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## **I. ASSIGNMENTS OF ERROR**

No. 1. The trial court erred when it entered an Order on January 11, 2007 granting Respondent Rayna Mattson's motion for partial summary judgment on liability.

No. 2. The trial court abused its discretion when it excluded testimony of Bernd Stadtherr at trial on February 20, 2008.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court commit error when it concluded American Petroleum Environmental Services, Inc.'s ("APES") was negligent as a matter of law when material issues of fact remain regarding APES's negligence and the proximate cause of this accident? (Assignment of Error No. 1.)

2. Did the trial court commit error when it determined at summary judgment that APES was negligent under the doctrine of res ipsa loquitur? (Assignment of Error No. 1.)

3. Did the trial court abuse its discretion in excluding trial testimony of the truck driver, Bernd Stadtherr, regarding his pre-trip inspection and maintenance of the truck, where APES was prejudiced at trial by the ruling? (Assignment of Error No. 2.)

### III. STATEMENT OF THE CASE

#### A. Statement of Facts

On July 21, 2003, Respondent Rayna Mattson ("Mattson") drove her Ford Explorer on the I-5 northbound ramp at 320<sup>th</sup> Avenue in Federal Way when she lost control of her vehicle, ran off the road, and rolled her SUV several times. (CP 6) Mattson alleges that the accident was caused by oil dropped on the roadway from a loose hose on an empty tanker truck driven by Bernd Stadtherr ("Stadtherr") and owned by APES. (CP 6.) Mattson claims a cervical strain or whiplash injury as a result of the accident. (RP 235, ll. 14-15; RP 284, ll. 6-13.)

APES is in the business of transporting waste oil products from filling and service stations and other businesses to a reprocessing plant where the oil is recycled for reuse. (CP 402.) Stadtherr has worked as a professional truck driver/sales representative for the company since 2003, and has been employed as a driver since 2001. (CP 391, ll. 7-23; CP 392.)

On July 21, 2003, the day of the accident, Stadtherr started work between 1:00 p.m. and 2:00 p.m. (CP 393, ll. 16.) Stadtherr arrived at work 15-20 minutes before departing. (CP 393, ll. 24.) He noted the exact time in the driving log he keeps per Department of Transportation (DOT) regulations. (CP 393, ll. 3-25.) On the day of the accident, he was

driving an empty truck to Canada to pick up a load of used oil and return it to the reprocessing plant. (CP 394, p. 21, ll. 3-11; CP 397, p. 30, ll. 18-21.) He is required to conduct both a pre-trip and post-trip inspection of the truck to make sure the whole truck is in good working order. (CP 393, p. 16, ll. 9 -25, p. 17, ll. 1-11.). He did perform the inspections. (CP 395.)

The truck is a tanker truck tanker-trailer combination. (CP 397, p. 30, ll. 13.) The hoses on the back of the truck are stored lengthwise in a tube running the length of the tanker, and the ends of the hose are secured to the back of the truck using rubber straps with hooks, referred to as "tie-downs". (CP 395, p. 23-24.) The hose is secured to the tanker at four points using rubber straps secured by hooks. (CP 395, p. 23-24.) The hose itself is nylon and has steel wiring running through the hose material. (CP 399, p. 51, ll. 1-3.)

Stadtherr specifically recalls inspecting the tie-downs to make certain the hose ends were secure on the day of the accident. (CP 395, p. 24- p. 25 ll. 1-3.) He recalls specifically marking it off on his pretrip checklist that the tie-downs were okay. (CP 395, p. 25, ll. 4-6.) If the tie-down was fatigued, he would not have been able to detect fatigue with visual inspection. (CP 395, p.25, ll.7-15; CP 405.) The visual inspection showed no problems with the tie-downs. (CP 395, p. 25, ll. 4-6.)

After his pretrip inspection, Stadtherr left for Canada on northbound Interstate 5 to pick up a load of oil. (CP 393.) It is his normal practice to look in his rearview mirror every 15 to 20 seconds. (CP 397, p. 32, ll. 18-25.) As he approached Federal Way on northbound I-5, four miles from the APES plant where he just left, Stadtherr noticed in his mirror that a hose was dragging on the ground behind him. (CP 394, p. 21, ll. 21-24; CP 397, p. 30, ll. 22 to p. 31, ll. 1.) He saw the hose end dragging near the trailer of his truck by the rear duals. (CP 397, p. 33, ll. 1-9.) He immediately crossed back across lane one, the on ramp lane, and then pulled to the shoulder. (CP 399, p. 51, ll. 17 to p. 53 ll. 15; CP 400, p. 55 ll. 3-17.)

Stadtherr inspected the truck and discovered that one of the tie-downs had ruptured causing one of the suction hoses to come out of the stow tube and drag behind the truck. (CP 395, p. 23, ll. 6-12; CP 398, p. 36 ll. 2-17.) While he was pulled over on the shoulder, a state trooper pulled up and informed him of the accident. (CP 394, p. 21, ll. 25 to p. 22 ll. 15.) Stadtherr testified that he saw no oil on the roadway or on the ramp after the accident. (CP 398, p. 34, ll. 1-2.)

