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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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NO. 67237-1-I
IN THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARY ANN HARRIS

Appellant

v.

SUSAN WABEY

Respondent

BRIEF OF RESPONDENT WABEY

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I. STATEMENT OF THE FACTS

On October 18, 2008, Wabey was driving an Econoline van on an errand. Suddenly and without warning, the front driver's side wheel of Wabey's van separated. The escaping wheel rolled across traffic, bounced over the median barrier, and struck the windshield of Harris' oncoming vehicle. Harris controlled the vehicle and came to an uneventful stop.

Harris commenced this action for personal injuries. Wabey answered denying liability. Wabey moved for summary judgment and Harris opposed. Harris asserted the doctrine of res ipsa loquitur provided the necessary inference that Wabey had acted negligently.

The trial court granted summary judgment. During oral argument, the trial court professed concern that the application of res ipsa loquitur under these factual circumstances amounted to the imposition of "strict liability." The trial court queried counsel what more Wabey could have done to avoid a wheel separation, given Wabey provided contemporary invoices demonstrating regular maintenance of the van by a mechanic and tire store.

A. **Wabey Was Physically Disabled and Relied upon Tom's B & M Auto, Her Mechanic, and Les Schwab Tires to Routinely Maintain the Van and Its Tires.**

Wabey was physically disabled from multiple back surgeries. CP 165. Wabey did no mechanical work on the van. CP 165.

Wabey relied upon automobile mechanic, Ives, at Tom's B & M Auto for maintenance of the van and employees of Les Schwab Tires for

servicing of its tires. Wabey routinely maintained her van. CP 25, 127, 130, 131-134, 141-145, and 152.

“...[M]y vehicles are very important to me and I’ve always maintained them absolutely perfectly because I count on them to get me around – and my mother.” CP 25. Her mechanic, Ives, noted: “She doesn’t want to be broken down due to her health concerns, you know. She’s always asked us to if we see anything that could be a problem to let her know so that she can try to fix it. She’s not a person that doesn’t take care of things.” CP 116 and CP 25.

B. The Wheel Separated Suddenly and Without Warning

On March 7, 2008, the driver’s side front wheel was taken off and placed back on when that tire was replaced by employees of Les Schwab Tires. CP 164 – 166.

On September 18, 2008, Wabey had the van serviced by the automobile mechanic. As part of the service, Ives “road-tested” the van. Ives found no vibration or noise or visual indication of any loose lug or loose wheel nuts on the van. CP 167-168.¹

On October 18, 2008, Wabey drove the van on an errand. CP 42. Wabey testified that there was no prior warning that the wheel would separate from the van. CP 3-5, 52, 65-67, and 152.

¹ As of March 27, 2008, the odometer on the Wabey van was reported to read 90,551 miles. On June 25, 2008, the odometer read 91,274 miles. CP 105 and 173. On November 13, 2008, the odometer read 92,650 miles. CP 109.

Wabey retained Mechanical Engineer Schaefer of MDE to analyze the event. Schaefer opined that the wheel separated due to either over tightening or under tightening of the wheel lugs or nuts when the wheel was placed back on the van. CP 45, 59-60, and 65-67.

Schaefer also testified that the wheel separation would occur without prior knowledge of the driver of any pending separation. CP 3-5, and CP 42-48.

The lack of notice of a pending separation is due to the fact that the bolts (studs) of the wheel upon the wheel nuts sit and secure the tire to the wheel failed on the date of the accident catastrophically and suddenly. At that point, the wheel separates. Before any bolt fails, the tire remains secured to the wheel by the other bolts and nuts. CP 43-44.

Schaefer, who has examined other incidents involving wheel separation, testified that the lack of warning to the driver of a wheel separation has been reported and described in the automotive literature. CP 70-85 and CP 184-195.

On the day of the accident after it occurred, Ives, the mechanic, repaired the van and examined the wheel nuts on the remaining three wheels of the van. Ives found them to be properly secured. Ives found they were "all tight". CP117.

II. SUMMARY OF ARGUMENT

The trial court correctly rejected Harris' assertion the doctrine of *res ipsa loquitur* precluded the granting of Wabey's motion for summary judgment.

