

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESPONSE TO APPELLANTS' ASSIGNMENT OF ERROR.....	3
	A. Response	3
	B. Issues Pertaining to Assignments of Error.....	3
III.	COUNTERSTATEMENT OF THE CASE.....	4
	A. The Fire Department Responded to Morillo's One-Motorcycle Accident and Left Without Securing the Scene	4
	B. Procedural History	6
IV.	ARGUMENT.....	8
	A. Summary of the Argument.....	8
	B. The Trial Court Properly Held that Morillo Owed No Duty to the Dunbars As a Matter of Law.....	10
	1. Morillo Owed No Duty to the Dunbars to Avoid His One Motorcycle Accident Because the Dunbars Were Outside Any Zone or Field of Danger of a Foreseeable Risk of Harm.	11
	2. Morillo Owed No Duty to Clean Up or Warn of Any Fluid on the Roadway.....	16
	C. The Dunbars Cannot Establish Proximate Cause Because the Fire Department's Response Was a Superseding Cause, and Considerations of Policy and Common Sense Do Not Support a Finding of Legal Causation.	17
	1. The Fire Department's Response is an Intervening and Superseding Cause	18
	2. The Dunbars Cannot Establish Legal Causation.	23

D.	The Dunbars Rely on Cases That Are Factually and Legally Dissimilar, and, Therefore, Unpersuasive.....	26
1.	The Dunbars Were Not Rescuers, and the Rescue Doctrine is Inapplicable.	26
2.	This Case Does Not Involve an Unsecured Load.	29
3.	“Second Car Accidents” Are Inapplicable.....	31
4.	Cases Involving Cars Left on the Traveling Roadway Are Dissimilar.	32
E.	The Trial Court Properly Denied Partial Summary Judgment to the Dunbars.	33
V.	CONCLUSION	36

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Bell v. McMurray</i> , 5 Wn. App. 207, 486 P.2d 1105 (1971)	26
<i>Christen v. Lee</i> , 113 Wn.2d 479, 780 P.2d 1307 (1989).....	11
<i>Colvin v. Auto Interurban Co.</i> , 132 Wash. 591, 232 P. 365 (1925)....	32, 33
<i>Cook v. Seidenverg</i> , 36 Wn.2d 256, 217 P.2d 799 (1950).....	22
<i>Estate of Keck v. Blair</i> , 71 Wn. App. 105, 856 P.2d 740 (1993).....	26, 27
<i>Frazee v. Western Dairy Products</i> , 182 Wash. 578, 47 P.2d 1037 (1935).....	12, 13
<i>Hansen v. Wash. Natural Gas Co.</i> , 37 Wn. App. 127, 615 P.2d 1351 (1981).....	15
<i>Hardman v. Younkers</i> , 15 Wn.2d 483, 131 P.2d 177 (1942).....	36
<i>Hash v. Children's Orthopedic Hosp.</i> , 49 Wn. App. 130, 741 P.2d 584 (1987).....	34, 35
<i>Hertog v. City of Seattle</i> , 138 Wn.2d 265, 979 P.2d 400 (1999).....	23, 24
<i>Howell v. Spokane & Inland Empire Blood Bank</i> , 114 Wn.2d 42, 785 P.2d 815 (1990).....	35
<i>Hutchins v. 1001 Fourth Ave. Assoc.</i> , 116 Wn.2d 217, 802 P.2d 1360 (1991)	10
<i>Kim v. Budget Rent a Car Systems, Inc.</i> , 143 Wn.2d 190, 15 P.3d 1283 (2001).....	24
<i>Leach v. Weiss</i> , 2 Wn. App. 437, 467 P.2d 894 (1970).....	32
<i>Maltman v. Sauer</i> , 84 Wn.2d 975, 530 P.2d 254 (1975)	<i>passim</i>
<i>McCoy v. Am. Suzuki Motor Corp.</i> , 136 Wn.2d 350, 961 P.2d 952 (1998).....	26, 27

<i>Minahan v. W. Wash. Fair Ass'n</i> , 117 Wn. App. 881, 73 P.3d 1019 (2003).....	24
<i>Olympic Fish Prods., Inc. v. Lloyd</i> , 93 Wn.2d 596, 611 P.2d 737 (1980).....	34
<i>Rose v. Nevitt</i> , 56 Wn.2d 882, 355 P.2d 776 (1960).....	12
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 80 Wn. App. 862, 912 P.2d 1044 (1996).....	11, 14
<i>Skeie v. Mercer Trucking Co.</i> , 115 Wn. App. 144, 61 P.3d 1207 (2003).....	29, 30
<i>Thornton v. Eneroth</i> , 177 Wn. 1, 30 P.2d 951 (1934)	31

FOREIGN CASES

<i>Allen v. Shiroma</i> , 514 P.2d 545 (Or. 1973).....	13
<i>Bell v. Fore</i> , 419 S.W.2d 686 (Tex. Civ. App. 1967).....	20
<i>Coleman v. Blankenship Oil Corp.</i> , 267 S.E.2d 143 (Va. 1980)	29
<i>Fallon v. D. Mongillo & Sons</i> , 4 Conn. Supp. 156 (Conn. Super. Ct. 1936)	29
<i>Farm Bur. Mut. Ins. v. Henke</i> , Not Reported, Mich. App. LEXIS 3108 (Mich. App. 2005)	29
<i>Fox v. Lyte</i> , 532 N.Y.S.2d 432 (N.Y. App. 1988)	27, 28
<i>Greenwood v. Vanarsdall</i> , 356 S.W.2d 109 (Mo. Ct. App. 1962).....	21, 22, 36
<i>Griego v. Marquez</i> , 546 P.2d 859 (N.M. Ct. App. 1976)	31
<i>Herman v. Welland Chem., Ltd.</i> 580 F. Supp. 823 (M.D. Pa. 1984).....	27, 28
<i>Jackson v. Howell's Motor Freight</i> , 485 S.E.2d 895 (N.C. Ct. App. 1997).....	18, 19

<i>Johnson v. Sunshine Creamery Co.</i> , 274 N.W. 404 (1937)	32
<i>Knowles v. Barnes</i> , 671 So.2d 1123 (La. Ct. App. 1996).....	29
<i>Kukacka v. Rock</i> , 61 P.2d 297 (Or. 1936).....	20, 21
<i>Lasley v. Combined Transport, Inc.</i> , 227 P.3d 1200 (Or. Ct. App. 2010).....	29
<i>O'Connor v. Nigg</i> , 838 P.2d 422 (Mont. 1992).....	21
<i>Palsgraf v. The Long Island R.R. Co.</i> , 162 N.E. 99 (N.Y. 1928).....	11, 12, 15
<i>Rozz v. Village Auto Body Works, Inc.</i> , 905 N.Y.S.2d 490 (D.C. N.Y. 2010).....	16, 17
<i>Williams v. Smith</i> , 314 S.E.2d 279 (N.C. Ct. App. 1984).....	28

STATUTES

RCW 46.61.655	29, 30
RCW 52.02.020.	23

I. INTRODUCTION

Longstanding Washington law holds that the mere occurrence of a negligent act does not give rise to liability. Rather, the threshold question of duty must be answered affirmatively before any issue of negligence is presented to the factfinder. Duty is composed of two equally important requirements. First, the negligent act must create a foreseeable **type** of harm. Second, it must be foreseeable that the **plaintiffs** will be subjected to the risk of that type of harm.

