict between RCW 7.08.080 and the collateral source rule.

The whole purpose of 7.70.080 is to abrogate the collateral source rule in medical malpractice cases. It is no different than other procedural rules such as the certificate of merit (*Putman, supra*) or notice provisions (*Waples v. Yi, supra*) which the legislature applied specifically for medical malpractice cases, and which the Supreme Court struck down on separation of powers grounds because the statutes conflicted with the Court's procedural and evidentiary rules.

The trial court erred in allowing evidence of collateral source payments pursuant to the unconstitutional statute. The trial court should be instructed that on remand for a new trial, evidence of collateral source payments pursuant to RCW 7.70.080 is inadmissible.

3. The Trial Court Erred in Instructing the Jury Venire in Voir Dire that 51% is not the Degree of Proof for Preponderance of the Evidence, and in Permitting Counsel to Argue in Closing that the Jury was to Determine the Percentages of Proof Needed for the Preponderance of Evidence Standard

In this civil case, the standard for proving the elements of the claim is the preponderance of the evidence, or more likely than not. The Washington Supreme Court has quantified the preponderance of the evidence standard as follows:

> In order to establish a causal connection in most civil matters, the standard of confidence required is a "preponderance," or more likely than not, ***or more than 50 percent***. *See* Lloyd L. Wiehl, *Our Burden of Burdens,* 41 WASH. L. REV. 109, 110 & n. 4 ("The Washington court has reduced the burden to the probability factor.").

Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 608, 260 P.3d 857 (2011).

During voir dire, Plaintiff's counsel discussed with the jury the Plaintiff's burden of proof, and discussed the difficulties jurors sometimes have with following the law on preponderance. Counsel noted the difficulty some jurors have with the law in this regard, wondering if the burden should not be 80 or 90 percent rather than 51 percent. RP (1/14/13) at 10-15. Some members of the venire voiced their dissatisfaction with this percentage, suggesting instead "70/30," and "75/25" and suggesting discomfort "that it's only 51 percent." RP (1/14/13) at 13-14. Defense counsel objected that counsel's statement was not the law, and the trial court sustained the objection. RP (1/14/13) at 14-15.

This ruling shut off any discussion of the percentages required for a preponderance of the evidence. The ruling further left the clear impression that counsel was incorrect in the percentage suggested, and that the jury could require a higher percentage of proof. The effect of the ruling was exacerbated when defense counsel in closing argument expressly referred to the trial court's ruling in voir dire regarding percentages. RP (1/29/13) at 476.

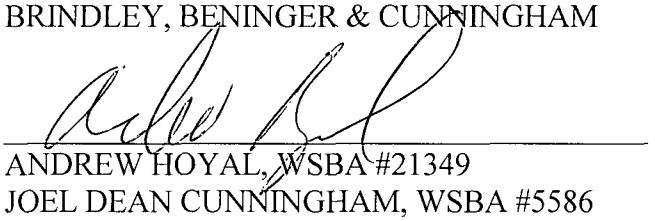
The courts do understand and explain the preponderance of the evidence standard in civil cases in terms of percentages. The trial court's ruling allowed the jury to insert its own notions of percentages into the preponderance of the evidence standard. The trial court's ruling was error under *Anderson v. Akzo*, and the case should for this additional reason be reversed and remanded for a new trial.

CONCLUSION

For the reasons stated herein, Appellant Lonnita Haskins respectfully requests that this Court vacate the judgment of the trial court, and remand the case for a new trial.

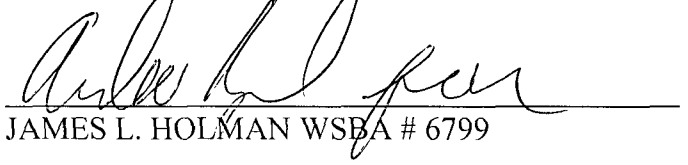
DATED this 9th day of SEPTEMBER, 2013.

