

67237-1

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NO. 67237-1-I

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

MARYANN HARRIS,

Appellant,

v.

SUSAN WABEY, et al.,

Respondent.

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
III. STATEMENT OF THE CASE	3
IV. SUMMARY OF ARGUMENT	5
V. ARGUMENT	6
A. Standard of Review	6
B. Disputed Facts Preclude Summary Judgment	7
C. Driver's Responsibility	8
D. Res Ipsa Loquitur Applies Here	9
E. Washington Res Ipsa Cases Apply to All Vehicles	13
F. Counter Expert Testimony is Not Required	14
VI. CONCLUSION	15

TABLE OF CONTENTS

STATE CASES	PAGE(S)
<i>Covey v. Western Tank Lines</i> , 36 Wn.2d 381, 390, 218 P.2d 322 (1950)	11,12,13
<i>Curtis v. Lein</i> , 169 Wn.2d 884, 239 P.3d 1078 (2010)	6
<i>D'Amico v. Conguista</i> , 24 Wn.2d 674, 684-686, 167 P.2d 157 (1946)	11,12,13
<i>Graaf v. Vulcan Iron Works</i> , 59 Wash. 325, 109 P.2d 1016 (1910)	11
<i>Hogland v. Klein</i> , 49 Wash.2d 216, 219, 298 P.2d 1099 (1956)	10
<i>Korlund v. DynDorp Tri-Cities Servs. Inc.</i> , 156 Wn.2d 168, 125 P.2d 119 (2005)	6,7
<i>Martini v. State</i> , 121 Wn.App. 150, 160, 89 P.3d 250 (2004)	8
<i>Morner v. Union P. R.R. Co.</i> , 31 Wash.2d 282, 293, 196 P.2d 744 (1948)	9
<i>Pacheco v. Ames</i> , 149 Wn.2d 431, 436, 69 P.3d 324 (2003)	6, 10
<i>Peterson v. Seattle Auto</i> , 149 Wash. 648, 271 P. 1001 (1928)	8
<i>Ripley v. Lanzer</i> , 152 Wn.App. 296, 215 P.3d 1010 (Div. 1 2009)	14

<i>State v. Gonzales Flores</i> , 164 Wn.2d 1, 10, 186 P.3d 1038 (2008)	6
<i>Tinder v. Nordstrom, Inc.</i> , 84 Wn.App. 787, 792, 929 P.2d 1209 (1997)	9
<i>Zukowsky v. Brown</i> , 79 Wash.2d 586, 600, 488 P.2d 269 (1971)	9
STATE STATUTES	
RCW 46.61.655	8
RULES	
CR 56	6,7,9
ER 601-602, 701	7
OTHER AUTHORITIES	
W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 243 (5th ed.1984)	9

I. INTRODUCTION

On October 16, 2008 Respondent Susan Wabey (Ms. Wabey) was driving her 1990 Ford van northbound on I-5 near mile post 173 in the Northgate area when the left front wheel and tire flew off her van striking the windshield of a 2003 Hyundai sedan traveling southbound on I-5, injuring its driver Appellant MaryAnn Harris (Mrs. Harris). CKS PPRS pgs 143 & 174. On March 22, 2011 Ms. Wabey filed a motion for summary judgment arguing that she was not negligent since she had no warning that the wheel and tire were coming off her vehicle and that the wheel and tire came off due to a latent defect. CKS PPRS pgs 198-208. Declarations opposing Ms. Wabey's Motion were filed creating disputed issues of material fact. CKS PPRS pgs 173-184. In addition, Mrs. Harris presented argument to the court that the doctrine of *res ipsa loquitur*, which established a *prima facie* case of negligence, precluded summary judgment as a matter of law. CKS PPRS pgs 185-187, #EF72 pgs 2-14. Ms. Wabey's motion for summary judgment was heard on April 22, 2011 by Judge Palmer Robinson, King County Superior Court Judge, who subsequently granted Ms. Wabey's motion for summary judgment. CKS PPRS pgs 227-228. On May 6, 2011 Mrs. Harris filed a Motion for Reconsideration, arguing that the court's decision was contrary to the law, that the correct law had not been applied or followed and that substantial

justice had not been done. CKS PPRS pgs 190-197. Mrs. Harris' motion for reconsideration was denied. CKS PPRS pg 224.