First, under Washington law Wabey did not have exclusive control required under the doctrine of *res ipsa loquitur* of the wheel that failed. Wabey, who was physically disabled, relied upon the employees at Les Schwab Tire Center to inspect and maintain the tires. On this occasion, Les Schwab employees removed and reinstalled the subject wheel in March 2008.

Second, Harris cited no Washington case that holds that the separation of a wheel of a private vehicle leads to the inference of negligence on the part of the owner/driver. While in a commercial context where business are regulated and required to routinely inspect and maintain vehicles and tires, there is no similar requirement for private vehicles.

Finally, this is not type of “peculiar and exceptional” case requiring the application of *res ipsa loquitur*, given the established causes of the wheel separation – over or under tightening of the wheel or lug nuts – do not implicate Wabey in an act of negligence. Further, Plaintiff provided no opposing evidence that explained why the wheel separated and did not dispute contest defendant’s explanation. Plaintiff’s only argument directed to Wabey’s potential negligence was Wabey failed to observe by a visual inspection a loose wheel nut prior to the accident. Harris, however, presented no facts suggesting there was a loose wheel nut for any appreciable time prior to the separation and that hypothetical “loose” wheel nut would have been observable by a driver by ordinary inspection. Here, the mechanic who regularly serviced the Wabey van test-

drove the van one month before the wheel separation occurred and did not detect any problems with the wheel or the wheel nuts. In fact, the remaining wheel nuts on the remaining three wheels were all properly secured. The assertion by Harris of a negligent inspection by Wabey is untenable conjecture and speculation.

As for the declarations, the trial court correctly denied Harris' motion to strike Wabey's proffered declarations in support of Wabey's motion for summary judgment.

The granting of summary judgment should be affirmed.

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE DOCTRINE OF RES IPSA LOQUITUR DID NOT APPLY

Wabey was disabled. Wabey had the automobile mechanic at B&M Auto, and the employees at Les Schwab Tires regularly service the van and the van's tires in 2008. The wheel that separated was serviced on March 7, 2008. CP 27-28, 101-110, 119 and 130.

The automobile mechanic test drove the van one month before the accident and detected no problems with any wheel or the wheel nuts. CP 167-168.

There was no evidence presented that there were any indication of problems (such as rust or fractures) with any wheel. There was no evidence presented that there were any detectable problems or visible

indication of problems with the wheel that separated or with any other wheel. Schaefer did inspect the van prior to his deposition. CP 41.

Wabey reasonably relied upon the mechanic and would reasonably have expected the mechanic to advise if there were a problem with a wheel or wheel nut. The only inference to be drawn is that after the mechanic test-drove the van in September; Wabey had no concerns about any wheel or the van given the recent servicing. Thus, on the day of the accident, Wabey no prior notice that the wheel would separate. CP 151-153.

In summary, Wabey did not perform any mechanical work on the van. Wabey reasonably relied upon others to maintain the van and the van tires. Wabey testified Wabey had no warning prior to the wheel separating that the wheel would, in fact, separate. The forensic engineer concluded Wabey had no notice of an imminent wheel separation and the automotive literature supported that conclusion.

Harris presented no factual evidence to the contrary. Harris presented no expert opinion.

Harris argued instead that Wabey had “actual or constructive knowledge that the wheel on her van had and/or could come loose.” CP 198. Harris further argued Wabey had “exclusive custody and control of the van.” CP 198. Harris concluded: “[t]he undisputed evidence is that

Mrs. Wabey was negligent in the maintenance and inspection of her van.”
CP 199.²

Harris then cited selected testimony from the deposition of Schaefer to support the opposition. CP 197. Harris asserts the following statements among others supported the reversal of the granting of summary judgment: the nuts of the wheels are exposed, a missing wheel nut is detectible, and a wheel nut that is loose to the touch is detectible.

Notwithstanding Harris quotes these “statements” out of context, they do not lend support to Harris’ argument as they are entirely speculative and unsubstantiated conjecture. In essence, Harris argues a missing or loose to the touch wheel nut would be detectible.³ However, Harris has not provided any facts or described any circumstances prior to the wheel separation to support these baseless assertions. Wabey, however, has provided conclusive factual evidence disproving the assertions.

² See *Zukowsky v. Brown*, 79 Wash.2d 586, 488 P.2d 269(1971)(Any question of whether circumstances of an occurrence are sufficient to support a reasonable inference of negligence against a particular defendant in the context of *res ipsa loquitur* must recognize the distinction between mere conjecture and reasonable inference from the facts and circumstances.)