LUVERA, BARNETT
BRINDLEY, BENINGER & CUNNINGHAM



ANDREW HOYAL, WSBA #21349
JOEL DEAN CUNNINGHAM, WSBA #5586

LAW OFFICE OF JAMES L. HOLMAN



JAMES L. HOLMAN WSBA # 6799

Counsel for Appellant

CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that she caused delivery of the foregoing Brief to be served on Monday, September 9, 2013, on the below counsel of record in the following manner:

email

Rebecca S. Ringer
Floyd, Pflueger & Ringer
200 West Thomas Street, Suite 500
Seattle, WA 98119-4296

Via ~~hand delivery~~

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 9th of September, 2013, at Seattle, Washington.

Dee Dee White
Paralegal

INDEX TO APPENDIX

APPENDIX A

INSTRUCTION NO. _____

If you find that:

(1) The occurrence producing the injury is of a kind that ordinarily does not happen in the absence of someone's negligence;

(2) The injury is caused by an agency or instrumentality within the exclusive control of the defendant;

(3) The injury-causing occurrence is not due solely to a voluntary act or omission of the plaintiff;

Then, in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the defendant was negligent.

WPI 22.01 (modified)
PLAINTIFF'S PROPOSED INSTRUCTION NO. 17

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APPENDIX B

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CHAPTER 22

BURDEN OF PROOF—RES IPSA LOQUITUR

WPI 22.01 Res Ipsa Loquitur—Inference of Negligence

WPI 22.01

RES IPSA LOQUITUR—INFERENCE OF NEGLIGENCE

If you find that:

(1) the [accident] [or] [occurrence] producing the [injury] [damage] is of a kind that ordinarily does not happen in the absence of someone's negligence; [and]

(2) the injury was caused by an agency or instrumentality within the exclusive control of the defendant; [and]

[(3) the injury-causing [accident] [or] [occurrence] was not due solely to a voluntary act or omission of the plaintiff;]

then, in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the defendant was negligent [and that such negligence produced the [injury] [damage] complained of by the plaintiff].

NOTE ON USE

This instruction is for use in a case in which all of the elements of res ipsa loquitur are supported by substantial evidence and the judge determines that the jury should be instructed on the inference of negligence. See discussion in the Comment.

WPI 1.03, Direct and Circumstantial Evidence, should always be used along with this instruction.

Use bracketed material as applicable. The bracketed third element will rarely be used; see discussion in the Comment.

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COMMENT

Revised instruction. The instruction was revised in 2010 to use language from Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). The *Pacheco* language will be easier for lay jurors to understand. The revisions to the pattern instruction include adding the phrase "of a kind" to the first element and adding the bracketed third element. The third element is discussed below.

Application. Res ipsa loquitur ("the thing speaks for itself") provides a permissive inference of negligence to be drawn by the fact-finder in certain cases. Curtis v. Lein, ___ Wn.2d ___, 239 P.3d 1078, 1081 (2010). Whether the doctrine can be used in a given case is a question of law. Curtis v. Lein, supra; Pacheco v. Ames, 149 Wn.2d at 436. The doctrine is "ordinarily sparingly applied, 'in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.' " Curtis v. Lein, 239 P.3d at 1081; Tinder v. Nordstrom, Inc., 84 Wn.App. 787, 792, 929 P.2d 1209 (1997). After the judge decides the initial question of law, the jurors decide whether the inference should be drawn. Pacheco v. Ames, supra; Robison v. Cascade Hardwoods, Inc., 117 Wn.App. 552, 563, 573–74, 72 P.3d 244 (2003). When each of the elements of res ipsa loquitur is supported by substantial evidence, the plaintiff is entitled to an instruction on this doctrine. See Pacheco v. Ames, 149 Wn.2d at 444.

Elements. The functioning of the doctrine has been explained in these terms:

> The doctrine of res ipsa loquitur spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent. In such cases the jury is permitted to infer negligence. 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.

Pacheco v. Ames, 149 Wn.2d at 436 (citations omitted).

The Supreme Court has enumerated three essential elements for res ipsa loquitur to apply:

> A plaintiff may rely upon res ipsa loquitur's inference of negligence if (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the

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instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence.

Curtis v. Lein, 239 P.3d at 1082 (citing Pacheco v. Ames, 149 Wn.2d at 436).

A more detailed discussion of the doctrine and representative cases can be found in DeWolf & Allen, 16 Washington Practice, Tort Law and Practice § 1.53 (3rd ed.).

First element. The first element may be established in three circumstances:

> The first element is satisfied if one of three conditions is present: "(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries."

