

No. 37498-6-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

RAYNA MATTSON,

Respondent,

v.

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

Appellants.

REPLY BRIEF OF APPELLANTS

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I. REPLY TO COUNTER-STATEMENT OF CASE

Mattson's response brief raises significant factual disputes. Contrary to Mattson's contentions, driver Berndt Stadtherr never testified that "bumpy conditions on I-5" caused the tie-down to rupture. His testimony instead states that bumpy conditions on I-5 caused the hose to come loose following the tie-down rupture. Stadtherr testified:

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

(CP 395, p. 23, ll. 4-12.)

Regarding the tie-down, Stadtherr testified that he thought the tie-down ruptured because of fatigue:

Q. Do you know how it [the tie-down] broke?

A. No. Just fatigue¹.

(CP 395, p. 24, ll. 7-8.) The owner of APES, Mike Mazza, had a different opinion than the driver of the truck. Mazza testified that the tie-down ruptured from poor road conditions. (CP 271, p.38, ll. 1-2.) In any event,

¹ No objections were made as to the admissibility of Stadtherr's testimony on summary judgment.

neither the driver of the truck or Mazza attributed fault to APES for the tie-down rupture.

Mattson asserts that the pre-trip inspection of the tie-down was never performed. Mattson claims that the pre-trip inspection report only indicated that Stadtherr "secured latches" rather than checking bungee cord tie-downs. (Respondent's Brief, p. 7.) She argues that Stadtherr did not meet the standard of care for truck inspections despite uncontested testimony that he inspected the tie-down four miles before this accident. (Respondent's Brief, p. 7). Stadtherr testified he specifically looked at the tie-downs before he left that day (CP 393, p. 16, ll. 9-14.) Whether Stadtherr inspected the tie-downs before leaving that morning and whether the inspection report supports his testimony are credibility determinations for the jury not a judge on a motion for summary judgment. Mattson's attempt to "disprove" material facts on appeal of an order granting summary judgment simply illustrates that this case must be remanded for a trial.

Next, Mattson's counter-statement of facts focuses on the irrelevant fact that APES admitted for purposes of summary judgment that the residual oil leak was a proximate cause of this accident. (Respondent's

Brief, p. 14.) In opposition to Mattson's motion for partial summary

judgment, APES stated in its opposition brief:

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

(CP 475, p. 3.)

The only assignments of error made by APES related to Mattson's motion for partial summary judgment in the trial court are whether Mattson established as a matter of law that (1) APES was negligent; and (2) APES's negligence caused residual oil to spill on the freeway. (Brief of Appellants, p. 1.)

Further, fact issues relating to the accident scene are not at issue on appeal. (Respondent's Brief, pp. 2-5.) APES does not dispute the testimony of Washington State Patrol Detective Karen Villeneuve concerning what she saw after the collision. The substance seen on I-5 after the accident has nothing to do with whether APES met the standard of care for maintenance and inspection. Additionally, the four pages of Mattson's response brief at pages 16-20 are details of her claimed injuries, which are not relevant to the trial judge's improper finding of negligence

against APES and assignments of error by APES in this appeal. (Respondent Brief, pp. 16-20.)

In her counter-statement of this case, Mattson can cite to no evidence in the record showing what APES did or did not do to cause the tie-down to rupture and suction hose to come loose.

II. ARGUMENT IN REPLY

A. Standard of Review

RAP 9.12 states that "[o]n review of an order granting or denying a motion for summary judgment, the appellate court will consider only evidence and issues called to the attention of the trial court." Mielke v. Yellowstone Pipeline Co., 73 Wn. App. 621, 870 P.2d 1005 (1995). Mattson incorrectly states throughout her brief that APES is raising "new issues" (like tie-down fatigue and maintenance of the tie-down by Western Peterbilt) for the first time on appeal.

