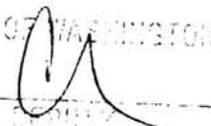


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
CLERK

No. 43735-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RAYNA MATTSON, individually,

Appellant/Plaintiff,

v.

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

Respondents/Defendants.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
The Honorable Judge Garold E. Johnson

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Jury's Verdict in this case unjustifiably allows a Defendant trucking company to admittedly spill used waste oil it carries on the freeway, cause a serious roll-over collision without any comparative fault by the Plaintiff, to not plead any empty chair/third parties, and then be held not responsible for such spill. The Court's wrongful refusal to overturn the improper verdict and grant a new trial further rewards the Defendants for their repeated misconduct and last-minute fabricated and disclosed defenses.

This case was previously appealed by the Defendants after liability, proximate cause of injuries and the reasonableness of special damages were determined pursuant to Summary Judgment rulings. Division II, with a strong dissent by Judge Hunt, remanded the case back for trial on the issue of whether the Defendants were negligent in securing hose tie downs on the Defendants' oil tanker truck. (Appendix "A") Upon remand, the Superior Court ordered that the trial would proceed on liability only, including proximate cause of the collision, despite Defendants' prior admission that they spilled oil on the freeway and that caused the collision, and in spite of Plaintiff's multiple motions for the application of equitable estoppel in this regard. The defense seized upon the Court's erroneous denial and literally argued throughout the course of trial that the oil could have "dropped from the sky."

Plaintiff is asking this Court to reinstate the Judgment entered on March 7, 2008 including interest as Plaintiff unequivocally established the Defendants' negligence caused the subject collision without any controverted evidence set forth by Defendants. In the alternative, Plaintiff is asking Division II to remand this case for a new trial, on the issue of negligence only, excluding the proximate cause of the collision.

II. ASSIGNMENT OF ERRORS

1. The Trial Court erred in failing to grant the Plaintiff's motion for directed verdict/judgment as a matter of law at the close of Defendants' case, and again, after the Verdict.
2. The Trial Court abused its discretion when it refused – for a second time - to hear plaintiff's motion for the application of equitable doctrines to preclude defendants from arguing the proximate cause of the collision in this case and summarily denied the same.
3. The Trial Court erred when it denied Plaintiff's motion for application of res judicata, collateral and/or equitable estoppel.
4. The Trial Court abused its discretion when it denied Plaintiff's motion for application of judicial estoppel.
5. The Trial Court erred in giving Court's Instruction No. 16, over Plaintiff's Instruction No. 22.
6. The Trial Court erred in failing to give Plaintiff's Instruction No. 14 regarding nondelegable duties.
7. The Trial Court erred in giving Court's Instruction No. 5, over Plaintiff's Instruction No. 3A.
8. The Trial Court abused its discretion when it allowed defendants to argue that oil dropped from the sky or came from an unknown third party and then perpetuated such error by failing to give Plaintiff's Instruction No. 3A.
9. The Trial Court erred in failing to give Plaintiff's Instruction No. 23A regarding spoliation.

10. The Trial Court abused its discretion when it allowed Defense counsel to question Plaintiff regarding her hiring of Plaintiff's counsel, her contacts with counsel, and her filing of the lawsuit in this case, improperly suggesting delay on her part, and then, further failed to cure such prejudicial error by failing to give Plaintiff's Instruction No. 23A.
11. The Trial Court erred in giving Court's Instruction No 7, over Plaintiff's Instruction No. 15 instructing the jury that Res Ipsa Loquitor applied in this case as a matter of law.
12. The trial court abused its discretion when it denied plaintiff's motion for new trial based upon defense counsel's misconduct.
13. The trial court abused its discretion when it denied plaintiff's motion for new trial based upon the jury's misconduct.
14. The Trial Court erred when it denied plaintiff's motion for a new trial given the cumulative errors that occurred at trial and the fact that substantial justice has not been done in this case.
15. The Trial court erred in entering a final judgment in this case in favor of Defendants.

III. STATEMENT OF ISSUES RELATING TO ASSIGNMENT OF ERRORS

1. Did the Trial Court err in failing to grant the Plaintiff's motion for directed verdict/judgment as a matter of law at the close of Defendants' case, and again, after the Verdict, when there was simply no conflict of relevant evidence regarding Defendants' negligence or causation and the defendants' evidence was only speculative?
2. Did the Trial Court err and/or abuse its discretion when, based upon an erroneous view of the law and in contradiction of its prior direction to Plaintiff's counsel, it refused – for a second time - to hear plaintiff's motion for the application of equitable doctrines to preclude defendants from arguing the proximate cause of the collision in this case and summarily denied the same, which provided Defendants a great procedural advantage when (1) they changed their position on the eve of trial to dispute causation of the collision despite their prior stipulation on summary judgment upon which Plaintiff had reasonably relied for four years and which severely prejudiced Plaintiff's ability to prepare for and present her case at trial and (2) the trial court and Division II accepted Defendants' stipulation as to causation?

3. Does Equitable Estoppel also preclude Defendants' last minute sandbagging of Plaintiff with their withdrawal of their stipulation as to causation of the collision when Defendants made an admission and statement inconsistent with their subsequent claim at trial disputing causation of the collision upon which Plaintiff had reasonably relied and was severely prejudiced in her preparation and presentation of her case at trial?
4. Did the Trial Court err in giving Court's Instruction No. 16, over Plaintiff's Instruction No. 22, when it (1) erroneously advised the jury they could excuse any of Defendants' violations of regulations; (2) there was no evidence to support the giving of the instruction; (3) the instruction was completely contradictory to and negated the Court's Instruction No. 12, particularly when the Court refused to give Plaintiff's Instruction No. 14 regarding nondelegable duties, for which Plaintiff provided substantial evidence to support the instruction?
5. Did the Trial Court err in giving Court's Instruction No. 5, over Plaintiff's Instruction No. 3A, which correctly instructed the jury that there were no unnamed parties that were in any responsible for the collision, and in light of the Court's erroneous ruling allowing defendants to argue that oil dropped from the sky or came from an unknown third party, which then perpetuated such error by failing to give Plaintiff's Instruction No. 3A?
6. Did the Trial Court err in failing to give Plaintiff's Instruction No. 23A regarding spoliation when despite their clear knowledge of their involvement in a very serious collision and despite multiple discovery requests, Defendants failed to preserve and/or intentionally destroyed the broken bungee cord, the broken hose, the driver checklist, and the pre and post trip inspection reports for the truck involved in the collision in this case, as well as the truck itself as requested by the Plaintiff during discovery?
7. Did the Trial Court abuse its discretion when it allowed Defense counsel to question Plaintiff regarding her hiring of Plaintiff's counsel, her contacts with counsel, and her filing of the lawsuit in this case, which violated the Order on Motions in Lime and attorney client privilege and improperly suggested delay on Plaintiff's part, particularly when the Court further failed to cure such prejudicial error by failing to give Plaintiff's Instruction No. 23A?
8. Did the Trial Court err in giving Court's Instruction No 7, over Plaintiff's Instruction No. 15 instructing the jury that Res Ipsa Loquitor applied in this case as a matter of law when Defendants

failed to present any evidence to refute the application of the doctrine and Plaintiff's expert provided unequivocal evidence that satisfied the elements of the doctrine?

9. Did the Trial Court abuse its discretion when it denied plaintiff's motion for a new trial based upon defense counsel's misconduct as such conduct materially affected Plaintiff's substantial rights, injected prejudice into the trial, and amounted to jury nullification?
10. Did the trial court abuse its discretion when it denied plaintiff's motion for a new trial based upon the jury's misconduct as (1) the jury failed to properly deliberate and (2) one juror failed to disclose material information during voir dire and then interjected that information into deliberations?
11. Should the Court of Appeals reverse the judgment of the Trial Court and reinstate the prior Judgment against Defendants with interest, or in the alternative, grant a new trial only on the issue of negligence given the cumulative errors that occurred at trial and the fact that substantial justice has not been done in this case.

IV. STATEMENT OF THE CASE

A. BACKGROUND FACTS OF THE COLLISION

There is no dispute that this case involves a serious roll-over collision that occurred on July 21, 2003 when Plaintiff Rayna Mattson suffered significant injuries due to her losing control of her vehicle on used waste oil spilled on the freeway by Defendants American Petroleum Environmental Service. ("APES") (CP 82-86)

B. TRIAL #1

Following the close of discovery and prior to the FIRST trial, Plaintiff and Defendants filed cross-motions for Summary Judgment on the issue of liability. Plaintiff also filed a Motion for Summary Judgment on the issues of proximate cause and the reasonableness and necessity of Plaintiff's past and future medical billings, wage loss and travel expenses.

(CP 190-213); Defendants filed absolutely no response to those motions.

With regard to liability, Defendants specifically stated in their response to Plaintiff's summary judgment motion:

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 529) (Emphasis added)

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 473-496) 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 527-533) The trial court determined that all of the elements of negligence 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 and entered an order finding the defendants liable for the collision as a matter of law and the Plaintiff was fault-free. (CP 569-571) The Court also entered a separate order regarding proximate cause and Plaintiff's special damages, which was also unopposed by Defendants.(CP 572-574)

At trial, Plaintiff presented lay witness testimony from her husband, Brent Mattson and two co-workers/friends Lisa Porter and Nicole Byrum Wahl, as well as expert testimony from her primary care physician, Dr.

Joy Ziemann and her chiropractor, Dr. Don Finlayson. **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 jury finding for Plaintiff in the amount of \$547,665.40.¹ (Appendix “A”)

C. APPEAL #1

Defendants filed their Notice of Appeal on March 21, 2008. (CP 1033-38) Defendants assigned error only to: (1) the Court’s conclusion on summary judgment that APES was **negligent** as a matter of law; (2) the Court’s finding of a presumption of **negligence** against APES under the doctrine of *res ipsa loquitur*; and (3) the Court’s exclusion of trial testimony from the Defendant driver regarding his pre-trip inspection and maintenance of the truck. The Defendants did not assign error to any of the damages awarded to Plaintiff by the jury. (CP 671)

The Defendants did not assign error to the finding that Plaintiff was not comparatively at fault, nor was that an issue on appeal. In fact, Division II specifically noted:

¹Based 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. (See Second Supplemental Designation of Clerk’s Papers; Appendix “A”)

Defendants conceded for purposes of the summary judgment motion that “residual oil in the suction hose spilled [onto] the pavement, causing [Mattson] to lose control of her car and run off the road.” 3 CP at 475.

Mattson v. Am. Petroleum Enviromental Services, Inc., 155 Wn. App. 1024, 1, *review denied*, 169 Wn. 2d 1019, 238 P.3d 502 (2010)

Division II’s opinion of April 13, 2010 reversed the trial court’s ruling regarding summary judgment, specifically holding that the doctrine of *res ipsa loquitur* did not apply because “the defendants offered evidence of a non-negligent cause of the broken tie-down.” Judge Hunt offered a very insightful dissent and in that regard stated:

I respectfully dissent. Viewing the evidence in the light most favorable to Defendants, I agree with the trial court that (1) the *res ipsa loquitur* doctrine applies to Mattson's loss of traction on the oil slick spilled from Defendants' truck and her vehicle's resultant collision, and (2) Mattson's accident was “of a type that would not ordinarily result if the defendant were not negligent.” *Pacheco v. Ames*, 149 Wash.2d 431, 436, 69 P.3d 324 (2003). Based on the undisputed facts in this case, reasonable minds could not differ that Defendants breached a duty of care to other drivers to avoid placing them in danger when Defendants failed to secure a suction hose containing waste oil to prevent its coming loose while driving their otherwise “empty,” 2 Clerk's Papers (CP) at 333, transport truck on a familiar and “very rough,” 2 CP at 333, section of I-5, with knowledge that the hose tie-downs, secured and inspected according to usual practice, were susceptible to breaking. I would hold that under the doctrine of *res ipsa loquitur*, Defendants acted negligently as a matter of law. And I would affirm the trial court's grant of partial summary judgment for Mattson on the issue of liability.

Id. at 5-6

D. TRIAL #2

1. PRELIMINARY MOTIONS/LIMINE AND VOIR DIRE

Upon remand, on January 11, 2012, **almost two and a half months before trial**, Plaintiff moved the Superior Court to confirm that the second

trial would only be on the issue of liability and specifically negligence, based upon Defendants' failure to appeal, or even assign error, to the issue of proximate cause of injury and/or the amount of damages. Further, as the Defendants had conceded in the first trial that their spilling of oil caused the collision, Plaintiff also moved to preclude any argument as to the cause of the collision and also to preclude any argument of comparative fault. The Court granted Plaintiff's motion on January 27, 2012, ruling that the trial would only go forward as to liability. (RP 19, CP 727-729) The Court reserved ruling on the issue of whether the defense would be precluded from arguing comparative fault or causation of the collision. In that regard, the hearing transpired as follows:

MS. LESTER: There were other issues that I've raised in my motion as far as – including one was that they hadn't raised comparative fault as an issue at the Court of Appeals and had admitted in the lower proceedings, including a motion for summary judgment, that my client was comparatively at fault. Same thing also the Court of Appeals noted was that they weren't disputing that the oil from the hose had actually caused the accident. That was in my motion as not being issues for trial. So, I don't know if you want me to address that by separate motion again or how you would like me to do that. I'm trying to limit – I don't like to do things as a motion in limine so we're just a week before trial trying to deal with that and trying to deal with it in advance.

It's not really an SJ, because they've already been issues that I've brought before as SJ and even the Court of Appeals has noted. **But I don't want to get to trial and they're saying Oh, well it could have been some other reason that this whole accident occurred. The issue is whether or not they breached their duty in maintaining the hose and securing it and doing all that, but not actually how – the fact that the collision was caused by my client's vehicle slipping on oil or that she anything to cause or contribute to it.**

MR. WALLACE: I don't – I'm not prepared to discuss that. I believe that-

THE COURT: She can bring it on by separate motion. **I actually did anticipate that. I did read it as well.** But you didn't –

MR. WALLACE: As she indicated, I was not trial counsel. **And I do believe that she's representing this correctly; that there was no issue that the oil, in fact, caused the collision. But I think that – I think we can reach an agreement on that separately.**

THE COURT: **If not, we cover that through motions in limine.**

MS. LESTER: I just didn't want to re-note it as SJ and do all that when it's already been addressed. It's more a collateral estoppel issue, especially with the Court of Appeals. I'm just trying to get direction from the Court, and I apologize.

THE COURT: **It would seem to be appropriate, just superficially, as something that would be a motion in limine.** It does seem appropriate in this case, without studying it.

(RP 21-22) (Emphasis added)

The SECOND trial in this case commenced on March 21, 2012. Prior to the empaneling of the jury on March 28, 2012, the Court dedicated a morning and an afternoon to hearing the parties' pretrial motions, including both the Plaintiff's and defense's Motions in Limine. Accordingly, and as instructed by Judge Johnson, Plaintiff filed a separate motion in limine prior to trial to confirm pursuant to judicial estoppel that issues of comparative fault and causation of the collision would not be issues at trial when they were not issues raised by the Defense on Summary Judgment or on Appeal. (CP 613-686)

In defendants' response to the motion, Defense counsel, William O'Brien, attempted to completely change Defendants' position that had been previously asserted in pleadings, as noted by the Court of Appeals, and even agreed to by prior counsel at the January 27, 2012 hearing just two months before. He argued that there was an issue of comparative fault and causation of the collision was an issue. At the outset of trial and in

arguing this motion, he falsely argued:

From day one and without change we've always denied that any oil from our truck could have caused this accident. Always consistently.” (RP 194)

The trial Judge changed his entire ruling as noted above, that the issue could be brought as a motion in limine and stated the issue of estoppel was not properly before him and should have been brought as a motion for summary judgment. (RP 6-19) The court ultimately denied Plaintiff's motion as to the issue of causation, but ruled that Defendant could not argue that Plaintiff was comparatively at fault, or that any third parties were negligent. (RP 122-123; CP 1456-1462)

Plaintiff also brought a motion to exclude any evidence surrounding the hiring of counsel, which was granted. (CP 1459)

At the outset of trial, the Court instructed the parties that it would require proper decorum in the court, including specifically, proper stating of objections, with no speaking objections. (RP 112-113) The Court gave examples of proper objection style to be employed during the trial:

When we get into trial, I'm fairly stern on don't give me speaking objections in front of the jury. I sometimes allow a little leeway, but let's argue those. And it seems like this case may have a few that are quite technical in nature and very confusing if we start doing that in front of the jury. So what we'll have to do is send the jury out. (RP 359)

Just prior to Voir Dire, the jury was asked to complete Questionnaires, which sought pertinent information, including, but not limited to the juror's employment for the past 5 years and more specifically asked: “*Have you or someone close to you ever worked in the*

following fields? (Check those that apply)” (Emphasis added) Included in those fields was “law enforcement.”

Prospective Juror No. 19 (later empaneled as Juror No. 10), Enrique Mesa Reyes, stated in the Questionnaire that he worked for Costco and specifically wrote in “NONE” as to having ever worked in any of the fields, including law enforcement.¹ (CP 38, 1478-81) He further stated that it was his “first time [on a jury] and [he didn’t] know what to do,” insinuating a non-opinion. (CP 39)

Conversely, the other 31 of the total 40 prospective jurors responded affirmatively to the question, noting whether they, or any family member worked in any of the noted fields and checking the applicable fields. (CP 1-81) Relating to law enforcement, four (4) prospective jurors – Jurors 26, 30, 33, and 39 -- responded affirmatively that they, or someone close to them, had some involvement in that field. (CP 52, 60, 66, and 78)

At the beginning of the actual Voir Dire, the jurors were sworn in to provide truthful answers. (RP 291) The Judge specifically asked the jury, “Are there any of you who will not be able to follow the law regardless of what you personally believe the law is or ought to be?” No one replied. (RP 300)

Based upon their answers, on March 27, 2012, Plaintiff’s counsel extensively questioned the prospective jurors who had affirmatively noted

¹ The fields were: Automotive Industry; Insurance; Business; Law; Law Enforcement; Accounting; Engineering; Claims; Medical; and Mental Health (CP 1258-60)

positive responses to the question regarding law enforcement: number 26, Gerald Jenson (RP 352-354, 373-376, 386-89), prospective juror number 30, Jennifer Dixon, (RP 337-338), and prospective juror number 33, Jane Golson, (RP 376-379)² Included in much of counsel's questioning was regarding the juror's law enforcement/investigation experience. Plaintiff ultimately used a peremptory challenge on prospective juror number 26.

In follow-up to Plaintiff's counsel's questioning, defense counsel asked the entire panel:

Any of the jurors have any investigative experience as a private investigator, as a member of **law enforcement**, or as a military law enforcement, **investigating a potential crime or an accident, anything of that nature**? (RP 365-66) (Emphasis added)

Prospective Juror number 33, Jane Golson, was the only one to raise her hand, and defense counsel questioned her. (RP 366-367) Again, prospective juror number 19, Juror Number 10 (Mr. Reyes) failed to respond to this question and remained silent.

Defense counsel then asked the panel:

If the court gives you an instruction on the law that you're not an expert on and that law is different than what you thought it was when you walked into this courtroom, will you follow the law given you by the court? Raise your hand if you would answer that question no.

Thank you. No numbers.

(RP 368-69)

Plaintiff's counsel reiterated this:

Well, if you're instructed that's what the law is, you don't have a problem

² No time was spent on prospective Juror number 39 given the limited time of voir dire and the fact that juror number 39 could not theoretically be a member of the jury panel.

with that I take it.

Right. [Answered by prospective juror number 22]

Who has a problem? Somebody must have a problem with that. Thinking, ah, that's just a little too light. Anybody?

The only prospective juror who responded was prospective juror number 16 and Plaintiff's counsel questioned him. (RP 380-81) On the following day, March 28, 2012, Plaintiff's counsel finished voir dire questioning the jurors who had not spoken much, or at all. (RP 418-423) Included in that inquiry was prospective juror number 19, Mr. Reyes:

MR. BARCUS: ... Number 19, we didn't talk to you, Mr. Reyes.

PROSPECTIVE JUROR NO. 19: Yes, sir.

MR. BARCUS: You work at Costco; is that correct?

PROSPECTIVE JUROR NO. 19: Yes sir.

MR. BARCUS: Any concerns that you have about any of the topics we've discussed here?

PROSPECTIVE JUROR NO. 19: No, sir.

(RP 421)

2. TESTIMONY AT TRIAL

At trial, the Plaintiff presented the testimony of Rayna Mattson, Trooper Karen Villeneuve (via deposition transcript), witness John Watchie (via videotaped preservation deposition), Driver Bernd Stadtherr, Defendant APES Owner Michael Mazza, and Expert Witness Chris Ferrone. Defendants called only their purported expert, Donald Lewis.

Rayna Mattson testified that on July 21, 2003, she was driving from Federal Way to work in Tukwila with two of her children in her SUV. (RP 899-900) It was warm and sunny out and there was light traffic. (RP 900) She had merged onto I-5 north at the 320th Street exit and suddenly lost control of her vehicle after merging. (RP 901) She described the

sliding and spinning of her vehicle as “like being on ice” with no traction. (RP 901-902) She had no warning, never saw any other vehicles sliding, and never saw the oil on the road, or any type of slick substance. (RP 902, 907-908) She shot off the side of the freeway sideways and started rolling down an embankment at a high speed, rolling 3-4 times. (RP 902-903) People came to assist her and the immediate concern was getting her and her kids out of the car and away so that other cars would not roll down on top of them if they also slid on the oil. (RP 904)

John Watchie was an independent eye-witness whose preservation deposition was played for the jury on March 28, 2012 (RP 471-472)³ He testified that he was the first one on the scene and watched it happen:

Q . . . Sir, can you please tell the jury whether or not you recall a one-car, rollover collision that occurred on July 21st, 2003?

A I do. . . . I was an eyewitness to it. I was the first one on the scene and watched it happen.

Q Okay. And how well do you remember it, sir?

A Vividly.

Q Where did that collision take place?

A **Just north of the 320th exit on I-5 on the northbound lanes.**

³ Plaintiff moved to have the entirety of the deposition admitted into evidence (CP 1261-1302) and Defendant objected to portions of the transcript (CP 1300-1305) The edited DVD videotape of John Watchie’s preservation deposition was admitted into evidence, but the corresponding transcript does not appear to have been filed in the Court’s file. (Exhibit 21) The deposition was read to the jury after being redacted by the Court. (RP 471-72) The argument and the Court’s specific rulings regarding the redactions are noted at RP 29-52. Specifically redacted were:

p. 10, lines 23-25 – p. 11 line 5 (RP 36-37);

p. 11, lines 23-25; p. 12, lines 1-25; p. 13, lines 1-25; page 14, lines 1-25 (RP 43)

p. 15, lines 1-21 (RP 45)

p. 16, lines 13-25; p. 17, lines 1-20 (RP 47)

p. 18, lines 24-25; p. 19, lines 1, 8-9 (starting with “It was a miracle” (RP 49-50)

p. 20, line 3 – p. 22, line 6 (RP 50-51)

p. 23, lines 7-17 (RP 52)

Q Okay. And, sir, where were you when you saw this collision occur? I was on the far right shoulder of the northbound lanes. **My van had broken down, and I'd walked about a quarter mile back towards 320th when the accident took place.**

Q Okay. How long had you been on the side of the freeway at that -- when the collision actually took place?