Curtis v. Lein, 239 P.3d at 1082 (citations omitted).

Substantial evidence as to the first element may be provided by an expert's testimony that the damage or injury ordinarily does not occur in the absence of negligence; if substantial evidence also supports the other two elements, then the plaintiff is entitled to a jury instruction on res ipsa loquitur. Brown v. Dahl, 41 Wn.App. 565, 582–83, 705 P.2d 781 (1985) (reversing the trial court's refusal to instruct on res ipsa loquitur when all three elements were supported by substantial evidence); ZeBarth v. Swedish Hosp. Med. Ctr., 81 Wn.2d 12, 19–22, 499 P.2d 1 (1972).

Second element. The crux of the second element is the exclusivity of the defendant's control rather than the pinpointing of the precise agency or instrumentality involved. Restatement (Second) of Torts § 328 D. In some cases, the instrumentality is clear, as with the collapsing dock in *Curtis* or the oral surgeon's drilling on the wrong side in *Pacheco*. In other cases, the nature of the instrumentality is less clear, but the defendant's exclusive control is clear. Horner v. N. Pac. Beneficial Ass'n Hosps., Inc., 62 Wn.2d 351, 360, 382 P.2d 518 (1963) (res ipsa loquitur applicable when hospital employed surgical team and patient awakened from abdominal surgery with paralyzed arm.)

Exclusive control includes situations when the defendant has the

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right of control, as in a principal-agent relationship, or a non-delegable duty, as well when the defendant has actual physical control of the agency or instrumentality. Hogland v. Klein, 49 Wn.2d 216, 219, 298 P.2d 1099 (1956) ("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 sufficient basis for application of the doctrine."); Horner v. N. Pac. Beneficial Ass'n Hosps., Inc., supra. "However, exclusive control is not established merely by showing that the defendant has a superior ability to investigate and possibly determine causation." Tinder v. Nordstrom, Inc., 84 Wn.App. at 795. When there is shared responsibility for a task, there can be shared "exclusive control." See Ripley v. Lanzer, 152 Wn.App. 296, 319–23, 215 P.3d 1020 (2009) (because operating room nurses and surgeons share responsibility for condition and location of the surgical instruments before and after they are used, "control" element may be satisfied as to both defendant surgeon and defendant hospital for piece of broken scalpel left in patient after surgery).

The issue may arise as to whether res ipsa loquitur applies when one of several *independent* defendants must have had exclusive control of the instrumentality at the time of the occurrence, but plaintiff cannot prove which one. The courts are split on whether the doctrine can apply in this circumstance. Prosser and Keeton on Torts, at 251 (5th ed. 1984). Courts that have allowed res ipsa loquitur in this circumstance have done so primarily in the setting of a surgical operation under anesthesia. The rationale is that the defendants are the only ones in a position to know what happened when the plaintiff is under anesthesia, and they are unlikely to come forward and testify as to which health care provider made the mistake. See Ybarra v. Spangard, 25 Cal.2d 486, 490, 154 P.2d 687 (1944). No Washington case has directly decided this issue.

Third element. The committee added the third element because the element is routinely included in case law statements of the elements. The element appears in brackets, however, because it will rarely be needed in a jury instruction. Several reasons underscore this point. "[T]he advent of comparative fault should logically eliminate the element of the absence of the plaintiff's contribution to the accident from the doctrine, unless the plaintiff's negligence appears to be the sole proximate cause of the event." Tinder v. Nordstrom, Inc., 84 Wn.App. at 795 fn. 23 (citing Prosser & Keaton on Torts, at 254 (5th ed. 1984)). Thus, the third element is often merged into the second. Tinder v. Nordstrom, Inc., 84 Wn.App. at 795; Marshall v. Western Airlines, 62 Wn.App. 251, 261, 813 P.2d 1269 (1991). See also DeWolf & Allen, 16 Washington Practice § 1.53 at n. 25 ("so long as the plaintiff's fault does

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not affect the inference that the accident was probably caused (in part) by the defendant's negligence, this third element should be disregarded"). In some cases, the third element is not needed in light of the instruction's subsequent phrase "in the absence of satisfactory explanation." Finally, the third element is not needed unless it involves a material issue of fact that requires the jury's consideration. Most jurisdictions that have considered this issue have modified the third element by adopting the view that under the principles of comparative negligence, a plaintiff's contributory negligence does not bar reliance on the doctrine of res ipsa loquitur. See Emerick v. Raleigh Hills Hosp., 133 Cal.App.3d 575, 585–86, 184 Cal.Rptr. 92 (1982); Terrell v. Lincoln Motel, Inc., 183 N.J.Super. 55, 443 A.2d 236, 239 (1982); Cramer v. Mengerhausen, 275 Or. 223, 550 P.2d 740, 744 (1976).