In this appeal, Mrs. Harris asks that the Court of Appeals reverse Judge Robinson's decision and remand this matter back to the King County Superior Court for trial

II. ASSIGNMENTS OF ERROR

Assignments of Error.

1. The trial court erred by entering summary judgment in favor of Ms. Wabey.

Issues Pertaining to Assignments of Error.

1. Were there material issues of fact in dispute that preclude the granting of summary judgment in favor of Ms. Wabey when the evidence is viewed most favorably to Mrs. Harris?

2. Did the court err in failing to strike the improper declarations and/or portions thereof of Ms. Wabey, her expert Mr. Schaefer and/or her mechanic Mr. Ives?

3. Does the doctrine of res ipsa loquitur apply here so as to establish a prima facie case of negligence, thus precluding summary judgment as a matter of law?

4. Is Ms. Wabey entitled to summary judgment as a matter of law?

5. Did the trial court properly apply the law in entering summary judgment in favor of Ms. Wabey?

III. STATEMENT OF THE CASE

On October 16, 2008 Ms. Wabey was driving her 1990 Ford van northbound on I-5 near mile post 173 in the Northgate area of Seattle, when the left front wheel and tire flew off her van striking the windshield of a 2003 Hyundai sedan traveling southbound on I-5 and injuring its driver, Mrs. Harris. CKS PPRS pgs 143 & 174.

Ms. Wabey filed her first motion for summary judgment on November 4, 2010, which she then withdrew at the time of the hearing on December 1, 2010. Thereafter, Ms. Wabey filed her second motion for summary judgment on March 22, 2011, arguing that she was not negligent since she had no notice that the wheel to come off her van and that the wheel and tire came off due to a latent defect. CKS PPRS pgs 1-172, 198-208 Mrs. Harris filed her response to Ms. Wabey's motion, as well as a motion to strike the declarations of Ms. Wabey, her expert Mr. Schaefer and/or her mechanic Mr. Ives. Thereafter, Ms. Wabey moved to strike the declaration of Mrs. Harris. CKS PPRS pgs 173-189.

The hearing on Ms. Wabey's motion for summary judgment, CKS PPRS pgs 1-172, 198-208, on Mrs. Harris' memorandum in opposition and motion to strike, CKS PPRS pgs 173-189, and on Ms. Wabey's

motion to strike, CKS PPRS 209-212, was held on April 22, 2011. At the hearing, Mrs. Harris, through her counsel, argued, among other things, that:

- 1) Owners and drivers of vehicles are charged with notice of anything that reasonable inspection, including defects, would disclose (#EF72 pg 2);
- 2) The doctrine of res ipsa loquitur precluded summary judgment (#EF72 pgs 3-8);
- 3) All of the lug bolts securing Ms. Wabey's wheel to the van were sheared and/or broken off, and there is uncertainty as to why this occurred (#EF72 pgs 5, 17);
- 4) Several months prior to the accident, Ms. Wabey took the van to a tire store to fix a loose wheel. Invoice No. 658405 attached to Ms. Wabey's declaration indicates that the wheel tightened was wheel 1, which Ms. Wabey's expert Mr. Schaefer testified normally meant the left (driver) front wheel. Nevertheless, Ms. Wabey wrote sometime later on invoice No. 658405 "pass rear" meaning the rear passenger wheel. (#EF72 pgs 9-10, CKS PPRS pg 146);
- 5) Ms. Wabey's van had custom wheels with exposed lug nuts (#EF72 pgs 9-10, CKS PPRS pgs 169-170)