Mike Mazza, the principal stockholder and chief executive officer of APES, was called to the accident scene immediately after the accident.

(CP 404.) Mazza examined the highway and the on-ramp behind the truck and did not see any oil on the road surface. (CP 405.) Mazza did not observe any "oil spill" clean-up effort before the roadway reopened traffic. (CP 405.) To the knowledge of APES, no Department of Transportation trucks were on the scene, and no oil absorption material was put on the road surface. (CP 405.)

Other than a flat tire, Stadtherr has never encountered any other problems with his truck while driving. (CP 397, p. 30 ll. 10 to p. 31 ll. 15.) The driver has never had a hose come loose before or since this incident. (CP 300, p. 52, ll. 8-11.) None of APES's thirteen trucks have ever had a tie-down rupture and a hose come loose, except for this incident. (CP 404.)

There are two levels of service for the trucks. (CP 403.) APES trucks are certified and inspected once per year by the Department of Transportation. (CP 403.) APES services the trucks with Western Peterbilt in Fife, Washington every 6,000 miles. (CP 403.) The trailers are serviced every time the truck is serviced. (CP 403.)

#### **B. Procedural History**

On December 14, 2007, APES filed a motion for summary judgment arguing that Mattson's case should be dismissed as a matter of

law because there was no evidence APES was negligent or that any negligence was the proximate cause of the hose coming loose on the empty tanker truck. (CP 408-415.) Mattson filed a brief in opposition to that motion. (CP 446 – 456.) On December 24, 2007, Mattson filed a motion for summary judgment arguing APES was the sole proximate cause of Mattson's injuries as a result of the July 21, 2003 automobile accident as a matter of law. (CP 133-156.) APES filed a brief in opposition to that motion. (CP 473-479; CP 494-498.) The parties argued the motions for summary judgment at hearing before Honorable John R. Hickman on January 11, 2008 (RP 1-6.).

Honorable John R. Hickman granted Mattson's motion for summary judgment finding that APES was liable "based on common law negligence." The Order Granting Plaintiff's Motion for Partial Summary Judgment Re: Liability and Lack of Comparative/Contributory Fault stated in part:

[T]his Order on Partial Summary Judgment shall be and is hereby entered in favor of the Plaintiff and against Defendants finding Defendants are jointly and severally **liable for the subject automobile collision based on common law negligence**, and all injuries proximately caused to the Plaintiff as a result of said collision. . .

(CP 517 (Emphasis added).) The trial court also found "Plaintiff was not contributorily or comparatively negligent in the automobile collision . . .

therefore this matter shall proceed to trial solely on the issue of the nature and extent of the damages proximately caused to the Plaintiff as a result of the Defendants' negligence." (CP 517.)

The trial court's January 11, 2008 oral ruling granting Mattson's summary judgment motion stated "[t]his court focused primarily on the issue of common law negligence and the issue of res ipsa loquitur. The issue is whether or not there is a material issue of fact as to any one of these elements." (RP 3.)

The trial court further stated in its oral ruling granting summary judgment for Mattson:

The response of the defendant appears to be 'We didn't see it coming.' Or in the alternative, 'There was nothing we could do other than make an inspection and that inspection was sufficient.'

I don't believe those are adequate excuses or defenses that raise a material issue of fact under the facts of this particular case.

(RP 4.) The trial court found that all the elements of common law negligence were present and there was no genuine issue of material fact that APES negligently secured the hoses. (RP 5.) The trial court also found no dispute in regards to the reasonableness of the medical costs, lost

wages, and other special damages alleged by Mattson, and awarded special damages to Mattson. (RP 5; CP 519 -521.)

The case was tried to a 12-person jury on February 20, 2008, in Pierce County, Honorable John R. Hickman presiding. The only issues which proceeded to trial were Mattson's future medical expenses, future economic damages and noneconomic damages for alleged injuries caused by the accident. (RP 720; CP 517.) The jury returned a verdict in favor of Mattson in the amount of \$547,665.40. (CP 985.) Mattson was awarded \$10,000 for future chiropractic care; \$132,000 for future economic damages; and noneconomic damages in the amount of \$265,000. (RP 720.) Final judgment was entered on March 7, 2008. (CP 1024 -1026.) APES timely filed a notice of appeal. (CP 1033-1038.)

#### **IV. ARGUMENT**

##### **A. Standard of Review**

A trial court's granting of a motion for summary judgment is reviewed de novo considering the facts in the light most favorable to the nonmoving party. Tinder v. Nordstrom, 84 Wn. App. 787, 791, 929 P.2d 1209 (1997). Summary judgment is only appropriate when “there is no

genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” CR 56(c).

