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Nani Nau Plaintiff/Appellant v. Safeco Insurance Company of Illinois, a Washington Corporation. Defendant/Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

NANI NAU, Plaintiff/Appellant, v. SAFECO INSURANCE COMPANY OF ILLINOIS, a Washington Corporation, Defendant/Appellee.	**BRIEF OF APPELLEE** Appeal No. 20150427-CA

Nathan E. Burdsal (USB #11034)
Hutch U. Fale (USB #11189)
AVERY BURDSAL & FALE, PC
1979 North 1120 West
Provo, Utah 84604
Telephone: (801) 788-4122
Facsimile: (801) 705-0606
Attorneys for Appellant

Nathan R. Skeen (12662)
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000
Facsimile: (801) 363-0400
Email: nrs@scmlaw.com
Attorneys for Appellee

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Facsimile: (801) 705-0606
Attorneys for Appellant

Nathan R. Skeen (12662)
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145-5000
Telephone: (801) 521-9000
Facsimile: (801) 363-0400
Email: nrs@scmlaw.com
Attorneys for Appellee

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Appellee Safeco Insurance Company of Illinois ("Safeco") submits this brief in response to the principal brief submitted by the Appellant, Nani Nau ("Mr. Nau").

STATEMENT OF JURISDICTION

Safeco agrees with Mr. Nau's Jurisdictional Statement contained in his principal brief.

ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

Safeco generally agrees with Mr. Nau's Statement of Issues and Standards of Review, with the following exceptions:

This appeal involves Mr. Nau's inability to carry his burden of proof under Utah Code Ann. § 31A-22-305(6). Specifically, because he claimed an uninsured motor vehicle caused an accident, he was required to show "the existence of the uninsured motor vehicle by clear and convincing evidence consisting of more than" his own testimony. Utah Code Ann. § 31A-22-305(6). Contrary to Mr. Nau's statement of the first issue for review, the trial court did not find that he failed to present "more than" his own testimony. Rather, the trial court found that the evidence Mr. Nau presented, viewed in the light most favorable to him, does not establish the existence of debris in the road, by clear and convincing evidence. (R. at 000205.) Therefore, the first issue for review should be whether the trial court erred in finding that Mr. Nau cannot establish the existence of an uninsured motor vehicle, by clear and convincing evidence, consisting of more than his own testimony. Utah Code Ann. § 31A-22-305(6).

Additionally, with respect to the second issue for review, whether a plaintiff has established the requisite foundation for a *res ipsa loquitur* instruction is a question of law

for the trial court to answer. *Walker v. Parish Chemical Co.*, 914 P.2d 1157, 1161 (Utah Ct. App. 1996). However, because a trial court's legal conclusions are reviewed for correctness (*Wilson Supply, Inc. v. Fradan Mfg. Corp.*, 2002 UT 94, ¶ 11, 54 P.3d 1177), Safeco agrees with the standard of review stated by Mr. Nau for this issue.

DETERMINATIVE RULES

1. Utah Rule of Civil Procedure 56:[1]

> (b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.
>
> (c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

2. Utah Code Ann. § 31A-22-305:

> (2) As used in this section, "uninsured motor vehicle" includes:
>
> (b) an unidentified motor vehicle that left the scent of an accident proximately caused by the motor vehicle operator;
>
> . . .
>
> (6) When a covered person alleges that an uninsured motor vehicle under Subsection (2)(b) proximately caused an accident without touching the covered person or the motor vehicle occupied by the covered person, the covered person shall show the existence of the uninsured motor vehicle by

[1] Because the recent amendments to the text of Utah Rule of Civil Procedure 56 were not effective until after the trial court granted summary judgment in the underlying action, all references to Rule 56 in this Brief will be to the pre-amendment text of the rule.

clear and convincing evidence consisting of more than the covered person's testimony.

STATEMENT OF THE CASE

Nature of the Case

This lawsuit involves a single-vehicle auto accident taking place on I-15 near Sandy, Utah. Mr. Nau was the operator of that vehicle, and he, subject to the terms, conditions, limitations, and exclusions of the policy, was insured by Safeco. Mr. Nau claims that the accident was proximately caused by the operator of an unidentified motor vehicle, thereby invoking uninsured motorist coverage under the Safeco insurance policy.

