NO. 97503-5

Court of Appeals No. 51055-3-II

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

JODI BRUGH, an individual,

Respondent,

v.

FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity,

Petitioners.

PETITION FOR REVIEW

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I. INTRODUCTION

Can a person use his or her preexisting health problems to create an inference of negligence through res ipsa loquitur? The Court of Appeals answered yes.

Fun-Tastic operates a roller coaster. CP 2.[1] Three days before riding the roller coaster, Brugh went to her doctor complaining of dizziness and loss of balance. CP 88. According to Brugh's doctor, these symptoms are consistent with the alleged head trauma Brugh subsequently had on the roller coaster. CP 87, 90. Three days after complaining about injuries consistent with head trauma, the alleged injury-causing event occurred. CP 2. Brugh rode the roller coaster and alleges that her head struck the safety harness after a "sudden and violent jolt." CP 105. Subsequently, Brugh rode other rides, attended a rock concert, and drove herself home. CP 106–07. Approximately three weeks later, Brugh was diagnosed with a subdural hematoma and blames the roller coaster. CP 90, 2.

Brugh sued Petitioners for negligence. CP 1. The Court of Appeals concluded that res ipsa loquitur applied based on the severe injury alone. *Slip Op.* 8–9. This Court should accept review and reverse.

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[1] Clerk's Papers (CP) are included as Appendix C.

II. IDENTITY OF PETITIONERS

Fun-Tastic Rides Co. and Midway Rides, LLC (Petitioners), seek review of the Court of Appeals' published decision terminating review.

III. THE COURT OF APPEALS' DECISION

The Court of Appeals, Division II, filed its published opinion on March 26, 2019 (Appendix A). A timely motion for reconsideration was denied on July 2, 2019 (Appendix B).

IV. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err by determining that res ipsa loquitur applies to the facts in the record?
2. The first element of res ipsa loquitur requires that the accident or occurrence causing injury would not ordinarily happen in the absence of negligence. One condition for meeting this element is that the "general experience and observation of mankind teaches that the *result* would not be expected without negligence." Does "result" mean the injury-causing event or the alleged injury?
3. Assuming that "result" means injury, did the Court of Appeals err by using "general experience" to speculate about medical causation rather than require plaintiff to present evidence on the requisite force needed to cause her injury?

4. Did the Court of Appeals err by failing to consider the non-moving party's evidence demonstrating that she had symptoms consistent with head trauma *before* riding the roller coaster?

V. STATEMENT OF THE CASE

A. Procedural History

Petitioners moved for summary judgment to dismiss Brugh's negligence claim on the basis that she had insufficient evidence to establish breach of duty.[2] CP 21-30. In response, Brugh relied on res ipsa loquitur and submitted an affidavit from her family doctor, Dr. Rachel Gonzalez. CP 66–80, 86-94. Thus, the question became whether Brugh presented sufficient evidence to warrant the application of res ipsa loquitur. After reconsideration, the trial court granted summary judgment, and Brugh appealed. The Court of Appeals reversed.

B. The Court of Appeals' Reasoning

On September 16, 2013, Brugh alleges that she sustained head trauma on Petitioners' roller coaster. CP 1–5. This trauma allegedly occurred when she hit her head on the padded shoulder harness after a "sudden and violent jolt." CP 104–05. Three weeks later, she went to her doctor with symptoms consistent with a brain bleed—a subdural

[2] Petitioners also moved to dismiss Brugh's other claims, including product liability. All of her claims were dismissed. Brugh only appealed the dismissal of her negligence claim based on res ipsa loquitur.

hematoma. CP 90 ¶ 10. Brugh's doctor characterized the subdural hematoma as a "slow bleed" that often does not manifest in symptoms for several weeks after the alleged traumatic event. CP 90 ¶ 12. Because Brugh reported head trauma on the roller coaster and no subsequent trauma, Dr. Gonzalez concluded that the roller coaster caused the subdural hematoma. CP 88–90 ¶¶ 9–10, 13.

The Court of Appeals recognized that people may receive minor bumps on the head against the safety harness without negligence. *Slip Op.* 8. But the court held that "general experience" teaches subdural hematomas do not result from minor head trauma. *See id.* at 8–9. Thus, Brugh's alleged injury by itself created an inference that Petitioners were negligent. *Id.* The record, however, contains no evidence regarding the amount of force—minor or something greater—needed to cause a slow bleed subdural hematoma. In other words, the court concluded on its own that something greater than a minor head trauma is needed.

Additionally, the Court of Appeals premised its decision on the erroneous belief that Petitioners agreed the roller coaster caused Brugh's subdural hematoma because Petitioners moved on breach of duty, not causation. *Slip Op.* 3–4. This premise ignores the procedural posture above, which required the Court of Appeals to assess whether Brugh presented sufficient evidence to warrant res ipsa loquitur. To the extent

that the plaintiff's own evidence raises questions about how the injury occurred, res ipsa loquitur is unwarranted. *Slip Op.* 3.[3]

C. Relevant Facts Ignored by the Court of Appeals

i. Did Brugh have preexisting trauma?

In her affidavit, which the Court of Appeals relied on, Dr. Gonzalez listed symptoms that were allegedly caused by head trauma on the roller coaster.[4] CP 87 ¶ 5. Among these symptoms, she identifies "dizziness" and "balance disturbance." *Id.* She states that "*at no time prior*" to the roller coaster event did Brugh report these symptoms. *Id.* (emphasis added). Then she contradicts herself.

According to Dr. Gonzalez, three days before the alleged injury-causing event on the roller coaster, Brugh complained of "constant bilateral ear pain, **dizziness**, fullness in her ears, hearing deficits, and **loss of balance**." CP 88 ¶ 9. Brugh is also diabetic. CP 87 ¶ 4.

The Court of Appeals omits these facts and fails to explain how it found res ipsa loquitur under these circumstances—when Brugh's own evidence shows that she was experiencing symptoms consistent with head trauma *before* riding the roller coaster. Furthermore, Brugh's doctor says

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[3] Citing to the rule for res ipsa loquitur, which requires that the defendant's instrumentality cause the injury. The plaintiff has the burden to establish this element by sufficient evidence. *See Slip Op.* 3.

[4] Inferentially, because Dr. Gonzalez concludes the head trauma caused Brugh's subdural hematoma, these are symptoms consistent with a subdural hematoma.

that it can take weeks after a traumatic event for a slow bleed hematoma to manifest with symptoms, raising a significant question about when the hematoma began. CP 90 ¶ 12. Brugh, the non-moving party, raised these facts, yet the Court of Appeals failed to consider them. *See Slip Op.*

ii. Did Brugh suffer trauma after the roller coaster?

Additionally, after allegedly sustaining "severe" head trauma on the roller coaster, Brugh rode other rides, attended a rock concert, and drove home. CP 106–107. The Court of Appeals omitted these facts.

D. Injury from Preexisting Conditions

The opinion references that Brugh lost hearing[5] in her right ear after hitting her head. *Slip Op.* 2. The next day, she saw her doctor and was bleeding from the ears. *Id.* Dr. Gonzalez, however, connected these issues to preexisting conditions, disconnecting them from alleged trauma on the roller coaster and the subdural hematoma. CP 88–90 ¶¶ 9, 13. The court's reasoning did not rely on these injuries.[6] *See Slip. Op.* 8–9.

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[5] Three days before, Brugh complained to her doctor about "hearing deficits" and "fullness in her ears." CP 88 ¶ 9

[6] Petitioners bring these facts to the Court's attention out of an abundance of caution. Without considering her preexisting conditions, a layperson might speculate about what caused the hearing loss and bleeding from the ears. However, Brugh's own evidence connects these injuries to preexisting issues and disconnects them from the alleged head trauma—thus, these injuries cannot create an inference of negligence. CP 88–90 ¶ 9. Further, the Court of Appeals did not rely on these injuries in its analysis. *Slip Op.* 8–9.

VI. REASONS WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' decision interpreting "result" as the injury, rather than the act or event or occurrence, conflicts with numerous decisions of the Court of Appeals and this Court. RAP 13.4(b)(1)–(2).

Whether res ipsa loquitur applies in a given case is a question of law reviewed de novo. *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). To establish a prima facie case, plaintiff must satisfy the following elements: (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. *Zukowsky v. Brown*, 79 Wn.2d 586, 593, 488 P.2d 269 (1971). The first element can be established by one of three conditions:

> (1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, *i.e.*, leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.

Reyes v. Yakima Health Dist., 191 Wn.2d 79, 90, 419 P.3d 819 (2018) (quotations and citations omitted).

The Court of Appeals relied on the second condition—general experience—and held that "result" can mean injury alone. *Slip Op.* 5, 7.[7] Thus, the court relied on the seriousness of Brugh's injury—a slow bleed subdural hematoma that allegedly did not manifest for three weeks—to determine that negligence must have occurred. *See id.* at 7–9. This analysis conflicts with numerous decisions from the Court of Appeals and this Court that have focused the result analysis on the injury-producing event, not the injury.

Applying this element in *Curtis*, this Court said, "[G]eneral experience tells us that *wooden docks ordinarily do not give way* if properly maintained." *Curtis v. Lein*, 169 Wn.2d 884, 894, 239 P.3d 1078 (2010) (emphasis added).[8] It did *not* say, "Hairline fractures to tibias do not ordinarily occur while walking on docks." *See id.* at 888.

Applying this element in *Pacheco*, this Court said, "[I]t is within the general experience of mankind that *the act of drilling* on the wrong side of a patient's jaw would not ordinarily take place without negligence." 149 Wn.2d at 439 (emphasis added). It did not say, "Nerve

[7] "The issue here then is whether the general experience and observation of mankind teaches that a subdural hematoma would not be expected from riding a roller coaster without negligence." *Slip Op.* 7.

[8] This Court also said, "As noted, res ipsa loquitur applies where the injury-producing event is of a type that would not ordinarily occur absent negligence . . . ." *Curtis*, 169 Wn.2d at 893.

damage does not ordinarily result from dental procedures absent negligence." *See id.* at 434 (describing injury).

Applying this element in *Zukowsky*, this Court said, "In the general experience of mankind, *the collapse of a seat is an event* that would not be expected without negligence on someone's part." *Zukowsky*, 79 Wn.2d at 596. (emphasis added). It did not say, "Injuries do not ordinarily result from sitting in non-swivel seats absent negligence." *See id.* at 588.

Similarly, the Court of Appeals has focused on "result" as the injury-producing event. In *Miller v. Kennedy*, Division I held: "It cannot be said from the vantage point of an unskilled person that *the insertion of a biopsy needle* into the calyceal area . . . [from] the general experience of most people indicates this would not have happened without negligence." 11 Wn. App. 272, 278, 552 P.2d 852 (1974) (emphasis added). It did not focus on the injury—the loss of a kidney following a biopsy. *See id.* at 275.

Applying this element in *Robison*, Division II said, "[I]ndividuals ordinarily do not suffer *severe electrical shocks* unless someone has been negligent." *Robison v. Cascade Hardwoods, Inc.*, 117 Wn. App. 552, 567, 72 P.3d 244 (2003) (emphasis added). The court focused the analysis on the what caused the injuries, not the injuries themselves. *See id.* at 566 ("Three medical experts concluded that electrical shock caused his severe

injuries[9] and medical symptoms . . . . ."). The Court of Appeals in this case relied on *Robison*, characterizing the electrical shock as the injury, though it was actually the injury-producing event. *See Slip Op.* 6–7.

As Division II recognized in this case, Washington courts have apparently not applied "result" to mean injury except in limited medical malpractice cases.[10] *See Slip Op.* 6 (citing *ZeBarth*[11]). Thus, this decision warrants review under RAP 13.4(b)(1) and (b)(2). Not only does it conflict with the analysis of multiple decisions, *supra*, the facts provide an excellent opportunity to analyze whether injury as "result" applies outside of the medical malpractice context or at all. Even in recent res ipsa loquitur medical malpractice decisions, this Court's analysis has focused on the event, not the injury.[12] *See, e.g., Reyes,* 191 Wn.2d at 90 (analyzing

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[9] The plaintiff suffered severe internal electrical burns. *Robison*, 117 Wn. App. at 566.

[10] *See, e.g., Douglas v. Bussabarger*, 73 Wn.2d 476, 482, 483 P.2d 829 (1968) (harmful result of paralysis would not ordinarily result from stomach ulcer surgery). *But see Miller v. Kennedy*, *supra*.

[11] *ZeBarth* was an esoteric experts case (the third condition to fulfill the first res ipsa element). *ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wn.2d 12, 19–20, 499 P.2d 1 (1972). The discussion regarding injury as the "result" was dicta. *See id.* In *ZeBarth*, the plaintiff suffered paralysis after receiving radiation treatment for cancer. *Id.* at 14–15. The evidence showed that the plaintiff had irradiation myelitis—paralysis caused by radiation. *Id.* The plaintiff had evidence from medical experts that paralysis does not result from radiation treatment without negligence. *Id.* at 19–20.

[12] Applying "result" to mean injury can make sense in the medical malpractice context. *See, e.g., Horner v. Northern Pac. Beneficial Ass'n Hospitals, Inc.*, 62 Wn.2d 351, 359–60, 382 P.2d 518 (1963). In effect, when a patient submits to medical personnel for a procedure, the patient is an instrumentality under the defendants' care and custody. *Young v. Webster*, 9 Wn. App. 87, 94, 510 P.2d 1182 (1973). An unusual injury from a procedure indicates that the patient was handled negligently. *See id.*

"general experience" as the "act of prescribing isoniazid" rather than the resulting injury—liver failure and death); *Pacheco*, *supra*.

2. The Court of Appeals' failure to consider the full context, manner, and circumstances of the alleged injury conflicts with decisions of the Court of Appeals and this Court, warranting review under RAP 13.4(b)(1)–(2).

Res ipsa loquitur requires the Court to look at the full context, manner, and circumstances of the alleged injury to determine if they are of a kind that do not ordinarily happen in the absence of negligence. *E.g.*, *Robison*, 117 Wn. App. at 565; *Zukowsky*, 79 Wn.2d at 594–95 (1971).

Here, the Court of Appeals ignored relevant circumstances and context surrounding the alleged injury. First, it ignored Brugh's own evidence demonstrating that she had symptoms consistent with head trauma *before* riding the roller coaster. CP 87–88 ¶¶ 5, 9. This evidence was submitted by the nonmoving party—Brugh—and therefore must be accepted as true. *State ex rel. Bond v. State*, 62 Wn.2d 487, 491, 383 P.2d 288 (1963).

