

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

No. 37498-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RAYNA MATTSON, individually,

Respondent,

v.

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

Appellants.

APPEAL FROM THE SUPERIOR COURT OF
AND FOR PIERCE COUNTY

The Honorable John R. Hickman, Judge

RESPONDENT'S CORRECTED BRIEF

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I. INTRODUCTION

For the reasons stated herein, this Court should affirm the trial court's rulings granting Summary Judgment on the issue of liability and excluding irrelevant testimony by Defendant Stadtherr. In addition, as Appellants have failed to assign error to the jury's verdict in this case, and as they failed to oppose Plaintiff's Motion for Summary Judgment regarding proximate cause and the reasonableness and necessity of \$140,665.40 of her claimed special damages, the jury's entire damage award in this case must likewise be affirmed. Finally, it is respectfully requested that the Court assess attorney fees and costs against Appellants for their frivolous appeal.

II. COUNTER-STATEMENT OF ISSUES

1. Whether the Superior Court properly determined that Defendants were liable as a matter of law for the subject collision under the principles of common law negligence when the undisputed material facts demonstrate that Defendants knew or should have known that the hose on their truck trailer could come loose and spill oil on the freeway due to the combination of the known rough conditions of I-5 and an empty truck.
2. Whether the Superior Court properly determined that the doctrine of *res ipsa loquitor* applied in this case where the undisputed material facts demonstrate that (1) Plaintiff would not have lost control of her vehicle absent oil admittedly spilled on the freeway by the Defendants; (2) the truck, trailer, hose and bungee-cord tie downs were in the exclusive control of the Defendants, and (3) Defendants admitted that Plaintiff did nothing to cause or contribute to the roll-over collision?.
3. Whether the Superior Court erred in not finding that RCW 46.61.655 applied to the present case to determine that Defendants were negligent as a matter of law when the undisputed facts demonstrated that Defendants failed to securely fasten their load and/or covering

and it therefore became loose and caused substantial bodily harm to Plaintiff.

4. Whether this Court must refuse to consider any issue regarding the jury's damage award and must affirm it because Appellants' failed to assign error to the same.
5. Whether the Jury's verdict is supported by substantial evidence when the verdict included a minimum of \$140,665.40 of unopposed and uncontroverted damages and the uncontroverted evidence presented by Plaintiff demonstrated that she suffered extensive injuries that are permanent and ongoing.
6. Whether Respondent/Plaintiff is entitled to attorney fees and costs when Appellants' appeal is without merit.

III. COUNTER-STATEMENT OF FACTS

A. THE COLLISION

There is no dispute that this case involves a serious roll-over collision wherein Plaintiff Rayna Mattson suffered significant injuries due to oil spilled on the freeway by Defendants' truck. In that regard, at approximately 2:15 pm on July 21, 2003, Plaintiff Rayna Mattson was driving her 2001 Ford Explorer. (CP 5-9; 479-80) It was a warm sunny day and Rayna had just merged onto the I-5 freeway from the 320th ramp and was traveling northbound. *Id.* She had her three children with her in the vehicle. *Id.*

Defendant Berndt Stadtherr was operating a large 75 foot long 1991 Kenworth truck that was utilized for transporting used oil, and he was traveling ahead of Rayna on I-5 and had passed the 320th exit. (CP 10-13) The truck Mr. Stadtherr was driving was owned by Defendant American Petroleum Environmental Service (hereinafter APES), a company with whom

he had been employed for only one month. (CP 371) As admitted by Defendants, Stadtherr was acting in the course and scope of his employment at the time of the collision. *Id.*

Rayna was traveling in the first lane and driving the speed limit, when all of a sudden, she was sliding all over the freeway, hydroplaning, and she could not control her vehicle. (CP 479-80) Her vehicle went off the road and rolled four times down a very steep embankment. *Id.* In her deposition, Rayna explained what she experienced:

And before I knew it, I started sliding out of control on the freeway. And I slid through -- I'm not sure -- at the time I wasn't sure what -- I was on the freeway. I just lost control of my vehicle and I went down the embankment. . . . I rolled over several times with my children in the back seat. And when I came to a stop, I got out of the car as fast as I could. I grabbed my children out of the car. My daughter was very upset. I wasn't sure whether she was hurt or -- my children were very scared. I was very scared. (CP 479)

There was absolutely no question in Rayna's mind that the substance on the freeway caused her to lose control of her vehicle, thus resulting in the roll-over collision. (CP 487)

An independent witness, John Watchie, watched the entire frightening scene unfold, and in a sworn declaration, he described what he saw:

On July 21, 2003 at approximately 2:30 p.m. I was walking on the shoulder of the I-5 northbound lane, heading South. My van had just broke down and I was walking towards the 320th Exit. I heard tires screeching and looked up to see a Ford Explorer in the far right lane of the Northbound lanes of I-5. The Explorer spun around 2 times (360° each time) in a clockwise manner, exiting the highway with the rear of the vehicle facing eastbound. It went off the shoulder and down the embankment at a high rate of speed before coming to rest on its wheels. I immediately ran to the vehicle to check on the

occupants. The driver (female) was crying and in shock. She had blood on her face and the kids were crying too. I asked the driver several times. “Are you ok?” and she was so shook up she didn’t answer. I called 911 on my cell phone, and another guy was talking to her. Due to the smell of gas, myself and a guy on the driver’s side asked the driver if she was ok to move, and she said “yes.” She then exited the vehicle and gave permission for another guy on the driver’s side to remove the 2 children. As the driver exited the vehicle, it was clear that she was injured and it’s possible that she threw up. Medical aide and police arrived a short time later and took over. **A few seconds before the accident, I smelled oil, and observed a large oil truck go by. It left an oil slick on the highway that was 200 yards large. The explorer then hit the oil slick, lost control and crashed. That was the cause of the entire accident.**

(CP 354-357)(Emphasis added)

Washington State Patrol Detective Karen Villeneuve arrived at the scene shortly after the collision occurred to investigate it. (CP 457) As the Detective testified in her deposition, she could see a dark liquid substance in the first lane that extended a long distance – the length of almost two football fields. (CP 457-458) Looking down over the embankment at the scene, she saw an SUV, and she observed a tanker up ahead on the side of the road. (CP 458) The Detective testified that the driver of the tanker truck admitted that the oil spilled onto the roadway from a loose hose on his truck. (CP 458)

The Detective ordered State Patrol Department of Transportation trucks to the scene due to the fact it was a large lengthy spill and she needed a lot of dirt. (CP 458) The Patrol log verified that two trucks actually came - a blocker truck and a truck to lay down all of the dirt. (CP 458-59)

Based upon the Detective’s investigation of the collision, she determined that there was no question that the oil on the roadway caused the

collision, and she therefore issued Defendant Berndt Stadtherr a citation for the same. (CP 460)

According to Defendant Berndt Stadtherr, he began work that day between one and two o'clock. (CP 466) Although he did have a pre-trip checklist that he would complete as part of his driver's log, he did not know what time he did that or what time he left the APES plant. *Id.* The normal course of action once he arrived at work would be to conduct a pre-trip inspection on his truck, travel to Canada (via I-5) to the customer, load his truck with used oil, inspect the truck before leaving, and then return to the plant and do a post-trip inspection trip. (CP 464-66) As Defendant Stadtherr explained, he had no idea that a collision had occurred behind him and he only pulled over after seeing the loose hose in his mirror.

In Federal Way ... which was ... only a few miles from our location, I noticed that -- I saw in my mirror that a hose was dragging on the ground behind me. So I pulled over and gathered the hose, and -- at which -- the state trooper arrived then and accused me of causing an accident, basically. (CP 467-68)

Regarding his understanding as to how the hose came loose, Mr. Stadtherr testified:

There was nothing wrong with the hose . . . at first. There was actually -- the hoses are secured on four points on the truck, and one of those tie-downs actually ruptured, which allowed the hose -- because it was -- back then, it was a -- Federal Way was a bumpy road -- allowed the hose to come out of the hose compartment partially, and it got caught in the tires and ripped apart, basically.

(CP 468)

Mr. Stadtherr did not know when the hose came loose. (CP 472)
When he first saw the hose dragging, it was by the rear duals at the end of the trailer. (CP 470) After he pulled off to the side of the freeway, he **saw there was "splattered oil on the front of the trailer where the hose got pulled apart"** as there had been residue oil in the hose. *Id.* He explained the events:

I was gathering the hose -- the broken hose, and a state trooper walked up to me and just said: Did you know that you caused an accident? And I said: No, I didn't know that. Then I asked if everybody was okay. And he told me -- he says no. At the point in time, there's a fire truck, I believe, on the scene. . . . Then the trooper came to me after he had all my information and everything, and then he said I'm good to go if everything is safe on the truck -- which, at that point, I took the broken hose off already and stowed it away -- was good to go, so I continued on to my destination. . . .
(CP 471) (Emphasis added)

Of the hose, he explained:

- Q How long was the hose that you took off, then?
A Approximately, 35 to 40 feet.
Q Okay. And that hose was no longer used again?
A No.
Q Okay. And what specifically was wrong with it when you actually looked at it, then?
A **The hose pulled apart in the middle section, basically, of -- of it where it got cut by the tires, I assume.**
Q I'm sorry?
A Where it got cut by the tires and ripped apart. **I assume that.**
Q Okay. Was any -- did you bring the hose back to American Petroleum?
A Yes. I brought it back, but at that point in time, it's useless, so we threw it away.
Q Okay. Do you know if there was any further inspection made of that hose?
A Nope.
(CP 471)

When asked how the tie down for the hose might have broken, Defendant Stadtherr admitted he did not know. (CP 468) Further, despite his claim that he conducted a pre-trip inspection before he left, the pre-trip inspection report did not indicate whether or not he checked the bungee cord tie downs and the security of the hose, but rather only indicated that he “secure[d] latches.” (CP 468) He signed off on the pre-trip inspection report and did not have any concerns or questions that there was a problem with the hose or the tie-downs or any component of the vehicle. (CP 468)

After pulling over to the roadside, Defendant Stadtherr never left his truck, and from where his truck was parked, he could not see Rayna’s vehicle or the roadway near it. (CP 472) He thus admitted he had no knowledge as to whether or not there was oil on the roadway near the collision scene. (CP 40) Defendant Stadtherr also admitted that he did not see the collision, and he had no personal knowledge as to Ms. Mattson’s driving. He stated in his interrogatory responses:

14. **INTERROGATORY:** State how, when, and where the automobile collision giving rise to this action took place, being specific as to the date, hour and your recollection of the events surrounding this incident.