**B. The Trial Court Improperly Found APES Negligent As A Matter of Law.**

Proof of negligence requires that the defendant owe a duty to the plaintiff, that the defendant breach that duty, and that the breach is the proximate cause of injuries to the plaintiff. Hertog v. City of Seattle, 138 Wash.2d 265, 275, 979 P.2d 400 (1999). Even where negligence is clear, proximate cause is still a jury question unless the facts and inferences concerning proximate cause are not subject to dispute. Van Cleve v. Betts, 16 Wn. App. 748, 751, 559 P.2d 1006 (1977).

**1. Issues Of Fact On Whether APES Breached Its Duty of Care Preclude Summary Judgment.**

A driver on the public highways of Washington is required to exercise ordinary care to avoid placing others in danger. The driver is thus required to exercise a degree of care that a reasonably prudent person would have exercised under the same or similar circumstances. Robinson v. Simard, 57 Wn.2d 850, 360 P.2d 153 (1961). When viewing the facts in the light most favorable to APES on summary judgment, Mattson failed to establish that there was no dispute of material fact that Stadtherr knew or

should have known the tie-down would rupture and of the reasonable likelihood the rupture would cause injury. See Nawrocki v. Cole, 41 Wn.2d 474, 478, 249 P.2d 969 (1952) (reversing jury verdict based on lack of evidence that driver defendant was on notice of mechanical defect of vehicle prior to automobile collision.)

Mattson presented no evidence, including any expert testimony or other evidence, establishing that APES failed to properly maintain the truck, secure the hose, or that APES committed some act which would result in the tie-down rupturing. (CP 446 -456; CP 45-129.) The driver or APES were not on notice that the hose would come loose; there is no evidence suggesting APES should have fixed the tie-down before this accident; or that APES's maintenance of this truck and its mechanical parts, including the tie-down, was negligent. The hose was secured to the tanker at four points using rubber straps secured by hooks, and then placed in a metal tube. (CP 405.) This is a safe and secure method of tying the hose down and exceeds industry standards for securing the hose. (CP 405.)

Nevertheless, based only on the fact that the hose came loose while Standtherr was driving on a highway, the trial court imposed liability against APES. The trial court ruled that the pre-trip inspection was not an

"adequate excuse" or defense to raise a material issue of fact. (RP 4.) But what "negligence" had Mattson shown that required an "excuse"?

During trial, the jury submitted written questions to Stadtherr:

Juror No. 1: to Bernd Stadtherr: Was a D.O.T. inspection performed before you took off and how long did it take? (CP 841.)

Juror No. 4 to Bernd Stadtherr: Did you do a pre-maintain [sic] look over of the truck before you started the day? (CP 845.)

Juror No. 8 to Bernd Stadtherr: Who connects the hose that came loose? Was it already connected when you picked up the truck? (CP 849.)

Juror No. 10 to Bernd Stadtherr: How did hose get loose? (CP 853.)

The trial court refused to allow the jury questions on the basis that liability had been determined at summary judgment. (RP 225.) The answers to each of these material fact questions were in the declarations and deposition testimony before the court on the motions for summary judgment. (CP 402-407; CP 387-400.)

Regarding testing of the trucks by DOT asked by Juror No. 1, Mazza's declaration before the court at summary judgment stated:

[T]here are two levels of service for the trucks. Our trucks have to be inspected and certified once per year by the Department of Transportation. When I have the trucks serviced, I always opt for a more expensive, full service of the truck, so that when it leaves Western Peterbilt is it certified to pass a DOT inspection. I also have the trailers

serviced every time the truck is serviced, even though industry standard is to service the truck once yearly.

(CP 403.)

Regarding Juror No. 4's question, Standtherr, the driver, testified in his deposition that he conducted a pretrip inspection of the truck:

Q. And when you arrived at American Petroleum, tell me what you do. What was the procedure before you got in the truck?

A. Pre-trip to truck, which involves checking everything; that is, to check oil, tires, the whole truck, inspect the truck . . .that everything is functioning and working . . .

Q. Do you recall specifically looking at that [tie-down latches] before you left that day?

A. Yes.

Q. Do you recall specifically marking it off on that day that it was okay?

A. Yes.

.....

Q. [W]hen you signed off on the pre-trip inspection report, you didn't have any concerns or questions that there was a problem with the hose or the tie-downs or any component?

A. Correct.

(CP 393, p. 16, ll. 9-14; CP p. 395, ll. 24-25)

Regarding the question by juror No. 10, at summary judgment, the driver also explained how the hose came loose:

The hoses are secured on four points on the truck, and one of those tie-downs actually ruptured . . . which allowed the hose to come out of the hose compartment partially, and it [the hose] got caught in the tires and ripped apart.

(CP 395, p. 23, ll. 6-12; CP 398, p. 36 ll. 2-17.)

Mattson provided no evidence to refute any of the above facts presented by APES at summary judgment. (CP 446 -456; CP 45-129.)

