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STATE OF WASHINGTON

67237-1

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NO. 67237-1-I

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

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MARYANN HARRIS,

Appellant,

v.

SUSAN WABEY, et al.,

Respondent.

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**REPLY BRIEF OF APPELLANT**

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## I. ARGUMENT

### A. Reply to Wabey's Contention that the Doctrine of Res Ipsa Loquitur Does Not Apply

Harris agrees with Wabey that the doctrine of res ipsa loquitur is an evidentiary rule which is applied where the facts and the demands of justice make its application essential. Respondent's Brief pg 8. Harris further agrees that the doctrine of res ipsa loquitur is to be applied in peculiar and exceptional cases where direct evidence of negligence is absent and unavailable. *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). As stated by Wabey in her brief at pg 9 "[t]he 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). Harris submits the instant case requires the application of this doctrine.

For the doctrine to apply, the plaintiff must establish all three of the elements:

“(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) (citations omitted).

**B. Reply to Wabey’s Contention that the Second Element of Exclusive Control Requirement was not met**

Wabey concedes the third element that Harris did not contribute to the accident. Respondent’s Brief pg 10, footnote 5. Nevertheless, Wabey claims that the doctrine does not apply because she did not have exclusive control of the van and the separate wheel. Wabey ignores established case law that the control element of the *res ipsa* doctrine does not necessarily require “actual physical control” but refers instead to the “right of control at the time of the accident.” *Hogland v. Klein*, 49 Wash.2d 216, 219, 298 P.2d 1099 (1956), Instead Wabey argues that she ceded exclusive control when she delivered her vehicle to her mechanic for repairs. Curiously, Wabey has failed to submit any case law to support this theory.<sup>1</sup>

Nevertheless, assuming *arguendo* that such case law actually exists, it would still be inapplicable to this case since there is no evidence of any intervening act in which Wabey gave up exclusive control.

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<sup>1</sup> While Wabey cites *Tuttle v. Allstate Ins. Co.*, 134 Wn.App. 120, 138 P.3d 1107, 1113 (2006) in support of her proposition, that case is so factually dissimilar from the instant case as to be completely distinguishable and inapplicable.

According to Wabey, the only time the wheel in question was removed from her van was in March 2008, by Les Schwab Tires. Respondent's Brief, pg 2. Given that this was more than 7 months prior to the October accident and given that Ms. Wabey drove the van more than 2,000 between March and October 2008<sup>2</sup> the March 2008 service of her wheel by Les Schwab Tires is simply too remote in time to be able to be considered. Wabey's expert never testified that Les Schwab Tires was the cause of Wabey's wheel separation and Wabey has produced no evidence that Les Schwab Tires either over tightened or under tightened the nuts on Wabey's wheel or otherwise did anything wrong.<sup>3</sup> Any assertion by Wabey that Les Schwab Tires is to blame for her wheel coming off is based on speculation and conjecture and cannot be seriously considered. Wabey also failed to present any evidence that any other person or entity serviced, repaired or replaced the wheel in question at any relevant time prior to the accident. Wabey has failed to present any credible evidence to support her claim that she was not in exclusive control of the van at all relevant times prior to the accident, or that the intervening acts of a third person resulted in the wheel coming off her van. Accordingly, Harris submits that she meets the second element.

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<sup>2</sup> See Respondent's Brief pg 11, footnote 1

<sup>3</sup> Despite Wabey's assertions in her brief at pg 11 that "[t]he wheel separated probably due to over tightening or under tightening of the wheel nuts" there simply is no evidence to support this wild speculation.

**C. Reply to Wabey's Contention that the First Element was not met**

Wabey claims that the first element is not met, boldly declaring that the prior holdings of the Washington Supreme Court that a wheel coming off a moving vehicle resulting in injury ordinarily does not happen in the absence of someone's negligence only apply to commercial, and not to private, vehicles. Respondent's Brief pg 15. The cases of *Covey v. Western Tank Lines*, 36 Wn.2d 381, 390, 218 P.2d 322 (1950); *D'Amico v. Conguista*, 24 Wn.2d 674, 684-686, 167 P.2d 157 (1946); *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 P.2d 1016 (1910) do not draw a distinction between commercial and private vehicles and it is inappropriate for Wabey to attempt to now do so.

Wabey also attempts to garner support for her novel proposition by citing this court to cases from remote jurisdictions involving metal fatigue. Respondent's Brief pgs 16-18. Wabey failed to present any credible evidence of mechanical wear or metal fatigue, other than unsupported speculation by her expert witness. While it may be possible for wheel lug nuts to fail for reasons of wear and tear unrelated to negligence, there is simply no evidence of such in this action and this court cannot rely upon Wabey's unsupported speculations. Given that the established case law on this issue, Harris submits that she meets the first element that wheels

coming off vehicles resulting in injuries normally does not occur in the absence of negligence.

## II. CONCLUSION

Harris submits that she has met all of the required elements of res ipsa loquitur and further submits that the doctrine should apply in this matter. For each of the foregoing reasons, and in the interest of justice, Mrs. Harris respectfully requests that this Court reverse the order granting summary judgment and remand this matter back to the King County Superior Court for a trial.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of January, 2012.

Law Offices of Larry L. Whyte, PLLC

Attorneys for Appellant

By   
Larry L. Whyte  
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**CERTIFICATE OF SERVICE**

The undersigned certified under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

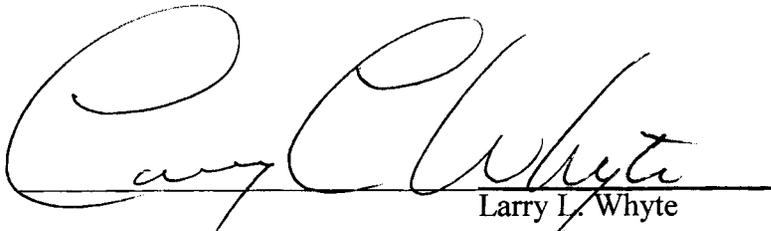
On the date given below I caused to be served in the manner noted a copy of the attached document(s) on counsel below:

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