- 6) That after getting her wheel re-tightened, Ms. Wabey testified that she walked around and visually inspected the van and its wheels and tires before driving. (#EF72 pg 10);
- 7) That Ms. Wabey and her witnesses Mr. Ives and Mr. Schaefer are not competent to testify and their declarations should be stricken (#EF72 pgs 15-19, CKS PPRS 176-179); and
- 8) Ms. Wabey presented no evidence of a latent defect (#EF72 pgs 17-18, CKS PPRS 184-185

On April 26, 2011 Judge Robinson executed an order granting Ms. Wabey's motion for summary judgment and denying Ms. Wabey's motion to strike Mrs. Harris' declaration. CKS PPRS 225-228. Mrs. Harris then filed a motion for reconsideration asserting that the order granting summary judgment was contrary to established law and/or that Judge Robinson had misapplied the law and that substantial justice had not been done. Mrs. Harris timely filed and served her notice of appeal on June 2, 2011. CKS PPRS 190-197.

VI. SUMMARY OF ARGUMENT

The court erred in considering improper declarations submitted by Ms. Wabey. In entering summary judgment against Mrs. Harris, Judge Robinson improperly found there to be no material facts in dispute, when in fact several material issues of fact are in dispute as documented in Mrs.

Harris' Memorandum in Opposition. CKS PPRS 179-182. More importantly, Judge Robinson failed to follow the law, and/or failed to properly apply the law to the facts and circumstances of this case.

Specifically Judge Robinson failed to apply the doctrine of *res ipsa loquitur* to this matter, although Mrs. Harris meets all of the elements for this doctrine to apply. Had Judge Robinson correctly followed and/or applied the doctrine of *res ipsa loquitur*, an inference of negligence would exist, resulting in the denial of Ms. Wabey's motion for summary judgment.

V. ARGUMENT

A. Standard of Review

This Court reviews a grant of summary judgment *de novo*. *Korlund v. DynCorp Tri-Cities Servs. Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Whether *res ipsa loquitur* applies in a given context is a question of law. *Curtis v. Lein*, 169 Wn.2d 884, 239 P.3d 1078 (2010) citing *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). Questions of law are given no deference, but are subject to *de novo* review. *State v. Gonzales Flores*, 164 Wn.2d 1, 10, 186 P.3d 1038 (2008).

Summary judgment is only proper if there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a

matter of law. CR 56, *Korslund*, 156 Wn.2d at 177. Facts and reasonable inferences there from are viewed in a light most favorable to the nonmoving party. *Korslund*, 156 Wn.2d at 177. Summary Judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Korslund*, 156 Wn.2d at 177.

B. Disputed Facts Preclude Summary Judgment

There are disputed issues of fact raised by Mrs. Harris' declaration. Furthermore, the declarations of Ms. Wabey, her expert Mr. Schaefer and/or her Mechanic Mr. Ives contain improper legal conclusions and/or are otherwise objectionable and fail to comply with the rules of evidence. See ER 601-602, 701. Nevertheless, Judge Robinson relied upon the offending declarations and/or applicable portions thereof. With the offending portions of the declarations appropriately stricken, no material issues of fact exist upon which Ms. Wabey is entitled to summary judgment.

However, even with the improper and offending declarations, it cannot be said when viewing the facts most favorable to Mrs. Harris that there are no material issues of fact in dispute or that reasonable minds could reach only one conclusion. CR 56, *Korslund*, 156 Wn.2d at 177.

Ms. Wabey does not meet the standard of CR 56, and summary judgment in her favor is improper and contrary to established law. *See, Korslund*, 156 Wn.2d at 177; CR 56.

C. Driver's Responsibility

Drivers in Washington owe a duty of care to other nearby drivers. *Martini v. State*, 121 Wn.App. 150, 160, 89 P.3d 250 (2004). It has long been held that drivers and owners of vehicles are charged with notice of anything that reasonable inspection, including defects, would disclose. *Peterson v. Seattle Auto*, 149 Wash. 648, 271 P. 1001 (2008). More recently, the Washington Legislature has increased driver responsibility for anything that comes off of, falls or escapes from a moving vehicle. RCW 46.61.655. It is undisputed that this accident occurred because Ms. Wabey's wheel and tire came flew off her 18-year-old van and struck Ms. Harris' vehicle injuring Mrs. Harris. Ms. Wabey seeks to excuse herself from this duty, claiming she had no notice that the wheel would fly off and thus could not be negligent. However, this reasoning clearly ignores the doctrine of *res ipsa loquitur* which has allowed negligence to be inferred in similar cases. Since the question of negligence persists, it cannot be said that Ms. Wabey is entitled to summary judgment as a matter of law. And,

because the question of negligence persists, Judge Robinson's order granting summary judgment is improper and must be reversed.