APES called to the attention of the judge in opposition to Mattson's motion for partial summary judgment on liability that the tie-down ruptured because it was fatigued. (CP 409; 395, p. 24, ll. 7-8.) Evidence of the maintenance of the trucks by Western Peterbilt was also part of the trial court record during summary judgment proceedings. (CP 403.) All evidence and issues APES argues in this appeal were reviewed

by the trial court in its Order Granting Plaintiff's Motion for Partial Summary Judgment Re: Liability and Lack of Comparative/Contributory Fault. (CP 516-517.) The following items were considered by the trial court during summary judgment proceedings:

1. Plaintiff's Motion and Memorandum for Partial Summary Judgment Re: Liability and Lack of Comparative/Contributory Fault;
2. Affidavit of Kari I. Lester with supporting documentation;
3. Defendant's Response Memorandum;
4. Declaration of Richard Phillips;
5. Plaintiff's Reply Memorandum;
6. Defendants' Motion for Summary Judgment;
7. Declaration of Mike Mazza and Decl. of R. Phillip
8. Response of Plaintiff to Defendant's Motion for Summary Judgment
9. Defendants' Reply Memorandum

(CR 517.)

B. Material Disputes of Fact Preclude Summary Judgment

Mattson contends that because APES spilled oil on the roadway, then it must be liable for common law negligence. Mattson presents no facts on appeal to show that APES breached any duty of care owed to Mattson. Breach mirrors duty. Schooley v. Pinch's Deli Market, 80 Wn. App. 862, 865-66, 912 P.2d 1044 (1996). To prove breach, a plaintiff must show that (1) the defendant is a member of the obligated class; (2) that the plaintiff is a member of the protected class; and (3) that the defendant failed to comply with the standard of care. Id. Except when

reasonable minds could not differ, each of these questions is a question of fact for the jury. Id. at 865-66.

It is uncontested that APES met the standard of care in the trucking industry for securing the hose on the day of the accident. Mattson contends that rough road conditions on I-5 combined with APES's decision to drive an empty truck on I-5 was negligent. However, APES knew about I-5's rough road conditions and secured the tie-down before driving on I-5. (CP 402-407.)

Mattson contends "defendants never obtained any expert witnesses for purposes of liability or damages, nor listed any in their disclosure of witnesses or discovery responses. (Respondent's Brief, p. 13.) APES served Mattson with its "Disclosure of Primary Witnesses" pursuant to the case schedule. (CP 31-34.) Mike Mazza was designated as an expert witness to be called to testify as "an expert as to practices and regulatory requirements in handling oil for transport and clean-up of spills." (CP 32.) Mazza has been involved in the shipment of waste and reprocessed oil since 1989, as a driver, shift foreman, transport manager and owner, and has been in a management role in the industry since 1996. (CP 403.)

Mattson filed a motion to strike the declaration of Mike Mazza based on hearsay and lack of foundation. (CP 442-445.) The trial court

entered an order on January 11, 2008 denying Mattson's motion to strike the Mazza declaration. (CP 513-515.) Mattson has not cross-appealed on the issue of admissibility of Mazza's declaration at summary judgment.

In addition, the trial court erroneously failed to consider APES's expert testimony in opposition to Mattson's motion for summary judgment:

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 on any case, but in a case of this nature I was looking for some form of expert testimony that would raise a material issue of fact as to the conduct of the defendant, and again, there was no expert or lay testimony that would indicate and raise a material issue of fact.

Those who did provide declarations on behalf of the defendant, again, I gave them very little weight because of their ability to observe or be present when these instructions took place or when this accident took place.

(RP 3-4.)

Fleming v. Smith, 64 Wn.2d 181, 185, 390 P.2d 990 (1964); No Ka Oi Corp. v. National 60 Minute Tune, Inc., 71 Wn. App. 844, n. 11, 863 P.2d 79 (1993). ("It is axiomatic that on a motion for summary judgment the trial court has no authority to weigh evidence or testimonial credibility, nor may we do so on appeal."). The trial court committed error, by ignoring the content of the declaration and testimony of defendants, and then by putting the burden on APES to come up with an expert when

Mattson offered no expert testimony, and finally the trial court ignored the fact that Mike Mazza is an expert.

1. Dispute of Fact #1: APES Met the Standard of Care By Securing The Hose At Four Points.

In opposition to Mattson's motion for summary judgment, Mazza stated in his declaration:

This hose is secured to the tanker at 4 points using rubber straps secured by hooks, and then placed in a metal tube. This is a safe and secure method of tying the hose down, meets all federal and state standards, and exceeds industry standards, for security of the hose.

(CP 405.)

Mazza's testimony was uncontroverted on summary judgment. Mattson did not allege or present any facts or argument on summary judgment that any federal or state industry standard was violated with respect to how APES secured the hose.