Appellants Bruce and Leslie Dunbar (the “Dunbars”) allege that Manuel Morillo (“Morillo”) was involved in a single motorcycle accident on a Jefferson County roadway, and that oil from the oil chamber of his motorcycle spilled on the roadway. The Dunbars claim that oil from Morillo’s accident caused the Dunbars’ injuries in a subsequent motorcycle accident, and have asserted claims against their underinsured motorist insurance carrier, Respondent Nationwide Insurance Company of America (“Nationwide”).

Morillo’s accident occurred 30 minutes prior to the Dunbars’ accident. By the time the Dunbars approached the scene of Morillo’s accident, Jefferson County Fire Protection District No. 4 (the “Fire Department”) had already responded to and controlled the scene, determined that Morillo was critically injured, and left, without containing

or securing the scene, to transport Morillo by helicopter to Harborview Medical Center in Seattle.

Given that reasonable minds cannot differ that the Dunbars were not foreseeable plaintiffs, the trial court properly granted summary judgment to Nationwide because Morillo owed no duty to the Dunbars.

The Dunbars now appeal the trial court's decision, erroneously arguing that Morillo owed them a duty, and that his claimed negligence was the cause of their injuries. The Dunbars rely on rescue doctrine, unsecured load, and other distinguishable cases with underlying facts that are patently dissimilar from, and legal theories that are inapplicable to, those before the Court. The Dunbars also argue that their motion for partial summary judgment on duty and breach of duty should have been granted, notwithstanding their utter failure to present any evidence that Morillo breached his duty of care and caused either accident, elements of negligence on which the Dunbars bear the burden of proof.

The trial court properly rejected the Dunbars' arguments regarding duty and breach and dismissed Nationwide as a matter of law because Morillo owed no duty to the Dunbars to prevent oil from leaking from his motorcycle. The Court should affirm the trial court's order granting summary judgment to Nationwide.

II. RESPONSE TO APPELLANTS' ASSIGNMENT OF ERROR

A. Response

1. Nationwide assigns no error to the trial court's ruling that Morillo owed no duty to the Dunbars as a matter of law.

2. Nationwide assigns no error to the trial court's ruling that the Dunbars failed to establish Morillo's duty and breach of duty as a matter of law.

B. Issues Pertaining to Assignments of Error

1. Duty requires both that the defendant's actions create a foreseeable risk of harm and that the plaintiffs foreseeably fall within the zone of danger of that risk of harm. The Dunbars were not involved in Morillo's accident. They came upon the scene only after a sufficiently long period of time elapsed, and only after emergency responders arrived, assessed, and controlled the scene, ultimately leaving and removing Morillo from the scene. Did the trial court properly conclude that the Dunbars were not foreseeable plaintiffs subject to a foreseeable risk of harm such that Morillo owed no duty to the Dunbars? (Appellants' Assignment of Error 2.)

2. Proximate cause requires continuous causation as well as whether logic, common sense, justice, policy, and precedent support a finding of liability. Is the connection between Morillo's alleged negligent

act and the Dunbars' claimed injuries too remote and insubstantial to impose a finding of liability because reasonable minds cannot differ that the Fire Department's failure to contain the scene was unforeseeable to Morillo? (Appellant's Assignment of Error 3.)

3. The Dunbars moved for partial summary judgment on duty and breach of duty in their favor. They bear the burden of proof as to all elements of negligence. There is no evidence that Morillo's negligence created the alleged hazard that the Dunbars encountered. Did the trial court properly deny the Dunbars' motion for partial summary judgment given the Dunbars' failure to produce any evidence as to Morillo's negligence? (Appellant's Assignment of Error 1.)

III. COUNTERSTATEMENT OF THE CASE

The Dunbars present a statement of the case that is inaccurate, incomplete, and misstates facts relevant to their appeal. These misrepresentations require clarification.

A. The Fire Department Responded to Morillo's One-Motorcycle Accident and Left Without Securing the Scene.

On October 14, 2007, the Fire Department received a report of a one-motorcycle accident, involving Morillo, on Highway 101 in Jefferson County. The accident was first reported at 3:40 p.m. CP 32.

There is no evidence as to the cause of Morillo's accident. There is also no evidence that Morillo's motorcycle deposited fluid – oil or otherwise – on the roadway.

In any event, the first Fire Department firefighter responded to the scene at 3:46 p.m. CP 34. Two Fire Department vehicles, and three other firefighters, including the Chief, also responded. CP 22. The Fire Department activated flashing lights on emergency vehicles while they tended to the scene. CP 109, 111. The Chief's vehicle was parked in a blocking position and he established command of the scene. CP 110.

The Fire Department determined that Morillo's injuries were severe, and that the level of care that he required was not available within a one hour drive time. CP 21. There was a medical need to life-flight Morillo to Harborview. *Id.* Morillo was placed in full c-spine protection and into an ambulance. CP 22. The Fire Department, with Morillo, departed from the scene.

The Fire Department had the following operating procedure for scene containment:

As it applies to the roadway, if there is no debris in the roadway and both lanes of traffic are open then all units may depart the scene without a formal turnover to another entity or agency. **Should there be hazards that are not removable, then there must be positive control so as not**

to create another incident. This may be a Brinnon FD responder or another state agency.

CP 25 (emphasis added).

The Fire Department was aware of fluid on the roadway before leaving the scene with Morillo. CP 34. The Fire Department was equipped with flares and traffic cones but did not utilize either. CP 188-89. No warnings from the Fire Department remained at the scene once responders left with Morillo in an ambulance. CP 113.