Procedural History and Disposition of the Trial Court

Mr. Nau filed this lawsuit in March 2014. Fact and expert discovery were complete by January 21, 2015. During discovery, Mr. Nau was unable to identify any witness, including himself, who could testify to seeing debris in the roadway at or near the time of the accident. Additionally, no evidence was presented, demonstrating that an unidentified motor vehicle left debris on the interstate in the area of the accident. Testimony was presented, however, that there was no debris in the roadway leading up to the area of Mr. Nau's accident.

In response to Safeco's Motion for Summary Judgment, Mr. Nau argued that a genuine issue of material fact existed as to whether debris was actually in the road and caused his accident. Mr. Nau also argued that the doctrine of *res ipsa loquitur* relieved him from his burden of proving that the alleged debris was in the roadway as a result of

the negligence of an uninsured motorist. The trial court rejected each argument and granted summary judgment in favor of Safeco on April 22, 2015.

Statement of the Facts Relevant to the Issues Presented for Review

1. On February 25, 2012, Mr. Nau was driving his Ford Explorer in the carpool lane on southbound I-15 near 11400 South in Salt Lake County. (R. at 000066, 000076-000077.)

2. He testified that, as he was driving, the front left tire of his vehicle blew, causing him to lose control of the vehicle and collide with a concrete barrier across the emergency lane to the left of the lane in which he was traveling. (R. at 000076-000077.) The only other occupant of the vehicle was Mr. Nau's wife, Lusi. (R. at 000077.)

3. Mr. Nau testified that he did not see what caused the tire to pop. (R. at 000076.) It just "suddenly happened." (R. at 000076.)

4. Mr. Nau had earlier thought that there might have been something in the road, but, at the time of his deposition, he could not remember seeing anything in the road. (R. at 000076.)

5. Mrs. Nau testified that she was looking down and crocheting leading up to the time when the tire popped. (R. at 000066.)

6. She testified that she felt a bump/pop, as though the tire had blown:

Q: Okay. So you were looking down?

A: Yeah, I was looking down, doing my crocheting thing. Yeah.

Q: And when did you first look up from your crocheting?

A: When I hear the thing—its kind—pop.

Q: Okay. So when you say that, you mean you hear the car bump? Like the—

A: Yeah.

Q: Okay. So is—

A: Like its a bump like—and pop. Like a tire flat.

Q: Oh, like a pop?

A: Yeah.

Q: Like the tire pop. Alright. So you felt a tire pop and then you looked up?

A: Yeah.

(R. at 000066.)

7. Mrs. Nau did not look up until she felt and heard the tire pop. (R. at 000066.) She never saw what, if anything, the tire hit, and she never looked back after the tire blew to see if there was anything in the road. (R. at 000064-000065.)

8. Mrs. Nau testified that she does not remember Mr. Nau attempting to brake or swerve his vehicle prior to the time the tire blew. (R. at 000064.)

9. People in a vehicle traveling behind the Nau vehicle stopped to help Mrs. Nau and telephoned police. (R. at 000065.)

10. Mrs. Nau does not know the identities of those individuals, and those individuals did not say anything to Mrs. Nau about road conditions. (R. at 000064-000065.) Mrs. Nau does not remember those individuals saying anything about the existence of debris in the roadway. (R. at 000064.)

11. Mrs. Nau did not speak to anyone else about what caused the accident. (R. at 000062.)

12. Mr. Nau suffers from some memory loss as a result of a head injury he sustained when his vehicle struck the concrete barrier. (R. at 000078.) After the tire popped, but before he sustained his head injury, Mr. Nau did not say anything to Mrs. Nau about what may have caused the tire to pop. (R. at 000064.)

13. Trooper Brian Schultz was the lead investigating officer for the accident. (R. at 000092-000093.)

14. Trooper Schultz approached the scene of the accident by traveling in the HOV lane. (R. at 000091.) He testified that he did not see any debris in the HOV lane before he arrived at the scene of the accident. (R. at 000086, 000088, 000091.)

15. Neither Mr. Nau nor Mrs. Nau reported to Trooper Schultz that something in the roadway caused the tire to blow. (R. at 000088, 000090-000091.) Instead, they reported that, as they were driving, the tire on their vehicle went flat and lost control. (R. at 000084, 000090.)

16. No other witnesses ever came forward to report what had caused the accident. (R. at 000088, 000090.)

17. Trooper Schultz does not remember receiving any report that day about debris being in the highway, and he did not observe any obvious damage on the vehicle that was caused by debris in the roadway. (R. at 000088-000090.) For that reason, Trooper Schultz did not indicate on his report that the vehicle struck debris in the roadway. (R. at 000088-000089.)