2. Dispute of Fact #2: APES Met the Standard of Care By Conducting A Pre-Trip Inspection.

The juror's questions to Stadtherr during trial, and which the trial court excluded, illustrate how "material" the facts were surrounding Stadtherr's pre-trip inspection. The jury's written questions to Stadtherr prove the trial court decided material issues of fact on summary judgment:

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

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

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

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

If four different jurors wanted to know what happened during the pre-trip inspection, these facts were material to this case. The trial court should have allowed these fact finders to weigh the evidence concerning Stadtherr's pre-trip inspection. The inspection is material to Mattson's negligence claim and should not have been decided as a matter of law at summary judgment. Further, Mattson disputes that Stadtherr inspected the tie-downs citing to his inspection report. (Respondent's Brief at p. 7.) The trial court erred in deciding that the pre-trip inspection evidence was insufficient or immaterial evidence to withstand Mattson's motion for partial summary judgment.

In opposition to Mattson's motion for summary judgment, Mazza presented uncontroverted evidence about the inspection in his declaration, which stated:

Our drivers are required by federal regulation to make pre and post trip inspections of the truck and fill out an industry prescribed driver's log that documents the inspection. We are required to keep these logs for six months and make them available for the Department of Transportation for inspection on request. Neither the company nor any of my drivers has ever been cited by the DOT for failing to keep these logs.

Stadtherr testify that as part of his pretrip inspection he specifically inspected the tie downs and they were secure. I am not aware of any federal or state requirements that require him to do any more than he did in his pretrip inspection. I have known Stadtherr for 6 years and know him to be attentive to detail. If he inspected them in the manner in which he testified in his deposition, then Stadtherr exercised reasonable care in securing the hoses to the truck. It was not reasonable to expect him to do more to secure the hose to the truck . . . There is nothing further Stadherr could have done to secure the hose to the truck.

(CP 405-406.) An expert witness may give opinion evidence on the ultimate issue. ER 704. Declarations of qualified experts are sufficient to raise a factual issue as to whether the standard of care has been met. LeBeuf v. Atkins, 28 Wn. App. 50, 621 P.2d 787 (1980). Regardless of the road conditions on I-5, the empty truck was safe to drive on the roadway because "there was nothing further Stadherr could have done to secure the hoes to the truck." (CP 406.)

With regard to Mazza's opinions, Mattson falsely claims Mazza made an "admission of liability" in his deposition. (Respondent's Brief at pages 12 and 30). Mazza and APES deny all liability in this case. (CP 10-13.) Mazza testified that the truck was in compliance with DOT; received

regular maintenance every 6,000 miles; and the subject tie-downs were probably changed every 3-4 months. (CP 403-404; CP 273, p. 47, ll. 23.) If the tie-down was broken during the pre-inspection, "there is no way you couldn't see it." (CP 273, p. 47, ll. 7.) "If it's broke, it's broke. You'd know it." (CP 273, p. 46, ll. 24-25.)

In addition, Mattson mischaracterizes the meaning of Mazza's testimony regarding driver responsibility for securing the hose. Mazza agrees that it is 100% the driver's responsibility to secure their trucks, hoses, equipments, and loads.² (CP 274, p. 53, ll. 21-25.) Stadtherr secured the load and inspected his vehicle and the tie-down was secure before he left his jobsite on the day of the accident. (CP 395, p. 25, ll. 4-6.) Based on this material evidence, Mazza states in his declaration that his driver exercised reasonable care in securing the hoses to the truck. (CP 405.)

Mattson repeatedly argues that the tie-downs were not "properly secured" on an empty truck driving in rough road conditions, but what evidence is there that the tie-downs were not properly secured? The mere fact of the accident and residual oil spill on the freeway is insufficient

² When Mattson's counsel did ask Mazza to admit liability in subsequent questioning, counsel for APES objected that the question called for a legal conclusion and Mazza denied liability. (CP 275, p.55, ll. 4-8)

under common law negligence to show APES negligently secured the tie-down. Marshall v. Bally's Pac West, Inc., 94 Wn. App. 372, 378, 972 P.2d 475 (1999).

All of the above facts are uncontroverted and establish that APES met the standard of care for inspecting the tie-down.

