

No. 43735-0-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

RAYNA MATTSON, individually,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENTS

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A. INTRODUCTION

This case involves an automobile accident on Interstate 5. This is the second time this case has come before this Court. This Court ruled in *Mattson v. American Petroleum Environmental Services, Inc.*, 155 Wn. App. 1024, 2010 WL 1453997, *review denied*, 169 Wn.2d 1019 (2010) (“*Mattson I*”) that fact issues remained for the trier of fact as to whether American Petroleum Environmental Services, Inc. (“APES”) and driver Bernd Stadtherr were negligent.

On remand, the jury was properly instructed and rendered an 11 to 1 verdict against the plaintiff Rayna Mattson in favor of APES and Stadtherr. Mattson filed extensive post-trial motions under CR 50(b) and CR 59 in which Mattson sought to relitigate issues already resolved by the trial court and this Court previously. The trial court properly rejected those baseless motions.

Mattson's lengthy brief contains a myriad of issues. She asserts these numerous issues in the vain hope that one of them might intrigue this Court. This Court can appropriately conclude that Mattson has had a fair trial and the jury simply did not agree with her. This Court should affirm the judgment on the jury's verdict.

B. ASSIGNMENTS OF ERROR

APES/Stadtherr acknowledge Mattson's assignments of error but believe the issues are more properly formulated as follows:

1. Where there is ample evidence supporting the jury's verdict, was the trial court correct in denying Mattson's post-trial motions that were calculated to have the trial court improperly substitute its decision for that of the jury?

2. Where this Court in *Mattson I* specifically remanded the case for trial on causation, and any prior statements by APES on causation were limited to summary judgment only, was the trial court correct in submitting causation to the jury?

3. Where Mattson was able to argue her theory of the case from the trial court's instructions on negligence and she was not entitled to a spoliation instruction, was the trial court correct in rejecting her post-trial motions as to alleged instructional error?

4. Was the trial court correct in rejecting Mattson's arguments that juror or counsel misconduct required a new trial, particularly where the evidence she proffered on juror misconduct inhered in the jury's verdict?

5. Given Mattson's lack of any specific substantive basis for judgment as a matter of law or a new trial, was the trial court correct in rejecting her amorphous allegation of cumulative error?

C. STATEMENT OF THE CASE¹

On July 21, 2003, Rayna Mattson drove her Ford Explorer SUV on the I-5 northbound ramp at 320th Avenue in Federal Way when she lost control of her vehicle, ran off the road, and rolled her vehicle several times. RP (4-2-12) at 900-05. CP 83, 354. Mattson alleged that the accident was caused by oil dropped on the roadway from a loose hose on an empty tanker truck driven by Stadtherr and owned by APES. CP 362. Mattson claimed a cervical strain or whiplash injury as a result of the accident. CP 357.

APES is in the business of transporting waste oil products from service stations and other businesses to a reprocessing plant where the oil is recycled for reuse. RP (3-29-12) at 622; RP (4-2-12) at 844-45, 858. CP 339-40, 383. Stadtherr is an experienced truck driver who has worked as a professional truck driver/sales representative for the company since 2003; he has been employed as a driver since 2001. RP (4-2-12) at 875-76. CP 339-40.

¹ Mattson has provided this Court a statement of the case that violates RAP 10.3(a)(5) by being argumentative rather than a fair recitation of the facts and procedure. Indeed, she uses 42 pages of her over length brief to reargue the facts presented at trial. *Nearly every page* of her statement of the case contains improper argument in violation of RAP 10.3(a)(5). Moreover, Mattson's repeated use of multiple fonts is contrary to the format requirements for a brief set forth in RAP 10.4(a).

On July 21, 2003, the day of the accident, Stadtherr started work between 1:00 p.m. and 2:00 p.m. RP (4-2-12) at 849. CP 340-41. He arrived at work 15-20 minutes before departing. RP (4-2-12) at 853. CP 341. He noted the exact time in the driving log he keeps in accordance with United States Department of Transportation regulations. RP (4-2-12) at 853. CP 341. On the day of the accident, he was driving an empty truck to Canada to pick up a load of used oil and return it to the reprocessing plant. RP (4-2-12) at 856-58. CP 344-45. By APES policy and by law, Stadtherr was required to conduct both a pre-trip and post-trip inspection of the truck to make sure the whole truck was in good working order. He performed the inspections. RP (4-2-12) at 854. CP 341-42.

The truck was a tanker truck-trailer combination. RP (4-2-12) at 792, 846-47. CP 345. The hoses on the back of the truck were stored lengthwise in a tube running the length of the tanker, and the ends of the hose were secured to the back of the truck using rubber straps with hooks, referred to as "tie-downs" or bungee cords. RP (3-29-12) at 720, 721; RP (4-2-12) at 792, 936. CP 393. The hose was secured to the tanker at four points using rubber straps secured by hooks. CP 343. The hose itself was nylon and had steel wiring running through the hose material. RP (4-2-12) at 838. CP 350-51.

Stadtherr inspected the tie-downs to make certain the hose ends were secure on the day of the accident. RP (4-2-12) at 936. CP 343. On his pre-trip checklist, he noted that the tie-downs were okay. *Id.* If the tie-down was fatigued, he would not have been able to detect fatigue with visual inspection. RP (3-29-12) at 732. CP 343. The visual inspection showed no problems with the tie-downs. *Id.*

After his pre-trip inspection, Stadtherr left for Canada on Interstate 5 to pick up a load of oil. RP (4-2-12) at 858, 879. CP 34. It is his normal practice to look in his rearview mirror every 15 to 20 seconds. CP 345. As he approached Federal Way on northbound I-5, four miles from the APES plant he had just left, Stadtherr noticed in his mirror that a hose was dragging on the ground behind him. RP (4-2-12) at 862. CP 345. He saw the hose end dragging near the trailer of his truck by the rear duals. RP (4-2-12) at 948. CP 345. He immediately crossed back across lane one, the on-ramp lane, and then pulled to the shoulder. RP (4-2-12) at 862. CP 345-46, 350.

Stadtherr inspected the truck and discovered that one of the tie-downs had ruptured causing one of the suction hoses to come out of the stow tube and drag behind the truck. RP (3-29-12) at 686; RP (4-2-12) at 792-93. CP 343. While he was pulled over on the shoulder, a Washington State trooper pulled up and informed him of Mattson's accident. RP (4-2-

12) at 866. CP 346. Stadtherr testified that he saw no oil on the roadway after the accident. RP (4-2-12) at 947. CP 346-47.

Mike Mazza, the principal stockholder and chief executive officer of APES, was called to the Mattson accident scene immediately after the accident. RP (3-29-12) at 621,623. CP 459, 461. Mazza examined the highway behind the truck and did not see any oil on the road surface. RP (4-2-12) at 792, 947. CP 462. Mazza did not observe any "oil spill" clean-up effort before the roadway reopened to traffic. *Id.* No Washington State Department of Transportation trucks came to the scene while Mazza was there, and no oil absorption material was placed on the road surface near the APES truck. RP (3-29-12) at 741; RP (4-2-12) at 792-93. *Id.* APES received no bill for any clean up. CP 462; RP 462-63.

Other than a flat tire, Stadtherr never encountered any other problems with his truck while driving. RP (4-2-12) at 883. CP 345. He never had a hose come loose before or since this incident. RP (4-2-12) at 883. CP 350. None of APES' thirteen trucks ever had a tie-down rupture and a hose come loose, except for this incident. RP (3-29-12) at 684. CP 461.

APES employs two levels of service for its trucks. CP 460. APES trucks are certified and inspected once per year by the Washington State Department of Transportation. CP 460. APES services the trucks with

Western Peterbilt in Fife, Washington every 6,000 miles. *Id.* The trailers are serviced every time the truck is serviced. *Id.*

Mattson filed the present action in the Pierce County Superior Court on June 28, 2006. CP 82. The case was assigned to the Honorable John R. Hickman. APES filed a motion for summary judgment on December 14, 2007, arguing that Mattson's case should be dismissed as a matter of law because there was no evidence APES was negligent or that any negligence was the proximate cause of the hose coming loose on the empty tanker truck. CP 465-72. Mattson opposed that motion. CP 501-22. Mattson filed a cross-motion for partial summary judgment arguing APES was the sole proximate cause of Mattson's injuries as a result of the July 21, 2003 automobile accident as a matter of law. CP 473-96. APES opposed that motion. CP 527-33.

The trial court granted Mattson's motion for summary judgment finding that APES was liable "based on common law negligence" and res ipsa loquitur. CP 570. The court also found "Plaintiff was not contributorily or comparatively negligent in the automobile collision . . . therefore this matter shall proceed to trial solely on the issue of the nature and extent of the damages proximately caused to the Plaintiff as a result of the Defendants' negligence." CP 570. The trial court also found no dispute in regards to the reasonableness of the medical costs, lost wages,

and other special damages alleged by Mattson, and awarded special damages to Mattson. CP 572-74.

The case was tried to a jury in February 2008. CP 688. The only issues for trial were Mattson's future medical expenses, future economic and noneconomic damages for alleged injuries caused by the accident. The jury returned a verdict in favor of Mattson in the amount of \$547,665.40. CP 579. A judgment on the verdict was entered on March 7, 2008, CP 578, from which APES timely appealed to this Court. CP 575.

In the first appeal, this Court reversed the trial court's summary judgment and remanded the case for trial. This Court concluded that the trial court erred in deciding negligence as a matter of law. *Mattson I* at *4. The Court also decided that the trial court erred in resolving liability as a matter of law based on res ipsa. *Id.* at *5.