18. Based on his investigation, Trooper Schultz was unable to determine whether the tire had blown out while traveling in the HOV lane, or if it was damaged after hitting a concrete barrier. (R. at 000090.) In fact, all of the damage to the vehicle appeared to have been caused by impacting the concrete barrier. (R. at 000090.)

19. Trooper Schultz concluded that, even if the vehicle had sustained a flat tire while traveling in the HOV lane, Mr. Nau should have been able to maintain control of the vehicle. (R. at 000086, 000089.) Because he did not maintain control of the vehicle, and it collided with the concrete barrier multiple times, Trooper Schultz issued Mr. Nau a citation. (R. at 000089.)

20. In a court proceeding related to that citation, Trooper Schultz does not recall either Mr. or Mrs. Nau testifying that debris was in the roadway and caused the accident. (R. at 000084-000085B. Schultz Depo., at 44-46.)

Recorded Statement

21. More than 11 months after the accident, Mr. Nau and Mrs. Nau, with their attorney present, gave recorded statements to a Safeco adjuster about what they remembered from the accident. (R. at 000131.) Their statements were not made while under oath. (R. at 000131-000121.)

22. In his out-of-court statement, Mr. Nau vaguely described seeing a piece of rubber, a piece of cement/concrete, or a piece of carpet in the road. (R. at 000129-000128.)

23. In her out-of-court statement, Mrs. Nau stated that she felt like the car ran over something and that the tire sustained damage. (R. at 000122.) She did not state that she saw anything in the road. (R. at 000122.)

Summary Judgment Ruling

24. On March 2, 2015, the trial court heard oral argument on Safeco's Motion for Summary Judgment. (R. at 000219.)

25. Relying on precedent from the Utah Court of Appeals, the trial court explained that it "can properly decide as a matter of law whether the undisputed facts would meet a clear and convincing standard of proof." (R. at 000219, pg. 30.)

26. The trial court also explained that it considered Mr. Nau's out-of-court statement to be admissible. (R. at 000219, pg. 30.)

27. The trial court then found that the evidence Mr. Nau presented, which specifically included his out-of-court statement and Mrs. Nau's deposition testimony, when viewed in the light most favorable to him fell short of demonstrating the existence of debris in the roadway, by clear and convincing evidence, consisting of more than his testimony. (R. at 000219, pg. 30-31.)

28. Even if a reasonable jury could conclude that debris was in the roadway, the trial court also ruled that there were no facts upon which a reasonable jury could find, by clear and convincing evidence, that the debris was in the roadway, because of the negligence of an uninsured motorist. (R. at 000219, pg. 31.)

29. While recognizing that the doctrine of *res ipsa loquitur* could apply to uninsured motorist cases under some circumstances, the trial court found that the doctrine

was inapplicable to the facts of this case, based on the evidence, or lack thereof, of what debris was actually in the roadway. (R. at 000219, pg. 32.)

SUMMARY OF ARGUMENTS

The trial court correctly ruled that Mr. Nau could not meet his burden of proving, by clear and convincing evidence consisting of more than his own testimony, that (1) debris was in the roadway, and (2) if debris was in the roadway, it was there as a result of the negligence of an uninsured motorist.

In finding Mr. Nau could not establish the existence of debris in the roadway through evidence consisting of more than Mr. Nau's testimony, the trial court considered a variety of evidence, including the testimony of Mrs. Nau, the testimony of Mr. Nau, and the out-of-court statement of Mr. Nau while he was not under oath. The trial court viewed this evidence in the light most favorable to Mr. Nau. This evidence was limited and could not establish the existence of debris in the road by clear and convincing evidence. Specifically, Mr. Nau never testified that he saw debris in the road. He only stated, while he was not under oath, that he thought he saw something in the road, but he did not know what it was. Mrs. Nau testified that she never saw anything in the road. She only felt the tire pop. Mrs. Nau's interpretation of what she felt was speculation. Because Mr. Nau's burden of proof required clear and convincing evidence, consisting of more than his own testimony, the trial court's determination was correct.

The determination that there was insufficient evidence to demonstrate that debris was in the road due to the negligence of an uninsured motorist was also correct. If debris was in fact in the roadway, there would be countless possibilities of how it could have

arrived there, and none of them imply negligence by the operator of a different motor vehicle. The trial court's refusal to apply the doctrine of *res ipsa loquitur* was justified, because Mr. Nau cannot establish each element necessary to invoke the doctrine without resorting to speculation. Therefore, summary judgment was properly granted and should be affirmed.