RESPONSE:

N/A as neither I nor the A.P.E.S. Inc. vehicle I was operating were present when the “collision” took place.
(CP 368)

When asked about any potential affirmative defenses, Defendant Stadtherr provided the following answers:

28. **INTERROGATORY**: Do you allege that there exist any persons or entities that have caused or contributed to plaintiff's damages who are not specifically named as parties to this action? . . .

RESPONSE:

None known at this time.

29. **INTERROGATORY**: If you allege that the plaintiff was contributorily negligent. Please state as to this allegation: all facts upon which you base allegation; name, address, telephone number, employer and job title of each person believed to have knowledge concerning allegation; identify all documents pertaining to, supporting or evidencing allegation, and identify all custodians thereof.

RESPONSE:

Speed too fast for condition; failure to use due care and caution.

(CP 374-75)

Despite his answer above, Mr. Stadtherr confirmed that Ms. Mattson did not cause or contribute to the collision in his deposition:

Q To your knowledge, is American Petroleum denying responsibility for this collision occurring? . . .

A I don't know. . . .

Q **Are you aware of any facts or circumstances, anything that would support somebody taking a position and saying that Rayna Mattson caused her -- this collision?**

A **Don't know.**

Q **Are you aware of any facts or circumstances that would support somebody saying that anything other than the hose coming apart and leaking oil onto the roadway caused this collision?**

A **Don't know.**

Q Your attorney has just indicated that you did actually sign plaintiff's second set of interrogatories. . . . No. 5: If you allege . . . plaintiff's alleged injuries were caused in whole or part by her own negligence, please state as to this allegation all facts upon which you base this allegation. **And the answer that is written in there, and that you**

signed off on, is: Plaintiff was traveling too fast for conditions and failed to use due care and caution. I'm going to show you that.

A Mm-hmm.

Q . . . **What facts do you have to support that?**

A None.

Q . . . In Interrogatory No. 4, it says: **If you allege that plaintiff assumed the risk of her own injury, please state as to this allegation all facts upon which you base this allegation. And then it has the same answer: Plaintiff was traveling too fast for conditions and failed to use due care and caution. . . . What facts do you have to support that?**

A None.

Q **... And just so we have it clear, you never saw what happened with my client's vehicle? You never saw her car -- her collision or any of that; correct?**

A Correct.

(CP 401-402; 473-74) (Emphasis added)

Michael Mazza, the owner of APES, was called to the scene after the collision occurred. He did not observe the collision and specifically testified, "I have never heard Ms. Mattson's side of the story, so I don't know what actually happened." (CP 511, 519) In fact, since he drove straight past the collision and directly to Mr. Stadtherr's truck, like Mr. Stadtherr, he never saw Ms. Mattson's vehicle and was not able to determine the amount of oil on the roadway. (CP 511) Despite the insinuations in Appellants' brief to the contrary, in sworn deposition testimony, Defendants did not dispute that there was oil on the freeway. In that regard, Mr. Mazza testified:

Q . . . My first question to you was that **you're disputing that the truck owned by your company on July 21st, 2003, left any type of substance on the roadway.** Is that correct?

A **I am not disputing that.**

. . . . **Anything is possible. Anything and everything in life is possible. . . . I have too many miles on the road and too many things that I've seen to dispute anything, unless I physically was involved in it.**

Q . . . [I]f there was an independent witness who actually observed oil – used, whatever it is -- used-oil, petroleum, some type of substance come out of the truck that Mr. Stadtherr was driving on your company's behalf, and he observed it leave an oil slick, or some type of substance slick, that was at least 200 yards, do you have any basis to dispute that?

A **No.**
(CP 511-12) (emphasis added)

Defendants also did not dispute that a hose came loose, and contrary to the suggestion in Appellants' brief that the it was due to some type of unforeseen mechanical failure, Mr. Mazza explained similarly to Defendant Stadtherr that the hose came loose due to the foreseeable combination of poor road conditions of which every driver is aware, in conjunction with the fact that Defendants' truck was empty:

Q **You're not disputing that a hose came loose in this case?**

A **No.**

Q **And what is your understanding of how that hose came loose off the truck?**

A **A securing device, that can be called "bungee cord" in the industry, broke due to poor road conditions on I-5.**

Q What do you mean by that?

A **I-5 is a very rough road, in an empty truck. The truck was empty going northbound. That specific stretch of freeway is terrible in an empty truck. It bounces. The trucks were designed to be loaded, not empty. So it's very hard, very bouncing, violent action in some cases.**

Q **And is that something that you have to deal with on a regular basis, given that you're driving to collect loads?**

A **Yes. It's a very normal thing, yes. Every trucker out there knows I-5 is bad.**

Q And as far as exactly how it broke due to the conditions, can you explain that in a little bit more detail?

A In the hose, the bungee cord -- there's a long tube on the sides of the truck. The bulk of the hose is secured inside the tubes. I believe the -- and then the hose comes out of the tubes, and it's secured, using bungee cords, to the back of the truck. There's a hose rack; basically, an L-shaped bracket that the hose sets in. You secure the bungee over the top of that so that the hose won't bounce out of that. Obviously, the bungee broke. **The violent action of I-5 caused the hose to come out of the bracket and got caught up in the front dual on the trailer.**

Q **So have you seen these types of things happen before, given the road conditions?**

A **I've seen just about everything happen before.**

Q Have you seen this type of -- like, where the hose breaks?

A The hose come out?

Q Yeah.

A Not specifically that -- this particular situation, but **I have seen hoses come off a truck before. It's usually due to a driver error.**

(CP 514-15)

Similar to Defendant Stadtherr, Mr. Mazza admitted that Plaintiff did nothing to cause or contribute to the collision occurring, or that anything but the spilled oil on the roadway caused the collision:

Q **Are you aware of any facts or circumstances that would support somebody taking a position to say that Rayna Mattson caused this collision herself, or contributed to it?**

A **No.**

(CP 518)

...
Q Are you aware of any facts or circumstances to support somebody taking the position that oil on the road from your truck did not cause -- or leaked oil or petroleum leaking from a hose that was on your truck did not cause or contribute to this collision, to the rollover-vehicle, one-car collision?

A Am I aware of that?

Q **Are you aware of any facts or circumstances that would support somebody taking a position that anything but that caused this collision?**

A **No, I'm not aware.**

Q **As the owner of this company, and, obviously, all your background, what is your understanding of the driver's responsibility -- the drivers that you employ -- to secure their trucks, the hoses, the equipment, and the loads they carry?**

A **It's my position and the company's position it's 100 percent, always, the driver's fault. In other words, it is their responsibility. I pay them and compensate them to basically do a job, to protect the public and protect the trucks and the equipment and get from Point A to Point B safely.**

Q **Are you disputing that any oil was leaked by the hose that we've discussed, that was attached to your truck?**

A **No.**

...

Q All right. Now, I have some interrogatories that I'm going to have you look at. . . . I just want to verify that these are your answers that you've made on behalf of your company as who is the listed defendant.

A Correct.

...

Q **. . . What facts or circumstances are you aware of that would support an allegation that plaintiff assumed the risk for her own injury in this case?**

A I would assume that everybody that drives a vehicle of any type up and down the road assumes a certain risk themselves.

Q Anything else?

A Other than the fact she was driving a Ford Explorer, that's the number-one rollover vehicle on the planet, no. **Nothing -- nothing else.**

Q **. . . What, if any, facts or circumstances are you aware of that support that Ms. Mattson caused, in whole or in part, her own injuries?**

A **I am not aware of any facts.**

(CP 518-19) (Emphasis added)

B. PRE-TRIAL DISCOVERY, MOTIONS, AND RULINGS

The only discovery that took place in this case were depositions and the parties' exchanges of interrogatories and requests for production. In that regard, Defendants took the depositions of Plaintiff Rayna Mattson, the Washington State Patrol Detective, as well as two of Rayna's doctors, Karen Ziemann, M.D. and Michael Martin, M.D. Plaintiff took the depositions of Defendant Berndt Stadherr and APES owner, Michael Mazza and procured declarations from an eyewitness to the scene, John Watchie, and Rayna's treatment providers, Dr. Ziemann and Dr. Finlayson. Defendants never requested, nor obtained the medical records of Plaintiff, nor did they request a CR 35 examination of Plaintiff. Further, Defendants never obtained any expert witnesses for purposes of liability or damages, nor listed any in their disclosure(s) of witnesses or discovery responses. (CP 31-34)

Following the close of discovery and prior to trial, Plaintiff and Defendants filed cross-motions for Summary Judgment on the issue of liability. Plaintiff also filed a motion to strike portions of the declaration of Mike Mazza, which the Court denied. In addition, Plaintiff filed a Motion for Summary Judgment on the issues of proximate cause, as well as the reasonableness and necessity of Plaintiff's past and future medical billings, wage loss and travel expenses. (CP 133-156); Defendants filed absolutely no response or opposition to those motions. (RP 5)

With regard to the issues surrounding liability, Defendants specifically stated in their response to Plaintiff's summary judgment motion that they "do

not dispute that residual oil in the suction hose spilled onto the pavement, causing plaintiff to lose control of her car and run off the road.” (CP 475)

Defendants therefore admitted: (1) that they spilled oil on the freeway; (2) that the spilled oil proximately caused Rayna to lose control of her car and become involved in a serious roll-over collision; (3) that that the collision proximately caused Rayna to suffer injuries to her neck and back, including Posttraumatic Cervical Strain and resulting Fibrositis, as well as headaches, pain and tenderness in her neck, trapezius region, mid- and low back; and (4) that Rayna’s medical billings, wage loss and out-of-pocket expenses, totaling a minimum of \$140,665.40 were reasonable and necessary for her collision-related injuries as a matter of law. Thus, the only issue that was before the Court for argument on January 11, 2008 was whether Defendants were negligent and/or negligent as a matter of law in the actual spilling of oil on the freeway.