D. Res Ipsa Loquitur Applies Here.

Under CR 56, summary judgment is only appropriate if there are no material issues of fact in dispute and the moving party is entitled to judgment as a matter of law. Since the doctrine of res ipsa loquitur applies here, thus establishing an inference of negligence, Ms. Wabey is not entitled to judgment as a matter of law.

Res ipsa loquitur means "the thing speaks for itself." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 243 (5th ed.1984). While it generally provides nothing more than a "permissive inference" of negligence. *Zukowsky v. Brown*, 79 Wash.2d 586, 600, 488 P.2d 269 (1971), res ipsa loquitur is applied in peculiar and exceptional cases where the facts and the demands of justice make its application essential. *See, Tinder v. Nordstrom, Inc.*, 84 Wn.App. 787, 792, 929 P.2d 1209 (1997) (quoting *Morner v. Union P. R.R. Co.*, 31 Wash.2d 282, 293, 196 P.2d 744 (1948)). Mrs. Harris submits that the doctrine of res ipsa loquitur squarely applies to this action as a matter of law.

The doctrine of *res ipsa loquitur* spares the plaintiff the requirement of proving specific acts of negligence in cases where the evidence shows that:

“(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).

In the present action it is undisputed that the injury-causing accident or occurrence was not due in any way to any voluntary action or contribution by Mrs. Harris. In fact, Ms. Wabey agrees that Mrs. Harris did not contribute to the accident in any way. Thus, the third element of the *res ipsa* doctrine is satisfied.

It is also undisputed that Ms. Wabey was in the exclusive control of her vehicle at the time of the accident, thus satisfying the second element. The Washington Supreme Court has already concluded 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). It is undisputed that Ms. Wabey was not only in actual

physical control, but that she also had the right of control, of her vehicle at the time of the accident.

With the last two elements of the res ipsa doctrine satisfied, the only remaining issue is whether the first element is satisfied. Again, we look for guidance to the Washington Supreme Court, which has already found that a wheel coming off a moving vehicle resulting in an injury ordinarily does not happen in the absence of someone's negligence. *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). Accordingly, the Mrs. Harris also meets the first element. Having met all three elements of the res ipsa doctrine, a presumption of negligence exists in this case which precludes the granting of summary judgment in favor of Ms. Wabey as a matter of law.

A close examination of these Washington cases reveals the striking similarity to the facts of the instant appeal. In *D'Amico v. Conguista*, 24 Wn.2d 674, 684-686, 167 P.2d 157 (1946), a wheel came off a truck striking and killing a pedestrian. In that case, an action was brought based upon the doctrine of res ipsa loquitur. On appeal, the Washington Supreme Court held that a jury instruction on the doctrine of res ipsa loquitur was

proper. The *D'Amico* court specifically affirmed the doctrine of res ipsa loquitur by holding:

“When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen, if those who have the management use proper care, it affords a reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.” *D'Amico*, 24 Wn.2d at 685 (citations omitted)

In addition, the *D'Amico* court also addressed the issue of inspection, finding that proof of regular inspection “still leaves the question of negligence for the jury.” *D'Amico*, 24 Wn.2d at 685 (citations omitted). The facts of the instant appeal are squarely on point with those in *D'Amico*. Accordingly, the *D'Amico* decision should govern this matter.