³ Harris makes passing reference to RCW 46.61.655. This law imposes duties upon drivers hauling loads on vehicles. There is no suggestion under the statute or case law that the statute would apply to a wheel separating from the vehicle. A wheel attached to the axle is neither a “load” within the meaning of the statute nor what was intended to be regulated. . See, *Ganno v. Lanoga Corp.*, 119 Wn. App. 310, 80 P.3d 180 (2003); *Skeie v. Mercer Trucking Co., Inc.*, 115 Wn. App. 144, 61 P.3d 1207 (2003); and *Siegler v. Kuhlman*, 81 Wn.2d 448, 502 P.2d 1181 (1972).

Given the complete absence of any facts supporting an inference of negligence, Harris then turned to the doctrine of res ipsa loquitur.

The trial court rejected Harris' assertion that the doctrine of res ipsa loquitur applied. Wabey did not have exclusive control of the vehicle. Incidents such as this wheel separation can occur without negligence. It would be fundamentally unjust to impose the doctrine under these circumstances because Wabey conclusively demonstrated reasonable and ordinary care in maintaining and servicing of the van. Given the submitted evidence, the trial court may well have entertained the question; "What greater duty of care could the law impose upon Wabey to avoid a wheel separation short of imposing strict liability?"⁴

Res ipsa loquitur, which literally translated means "the thing speaks for itself," is a rule of evidence that permits a jury to infer negligence from the proof of injury and attendant circumstances. *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 138 P.3d 1107 (2006). The doctrine of res ipsa loquitur is an evidentiary rule which is sparingly applied and only where the facts and the demands of justice make its application essential. It is applied in peculiar and exceptional cases. *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 792, 929 P.2d 1209 (1997); *Morner v. Union Pac. R.R. Co.*, 31 Wn.2d 282, 293, 196 P.2d 744 (1948)(

⁴ For guidance, in *Morner v. Union Pac. R.R. Co.*, 31 Wn.2d 282, 293, 196 P.2d 744 (1948)(the court stated if, for example, the defect is such that any reasonable inspection would have been unavailing to disclose its existence, then defendant's failure to make such an extraordinary inspection does not constitute negligence or permit an inference of negligence. See, e.g., *Dwyer v. Skyline Apts., Inc.*, 123 N.J. Super. 48 (App.Div. 1973), *aff'd o.b.*, 63 N.J. 577.

“However, the doctrine is a rule of necessity to be invoked only where direct evidence of negligence is absent and unavailable.”). Courts are cautious in applying the doctrine, as plaintiff's evidence should not be entitled a special treatment as a matter of law. Elevating the importance of plaintiff's evidence to the jury by the use of a jury instruction on *res ipsa loquitur* would necessarily result in a proportionate decline in the importance and weight of defendants' evidence. *Siegler v. Kuhlman*, 3 Wn. App. 231, 473 P.2d 445 (1970).

The doctrine is a rule of necessity to be invoked only where direct evidence of negligence is absent and unavailable and is not used if the defendant comes forth with an exculpatory statement or alternate explanations of what happened. *See, Emrik v. Mayr*, 39 Wn.2d 23, 234 P.2d 1079 (1951); *Vogreg v. Shepard Ambulance Service, Inc.* 47 Wn. 2d 659, 289 P.2d 350 (1955).

Importantly, the mere occurrence of an accident and an injury does not necessarily lead to an inference of negligence and *res ipsa loquitur* cannot be invoked from the mere fact that an injury occurred. *See, Tinder* at 792-93; *Webstad v. Stortini*, 83 Wn. App. 857, 924 P.2d 940 (1996). See also Restatement (Third) Of Torts: Liability for Physical and Emotional Harm § 17 cmt. e (2010)) ("Evidence that harmful results are rare in the course of a particular activity does not itself show that *res ipsa loquitur* is warranted.")

The doctrine is inapplicable if the defendant comes forth with a conclusive exculpatory statement or explanation of what happened.

Vogreg v. Shepard Ambulance Service, Inc., 47 Wn.2d 659, 289 P.2d 350 (1955). When it is shown that an accident may have happened as a result of one of two causes, the plaintiff has no reason for the use of the rule of *res ipsa loquitur*, and it cannot be invoked. *McKinney v. Frodsham*, 57 Wn.2d 126, 135, 356 P.2d 576 (1960).

