IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RAYNA MATTSON, individually; Respondent, v. AMERICAN PETROLEUM ENVIROMENTAL SERVICES, INC., a Washington Corporation; and BERND STADTHERR and JANE DOE STADTHERR, individually, and the marital community comprised thereof; Appellants.	No. 37498-6-II UNPUBLISHED OPINION

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

[1] Stadtherr was liable as an individual and as part of his marital community with "Jane Doe" Stadtherr. We refer to American Petroleum and the Stadtherrs collectively as "defendants."

FACTS

I. Background[2]

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

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

After leaving the truck yard, Stadtherr drove northbound for several miles on Interstate-5 (I-5) before noticing, as he neared Federal Way, that a suction hose had broken loose from its compartment and dragged on the ground behind the truck. At the time, Mattson was driving her Ford Explorer on I-5, her two children in the backseat, when she hit a "slick" area and began "sliding all over the freeway." 2 CP at 298, 305. After Mattson lost control, the Explorer slid off a steep embankment and rolled three or four times. Immediately after the accident, Mattson

[2] We take these facts primarily from depositions taken during the litigation.

noticed "fume smells." 4 Report of Proceedings (RP) at 491. Mattson suffered injuries, including cervical strain, contusions, and "considerable trouble with neck pain and some head pain." 3 RP at 234.

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

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

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

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

[3] After removing the suction hose and returning it to the plant, American Petroleum threw it away without further inspection.

II. Procedural History

On June 28, 2006, Mattson filed a complaint in Pierce County Superior Court asserting a claim of negligence against American Petroleum and Stadtherr and his wife. Mattson requested damages for past and future medical expenses, lost earnings, physical and mental pain and suffering, past and future physical disabilities, loss of capacity to enjoy life, prejudgment interest, and "all items of special damages." 1 CP at 8.

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

Mattson moved for partial summary judgment on the issues of liability and lack of comparative fault. Mattson argued that the defendants were negligent as a matter of law under the theories of negligence per se[4] and strict liability. In a separate motion, Mattson moved for partial summary judgment on proximate cause and damages. She attached numerous exhibits to support her motions, including her deposition, Watchie's sworn declaration and Villeneuve's, Stadtherr's and Mazza's depositions.

Defendants conceded for purposes of the summary judgment motion that "residual oil in

[4] Negligence per se is a doctrine that a defendant is negligent as a matter of law if he or she breaches a statutory duty. The doctrine was limited by the enactment of RCW 5.40.050, which reads in relevant part: "A breach of a duty imposed by statute, ordinance, or administration rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence[.]" That statute imposes negligence per se in circumstances not applicable here.

Mattson primarily based her negligence per se theory on former RCW 46.61.655(1) (1990), which prohibited vehicles from driving on any public highway "unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom . . . ." Another subsection of the statute requires drivers to "securely fasten[ ]" any "load and such covering . . . to prevent the covering or load from becoming loose, detached, or in any manner a hazard to other users of the highway." RCW 46.61.655(2).

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

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

> This court focused primarily on the issue of common law negligence and the issue of res ipsa loquitur.[5] All of the elements of common law negligence are present. The issue is whether or not there is a material issue of fact as to any one of these elements.
>
> None of the evidence or affidavits presented by the defendant raise an issue of material fact in the mind of this court. Although it's not required [for] any case . . . I was looking for some form of expert testimony that would raise a material issue of fact as to the conduct of the defendant[s], and again, there was no expert or lay testimony that would indicate and raise a material issue of fact
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> . . . .
>
> The response of the defendant[s] appears to be, "We didn't see it coming." Or in the alternative, "There was nothing we could do other than make an inspection and that inspection was sufficient."
>
> I don't believe those are adequate excuses or defenses that raise a material issue of fact under the facts of this particular case.
>
> This vehicle was under the exclusive control of the defendant. There was no testimony to indicate that the way they secured these hoses was adequate in light of the road conditions on I-5, which I think even their witnesses indicated it would be foreseeable that hoses would break loose if they were not properly secure.
>
> I just think this is a classic case of negligence on the part of the defendant, and I will grant the motion for summary judgment on the basis of common law

[5] Mattson did not argue res ipsa loquitur in her summary judgment motion, and her negligence claim focused on negligence per se rather than common law negligence.

