

No. 72858-0

WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

JEFFREY BURKE and KIMBERLY BURKE, a married couple,

Appellants,

v.

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

Respondents.

On appeal from King County Superior Court,
No. 13-2-07713-2
Honorable Tanya Thorp

OPENING BRIEF OF APPELLANTS
JEFFREY and KIMBERLY BURKE

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INTRODUCTION

On April 21, 2010, Appellant Jeffrey Burke (Mr. Burke) was driving his work van uphill on a wet Olsen Pl. SW in Seattle. Defendant City of Seattle (City) employee Charles Elfrink-Thompson (Mr. Thompson) was driving a Chevrolet Trailblazer (Trailblazer) owned by the City downhill around a curve in the opposite direction. Mr. Thompson lost control of the Trailblazer in the curve as he approached Mr. Burke's van, causing it to slide cross the center line and crash head-on into Mr. Burke's van.

Mr. Thompson lost consciousness in the crash and died the next day. Mr. Burke was injured and filed a claim, but the City denied liability. Mr. Burke sued, alleging Mr. Thompson drove negligently.

The City moved for summary judgment regarding liability, arguing it was not liable because Mr. Burke could not show exactly how Mr. Thompson was negligent. Mr. Burke responded with expert testimony that Mr. Thompson drove negligently by either driving too fast for the conditions or by driving while distracted; alternatively, Mr. Burke alleged *res ipsa loquitur* applied to supply an inference of Mr. Thompson's negligence, because Mr. Thompson's death prevents knowledge of how he lost control of the Trailblazer. The motion was granted on the bases that the testimony of Mr. Burke's expert regarding Mr. Thompson's

negligence amounted to speculation, and that res ipsa loquitur did not apply because alternative crash causes may have been involved, like the wet road and the involvement of two cars, which the Superior Court considered intervening conditions preventing the application of res ipsa loquitur.

Mr. Burke appeals on the basis that res ipsa loquitur applies to establish the inference that Mr. Thompson was negligent, and, in the alternative, that he also met his burden of showing Mr. Thompson's negligence through his and his expert's testimony.

If res ipsa loquitur does not apply to this case, and if Mr. Burke's expert's testimony is found speculative, then Mr. Burke will not have recourse for his injuries just because of unfortunate circumstances—that there were no other witnesses to the crash, and because Mr. Thompson died without testifying as to what he did to cause the crash.

ASSIGNMENTS OF ERROR

1. The Superior Court erred by granting the City's motion for summary judgment regarding liability (Clerk's Papers (CP) 157-158) on the basis that res ipsa loquitur does not apply to this case because the wet road and the fact that two vehicles were involved in the crash were abnormal conditions that may have contributed to the crash. Verbatim Report of Proceedings (VRP) 26-27.

2. The Superior Court erred by considering the testimony of Mr. Burke's expert regarding Mr. Thompson's negligence speculative, that Mr. Thompson was driving too fast for conditions or driving while distracted. VRP25.

ISSUES REGARDING ASSIGNMENTS OF ERROR

1. Does res ipsa loquitur apply when there may be alternative, non-negligent explanations for a crash? (Assignment of Error 1).
2. Does a wet road amount to a condition that prevents res ipsa loquitur from allowing the inference that Mr. Thompson drove negligently? (Assignment of Error 1).
3. Does the crash alone suffice to establish a prima facie case of Mr. Thompson's negligence? (Assignment of Error 1).
4. Is Mr. Burke's expert's testimony regarding Mr. Thompson's negligence speculative, when the testimony is that a driver is negligent if he or she loses control of a car? (Assignment of Error 2).

STATEMENT OF THE CASE

In the morning of April 21, 2010, Mr. Burke was driving his work van southbound on Olsen Pl. SW in Seattle while Mr. Thompson was driving northbound in the opposite direction. CP29 (SPD Det. Thomas Bacon Deposition at p. 12). The road was wet. Id.

Det. Bacon is the Seattle Police Department investigator who investigated the crash. CP89-90 (Decl. of Thomas Bacon).

As Mr. Burke and Mr. Thompson approached each other, Mr. Thompson lost control of the Trailblazer, causing it to cross the center line and rotate counter-clockwise while sliding broadside directly towards Mr. Burke's van. Id.