This maxim applies only where the circumstances leave no room for a different presumption. *McKinney v. Frodsham*, 57 Wn.2d 126, 135, 360 P.2d 576 (1960).

For the doctrine to apply, the plaintiff must establish all three elements: (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of the defendant's 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, 239 P.3d 1078 (2010) and *Covey v. Western Tank Lines, Inc.*, 36 Wn.2d 381, 218 P.2d 322 (1950).⁵ If plaintiff fails to satisfy each of the elements of *res ipsa loquitur*, no presumption of negligence can be maintained. *Tinder*, 84 Wn. App. at 792.

While Washington court have stated proof of regular inspection of the machine still leaves the question of negligence one for the jury (*Lane v. Spokane Falls & Northern Railway Co.*, 21 Wash. 119, 57 Pac. 367, 75 Am. St. 821, 46 L. R. A. 153)(1899)), the presumption is overcome as a

⁵ Wabey agrees Harris did not contribute to the accident.

matter of law when the explanation shows, without dispute, the happening was due to a cause not chargeable to defendant's negligence. *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870 (1911).

1. Wabey Did Not Have “Exclusive Control” of the Wheels and Installation of the Wheel Nuts and Therefore Element Two Is Not Satisfied

Harris has failed to show that Wabey had exclusive control of the van warranting the application of the doctrine of *res ipsa loquitur*. Wabey was handicapped from multiple back surgeries and did no physical maintenance of the van. Wabey relied upon others, Les Schwab, in particular, to maintain and change the tires of the van as demonstrated by the invoices.

In general, an owner/driver of a vehicle is not responsible for the work of an automobile mechanic or tire service. See, for example, *Nawrocki v. Cole*, 41 Wn.2d 474, 249 P.2d 969 (1952) and *Murray v. Corson*, 55 Wn.2d 733, 350 P.2d 468 (1960).

The wheel in contention was taken off and placed back on to the van on March 7, 2008 by Les Schwab Tires. CP 164 – 166. The wheel separated probably due to over tightening or under tightening of the wheel nuts. If any inference of negligence were to be made, it would point to the employees of Les Schwab who installed the wheel.

The Supreme Court in *Zukowsky v. Brown*, 79 Wash. 2d, 586, at 595, 488 P.2d 699(1971) described this element to require:

Of course, to be relevant, the evidence must support a legitimate inference that defendant was negligent. This is generally reflected

in the requirement that the instrumentality which caused the damage or injury be in the actual or constructive control of defendant. To satisfy this requirement, the degree of control must be exclusive to the extent that it is a legitimate inference that defendant's control extended to the instrumentality causing injury or damage. In its proper sense, this "condition" states nothing more than the logical requirement that "the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it.

Zukowsky, 79 Wash.2d at 595.

There is no evidence here that Wabey had exclusive control to warrant the inference that Wabey would be responsible for any negligence of the mechanic or tire service connected with the van. Res ipsa loquitur will not apply unless the agency causing the injury was in the sole and exclusive control of the defendant. See *Morner v. Union Pac. R. Co.*, 31 Wn. 2d 282, 196 P. 2d 744 (1948).

In *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 138 P.3d 1107, 1113 (2006) the court stated:

The exclusive control element requires the defendant, who is the person most likely to know how the accident happened, to come forward with the explanation. *Pacheco*, 149 Wash.2d at 437, 69 P.3d 324. But if the defendant does not have exclusive control, "he cannot offer a complete explanation, and it would work an injustice upon him to presume negligence on his part and thus in practice demand of him an explanation when the facts indicate such is beyond his ability." *Pacheco*, 149 Wash.2d at 437, 69 P.3d 324 (citing *Morner v. Union P.R. Co.*, 31 Wash.2d 282, 196 P.2d 744 (1948)).

Khirieh does not help Tuttle. Allstate did not have exclusive control over the wheel and tire — the injury causing instrumentality. And even if we consider the phantom driver as the defendant for a res ipsa loquitur analysis, Tuttle cannot show that the driver had exclusive control over the wheel and tire. The wheel

may have come off the vehicle because a third party negligently installed it or intentionally rolled it into the road. If so, the phantom driver did not have exclusive control of the instrumentality.