> negligence . . . . And based on the fact that there is no dispute in regards to the reasonableness of medical costs, lost wages, et cetera, I will also grant judgment on that issue as well, but obviously the issue of general damages is still a matter for trial.

RP (1/11/08) at 3-5.

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

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

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[6] On the issue of proximate cause, the trial court ruled that "the collision of July 21, 2003 caused Ms. Mattson's injuries to her neck and back, including Postraumatic [sic] Cervical Strain and resulting Fibrositis, as well as headaches, pain and tenderness in her neck, trapezuis region, mid- and low back[.]" 3 CP at 520. The trial court determined that even though Mattson was involved in another vehicle collision on July 26, 2005, "any injury that Ms. Mattson suffered in the July 26, 2005 accident is indivisible from the injury she suffered in the July 21, 2003 collision . . . as a matter of law, and any and all treatment that [she] underwent following the July 26, 2005 accident cannot be apportioned between the two accidents and the medical bills that she incurred following July 26, 2005 were due to a combination of the two accidents as a matter of law." 3 CP at 520.

The trial court determined that Mattson's past medical expenses totaled $30,429.14, her out-of-pocket expenses for mileage totaled $1,036.44, and her lost wages totaled $78,179.82.

ANALYSIS

I. Negligence as a Matter of Law

The defendants ask us to vacate the trial court's order granting partial summary judgment on behalf of Mattson and to remand for a new trial.[7] They argue that the trial court erred in ruling that they were negligent as a matter of law because (1) genuine issues of material fact remained as to whether they breached a duty of care and, if so, whether that breach proximately caused the accident; and (2) Mattson failed to satisfy the elements of res ipsa loquitur. Br. of App. at 9, 16, 19. We agree that summary judgment was not appropriate.

A. Standard of Review

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

[7] The defendants do not specifically assign error to the trial court's order on proximate cause, medical expenses, lost wages, and out-of-pocket expenses. Therefore, we do not review these issues.

B. Negligence—Duty and Breach of Duty

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

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

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

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

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

II. Res Ipsa Loquitur

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

The doctrine of res ipsa loquitur, or "the thing speaks for itself," allows the jury to infer negligence when (1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff. *Pacheco v. Ames*, 149 Wn.2d 431, 436-37, 69 P.3d 324 (2003) (quoting *Zukowsky v. Brown*, 79 Wn.2d 586, 593, 488 P.2d 269 (1971)); *Morner v. Union Pac. R.R. Co.*, 31 Wn.2d

282, 290, 196 P.2d 744 (1948). As with the issue of negligence, the evidence of a broken tie-down prevents judgment based on res ipsa loquitur because defendants offered evidence of a non-negligent cause of the broken tie-down.

III. Stadtherr's Testimony

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

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

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

Penoyar, A.C.J.

I concur:

Quinn-Brintnall, J.

Hunt, J. — I respectfully dissent. Viewing the evidence in the light most favorable to Defendants, I agree with the trial court that (1) the *res ipsa loquitur* doctrine applies to Mattson's loss of traction on the oil slick spilled from Defendants' truck and her vehicle's resultant collision, and (2) Mattson's accident was "of a type that would not ordinarily result if the defendant were not negligent." *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). Based on the undisputed facts in this case, reasonable minds could not differ that Defendants breached a duty of care to other drivers to avoid placing them in danger when Defendants failed to secure a suction hose containing waste oil to prevent its coming loose while driving their otherwise "empty," 2 Clerk's Papers (CP) at 333, transport truck on a familiar and "very rough," 2 CP at 333, section of I-5, with knowledge that the hose tie-downs, secured and inspected according to usual practice, were susceptible to breaking. I would hold that under the doctrine of *res ipsa loquitur*, Defendants acted negligently as a matter of law.[8] And I would affirm the trial court's grant of partial summary judgment for Mattson on the issue of liability.