Second, setting aside the subdural hematoma that allegedly did not appear until three weeks later, the court ignored that ***no indicia exists*** demonstrating that Brugh sustained severe head trauma, as opposed to a

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Furthermore, the defendants—medical professionals—are in the best position to explain the procedure and medical causation for the injury. *See Horner*, 62 Wn.2d at 360.

minor bump.[13] For example, the evidence does not show: loss of consciousness, external bruising in the alleged impact area, emergency transport to the hospital, or slurred speech. The uncontradicted facts show: after riding the roller coaster, Brugh rode other rides, attended a rock concert, and drove herself home—facts the court omitted from its opinion. CP 106-107; *see Slip Op.* 1–2. These facts suggest other potential traumas and undermine that a "severe" head trauma occurred.

Third, the court failed to consider the requisite force needed to cause a slow bleed subdural hematoma in a diabetic patient with Brugh's medical history and preexisting conditions. When medical knowledge is necessary, courts have declined to substitute their "general experience" for expert knowledge. *See, e.g., Reyes*, 191 Wn.2d at 90; *Miller*, 11 Wn. App. at 278. A slow bleed subdural hematoma that allegedly presented three weeks after riding the roller coaster cannot alone support that Brugh sustained severe, rather than mild, head trauma.[14] To understand the severity of trauma would require esoteric medical knowledge—knowledge about the requisite force to cause a slow bleed subdural hematoma. Brugh presented no evidence regarding the requisite force. When the *Brugh*

[13] The court recognized that minor head trauma can occur on roller coasters without negligence. *See Slip Op.* 8.

[14] The evidence equally suggests that Brugh's slow bleed subdural hematoma began *before* riding the roller coaster, suggesting this is not the type of occurrence that happens only through Petitioners' negligence.

court relied on "general experience" to conclude severe head trauma was necessary, it necessarily concluded the following are common knowledge:

- A diabetic with ongoing complaints of "constant bilateral ear pain, dizziness, fullness in her ears, hearing deficits, and loss of balance" is not susceptible to sustaining a subdural hematoma from a "minor bump." (*See* CP 88 ¶ 9).
- A slow bleed subdural hematoma that first presents itself through symptoms three weeks after head trauma indicates that the trauma was severe, not minor.
- Minor head trauma cannot cause a slow bleed subdural hematoma.
- Only severe trauma, something greater than a minor bump on the head, can cause a subdural hematoma.
- Severe head trauma occurs without any contemporaneous external indicia of severe head trauma.

Most if not all of these conclusions require medical opinion. General experience cannot answer the following question. What does an onset of subdural hematoma symptoms three weeks after the trauma indicate about the trauma's severity? Contrary to the Court's conclusion, no evidence in the record supports that a delayed onset of symptoms indicates severe head trauma.[15]

Indeed, Dr. Gonzalez does not opine about the requisite force

[15] Contrary to Division II's reasoning, the delayed onset of symptoms suggests relatively minor trauma. An obvious example demonstrates that a correlation likely exists between the trauma's severity and the temporal onset of symptoms. It cannot seriously be disputed that the most severe head trauma will result in instant death or immediate symptoms. Thus, delayed onset suggests something relatively minor.

needed to cause a slow bleed subdural hematoma in a diabetic patient with Brugh's medical history and preexisting conditions. Her affidavit simply refers to head trauma, not to the trauma's severity. *See* CP 86–91. But as the Court of Appeals recognized, minor head trauma occurs on roller coasters without negligence. *Slip. Op.* 8. The Court should accept review and determine if the Court of Appeals erred by ignoring the full context of the injury and by relying on its "general experience" to speculate about medical causation.

3. The Court of Appeals erred by relying on the rareness of the injury, conflicting with numerous decisions of the Court of Appeals and this Court, warranting review under RAP 13.4(b)(1)–(2).

The *Brugh* decision adopted a rule that severe injuries, standing alone, can serve as evidence of negligence. *Slip Op. 8.*[16] This holding and analysis conflict with numerous cases. In *Swanson*, Division II held: "The fact that the injury rarely occurs does not in itself prove that the injury was probably caused by someone's negligence." *Swanson v. Brigham*, 18 Wn. App 647, 650, 571 P.2d 217 (1977).[17]

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[16] "We do not determine which types of injuries are severe enough to invoke the doctrine of res ipsa loquitur in all cases."

[17] A 15-year-old admitted to the hospital overnight for infectious mononucleosis died from asphyxiation. 18 Wn. App at 649–50. *Swanson* upheld summary judgment dismissal, holding the doctor's negligence could not be inferred from the patient's death based on general experience. *Id.* at 650. Medical expert opinion was required. *Id.*

In *Tate v. Perry*, Division II rejected that a severe reaction to a drug, standing alone, can be used to infer negligence. 52 Wn. App. 257, 263, 785 P.2d 999 (1988). More recently, this Court held an alleged misdiagnosis followed by prescribing a drug that caused liver failure and death did not by itself create an inference that the doctor was negligent. *Reyes*, 191 Wn.2d at 90.[18]

4. The Court of Appeals erred by creating and then relying on a "concession" regarding causation.

The Court of Appeals created and then relied on a "concession" regarding causation that Petitioners never made. *See Slip Op. 8.* The court stated that Defendants do not dispute causation. *Id.* This is factually incorrect. Defendants made clear before the trial court in briefing and in oral argument that they dispute causation and disagree that the roller coaster caused the subdural hematoma. CP 21-30; 109–111 (arguing that plaintiff speculates that the roller coaster caused her subdural hematoma); Verbatim Report of Proceedings, Vol 1, at 3:23-4:8 (Appendix D).

The Court of Appeals misunderstood the procedural posture.[19] Petitioners moved for summary judgment based on Brugh's insufficient

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[18] Although *Reyes* is a medical malpractice case, the Court of Appeals has transplanted this line of authority into general res ipsa loquitur analysis. *See Slip Op.* 5–6 (relying on *ZeBarth*).

[19] While the Court of Appeals' premise that Fun-Tastic agreed "Brugh's subsequent subdural hematoma directly resulted from hitting her head during the roller coaster

evidence supporting breach of duty, a necessary element of negligence. CP 21-30 (Defs.' Mot. Summ. J.). Brugh relied on res ipsa loquitur. CP 71–80. Accordingly, the issue before the Court of Appeals was whether Brugh presented sufficient evidence to warrant res ipsa loquitur. *See Slip Op.* 1. Causation, while necessary to sustain a tort claim, is not an element of breach of duty. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998).

Not only did the Court of Appeals mistakenly start from the premise that Defendants agreed the roller coaster caused the subdural hematoma, *Slip Op.* 4, it ignored a necessary and implied element to establish res ipsa loquitur. "[A]n implied requirement of the first element is that the 'accident or occurrence' alleged to have produced the injury actually occurred." *Marshall v. Western Air Lines, Inc.*, 62 Wn. App. 251, 259, 813 P.2d 1269 (1991). *Brugh* did not consider this requirement.

Thus, Division II's *Brugh* decision conflicts with Division I's *Marshall* decision. In *Marshall*, the plaintiff alleged that a sudden change in cabin pressure occurred during a flight, causing a perilymph fistula with debilitating and long-lasting symptoms. *Id.* at 252–54. The plaintiff's expert opined that the fistula resulted from a change in cabin pressure. *Id.*

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ride" made its analysis easier, the court effectively decided a different case. *See Slip Op.* 8.

at 254.[20] Although the plaintiff had preexisting symptoms similar to what she experienced from the fistula, plaintiff's experts said her preexisting issues had no relation to the inner ear rupture.[21] *Id.* The court recognized that ear damage associated with flying ordinarily does not occur absent negligence. *Id.* at 259. Yet, normal changes in cabin pressure occur without negligence. *See id.* at 259–60. Thus, negligence could only be inferred if the evidence supported that a sudden, abnormal change in cabin pressure actually occurred.[22] *Id.*

The only direct evidence plaintiff presented to support an abnormal change in pressure was her own subjective testimony. *Id.* at 260. Further, the alleged sudden change in pressure went unnoticed by everyone except the plaintiff. *Id.* Based on these facts, the court held no reasonable person would conclude that a sudden, abnormal pressure change occurred, and therefore, plaintiff failed to prove the first res ipsa loquitur element. *Id.*

In close parallel, the *Brugh* opinion turned on severe head trauma occurring, as opposed to minor trauma that can occur on a roller coaster without negligence. *See Slip Op.* 8. But the court failed to conduct the

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[20] Similarly, Brugh's expert alleges that her subdural hematoma resulted from head trauma on the roller coaster.

[21] In contrast, Brugh's expert did not disconnect her preexisting symptoms from head trauma allegedly caused by the roller coaster. Indeed, Dr. Gonzalez said that Brugh never had these symptoms and then contradicted herself. *Compare* CP 87 ¶ 5, *with* CP 88 ¶ 9.

[22] In contrast, Division II in *Brugh* inferred negligence from the injury alone. *See Slip. Op.* 8–9.

Marshall analysis. Brugh's subjective description, such as a "sudden and violent jolt" occurred, is not enough.[23] Having an expert who causally links the alleged event with the injury is not enough.[24] The rareness of the injury occurring is not enough.[25] Furthermore, as *Marshall* noted, the fact that only the plaintiff experienced the alleged event undermines that the event actually occurred. *Marshall*, 62 Wn. App. at 260. Similarly, here, only Brugh alleged injury from the roller coaster ride.[26]

On similar facts, the vastly different results indicate that either *Marshall* or *Brugh* applied an incorrect legal analysis. This warrants review.

5. This case presents issues of substantial public interest under RAP 13.4(b)(4).

The Court of Appeals' holding invites trial courts to find res ipsa loquitur based only on severe injury alone, even absent additional evidence consistent with negligence. *See Slip Op.* 8–9. This raises an issue of substantial public interest. *See State v. Watson*, 155 Wn.2d 574,

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[23] *Compare Slip Op.* 2, *with Marshall*, 62 Wn. App. at 257 ("In Marshall's deposition, she stated only that she felt a sudden change in cabin pressure . . . .")

[24] *See Marshall*, 62 Wn. App. at 254.

[25] *Compare Slip. Op.* 8–9, *with Marshall*, 62 Wn. App. at 262.

[26] The *Brugh* opinion omits this fact. It relies on circular reasoning: severe trauma must have occurred on the roller coaster; otherwise, people would routinely experience subdural hematomas. *See Slip Op.* 8. Yet, the premise is unproven. To the contrary, *Brugh* fails to recognize that the absence of injury to other riders suggests severe trauma did not occur: if the roller coaster caused severe trauma during Brugh's ride, other riders should have experienced injuries. *See Marshall*, 62 Wn. App. at 260.

577, 122 P.3d 903 (2005) (finding substantial public interest when Court of Appeals' holding may affect future proceedings and lead to needless litigation). If *Brugh*'s res ipsa loquitur analysis is incorrect, trial courts will erroneously rely on the decision to apply res ipsa loquitur and deny summary judgment. Consequently, defendants will face needless litigation because they cannot appeal an erroneous denial of summary judgment until after a verdict. *See* RAP 2.2(a)(1).

Furthermore, this case presents a great opportunity for the Court to determine compelling issues within the context of res ipsa loquitur. First, the plaintiff in this case had preexisting symptoms consistent with a subdural hematoma *before* riding the roller coaster. Assuming a plaintiff can rely on the severity of injury alone, how should courts apply the analysis when the plaintiff has symptoms consistent with the alleged injury before the alleged injury-causing event?

Second, the plaintiff relied on an affidavit from a medical professional that contains internal contradiction, denying that the plaintiff had preexisting symptoms consistent with head trauma and then admitting that she did. Does this create a genuine issue of material fact?[27]

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[27] In the typical scenario, a plaintiff may attempt to create an issue of fact by submitting an affidavit to contradict prior sworn testimony. *See, e.g., Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002). Here, the affidavit from Brugh's doctor contains internal contradiction. *Compare* CP 87 ¶ 5, *with* CP 88 ¶ 9.

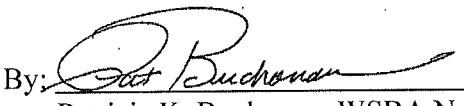
Finally, the Court of Appeals used the general-experience-of-mankind analysis to speculate about medical causation for a slow bleed subdural hematoma that allegedly manifested three weeks after trauma. *See Slip Op.* 8–9 (implicitly holding severe head trauma necessary). When medical knowledge is needed to determine how an injury arises, is this an area beyond the "general experience of mankind," *i.e.*, an area that requires esoteric knowledge, not a layperson's speculation?[28]

VII. CONCLUSION

For the foregoing reasons, this Court should accept review and reverse.

RESPECTFULLY SUBMITTED this 1st day of August, 2019.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., PS

By: 

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Of Attorneys for Defendants

[28] *See, e.g., Reyes*, 191 Wn.2d at 90; *Miller*, 11 Wn. App. at 278.

APPENDIX A

Brugh v. Fun-Tastic Rides Co., et al, 8 Wn. App.2d 176, 437 P.3d 751 (March 26, 2019)

Filed
Washington State
Court of Appeals
Division Two

March 26, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JODI BRUGH, an individual, Appellant, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Respondents.	No. 51055-3-II PUBLISHED OPINION

MELNICK, J. — While riding a roller coaster at the Washington State Fair, Jodi Brugh received a severe injury that resulted in a subdural hematoma that required brain surgery. Brugh sued Fun-Tastic Rides Co., Midway Rides LLC, and John Doe Manufacturer (collectively Fun-Tastic), alleging negligence. She relied on the doctrine of res ipsa loquitur to establish a breach of duty. Fun-Tastic moved for summary judgment on the theory that res ipsa loquitur did not apply, and after reconsideration, the trial court granted the motion.

We reverse.

FACTS

Fun-Tastic operated a roller coaster at the Washington State Fair. Before the start of the Fair, the Department of Labor and Industries (L&I) inspected the roller coaster for safety. L&I issued a permit for the roller coaster. Fun-Tastic inspected the ride on September 16, 2013, found no abnormalities, and noted that the "Ride is Running well." Clerk's Papers (CP) at 46.

On September 16, Brugh rode Fun-Tastic's roller coaster. Brugh described the last turn of the roller coaster as a sudden and violent jolt. As a result of the jolt, she struck both sides of her head on the roller coaster's safety harness. Subsequently, she lost hearing in her right ear. Fearing that she had a blown eardrum, she went to the Fair's medical tent for assistance. The Fair's medical staff recommended that she either go to urgent care or see her doctor the next day.

The next day, Brugh saw her primary care physician, Dr. Rachael Gonzalez. Brugh was bleeding from her ears. Because Brugh had a history of ear infections, Dr. Gonzalez attributed the bleeding to an ear infection.

