

72858-0

72858-0

COA NO: 72858-0-I

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

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I

JEFFREY BURKE and KIMBERLY BURKE, a married couple,

Plaintiffs/Appellants

v.

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

Defendants/Respondents

BRIEF OF RESPONDENT CITY OF SEATTLE

PETER S. HOLMES
Seattle City Attorney

LORRAINE L. PHILLIPS, WSBA #33126
Assistant City Attorney
Attorneys for Defendants/Respondents

Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JUN 11 PM 4:01

Table of Contents

I. INTRODUCTION1

II. THE BURKES' ASSIGNMENTS OF ERROR.....2

III. STATEMENT OF THE CASE.....3

A. The Parties3

B. The Accident.....3

C. The Medical Evidence.....6

D. Procedural History.....7

IV. ARGUMENT.....7

A. Standard of Review7

B. The Burkes have Provided No Admissible Evidence that the City Breached its Duty of Care and the Speculative Opinion by their Expert Does Not Establish a Breach of Duty.....9

C. There is No Presumption of Negligence in Automobile Accidents.13

D. *Res Ipsa Loquitur* Does Not Apply in the Present Case. 15

1. The Burkes do not meet the requirements for applying the doctrine of *res ipsa loquitur*.16

2. Because there are alternative, non-negligent explanations for the accident, *res ipsa loquitur* does not apply.18

3. There is no circumstantial evidence in the present case to warrant the application of *res ipsa loquitur*.....21

E. Even if Negligence Could be Adduced through a Breach of Duty or *Res Ipsa Loquitur*, the City has a Complete Defense of Sudden Incapacity.....22

IV. CONCLUSION27

CASES

<i>Bellantonio v. Warner</i> , 47 Wn.2d 550, 288 P.2d 459 (1955)	14
<i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 731, 927 P.2d 240 (1996)	8
<i>Cho v. City of Seattle</i> , 185 Wn. App. 10, 16, 341 P.3d 309 (Div. 1 2014). 9	
<i>Craig v. Washington Trust Bank</i> , 94 Wn. App. 820, 824, 976 P.2d 126 (Div. 3 1999).....	9
<i>Curtis v. Lein</i> , 169 Wn.2d 884, 889, 239 P.3d 1078 (2010).....	15
<i>Dodge v. Stencil</i> , 48 Wn.2d 619, 296 P.2d 312 (1956).....	14
<i>Douglas v. Bussabarger</i> , 73 Wn.2d 476, 485-86, 438 P.2d 829 (1968)... 19	
<i>Frank Coluccio Const. Co., Inc. v. King County</i> , 136 Wn. App. 751, 779, 150 P.3d 1147 (Div. 1 2007).....	20
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).....	10
<i>Hammel v. Rife</i> , 37 Wn. App. 577, 581, 682 P.2d 949 (Div. 1 1984)	9
<i>Hardman v. Younkers</i> , 15 Wn.2d 483, 489, 131 P.2d 177 (1942).....	14
<i>Jackass Mt. Ranch, Inc. v. South Columbia Basin Irrigation District</i> , 175 Wn. App. 374, 400, 305 P.3d 1108 (Div. 3 2013).....	15
<i>Kaiser v. Suburban Transportation System</i> , 65 Wash.2d 461, 466, 398 P.2d 14 (1965).....	23
<i>Kiessling v. Nw. Greyhound Lines, Inc.</i> , 38 Wn.2d 289, 293, 229 P.2d 335 (1951).....	14
<i>Klossner, v. San Juan County</i> , 21 Wn. App. 689 (Div. 1 1978).....	22
<i>Loudon v. Mhyre</i> , 110 Wn.2d 675, 682, 756 P.2d 138 (1988)	26
<i>Miller v. Likins</i> , 109 Wn. App. 140, 148, 34 P.3d 835 (2001)	11
<i>Moore v. Hagge</i> , 158 Wn. App. 137, 146, 241 P.3d 787 (Div. 1 2010).....	8
<i>Mortgage & Securities Co., Inc. v. Washington Water Power</i> , 37 Wn. App. 241 (Div. 3 1984).....	21
<i>Nguyen v. City of Seattle</i> , 179 Wn. App. 155, 317 P.3d 518 (Div. 1 2014)	14
<i>Osborne v. Charbneau</i> , 148 Wn. 359, 364, 268 P. 884 (1928)	15
<i>Pacheco v. Ames</i> , 149 Wn.2d 431, 436, 69 P.3d 324 (2003).....	16
<i>Ramey v. Knorr</i> , 130 Wash. App. 672, 684, 124 P.3d 314 (2005)	23
<i>Renner v. City of Marysville</i> , 145 Wn. App. 443, 448-49, 187 P.3d 286 (Div. 1 2008).....	8
<i>Ripley v. Lanzer</i> , 152 Wn. App. 296, 215 P.3d 1020 (Div. 1 2009).....	17
<i>Smith v. Orthopedics Int'l, Ltd, P.S.</i> , 170 Wn.2d 659 668, 244 P.3d 939 (2010).....	26
<i>State v. Uglem</i> , 68 Wn.2d 428, 436, 413 P.2d 643 (1996)	11
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 226, 770 P.2d 182 (1989).....	8
<i>Zukowsky v. Brown</i> , 79 Wn.2d 586, 593, 488 P.2d 269 (1971).....	16