A Oh, maybe from -- you mean, from the -- my van to --probably -- I don't know -- five minutes.

Q Okay. And, approximately, what time do you recall this all happening?

A **It was about 2:30, I think, roughly.**

Q And what were the weather conditions at that time, if you can recall?

A Sunny. It was hot.

...

Q Okay. And, sir, can you please describe for the jury what you saw?

A What started -- well, it was -- again, I was walking in --generally, if I'm on the freeway, I'm pretty cautious just to make sure that I stay out of the way. I don't break down very often, but this was one of those times when -- that's not a good place to break down. And the first thing I notice is, I smelled fumes -- really strong fumes, and at -- just as I smelled them, I heard screeching -- not screeching, but more of a -- it -- it sounded out of place. And I looked up, and I saw this big blue SUV doing 360s. And at first, I thought it was going to hit -- I thought it was going to hit me. And -- and then it just like went completely sideways and shot right off -- it -- it spun at least twice around -- possibly, more -- again, it -- it happened so fast -- but it went straight off the road, the embankment. There's a -- a steep hill right off the shoulder that went down into this field, and the vehicle went flying off backwards and just -- it must have fallen 70 feet before it hit the ground. And I credit that, again, to the steepness. But I watched the whole thing happen. And it rolled really fast, like three or four times -- or three and a half times -- and landed on its wheels. . . .

Q Okay. Sir, I want to back up just a moment. You indicated that you'd smelled fumes and that's what had caused you to look up?

A Yeah. I mean, it was really strong. I mean, you could -- it -- it wasn't gas. I mean, it was like a -- a kerosene smell -- diesel something. It -- it wasn't gasoline fumes; it was something stronger. And, you know, I just -- **I smelled it. And right when I looked up, that's when, you know, I heard the noise.** And, you know, it was right -- like if I'm sitting at six o'clock, it was at two o'clock where the car started spinning. And that -- that was --

Q Okay. How far -- I mean, if you had to put it in terms of feet, how far away did all of this happen in front of you?

A Half the distance from here to that blue car, so I'd say about **25, 30 feet.**

...

Q Okay. And did you ever have an opportunity to make a determination as to what the fumes that you smelled were from?

A The -- when the State Patrol finally got there, I was telling the -- the officer, you know, that: Hey, look there's something up there on the freeway -- because you could -- I mean, after I saw what had happened and we had gotten her -- you know, them out of the car and got them on their way in the ambulance, the officer -- you -- you could see other cars were having trouble on that same stretch of highway. And I kept telling the officer that: **Look, you know, you've got a spill here.** . . .

Q Okay. I'm going to question you about that in a moment, but did you happen to see anything on the freeway?

A **You could see that there was oil, yeah.**

Q How much oil would you say you observed to be on the freeway?

A You know, I wasn't looking at it right then. I mean, but when the cleanup crews got there, **they had probably 200 feet of freeway closed off.** The officer had the cones out. Traffic was just barely crawling by. It looked -- you know, there were -- there were three guys out there shoveling sand, so it looked to me like it -- it was both the right and the -- as you're heading north, it would be the far right lane -- there's the on-ramp, and then there's the right lane, and then **there's the second lane to its left, and those two lanes were the ones that were affected by it.**

Q When you first saw Ms. Mattson's vehicle -- or let me back up. Is it your understanding that the driver of the vehicle that you've -- that you've talked about today was Rayna Mattson?

A Yes.

Q Okay. When you first saw her SUV, the Ford Explorer, which lane was she in?

A **She was in the second.**

....

Q Okay. And what would you say -- or how would describe the traffic conditions at the time you saw all this going on?

A There -- there was no traffic. The traffic was zooming right along.
(CP 1363-65)

Q **Sir, could you actually see the oil on the freeway?**

A Yeah. **He -- I mean, it was obvious. I mean, it was black.** You know, the -- you didn't have to touch it. **I mean, you could smell it.** You could see it. There was -- there was a lot of it. And like I said, it -- it **went, you know, a good couple hundred feet.** From where -- you know,

the -- **from where the cones were to where she had crashed, that was all closed off by the highway cleanup crew.**

Q And what was your understanding why it was closed off?

A Because **they were trying to protect other cars from hitting it and having the same thing happen.**

(CP 1366-68)

According to Defendant Stadtherr, he had only been working for Defendant APES for 3-4 months and had not undergone any formal safety training for the position. (RP 844, 848) His company's main function was to collect and transport used oil, and he drove a 75 foot long, 8 foot wide 1991 Kenworth truck (Truck 54). (RP 844-47) It was the only truck he had driven there during the course of his employment, and in that time, he had never replaced the hose that ruptured.

On July 21, 2003, he began work between one and two o'clock pm (two o'clock was his normal start time Monday through Friday) with his agenda to pick up a load of used oil from Canada and bring it back to the plant in Tacoma. (RP 849, 858). As July 21, 2003 was a Monday and there was a weekend in between, the truck had just been parked between the Friday after he returned it late at night with a full load of used oil, which had to all be sucked out of the truck before his next trip the following Monday when the subject collision occurred. (RP 849-851; RP 888)

As part of his job, Defendant Stadtherr was required to log his hours and do a pre-trip inspection of the truck, and when he returns, a post-trip inspection. (RP 854) The trip inspection reports are maintained on the truck, although after July 21, 2003, he never saw them for that day

again. (RP 855-56) He admitted that as a driver he is responsible for inspecting his vehicle to ensure that all of his load, cargo and attachments are secure. (RP 855) However, there is nothing on his form inspection checklist that tells a driver to check that he has secured the bungee cords or the hose(s) that hold the cords to the truck. (RP 856)

Mr. Stadtherr admitted that he was aware that Washington law states that he cannot drive his truck onto the roadway until he has properly and safely secured everything on his vehicle, including the hoses, to prevent the attachments to the vehicle from becoming loose, detached, or in any way a hazard to other drivers. (RP 855, 858) He further admitted that he was not allowed to drive his truck on the roadway until he had properly and safely constructed and loaded his load to make sure nothing shifted, leaked, or otherwise escaped. (RP 858)

On the day of the collision, Defendant Stadtherr arrived at the American Petroleum plant and was only there for about 15-20 minutes before he left for his trip to Canada. (RP 853) A few miles after he left the APES plant and was on I-5, Mr. Stadtherr looked in his rearview mirror and saw a hose that had come off the truck trailer and was dragging on the ground behind his truck. (RP 862) The hose that was dragging was one that was normally used to suck oil out of the tanks.⁴ (RP 863, 890) Mr. Stadtherr believes he had been driving in lane 1, but moved over to lane 2 to allow for traffic entering the freeway from the same exit Rayna Mattson entered. (RP 860-862)

⁴ Defendant Stadtherr tried to change his testimony at the time of trial. (RP 863)

Defendant Stadtherr admitted that he knew back in 2003 before this collision that the stretch of I-5, which he drove every day, was very violent and bumpy on an empty truck, such that when the truck would bounce on the road, it would shake and cause things to become loose; he believed that most every trucker was aware of that problem. (RP 872-73) He also admitted that it is known that the bungee cords can break when they are overextended – even when they are being put on the hose to secure it. (RP 871) In fact, that is why Mr. Stadtherr would carry spare bungee cords with him. (RP 871) The bungee cords would only be replaced every three to four months unless they were damaged, or did not appear to be up to code, and the driver, such as himself, would be responsible for that determination and the replacement. (RP 871-872)

Mr. Stadtherr had no knowledge as to how long the hose had been dragging before it fell off his truck, or how much oil was in the hose before it ruptured. (RP 864) The hose that he took off the truck was about 35-40 feet long. (RP 864) Mr. Stadtherr could actually see that oil had come out of the hose and was in fact splattered on the front of his truck trailer. (RP 865) He did not know whether or not there was any oil on the roadway. (RP 873)

Despite the fact that Mr. Stadtherr admitted he was aware that Washington law required him to notify the authorities when objects or materials have either fallen, leaked or escaped from his vehicle, he did not do so. (RP 865) When asked at trial if he was told by a State Trooper that he had caused a collision, Mr. Stadtherr testified, “No.” (RP 866) He

was then immediately impeached as he had previously testified in his deposition that “the state trooper ... accused me of causing an accident ...” (CP 1616; RP 866) The state trooper had walked up to him while he was gathering up the hose. He then admitted that he did not deny causing the accident to the trooper and he asked if everyone was ok, to which the Trooper replied no and that a fire truck was on scene. (RP 868) He also admitted that he called company owner Mike Mazza from the scene of the collision and told him that “a trooper had accused [him] of causing an accident.” (RP 868) In fact, he received and signed for a copy of a Driver Vehicle Examination Report (Exhibit 8-A) (RP 894-895)

Mr. Stadtherr never left the scene of his truck, never went to the location where Rayna’s vehicle had flipped, and did not have any knowledge as to the location where he pulled over. (RP 868-869) He admitted that at the time of his deposition in 2007 that he was “not aware of any facts or circumstances that would support someone saying that anything other than the hose coming off the truck that [he was] driving and coming apart and leaking oil onto the roadway caused the collision ...” (RP 874)

Washington State Patrol Detective Karen Villeneuve, who investigated the collision shortly after it occurred, testified in her deposition that was read to the jury that upon her arrival at the scene, she could see a dark liquid substance in the first lane that extended a long distance – more than a football field. (CP 1571, 1578) Looking down over the embankment at the scene, she saw an SUV, and then she

specifically noticed a tanker “just a short ways up the road” on the side of the road. (CP 1571)

The Detective called for aid and asked for another trooper to **contact the truck up ahead, “assuming that it was probably related to the liquid substance on the roadway. And it ended up being.”** (CP 1572) (Emphasis added)

The Detective ordered 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 1572) The Patrol log verified that two trucks actually came - a blocker truck and a truck to lay down all of the dirt. (CP 1576)

The Detective also testified that she went to and spoke with the tanker truck driver, Berndt Stadtherr, and that he admitted that a hose (containing oil) came off of his truck. (CP 1574)⁵ She assessed that there was no other cause for the collision and she “did not see any other reason Rayna would have went off the road.” (CP 1580)

Plaintiff called Mike Mazza, the president and owner of Defendant APES to testify in her case in chief. (RP 621) His company was only in business a couple of months before the subject collision. (RP 622, 636). Mr. Mazza drove to the collision scene after receiving two phone calls from Mr. Stadtherr. The first call was that there was an issue with the hose that had come off the truck, and the second call was that Mr. Stadtherr had been accused of being involved in a collision. (RP 648,

⁵ Detective Karen Villeneuve’s deposition that was read is found at CP 1567-1581 and the Order excluding portions of the testimony is at (CP 1464-64)

673) Mr. Mazza arrived at the scene within 15 minutes of receiving Mr. Stadtherr's phone call(s), between 2 and 3 o'clock; the APES truck pulled off the side of the road was about a quarter of a mile (400 yards) from the 320th Street northbound I-5 on-ramp. (RP 672, 674, 676) The testimony on direct was:

Q: You gained an understanding very quickly that there was a concern that your truck had been involved in this accident with the hose having come off and oil spilled on the road, correct?

A: That was the reason I was there.
(RP 672)

As reiterated at trial, Mr. Mazza had previously testified:

Q: What is your understanding of how the 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. 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 bouncy, violent in some cases.

Q: 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: ... as far as exactly how it broke due to the conditions, can you explain that in a little 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 – 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 bracked 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 of the trailer.**

Q: So you've 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, the hose comes out?

A: Yeah – or excuse me.

Q: **Yeah**

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

(RP 685-687) (Emphasis added)

Mr. Mazza further confirmed that when bungee cords become fatigued, it's the driver's responsibility to change them, and further, that when they are fatigued, they can break. (RP 689-691)

Mr. Mazza attempted to change his testimony that was taken five years prior to conform to the defense's new theory that they concocted on the eve of trial, which the Court allowed, that if there was anything in the hose, it was wastewater because suddenly, he remembered that he had allegedly used the truck to haul a load of wastewater the week before the collision. (RP 730-732) This was not mentioned in any of his multiple interrogatory responses or in any of his prior deposition testimony, and of course, there were no trip inspection reports to show these. (RP 702-705; 830) However, upon further questioning from Plaintiff's counsel, he also admitted that he does not dispute that oil came out of the hose on his truck, on that the truck driven by Mr. Stadtherr left oil on northbound I-5 from the ripped up hose. (RP 679-680, 693, 737)⁶ Mr. Mazza also admitted that he has no knowledge as to how much oil was in the hose prior to it rupturing. (RP 693)

⁶ Defense counsel made much about the independent witnesses testimony that there was a black substance on the roadway that extended 200 yards (or up to a football field/field and a half). However, no testimony was ever presented that the spill covered the entire road and was spread out, etc. Rather, it could have easily have been that the oil was left in a small trickled amount given the truck was driving at freeway speeds.

During examination by his counsel, Mr. O'Brien, Mr. Mazza testified:

And did you know before or after you got to the scene that anyone was saying that the rollover accident was due to oil that allegedly could have spilled from your truck or your hose?

In response, Mr. Mazza replied:

No, I did not know that. I assumed it was like he cut her off or something or we hit her on the way there. **I never really received anything about the oil until years later.** (RP 740)⁷

At that juncture, due to the obvious fabrications occurring, the Court allowed Plaintiff to cross-examine Mr. Mazza regarding a citation, vehicle examination report and insurance claim form that directly contradicted this testimony. Of those documents, the Court stated:

... [T]his is evidence that seems to me that rebuts what your client testified to . . . I'm just saying that it seems to me that a proper form of cross-examination that it's simply not true that he didn't know about the oil and the spill on the road; took three years for him to understand that it caused an accident." (RP 763-764)

In fact, on the WSP Driver Vehicle Examination Report that was dated 3:05 p.m. – 3:26 p.m. on July 21, 2003 and signed by Mike Mazza on July 22, 2003, it stated that there was a violation of CFR 383.100(a):

"No or improper load securement—RCW 46.61.655 – ALLOWING ESCAPE OF LOAD – [collision causing]," and it was signed by Mr. Mazza **the day after the collision, July 22, 2003.**

(Exhibit 8A, RP 812-816)

It further noted that the cargo was "waste oil" despite Mr. Mazza's

⁷ This testimony, of course, was directly contradicted by Mr. Mazza's prior sworn testimony and appears to be fabricated.

attempts to testify that the report did not say anything about oil. (RP 815) **Not only did Mr. Mazza admit that he signed that document in two locations, which acknowledged his receipt and prior review, he admitted that “[t]he hose was considered part of the load.”** (RP 815)

This was contrary to ALL of defense counsel’s arguments throughout the trial and defendants’ own experts’ testimony set forth in greater detail below.

Mr. Mazza therefore not only testified falsely, but his testimony confirmed that he threw out the bungee cord and hose the same day that he signed for the citation. (Exhibit 8A, Admitted 4/02/12) His testimony was further proven to be false when he admitted that he received a copy of the State of Washington Police Traffic Collision Report while he was still at the scene of the collision, which directly advised him that his truck was involved in Ms. Mattson’s collision. (RP 805-806; Exhibit 8-B)

Mr. Mazza also admitted that he went the hospital directly from the scene of the collision to see Ms. Mattson and her children, and although he could not see them, he spoke with Ms. Mattson’s husband and gave him his business card. (RP 804) In fact, he told Mr. Mattson, “don’t worry about it, we’ll take care of everything.” (RP 806-807) Although he again tried suggesting that he did not know for sure at that time if his truck was involved, he admitted that “if [his] truck was not involved in causing this accident, there would be no reason for [him] to go to the hospital.” (RP 807) As to causation of the collision, Mr. Mazza admitted that he was not aware of any facts or circumstances that would support anybody taking a

position that anything but the spill of the oil from his truck caused the collision in this case. (RP 694-696)

Mr. Mazza admitted that Rayna's collision was a significant event that he would not want to happen again and that it was an error that occurred that his company was responsible to prevent. (RP 818)

Like Mr. Stadtherr, Mr. Mazza admitted that he knew that I-5 at the location of the collision on July 21, 2003 was a violent bumpy road that could cause the breaking of equipment, including bungee cords and even springs on trucks to break. (RP 683) He specifically stated that before and up to the time of July 21, 2003, the rough road could "cause anything to break" and as he knew that, it is/was his duty to make sure that his trucks were safe in anticipation of the rough road so that other members of the public would not be endangered. (RP 684)

Also in direct contradiction to his testimony procured by his counsel, Mr. O'Brien, Mr. Mazza admitted that he knew there was a claim pending just within a day, if not the day of, the collision because he personally turned in an insurance form in which he personally wrote in Ms. Mattson's information. (RP 808 810; Exhibit 8C) That "automobile loss notice" insurance claim form, which he in part filled out, stated:

Description of Accident: Bracket for hose broke on I/V while traveling on I-5 causing approx 1 gallon of petroleum to spill on pavement. C/V passed through spill and shortly after, lost control and rolled. (Exhibit 8C)

Mr. Mazza testified that the completed claim form with the accident description was part of his own file and he provided it to Plaintiff

during discovery. (RP 827)

Although defense counsel attempted to elicit further inconsistent testimony from Mr. Mazza about how much oil he believed spilled onto the roadway and tried to suggest that it was .06 of a gallon (RP 729), consistent with the insurance claim that Mr. Mazza assisted in filling out dated July 21, 2003 that noted 1 gallon of oil had spilled, he had previously testified at the time of his deposition:

Those particular hoses are suction hoses. So at the end of the day or at the end of every time those things are connected to the truck they're sucked out. I could mathematically reproduce a situation and let the hose gravity drain and **come up with a gallon of oil**. That would mean retain, what we call retain. In the industry that would have been what was left in the hose. (RP 824-825) (Emphasis added)

Mr. Mazza admitted that he must strictly comply with the (Code of Federal Regulations) CFR's. (RP 632) In that regard, he testified that in order to comply with the procedures under the regulations, everything including the hoses must be properly secured on his trucks before leaving the truck yard on any trip so they will not come off and cause a danger or an accident. (RP 634) However, checking tie downs/holds (such as bungee cords) was not part of the checklists that the drivers had to fill out. (RP 639; Exhibit 6) In any event, Mr. Mazza testified:

Q: That **would fall below the standard of care that you expect as the owner of this company of your drivers not to properly make sure that the hoses are secure before a trip is begun, correct?**

A: Correct.

Q: And that **would be in violation of applicable code regulations, correct?**

A: **I believe so, yes.**

Q: And you do not dispute that if one of your drivers fails to carry out their responsibilities, then you and your company are responsible for that driver's actions or inactions, correct?

...

A: Yes. It's the drivers position to take responsibility for the truck when he's in possession of it. And it's the company's responsibility to maintain it's within compliance being able to handle it down the road. (RP 707)

Mr. Mazza never inspected the truck, or its set up on July 21, 2003 before the collision, and he could not testify as to Mr. Stadtherr's pre or post trip inspections because the reports were supposedly thrown out. (RP 641, 643)⁸

Plaintiff presented expert testimony from Christopher Ferrone, a mechanical engineer whose work is related to heavy vehicle failure and determining accident causation from an engineering point of view. (RP 473-74) Mr. Ferrone testified that he had been qualified as an expert in this regard in Courts in all 50 States, and he was accepted as an expert in this case as well. (RP 478-480)

Mr. Ferrone conducted an engineering investigation assessment regarding the collision in this case. (RP 481)⁹ Any and all opinions Mr. Ferrone expressed were confined to terms of more probably true than not true. (RP 480) In that regard, Mr. Ferrone testified that based upon the testimony and observations of Mr. Watchie and the investigating officer,

⁸ Despite the fact that Mr. Mazza clearly testified at the time of his deposition that he maintained all of the driver logs as part of his paperless system, at the time of trial, he claimed he destroyed them because he was not aware that his company was being alleged to have been involved in the subject collision, which as noted above, was proven to be false. (RP 650) He also destroyed the truck despite being aware that Plaintiff wanted photographs of the truck before it was destroyed. (RP 653-654)

⁹ He had worked on other cases previously where oil had spilled on the roadway. (RP 482)

his first conclusion was that there was oil on the roadway. (RP 484) Significantly, Mr. Ferrone opined that oil on the roadway changes the coefficient of friction on the roadway, which drastically affects the ability of a car to negotiate the roadway similar to ice or snow. (RP 484-85) Thus, he opined that “Ms. Mattson experienced a snow day in July ...” (RP 485)

Mr. Ferrone further testified that Mr. Watchie’s testimony was especially critical in that:

He said he watched it happen. He said his memory was vivid. He said it was sunny and hot. He smelled fumes. He heard screeching, but unlike dry pavement screeching, he made a distinction. He said he saw the SUV doing 360s, spun twice around in a complete spin. He told the officer that there was something on the road. He said later other cars were having trouble. He said there was a spill here, and he quantifies the distance of the substance to be about 200 feet based upon the clean-up crews spreading of sand. (RP 485)

He then pointed out the Trooper’s testimony in that:

She said that there was substance on the road, a long distance, more than a football field, a dark liquid substance, short distance away from the tanker; that the tanker ended up being related to the accident. The substance was slick and she called for a clean-up crew. She knew the hose came off. The driver admitted the hose came off. (RP 486)

As to the importance of the path or behavior of Rayna’s vehicle to his analysis, he explained:

It would be nearly impossible from a coefficient of friction standpoint to have that described behavior, how she was spinning, on dry pavement at that high of a speed without vaulting or rolling over on the highway. So that would be indicative of some drastic change in the coefficient of friction such as ice or snow, where you can spin freely without rolling or vaulting at a high speed . . . I would from an engineering standpoint

closely attribute [oil] to more towards ice and snow as opposed to just dry pavement. (RP 503-504)

He also explained that if the oil was mixed with water at all, that combination would be as slippery as oil alone, or even more slick. (RP 504)

Mr. Ferrone testified that all motor carriers in the US are governed and controlled and must comply with all DOT regulations “one hundred percent of the time.” (RP 504) Mr. Ferrone is an expert regarding the federal regulations as they are such an important part of compliance in his business it is mandatory for him to understand them, and he utilizes them in the cases he works on, as well in his own personal trucking business. (RP 477) Further, in addition to educational background, he has spent the better part of his life driving big trucks. (RP 524) Specifically, in this case, Mr. Ferrone opined that because something leaked out of the truck, the Defendants were in direct violation of CFR 393.100, which states in pertinent part:

- (a) **Applicability.** The rules in this subpart are applicable to trucks, truck tractors, semitrailers, full trailers, and pole trailers.
- (b) **Prevention against loss of load.** Each commercial motor vehicle must, when transporting cargo on public roads, be loaded and equipped, and the cargo secured, in accordance with this subpart to prevent the cargo from leaking, spilling, blowing, or falling from the motor vehicle.

(RP 505-506) He explained that the oil that was residually held in the hose was cargo (a load). (RP 529)

He further explained that there is no leeway regarding compliance with the Federal codes as the regulations are non-delegable and the

responsibility for their compliance cannot be given to anyone but the motor carrier. “No matter what happens it’s always your fault if you’re the motor carrier.” (RP 506-507) He used an example and explained that:

The wheel comes off a big truck and unfortunately hits a pedestrian or hits another motorist or damages property and fortunately doesn’t hurt somebody. The reasons for that wheel coming off don’t matter because the motor carrier is not allowed to let its wheels come off. So you can’t give that away. (RP 507)

Ironically, this is consistent with Defendant Owner Mike Mazza’s testimony set forth above.