On October 7, Brugh again saw Dr. Gonzalez. Brugh reported "severe and debilitating" head and neck pain. CP at 89. Dr. Gonzalez diagnosed Brugh with, among other injuries, "[s]evere traumatic brain injury" and a "[s]ubdural hematoma post head injury." CP at 90. Dr. Gonzalez believed the injuries were, more probably than not, "directly related to the head trauma Ms. Brugh suffered from the rollercoaster ride." CP at 90.

Dr. Gonzalez referred Brugh to a neurologist for an emergency consultation. Brugh had brain surgery for the subdural hematoma on October 16.

Brugh then filed a complaint alleging Fun-Tastic's negligence. After some discovery, Fun-Tastic moved for summary judgment. The court denied the motion.

Fun-Tastic filed a motion for reconsideration. The court heard oral argument, granted Fun-Tastic's motion, and dismissed Brugh's claims. Brugh appeals.

ANALYSIS

I. LEGAL PRINCIPLES

A. Summary Judgement

We review an order for summary judgment de novo, performing the same inquiry as the trial court. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). "We consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Rublee v. Carrier Corp.*, 192 Wn.2d 190, 199, 428 P.3d 1207 (2018). "Summary judgment is proper when the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012).

B. Res Ipsa Loquitur

In an action for negligence, a plaintiff must prove four basic elements: "(1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause." *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). The parties dispute only breach of duty.

Res ipsa loquitur "provides an inference as to the defendant's breach of duty." *Curtis v. Lein*, 169 Wn.2d 884, 892, 239 P.3d 1078 (2010). Whether res ipsa loquitur applies is a question of law. *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003).

A plaintiff may rely on res ipsa loquitur's inference of breach of duty if three elements are met: "(1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence." *Curtis*, 169 Wn.2d at 891. The parties dispute only the first element.

The first element is satisfied in any of three conditions:

> "(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law . . . ; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; [or] (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries."

Curtis, 169 Wn.2d at 891 (internal quotation marks omitted) (quoting *Pacheco*, 149 Wn.2d at 438-39). The parties here dispute the applicability of the second condition.

"[T]he res ipsa loquitur doctrine allows the plaintiff to establish a prima facie case of negligence when he cannot prove a specific act of negligence . . . . Once the plaintiff establishes a prima facie case, the defendant must then offer an explanation, if he can." *Pacheco*, 149 Wn.2d at 441. Res ipsa loquitur is inapplicable only where the defendant's evidence completely explains the plaintiff's injury. *Pacheco*, 149 Wn.2d at 440. "Thus, the plaintiff may be entitled to rely on the . . . doctrine even if the defendant's testimony, if believed by the jury, would explain how the event causing injury to the plaintiff occurred." *Pacheco*, 149 Wn.2d at 440. Fun-Tastic does not argue that it presented evidence explaining Brugh's injury. Instead, it contends that Brugh has not established her prima facie case.

To summarize, the parties do not dispute that Fun-Tastic owed Brugh a duty as a business invitee, that Brugh's injuries were caused by Fun-Tastic, or that Brugh suffered damages. They dispute only whether Fun-Tastic breached its duty of care. They dispute the applicability of res ipsa loquitur to establish this element.

Regarding the applicability of res ipsa loquitur, the parties do not dispute that Fun-Tastic maintained exclusive control of the roller coaster that caused Brugh's injury. They also agree that Brugh did not contribute to her own injury. The parties dispute only the applicability of res ipsa loquitur's first element. In determining whether this element is established, the parties dispute

whether "'the general experience and observation of mankind teaches that the result would not be expected without negligence.'" *Curtis*, 169 Wn.2d at 891 (internal quotation marks omitted) (quoting *Pacheco*, 149 Wn.2d at 438-39). Thus, determining whether this condition is satisfied is dispositive to the current appeal.

II. BRUGH'S ROLLER-COASTER RIDE

Brugh argues she experienced an abnormally strong jolt on her roller-coaster ride that caused her to hit her head on the roller coaster's safety harness. This injury resulted in a subdural hematoma that required brain surgery. Brugh argues that general experience teaches that such an impact leading to her brain injury does not ordinarily occur on roller coasters, absent negligence.

Fun-Tastic argues that Brugh must show something more than just the extent of her injuries to show that the roller coaster operated abnormally. Fun-Tastic claims that the roller coaster operated as expected and that any jolts were the normal jolts of the roller coaster.

A. Using Resulting Injuries as the "Result"

The parties dispute whether res ipsa loquitur's first element may be satisfied by showing that the resulting injury would not be expected without negligence. We conclude it can.

In *ZeBarth v. Swedish Hospital Medical Center*, 81 Wn.2d 12, 20, 499 P.2d 1 (1972), the court looked to the nature of the plaintiff's injuries in applying res ipsa loquitur. In the case, approximately one year after the plaintiff received treatment for Hodgkin's disease, he became paralyzed. *ZeBarth*, 81 Wn.2d at 13. He sued the hospital where he received treatment. *ZeBarth*, 81 Wn.2d at 13. The plaintiff relied on res ipsa loquitur to prove that his medical injuries would not have occurred if the hospital's version of the events was accurate. *ZeBarth*, 81 Wn.2d at 20. That is, he argued that an intervention of someone's negligence must have occurred to leave him paralyzed. *ZeBarth*, 81 Wn.2d at 18, 20. At trial, the plaintiff called experts who speculated about

potential hospital actions that could have caused his paralysis. *ZeBarth*, 81 Wn.2d at 15-17. The jury found for the plaintiff, and the hospital appealed. *ZeBarth*, 81 Wn.2d at 13-14, 18.

The hospital argued that, in the absence of direct proof of the injury-causing event, res ipsa loquitur was improper. *ZeBarth*, 81 Wn.2d at 18. The court rejected the hospital's argument and concluded that the record permitted the plaintiff to rely on res ipsa loquitur. *ZeBarth*, 81 Wn.2d at 22. Specifically, in discussing whether the general experience and observation of mankind teaches that the result would not be expected without negligence, the court noted that "high voltage radiation in the treatment of cancer has been widely enough and long enough employed in this country to allow the jury to find that . . . paralysis ordinarily will not result from its use except for the intervention of someone's negligence." *ZeBarth*, 81 Wn.2d at 20.

Although *ZeBarth* occurred in the medical malpractice context, the court's reasoning is applicable here. *ZeBarth* recognized that to establish whether the general experience and observation of mankind teaches that the *result* would not be expected without negligence, the result need not be the specific injury-causing event (e.g., a barrel falling out of a window). 81 Wn.2d at 20. Rather, the result can be the plaintiff's resulting injuries (e.g., paralysis). *ZeBarth*, 81 Wn.2d at 20. Thus, the court permitted the plaintiff in *ZeBarth* to do what Brugh attempts here.

In *Robison v. Cascade Hardwoods, Inc.*, 117 Wn. App. 552, 566-67, 72 P.3d 244 (2003), we similarly looked to the nature of the plaintiff's injuries in applying res ipsa loquitur. There, a logging-truck driver suffered a severe electrical shock while operating the defendant's trailer loader. *Robison*, 117 Wn. App. at 555, 566. The trial court granted summary judgment to the defendant on the ground that res ipsa loquitur did not apply. *Robison*, 117 Wn. App. at 561-62. We reversed, stating, "[G]eneral experience and observation [teaches] that, absent evidence of an

act of God, individuals ordinarily do not suffer severe electrical shocks unless someone has been negligent." *Robison*, 117 Wn. App. at 567 (footnote omitted).

Our decision turned on the nature of the shock. *See Robison*, 117 Wn. App. at 567. For example, general experience teaches that minor shocks, like those resulting from static electricity, do occur in the absence of negligence. But severe shocks are different. In the absence of negligence, they do not ordinarily occur while operating a trailer loader. *Robison*, 117 Wn. App. at 567. Thus, we looked to the nature of the plaintiff's injuries and determined whether general experience teaches that those injuries ordinarily happen in the absence of negligence. *Robison*, 117 Wn. App. at 567.

Language from the Supreme Court further supports our conclusion. In *Zukowsky v. Brown*, 79 Wn.2d 586, 594-95, 488 P.2d 269 (1971), the court recognized that application of res ipsa loquitur depends on whether "the manner and circumstances of the damage or injury be of a kind that do not ordinarily happen in the absence of someone's negligence." In *Pacheco*, the court again recognized that the doctrine takes effect when "a plaintiff asserts that he or she suffered 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." 149 Wn.2d at 436. Thus, *Zukowsky* and *Pacheco* further suggest that we may determine whether res ipsa loquitur's first element is established by analyzing whether the general experience and observation of mankind teaches that the nature of plaintiff's injury would not be expected without negligence.

Accordingly, we conclude that it is appropriate to examine the nature of an injury when analyzing the first element of res ipsa loquitur. The issue here then is whether the general experience and observation of mankind teaches that a subdural hematoma would not be expected from riding a roller coaster without negligence.

B. General Experience and Observations

Brugh argues that "general experience counsels that properly inspected, maintained, and operated roller coasters[] do not slam heads into shoulder rests with the requisite force to cause a subdural hematoma," absent negligence. Br. of Appellant at 17. We agree.

For purposes of its motion for summary judgment, Fun-Tastic makes numerous concessions. It does not dispute causation or allege that Brugh contributed to her own injury. Thus, Fun-Tastic recognizes that Brugh, while strapped into the roller coaster, hit her head during the course of the ride. It recognizes that Brugh's subsequent subdural hematoma directly resulted from hitting her head during the roller-coaster ride. It also recognizes that Brugh did not contribute in any way to her injury. Yet, Fun-Tastic argues that the roller coaster operated as expected. The general experience and observation of mankind teaches that these cannot all simultaneously be true. *See Bibeau v. Fred W. Pearce Corp.*, 173 Minn. 331, 334, 217 N.W. 374 (1928) ("One would hardly suppose it possible for defendant to continue the roller-coaster business if such accidents were ordinary occurrences.").

We recognize that certain injuries are to be expected while riding roller coasters. For example, general experience teaches that people may receive minor bumps to their head from the safety harness of a roller coaster during a ride. General experience teaches that people may receive minor whiplash while riding a roller coaster. However, general experience teaches that a subdural hematoma brain bleed does not ordinarily happen while strapped into a roller coaster in the absence of negligence. Accordingly, the nature of Brugh's injury is not of a type that one would expect while riding a roller coaster.

We do not determine which types of injuries are severe enough to invoke the doctrine of res ipsa loquitur in all cases. Instead, whether a plaintiff may rely on res ipsa loquitur "depends

upon the peculiar facts and circumstances of the individual case." *Morner v. Union Pac. R.R. Co.*, 31 Wn.2d 282, 293, 196 P.2d 744 (1948). Here, we simply recognize that this specific injury, Brugh's subdural hematoma, would not ordinarily occur while strapped into a roller coaster without negligence. Res ipsa loquitur, therefore, provides an inference of a breach of duty.[1]

Other jurisdictions considering similar facts have arrived at the same conclusion. In *Bibeau*, the plaintiff rode the defendant's roller coaster and hit her nose on the safety bar; the hit broke her nose and rendered her unconscious. 173 Minn. at 333. The Supreme Court of Minnesota concluded that res ipsa loquitur applied. "[I]f such accidents were ordinary occurrences," the court reasoned that roller-coaster companies would find willing patrons hard to come by. *Bibeau*, 173 Minn. at 334. Thus, the plaintiff's abnormal injuries must have been the result of an abnormal roller-coaster ride, which do not ordinarily occur in the absence of negligence. *See Bibeau*, 173 Minn. at 334.

In *Jenkins v. Ferguson*, 357 So. 2d 39, 40 (La. Ct. App. 1978), the plaintiff broke her leg after being thrown from an amusement park ride called the "Scrambler." The evidence showed that the plaintiff's fiancé, who accompanied her on the Scrambler, "first locked the device and subsequently the operator came back unlocked it and locked it properly, rattling it to be sure that it was properly locked." *Jenkins*, 357 So. 2d at 40-41. Nonetheless, the door opened, and the plaintiff was thrown from the ride. *Jenkins*, 357 So. 2d at 40.

The Court of Appeal of Louisiana concluded that because the elements of exclusive control and contributory negligence were not in dispute, "this is a proper case for the application of the

[1] The "jury is [still] free to disregard or accept the truth of the inference." *Curtis*, 169 Wn.2d at 895.

doctrine of res ipsa loquitur. No one knows what happened . . . . We do know that the locking device did not work properly. . . [but n]o one knows . . . why." *Jenkins*, 357 So. 2d at 41.

In *Coaster Amusement Co. v. Smith*, 141 Fla. 845, 846-47, 194 So. 336 (1940), out of the 1,236 patrons who rode the roller coaster on the night in issue, only the plaintiff suffered an injury. While the plaintiff rode the roller coaster, "the car in which she was riding was by some means caused to perform a sudden and unusual jerk," and as a result, the plaintiff was thrown from the roller-coaster car and injured. *Coaster Amusement*, 141 Fla. at 846.

The defendant presented the following evidence. Before the plaintiff's injury, the roller coaster was inspected every day, and no defects were found. *Coaster Amusement*, 141 Fla. at 847. Immediately after the plaintiff's injury, the defendant inspected both the car in which the plaintiff rode and the roller coaster's track. *Coaster Amusement*, 141 Fla. at 847. The defendant found nothing wrong with either. *Coaster Amusement*, 141 Fla. at 847. Further, the day after the injury, the roller coaster operated with no mishaps. *Coaster Amusement*, 141 Fla. at 847. The defendant had not repaired or replaced any parts in the intervening time. *Coaster Amusement*, 141 Fla. at 847. However, the defendant offered "no explanation of the cause of the unusual gyrations of [the roller coaster]." *Coaster Amusement*, 141 Fla. at 847.

The trial court instructed the jury on res ipsa loquitur, and the jury found in favor of the plaintiff. *Coaster Amusement*, 141 Fla. at 846-47, 856. The Supreme Court of Florida approved the res ipsa loquitur instruction based upon the facts of the case. *Coaster Amusement*, 141 Fla. at 856.

CONCLUSION

Because we conclude that Brugh's injury, a subdural hematoma, is not of a type one would expect while riding a roller coaster without negligence, we conclude that the doctrine of res ipsa loquitur applies to her case.[2] Therefore, the trial court erred in granting Fun-Tastic's motion for summary judgment.

We reverse.

Melnick, J.

We concur:

Worswick, J.

Maxa, C.J.