We conclude that the trial court did not err in granting Allstate summary judgment. Tuttle offered no evidence that her collision with the wheel and tire was an accident caused by a phantom vehicle.

Tuttle, supra at 1112-1113. [Emphasis supplied]

“The reason for the prerequisite of exclusive control of the offending instrumentality is that the purpose of the rule is to require the defendant to produce evidence explanatory of the physical cause of an injury which cannot be explained by the plaintiff. If the defendant does not have exclusive control of the instrumentality producing the injury, he cannot offer a complete explanation, and it would work an injustice upon him to presume negligence on his part and thus in practice demand of him an explanation when the facts indicate such is beyond his ability.”

Morner, 31 Wash.2d at 296, 196 P.2d 744.

Wabey did not have exclusive control of the wheel. By reason of servicing of the wheels on the van, Les Schwab and its employees had control at relevant times over the wheels. Yet, Harris could have deposed employees of Les Schwab to discovery knowledge of any negligence or defect, but choose not to conduct such discovery.

Under these circumstances, it would be an injustice to impose an inference of negligence upon Wabey for the wheel that Wabey did not install and that Wabey reasonably relied upon the employees of Les Schwab to install.

Hogland v. Klein, 49 Wn.2d 216, 298 P.2d 1099 (1956), relied upon by Harris, is not dispositive and may be distinguished as to the issue

of exclusive control. In *Hogland*, the defendant sought to avoid the claim of exclusive control on the basis that the defendant was not personally involved in the allegedly negligent actions. The court countered by noting that the defendant, as the employer, had the right to control the employees involved in the accident, and, therefore, the employer had exclusive control within the meaning of the doctrine.

Similarly, the Court in *Curtis v. Lien*, 239 P.3d 1078 (2010) found exclusive control by defendants of the wooden dock which collapsed and allegedly hurt the plaintiff because defendants did not argue that anyone else had responsibility for the dock. In footnote 1 of the decision, the Court noted that there was a suggestion that Stewart was responsible for maintenance for the dock as his job was to oversee the farm. The Court also noted that Stewart was acting as the agent of the defendants and therefore the defendants had exclusive control as exercised by their agent. The dictum in *Lien* echoes the court's statements in *Hogland* that a defendant who employs others maintains exclusive control under the doctrine.

Here, Wabey did not employ or have a right of control over Ives or the employees of Les Schwab Tires. Wabey, therefore, did not have the requisite exclusive control necessary for the application of *res ipsa loquitur*.

2. The Cited Washington Decisions By Harris Did Not Find Wheels Separate Only By Reason Of Negligence In Circumstances Involving Private Vehicles In Order To Satisfy The First Element

Considering the first element of *res ipsa loquitur*, the question is whether "the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence." *Ripley v. Lanzer*, 215 P.3d 1020, and 1028-1029 (Div. 1, 2009) The Lanzer court noted:

The supreme court in *Zukowsky v. Brown*[footnote omitted] explained this element:

When are the circumstances of an occurrence sufficient to support a reasonable inference of negligence against a particular defendant? We have long recognized that the answer to this question can only be determined in the context of each case. However, some generalities can be gleaned from our cases. The most fundamental of these is that the inference of negligence must be legitimate. That is, the distinction between what is mere conjecture and what is reasonable inference from the facts and circumstances must be recognized. Thus, it is not enough that plaintiff has suffered injury or damage, for such things may result without negligence. It is necessary that the manner and circumstances of the damage or injury be of a kind that do not ordinarily happen in the absence of someone's negligence. [footnote omitted].

Lanzer, 215 P.2d at 1028-1029.

As for first element, Harris relies upon the decisions involving commercial trucks. In those circumstances, the Washington courts have stated that wheels do not detach in the absence of negligence. *Covey v. Western Tank Lines*, 36 Wn.2d 381, 390, 218 P.2d 322 (1950)(semitrailer owned by Western Tank Lines); *D'Amico v. Conguista*, 24 Wn.2d 674, 684-686, 167 P.2d 157 (1946)(defendant's truck); and *Graff v. Vulcan*

Iron Works, 59 Wash. 325, 109 P.2d 1016 (1910)(truck carrying cast iron weighing 1,600 lbs).⁶

It may be that the courts have correctly concluded that wheel separations are not expected to occur in the absence of negligence in the setting of commercial enterprises where such entities often have employees or drivers perform their own maintenance and servicing of the commercial trucks. Further commercial entities are required by law to routinely inspect commercial trucks and lug nuts.⁷ That logic, however, would not necessarily apply to private vehicles.