The Dunbars' accident occurred no earlier than 4:10 p.m., after the Fire Department left. CP 39. There was no vehicle left on the roadway; in fact, the motorcycle was on the shoulder leaning against the Jersey barrier. CP 81. Bruce Dunbar was driving his motorcycle with Leslie Dunbar on the back. The Dunbars allege that oil on the roadway caused them to lose control of their motorcycle. CP 40.

B. Procedural History

The Dunbars filed a complaint for personal injuries against Morillo, the Fire Department, and Nationwide on August 23, 2010. CP 1.

Nationwide and the Fire Department moved for summary judgment in June 2011. CP 43. Nationwide, stepping into Morillo's shoes, argued that Morillo owed no duty to the Dunbars because the Dunbars were unforeseeable plaintiffs outside the scope of a foreseeable risk of harm; that the Fire Department's actions were an intervening,

superseding cause; and that policy considerations weighed against a finding of legal causation. CP 43-55.

The Dunbars moved for partial summary judgment against Nationwide, arguing that, as a matter of law, Morillo owed, and breached, a duty of care to the Dunbars. CP 85-91.

The Fire Department argued that the Dunbars' claims were barred by the public duty doctrine, claiming that any negligence of the Fire Department in failing to clean up or warn of the fluid on the roadway was a breach of an obligation owed to the public, not the Dunbars individually. RP 3-11.

On July 15, 2011, the Superior Court of Jefferson County, Washington, the Honorable Craddock Verser presiding, granted Nationwide's and the Fire Departments' motions for summary judgment. RP 11, CP 234-37. The trial court denied the Dunbars' motion for partial summary judgment. CP 238-41. The trial court agreed that Morillo owed no duty to the Dunbars to ride his motorcycle in such a manner so as to prevent oil on the roadway. RP 18. The trial court did not rule on the issue of causation.

The Dunbars did not appeal the Fire Department's dismissal under the public duty doctrine. The trial court's July 15, 2011 orders granting Nationwide's motion for summary judgment and denying the Dunbars'

motion for partial summary judgment are the subject of the Dunbars' appeal. CP 242-43.

IV. ARGUMENT

A. Summary of the Argument

The Dunbars' appeal arises from an obvious misunderstanding of foreseeability. For a duty to be imposed, not only must the risk of the type of harm be foreseeable to the negligent actor, but the plaintiffs must foreseeably be put at risk by that type of harm. In this regard, duty is composed of two equally important questions: what type of harm may result and to whom.

The Dunbars were unforeseeable plaintiffs outside the zone of danger of any foreseeable type of harm that could result from Morillo's alleged failure to properly control his motorcycle. Morillo, the alleged negligent actor, could not have reasonably foreseen that his loss of control of his own motorcycle would result in the Dunbars, or any motorist, losing control on the same curve 30 minutes later, allegedly because of fluid used in the operation of Morillo's motorcycle, after the Fire Department responded to, controlled, and failed to warn of or secure the scene upon leaving, and after Morillo was physically removed.

Proximate cause is also lacking in this case. The Dunbars cannot show a sufficiently close, actual, and causal connection between Morillo's

alleged conduct and the damages that they claim they suffered. The Fire Department's response to the scene was an intervening and superseding cause, negating cause in fact, because its actions were unforeseeable as a matter of law. Moreover, legal causation – comprised of considerations of logic, common sense, justice, policy, and precedent – does not support liability given the attenuated connection between Morillo's alleged actions and the Dunbars' claimed injuries.

The distinguishable case law cited by the Dunbars falls into four categories involving law and facts not present here:

- The Dunbars rely heavily on the rescue doctrine even though the doctrine is inapplicable. Rescuers are entitled to a presumption of foreseeability, and are thus owed a duty, because “rescue invites danger.”
- The Dunbars also erroneously rely upon cases involving unsecured loads foreseeably susceptible to falling off or spilling from a vehicle, and a duty for which is imposed by statute.
- The Dunbars improperly rely upon cases involving so-called “second car accidents” where the plaintiffs are in the foreseeable zone of danger, and are thus owed a duty, because they are involved in a first accident with the defendant before the second car accident occurs.
- The Dunbars' reliance on case law concerning vehicles improperly parked or stopped on the traveling roadway, which did not occur here and concerns a statutory duty because of the potential of a collision, is similarly misplaced.

The court should disregard these cases because they are unpersuasive, dissimilar, and inapplicable, as they do not support a finding of duty or causation here, and should affirm the trial court's holding in Nationwide's favor.

Finally, the Dunbars are not entitled to partial summary judgment on duty or breach of duty. The Dunbars, as plaintiffs in this lawsuit, bear the burden of proof. While Morillo's negligence was assumed solely for purposes of Nationwide's motion for summary judgment, there is actually no evidence that operator error caused Morillo's crash, or that the fluid on the roadway came from Morillo's motorcycle. Partial summary judgment in favor of the Dunbars is improper, and the trial court's order denying such should be affirmed.

B. The Trial Court Properly Held that Morillo Owed No Duty to the Dunbars As a Matter of Law.

The Dunbars have asserted claims for negligence, claiming that their injuries resulted from Morillo's failure to operate his motorcycle in a reasonably safe manner. CP 5. The existence of a duty, an essential element of negligence, is a question of law, determined by foreseeability and policy considerations. *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). Foreseeability is decided as a

matter of law where reasonable minds cannot differ. *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989) (citation omitted).

Here, the Dunbars were outside any zone or field of danger of the risk of harm resulting from Morillo's alleged negligent loss of control of his motorcycle. Moreover, imposing a duty on an injured motorist to clean up or warn of accident debris or fluid is unsupported by socially, culturally, and economically acceptable civil responsibilities. The trial court properly dismissed Nationwide because Morillo owed no duty to the Dunbars as a matter of law.

1. Morillo Owed No Duty to the Dunbars to Avoid His One-Motorcycle Accident Because the Dunbars Were Outside Any Zone or Field of Danger of a Foreseeable Risk of Harm.

Foreseeability is a well-established principle of duty, and thus negligence. To establish foreseeability, the risk of harm and the plaintiffs must be foreseeable. There is no duty owed to those individuals who are not foreseeably put at risk by the defendant's conduct, or, in other words, are outside the zone or field of danger of the foreseeable risk of harm. *Schooley v. Pinch's Deli Market, Inc.*, 80 Wn. App. 862, 868-69, 912 P.2d 1044 (1996), *aff'd*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998).