ARGUMENT

A party moving for summary judgment on an issue that the nonmoving bears the burden of proof at trial satisfies its burden by showing, through reference to the pleadings, depositions, written discovery, and affidavits, that no genuine issue of material fact exists. *Jones & Trevor Mktg., Inc. v. Lowry*, 2012 UT 39, ¶ 30, 284 P.3d 630. The burden then shifts to the nonmoving party, who cannot rest on mere allegations, to come forward with specific facts. *Id.* at ¶ 30. Under those circumstances, "[a] plaintiff's failure to present evidence that, if believed by the trier of fact, would establish any one of the [elements] of the prima facie case justifies a grant of summary judgment to the defendant." *Niemela v. Imperial Mfg., Inc.*, 2011 UT App 333, ¶7, 263 P.3d 1191 (citation and quotations omitted).

In this case, Mr. Nau sought to recover uninsured motorist benefits from Safeco. Utah law requires coverage to an insured for the damages proximately caused by the operator of unidentified motor vehicle that leaves the scene of the accident. Utah Code Ann. § 31A-22-305(2)(b). However, when the unidentified motor vehicle is alleged to have caused the accident without physically touching the insured or the insured's vehicle, the insured "shall show the existence of the uninsured motor vehicle by clear and

convincing evidence consisting of more than the covered person's testimony." Utah Code Ann. § 31A-22-305(6).

Mr. Nau failed to come forward with sufficient evidence upon which a reasonable jury could conclude, by clear and convincing evidence, that his accident was proximately caused by the operator of an unidentified motor vehicle. He also failed to establish each of the necessary elements of the *res ipsa loquitur* doctrine. Mr. Nau cannot satisfy his burden of proof, and, therefore, summary judgment should be affirmed.

I. MR. NAU CANNOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT DEBRIS WAS IN THE ROADWAY AT THE TIME OF HIS ACCIDENT

A. The Trial Court Considered More Than Mr. Nau's Testimony When it Determined the Evidence Was Insufficient to Satisfy the Burden of Proof.

Mr. Nau acknowledges that he must establish the existence of debris in the roadway through evidence, consisting of more than his own testimony, in order to recover under Section 31A-22-305(6). He claims, however, that all he was required to do to prevent summary judgment was to present "more than" his own testimony to corroborate his claims. Mr. Nau also contends that the trial court found that Mr. Nau failed to present "more than" his own testimony to support his claim. Both statements are incorrect.

Mr. Nau could only prevent summary judgment by presenting enough evidence (consisting of more than his own testimony) for a reasonable jury to conclude, by clear and convincing evidence, that debris was actually in the roadway. Utah Code Ann. § 31A-22-305(6); *see also Wilberg v. Hyatt*, 2012 UT App 233, ¶ 11, 285 P.3d 1249

(affirming summary judgment "because the evidence presented by the [plaintiffs] cannot establish by clear and convincing evidence" each element of the cause of action); *Stern v. Metro. Water Dist. of Salt Lake & Sandy*, 2012 UT 16, ¶ 83, 274 P.3d 935 (affirming summary judgment, because "no reasonable fact finder could conclude . . . by clear and convincing evidence that" the plaintiffs could prove each element of their claim). Simply presenting "more than" his own testimony alone was not enough if the evidence, taken as a whole, fell short of satisfying the clear and convincing standard.

Mr. Nau is also mistaken when he asserts that the trial court failed to recognize that the evidence he presented consisted of more than his testimony. The trial court considered Mr. Nau's deposition testimony, his out-of-court statement, and the testimony of Mrs. Nau when it determined that the evidence fell short of proving, by clear and convincing evidence, the existence of debris in the roadway. (R. at 000219, pg. 30-31.) Accordingly, the trial court did not refuse to consider Mrs. Nau's testimony, and it did not err by requiring proof, consisting of more than Mr. Nau's testimony, that a reasonable jury could find that rises to the level of clear and convincing evidence.