[2] We also reject Fun-Tastic's argument that the injury-causing instrumentality must be destroyed before a plaintiff may rely on the doctrine. Fun-Tastic argues if the instrumentality is not destroyed, a plaintiff can inspect it, and res ipsa loquitur is inapplicable. Fun-Tastic's argument relies on the concurrence from *Curtis*. 169 Wn.2d at 896 (Madsen, C.J., concurring). However, no binding authority holds that res ipsa loquitur may only be applied when the injury-causing instrumentality has been destroyed or is otherwise unavailable to the plaintiff. In fact, in numerous cases the injury-causing instrumentality was not destroyed, yet the plaintiff was able to rely on res ipsa loquitur's inference of breach of duty. *See, e.g.*, *Zukowsky*, 79 Wn.2d at 589; *Robison*, 117 Wn. App. at 560, 566-67.

APPENDIX B

Brugh v. Fun-Tastic Rides Co. et al, No. 51055-3-II,
Order Denying Motion for Reconsideration (July 2, 2019).

Filed
Washington State
Court of Appeals
Division Two

July 2, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JODI BRUGH, an individual, Appellant, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Respondents.	No. 51055-3-II ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO STRIKE

Respondents, Fun-Tastic Rides Co. and Midway Rides LLC, filed a motion for reconsideration of this court's March 26, 2019 opinion. Appellant, Jodi Brugh, filed a motion to strike Respondents' motion. After consideration, we deny the motion for reconsideration and the motion to strike.

IT IS SO ORDERED.

Panel: Jj. Worswick, Maxa, Melnick.

FOR THE COURT:

Melnick J.

Melnick, J.

APPENDIX C

Clerk's Papers (CP 1–144)

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

JODI BRUGH	Plaintiff	December 14, 2017
vs.		No.: 16-2-10983-2 Court of Appeals No.: 51055-3
FUN-TASTIC RIDES CO MIDWAY RIDES LLC	Defendant	CLERK'S PAPERS PER REQUEST OF APPELLANT TO THE COURT OF APPEALS, DIVISION II

HONORABLE KATHRYN J. NELSON
Trial Judge

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

JODI BRUGH Plaintiff vs. FUN-TASTIC RIDES CO MIDWAY RIDES LLC Defendant	December 14, 2017 No.: 16-2-10983-2 Court of Appeals No.: 51055-3 CLERK'S PAPERS PER REQUEST OF APPELLANT TO THE COURT OF APPEALS, DIVISION II

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF PIERCE

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	)	No. **COMPLAINT FOR DAMAGES**

Plaintiff Jodi Brugh, through her attorneys, by way of Complaint against Defendants Fun-tastic Rides Co., Midway Rides LLC, and John Doe Manufacturer, alleges as follows:

I. PARTIES

1.1 Jodi Brugh ("Brugh") is a single woman who resides in the County of Spokane, State of Washington.

1.2 Fun-tastic Rides Co. ("Fun-tastic") is an Oregon corporation with its principal place of business in Oregon, and its registered agent in Vancouver, Washington.

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1.3 Midway Rides LLC ("Midway") is a Washington limited liability company with its principal place of business in Washington and its registered agent in Puyallup, Washington.

1.4 John Doe Manufacturer is an unknown entity which may have manufactured the roller coaster in question.

II. JURISDICTION AND VENUE

2.1 As the events which give rise to the instant complaint occurred in the County of Pierce, jurisdiction and venue are appropriate in Pierce County. RCW 4.12.020.

III. FACTS

3.1 Fun-tastic, Midway, John Doe Manufacturer, or all, are the owners, operators, and/or manufacturers of a roller coaster, believed to be known at the time of the complained-of incident as the "Rainier Rush."

3.2 On September 16, 2013, Brugh attended the Washington State Fair in Puyallup, Washington.

3.3 Brugh rode the "Rainier Rush" roller coaster.

3.4 The roller coaster was, in combination or in the alternative, unreasonably unsafe as designed, unreasonably unsafe as manufactured, unreasonably or improperly maintained, and/or unreasonably or improperly operated.

3.5 As a consequence, Brugh was caused by the roller coaster to strike her head, causing her personal injury.

3.6 As a result, Brugh has suffered special and general damages, in an amount to be proven at trial.

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IV. CAUSES OF ACTION

A. Negligence.

4.1 Brugh re-alleges the preceding paragraphs as if fully set forth herein.

4.2 Defendants owe duties to maintain and operate their roller coaster in a reasonably prudent fashion.

4.3 Defendants breached these duties.

4.4 Said breach is a proximate cause of Brugh's special and general damages.

4.5 Brugh has incurred special and general damages in an amount to be proven at trial.

B. Product Liability.

4.6 Brugh re-alleges the preceding paragraphs as if fully set forth herein.

4.7 Defendants owe duties to the public, *inter alia*, under the product liability act vis-à-vis the roller coaster in question.

4.8 Defendants breached these duties.

4.9 Said breach is a proximate cause of Brugh's special and general damages.

4.10 Brugh has incurred special and general damages in an amount to be proven at trial.

C. Failure to Warn.

4.11 Brugh re-alleges the preceding paragraphs as if fully set forth herein.

4.12 Defendants knew or had reason to know that the roller coaster they manufactured, own, and/or operate is unreasonably unsafe.

4.13 Defendants had a duty to warn.

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4.14 Defendants breached this duty.

4.15 Said breach is the proximate cause of Brugh's special and general damages.

4.16 Brugh has incurred special and general damages in an amount to be proven at trial.

D. Breach of Promise.

4.17 Brugh re-alleges the preceding paragraphs as if fully set forth herein.

4.18 Defendants either expressly or impliedly warranted that the roller coaster was reasonably safe for riders such as Brugh.

4.19 Defendants breached this duty.

4.20 Said breach is the proximate cause of Brugh's special and general damages.

4.21 Brugh has incurred special and general damages in an amount to be proven at trial.

V. PRAYERS FOR RELIEF

Brugh prays for the following relief:

1. For entry of judgment against Defendants, jointly and severally, for special and general damages incurred, in an amount to be proven at trial;

2. For costs and fees, as allowed by law; and

3. For such other and further relief as the Court deems just and equitable.

For adjudication of all claims, a jury of twelve members is demanded.

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PAINE HAMBLEN LLP
717 WEST SPRAGUE AVENUE, SUITE 1200
SPOKANE, WASHINGTON 99201-3505
PHONE (509) 455-6000; FAX: (509) 838-0007

DATED this 9 day of September, 2016.

PAINE HAMBLEN LLP

By: _____
WILLIAM C. SCHROEDER, WSBA #41986
ANNE K. SCHROEDER, WSBA #47952
Attorneys for Plaintiff

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PHONE (509) 455-6000; FAX: (509) 838-0007

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 FUN-TASTIC RIDES CO.'S ANSWER TO COMPLAINT FOR DAMAGES

COMES NOW Defendant Fun-tastic Rides, Co. ("Fun-tastic Rides Defendant"), by and through its counsel of record, and hereby answers Plaintiff's Complaint for Damages as follows with the paragraph numbers below coinciding with the paragraph numbering of the Complaint that is being responded to. In answering Plaintiff's Complaint, which contains multiple allegations in paragraphs, and a number of allegations embedded into individual sentences, Fun-tastic Rides Defendant is aware that it could be interpreted that a particular allegation was neither admitted nor denied in this Answer. Therefore, in addition to the admissions and denials set forth below, Fun-tastic Rides Defendant denies any allegation of the Complaint which is not expressly admitted or denied below.

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ANSWER

I. PARTIES

1.1 This answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations.

1.2 This answering Defendant admits that Fun-tastic Rides, Co.'s corporation in Oregon has a principal place of business in Oregon and further admits that the corporation has a registered agent in Vancouver, Washington. This answering Defendant denies any remaining allegations in the corresponding paragraph.

1.3 The allegations in the corresponding paragraph are not directed at this answering Defendant, and therefore, no response is required.

1.4 The allegations in the corresponding paragraph are not directed at this answering Defendant, and therefore, no response is required. To the extent a response is required, this answering Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and therefore, denies them.

II. JURISDICTION AND VENUE

2.1 This answering Defendant admits jurisdiction and venue are proper in Pierce County because the alleged events which give rise to the Complaint occurred in the County of Pierce. This answering Defendant denies any remaining allegations in the corresponding paragraph.

III. FACTS

3.1 This answering Defendant admits Fun-tastic Rides Defendant is an operator of roller coasters and further admits that it has previously operated the roller coaster known as the "Rainier Rush." The remaining allegations in the corresponding paragraph are not directed at this answering Defendant, and therefore, no response is required. To the extent a response is required, this answering Defendant is without sufficient information to form a belief as to the truth of the allegations, and therefore, denies them.

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3.2 This answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore, denies them.

3.3 This answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore, denies them.

3.4 This answering Defendant specifically denies wrongdoing of any kind; therefore, this answering Defendant denies the allegations in the corresponding paragraph against Fun-tastic Rides. The remaining allegations are denied.

3.5 This answering Defendant specifically denies wrongdoing of any kind and lacks sufficient information to form a reasonable belief as to Plaintiff's alleged injuries; therefore, this answering Defendant denies the allegations in the corresponding paragraph. Through pre-litigation discovery, this answering Defendant understands that Plaintiff's injuries pre-existed and/or had unrelated proximate causes and/or are genetic.

3.6 This answering Defendant specifically denies wrongdoing of any kind and lacks sufficient information to form a reasonable belief as to Plaintiff's alleged injuries; therefore, this answering Defendant denies the allegations in the corresponding paragraph.

IV. CAUSES OF ACTION

A. Negligence.

4.1 The answering Defendant re-incorporates by reference all other paragraphs of this Answer as if fully set forth herein.

4.2 The allegations in the corresponding paragraph call for a legal conclusion for which no answer is required. The remaining allegations in the corresponding paragraph are not directed at this answering Defendant, and therefore, no response is required.

4.3 This answering Defendant specifically denies wrongdoing of any kind; therefore, this answering Defendant denies the allegations in the corresponding paragraph against Fun-tastic Rides. The remaining allegations in the corresponding paragraph are not

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directed at this answering Defendant, and therefore, no response is required. To the extent a response is required, this answering Defendant denies them.

4.4 This answering Defendant specifically denies wrongdoing of any kind and denies proximate cause.

4.5 This answering Defendant specifically denies wrongdoing of any kind and lacks sufficient information to form a reasonable belief as to Plaintiff's alleged injuries; therefore, this answering Defendant denies the allegations in the corresponding paragraph, and denies proximate cause.

B. Product Liability.

4.6 The answering Defendant re-incorporates by reference all other paragraphs of this Answer as if fully set forth herein.

4.7 The allegations in the corresponding paragraph call for a legal conclusion for which no answer is required.

4.8 This answering Defendant specifically denies wrongdoing of any kind; therefore, this answering Defendant denies the allegations in the corresponding paragraph against Fun-tastic Rides. The remaining allegations in the corresponding paragraph are not directed at this answering Defendant, and therefore, no response is required. To the extent a response is required, this answering Defendant denies them.

4.9 This answering Defendant specifically denies wrongdoing of any kind and lacks sufficient information to form a reasonable belief as to Plaintiff's alleged injuries; therefore, this answering Defendant denies the allegations in the corresponding paragraph.

4.10 This answering Defendant specifically denies wrongdoing of any kind and lacks sufficient information to form a reasonable belief as to Plaintiff's alleged injuries; therefore, this answering Defendant denies the allegations in the corresponding paragraph.

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C. Failure to Warn.

4.11 The answering Defendant re-incorporates by reference all other paragraphs of this Answer as if fully set forth herein.

4.12 This answering Defendant specifically denies wrongdoing of any kind; therefore, this answering Defendant denies the allegations in the corresponding paragraph against Fun-tastic Rides. The remaining allegations in the corresponding paragraph are not directed at this answering Defendant, and therefore, no response is required. To the extent a response is required, this answering Defendant denies them.

4.13 The allegations in the corresponding paragraph call for a legal conclusion for which no answer is required.

4.14 This answering Defendant specifically denies wrongdoing of any kind; therefore, this answering Defendant denies the allegations in the corresponding paragraph against Fun-tastic Rides. The remaining allegations in the corresponding paragraph are not directed at this answering Defendant, and therefore, no response is required. To the extent a response is required, this answering Defendant denies them.

4.15 This answering Defendant specifically denies wrongdoing of any kind and denies proximate cause.

4.16 This answering Defendant specifically denies wrongdoing of any kind and denies proximate cause.

D. Breach of Promise.

4.17 The answering Defendant re-incorporates by reference all other paragraphs of this Answer as if fully set forth herein.

4.18 The allegations in the corresponding paragraph call for a legal conclusion for which no answer is required.

4.19 This answering Defendant specifically denies wrongdoing of any kind; therefore, this answering Defendant denies the allegations in the corresponding paragraph

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against Fun-tastic Rides. The remaining allegations in the corresponding paragraph are not directed at this answering Defendant, and therefore, no response is required. To the extent a response is required, this answering Defendant denies them.

4.20 This answering Defendant specifically denies wrongdoing of any kind and denies proximate cause.

4.21 This answering Defendant specifically denies wrongdoing of any kind and denies proximate cause.

V. PLAINTIFF'S PRAYERS FOR RELIEF

BY WAY OF FURTHER ANSWER and in answer to Plaintiff's "Prayers for Relief," this answering Defendant denies it acted unlawfully in any manner and further specifically denies that Plaintiff is entitled to any of the relief prayed for with respect to this answering Defendant.

AFFIRMATIVE DEFENSES

1. Failure to state a claim. The Complaint may not contain enough facts to state one or more causes of action against this answering Defendant.

2. Failure to mitigate damages. Plaintiff may have failed to take reasonable steps to minimize or prevent the damages Plaintiff claims to have suffered.

3. Assumption of risk. Plaintiff may have knowingly and voluntarily chosen to encounter the risk associated with the activities alleged to have been engaged in, thereby relieving the Defendant from duties and liabilities that may arise from such activities.

4. Comparative fault. Plaintiff and/or other persons or entities other than this answering Defendant caused or contributed to the damages Plaintiff claims to have suffered. Therefore, any award made in favor of the Plaintiff in this case must be reduced by an amount equal to the percentage of the fault of others in causing or contributing to the damages as alleged in the complaint.

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5. Apportionment of fault. Defendants other than this answering Defendant caused or contributed to the damages Plaintiff claims to have suffered. Therefore, any award made in favor of the Plaintiff in this case must be divided between the parties so that each pays only his, her, or its fair share in relationship to his, her, or its amount of fault.