When Mr. Burke first saw Mr. Thompson's Trailblazer, Mr. Thompson was driving around a right-hand corner (for him) with the Trailblazer's rear sliding left. CP58 (Decl. by Jeffrey Mr. Burke §4). Mr. Thompson appeared to counter-steer, causing the Trailblazer to slide right. Id. Mr. Burke saw the front wheels of the Trailblazer turning as if Mr. Thompson was trying to correct that slide as the Trailblazer was coming toward Mr. Burke. CP32 (Det. Bacon Deposition, at p. 29). Mr. Burke informed Det. Bacon a few days after the crash that the Trailblazer was fishtailing right before the crash. CP32 (Det. Bacon Deposition at p. 30). Mr. Burke tried to avoid the Trailblazer by braking, but his van crashed hard into the Trailblazer. Id. (Det. Bacon Deposition at p. 29).

Mr. Thompson died on April 22, 2010. CP90-91 (Bacon Decl. at §6).

Det. Bacon investigated whether Mr. Thompson experienced a medical emergency before the crash, CP31 (Bacon Deposition at pp. 25-

26), and found no evidence that had happened. Id. (p. 27).

Det. Bacon also investigated whether Mr. Thompson's Trailblazer suffered a mechanical malfunction right before the crash, and determined it had not. CP92 (Bacon Decl. at §11).

Det. Bacon also found no evidence that Mr. Thompson's Trailblazer had struck the curb or been involved with other vehicles right before the crash. Id. (Bacon Decl. at §12.).

Steve Harbinson is a police officer and accident reconstructionist with the Edmonds Police Department. CP131 (Steve Harbinson's CV attached to Decl. by Steve Harbinson). Mr. Harbinson reviewed documents pertaining to the crash investigation, including the SPD crash investigation file, crash scene photos, and Det. Bacon's and Mr. Burke's deposition transcripts. CP124 (Mr. Harbinson Decl. §4).

Mr. Harbinson states on a more probable than not basis that Mr. Thompson lost control of the Trailblazer from distraction or excessive speed while driving around the wet right-hand corner, which caused the Trailblazer's tail to slide left, causing Mr. Thompson to counter-steer and overcorrect, causing the Trailblazer's tail to skid to the right and to skid sideways across the centerline toward Mr. Burke's van, with Mr. Thompson still trying to correct the slide by steering to the right,

explaining why the Trailblazer's front wheels were turned to the right at the point of impact. CP126 (Mr. Harbinson Decl. §9).

Mr. Harbinson states more probably than not that Mr. Thompson lost control of the Trailblazer because he was either driving distracted or too fast for the wet conditions. CP130 (Mr. Harbinson Decl. §5).

Mr. Harbinson states that anytime a driver loses control of a car, regardless of whether the surface is dry or wet, the driver is driving too fast for the conditions. CP201 (Mr. Harbinson Dep. at p. 28).

The City filed a motion for summary judgment regarding liability on November 7, 2014, with oral argument set for December 5, 2014. CP8 (Defendants' Motion for Summary Judgment). Mr. Burke responded on November 24, 2014. CP104 (Plaintiffs' Response). The City filed a reply on December 1, 2014. CP151 (Defendants' Reply).

The Superior Court granted the City's motion on the following bases:

- Mr. Burke cannot raise an issue of material fact regarding Mr. Thompson's breach of duty. VRP25.
- Mr. Harbinson's testimony that Mr. Thompson was either driving distractedly or too fast for the conditions is speculative, and does not raise an issue of material fact. Id.

- Without admissible evidence [of Mr. Thompson's breach of duty], there can be no issue of material fact regarding a breach of duty and negligence cannot be shown. VRP26.
- Res ipsa loquitur may apply to vehicle accidents, but only where no other contributing elements exist, like weather. Id.
- Res ipsa loquitur does not apply to this case because there were two cars involved in the subject crash, and because the road was wet. Id.
- Res ipsa loquitur does not apply because cars can just veer off the road without negligence in the ordinary experience of mankind. Id.
- Res ipsa loquitur does not relieve a party from the burden of establishing their case. Id.