B. Mr. Nau Failed to Present Clear and Convincing Evidence, Showing the Existence of Debris in the Roadway.

The trial court also correctly ruled that the evidence presented was not enough for a reasonable jury to find, by clear and convincing evidence, that debris was in the road. The clear and convincing evidence standard requires the existence of facts that make a conclusion "very highly probable." *Essential Botanical Farms, LC v. Kay*, 2011 UT 71, ¶ 24, 270 P.3d 430. It means that a party "must persuade [the jury], by the evidence, to

the point that there remains no serious or substantial doubt as to the truth of the fact." Model Utah Jury Instructions 2d CV118. While trial courts cannot weigh evidence or determine credibility when deciding a motion for summary judgment, they can determine whether a plaintiff presents sufficient facts that, if accepted as true, would establish an element of a claim by clear and convincing evidence. *Fisher v. Davidhizar*, 2011 UT App 270, ¶ 15, 263 P.3d 440; *see also Republic Group, Inc. v. Won-Door Corp.*, 883 P.2d 285, 292 (Utah Ct. App. 1994) ("Because the elements of fraud must be proven by clear and convincing evidence, we must consider this standard in determining whether the trial court should have granted summary judgment on this claim.").

No witness testified in this case that debris was in the road. Mr. Nau claims that he testified that he saw debris in the road, was unable to avoid it, and crashed after his tire popped. This was not Mr. Nau's testimony. Rather, it was an out-of-court statement Mr. Nau made when he was not under oath. (R. at 000131-000121.) When he was under oath, Mr. Nau testified that his tire popped suddenly, and that he did not see what caused it to pop. (R. at 000076.) He testified that he could not remember seeing anything in the road. (R. at 000076.) Even in his out-of-court statement, Mr. Nau could only vaguely describe seeing a piece of rubber, a piece of cement/concrete, or a piece of carpet in the road. (R. at 000129-000128.)

Mrs. Nau similarly testified that she did not see any debris, that she wasn't looking at the road when the tire popped, and that she never looked back after the tire popped to see if debris was in the road. (R. at 000064-000065.) Mr. Nau construes Mrs. Nau's testimony about feeling a bump when the tire deflated (R. at 000065) as evidence that his

vehicle must have run over something. The plain language of Mrs. Nau's testimony, however, conveyed that she felt a bump, because the tire popped. (R. at 000065.) Regardless, Mrs. Nau's testimony about feeling a "bump" would require speculation to conclude that the bump was caused by debris, and not by a pothole, or bump in the road, or by the sudden deflation of the tire.

The other evidence Safeco presented, regarding the absence of debris in the road, further supported the trial court's determination that the clear and convincing standard was not satisfied. Trooper Schultz, the highway patrol officer who investigated the accident, testified that there was no debris in the road when he approached the accident scene and that no one, including Mr. and Mrs. Nau, reported debris in the road, which caused the accident. (R. at 000086, 000088, 000090-000091.) In fact, Mr. and Mrs. Nau only reported to Trooper Schultz that the tire went flat and their vehicle lost control. (R. at 000084, 000090.)

The evidence presented to the trial court clearly fell short of the level where a reasonable jury could conclude, by clear and convincing evidence, that debris was in the road. The trial court's ruling, therefore, was correct.

II. IF DEBRIS WERE PRESENT IN THE ROADWAY, MR. NAU CANNOT ESTABLISH THAT IT ARRIVED THERE DUE TO THE NEGLIGENCE OF AN UNINSURED MOTORIST

A. The Jury Would Be Forced to Speculate to Find that Debris in the Road Arrived There Because of the Negligence of an Uninsured Motorist.

The trial court also correctly found that, even if Mr. Nau could have established the existence of debris in the road, by clear and convincing evidence, he would fall short

of his burden of proving that it was there as a result of the negligence of an uninsured motorist. While there does not appear to be any prior Utah appellate court decision that has analyzed Section 31A-22-305(6) in this context, Safeco pointed to decisions from other jurisdictions, applying substantially similar uninsured motorist statutes, where it was undisputed that debris was in the road. Those courts held that an insured is unable to recover, in the absence of evidence about how certain debris arrived in the road, because it would require speculation by the jury.

Safeco cited to two Tennessee Court of Appeals cases (*Bruno v. Blankenship*, 876 S.W.2d 294 (Tenn. Ct. App. 1994) and *Oliver v. Quinby*, W2000-02158-COA-R3-CV, 2001 WL 359241 (Tenn. Ct. App. April 6, 2001)). In both cases, there was no dispute that debris was in the road and that it caused the accidents. *See Oliver*, 2001 WL 359241 at * 1 (insured rear-ended when traffic slowed to avoid a pile of carpet lying in the roadway); *Bruno*, 876 S.W.2d at 295 (insured crashed into a parked truck and highway rail guard while attempting to avoid a ladder laying in the road). Similar to Utah Code § 31A-22-305(6), Tennessee's uninsured motorist statute only required coverage for injuries caused by an unknown motor vehicle if the "existence of such unknown motorist is established by clear and convincing evidence, other than any evidence provided by occupants in the insured vehicle." *Bruno*, 876 S.W.2d at 295 (quoting Tenn. Code Ann. § 56-7-1201).