RESERVATION OF RIGHTS

This answering Defendant expressly reserves its right to plead further answers, affirmative defenses, counterclaims, crossclaims, and third-party claims as investigation and discovery may warrant.

PRAYER FOR RELIEF

Fun-tastic Rides Defendant prays for relief and judgment against Plaintiff as follows:

(1) Dismissal of Plaintiff's claims with prejudice.

(2) All such other relief as is just and proper.

DATED this 30th day of September, 2016.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: _____
Patricia K. Buchanan, WSBA No. 19892
Tamila N. Stearns, WSBA No. 50000
Of Attorneys for Defendant Fun-tastic Rides, Co.

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CERTIFICATE OF SERVICE

I, Jennifer Friesen, hereby declare that on September 30th, 2016, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

ATTORNEY NAME & ADDRESS	METHOD OF DELIVERY
Mr. William J. Schroeder Ms. Anne Schroeder Paine Hamblen LLP 717 W. Sprague Avenue, Suite 1200 Spokane, WA 99201-3505	■ Electronic Mail □ ABC Legal Messenger Service ■ Regular U.S. Mail □ Other: Pierce County Linx

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

DATED September 30th, 2016 at Seattle, Washington.

Jennifer Friesen
Legal Assistant

PATTERSON BUCHANAN FOBES & LEITCH, INC., P.S.
2112 Third Avenue, Suite 500, Seattle WA 98121
Tel. 206.462.6700 Fax 206.462.6701

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

JODI BRUGH, an individual,

Plaintiff,

v.

FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity,

Defendants.

No. 16-2-10983-2

MIDWAY RIDES LLC'S ANSWER TO COMPLAINT FOR DAMAGES

COMES NOW Defendant Midway Rides, LLC ("Midway Rides Defendant"), by and through its counsel of record, and hereby answers Plaintiff's Complaint for Damages as follows with the paragraph numbers below coinciding with the paragraph numbering of the Complaint that is being responded to. In answering Plaintiff's Complaint, which contains multiple allegations in paragraphs, and a number of allegations embedded into individual sentences, Midway Rides Defendant is aware that it could be interpreted that a particular allegation was neither admitted nor denied in this Answer. Therefore, in addition to the admissions and denials set forth below, Midway Rides Defendant denies any allegation of the Complaint which is not expressly admitted or denied below.

PATTERSON BUCHANAN
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ANSWER

I. PARTIES

1.1 This answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations.

1.2 The allegations in the corresponding paragraph are not directed at this answering Defendant, and therefore, no response is required.

1.3 This answering Defendant admits that Midway Rides, LLC corporation in Washington has a principal place of business in Washington and further admits that the corporation has a registered agent in Puyallup, Washington. This answering Defendant denies any remaining allegations in the corresponding paragraph.

1.4 The allegations in the corresponding paragraph are not directed at this answering Defendant, and therefore, no response is required. To the extent a response is required, this answering Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and therefore, denies them.

II. JURISDICTION AND VENUE

2.1 This answering Defendant admits jurisdiction and venue are proper in Pierce County because the alleged events which give rise to the Complaint occurred in the County of Pierce. This answering Defendant denies any remaining allegations in the corresponding paragraph.

III. FACTS

3.1 This answering Defendant admits Midway Rides Defendant is an owner of roller coasters and further admits that it has previously leased/purchased the roller coaster known as the "Rainier Rush." The remaining allegations in the corresponding paragraph are not directed at this answering Defendant, and therefore, no response is required. To the extent a response is required, this answering Defendant is without sufficient information to form a belief as to the truth of the allegations, and therefore, denies them.

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3.2-3.3. This answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the corresponding paragraphs, and therefore, denies them.

3.4-3.6. This answering Defendant specifically denies wrongdoing of any kind and lacks sufficient information to form a reasonable belief as to Plaintiff's alleged injuries; therefore, this answering Defendant denies the allegations in the corresponding paragraph.

IV. CAUSES OF ACTION

A. Negligence.

4.1 The answering Defendant re-incorporates by reference all other paragraphs of this Answer as if fully set forth herein.

4.2 The allegations in the corresponding paragraphs call for a legal conclusion for which no answer is required. The remaining allegations in the corresponding paragraph are not directed at this answering Defendant, and therefore, no response is required.

4.3-4.5. This answering Defendant specifically denies wrongdoing of any kind and lacks sufficient information to form a reasonable belief as to Plaintiff's alleged injuries; therefore, this answering Defendant denies the allegations in the corresponding paragraph and denies proximate cause.

B. Product Liability.

4.6 The answering Defendant re-incorporates by reference all other paragraphs of this Answer as if fully set forth herein.

4.7 The allegations in the corresponding paragraphs call for a legal conclusion for which no answer is required.

4.8-4.10. This answering Defendant specifically denies wrongdoing of any kind and lacks sufficient information to form a reasonable belief as to Plaintiff's alleged injuries; therefore, this answering Defendant denies the allegations in the corresponding paragraph.

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C. Failure to Warn.

4.11 The answering Defendant re-incorporates by reference all other paragraphs of this Answer as if fully set forth herein.

4.12 This answering Defendant specifically denies wrongdoing of any kind and lacks sufficient information to form a reasonable belief as to Plaintiff's alleged injuries; therefore, this answering Defendant denies the allegations in the corresponding paragraph.

4.13 The allegations in the corresponding paragraphs call for a legal conclusion for which no answer is required. To the extent that an answer is required, it is denied.

4.14-4.16. This answering Defendant specifically denies wrongdoing of any kind and lacks sufficient information to form a reasonable belief as to Plaintiff's alleged injuries; therefore, this answering Defendant denies the allegations in the corresponding paragraph and denies proximate cause.

D. Breach of Promise.

4.17 The answering Defendant re-incorporates by reference all other paragraphs of this Answer as if fully set forth herein.

4.18 The allegations in the corresponding paragraphs call for a legal conclusion for which no answer is required. To the extent that an answer is required, it is denied.

4.19-4.21. This answering Defendant specifically denies wrongdoing of any kind and lacks sufficient information to form a reasonable belief as to Plaintiff's alleged injuries; therefore, this answering Defendant denies the allegations in the corresponding paragraph and denies proximate cause.

V. PLAINTIFF'S PRAYERS FOR RELIEF

BY WAY OF FURTHER ANSWER and in answer to Plaintiff's "Prayers for Relief," this answering Defendant denies it acted unlawfully in any manner and further specifically denies that Plaintiff is entitled to any of the relief prayed for with respect to this answering Defendant.

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AFFIRMATIVE DEFENSES

1. Failure to state a claim. The Complaint may not contain enough facts to state one or more causes of action against this answering Defendant.

2. Failure to mitigate damages. Plaintiff may have failed to take reasonable steps to minimize or prevent the damages Plaintiff claims to have suffered.

3. Assumption of risk. Plaintiff may have knowingly and voluntarily chosen to encounter the risk associated with the activities alleged to have been engaged in, thereby relieving the Defendant from duties and liabilities that may arise from such activities.

4. Comparative fault. Plaintiff and/or other persons or entities other than the named Defendants in this action caused or contributed to the damages Plaintiff claims to have suffered. Therefore, any award made in favor of the Plaintiff in this case must be reduced by an amount equal to the percentage of the fault of others in causing or contributing to the damages as alleged in the complaint.

RESERVATION OF RIGHTS

This answering Defendant expressly reserves its right to plead further answers, affirmative defenses, counterclaims, crossclaims, and third-party claims as investigation and discovery may warrant.

PRAYER FOR RELIEF

Midway Rides Defendant prays for relief and judgment against Plaintiff as follows:

(1) Dismissal of Plaintiff's claims with prejudice.

(2) All such other relief as is just and proper.

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DATED this 21 day of December, 2016.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: _____
Patricia K. Buchanan, WSBA No. 19892
Tamila N. Stearns, WSBA No. 50000
Of Attorneys for Defendant Midway Rides, LLC

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FOBES & LEITCH, INC., P.S.
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CERTIFICATE OF SERVICE

I, Lauren M. Brown, hereby declare that on January 3rd, 2016, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

ATTORNEY NAME & ADDRESS	METHOD OF DELIVERY
Mr. William J. Schroeder Ms. Anne Schroeder Mr. David Broom KSB Litigation, P.S. 221 North Wall, Suite 210 Spokane, WA 99201	■ Electronic Mail □ ABC Legal Messenger Service ■ Regular U.S. Mail □ Other: Pierce County Linx

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

DATED January 3rd, 2016 at Seattle, Washington.

Lauren M. Brown
Legal Assistant

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.
2112 Third Avenue, Suite 500, Seattle WA 98121
Tel. 206.462.6700 Fax 206.462.6701

Honorable Kathryn J. Nelson
Hearing Date/Time: September 8, 2017/9:00 AM
With Oral Argument

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 DEFENDANTS FUN-TASTIC RIDES CO. AND MIDWAY RIDES LLC'S MOTION FOR SUMMARY JUDGMENT

I. RELIEF REQUESTED

Defendants Fun-tastic Rides, Co. ("Fun-tastic Rides) and Midway Rides, LLC ("Midway Rides") move for summary judgment to dismiss Plaintiff's claims with prejudice. To prove negligence, Plaintiff must establish breach of an applicable duty. Plaintiff has no evidence to establish breach. Nor does Plaintiff have any evidence that Defendants are "product manufacturers" under the applicable RCW. Accordingly, the Court should dismiss Plaintiff's claims with prejudice.

II. STATEMENT OF FACTS

Jodi Brugh attended the Washington State Fair in Puyallup, Washington on September 16, 2013. Pl. Compl. ¶15, at 2. She rode the Rainier Rush roller-coaster around noon. *See*

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Interrogatory No. 7, 11:14-15 attached to Declaration of Patricia K. Buchanan., Ex. D. She claims to have sustained injuries as a result of the ride. The roller-coaster is owned and operated by Fun-tastic Shows. Before the roller-coaster is put into operation it must be inspected for safety by an agent of the State of Washington. The roller-coaster at issue was inspected by the State approximately one week before Plaintiff's alleged injury. The State issued a permit, signifying that the ride was safe for use. Buchanan Decl., Exhibit A, B. Additionally, the roller-coaster was inspected for safety each day it was operated, including the date of Plaintiff's ride. Buchanan Decl., Exhibit C.

Plaintiff claims she hit her head on the shoulder restraint, causing injury. *See* Plaintiff's Deposition at 115:18-25, attached to Buchanan Decl., Ex. E. The shoulder restraint was padded. *Id.* At deposition Plaintiff provided testimony as follows:

> Q. Did you notice anything about the ride that seemed unusual or that seemed like it was not in working order?
> A. I can't tell you what the working order is --- I -- I can't -- I guess I can't speak to the mechanics of the ride. I...
> Q. Is that a no then? You didn't see -- you didn't notice anything that appeared not to be in working order?
> A. Not that I was aware of.
> Q. Did you notice whether any parts of the ride seemed to be unsteady or unstable or falling apart of out of order?
> A. Not that I noticed.
> Q. Do you have any reason to believe that your ride on the Rainier Rush did not play out in an ordinary fashion?
> A. Besides the violent jolt, hitting my head, no.
> Q. When you say "violent jolt," did -- did you feel the cars come off the tracks or some other possible mechanical failure?
> A. I can't speak to what caused it.

Id. 118:2-23.

Ms. Brugh admitted that verbal warnings were given and that warning signs for the ride were posted on the premises. *See* Buchanan Decl. Ex. E, at 103, 117-119, 121.

Ms. Brugh filed suit on September 9, 2016 against Fun-tastic Rides, Co., Midway Rides, LLC, and an unidentified manufacturer alleging negligence, product liability, failure to warn, and

breach of promise. Pl. Compl., at 3-5. When asked to set out the statute, rule, regulation, or ordinance that Defendants allegedly violated, Ms. Brugh and her counsel responded by stating that "it is expected that occurrence of an injury to a carnival patron on a carnival ride indeed is in violation of statute; however none specifically known at this point." *See* Interrogatory No. 32, 20:3-5 attached to Buchanan Decl., Ex. D.

III. ISSUES

(A) A person has a duty to exercise the care that a reasonable person would exercise under the same or similar circumstances. The Plaintiff alleges that Fun-tastic Rides and Midway Rides breached this duty, but she has not provided any evidence that Defendants could have done anything to prevent the alleged injury. Is there a genuine issue of material fact regarding breach of duty?

(B) Product liability theories only apply to manufacturers and product sellers. The Plaintiff alleges that product liability theories apply to Fun-tastic Rides and Midway Rides, but she has no evidence that either was involved in manufacturing or selling the ride. Can the Plaintiff assert product liability theories against Defendants?

IV. EVIDENCE RELIED UPON

The pleadings and evidence previously filed, discovery responses, Declaration of Patricia K. Buchanan, and attached exhibits.

V. ARGUMENT

Civil Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

> In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to

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> a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 322-3 (internal quotations omitted); *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014).

The moving party carries its initial burden of showing no genuine issue of material fact by arguing that the nonmoving party has a failure of proof concerning a necessary element of the nonmoving party's claim. *See Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). There can be no genuine issue of material fact for trial when there is a complete failure of proof concerning an essential element of negligence. *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 23-24, 851 P.2d 689 (1993) ("Because they moved for summary judgment based on (Plaintiff's) lack of evidence, they were not required to support their summary judgment motions with affidavits.") (citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989); *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015)).

The nonmoving party must set forth evidentiary facts and cannot meet its burden by relying on "speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Statements of ultimate facts, conclusions of fact, or conclusory statements of fact on the part of the nonmoving party are insufficient to overcome a motion for summary judgment. *See* CR 56(e); *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008); *See Kirk v. Moe*, 114 Wn.2d 550, 557, 789 P.2d 84 (1990).

A. The Court Should Grant Summary Judgment Because There is no Evidence of Breach of Duty.

In order to prove actionable negligence, a plaintiff must establish: (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992).

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Plaintiff has alleged negligence on the part of the Defendants. Pl. Compl., ¶2, at 3. But Plaintiff has not presented any evidence regarding breach of duty. To support her claim Plaintiff offers only the conclusion that "it is expected that occurrence of an injury to a carnival patron on a carnival ride indeed is in violation of statute." Interrogatory No. 32, 20:3-5 attached to Buchanan Decl., Ex. D. She has not provided any factual or legal support for her claims.

No genuine dispute exists regarding several facts. The Rainier Rush underwent daily, weekly, and annual inspections. Labor and Industries-certified agents of the State of Washington inspected the ride approximately one week before the alleged incident, determined that it was safe for use at the Puyallup Fair, and issued a permit.