The sufficiency of inspection of the truck by APES employees is a fact question. Stadtherr should have been allowed to testify at trial that he performed full inspection of his vehicle before leaving the yard to ascertain it was in good working order. He also should have been able to tell the jury that he specifically inspected the tie-downs to see that the hoses were secure. The trial court erred by deciding a fact question on summary judgment.

There are factually similar cases which show the clear error in the court's entry of summary judgment in this case. In Manson v. Foutch-Miller, 38 Wn. App. 898, 691 P.2d 236 (1984), a laborer worked for a contractor who cut holes through the roof and later fell through the holes because the subcontractor defendant did not place the plywood cover on the holes. Id. The Court held, "on these facts reasonable minds could certainly differ as to whether the plywood cover was accidentally displaced or moved, and whether Villwock's measures were sufficient to secure it

against accidental displacement or removal." Id. at 239. Similar to this case, the jury should have heard that the tie-down ruptured and whether APES satisfied its duty of care by its inspections and certifications of the equipment, or somehow breached its duty.

In addition, a court denied plaintiff's summary judgment motion to establish liability in O'Dell v. Ford Motor Co., 2008 U.S. Dist. Lexis 63043 (S.D.Iowa, January 9, 2008), where a fuel leak from a pickup truck caused the truck to become engulfed in fire. The plaintiff truck driver sued Ford Motor Company alleging defects in the truck's fuel system. Id. at \*3. The Court denied summary judgment finding that "the alleged fuel leak could have been caused by any of the several events, including the truck's striking a sharp object, vandalism, or faulty repairs. The leak could have been caused by "lots of other reasons" rather than a defect. Id. at \*27 (court also rejected application of res ipsa loquitur as several events could have intervened to cause the fuel system to leak).

In the instant case, there are other reasons absent APES's negligence, which could have caused the tie-down to rupture on the APES truck. The tie down could have had a latent defect, or could have fatigued or worn out with no evidence of the same apparent to APES. (CP 395, p. 24, ll. 7-8.)

This case involving a ruptured tie-down on a truck is the same as cases involving tire blow outs. In tire blow-out cases, the courts have a longstanding history of not presuming negligence against the driver with the blown out tire. In Wellons v. Wiley, 24 Wn.2d 543, 166 P.2d 852 (1946), the Washington Supreme Court upheld a judgment for defendant driver whose vehicle skidded on a dry road and crashed into a boat. Id. at 544. The driver defendant argued his tire blew out, through no fault of his own, and he lost control of his vehicle and he was unable to prevent the car from colliding with plaintiff's boat. Id. The case proceeded to a bench trial and the trial court dismissed the action finding the accident occurred without fault or negligence of the driver. Id. at 545. The Wellons court upheld the dismissal of the action against the driver stating :

So many elements contribute to the gyrations of an automobile that suffers a blowout, or skids, or goes out of the driver's control, that this court long ago refused to indulge in speculations concerning the causes of admitted results due to the movement of the car. In the case of Eubanks v. Kielsmeier, 171 Wash. 484, 18 P. (2d) 48, we said:

'No one can anticipate what contortions an automobile will go through, or what vagaries it will pursue, when a blowout occurs. It may steer for a telephone pole, or it may seek an embankment or a ditch. The driver is usually, or at least often, powerless. Even though he may err in his immediate action, yet if it be an error of judgment only, he is not to be charged with negligence for that act alone.'

Wellons, 24 Wn.2d at 547 quoting Eubanks v. Kielsmeier, 171 Wn. 484, 18 P. (2d) (1948) overruled on other grounds by Roberts v. Johnson, 91 Wn.2d 182, 188 (1978). Similarly, APES is not presumed negligent simply because the tie-down ruptured. Washington courts have already held that a tire blow-out alone cannot be negligence against a driver, thus it is without logic and contrary to Washington law to apply a different rule of law to a ruptured tie-down causing a hose on a truck to come loose. Id.

This case should be remanded for trial to on the fact question of whether APES breached its duty of care.

**2. The Trial Court Speculated On Summary Judgment That APES and Stradtherr's Breach of A Duty Was The Proximate Cause of This Accident.**

The mere occurrence of an incident and alleged resulting damage does not necessarily lead to an inference of negligence. Marshall v. Bally's Pac West, Inc., 94 Wn. App. 372, 378, 972 P.2d 475 (1999) citing Tinder, 84 Wn. App. 787 at 792-93 (granting summary judgment based on plaintiff's failure to "make a prima facie case of negligence against Nordstrom by alleging specific, nonconclusory facts."). Mattson bears the burden of proving improper maintenance or negligent operation of the

truck proximately caused plaintiff's damages. Kennedy v. Sea-Land Service, Inc., 62 Wn. App. 839, 856-57, 816 P.2d 75 (1991).