Plaintiff specifically argued that Defendants were liable under numerous theories, including common law negligence, negligence pursuant to the doctrine of *res ipsa loquitur*, statutory negligence, and/or strict liability. (CP 416-3, 446-56, 480-83) Defendants argued that they exercised reasonable care in securing the hose with bungee-cord tie-downs and that neither statutory, nor strict liability was applicable. (CP 408-415, 473-79, 494-98) The trial held that it could not determine that either strict liability or statutory liability applied as a matter of law in this case. However, it determined that with regard to the issue of common law negligence, all of the elements were

present and none of the evidence or affidavits presented by the Defendants raised an issue of material fact. Therefore, the Court granted Summary Judgment on the issue of liability:

This vehicle was under the exclusive control of the defendant. There was no testimony to indicate that the way they secured these hoses was adequate in light of the road conditions on I-5, which I think even their witnesses indicated it would be foreseeable that hoses would break loose if they were not properly secure. I just think this is a classic case of negligence on the part of the defendant, and I will grant the motion for summary judgment on the basis of common law negligence and there being no material issue of fact that has been raised by the defense would require this to be tried on that issue. And based on the fact that there is no dispute in regards to the reasonableness of the medical costs, lost wages, et. cetera, I will also grant judgment on that issue as well, but obviously the issue of general damages is still a matter for trial. (RP 4-5)

Therefore the Court entered an order finding the defendants liable for the collision as a matter of law and Plaintiff fault-free. (CP 516-18) The Court also entered as a separate order regarding proximate cause and Plaintiff's special damages, which was unopposed by Defendants.¹

¹ The Court held as follows:
ORDERED, ADJUDGED AND DECREED that the Plaintiff's past medical billings including prescriptions in the amount of \$30,429.14, Plaintiff's out-of-pocket expenses for mileage in the amount of \$1,036.44 and Plaintiff's wage loss in the amount of \$78,179.82 are hereby determined to be reasonable and necessary as a matter of law; it is further

ORDERED, ADJUDGED AND DECREED that the Court has determined that Plaintiff will need future medical treatment as a result of her injuries in the subject collision as a matter of law and the costs of that future treatment will range from \$31,020.00 to \$62,040.00; it is further

ORDERED, ADJUDGED AND DECREED that at trial, the Jury will be instructed that the court has determined that the collision of July 21, 2003 proximately caused Ms. Mattson's neck and back injuries; that the jury shall award Plaintiff her past medical billings including prescriptions in the amount of \$30,429.14, Plaintiff's out-of-pocket expenses for mileage in the amount of \$1,036.44 and Plaintiff's wage loss in the amount of \$78,179.82

(CP 519-21)

C. TRIAL

During the course of trial, Plaintiff presented the testimony of two expert witnesses, her primary care physician, Joy Ziemann, M.D. and chiropractor, Don Finlayson, D.C., to testify about the injuries that she suffered as a result of the subject collision and the related treatment she underwent. In addition to her own testimony, Rayna also presented testimony from three lay witnesses.

Brent Mattson, Rayna's husband, testified that he met Rayna in 1994 when she worked two jobs and was a single mom. (RP 392-94) She was "always busy," and had no physical disabilities or restrictions or any pain before the collision. (RP 394-96) She had her second two children before the collision and was so active that she closed the restaurant where she worked immediately before going into labor. (RP 397-98) Before the collision, their family would do numerous activities together, go camping three to four times a year, and take biweekly to monthly trips to Portland. (RP 394, 406-13) However, since the collision, they can no longer do any of those things. *Id.* In addition, they used to go to concerts and/or sporting events, and now if Rayna does that, she "pays for it," so they do not attend them. *Id.* They also used to travel to the Oregon Coast every summer, but have only done so once since the collision. *Id.* Brent further testified that Rayna can not sit for long periods of time without increased symptoms; she cannot go to the kids' football or softball games, Cheer, or track meets. *Id.* She can no longer interact with their children in the same way, and she has never returned to

enjoy the same level of health or activity since the collision. (RP 415-16) In addition, now Rayna has to take medication every day for her pain, whereas before the collision, she did not. (RP 414)

Lisa Porter, a co-worker and close friend, testified that she has known Rayna for 12 years. (RP 424) She has also been Rayna's manager at work for many years and described Rayna as the "best" waitress. (RP 425-26) Before the collision, Rayna had the "Hustle" and she was always steps ahead. *Id.* Outside of work, Lisa and Rayna also did activities together with their kids before the collision such as going to concerts, the Zoo, the Park, and shopping; she described Rayna as "Supermom." (RP 426-27) Lisa testified that she saw Rayna the day following the collision and observed how scared she was and how much pain she was experiencing. (RP 428) Rayna could not return to work for nearly a year because of her injuries, and when she did, Lisa had to make accommodations for her. (RP 428-432) Lisa also observed that Rayna could not do things around the home or go to her children's sports activities. (RP 435) Lisa testified that Rayna has never returned to enjoy the same level of health as she did before the collision. (RP 435)

Nicole Byrum Wahl, another co-worker and friend, met Rayna after the collision and testified that they could not do much together and she immediately became acutely aware of Rayna's limitations. (RP 442-43, 446) She worked with her and saw the accommodations Rayna had to have and make, including using ice packs during breaks, special chairs, and heating pads; she would also have to make twice the number of trips carrying half as

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many plates, and she could not use trays. (RP 444-45) Based upon Rayna's body language, Nicole observes that Rayna always appears to be tense and in pain; she winces, and Nicole often helps her do things around the home in order to help minimize some of her pain. (RP 448)

Rayna testified that following the collision, her life changed dramatically. (RP 508) She explained that before the collision, her life was busy, and she did not have any difficulty doing any of her daily tasks. (RP 487) She did not have to think of anything regarding her activities, whereas now, she has to plan everything out ahead of time, and there is no spontaneity. (RP 487, 542) The most significant changes she has experienced are those in her body, her relationship with her family and her quality of life, all of which are very frustrating for her. (RP 511-12, 522, 542) She has also had to deal with the trauma of the collision and the fear of her kids having been in the collision. (RP 512-14) Rayna further testified that she has never been pain-free since the collision, and now, she is stuck in the same place and has not experienced any more improvement. (RP 541-42) With regard to special damages, in addition to the Court's order on summary judgment, Rayna testified that she purchases out-of-pocket heatwraps that she uses daily in order to help her pain and spends nearly \$600 per year on those modalities and approximately \$500 per year on prescription medications. (RP 533-34, 539) Before the collision, she did not take medication and it causes her great concern. (RP 488, 540)

Rayna also testified that as her ability to work as a waitress has been greatly impacted by her injuries, she will have to change occupations in the near future. (RP 520-21, 530) As she is without much of an educational background, she will have to incur costs for schooling and associated time off, as well as a potential decrease in pay. *Id.*

Dr. Finlayson testified that Rayna had no pain or problems before the collision. (RP 311) However, immediately following the collision, she experienced headache and neck pain, which was reported to be constant; he noted that Rayna rated her neck pain as a 7 out of 10 burning pain that was “severe” and “ruining her quality of life.” (RP 314) He could see that Rayna was very frustrated as her pain prevented her from taking vacations, working, cleaning her house, and lifting her kids. (RP 347-48) Dr. Finlayson also testified that Rayna suffered ligament damage that will never improve and is a permanent impairment and injury. (RP 350-51)

Dr. Ziemann testified that she has been Rayna’s primary care physician since 2000 and that Rayna was in good health and had no problems or history of symptoms in those three years prior to the collision. (RP 232-34) She further testified that due to the subject collision, on a more probable than not basis, Rayna suffered a permanent cervical strain injury, as well as anxiety and ongoing frustration due to her inability to undertake her regular daily activities. (RP 235-46, 258-59, 266) Due to the significance of Rayna’s injury and resulting pain, Dr. Ziemann ordered Rayna to remain off work

from her waitressing job for nearly a year, and then only allowed her to return at reduced hours. (RP 237, 242-44, 248, 251, 256)

With regard to a prognosis for Rayna, Dr. Ziemann testified that it will “be an ongoing struggle for her,” that she is more susceptible to arthritis in her neck and more likely to have a re-injury. (RP 271) She also testified Rayna’s injuries will continue to cause her physical limitations and she will not be able to maintain her waitressing job indefinitely, and thus, she will need to be retrained for another occupation. (RP 272) With regard to future treatment, Dr. Ziemann testified that Rayna will have to continue with 2-4 medical appointments per year, as well as take prescription medication on an indefinite basis, and that she would benefit from physical and massage therapy, as well as ongoing chiropractic care. (RP 273-75)

Defendants did not call any witnesses or put forward any evidence or defense to contravene the testimony presented by Plaintiff or her damages.

