No. 83307-9

MADSEN, C.J. (concurring)—As the majority states, the doctrine of res ipsa loquitur is a rule of evidence. "A circumstance necessary to its application is that the injured party, from the nature of the case, is not in a position to explain the cause, while the party charged is in a position where he is, or if he has exercised reasonable care should be, able to explain and show himself free from negligence." *Penson v. Inland Empire Paper Co*., 73 Wash. 338, 346, 132 P. 39 (1913). The plaintiff in *Penson* was a painter who was injured in a fall when the timber broke in the scaffolding erected by the defendant. The court affirmed application of the doctrine in that case because, in part, the plaintiff was so injured that he could not inspect the board after the accident and the defendant did not produce the board or any evidence as to its condition. *Id*.

Similar to the plaintiff in *Penson*, the plaintiff here was injured when a timber broke in a dock owned and maintained by the defendants. I agree with the majority that the doctrine should be applied in this case, as it was in *Penson*, to relieve Curtis from

establishing whether the defect in the dock was discoverable because the Leins ordered the dock removed, depriving Curtis of evidence with which to meet her burden.

I write because the majority appears to attach no significance to the fact that Jack and Claire Lein had the dock removed. But for the removal of the dock, I would not agree that the doctrine should apply to shift the burden of establishing whether the defect in the dock was discoverable.

AUTHOR:

Chief Justice Barbara A. Madsen

WE CONCUR:

Justice James M. Johnson