3. Dispute of Fact #3: APES Met the Standard of Care By Regularly Maintaining the Truck in Compliance with Local and Federal Standards.

Mike Mazza testified in his deposition that the tie-downs are changed every three to four months by the driver. (CP 273, p. 47, ll. 23.) APES also has the trucks serviced approximately every 6,000 miles by Western Peterbilt. (CP 403.) The trailers are serviced every time the truck is serviced; this frequency exceeds industry standards. (CP 403.) APES trucks are inspected and certified once a year by the Washington State Department of Transportation. (CP 403.)

C. Poor Road Conditions on I-5 Do Not Establish APES Was On Notice That The Tie-Down Would Rupture As A Matter of Law.

The trial court speculated on summary judgment that APES's negligence caused the tie-down to rupture. (CP 516-518.) In response to APES's argument that the trial court speculated on summary judgment, Mattson contends that APES's negligence can be shown by its knowledge

that I-5 was bumpy for an empty truck, and that the road conditions caused the tie-down to rupture. This contention is pure speculation. Mattson provides no expert or lay testimony to support its contention. Further, APES was hardly "on notice" of any danger associated with driving an empty truck on I-5 when Stadtherr made daily trips to Canada without any incidents. (CP 396, p. 26, ll. 13-16.) In fact, APES has never had a hose break on any of their trucks. (CP 404.)

On summary judgment, APES offered two possible explanations for the hose coming loose: poor road conditions and/or tie-down fatigue. (CP 271; CP 395.) Under either scenario, there is no evidence to show APES negligently secured the tie-down, or had any reason to believe the tie-down would rupture. Whether APES acted reasonably or violated the standard of care in securing the hose is a jury question.

Mattson fails to establish as a matter of law that APES was negligent for driving on I-5, or that it should have done anything different about the tie-down. Mattson simply contends that driving an empty truck on I-5 where there may be poor road conditions is negligence per se. Thus, according to Mattson, a driver is negligent for failing to foresee a mechanical failure caused by poor road conditions. This is simply not the

law. Wellons v. Wiley, 24 Wn. 2d 543, 166 P.2d 852 (1946) (refusing to find driver negligent for losing control of vehicle due to a tire blow out.)

4. Mattson's Legal Authorities Are Inapposite.

The cases Mattson cites in support of the contention that APES is liable under common law negligence are Alaska Freight Lines v. Harry, 220 F.2d 272 (9th Cir. 1955) and Porter v. Smart's Auto Freight, 174 Wash. 566, 25 P.2d 576 (1933). (Respondent's Brief at pp. 30-31.) Both cases are not relevant to this case.

In Porter, 174 Wash. at 566, the trial court made findings of fact after bench trial, and was not a case decided on summary judgment. Porter actually supports the position of APES. In Porter, the court heard evidence at trial from the driver of the truck as to how he had secured the machinery which fell off a truck on a highway. The trial court then entered findings of fact against the truck driver, but only after a trial. Id. at 570. Porter is also factually dissimilar because there was substantial evidence at trial to show that the driver fastened the machinery with "rope" and it was "a small one". Id. The rope "was broken in two or three different places" before the driver used it to fasten the equipment. Id. Such a rope, when jolted by bumps and wind, would be destroyed.

Id. The method used to fasten the machinery was found to be negligent after presentation of all the facts at trial. Id. at 570.

Similarly, Alaska Freight Lines, 220 F.2d at 272, is also a case where the court, serving as the finder of fact in a bench trial, entered findings of fact after a bench trial. Id. Thus, Mattson has cited two cases involving highway collisions involving falling objects from vehicles. The material issues of fact of those cases were decided at trial. Mattson cannot find a case like this that was decided on a motion for summary judgment. This case would be the first.

D. A Hose Leaking Oil On the Roadway Does Not Establish Res Ipsa Loquitur As a Matter of Law.

Mattson fails to establish that a hose coming loose is the type of incident that does not happen absent someone's negligence. "It is necessary that the manner and circumstances of the damage or injury be of a kind that do not ordinarily happen in the absence of someone's negligence." May v. Triple C. Convalescent Centers, 19 Wn. App. 794, 578 P.2d 541 (1978) quoting Zukowsky v. Brown, 79 Wn.2d 586, 594-95, 488 P.2d 269 (1971).