Palsgraf v. The Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928) is the landmark case discussing foreseeable and unforeseeable plaintiffs. In

Palsgraf, the plaintiff was standing on a platform of defendant's railroad. A railroad guard pushed a man onto the train after the train was already moving. The guard's act caused the man's package to dislodge and fall. The package contained fireworks, which exploded. The plaintiff, many feet away, was injured. *Palsgraf*, 162 N.E. at 99.

Chief Justice of the Court of Appeals of New York, Benjamin Cardozo, agreed that the guard's act was negligent with respect to the man carrying the package. However, "relatively" to the plaintiff, the guard's act was "not a wrong." *Id.* Justice Cardozo emphasized that negligence is a term of relation. *Id.* at 101. Duty is not derivative: "**[t]he plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.**" *Id.* at 100 (emphasis added).

Washington courts consistently follow Justice Cardozo's opinion in *Palsgraf*. Thus, to sustain a negligence claim for personal injuries, the duty must flow to the person injured. *Rose v. Nevitt*, 56 Wn.2d 882, 885, 355 P.2d 776 (1960) (citation omitted). "[I]f the conduct of the actor does not involve an unreasonable risk of harm to the person injured, he owes no duty to that person and, therefore, there is no actionable negligence." *Id.*

The orbit of danger includes both expectable persons and expectable risks. **Both are of equal importance.**

In regard to persons, the law is extremely clear. Only persons whose presence within the zone of apprehended danger is expectable can complain of a failure to protect them against expectable risks. Failure to furnish protection is negligence only toward those to whom a duty of protection is owed.

Frazer v. Western Dairy Products, 182 Wash. 578, 585, 47 P.2d 1037 (1935) (citing *Flynn v. Gordon*, 86 N.H. 198, 165 A. 715 (N.H. 1933) (emphasis added)).

Drivers owe a duty of care to operate their vehicles in a reasonably safe manner to avoid foreseeable risks of harm to foreseeable persons. However, that duty is not owed to the traveling public at large. In *Allen v. Shiroma*, 514 P.2d 545, 546 (Or. 1973), the defendants were involved in a collision. The plaintiff came upon the scene and assisted with putting out flares and directing traffic. *Id.* He was injured when another passerby, driving plaintiff's car at plaintiff's request, struck him 15 minutes after the first accident. *Id.* The Supreme Court of Oregon found that the defendants' actions did not foreseeably cause the type of risk of harm to the class of persons to which the plaintiff belonged:

[P]laintiff's injury and the manner of its occurrence was [sic] so highly unusual that we can say as a matter of law that a reasonable man, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected the injury to occur.

Id. at 547 (citation omitted).

In this case, Morillo owed no duty to the Dunbars to avoid losing control of his motorcycle because the Dunbars were outside the zone or field of danger of any reasonably foreseeable risk of harm resulting from such loss of control. Morillo's alleged negligence occurred when the Dunbars were spatially and temporally removed from the scene, far outside the zone of danger of any risk of harm. At the time of the Dunbars' accident – 30 minutes after Morillo's accident occurred – Morillo's accident had not only been reported, but the Fire Department had already responded to, controlled, and departed from the scene.

The duty of ordinary care does not require more care than a reasonable person would exercise. A reasonable person can foresee, and avoid creating, foreseeable risk. A reasonable person cannot foresee, or avoid creating, unforeseeable risk. Thus, the duty of ordinary care proscribes only the creation of foreseeable risk, and protects only those persons subjected to such risk.

Schooley, 80 Wn. App. at 869 n. 16 (citing *Palsgraf*).

Here, it was not foreseeable to Morillo that (1) alleged oil used in the operation of his motorcycle would leak onto the roadway (2) after a one-motorcycle accident involving only himself, and, (3) 30 minutes later, cause injury to a motorist (4) after first responders had arrived, (5) controlled the scene, (6) determined that Morillo was severely injured, (7) failed to contain or warn of the fluid before leaving, and (8) then left with Morillo in their care. Thus, Morillo owed no duty to the Dunbars, either

with respect to avoiding his own accident or preventing the deposit of oil from an oil chamber used in the operation of his motorcycle. Assuming that Morillo's accident was the result of his negligence, it was not negligence to the Dunbars. The Dunbars have no cause of action "as the vicarious beneficiary of breach of duty to another"— "another" being Morillo himself. *See Palsgraf*, 162 N.E. at 100.

Because reasonable foresight, and not 20/20 hindsight, sets the standard for duty, the Court must consider the context of Morillo's actions: "[i]n each case plaintiff must bring himself within the class of persons threatened by defendant's conduct. 'Proof of negligence in the air, so to speak, will not do.'" *Hansen v. Wash. Natural Gas Co.*, 37 Wn. App. 127, 131, 615 P.2d 1351 (1981) (citing 2 F. Harper and F. James, *Torts* § 18.2 at 1018-19 (1956)), *reversed* on other grounds, 95 Wn.2d 773, 632 P.2d 504 (1981)). The Dunbars were neither at nor near Morillo's accident scene when he lost control or when any foreseeable risk of harm existed. They only came to the scene after the Fire Department responded, controlled the roadway, and left without warning. The Dunbars were unforeseeable plaintiffs outside the orbit of Morillo's duty to operate his vehicle within the standard of care, and, because reasonable minds cannot differ on this point, summary judgment was appropriate.

2. Morillo Owed No Duty to Clean Up or Warn of Any Fluid on the Roadway.

Morillo, who was critically injured and removed from the accident scene, owed no duty to the Dunbars to clean up or warn any fluid.

No Washington court has decided whether a party involved in an accident owes a duty to clean up or warn others of accident debris. However, the holding in *Rozz v. Village Auto Body Works, Inc.*, 905 N.Y.S.2d 490 (D.C. N.Y. 2010), is persuasive. There, the plaintiff's vehicle was damaged in a motor vehicle accident when he swerved to avoid a license plate in the middle of the highway. The plaintiff looked up the license plate number and learned that the vehicle originally carrying the license plate had been involved in a one-vehicle accident on the highway six days earlier. *Id.* at 492.

The plaintiff filed suit against the driver involved in the earlier accident. The court refused to impose a duty on the defendant driver and granted summary judgment: **"If this Court were to impose a duty upon a motorist to clean accident debris from a highway it would, at the very least, create a dangerous and unreasonable risk of harm."** *Id.* at 493 (emphasis added).

The court's opinion resonates here: Morillo's accident occurred on a 25 mile per hour curve on a highway. Notwithstanding that it is

unreasonable to expect that Morillo, or any driver, has the means to remove fluid from a roadway, imposing a duty on Morillo to clean up or remove the fluid would only invite danger.