Mr. Ferrone considered the defendants’ argument that they did everything that was required of them in order to secure the hose to the truck, and testified that their actions were not adequate given that the method of securement failed and it would not matter in any event given the non-delegable nature of the rules. (RP 509) Mr. Ferrone opined:

Well, my opinion is ultimately that the oil is related to this truck as a result of the hose becoming detached or partially detached from the truck and being run over by its own wheels, and as a consequence putting that oil on to the pavement. (RP 511)

Of Defendants’ method of securing the hose to the truck by using bungee cords as Defendants testified, Mr. Ferrone opined that specifically is an unreasonable and inappropriate method because:

[B]ungee cords break. They shake. They can allow it to come off, which obviously that speaks for itself in this instance; that did, in fact fail for whatever reason. (RP 511-513)

He further testified that such method does not constitute ordinary care. (RP 513)

Mr. Ferrone testified that (1) there was no other evidence to

suggest that anything but oil on the freeway from the defendants' truck or the ruptured hose from the truck caused Rayna Mattson's collision to occur; (2) that Defendants had exclusive control of their vehicle and the hose that ruptured before and up to the time Rayna's collision occurred; and (3) that the subject collision would not have occurred but for negligence, such as the spilling of oil in this case. (RP 515-517)

Specifically, he testified that all of the physical evidence confirms that Defendants were negligent:

They have a duty to be in compliance, which essentially says don't spill – in their business, not to spill. They didn't succeed in that duty, and that duty was directly in my opinion, related to the accident. (RP 532-536)

He reiterated in cross-examination:

[W]e have the physical evidence in very close proximity in very close chronology of this incident, which is very hard to not include in the analysis. Yet there's no other evidence to show any other source. (RP 538-539)

He also testified that contrary to the Defendants' suggestion that the hose would not have contained much oil, a full hose that is the size of the hose that ruptured in this case -- 40 feet long and two inches in diameter --- would hold approximately six and a half gallons. (RP 517-518) Mr. Ferrone explained however, that it did not make any difference specifically how much oil would be left in a hose such as in this case:

... [M]y opinion is the outcome of this accident was caused, or the cause of this accident is because there's oil on the roadway. It was obviously enough to cause an accident. It was obviously enough to change the coefficient of friction. There's evidence that there was oil on the road, and so – and her car behaved as if there was a drastic change of coefficient of friction. (RP 518-519)

He opined that there was residual oil in the hose and the claim that the truck was empty does not make any difference. (RP 519-520)

Mr. Ferrone explained that used motor oil smells like oil, **could smell like diesel, or anything it is mixed with**, and certainly has a strong odor. (RP 520-521) He further testified upon questioning by defense counsel on cross-examination that he would have expected the defendants to maintain the driver logs in question due to the reasonable contemplation of litigation. (RP 522)

When defense counsel tried to insinuate the investigation was inadequate in this case because they did not collect samples of oil on the roadway, Mr. Ferrone opined:

[T]he obvious nature of it could have been just as much of a possibility; that it was so obvious to them standing there and putting all of these – connecting all the dots everyone in this room today has discussed with me, they could have arrived at the conclusion and found it unnecessary. (RP 540)

Defendants only called Donald Lewis to testify as their expert, but he was never actually offered as an expert, admitted that he never had any occasion to work with oil spill clean-ups or clean-ups of liquid materials on the highway, and never provided any opinions on a more probable than not basis. (RP 949)

In fact, the only “opinions” Mr. Lewis provided was that (1) under CFR 392.1, drivers have to inspect something like a bungee cord (rubber tie down) and despite not having any documents to prove and solely based upon Mr. Stadtherr’s deposition testimony (not trial testimony), Mr. Stadtherr did an inspection and found no defects, so he was not in

violation of CFR 392.1 and (2) under CFR 393.100, neither the hose or the oil in the hose in this case qualified as “cargo.” (RP 929-930; 936-937)

Mr. Lewis admitted that he did not take a lot of independent testimony into account, including that of John Watchie’s statement that he saw a truck and trailer go by just before before Rayna’s collision and that just before trial, he did not even know that part of the road had been closed after Rayna Mattson’s accident. He was not even aware that the Department of Transportation had responded with sand trucks to clean up the oil, and had not taken that into account in his opinions. (RP 962)

The first time that Mr. Lewis reviewed anything or did any work on the present case was only a little more than a month before the trial. (RP 956) In that regard, he prepared two reports, a draft report dated February 22, 2012 and a final report dated February 27, 2012. (RP 1016-1018) At the time Plaintiff’s counsel deposed Mr. Lewis, only two weeks before trial, Mr. Lewis testified under oath that the report of February 27, 2012 was the “sole document” that he had prepared referencing any opinions in this case. (RP 1019-1020) It was not until Plaintiff brought a motion to compel documents omitted from a Subpoena Duces Tecum and the Court Ordered the Defendants to produce the documents that Plaintiff discovered the draft report. (CP 753-992; 1447-1449) The draft report revealed that Mr. Lewis’ **only** opinion in this case was the **first one** noted above regarding CFR 392.1 and had nothing to do with CFR 393.100.¹⁰ (RP

10 In that regard, on direct examination, he admitted that he referenced in his draft report and then his final report testimony from John Watchie from his declaration and specifically wherein he told the detective that he smelled oil, but when questioned about

1021)

Plaintiff also discovered emails dated February 24, 2012 from defense counsel (between the dates of the two reports) pursuant to her motion to compel, in which defense counsel essentially directed Mr. Lewis' second opinion and stated:

I think it critical that you make it clear 393.100(b) applies to spilling a 'load,' not residual oil in a hose when the tank of the truck is empty, and (no load at all) (RP 1017)

Apart from his opinion that the defense complied with one federal regulation and that – after direct instructions from defense counsel – that another regulation did not apply, Mr. Lewis addressed absolutely no other issues in this case or rendered any other opinions.¹¹ (RP 1025) He never addressed any issues of causation, whatsoever. As noted by the Court, **“He didn’t opine how much oil was in the hose. Didn’t offer any opinion at all what was on the road. Only opined it wasn’t cargo.”** (RP 978) Mr. Lewis also never opined that the bungee cord contraption securing the hose was an appropriate method of by which to secure a hose with residual oil in it to a truck, or that Defendants did not fail to use ordinary care as compared to Mr. Ferrone who directly opined it was not. (RP 512)

Most importantly, Mr. Lewis agreed that even though he did not

why he omitted key factual testimony from his report from that declaration that he swore under oath he had read and utilized, he changed his testimony and said that he never read any of Mr. Watchie's testimony or his statement prior to rendering his opinions as set forth in his reports. (RP 957, 964, 1007-1016)

¹¹ Mr. Lewis is not an accident reconstructionist, did not have an engineering background, and investigated no other cases with a petroleum or oil leak causing an accident. (RP 954)

believe CFR 393.100 applied in that the oil in the hose was not cargo (although oil in the truck tank would be), that it was not ‘good’ for a motor carrier that transports used oil to drop, leak, or spill any amount of oil on a freeway. (RP 1025) **He also admitted that under CFR 393.100, the hose in the subject case is part of the equipment that is loaded on to a truck.** (RP 1036)

Further, Mr. Lewis did not testify that it was not negligence for the Defendants to spill oil on the freeway, which they admittedly did. Also significant was that Mr. Lewis agreed that it would be **reasonably foreseeable in his opinion that a bungee cord could break and cause a hose to come loose from an empty truck when it is traveling on a very bumpy road.** (RP 1026)

Prior to trial and then again after his testimony, Plaintiff moved to exclude the testimony of Donald Lewis. (CP 1067-77) The court reserved on Plaintiff’s motion in that regard. (CP 1457). Plaintiff renewed her motion and requested that the Court strike Mr. Lewis’ testimony, with the jury instructed accordingly, after he had finished testifying based upon the fact that there was no foundation laid for any opinions and that he “rendered no opinion on anything on a more probable than not basis ...” and that “the questions were not asked on a proper legal basis ...” (RP 1042) The court denied the motion. (RP 1049)

As noted above and throughout this brief, the Defense attempted to concoct new theories at the time of trial that they had not alleged in the first trial, or disclosed in discovery. Therefore, Plaintiff made numerous

motions for an instruction regarding spoliation, as the Defendants had conveniently destroyed the ripped hose, the ripped bungee cords, their records, trip logs, and the truck. (CP 1215-1257; CP 1431-1437; e.g. RP 549-613) They also attempted to argue that they had no idea that that a collision had occurred.

Defense counsel tried insinuating on multiple occasions that there was another cause for the collision, i.e. Ms. Mattson's tires, as he asked her about the tires her vehicle was equipped with, and when she did not know, he supplied the answer in his question with "Firestone." (RP 906) He asked of Defendant Stadtherr, "do you know if anything came off someone else's truck." (RP 886) Over Plaintiff's objection as to speculation, the court allowed Defendant to answer, "no." (RP 886) He asked Plaintiff's expert, Mr. Ferrone if he was aware of a truck stop a mile and a half south of the accident site, and "would [he] allow for the possibility that some other truck spilled a 450 foot to 600 foot oil spill or even 200 foot oil spill on the roadway other than my client's empty hose?" Plaintiff's counsel immediately objected that it called for speculation. (RP 538)

As defense counsel argued to the Court in response to Plaintiff's motion for directed verdict, noted in greater detail below:

We don't have evidence of who did or didn't spill this. It could have come off the back of a pickup truck. It could have been spilled while fuel is being switched by a diesel truck ... (RP 1044)

Mr. O'Brien continued this attempt to blame the oil on other unknown sources, such as traffic, in questioning Donald Lewis,

Defendants' purported expert. (RP 952)

Defense counsel also violated the Motions in limine on numerous occasions. For example, Mr. O'Brien incredulously asked Ms. Mattson "[W]hen did you first speak with an attorney about this case?" Plaintiff's counsel **immediately** objected as to Relevance, attorney-client privilege, and motions in limine. (RP 909-910) Incredulously, the Court overruled the objection and allowed the Plaintiff to answer "within six months." (RP 910) Defense counsel proceeded and then inquired if it was Plaintiff's present attorneys at trial that she had hired, which Plaintiff's counsel again objected to and requested a side bar. (RP 910) Despite such request, the Court allowed defense counsel to proceed and then ask Rayna if she was aware if her attorneys asked his client to retain any records of the accident, to which she was allowed to answer (over the same objection) that she did not have any knowledge in that regard. (RP 910)

At the next break, Plaintiff's counsel raised the issue with the Court and argued that the questioning specifically violated the Order on Plaintiff's Motion in Limine No 10, "which stated that "it is Ordered, Adjudged and Decreed that Plaintiff's motion to exclude any evidence regarding circumstances surrounding plaintiff's hiring counsel ... shall be granted." (RP 917, CP 1080, CP 1459) Plaintiff's counsel then specifically requested a curative instruction due to the clear violation. (RP 917) The Court denied the motion and allowed the questioning essentially as a 'ramification' of Plaintiff being allowed to ask Defendants

why they did not maintain evidence in this case. (RP 918-919)

Plaintiff's counsel had also previously objected to Defense counsel's opening statement when he insinuated a preview of this argument that:

[A]fter the accident almost three years pass until my client was sued. And we'll leave it to your decision as to whether or not that explains why some things we'd dearly like for you to have don't exist.

Plaintiff's objection was overruled. (RP 452)

Defense counsel's attitude was reiterated in his closing argument when he argued:

I asked her when did you hire your lawyers in connection with this lawsuit. Well, within six months. . . . (RP 1189-90)

You've heard evidence in this case ad nauseam; most of it having nothing to do with this case. (RP 1184)

3. PLAINTIFF'S MOTION FOR DIRECTED VERDICT, VERDICT AND JUROR MISCONDUCT, AND MOTION FOR NEW TRIAL

Following the close of evidence, Plaintiff moved for a directed verdict on causation, as well as negligence and argued:

The simple fact is that we're long past argument in this case. Now we're looking at the facts. Their denials don't carry the day. It would not carry the day in a summary judgment motion. You can't simply deny and say we didn't do it. We've got the facts. We have the evidence. They have nothing that's admissible other than what they want to do. And I call this the meteor defense. A meteor came out of the sky and must have dumped this oil on the freeway. No. We have one truck in this universe, a tanker truck with a hose that came off that spilled oil seconds before – on the freeway northbound on I-5 just north of the 320th onramp that unfortunately Ms. Mattson encountered and caused her to have a serious collision. There are no other facts upon which the defense can rely. They are simply asking the court to rely upon speculation, conjecture, some other truck, some other thing. They didn't plead that. They have no

evidence to support it. And we have an order in limine precluding that type of an argument. It's Order in Limine No. 14 that they can't claim any fault, contributory fault or fault of unnamed third parties. It's not permissible. (RP 1047)

(See RP 1040-1049) The court inexplicably denied the motion. (RP 1049)

Plaintiff also reiterated her motion in limine so as to preclude argument in closing regarding unknown causes or unnamed parties:

The other motion ... is that there should be no argument that any other – other causation without evidence in this regard. They should not be able to come in closing argument and argue that someone else, some other truck or something else dropped this oil. There's no evidence whatsoever to support any such argument. It would just invite speculation and conjecture by the jury and mislead and confuse the jury. (RP 1049)

The Court responded:

And I suspect it would be reasonable to conclude, if they conclude this truck did not drop this oil, then something else did; that would be a reasonable conclusion. But who or what the source was, where it came from, I haven't heard any testimony about that at all. (RP 1050)

Plaintiff's counsel continued:

And that's what it goes to, Your Honor. They can deny it all day long if they want to. But they can't – and it's improper for them to suggest some other entity or some other way that this occurred when they have no evidence to support that. (RP 1050)

The Court ultimately denied Plaintiff's motion and stated:

I'm not talking about another third party. We're talking about coming from another source other than their own. (RP 1052)

Plaintiff again argued this issue and opposed the defense's ability to argue the "meteor defense" when the Court modified Plaintiff's instruction 3-A and refused to instruct that the jury was not to consider the fault of

anyone other than the named defendants and that there were no unnamed parties in any way responsible for this collision. (RP 1060) Plaintiff took specific exception to the Court's giving Instruction No. 5 (CP 2634) instead of her Instruction 3-A. (RP 1136, CP 1440)

Given the court's ruling, Defense counsel was allowed to argue:

You can't get a sample out of the hose to match it to what was on the freeway to match it with what would have been on her tires because the state trooper, quite frankly, didn't go a very good job. Now, that's not the plaintiff's fault; that's not my fault; that's not my client's fault. They just didn't do it. So what good would that evidence have done? Wouldn't have done you much good. Might have done us a lot of good. **Could have absolutely proven what we already know, is that that substance that came out of somebody's vehicle apparently, or dropped out of the sky, could not have come from our vehicle.** (RP 1190-91)

Plaintiff also argued vehemently that the Court could not instruct the jury that if they found a violation, they could excuse the same. In that regard, Plaintiff had proposed Instruction No. 22, which provided pursuant to WPI 60.03, that violation of a statute or regulation may be considered as evidence in determining the Defendant's negligence. (CP 1204) Over Plaintiff's objection, the Court in its **Instruction No. 16** included the additional inapplicable bracketed material which stated:

Such a violation may be excused if it is due to some cause beyond the violator's control, and that ordinary care could not have guarded against. (emphasis added) (CP 2645)

Counsel argued the Court allowed the bracketed sentence:

Mr. O'Brien: You've heard the evidence from the expert if you do the inspection and the inspection is adequate and something happens when you're going down the road, you haven't violated the statute. And so the bracketed section says a violation could be excused if it's

due to some cause beyond the violator's control and ordinary care could not have guarded against.

...

Ms. Lester: That's not what his expert testified to.

The Court: Well, whether his expert testified to it or not, it is his theory of the case. I'm going to offer 22 in the form that the defendant has offered it.

Ms. Lester: Your Honor, this, by adding this, this actually goes completely contradictory to the testimony...He didn't testify about that in this case. What he testified about was only in regard to the whole tire thing. He did not say in this case they had – had they – had the bungee cord broken, had the hose fallen off that any violation would be excused.

The Court: All right you have my ruling.

(RP 1103-1104)

The Court refused to provide Plaintiff's Instruction Number 22, and instead used the referenced bracketed portion. (RP 1104) Given Plaintiff's grave concerns, Plaintiff filed a brief the next morning on this issue before the jury was to be instructed. (CP 2701-2705) The Court again denied Plaintiff's motion to exclude the bracketed portion of the instruction. (RP 1135) Plaintiff also argued that the non-delegable duty instruction should have been given. (RP 1070-72) and the court declined to give it. (RP 1072) Plaintiff took exception to the Court's error in this regard. (RP 1146)

Therefore, defense counsel was allowed to argue in his closing:

And I suppose if you thought the hose was cargo or there was – the residual in the empty hose was somehow cargo and part of it, or little drops or whatever came out, contacted the road, you'd have to look at this; that violation can be excused if it's due to some cause beyond the violator's control and ordinary care could not have guarded against it. (RP

1198)

Plaintiff also took exceptions to the Court's Instructions No 7 (Plaintiff had proposed 7-A) because the Court instructed the jury on proximate cause and given the estoppel issues, as well as Plaintiff's motion for a directed verdict, they should not have been instructed on the same. (RP 1137; CP 2626, 1441) Plaintiff also took exception the Court's instructions 9, 10, 11, 13, 14 and the Verdict Form due to Plaintiff's motion for directed verdict that the court denied. (RP 1138-40, 1144-45; CP 2638-2640, 2642) Plaintiff took exception to the Court's refusal to instruct the jury on res ipsa loquitor as a matter of law in Instruction No. 12 (CP 2641) as Plaintiff proposed it in their instruction Number 15. (RP 1139; CP 1197; CP 2636; CP 1441) Spoliation Instructions (Numbers 23 and 23-A) were also refused by the Court and Plaintiff took exception to the same. (RP 1104, 1146, CP 1205, CP 1442)

Plaintiff reiterated her exceptions to the Court's refusal to give her proposed Instructions 2, 3 A, 7, 15, and 20. (RP 1145-46; CP 1184, 1440, 1189, 1197, 1202)

On April 3, 2012, after four days of testimony and after the Defendants rested their case, Plaintiff moved for a judgment as a matter of law/directed verdict regarding the issues of whether Defendants actions were negligent and the proximate cause of Plaintiff's collision. Plaintiff filed a brief in that regard and also presented argument before the Court. The Court denied the motion. The jury began its deliberations in the afternoon on April 4, 2012, and shockingly delivered a verdict finding no

negligence on the part of the Defendants within less than thirty minutes of the commencement of deliberation. (CP 2656; CP 3194) Subsequent to the deliberations, Plaintiff's counsel learned that juror misconduct had occurred.

As set forth in the declaration of Juror Matthew Besteman, Juror No. 5, filed with this motion, the jurors in the present case failed to deliberate in accordance with Jury Instructions No. 1 and No. 24. Jury Instruction No.1 instructed them in pertinent part:

. . . It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law that I give you to the facts that you decide that have been proved, and in this way decide the case. By applying the law, you will be able to decide this case.

. . . As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. **Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.**

(CP 2628-2830)

Jury Instruction No. 24 instructed the jurors in pertinent part:

When you begin to deliberate, your first duty is to select a presiding juror. **The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.**

(CP 2654-2655)

As set forth in the Declaration of Juror #5, Matthew Besteman, he was on the jury panel that deliberated in this case:

Juror # 4 was voted as the Presiding Juror, and instead of first proceeding with a full and fair discussion of the issues the jury had to determine, or looking at the admitted exhibits, or the Court's instructions in order to address the first issue in question, Negligence, he took a brief vote asking how many people believed there was no negligence by Defendants. Only four or five jurors said anything in response, and the process was then concluded when the rest of the group, apart from me, just agreed to the Verdict finding no negligence without any further discussion. It was apparent to me upon entering the room for jury deliberations, that most of the jury already had their mind made up and wanted to do a quick vote in lieu of discussing all areas of the case, including negligence. I did try to engage the group into discussion which lasted only a brief time. In fact, we came to the verdict in less than 30 minutes.

In addition, Juror # 10 told the jury about outside and irrelevant standards of investigation that he had dealt with when he was employed as a previous OSHA investigator and then interjected his opinion that based upon his knowledge of OSHA standards, he could not find Defendants negligent because the Washington State Patrol investigation conducted at the scene in this case did not comply with the standards of OSHA. **He gave his opinion that as the Washington State Patrol investigation did not meet the OSHA standards of investigation, Plaintiff could not prove Defendants were negligent without such an OSHA-compliant investigation even though that was not a part of the case and was irrelevant to what we were supposed to do.**

(CP 3192-3194) (Emphasis added)

Given all of the errors that occurred in this case, the misconduct of counsel and the jury, the defense's failure to provide any material facts to defeat Plaintiff's uncontroverted evidence, Plaintiff filed a motion for a new trial that was heard on June 8, 2012. (CP 2716-2762; 2763-3191) The Court denied Plaintiff's motion. (CP 3277-3278) Plaintiff filed the present appeal. (CP 3281-3288)

V. ARGUMENT

A. STANDARD OF REVIEW

Generally, issues of law are reviewed de novo. Thus, if a motion for a new trial relates to a disputed issue of law, the standard review is de novo. See, *Columbia Park Golf Course, Inc. v. City of Kennewick* 160 Wn. App. 66, 79-80, 248 P. 3d. 1067 (2011). If what is at issue is whether or not the Trial Court should have granted a new trial due to misconduct of counsel (or a juror), an abuse of discretion standard is applicable. See, *Teter v. Deck* 174 Wn. 2d. 207 222, 274 P. 3d. 336 (2012). As stated in *Teter*, "We review a trial court's order granting a new trial solely for abuse of discretion when it is not based on an error of law." *Id.* See also *Richards v. Overlake Hospital Medical Center*, 59 Wn. App. 266, 271, 796 P.2d 737 (1990).

Additionally, a trial court's determination to exclude and/or admit evidence is also reviewed under an abuse of discretion standard. See, *Salas v. Hi-Tech Erectors* 168 Wn. 2d. 644, 668-69, 230 P.3d. 583 (2010). As explored in the *Salas* case, a trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds or reasons." *Id.*, citing to *State v. Stenson* 132 Wn. 2d. 668, 701, 940 P. 2d. 1239 (1997). A decision is based on untenable grounds or untenable reasons if the Trial Court applies the wrong legal standard or relies on unsupported facts. *Id.* Submission of prejudicial evidence will be deemed a harmless error unless there is a risk of prejudice and "no way of knowing what value the jury placed upon improperly admitted evidence." *Id.*, citing

to *Thomas v. French*, 99 Wn. 2d. 95, 105, 659 P. 2d. 1097 (1983).

The adequacy of jury instructions are subject to de novo review as to questions of law. See, *Hall v. Sacred Heart Med Ctr.*, 100 Wn. App. 53, 61, 995 P. 2d. 621 (2000). A Trial Court's decision whether to give a particular instruction to the jury is a matter that is reviewed for an abuse of discretion. See, *Anifinson v. FedEx Ground Packaging Systems Inc.* 159 Wn. App. 35, 44, 244 P. 3d. 32 (2010).