Evidence of other possible explanations. When the defendant presents strong evidence of alternative non-negligent explanations for the occurrence, the plaintiff may still be entitled to an instruction on res ipsa loquitur. The Supreme Court in *Curtis* held:

> The fact that the defendant may offer reasons other than negligence for the accident or occurrence merely presents to the jury alternatives that negate the strength of the inference of negligence res ipsa loquitur provides. The trial court therefore erred when it concluded that res ipsa loquitur was inapplicable as a matter of law due to the possibility that reasons other than negligence accounted for the dock's collapse.

239 P.3d at 1084. Accord, Pacheco v. Ames, 149 Wn.2d at 440 ("In particular, a res ipsa loquitur instruction should not be denied to a plaintiff when all of the elements for application of the doctrine are present although there is evidence offered to explain the incident. Even when the defendant offers weighty, competent and exculpatory evidence in defense, the doctrine may apply"; citations omitted).

Evolution of the doctrine in the courts. The doctrine of res ipsa loquitur by its nature changes in its application over time as our scientific understanding of how things happen advances. An occurrence that might have been presumed to be due to negligence years ago may be explained today as caused by non-negligent factors. On the other hand, accidents or occurrences that were difficult to prevent years ago may be entirely preventable today absent negligence. This requires the trial court to look at cases individually and in the context of current knowledge.

[Current as of October 2010.]

APPENDIX C

competency of members of the nursing staff. This is a provision that is really intended to deal with physician credentialing, which is, as Mr. Cunningham said, not an issue in this case.

So we think that by instructing the jury on the standard of care of a nurse and a CNA and by instructing the jury on the policies and procedures portion of the corporate negligence doctrine, that the Court will have fully apprised the jury of the viable legal theories that are supported by substantial evidence here.

THE COURT: I'm going to deny the motion regarding the standard of care for nursing and CNA because that has been an issue of fact that's been testified to both sides -- by both sides' experts in this area. And I believe it's a question of fact on a theory of liability that should go to the jury, along with the other one that was agreed upon by counsel.

MR. COREY: Thank you, Your Honor. With regard to re ipsa loquitur --

THE COURT: I don't know even if that doctrine exists anymore.

MR. COREY: I think it can only be applied very sparingly and cautiously in a medical malpractice case. It is -- I can assure Your Honor that it is

applied very, very infrequently in medical malpractice cases.

THE COURT: And I laugh only because I've seen it. I was a subject of a Supreme Court decision when it came to personal injury cases, but -- and I make no caustic remark regarding medical malpractice because I've not seen -- I've not ruled on that issue. I've just seen them talk about it in general when it was a case that was involved in my court, but please proceed.

MR. COREY: I believe, Your Honor, that in order for a jury to be properly instructed on res ipsa in a medical malpractice case, it requires substantial evidence, a real powerful, affirmative showing on the part of the plaintiff, that the occurrence cannot happen in the absence of negligence.

And here, by the admission of every one of the plaintiff's own experts, this is a complication, slipped stents, that can and does occur in the absence of negligence. I just don't think that the plaintiff has met her burden with substantial evidence showing the first prong of the res ipsa test.

I, incidentally, also don't think that they've satisfied the third prong because I think that there is an issue of fact here about whether the plaintiff's own acts could have caused or contributed to

this event, but they certainly have not shown that this is something that can't happen in the absence of negligence.

THE COURT: Response.

MR. CUNNINGHAM: Yes, Your Honor. This is the 2012 Washington Pattern Jury Instructions. It's Pattern Jury Instruction 22.01.

THE COURT: You said 22?

MR. CUNNINGHAM: 22.01. If you've got the 2012 edition, it would be page 255, Your Honor.