Moreover, Morillo was critically injured. The accident had been reported. The Fire Department, who had its own operating procedures for the control of accident scenes, arrived and controlled the scene. The Fire Department removed Morillo from the scene. Morillo was in no condition to warn or clean up the scene, nor was he afforded the opportunity to do so. Imposing a duty on a critically injured motorist to warn or clean up an accident scene does not comport with the boundaries of civil responsibility and what is “socially, culturally, and economically acceptable.” *See Rozz*, 905 N.Y.S.2d at 493.

C. The Dunbars Cannot Establish Proximate Cause Because the Fire Department’s Response Was a Superseding Cause, and Considerations of Policy and Common Sense Do Not Support a Finding of Legal Causation.

In addition to duty, the Dunbars cannot prove proximate cause, another essential element of negligence. “A finding of proximate cause is premised upon proof of cause in fact, as well as the legal determination that liability should attach.” *Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975) (citation omitted).

1. The Fire Department's Response is an Intervening and Superseding Cause.

Cause in fact requires a sufficiently close, actual, and causal connection between a defendant's conduct and the damage suffered by the plaintiffs. *Maltman*, 84 Wn.2d at 981 (citation omitted). If there is an intervening cause that comes into active operation after the negligence of the defendant has ceased, and if that intervening cause is not reasonably foreseeable to the original negligent actor, then there is no cause in fact. *Id.* at 982.

Here, the Fire Department's failure to warn of or secure the scene before leaving was an intervening and superseding cause of the Dunbars' claimed injuries. The Fire Department responded to and controlled the scene before the Dunbars arrived. The Fire Department had an established protocol for scene containment that required positive control of a roadway hazard. The Fire Department knew of fluid on the roadway. No one remained behind. The Fire Department did not utilize flares or orange traffic cones, in its possession, before leaving.

Once the Fire Department arrived and had control of the scene, Morillo's original negligence was no longer an active factor in the course of events leading to the Dunbars' injury. The intervening and supervening acts in *Jackson v. Howell's Motor Freight*, 485 S.E.2d 895 (N.C. Ct. App.

1997) are identical to those here. There, the defendant fell asleep at the wheel, causing his vehicle to leave the roadway and collide with a utility pole. That pole then fell into the street. After police and firemen responded, and took control of the scene, a subsequent vehicle dragged the pole and hit a policeman. *Jackson*, 485 S.E.2d at 897. The court dismissed the plaintiff-policeman's suit against the original tortfeasor for failure to prove proximate cause because the intervening acts of the first responders were superseding causes of negligence cutting off the defendant's negligence:

Police officers and other officials had taken control of the accident scene. These officials placed traffic cones and positioned emergency vehicles in the road, made decisions regarding the flow of traffic and assumed the responsibility for directing traffic through the accident scene. . . . **[The subsequent negligent act of the responders or driver was] not itself a consequence of [the] original negligence, nor under the control of [the original tortfeasor], nor foreseeable by him in the exercise of reasonable prevision.**

Id. at 900 (emphasis added).

Here, that the Fire Department would arrive, recognize the fluid on the roadway, and leave without warning of or containing the scene is similarly highly extraordinary and unexpected. The Fire Department was a separate, independent agency over which Morillo had no control, and whose negligence, and the resulting damage, could not have reasonably been anticipated or foreseen by him. Thus, the Fire Department's

response to the scene was an intervening and superseding cause, negating cause in fact, and, in turn, proximate cause.

Other jurisdictions agree that the liability of an original tortfeasor must have a sufficiently close and causal connection to the alleged injury. In *Bell v. Fore*, 419 S.W.2d 686 (Tex. Civ. App. 1967), the defendant caused an accident with a pickup truck pulling a horse trailer. The horse trailer, with the horse inside, created an obstruction on the roadway. However, the defendant's vehicle was off the roadway. *Id.* at 690. Plaintiff stopped to help remove the horse trailer and horse, and, while assisting, was struck by a car coming upon the accident scene. *Id.* at 688.

The Texas appellate court held that the subsequent driver's actions were an intervening and superseding cause, and, as a matter of law, the defendant was not liable. *Id.* at 692. The court noted that the defendant's actions simply created a condition, but did not cause the plaintiff's injuries:

A prior or remote cause cannot be made the basis for an action for damages if it does nothing more than furnish the condition or give rise to the occasion which makes the injury possible, if such injury is the result of some other cause which reasonable minds would not have anticipated, even though the injury would not have occurred but for such condition.

Id. at 691 (citations omitted). *See also Kukacka v. Rock*, 61 P.2d 297 (Or.

1936) (no proximate cause where the plaintiff was injured when her car swerved to avoid a passenger flagging for assistance on the roadway, where that passenger was involved in the defendant's original accident).

Likewise, in *O'Connor v. Nigg*, 838 P.2d 422, 423 (Mont. 1992), the original tortfeasor lost control of his vehicle, which ended up in the median of the highway. Passersby stopped and a highway patrolman responded. Ten minutes after the original accident, the plaintiff slowed down or stopped at the accident scene and was rear-ended. *Id.* The Montana Supreme Court refused to find liability against the driver of the one-car accident, noting that although he was negligent and the cause in fact of the plaintiff's injury, the intervening act of the rear-end accident was not foreseeable to the defendant. *Id.* at 425.

Similarly, in *Greenwood v. Vanarsdall*, 356 S.W.2d 109 (Mo. Ct. App. 1962), the plaintiff alleged that the defendant drove at a high rate of speed, causing the defendant's car to go off the road and into a ditch. As a result of the accident, skid marks were left on the road. Passersby stopped at the accident scene, and a state trooper responded. *Id.* at 110-11.

Fifty-five minutes later, after the defendant was no longer present, the plaintiff happened upon the accident scene while the officer and at least one of the passersby were in the roadway checking the skid marks. The plaintiff claimed he was seriously injured when he tried to avoid the

individuals in the roadway. *Greenwood*, 356 S.W.2d at 111. The court found that the plaintiff's accident was not the foreseeable result of the defendant's actions, which were done and finished. "[T]he wrongs which any of us may do can be traced in the ultimate causal connection with injury to a great many others . . . but the law . . . does not permit the recovery of damages except for those which have an immediate affinity with actions which produce the wrong." *Id.* at 114.