ARGUMENT

1. STANDARD OF REVIEW

Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). The burden is on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be

resolved against the moving party. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979). The motion should be granted only if, from all the evidence, a reasonable person could reach only one conclusion. Lamon, 91 Wn.2d at 350. An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

An appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court, including evidence that had been redacted. The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party, Lamon, 91 Wn.2d at 349, 588 P.2d 1346 (citing Morris, 83 Wn.2d at 494-95, 519 P.2d 7), and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court. Mountain Park Homeowners Ass'n, 125 Wn.2d at 341.

Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

2. Res Ipsa Loquitur May Apply to Establish an Inference of Negligence When the Specific Breach of Duty Cannot Be Known

The Superior Court ruled that res ipsa loquitur is not available to Mr. Burke to establish Mr. Thompson's negligence as there may have been alternative, non-negligent causes for the crash. But, the doctrine is

available as a method of proving negligence when the specific negligent act is unknown even when non-negligent causes of an accident exist.

A. Res Ipsa Loquitur Applies Generally

There were only two witnesses to the crash—Mr. Burke and Mr. Thompson—and the latter died without speaking to anyone about how he lost control of the Trailblazer. This is when res ipsa loquitur may be used to establish Mr. Thompson’s negligence, if certain factors as outlined below are met.

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 431 at 436, 69 P.3d 324 (2003).

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

Simply stated, the doctrine of res ipsa loquitur relies on circumstantial evidence to prove negligence. We recognize the use of a Latin phrase to describe a legal maxim oftentimes leads to confusing results.

Negligence and causation, like other facts, may of course be proved by circumstantial evidence. Without resort to Latin the jury may be permitted to infer, when a runaway horse is found in the street, that its owner has been negligent in looking after it; or when a driver runs down a visible pedestrian, that he has

failed to keep a proper lookout. When the Latin phrase is used in such cases, nothing is added. A *res ipsa loquitur* case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it. Restatement (Second) Torts § 328 D, Comment b (1965).

Metro. Mortgage & Sec. Co. v. Washington Water Power, 37 Wn. App. 241, 243, 679 P.2d 943 (1984).

Mr. Thompson lost control of his Trailblazer causing it to slide uncontrollably into Mr. Burke's path. We do not know exactly how Mr. Thompson lost control of his Trailblazer, but the strong inference is that he drove negligently in the moments before the crash. It cannot be said that, in the general experience of mankind and absent unforeseeable conditions, drivers lose control of cars without negligence. There may exist specific, rare instances where a driver might lose control of a car without negligence; but the general experience of mankind is that when a driver loses control of a car, the driver was negligent in some way, as Mr. Harbinson testifies. Since Mr. Thompson could not testify about what happened, the inference of negligence should be allowed to prevent a miscarriage of justice.

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The following are the factors courts review in determining whether res ipsa loquitur applies to a given case:

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 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. Pacheco, 149 Wn.2d at 436, 69 P.3d 324. 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.’ ”

Id. at 438–39, 69 P.3d 324 (quoting Zukowsky, 79 Wn.2d at 595, 488 P.2d 269 (quoting Horner v. N. Pac. Beneficial Ass'n Hosps., Inc., 62 Wn.2d 351, 360, 382 P.2d 518 (1963))).

Curtis, 169 Wn.2d at 891.

And,

An [accident] injury is of the type that does not occur absent negligence if, “in the abstract, there is a ‘reasonable probability’ that the incident would not have occurred in the absence of negligence.” Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 792-793, 929 P.2d 1209 (1997). When this “balance of probabilities in favor of negligence” does not exist, res ipsa loquitur does not apply. William L. Prosser, Law of Torts 218 (4th ed. 1971).

A.C. ex rel. Cooper v. Bellingham Sch. Dist., 125 Wn. App. 511, 517, 105 P.3d 400 (2004).

The Burkes argue that, absent unusual, unforeseeable road conditions like black ice or a hidden obstruction, the balance of probabilities is that drivers do not lose control of their cars unless they are negligent.

The Pacheco res ipsa loquitur factors apply in this case:

1. The accident does not ordinarily happen without negligence.

Without any other causative factors like equipment failure (the lack of which is established), a car does not fishtail left then right on a wet road and slide sideways across a road's centerline without driver negligence.