In affirming summary judgment, the *Bruno* court explained:

> The question then is whether the accident can be traced to an unknown motorist. There is nothing in the record that would justify that conclusion, although the circumstances showing the character of the

> highway and the limited access to it make this a close case. The ladder may have fallen off a vehicle or it may have been placed on the highway as a prank. It may have been deliberately thrown from a vehicle by a passenger; i.e. someone other than the motorist. Therefore, we are of the opinion that to say the ladder was on the highway as a result of the negligence of a motorist would be pure speculation.

Id. at 296.

Following *Bruno*, the court in *Oliver* also affirmed summary judgment as follows:

> [I]t is undisputed that no one saw how the pile of carpet came to be in the roadway. The carpet could have been placed on the highway as a prank or it could have been thrown deliberately from a vehicle by a passenger. Therefore, to say that the carpet was on the highway as a result of the negligence of a motorist would be pure speculation, and pure speculation does not rise to the level of clear and convincing evidence.

2001 WL 359241 at *3.

Here, the trial court correctly came to the same conclusion based on Mr. Nau's inability to prove how the alleged rubber, concrete, or carpet arrived on the freeway. Rubber, concrete, or carpet could have fallen from a vehicle due to a third party's failure to properly load it, it may have been deliberately thrown there by a passenger, or it may have been placed there by a pedestrian as a prank. It also could have fallen from a vehicle due to an unknown defect in a vehicle that was outside of the vehicle operator's control. If the debris in the road was concrete, it could have been a broken piece of the highway that remained in the highway as a result of negligent construction or maintenance of the highway. Mr. Nau's inability to prove what the alleged debris was and where it came from precluded him from establishing the existence of an uninsured motor vehicle by clear and convincing evidence. Therefore, summary judgment was appropriate on these grounds as well.

B. The Doctrine of *Res Ipsa Loquitur* Does Not Apply to the Facts of Mr. Nau's Uninsured Motorist Claim.

Even though Mr. Nau was unable to come forward with any evidence, let alone clear and convincing evidence, demonstrating that the alleged debris was in the road as a result of the uninsured motorist's negligence, he claimed that the doctrine of *res ipsa loquitur* wholly relieved him of his burden of proof. The trial court was correct in rejecting the application of that doctrine to the facts and allegations of this case.

As Mr. Nau recognizes, *res ipsa loquitur* only applies if a plaintiff first establishes a foundation that negligence of the defendant was probably the cause of the injury by proving the following three elements. Laying this foundation requires proof of the following three elements:

> (1) the accident was of a kind which, in the ordinary course of events, would not have happened had the defendant used due care;
>
> (2) the agency or instrumentality causing the accident was at the time of the accident under the exclusive management or control of the defendant; and
>
> (3) the plaintiff's own use or operation of the agency or instrumentality was not primarily responsible for the accident.

King v. Searle Pharmaceuticals, Inc., 832 P.2d 858, 861-62 (Utah 1992). The first element requires the plaintiff to show that the injury was "more probably than not caused by negligence." *Warenski v. Advanced RV Supply*, 2011 UT App 197, ¶ 12, 257 P.3d 1096, 1101, *cert. denied*, 268 P.3d 192 (Utah 2011) (quoting *Ballow v. Monroe*, 699 P.2d 719, 722 (Utah 1985)). The analysis of courts from other jurisdictions, on whether *res ipsa loquitur* applies to uninsured/underinsured motorist claims, is instructive.

In *Tuttle v. Allstate Ins. Co.*, 138 P.3d 1107 (Wash. Ct. App. 2006), the plaintiff sued Allstate for underinsured motorist coverage after she drove her vehicle into a truck tire and wheel that was left in the road. She could not carry her burden of proving it was there due to the negligence of an unidentified motor vehicle because it was "entirely plausible that the tire came off of a moving truck, because it was negligently installed by" a third party. *Id.* at 1111-12. In an attempt to sidestep this burden of proof, the plaintiff sought to apply the doctrine of *res ipsa loquitur*. The Washington Court of Appeals refused to apply the doctrine and affirmed summary judgment, because the plaintiff could not satisfy the "exclusive control" element of the doctrine. It explained:

> Allstate did not have exclusive control over the wheel and tire — the injury causing instrumentality. And even if we consider the phantom driver as the defendant for a *res ipsa loquitur* analysis, [the plaintiff] cannot show that the driver had exclusive control over the wheel and tire. The wheel may have come off the vehicle because a third party negligently installed it or intentionally rolled it into the road. If so, the phantom driver did not have exclusive control of the instrumentality.