THE COURT: Yeah. And I've got an -- they have it -- let's see, I have it now.

MR. CUNNINGHAM: Thank you, Your Honor. Res ipsa loquitur has been resurrected as a doctrine in this state under recent case law, particularly in the medical malpractice area, Your Honor.

There are several recent cases on this, one of them Pacheco v. Ames, which is -- these are all cited, by the way, in the comment, which is rather extensive on the doctrine. Pacheco v. Ames and Brown v. Dahl. I'll tell you a summary of what they say is, if an expert testifies on the stand in a malpractice case, that more probably than not, this type of an event wouldn't occur absent negligence, the Court should give the instruction. If I could refer the Court to page 259

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of the comment. I'll wait until the -- if I could refer the Court to page 259 of the comment.

THE COURT: Well, in my version the WPIs starts on page 243.

MR. CUNNINGHAM: May I -- would it be possible for me to show the Court where I'm referring to by handing the book up?

THE COURT: Sure.

MR. CUNNINGHAM: If you look at page 259, there is a paragraph in the middle there that talks about other explanations. In there what it says is even though the defendant puts on a ton of evidence that there's other explanations for this other than negligence, as long as the plaintiff puts on its evidence that this ordinarily would not occur in the absence of negligence, the Court is obligated to give the instruction under this new case law.

And it's been specifically applied to malpractice cases as recently -- there's even once more recent than this one, but as recently as Pacheco vs. Ames. In fact, in the Court of Appeals case, the Dahl v. Brown -- excuse me, Brown v. Dahl case, the only testimony supporting the giving of the res ipsa doctrine was a doctor saying that more likely than not, this anesthesia wouldn't have gone awry if there hadn't been

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negligence because ordinarily there's negligence. The defense put on all sorts of testimony to the contrary, and the Court said in that case it was error not to give the res ipsa instruction.

That has been the holding as well in the Ames case, Pacheco v. Ames, where -- it was a dental malpractice case where the Court again said if the plaintiff puts on an expert that says more likely than not, the cause of the injury was negligence, then it goes to the jury.

And the way the instruction is phrased, it allows the defendant to argue that they do have an explanation, and the jury's not told they have to find res ipsa. They're only told they are at liberty to consider it.

THE COURT: Brief response.

MR. COREY: Your Honor --

MR. CUNNINGHAM: Can I just say the elements -- this is kind of part of our case, so I just want -- in terms of the elements, as you will see, Your Honor, the third element of that instruction under the new instruction says that the only time you don't give the instruction if the plaintiff contributes is if the plaintiff is the sole cause. That is a recent change in the doctrine that came about in the last five

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or six years. It has been recently adopted as of 2012 by the Washington Pattern Jury Instruction Committee.

We would ask the Court to submit the res ipsa instruction under those recent cases and under the Washington Pattern Jury Instruction Committee book.

THE COURT: Okay. Response.

MR. COREY: Your Honor, I don't believe that the plaintiff has met her burden of showing that she wasn't the sole cause.

But returning to the first requirement, I would caution the Court against applying the Pacheco case or the Brown case beyond the facts at bar in those cases. It has -- it has been well established in Washington that res ipsa to be applied cautiously and sparingly. If it were enough for a plaintiff to call an expert to come to court and say, well, it's more probable than not that negligence was the cause of this event, then in every case, in every medical malpractice case, there would be justification for giving a res ipsa instruction. This isn't and could not possibly be a law of the state of Washington.

THE COURT: I need the cites for the two cases that you're giving me since I would like to take a look at those. Unfortunately our budget doesn't allow us to get updated WPIs, so I don't have the --

MR. CUNNINGHAM: I have copies of those cases.

THE COURT: Do you want to hand them to her?

I would like the opportunity to give this back to you, but at some point in time, I would like to read the case notes under res ipsa loquitur because I don't have the updated version.

MR. CUNNINGHAM: All right, thank you.

THE COURT: So I'll reserve on that until I have an opportunity to do further research.

MR. COREY: I believe that that is the motion.

THE COURT: Okay.

MR. CUNNINGHAM: May I make a motion, Your Honor?

THE COURT: You may.