Trial commenced on February 14, 2008 and proceeded until February 27, 2008 with the conclusion of the jury’s deliberations finding for Plaintiff in the amount of **\$547,665.40.**² (CP 985)

Defendants did not file a motion for a remittitur or a new trial on any issue; they filed their Notice of Appeal on March 21, 2008. (CP 1033-38)

² Based upon the Court’s summary judgment rulings regarding damages, which Defendants did not oppose, the verdict necessarily included an award of \$30,429.14 for past medical expenses, \$78,179.82 for past wage loss, \$1,036.44 for past out-of-pocket travel expenses, and a minimum of \$31,020.00 for future chiropractic expenses. The jury further awarded Plaintiff an additional \$10,000.00 in chiropractic expenses, \$132,000.00 in future economic damages, and \$265,000.00 in future non-economic damages. (CP 985)

IV. ARGUMENT

A. **THE SUPERIOR COURT’S RULING FINDING DEFENDANTS LIABLE AS A MATTER OF LAW MUST BE AFFIRMED BECAUSE THERE WERE NO MATERIAL FACTS IN DISPUTE AND THE APPLICABLE LAW REQUIRES A FINDING THAT DEFENDANTS WERE NEGLIGENT IN SPILLING OIL ON THE FREEWAY CAUSING THE ACCIDENT.**

1. INTRODUCTION

“The office of a summary judgment proceeding is to avoid a useless trial”; “it is to separate the wheat from the chaff in evidentiary pleadings, and to establish, at the hearing, the existence or nonexistence of a genuine, material issue.” *Almy v. Kvamme*, 63 Wn.2d 326, 329, 387 P.2d 372 (1963).

In reviewing summary judgment rulings, the appellate courts apply the same standard as the trial court. *Sanders v. City of Seattle*, 160 Wn.2d 198, 207, 156 P.3d 874 (2007). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Stated another way, a moving party is “entitled to judgment as a matter of law” when the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed 2d 265, 104 S. Ct. 2548 (1986).

In such a situation, there can be “no genuine issues as to any material fact,” since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.

Id. at 322-23. *Accord Young v. Key Pharmaceutical*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) A “genuine issue” under CR 56(c) is one on which reasonable persons could differ. See *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987). A “material fact” is one upon which the outcome of the litigation depends. *Hudesman v. Foley*, 73 Wn.2d 880, 886, 441 P.2d 532 (1968)

A party has two ways of moving for summary judgment. *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993). One is to set out the material facts and demonstrate there is no genuine issue as to those facts. *Id.* “Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the non-moving party lacks sufficient evidence to support its case.” *Id.*

Although the Court considers all facts submitted and all reasonable inferences in the light most favorable to the nonmoving party, *Wilson v. Steinbach*, 98 Wn2d. 434, 437, 656 P.2d 1030 (1982), the nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). After the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. *Seven Gables*, 106 Wn .2d at 13. The court should grant summary

judgment if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson*, 98 Wn.2d at 437.

In this case, the evidence overwhelmingly establishes Mr. Stadherr and APES' negligence and the lack of comparative fault on Plaintiff's part. There were no material facts in dispute and the Defendants offered no reasonable explanation as to why they negligently spilled oil on the freeway. The Court correctly entered summary judgment in this case and this Court is respectfully requested to affirm that ruling.

2. THERE WERE NO MATERIAL FACTS IN DISPUTE

Appellants' brief constitutes an attempt to merely re-write the facts of this case. There were no facts in dispute, material or otherwise. In that regard, the **undisputed** facts establish that a hose from Defendants' truck came loose and spilled oil on the roadway, which proximately caused Rayna Mattson to suddenly lose control of her vehicle, thus resulting in a multiple roll-over crash that proximately caused her significant injuries.

In support for her motion for summary judgment on liability, Plaintiff put forward evidence of the collision through her own testimony, as well as that of the investigating Detective and the independent eye witness. Defendants did not, or could not, dispute this evidence as Defendant Stadherr admittedly did not see the collision. In addition, neither Defendant Stadherr, nor Mike Mazza, were ever present at the collision scene. Mr. Stadherr's truck was up so far ahead of the collision scene that he did not even know that a collision had occurred behind him, and he never left the

vicinity of his truck before continuing on northbound I-5 to Canada. When Mr. Mazza arrived, he drove immediately to where the truck was parked and never saw Mrs. Mattson or her vehicle. Defendants admitted that a hose broke, which leaked oil on the freeway, and both Stadtherr and Mazza testified that the hose broke due to the rough conditions of the I-5 freeway right near their plant, of which they were very well aware. Mr. Mazza admitted that he could not dispute the independent eye witness testimony as to the amount of oil on the freeway, and Mr. Stadtherr admitted that since he could not see the roadway where the collision occurred, he had no knowledge as to the amount of oil present at the scene.

Appellants waste much time alleging that there were other possible causes of the collision - apart from the fact that Defendants spilled oil on the freeway which proximately caused Plaintiff's vehicle to lose control and flip and roll down over a steep embankment. First, both Stadtherr and Mazza admitted that Rayna did nothing to cause or contribute to the collision occurring, and Defendants provided absolutely no evidence of any other causes. Second, in their response to Plaintiff's motion for Summary Judgment on Liability, Defendants specifically stated:

Plaintiff contends, and for purposes of this motion defendants do not dispute, that residual oil in the suction hose spilled onto the pavement, causing plaintiff to lose control of her car and run off the road. (CP 475)

Now, for the first time on appeal, Defendants attempt to claim that a "fatigued" tie-down was responsible for causing this collision and allege that was an unforeseen mechanical defect or failure. They argue without evidence

or authority, and for the first time on appeal, that somehow Western Peterbuilt who maintains their trucks, or some other entity could be responsible for the allegedly fatigued bungee-cord. This issue, which is essentially the allegation of fault of a non-party, is an affirmative defense that was never claimed by Defendants throughout the course of this case, or pled pursuant to CR 8, and was therefore waived. *Bickford v. City Of Seattle* 104 Wn. App. 809, 17 P.3d 1240, *reconsideration denied, review denied* 144 Wn.2d 1019, 32 P.3d 284 (2001) (See, CP 10-13, 408-415, 473-79, 494-98) In addition, Defendants also specifically denied in their discovery responses that there was any unnamed or any third party responsible for the collision.

Defendants never proffered any evidence whatsoever, either through lay or expert witness testimony or circumstantial evidence, that the hose became loose because of a faulty or fatigued bungee-cord/tie down. Further, Defendants never provided any evidence whatsoever that Western Peterbuilt had anything to do with supplying, installing, or inspecting the tie-downs/bungee cords that fasten the hoses to the truck. Issues not raised in the hearing for summary judgment cannot be considered for the first time on appeal. *Almy*, 63 Wn.2d at 329.

Contrary to Defendants' assertions in this appeal, the actual testimonial evidence presented by Defendants established that the rough conditions of I-5 in conjunction with the empty truck Stadtherr was driving is what caused the bungee cord to break and the hose to become loose. Mike Mazza specifically testified the hose came loose off the truck because “a

securing device, that can be called "bungee cord" in the industry, broke due to poor road conditions on I-5.” (CP 514-15)

The actual evidence presented by Defendants also established that Defendant Stadtherr was the one responsible for verifying the hoses were properly attached to the trailer with the bungee-cord/tie-downs, not Western Peterbuilt. (CP 509) As a driver, he is also the one responsible from taking the hose off the truck and/or re-securing it. (CP 510) In fact, Stadtherr took the broken hose from the truck after it ruptured and threw it away. (CP 472-73) Most significantly, he (or another company employee in his position) - not Western Peterbuilt - would be the person to replace the broken hose and re-install a new hose on the truck. (CP 474)

Defendants cannot take one factual position in the Superior Court and then a contrary position on appeal. The doctrine of judicial estoppel prevents a party from taking a factual position that is inconsistent with his or her factual position in previous litigation. *See Hisle v. Todd Pacific Shipyards, Corp.*, 113 Wn. App. 401, 416, 54 P. 3d 687 (2002). As noted in 31 CJS, Estoppel and Waiver § 139: under the rule, principle, or doctrine to be nominated as “judicial estoppel”, or “judicial quasi estoppel”:

. . . during the course of litigation a party is not permitted to occupy or assume inconsistent and contradictory positions and the parties to litigation are necessarily bound to the position they assume therein. This principle is sometime expressed in the language of the rule or maxim that, “one cannot blow both hot and cold”. . .

Thus, Defendants are now judicially estopped from claiming anything other than the oil on the roadway, including any action on Rayna's part, or any other third party, caused the subject collision.

3. DEFENDANTS ARE LIABLE TO PLAINTIFF UNDER THE PRINCIPLES OF COMMON LAW NEGLIGENCE

Negligence is the failure to exercise reasonable care. *J.N. By and Through Hager v. Bellingham School Dist.*, 74 Wn. App. 49, 871 P.2d 1106 (1994) A duty may arise from common law principles or a statute or regulation. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 932, 653 P.2d 280 (1982); *Amend v. Bell*, 89 Wn.2d 124, 132 570 P.2d 138 (1977) Common law negligence encompasses four basic elements: duty, breach, proximate cause, and injury. *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781 (1988)).