STATUTES

CR 26(b)(5)..... 26
RCW 46.61.445 21
RCW 7.70.020(3)..... 25

OTHER

Comment d to §11, Restatement Third, Torts..... 23

I. INTRODUCTION

This case arises out of an automobile accident between a van driven by Appellant Jeffrey Burke, plaintiff below, and an SUV owned by defendant City of Seattle, driven by its employee Charles Elfrink-Thompson, deceased. It is undisputed that the accident occurred when the SUV crossed the center line of the roadway and drifted into Mr. Burke's path of travel. Mr. Burke sued the City of Seattle and the Estate of Charles Elfrink-Thompson (collectively, "the City"), alleging that Mr. Elfrink-Thompson was driving negligently, thereby causing the accident. However, the only evidence before the court as to the proximate cause of Mr. Elfrink-Thompson's actions is that he likely suffered a myocardial infarction which resulted in some degree of unconsciousness, rendering him unable to control his vehicle. Mr. Elfrink-Thompson died the next day; fortunately, Mr. Burke sustained only soft tissue injuries.

The City moved for summary judgment, arguing that plaintiff lacked evidence, pursuant to CR 56(e), that Mr. Elfrink-Thompson was negligent and that Mr. Elfrink-Thompson's sudden incapacity was a complete defense. In a well-articulated decision, the trial court granted the City's motion, ruling that there were no genuine issues of material fact to support a showing of negligence on the part of the City. Because the court

found that plaintiffs had failed to meet their threshold burden of establishing the necessary elements to sustain their claims, the court did not reach the issue of Mr. Elfrink-Thompson's sudden incapacity. The City's affirmative defense, however, remains part of the record on this appeal.

On appeal, Mr. Burke seeks to sidestep the trial court's findings by asking this court to apply the doctrine of *res ipsa loquitur* to this case. The facts of this case, however, do not allow for such an expansion of the doctrine. The cases Mr. Burke cites are inapposite to the facts in this case, and the speculative testimony by his expert witness, as the trial court properly ruled, does not meet the admissibility requirements of CR 56(e) to establish a *prima facie* case of negligence. The trial court did not err in its ruling on the City's motion, and the City accordingly asks this court to affirm the trial court's order granting summary judgment on behalf of the City.

II. THE BURKES' ASSIGNMENTS OF ERROR

The Burkes have assigned two errors to the trial court's decision. The City restates the Burkes' assignments of error as follows:

1. Was the trial court correct in finding that the Burkes lacked admissible evidence from which a jury could conclude that Mr. Elfrink-Thompson was negligent?

2. Was the trial court correct in refusing to apply the doctrine of *res ipsa loquitur* to the facts of this case?

III. STATEMENT OF THE CASE

A. The Parties

Plaintiffs are Jeffrey and Kimberly Burke (“Burkes”). The defendants are Dalynne Singleton, as the personal representative of the Estate of Charles Elfrink-Thompson, the City of Seattle, Mr. Elfrink-Thompson’s employer at the time of the accident, and John and Jane Does 1 through 10. The City does not dispute that Mr. Elfrink-Thompson, a communications specialist for the Seattle Department of Transportation (“SDOT”), was within the course and scope of his employment at the time of the accident.

B. The Accident

The accident in question occurred in the 9400 block of Olson Pl. SW, an arterial roadway, at around 8:30 a.m. on April 21, 2010. A light to moderate rain had been falling, and the pavement was wet. CP 90.

Travelling northbound, a Chevrolet Trailblazer, owned by the City and operated by Mr. Elfrink-Thompson, crossed the centerline in the 9400 block of Olson Pl. and drifted into the path of Mr. Burke’s southbound

van.¹ Mr. Burke was unable to brake and the van struck the Trailblazer on the passenger side. CP 90. When first responders arrived, Mr. Elfrink-Thompson was largely non-responsive; he was taken by ambulance to Harborview Medical Center, where he was found to have suffered a traumatic brain injury with a large subdural hematoma. CP 78-79. His neurological status worsened, and he died the next day. CP 79.

The collision was investigated by the Seattle Police Department's Traffic Accident Investigation Squad ("TCIS"). CP 90. TCIS Detective Thomas Bacon measured a relatively straight 41-foot-long tire mark in the wet pavement, running from the northbound lane diagonally across the centerline of the street, ending where the Trailblazer came to rest. CP 91; CP 95. A scuff mark left on the wet surface of the road by the Trailblazer's tire indicated the vehicle's movement into the opposite lane. CP 29, 14:9-12. Detectives used electronic surveying instruments to generate a diagram of this mark in order to determine its precise location. CP 91; CP 97-98. Detective Bacon concluded that Mr. Elfrink-Thompson lost control of his car at the point where the scuff mark began. CP 33, 42:12-16. Detectives were unable to locate any evidence as to *why* Mr. Elfrink-Thompson had lost control – i.e., what caused the Trailblazer to

¹ The van was owned by Mr. Burke's employer, Provident Electric, which is not a party to this action.

move into the opposite lane of travel. CP 34, 44:14-45:19. In a telephone conversation with Detective Bacon after the accident, Mr. Burke describes the Trailblazer's movements as "fishtailing," which confirmed Detective Bacon's finding that the SUV was not being controlled as it crossed into Mr. Burke's lane of travel. CP 32, 29:24 - 30:11.