Upon remand, the case was assigned to the Honorable Garold Johnson for trial. CP 729. Mattson moved for an order limiting the trial to liability only, CP 727, which the trial court granted. CP 727-29.

At trial, the jury was instructed on negligence and res ipsa loquitur. CP 2636-41. After a ten-day trial, the jury returned a verdict for APES/Stadtherr. CP 2656-73. The trial court entered a judgment on the jury's verdict on May 4, 2012. CP 2713. Thereafter, Mattson filed an

extensive CR 50(b)/CR 59 motion. CP 2716-62. The trial court denied that motion, CP 3277-78; RP (6-8-12) at 36-49, and this appeal followed.²

D. SUMMARY OF ARGUMENT

Mattson's appeal represents nothing more than an effort to have this Court substitute its judgment for that of the jury when the jury was properly instructed on the law. Mattson's complaints about juror or counsel misconduct are baseless.

In effect, Mattson renews her challenges made in her post-trial CR 50/59(a) motion for directed verdict or for a new trial. She reiterates her contentions below that a new trial is warranted because (1) no evidence supported the jury verdict, (2) that proximate cause of the accident had already been established, (3) the trial court erred in instructing the jury, (4) misconduct of defense counsel, misconduct of a juror and/or cumulative error warranted a new trial. Each of Mattson's contentions fail.

E. ARGUMENT

(1) Standard of Review for CR 50/59 Motions

² Mattson filed her notice of appeal late, and filed a motion in Division II asking the Court of Appeals to accept the late filing based on alleged confusion regarding the e-filing process in the Pierce County Superior Court LINX system. APES opposed the late filing. Commissioner Schmidt ruled permitting the late filing. APES filed a motion to modify, which a Division II panel denied. APES renews its objection that Mattson's notice of appeal was untimely.

Mattson cites the standard for consideration of CR 50 and CR 59 motions, but then glosses over the high burden on a party seeking to overturn a jury verdict. In assessing a CR 50 motion, a court must view the evidence and the inferences from that evidence in a light *most favorable to APES*, as the non-moving party. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Mattson must admit the truth of the evidence offered by APES and the inferences from such evidence. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 98, 882 P.2d 703 (1994). If there is any justifiable evidence or reasonable inference on which reasonable minds might reach conclusions consistent with the verdict, the jury's verdict stands. *Id.* This Court then reviews the decision de novo. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530–31, 70 P.3d 126 (2003).

An equally heavy burden faces Mattson on her new trial motion under CR 59(a). That motion is addressed to a trial court's discretion. A court exercising its discretion under CR 59(a) must determine that there is such a feeling of prejudice in the minds of the jury so as to have deprived a party of its right to a fair trial. *Aluminum Co. of America v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). This Court then reviews that decision for an abuse of discretion. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 81, 231 P.3d 1211 (2010).

The reason for these high burdens on a party filing post-trial motions rests in the public policy of Washington beginning with article I, § 22 of our constitution, which requires that the right to trial by jury be held inviolate. The jury has the constitutional role of finding facts. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). In deference to the key role of the jury, our courts, thus, strongly presume the jury's verdict is correct. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 654, 771 P.2d 711 (1989).

(2) Mattson's CR 50/59(a)(7) Challenge to the Jury Verdict For Lack of Evidence Fails Because Substantial Evidence Supported the Jury's Verdict

Relying on CR 50³ and CR 59(a)(7),⁴ Mattson contends that there is “no evidence” that supports the jury's verdict, and that the jury's verdict

³ CR 50(a)(1) provides for a judgment as a matter of law:

If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim ... that cannot under the controlling law be maintained without a favorable finding on that issue.

Subsection (b) of the same rule provides: “The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment.”

⁴ CR 59(a)(7) permits the trial court on motion of an aggrieved party to vacate a verdict and grant a new trial when there is no evidence or no reasonable inference from the evidence to justify the verdict, or the verdict is contrary to law.

in APES favor “was simply contrary to all competent evidence and is grounds for a new trial.” Br. of Appellant at 48, 54. That is not so.

This Court reviews the grant or denial of a motion for a new trial based on an evidentiary challenge under the same standard as a motion for judgment as a matter of law. *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 768, 260 P.3d 967 (2011), *review denied*, 173 Wn.2d 1029 (2012); *Hizey v. Carpenter*, 119 Wn.2d 251, 272, 830 P.2d 646 (1992). In reviewing a trial court’s decision to deny a motion for judgment as a matter of law, the appellate court applies the same standard as the trial court. *Id.* at 271 (quotation marks and citations omitted). A judgment as a matter of law is appropriate *only* when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party. *Id.* at 271-72. Substantial evidence is evidence that would convince an unprejudiced, thinking mind. *Id.* at 272. Accordingly, the inquiry on appeal is limited to whether the evidence presented was sufficient to sustain the jury’s verdict. *Id.* Denial of a motion for judgment as a matter of law is appropriate when it is clear that the evidence and reasonable inferences are sufficient to support the jury’s verdict. *Id.* The nonmoving party is given “the benefit of every favorable

inference which reasonably may have been drawn from the available evidence.” *Id.*

Mattson’s argument ignores the evidence favorable to APES. As the trial court noted on the record when denying Mattson’s motions for judgment as a matter of law and for a new trial, as to the issues of negligence and causation, the evidence presented at trial included testimony that the bungee cord strap had been attached properly, inspected properly, and the person performing those tasks had done so for many years. RP (6-8-12) at 37. A reasonable jury could conclude that the bungee cord strap was properly attached and properly inspected; thus, if the strap failed, it could have done so at no fault of APES because mechanical devices can fail. *Id.* See *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 793 n.16, 929 P.2d 1209 (1997) (mechanical devices and materials can wear out or break without negligence being involved).

As for any substance on the roadway, there was also evidence presented that there was a far greater quantity of material on the road than could have come from the empty hose that came loose from the empty APES truck. RP (6-8-12) at 38. There was also *conflicting evidence* about what was on the roadway. The Washington State trooper who responded to the accident scene testified that in her view the accident was caused by an oil slick on the roadway that was as big as one and a half to

two football fields long. CP 1578. An eyewitness, John Watchie, testified that the substance on the road had a strong smell like kerosene or diesel and there was “a lot of it.” CP 1282, 1286. APES’s witnesses testified that the APES truck and the hose in question were empty, any residue in the hose could not account for the large oil spill on the roadway which was near a commercial truck scale, the APES truck never carried kerosene or diesel fuel, and in fact it last carried wastewater. CP 1576; RP (3-29-12) at 723, 739. Weight and credibility determination were for the jury, which could reasonably conclude that the large oil slick on the road did not come from the APES truck. RP (6-8-13) at 38. Accordingly, because substantial evidence supported the jury verdict, the trial court did not err in denying Mattson’s motions for a directed verdict or for a new trial.

In the principal case on which Mattson relies, *Sommer v. Dep’t of Soc. & Health Servs.*, 104 Wn. App. 160, 15 P.3d 664, *review denied*, 144 Wn.2d 1007 (2001), there actually was *no evidence* in the record in a handicapped discrimination case to sustain the Department’s claim that it lacked notice of the plaintiff’s disability. *See also, Izett v. Walker*, 67 Wn.2d 903, 410 P.2d 802 (1966). In fact, there was evidence entirely to the contrary. That is plainly not the case here.

Admitting the truth of the evidence offered by APES and all reasonable inferences from that evidence, the jury's verdict was more than adequately supported.

(3) Mattson Is Not Entitled to Judgment As a Matter of Law On Negligence

Mattson additionally contends that since damages are not at issue and she is entitled to judgment as a matter of law on negligence, "the case need not be remanded and the prior judgment should be reinstated." Br. of Appellant at 52. But she is not entitled to judgment as a matter of law on negligence.

This Court rejected Mattson's argument that she is entitled to a finding of negligence as a matter of law in *Mattson I*. That was entirely proper. Negligence is almost invariably *a question of fact* for the jury. "[I]ssues of negligence and proximate cause are generally not susceptible to summary judgment." *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); *Owen v. Burlington Northern & Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).

Mattson also references *res ipsa loquitur* in her brief at 51, 85, but Mattson misconstrues that doctrine, apparently believing that *res ipsa loquitur* is a *question of law*. Whether to give such an instruction is a question of law. *Curtis v. Lein*, 169 Wn.2d 884, 889, 239 P.3d 1078

(2010); *Tinder*, 84 Wn. App. at 791. But whether its tenets are met and an inference of negligence can arise is a question of fact for the jury. *Id.* at 791-92; *Curtis*, 169 Wn.2d at 895. In *Tinder*, for example, the court held res ipsa was not established where an escalator stopped abruptly. 84 Wn. App. at 793-49.

Washington law generally mandates that negligence be proven; res ipsa is an exception to that principle, offering a permissive inference of negligence under peculiar and limited facts. The doctrine should be applied “sparingly” and only “in peculiar and exceptional cases.” *Tinder*, 84 Wn. App. at 792; *Curtis*, 169 Wn.2d at 889-90.

Res ipsa cannot be invoked from the mere fact that an injury occurred. *Tinder*, 84 Wn. App. at 792-93. This is consistent with this Court's determination in *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.3d 475 (1999) that the mere occurrence of an accident and an injury does not inescapably lead to the inference of negligence. Mattson had to prove her case by establishing the traditional elements of negligence – duty, breach, causation, and harm – or by res ipsa loquitur. The jury was instructed on those points, CP 36-43, and she lost. Moreover, the jury here was given the res ipsa instruction that Mattson proposed, CP 2614, 2641, and the jury simply disagreed with her contention that APES was liable on that basis. *Curtis*, 169 Wn.2d at 895

(jury is free to disregard or accept the truth of the inference of negligence that *res ipsa loquitur* provides).