Challenges to the sufficiency of evidence to support a verdict is subject to de novo review applying the same standards as the Trial Court. See, *Schmidt v. Coogan*, 17 Wn. App. 602, 287 P. 3d. 681 (2012).

B. THE JURY'S VERDICT IS INCONSISTENT AND CONTRARY TO THE UNDISPUTED EVIDENCE IN THIS CASE WITH RESPECT TO NEGLIGENCE (CR59(A)(7)), AND THIS COURT SHOULD REVERSE AND FIND DEFENDANTS LIABLE AS A MATTER OF LAW

Under the specific facts of this case, the jury's verdict is contrary to the un rebutted and undisputed evidence, which was presented at time of trial by the Plaintiff. Under the terms of CR 59(a)(7), a new trial may be granted on the basis that "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is "contrary to law." Challenges to the sufficiency of the evidence may be made by either the plaintiff or the defendant under either CR 50 or CR 59(a)(7). See, *14A WAPRAC § 24:7*, Tegland, (2011). See also, *15 WAPRAC §38:17*, Tegland, (2011).

In this case, ALL of the testimony presented at trial from both

Plaintiff's expert and Defendants' experts confirmed that Defendants had a non-delegable duty to make sure everything was properly secured on their trucks, so nothing could come loose, leak, spill, or drop onto the freeway. Further, trucking company owner, Mr. Mazza and Defendant driver Bernd Stadtherr confirmed that Defendants knew that the I-5 stretch of road where the collision was a very "violent" bumpy road and especially "terrible" on an empty truck, such that it could be expected to cause a hose secured by bungee cords to come loose. (e.g. RP 583) This was established by Defendants' own expert who also agreed that the hose coming loose was foreseeable.

For that reason, extra bungee cords were kept to replace broken ones that could only be expected to last about three months under the harsh conditions that they were placed. Further, Mr. Mazza admitted that the violent action of I-5 is what caused the hose to come out of the bracket from the side of the truck, and get caught up in the truck's tires spilling oil onto the highway. Mr. Mazza admitted that it is "usually due to driver error when hoses come off trucks."

Mr. Mazza further admitted:

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 COMPENSATES 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. (emphasis added) (RP 695)

He further testified specifically that the hose falling from the Defendants' truck "**WAS AN ERROR THAT OCCURRED THAT HIS**

COMPANY WAS RESPONSIBLE TO PREVENT.” *Id.*

Mr. Ferrone, Plaintiff’s automotive engineering expert confirmed that the Defendants’ duty to anticipate equipment failure is strict and non-delegable under the Code of Federal Regulations for Motor Carriers, and that Defendants’ failure to properly secure the hose and the subsequent spilling of oil was absolutely preventable. He opined that using bungee cords like the defendants did here to secure their hose was unreasonable, and as proof of that, even though defendants used four bungee cords to hold the hose in place, when only one broke, the system failed and the hose fell off the truck and ruptured, spilling oil onto the highway. He further testified that there was no evidence to suggest that anyone but the defendants had exclusive control of their vehicle and the hose that ruptured on July 21, 2003, and that based upon his training and experience, this collision would not have occurred but for someone’s, i.e. the Defendants’ negligence (thus satisfying the elements of *res ipsa loquitur* as a matter of law because defendants did not provide any competing evidence).

Even Defendants’ own expert, Donald Lewis, admitted that a motor carrier cannot spill oil on a roadway, that it would be reasonably foreseeable that a bungee cord would break and cause a hose to come loose from an empty truck when traveling on a very rough road, and that the Federal Motor Carrier Safety Regulations clearly state that a motor carrier has a non-delegable duty related to safety matters, such as properly securing a truck’s load, cargo, or equipment. (See, Court's Instructions

No. 19, Regarding FMCSR (CFR) 393.100, CP 2648)

In the present case, not only did the common law principles of negligence apply and reveal that Defendants failed to use ordinary care, as a matter of law by Defendants' own testimony, but Defendants also violated numerous statutes and Federal Regulations. Finally, and most importantly, the doctrine of *res ipsa loquitur* confirms that the Defendants were negligent in this case, and the verdict must accordingly be set aside by the Court pursuant to CR 50(b).

With regard to the issue of causation and Plaintiff's request that the Court enter judgment of a matter of law on that issue as well, the facts in this case, as well as Plaintiff's expert's testimony likewise confirm that there was no evidence presented at trial to counter the substantial evidence that there was nothing but the oil spilled from the defendants' admittedly ruptured hose that caused the Plaintiff's collision.

The only evidence that Defendants attempted to submit regarding causation was that Defendants were not transporting kerosene or diesel and that they did not leave a spill that spread over 200-600 yards. First, Plaintiff never argued that the oil was kerosene or diesel – that was a misleading argument by defense counsel taken from Mr. Watchie's statement in his layman's attempt to describe the smell of the oil on the pavement and he admitted that he was not sure of the smell. (RP 734-735) Second, Plaintiff's claim was not dependent on the oil being spread across 200-600 yards. Mr. Watchie testified that there were cones set around a 200 yard perimeter. Given that the hose was spraying oil at the truck's

traveling rate of 60 miles per hour, even Mr. Mazza admitted upon questioning that if a driver drove over 10 feet of oil, it is “not hard to conceive that the car could lose control;” Mr. Mazza answered that the oil could be slick “in any circumstances.” (RP 840) In any event, Mr. Ferrone confirmed that the amount of oil was not relevant to the accident, so any dispute in the facts on that issue were not material. In any event, Defendants should have been equitably estopped from arguing causation as set forth in the next section.

Under the specific facts of this case, the jury’s verdict is inconsistent and contrary to the unrebutted and undisputed evidence, which was presented at time of trial by the Plaintiff, and which is set forth above in great detail.

Under the terms of CR 59(a)(7), a new trial may be granted on the basis that "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is "contrary to law." Challenges to the sufficiency of the evidence may be made by either the plaintiff or the defendant under either CR 50 or CR 59(a)(7). *See, 14A WAPRAC § 24:7, Tegland, (2011). See also, 15 WAPRAC §38:17, Tegland, (2011).* When a verdict is in favor of the defense, and the Court ultimately determines that such a verdict is contrary to the evidence, the appropriate remedy is a grant a new trial limited to the issue of damages. *See, Sommer v. DSHS, 104 Wn. App. 160, 175, 15 P.3d 664 (2001).* Here, damages are not an issue, so the case need not be remanded and the prior judgment should be reinstated.

The standards applicable to granting a motion for new trial based on CR 59(a)(7) that "there is no evidence or reasonable inference to the evidence to justify the verdict ..." are the same as the standard applicable to granting a CR 50 motion for judgment as a matter of law, even on appeal. See, *15 WAPRAC § 38:17 (2011)*, Tegland (2011). Such standards are discussed in detail in the Appellate Court's opinion in *Sommer v. DSHS*, supra. The *Sommer* opinion provides at page 172 the following under the heading of "New Trial – Verdict Contrary to the Evidence:"

*CR 59(a)(7) permits a new trial when 'there is no evidence or reasonable interference from the evidence to justify the verdict'. It is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence. Palmer v. Jensen, 132 Wn.2d 193, 198, 937 P.2d 597 (1997). When the proponent of a new trial argues that the verdict was not based on the evidence, the appellate court reviews the record to determine whether there was sufficient evidence to support the verdict. Palmer, 132 Wn.2d at 197-98, 937 P.2d 597. All evidence must be viewed in the light most favorable to the party against whom the motion is made. Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2 275 (1980). **There must be 'substantial evidence' as distinguished from a 'mere scintilla' of evidence, to support the verdict – i.e., evidence of a character 'which would convince an unprejudiced, thinking mind of the truth of the fact at which the evidence is directed'. Id. A verdict cannot be founded on mere theory or speculation.** (Emphasis added)*

Id. Accord Campbell v. ITE Imperial Corp., 107 Wn.2d 807, 817-18, 73 P.2d 969 (1987).

In *Sommer*, **despite a defense verdict, the Appellate Court reversed and found as a matter of law in favor of the plaintiff.** In *15 WAPRAC § 38:17*, Professor Tegland cites to the *Sommer* opinion for the proposition, "**[w]hen there is simply no conflict of the evidence, and all**

relevant evidence favors the moving party, the court will not hesitate to authorize a new trial." Further, although the plaintiff has the burden of proof, when the defendants' evidence is only speculative, a directed verdict in favor of the plaintiff on the issue of liability may very well be proper. See, *Curtiss v. YMCA, of Lower Columbia Basin*, 82 Wn.2d 455, 465, 511 P.2d 991 (1973). Where a defendant introduces no evidence, a directed verdict for the plaintiff has previously been upheld. *Clancy v. Reis*, 5 Wn. 371, 31 P. 971 (1892); *Pacific National Bank of Tacoma v. Aetna Indemnity Company Tacoma*, 33 Wn. 428, 74 P. 590 (1903), (same).

In this case, even viewing the evidence in the light most favorable to the defense, the Defendants provided no countervailing evidence on the issue of whether or not they were negligent and that the oil they spilled on the road did not cause the subject collision. Thus, the jury's verdict in the Defendants' favor was simply contrary to all competent evidence and is grounds for a new trial, and more importantly simply imposition of the first Judgment.

C. **THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFF'S MOTION FOR PRECLUSION AND/OR ESTOPPEL AND IMPROPERLY ALLOWED THE JURY TO CONSIDER THE ISSUE OF WHETHER THE DEFENDANTS SPILLING OF THE OIL PROXIMATELY CAUSED THE COLLISION, WHICH ALLOWED IMPERMISSIBLE ARGUMENT, SPECULATION AND EVIDENCE TO PERVADE THE TRIAL**

Appellate review of a trial court's application of res judicata is question of law *Kuhlman v. Thomas*, 78 Wn. App. 115, 120, 897 P.2d 365

(1995), as is its application of collateral estoppel. *Satsop Valley Homeowners Ass'n, Inc. v. Nw. Rock, Inc.*, 126 Wn. App. 536, 542, 108 P.3d 1247, 1251 (2005) A trial court's application of judicial estoppel is reviewed under an abuse of discretion standard. *Miller v. Campbell*, 164 Wn. 2d 529, 536, 192 P.3d 352, 355 (2008)

As set forth above, Defendants took a completely inconsistent position on the eve of trial from the one they took at the time of the original summary judgment motion when they stipulated that oil leaked from a ruptured hose that fell of their truck and caused Plaintiff's vehicle to lose control. Although Plaintiff had no reason to believe Defendants would attempt to argue proximate cause of the collision at the second trial, and especially could not have predicted an argument that "oil dropped from the sky, etc.," (Defendants had not disclosed any intention in this regard in the discovery cutoff), in order to prevent any such surprises, two and a half months prior to the trial date, as a precautionary measure Plaintiff filed a specific motion to confirm that trial would only be proceeding on negligence – not damages or causation of the collision. (CP 613-686) The Defendants did not provide any substantive response to Plaintiff's Motion and the Court declined to hear it at that time, but upon Plaintiff's specific inquiry of how the Court wanted Plaintiff to proceed with re-noting the motion, the Court advised counsel she could bring the motion in limine prior to trial. Defense counsel further indicated on the record that he believed an agreement could even be reached as he did not

think Defendants were disputing proximate cause of the collision. Plaintiff reasonably relied upon the Court's direction, as well as Defense counsel's representation, and filed the motion a week prior to trial as a motion in limine. (CP 1030-1064)¹²

When Plaintiff did as specifically instructed by the court, the Court provided a contradictory decision on the first day of trial and refused to consider Plaintiff's motion for the application of the doctrines of Res Judicata, Collateral Estoppel, and/or Judicial Estoppel, thus greatly prejudicing Plaintiff. While the Court failed to articulate a reason for its refusal, it alluded to its erroneous view of the law that Plaintiff had to bring the same pursuant to a Motion for Summary Judgment. The Court's refusal to hear the Motion was clearly an abuse of its discretion, particularly when Plaintiff filed her original motion regarding these issues two and a half months before trial and the Court told Plaintiff to re-note the motion as a motion in limine. (CP 613-686) Furthermore, given that there were no issues of fact to be determined and it was just a decision on the pleadings, Plaintiff's motion was not required to be brought pursuant to Summary Judgment. *See e.g. Judy v. Hanford Environmental Health Foundation*, 106 Wn. App. 26, 22 P.3d 810, *review denied* 144 Wn.2d 1020, 32 P.3d 284 (2001)(holding there is no need to convert a motion to dismiss on the pleadings into one for summary judgment when the

¹² Although at trial, defense counsel O'Brien argued that it was a different attorney who made such representation, there have been at least 4 different defense counsel (all from the same office on this case – including different trial counsel)

operative facts are undisputed, the core issue is one of law, and whatever else might be presented would not change the disposition of the motion). See also *Loger v. Washington Timber Products, Inc.*, 8 Wn. App. 921, 926, 509 P.2d 1009, 1012 (1973) (holding that when the question presented was one of law entirely, compliance with the formalities of CR 56 is not necessary) The Court's inconsistent rulings denied Plaintiff even the opportunity to have her motion heard.

As to the merits, of Plaintiff's motion, it facts before a trial court are verities on appeal from summary judgment, if on appeal appellant does not allege there are material issues of fact left undecided. See *King County Cent. Blood Bank v. United Biologic Corp.*, 1 Wn. App. 968, 465 P.2d 690 (1970) Here, Defendants admitted that the oil on the roadway caused the subject collision in this case, and thus, that was part of the Court's ruling on summary judgment and those facts were confirmed by the Court of Appeals. While the Court of Appeals reversed the trial court's summary judgment ruling on liability, what caused the collision was not in issue and thus, like the issue of damages was not to be re-litigated. The evidence is clear how the collision occurred.

The doctrine of res judicata prevents re-litigation of the same claim where a subsequent claim involves the same subject matter, cause of action, persons and parties, and quality of persons for or against the claim made. *Seattle-First Nat'l Bank v. Kawachi*, 91 Wash.2d 223, 225-26, 588 P.2d 725 (1978). Res judicata bars "every question which was properly a

part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated.” *Id.* at 226, 588 P.2d 725; *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 891–92, 1 P.3d 587 (2000) (stating that res judicata applies to matters actually litigated and those that could and should have been raised in the prior proceeding).

This doctrine applies to issues decided on summary judgment. Because “[a] grant of summary judgment is a final judgment on the merits with the same preclusive effect as a full trial,” *id.* at 892, 1 P.3d 587, an unappealed summary judgment is res judicata as to rights determined during summary judgment. *See Lowe v. Double L Props., Inc.*, 105 Wn. App. 888, 896, 20 P.3d 500 (2001) (stating that an unappealed summary judgment became res judicata as to a party's maintenance rights, which had been determined in the summary judgment proceeding). *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796, 805-06 (2004) The law of the case doctrine promotes “the finality and efficiency of the judicial process by protecting against the agitation of settled issues.’ ” *State v. Stein*, 140 Wn. App. 43, 55, 165 P.3d 16 (2007)

Here, the doctrine of res judicata prevented re-litigation of the issue of proximate cause where the second trial involved the same subject matter, cause of action, persons and parties, and quality of persons for or against the claim made. Defendants’ stipulation on summary judgment, upon which the trial Court initially relied and which the Court of Appeals noted and addressed in its decision, prevented Defendants from re-litigating the issue. Specifically, Division II reversed the trial court’s

summary judgment ruling solely because it believed there was a factual question on whether or not defendants acted reasonably in inspecting the tie-downs to see that the hoses were secure. *Mattson*, at 2. In its analysis, the majority addressed only “Negligence as a Matter of Law,” “Negligence- Duty and Breach of Duty,” “Res Ipsa Loquitor” (as it related to the cause of the broken tie down, not oil on the roadway) and “Stadtherr’s Testimony.”¹³

¹³ Shortly after the Court of Appeals reversed the trial court in this case, the Supreme Court re-examined the doctrine of res ipsa loquitor in the case of *Curtis v. Lein*, 169 Wn. 2d 884, 892, 239 P.3d 1078, 1082 (2010), which arguably would have led to a different outcome in the first appeal. In that case, the Plaintiff lived on a farm owned by the respondents, Defendants Lien. Plaintiff was injured on the farm when a dock on which she was walking gave way beneath her. The Leins had the dock destroyed shortly after the incident, so there was no evidence as to the dock's condition at the time of the accident. Curtis brought a negligence suit against the Leins, who moved for summary judgment. Curtis invoked res ipsa loquitor to fill in the evidentiary gaps caused by the dock's destruction. In that regard, she argued that because the dock was destroyed following her accident, it was impossible to know what precisely about the dock caused her fall. She therefore relied upon res ipsa loquitor, contending that a wooden dock does not ordinarily give way unless the owner has negligently failed to maintain the structure. *Id.* The trial court granted the Leins’ motion for summary judgment, reasoning that res ipsa loquitor did not apply to Curtis’s claim because the court could conceive of “multiple other causes which could have caused the failure of the step on the dock,” such as improper construction or defective materials. The Court of Appeals affirmed the trial court, reasoning that while wooden docks do not ordinarily give way in the absence of negligence (thus implicating res ipsa loquitor), the doctrine could not be used to infer that dangerous docks exhibit *discoverable* defects and held that Curtis retained the burden under premises liability of proving the Leins knew or should have known of the dock’s faulty condition. *See Curtis v. Lein*, 150 Wash.App. 96, 107, 206 P.3d 1264 (2009).

The Supreme Court reversed the Court of Appeals, rejecting its analysis, and citing *Pacheco, supra*, held that at trial, the Plaintiff may rely upon res ipsa loquitor as evidence of negligence and further held:

When res ipsa loquitor applies, it provides an inference as to the defendant's breach of duty. *See Miller v. Jacoby*, 145 Wash.2d 65, 74, 33 P.3d 68 (2001). It therefore would apply an inference of negligence on the part of the Leins generally: what they knew or reasonably should have known about the dock's condition is part of the duty that they owed to Curtis. **What the Leins knew or reasonably should have known about the dock is exactly the sort of information that res ipsa loquitor is intended to supply by inference, if the inference applies at all.** *See Ripley v. Lanzer*, 152 Wash.App. 296, 307, 215 P.3d

The doctrine of collateral estoppel also applies here and precludes litigation of whether the oil spilled by the Defendants caused the collision.

In that regard, the Supreme Court stated in *Hadley v. Maxwell*:

The doctrine of collateral estoppel is well known to Washington law as a means of preventing the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal. Collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of parties.

Hadley v. Maxwell, 144 Wn.2d 306, 311, 27 P.3d 600, 602 (2001)

Collateral estoppel requires:

(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *Id.*

Again, the issue of proximate cause of the collision is the same as it was in the first trial, there was a summary judgment ruling on the issue, the Defendant was the party against whom it was asserted, and application of collateral estoppel cannot work an injustice against Defendants when it was their own stipulation that their spilling oil on the roadway caused the collision.

Defendants argued that their concession about the spilling of oil on the roadway was “only for summary judgment purposes.” However, the doctrine of judicial estoppel is a third equitable remedy that takes care of

1020 (2009) (accident's “ ‘occurrence is of itself sufficient to establish prima facie the fact of negligence on the part of the defendant, without further direct proof.’ ” (quoting *Metro. Mortgage & Sec. Co. v. Wash. Water Power*, 37 Wash.App. 241, 243, 679 P.2d 943 (1984))). The Court of Appeals erred when it held otherwise.

that argument as it is specifically calculated to prevent a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. The doctrine aims to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and waste of time.¹⁴

A court may properly apply judicial estoppel when the following elements are shown: (1) **a party asserts a position that is "clearly inconsistent" with an earlier position**; (2) **judicial acceptance of the inconsistent position would indicate that either the first or second court was misled**; and (3) **the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party**. *Baldwin v. Silver*, 147 Wn. App. 531 (2008)

The elements under judicial estoppel are more than satisfied here when (1) Defendants' position on causation of the collision at the second trial was that oil from their truck did not cause the subject collision versus their stipulation on summary judgment that it did; (2) the trial court accepted their position in the first summary judgment motion as did Division II; and (3) the defendants sought and gained an obvious unfair

¹⁴ This doctrine should have certainly applied in this case where Defendants continually attempted to concoct new evidence while on the witness stand (i.e. wastewater, etc)

advantage with their tactical decision to argue causation on the eve of trial. In that regard, Plaintiff did not have sufficient time to prepare for trial with causation an issue for the jury (exactly what Plaintiff tried to prevent in bringing her motion over two months prior to trial).

For example, she could not call Trooper Villeneuve live (she lived in Arizona at the time and could not be available at the last minute) to address her investigation of the collision in greater detail when Defendant spent much of the trial disparaging it. She could have also provided further detail as to her determination of causation, which the Court excluded from her deposition testimony without such foundation. Plaintiff had also previously deposed John Watchie's testimony for the first trial in 2008 and when causation was not an issue because the defense had stipulated to the same and the Court had granted Summary Judgment. Had Plaintiff known causation was going to be argued and in the manner it was pursuant to Defendants' fabrications, Plaintiff could have called Mr. Watchie live at trial to address all of the defense's arguments regarding the amount and smell of the oil (issues on which the defense primarily focused) and his seeing Defendants' truck pass by right before Rayna's collision. Plaintiff was further prejudiced because Defense counsel was also allowed to argue and suggest numerous improper theories to the jury that the oil came from another truck, the sky, etc., which infected the jury and certainly tainted its verdict.

Similarly, the doctrine of equitable estoppel is also applicable here:

Equitable estoppel is based on the notion that “a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” The elements of equitable estoppel are: “(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.”

Lybbert v. Grant County, State of Wash., 141 Wn. 2d 29, 35, 1 P.3d 1124, 1127-28 (2000)(citations omitted) See also, *Bd. of Regents of Univ. of Washington v. City of Seattle*, 108 Wn. 2d 545, 553-54, 741 P.2d 11, 16 (1987) (where a person with actual or constructive knowledge of facts induces another, by his words or conduct, to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice. Such an estoppel may arise under certain circumstances from silence or inaction as well as from words or actions)

Here, again, Defendants (1) made an admission in a pleading on a motion for summary judgment, a dispositive motion – and confirmed it two months before trial in a hearing on the record before the Court -- that is absolutely inconsistent with their position on the first day of trial that causation has “always been an issue in the case”; (2) Plaintiff relied upon such admission in her preparation for trial and even made a motion to confirm it; and (3) the inconsistent withdrawal of the admission prohibited proper preparation by the Plaintiff, allowed the jury to consider all of defendants’ baseless causation defendants’ arguments, and ultimately resulted in a defense verdict. Defendants’ tactics in changing their position on the eve of trial amounts to sandbagging, are in direct contravention of and an affront to the judicial process and our system of justice, and they should not be condoned by this Court.

While the defendants may attempt to argue that because the jury did not reach the issue of causation, the Judge's reversible error in not considering Plaintiff's motion for application of equitable doctrines and/or allowing the issue of causation to go before the jury, is harmless, the two issues were so inseparably connected as argued by the defense at trial and as elements of liability, that the entire verdict must be held invalid in its entirety. *See Myers v. Smith*, 51 Wn.2d 700, 321 P.2d 551 (1958) There is no way to know how the jury would have found had the case not been muddled up with the Defendants' obvious fabrications and misdirections.