The existence of a legal duty is a question of law for the Court to decide. *See, Linville v. State*, 137 Wn.App. 201, 151 P3rd 1073 (2007). Recognition of a duty generally involves policy considerations and a balancing of interests. *Whaley v. DSHS*, 90 Wn.App. 658, 672, 956 P3rd 1100 (1998).

In an auto accident case like this one, the defendant driver owes a duty of ordinary care to other nearby drivers, whether or not a statute applies. *Martini ex rel. Dussault v. State*, 121 Wn. App. 150, 160, 89 P.3d 250 (2004) "It is the duty of every person using a public street or highway to exercise ordinary care to avoid placing others in danger and to exercise ordinary care to avoid a collision." *Martini ex rel. Dussault*, *supra*, citing 6 WAPRAC:

WPI CIVIL § 70.01, at 443-44 (3rd ed. 1989) Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary. *Alston v. Blythe*, 88 Wn. App. 26, 943 P.2d 692 (1997)

If all reasonable minds would conclude that the defendant failed to exercise ordinary care, the judge can find negligence as a matter of law. . . .

Pudmaroff v. Allen, 138 Wn.2d 55, 68-69, 977 P.2d 574 (1999)

The existence of a duty turns on the foreseeability of the risk created. *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002) Foreseeability also determines the scope of the duty owed. *Seeberger v. Burlington Northern R. Co.*, 138 Wn.2d 815, 982 P.2d 1149 (1999) Absent some type of immunity, actors are responsible for the foreseeable consequences of their acts. *Wells v. City of Vancouver*, 77 Wn.2d 800, 803, 467 P.2d 292, 295 (1970) The harm sustained from an act is foreseeable “if the risk from which it results was known or in the exercise of reasonable care should have been known.” *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953); Restatement (Second) of Torts § 320, cmt. d (1965). In addition, harm is foreseeable if the harm can reasonably be perceived as being within the field of danger covered by the specific duty owed by the defendant. *Skeie v. Mercer Trucking Co., Inc.*, 115 Wn.App. 144, 61 P.3d 1207 (2003) (reversing trial court’s dismissal of a claim against a trucking

company because the enhancement of collision injuries due to improperly secured cement blocks on a truck was reasonably foreseeable even though the truck did not cause the collision). Liability extends to the foreseeable results from unforeseeable causes; it is not necessary to foresee the exact manner in which the injury may be sustained. *King v. City of Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974) (type of damage suffered as a result of city's wrongful act was foreseeable even though mechanism of injury was not).

Although foreseeability is normally an issue for a jury, it will be decided by a court as a matter of law where reasonable minds cannot differ. *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989) Here, there is no question that Defendants owed Plaintiff a duty to use ordinary care to not spill used waste oil on the roadway that would foreseeably place another driver, such as Rayna, in danger of being harmed. Thus, no question of fact existed for the jury to decide because no reasonable person could conclude that defendants exercised reasonable care in failing to properly secure a hose on an empty truck that they admittedly knew was subject to loosen as the result of being “violently” jostled on the rough freeway. This is particularly true as this stretch of freeway was only a few miles from the Defendants’ plant and Defendant Stadtherr drove on this stretch of road nearly every day as part of his route. Further, given that that Stadtherr was the person who handled the waste oil and hoses, there can be no issue that Defendants knew, or should have known, that residual waste oil was in the hose and could spill onto the road if the hose became loose. Finally, there can be no issue or

dispute that the harm, i.e., a collision occurring because a driver lost control of her vehicle after unexpectedly encountering spilled oil on a freeway where a car is expected to go 60 miles per hour, was not foreseeable.

Defendants' argument at page 14 of their brief that "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" must fail for a number of reasons. First, Defendants had no expert to testify in support of their position. Second, this argument ignores the admissions of Defendants regarding the foreseeability of the rough conditions of I-5 on an empty truck, as well as the testimony that it was in fact the poor conditions of the freeway on the truck that caused the bungee-cord securing the hose to break. Third, Mike Mazza's own testimony contradicts this position as he admitted both Defendants' duty and liability:

Q As the owner of this company, and, obviously, all your background, what is your understanding of the driver's responsibility -- the drivers that you employ -- to secure their trucks, the hoses, the equipment, and the loads they carry?

A It's my position and the company's position it's 100 percent, always, the driver's fault. In other words, it is their responsibility. I pay them and compensate them to basically do a job, to protect the public and protect the trucks and the equipment and get from Point A to Point B safely.

(CP 518-519, pp. 53-54)

The Defendants are therefore liable under common law negligence for spilling used oil on the freeway and causing the subject collision. *See e.g., Alaska Freight Lines v Harry*, 220 F2d 272 (9th Cir. 1955)

A case that is directly on point and supports such a conclusion is *Porter v. Smart's Auto Freight*, 174 Wash 566, 25 P2d 576 (1933). In *Porter*, the plaintiffs brought an action to recover damages for injuries suffered in a collision between their car and a piece of machinery, which fell from the defendant's truck as the two vehicles were passing each other traveling in opposite directions. The Court held that the evidence sustained the finding that the defendant was guilty of negligence, when it showed that in transporting the machinery, the load had been placed outside the body of the trailer and tied with a rope on the tailgate, which had been dropped to the level of the trailer floor and was supported by a three-eighths-inch chain. The evidence had also disclosed that the rope used to fasten the machinery was inadequate, that the machine broke loose from its fastening and that the plaintiffs had been driving in a prudent manner and had no notice of, or chance of seeing, the danger before their automobile was struck. **Despite Appellant's claims that the giving away of the tailgate chain containing a link with a latent defect was the cause of the accident**, the Court held that "the testimony, directly and by necessary inference, preponderatingly showed negligence in the manner of fastening the piece of machinery to the trailer." The Court further noted that the driver of the truck was familiar with the highway, having traveled over it about every day for several years.

The case cited by Defendants, *Manson v. Foutch-Miller*, 38 Wn. App. 898, 691P.2d 236 (1984), is not in any way factually applicable to the present case. First, *Manson* is a construction case, not an automobile case, wherein

the plaintiff was claiming that the duty owed to him was based upon a regulation promulgated under the Occupational Safety and Health Act. Second, there were material issues of fact including whether or not the plywood that was installed (and of which installation the plaintiff was aware) was done so in such a manner so as to prevent displacement or removal by chance, and whether displacement or removal occurred by chance. Both breach and proximate cause of injury were issues in the case. Conversely, as set forth above, in the present case, no material issue of fact existed. There is no dispute here that the bungee-cord holding the hose broke and caused the hose to loosen and spill oil on the freeway. The issue is whether Defendants should have foreseen such action could occur, and Defendants' own testimony establishes that as a matter of law.

Likewise, the case, *O'Dell v. Ford Motor Co.*, 2008 U.S. Dist. Lexis 63043 (S.D. Iowa, January 9, 2008), which is simply a ruling on a summary judgment from an Iowa district court in a products liability case, is neither persuasive or precedential authority that this Court can consider, nor applicable. Further, the principle for which the Defendants cite this case, that a latent defect in the bungee cord somehow caused the subject collision, cannot be considered as that issue was not argued or pled below, and defendants submitted absolutely no evidence to support such an argument. As noted above, conjecture and/or speculation, which is to what this arguments amounts, cannot defeat a motion for summary judgment.

Defendants also attempt to draw an analogy between a truck foreseeably spilling oil on the freeway to an unforeseeable tire blowout and cites *Wellson v. Wiley*, 24 Wn.2d 543, 166 P.2d 852 (1946) and subsequently *McMillian v. Auto Interurban Company*, 127 Wn 625, 221 P. 314 (1923) in that regard. This analogy must fail because the basis for the courts refusing to attribute negligence as a matter of law in those cases was that the tire blow-outs, actions taken by the subject defendants in response to the blow-outs, and the resulting collisions were all “unavoidable.” More importantly, there were material disputed facts as the proximate causes of the claimed injuries. (See, *Church v. West*, 75 Wn.2d 502, 510-11, 452 P.2d 265 (1969), examining and distinguishing *Wellson* and noting material disputed facts as to the proximate cause of the accident and/or injuries)

As noted by the *Wellson* court, an ‘unavoidable accident’ is an unintended occurrence, which could not have been prevented by the exercise of reasonable care. The Court ruled *in limine* in this case that Defendants could not argue that the collision was unavoidable and Defendants have not assigned error to that issue. (CP 896) Further, a tire blowing out, which more often times than not, is not a foreseeable event, is not analogous to a hose coming loose that was not properly or reasonably secured when it was reasonably foreseeable that it could be come loose and spill its contents on the freeway because of the known rough road conditions.

Contrary to the cases cited by the Defendants, a case that is directly on point is *Alaska Freight Lines, supra*. In that case, the ninth circuit held that

the defendant truckowner was liable to the plaintiff, who had been injured when the windshield of his panel truck was shattered by a piece of ice, which fell from the top of the defendant's tractor-trailer, as the two vehicles passed each other going in opposite directions on the Alaska Highway, during the early morning hours of a day when the temperature was 26 degrees below zero and the wind was blowing in gusts up to 30 miles an hour. It was held that the defendant was careless and negligent in allowing the ice to accumulate, and that the plaintiff's injuries were the direct result of such negligence. The defendant contended that there was no foreseeability of harm to other motorists in permitting the ice to accumulate and that even if the harm was foreseeable, the risk was not unreasonable because the magnitude of it did not outweigh the social utility of the driver's conduct in not cleaning the top of his truck. The 9th Circuit Court rejected these arguments and held that it could be reasonably anticipated that snow and ice might be dislodged from a truck traveling at approximately 40 miles an hour and cause injuries to persons in the immediate vicinity. The Court also held that since the defendant regularly cleaned the tops of its trucks at the depots, it would have knowledge that ice and snow "might" accumulate on the top of the truck during a trip which took 16 to 24 hours and during which time the truck was parked overnight for a matter of 6 or 10 hours.