As noted, APES also provided evidence at trial that it was not negligent: Stadtherr inspected the truck including the bungee securing the hose during his comprehensive pre-trip inspection, and Lewis testified that this conduct complied with Washington State Department of Transportation and federal regulations regarding pre-trip inspections of the truck and its equipment. RP (4-2-12) at 854, 930; RP (3-29-12) at 732. Just because Mazza testified that he is responsible and his driver is responsible for complying with federal regulations regarding inspection and equipment on the truck (those regarding “load” or “cargo” do not apply), RP (4-2-12) at 934; RP (3-29-12) at 707, when something like a bungee or a tire that appear in good condition fails in some manner during the trip, it does not equate with liability. *See Tinder*, 84 Wn. App. at 793 n.16 (mechanical devices and materials can wear out or break without negligence being involved).

In sum, this Court correctly discerned in *Mattson I* at *4 that there were issues of fact for trial on the alleged negligence of APES and Stadtherr. The trial court did not err in denying Mattson’s CR 50 motions for the same core reason: the negligence issue was for the jury.

(4) The Trial Court Properly Submitted Causation to the Jury On Remand

Mattson next contends that APES improperly changed its position regarding causation on remand and that such change in position violated the doctrines of res judicata, collateral estoppel, judicial estoppel, and equitable estoppel. Br. of Appellant at 54-64. This argument fails.⁵

Mattson misconstrues and misrepresents the record, stating that APES assumed an inconsistent position at the second trial after having earlier stipulated during the parties' cross-motions for summary judgment that oil from the loose hose on its truck caused Mattson to lose control of her car. The language upon which Mattson relies appears in APES' summary judgment motion and in APES response to Mattson's summary judgment motion. In each case, APES expressly limited its concession to *summary judgment only*. CP 466, 529. Mattson ignores the clear and express limitation regarding APES' concession.⁶ As this Court recognized in *Mattson I*,

⁵ Moreover, Mattson's claim of error here is harmless in any event. The jury determined that neither defendant was negligent. CP 2656. Thus, the jury did not reach the issue of causation. *Id.* Consequently, any alleged instructional error is harmless. *See, e.g., Jones v. Robert E. Bayley Constr. Co., Inc.*, 36 Wn. App. 357, 361-62, 674 P.2d 679, *overruled on other grounds*, 102 Wn.2d 1010, 688 P.2d 499 (1984) (error in causation instruction harmless where jury determined defendant was not negligent).

⁶ In its summary judgment motion APES stated: "*For purposes of this motion the court should assume that the hose on the truck dropped oil on the roadway and that the oil on the roadway was the proximate cause of Mattson's rollover accident.*" CP 466 (emphasis added). In response to Mattson's summary judgment motion, APES stated:

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.

Mattson I at *2 (emphasis added).

Here, APES made a limited concession of certain facts so as to narrow and focus the legal inquiry upon the dispositive threshold issue of whether APES had breached any duty. That was a proper narrowing of the issues for limited summary judgment purposes.⁷ Because APES’ concession was properly and expressly limited to the summary judgment motions only, Mattson’s assertion that such concession provides a prior inconsistent position fails. Similarly, in light of APES’ expressly limited concession, and Mattson’s notice thereof, Mattson’s assertion that APES’ prior representation was misleading, provided an unfair advantage, and that she relied on it also fail. Accordingly, because essential elements of the various doctrines that Mattson cites (*res judicata*, collateral estoppel,

“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 at 529.

⁷ See *City of Seattle v. State, Dep’t of Labor & Industries*, 136 Wn.2d 693, 697, 965 P.2d 619, 621 (1998) (summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial); *Davis v. West One*

judicial estoppel, and equitable estoppels) are not met, such doctrines do not apply here.

Mattson also relies on *King County Central Blood Bank v. United Biologic Corp.*, 1 Wn. App. 968, 465 P.2d 690 (1970), but that case holds only that where an appellant does not allege that there are any material facts left undecided by the summary judgment below, the facts before the trial court are verities on appeal. That unremarkable holding does not assist Mattson because this Court's remand for trial on liability in *Mattson I* included causation. In reversing the summary judgment and remanding for trial, this Court noted APES argued that reversal was warranted "because (1) questions of material fact remain as to whether [APES] 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 loquitor." See *Mattson I* at *1 (emphasis added). See also RP at 3 (quoting *Mattson I*). This Court held that it could not say as a matter of law that APES breached its duty of care and that such inquiry was for a jury. *Id.* at *4-5. Accordingly, APES was not precluded from arguing/challenging causation on remand.

(5) Mattson Fails to State a Basis for the Granting of Post-Trial Relief

Automotive Group, 140 Wn. App. 449, 456, 166 P.3d 807, 811 (2007), *review denied*, 163 Wn. 2d 1040 (2008) (purpose of summary judgment is to avoid a useless trial).

Mattson argues that a series of alleged errors were committed by the trial court in the conduct of the case, as well as defense counsel and juror misconduct as grounds for the award of a new trial. Br. of Appellant at 64-102. None of the contentions advanced by Mattson justify a new trial under CR 59(a) as they are baseless.

(a) This Court Properly Instructed the Jury on Negligence

Mattson contends in her brief at 65 that a new trial is required under CR 59(a)(8) because the jury was improperly instructed on the law. Mattson's argument focuses upon Instruction Number 16 and the failure to give a spoliation instruction.

(i) Instruction Number 16 Was a Correct Statement of the Law

Mattson's principal argument regarding alleged instructional error under CR 59(a)(8) is that Instruction Number 16 was an incorrect statement of the law, and that it was inconsistent with the trial court's res ipsa instruction, Instruction Number 12.⁸ Mattson is incorrect on both assertions.

⁸ Instruction Number 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);

Instruction Number 16 stated:

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.

CP 2645. This instruction is based on RCW 5.40.050 wherein our Legislature specifically provided that Washington no longer recognizes the doctrine of negligence per se. Violation of a statute or regulation is *an evidentiary issue only*.

Although Mattson focuses upon the second paragraph of the instruction, she assumes regulations were violated when the hose broke and some residual material spilled. She apparently thinks the jury had to believe her argument and her expert. They did not. She argued that this hose and the residual oil drops are "load" or "cargo." APES presented expert testimony that the hose and residual content in the hose on the empty tanker truck were not "load" or "cargo." RP (4-2-12) at 934. At Mattson's request, the trial court gave Instructions Numbers 15, 17, 18, 19 and 22. CP 1199-1201, 1203, 2644, 2646-48, 2651. Each of the regulations referenced in the instructions pertained to "load" or "cargo"

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

CP 2641.

and the jury was entitled to find that not a single one of the instructions addressed securing the empty hose to the truck with a bungee. Therefore, the second section of the instruction that Mattson complains of is, or could be under this evidence, completely irrelevant to the verdict.

Second, even looking at the second paragraph, Mattson mistakenly equates the violation of a federal regulation with negligence. But the regulations set forth in the instructions do not create a private right of action in federal law or amount to strict liability. Rather, by the terms of RCW 5.40.050, the violation of a regulation “may” be considered evidence of negligence. The jury did not have to agree, again making the second paragraph of the section irrelevant.

Third, Washington law recognizes that if circumstances beyond the control of the motor carrier caused a load to become dislodged, the motor carrier may be without fault, even if there is a statutory violation (a spill of cargo, for example). The trial court’s Instruction Number 16 relating to excuse of a violation of a statute or regulation because of a cause beyond the violator’s control is taken straight from WPI 60.03. The jury did not even have to find any violation of any of the regulations instructed upon for the reasons stated above: no “load” or “cargo” was spilled in violation of any statute.

However, even if the jury could have found a violation due to residual oil drops on the roadway being considered “cargo” or a “load,” the instruction was proper. Washington law has long recognized that the doctrine of negligence per se is inapplicable where the alleged violator’s conduct is excused due to factors beyond that violator’s control if ordinary care could not have guarded against such factors. In *Bissell v. Seattle Vancouver Motor Freight*, 25 Wn.2d 68, 168 P.2d 390 (1946), the plaintiff’s car collided with defendant’s truck. The plaintiff alleged the truck had no rear lights, a violation of law. Our Supreme Court upheld an instruction that advised the jury that if the defendant made a reasonable inspection of the truck and exercised due care to determine if the lights were functional, the truck owner would not be guilty of negligence despite the statute. The Court rejected the plaintiff’s argument that he was entitled to judgment as a matter of law:

We may say generally that we are unable to understand how the jury could have arrived at any other verdict than it did. In the first place, the jury could have found, under the facts in this case and the instructions, that a reasonable inspection of the truck and trailer was made, and that due care was exercised to see that the trailer lights were burning. In addition, they could reasonably have inferred that the trailer lights were in fact burning until the collision, that the force of the collision disconnected one of the wires in the trailer light cable, causing the lights of the trailer to go out. If they did so find *in either case*, then respondent would not be guilty of negligence.

(emphasis added.) *Id.* at 84. The Court affirmed the judgment on the defense verdict. *See also, Wood v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 45 Wn.2d 601, 608-09, 277 P.2d 345 (1955) (citing *Brotherton v. Day & Night Fuel Co.*, 192 Wash. 362, 73 P.2d 788 (1937), for the proposition that defendant driver's violation of statute, which required trucks to display lighted tail lights after dark, was not negligence per se where evidence indicated driver had inspected the lights and found them working shortly before the accident).