D. IN THE ALTERNATIVE, A NEW TRIAL IS WARRANTED IN THIS CASE PURSUANT TO CR 59(A)(8) DUE TO VARIOUS INSTRUCTIONAL ERRORS BY THE TRIAL COURT

The test for the sufficiency of instructions involves three determinations: (1) that the instructions permit the party to argue his theory of the case; (2) that the instruction(s) is/are not misleading; and (3) when read as a whole all the instructions properly inform the trier of fact on the applicable law. *Richards v. Overlake Hospital Medical Center*, 59 Wn. App. 266, 275, 796 P.2d 737 (1990) (citing *Crossen v. Skagit Cy.*, 100 Wn.2d 355, 360, 669 P.2d 1244 (1983)); *Gammon v. Clark Equipment Co.*, 104 Wn.2d 613, 707 P.2d 685 (1985).

Erroneous instructions given on behalf of a party in whose favor the verdict is returned are presumed prejudicial and a new trial is clearly appropriate unless it is affirmatively shown that they were harmless. *State v. Rice*, 102 Wn.2d 120, 683 P.2d 199 (1984); *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995). An error in

instruction is harmless only if it has no effect on the final outcome of the case. *State v. Rotunno*, 95 Wn.2d 931, 631 P.2d 951 (1981).

Had the trial court in the instant case issued a 'substantial factor' jury instruction rather than a 'determining factor' instruction, the jury very well might have found in favor of Plaintiff. Therefore, the trial court did not make a harmless error when it instructed the jury to find in favor of Plaintiff only if it concluded that one of the attributes enumerated in RCW 49.60.180(2) was a 'determining factor' in Acorn's adverse employment decision. **The error is therefore presumptively prejudicial and supplies a ground for reversal.** We reverse and remand to the trial court for a new trial.

Mackay, 127 Wn.2d at 311. (Emphasis added)

Refusal of a requested instruction is reversible error where the instruction is a correct statement of law and refusal results in there being no instruction covering requesting party's theory of the case. *Izett v. Walker*, 67 Wn.2d 903, 410 P.2d 802 (1966).

1. INSTRUCTING THE JURY THAT A VIOLATION OF ANY STATUTE OR REGULATION BY THE DEFENDANTS COULD BE "EXCUSED IF IT [WAS] DUE TO SOME CAUSE BEYOND THE VIOLATOR'S CONTROL," WHEN THERE WAS NO EVIDENCE TO SUPPORT SUCH INSTRUCTION AND FAILING TO GIVE THE PLAINTIFF'S PROPOSED INSTRUCTIONS THAT DEFENDANTS' DUTIES WERE NON-DELEGABLE, AND DEFENDANTS COULD NOT ATTRIBUTE FAULT TO ANY UNNAMED THIRD PARTY WERE ALL ERRORS THAT REQUIRE A NEW TRIAL UNDER CR 59(A)(8)

"When reviewing a claim of error relating to jury instructions, the court must give consideration to the entire charge as a whole to determine whether the instruction is misleading or incorrectly states the law to the prejudice of the objecting party." *Furfaro v. City of Seattle*, 144 Wn.2d

363, 382, 27 P.3d 1160 (2001) "A new trial is the appropriate remedy for prejudicial errors in jury instructions." *Id.*

Plaintiff had proposed Instruction No. 22, which provided pursuant to WPI 60.03 that violation of a statute or regulation may be considered as evidence in determining the Defendant's negligence. Over Plaintiff's objection, the Court in its **Instruction No. 16** included the additional inapplicable bracketed material which stated: "**Such a violation may be excused if it is due to some cause beyond the violator's control, and **that ordinary care could not have guarded against.**" (emphasis added) (CP 2645)**

This instruction at issue is patterned from RCW 5.40.050 after it was determined that all but certain defined acts would no longer be considered "negligence per se," and as noted by *Young v. Caravan Corp.*, 99 Wn. 2d 655, 660-61, 663 P.2d 834, 837-38 (1983) amended, 672 P.2d 1267 (Wash. 1983):

We point out, however, as did the court in *Callan*, that if a tavern keeper takes reasonable precautions to determine whether customers are over 21 years of age, liability for negligence per se will not be imposed as a matter of law. *See Callan*, 20 Wash.App. at 40, 578 P.2d 890. As we observed in *Brotherton v. Day & Night Fuel Co.*, 192 Wash. 362, 369-70, 73 P.2d 788 (1937):

While it is true that violation of a statute is, generally speaking, negligence *per se*, it is also true that such violation is not negligence when due to some cause beyond the violator's control, and which reasonable prudence could not have guarded against.

Whether defendant took reasonable precautions so as to prevent the imposition of negligence per se is a question of fact which would be determined in further proceedings in this case.

The case law is clear that a requested instruction should not be given unless there is substantial evidence to support it. *See, Klein v. R.D. Werner Co., Inc.*, 98 Wn.2d 316, 318-19, 654 P.2d 94 (1982). Plaintiff took strong exception to the Court's giving the additional language in this instruction, which was a "poison pill," as there was no testimony that supported the bracketed portion of the instruction, which therefore misled the jury on the law of this case. Plaintiff also filed a brief regarding the bracketed portion of the instruction and urged the Court in her brief and twice in oral argument regarding jury instructions, not to give it. The Court allowed the bracketed information on the grounds that Defendants were entitled to present their theory of the case.

However, the Defendants' theory of the case is not supported by the bracketed language. That language requires that the violation be "due to some cause beyond the violator's control." The Defendants in this case never presented any evidence suggesting that the violations supported by Court's Instruction No. 16 were due to some cause beyond their control. Conversely, the testimony of Mr. Mazza demonstrated the opposite: "It is your duty to ensure that these trucks are safe in anticipation of the rough road so that other members of the public will not be endangered, correct? Correct." (RP 684) He further testified:

The duty to maintain the load on the truck, to secure the truck to make sure it is safe to go down the road and not to spill loads of any type, equipment come off, that duty is upon your driver and your employees and your company, correct? Yes it's an equally shared responsibility between

the company and the driver. (RP 635)

Thus, the responsibility for obeying all statutes, regulations, and ordinances related to public safety on the public roads as admitted by Defendants (the owner of the trucking company) fell exclusively within the control of Defendants.

The fact that Defendants may have used ordinary care is irrelevant with this instruction because the condition precedent to that clause is that the violation may only be excused if it is due to some cause beyond the violator's control. Further, "the most common instance where violation of a statute has been held to be due to a cause beyond the violator's control, which reasonable prudence could not have guarded against is where the violation is excused by an emergency." *Hood v. Williamson*, 7 Wn. App. 355, 362, 499 P.2d 68, 72 (1972). In this case, there were no emergent conditions – it was a sunny warm day in July with little traffic on the freeway, and conditions of the road were no different than usual for that time frame.

No one testified at trial that the bungee cord breaking and the hose coming loose in this case was due to some cause beyond the Defendants' control. There is absolutely no evidence to support such a notion in the trial of this case. In fact, as noted above, the testimony is directly to the contrary, wherein: (1) Mr. Lewis specifically testified that it was reasonably foreseeable that a bungee cord could break on an empty truck on a bumpy road; (2) Mr. Ferrone testified that the motor carrier is required to anticipate this exact issue and their duty in that regard as a

motor carrier is strict – there is no exception OR EXCUSE available; and (3) Defendant Stadtherr testified that the section of I-5 was a bumpy road and rough on an empty truck of which he was aware before the collision. **And most significantly**, Mr. Mazza testified that (1) it was his duty to anticipate that there would be breakage of his equipment due to the rough road, (2) that it was his “DUTY TO MAKE SURE THAT THESE TRUCKS ARE SAFE IN ANTICIPATION OF THE ROUGH ROAD SO MEMBERS OF THE PUBLIC WILL NOT BE ENDANGERED”; and specifically, (3) that he knew before July 21, 2003 given all of his experience driving that the rough road (“violent action of I-5”) could cause the bungee cords used by defendants on their trucks to secure hoses, to break.

The Defendants could still argue their “theory” of the case to the jury **without** the bracketed portion that the manner in which they secured the hose on their truck was supposedly reasonable, despite knowing I-5 in the location of the collision was “violent” on an empty truck, it was their choice to secure the hose in that dubious manner. However, **absolutely no evidence was presented in this case that anything “beyond [their] control”** caused the bungee cord to break and the hose to come loose and rupture spilling oil onto the highway, and thus, there was absolutely NO evidence in this case to support the giving of the bracketed portion of WPI 60.03. Again, the evidence in this case points to the exact opposite conclusion, particularly when Defendants admitted that they could reasonably foresee and/or anticipate that the truck will be subject to such

violence while on the roadway. Defendants are required under federal law to take appropriate precautions so that their load, cargo and equipment is secure, and does not fall off the truck; the jury was instructed in that regard. (CP 2644, 2646-48, 2650-52) Adding the bracketed portion of this instruction not only negates that requirement, it was absolutely misleading, confusing, and inconsistent with the other instructions setting forth the defendants' duties and was an improper comment on the facts and the evidence in this case. The prejudicial effect of the instruction was also concerning given the known Juror Questions in this case. In that regard, a juror had asked of Ms. Mattson, "Did you see any other tanker trucks on the freeway in front of you as you merged onto I-5," to which she replied "not that I recall." (RP 912) The question had to be asked to quell the concern, but clearly it was an issue that had been improperly planted in the juror's mind by defense counsel and then, with the instruction, it ensured a poison effect.

Further, the bracketed section of Instruction No. 16 was completely contradictory to Instruction No. 12 regarding Res Ipsa Loquitor (CP 2641),¹⁵ which informed the jury that they may infer the Defendant was negligent for spilling oil on the road causing Plaintiff's

15 Instruction No. 12 stated:

If you find that

- (1) The collision in this case is of a kind that ordinarily does not happen in the absence of someone's negligence; and
- (2) The collision was caused by an agency or instrumentality within the exclusive control of the Defendant(s); [This element was undisputed]

Then, in the absence of a satisfactory explanation, you may infer, but you are not required to infer, that the Defendant(s) were negligent. [Bracket added].

(CP2641; CP 1197)

accident. It is prejudicial error for the Court to give irreconcilable instructions on a material issue. This is because it is impossible to know what effect the inconsistent or contradictory instructions may have had on the jury's verdict. *Galvan v. Prosser Packers, Inc.*, 83 Wn.2d 690, 521 P.2d 929 (1974); *Hall v. Corporation of Catholic Archbishop*, 80 Wn.2d 797, 498 P.2d 844 (1972).

In *Galvan*, the plaintiff brought suit against his employer and a manufacturer for failure to properly maintain a corn harvester which ultimately resulted in plaintiff's injuries. Plaintiff sought to hold defendants strictly liable for the injuries sustained. Trial resulted in a defense verdict and plaintiff appealed. The Appellate Court affirmed and the Supreme Court granted review. *Galvan* at 691. Upon review, the Supreme Court found that the instructions as given by the lower court failed to properly advise the jury as to the meaning of foreseeability relative to use of the harvester.

The Court found the instruction to be "reversibly erroneous" and citing *Hall, supra*, ruled:

Where, however the error is such that the instructions are inconsistent or contradictory on a given material point, the use is prejudicial for the reason that it is impossible to know what effect they may have on the verdict. *Galvin* at 694. (emphasis added)

In *Hall*, the plaintiff was exiting a church when she fell down the stairs. Plaintiff brought suit alleging the church was negligent in failing to provide handrails and in failing to exercise reasonable care under the

circumstances. The defendant entered a general denial and asserted affirmative defenses of contributory negligence and assumption of risk. The jury returned a defense verdict and the plaintiff moved for, and was denied a new trial. *Hall, 80 Wn.2d* at 798. On appeal, the court examined the contradiction between two jury instruction and noted that the instruction was based on language from another case not meant to be used to instruct a jury, and that the instruction did not address a specific or additional duty imposed by statute, which was present in the case on review. The Court stated:

In the instant case, we are concerned with whether the property owner complied with, or was exempt from, the specific requirement of an ordinance enacted for the protection of persons using the landowner's premises. Under the facts of this case, if the jury were to find that the stairs were not "monumental" and/or were to find that the rise and run of the steps had not been approved as to safety by the superintendent of buildings, then even though the ordinance had been violated, Instruction No. 9 would negate the landowner's legislatively imposed duty of care...

Further, the Court noted the contradiction created by Instruction No. 9 with another instruction given to the jury, No. 6, which stated:

The violation, if you find any, of an ordinance, is negligence as a matter of law. Such negligence has the same effect as any other act of negligence.

The Court commented that in effect, Instruction No. 9 "**virtually negates the impact of Instruction No. 6...**" *Hall* at 803.

Here, the material and sole issue of the case was liability, and the irreconcilable instructions both pertained to the Defendants' negligent conduct. The two conflicting instructions given by the Court were

Instruction No. 12 and Instruction No. 16. Instruction No. 12 was given in accordance with the principles of *res ipsa loquitur* based on the clear facts in this case, although contrary to Plaintiff's proposed instruction, it was not given as a matter of law despite the uncontroverted evidence that (1) Plaintiff's vehicle would not have slid and rolled off the freeway if not for the negligence of the Defendant in spilling oil on the highway, (2) the fact that Defendant's vehicle was within the exclusive control of the Defendant at all times, and (3) no one else was responsible for securing the bungee cords or the hose apart from the Defendants. In any event, the jury was instructed they may infer negligence by the Defendant. Thus, it was improper for the Court to then give Instruction No. 16, which included the bracketed portion of the instruction because it contradicted instruction No. 12 creating a negating effect similar to that recognized by the Court in *Hall*.

In addition, the Court's refusal and failure to instruct the jury regarding the defendants' non-delegable duty as set forth in Plaintiff's Proposed Instruction No. 14 further compounded the error in giving the bracketed portion of WPI 60.03 in Instruction No. 16. In that regard, Plaintiff's proposed instruction No. 14, which was based on WPI 12.09 stated:

Defendants American Petroleum Environment Services are not relieved of their duty to properly secure the load or cargo on their vehicle, or their duty to not drop, spill, or leak anything on the roadway, by delegating or seeking to delegate that duty to another person. (CP 1184)

There was testimony by both experts in this case regarding Defendants' non-delegable duty as a motor carrier, particularly as it related to the Federal Motor Carrier Safety Regulations, which apply to motor carriers like defendants, not ordinary drivers. Such non-delegable duties preclude defendants as motor carriers from being able to "excuse" their negligence.

The error in Instruction No. 16 was then further highlighted when the Court gave instruction No. 5 (CP2634) and failed to give Plaintiff's Proposed Instruction No. 3A, which stated as follows:

You are instructed that the Court has determined that Plaintiff is not in any way at fault for this collision, **nor are there any unnamed parties that are in any way responsible for this collision, and therefore, you are not to consider the fault of anyone other than the named Defendants in determining your verdict in this case.** (CP 1440)

Instruction 3A provided the jury with the law of the case as to the absence of contributory fault on behalf of the Plaintiff, or fault of any unnamed parties consistent with the Court's ruling on Plaintiff's motion in limine, and most importantly, the lack of any affirmative defenses regarding any unnamed parties in Defendants' Answer -- as set forth in greater detail below. Respectfully, it was error to not give this instruction, and based upon the Court's failure in that regard, Defense counsel argued to the jury that the oil could have "dropped out of the sky" or been left by another vehicle despite the lack of any such evidence. Such argument was not only in violation of the Orders in Limine and could only have been prevented by submission of Instruction 3A, it was contrary to all of the

evidence submitted at trial, including Mr. Mazza's testimony, which during Plaintiffs direct examination, was consistent with the fact that there was no unnamed defendant third party. (RP 695-696)

Notwithstanding Defendant Mazza's testimony in that regard, Defense Counsel inappropriately stated in his closing argument that someone else supposedly was responsible for the oil on the highway or that the oil dropped out of the sky. (RP 1190-1191) He further argued:

*If you find the collision in this case is of a kind that ordinarily does not happen in the absence of someone's negligence. **Well, it may have been someone's negligence.** may not have been someone's negligence, **but there's oil on the road and we didn't put it there.** (RP 1203)*

Not only does Defense Counsel O'Brien say it is from someone else's vehicle, but Defense Counsel proceeded to argue that the accident must have been caused by some other entity when he stated that the petroleum substance that was carried in the Defendant's truck on the day of the collision supposedly smelled differently than the petroleum substances smelled by independent witness John Watchie;

*What did Mr. Watchie see, his direct evidence. He smelled really strong fumes. He noticed Ms. Mattson's Explorer spin out and go over the bank. He explained those fumes weren't gas but really strong, like kerosene smell, diesel-something. This is quote from his deposition testimony. He said it was overbearing, the smell. Asked if he could see what was on the roadway, he said it was obvious, it was oil, it was black, there was a lot of it. It went a couple hundred feet. That's what he said. That's his direct testimony. ***Coupled with the direct testimony that we had from my client, I submit to you that it is physically impossible for that kind of oil spill of a substance we don't carry to come out of an empty hose that had nothing more than residual oil or wastewater in it, or a combination thereof.*** (RP 1193-94)*

At trial, there was no evidence elicited by Defense Counsel that

what was in that truck smelled differently than what Watchie smelled. Moreover, Plaintiff's expert, Christopher Ferrone confirmed that Mr. Watchie's description of the smell was consistent with a smell of used motor oil.

In *Izett v. Walker*, 67 Wn.2d 903, 410 P.2d 802 (1966), the plaintiffs appealed a judgment for the defense arising out of a rear end motor vehicle collision after a motion for a new trial was denied. *Id.* at 803. According to the plaintiff in that case, the plaintiff's husband was driving their vehicle and testified to "easing off of the accelerator and pumping the brakes three or four times as he approached the line of stopped cars." *Id.* As he approached the vehicle directly in front of his, plaintiff's husband applied his breaks and came to a stop, slightly bumping the vehicle in front of his but causing no damage. Plaintiff's vehicle had come to a complete stop when the defendant's vehicle forcefully rear ended her vehicle. *Id.* Conversely, the defendant in *Izett* testified that he did not see the vehicles stopped in front of the plaintiff's vehicle because of the size of plaintiff's vehicle. Defendant admitted he had been trying to switch lanes and so had not been watching the plaintiff's vehicle the entire time. *Id.*

On appeal, plaintiff asserted numerous assignments of error; two assignments pertained to the failure of the court to give a requested instruction relating to the defendant's negligence. The trial court had refused an instruction regarding defendants' negligence because it previously determined the defendant to be negligent as a matter of law,

and despite objection from appellants' counsel, believed that providing the Instruction at issue would be unnecessarily restating the obvious.¹⁶ *Id.*, at 908.

The Supreme Court agreed with the plaintiff and held that the instruction should have been given, and found the failure to give it constituted an error warranting reversal of the judgment and the granting of a new trial:

*This facet of the case was not given to the jury in an instruction. There is nothing in the instructions to the jury regarding defendant's negligence to indicate what he was doing that proximately caused the accident in the eyes of the law. Under the instructions given to the jury, it was directed to consider if plaintiff driver was negligent, and, if so, whether his negligence contributed to the proximate cause of the collision. But if the jury did not know what act of the defendant might make him legally liable for the collision, how could it decide whether the actions of the plaintiff driver contributed to the proximate cause of the collision in the eyes of the law? **This is reversible error, because there is no instruction given which covers that part of appellant's theory of the case. Id. at 908.***

In this matter, in its Answer, Defendant provided under affirmative defenses that Plaintiff's alleged injuries were caused, in whole or in part, by her own negligence. (CP 87-90) That issue was determined by the prior trial court on Summary Judgment and Plaintiff was held to not be comparatively at fault as a matter of law. Defendants **did not**, however, include in their Answer any affirmative defense stating any other party was responsible for the allegations set forth in Plaintiff's Complaint. *Id.*

16 Court: At the risk of being slightly facetious, if a man is dead, you don't kill him more dead by hitting him again do you?

Counsel: No, I concede that your honor.

Court: If I held the defendant guilty of negligence, then there certainly is no need for an instruction, is there, on his primary duty or some additional duty he owes to the plaintiff.

Plaintiff therefore requested that the Court preclude any argument regarding contributory negligence by Plaintiff, as well as any unnamed third party, and/or the lack of an “empty chair” defendant in her Motions in Limine, so that Defendants would not attempt to make such argument when they had failed to plead it and had thus waived and conceded the issue. (CP 1030-1064) **The Court granted Plaintiff’s motion to preclude any argument, reference or insinuation regarding any comparative fault of the Plaintiff or any other [un]named defendant.** (CP 1460)

Inexplicably, despite its Order on Plaintiff’s motion, and over Plaintiff’s counsel’s objection, the Court refused to give Plaintiff’s Proposed Instruction No. 3A as set forth above.

As in *Izett*, the Court’s failure to give this instruction on a material issue of Plaintiff’s case constitutes reversible error. The issue of lack of contributory fault by the Plaintiff and/or lack of fault by an unnamed party was a material part of Plaintiff’s theory of the case. Similar to the proposed instruction in *Izett* regarding contributory negligence and proximate cause, “no other instruction provided to the jury covers this part” of Plaintiff’s theory of the case. *Id* at 908.

Whereas in *Izett*, the jury was instructed to determine if the plaintiff was contributorily negligent, but not instructed on any act by the defendant which would make the defendant liable, here, the jury was instructed on the acts which would result in liability for the defendant, but not instructed that any other unnamed party (including any other motorists

who Defense Counsel argued could have also dropped oil on the freeway) could not be found negligent or liable for the collision. Simply put, in *Izett*, the jury was not instructed on what acts could constitute negligence by the defendant and here, the jury was not instructed that any unnamed party could not be found negligent at all.

The effect of the Court's failure to give Plaintiff's Proposed Instruction No. 3A in this case is the same as that of the trial court's failure in *Izett* to give the Proposed Instruction; the jury was left without guidance and "could not properly evaluate the claims of contributory negligence..." See *Izett* at 908. In *Izett*, the jury needed to know what the defendant did wrong. This jury needed to know that not only did Plaintiff do nothing wrong, but neither did anyone but the named Defendants (if the jury was going to find them negligent). The "guidance" provided by the Court to the jury on this issue was crucial, and the lack of guidance provided was fatal. The result of the Court's failure to give Plaintiff's Instruction No. 3A in the case at hand, should also be the same as the result of the Court's failure in *Izett*; it is reversible error and the Court should properly grant a new trial.

2. Failing to Instruct the Jury Regarding Spoliation Was an Error of Law that Requires a New Trial Under CR 59(A)(8)

Despite extensive briefing and argument by Plaintiff's Counsel, the Court failed to give Plaintiff's requested spoliation instruction, No. 23A, regarding the requested, but never produced, evidence in this case. (CP

1442) As indicated in Plaintiff's Trial Brief, and as repeatedly demonstrated throughout the course of trial, Defendants failed to preserve the broken bungee cord, the broken hose, the driver checklist, and the pre and post trip inspection reports for the truck involved in the collision in this case, not to mention preserve the truck itself as requested by the Plaintiff during case discovery.

Where relevant evidence to a case is within the sole control of a party who should have normally produced it, and that party fails to do so without satisfactory explanation, "the only inference which the finder of fact may draw is that such evidence is unfavorable to him." *Henderson v. Tyrrell*, 80 Wn. App. 592, 604, 910 P.2d 522 (1996) (citing *Pier 67, Inc., v. King County*, 89 Wn.2d. 379, 385-86, 573 P.2d 2 (1977)). A significant consideration is whether the loss or destruction of evidence has resulted in an investigative advantage for one party over the other.