Proximate cause consists of cause in fact and legal cause. Bullard v. Bailey, 91 Wn. App. 750, 755, 951 P.2d 1122 (1998). A cause is "proximate" only if it is both a cause in fact and a legal cause. Hartley v. State, 103 Wn.2d 768, 777-81, 698 P.2d 77 (1985). Cause in fact refers to the actual "but for" consequences of the act and requires a direct unbroken sequence between some act and the complained of event. Hertog, 138 Wn.2d at 282-83. "Proximate cause" is grounded in policy determinations about how far the consequences of a defendant's acts should extend. Schooley v. Pinch's Deli Mkt., 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998). "Proximate cause" is distinct from duty. See Hertog, 138 Wn.2d at 275.

The trial court's finding of liability against APES was speculative as there was no expert testimony, or other evidence, provided by Mattson demonstrating what negligent act or omission of APES or Standherr caused the tie-down to rupture. Under Marshall v. Bally's PacWest, Inc., 94 Wn. App. 372, 379, 972 P.2d 475 (1999), proximate cause cannot be established upon on speculation and conjecture. The court in Marshall

granted summary judgment for defendants because plaintiff had no evidence of causation:

In short, Marshall provides no evidence that she was thrown from the machine, what caused her to be thrown from the machine, or how she was injured. Given this failure to produce evidence explaining how the accident occurred, proximate cause cannot be established. Because Marshall did not produce evidence of proximate cause, she failed to produce evidence sufficient to withstand summary judgment.

Id. at 379.

Under Marshall, the trial court in this case erred by granting summary judgment for Mattson absent any evidence of what caused the tie-down to rupture. The APES driver fully inspected the vehicle before leaving the yard, including specifically inspecting the tie-down securing the hose. (CP 395, p.24; p. 25 ll. 1-3.) When driver Standherr left the yard, the hose was secure. (Id.) The mechanism of the hose coming loose is known: the tie-down ruptured. Inspection would not have revealed that the tie-down would rupture anymore than inspection of a tire cannot always provide a warning the tire will blow-out on the road. Also, it is not a common occurrence for a tie-down to break. There is no evidence of improper maintenance, or that the tie-downs were not replaced at regular intervals. Summary judgment is improper under these facts as there is no

evidence linking some act or omission (negligence) of APES to the broken tie-down on the hose.

This case should be remanded for trial to allow the jury to decide whether APES and its driver was the cause in fact of the tie-down rupturing.

**3. The Trial Court Erred In Finding APES Negligent As A Matter of Law Under The Doctrine of Res Ipsa Loquitur.**

In its oral ruling, the trial court applied the doctrine of res ipsa loquitur and found APES negligent as a matter of law for plaintiff's injuries. (RP 3-5.) The trial court found APES liable under res ipsa: "[t]his court focused primarily on the issue of common law negligence and the issue of res ipsa loquitur." (RP 3.) The trial court found that the vehicle was under the exclusive control of APES. (RP 4.) Mattson has not established the elements of res ipsa loquitur. If each of the elements of res ipsa loquitur are not satisfied, no presumption of negligence can be maintained. Tinder, 84 Wn. App. at 792.

The doctrine of res ipsa loquitur is applied only in exceptional cases and is to be used sparingly. Tinder, 84 Wn. App. at 789. Further, for the doctrine of res ipsa loquitur to apply, it must be established 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. Zukowsky v. Brown, 79 Wn.2d 586, 593, 488 P.2d 269 (1971). It is only where the circumstances leave no room for a different presumption that the maxim applies. When it is shown that an accident may have happened as a result of one of two causes, the reason for the rule of res ipsa loquitur fails, and it cannot be invoked. McKinney v. Frodsham, 57 Wn.2d 126, 135, 360 P.2d 576 (1960). If each of the elements of res ipsa loquitur are not satisfied, no presumption of negligence can be maintained. Id.

The first element of res ipsa loquitur is satisfied when one of the three conditions exist:

- (1) when the act causing the injury is so palpably negligent that it may be inferred as a matter of law...
- (2) when the general experience and observation of mankind teach 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.

Zukowsky, 79 Wn.2d at 595 quoting Horner v. N. Pac. Beneficial Ass'n Hospitals, Inc., 62 Wn.2d 351, 359, 382 P.2d 518 (1963).

In an automobile accident, the mere fact it happened is not in and of itself proof of negligence on the part of the driver. Dodge v. Stencil, 48 Wn.2d 619, 296 P.2d 312 (1956)(citations omitted). Res ipsa does not apply in this case because, similar to a tire-blow out, the rupture itself does not fit into the category of an event that does not happen without negligence on the part of the person in control of the vehicle.