Each of the three Zukowsky factors for testing whether this element of the res ipsa doctrine is met applies to this case:

(a) Mr. Thompson's loss of control of the Trailblazer on the wet road is so palpably negligent that it can be inferred as a matter of law;

(b) The general experience of mankind is that a car does not suddenly fishtail twice and slide sideways across a wet road without negligent driving; and

- (c) The expert testimony of Mr. Harbinson creates the inference that Mr. Thompson's negligence caused the crash.
2. Mr. Burke's injuries were caused solely by the crash with the Trailblazer, which car was under Mr. Thompson's sole control.
 3. Mr. Burke was not contributorily negligent in causing the crash.

B. Res Ipsa Loquitur Applies When Non-Negligent Explanations for a Crash Exist

The Superior Court ruled that res ipsa loquitur does not apply to this case because other factors, specifically the wet road and the fact that two cars were involved, may have contributed to or caused the crash. But, the cases do not support this interpretation of res ipsa loquitur.

In Douglas v. Bussabarger, 73 Wn.2d 476, 438 P.2d 829 (1968), the plaintiff suffered paralysis after an operation to repair a stomach ulcer. The plaintiff's medical expert testified that the injury could have been caused by five different actions, four of which amounted to negligence by the defendant physician, and one which amounted to an unexplained, mysterious cause proposed by the defense:

We are thus confronted with a situation in which there are four possible causes of plaintiff's disability which would be the result of negligence and one possible cause of the disability which would be the result of some indefinite and amorphous abnormality. Under the circumstances, we do not believe plaintiff should have been denied the aid of the doctrine of res ipsa loquitur. Were we to hold otherwise, patients who suffer injury or disability while being operated

upon will be unable to recover damages if the doctor merely alleges that a mysterious, unexpected, and unexplainable reaction by the patient to treatment took place on a single, isolated occasion, even though there is other medical testimony from which a jury could reasonably conclude that the doctor was in fact negligent.

Douglas, 73 Wn.2d 485-86.

In Curtis, a person was injured when a dock over a small pond collapsed. The dock was destroyed shortly after the accident, and the injured person sued the dock owner alleging the dock was negligently maintained through the inference of *res ipsa loquitur*. The plaintiff argued that, since the dock was destroyed shortly after the accident, it was impossible to know what exactly caused the dock to fail.

The trial court concluded that *res ipsa loquitur* did not apply because “there are multiple other causes [than negligence] which could have caused the failure of the step on the dock,” such as improper construction or defective wood. This analysis misses the mark. **A plaintiff claiming *res ipsa loquitur* is “not required to ‘eliminate with certainty all other possible causes or inferences’ in order for *res ipsa loquitur* to apply.”** [Emphasis added] Pacheco, 149 Wn.2d at 440–41, 69 P.3d 324 (quoting Douglas v. Bussabarger, 73 Wn.2d 476, 486, 438 P.2d 829 (1968) (quoting William L. Prosser, Handbook of the Law of Torts 222 (3d ed.1964))). Instead, “***res ipsa loquitur* is inapplicable where there is evidence that is *completely explanatory of how an accident occurred and no other inference is possible that the injury occurred another way.***” Id. at 439–40, 69 P.3d 324 [Emphasis added]. The rationale behind this rule lies in the fact that *res ipsa loquitur* provides an inference of negligence.

[T]he res ipsa loquitur doctrine allows the plaintiff to establish a prima facie case of negligence when he cannot prove a specific act of negligence because he is not in a situation where he would have knowledge of that specific act. Once the plaintiff establishes a prima facie case, the defendant must then offer an explanation, if he can. “ ‘If then, after considering such explanation, on the whole case and on all the issues as to negligence, injury and damages, the evidence still preponderates in favor of the plaintiff, plaintiff is entitled to recover; otherwise not.’ ”

Id. at 441–42, 69 P.3d 324 (quoting Covey v. W. Tank Lines, 36 Wn.2d 381, 392, 218 P.2d 322 (1950) (quoting Hardman v. Younkers, 15 Wn.2d 483, 493, 131 P.2d 177 (1942))). As with any other permissive evidentiary inference, a jury is free to disregard or accept the truth of the inference. 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.** [Emphasis added]

Curtis, 169 Wn.2d at 894-95.

The Superior Court ruled in error when ruling that res ipsa loquitur is not available in this case because there may have been non-negligent explanations for why the crash happened, either that the road was wet or because there were two vehicles involved in the crash. But, a long line of Washington cases hold that res ipsa loquitur can apply even when non-negligent explanations for a crash exist, and merely becomes a factor for

the fact finder to consider when weighing the inference of negligence supplied by res ipsa loquitur.