Under the doctrine of *res ipsa loquitur*, a plaintiff need not assert specific acts of

[8] The Majority notes, "Mattson did not argue res ipsa loquitur in her summary judgment motion" below, where her "negligence claim focused on negligence per se rather than common law negligence." Majority at 5, note 5; *see also* Majority at 4, note 4 (addressing Defendants' failure to comply with RCW 46.61.655(1), which prohibits driving on a public highway with an unsecured load). Mattson compellingly argues that (1) a violation of RCW 46.61.655(2) provides an alternative basis for affirming the trial court's grant of partial summary judgment in her favor; and (2) Defendants failed to comply with the requirements for transporting loads on public highways under the Washington Administrative Code. WAC 204-44-020(2). To the extent that these arguments support the trial court's ruling on liability based on *res ipsa loquitur*, I agree with Mattson.

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

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

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

is a question of law).

The uncontroverted evidence shows that (1) Defendants drove transport trucks containing heavy equipment and waste-oil liquids daily on public roads, including this particular "violent" and "very rough" stretch of I-5, 2 CP at 333; (2) Defendants knew that "empty" suction hoses can retain liquid waste oil after emptying out the tank and, therefore, company truck drivers cleaned the hoses and pumping equipment before and after each use to "minimize any retain[ed] [oil] in the hose[s]," 2 CP 328; (3) Michael Mazza, the defendant company's president, had previously seen suction hoses "come off a truck before," "usually due to a driver error," 2 CP at 333, and he noted that an "empty" suction hose that has been "sucked out" can retain "about [one] gallon of oil," 3 CP at 556; (4) Mazza and Stadtherr, the driver of this particular truck, testified that the defendant company directed its truck drivers to inspect suction hose tie-downs, such as the one that failed here,[9] and to replace the tie-downs "every three or four months," 2 CP at 335; (5) Stadtherr knew that these tie-downs break, though "usually . . .it's when you're putting it on the truck," 2 CP at 335; (6) according to Stadtherr, the tie-down in question broke from "fatigue" after he had inspected it and while he was driving the empty truck on I-5, 2 CP at 286; (7) Mazza testified in his deposition that "[t]he violent action of I-5 caused the hose to come out of the bracket," noting that "[e]very trucker out there knows I-5 is bad" and "[t]hat specific stretch of freeway is terrible in an empty truck" because "[the truck] bounces," 2 CP at 333; (8) the ruptured tie-down caused the suction hose to break loose from the truck, spilling its leftover oil onto the travelled surface of I-5; and (9) this oil spill caused Mattson's vehicle to veer out of

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

control off the highway, where it crashed, injuring Mattson.

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

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

I agree with the trial court's assessment in rejecting Defendants' excuses that the tie-down rupture and oil spill were not foreseeable and that there was nothing they could have done to prevent the spill other than their inspection, which they contend was sufficient: (1) The vehicle was under Defendants' exclusive control, (2) Defendants presented "no testimony to indicate that the way they secured these hoses was adequate in light of the road conditions on I-5," and (3)

"even [Defendants'] witnesses indicated it would be foreseeable that hoses would break loose if they were not properly secure." Verbatim Report of Proceedings (VRP) (Jan. 11, 2008) at 4. I would add to the trial court's list that the suction hose's breaking loose leaves no issue of fact about the tie-down's inadequacy in securing the hose to the empty truck for the foreseeably "violent" bouncing travel along this "very rough" stretch of I-5, which company truck drivers, including Stadtherr, "h[ad] to deal with on a regular basis" as part of their daily trucking route to collect loads. 2 CP at 333.

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

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Hunt, J.