In this case, there was ample evidence of due care exercised by APES with respect to the inspection of the truck and its equipment to support the excuse portion of Instruction Number 16. Inspection in compliance of federal or state regulations of working tail lights, a bungee, a tire in good condition, followed by a failure of tail lights, or a bungee or tire "may" excuse (as to a third party) the statutory violation i.e., of a spill on the road. CP 2645. RP (4-2-12) at 934, 936.

There was testimony from APES' well-qualified expert, Donald Lewis, that oil in an empty hose was not "cargo" to which the regulations apply. RP (4-2-12) at 934-35; RP (4-3-12) at 1032. He also testified that a regulation may not be violated merely because a problem ensues on the

road, using the example of a tire. RP (4-2-12) at 937-38; RP (4-3-12) at 1027-30.⁹

In sum, Mattson cannot point to anything *in law* that makes for strict liability to a third party on the part of a motor carrier for literally anything that occurs on the road. The trial court was correct in adding the phrase at issue to Instruction Number 16.

Additionally, Mattson's contention regarding an alleged conflict between Instructions Numbers 12 and 16 is baseless. It is certainly true that where instructions to the jury are inconsistent or contradictory on a key issue, their use may be prejudicial error. *Hall v. Corporation of Catholic Archbishop of Seattle*, 80 Wn.2d 797, 803-04, 498 P.2d 844 (1972), but Instruction Numbers 12 and 16 were entirely consistent.

Instruction Number 12, proposed by Mattson, instructed the jury on *res ipsa*. That doctrine is not a separate form of negligence, it is merely a method of proof. *Tinker*, 84 Wn. App. at 789. To allow the inference under *res ipsa*, a plaintiff must demonstrate: 1) the occurrence producing the injury was of a kind that ordinarily does not occur in the absence of negligence; 2) the injury was caused by an agency or instrumentality

⁹ Responding to a hypothetical set of facts posed to him, Lewis explained that if a truck tire blew out leaving debris on the roadway, and such debris caused another vehicle to have an accident, such event would not result in a violation of a federal trucking regulation as long as the driver had performed a proper pre-trip inspection of the tire and found it in good working order. *See* RP (4-2-12) at 937-38.

within the exclusive control of the defendant; and 3) the injury-causing occurrence was not due to any contribution by the injured party. *Id.* at 792. If the jury does not so find, the inference is inapplicable and a plaintiff like Mattson is then put to her proof as to the traditional elements of negligence. *Id.* at 795-98.¹⁰

In effect, Instruction Numbers 12 and 16 described alternate means by which a jury could consider and decide if negligence was present. The jury concluded APES was not negligent. The instructions were not contradictory. Moreover, a jury could find that Mattson failed to establish the *res ipsa* elements *and* the traditional elements of negligence. Mattson *assumes* that the accident was caused by APES' negligence in using a bungee tie-down, just as she assumes violation of regulations pertaining to "load" and to "cargo." The jury had to make such a determination, not Mattson or her attorneys.

¹⁰ The court should note the difference between the WPI *res ipsa* instruction paragraph 2 (WPI 22.01) quoted in *Tinker* and the one proposed by Mattson and given over APES objection. Instruction Number 12 does not say in paragraph 2 "the injury was caused by..." as does WPI 22.01(2). Rather, "the collision was caused by..." is the term Mattson used. The collision is not "the bungee" or the APES hose, it is the one-car rollover accident, and under the evidence that accident was caused by a 600 foot long diesel oil spill that both Mattson's and APES' evidence clearly indicated could not have come from the APES hose or tank truck, and thus could not have been within the exclusive control of APES. *See* CP 1282, 1286, 1578; RP (3-29-12) at 723, 739; RP (4-2-12) at 792, 856. The jury was entitled to so find.

Mattson additionally contends that the trial court erred in rejecting her proposed instructions numbered 14 and 3A. Br. of Appellant at 73-79. That is not so.

Refusal to give a particular instruction is an abuse of discretion only if the decision was manifestly unreasonable, or the court's discretion was exercised on untenable grounds, or for untenable reasons. *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 44-45, 244 P.3d 32 (2010), *affirmed*, 174 Wn.2d 851 (2012). If a party's theory of the case can be argued under the instructions given as a whole, then a trial court's refusal to give a requested instruction is not reversible error. *Id.* at 45. Trial court has considerable discretion in deciding how jury instructions will be worded. *Hizey*, 119 Wn.2d at 268.

Mattson's proposed Instruction Number 14 stated: "Defendants American Petroleum Environmental 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." CP 1196. But there was no evidence or assertion that APES delegated or sought to delegate any of its duties to another. Because there was no basis for giving this instruction, the trial court did not err in refusing it.

Mattson's proposed instruction 3A stated:

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. The trial court gave only the first page of the instruction indicating that plaintiff was not in any way at fault. CP 2634 (Instruction No. 5). RP (4-3-12) at 1060. But the trial court also instructed on both negligence and res ipsa, permitting Mattson to argue her theory of the case. CP 2636 (Instruction No. 7), 2641 (Instruction No. 12). Accordingly, the trial court's refusal to give the latter part of Mattson's proposed instruction 3A was not error. *Hizey*, 119 Wn.2d at 268; *Anfinson*, 159 Wn. App. at 45.

The instructions here informed the jury of the applicable law, are not misleading and enabled the parties to argue their theories of the case. *Adcox v. Children's Orthopedic Hospital & Medical Ctr.*, 123 Wn.2d 15, 36, 864 P.2d 921 (1993). The instructions were, therefore, proper.

(ii) Mattson Was Not Entitled to a Spoliation Instruction

In her brief at 79, Mattson argues that the trial court was obliged to give a spoliation instruction because APES should have kept the broken hose and its inspection logs for the three years it took her to decide to

pursue a lawsuit. She was not entitled to such an instruction, as the trial court properly determined.

Mattson does not discuss the standard for the giving of a spoliation instruction. In *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996), the Court of Appeals indicated that a spoliation instruction was merited only if the evidence is important to the case and the party deliberately destroyed the evidence without substantial justification. In that case, the court refused to impose a sanction on the defendant who got rid of a car two years after an auto accident. He had no duty to preserve the car. *See also, Marshall*, 94 Wn. App. at, 381-82 (no spoliation sanction according to this Court, where fitness club continued to use machine on which plaintiff was injured until it was returned to the manufacturer for replacement; plaintiff made no request to preserve the machine until 4 years after the accident).

Even the case cited by Mattson for the proposition that a defendant has a duty to preserve evidence, *Homeworks Construction, Inc. v. Wells*, 133 Wn. App. 892, 138 P.3d 654 (2006), does not support her contention. There, this Court *rejected* a spoliation sanction because Homeworks had no duty to preserve certain synthetic stucco on a house that was the subject of a claim.

In this case, Mattson cannot point to any duty on APES' part to preserve the hose or the log book containing inspections and related documents for the three years it took her to decide she had a claim. In fact, APES adduced evidence that federal motor carrier regulations only require APES to maintain the logs for a period of six months. RP (3-29-12) at 650. It strains credulity for Mattson to argue that APES, who had no notice that she intended to file suit for nearly three years after the accident, was required to preserve broken truck parts or its log books past the federal requirements. Her position is plainly contrary to the spoliation cases cited above.

As for asking when Mattson hired her attorneys, br. of appellant at 94, this question related to a date, and not the "circumstances" of hiring her attorneys. *See* RP (4-2-12) at 909-10, 918. Regardless, the trial court's order on motions in limine did not prohibit the question. CP 1459. RP (4-2-12) at 918-19. The question was asked, an objection made by counsel, and the court overruled the objection. Only then did Mattson answer the question. RP (4-2-12) at 909-10. This was not misconduct by APES counsel. As for the court allowing the answer, it was perfectly appropriate that the jury know that plaintiff was contemplating litigation during the time within which APES had to, and did, retain its paperwork for the subject trip, yet no request to APES to retain evidence was ever

made by Mattson, as Mazza testified. RP (3-29-12) at 750-51. The fact that the trial court allowed the answer in the presence of the jury, before hearing it outside the jury's presence, is immaterial. Spoliation did not occur here.

(b) APES' Counsel Did Not Engage in Misconduct¹¹

Mattson further claims that this Court should grant a new trial under CR 59(a)(2) for misconduct of counsel. Br. of Appellant at 85. The trial court was fully aware of how the case was tried and how the conduct of counsel was perceived by the jury and rejected Mattson's request below. The case was hard fought, but there is no basis for a new trial.