Data retrieved from the Trailblazer's sensing and diagnostic module did not indicate how fast the vehicle was travelling in the moments before the accident. CP 92. Detective Bacon determined from technical considerations that the braking and throttle information retrieved did not relate to the accident under investigation but rather to some earlier event. CP 91, CP 30, 22:23-23:1; CP 31, 25:4-7. The module produced no data on these functions just prior to the accident. *Id.*

There were no eyewitnesses to Mr. Elfrink-Thompson's actions or condition just prior to the collision. CP 92. Forensic examination of his cell phone showed it was not in use just before or during the accident. *Id.* Mr. Elfrink-Thompson's toxicology report from the King County Medical Examiner was negative for alcohol and drugs, other than diazepam (Valium), administered at Harborview Medical Center following the accident. CP 92. The Trailblazer was inspected by a mechanic at the City's fleet facility, who found no defects in the brakes, tires, suspension or steering. CP 92; CP 100-101.

C. The Medical Evidence

Carol Buchter, M.D., a cardiologist,² reviewed the police and fire department records of the accident, Mr. Elfrink-Thompson's medical records, and the autopsy report prepared by the King County Medical Examiner. CP 78. Dr. Buchter noted that during Mr. Elfrink-Thompson's hospitalization, serial cardiac enzymes were obtained. CP 79. Although the enzymes drawn on the day of admission at 9:46 a.m. were normal, his CK MB quotient (a measure of Creatine kinase isoenzymes) and mass, as well as his troponin (also an enzyme associated with cardiac injury), rose steadily over the subsequent 28 hours and were abnormal by the time of his declared death on April 22, 2010, indicating myocardial injury. *Id.* Multiple electrocardiograms demonstrated frequent multi-form premature ventricular complexes (PVCs), indicating a propensity of malignant, non-perfusing ventricular arrhythmias such as ventricular tachycardia or fibrillation. Such arrhythmias prevent adequate blood supply to the brain, causing near complete loss of consciousness. Based on her review of the medical records and first responders' reports, and the TCIS investigation, Dr. Buchter concluded on a more likely than not basis, that Mr. Elfrink-Thompson lost control of his vehicle when rendered unconscious due to a small myocardial infarction complicated by a non-perfusing ventricular

² Dr. Buchter's *curriculum vitae* is attached to her declaration at CP 81-88.

arrhythmia. *Id.*; CP 41, 65:25-66:13; CP 42, 72:13-73:23; CP 43, 82:4-9; CP 43-44, 83:13-84:2; CP 89:3-24.

Dr. Buchter further testified that such a cardiac event is, by its very nature, unpredictable, and would leave no evidence of structural or functional heart disease at autopsy, either at the gross/macrosopic or microscopic level. CP 79.

D. Procedural History

Plaintiffs Jeffrey and Kimberly Burke filed their Complaint on March 8, 2013, alleging negligence. The Burkes amended their Complaint on April 17, 2013, to name Dalynne Singleton, the court-appointed Personal Representative of the Estate of Charles Elfrink-Thompson, likewise alleging negligence. CP 1-5. The Burkes did not allege any other causes of action. *Id.*

On December 5, 2014, the Honorable Tanya Thorp of the Superior Court of the State of Washington for King County entered an Order Granting the City's Motion for Summary Judgment. CP 157-158. This is the order the Burkes now appeal. CP 159-162.

IV. ARGUMENT

A. Standard of Review

The Appellate Court reviews a trial court's order granting summary judgment *de novo*. *Moore v. Hagge*, 158 Wn. App. 137, 146,

241 P.3d 787 (Div. 1 2010). The appellate court “engag[es] in the same inquiry as the trial court.” *Id.* (internal citations omitted).

Summary judgment is appropriate if the pleadings, affidavits, and depositions establish both the absence of genuine issues of material fact and that movant is entitled to judgment as a matter of law. *Renner v. City of Marysville*, 145 Wn. App. 443, 448-49, 187 P.3d 286 (Div. 1 2008).

Summary judgment will be granted where the plaintiff cannot establish an element of his cause of action because a “complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

The elements of the Burkes’ negligence claim against the City are, as in all negligence cases: duty, breach, causation, and injury. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 731, 927 P.2d 240 (1996). The non-moving party may not rely on speculation or argumentative assertions, even from an expert, to defeat summary judgment. *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 824, 976 P.2d 126 (Div. 3 1999).

In the present case, the Burkes failed to produce evidence that Mr. Elfrink-Thompson negligently caused the accident or that the doctrine of *res ipsa loquitur* applies. The plaintiff bears these burdens and the trial court properly ruled they had not been met.