Four years after *D'Amico*, the Washington Supreme Court was again presented with a case involving a wheel coming off a semi tractor trailer and the doctrine of res ipsa loquitur. *Covey v. Western Tank Lines*, 36 Wn.2d 381, 218 P.2d 322 (1950). In that case the Court again found the doctrine of res ipsa loquitur was appropriately applied “where a wheel becomes disengaged from a moving vehicle. *Covey*, 36 Wn.2d at 390 (citations omitted). In *Covey*, just as in the instant action, the lug nuts or bolts sheared off resulting in the wheel becoming disengaged. Just as in this case, the evidence in *Covey* was in conflict as to how or why the lug bolts sheared off. Accordingly, the court held that it was an entirely proper

matter for the jury and for a proper jury instruction on the doctrine of res ipsa loquitur to be given. *Id.* At 391. Applying these cases to the instant action clearly demonstrates the court erred in failing to apply the doctrine of res ipsa loquitur and that granting summary judgment is contrary to established law.

E. Washington Res Ipsa Cases Apply to All Vehicles

Judge Robinson was reluctant to apply these res ipsa cases to the facts of the instant action, attempting to distinguish those cases from the instant one on the grounds those cases dealt with commercial, as opposed to passenger, vehicles. The *D'Amico* and *Covey* cases applied the doctrine of res ipsa loquitur to cases in which an innocent party is injured when a wheel and tire come off a moving vehicle. They did not distinguish between commercial and passenger vehicles. The facts of the instant case is on all fours with these cases, and there is nothing in these cases that would limit the application of res ipsa loquitur to cases in which wheels and tires come off commercial vehicles. Rather, *D'Amico* and *Covey* both clearly establish the standard for the application of the res ipsa doctrine in any circumstance where an innocent person is injured by a wheel and tire that has come off a moving vehicle. Furthermore, it would be an untenable task to try to parse the doctrine of res ipsa loquitur depending upon which type of vehicle the wheel and tire came from. Such an

approach would not only violate established precedent, it would also result in the law not being applied uniformly. Accordingly, these cases should apply and govern the instant action. And, when these cases are applied to the instant action, it is clear that an inference of negligence exists in the instant action, precluding summary judgment in favor of Ms. Wabey as a matter of law. Judge Robinson erred in her failure to apply the doctrine of res ipsa loquitur or to apply it correctly, requiring reversal of the order granting summary judgment.

F. Counter Expert Testimony is Not Required

In the recent case of *Ripley v. Lanzer*, 152 Wn.App. 296, 215 P.3d 1010 (Div. 1 2009), this Court reversed an order of summary judgment finding that under the doctrine of res ipsa loquitur the plaintiff was not required to provide expert testimony in response to a motion for summary judgment. Just as in this case, the moving party in *Ripley* obtained summary judgment on the strength of its expert's testimony. In *Ripley* this Court followed the long-established doctrine of res ipsa loquitur and found that summary judgment was improper where the plaintiffs had met all three elements of the doctrine, regardless of whether the plaintiff's motion was based on expert testimony. *Id.* At 1031. Again, Judge Robinson was reluctant to follow the *Ripley* holding since it involved medical malpractice and not wheels coming off trucks. Mrs. Harris submits that

regardless of the underlying facts, the Ripley case applies to the instant action. Having met all three (3) elements of the res ipsa loquitur doctrine, Mrs. Harris is entitled, as a matter of law “permissive inference” of negligence, thus precluding summary judgment.

VI. CONCLUSION

For each of the foregoing reasons, 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 14th day of November, 2011.

Law Offices of Larry L. Whyte, PLLC

Attorneys for Appellant

By 
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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.

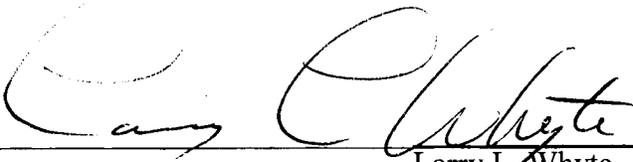
On the date given below I caused to be served in the manner noted a copy of the attached document(s) on counsel below:

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DATED at Bainbridge Island, Washington this 14th day of November, 2011.



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