As discussed, in order for the doctrine of res ipsa loquitur to apply, it must also be shown that the plaintiff's injuries were caused by an agency or instrumentality within the exclusive control of the defendant. Zukowsky, 79 Wn.2d at 593. In this case, the hose and tie-downs were not in the exclusive control of APES. APES had all of its trucks serviced by Western Peterbilt every 6,000 miles (CP 403.) The maintenance company, Western Peterbilt, could have failed to replace the tie-downs at regular intervals. (CP 403.) Tuttle v. Allstate Ins. Co., 134 Wn. App. 120, 138 P.3d 1107, 1113 (2006) (driver did not have "exclusive control" over a wheel and tire causing motor vehicle accident under res ipsa doctrine "where the wheel and tire may have come off the vehicle because a third-party negligently installed it . . .") Because APES did not have exclusive control over the instrumentality that allegedly caused plaintiff's damages -

-- the fuel hose and tie-down --- the doctrine of res ipsa loquitur cannot be applied in this case.

In addition, the doctrine cannot apply if there is more than one possible cause for the accident. McKinney, 57 Wn.2d at 135. In Tinder, 84 Wn. App. at 929, a patron was shopping and boarded an escalator. The escalator came to a sudden stop and the patron alleged she was injured. The court refused to apply the doctrine of res ipsa loquitur in Tinder stating "mechanical devices, like escalators and elevators, can wear out or break without negligence." Tinder, 84 Wn. App. at 1212. Like the facts in this case, the Court noted that regular maintenance was performed on the escalator six days before the incident. Id.; See also Adams v. Western Host, Inc., 55 Wn. App. 601, 606, 779 P.2d 281 (1989) (court declined to apply res ipsa loquitur doctrine finding another possible cause of a broken shunt was wear or fatigue, and there is no way to anticipate when metal fatigue will cause such a break.)

Similarly, in the instant case, APES trucks run a total of over a million miles a year transporting used motor oil. (CP 404.) The day of the accident, July 21, 2003, is the only time any of the 13 APES trucks has ever had a tie-down rupture while in transit, and the only time a hose has ever come off any of the trucks. (CP 404.) APES had no way of knowing

this specific tie-down would rupture unless it was evident on the visual inspection done by the driver four miles before this accident, which it was not. Mechanical parts break from wear and tear without notice to the operator. APES complied with all vehicle maintenance requirements and regularly inspected this truck and inspected the tie-downs just prior to this accident. (CP 403.)

Further, Washington courts have long held that res ipsa cannot be applied in cases similar to this one involving tire blow outs. For example, in McMillan v. Auto Interurban Company, 127 Wn. 625,627, 221 P. 314 (1923), the Washington Supreme Court held:

[T]he rule of *res ipsa loquitur* does not apply in this case because it was shown that the blow-out of the tire, a known cause, was first in the train of circumstances leading to the accident, and that there was proper selection and inspection of the tire a reasonably short time before the mishap.

Id. at 627; See also Wellons v. Wiley, 24 Wn.2d 543,166 P.2d 852 (1946).

In McMillan, the case proceeded to trial on the question of whether the driver was negligent after the blow-out. Id. at 627.

Another possible cause of the accident has nothing to do with the hose coming loose. Mike Mazza, principal stockholder and chief executive officer of APES, investigated the accident scene and testified that he (1) did not believe the oil leak from the hose would have caused

Mattson's accident because it was such a small amount of oil; (2) there was no oil clean-up and the roadway was reopened without remedial measures; and (3) oil was not visible to Mazza on the highway. (CP 405-406.) Viewing this evidence in a light most favorable to APES, the court cannot find that there was oil on the highway that Mattson's vehicle ran over and that caused her (and only her) vehicle to go out of control.

The trial court erred by finding APES liable and applying the doctrine of res ipsa loquitur when the incident is not negligence per se, there was more than one possible cause for the accident, and the truck was not in the exclusive control of APES. Under the trial court's ruling, a driver whose tire came off of their vehicle for an unexplained reason who then collided with another vehicle on the highway could be held presumptively negligent for a collision under res ipsa loquitur.

At best, Mattson may have been entitled to a res ipsa jury instruction at trial had liability not been decided against APES at summary judgment. APES presented facts material to counter any presumption or inference of negligence and the issue should have been presented to the jury (as is evident from the juror questions) and not resolved by the judge on summary judgment. (CP 395, p. 25, ll. 1-3.).

In McShane v. Cleaver, 247 Cal. App. 2d 260, 267, 55 Cal. Rptr. 427 (1966), the court allowed jury instructions on res ipsa loquitur in a motor vehicle accident caused by a tire blow-out stating that the doctrine is only a rule of circumstantial evidence and, if it is overcome, the plaintiff still has the overall burden of proof of negligence. Id. at 267. Here, APES rebutted the presumption of negligence on summary judgment, thus the trial court erred in holding APES liable under this doctrine.

The elements of res ipsa loquitur are not satisfied, and the trial court's presumption of negligence against APES simply because the tire down ruptured and/or that Mattson had an accident, was error.