B. The Burkes have Provided No Admissible Evidence that the City Breached its Duty of Care and the Speculative Opinion by their Expert Does Not Establish a Breach of Duty.

The City does not dispute that Mr. Elfrink-Thompson was under a duty to exercise ordinary care in the operation of the City's vehicle. *See, Hammel v. Rife*, 37 Wn. App. 577, 581, 682 P.2d 949 (Div. 1 1984) (duty to exercise ordinary care to avoid collisions rests upon all drivers). The fact of an accident is generally not, by itself, evidence of negligence. *Cho v. City of Seattle*, 185 Wn. App. 10, 16, 341 P.3d 309 (Div. 1 2014), *rev. denied*, __ Wn.2d __ (June 4, 2015). And, the Burkes have no evidence from which a jury could conclude that Mr. Elfrink-Thompson breached his duty to exercise ordinary care.

The Burkes rely primarily on the opinion of their accident reconstructionist expert, Steven Harbinson, to argue that Mr. Elfrink-Thompson was negligent. Acknowledging that he had no actual evidence as to what Mr. Elfrink-Thompson was doing just prior to the collision, Mr. Harbinson speculates that Mr. Elfrink-Thompson might have lost control of his Trailblazer because he was distracted or was driving too fast for the conditions. Appellants' Br. 19; CP 126 ("Elfrink-Thompson lost control of his vehicle as he was going around the right hand curve due to being distracted or due to excessive speed on the wet pavement as he traveled

around the curve.”); CP 130 (“[t]he facts point to Elfrink-Thompson losing control of his vehicle because he was either driving distracted or too fast for the wet conditions”). Such speculation is patently inadmissible.

A “fact,” for purposes of CR 56,

is an event, an occurrence, or something that exists in reality. *Webster’s Third New Int’l Dictionary* 813 (1976). It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. 35 C.J.S. Fact 489 (1960). The “facts” required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. *See, Hatch v. Bush*, 215 Cal.App.2d 692, 30 Cal. Rptr. 397 (1963). Likewise, conclusion statements of fact will not suffice. *American Linen Supply Co. v. Nursing Home Bldg. Corp.*, 14 Wn. App. 757, 767, 551 P.2d 1038 (1976).

Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

“Speculation” in contrast,

is no more than guesswork or conjecture. . . . It is a mental process by which one reaches a conclusion as to the existence of an essential fact by theorizing either on incomplete evidence or on assumed factual premises that are outside and beyond the actual scope of the evidence.

State v. Uglem, 68 Wn.2d 428, 436, 413 P.2d 643 (1996); *see also*, Black’s Law Dictionary 6th Ed. (1990) (“Speculation, upon which neither court in nonjury case nor jurors in jury case may base verdict, is the art of theorizing about a matter as to which evidence is not sufficient for certain

knowledge.”).

This fundamental rule of law was recently reaffirmed by this court in *Cho*, 185 Wn. App. at 20, in which this court reiterated that “an expert’s affidavit must include more than mere speculation or conclusory statements.” In *Cho*, the court upheld summary judgment for the City in a road design case, finding that an expert’s declarations containing conclusory allegations without factual support could not create an issue of material fact. *Cho* follows *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (“It is well established that conclusory or speculative expert opinions lacking adequate foundation will not be admitted.”).

Here, Mr. Harbinson offers no evidence as to what purportedly distracted Mr. Elfrink-Thompson, nor does he offer any evidence as to how fast the Trailblazer was traveling. In fact, he admitted that he has **no** facts to support either of his assertions as to why Mr. Elfrink-Thompson lost control:

Q. “What physical evidence can you rely on in forming this opinion as to why Elfrink-Thompson lost control of the car?”

A. “I’m not sure there’s any physical evidence you can say why he lost control.” CP 200, 27:9-13.

Q. “[W]hat distracted him?”

A. “I don’t know.” CP 201, 28:10-11.

Q. “How fast was he going?”

A. “That I don’t know either.” CP 201, 28:12-13.

When asked if he knew of any testimony that would lead him to conclude that Mr. Elfrink-Thompson was distracted or driving too fast, Mr. Harbinson replied, “[n]o.” CP 202, 33:2-5. Finally, when asked, “[s]o you’re just - - it’s a conclusion you’re making, isn’t it, that he was distracted or driving too fast?” Mr. Harbinson conceded, “[t]hat is correct.” CP 201, 28:14-16.