The Plaintiff has alleged that Defendants breached duties to maintain and operate the roller coaster in a reasonably prudent fashion. Pl. Compl., ¶2, at 3. A person has a duty to exercise the care that a reasonable person would exercise under the same or similar circumstances. *See Mathis v. Ammons*, 84 Wn. App. 411, 416, 928 P.2d 431 (1996), *as amended on denial of reconsideration* (Jan. 21, 1997). But when no reasonable person could find that the defendant failed to exercise reasonable care, the court can find an absence of negligence as a matter of law. *Id.* at 419.

The Plaintiff has failed to present any evidence that would support a finding that Fun-tastic Rides or Midway Rides acted unreasonably. Here, as a matter of law, Fun-tastic Rides and Midway Rides acted reasonably under the circumstances.

The concept of ordinary care asks whether, under the circumstances, a reasonable person would have exercised a greater degree of care than the party who allegedly acted negligently. *See id.* In this case, Fun-tastic Rides and Midway Rides: (1) applied for and were issued a permit; (2) inspected the ride daily, weekly, and annually; and (3) conducted regular maintenance of the Rainier Rush ride. Fun-tastic Rides and Midway Rides' conduct was reasonable as a matter of law.

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B. The Court Should Grant Summary Judgment Because Product Liability Theories Apply Only to Manufacturers and Product Sellers.

Interpretation of a statute is a question of law. *Qualcomm, Inc. v. Dept. of Revenue*, 171 Wn.2d 125, 131, 249 P.3d 167 (2011). Summary judgment is proper when neither of the defending parties are product sellers or manufacturers of the product. *Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wn. App. 12, 17, 84 P.3d 895 (2004).

The Washington Product Liability Act of 1981 ("Product Liability Act") applies to manufacturers and product sellers. *See* RCW 7.72.010. "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the product or component part before its sale to a user or consumer. RCW 7.72.010(2). "Product seller" is a person or entity engaged in the business of selling or leasing products, including a manufacturer, wholesaler, distributor, or retailer of the product. *See* RCW 7.72.010(1).

A product seller who performs minor assembly of a product in accordance with the instructions of the manufacturer is not deemed to be a manufacturer. *Id.* Architectural services, engineering services, and inspection services are not "products" under the Products Liability Act. *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 822, 881 P.2d 986 (1994).

A provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider is excluded from the definition of a "product seller." *See* RCW 7.72.010(1)(b). Assembly of prefabricated parts for construction is considered to be a professional service exempt from the Product Liability Act. *Anderson Hay & Grain Co., Inc., v. United Dominion Inds., Inc.*, 119 Wn. App. 249, 260, 76 P.3d 1205 (2003).

Neither Fun-tastic Rides nor Midway Rides is a manufacturer of the Rainier Rush ride because neither manufactured, designed, produced, made, fabricated, constructed, or remanufactured the Rainier Rush ride. Even if minor assembly was performed, it does not constitute manufacturing. Any inspection conducted by Fun-tastic Rides or Midway Rides does not fall under the definition of a "product."

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Tel. 206.462.6700 Fax 206.462.6701

Additionally, neither Fun-tastic Rides nor Midway Rides is a product seller, wholesaler, distributor, or retailer because neither engaged in the business of selling or leasing the Rainier Rush ride. Defendants offered the Rainier Rush Ride as an entertainment service at the Fair, not a product for purchase.

VI. CONCLUSION

Plaintiff has no evidence supporting breach of duty. Summary judgment is therefore appropriate. Additionally, the Products Liability Act does not apply to Defendants. Even if the Court determines that Plaintiff has raised a question of fact regarding breach, her product liability claims should be dismissed with prejudice.

DATED this 7th day of August, 2017.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

I certify that this memorandum is under 24 pages, in compliance with the Local Civil Rules.

By:
Patricia K. Buchanan, WSBA No. 19892
Timothy T. Parker, WSBA No. 43674
Attorneys for Defendants Fun-tastic Rides, Co. and Midway Rides, LLC
2112 3rd Ave. Suite 500
Seattle, WA 98121

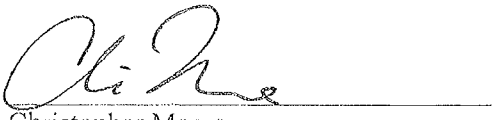
CERTIFICATE OF SERVICE

I, Christopher Moore, hereby declare that on this 7th day of August, 2017, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

ATTORNEY NAME & ADDRESS	METHOD OF DELIVERY
Mr. William J. Schroeder Ms. Anne Schroeder Mr. David Broom KSB Litigation, P.S. 221 North Wall, Suite 210 Spokane, WA 99201	□ Electronic Mail ■ ABC Legal Messenger Service □ Regular U.S. Mail □ Other: Pierce County Linx

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

DATED this 7th day of August, 2017 at Seattle, Washington.



Christopher Moore
Legal Assistant

Honorable Kathryn J. Nelson
Hearing Date/Time: September 8, 2017/9:00 AM
With Oral Argument

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 [PROPOSED] ORDER GRANTING DEFENDANTS FUN-TASTIC RIDES CO. AND MIDWAY RIDES LLC'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court for hearing on Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment.

The Court reviewed the pleadings and files herein, including:

1. Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment;
2. Plaintiff's Response(s), if any;
3. Defendant's Reply, if any.

//

PATTERSON BUCHANAN
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2112 Third Avenue, Suite 500, Seattle WA 98121
Tel. 206.462.6700 Fax 206.462.6701

Based on the foregoing, Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment is GRANTED. The above-captioned lawsuit shall be dismissed with prejudice.

IT IS SO ORDERED.

DATED this _____ day of August, 2017.

By:_____
HONORABLE KATHRYN J. NELSON

Presented by:

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: _____
Patricia K. Buchanan, WSBA No. 19892
Timothy T. Parker, WSBA No. 43674
Attorneys for Defendants Fun-tastic
Rides, Co. and Midway Rides, LLC

Approved as to form, notice of presentation waived:

KSB LITIGATION, P.S.

By:
William J. Schroeder, WSBA No. 41986
Anne Schroeder, WSBA No. 47952

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.
2112 Third Avenue, Suite 500, Seattle WA 98121
Tel. 206.462.6700 Fax 206.462.6701

Honorable Kathryn J. Nelson
Hearing Date/Time: September 8, 2017/9:00 AM
With Oral Argument

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 DECLARATION OF PATRICIA K. BUCHANAN IN SUPPORT OF DEFENDANTS FUN-TASTIC RIDES CO. AND MIDWAY RIDES LLC'S MOTION FOR SUMMARY JUDGMENT

I, Patricia K. Buchanan, make the following statements based on personal knowledge:

1. I am over the age of eighteen and am competent to testify.

2. I am one of the attorneys who represents Fun-tastic Rides, Co. ("Fun-tastic Rides") and Midway Rides, LLC ("Midway Rides") in the above-captioned matter.

3. Attached as Exhibit A are true and correct copies of the Application for Amusement Ride Operating Permit received by Labor and Industries on September 5, 2013 and the Permit issued by the State of Washington and valid until September 30, 2014.

4. Attached as Exhibit B are true and correct copies of the Statements of Amusement Ride Inspections issued by John P. Hinde and Raymond L. Rieger, dated September 14, 2013, and Washington State Department of Labor & Industries Certified Amusement Ride Inspectors.

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Tel. 206.462.6700 Fax 206.462.6701

5. Attached as Exhibit C is a true and correct copy of the Typhoon Daily Maintenance Checklist, dated September 16, 2013.

6. Attached as Exhibit D is a true and correct copy of Defendant Fun-tastic Rides Co.'s First Set of Interrogatories and Requests for Production to Plaintiff Jodi Brugh [And Answers Thereto], pages 11–13, 19–20.

7. Attached as Exhibit E is a true and correct copy of the transcribed Videotaped Deposition Upon Oral Examination of Jodi Brugh dated June 15, 2017, pages cover, 1–4, 103, 115, 117–119, 121.

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

DATED this 7th day of August, 2017.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: _____
Patricia K. Buchanan, WSBA No. 19892
Of Attorneys for Defendants Fun-tastic Rides, Co. and Midway Rides, LLC

PATTERSON BUCHANAN
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Tel. 206.462.6700 Fax 206.462.6701

EXHIBIT A

RECEIVED
LABOR & INDUSTRIES
SEP 05 2013
REGION 4 TUMWATER-WA

Department of Labor and Industries
ctrical Section
. O Box 44460
Olympia WA 98504-4460
www.Lni.wa.gov

APPLICATION FOR AMUSEMENT RIDE OR AIR SUPPORTED STRUCTURE OPERATING PERMIT

$10.00 FEE PER RIDE DECAL ISSUED MUST ACCOMPANY COMPLETED APPLICATION
This application must be used to receive your operating permits – We do not accept personal made forms

Name:	Phone number:
Ronald E. Burback	(503) 761-0989

Firm name:	FAX Number:
Midway Rides, LLC	(503) 761-6648

Address:	City:	State:	ZIP+4:
3407 S.E. 108th Avenue	Portland	OR	97266

Email address: info@funtasticrides.com

RIDE	DECAL NUMBER Department use only	SERIAL NUMBER	Emergency Corrections NO	YES	Completed?
Typhoon (Rainier Rush)	43430	003628 BIS	☒	☐	☐
			☐	☐	☐
			☐	☐	☐
			☐	☐	☐
			☐	☐	☐
			☐	☐	☐
			☐	☐	☐
			☐	☐	☐
			☐	☐	☐
			☐	☐	☐
			☐	☐	☐
			☐	☐	☐

IF CORRECTIONS HAVE BEEN ISSUED, PLEASE ATTACH ALL INSPECTION REPORTS TO THIS APPLICATION.
PERMITS WILL NOT BE ISSUED UNTIL EMERGENCY CORRECTIONS ARE COMPLETED AND MARKED OFF BY INSPECTOR.

NOTE: An original copy of the insurance policy must be on the file with the Dept. of Labor & Industries, Electrical Section, before an operating permit can be issued. The Dept must be listed as a policy holder on your certificate.

Applicant's signature (REQUIRED): Ronald E Burback

AMUSEMENT RIDE OR STRUCTURE CERTIFICATE OF INSPECTION

INSPECTOR: I hereby certify and affirm that on the date shown below I personally performed the mechanical safety inspection of the amusement ride(s) or structure(s) named above and found that the ride(s) or structure(s) meets the standards for coverage as required by Chapter 67.42 RCW.

Inspection date	Inspector's signature (REQUIRED)	Print Name:	Phone Number:
September 5, 2013		Ray Rieger, Ken Rieger, John Hinde	(775) 720-3754 (772) 485-5112

exp 9-30-14

F500-010-000 application for amusement ride operating permit 3-2009

AMUSEMENT RIDE
OR STRUCTURE

This certifies that this Amusement Ride or structure has had a

SAFETY INSPECTION Permit No.

and complies with Chapter 67.42 RCW 43431

Ride Name Typhoon (Rainier Rush)

This permit is valid thru 09 30 2014

Department of Labor and Industries • Permits & Licensing

003628 BIS

EXHIBIT B

J.P. HINDE ENTERPRISES, INC.

3801 S.W. Kakopo Street
Port St. Lucie, Florida 34953
Phone 772-340-1401 * Fax 772-340-2328 * Cell 772-485-5112
E-mail - JohnPHinde@aol.com

Serving the Amusement, Entertainment, Leisure, and Recreation Industry

September 14, 2013

Ronald E. Burback
Funtastic Rides Company
3407 S.E. 108th Ave.
Portland, Oregon 97266

RE: Statement of Amusement Ride Inspection.

This letter is a statement of verification of required items from the annual permitting inspection for the amusement rides and devices as listed on these Application Forms.

Any deficiencies identified in the course of the inspection were corrected prior to the completion of the survey.

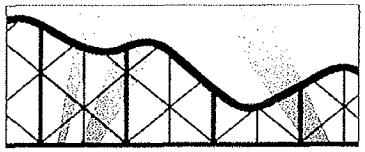
These amusement rides have been inspected and have met the requirements for an amusement ride or device in the State of Washington.

If you have any questions regarding these inspections, please don't hesitate in contacting me.

Sincerely,

John P. Hinde
President

Ray Rieger
Loss Control Services LLC
A Nevada Limited Liability Company



September 14, 2013

Ronald E. Burback
Funtastic Rides Company
3407 S.E. 108th Ave.
Portland OR 97266

Statement of Amusement Ride Inspections

This letter is a statement of verification of required items from the annual permitting inspection for the amusement rides and devices as listed on these Permit Application Forms. Any deficiencies identified in the course of the inspection were corrected prior to the completion of the survey.

These amusement rides have been inspected and have met the requirements for an amusement ride or device in the State of Washington.

If you have any questions regarding these inspections, please contact me.