In her response brief, Mattson does not cite a single case in Washington where the doctrine has been applied to vehicle mechanical failures on the roadway. Mattson fails to distinguish this case from Tuttle

v. Allstate ins. Co., 134 Wn. App. 120, 138 P.3d 1107, 1113 (2006) (refusing to apply res ipsa to wheel and tire coming off vehicle); Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 793, 929 P.2d 1209 (1997) (refusing to apply res ipsa to mechanical failure of an escalator causing a patron injury due to a sudden stop); McMillan v. Auto Interurban Company, 127 Wn. 625, 627, 221 P.314 (1923) (refusing to apply res ipsa to tire blow-outs).

Further, under res ipsa APES need not prove every alternative cause of the accident. (Respondent's Brief at p. 37.) In Tuttle, the Court did not require "proof" that a third-party negligently installed the tire, which had blown-out on the highway. Id. at 138. The fact that APES did not add Western Peterbilt as a third-party defendant has nothing to do with res ipsa. APES need not sue every potential third-party to establish a broken hose on a truck can occur absent negligence of the person in control of the truck.

In addition, under the doctrine of res ipsa, Mattson has failed to meet her burden that the hose was in the "exclusive control" of APES. Zukowsky, 79 Wn.2d at 593. Rather, the doctrine of res ipsa is inapplicable because of the mere fact that "the wheel and tire may have come off the vehicle because a third-party negligently installed it." Id. APES did not have exclusive control of the fuel hose and tie-down as

required under Zukowsky. The vehicles were regularly serviced by Western Peterbilt every 6,000 miles. (CP 403.) Here, the hose came-off the truck because Western Peterbilt may have negligently failed to replace a tie-down at the last scheduled maintenance.

The trial court erred by finding APES negligent under the doctrine of res ipsa loquitur.

E. APES's Alleged Violation of An Administrative Rules Should Not Be Considered For the First Time On Appeal.

For the first time on appeal, Mattson alleges that APES violated Washington Administrative Code ("WAC") 204-44-020(4), the administrative regulation regarding the Standards for Load Fastening Devices. Mattson did not allege a violation of WAC 204-44-020(4) in her motion for partial summary judgment or in opposition to APES's motion for summary judgment. (CP 416-439; CP 480-483; CP 446-456.) A violation of this regulation was never called to the attention of the trial court, and therefore cannot be considered on appeal. RAP 9.12. In Van Dinter v. Orr, 138 P.3d 608, 157 Wn. 2d 329 (2006), the court could not consider the buyer's argument that the sellers had engaged in negligent misrepresentation by omitting a material fact as the claim was not raised by the sellers in the trial court.

Although Mattson is barred from claiming new regulatory violations by APES on appeal, the administrative regulation does not apply to an empty truck for the same reason RCW 46.61.655 is inapplicable. The suction hose at issue is secured in long tubes on the sides of the truck. (CP 271, p.38.) The hose comes out of the tubes and is secured using tie-downs to the back of the truck. (CP 271.) The suction hose is not used for transporting a load. The truck was empty at the time of the collision. (CP 271, p.38, ll. 4-5.) The hose would only have a small amount of residual waste oil in it. (CP 404.)

F. RCW 46.61.655 Does Not Apply To Residual Waste Oil.

The purpose of interpreting a statute is to determine and enforce the intent of the legislature. State of Washington v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345 (2008) quoting City of Spokane v. Spokane County, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). Where the meaning of statutory language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. Id. "Common sense informs our analysis, as we avoid absurd results in statutory interpretation." Id. quoting Tingey v. Haisch, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007). "When a term has a well-accepted, ordinary meaning, we may consult a dictionary to ascertain the term's meaning." Id. at 658.

The secure load statute, RCW 46.61.655, provides in relevant part:

- (1) No vehicle shall be driven or moved on any public highway unless such vehicle is **so constructed or loaded as to prevent its load from dropping, sifting, leaking, or otherwise escaping there from...**
- (2) No person may operate on any public highway any vehicle with any load unless **the load . . .** is securely fastened to prevent . . . **the load** from becoming loose, detached or in any manner a hazard to other users of the highway.

RCW 46.61.552 (1) and (2) (Emphasis added).