The Fire Department's response was a superseding cause of the Dunbars' claimed damages. However, the Dunbars are expected to argue that because the Fire Department was dismissed on summary judgment under the public duty doctrine, the Fire Department's response cannot be deemed a superseding cause. This is a failed argument incorrectly assuming that an intervening and superseding cause must be the result of a negligent tortfeasor, and, at that, one against whom a judgment can be obtained. There is no rule or principle of law that defines a superseding cause as such, and any argument regarding the effect of the Fire Department's dismissal is a red herring irrelevant to the issue of causation. *See Cook v. Seidenverg*, 36 Wn.2d 256, 264, 217 P.2d 799 (1950) ("[t]he fact that this accident may have been caused by an intervening act of a child who could not be held guilty of contributory negligence, would not prevent the doctrine of superseding cause from attaching"). All that is

required for a cause to be superseding is a force or act not reasonably foreseeable to the defendant. *See, e.g., Maltman*, 84 Wn.2d at 982.

The foreseeability of an intervening act must be viewed from the perspective of the alleged tortfeasor, Morillo. The very purpose of a fire department, especially as understood by the public, is fire prevention and suppression, emergency medical services, and “the protection of life and property.” RCW 52.02.020. That the Fire Department would have control of the scene and fail to warn of or secure the fluid on the roadway before departing, particularly when Morillo was unable to do so himself, is completely unforeseeable as a matter of law. Morillo had no reasonable basis to anticipate such a response, and therefore, Morillo’s negligence was not the proximate cause of the Dunbars’ injuries.

2. The Dunbars Cannot Establish Legal Causation.

Additionally, the Dunbars cannot establish legal causation, the second requirement for proving proximate cause. Legal causation rests upon considerations of policy, and a common sense determination as to “how far the defendant’s responsibility for the consequences of [his] actions should extend.” *Hertog v. City of Seattle*, 138 Wn.2d 265, 283, 979 P.2d 400 (1999) (citation omitted). The existence of a duty does not

automatically satisfy the essential element of legal causation. *Hertog*, 138 Wn.2d at 284 (citation omitted).

Legal causation is a question of law for the court, and requires that the court “decide whether logic, common sense, justice, policy, and precedent” support liability. *Minahan v. W. Wash. Fair Ass’n*, 117 Wn. App. 881, 898, 73 P.3d 1019 (2003). Legal causation is a fluid concept focusing on “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.” *Kim v. Budget Rent a Car Systems, Inc.*, 143 Wn.2d 190, 204-05, 15 P.3d 1283 (2001) (citation omitted).

In this case, the connection between Morillo’s loss of control of his motorcycle and the Dunbars injuries is too tenuous to impose legal causation. Doing so would be illogical and nonsensical given the amount of time that passed between Morillo’s accident to the Dunbars’ accident, Morillo’s own injury, and the Fire Department’s failed response at the scene prior to the Dunbars’ accident.

Imposing legal causation would also be unjust. A motorist should not be required to anticipate that if they lose control of their own vehicle, another driver who is neither spatially nor temporally at or near the scene may also be injured by fluid used in the operation of the vehicle after a governmental emergency responder, such as the Fire Department, has

arrived, assessed, and departed from the scene. Such a broad imposition of liability would not only exponentially expand the well-established limits of foreseeability, but it would also have far-reaching, undesirable consequences by making unprofessional and untrained motorists, unfamiliar with traffic control and debris removal, the insurers of all other drivers' safety.

Moreover, imposing legal causation in this case would offend policy by forcing a private party to usurp the well-established role of the government. A motorist should be allowed to believe that if he is involved in an accident, even by his own doing, and a governmental entity with scene containment protocols responds, such as the Fire Department, subsequent motorists will be warned of any fluid on the roadway. Otherwise, as mentioned above, motorists involved in accidents will be encouraged to attempt to clean up or warn of an accident scene to avoid liability, putting themselves in grave danger and interfering with the duties of trained, professional responders. **The burden of ensuring the safety of the public is allocated to the government, not to private persons.**

Finally, imposing legal causation would contradict sound precedent from Washington and other jurisdictions, as discussed throughout, by imposing a duty to protect the safety of the world at large.

Logic, common sense, justice, policy, and precedent do not support a finding of legal causation in this case. In light of these concepts, Morillo's alleged negligence and the Dunbars' injuries are too unrelated to impose liability on Morillo.

D. The Dunbars Rely on Cases That Are Factually and Legally Dissimilar, and, Therefore, Unpersuasive.

The Dunbars attempt to persuade the Court of the existence of duty and causation by compiling a list of cases that purport to have bearing on this case. However, the Dunbars do not cite **any** case law involving a member of the traveling public injured by parts or fluids used in the operation of a vehicle left upon the roadway after the government has control of an accident scene. Rather, the Dunbars cite cases involving the rescue doctrine, unsecured loads, second car accidents, and vehicle obstruction cases, none of which are applicable here.

1. The Dunbars Were Not Rescuers, and the Rescue Doctrine is Inapplicable.

The Dunbars improperly rely upon Washington cases involving the rescue doctrine. *See* App. Br. p. 11, 16, 17 (citing *McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 961 P.2d 952 (1998); *Estate of Keck v. Blair*, 71 Wn. App. 105, 856 P.2d 740 (1993); *Bell v. McMurray*, 5 Wn. App. 207, 486 P.2d 1105 (1971)). In those cases, every plaintiff was at the accident scene to render assistance to an accident victim.

Importantly, those cases involve legal principles not applicable here. The duty owed to the plaintiff-rescuer arises out of the rescue doctrine – in Washington, a common law **exception** to the usual limits of foreseeability. Because “danger invites rescue”, the doctrine is intended to “provide a source of recovery to one who is injured while reasonably undertaking the rescue of a person who has negligently placed himself in a position of imminent peril.” *Maltman*, 84 Wn.2d at 976-77 (citing *Wagner v. Int’l Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921) (Cardozo, J.) and 4 A.L.R.3d 558, *Rescue-Doctrine Negligence* (1965)). By establishing the foreseeability of the risk of the type of harm to the plaintiff, the doctrine allows for a finding of duty and proximate cause for the rescuer. *McCoy*, 136 Wn.2d at 355; *Estate of Keck*, 71 Wn. App. at 111.

The Dunbars also rely on two extra-jurisdictional cases involving police officers who, in their capacities as professional responders at the scene, were injured by third-party tortfeasors who later came upon the accident scene. Those officers alleged negligence claims against the actor in the original accident. *Fox v. Lyte*, 532 N.Y.S.2d 432 (N.Y. App. 1988); *Herman v. Welland Chem., Ltd.* 580 F. Supp. 823 (M.D. Pa. 1984).

The Dunbars, unlike the plaintiffs in *Fox* and *Herman*, were not professional responders injured while assisting at the accident scene. More importantly, neither of those cases is persuasive in Washington.