Mechanical devices which presumably include the failure of wheels lug nuts arguably fail for reasons unrelated to negligence. In *Tinder v. Nordstrom*, the court refused to apply the doctrine of res ipsa loquitur where the escalator came to a sudden stop allegedly injuring a patron stating "mechanical devices, like escalators and elevators, can wear out or break without negligence." *Tinder*, 84 Wn. App. at 1212.

Again, in *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 606, 779 P.2d 281 (1989) the Court of Appeals declined to apply res ipsa loquitur finding another possible cause of a broken shunt was wear or fatigue, and

⁶ In *Covey*, the court reviewed an accident involving a commercial truck with an attached semi-trailer owned by Western Tank Lines, Inc.. There, the truck and driver had left Seattle, bound for Sunnyside, Washington. Before making the return trip, the professional truck driver examined the wheels of the commercial vehicle and tightened two of the lug nuts on the wheel. *Covey*, at 383. Three hours later, the wheel detached and the accident occurred. *Id.* Western Tank Lines argued that no instruction on res ipsa loquitur should have been given as the cause of the accident was known as the truck driver had improperly inspected the wheel. *Id.* at 390.

⁷ Federal Motor Carriers Safety Regulation, Part 396; 393.205. D1; V1; V3

stated there was no way to anticipate when metal fatigue will cause such a break.

See also, e.g. *Ex Part Crabtree Industrial Waste, Inc.*, 728 So. 2d. 155 (Alabama 1998). In *Crabtree*, the court noted:

“This Court finds the observations of the circuit court particularly compelling. The doctrine of *res ipsa loquitur* may not be applied to hold the owner or the operator of a vehicle liable simply because a component of the vehicle has failed. The evidence presented would support an inference that the wheel came off as a result of negligence on the part of the third party, Mr. Carney, who repaired the tire three days before this event, and that no effects of any such negligence were visible to these defendants. The evidence could also support an inference that the studs broke with no warning, because of some materials failure or some other cause.

Therefore, this Court disagrees with the opinion of the Court of Civil Appeals. The record suggests that the wheel could have broken loose as a result of a materials failure in two or more of the truck's studs or as a result of negligence by the third party who had repaired the tire.”

Crabtree Industrial Waste, Inc., 728 So. 2d. 155 at 157-158.

In *Burgin v Merritt*, 311 So 2d 688, (Fla.App. 2 Dist 1975) cert. den. 324 So 2d 84 (1975), the court refused to apply the doctrine of *res ipsa loquitur* was for injuries sustained in an accident when the left rear wheel came off since it appeared from the evidence that only two days before the accident, the defendant had taken the truck to a service station where both rear wheels were removed and replaced, that the defendant was not present at such time, and that from then up to the time of the accident the truck had been used by the defendant without incident.

The *Burgin* court stated the *res ipsa* rule was ordinarily not available to

the plaintiff in automobile accident cases, except in situations involving defective equipment on a vehicle where the defendant knew of the condition or in the exercise of reasonable care should have known of it. That was not the case here.

Thus, wheel lug nuts could fail for mechanical reasons of wear and tear unrelated to negligence. If the wheel that separated was placed on the van in March 2008 and Ives road-tested the van on September 18, 2008, only 30 days before the wheel separated and Ives did not note any vibration or noise, then one inference could be the studs or lug nuts suddenly failed for mechanical reasons absent negligence.

If this is the case, then this element is not satisfied.

3. The Application of Res Ipsa Loquitur Is Not Warranted As This is Not The Kind of “Peculiar and Exceptional” Case Where Application is Necessary for Justice, Especially Given The Causes for the Wheel Separation are Known

The wheel separated from the van either because of mechanical failure of wear and tear or more likely due to over tightening or under tightening of the wheel nuts. The causes of the wheel separation have been sufficiently established that the doctrine of res ipsa loquitur is not necessary. Harris knows all of the potential causes of the wheel separation and none implicate Wabey.

Harris attempted to argue that Wabey had knowledge of or should have known of the pending wheel separation, but provided no facts. Wabey denies any knowledge of such. The doctrine of res ipsa loquitur is not intended to supply that inference.