Sincerely,

Raymond L. Rieger
President

4550 Risue Canyon Road, Gardnerville, NV 89410
P.O. Box 128, Topaz, CA 96133
Federal ID Number 20-4278459
Insurance Surveys ■ Due Diligence Surveys ■ Commission Inspections ■ Litigation Support ■ State Jurisdictional Inspections ■ Safety Programs
telephone 775.720.3754 fax 801.912.4432 e-mail rieger06@earthlink.net www.losscontrolservices.org

**Some of our online services may be unavailable between 4:30 p.m. and 6:30 p.m. this evening for scheduled maintenance.
We apologize for the inconvenience.**

Washington State Department of Labor & Industries

Amusement Ride Safety & Inspections

Certified Amusement Ride Inspectors

Name	City/State	Phone Number	Email
CAW Technical Services Woodcock, Ozzie	Federal Way, WA	253-838-8291	cawtech@comcast.net
Comspeq Consulting Pierce, John Dodson, John	Terre Haute, IN Pickerington, OH	813-685-8792	comspeqconsult@aol.com
Culver, Joseph	Casa Grande, AZ	208-250-2400	scalifeencounter@aol.com
DNS Consulting, Inc. Dennis Sutherland	Shoreline, WA	469-693-3831	dnssafetyconsulting@gmail.com
Dorgan, Tom	Alto, NM	815-218-9810	tomsbiz88312@peoplepc.com
Safetek, LLC Hall, James	Battleground, WA	360-607-7749	safetekjeh@aol.com
Hinde, John	Port St. Lucie, FL	772-485-5112 Fax: 772-340-2328	johnphinde@aol.com
International Leisure Consultants Bixler, Joe Simms, Darren Page, Randall Kuhlmann, Joan *Will not inspect go-carts*	Seattle, WA	425-778-2552 Fax: 425-778-2772	jlcseawa@aol.com
James, Wallace	Powder Springs, GA	770-634-0143	conserv1@mindspring.com
JWK Enterprises Jobe, Michael	Spokane, WA	509-879-5448	jobeywan64@gmail.com
Lamoreaux, John	Portland, OR	503-519-1389	jlthcridedude@msn.com
LJM & Associates Inc Merz Lewis	Gobsonton, FL	321-266-6823	ljmerz@aol.com
Nicholson, Drake	Olympia, WA	360-352-8444	drake@nichinsure.com
Prime Pacific Amusements Haworth, Douglas Haworth, Maurice	Brush Prairie, WA Topaz, CA	360-921-6807 360-903-6705	Awes1@aol.com primepacific@ymail.com

Ray Rieger Loss Control Services, LLC Rieger, Ray Rieger, Kenneth		775-720-3754 Fax: 801-912-4432	Riegero6@earthlink.net Rieger1@verizon.net
Slaggert, Phillip	Hobe Sound, FL	561-758-3266	pslaggert@msn.com
Spromberg, Richard	Longview, WA	513-519-8388	Funtasticrick@aol.com

Certified Zipline Inspectors

Name	City/State	Phone Number	Email
AbeeInc.com Curt Hall	Manitowoc, WI	608-769-1351	curt@abeeinc.com
Aerial Designs Lallemand, Valdo	Seattle, WA	206-418-0808	valdo@aerialdesigns.com
Andrews, Scott	Seattle, WA	206-818-1838	scott@andrewsconsultingllc.com
Marter, Erik	Portland, OR	503-452-9451	erik@teamsynergo.com

- Any of the Inspectors listed above are allowed to inspect rides for Washington State Operators, even if the inspector is out of state.
- When searching for an inspector, please keep in mind most inspectors work during the day and may not be able to return your phone call right away.

Access Washington

Help us improve

EXHIBIT C

Washington State Fair 9/16/2013

TYPHOON DAILY MAINTENANCE CHECKLIST

TRACK & FOUNDATION BLOCKING

1. Inspect all blocking; using a 48 oz hammer, tap the blocking to ensure security. ☑
2. Ensure all leveling screws are <u>firm</u>. DO NOT OVER TENSION. ☑
3. Inspect all column pins and insure that the R clips are intact. ☑
4. Visually inspect track joints for consistency and for any abnormalities. ☑
5. Visually inspect all track sensors for security. ☑

COMPRESSOR

1. Check oil level in compressor. Oil level should be in the middle of site glass. Top up with SAE HD 40. ☑
2. Check condition and tension of compressor drive belt. Apply pressure to the center of the belt between both pulleys. Deflection should not be more than 3/8 inch. ☑
3. Inspect compressor mounting bolts for security. ☑
4. Start compressor; once air pressure reaches 20 PSI, drain large air receiver and both stainless steel receivers at the main control panel. ☑
5. Listen for any air leaks and peculiar noises from the compressor. ☑

HYDRAULICS

1. Check oil level in red hydraulic tank. Oil level should be in the middle of site glass. Top up oil with H68 ESSO or equivalent. ☑
2. Inspect condition of all linkage and valves on hydraulic tank. ☑
3. Inspect all hose fittings for oil leaks and ensure hoses are not chaffing. ☑

4. Inspect all station jog motors for oil leaks and security. ☑

5. Inspect the condition of all jog tires. ☑

6. Stand on tire to test inflation. Tire inflation should be around 30 PSI. ☑

7. Inspect station chain for tension and lubrication. If required, lubricate chain with 50 grade motor oil. ☑

8. Visually inspect all elevator piping and fittings for oil leaks. ☑

9. Inspect elevator chain for tension and lubrication. If necessary, lubricate chain with 50 grade motor oil. ☑

TRACK BRAKES

The following brake inspections must be carried out on all eight (7) brakes, each day to ensure the adequacy and safety of the blocking system during operation. Failure to carry out all of the following checks may result in brake failure or the train failing to complete the circuit.

1. Inspect all brake hoses for air leaks. ☑

2. Inspect and listen for leaking booster actuators. ☑

3. Inspect and ensure all brake linings and brake fastening bolts are secure. ☑

4. Check condition and wear of brake linings. Minimum lining thickness should not exceed 3/16 inch. Always replace both linings as necessary. ☑

5. Ensuring brake is fully open against mechanical stop, slide the brake lining gauge between linings at the front and rear of brake. Adjust 20 mm bolt until gauge is firm between linings. Maximum gap between linings should not exceed 6-7 mm. ☑

6. Manually operate all brakes to ensure correct function. ☑

TRAIN WHEELS & AXLE ASSEMBLY

	T1	T2
1. Inspect the condition of padding and harnesses in each car. Replace as required.	☑	☑
2. Inspect each vehicle to ensure all passenger compartments are clear of sharp hazards, i.e., loose rivets, bolts, and any cracked or damaged fiberglass.	☑	☑
3. Release harnesses and lift until they are at a 45 degree angle. Harness should maintain its position. If the harness falls, adjust the friction coupling.	☑	☑
4. Lift harnesses to maximum open position, ensure that the harness locks into its open position.	☑	☑
5. Actuate harness lock and move each harness downwards into three positions pulling the harness upwards to ensure harness will not move upwards.	☑	☑
6. Visually inspect the eight (8) locating bolts on each harness that fix the harness to the vehicle mechanism.	☑	☑
7. Visually inspect the welding on each harness in two locations.	☑	☑
8. Inspect the tow bar hitch bolts between each car. Ensure tow bar safety lock nut is firm. Inspect safety chain condition and D shackles for security.	☑	☑
9. Start system dispatch train and hold train in brake five (5). This can be achieved by increasing the boost pressure located via the pressure regulator on the control panel marked brake 5.	☑	☑
10. Visually inspect the condition of all road wheels and safety wheels.	☑	☑
11. Spin all wheels and ensure that the wheels spin freely.	☑	☑

TRAIN UNDERCARRIAGE

1. Inspect chain pickups and anti roll back condition. Both should move up and down freely.	☑	☑

2. Inspect brake, visually inspect for cracking, check mounting bolts are secure. ☑ ☑

3. Visually inspect undercarriage for cracking. The areas more prone to cracking are the chain pickup fixing boss, brake fin locating bolts, and jog wheel plate. ☑ ☑

4. Visually inspect the seat fastening bolts for security. These attach the seat and body of the vehicle to the base chassis. ☑ ☑

TEST RUNNING SYSTEM

1. Start system and return train to the exit station position. ☑

2. Operate harness lock and inspect harnesses to ensure that all are locked. ☑

3. Dispatch train from station; holding the dispatch button down, ensure that once the train reaches Proximity Switch 1, the dispatch station chain ceases to operate. ☑

4. Bring the second train from the exit platform to the loading station and dispatch the train. If the first train has not reached Proximity Switch 4, once the second train reaches Proximity Switch 2, the lift should stop the second train. Once the first train has reached Proximity Switch 4, the lift should commence operation automatically. ☑

CONTROL PANEL

1. Inspect and adjust the four brake regulators to ensure correct operation. ☑

2. Listen for any air leaks and repair as necessary. ☑

3. Inspect all air pressure gauges to ensure correct operation. ☑

4. Check that the correct air pressure is set on the main pneumatic regulators located in the control cabinet. Large regulator should be set at 6 bar and the small regulator should be set between 4-4.5 bar. ☑

5. Check to ensure that all light bulbs on the control panel are working, replace as necessary. ☑

6. Test the low air pressure sensor. Isolate the main air valve at the large blue air receiver tank. Move back to the control panel and open and close the

station brake to purge the air from the system. The low pressure light should illuminate, and the train should not be able to be dispatched from the station. ☑

7. Clean control panel and remove any foreign material. ☑

STATIONS & QUEUING RAILS

1. Inspect all hand rails in the station area for security. ☑
2. Inspect all floor panels to ensure they are consistent and even. ☑
3. Inspect the condition of step highlighting, touch up as necessary. ☑
4. Inspect platforms for any loose or sharp edges that may injure patrons. ☑
5. Clean away any loose or foreign material. ☑
6. Inspect all safety signage, clean as necessary. If any sign requires touching up, notify your manager. ☑
7. Inspect all queue rails for brakes and security, make repairs as necessary. ☑
8. Remove any trash from the queue areas. ☑
9. Lock both access gates to the ride and maintenance areas. ☑

Comments: Ride is Running well

EXHIBIT D

ANSWER: **LinkedIn – Less than 2 years**
Facebook – Approximately 10 years
My Space – Sometime in the distant past
Devices used are desktop, laptop and tablet

INTERROGATORY NO. 6: Please identify all crimes, including crimes of fraud or crimes of dishonesty, you have been convicted of or pleaded guilty to. In identifying the foregoing, please provide the crime or felony, the date you were convicted or pleaded guilty, the court in which you were convicted or pleaded guilty, and any sentence or other determination made for the crime.

ANSWER: **None.**

INTERROGATORY NO. 7: Describe in detail your version of the accident or occurrence giving rise to this lawsuit, setting forth the date, location, time, and weather. In identifying the foregoing, please provide as much as detail as possible, including what you were doing immediately prior to the incident, where you were sitting, all facts you recall about the occurrence itself, and the names or physical descriptors of anyone you spoke with.

ANSWER: **The accident occurred September 16, 2013. It was intermittently raining, but it was not raining at the time I was on the ride. The accident occurred at the Puyallup Fairgrounds at approximately 12:00 P.M., when the car I was riding in on the Rainier Rush machine violently jerked going around a turn. This caused me to hit both sides of my head on a portion of the car that I believe was connected to or was the shoulder restraint. Please also see medical records where I related histories to various providers**

In addition, I spoke with my friend Colleen Cameron immediately after the incident and a transcript of the statement taken from Colleen is furnished with these responses.

INTERROGATORY NO. 8: State the names, addresses, and phone numbers of all eyewitnesses to the accident or occurrence, their relation to you, and their interest in this lawsuit.

ANSWER: **I am unaware of names of persons who may have witnessed my ride on the Rainier Rush. I reported the**

KSB LITIGATION, P.S.
221 NORTH WALL STREET, SUITE 210
SPOKANE, WASHINGTON 99201
PHONE (509) 624-8988
FAX (509) 474-0358

occurrence to various medical personnel and to my friend Colleen Cameron. Colleen took photos of me on the ride (attached) but I do not believe she eye witnessed the actual contact trauma I described above

INTERROGATORY NO. 9: State the names, addresses, phone numbers, occupations, job designations, and present location of any person known to you or your attorneys, as having knowledge of any facts relating to the liability or damages issues in this case.

ANSWER: **My Aunt Raelene Brugh is also aware of the incident as I reported the same to her.**

1409 E Rockwell Avenue
Spokane, WA 99207

INTERROGATORY NO. 10: Identify and state in detail all injuries you claim to have suffered as a result of the incident giving rise to this lawsuit, including, but not limited to, the following:

i. Set forth exactly what injuries, including any physical and emotional or psychological, you claim resulted from the incident.
ii. To the best of your knowledge and recollection, state the approximate date that you first saw a health care provider for each of those bodily injuries you claim to have experienced relating to the incident.
iii. If a previous injury, disease, illness, or condition is claimed to have been aggravated, accelerated or exacerbated, specify in detail the nature of each and list the current address of the healthcare provider, if any, who provided treatment for the condition.
iv. Describe your current symptoms in detail.
v. List all health care providers you have seen, or are currently seeing, for treatment of any of the bodily injuries or symptoms you have listed above, and provide the provider's name and address, the condition treated, and approximate dates of treatment for each healthcare provider.
vi. If you were hospitalized at any time for the bodily injuries you listed above, provide the hospital's name and address, the condition treated, and approximate dates of treatment for each hospitalization.
vii. If you seek to recover the costs of any medical care or treatment that you claim was caused by the injuries alleged in your Complaint, state the total expenses you are claiming for medical treatment due to your injuries from the incident to date, and provide a detailed itemization to show how that amount was calculated. Such an itemization must include a daily account of: the treatment received and by whom, as well as the cost of the treatment on each date.
viii. State what your doctors have advised you concerning the necessity of further medical treatment or permanency of your injuries. If a doctor has advised of future medical

KSB LITIGATION, P.S.
221 NORTH WALL STREET, SUITE 210
SPOKANE, WASHINGTON 99201
PHONE (509) 624-8988
FAX (509) 474-0358

treatment, please identify the doctor and state the total future medical expenses you are claiming due to your injuries from the incident, reduced to present value.

ANSWER: (i) Left frontal parietal subdural hematoma requiring surgical correction (*See* Harborview medical record for more detailed description); in addition to the brain bleed injury as described, this incident exacerbated my then previously existing depression, anxiety and ADD; I also immediately experienced headaches and ear aches;

(ii) September 16, 2013, went to first aid station at the fair. They instructed me to go to my own doctor, which I did the next day. On September 17, 2013 I saw Rachel Gonzalez M. D. at Paradigm (see records).

(iii) Depression, panic disorder and A.D.D. (see attached regarding neuropsychological exam).

(iv) My current symptoms include impaired cognition; short-term memory loss; some speech impairment; continuing and exacerbated depression, anxiety, ADD, PTSD and chronic fatigue;

(v) See Bates labeled pages 4-7.

(vi) Valley Hospital – 10/12/13 to 10/15/13
Harborview for surgery as indicated above; no other inpatient hospitalization

(vii) See compilation provided in response to RFP No. 10

(viii) I am currently under medical care for the symptoms described above. Dr. Gary Stobbe of University of Washington Medical, in a report dated 11/3/14 stated that my cognition impairment condition is not likely to improve. That appears to be the primary basis for my inability to return to previous employment (wage) level. I have not yet attempted to determine the total of future medical expenses related to my continuing and likely permanent conditions as described above.

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INTERROGATORY NO. 11: If you now or have you ever smoked (legal or illegal substances), state in detail over what time period, how frequently (daily, weekly, monthly), and what products you used.

ANSWER: **Cigarettes from 1987 to 2009, on average less than 5 per day.**
Marijuana from 1996 to 1999, less than 1 per day

INTERROGATORY NO. 12: Please identify all alcohol or illicit drug you have consumed for the past five (5) years. In identifying the foregoing, please provide the type of alcohol or illicit drug you used, the frequency of use in a one week period, and the amount of use in a one week period.

ANSWER: **Alcohol mixed drinks, less than 1 per week.**

INTERROGATORY NO. 13: If you have been diagnosed with and/or treated for any alcohol or chemical dependency or any other mental health conditions, including depression, anxiety, or other emotional or psychiatric disorders, at any time within the five (5) year period prior to the incident through the present, please list and state in detail the condition, date of onset, medication/treatment, treating physician, and the current status of the condition.