First, it is not clear that Mattson preserved any claimed error here. She effectively *concedes* she did not always object to the alleged "misconduct." Br. of Appellant at 88. More critically, she apparently did not object to questions or closing argument about which she now complains nor did she seek a mistrial. *Id.* at 85-96; RP 1189-90. She was *obligated* to object. *Sommer*, 104 Wn. App. at 171. The only exception to

¹¹ It is truly incredible that Mattson contends that APES' counsel engaged in misconduct. This is something of the old adage of "the pot calling the kettle black." Mattson's counsel was exceedingly aggressive during trial. During Mattson's counsel Benjamin Barcus' closing argument, in which he went well over his time limit and ignored repeated warnings from the court, APES' trial counsel William O'Brien addressed the court, asking the court to put an end to his overlength argument. In response, Barcus turned on O'Brien and very angrily addressed counsel, not the court. This resulted in the trial court admonishing Barcus. Mattson's counsel even sought to browbeat the jurors in the jury room post-trial with Mattson in tears imploring the jurors to change their verdict. CP 3262-63.

that rule is if the misconduct is so flagrant that an objection or curative instruction would not have remedied the prejudice. *Id.*

More troubling yet is Mattson's willingness to distort the record. Mattson asserts in her brief at 91 that the trial court admonished APES' counsel for misconduct, *omitting the fact that the court also admonished Mattson's own counsel as well.* See RP 707. This case was hard fought on both sides but the trial court kept a firm rein on both sides. *Id.*

In *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 998 P.2d 856 (2000), the Supreme Court articulated the standard for misconduct of counsel as a grounds for a new trial, stating that a party claiming misconduct of counsel must demonstrate that actual misconduct (as opposed to aggressive advocacy) occurred, and that such misconduct is prejudicial on the basis of the whole record. *Id.* at 539. The Court also indicated that any prejudicial conduct must not be "curable" by objection or an instruction to the jury. *Id.* The Court there *rejected* an argument of misconduct of counsel in closing arguments. *Id.* The Supreme Court's decision in *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012), also does not help Mattson. There, the Supreme Court upheld a trial court decision to grant a new trial where the misconduct was pervasive. Particularly problematic was counsel's effort to put evidence not admitted before the jury. *Id.* at 223-24.

Here, Mattson's argument on misconduct of counsel fails. At most, APES' counsel, like Mattson's, engaged in aggressive advocacy. Mattson failed to preserve any alleged error by failing to object in many instances (particularly in closing), failing to seek a curative instruction, or failing to move for a mistrial. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 93-94, 231 P.3d 1211 (2010) (this Court rejects counsel misconduct argument). No showing of prejudice has been made; Mattson has not shown that any alleged misconduct materially affected her substantial rights.

Moreover, *nothing* done by APES' trial counsel evidences prejudicial conduct, reference to something not supported by the record, or the conveying of an impression to the jury regarding the evidence that was expressed by the court outside the jury's presence.

Mattson also claims APES allegedly violated a pretrial order about blaming "unnamed" third parties for the oil spill. Br. of Appellant at 93. This misrepresents what the text of the order on the motion in limine actually stated. CP 1460. The text of the order says "named" third parties because APES defense is, and was, that the football field-size spill of oil on the roadway did not and could not have come from its empty hose. Therefore, logically, somehow, through someone, the oil came to be on the roadway. APES could not and did not put a "name" to any third party

at fault or any person or entity. APES properly proved and argued that if it did not and could not come from the APES broken hose, then it had to come from elsewhere. RP 1039-52, 1192-94. In any case, this entire subject is also irrelevant when the jury found no negligence on the part of APES in having the hose come loose, whatever substance may have come from the hose.

Mattson also asserts APES “blamed” her for not suing for three years. Br. of Appellant at 94. This is not true. The issue of how long Mattson waited to put APES on notice regarding the possibility of a claim relates legitimately to the spoliation issue. Mattson’s stretched a 3-4 day trial into two weeks by repeatedly going over and over the same evidence, day after day, that APES had “destroyed” its log book with inspection records, when APES did have them for up to two years post-accident and HAD to keep them for six months following the subject trip.

Much of this obviously comes down to two different views. In her CR 50/59 motion brief, Mattson stated in bold type:

Defense Counsel improperly went beyond the available defenses of explanation provided under Instruction 12 or 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.

CP 2753. APES did not deny that some small amount of drops or spray of oil and/or oil and waste water got on the roadway (at some location and in some lane of travel), but denied that a large oil slick of diesel-like oil (observed by Mattson's witness Watchie) did or could have come from APES' empty hose. RP (4-4-12) at 1194.

The trial court was in the best position to assess whether counsel's conduct so prejudiced the jurors' minds as to deprive Mattson of a fair trial. *Collins*, 155 Wn. App. at 93-94. There was no prejudice here. There was no misconduct sufficient to warrant a new trial. RP (6-8-12) at 48.¹² The trial court is in the best position to evaluate the impact of any misconduct by counsel. *Kuhn v. Schnall*, 155 Wn. App. 560, 577, 228 P.3d 828, *review denied*, 169 Wn.2d 1024 (2010). Moreover, Mattson's failure in some instances to object, her failure to seek a curative instruction, and her failure to seek a mistrial undercut her allegations of prejudice.¹³

(c) There Was No Juror Misconduct Here

¹² The trial court described APES' counsel's conduct as at times "colorful," and Mattson's counsel's conduct as "aggressive" and "emotional." RP (6-8-12) at 45. The trial court observed that both counsel violated the trial court's directive against speaking objections, but found no sanctionable misconduct by either counsel and no basis for a new trial. *Id.* at 46-48.

¹³ Any alleged misconduct was not so "flagrant" that even if it were misconduct, it was not corrected by the sustaining of objections, or could not have been cured by an appropriate jury instruction.

Mattson further claims that juror misconduct supports an award of a new trial under CR 59(a)(1). Br. of Appellant at 96. In support, she provides the declaration of Matthew Besteman, the one juror who did not agree with the 11 other jurors that APES was not negligent. CP 3192-99; RP 1222-24. This Court reviews a trial court's grant or denial of a motion for a new trial based on juror misconduct for abuse of discretion.¹⁴ No abuse of discretion was present here.

Further, a party may not, in the guise of claiming juror misconduct, seek to introduce evidence regarding jury deliberations. Such evidence inheres in the verdict and is inadmissible. *Gardner v. Malone*, 60 Wn.2d 836, 840-41, 376 P.2d 651 (1962). The Supreme Court there defined the circumstances in which jurors' actions inhere in the verdict. "One test is whether the facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon him Another test is whether that to which the juror testifies can be rebutted by other testimony without probing a juror's mental processes." *Id.* at 841. The Court has also stated:

¹⁴ *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 757, 260 P.3d 967 (2011), *review denied*, 173 Wn.2d 1029 (2012). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.* at 758; *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.* (quotation marks and citations omitted). Issues relating to alleged juror misconduct are left to the trial court's discretion as that court is best able to discern if a juror's actions prejudiced the jury deliberations and resulting verdict. *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967). See also, *Breckenridge v. Valley General Hospital*, 150 Wn.2d 197, 206-07, 75 P.3d 944 (2003) (Court holds that declaration from juror discussing other juror's statements about his wife's emergency room experiences as a factor in jury deliberations inhere in the verdict).

Here, Besteman complains that it appeared most of the jury panel had their minds made up upon entering the jury room. CP 3194. Besteman's declaration also stated that Juror Number 10 explained that based on his experience with OSHA standards and the Washington State Patrol's inadequate investigation, Mattson had not proven that APES was negligent. CP 3194. Under *Cox* and *Breckenridge*, Besteman's affidavit was *inadmissible* because it addressed matters that inhere in the jury's verdict.

Even if the affidavit were admissible, Mattson has failed to establish juror misconduct. At most, the affidavit addresses the procedures of jury deliberation and the fact that Juror Number 10 brought

his experiences as an OSHA investigator to bear on the issues before the jury. Neither was misconduct. *McCoy*, 163 Wn. App. at 767 (juror's comment during deliberation relaying her past experience and explaining her individual thought processes and reasons for weighing the evidence as she did inhere in the verdict and provide no basis for challenging that verdict).

Besteman's affidavit *nowhere* states that Juror Number 10 made any statements about his association with OSHA *before* the jury voted. CP 3192-94. It would appear that his statements were made in connection with the State Patrol's evidence gathering at the scene. But if the jury concluded that APES' truck did not spill oil on the roadway, any statement by Juror Number 10 was at most surplusage or harmless error as the jury had essentially already determined APES was not negligent.

Besteman's declaration was also disingenuous. Besteman asserted that he recalled two lengthy portions of the court's instructions verbatim; he neglected to point out how many of the jurors in the first vote found that there was no negligence on the part of APES; he stated only 4 or 5 jurors said anything right after the initial vote and does not mention there was another vote in which any juror was persuaded by another - i.e., by something Juror Number 10 allegedly said, for example; he allegedly tried to engage the group in a discussion and says it lasted only a brief time. CP

3192-94. As for the hearsay attributed to Juror Number 10, there are no quotes. It is unclear if he was talking about the investigation being inadequate to prove the oil came from the truck – a matter that goes to causation which is irrelevant as the jury found no negligence, whether the oil came from the truck or not. Moreover, Besteman was a disgruntled minority juror who disagreed with all 11 of his fellow jurors. CP 3192-94; RP 1222-24.

This Court's *McCoy* decision bears directly on this issue. There, the Court found no juror misconduct in the face of allegations by the plaintiffs that the jury procedures were improper and one juror spoke of her problems with the County on permitting, and another spoke of his experience with clay pipes. 163 Wn. App. at 767-68. The Court noted that the jurors did not withhold their past experiences during voir dire. *Id.* at 764. This Court reversed a trial court award of a new trial based on juror misconduct. *Id.* at 765.

Courts should not inquire into the internal process by which a jury reaches its verdict. *Id.* at 765. The Besteman affidavit indicates that the jurors voted 11-1 to find no negligence. The fact that other jurors were not receptive to Besteman's viewpoint does not support misconduct.