Id. at 1113; *see also Feliciano v. Encompass Ins. Co.*, 2006 WL 1060497 (N.J. Sup. Ct., April 3, 2006) (*res ipsa loquitur* instruction was not appropriate, because there was no evidence to establish exclusive control of tire in the road by an uninsured motor vehicle).

In *Bingenheimer v. State Farm Mut. Auto. Ins. Co.*, 100 P.3d 1132 (Oregon Ct. App. 2004), the plaintiff sued for uninsured motorist coverage, claiming she was in an accident because a slick substance was left on the road by an unknown vehicle. *Id.* at 1133. The plaintiff argued that she could meet her burden of proof through the doctrine of *res ipsa loquitur*. *Id.* at 1135. The Oregon Court of Appeals disagreed, because the plaintiff could not establish the first *res ipsa loquitur* element that the accident more

probably than not would not have occurred in the absence of negligence on the part of the unidentified vehicle. *Id.* While the slick substance may have been left on the road as a result of the unidentified vehicle's negligence, it also could have arrived there due to a defect in the vehicle that was beyond the driver's knowledge or control. *Id.* Because there was no evidence, as to the probability of a vehicle leaking oil with or without negligence, the jury would be without a legally sufficient basis for inferring the substance was on the road as a result of the unidentified vehicle's negligence. *Id.* Accordingly, *res ipsa loquitur* was inapplicable and summary judgment was affirmed.

Similarly, in *Edwards v. Shelter Mut. Ins. Co.*, 280 S.W.3d 159 (Mo. Ct. App. 2009), a pedestrian sued her auto insurer for uninsured motorist benefits after she slipped and fell on transmission fluid that was left in a parking lot by an unidentified motor vehicle. The Missouri Court of Appeals identified several potential non-negligent causes for transmission fluid to leak from a vehicle (including a defect in the vehicle, improper maintenance by a mechanic, unknown damage to the vehicle, and a collision with a different vehicle in which the uninsured motor vehicle was not at fault). *Id.* at 163. Because the jury could only conclude through speculation, conjecture, or surmise that the transmission fluid in the parking lot was present due to the unidentified vehicle's negligence, summary judgment was appropriate. *Id.* at 163.[2]

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[2] *See also* Semler v. Geico Gen. Ins. Co., No. CIV-11-1354-D, 2013 WL 2179357 at *6 (W.D. Okla. May 17, 2013) (refusing to apply *res ipsa loquitur* doctrine to establish UM coverage for accident caused by tire tread left in road by unidentified truck, because the plaintiff did not present any evidence to establish unidentified driver's "exclusive control over the tire tread or responsibility for its fitness"); *Shafer v. Interstate Auto. Ins. Co.*, 888 A.2d 1211, 1217-18 (Md. Ct. App. 2005) (rejecting application of *res ipsa loquitur*

The same reasoning applies to this case. Mr. Nau cannot establish that negligence by an unknown motorist was probably the cause of his injury, because a piece of rubber, concrete, or carpet falling from an unidentified vehicle could have happened due to unknown damage or an unknown defect in the vehicle, the negligence of a third-party who maintained the vehicle, and/or the negligence of a third-party who loaded the vehicle, none of which is the negligence of the unknown vehicle's owner or operator. Furthermore, under any of these scenarios, the rubber, concrete, or carpet would not have been under the exclusive control of Safeco or the unidentified motorist. The same would be true if the rubber, concrete, or carpet was intentionally left there by a pedestrian or if the concrete was a broken piece of the freeway or cement barrier. As a result, Mr. Nau cannot satisfy the first two elements of the *res ipsa loquitur* doctrine.