On appeal, the Burkes submit that Mr. Harbinson “based his opinions partly on the testimony of Mr. Burke, who is the only eyewitness to the crash. Appellants’ Br. at 19. While it is true that Mr. Harbinson read Mr. Burke’s declaration and the transcript of his deposition, CP 124, it is clear that he did not base his opinions on the testimony of Mr. Burke, or anyone else. CP 202. The Burkes themselves concede that Mr. Burke’s statements³ describing what Mr. Elfrink-Thompson was doing just before the accident are inferences only. Appellants’ Br. at 19. As in *Likins*, where the expert relied on the declaration of plaintiff’s friend in forming

³ Mr. Burke made a total of four statements relating to the accident. The first statement was on the day of the accident, the second and third statements were answers in response to interrogatories, and the fourth statement was a declaration that was made more than four years after the accident occurred. In the first three statements, Mr. Burke describes his observation of the vehicle, e.g. “a vehicle sliding sideways toward me.” CP 17. It is not until the fourth statement that Mr. Burke ascribes intentionality to Mr. Elfrink-Thompson’s driving by saying that he “overcorrected that slide.” CP 58-59.

his opinion, the court held that the expert's opinion lacked an adequate factual basis. *Likins*, 109 Wn. App. at 149 (“It is unclear how, relying only on Richards’ statements, [the accident reconstructionist] could have formed an expert opinion ‘on a more probable than not basis.’”).

As with the *Cho* and *Likins* cases, the testimony of appellants’ expert is insufficient, as a matter of law, to support the element of breach of duty. This court should affirm the trial court’s evidentiary finding on this point.

C. There is No Presumption of Negligence in Automobile Accidents.

The Burkes alternatively ask this court to rule that a car accident alone establishes a *prima facie* case of negligence. Appellants’ Br. at 16. This would require the court to create new law. It is well established that there is no presumption of negligence from an automobile accident alone – a rule recently re-affirmed by this court in *Cho*, 185 Wn. App. at 16 (“[t]he fact that an accident occurred does not, by itself, necessarily give rise to an inference of negligence.”) (internal citations omitted).

Indeed, case law is replete with examples of car accidents occurring where there is no negligence on the part of the driver. *See e.g.*, *Nguyen v. City of Seattle*, 179 Wn. App. 155, 317 P.3d 518 (Div. 1 2014) (where a driver of a U-Haul truck brought an action against the City for

personal injury and property damage due to the truck hitting a tree on the planting strip, the court held that *res ipsa loquitur* did not apply); *Dodge v. Stencil*, 48 Wn.2d 619, 296 P.2d 312 (1956) (insufficient evidence to establish that the driver who hit a child was negligent); *Bellantonio v. Warner*, 47 Wn.2d 550, 288 P.2d 459 (1955) (“[t]here is no presumption of negligence from the accident alone. No person is presumed to have been negligent, until the party having the burden of proof establishes that fact by a preponderance of the evidence.”) (citing *Hutton v. Martin*, 41 Wn.2d 780, 790, 252 P.2d 581 (1953)); *Kiessling v. Nw. Greyhound Lines, Inc.*, 38 Wn.2d 289, 293, 229 P.2d 335 (1951) (the “general rule that skidding in and of itself may not be evidence of negligence in the operation of the vehicle.”); *Hardman v. Younkers*, 15 Wn.2d 483, 489, 131 P.2d 177 (1942) (“the mere fact that an automobile accident has occurred is not of itself proof of negligence on the part of a driver.”). The Burkes even acknowledge this rule, citing to a Washington Supreme Court case from 1928 which found then, as still holds true today, that “[t]he mere skidding of an automobile is **not** an occurrence of such uncommon or unusual character that alone, and unexplained, it can be said to furnish evidence of negligence in the operation of the car.” *Osborne v. Charbneau*, 148 Wn. 359, 364, 268 P. 884 (1928) (emphasis added). This court should decline the Burkes’ invitation to set aside this long history of

Washington jurisprudence on this point.

D. *Res Ipsa Loquitur* Does Not Apply in the Present Case.

Whether *res ipsa loquitur* applies is a question of law. *Curtis v. Lein*, 169 Wn.2d 884, 889, 239 P.3d 1078 (2010). “*Res ipsa loquitur* is a disfavored doctrine. It is used sparingly and in exceptional cases” *Jackass Mt. Ranch, Inc. v. South Columbia Basin Irrigation District*, 175 Wn. App. 374, 400, 305 P.3d 1108 (Div. 3 2013); *see also*, *Nguyen*, 179 Wn. App. at 172 (citing *Curtis*, 169 Wn.2d at 889) (“[*r*]es ipsa loquitur is ordinarily sparingly applied, in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.”). Moreover, “[t]he incident causing the injury must be of such a nature that the occurrence itself is sufficient to establish negligence on the part of the defendant **without any further proof.**” *Jackass Mt. Ranch, Inc.*, 175 Wn. App. at 398 (internal citations omitted) (emphasis added). Particularly given the rule of law that negligence **cannot** be inferred from the fact of an accident alone, *see* Section C., *supra*, the trial court was correct in refusing to sidestep that rule through the application of *res ipsa loquitur*. Separate and apart from this rule, however, the Burkes still fail to meet the requisite elements of *res ipsa loquitur*.

1. The Burkes do not meet the requirements for applying the doctrine of *res ipsa loquitur*.

In order for *res ipsa loquitur* to apply, a plaintiff must meet the following three-prong test:

(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003) (citing *Zukowsky v. Brown*, 79 Wn.2d 586, 593, 488 P.2d 269 (1971)).

The City does not dispute that it, through its agent, had control of the vehicle that caused the collision. This inquiry though, is separate from the first and third inquiries, neither of which can be met.