In that regard, Defendant Stadtherr admitted that he brought the ruptured hose and bungee cord back to American Petroleum and Mike Mazza did not throw them away until the next day. (RP 869) Mr. Mazza subsequently destroyed the pre and post trip inspection reports and the incidence report. This was despite the fact that he knew that there was an accident, received a citation for a loss of load that caused a collision, filled in an insurance claim, and knew that Defendant Stadtherr was being accused of causing a collision. (RP 869, 871) The Defense was already at an advantage having destroyed this evidence before trial, and by failing to give a spoliation instruction, this Court increased the advantage for the

Defense. The Defense seized upon this advantage continuously throughout trial.

Defense Counsel repeatedly made comments and elicited testimony from Defendant Mazza pertaining to the lack of “evidence” in this case. From the outset of the case, Defense Counsel, in his opening argument, discussed the lack of evidence and commented that the reason for this was because of Plaintiff’s delay. Such comments are not only completely untrue, but were specifically calculated to prejudice the jury. Defense Counsel in opening statement before the jury stated:

So you can already guess that Ms. Mattson was involved in a one-car rollover accident while getting on the freeway at the 320th Street ramp, northbound ramp I-5. **And after that accident almost three years pass until my client is sued. And we’ll leave it to your decision as to whether or not that explains why some things we’d dearly like to have for you don’t exist.**

(RP 452)

Also in opening statement, regarding the absence of evidence, defense counsel argued:

He [defendant Mazza] didn’t get sued for three years. **Nobody called up and say hey, keep your documents. We might sue you. There’s no reason to believe they were going to be sued by Ms. Mattson.** (RP 465)

Plaintiff objected to these arguments, and then raised the issue again with the Court citing that they not only were inappropriate, but also violated the Order on Motions in Limine (Number 10), which specifically stated:

CIRCUMSTANCES OF HIRING COUNSEL

It is ORDERED, ADJUDGED, AND DECREED that Plaintiff’s hiring counsel, including, but not limited to, any professional, business,

familial, or friendships between the Plaintiff(s) and/or Plaintiffs' witnesses shall be and is hereby GRANTED; [Added language included] For purposes of trial testimony with the possible exception of spoliation issue **outside the presence of the jury.**

(CP 1459)

Then, Defense counsel, again over Plaintiff's counsel's objection and in direct violation of the above Order on the Motions in limine, was able to inquire of Plaintiff when Plaintiff hired counsel. Defense counsel failed to ever elicit any evidence by any witness, however, as to when the lawsuit in this case was actually filed in order to support his opening statement.

It is possible that a party may be responsible for spoliation of evidence without a finding of bad faith but the party must do more than disregard the importance of the evidence; the party must also have a duty to preserve the evidence in the first place. *Homeworks v. Const., Inc. v. Wells*, 133 Wn. App. 892, 138 P.3d 654 (2006). The duty to preserve evidence attaches when litigation is reasonably anticipated.

In this case, without question, the date that litigation was reasonably anticipated was the date of the accident, July 21, 2003. Defense Counsel's manipulative assertions that Defendants did not know they were going to be sued, and had no reason to know they were going to be sued, is wholly contradicted by both evidence and testimony and amounted to absolute fabrication.

Moreover, there was extensive argument before the Court, an offer of proof in a hearing with testimony by Mr. Mazza, and trial testimony by Defendant Stadtherr, who admitted that he intentionally threw away the

broken hose and broken bungee cord the day after the collision and THE SAME DAY Defendant Stadtherr and Mr. Mazza signed and acknowledged the notice of violation from the Washington State Patrol Commercial Vehicle Enforcement Department, which specifically advised them that they were in violation of RCW 46.61.655 AND FMCSR/CFR 393.100 for failure to secure their truck's load, cargo or equipment.

Mr. Mazza further had to admit that he had previously testified in a deposition in December 2007 that he had refused to answer interrogatories and requests for production that were propounded to him in 2006, asserting that it was overly burdensome for him to produce all of the records relating to the truck Mr. Stadtherr was driving on the day of the collision even though that was not in fact true. He also had to admit that he testified at his deposition that he was in possession of the records relating to the truck, including driver logs, because his office scanned in all documents, did not destroy documents, and that he would produce them. Shortly thereafter, he failed to produce them, supposedly because they had been destroyed, notwithstanding his contradictory testimony that all such documents were kept "forever." As the trial court granted Summary Judgment on liability, the issue became moot until after remand by the Court of Appeals, which is when Plaintiff again sought the materials. (Exhibit 24)

Thus, the defense was allowed to intentionally destroy evidence they affirmatively knew was critical to their being accused of causing a collision, and evidence that was specifically requested in discovery

requests. They were then erroneously allowed by the Court to insinuate delay in Plaintiff's filing her lawsuit against the defendants, although such argument was completely prejudicial and misleading under ER 403 and objected to by Plaintiff in her motions in limine and throughout trial. Not instructing the jury on spoliation rewarded the defendant's destruction of evidence and was error that warrants a new trial. Moreover, the Court, on its own volition, strongly admonished Defense Counsel in this regard:

The Court: Thank you, counsel. I feel compelled, because I've heard this argument repeatedly, that – casting dispersions on others about the time that's gone by in this case. I can't help but to comment that, you know, if the defense had not waived causation in the first trial, had not waived it for purposes of summary judgment, had not told the court that for the purposes of summary judgment the oil came from the truck and caused the accident, no summary judgment would have been granted. And to put this at the feet of anyone else other than the defense on that particular issues seems to me very inappropriate. And it's been argued again and again, and I just want – feel compelled to say something about it.

(RP 1047-48)

The most egregious was Defendants' attempt to twist this argument and assert that it was Plaintiff's fault for not requesting the Defendants to preserve the broken hose and the broken bungee cord within 24 hours after the collision occurred. Defendant Mike Mazza lied on the stand and stated that he did not preserve those items or the driver's pre and post trip checklists or the incident report because he had no idea until the lawsuit was filed that his vehicle was in any way asserted to be responsible for Rayna's collision. This was a complete fabrication as even noted by the Court.

3. FAILING TO INSTRUCT THE JURY ON RES IPSA LOQUITOR AS A MATTER OF LAW WAS ERROR THAT REQUIRES A NEW TRIAL

As set forth above, Plaintiff submitted Instruction No. 15 requesting that the Jury be instructed on the doctrine of Res Ipsa Loquitur as a matter of law versus instructing the jury permissibly “it they [found]” given the undisputed testimony of Plaintiff’s expert Christopher Ferrone (CP 1197; 2641) Mr. Ferrone specifically opined more probably than not that this type of collision ordinarily does not happen in the absence of someone’s negligence and the collision was caused by the hose leaking oil, which was in the exclusive control of the Defendants at all times. Defendants presented no expert or lay testimony to contradict Mr. Ferrone and Defendant Mazza and Defendant Stadtherr’s testimony actually confirmed these facts. The case of *Curtis v. Lien, supra*, is instructive and demonstrates that the jury should not have been left with the legal determination of whether res ipsa applied in this case as it should have applied as a matter of law, and it was error to instruct them in that regard.

E. A NEW TRIAL IS WARRANTED IN THIS CASE PURSUANT TO CR 59(A)(2) DUE TO DEFENSE COUNSEL’S REPEATED ACTS OF MISCONDUCT, WHICH DEPRIVED PLAINTIFF OF A FAIR TRIAL.

Misconduct by the prevailing party is grounds for a new trial as set forth by CR 59(a)(2). *See also, Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 998 P.2d 856 (2000) (holding a trial court may grant a new trial where misconduct of the prevailing party materially affects the substantial rights of the losing party).

ER 103(c) provides:

*In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent **inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof, or asking questions within hearing of the jury.***

In addition, RPC 3.4, under the heading of Fairness to Opposing Party and Counsel provides that:

A lawyer shall not:

*(e) in trial allude to any matter that the lawyer does not reasonably believe is relevant **or that will not be supported by admissible evidence**, assert personal knowledge of facts and issue, except when testifying as a witness, or state personal opinion as to the justice of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of the accused.*

Unfortunately, that is exactly what happened here. Evidence, for which no foundation could ever be properly laid based upon the information known pre-trial, was submitted in front of the jury in a clear effort to mislead and confuse the jury with respect to liability issues. Such efforts were highly improper and intentionally prejudicial.

This issue, clearly not only involves an erroneous admission of evidence, but also clearly involves misconduct of counsel. The erroneous admission of irrelevant evidence can constitute sufficient prejudicial error to warrant the grant of a new trial. See, *Liljebloom v. Dept. of Labor & Industries*, 57 Wn.2d 136, 356 P.2d 307 (1960) (admission of medical report). (CR 59 (a)(8)). Patently if it is highly prejudicial as discussed below.

As cited by *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983), when **“there is no way to know what value the jury placed**

upon the improperly admitted evidence, a new trial is necessary.”

Not only was the evidence here improperly admitted, but it was done so under circumstances which the Court could reasonably find to be misconduct of counsel.

As discussed by Professor Tegland at 15 WAPRAC § 38:10 (2011) under the heading of “grounds for new trial – misconduct,” the misconduct of counsel is considered to be the misconduct of a party even though it is not expressly mentioned generally within the terms of CR 59, nor specifically within the terms of CR 59(a)(2). Professor Tegland in another one of his scholarly works, which is set forth at 14A WAPRAC § 30:33 (2011), discusses in detail when misconduct of counsel can occur, and how it can unfairly impact an opposing party during trial. Under the heading of “injecting prejudice” Professor Tegland goes on to provide:

Perhaps the most common of the unfair tactics employed by counsel in trials is the injection of prejudice into the case. The case should be decided by the jury on the facts proven in court. This the counsel knows, and the injection of prejudice is a deliberate violation of the principles of fair play as they are expressed in the rules and in the standards of justice. It is improper for counsel to make prejudicial statements in the course of trial not supported by the record. And the error cannot be cured by instruction when counsel conveys to the jury the opinion that the court relative to facts in the case expressed in the absence of the jury when the judge was ruling on a point of law. Prejudice takes many forms....

In order for a party to preserve issues regarding misconduct of counsel, a party should object to the statement, seek a curative instruction and/or move for a mistrial, or a new trial. See, *City of Bellevue v. Kravik*, 69 Wn.App. 735, 743, 850 P.2d 559 (1993). If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not

remain silent, speculate upon a favorable verdict, and then, when it is adverse, use the claim misconduct as a life preserver on a motion for a new trial or on appeal. See, *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960); See also, *Estate of Lapping v. Group Health*, 77 Wn. App. 612, 892 P.2d 1116 (1995) (although misconduct occurred, a failure to accept the trial court's offer of a mistrial, and "gambling on the verdict" waived the issue). In this case, there is simply no question that the plaintiff preserved as grounds for a new trial, the misconduct of counsel by objecting to defense counsel's improper questions on multiple occasions as set forth above. Moreover, Plaintiff brought motions in limine and motions for curative instructions during trial in jury instructions. Nevertheless, even if we assume for sake of discussion that no such efforts occurred, the acts of counsel in this case were so toxic, incendiary, and inappropriate, even had Plaintiff not made such efforts, such actions nevertheless would be valid grounds for a new trial.

There is a long-standing **exception** for the need to object to such conduct when the misconduct is "flagrant." As discussed in *Carabba v. Anacortes School District*, 72 Wn.2d 939, 954, 435 P.2d 936 (1968) this exception has been described as follows:

The necessary inquiry, therefore, is whether the incidence of misconduct referred to were so flagrant that no instruction of the court, or admonition to disregard, could suffice to remove the harm caused thereby. If such is the case, appellants failure to bolster his objections by moving for a mistrial did not waive, and the instruction and admonitions by the trial court did not cure, the harm produced. The only effective remedy is a new trial, free from prejudicial misconduct of this magnitude.

The Supreme Court's recent decision in *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) is directly on point when addressing this issue, and in analyzing the misconduct of Defense Counsel O'Brien during trial. In *Teter*, newly appointed Supreme Court Justice Stephen Gonzalez was the presiding judge over a medical malpractice matter brought in King County Superior Court. The facts of the case are not as relevant to this matter, but the conduct of defense counsel Elliot in *Teter* is quite instructive here. **Prior to trial, JUST AS THE COURT DID IN THIS CASE AT HAND NUMEROUS TIMES, Judge Gonzalez instructed both parties on his requirement that there be no speaking objections during trial stating: "You will say "objection," rule number, you will cite the rule, or you will give the heading or title of the rule, but you won't make speaking objections during trial."** *Id.*, at para. 10.

Throughout trial, defense counsel Elliot proceeded to disregard multiple instructions from the judge, including repeatedly making speaking objections. Elliot also put exhibits before the jury which had not been admitted into evidence, and repeatedly attempted to elicit testimony regarding subjects ruled inadmissible or irrelevant by the court in prior rulings. *Id.* at para. 11. After consistent misconduct by Elliot, Judge Gonzalez commented on the record about his concerns with defense counsel's conduct, just as the court did in the case at hand. Judge Gonzalez's admonishment of defense counsel included in pertinent part:

Finally, I'd like to make a record of a few things, including my displeasure with some of the conduct in this case. ...I'm also concerned about attempts to circumvent the court's ruling on admissibility of

*documents. It certainly appears that way by putting issues before the jury regarding documents in a purported attempt to lay foundation. **For disregard for protocol and rules of evidence which are repeated – and this is not the first court in which they have occurred – for continued speaking objections after clear direction from me not to do so**, and what can only be described as feigned ignorance when I say that a document must be marked before shown to a witness....* *Id.*, at para 12. (Emphasis added).

Despite the concerns being noted on the record, defense counsel continued to question witnesses on subjects previously ruled inadmissible. *Id.* Following a defense verdict, Judge Gonzalez granted plaintiff's motion for a new trial based upon the striking of plaintiff's expert witness by a prior judge and upon defendant's misconduct, which prevented a fair trial under CR 59(a)(1) and (a)(2). *Id.*, at 13. On review, the Supreme Court found that Judge Gonzalez did not abuse his discretion in granting a new trial based on the misconduct of defense counsel as provided by both CR 59(a)(1) and (a)(2). *Id.*, at 12. The Supreme Court held, in part:

The Rules of Evidence impose a duty on counsel to keep inadmissible evidence from the jury.¹⁷ Persistently asking knowingly objectionable questions is misconduct.¹⁸ ...Misconduct that continues after warnings can give rise to a conclusive implication of prejudice.¹⁹ *Id.*, at para. 30.

Upon review of defense counsel's repeated and consistent inappropriate behavior throughout trial, including violation(s) of the court's order granting plaintiff's motion in limine regarding evidence that plaintiff failed to mitigate damages, the Supreme Court determined that the record supported Judge Gonzalez's finding of misconduct. *Id.*, at para.

17 ER 103(c)

18 14A Karl B. Tegland, Washington Practice: Civil Practice §30:33 (2d ed. 2009)

19 *Id.* §30:41

32-33.

The conduct of Defense Counsel O'Brien throughout this trial is strikingly similar to that of defense counsel Elliot in the *Teter* case. This Court in the case at hand, also provided instructions on numerous occasions, including prior to the commencement of trial, during argument regarding the motions in limine, and to both parties before trial that no speaking objections were to be made. Defense Counsel O'Brien consistently disregarded the Court's instructions, making quite obvious speaking objections throughout the entirety of trial. The misconduct of defense counsel in this regard was so flagrant that this Court also felt compelled at one point to admonish Defense Counsel for his behavior and disregard of prior instructions:

THE COURT: **Counsel, I have to say I just for a moment, we have to change the decorum we're seeing. Mr. O'Brien, I just have to admonish you to not walk around this courtroom saying words like "outrageous."**

MR. O'BRIEN: I'm sorry.

THE COURT: **You did. I don't know if the jury heard you or not.** Please, I know it gets emotional. It does for everybody, even the judge sometimes.

MR. O'BRIEN: Absolutely.

THE COURT: But we do have to control that. **I did ask, please just the objection and the basis. That's objection, relevance; that's objection, hearsay; that's objection, cumulative. Asked and answered is actually cumulative, I think.**

MR. O'BRIEN: Cumulative.

THE COURT: Asked and answered is fine. Let's stay with that. If there are multiple reasons, hearsay and relevance, but going beyond that is what I need you to stop. Mr. Barcus, same for you, all right. Please, just stay within the perimeters. I understand once it gets going and it gets out of control. Let's keep it down....

(RP 707)

Ignoring the Court's directives, Defense Counsel O'Brien, like defense counsel Elliot, continued to make improper speaking objections throughout Plaintiff's Counsel's examination of witnesses.

Q: ... The duty to maintain the load on the truck, to secure the truck to make sure it's safe to go down the road and not to spill loads of any type, equipment come off, that duty is upon your driver and your employees and your company, correct?

MR. O'BRIEN: Again, I'm going to object to lack of foundation. He's just picking things out; a regulation.

MR. BARCUS: Your Honor, I will not have a speaking objection.

THE COURT: No Speaking Objections, Mr. O'Brien. I'm gong to overrule the objection. Thank you.

(RP 635)

Q: (By Mr. Barcus) Now, you testified on Thursday that you didn't know about this oil causing this accident for about three years until the suit was filed; isn't that right?

MR. O'BRIEN: **Objection. We have the testimony, if you'd like him to review it.**

MR. BARCUS: **I have a question for him pending.**

THE COURT: **Pardon?**

MR. BARCUS: **I asked him a question. That's not a proper objection.**

MR. O'BRIEN: **It's improper to cross-examine somebody from their testimony when you don't show it to him.**

MR. BARCUS: **Your Honor, he's –**

THE COURT: **Objection is overruled.**

(RP 798)

Additionally,

Q: (By Mr. Barcus) Sir, did you testify in your deposition that you were not aware of any facts that would support somebody taking the position that anything but the spill of the oil caused the collision?

MR. O'BRIEN: **Objection.**

THE COURT: **Overruled.**

MR. O'BRIEN: **Your Honor, how many times are we going to go over –**

MR. BARCUS: **No. Can we have speaking objections or not?**

THE COURT: **You may move forward. Answer the question, please. Answer the question, please.**

(RP 817)

Identical to other conduct warranting a new trial in *Teter*, and as set forth in greater detail above, Defense Counsel O'Brien willfully and repeatedly violated the Court's orders concerning the preclusion of argument regarding the lack of fault by any unnamed third party.²⁰ The Court's Order directed Defense Counsel not only to refrain from argument, but also **any reference or insinuation** that Plaintiff or any other third parties are at fault. Jury instruction Number 5 confirmed that the Plaintiff was not in any way comparatively at fault for her collision. Some of the arguments by defense counsel are set forth above, which were in direct violation of the Court's orders in limine, specifically when he argued to the jury that the accident was someone else's fault and someone else spilled this material despite the fact that there was absolutely no evidence to that effect. **Defense Counsel improperly went beyond the available defenses of explanation provided under Instruction 12 or even the excuse provided under Instruction 16, and time and time again told the jury it was not the defendant's substance on the roadway, notwithstanding the defendants' many admissions in that regard.** The practical effect of Defense Counsel's mantra was that the

²⁰ As set forth above, prior to trial, Plaintiff made several motions in limine pertaining to issues in this case. The Court granted Plaintiff's motion in limine that **barred any argument, reference or insinuation regarding any comparative fault of the Plaintiff or the fault of any other [un]named third party apart from the named defendant.** (CP 1460) In direct contravention of the Court's ruling, Defense Counsel repeatedly violated the Order in limine throughout the course of trial.

collision was caused by the fault of some other party. Not only did the Court err in not providing a specific instruction to preclude such argument, but defense counsel violated the Order on Plaintiff's motion in limine Number 14, but likewise, Number 20, which specifically Ordered as follows:

JURY NULLIFICATION

It is ORDERED, ADJUDGED, AND DECREED that the Plaintiff's Motion to prohibit the defense from making comments that encourage a **jury to render a verdict on facts not in evidence or counter to the law of the case as instructed by the Court shall be and is hereby granted.**

(CP 1461)

Not only was this the ruling of the Court, but Defendants did not oppose this motion. Through his repeated speaking objections and arguing repeatedly against the direct evidence in this case in his opening and closing, defense counsel violated this order and motion on numerous occasions.

Defense Counsel O'Brien also violated the order blaming Plaintiff for failing to initiate suit for nearly three years. Defense Counsel repeatedly asserted that the reason as to why evidence was supposedly unavailable was due to the fault of the Plaintiff for not bringing suit earlier. This was extremely prejudicial to Plaintiff and deprived Plaintiff of a fair trial. The conduct of Defense Counsel was intended to mislead the jury as to why evidence was not available or produced, and was directly contrary to the Defendants' admissions and the proof that the Defendants had notice of the violations.

Notwithstanding this clear unequivocal and straightforward

admonishment, Defense Counsel, in closing argument stated:

Why didn't anyone call them [defendants] up for two and half years, almost three years before a lawsuit was filed and say Hey, by the way, you know, we understand a hose came off your truck and we think it might be related. Would you keep that stuff for us. Now, it would have been too late, but they didn't even ask. So how important do you think it really is. (RP 1190, see also RP 1189)

The comments of Defense Counsel go far beyond insinuation and constitute a flagrant violation of the Court's Order on Plaintiff's Motion in Limine and the Court's repeated admonishments during trial. One of the most egregious acts of misconduct by Mr. O'Brien were the last words the jury heard at the end of Mr. Barcus' closing argument (which was limited by the Court to one hour just prior to closing arguments, despite the fact that the Court had asked counsel the day prior how much time they needed for closing and Plaintiff's counsel indicated 45-60 minutes for the first part of their closing. and 30 minutes for rebuttal – and relying upon such time prepared closing arguments accordingly):

MR. O'BRIEN: **Your Honor.**
THE COURT: 30 seconds, Mr. Barcus.
MR. BARCUS: Let me just finish up, if I may, Your Honor.
THE COURT: Quickly.
MR. BARCUS: ...
MR. O'BRIEN: **You know, I thought we were done here, Your Honor. He's long past his time that you allotted for both of us.**
MR. BARCUS: Your Honor, he doesn't like my argument so he's trying to interrupt me.
MR. O'BRIEN: **I'm hungry.**

MR. BARCUS: Too bad if you want to go. This is important to my client, sir.
(RP 1219)

Defense Counsel O'Brien's disturbing conduct directly parallels the conduct recently reviewed by the Supreme Court in *Teter, supra*. Like defense counsel Elliot, Defense Counsel O'Brien's conduct was prejudicial and prohibited a fair trial for Plaintiff, and therefore it is respectfully submitted, that she is entitled to a new trial accordingly pursuant to CR 59(a)(2).