#### 4. RCW 46.61.655 Applies to Secure "Loads".

The trial court properly found that APES was not liable under RCW 46.61.655 as a matter of law. (RP 3.) The trial court held in its oral ruling:

I can't say as a matter of law that strict liability is applicable in terms of a summary judgment, nor can I say that as a matter of law that statutory liability is applicable as a matter of law.

(RP 3.)

The secure load statute, at RCW 46.61.552, provides in relevant part:

(1) No vehicle shall be driven or moved on any public highway **unless such vehicle is so constructed or loaded**

**as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom . . .**

(2) No person may operate on any public highway any vehicle with any load unless **the load** . . . is securely fastened to prevent the . . . load from becoming loose, detached or in any manner a hazard to other users of the highway.

RCW 46.61.552 (1) and (2) (Emphasis added). Mattson argued to the trial court that APES's truck carried a "load" under RCW 46.61.552(1) and (2), even though the truck was empty and the alleged leak originated from a broken tie-down line of a hose. (RP 436-437.) APES opposed Mattson's motion with evidence the truck was empty and thus statutory liability under RCW 46.61.552 could not apply (RP 476.) The APES truck was used to carry waste motor oil. (CP 391, p. 8, ll. 17-19; CP 394, p.21, ll. 3-11.) At the time of the accident, however, the truck was not loaded. (CP 397, p. 30, ll. 18-19.) It had no load to secure. (Id.)

The statute has been applied to a truck owner who failed to secure a load of cement blocks on his truck. Skwei v. Mercer Trucking Co., Inc., 115 Wn. App. 144, 61 P.3d 1207 (2003). Likewise, in Ganno v. Lanoga Corporation, 119 Wn. App. 310, 318, 80 P.3d 180 (2003), the court held that it was the driver's duty to secure a beam in a truck hauling the beam and not the seller of the beam who loaded it into the truck. The statute does not apply to an oil leak in a mechanical part of a vehicle. If this were

true, every driver would be cited under this statute any time oil accidentally leaked from a ruptured hose of their vehicles and trucks. The statute narrowly applies to “secure loads”. RCW 46.61.655. The trial court properly held that the statute was inapplicable.

**5. The Transport Of Residual Oil In A Hose Does Not Constitute An Inherently Dangerous Activity.**

Properly, the trial court also rejected Mattson’s claim that the empty tanker truck constituted an inherently dangerous activity. (RP 3.) Under Washington law, strict liability may be imposed where a highly flammable, volatile and explosive substance is carried at a high rate of speed and at dangerous quantities Siegler v. Kuhlman, 81 Wn.2d 448, 502 P.2d 1181 (1972). In Siegler, a tanker truck filled with 3,800 gallons of gasoline in the truck tank and 4,800 gallons of gasoline in the trailer tank was driving on I-5 at 50 miles per hour. Id. at 450. After loading the truck with gasoline, the driver inspected the trailer, checked the lights, the hitch, air hoses and tires. Id. Finding nothing wrong, the driver set out with the fully loaded truck. Id. Shortly thereafter, as the driver was proceeding down an off ramp, the trailer came loose, slid through a fence and came to rest on a roadway below, spilling gasoline. Id. at 451. Carol House came along on the roadway below and drove over the spilled

gasoline, which exploded and killed her. Id. at 450. The reason the trailer came loose was never ascertained, and there was evidence that if it came loose because of defects or fatigue in the metal connections, the driver's inspection would not have revealed them. Id. at 453. At trial, the jury found that the defendants had not been negligent in their inspection of the vehicle. Id. at 451. The Court of Appeals affirmed. The Supreme Court reversed, but not on the negligence issue. Rather because of the highly flammable, volatile and explosive nature of gasoline, and the fact that evidence of the cause of the accident was destroyed, Siegler, 81 Wn. 2d at 456, the court imposed strict liability.

There is no basis for imposing strict liability here. APES was not engaged in an inherently dangerous activity as the truck was empty. Waste motor oil is not readily flammable, it is not explosive, it is not volatile and it is not corrosive. (CP 406.) Driving an empty truck used for hauling waste motor oil is not an abnormally dangerous activity, thus the court cannot impose strict liability. Siegler, 81 Wn.2d at 457.

**C. The Trial Court Erred In Excluding Testimony of Brent Standtherr.**

The exclusion of testimony of Standtherr at trial warrants a new trial. At trial, the court allowed Mattson to call the APES driver, Standtherr, to testify. (RP 212-222.) Standtherr testified that he saw that

a hose was dragging on the ground behind his truck. (RP 216.) He was then permitted by the trial court to testify that he pulled over and investigate why the hose had come loose. (RP 217.) He saw oil on the trailer which was 15 feet behind the truck as well as in the hose which broke. (RP 217.) The jury heard about how the oil spilled without considering any of the safety precautions taken by Standtherr. (RP 212-222.) As we know by the jurors' unanswered questions, they wanted to know if Standtherr (or APES) took precautions.

Counsel for APES objected to the trial court's exclusion of testimony about what Standtherr did in the yard during his pretrip inspection of the truck. (RP 117; RP 224-225.)