C. A Wet Road Is Not an Abnormal Condition Precluding the Application of Res Ipsa Loquitur

The Superior Court ruled that, in the ordinary experience of mankind, cars can just veer off the road when abnormal road or mechanical conditions exist. VRP26. But, Mr. Thompson's Trailblazer was found to be free of mechanical defects, leaving the wet road as something the Superior Court considered an abnormal condition.

This Court is asked to take judicial notice of the fact that the Seattle area experiences around 150-160 rainy days per year. Mr. Burke argues that wet roads is a common condition when driving in Seattle.

D. All Elements of Negligence May be Shown by Circumstantial Evidence

An accident's "occurrence is of itself sufficient to establish prima facie the fact of negligence on the part of the defendant, without further direct proof." Ripley v. Lanzer, 152 Wn. App. 296, 307, 215 P.3d 1020 (2009) (quoting Metro. Mortgage & Sec. Co. v. Wn. Water Power, 37 Wn. App. 241, 243, 679 P.2d 943 (1984)). Curtis, 169 Wn.2d at 892.

In Klossner v. San Juan Cnty., 21 Wn. App. 689, 586 P.2d 899 (1978), the plaintiff sued a county for wrongful death after a road accident claiming defective road maintenance, though without specific allegations

regarding how the county's negligence caused the accident. The primary issue was whether there was evidence that the county's negligence caused the death.

The county contends that the record is devoid of evidence on how the accident occurred, and there can only be speculation or conjecture to connect the condition of the road with the cause of death. Precise knowledge of how an accident occurred, however, is not required to prove negligence and all elements, including proximate cause, can be proved by inferences arising from circumstantial evidence. Raybell v. State, 6 Wn. App. 795, 496 P.2d 559 (1972).

Klossner, 21 Wn. App. at 692.

This fact pattern mirrors that of this case, where Defendant City contends Mr. Burke cannot establish the specific act by Mr. Thompson that caused the crash, thereby failing to establish negligence. But, the circumstantial evidence of this crash indicates Mr. Thompson's negligence because he lost control of his Trailblazer without there being evidence of unforeseeable road conditions or hazards, or evidence that something other than Mr. Thompson's negligence caused the crash. The fact of the crash alone suffices to establish Mr. Thompson's negligence.

E. Sliding Cars as Proof of Negligence

The City argued that the mere skidding of a car does not prove negligence by the driver. But, the cases cited for that proposition involved unforeseeable road hazards. Rickert v. Geppert, 64 Wn.2d 350, 391 P.2d

964 (1964), involved a pedestrian plaintiff who was injured during foggy conditions by a car sliding on a patch of ice that may or may not have been foreseen by the driver.

In Osborne v. Charbneau, 148 Wn. 359, 268 P. 884 (1928), the plaintiff was struck by a car that had hit an unforeseen, isolated patch of wet road on an otherwise dry day, causing the car to skid.

In Kiessling v. NW Greyhound Lines, Inc., 38 Wn.2d 289, 229 P.2d 335 (1951), a bus slid sideways on a wet, slippery, crushed rock/oil aggregate surface around a downhill corner, eventually upsetting. The driver claimed wind caught the tail-end of his bus as he came around the corner, causing it to slide. Given this denial of liability, the issue of the driver's negligence was held to be for the jury to determine.

Each of these examples involve crashes that allegedly were caused by unusual circumstances, like unforeseeable icy and wet patches of road, and wind causing a bus to start skidding without negligence by the driver.

But, in this case, the roads were plainly wet, a very common condition in Seattle, and not something that can reasonably be called an abnormal condition. Every driver knows to take extra care when driving on wet roads; if a wet road is to be considered an abnormal road condition that exculpates drivers from liability for causing crashes, the entire motor vehicle tort system would be upended.

3. If Res Ipsa Loquitur Does Not Apply, then Mr. Burke's Expert Testimony Regarding Mr. Thompson's Negligence, that Mr. Thompson Was Driving Too Fast for Conditions or Driving While Distracted, Establishes Defendants' Negligence

As an alternative to using res ipsa loquitur to establish Mr. Thompson's negligence, the Burkes introduced the testimony of traffic accident reconstruction expert Steve Harbinson, whose primary testimony is that Mr. Thompson lost control of his Trailblazer because he was driving too fast for the conditions or driving while distracted.