As for the statements of Juror Number 10, jurors come to a jury with real life experiences and their discussion of such experiences in

deliberations is not misconduct. As our Supreme Court noted in *Breckenridge*, jurors may rely on their personal life experiences to evaluate the evidence presented at trial. There, a juror related his wife's experiences with migraines to his fellow jurors in a case in which the plaintiff experienced migraine headaches. The Court found no misconduct. 150 Wn.2d at 199. Similarly, in *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 274, 796 P.2d 737 (1990), *review denied*, 116 Wn.2d 1014 (1991), the Court of Appeals concluded that a juror, who had some medical background and offered her opinion to her fellow jurors that the plaintiff's mother's flu history explained plaintiff's birth defects, did not engage in misconduct. *See also, Chiappetta v. Bahr*, 111 Wn. App. 536, 543, 46 P.3d 797, *review denied*, 147 Wn.2d 1018 (2002) (juror's personal experiences with back injuries not misconduct).

Before a court can overturn a verdict based on juror misconduct, a party must make a strong, affirmative showing of misconduct "to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994), *cert. denied*, 536 U.S. 943 (2002); *Breckenridge*, 150 Wn.2d at 203.

Mattson did not make such a necessary showing here. Even if Besteman's affidavit regarding Juror Number 10's statements is true, Juror

Number 10 did nothing more than bring his life experiences to bear on the evidence. That was not misconduct. *See Breckenridge*, 150 Wn.2d at 199.

For the same reasons, Mattson's contention that Juror Number 10 introduced extrinsic evidence into the jury deliberations thereby requiring a new trial also fails. *See Br. of Appellant* at 99. While it is true that the jury's consideration of "novel or extrinsic evidence" is misconduct and can be grounds for a new trial, *see Balisok*, 123 Wn.2d at 118, "[n]ovel or extrinsic evidence is defined as information that is *outside all the evidence* admitted at trial, either orally or by document." *Id.* (adding italics) (quoting *Richards*, 59 Wn. App. at 270). As noted, Juror Number 10's alleged comments merely related his life experiences and thought processes in reaching his conclusion that Mattson had failed to meet her burden of proving APES was negligent. CP 3194. There was no introduction of extrinsic evidence warranting a new trial. *See Breckenridge*, 150 Wn.2d at 199.

Also, Juror Number 10's alleged mention of his past experience with OSHA standards was purportedly relayed in the context of confirming the inadequacy of the Washington State Patrol's investigation of the accident. CP 3194. Such comments were not outside the evidence. APES argued at trial that the accident investigation was inadequate, and

the evidence supported that contention. RP 1191, 1201; CP 1574 (no measurements taken at accident scene). Juror Number 10's alleged comments merely reflected that his life experience comported with the evidence presented on the matter and revealed his thought processes in reaching his conclusion. There is no indication that he applied a different legal standard or introduced novel evidence into the deliberations.

Mattson further contends that because Juror Number 10 failed to disclose his prior employment as an OSHA investigator during voir dire and later interjected that information into the jury deliberations, a new trial is warranted under *State v. Briggs*, 55 Wn. App. 44, 776 P.2d 1347 (1989). *See Br. of Appellant* at 101-02. That is not so.

In *Briggs*, Division I found misconduct requiring a new trial after a juror related to fellow jurors his personal experience of learning to control his stutter-like speech disorder. In *Briggs*, the defendant suffered from a profound stutter, but none of the victims of a string of robberies, assaults, and attempted rapes reported that their assailant had stuttered. The central issue in the case was whether a stutterer could control his speech impediment. Prospective jurors were asked during voir dire whether they had any experience with speech disorders. The juror in question had not disclosed his own speech impediment. On appeal, Division I found prejudicial misconduct in the juror's withholding of material information

during voir dire and in his sharing of his highly specialized knowledge with the jury on a topic addressed by expert witness testimony during trial. *See Briggs*, 55 Wn. App. at 58.

This case is distinct from *Briggs* in several respects, particularly in regard to the *Briggs* juror's material withholding of his personal expertise despite direct inquiries by counsel on voir dire. Here, there was no similar willful failure to disclose material information in response to voir dire inquiries. Here, the appropriate question was never asked.

While a juror's failure to speak during voir dire regarding a material fact can amount to juror misconduct, to obtain a new trial in such a situation the party asserting juror misconduct "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.'" *In re Detention of Broten*, 130 Wn. App. 326, 337, 122 P.3d 942 (2005), *review denied*, 158 Wn.2d 1010 (2006) (adding italics) (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553, 556, 104 S. Ct. 845, 78 L.Ed.2d 663 (1984)).

Mattson cannot establish the first prong of the required test because Juror Number 10 *was never asked the appropriate question to reveal such background*. Mattson asserts that Juror Number 10 had multiple opportunities to disclose his alleged employment background as

an OSHA investigator, but none of the questions she cites shows that Juror Number 10 failed to honestly answer any question put to him.

Mattson notes that (1) the juror questionnaires asked about employment history in listed fields including “law enforcement,” (2) APES’ counsel asked the potential jurors if anyone had investigation experience, (3) Mattson’s counsel asked Juror Number 10 if he had “any concerns” about anything discussed in voir dire, and (4) the trial court and counsel asked the jurors if there was anyone who would not follow the law as instructed by the court. *See* Br. of Appellant at 102-03; CP 38; RP 300, 365-68, 421. *None* of these inquiries obliged or suggested that Juror Number 10 should reveal his past employment experience as an OSHA investigator. The questionnaire’s inquiry about “law enforcement” clearly asked if any juror had been *a police officer*. CP 38 [sealed].¹⁵ APES’ counsel’s question to potential jurors was actually: “Any of the jurors have any investigative experience as a private investigator, as a member of law enforcement, investigating a potential crime or an accident, anything of that nature?” RP 365-66. As asked, that question did not suggest that Juror Number 10’s past experience as an OSHA investigator need be

¹⁵ The colloquial understanding of law enforcement usually means a sworn officer.

revealed. The same is true for plaintiff's counsel's inquiry whether Juror Number 10 had "any concerns" about matters discussed in voir dire. RP 421. Finally, there is no indication that Juror number 10 failed to follow the law as instructed by the court. As discussed above, Juror Number 10 merely divulged that his decision on the verdict comported with his life experience.

Mattson has not met her burden of proving that Juror Number 10 failed to answer honestly a material question put to him in voir dire. At most, she seems to suggest that Juror Number 10 should have revealed his past OSHA investigation experience in any event because it is a matter that her counsel would like to have known about. If that is the case, counsel should have so inquired. There is simply no showing that Juror Number 10 either dishonestly or unfairly withheld material information at voir dire.¹⁶

Finally, as this Court noted in *McCoy*, 163 Wn. App. at 759, the trial court was in the best position to determine if any alleged juror misconduct affected the verdict. Not only was there no misconduct here

¹⁶ Mattson must prove that Juror Number 10 gave a dishonest answer at voir dire. As noted in *Brotten*, "[t]o invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *Brotten*, 130 Wn. App. at 337 n.4 (quoting *McDonough*, 464 U.S. at 555).

under the case law, any statements by Juror Number 10 regarding OSHA investigations did not prejudice the jury's general sense of the case.¹⁷ They simply did not believe Mattson established her case.

(d) Lacking any Specific Error, Mattson Is Not Entitled to a New Trial for "Cumulative Errors"

Lacking legitimate specific grounds under CR 59(a), Mattson asserts that she is entitled to a new trial under CR 59(a)(9), the catch-all provision of the rule, alleging that "substantial justice has not been done," based on the accumulation of trial errors. Br. of Appellant at 102; CR 59(a)(9). This argument fails.

The cumulative error doctrine applies when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. *In re Morris*, 176 Wn.2d 157, 172, 288 P.3d 1140 (2012); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). But where there are no errors, or the alleged errors had little or no effect on the outcome at trial, no new trial is warranted. *Id.* For the reasons discussed in the previous sections, there are no errors to accumulate that would justify a new trial.

¹⁷ See, e.g., *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 265, 744 P.2d 605 (1987) (Supreme Court found juror engaged in misconduct by committing outside research on defendant's finances but upheld trial court decision that jury was not prejudiced by same).

Further, “granting new trials under CR 59(a)(9) for ‘lack of substantial justice’ should be rare.” *McCoy*, 163 Wn. App. at 769. Overturning a jury verdict is appropriate only when the verdict is clearly unsupported by substantial evidence.¹⁸ *Id.* (quotation marks and citations omitted). As discussed in section (2), the jury’s verdict is supported by substantial evidence.

Mattson cites *Storey v. Storey*, 21 Wn. App. 370, 585 P.2d 183 (1978), *review denied*, 91 Wn.2d 1017 (1979), and *Snyder v. Sotta*, 3 Wn. App. 190, 473 P.2d 213, *review denied*, 78 Wn.2d 995 (1970), but neither case helps her. In *Storey*, the trial court granted a new trial based on two witnesses’ continuing unresponsive answers and volunteered information following admonitions that resulted in incurable prejudice. *See Storey*, 21 Wn. App. at 372-74. No similar circumstance is present here. In *Snyder*, the trial court granted a new trial based in part on particular instances of defense counsel’s misconduct. *See Snyder*, 3 Wn. App. at 193-95. But, as discussed above, there was no misconduct warranting a new trial in this

¹⁸ As noted, this Court reviews whether substantial evidence supports the verdict. *McCoy*, 163 Wn. App. at 769. Such a challenge to the verdict admits the truth of the opponent’s evidence and all inferences which can reasonably be drawn from it. *Id.* This Court interprets the evidence against the party seeking a new trial and in a light most favorable to the party who prevailed. *Id.* The appellate court defers to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence. *Id.*

case.¹⁹ More to the point, both *Storey* and *Snyder* acknowledge that the trial court is in the best position to evaluate the impact of any alleged impropriety in the proceedings and thus is to be accorded “the greatest deference” regarding its decision on whether to grant a new trial. *See Snyder*, 3 Wn. App. at 198; *Storey*, 21 Wn. App. at 377. Mattson offers no convincing basis for abandoning that deference.