Harris has not undertaken any independent investigation to determine the cause of the wheel separation and has offered no alternative causes. Harris failed to carry out any discovery or depositions directed to Les Schwab, its employees or owners of the franchises. See, in general, *Curtis v. Lein*, 169 Wn.2d 884, 891, 239 P.3d 1078 (2010).

The circumstances of this case do not present the “peculiar and exceptional” case where the application of the doctrine is necessary for justice. *Curtis*, 169 Wn.2d at 891. For example, in *Curtis* the cause of the dock failure could not be determined. Here the causes have been identified, and Harris could have identified these causes.

B. THE TRIAL COURT PROPERLY DENIED THE MOTION TO STRIKE MS. WABEY’S EVIDENCE – DECLARATIONS OF WABEY, IVES AND SCHAEFFER

Finally, Harris argues the declarations of Wabey, along with experts Gerald F. Schaefer, P.E. and Tom Ives, contain improper legal conclusions. In the trial court, Harris’ moved to strike the declaration and testimony of Wabey, of Schaefer, a registered mechanical engineer specializing in motor vehicle accident reconstruction and of Wabey’s automobile mechanic, Ives. Harris argued that Wabey was not competent to testify and that Schaefer and Ives were not qualified to testify with regard to the maintenance of the van or likely causes of the wheel separating from the van. CP 186.

The review of a trial court's decisions as to the admissibility of evidence is reviewed under an abuse of discretion standard. E.g., *State v. Pirtle*, 127 Wash.2d 628, 648, 904 P.2d 245 (1995), cert. denied, ___ U.S. ___, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996); *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995) (this court will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion); *State v. Swan*, 114 Wash.2d 613, 658, 790 P.2d 610 (1990) (the admission and exclusion of relevant evidence is within the sound discretion of the trial court and the court's decision will not be reversed absent a manifest abuse of discretion).

The trial court did not abuse its discretion in admitting the proffered declarations.

1. Wabey is Competent to Testify at Trial

ER 601 states “Every person is competent to be a witness except as otherwise provided by statute or by court rule.” In his motion, Harris argued that Wabey was incompetent to testify at trial as Wabey was physically disabled, had some unmeasured hearing loss and took pain medication. CP 192. Also, Harris claimed that Wabey’s alleged “impaired memory” further demonstrated incompetence to testify at trial. CP 192. The trial court disagreed with Harris, stating that there was “no hint” that Wabey took the pain medication during the time of the accident. The court noted that Harris didn’t even inform the court of what type of

pain medication Wabey took. Accordingly, the court was not persuaded that Ms. Wabey was incompetent to testify as a matter of law and denied Harris' motion to strike the declaration of Wabey. CP 221, 224-225.

Harris still doesn't provide any evidence as to how or why Wabey is incompetent to testify. Harris does not—and indeed cannot—provide any support for his ridiculous notion that simply being physically disabled renders a person incompetent to testify at trial. Wabey was and remains competent to testify.

2. Ives' Testimony Meets the Requirements of ER 602 and ER 701 as He Has Personal Knowledge of the Condition of the Wabey Van

Harris argued that Ives testimony should be stricken as he was not a wheel expert, he did not provide documentary evidence showing that he had personal knowledge of Wabey's van and that he was making a legal conclusion as to the lug nuts. CP 187-189. The trial court correctly stated that documentary evidence was unnecessary as Ives testified based on personal knowledge and that Harris' arguments went to the credibility or weight of the testimony, neither of which provided a basis to strike Ives declaration. Hence, the court denied Harris' motion to strike the testimony of Ives. CP 221, 224-225.

Here, Harris again tries to discredit Ives' testimony as containing improper legal conclusions, and/or otherwise objectionable and failing to comply with the rules of evidence. Yet, Harris provides *nothing* to

support her sweeping claims but simply refers the Court to ER 601, 602 and 701.

ER 602, the rule calling for personal knowledge on the part of the witness, states in part:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. *Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.* (Emphasis added.)