Thus, Stadtherr's testimony was a half-truth and misled the jury. The jury was free to believe that Standtherr carelessly drove his truck down I-5 and allowed oil to spill from the hose without taking any precautionary measures. The accident was described to the jury in a vacuum, and as a result, they punished APES, a transport company of waste oil products, by awarding an excessive verdict. The jury awarded \$10,000 for future future chiropractic care; \$132,000 for future economic damages; and noneconomic damages in the amount of \$265,000. (RP 720.)

Once the trial court allowed Standtherr to testify about the tanker truck leaking oil while driving down I-5, it was required to also allow APES to explain the actions of the driver before the truck was driven onto the freeway. The jurors' questions about what Standtherr did at the yard, how the hose came loose, and whether he inspected the hose make clear the error by the court's resolution of these material fact questions on summary judgment.

The exclusion of Standtherr's testimony prejudiced APES. An error is only harmless when it is trivial or merely academic, or formal, did not prejudice the substantial rights of the opposing party, and when it "in no way affected the final outcome of the case." McKay v. Acorn Custom Cabinetry, 127 Wn.2d 302, 311, 898 P.2d 284 (1995) quoting State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1997) quoting State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970). The admission of Standtherr's testimony about the accident without any foundation for how the hose came loose was highly prejudicial to APES.

Mattson obtained an excessive award in her favor. The exclusion of safety measures taken by Standtherr after Mattson's counsel opened the door with testimony about oil leaking from a tanker truck, and detailed examination regarding an oil spill on the freeway inflamed the jury against

APES, thus the error was not harmless. The questions asked by the jury about Standtherr's pretrip inspection, which were never allowed by the trial court, are compelling proof that the erroneous ruling influenced the jury. The Court should vacate the judgment and order a new trial based on the prejudice to APES.

## V. CONCLUSION

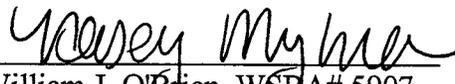
APES presented material issues of fact at summary judgment showing APES properly maintained and inspected the truck before driving it in the highway. The driver for APES testified that he inspected the specific hose and tie-down which ruptured four miles before it came loose. Mechanical parts break or wear out without negligence. Tinder, 84 Wn. App. at 1212. The trial court erred in resolving fact questions on summary judgment. No presumption of negligence against APES exists as Mattson failed to meet the elements of res ipsa loquitur. Finally, even if the circumstances could support a jury instruction on res ipsa loquitur, APES is entitled to answer the jurors questions to counter the presumption of negligence.

Strict liability against APES also fails because the truck and trailer was empty and was not carrying a highly flammable, volatile and explosive substance in dangerous quantities. In addition, the trial court

properly determined RCW 46.61.655, the statute requiring secure "loads", does not apply.

At trial, the court allowed the driver to testify about how the accident happened but simultaneously excluded jury questions to the driver about how the hose broke and whether inspections of the truck took place before the incident, including a truck inspection and his inspection of the specific tie-down which ruptured. Omission of these material facts made APES appear as if it did nothing to prevent this accident or to maintain its trucks. The jury punished APES by awarding \$547,665.40 in a cervical strain injury case. This Court should vacate the judgment and remand this case for a new trial on the merits.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of October, 2008.

  
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STATE OF WASHINGTON  
No. 37498-6-II

BY \_\_\_\_\_  
DEPUTY

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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RAYNA MATTSON,

*Respondent,*

v.

AMERICAN PETROLEUM ENVIRONMENTAL SERVICES, INC., a  
Washington corporation; and BERND STADTHERR and "JANE DOE"  
STADTHERR, individually, and the martial community comprised thereof,

*Appellants.*

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**CERTIFICATE OF SERVICE**

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**ORIGINAL**

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

On the 10<sup>th</sup> day of October, 2008, I caused to be delivered a true and correct copy of:

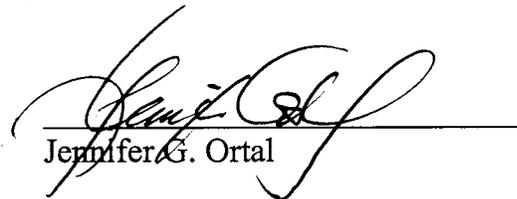
1. *Brief of Appellants*; and
2. *Certificate of Service*.

to the following counsel of record:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<b>COUNSEL FOR RESPONDENT</b>	
Kari Lester Benjamin Barcus Law Office 4303 Ruston Way Tacoma, WA 98402	<input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via ABC <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via DHL Overnight
<b>ORIGINAL TO:</b>	
Clerk Court of Appeals of the State of Washington, Division II 950 Broadway, Suite 300, MS TB-06 Tacoma, WA 98402-4427	<input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via ABC <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via DHL Overnight

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10<sup>th</sup> day of October, 2008.

  
Jennifer G. Ortal