F. **A NEW TRIAL IS WARRANTED IN THIS CASE PURSUANT TO CR 59(A)(1) AND (2) DUE TO IRREGULARITY IN THE PROCEEDINGS OF THE JURY AND JUROR MISCONDUCT.**

CR 59(a)(1) provides that a "decision may be vacated for an irregularity in the proceedings, which materially affects the substantial rights of a party, preventing that party from having a fair trial." *Buckley v. Snapper Power Equipment Company*, 61 Wn. App. 932, 938, 813 P.2d 125 (1991). A trial court's discretionary ruling regarding a new trial will not be reversed absent an abuse of discretion. *State v. Cho*, 108 Wn. App. 315, 320, 30 P.3d 496 (2001). However, while great deference is due to the trial court's determination that no prejudice occurred, greater deference is owed to a decision to grant a new trial than a decision not to grant a new trial. *State v. Johnson*, 137 Wn. App. 862, 870-71, 155 P.3d 183, 187 (2007)(holding that the trial court abused its discretion when it denied defendant's motion for a new trial because juror's failure to disclose material information during voir dire and interjection of such undisclosed information during deliberations was misconduct)

As noted by the Court of Appeals in *Johnson v. Carbon*, 63 Wn. App. 294, 302, 818 P.2d 603 (1991), *review denied*, 118 Wn.2d 1018 (1992) (quoting the trial court), “a jury deliberation is supposed to be an opportunity for 12 people of common sense to get together to weigh the evidence, to sort it out within the context of common sense, which necessarily includes their past experiences, and their life experiences, and their passions and their prejudices.”

The voir dire process protects the right to an impartial jury by exposing possible biases. Truthful answers by prospective jurors are necessary for this process to serve its purpose. *State v. Johnson*, 137 Wn. App. at 868(citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984))

A juror's failure to speak during voir dire regarding a material fact can amount to juror misconduct. *Allyn v. Boe*, 87 Wash.App. 722, 729, 943 P.2d 364 (1997),*review denied*, 134 Wash.2d 1020, 958 P.2d 315 (1998). The United States Supreme Court has held that to obtain a new trial in such a situation, a party must prove (1) that “a juror *failed to answer honestly* a material question on *voir dire* ” and (2) that “a correct response would have provided a valid basis for a challenge for cause.” *McDonough*, 464 U.S. at 556, 104 S.Ct. 845 (emphasis added). Washington cases are in accord. *In re Det. of Broten*, 130 Wn. App. 326, 337, 122 P.3d 942, 947 (2005) (Citations omitted)

If juror misconduct can be demonstrated with objective proof without probing the jurors' mental processes, and if the trial court has any doubt about whether the misconduct affected the verdict, it is obliged to grant a new trial. *Chiappetta v. Bahr*, 111 Wn. App. 536, 46 P.3d 797 (2002) (citing *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 137, 750 P.2d 1257 (1988)). Moreover, once juror misconduct has been found, and

it is reasonably doubtful whether the misconduct affected the verdict, a trial court abuses its discretion if it does not grant a new trial. *State v. Hall*, 40 Wn. App. 162, 697 P.2d 597 (1985) *review denied*.

As a general rule, juror affidavits which state facts and circumstances of juror misconduct **are admissible** to challenge a verdict. *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1962). The general policy favoring stable and certain verdicts and necessity of maintaining the secrecy of deliberation and frank and free discussion by all must yield: (1) if the affidavit(s) of **the juror(s) alleges facts showing misconduct**, and (2) **those facts are sufficient to justify making a determination that the misconduct, if any affected the verdict**. *Id.* at 271-72. (Emphasis added)

Jurors have no right to consider matters extraneous to the evidence in reaching a verdict, nor do they have the right to come up with their own evidence or theories that the parties did not present. *Halverson v. Anderson*, 82 Wn.2d 746, 752, P.2d 827 (1973) The reason for this is obvious. Information outside the record has not been “subject to objection, cross-examination, explanation, or rebuttal by either party” and accordingly, using it to reach a verdict may deprive a party of its right to a fair trial. *See id.* (improper for juror to comment on what a pilot earns annually where lost earnings were at issue, yet plaintiff offered no evidence of salaries or loss of future earning capacity); *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 137 (1988) (improper for jurors to independently review a law dictionary's negligence definition); *Steadman*

v. Shackelton, 52 Wn.2d 22, 28-29 (1958) (improper for juror to engage in an experiment at the accident scene, which amounts to the reception of independently-acquired evidence); *Gardner v. Malone*, 60 Wn.2d 836, 841 (1962) (an unauthorized jury view of the accident scene, coupled with statements about the possibility of other lawsuits being filed against defendant, constituted misconduct sufficient to raise a reasonable doubt that extrinsic evidence affected the verdict).

In a case where the alleged juror misconduct is the supposed interjection of new or novel (extrinsic) evidence, the test to determine whether the verdict may be impeached or a new trial warranted is first whether the alleged information actually constituted misconduct and second, whether the misconduct affected the verdict. *Richards*, 59 Wn. App. at 270 (citing *Halvorson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973)). “The injection of information by a juror to fellow jurors, which is outside the recorded evidence of the trial and not subject to the protections and limitation of open court proceedings, constitutes juror misconduct.” *Richards*, 59 Wn. App. at 270 (citing *Halvorson*, 82 W.2d 746, 513 P.2d 827; *State v. Gobin*, 73 Wn.2d 206, 437 P.2d 389 (1968)). Evidence is novel or extrinsic if it is wholly outside the evidence received at trial, and as a result is not subject to objection, cross examination, explanation or rebuttal of either party. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994); *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 137, 750 P.2d 1257 (1988); *Halverson*, 82 Wn.2d at 752; *Richards*, 59 Wn. App. at

270-271. To determine whether a juror has injected information outside the recorded evidence of the trial, the court properly considers juror affidavits. *Richards*, 59 Wn. App. at 272. The Court must make an objective inquiry into whether the extraneous evidence **could have affected the jury's verdict, not a subjective inquiry into the actual effect.** *Richards*, 59 Wn.App. at 273 (emphasis added).

Where the record demonstrates that the undisclosed information is later employed in the jury's deliberations, additional analysis is required. *State v. Briggs*, 55 Wash.App. 44, 53, 776 P.2d 1347 (1989). When a juror withholds material information during voir dire and then later injects that information into deliberations, the court must inquire into the prejudicial effect of the combined, as well as the individual, aspects of the juror's misconduct. *Briggs*, 55 Wash.App. at 53, 776 P.2d 1347.

State v. Johnson, 137 Wn. App. 862, 868-69, 155 P.3d 183, 186 (2007)

In that regard:

When jury misconduct can be demonstrated by objective proof without probing the jurors' mental processes, our courts have emphasized that **any doubt as to whether the misconduct may have affected the verdict must be resolved against the verdict:**

[A] new trial must be granted unless 'it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.' *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir.1981) (quoting *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir.1980))[.]

State v. Briggs, 55 Wn.App. at 56.

In this case, the declaration of Mr. Besteman states facts and circumstances specifically relating to Mr. Reyes' failure to disclose material facts about his employment background involving investigation and then his interjection of his background employment into the jury deliberations. Thus, the Court can objectively infer the effect that such

actions had on the jury's verdict, i.e. the extreme prejudice to Rayna Mattson.

First, Mr. Besteman's declaration confirms that the jurors failed to follow the instructions regarding deliberations, and second, and more importantly, that a juror – Number 10, Mr. Reyes - interjected his own personal belief regarding what he believed the applicable law should be. *See also Cornejo v. Probst*, 6 Kan.App.2d 529, 630 P.2d 1202 (1981) (proffered juror affidavits in motion for new trial did not relate solely to the mental processes of the jury, rather, the allegations show that the jury could have consciously conspired to “disregard and circumvent the instructions on the law given by the court”).

In addition, Mr. Besteman's Declaration, in conjunction with the answers submitted (“NONE” as to any experience **ever** in fields including ‘law enforcement’) by Mr. Reyes in the juror questionnaire and in voir dire demonstrate that Mr. Reyes failed to disclose his significant prior employment as an investigator with OSHA (the Occupational Safety and Health Administration), which is an organization whose goal is to **enforce** Federal **laws** and standards.

Mr. Reyes had multiple opportunities to disclose this highly relevant information: (1) in the questionnaire that directly asked him for any experience **ever** in “law enforcement;” (2) in response to defense counsel's questions about **anyone** who had **investigation experience**; (3) in response to Plaintiff's counsel's question directly of Mr. Reyes regarding whether **he had any concerns about anything discussed in**

voir dire or about the case; (4) and in response to the Court's and counsel's inquiries **if there was anyone who would not follow the law as they were instructed by the Court.** By failing to properly disclose his background employment as an investigator for a division of the Federal Government, which was obviously highly relevant in a case where defense counsel continually blamed issues on poor investigation of the collision by Washington State Patrol, Mr. Reyes' and then his interjection of that background and improper legal standards provided a combine effect that certainly cannot objectively be said to have been harmless beyond a reasonable doubt under the *State v. Briggs* standard, *supra*.

Defendants provided no other declarations or affidavits to oppose Mr. Besteman's declaration.

Therefore, in addition to the reasons set forth both above and below, the trial court abused its discretion in not granting Plaintiff a new trial based upon the juror misconduct particularly, by Mr. Reyes, and/or irregularity in the proceedings, pursuant to CR 59(a)(1) and (2), and this court should reverse that error.

G. A NEW TRIAL IS WARRANTED IN THIS CASE PURSUANT TO CR 59(A)(9) DUE TO THE CUMULATIVE ERRORS AND BECAUSE SUBSTANTIAL JUSTICE HAS NOT BEEN DONE IN THIS CASE.

Cumulative errors, misconduct, and events which occurred at the time of trial prevented the Plaintiffs from having a fair trial and justify the grant of a new trial pursuant to CR 59(a)(9) because, the Court should be

left with an abiding belief that in this case “substantial justice has not been done.” CR 59(a)(9) permits the Trial Court to grant a new trial when it determines “that substantial justice has not been done.” As discussed above, there are multiple grounds pursuant to CR 59(a) from which this Court could grant a new trial. Dispositively, a new trial should be granted in this case pursuant to CR 59(7) because there is simply no evidence justifying the jury’s verdict with respect to negligence. Additionally, this is a case that was permeated, and toxically so, by the misconduct of defense counsel who prevailed on that issue. Thus, grounds exist pursuant to CR 59(a)(2) for the grant of a full new trial.

In this case, based upon the cumulative effect of the instructional errors, Defense counsel’s repeated misconduct, as well as the Jury’s misconduct, in addition to the uncontroverted evidence presented at trial regarding the Defendants’ negligence, it is respectfully suggested that the requirements of CR 59(a)(9) are more than fulfilled in this case and substantial justice simply has not been done. *See, Storey v. Storey*, 29 Wn. App. 370, 585 P.2d 183 (1978) (Even if one error, alone, would not justify a new trial, the accumulative affect of multiple errors may justify a new trial pursuant to CR 59(a)(9)). Ms. Mattson was the innocent victim of the Defendants’ admitted failure to secure a hose on the back of their truck that was dislodged to due to admitted foreseeable reasons and ruptured, spilling oil and causing a significant rollover collision in which Plaintiff’s vehicle flipped multiple times down an embankment.

In the case of *Snyder v. Sotta*, 3 Wn.App. 190, 473 P.2d 213 (1970),

the Appellate Court found that the Trial Court was justified in granting a new trial due to a failure of “substantial justice,” because due to the misconduct of defense counsel, among other things, deterioration of relationships between counsel, and counsel and the Trial Court, which had to be conveyed to the jury, in and of itself granting a new trial due to “a failure of substantial justice:”

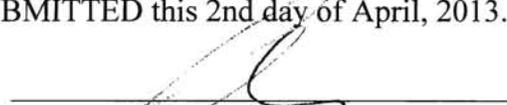
*We have also considered portions of the record, made outside of the presence of the jury, wherein the trial judge may comment on one occasion accusatory of defense counsel supposed petty frogging and on another occasion advising him to have some responsible member of his firm associate with him for the balance of the trial. Furthermore, **counsel of both parties agree that ‘the record itself indicates the length and, to some extent, the bitterness of the ordeal. Only those present at the trial however can attest to its heat.’ The verve and piquancy of trial counsel radiates from the cold record. From the record, it is evidence the rapport between the trial counsel and counsel, while involving matters outside the presence of the jury, deteriorated to the point of being rancorous; the aura of which must have transmitted to the jury. This is supported, not by a mere feeling from the case, but by the trial court’s observation [strike that last sentence]...** (Emphasis added).*

In this case, the rancor provoked by the misconduct of defense counsel became palpable. It would be hard to imagine that the jurors were not somehow adversely impacted by the “rancorous aura,” which was provoked by defense counsel’s repeated efforts to either push the limits or intentionally violate this Court’s Orders on Plaintiffs’ Motions in Limine. While clearly the Trial Court did not enter the fray, the “aura” of this trial was another unfortunate victim of the exceptionally “flagrant and prejudicial misconduct” of defense counsel.

VI. CONCLUSION

The jury's verdict finding of no "negligence" is contrary to the evidence. The issue of proximate cause should not have been presented at trial, or submitted to the jury, and the original judgment should be entered with accrued interest. Even if the Court concludes that the verdict is supported by the evidence, (it is not), there are ample grounds for the grant of a new trial, and in that event, this case should be remanded for a new trial limited to the issue of whether the defendants were negligent.

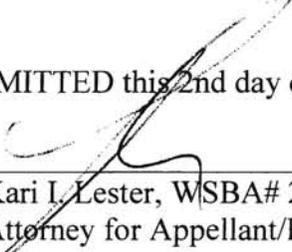
RESPECTFULLY SUBMITTED this 2nd day of April, 2013.


Kari I. Lester, WSBA# 28396
Attorney for Appellant/Plaintiff

VI. CONCLUSION

The jury's verdict finding of no "negligence" is contrary to the evidence. The issue of proximate cause should not have been presented at trial, or submitted to the jury, and the original judgment should be entered with accrued interest. Even if the Court concludes that the verdict is supported by the evidence, (it is not), there are ample grounds for the grant of a new trial, and in that event, this case should be remanded for a new trial limited to the issue of whether the defendants were negligent.

RESPECTFULLY SUBMITTED this 2nd day of April, 2013.



Kari I. Lester, WSBA# 28396
Attorney for Appellant/Plaintiff

APPENDIX “A”



06-2-09015-8 29271864 VRD 02-29-08

COURT OF WASHINGTON
FOR PIERCE COUNTY

RAYNA MATTSON, individually,

Plaintiff,

vs.

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

Defendants.

NO. 06-2-09015-8

VERDICT FORM



We, the jury, find for the Plaintiff, Rayna Mattson, in the sums of:

Past Economic Damages:

Past Medical Billings:	\$	<u>30,429.14</u>
Past Wage Loss:	\$	<u>78,179.82</u>
Out-of-Pocket Travel Expenses:	\$	<u>1,036.44</u>

Future Chiropractic Care: \$ 31,020.00
(Minimum Amount for Chiropractic Care Only)

Additional Future Chiropractic Care: \$ 10,000
(Beyond \$31,020.00 if the Jury Finds Additional Chiropractic Care is Proven and Needed)

Additional Future Economic Damages: \$ 132,000

Non-Economic Damages: \$ 265,000

DATED THIS 26th day of February, 2008.

Presiding Juror

APPENDIX “B”



06-2-09015-8 29329030 JOV 03-10-08



The Honorable John R. Hickman

**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

RAYNA MATTSON, individually,

Plaintiff,

vs.

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

Defendants.

NO. 06-2-09015-8

JUDGMENT ON JURY VERDICT

JUDGMENT SUMMARY

- 1. **Judgment Creditor:** Rayna Mattson
- 2. **Judgment Creditor's Attorney:** Kari I. Lester
- 3. **Judgment Debtor:** American Petroleum Environmental Services Inc.; Bernd and "Jane Doe" Stadtherr
- 4. **Judgment Debtor's Attorney:** Richard Phillips
- 5. **Principal Judgment Amount:** \$ 547,665.40

**Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.**
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

1 ORDERED, ADJUDGED, AND DECREED that a total judgment shall be and is hereby entered
2 in favor of Plaintiff Rayna Mattson and against Defendants in the amount of \$552,599.59; and it is
3 further
4

5 ORDERED, ADJUDGED AND DECREED that the Judgment entered herein shall bear interest
6 from today's date until said Judgment is satisfied in full ~~at the highest statutory amount allowable~~
7 under the law ^{is 15%} which was 5.275% on February 27, 2008, the date the Jury entered its Verdict as set
8 forth in RCW 4.56.110). *YRA*

9 DONE IN OPEN COURT THIS 7th day of March, 2008

10
11 *[Signature]*
12 Honorable John R. Hickman

13 Presented by:
14 *[Signature]*
15 Kari I. Lester, WSBA#28396
16 Attorney for Plaintiff

17 *Copy Received in Open Court*
18 Approved as to Form and Content:
19 *[Signature]*
20 Richard Phillips, WSBA #6252
21 Attorney for Defendants



APPENDIX “C”

155 Wash.App. 1024

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,
Division 2.

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. | April 13, 2010.

West KeySummary

I Judgment
=Tort Cases in General

Genuine issues of material fact existed as to whether waste disposal company and truck driver breached a duty of care related to ruptured tie-down and, if so, whether this breach was a proximate cause of the automobile driver losing control of her vehicle. Thus, summary judgment was precluded on liability for driver's negligence claims. It could not be determined as a matter of law that the company and driver breached their duty of care by failing to properly maintain or anticipate a tie-down's rupture. Due to the possibility that reasonable minds could differ, the trier of fact was better situated to make the determination.

Appeal from Pierce County Superior Court; Honorable John Russell Hickman, J.

Attorneys and Law Firms

Kasey C. Myhra, Law Office of William J. O'Brien, Seattle, WA, for Appellants.

Kari Ingrid Lester, Ben F. Barcus & Associates PLLC, Tacoma, WA, for Respondent.

Opinion

UNPUBLISHED OPINION

PENOYAR, A.C.J.

*1 The trial court found American Petroleum Environmental Services, Inc., a waste disposal company, and Bernd Stadtherr,¹ its truck driver, liable at summary judgment for damages resulting from a freeway accident involving American Petroleum's truck. Defendants appeal the trial court's grant of Rayna Mattson's motion for partial summary judgment on liability for her negligence claims. Defendants argue that the trial court erred in granting Mattson's motion because (1) questions of material fact remain as to whether they breached a duty of care and whether this breach, if any, proximately caused Mattson's accident, and (2) Mattson failed to satisfy the elements of *res ipsa loquitur*. We reverse the trial court's grant of summary judgment and remand for trial.

FACTS

I. Background²

Stadtherr is a truck driver for American Petroleum, a company that transports waste oil products from filling stations and other businesses to its reprocessing plant in Tacoma. American Petroleum requires truck drivers to inspect their vehicles before and after transporting products. During pre-trip inspections, truck drivers examine "the whole truck," checking "everything" from oil levels to tire quality. ² Clerk's Papers (CP) at 393.

On July 21, 2003, Stadtherr prepared to drive an empty truck to Canada to pick up a load of used oil. Following American Petroleum's pre-trip inspection protocol, Stadtherr examined the truck to ensure "that everything [was] functioning and working." ² CP at 393. The truck measured 75 feet long by 8 feet wide, and the tank had a several thousand gallon capacity. The truck also contained two compartments with suction hoses made of nylon and steel wire for pumping waste oil into and out of the tank. Rubber straps with hooks, called "tie-downs," secured the suction hoses at four different points on the back of the truck. ² CP at 395. Stadtherr inspected the tie-downs

before leaving.

After leaving the truck yard, Stadtherr drove northbound for several miles on Interstate-5 (I-5) before noticing, as he neared Federal Way, that a suction hose had broken loose from its compartment and dragged on the ground behind the truck. At the time, Mattson was driving her Ford Explorer on I-5, her two children in the backseat, when she hit a "slick" area and began "sliding all over the freeway." 2 CP at 298, 305. After Mattson lost control, the Explorer slid off a steep embankment and rolled three or four times. Immediately after the accident, Mattson noticed "fume smells." 4 Report of Proceedings (RP) at 491. Mattson suffered injuries, including cervical strain, contusions, and "considerable trouble with neck pain and some head pain." 3 RP at 234.

John Watchie, who was walking along I-5's shoulder at the time of the accident, "heard tires scre[e]ching and looked up to see a Ford Explorer ... sp [i]n around [two] times" and then continue down an embankment "at a high rate of speed," rolling over three or four times before coming to a stop. 1 CP at 172-73. Moments before the accident, Watchie had seen a tanker-truck drive past and had smelled oil. He noticed that the truck left a 200-yard long "oil slick" on the freeway and that Mattson lost control and crashed when she "hit the oil slick." 1 CP at 175.

*2 Stadtherr did not see Mattson's accident, but he pulled over to the shoulder after he noticed the dragging suction hose in his rearview mirror. He inspected the vehicle and discovered that one of the tie-downs had ruptured, causing the suction hose to come out of its compartment and become caught in the tires, where it ripped apart.

As Stadtherr gathered the ripped suction hose, Washington State Patrol trooper Karen Villeneuve arrived and told him about the accident. Villeneuve investigated the accident scene and observed a "dark," "liquid," and "slippery" substance on an area of roadway equivalent to "a football field and a half or two." 1 CP at 50. She ticketed Stadtherr for causing the accident.

After Stadtherr removed the damaged hose, which was approximately 35 to 40 feet long, he called Michael Mazza, American Petroleum's president.³ Mazza joined Stadtherr fifteen minutes later to examine the truck.

II. Procedural History

On June 28, 2006, Mattson filed a complaint in Pierce County Superior Court asserting a claim of negligence against American Petroleum and Stadtherr and his wife.

Mattson requested damages for past and future medical expenses, lost earnings, physical and mental pain and suffering, past and future physical disabilities, loss of capacity to enjoy life, prejudgment interest, and "all items of special damages." 84 N.Y. 659, 1 CP at 8.

The parties filed cross-motions for summary judgment. The parties also filed briefs opposing each other's respective summary judgment motions.

Mattson moved for partial summary judgment on the issues of liability and lack of comparative fault. Mattson argued that the defendants were negligent as a matter of law under the theories of negligence per se¹ and strict liability. In a separate motion, Mattson moved for partial summary judgment on proximate cause and damages. She attached numerous exhibits to support her motions, including her deposition, Watchie's sworn declaration and Villeneuve's, Stadtherr's and Mazza's depositions.

Defendants conceded for purposes of the summary judgment motion that "residual oil in the suction hose spilled [onto] the pavement, causing [Mattson] to lose control of her car and run off the road." 3 CP at 475. They argued, however, that they had not violated the duty of care because Stadtherr acted reasonably by fully inspecting his vehicle before leaving the truck yard and by "specifically inspect[ing] the tie-downs to see that the hoses were secure." 3 CP at 412. The defendants presented no expert evidence on the issue of liability.

The trial court granted Mattson's motion for partial summary judgment on all issues. In its oral ruling, the trial court stated:

This court focused primarily on the issue of common law negligence and the issue of *res ipsa loquitur*.⁵ All of the elements of common law negligence are present. The issue is whether or not there is a material issue of fact as to any one of these elements.

*3 None of the evidence or affidavits presented by the defendant raise an issue of material fact in the mind of this court. Although it's not required [for] any case ... I was looking for some form of expert testimony that would raise a material issue of fact as to the conduct of the defendant[s], and again, there was no expert or lay testimony that would indicate and raise a material issue of fact

....

The response of the defendant[s] appears to be, "We didn't see it coming." Or in the alternative, "There

was nothing we could do other than make an inspection and that inspection was sufficient.”

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

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 based on the fact that there is no dispute in regards to the reasonableness of 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 (1/11/08) at 3-5.