ER 701, the rule on admissibility of lay opinions, provides in part:

If the witness is not testifying as an expert, his testimony in the form of opinion or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

A relevant application of ER 701 is found in *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 991 P.2d 728 (2000). There, the issue before the court was whether the trial court had properly disallowed the testimony of two expert witnesses: an accident reconstructionist and a state trooper. The Court of Appeals held that both witnesses were qualified as experts and that in any event a lay witness may testify as to an opinion under circumstances of personal knowledge based upon rational perceptions when it would help the jury understand the witnesses' testimony or a fact in issue. *Id.* at 34.

With regard to the state trooper, the court held that he had adequately described his expertise based upon his education, training and

practical experience and gave the underlying facts supporting his ultimate conclusions.

Here, Ives is a mechanic and the owner of Toms B&M Auto. CP 167. Like the state trooper in *Pagnotta*, Ives has direct personal knowledge of Wabey's van and relevant testimony. Ives had regularly serviced Wabey's Econoline van. CP 167. He has personal knowledge of the van. CP 167-168. In his declaration, Ives stated that he never observed any loose lug nuts on the wheel of the van. CP 168. He test drove the van in September 2008 after it was serviced and again did not detect any loose lug nuts or notice any noise or vibration from the wheels. CP 168. Thus, under the holding of *Pagnotta*, and the application ER 602, 701-702, Ives testimony is admissible.

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3. Gerald F. Schaefer P.E. is Qualified to Testify as an Expert Witness

Finally, Harris argued that Schaefer was not qualified to testify as an expert witness in this matter and moved to strike his declaration. CP 189.

The trial court has wide discretion in ruling on the admissibility of expert testimony. *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001). Under ER 702, expert testimony may be admitted if it will assist the trier of fact. *Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 283 (1995). Analysis of proposed testimony under ER 702 involves a determination whether the witness qualifies as an expert, whether the testimony

constitutes scientific evidence and whether the expert testimony would be helpful to the trier of fact. *Id.*

In this matter, Schaefer's expertise in motor vehicle accident reconstruction is well documented and was presented to the lower court. CP 181, 68-69. Schaefer has been involved in approximately 10 cases of wheel separation from an axle as an engineer for MDE. CP 182. He is trained as a mechanical engineer. CP 182. CP 184. Schaefer reviewed the auto repair invoices and history and photographs of the damaged parts taken by the repair shop of the Wabey van. CP 181. Schaefer is clearly qualified as an expert to testify in this matter.

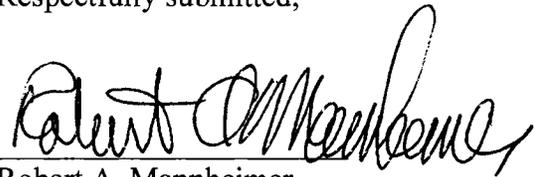
IV. CONCLUSION

The trial court properly granted summary judgment. *Res Ipsa Loquitur* did not apply to the facts of this accident. Wabey did not have exclusive control as required. Wheel separations can occur on private vehicles without negligence on the part of the driver or owner. Wabey provided the only identified causes for the separation and none suggest Wabey acted negligently. There were no facts provided or expert testimony offered regarding Wabey's alleged ability to visually detect upon inspection a "loose" wheel nut, if there had been one and if it had been "loose" for any appreciable time before the separation.

Wabey respectfully requests the Court to affirm the order of the trial court.

Dated this 14th day of December, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert A. Mannheimer". The signature is written in a cursive style with a horizontal line underneath the name.

Robert A. Mannheimer

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Attorney for Respondent, Wabey

No. 67237-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARYANN HARRIS,
Appellant,
vs.
SUSAN WABEY,
Respondent.

CERTIFICATE OF SERVICE

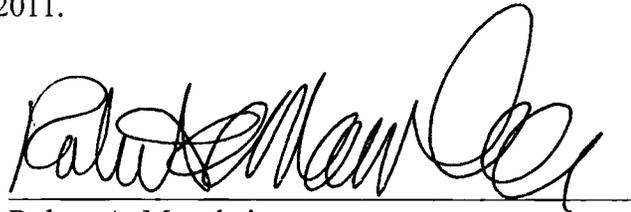
I hereby certify under penalty of perjury under the laws of the State of Washington that on the 14th day of December, 2011, I caused a true and correct copy of the following document to be delivered that day via U.S. Mail, facsimile and email to the address of counsel to the following counsel of record:

1. Brief of Respondent Wabey

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2011 DEC 14 PM 2:45

DATED this 14th day of December, 2011.



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