Webster's Ninth New Collegiate Dictionary (1998) defines a load as

1. [W]hatever is put in a ship or vehicle or airplane for conveyance: CARGO esp: a quantity of material assembled or packed as a shipping unit. 2. the quantity that can be carried at one time by a specified means esp.: a measured quantity of a commodity fixed for each type of carrier.

Id. Mattson claims the amount of oil on the roadway proves that APES carried "a load" of oil. Mazza testified that there would be no more than a gallon of residual oil stored in the hose:

I could mathematically reproduce the situation and let the hose gravity-drain and come up with about a gallon of oil that would be retained---what we call "retained" in the industry, that would have been in the hose. ..

(CP 275, p.56-57, ll. 24-5.)

The secure load statute at RCW 46.61.552 (1) has no application to this situation. An analysis of the only case that plaintiff cites applying that statute makes this clear. Skwei v. Mercer Trucking Co., Inc., 15 Wn. App. 144, 61 P.3d 1207 (2003) held merely that a truck owner had a duty to secure a load of cement blocks on his truck. Likewise, in Ganno v. Lanoga Corporation, 119 Wn. App. 310, 80 P.3d 180 (2003), the court held that it was the driver's duty to secure a beam in a truck hauling the beam and not the seller of the beam who loaded it into the truck. In Solomonson v. Melling, 34 Wn. App. 687, 690, 664 P.2d 1271 (1983), the driver violated a specific regulation requiring that he carry a safety chain to keep the trailer from parting from the logging truck, which the court held constituted negligence per se. Id. at 1274. Mattson has failed to identify any case law extending RCW 46.61.655 to the unique situation of a hose coming loose from an empty truck causing spillage of residual oil.

One gallon of residual oil contained in a two-inch suction hose of an empty tanker truck cannot constitute a "load" under RCW 46.61.655.

G. Strict Liability Has Not Been Established As A Matter of Law.

The Washington Supreme Court set out the reasons for imposing strict liability in Seigler v. Kuhlman, 81 Wn.2d 448, 458, 502 P.2d 1181 (1972). First, strict liability applies only to abnormally dangerous activity. Id. In determining whether an activity is abnormally dangerous,

the court is to consider the following factors: 1) whether the activity involves a high degree of risk of some harm to the person, land or chattels of others; 2) whether the gravity of harm is likely to be great; 3) whether the risk cannot be eliminated by the exercise of reasonable care; 4) whether the activity is not a matter of common usage; 5) whether the activity is inappropriate to the place where it is carried on, and 6) the value of the activity to the community. Id.

The only evidence Mattson has offered on these factors is that the Washington Model Toxic Control Act, RCW 70.105D.020 (7) has defined petroleum products as a hazardous substance. An examination of the statute and of the case plaintiff cites, Seattle City Light v. Washington D.O.T., 98 Wn. App. 165 , 989 P.2d 1164 (1999), make clear that it has no bearing on whether this is an appropriate case for strict liability. First, the statute governs clean-ups of toxic waste. Second, the statute at RCW 70.105D.020(10) defines "hazardous substance" as follows:

10) "Hazardous substance" means:

(a) Any dangerous or extremely hazardous waste as defined in RCW 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste designated by rule pursuant to chapter 70.105 RCW;

(b) Any hazardous substance as defined in RCW 70.105.010(14) or any hazardous substance as defined by rule pursuant to chapter 70.105 RCW;

(c) Any substance that, on March 1, 1989, is a hazardous substance under section 101(14) of the federal cleanup law, 42 U.S.C. Sec. 9601(14);

(d) Petroleum or petroleum products; and

(e) Any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or the environment if released into the environment.

The term hazardous substance does not include any of the following when contained in an underground storage tank from which there is not a release: Crude oil or any fraction thereof or petroleum, if the tank is in compliance with all applicable federal, state, and local law.

RCW 70.105D.020(10).

Second, the case cited by Mattson, City of Seattle v. Washington State Dept. of Transp., 98 Wn. App. 165, 989 P.2d 1164 (1999), pertains to whether the state was liable for clean-up costs at the Superfund site in an action for contribution under the Model Toxics Control Act. Id. Application of strict liability for spilling residual oil on the roadway was not addressed.