Mattson’s cumulative error argument is nothing more than a “Hail Mary pass” in the hopes of finding some basis on which to prevail. Her argument is groundless.

* * * * *

In sum, Mattson’s multiple allegations of error allegedly justifying post-trial relief are baseless and cannot form the basis for a new trial.

F. CONCLUSION

The jury was properly instructed by the trial court on the law and it exonerated APES and Stadtherr from liability. Mattson’s arguments for a new trial or judgment as a matter of law are baseless, all too often repeating contentions rejected by this Court in *Mattson I*. Upon proper

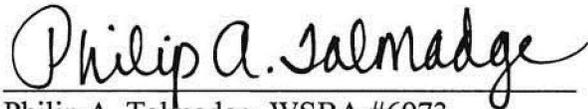
¹⁹ A new trial may be granted based on the prejudicial misconduct of counsel if the conduct complained of constitutes misconduct, not mere aggressive advocacy, and the misconduct is prejudicial in the context of the entire record. *Kuhn v. Schnall*, 155 Wn. App. 560, 576, 228 P.3d 828, *review denied*, 169 Wn.2d 1024 (2010). The misconduct must have been properly objected to by the movant and the must not have been cured by court instructions. *Id.* at 576-77. A mistrial should be granted only when nothing the trial court could have said or done would have remedied the harm caused by the misconduct.

instructions, the jury came to a result that Mattson did not like, but that result was amply supported by the evidence. The jury's verdict should stand.

This Court should affirm the judgment on the jury's verdict. Costs on appeal should be awarded to respondents APES/Stadtherr.

DATED this 23d day of May, 2013.

Respectfully submitted,



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Id. at 577. The court was in the best position to evaluate the impact of counsel's misconduct. *Id.*

APPENDIX



SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

FILED
APR 11 11

APR - 4 2012

<p>RAYNA MATTSON, individually, Plaintiff, vs. AMERICAN PETROLEUM ENVIRONMENTAL SERVICES INC., a Washington Corporation; and BERND STADTHERR, individually, and the marital community comprised thereof. Defendants.</p>	<p>NO. 06-2-09015-8 <i>[Signature]</i> VERDICT FORM</p>
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We, the jury, answer the questions submitted by the court as follows:

QUESTION #1: Were either of the Defendants negligent?
(Answer "YES" or "NO")

ANSWER: NO

(INSTRUCTION: If you answered "NO" to Question 1, sign this verdict form. If you answered "YES" to Question 1, answer Question 2)

QUESTION #2: Was Defendant(s)' negligence a proximate cause of the Plaintiff's collision?
(Answer "YES" or "NO")

ANSWER: _____

(INSTRUCTION: Sign this verdict form and notify the Judicial Assistant.)

DATED THIS 4 day of April, 2012.

[Signature]
Presiding Juror

1 was an innocent victim here of the tort-feasors. And
2 that the defendants' own expert, along with our expert,
3 admitted that as a federal motor carrier there was a
4 nondelegable duty as to safety. They failed to do that.
5 They failed to oblige that. That failed to show any
6 evidence or reasonable inference therefrom to defeat a
7 verdict of negligence.

8 And when you combine everything, and then you take
9 the declaration of Mr. Besteman, again, Ms. Mattson did
10 not receive a fair trial in this case.

11 THE COURT: I read this with a great deal
12 of -- I spent a great deal of time on that. And I'm more
13 than glad to do that. I'm not saying that negatively at
14 all. I understand there's a great deal at risk here and
15 a great deal at stake here. And I did hear the trial,
16 and I don't think anybody disagrees that the plaintiff is
17 an innocent victim. There's no disagreement about that
18 at all.

19 Couple things that went into my analysis of this, and
20 is the quote provided by both parties, but I think it's
21 well-known to most practitioners who have ever done jury
22 trials particularly in civil cases, but maybe criminal as
23 well. Quote was provided by both parties, and that is
24 "The party who is seeking to set aside a jury verdict is
25 required to admit the truth of the opponent's evidence

1 and all inferences that can reasonably be drawn therefore
2 and requires the evidence to be interpreted most strongly
3 against that party."

4 And most favorably in this case from the defense
5 point of view.

6 The evidence can be, as we know, direct or
7 circumstantial. Evidence could be presented in some sort
8 of a positive showing by testimony or otherwise; that can
9 be considered, of course, and so can lack of evidence be
10 considered, something that's not there that the juror may
11 think should be there.

12 I'd break this down, in my mind at least, into two
13 areas it has to be in terms of the negligence, itself,
14 two major areas. First is the failure of the bungee cord
15 strap; and the second is the substance on the road, for
16 lack of a better term I'll use the word "oil" on the
17 road. I'm not going to suggest it was oil on the road.

18 The evidence presented to the jury was that the strap
19 was attached properly, inspected properly as had been
20 done for many years by the person doing the inspecting
21 and attaching.

22 A juror -- a jury from that evidence could certainly
23 have come to the conclusion that the strap was properly
24 attached and properly inspected, and if the strap failed,
25 at no fault of the defendant. Mechanical devices fail,

1 and that may very well be what they concluded, I don't
2 know.

3 The oil on the road issue. There was testimony that
4 it was in far greater quantity than had could have come
5 from the hose. The jurors were free to believe that if
6 they chose. It's not for me to weigh the evidence.
7 Matters little what I think the result should be; in
8 fact, it means nothing at all. It's a trial by jury, not
9 trial by jury and then second guessed by the judge. It's
10 a constitutional right.

11 There was certainly evidence from which a juror could
12 conclude that the oil on the road did not come from this
13 hose.

14 That is different than saying that the defendant
15 failed to provide some other party put the oil there or
16 some other party is responsible. To do so would be a
17 shifting of burdens. It's not the defense's
18 responsibility to say where the oil came from or from
19 what source. They're certainly entitled to attack that
20 it came from this vehicle at all or this truck at all.

21 Consequently, I think there is substantial evidence
22 under substantial evidence rules and under the quote I
23 just gave you in terms of the standards to be applied for
24 the jury to conclude that the defendant was not
25 negligent.

1 The three years to file issue, and to comment on
2 this; the spoliation issue was addressed at some length.
3 I spent some time researching this during the motions in
4 limine so will be hopefully well versed in the law in
5 this particular area.

6 The strap, as I recall the evidence quite clearly,
7 was destroyed, or tossed out I should say, the day of the
8 accident or the day after the accident. The records were
9 kept for the length of time provided for by the
10 controlling regulations, and they were gone. I remember
11 it succinctly and quite clearly the business about them
12 being recorded on to CDs and then what happened with all
13 that.

14 The reason that I allowed the evidence in went this
15 way. The evidence that they were gone -- and the
16 evidence that the defendant had control of them and then
17 they were gone, why that went in to evidence is because
18 as a pragmatic matter I think the jury needed to
19 understand why that wasn't here. It's not right to have
20 the plaintiff to come to court and have to explain why
21 they don't have evidence when the plaintiff [sic] had
22 control of it and it's gone. They need to be able to
23 explain that.

24 But that's not the end of the story.

25 MR. BARCUS: You said plaintiff. Did you mean

1 defendant, Your Honor?

2 THE COURT: No, the plaintiff needs to be able
3 to explain why they can't present the strap, why they
4 can't present the other evidence.

5 MR. BARCUS: You said the plaintiff had control
6 of it.

7 THE COURT: Oh, I'm sorry. The defendant had
8 control of it. I did mean that. Thank you, Mr. Barcus.

9 And certainly that needed to be explained. I
10 thought, in all fairness to the jury, they need to have
11 the facts.

12 On the other hand, spoliation is different than
13 simply the evidence not being available. And I went
14 through those standards before. I don't intend to go
15 through them again.

16 But once you have put before the jury that that
17 information or that evidence is gone, then the defense
18 has the ability to come in and say why it's gone, less
19 there be some sort of an improper negative inference
20 being drawn, at least they should be able to argue that a
21 negative inference should not be drawn.

22 And the fact that the plaintiff didn't request
23 these -- this particular evidence for several years is
24 something that I felt the jury should hear in all
25 fairness to the defense. And consequently, I did allow

1 that evidence in. I did it intentionally. I was
2 fully -- I shouldn't say intentionally so much as after
3 serious consideration of the problems.

4 And that's why the spoliation, the reason I said
5 before, the spoliation instruction was not given. It
6 would have been quite different if two months afterwards
7 or a month afterwards or even a couple of days afterwards
8 the plaintiffs had asked for preservation of evidence and
9 it wasn't there. But three years later it's hard to
10 imagine how, without any request for that evidence be
11 preserved, it doesn't seem to meet the standard, and
12 that's why I didn't allow the jury instruction.

13 Instruction 16, which was given some considerable --
14 very good briefing, by the way, on the part of the
15 plaintiffs. I looked at it very carefully. As I had
16 before, actually; although, my response in the courtroom
17 may have been rather abrupt cutting off the argument, I
18 did consider it very, very carefully.

19 And the reason that I did allow it, the extra
20 language in Instruction 16, was because what happened may
21 very well be the jury could conclude that no fault at all
22 of the defendant. Straps mechanically fail; they could
23 certainly conclude that. They don't need evidence of
24 that. That's something, the common knowledge of every
25 person, I suppose, at least one could argue that it is,

1 that straps do fail.