The first element of the *res ipsa loquitur* inquiry is satisfied if one of the following 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.

Pacheco, 149 Wn.2d at 438-39 (quoting *Zukowsky*, 79 Wn.2d at 595).

The Burkes make passing reference to all three of the *Zukowsky* factors. Appellants' Br. 12-13; however, the first and third prongs are patently inapplicable to the present case because injuries from a car accident are not "palpably negligent," *see, e.g., Ripley v. Lanzer*, 152 Wn. App. 296, 215 P.3d 1020 (Div. 1 2009) (where a physician left a scalpel blade in the patient's knee during surgery), nor do car accidents involve experts in an "esoteric field," such as urinary diversion surgery.

Rather, all of the Burkes' arguments tend to implicate the second *Zukowsky* condition, which is that general experience and observation teaches that the result would not occur without negligence. The Burkes argue:

[i]t 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.

Appellants' Br. 10 (emphasis added)⁴. The Burkes' argument here simply cannot be reconciled with the long history of case

⁴ Notably, the Burkes qualify the second element outlined in *Zukowsky* by adding the term "absent unforeseeable conditions." Appellants' Br. 10. This qualifier, however, is exactly why *res ipsa loquitur* does not apply in the present case – the evidence shows that there likely were unforeseeable conditions.

law that precludes a court from making such a finding. *See*, Section C., *supra*.

2. Because there are alternative, non-negligent explanations for the accident, *res ipsa loquitur* does not apply.

The doctrine of *res ipsa loquitur* should only be applied when, at the outset, the event would not normally occur absent someone's negligence. Again, as Washington courts have recognized, car accidents can, and do, occur without someone's negligence. *See*, Section C., *supra*.

The Burkes primarily rely on two cases to argue that *res ipsa loquitur* can apply when a non-negligent explanation exists for the accident, neither are on point to the facts here. In *Douglas*, the court applied the doctrine of *res ipsa loquitur* after analyzing the plaintiff's medical expert's testimony that the paralysis which occurred after a surgery to repair a stomach ulcer would not have occurred absent someone's negligence. *Douglas v. Bussabarger*, 73 Wn.2d 476, 485-86, 438 P.2d 829 (1968) (emphasis added). The court specifically noted that "[i]t is apparent that the first condition [an event which does not ordinarily occur unless someone is negligent] is **not** met unless all possible causes of injury are such as would not ordinarily occur in the absence of someone's negligence." *Id.* at 484 (emphasis added). As the Burkes acknowledge, the court in *Douglas* also cited "other medical testimony from which a

jury could reasonably conclude that the doctor was in fact negligent.”
Douglas, 73 Wn.2d at 486; Appellants’ Br. 14.

Curtis is likewise inapposite. In *Curtis*, a premises liability case, the court held that the plaintiff could apply the doctrine of *res ipsa loquitur* and need not eliminate other possible causes of her injury which resulted when she (the tenant) fell through the property owner’s wooden dock and injured herself. *Curtis*, 169 Wn.2d 884. However, the court applied *res ipsa loquitur* on the theory that docks are built to walk on and do not ordinarily give way so that someone falls through the wooden planks, without there being negligence on the owner’s part. Furthermore, an exceptional fact in the *Curtis* case is that the defendant property owners immediately destroyed the dock after the incident, thereby denying the plaintiff an opportunity to inspect the construction and maintenance of the dock which led to her injury. Although the court held that *res ipsa loquitur* did apply, the exceptional consideration in that case (and a distinguishing characteristic from the present case) is, as Justice Madsen aptly pointed out in the concurrence, “[b]ut for the removal of the dock, I would not agree that the doctrine [of *res ipsa loquitur*] should apply to shift the burden of establishing whether the defect in the dock was discoverable.” *Curtis*, 169 Wn.2d at 896.

The Burkes further submit that the trial court erred when it ruled

that *res ipsa loquitur* is not available 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. Appellants' Br. 15. They advise the court that there is "a long line of Washington cases [which] hold that *res ipsa loquitur* can apply even when non-negligent explanations for a crash exist" *Id.*, but cite no cases to support this claim. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. *Frank Coluccio Const. Co., Inc. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (Div. 1 2007) (citing *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

The burden is on the Burkes to prove that Mr. Elfrink-Thompson was driving negligently and thereby breached his duty of ordinary care. The Burkes' expert admits that "he could have lost control of his vehicle if something cut him off, turned in front of him, any sort of thing." CP 202, 32:16-18. Indeed, the Burkes' own brief acknowledges that specific situations do exist where a driver might lose control of a car without being negligent. Appellants' Br. 10.

The Burkes also assign error to the trial court's finding that *res ipsa loquitur* did not apply because there were contributing elements to the

accident, such as a wet road Appellants' Br. 16. The Burkes ask the court to take judicial notice that it rains 150-160 days per year in Seattle and that a wet road is a common condition. Appellants' Br. 16. If there was *any* evidence that Mr. Elfrink-Thompson was driving too fast for the conditions present, under RCW 46.61.445, this might be relevant. However, there is absolutely **no** evidence that the condition of the roadway contributed in any way to this collision, nor any evidence that Mr. Elfrink-Thompson was driving too fast for the conditions.