Mattson has presented no evidence that the activity involved here comes within the rationale for imposing strict liability. This case is unlike Siegler where the truck tank was filled with 3,800 gallons of gasoline and the trailer tank was filled with 4,800 gallons of gasoline. Seigler v. Kuhlman, 81 Wn.2d at 450. Foremost, the APES truck was empty. A small amount of residual waste oil in a suction hose cannot be compared to 8,600 gallons of gasoline carried by the truck in Seigler. Second, waste motor oil is not as hazardous as gasoline. (CP 406.) Waste motor oil is not readily flammable, it is not explosive, it is not volatile and it is not corrosive. (CP 406.). An empty truck transporting residual waste oil in a two-inch suction hose, estimated at one gallon of waste oil, does not fall within the realm of an abnormally dangerous

activity. Finally, the empty truck in this case is unlike the tanker in Siegler, where the aftermath of the abnormally dangerous activity involved a massive gasoline spill on a highway and a deadly gasoline explosion. Id. at 450. Driving an empty truck used for hauling waste motor oil is not an abnormally dangerous activity. See Siegler at 81 Wn.2d at 457.

H. Exclusion of Stadtherr's Testimony Was Reversible Error.

Mattson argues that Stadtherr's testimony regarding his pre-trip inspection was not relevant. (Respondent's Brief, p. 46.) This argument has no merit. The juror's questions about Stadtherr's inspection to the truck, show that this issue was material to the jurors. By excluding pre-trip inspection evidence, the trial court invited the juror's to speculate and assume the worst against APES.

In order to show that the exclusion of Stadtherr's testimony at trial prejudiced APES and is not harmless error, APES cites to the excessive jury verdict. Had Stadtherr been permitted to tell the jury what he did before the trip to take precautions, the jury would not have awarded \$265,000 in non-economic damages in this case. The jury punished APES with an excessive damage award because APES was cast as reckless and irresponsible as a result of the trial court's ruling only allowing Stadtherr

to discuss how his truck leaked residual waste oil on I-5 with no foundation or background to show that APES did take precautions.

I. Mattson's Request For Attorney Fees and Costs Should Be Denied.

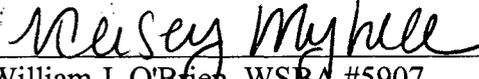
An appeal is frivolous if, considering the entire record and resolving all doubts in favor of the appellant, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal. Ramirez v. Dimon, 70 Wn. App 729, 855 P.2d 338 (1993); RAP 18.9.

Mattson has filed a 51-page response brief, yet argues that there are no debatable issues upon which reasonable minds can differ. APES has shown reversible error by the trial court in its decision to grant summary judgment in a case where virtually all facts were reviewed in a light most favorable to Mattson (the moving party) rather than in any way favorable to APES. There is no evidence of negligence and material disputes of fact exist as to whether APES met its standard of care. APES also assigns error to exclusion of testimony of the driver who was never permitted to testify about his pre-trip inspection and how the hose came loose.

This Court has already denied Mattson's motion on the merits. In Pearson v. Schubach, 52 Wn. App. 716, 763 P.2d 834 (1988), the court

held that respondent was not entitled to an award of fees against appellant for a frivolous appeal finding that there were debatable issues, as evidenced by an order denying respondent's motion on the merits. The request for attorney's fees and costs should be denied.

RESPECTFULLY SUBMITTED this 4th day of March, 2009.



William J. O'Brien, WSBA #5907
Kasey C. Myhra, WSBA #27100
Attorney for Appellants

No. 37498-6-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

RAYNA MATTSON,

Respondent,

v.

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

Appellants.

CERTIFICATE OF SERVICE

William J. O'Brien, WSBA #5907
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ORIGINAL

The undersigned declares as follows:

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

On the 4th day of March, 2009, I caused to be delivered a true and correct copy of:

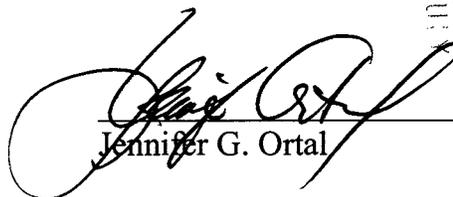
1. *Reply Brief of Appellants*; and
2. *Certificate of Service*.

to the following counsel of record:

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

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

DATED this 4th day of March, 2009.



 Jennifer G. Ortal

FILED
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 DIVISION II
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 BY _____ DEPUTY