Like the facts in *Alaska Freight Lines* demonstrated, based upon Defendants' own evidence, it could reasonably be anticipated that the known rough conditions of I-5 in combination with an empty truck might cause a

bungee-cord to break and dislodge a hose containing residual used oil that might then spill and cause injuries to persons in the immediate vicinity.

4. THE DOCTRINE OF RES IPSA LOQUITUR IS APPLICABLE TO THE FACTS OF THIS CASE AND DEFENDANTS FAILED TO REBUT THE PRESUMPTION OF NEGLIGENCE UNDER THE DOCTRINE

Generally, the plaintiff bears the burden of proof in a tort action. However, the doctrine of res ipsa loquitur, literally “the thing speaks for itself,” can spare “the plaintiff the requirement of providing specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant was not negligent.” *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003)

This doctrine permits the inference of negligence based on the principle that sometimes what causes the injury is practically accessible to the defendant but not to the injured victims. *Covey v. W. Tank Lines, Inc.*, 36 Wn.2d 381, 390, 218 P.2d 322 (1950). Whether the doctrine of res ipsa loquitur is applicable is a question of law and the Court reviews it de novo. *Zukowsky v. Brown*, 79 Wn.2d 586, 592, 488 P.2d 269 (1971); *Douglas v. Bussabarger*, 73 Wn. 2d 476, 438 P.2d 829 (1968) (trial court erroneously denied use of res ipsa loquitur where evidence showed that inference of negligence was logical). To infer negligence under the doctrine of res ipsa loquitur, the evidence must show:

“(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*, 79 Wn.2d at 593.

The first element is satisfied when one of 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 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. *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 793, 929 P.2d 1209 (1997).

The second element, exclusive control of the instrumentality, is not limited to actual physical control; rather, it refers to the right of control at the time of the accident, or at the time the negligent act probably took place. *Pacheco*, 149 Wn.2d 431 (trial court properly instructed jury on res ipsa theory when dentist had complete control over instrumentality that caused patient's injury); *Hogland v. Klein*, 49 Wn. 2d 216, 298 P.2d 1099 (1956); *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 150 P.2d 436 (1944) (waitress who was injured by exploding bottle was entitled to res ipsa instruction based on logical inference that bottle was negligently manufactured).

The third element of res ipsa is not defeated when the plaintiff cannot demonstrate with absolute certainty the cause of injury, so long as the defendant had exclusive control of the instrumentality of the reasonably inferred cause. *Robison v. Cascade Hardwoods, Inc.*, 117 Wn. App. 552, 72

P.3d 244 (2003) (minimal evidence of plaintiff's contributory fault did not defeat plaintiff's res ipsa loquitur theory as a matter of law).

Here, all three elements were satisfied and could not be rebutted by Defendants because of the uncontroverted evidence. The defendants' spilling of oil on the freeway thus causing a collision is so palpably negligent that how the hose broke and the oil spilled on the roadway may be inferred, and it cannot be logically disputed that without the oil on the roadway, particularly as it was a clear, sunny day and Plaintiff was traveling at the posted speed limit, the general experience and observation of mankind teaches that the collision would not be expected without negligence. Defendant Stadtherr was the driver at the time of the accident and had exclusive control over the vehicle, the trailer, the hose and its attachments. Finally, it was admitted by defendants that Plaintiff and all of the evidence demonstrates that Plaintiff was not in any way contributorily negligent.

The only arguments **now** posed by Appellants in an attempt to overcome the presumption of negligence in this case are the allegations that another party might be at fault, there are other possible causes for Rayna losing control of her vehicle, or the bungee cord broke from fatigue. As set forth above, there was no absolutely no evidence to support any of these speculative arguments presented on summary judgment.

There is a long line of cases in which res ipsa loquitur has been held applicable where an object being transported by a motor vehicle has fallen therefrom. See 66 A.L.R.2d 1255 (1959) and supplement. "Applicability of

Res Ipsa Loquitur Doctrine Where Objects Being Transported Fall From Motor Vehicles.”³ All of these cases support application of the doctrine in this case. Therefore, even if defendants argue it is not known how the hose came loose, i.e. how the bungee cord securing the hose to the trailer broke, and spilled oil on the roadway, the “thing speaks for itself.” Applying the doctrine of res ipsa loquitur to that issue in conjunction with the common law principles set forth above confirms that the trial court correctly determined that Defendants were negligent as a matter of law.

5. THE COURT ERRED IN FINDING THAT DEFENDANTS WERE NOT NEGLIGENT AS A MATTER OF LAW UNDER RCW 46.61.655 AND THEREFORE, THERE ARE ADDITIONAL GROUNDS UPON WHICH THIS COURT CAN AFFIRM THE SUPERIOR COURT’S SUMMARY JUDGMENT RULING ON LIABILITY.

An appellate court may affirm a trial court’s ruling on any grounds the record supports. *Hendrickson v. King County*, 101 Wn. App. 258, 2 P.3d 1006 (2000). In this case, the Court held that it could not determine statutory

³ These courts all held that the doctrine of res ipsa loquitur applied in cases similar to the present one (i.e. where a vehicle dropped or spilled something that subsequently caused injuries) even though the cause of how the material in question fell or spilled may not have been known:

McCarty v. Hosang, 154 F. Supp. 852 (W.D. Mo. 1957); *Mart v. Riley*, 239 Cal. App. 2d 649, 49 Cal. Rptr. 6 (3d Dist. 1966); *McCole v. Merchants Exp. Corp.*, 19 Cal. App. 2d 149, 64 P.2d 1130 (1st Dist. 1937); *Hohmann v. Jones*, 146 Kan. 578, 72 P.2d 971 (1937); *Roberts v. Davis*, 422 S.W.2d 890 (Ky. 1967); *Brady v. American Ins. Co.*, 198 So. 2d 907 (La. Ct. App. 4th Cir. 1967); *State Farm Mut. Auto. Ins. Co. v. Herrin Transp. Co.*, 136 So. 2d 272 (La. Ct. App. 2d Cir. 1961); *Poulin v H. A. Tobey Lumber Corp.* (1958) — Mass —, 148 NE2d 277; *Layton v. Palmer*, 309 S.W.2d 561, 66 A.L.R.2d 1242 (Mo. 1958); *Sober v. Smith*, 179 Neb. 74, 136 N.W.2d 372 (1965); *Forsch v. Liebhardt*, 5 N.J. Super. 75, 68 A.2d 416 (App. Div. 1949); *Polk v. Roger Sherman Transfer Co.*, 3 A.D.2d 882, 161 N.Y.S.2d 487 (3d Dep’t 1957); *Richard Equipment Corp. v. Manhattan Indus. Contracting Co.*, 9 A.D.2d 691, 191 N.Y.S.2d 587 (2d Dep’t 1959); *Golden v. R.L. Greene Paper Co.*, 44 R.I. 226, 116 A. 577 (1922)

negligence as a matter of law. That ruling was erroneous, and in addition to finding Defendants liable under the theory of common law negligence and/or the doctrine of res ipsa loquitor, this Court can find Defendants liable as a matter of law for their violation of RCW 46.61.655.

Statutes and/or regulations may impose duties that are additional to and different from the duty to exercise ordinary care. In Washington, a breach of a statutory duty no longer establishes negligence per se, but it may be evidence of negligence, and a court can properly find negligence as a matter of law if no reasonable person could find that the defendant exercised due care. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003)

A statute has this effect when it meets a four-part test: The statute's purposes, exclusively or in part, must be (1) to protect a class of persons that includes the person whose interest is invaded; (2) to protect the particular interest invaded; (3) to protect that interest against the kind of harm that resulted; and (4) to protect that interest against the particular hazard from which the harm resulted. *Mathis v. Ammons*, 84 Wn. App. 411, 416, 928 P.2d 431 (1996)

In that regard, as a driver carrying a truck transporting used oil, Mr. Stadtherr had a statutory duty to prevent any of his load, including used waste oil **and/or** the attached hose, from escaping the trailer on his truck pursuant to RCW 46.61.655. *Ganno v. Lanoga Corp.*, 119 Wn. App. 310, 80 P.3d 180

(2003).⁴ The statute provides in pertinent 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,** except that sand may be dropped for the purpose of securing traction.
 - (2) **No person may operate on any public highway any vehicle with any load unless the load and such covering as required thereon by subsection (3) of this section is securely fastened to prevent the covering or load from becoming loose, detached, or in any manner a hazard to other users of the highway.**
 - (3) Any vehicle operating on a paved public highway with a load of dirt, sand, or gravel susceptible to being dropped, spilled, leaked, or otherwise escaping therefrom shall be covered so as to prevent spillage. Covering of such loads is not required if six inches of freeboard is maintained within the bed. . . .
- (a)
 - (i) **A person is guilty of failure to secure a load in the first degree if he or she, with criminal negligence, fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1), (2), or (3) of this section and causes substantial bodily harm to another.**
 - (ii) Failure to secure a load in the first degree is a gross misdemeanor.

. . . .

(Also see Appendix A)

RCW 46.61.655 applies to all vehicles carrying loads on public highways. *Ganno*, 119 Wn. App. at 318-19. Although the above-referenced statute does not define “load,” given the dictionary definition and

⁴ In conducting review of a statute, the Court interprets a statute according to its plain language and gives effect to the intent of the legislature. *W.R.P. Lake Union Ltd. P'ship v. Exterior Servs., Inc.*, 85 Wn. App. 744, 749, 934 P.2d 722 (1997). In determining the definition of a word not defined by statute, the Court gives it its dictionary definition. *State v. Northshore School Dist. 417*, 99 Wn.2d 232, 662 P.2d 38 (1983) “Load” is defined in part by the Webster’s Third New International Dictionary in part as “whatever is put in a ship or vehicle or airplane for conveyance.”