The trial court issued two orders after its oral ruling. The first order granted Mattson’s motion for partial summary judgment on the issues of liability and lack of comparative fault. CP at 516-18. The trial court ruled that, “[d]efendants are jointly and severally liable for the [accident], based on common law negligence, and [for] all [Mattson’s] injuries proximately caused” by the accident. 3 CP at 517. The second order granted Mattson’s motion for partial summary judgment on the issues of proximate cause and reasonableness and necessity of Mattson’s medical expenses, lost wages, and out-of-pocket expenses.⁶

A jury trial on damages followed. In addition to the trial court’s award of past medical billings, lost wages and out-of-pocket expenses, the jury entered a verdict awarding Mattson damages for future chiropractic care, future economic damages, and non-economic damages. On March 7, the trial court entered a final judgment of \$547,665.40. Defendants timely appeal.

ANALYSIS

I. Negligence as a Matter of Law

The defendants ask us to vacate the trial court’s order granting partial summary judgment on behalf of Mattson and to remand for a new trial.⁷ They argue that the trial

court erred in ruling that they were negligent as a matter of law because (1) genuine issues of material fact remained as to whether they breached a duty of care and, if so, whether that breach proximately caused the accident; and (2) Mattson failed to satisfy the elements of *res ipsa loquitur*. Br. of App. at 9, 16, 19. We agree that summary judgment was not appropriate.

A. Standard of Review

*4 We review a grant of summary judgment *de novo*. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wash.2d 236, 243, 178 P.3d 981 (2008). We consider facts and any reasonable inferences from those facts in the light most favorable to the non-moving party. *Stalter v. State*, 151 Wash.2d 148, 154, 86 P.3d 1159 (2004). Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” demonstrate that “reasonable minds could reach but one conclusion from the admissible facts in evidence.” *Sanders v. City of Seattle*, 160 Wash.2d 198, 207, 156 P.3d 874 (2007) (quoting CR 56(c)); *Ranger Ins. Co. v. Pierce County*, 138 Wash.App. 757, 766, 158 P.3d 1231 (2007). Notably, “issues of negligence and proximate cause are generally not susceptible to summary judgment.” *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wash.2d 780, 788, 108 P.3d 1220 (2005) (quoting *Ruff v. King County*, 125 Wash.2d 697, 703, 887 P.2d 886 (1995)).

B. Negligence-Duty and Breach of Duty

Negligence is the failure to exercise reasonable care. *Gordon v. Deer Park Sch. Dist. No. 414*, 71 Wash.2d 119, 122, 426 P.2d 824 (1967). Common law negligence encompasses four basic elements: duty, breach, proximate cause, and resulting injury. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wash.2d 601, 618, 220 P.3d 1214 (2009). If all reasonable minds would conclude that the defendant failed to exercise ordinary care, the trial court can find negligence as a matter of law. *Pudmaroff v. Allen*, 138 Wash.2d 55, 68-69, 977 P.2d 574 (1999) (quoting *Mathis v. Ammons*, 84 Wash.App. 411, 418-19, 928 P.2d 431 (1996)).

A driver owes a duty of care to other nearby drivers. *Martini v. State*, 121 Wash.App. 150, 160, 89 P.3d 250 (2004). Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and obey the rules of the road. *Poston v. Mathers*, 77 Wash.2d 329, 334, 462 P.2d 222 (1969).

Both parties agree that the defendants owed a duty to

drivers on public highways to exercise ordinary care to avoid placing others in danger. The defendants, however, argue that the trial court erred by finding that they breached this duty as a matter of law. We agree.

Mattson certainly presented evidence tending to support a negligence claim, much of it from the defendants themselves. For example, Mazza testified that “[t]he violent action of I-5 caused the hose to come out of the bracket and g [e]t caught up in the front dual on the trailer.” 2 CP at 333. He described the stretch of I-5 where the spill occurred as “terrible in an empty truck” and stated that empty trucks in particular experience “bouncing, violent action.” 2 CP at 333. Stadtherr described that stretch of interstate as “a bumpy road” and testified that the suction hose could contain “residual oil.” 2 CP at 395; 3 RP at 219-20.

However, the defendants presented evidence that the hose was appropriately secured upon Stadtherr’s departure and that-along with road conditions-a ruptured tie-down caused the hose to become loose. The only evidence of previous tie-down breakage showed that the breakage usually occurred as drivers stretched the tie-downs out to secure the hose, and that the drivers then replaced the broken tie-downs. Arguably, this leaves a key issue unresolved: were the defendants negligent in maintaining, inspecting, or failing to anticipate that the tie-down would rupture? The plaintiffs did not offer evidence that the defendant’s tie-down regime was inadequate or that the defendants knew or should have known that a tie-down could rupture from the rough road conditions. Viewing the evidence in a light most favorable to the defendants, we cannot say as a matter of law that the defendants breached their duty of care by failing to properly maintain, inspect, or anticipate the tie-down’s rupture. Because reasonable minds might differ, we believe that the trier of fact is better situated to make this determination.

II. Res Ipsa Loquitur

*5 The defendants argue that the trial court erred in ruling that they are liable for proximately causing Mattson’s collision under the doctrine of *res ipsa loquitur*. We agree.

The doctrine of *res ipsa loquitur*, or “the thing speaks for itself,” allows the jury to infer negligence when (1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone’s negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or

contribution on the part of the plaintiff. *Pacheco v. Ames*, 149 Wash.2d 431, 436-37, 69 P.3d 324 (2003) (quoting *Zukowsky v. Brown*, 79 Wash.2d 586, 593, 488 P.2d 269 (1971)); *Morner v. Union Pac. R.R. Co.*, 31 Wash.2d 282, 290, 196 P.2d 744 (1948). As with the issue of negligence, the evidence of a broken tie-down prevents judgment based on *res ipsa loquitur* because defendants offered evidence of a non-negligent cause of the broken tie-down.

III. Stadtherr’s Testimony

The defendants also argue that the trial court abused its discretion by refusing to ask the jury’s submitted questions about Stadtherr’s pre-trip inspections. Because we reverse the grant of summary judgment on the issue of liability, we need not address this issue.

We reverse and remand for trial. We deny Mattson’s request for attorney fees and costs pursuant to RAP 14.2, 18.1, and 18.9.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

I concur: QUINN-BRINTNALL, J.

HUNT, J.

I respectfully dissent. Viewing the evidence in the light most favorable to Defendants, I agree with the trial court that (1) the *res ipsa loquitur* doctrine applies to Mattson’s loss of traction on the oil slick spilled from Defendants’ truck and her vehicle’s resultant collision, and (2) Mattson’s accident was “of a type that would not ordinarily result if the defendant were not negligent.” *Pacheco v. Ames*, 149 Wash.2d 431, 436, 69 P.3d 324 (2003). Based on the undisputed facts in this case, reasonable minds could not differ that Defendants breached a duty of care to other drivers to avoid placing them in danger when Defendants failed to secure a suction hose containing waste oil to prevent its coming loose while driving their otherwise “empty,” 2 Clerk’s Papers (CP) at 333, transport truck on a familiar and “very rough,” 2 CP at 333, section of I-5, with knowledge that the hose tie-downs, secured and inspected according to usual practice, were susceptible to breaking. I would

hold that under the doctrine of *res ipsa loquitur*, Defendants acted negligently as a matter of law.⁸ And I would affirm the trial court's grant of partial summary judgment for Mattson on the issue of liability.

Under the doctrine of *res ipsa loquitur*, a plaintiff need not assert specific acts of negligence in cases where: (1) "he or she suffered an injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent"; (2) the defendant exercised exclusive control over the agency or instrumentality causing the injury; and (3) the plaintiff played no part in causing or contributing to the injury. *Pacheco*, 149 Wash.2d at 436, 69 P.3d 324 (internal citations omitted). Here, it is undisputed that a hose tie-down on Defendants' transport truck broke, causing the suction hose to break loose and to spill waste oil onto I-5. It is also undisputed that Defendants exercised exclusive control over the truck and its exterior equipment, specifically the two-inch-diameter, 35 to 40-foot-long, suction hoses on both sides of the tank, and the suction hose tie-downs; and that Mattson neither caused nor contributed to the collision or her injury.

*6 As the Majority notes, Defendants conceded for summary judgment purposes that the "residual oil in the suction hose spilled [onto] the pavement, causing [Mattson] to lose control of her [vehicle] and run off the road." Majority at 4-5 (citing 3 CP at 475). The Majority does not dispute that the above second and third elements of *res ipsa loquitur* are satisfied. Nevertheless, it concludes that the evidence does not support the first element, opining that "the evidence of a broken tie-down prevents judgment based on *res ipsa loquitur* because defendants offered evidence of a non-negligent cause of the broken tie-down." Majority at 9-10. With all due respect to my colleagues, in my view, this conclusion is speculative and erroneous under the facts of this case. *Ranger Ins. Co. v. Pierce County*, 138 Wash.App. 757, 766, 158 P.3d 1231 (2007), *aff'd*, 164 Wash.2d 545, 192 P.3d 886 (2008) (A nonmoving party may not rely on speculation or argumentative assertions that an unresolved factual issue remains); see *Zukowsky v. Brown*, 79 Wash.2d 586, 592, 488 P.2d 269 (1971) (whether *res ipsa loquitur* is applicable to a particular case is a question of law).

The uncontroverted evidence shows that (1) Defendants drove transport trucks containing heavy equipment and waste-oil liquids daily on public roads, including this particular "violent" and "very rough" stretch of I-5, 2 CP at 333; (2) Defendants knew that "empty" suction hoses can retain liquid waste oil after emptying out the tank and, therefore, company truck drivers cleaned the hoses and

pumping equipment before and after each use to "minimize any retain [ed][oil] in the hose[s]," 2 CP 328; (3) Michael Mazza, the defendant company's president, had previously seen suction hoses "come off a truck before," "usually due to a driver error," 2 CP at 333, and he noted that an "empty" suction hose that has been "sucked out" can retain "about [one] gallon of oil," 3 CP at 556; (4) Mazza and Stadtherr, the driver of this particular truck, testified that the defendant company directed its truck drivers to inspect suction hose tie-downs, such as the one that failed here,⁹ and to replace the tie-downs "every three or four months," 2 CP at 335; (5) Stadtherr knew that these tie-downs break, though "usually ... it's when you're putting it on the truck," 2 CP at 335; (6) according to Stadtherr, the tie-down in question broke from "fatigue" after he had inspected it and while he was driving the empty truck on I-5, 2 CP at 286; (7) Mazza testified in his deposition that "[t]he violent action of I-5 caused the hose to come out of the bracket," noting that "[e]very trucker out there knows I-5 is bad" and "[t]hat specific stretch of freeway is terrible in an empty truck" because "[the truck] bounces," 2 CP at 333; (8) the ruptured tie-down caused the suction hose to break loose from the truck, spilling its leftover oil onto the travelled surface of I-5; and (9) this oil spill caused Mattson's vehicle to veer out of control off the highway, where it crashed, injuring Mattson.

*7 The record does not support Defendants' contention below that "the cause of the hose coming loose was an unforeseeable equipment failure." 3 CP at 494. As noted, Defendants knew that the suction hose tie-downs were susceptible to rupture, and Mazza had previously seen suction hoses come off trucks. Mazza acknowledged that it is the driver's responsibility to replace the tie-downs with spares they commonly carry on their trucks specifically for times when the tie-downs break. In addition, the record shows that, because this stretch of I-5 is part of Defendants' routine trucking route, they were familiar with its poor road conditions and these conditions' harmful effects on their empty trucks, which were "designed to be loaded." 2 CP at 333.

For example, Mazza testified in his deposition that: (1) "[t]hat specific stretch of freeway is terrible in an empty truck" because the "very rough road" causes vehicles to bounce violently, and (2) this "violent action of I-5" caused the suction hose "to come out of the bracket and g[e]t caught up in the front dual trailer," shortly before Mattson's collision. 2 CP 333. This evidence demonstrates that reasonable minds could not differ about whether Mattson's collision and related injury were "of a type that would not ordinarily result if the defendant were not negligent." *Pacheco*, 149 Wash.2d at 436, 69 P.3d

324.

I agree with the trial court's assessment in rejecting Defendants' excuses that the tie-down rupture and oil spill were not foreseeable and that there was nothing they could have done to prevent the spill other than their inspection, which they contend was sufficient: (1) The vehicle was under Defendants' exclusive control, (2) Defendants presented "no testimony to indicate that the way they secured these hoses was adequate in light of the road conditions on I-5," and (3) "even [Defendants'] witnesses indicated it would be foreseeable that hoses would break loose if they were not properly secure." Verbatim Report of Proceedings (VRP) (Jan. 11, 2008) at 4. I would add to the trial court's list that the suction hose's breaking loose leaves no issue of fact about the tie-down's inadequacy in securing the hose to the empty truck for the foreseeably "violent" bouncing travel along this "very rough" stretch of I-5, which company truck drivers, including Stadtherr, "h[ad] to deal with on a regular basis" as part of their daily trucking route to

collect loads. 2 CP at 333.

I would hold that *res ipsa loquitur* applies to the facts of this case and imputes liability to Defendants for breaching their duty of care to other drivers to avoid placing them in danger when Defendants failed to take adequate steps to tie down the hose securely enough to sustain the known "violent action of I-5," 2 CP at 333, on their empty truck and to prevent the hose from breaking loose and spilling waste oil onto the travelled portion of I-5. Agreeing with the trial court that Defendants acted negligently as a matter of law, I would affirm its grant of partial summary judgment for Mattson on the issue of liability.

Parallel Citations

2010 WL 1453997 (Wash.App. Div. 2)

Footnotes

- ¹ Stadtherr was liable as an individual and as part of his marital community with "Jane Doe" Stadtherr. We refer to American Petroleum and the Stadtherrs collectively as "defendants."
- ² We take these facts primarily from depositions taken during the litigation.
- ³ After removing the suction hose and returning it to the plant, American Petroleum threw it away without further inspection.
- ⁴ Negligence per se is a doctrine that a defendant is negligent as a matter of law if he or she breaches a statutory duty. The doctrine was limited by the enactment of RCW 5.40.050, which reads in relevant part: "A breach of a duty imposed by statute, ordinance, or administration rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence[.]" That statute imposes negligence per se in circumstances not applicable here.
Mattson primarily based her negligence per se theory on former RCW 46.61.655(1) (1990), which prohibited vehicles from driving 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...." Another subsection of the statute requires drivers to "securely fasten[]" any "load and such covering ... to prevent the covering or load from becoming loose, detached, or in any manner a hazard to other users of the highway." RCW 46.61.655(2).
- ⁵ Mattson did not argue *res ipsa loquitur* in her summary judgment motion, and her negligence claim focused on negligence per se rather than common law negligence.
- ⁶ On the issue of proximate cause, the trial court ruled that "the collision of July 21, 2003 caused Ms. Mattson's injuries to her neck and back, including Postraumatic [sic] Cervical Strain and resulting Fibrositis, as well as headaches, pain and tenderness in her neck, trapezoid region, mid- and low back[.]" 3 CP at 520. The trial court determined that even though Mattson was involved in another vehicle collision on July 26, 2005, "any injury that Ms. Mattson suffered in the July 26, 2005 accident is indivisible from the injury she suffered in the July 21, 2003 collision ... as a matter of law, and any and all treatment that [she] underwent following the July 26, 2005 accident cannot be apportioned between the two accidents and the medical bills that she incurred following July 26, 2005 were due to a combination of the two accidents as a matter of law." 3 CP at 520.
The trial court determined that Mattson's past medical expenses totaled \$30,429.14, her out-of-pocket expenses for mileage totaled \$1,036.44, and her lost wages totaled \$78,179.82.
- ⁷ The defendants do not specifically assign error to the trial court's order on proximate cause, medical expenses, lost wages, and out-of-pocket expenses. Therefore, we do not review these issues.
- ⁸ The Majority notes, "Mattson did not argue *res ipsa loquitur* in her summary judgment motion" below, where her "negligence claim focused on negligence per se rather than common law negligence." Majority at 5, note 5; *see also* Majority at 4, note 4

(addressing Defendants' failure to comply with RCW 46.61.655(1), which prohibits driving on a public highway with an unsecured load). Mattson compellingly argues that (1) a violation of RCW 46.61.655(2) provides an alternative basis for affirming the trial court's grant of partial summary judgment in her favor; and (2) Defendants failed to comply with the requirements for transporting loads on public highways under the Washington Administrative Code. WAC 204-44-020(2). To the extent that these arguments support the trial court's ruling on liability based on *res ipsa loquitur*, I agree with Mattson.

Furthermore, that the trial court "focused primarily on the issue of common law negligence and the issue of *res ipsa loquitur*," Majority at 5 (citing VRP (Jan. 11, 2008) at 3), does not prevent affirming the trial court on any ground the record supports. See *Saldivar v. Momah*, 145 Wash.App. 365, 403, 186 P.3d 1117, *review denied*, 165 Wash.2d 1049, 208 P.3d 555 (2009). In my view, the record supports the *res ipsa loquitur* ground.

9 The defendant company had no procedure for recording tie-down replacements in its maintenance log.

APPENDIX “D”

INSTRUCTION NO. 2

The Plaintiff claims that Defendants were negligent in spilling oil on the freeway, which caused Plaintiff's vehicle to lose control and a collision. Defendants deny they were negligent in spilling the oil on the freeway.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed unless established by the Court or admitted by the opposing party; and you are to consider only those matters that are admitted or are established by the Court or the evidence. These claims have been outlined solely to aid you in understanding the issues.

AUTHORITY: WPI 20.01; 20.05 (Modified)

INSTRUCTION NO. 3A

You are instructed that the Court has determined that Plaintiff is not in any way at fault for this collision, nor are there any unnamed parties that are in any way responsible for this collision, and therefore, you are not to consider the fault of anyone other than the named Defendants in determining your verdict in this case.

INSTRUCTION NO. 7

The plaintiff has the burden of proving the following proposition:

That the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent.

If you find from your consideration of all the evidence that this proposition has been proved, your verdict should be for the plaintiff. On the other hand, if you find that this proposition has not been proved, your verdict should be for the defendant.

AUTHORITY: WPI 21.02 Modified

INSTRUCTION NO. 14

Defendants American Petroleum Environment Services are not relieved of their duty to properly secure the load or cargo on their vehicle, or their duty to not drop, spill, or leak anything on the roadway, by delegating or seeking to delegate that duty to another person or entity.

AUTHORITY: WPI 12.09

INSTRUCTION NO. 15

The Court has determined that

- (1) the accident in this case is of a kind that ordinarily does not happen in the absence of someone's negligence;
- (2) the accident was caused by an agency or instrumentality within the exclusive control of the defendants; and
- (3) the accident was not in any way due to an act or omission of the plaintiff;

Therefore, in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the defendant was negligent.

AUTHORITY: WPI 22.01 Modified (Re: Res Ipsa Loquitor); *Curtis v. Lein*, 169 Wn.2d 884, 239 P.3d 1078 (2010)

INSTRUCTION NO. 20

A statute provides that:

A driver who knows that objects have fallen, escaped, or leaked from his vehicle that would constitute an obstruction, injure a vehicle, or otherwise endanger travel must notify the authorities so that the roadway can be safely cleared.

AUTHORITY: WPI 60.01; RCW 46.61.655 (1), (2), and (4); *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003); *Ganno v. Lanoga Corp.*, 119 Wn. App. 310, 80 P.3d 180 (2003); *Skeie v. Mercer Trucking Co., Inc.*, 115 Wn. App. 144, 61 P.3d 1207 (2003)

INSTRUCTION NO. 22

The violation, if any, of a statute, ordinance, administrative code, or Federal Regulation is not necessarily negligence, but may be considered by you as evidence in determining negligence.

AUTHORITY: WPI 60.03 Modified

INSTRUCTION NO. 23A

The broken hose, ruptured tie down(s), and trip inspection checklist are relevant evidence that you should have been able to see. This relevant evidence was within the Defendants' control prior to, during, and after the collision of July 21, 2003. When a party fails to produce relevant documentary evidence within its control without satisfactory explanation, the inference is that such evidence would be unfavorable to the party that failed to produce it.

AUTHORITY: *Pier 67, Inc v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977); *Henderson v. Tyrrell*, 80 Wn App. 592, 607, 910 P.2d 522 (1996)

APPENDIX “E”

INSTRUCTION NO. 5

You are instructed that the Court has determined that Plaintiff is not in any way at fault for this collision.

INSTRUCTION NO. 7

The Plaintiff has the burden of proving the following propositions:

(1) That either of the Defendants acted, or failed to act, in one of the ways claimed by the Plaintiff and that in so acting, or failing to act, either of the Defendants was negligent

and

(2) That the negligence of the Defendant(s) was a proximate cause of Plaintiff's collision.

If you find from your consideration of all the evidence that both of these propositions have been proved, your verdict should be for the Plaintiff. On the other hand, if you find that either of these propositions have not been proved, your verdict should be for the Defendants.

INSTRUCTION NO. 11

A cause of an event is a proximate cause if it is related to the event in two ways: (1) the cause produced the event in a direct sequence, and (2) the event would not have happened in the absence of the cause.

There may be more than one proximate cause of the same event. If you find that any of the defendants were negligent and that such negligence was a proximate cause of Plaintiff's collision, it is not a defense that some other force, other cause, or the act of some other person who is not a party to the lawsuit, may also have been a proximate cause.

INSTRUCTION NO. 12

If you find that.

- (1) the collision in this case is of a kind that ordinarily does not happen in the absence of someone's negligence; and
- (2) the collision was caused by an agency or instrumentality within the exclusive control of the Defendant(s);

then, in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the Defendant(s) were negligent.

INSTRUCTION NO. 16

The violation, if any, of a statute or regulation is not necessarily negligence, but may be considered by you as evidence in determining negligence.

Such a violation may be excused if it is due to some cause beyond the violator's control, and that ordinary care could not have guarded against.

FILED
COURT OF APPEALS
DIVISION II

2013 APR -4 PM 1:14

STATE OF WASHINGTON

BY _____
DEPUTY

No.: 43735-0

Pierce County Superior Court No.
06-2-09015-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RAYNA MATTSON, individually,

Appellant/Plaintiff,

v.

**AMERICAN PETROLEUM ENVIRONMENTAL SERVICES INC.,
a Washington Corporation; and BERND STADTHERR, individually,
and the marital community comprised thereof,
Respondents/Defendants.**

DECLARATION OF SERVICE

KARI I. LESTER, WSBA# 28396
PAUL A. LINDENMUTH, WSBA #15817
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ORIGINAL

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

On April 2, 2013, pursuant to RAP 18.6(c), I filed an original and a true and correct copy of:

Appellant's Opening Brief and Appellant's Motion to File Overlength Brief

by sending them via U.S. Mail to the:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

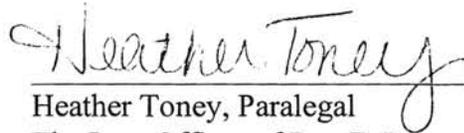
and served a copy of each document on the following via U.S. Mail to:

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DATED this 2nd day of April, 2013 at Tacoma, Washington.

A handwritten signature in cursive script that reads "Heather Toney". The signature is written in black ink and is positioned above a horizontal line.

Heather Toney, Paralegal
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