3. There is no circumstantial evidence in the present case to warrant the application of *res ipsa loquitur*

The Burkes contend that *res ipsa loquitur* can be based on circumstantial evidence, Appellants' Br. 9. They cite to *Metro. Mortgage & Securities Co., Inc. v. Washington Water Power*, 37 Wn. App. 241 (Div. 3 1984). The facts of that particular case, however, are not analogous to those here. *Metro. Mortgage* involved a burst water main which was buried and beyond practical inspection and maintenance. Finding that water mains do not break in the absence of someone's negligence, the court applied the doctrine of *res ipsa loquitur*, based on the second *Zukowsky* condition – i.e. general experience and observation teaches that the result would not occur without negligence. *Id.* at 247. This holding is very specific to water mains and cannot apply to car accidents for the

reasons discussed in Section C., *supra*.

The Burkes also cite *Klossner, v. San Juan County*, 21 Wn. App. 689 (Div. 1 1978), which is also distinguishable. In *Klossner*, the driver's estate filed a wrongful death and personal injury claim alleging negligent design, construction, and maintenance of the road, its shoulder area, and an adjoining ditch. *Id.* *Klossner* is distinguishable in several regards. First, *Klossner* does not assert *res ipsa loquitur* to establish negligence. Second, *Klossner* involved a one car accident. Third, the appellate court's reversal was predicated on a finding that there was sufficient evidence to bring a negligence claim to the jury - the plaintiff provided information in its answers to interrogatories that documented the poor condition of the road and the County failed to submit its own affidavits.

The holding in *Klossner* did not involve circumstantial evidence proving negligence. Rather, the case was reversed (in part) because the County was the party who moved for summary judgment, and it did not meet its burden of proving that there was no material issue of fact. That is not the case here.

E. Even if Negligence Could be Adduced through a Breach of Duty or *Res Ipsa Loquitur*, the City has a Complete Defense of Sudden Incapacity.

Even if there were a question of fact as to Mr. Elfrink-Thompson's negligence, the City's dismissal should still be affirmed because Mr.

Elfrink-Thompson's likely sudden incapacity is a complete defense. The trial court never reached that issue because it ruled that plaintiffs could not "establish the breach of duty element of negligence and [were] not entitled to the doctrine of *res ipsa loquitur*." VRP 27:2-4, but the defense remains open on appeal.

An unconscious driver who loses control of a car is not liable for an ensuing accident as a matter of law. *Kaiser v. Suburban Transportation System*, 65 Wash.2d 461, 466, 398 P.2d 14 (1965) ("A driver who becomes suddenly stricken by an unforeseen loss of consciousness, and is unable to control the vehicle, is not chargeable with negligence."); *see also, Ramey v. Knorr*, 130 Wash. App. 672, 684, 124 P.3d 314 (2005) (sudden, unforeseeable physical incapacity or loss of consciousness rendering driver unable to control vehicle is not negligence). The Burkes have no evidence to rebut Dr. Buchter's opinion that the collision in this case was a result of Mr. Elfrink-Thompson's sudden, unforeseeable loss of consciousness. The Burkes, accordingly, cannot meet their burden of proving the City's negligence. Comment d to §11, Restatement Third, Torts, provides:

Sudden incapacitation can be caused by a heart attack, a stroke, an epileptic seizure, diabetes, or other medical conditions. A typical case is sudden incapacitation that causes a driver to lose control of the car . . . when the incapacitation is itself

unforeseeable, it follows that no reasonable precautions were available to the driver that could have avoided the risk of harm.

Substantial evidence supports an event of precisely that nature in this case.

Dr. Buchter concluded that more likely than not Mr. Elfrink-Thompson lost consciousness due to a small myocardial infarction complicated by a non-perfusing ventricular arrhythmia and lost control of his car. CP 79; CP 41, 65:25-66:13; CP 42, 72:13-73:23. The medical examiner's description of Mr. Thompson's heart as unremarkable upon inspection does not rule out arrhythmia because those events leave no gross/macroscopic or microscopic traces which would be discovered during an autopsy. CP 79.

That Mr. Elfrink-Thompson's incapacity was *sudden* is confirmed by the absence of evidence that he was driving improperly in the moments before the collision. There is no evidence that the Trailblazer struck a curb, that it interfered with other vehicles, or that it was driven erratically, or at a speed inappropriate under the circumstances. CP 92. The data from Mr. Thompson's cell phone demonstrates that it was not in use just prior to or during the accident. *Id.* The toxicology report from the King County Medical Examiner shows no alcohol or drugs in Mr. Elfrink-Thompson's system, apart from a sedative administered at Harborview. *Id.*

The inspection of the Trailblazer after the accident disclosed no defects that might have caused the accident. *Id.* Detective Bacon, who investigated the accident, was unable to determine why the Trailblazer drifted into the opposite lane of travel. CP 91.