Defendants' testimony and admission that there was residual oil in the hose and the uncontroverted testimony by the Detective and John Watchie as to the extent of the amount of oil on the roadway, the used oil that the Defendants were carrying must be construed as a "load."

Therefore, based upon the plain meaning of RCW 46.61.655, Defendants failed to secure their load (and/or covering - i.e. the hose) of used oil and violated the above-referenced statute when they allowed the hose they were carrying on the exterior of their truck/trailer and/or used oil to escape. The hose itself is also arguably a "load" that Defendants failed to secure. As Defendants did not provide any evidence to contravene these facts or any excuse as to why they violated this statute, they are therefore liable to Plaintiff as a matter of law. *See, Skeie*, 115 Wn. App. 144, *supra*, ("considering the statutory duty to secure a load so that it does not fall and create a hazard to other users of the road, RCW 46.61.655, we conclude that Mercer owed a legally enforceable, societally recognized obligation to secure a load so that it would not detach during a collision.") *See also, Solomonson v. Melling*, 34 Wn. App. 687, 690, 664 P.2d 1271 (1983)(holding that the failure of a logging truck and trailer to be equipped with a safety chain or other positive alternative means of keeping the trailer from parting with the logging truck towing it, thus resulting in the connecting pin coming out, constituted negligence as a matter of law)

In addition, pursuant to the authority vested in the Department by way of RCW 46.37 et seq, Washington Administrative Code (WAC) 204-44 et.

seq. was promulgated and provides an additional basis for finding Defendants' statutorily negligent as a matter of law. In that regard, WAC 204-44-020(2), the administrative regulation regarding the Standards for Load Fastening Devices, states in pertinent part:

- (2) Any motor truck, truck tractor, trailer, semi-trailer, or any combination thereof, transporting any load other than logs, upon a public highway where binder devices are required, shall have the load thereon securely fastened and protected by at least two load binders sufficiently strong to withstand all possible strains. The load securing devices shall have a breaking strength of at least 15,000 pounds. Exception: Binders used to secure baled hay and baled straw shall have a breaking strength of not less than 9,000 pounds.⁵

Defendants provided no evidence that the bungee cords securing the hose to their trailer complied with WAC 204-44-020(2) in this case and thus, this regulation provides an additional basis upon which the Court can affirm the trial court's ruling on summary judgment regarding liability.

6. THE COURT ERRED IN FINDING THAT DEFENDANTS WERE NOT STRICTLY LIABLE AS A MATTER OF LAW, AND THEREFORE, THERE ARE ADDITIONAL GROUNDS UPON WHICH THIS COURT CAN AFFIRM

In addition, given that the Defendants were in the business of hauling used oil, a contaminating and dangerous substance, they can be found strictly

⁵ WAC 204-44-030 then states with regard to the approval of load fastening devices as follows:

The types of binder devices listed below are hereby approved by the state patrol, provided that they have a minimum breaking strength of at least 15,000 pounds, or meet or exceed federal standards contained in CFR 393.102:

1. Steel chain.
2. Steel cable.
3. Steel strapping.
4. Fiber webbing.

liable for Plaintiff's injuries. *See, Siegler v. Kuhlman*, 81 Wn.2d 448, 502 P.2d 1181 (1973)(holding that doctrine of strict liability was applicable to render a defendant owner of gasoline trailer liable as a matter of law for the wrongful death of motorist who died in the flames of a gasoline explosion when her automobile encountered a pool of gasoline spilled on the highway by defendant's gasoline trailer, which broke away from the truck towing it, rolled down a hill and onto the highway being used by motorist)

Washington courts have adopted the test for abnormally dangerous activities set forth in the Restatement (Second) of Torts, § 520. The Restatement sets forth six factors that are to be considered in deciding whether an activity is abnormally dangerous:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes. *Klein v. Pyrodyne Corp.*, 117 Wn. 2d 1, 6, 810 P.2d 917, 919 (1991), quoting Restatement (Second) of Torts § 520 (1977)

The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care." *Id.* The question of whether to impose strict liability is for the court, not the jury, since it is usually not a question of fact, but rather a judgment about an activity in

general. *Id.* For example, a company conducting a public fireworks display was held to be engaged in an abnormally dangerous activity, justifying the imposition of strict liability for injuries resulting from a misfired rocket. *Id.* Other cases holding a defendant strictly liable include: a gasoline tanker that overturned and exploded (*Siegler v. Kuhlman*, 81 Wn. 2d 448, 502 P.2d 1181 (1972), *cert. denied*, 11 U.S. 983, 93 S.Ct. 2275, 36 L.Ed.2d 959 (1973)); a crop duster whose aerial spraying resulted in damage to an organic farmer's crops (*Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 567 P.2d 218 (1977)); and a pile driver whose actions caused damage to an adjacent property (*Vern J. Oja & Assoc. v. Washington Park Towers, Inc.*, 15 Wn. App. 356, 549 P.2d 63 (1976), *affirmed* 89 Wn.2d 72, 569 P.2d 1141 (1977).

Defendants' only argument against the application of strict liability was that the petroleum transported by them is not "hazardous" according to the United States Department of Transportation." However, under Washington's Model Toxics Control Act, petroleum or petroleum products are **specifically defined** as "**Hazardous substance(s).**" *City of Seattle v. Washington State Dept. of Transp.*, 98 Wn. App. 165, 989 P.2d 1164 (1999); RCW 70.105D.020(7) Therefore, strict liability does apply in the present case and provides an additional basis upon which the Court can affirm the trial court.

B. THE SUPERIOR COURT CORRECTLY REFUSED, WITHOUT OBJECTION BY DEFENDANTS, TO ASK THE JURY'S IRRELEVANT QUESTIONS

CR 43(k) is the Court Rule regarding the jury's ability to propose questions to a witness. It states in pertinent part as follows:

(k) Juror Questions for Witnesses. The court shall permit jurors to submit to the court written questions directed to witnesses. Counsel shall be given an opportunity to object to such questions in a manner that does not inform the jury that an objection was made. The court shall establish procedures for submitting, objecting to, and answering questions from jurors to witnesses. The court may rephrase or reword questions from jurors to witnesses. The court may refuse on its own motion to allow a particular question from a juror to a witness.

Although no case has discussed review of a Court's ruling or decision not to ask a question posed by a juror, generally, evidence must be relevant in order to be admissible. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence. ER 401. Even if relevant, however, evidence may still be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury. ER 403. A trial court has wide discretion in determining whether evidence will mislead the jury. *State v. Luvene*, 127 Wn.2d 690, 707, 903 P.2d 960 (1995). Improper speculation can be the basis for exclusion under both ER 402 and ER 403, as either irrelevant or misleading, respectively. The appellate courts review a trial court's evaluation of relevance using a manifest

abuse of discretion standard of review. *State v. Luvene*, 127 Wn.2d 690, 903 P.2d 960 (1995).

In this case, the Court had already determined liability and as a result, properly limited the testimony in limine that could be presented to the jury about how the collision occurred, much in part based upon the Defendants' own motion in limine. (CP 573-74)(RP 33-34) The Court ruled that Defendant Stadtherr could testify at trial, but specifically limited his testimony "to set the stage for the accident," and stated that it would be "very, very conservative on that." (RP 117-18) In that regard, the Court stated, "All I want to do is establish where he was driving, the county, the state, what part of the freeway, what he observed and why he pulled over." (RP 118-19)

Consistent with the Court's ruling, Plaintiff's counsel simply asked Mr. Stadtherr the date of the collision, the basics of his employment with Defendant APES, and the basics of the truck he was driving on the date of the collision. (RP 212-16) Regarding the details of the collision, the questions posed to Mr. Stadtherr inquired where he was heading when the collision occurred, what happened that caused him to pull over to the side of the road, where on the road he pulled over, and what his observations were in regard to the hose and the oil on the truck trailer. (RP 212-218) Defense counsel was then allowed to follow-up with the questions and ask Defendant to confirm whether the truck was empty at the time of the collision, which Defendant confirmed. (RP 218-19) The Court then posed follow-up questions of Defendant Stadtherr from the jury including where on the truck

the oil was and why there was no oil in the hose. (RP 222) The Defendant testified that only a little, if any, residual oil was in the truck. (RP 222)

The Court's rulings regarding the jury's questions was consistent with its ruling regarding the parties' motions in limine and sufficiently informed the jury of the facts of the collision in order to understand the mechanism of Plaintiff's injury. Appellants have not assigned error to that ruling in violation of RAP 10.3(a)(3), (g), nor did they preserve any claimed error in trial. See RAP 2.5(a) (court may refuse to review issue not raised previously)

C. **DESPITE THE FACT APPELLANTS FAILED TO ASSIGN ERROR TO THE VERDICT, THE JURY'S VERDICT IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND CANNOT BE DISTURBED.**

Appellants argue that the jury's verdict in this case is excessive in their view and thus it is somehow representative of a punitive damage award. They cite absolutely no factual support or legal authority for such argument. This Court need not consider undeveloped arguments and arguments without authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

This is the first time Appellants have raised this issue. They never filed a motion asking the Court for a new trial pursuant to CR 59, nor did they request remittitur pursuant to RCW 4.76.030. Defendants' failure to assign error to the jury's verdict and/or their determination of damages forecloses this Court's consideration of the issue here. RAP 10.3(a)(3), (g). An appellate court does not address issues that a party neither raises appropriately nor discusses meaningfully with citations to authority on appeal from a trial court's judgment. *Saviano v. Westport Amusements, Inc.* 144 Wn.