Certain hazards are assumed by professional rescuers. *Maltman*, 84 Wn.2d at 978. “[I]t is the business of professional rescuers to deal with certain hazards, and such an individual cannot complain of the negligence which created the actual necessity for exposure to those hazards.” *Id.* at 979 (emphasis deleted). For example, the Washington Supreme Court held that emergency responders could not assert claims against a defendant whose negligence caused an accident when the responders’ helicopter crashed because the “hazards [were] inherently within the ambit of those dangers unique to and generally associated with this particular rescue operation.” *Id.*

If *Fox* and *Herman* had been decided in Washington, instead of in the New York Supreme Court and federal district court in Pennsylvania, respectively, a different conclusion would have been reached. To the extent that it is foreseeable that a police officer responding to an accident would be hit by a third-party tortfeasor’s vehicle, that danger would be known to the responding police officer. Indeed, the holdings in *Fox* and *Herman* are not universally accepted. See *Williams v. Smith*, 314 S.E.2d 279 (N.C. Ct. App. 1984) (where police officer was hit by car at scene of original tortfeasor’s accident, original tortfeasor’s negligence in causing the first accident was too remote and not foreseeable as a matter of law).

The Dunbars were not effecting a rescue of any type. They were not assisting at the accident scene in any regard. The rescue doctrine provides no basis for foreseeability for the Dunbars' alleged damages.

2. This Case Does Not Involve an Unsecured Load.

The Dunbars also improperly rely upon cases involving loads that were not properly secured, and thus fell or spilled on the roadway. See App. Br. p. 9, 12, 17, 19 (citing *Coleman v. Blankenship Oil Corp.*, 267 S.E.2d 143 (Va. 1980) (transporting oil); *Fallon v. D. Mongillo & Sons*, 4 Conn. Supp. 156 (Conn. Super. Ct. 1936) (same); *Farm Bur. Mut. Ins. v. Henke*, Not Reported, 2005 Mich. App. LEXIS 3108 (Mich. App. 2005) (transporting ammonium nitrate); *Knowles v. Barnes*, 671 So.2d 1123 (La. Ct. App. 1996) (transporting diesel fuel); *Lasley v. Combined Transport, Inc.*, 227 P.3d 1200 (Or. Ct. App. 2010) (transporting glass).

This is not an unsecured load case. In Washington, a duty of reasonable care for the securing of loads is imposed by statute. RCW 46.61.655; *Skeie v. Mercer Trucking Co.*, 115 Wn. App. 144, 61 P.3d 1207 (2003). **A statutory duty arises only when the statute protects against the particular hazard that causes the harm.** *Skeie*, 115 Wn. App. at 149. RCW 46.61.655 protects the traveling public from “improperly secured loads that fall from vehicles”. *Id.* There is no improperly secured load that fell from Morillo's vehicle. Rather, it is

alleged that oil, properly secured and used during and for the operation of the motorcycle, was deposited on the roadway as a result of the forces of Morillo's accident.

Foreseeability again distinguishes those cases relied upon by the Dunbars from the case at hand. The risk of the type of harm that arises from a load that has not been properly secured is foreseeable: a bicycle may fall off of the back of a sport utility vehicle and cause a following driver to swerve or a tarp may come loose from a pick-up truck and blanket a windshield. There is a socially recognized and legally enforceable obligation to secure a load so that it will not detach to cause injury to the public. *Skeie*, 115 Wn. App. at 150 (duty to securely fasten load of cements blocks that fell upon plaintiff during collision).

Here, the particular hazard that allegedly caused the harm is not proscribed by RCW 46.61.655. It is not foreseeable that oil used in the operation of a motor vehicle would pose a risk to a subsequent motor vehicle some 30 minutes after the accident that caused the deposit of the oil, and after the Fire Department responded, controlled, and left the scene with Morillo. There is no statutory duty arising under RCW 46.61.655, and the cases cited by the Dunbars involving the falling and spilling of unsecured loads are unpersuasive.

3. “Second Car Accidents” Are Inapplicable.

The Dunbars erroneously rely upon cases involving second car accidents. *See* App. Br. p. 11, 19 (citing *Thornton v. Eneroth*, 177 Wn. 1, 30 P.2d 951 (1934); *Griego v. Marquez*, 546 P.2d 859 (N.M. Ct. App. 1976).) The facts of these cases are straightforward and follow a foreseeable chain of events: plaintiff and defendant are in a motor vehicle accident, they remain at the scene, and a second accident involving an additional vehicle occurs.

For example, in *Thornton*, the defendant negligently stopped on the roadway to clear his windshield. A third party rear-ended the defendant, and then the plaintiff rear-ended the third-party. Although not hurt in the chain reaction, the plaintiff was injured by another collision at the scene of the accident “some minutes” later. *Id.* at 5.

Likewise, in *Griego*, the plaintiff and defendant were involved in a non-injury accident. Eight to ten minutes later, while discussing the accident, the plaintiff was hit by a third-party tortfeasor at the scene of the accident. 546 P.2d 861.

In both of these cases, the plaintiffs were well within the zone of danger of foreseeable harm, and were therefore foreseeable plaintiffs, because they were involved in the initial collision with the negligent defendants. Therefore, that **those plaintiffs** would be injured because of

the defendants' actions was foreseeable to those defendants. Here, however, the Dunbars were spatially and temporarily removed from Morillo's accident, having no involvement in his collision. Second car accident cases are not applicable here.

4. Cases Involving Cars Left on the Traveling Roadway Are Dissimilar.

The Dunbars cite to a final category of cases where foreseeability is established because of completely different facts and governing legal principles from those here: vehicles improperly left upon the roadway without warnings. *See* App. Br. 16, 19. In *Leach v. Weiss*, 2 Wn. App. 437, 444, 467 P.2d 894 (1970), the defendant parked his vehicle in the traveling roadway, on a bridge, to fix a flat tire in direct violation of three Washington statutes prohibiting the stopping, parking, or leaving of a vehicle upon the traveled part of the highway. Likewise, in *Johnson v. Sunshine Creamery Co.*, 274 N.W. 404 (1937), the defendants were involved in a motor vehicle accident and their vehicles blocked travel on the highway. These courts held that the subsequent accidents involving the plaintiffs, which in both cases happened before emergency responders took control of the scene, were foreseeable because the defendant knew or should have known that their unlawful vehicles' obstructions of the roadway would be a hazard to subsequent vehicles. *See Colvin v. Auto*

Interurban Co., 132 Wash. 591, 597, 232 P. 365 (1925) (“an automobile standing on the main traveled portion of the highway [i]s more or less dangerous to traffic.”).