Mr. Harbinson based his opinions partly on the testimony of Mr. Burke, who is the only eyewitness to the crash. Mr. Burke's testimony regarding seeing Mr. Thompson attempting to steer the Trailblazer before the crash was something he inferred from seeing the front wheels turning, which he noted the day of the crash in his written statement. Several days later, Mr. Burke noted to Det. Bacon that he saw Mr. Thompson's Trailblazer fishtailing, which is when a vehicle's tail slides from one side to the other. These statements by Mr. Burke are summarized in his declaration, CP58-59, which was also drafted after further recollection. Mr. Burke's statements in his declaration are consistent with those he made during the first week after the crash; he saw the wheels steering, causing the clear inference that Mr. Thompson was trying to steer the

Trailblazer, and he also saw the Trailblazer fishtailing, meaning its tail slid left, then right.

Mr. Harbinson testified that when a driver loses control of a vehicle, the driver is driving too fast for conditions. Mr. Thompson's negligent act was losing control of the Trailblazer, caused either by excessive speed for the conditions or distraction. The Superior Court ruled that Mr. Harbinson's testimony amounted to speculation, because he could not state whether it was excessive speed or distraction that caused Mr. Thompson to lose control.

It is agreed that testimony by an expert to the effect that there could be two different causes of an accident, with only one of the two involving negligence by the tortfeasor, does not suffice to establish causation:

[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.

Gardner v. Seymour, 27 Wn.2d 802, 809, 180 P.2d 564 (1947), quoted in Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 379, 972 P.2d 475 (1999).

Miller v. Likins, 109 Wn. App. 140, 34 P.2d 835 (2001), cited by the City during the proceedings below, illustrate this. In that case, a

pedestrian boy was injured by a driver; the parents sued the municipality alleging defective road design, specifically that the fog line was poorly designed. A primary issue was whether the boy was standing in the roadway or off to the side of the road past the fog line when he was hit. An expert testified that the boy was off the side of the road when he was hit, but then stated the boy could have been either place when hit, with serious ramifications for survival of the defective road design claim. As in Gardner, one version of events supports negligence, the other does not.

Mr. Harbinson's testimony is that Mr. Thompson's negligent driving caused him to lose control of the Trailblazer because he drove too fast for the conditions or because he was distracted. Mr. Thompson was negligent either way, and the Burkes would be able to recover damages through Mr. Thompson from either negligent act.

Had Mr. Harbinson's testimony been that the crash happened because either Mr. Thompson drove too fast for the conditions or because Mr. Thompson reasonably lost control after being cut off by another car, then his testimony would not suffice to establish negligence. The Burkes would not likely be able to recover damages through Mr. Thompson for the second scenario had Mr. Thompson not been otherwise negligent in his avoidance maneuver.

But, Mr. Harbinson's testimony is not speculative. He bases it specifically on eyewitness testimony and the other material he reviewed, and has a specific, reasonable, and basic opinion regarding what Mr. Thompson did to lose control of the Trailblazer—driving too fast for the conditions or driving while distracted. Both acts involve Mr. Thompson's negligence.

CONCLUSION

For the foregoing reasons, the Burkes respectfully request that the Superior Court's ruling granting the City's motion for summary judgment is reversed, and the case be remanded to the Superior Court for trial.

DATED 3/26/15, 2015.

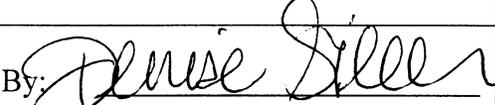
SEMENEA LAW FIRM, P.S.



Kristian Erik Soholm WSBA No. 30535
Leonard Semenea, WSBA No. 35327
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that I served an original of the foregoing on the following individual(s) by the listed means:

Counsel for Defendants: Peter S. Holmes Seattle City Attorney Lorraine Phillips, Esq. 600 Fourth Avenue, 4 th Floor Seattle, WA 98124-4769	<input type="checkbox"/> U.S. Postal Service (First Class) <input type="checkbox"/> Facsimile to _____ <input type="checkbox"/> U.S. Postal Service Express Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> Via email
DATED: <u>3/26/15</u>	By:  Name: <u>Denise Siler</u> Title: <u>Paralegal</u>