2 And of course, this strap was not available. It put
3 the plaintiff in kind of an unenviable position because
4 the defendant says I did everything to inspect it and it
5 broke. There was no strap there to take a look at and
6 say well, did it break? How did it break? What really
7 did happen? I understand. But again, the jury is
8 entitled to hear it. And I let the plaintiff argue that
9 very point to the jury; that there's no strap here. They
10 had it, it's gone.

11 All right. Plus the argument -- I think this kind of
12 also goes a little bit to the oil on the road -- there
13 has to be causation. And this volume of the oil, again,
14 the defendant is not required to say where the oil came
15 from or even suggest it came from a particular person,
16 only that it didn't come from their truck. And the jury
17 is free to conclude that it didn't come from their truck,
18 and there is substantial evidence to support that in this
19 particular case.

20 I'll be very candid. I was disturbed when the jury
21 came back in 30 minutes, but that's not for me to judge.
22 Quite clearly, the case law is very strong; the judge is
23 not to, the court is not to get into procedural aspects
24 of the jury's decision. Not at all. Not even to
25 consider it.

1 How long they were back, when they took a vote and
2 all of that inheres to the verdict of the jury, and
3 certainly disregard that part of the declaration that was
4 supplied. I'm not suggesting for a moment it wasn't
5 supplied in good faith, but that is going to be
6 disregarded.

7 That took me down to providing someone's personal
8 experience or opinion about how to properly investigate
9 an accident because of their experience with OSHA. I
10 think this is analogous to the *McCoy* case.

11 In *McCoy*, as you recall, there were clay pipes, and
12 the question was damages caused by leakage. A juror, not
13 the jurors that we're talking about in the voir dire,
14 they didn't disclose their knowledge in voir dire; but
15 the other juror, I think it was Juror No. 11, or maybe it
16 was 10 in that case, I've forgotten. It doesn't matter.
17 But telling the rest of the jurors that he lived on a
18 farm and he knew that driving a tractor over clay pipes,
19 particularly if they're wet, would crush them like an
20 eggshell, was certainly in some respects very similar to
21 this in that he's bringing in evidence -- I understand
22 law versus evidence -- but he's bringing in evidence from
23 outside the -- that was not presented to the jury.

24 And Judge Van Deren and Division II of the Court of
25 Appeals said you can't consider that. You must disregard

1 that. And again, it inheres to the verdict and is not
2 for the court to even consider in its decision.

3 I understand that the OSHA investigation could be
4 viewed as a question of fact or a question of law as
5 being inadequate in a juror's mind. And where I think
6 the line is supposed to be is if you have a juror that
7 comes into court who brings in experiences that are, I
8 guess, considerably outside the common experience,
9 considerably outside some sort of general understanding
10 of what folks know and don't know, presents it to the
11 jurors, I would say like someone who has a particular
12 expertise, presents it to the jurors, and has misled the
13 court during voir dire, that might give grounds for this.

14 I looked kind of carefully at the Spokane case.
15 Remember the case, the name escapes me for a moment,
16 where a juror, or actually three jurors were constantly
17 referring to the plaintiff's lawyer as Mr. Hiroshima; and
18 he wasn't, of course. And then there was a comment made
19 on the zero verdict, on the defense verdict that it was
20 on Pearl Harbor Day, and the words escape me, but
21 something to the effect that he got his just deserve.

22 That is so clearly misconduct, so clearly repugnant
23 to the administration of justice and the concepts of
24 decisions not based upon prejudice. But that case was
25 reversed.

1 This case doesn't come to that level. I think it is
2 analogous to *McCoy*. And I have to disregard the juror's
3 declaration, and I will so do, disregard it. Motion is
4 denied.

5 Have I covered all the issues?

6 MR. BARCUS: No.

7 THE COURT: Is there one I missed?

8 MR. BARCUS: You didn't cover misconduct, Your
9 Honor.

10 THE COURT: Oh, misconduct. Thank you. I do
11 have some thoughts on that.

12 There was, I think the record will reflect, some
13 colorful conduct on behalf of Mr. O'Brien. And there was
14 some I don't know if colorful is the right word, but
15 certainly aggressive and very well emotional, if you
16 will, I saw on the part of the plaintiff's counsel as
17 well. It was something I was trying to get slowed down a
18 bit in the courtroom.

19 This is a very emotional case. I completely
20 understand how it can get that way. I've been in trial
21 many times, and I know that even from a judge's point of
22 view already that it can get emotional quick. I tried to
23 calm it down. I don't think the prejudice was such a
24 level to warrant a new -- or the misconduct as to warrant
25 a new trial.

1 I did ask Mr. O'Brien -- it only happened once that I
2 recall -- not to wander around the back of the court and
3 say words like "outrageous." I'm not sure the jury heard
4 that, I'm not sure that they didn't. I would say that
5 I'm just about as far away as the jury is to Mr. O'Brien
6 was and I did hear it, but I'm not sure which way the
7 voice was going and so forth. But I asked him not to.
8 And it was somewhat under his breath, I do recall.

9 Speaking objections. Frankly, both parties were
10 doing it until I actually asked you both to stop. I
11 think if you review the record you'll find that's true.
12 I asked you again once in trial, directed both of you not
13 to do it again.

14 It still kept happening. But I understand, it does
15 get carried away, and it's hard to keep a lid on it. And
16 I'm not finding that to be certainly not sanctionable
17 misconduct on either party's part, and I don't think it's
18 a reason to reverse the decision of the jury in this
19 case.

20 MS. LESTER: And Your Honor, the comments in
21 Mr. Barcus's rebuttal.

22 THE COURT: The rebuttal comments about the
23 timing of when to file?

24 MS. LESTER: No. About being hungry.

25 THE COURT: Well, I guess it's worth a

1 discussion.

2 Now, I don't remember actually the details of how he
3 got the time frames of when the -- I'd have to look back
4 at the record, but I know we did amend the original
5 pretrial order. We brought it down. I believe --

6 MS. LESTER: That morning.

7 THE COURT: I think it was because we were
8 looking at noon for the jury. And I didn't want to
9 interrupt Mr. Barcus's rebuttal argument. I wanted to
10 get you a chance the get it in. And I think what we -- I
11 don't remember the actual conversation on this. But I
12 was trying to get it all done before lunch if we could,
13 rather than having it broken up; do part of your argument
14 before lunch, part of your argument after lunch. And
15 that was one of the considerations.

16 Plus as I recall, with all due respect, the initial
17 argument was pretty darn thorough, and then the rebuttal
18 argument to some extent was touching on many of the same
19 issues again. And I do mean that in the deepest respect,
20 but it was, in my review of it.

21 And I did put a time frame on it, and we were way
22 beyond it. We were well into about 12:20-ish or so. And
23 I think I'd asked two or three times, suggested to
24 Mr. Barcus that you really do need to wrap it up. And to
25 some extent Mr. O'Brien's response to that may have been

1 a little theatrical. Mr. O'Brien does have that, to be a
2 bit theatrical.

3 MR. O'BRIEN: Really, I think the record they
4 quoted was wrong. I said, Your Honor, something like,
5 you know -- he was just ignoring warnings, and I just
6 thought this should be it.

7 And then he turned on me, and that's when I just sort
8 of reacted and said I'm hungry or, you know, something
9 like that, because it was backwards in the transcript.
10 That's what happened.

11 THE COURT: And my recollection of the events
12 were that something similar as Mr. Barcus did have your
13 back to me, and you were actually kind of in somewhat of
14 an intimidating position, frankly. You're a very large
15 man. And that's the way I saw it from up here.

16 And when he said "I'm hungry," I wasn't again sure
17 the jury heard it because it was kind of softly said.
18 But nevertheless, it certainly wasn't something to be
19 bold and underlined; that's not the case in my
20 recollection. It may have affected you like that. You
21 were sitting next to him and you may have heard it
22 differently than I did, but that's what I heard.

23 Was it appropriate? Probably not. But not a basis
24 to warrant a new trial in this case.

25 MR. BARCUS: Your Honor, let the record reflect

1 that the court reporter got it right.

2 THE COURT: Okay.

3 MR. BARCUS: And for counsel to say the court
4 reporter got it wrong shows its disdain not only for this
5 court and orders of this court, but also the court staff.

6 THE COURT: Thank you.

7 MR. BARCUS: And it's just -- it's just
8 outrageous, to use his words, to try to suggest that it
9 did not occur as it did. It's the most unprofessional
10 comment I've ever seen in 26 years.

11 THE COURT: All right. I need an order before
12 we leave today, please.

13 MS. LESTER: Mr. O'Brien prepared one. But I
14 did have issues with it, because I had also made a motion
15 to strike portions of his declaration.

16 THE COURT: Motion to strike is denied.

17 I told you I did not give a great deal of weight to
18 portions of that for the reasons you stated.

19 MS. LESTER: Thank you, Your Honor, for your
20 time.

21 MR. O'BRIEN: Thank you.

22 THE COURT: Thank you. Thank you for your hard
23 work everybody, very much.

24 [Whereupon, the verbatim report of
25 proceedings adjourned.]

DECLARATION OF SERVICE

On the date stated below, I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of Brief of Respondents in Court of Appeals Cause No. 43735-0-II to the following parties:

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Court of Appeals, Division II
Clerk's Office

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

DATED: May 23, 2013, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick

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DIVISION II
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