This case does not involve a vehicle left on the traveling roadway in violation of any Washington statute. In fact, the motorcycle was off the roadway, on the shoulder, and leaning against the Jersey barrier. When a vehicle, disabled or not, is left stopped on the roadway, it causes the same type of foreseeable risk of harm to the same foreseeable plaintiffs as a vehicle that fails to yield the right of way, crosses the center line, or stops suddenly: a collision between vehicles. Vehicle obstruction case law cited by the Dunbars is not persuasive here.

E. The Trial Court Properly Denied Partial Summary Judgment to the Dunbars.

The Dunbars also ask the Court to reverse the trial court’s denial of summary judgment in their favor. The Dunbars moved for partial summary judgment on the issues of duty and breach of duty.

Because Nationwide’s motion for summary judgment did not turn on whether Morillo lost control of his vehicle because of operator error, or that oil came from the motorcycle, Nationwide conceded these issues **only for purposes of its own motion for summary judgment**. CP 45.

Nationwide vigorously disputed that Morillo was negligent and that the

fluid came from Morillo's motorcycle with respect to the Dunbars' cross-motion for partial summary judgment. CP 92-101.

The Dunbars cannot establish duty and breach of duty as a matter of law. The Dunbars cannot provide any evidence that operator error falling below the standard of care was the cause of Morillo's crash. They cannot provide any evidence that the fluid on the roadway came from Morillo's motorcycle. **In fact, there is no evidence that the fluid did not preexist and/or cause Morillo's accident.**¹

On summary judgment, the moving party has the burden of proving by uncontroverted facts that no genuine issue of material fact exists. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). Unsupported conclusory statements are insufficient to prove the nonexistence of issues of fact. *Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987), *aff'd* 110 Wn.2d 912, 757 P.2d 507 (1988). "If the adverse party must set forth 'specific facts' in

¹ The fluid on the roadway was diesel fuel, not oil. CP 113. Morillo's motorcycle did not use diesel fuel. Nationwide did not move for summary judgment on the issues of breach of duty and the source of the fluid because Morillo was serving our country overseas, his deposition had not been taken, and Morillo's counsel was considering moving the trial court for a stay of proceedings. Nationwide assumed that Morillo negligently caused his own accident and that the fluid came from his motorcycle so it could proceed with summary judgment based on issues of unforeseeability, as discussed herein.

order to defeat a motion for summary judgment, elemental fairness compels an interpretation of the rule which places the same burden on the moving party.” *Hash*, 49 Wn. App. at 134-35. If a moving party fails to show that there are no genuine issues of material fact, then it is simply unnecessary for the nonmoving party to submit affidavits or other evidence in opposition. *Id.* at 132 (citations omitted).

Here, the Dunbars are the moving parties and also bear the burden of proof, yet they rely solely upon speculation for their assertion that Morillo was negligent in causing his own accident and that the fluid came from his motorcycle. The Dunbars failed to show that there were no genuine issues of material fact. It was not Nationwide’s burden to present evidence disproving Morillo’s negligence when the Dunbars failed to present any evidence supporting it.

Furthermore, the Dunbars improperly argue *res ipsa loquitor* as a matter of law. *Res ipsa loquitor* requires that (1) the occurrence producing the injury must be of a kind which ordinarily does not occur in the absence of negligence; (2) the injury must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the injury-causing occurrence must not be due to any contribution on the part of the plaintiff. *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 58, 785 P.2d 815 (1990). *Res ipsa loquitor* does not apply

where the accident might have resulted from any one of several causes. In fact, the **Dunbars** recognize other potential causes of Morillo's accident: "road hazard, another vehicle, defect in his motorcycle, etc." CP 90.

Res ipsa loquitor has no place in this case. Accidents ordinarily occur in the absence of negligence. See *Hardman v. Younkers*, 15 Wn.2d 483, 488, 131 P.2d 177 (1942) ("[o]rdinarily, the mere fact that an automobile accident has occurred is not of itself proof of negligence on the part of a driver."). "[E]veryone is entitled to his own guess" as to how an accident occurred, but a defendant cannot be "guessed into liability." *Greenwood*, 356 S.W.2d at 112 (negligence could not be inferred in one-car accident because of the myriad of potential causes of an accident). There is also the issue of comparative fault as to Mr. Dunbar, as he saw both the motorcycle leaning against the Jersey barrier and a dark streak in the roadway before losing control. See CP 81.

There is no evidence that Morillo's conduct fell below the standard of care, or that the fluid on the roadway was from his vehicle. A finding of duty and breach of duty in the Dunbars' favor as a matter of law is improper.

V. CONCLUSION

The trial court properly held that Morillo owed no duty to the Dunbars as a matter of law. Regardless of whether this case is decided on

the essential element of duty or proximate cause, the result is the same: the Dunbars were not foreseeable plaintiffs exposed to a foreseeable type of risk of harm resulting from Morillo's accident. This Court should affirm the trial court's order granting summary judgment in favor of Nationwide and dismissing the Dunbars' lawsuit.

Respectfully submitted this 2nd day of December, 2011.

LAW OFFICE OF
ANDREA HOLBURN BERNARDING



Stacia R. Hofmann, WSBA No. 36931

Attorneys for Respondent

Nationwide Insurance Company of America

Law Office of Andrea Holburn Bernarding

1730 Minor Avenue, Suite 1130

Seattle, WA 98101

P: 206-403-4800

F: 206-403-4801

E: hofmans@nationwide.com

COURT OF APPEALS
DIVISION II

DECLARATION OF SERVICE

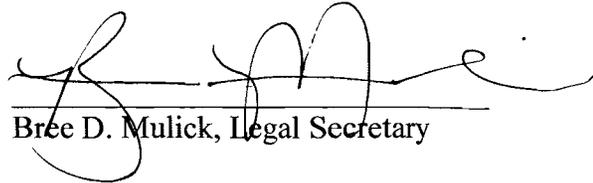
11 DEC -2 PM 4: 11

The undersigned declares under penalty of perjury under the law of
the State of Washington, that service of the foregoing pleading was made
upon each and every attorney of record herein via legal messenger:

STATE OF WASHINGTON
BY _____
DEPUTY

Michael David Myers
Ryan C. Nute
Myers & Company, PLLC
1530 Eastlake Avenue East
Seattle, Washington 98102

DATED this 2nd day of December, 2011, at Seattle, Washington.


Bree D. Mulick, Legal Secretary