MR. CUNNINGHAM: The plaintiffs would make a motion for a directed verdict on the issue that everyone in this case has agreed, that if the chart entry that the bags were hung over the side of the bed is accurate, that it was negligence. So we would ask for a directed verdict on the issue, that if the urine bags were hung over the side of the bed, that that is negligence by the hospital. There's nobody that said it wasn't.

THE COURT: Response.

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MR. COREY: Well, Your Honor, I think that the testimony of the defense liability expert yesterday, Cheyenne Haines, was that if hung over the bed in a manner that would cause traction on the tubes, that that would be below the standard of care. I don't think that the matter is quite as simple as counsel frames it to be, but certainly it's not disputed that leaving them hanging over the edge of the bed in a way that applies weight and traction on the tubes is below the standard of care.

So I don't think that the jury should be instructed in the oversimplified language counsel's proposing.

THE COURT: I'm trying to get some Pocket Parts for my instructions, so why don't you send -- I agree with both of you. I would grant the motion if it is worded in a manner in which, as counsel said, that if it was hung over the side of the bed in a manner which would cause traction, then it would be negligence.

MR. CUNNINGHAM: We'll word it that way and prepare it for the Court. Thank you, Your Honor.

MR. COREY: The other thing I would bring to the Court's attention is in response to the newly-proposed instruction from the plaintiff based on former WAC 246-320-365 -- this was, of course, the

I'm not going to use the administrative code. It doesn't reference that this would be the appropriate case for that type of instruction, and 105 clearly indicates that this is the instruction to give in these type of cases. So I'll use the 105 starting with the second paragraph all the way through, so we'll need to draft one up if it's not included in one of your sets.

The next is res ipsa loquitur. I'm going to decline to give a res ipsa loquitur instruction. I don't find this to be the sponge-in-the-stomach type of obvious negligence that they recommend they use this for in types of medical malpractice cases.

I think there's been plenty of evidence to indicate that this could have occurred without negligence, and I'm -- again, don't believe that this is the type of fact pattern that res ipsa loquitur would be used in.

Again, they recommend that it be used sparingly, and I think the case can be argued without it. And I think if I use it, it's inferring that there's obvious negligence. I just -- I think there's plenty of evidence for them to rule that there was no negligence in this particular case and that the hospital wasn't actively involved in having this slippage occur.

In regards to hospital negligence

THE COURT: I think that's the most appropriate.

MR. CUNNINGHAM: Whatever the Court decides is appropriate is fine with plaintiff's counsel.

THE COURT: Thank you.

MS. RINGER: Does Your Honor contemplate that we need to do further exceptions to the jury instructions or do you think --

THE COURT: I think you really made your exceptions clear cut.

MS. RINGER: I think it's clear, right?

THE COURT: I'm going to number these, and maybe at some point you can refer to them by number. I haven't put an actual number on here yet because there's so many changes and add-ins, I hesitate to do that.

MR. CUNNINGHAM: Your Honor, may I just put the res ipsa one on the record for my appellate department?

Plaintiffs would except to the Court's failure to give plaintiff's proposed instruction No. 17 based on WPI 22.01. Thank you. That's all I need.

THE COURT: If you'd like to make a similar record, feel free to do so.

MR. COREY: I would just say without editorial comment, but that the defense respectfully

MS. HOLMAN: Oh, it's just in a different order again. No, that's the same thing.

MS. RINGER: It's fine.

MR. COREY: It makes no difference to the defense.

THE COURT: As one last attempt to make sure that there's been no error made, I'm going to hand you, unnumbered, the instructions that I'll be giving. There's one that needs to be changed and that's -- Ms. Mangus, I scratched out the proximate cause sentence at the bottom, and that stays in. That will be retyped, but otherwise this is my instructions as I've given them to you. I want you to take one last look at it to make sure I didn't leave out --

MR. CUNNINGHAM: Thank you, Your Honor. I guess since counsel took all those exceptions, I can't even remember, but we argued about the WAC instruction and the Court's declined to give it, and I would just take exception to that. That's all.

THE COURT: The Court recognizes exception to plaintiff in regards to not giving the 60.1 instruction versus 10.5. The Court recognizes the exception of not giving the res ipsa loquitur instruction under 22.01.

And I think those were -- and I reconsidered

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