During the hearing on Safeco's summary judgment motion, and now here, Mr. Nau cites to *Pfoutz v. State Farm Mut. Auto. Ins. Co.*, 861 F.2d 527 (8th Cir. 1988) and Utah Code Ann. § 72-7-409 to argue that *res ipsa loquitur* should apply. In *Pfoutz*, the plaintiff struck a 200-pound diesel engine lying in a heavily travelled interstate. 861 F.2d at 528. Relying on Missouri law, which presumes a motor vehicle operator is responsible for the safety of any load being hauled by the vehicle, the Eighth Circuit held that "the very fact that a 200-pound engine head suddenly appeared in the middle of a major freeway provides sufficient evidence for a jury to conclude that someone must have been

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to uninsured motorist claim, because the piece of metal on the road that caused the accident was a component part of a different vehicle, and there was no evidence that the defect causing the piece to fall from that vehicle would have been detected by a reasonable and prudent inspection of the vehicle by the owner).

negligent," and "would allow a jury to infer that the negligence involved was that of the hauling vehicle's owner/operator." *Id.* at 529-30. The trial court in Mr. Nau's lawsuit correctly found that *Pfoutz* was distinguishable from the facts of his case.

Specifically, the trial court recognized that cases like *Pfoutz* involve obstructions in the road that obviously arise from the failure to load/secure the object. (R. at 000219, at pg. 24-27, 31-32.) A 200-pound piece of machinery in the middle of a crowded freeway likely does not arrive there unless it was loaded improperly onto a different vehicle. Where the debris in the road is alleged to have been a small piece of rubber, concrete, or carpet that no one else saw or reported, however, it would require speculation to determine that it was there as a result of a motor vehicle operator's negligence, and not because of the negligent or intentional acts of a third-party. Under none of the speculative scenarios identified above would the accident have been caused by an unidentified motor vehicle's failure to use due care, or an object within the exclusive management or control of the unidentified motor vehicle.

For these same reasons, Utah Code Ann. § 72-7-409 cannot satisfy the first two *res ipsa loquitur* elements. Subsections (2) and (6) of that statute only relate to the manner in which a motor vehicle is constructed and loaded. They have no relation to the negligent or intentional conduct of passengers, pedestrians, or highway constructors/ maintainers, each of which could be the source of (and have exclusive control over) a

piece of rubber, concrete, or carpet present on the freeway.[3] Furthermore, Section 72-7-409 does not impose liability on a reasonable motor vehicle operator when a load falls onto a highway due to the negligent or intentional conduct of a third party. *See Klafta v. Smith*, 404 P.2d 659, 661-62 (Utah 1965) (holding that the prior version of Section 72-7-409 does not make a motor vehicle operator "liable ipso facto, regardless of fault and in spite of any degree of care he may have exercised").

Finally, even if he could establish the first two elements, Mr. Nau cannot establish the third *res ipsa loquitur* element. After investigating the accident, Trooper Schultz testified that Mr. Nau should have been able to maintain control of his vehicle, even if his tire had blown out prior to colliding with the freeway barrier. (B. Schultz Depo., at 28, 39.) This testimony undermines Mr. Nau's ability to demonstrate that his own use or operation of the vehicle was not primarily responsible for the accident. Accordingly, the trial court correctly refused to find that Mr. Nau satisfied each element necessary to invoke the *res ipsa loquitur* doctrine, and, therefore, this Court should affirm the trial court's ruling.

CONCLUSION AND RELIEF REQUESTED

There was also no error in the trial court's decision to grant summary judgment in favor of Safeco. Mr. Nau failed to come forward with sufficient evidence for a reasonable jury to conclude, by clear and convincing evidence, that debris was in the road as a result of the negligence of an uninsured motor vehicle operator. The doctrine of *res*

[3] In the scenario where a passenger or pedestrian throws or deposits debris on a highway, it is the passenger or pedestrian who is responsible, and not a third-party who merely operates a motor vehicle. *See* Utah Code Ann. § 41-6a-1712.

ipsa loquitur does not relieve Mr. Nau of his burden of proof, because he cannot establish the elements necessary to invoke the doctrine. Therefore, summary judgment in favor of Safeco should be affirmed.

DATED this 4 day of January, 2016.

SNOW, CHRISTENSEN & MARTINEAU

NATHAN R. SKEEN
Attorneys for Appellee Safeco Insurance Company of Illinois

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,379 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The word count was obtained by a word processor, using Microsoft Word 2007.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 13 point font.

DATED this 4 day of January, 2016.

SNOW, CHRISTENSEN & MARTINEAU

Nathan R. Skeen
Attorneys for Appellee
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145-5000
nrs@scmlaw.com
(801) 521-9000

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing BRIEF OF APPELLEE to be served on the following via First Class Mail this 4 day of January, 2016:

Hutch U. Fale
David R. Gardner
1979 N. 1120 W.
Provo, Utah 84604-1183
Attorney for Appellant Nani Nau

Nathan R. Skeen

21397.63 3519278