App. 172, 180 P.3d 874 (2008) The damage award in this case must be affirmed.

Had Appellants properly preserved any claimed error, the jury's damage award would still be affirmed. Although either the trial court or the appellate court has the power to reduce an award or order a new trial based on a claim of excessive damages, appellate review is the most narrow and restrained, and the appellate court rarely exercises this power. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.* 122 Wn.2d 299, 858 P.2d 1054 (1993) The jury is the appropriate assessor of damages and a verdict should be overturned only in the most extraordinary circumstances: where the award is outside the range of evidence, the jury was obviously motivated by passion or prejudice, or the verdict amount is shocking to the court's conscience. *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 856 P.2d 746 (1993); *Miller v. Yates* 67 Wn. App. 120, 834 P.2d 36 (1992).

In reviewing the record on appeal to determine whether sufficient credible evidence supports the verdict, the Court of Appeals starts with the presumption that the verdict was correct. *Herriman v. May* 142 Wn. App. 226, 174 P.3d 156 (2007) Before Plaintiff even began her opening argument in this case, the Court had ruled – without any objection or opposition from the Defendants – that the jury had no choice but to find that the subject collision proximately caused Rayna's claimed injuries and it had to include a minimum of \$140,665.40 in special/economic damages in its verdict. As Defendants did not object or oppose Plaintiff's motion, the Court's findings

and rulings regarding proximate cause and the established damages are verities on appeal and cannot be challenged. RAP 2.5; *See, Pier 67, Inc. v. King County*, 71 Wn.2d 92, 94, 426 P.2d 610 (1967) At trial, Plaintiff presented un rebutted evidence of the significant permanent injuries that she sustained as a result of the collision and the extent of the life-altering impact her injuries have had on her life, including but not limited to, her inability to work, perform her normal daily activities as she did before the collision, travel, attend events, and interact with her friends and family. Appellants cited absolutely no evidence that the jury based its verdict upon anything but the uncontroverted facts presented to it.

Further, the Court's instructions to the jury instructed: "You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference." (CP 967; Instruction No. 1) They further instructed the jury that its "award must be based upon evidence and not upon speculation, guess, or conjecture." (CP 981; Instruction No. 8) These are standard instructions (WPI 1.02 and WPI 30.01.01) and there was no exception taken to them by Defendants. The jury is presumed to follow the trial court's instructions unless it is otherwise shown. *Carnation Co. v. Hill*, 115 Wn.2d 184, 187, 796 P.2d 416 (1990).

Defendants have not established that the jury did not follow the trial court's instructions, that the verdict was outside the range of evidence, or that jury was obviously motivated by passion or prejudice, or that the verdict

amount is shocking to the court's conscience. The verdict in this case and the jury's damage award are consistent with the evidence and must be affirmed.

**V. REQUEST FOR ATTORNEY FEES AND COSTS
PURSUANT TO RAP 18.1**

**A. UPON AFFIRMING THE TRIAL COURT'S RULINGS, THIS
COURT SHOULD ASSESS REASONABLE ATTORNEY FEES AND
COSTS AS THIS IS A FRIVOLOUS APPEAL**

It is respectfully requested that this Court assess an award of actual attorney fees and costs against Defendants for their frivolous appeal pursuant to RAP 14.2, 18.1 and 18.9. *See, e.g. Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004) Under RAP 18.9, an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. *State ex rel Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998); *Streater v. White*, 26 Wn. App. 430, 613 P.2d 187 (1980); *Johnson v. Jones*, 91 Wn. App. 127, 955 P.2d 826 (1998).

In this case, there are no debatable issues upon which reasonable minds can differ. There are no material disputed facts and defendants' own testimony and evidence established that Defendants failed to use ordinary care in securing the hose containing used oil to their truck/trailer when they knew that I-5 was a bumpy rough road that could cause a hose to become loose and oil spill onto the highway. In addition, numerous other theories of negligence support the trial court's finding of liability as set forth above. Apart from the Court's ruling on summary judgment and the exclusion of

irrelevant questions relating to that ruling, Defendants' have not assigned error to any other issues. Their insinuation and argument without authority that the damage award is somehow punitive is also frivolous in this case and sanctionable.

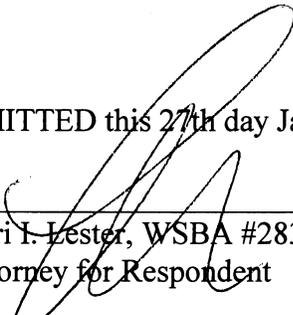
The Court has sanctioned an appealing party under similar circumstances. *Harvey v. Unger*, 13 Wn. App. 44, 533 P.2d 403 (1975) In *Harvey*, the Court held that the defendant's appeal, which challenged only the granting of plaintiff's motion for summary judgment on the issue of liability, was taken merely for delay and therefore awarded \$1,000 in attorney fees and costs for such delay. The Court pointed out that the defendant disfavored driver admitted that she made no observation of the roadway on which plaintiff approached and she failed to point out any facts that would support a finding of contributory negligence on the part of plaintiff in her brief.

Plaintiff respectfully requests that this Court order Defendants to pay Plaintiff reasonable attorney fees and costs on appeal.

VI. CONCLUSION

For the reasons stated above, the trial court's rulings should be affirmed, and Plaintiff should be awarded her additional fees and costs on Appeal.

RESPECTFULLY SUBMITTED this 27th day January, 2009.



Kari I. Lester, WSBA #28396
Attorney for Respondent

EXHIBIT “A”

RCW 46.61.655. DROPPING LOAD, OTHER MATERIALS--Covering

- (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, except that sand may be dropped for the purpose of securing traction.
- (2) No person may operate on any public highway any vehicle with any load unless the load and such covering as required thereon by subsection (3) of this section is securely fastened to prevent the covering or load from becoming loose, detached, or in any manner a hazard to other users of the highway.
- (3) Any vehicle operating on a paved public highway with a load of dirt, sand, or gravel susceptible to being dropped, spilled, leaked, or otherwise escaping therefrom shall be covered so as to prevent spillage. Covering of such loads is not required if six inches of freeboard is maintained within the bed.
- (4)
 - (a) Any person operating a vehicle from which any glass or objects have fallen or escaped, which would constitute an obstruction or injure a vehicle or otherwise endanger travel upon such public highway shall immediately cause the public highway to be cleaned of all such glass or objects and shall pay any costs therefor.
 - (b) Any vehicle with deposits of mud, rocks, or other debris on the vehicle's body, fenders, frame, undercarriage, wheels, or tires shall be cleaned of such material before the operation of the vehicle on a paved public highway.
- (5) The state patrol may make necessary rules to carry into effect the provisions of this section, applying such provisions to specific conditions and loads and prescribing means, methods, and practices to effectuate such provisions.
- (6) Nothing in this section may be construed to prohibit a public maintenance vehicle from dropping sand on a highway to enhance traction, or sprinkling water or other substances to clean or maintain a highway.
- (7)
 - (a)
 - (i) A person is guilty of failure to secure a load in the first degree if he or she, with criminal negligence, fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1), (2), or (3) of this section and causes substantial bodily harm to another.
 - (ii) Failure to secure a load in the first degree is a gross misdemeanor.
 - (b)
 - (i) A person is guilty of failure to secure a load in the second degree if he or she, with criminal negligence, fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1) or (2) of this section and causes damage to property of another.
 - (ii) Failure to secure a load in the second degree is a misdemeanor.
 - (c) A person who fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1), (2), or (3) of this section is guilty of an infraction if such failure does not amount to a violation of (a) or (b) of this subsection.

FILED
COURT OF APPEALS
DIVISION II
09 JAN 30 PM 2:00
STATE OF WASHINGTON
BY _____
DEPUTY

**COURT OF APPEALS
OF AND FOR THE STATE OF WASHINGTON
DIVISION II**

RAYNA MATTSON, individually,

Respondent,

v

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

Appellants.

NO. 37498-6-II

**CERTIFICATE OF
SERVICE**

I, Kari I. Lester, certify under penalty of perjury under the laws of the
State of Washington, that I am an attorney at *The Law Offices of Ben F.*

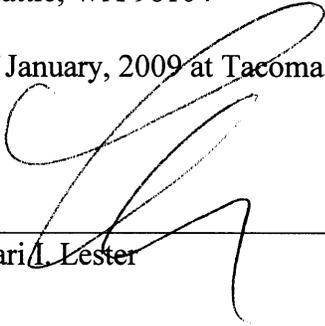
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ORIGINAL

Barcus and that I am depositing and sending via Legal Messenger, a true and correct copy of Respondent's Corrected Brief along with a copy of this Certificate of Service in the above-captioned case addressed to:

Kasey C. Myhra
Law Offices of William J. O'Brien
999 Third Ave, Suite 805
Seattle, WA 98104

DATED this 29th day of January, 2009 at Tacoma, Washington.



Kari L. Lester

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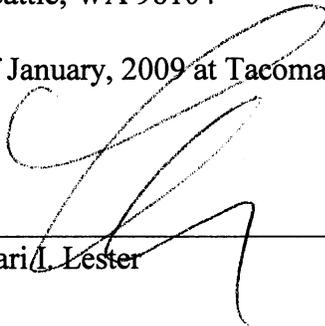
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I, Kari I. Lester, certify under penalty of perjury under the laws of the
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