The City anticipates that the Burkes will try to raise an issue of fact by submitting evidence from Marshall Corson M.D., regarding Mr. Elfrink-Thompson's medical condition. This issue was fully briefed at the trial court in Defendants' Reply Brief to Plaintiffs' Response to Defendants' Motion for Summary Judgment. CP 153-155. The City argued, and reasserts here, that statements by Dr. Corson that derive from his contacts with the Burkes' lawyers are inadmissible at trial, and thus inadmissible on summary judgment.

Dr. Corson was one of Mr. Elfrink-Thompson's treating physicians at Harborview Medical Center and was identified as such by the Burkes in discovery⁵. As a matter of public policy, a lawyer may not have *ex parte* contact with the treating physician of the opposing party. *Loudon v. Myhre*, 110 Wn.2d 675, 682, 756 P.2d 138 (1988). Such contact is also a

⁵ Plaintiffs' disclosure of possible primary witnesses lists "Marshall Corson, M.D." and states "These fact-and/or expert witnesses may testify regarding the treatment provided to Mr. Thompson at Harborview Medical Center, their review of Mr. Thompson's medical records, and any other relevant facts of which they have personal knowledge." CP 174. Notably, under RCW 7.70.020(3) "health care provider" includes hospitals and their employees or agents acting in the course and scope of their employment. Harborview Medical Center *and everyone at Harborview* who worked on Mr. Elfrink-Thompson's case were his health care providers.

violation of CR 26(b)(5). *See also, Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn. App. 268, 278, 996 P.2d 1103 (2000). It undermines the physician's role as a fact witness because "the physician would improperly assume a role akin to that of an expert witness for the defense." *Smith v. Orthopedics Int'l, Ltd, P.S.*, 170 Wn.2d 659 668, 244 P.3d 939 (2010). This is precisely what occurred here.⁶ Counsel for the Burkes, fully aware that Dr. Corson was one of Mr. Thompson's treating physicians, may not now offer Dr. Corson's expert opinion against his patient's estate in this action. This is inherently prejudicial:

Because doctors are viewed as owing [a] duty of loyalty to their patients, jurors are likely to perceive expert testimony adverse to a patient as a betrayal. The prejudice occurs when the jury, seeking to reconcile this breach of the trust relationship, concludes, without careful scrutiny of the testimony, that the patient's case is clearly without merit.

Carson v. Fine, 67 Wn. App. 457, 465, 836 P.2d 223 (1992), *rev'd on other grounds, Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 610 (1994).

Where *ex parte* communication is prejudicial, "the remedy is to ban the use of the evidence . . ."). *Rowe*, 100 Wn. App. at 280. Dr. Corson's declaration is not admissible, and cannot serve to create a question of fact

⁶ *Loudon* and its progeny discuss this rule in connection with *defense* counsel contacting the plaintiff's doctor, for obvious reasons. This case is unusual in that *plaintiffs'* counsel contacted the doctor of a defendant's decedent. The rule nonetheless applies, *mutatis mutandis*.

going to the sudden incapacity defense.

In any case, the City submits that since the Burkes have offered no evidence of negligence in support of their case in chief, this court, like the trial court, need not reach the applicability of the affirmative defense of sudden incapacity.

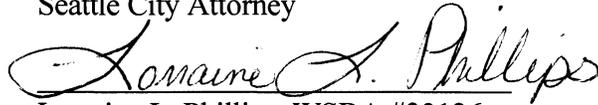
IV. CONCLUSION

Mr. Burkes have failed to establish negligence. There are no facts or evidence to support a breach of duty. The Burkes' expert's testimony is purely speculative and does not establish a breach of duty leading to negligence. The Burkes have also failed to establish that the accident which occurred is one that would only happen due to negligence. Therefore the doctrine of *res ipsa loquitur* does not apply. Finally, if for any reason the court finds there may be a question of fact as to Mr. Elfrink-Thompson's negligence, the City has a complete defense of "sudden incapacity." For these reasons, the City respectfully requests that this court affirm the trial court's order granting the City's Summary Judgment Motion.

DATED this 11th day of June, 2015.

PETER S. HOLMES
Seattle City Attorney

By:

A handwritten signature in cursive script, reading "Lorraine L. Phillips". The signature is written in black ink and is positioned above a horizontal line.

Lorraine L. Phillips, WSBA #33126
Assistant City Attorney
Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

AUTUMN DERROW certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed as a Legal Assistant with the Seattle City Attorney's office.

On June 11, 2015, a copy of this document was served upon the following counsel by electronic service:

Attorneys for Plaintiff:

Leonard Semenea
Kristian Erik Soholm
SEMENEA LAW FIRM, P.S.
10845 Main Street
Bellevue, WA 98004
E-Mail: semenealaw@gmail.com
office@semenealaw.com
denise@semenealaw.com

I further state that I requested ABC Messengers to deliver on June 11, 2015, for filing, the original and one copy of this document to the Court of Appeals, Division I at the business address listed below:

Court of Appeals, Division I
Clerk's Office
600 University St
One Union Square
Seattle, WA 98101-1176

DATED this 11th day of June, 2015.


AUTUMN DERROW, Legal Assistant