ANSWER: **No alcohol or chemical dependency diagnosed or treated**

Otherwise as described in answer to Interrogatory No. 10 above.

INTERROGATORY NO. 14: Please describe your physical activities associated with daily living, physical fitness, household tasks, and employment-related activities **before** and **after** the incident.

ANSWER: **With some differences, my overall physical activities have not changed from before the incident.**

Before Accident:

Weight training or stationary bike at least once a week; up and down eight stairs every time leaving or entering apartment; cooking; cleaning; five minute walk between car and office (before); some travel for both business and family.

My enjoyment of everyday life has been significantly diminished as a result of the conditions listed at Interrogatory No. 10 v. above.

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INTERROGATORY NO. 28: Please identify all persons whom you believe possess information or knowledge concerning your injury(ies) and current medical conditions, other than your healthcare providers, and please state his/her/their name, address, relationship to you, and the information/knowledge you believe they possess.

ANSWER: **See answers to Interrogatories No. 8 and 9 above.**

INTERROGATORY NO. 29: Identify each person whom you expect to call as an expert witness at trial, and as to each such person, please state his or her name, address, telephone number, occupation, job classification, name of employer, and a brief resume of professional and/or educational history and qualifications.

ANSWER: **Have not as yet designated any expert for testimony at trial. Upon such designation this interrogatory will be supplemented, and Case Schedule requirements will be complied with.**

INTERROGATORY NO. 30: Please state the subject matter that each expert you have listed above is expected to testify, substance of facts and opinions upon which each expert you have listed above is expected to testify, and provide a summary of grounds for such opinions to which the experts identified above are expected to testify.

ANSWER: **See above response.**

INTERROGATORY NO. 31: You allege in paragraph 3.4 of your Complaint that "the roller coaster was, in combination or in the alternative, unreasonably unsafe as designed, unreasonably unsafe as manufactured, unreasonably or improperly maintained, and/or unreasonably or improperly operated." Please describe in detail the factual basis, if any, for this allegation including what was unreasonably unsafe about design, manufacturing, maintenance, and operation.

ANSWER: **See my description of the accident, above. The Rainier Rush ride was held out to be safe and that I had a reasonable expectation that being a paying passenger on that ride would not result in a traumatic brain injury requiring surgery and exacerbation of other conditions (see answer to Interrogatory No. 10, above).**

As discovery continues the response to this Interrogatory will be updated.

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INTERROGATORY NO. 32: If you claim that the violation of any statute, rule, regulation, or ordinance is a factor in this litigation, state the exact title and section.

ANSWER: **It is expected that occurrence of an injury to a carnival patron on a carnival ride indeed is in violation of statute; however none specifically known at this point. This interrogatory will be supplemented as discovery continues.**

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EXHIBIT E

In the Matter of:

JODI BRUGH

vs

FUN-TASTIC RIDES CO.

JODI BRUGH

06/15/2017

SUPERIOR COURT OF WASHINGTON, PIERCE COUNTY

JODI BRUGH, an individual, Plaintiff(s), vs. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendant(s).	)	16-2-10983-2

Videotaped Deposition Upon Oral Examination of

JODI BRUGH

10:10 a.m.

June 15, 2017

2112 Third Avenue, Suite 300

Seattle, Washington

REPORTED BY: Mindi L. Pettit, RPR, CCR #2519

A P P E A R A N C E S

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Also Present: Cecil Grant, YOM: Full Service Court Reporting

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Q. Did they provide any verbal warnings regarding use of the ride?

A. Not that I recall.

Q. Do you recall any signage in front of the ride that would include warnings?

A. I don't remember seeing signs at the time. I'm sure they were there.

Q. Do you know whether there were height or weight restrictions in place for using the Rainier Rush?

A. I believe there was a height restriction.

Q. Please describe everything you can remember regarding the ride, including if you were in line before, if you received warnings when you boarded, what happened on the ride.

A. Oh, what I remember, I got in the line, walked up to the ride. There was not very many people there at the time. I showed -- gave them -- I can't remember if it was a special stamp that I had on my hand or had to give them a special ticket for the ride. And then they -- I believe they asked if I -- if I was -- if I was by myself. And I said yes.

Q. When you say "they asked," who -- who is that?

A. The ride -- I'm assuming he's a ride operator. Whoever I gave the ticket to. He had a shirt on that

A. If I remember correctly, the second row.
Q. Which seat in the second row?
A. I don't recall specifically.
Q. Was a harness present on the Rainier Rush on September 16, 2013?
A. Can you verify what you mean by "harness."
Q. A safety harness that would hold you in place in the seat similar to the one depicted in Exhibit 11.
A. Yes.
Q. Do you remember what it looked like?
A. It was a bar that came down over your shoulders. And it had -- it had a shoulder -- I mean, it had a bar that went in front of you.
Q. Did that bar lock into place?
A. Yes.
Q. Did it lock into place when you entered the Rainier Rush ride?
A. Yes.
Q. Did that bar have padding similar to that depicted in Exhibit 11?
A. I believe so. I . . .
Q. So you've boarded the Rainier Rush and have been harnessed into place. What happens next?
A. They start the ride.
Q. What do you remember about the ride?

Jodi Brugh.

Q. (By Mr. Parker) Ms. Brugh, you're still under oath. Do you understand that?

A. Yes.

MR. PARKER: Will you please read the last question.

(Reporter read back as requested.)

Q. (By Mr. Parker) You testified that there was a rough turn toward the end of the ride that caused your head to contact the shoulder harness; is that right?

A. Yes.

Q. Were there any other incidents before the ride came to an end?

A. No.

Q. Was that the only incident that occurred during the ride?

A. Yeah.

Q. Was there -- when you say that -- well, strike that.

How did you describe that turn that caused your head to contact the harness?

A. I believe violent.

Q. Okay. Was the violent turn part of the normal operation of the ride?

A. I can't tell you that. I don't know.
Q. Did you notice anything about the ride that seemed unusual or that seemed like it was not in working order?
A. I can't tell you what the working order is -- I -- I can't -- I guess I can't speak to the mechanics of the ride. I . . .
Q. Is that a no then? You didn't see -- you didn't notice anything that appeared not to be in working order?
A. Not that I was aware of.
Q. Did you notice whether any parts of the ride seemed to be unsteady or unstable or falling apart or out of order?
A. Not that I noticed.
Q. Do you have any reason to believe that your ride on the Rainier Rush did not play out in an ordinary fashion?
A. Besides the violent jolt, hitting my head, no.
Q. When you say "violent jolt," did -- did you feel the cars come off the tracks or some other possible mechanical failure?
A. I can't speak to what caused it.
Q. Do you know whether the ride was shut down at any point during the 2013 Puyallup Fair?

A. I know that there were times that it was shut down, yes.

Q. When?

A. I don't know the specifics. There were -- it was shut down, I believe -- actually later that day. I assumed that the cause was to rain, because it did rain that day.

Q. Was there anything else about the ride -- anything at all about the ride that was out of order or looked out of order to you?

A. Nothing that looked out of order. At -- I didn't notice at the time there -- later I -- when I saw the pictures, I did see it was sitting on wood blocks, which seemed odd to me.

Q. What do you mean "it was sitting on wood blocks"?

A. The bottom of the ride is sitting -- you can even see it in this picture, if this is the same ride. They're sitting on wooden blocks.

MR. BROOM: What are we referring to here?

THE WITNESS: The supports.

MR. BROOM: That's Tab 28, Exhibit 11? Is that what --

THE WITNESS: Yeah.

Q. Did you hear comments from any other passengers regarding the ride?
A. Not at that time, no.
Q. Were your interactions with the operators of the ride ordinary and as you would have expected?
A. Yeah.
Q. Do you recall receiving a verbal warning before the ride?
A. I don't.
Q. Do you recall receiving a verbal warning once you were harnessed into the ride?
A. I don't recall. They may have. I -- I don't recall.
Q. I know it happened very quickly, so you might not have the clearest of memories, but please describe for us everything you can recall about the final jerk that caused your head to contact the harness.
A. I thought I just did.
Q. Please describe what you recall about the final jerk that caused your head to contact the harness.
A. We were going around a corner. And I believe it was one of the last corner or two on the ride. And suddenly the car jerked really violently, and I hit -- I believe it was the left side and then the right.

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF PIERCE

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 **PLAINTIFF'S RESPONSE TO DEFENDANTS FUN-TASTIC RIDES CO. AND MIDWAY RIDES LLC'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION AND SUMMARY

On September 16, 2013, Plaintiff Jodi Brugh ("Brugh"), a patron of the Puyallup State Fair, went on a ride known as "Rainer Rush". During the course of that ride, Brugh's head was whipped violently, and she struck both sides of her head, which her Medical Doctor confirms caused her a severe brain injury, necessitating surgery, and resulting in a lifetime of debilitating injuries. Defendants do not dispute she suffered this injury as a result of the ride.

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Instead, defendants argue that because they claim that 'someone' 'inspected' the ride about a week before they inflicted upon Brugh the brain injury, they are not liable. As set forth more fully below, this contention is contrary to settled Washington law, and defendants' motion must therefore be denied.

EVIDENCE RELIED UPON

- August 25, 2017 Declaration of Rachael E. Gonzalez, MD ("Gonzalez Decl.")
- Transcript of June 5, 2017 Deposition of Jodi Brugh ("Brugh Depo"), with relevant exhibits (**Exhibit A** to the August 28, 2017 Declaration of Counsel in Response to Motion for Summary Judgment).

STANDARD OF REVIEW

This case comes before the Court on Defendants' Motion for Summary Judgment. In summary judgment, the moving party bears the burden of showing the absence of an issue of material fact, and "...the evidence and all reasonable inferences therefrom is considered in the light most favorable to the plaintiff, the nonmoving party." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989); *see also Lamtec Corp. v. Dep't. of Revenue*, 151 Wn. App. 451, 456, 215 P.3d 968 (2009).

STATEMENT OF MATERIAL FACTS CONSTRUED IN PLAINTIFF'S FAVOR

- As admitted in Defendants' Motion, it is undisputed that the moving defendants own and operate a rollercoaster, operated under the name "Rainier Rush".
- According to the Fair's website: "Hold on tight and get ready for the ride of your life!"

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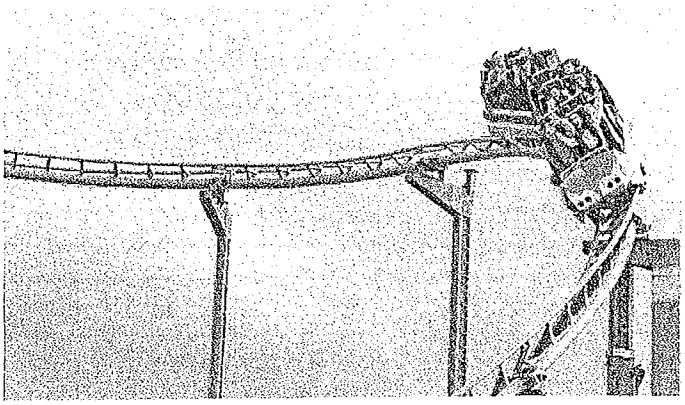

Come take a spin on Washington State Fair's newest roller coaster, which debuted with wild success at the 2013 Fair! Coast down from 60 feet in the air, speeding along winding tracks and sudden curves at speeds up to 50 mph. This inclined loop coaster will leave you exhilarated at a +5.8 gravity force. Hold on tight and get ready for the ride of your life!
Located in the midway
Riders must be at least 58" tall

See http://www.thefair.com/fun/details/rainier-rush

Notably, the only listed restriction is height.

- On September 16, 2013, Jodi Brugh ("Brugh") attended the Puyallup Fair. (Brugh Depo., pp. 101 - 102) The first ride she went on was Rainier Rush. (Id.)

- As can be seen both in the Answer to Brugh's Complaint, as well as in the pleadings submitted in support of Defendants' summary judgment motion, there is no dispute that defendants owned and operated the ride, and otherwise had exclusive control over the machine.

- The only interaction Brugh had with an operator of Rainier Rush was when one told her what seat to get in (Brugh Depo., p. 102)

- Brugh does not remember any verbal warnings regarding the ride (Brugh

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Depo., p. 103)

- The operator put the restraint over her shoulder and the attendant started the ride (Brugh Depo., p. 103 - 104)
- The only warning sign specifies: "Heart condition, neck disorders, pregnancy, seizures, dizziness, motion sickness, back disorder, or other physical ailments that may be aggravated by the motion of the ride." (Brugh Depo p. 105 *ll* 2-5, quoting Exhibit 9)
- The warning signs do not warn that head injuries are likely or inevitable. (Id.)
- As confirmed by Dr. Gonzalez, prior to September 16, 2013, Brugh did not suffer from "Heart condition, neck disorders, pregnancy, seizures, dizziness, motion sickness, back disorder, or other physical ailments that may be aggravated by the motion of the ride." (*See* Gonzalez Decl.)
- When Brugh was on the ride going around a corner, the 'car jerked really violently and she hit both the left and right side of her head'. (Brugh Depo., p. 121-123)
- Brugh then noticed that the hearing on her right-hand side was "a lot less". (Id.)
- At about 5pm Brugh's ear started hurting, so she went to the first aid station at the fair. The fair said to go to her doctor the next day (Brugh Depo., p. 125)
- Brugh saw her doctor the next day. (Brugh Depo., p. 127)
- Dr. Gonzalez confirms from her examination on September 17, 2013, the day after the accident, that at no time prior to September 16, 2013 did Ms. Brugh report or complaint of accident-relevant symptoms involving:

a. Headache

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b. Neck pain
c. Difficulty with multitasking
d. Difficulty with retaining information
e. Difficulty with word recall
f. Executive function difficulties
g. Vision difficulties
h. Balance disturbance
i. Dizziness
j. Fatigue

(Gonzalez Decl. ¶ 5)

- Dr. Gonzalez testified, that although Brugh had seen her on September 13, 2013 concerning her ears, Dr. Gonzalez has ruled out a relationship between that visit and the "head trauma and subdural hematoma that she suffered from the September 16, 2013 rollercoaster ride." (Gonzalez Decl. ¶ 9)

- As can be seen in Defendants' pleadings, as well as from the deposition testimony, there is no allegation that Brugh somehow rode the ride in an improper fashion.

- There is likewise no allegation that any posted restriction applied to Brugh or that she disregarded the same.

- Finally, Brugh's testimony is her injury was caused by a blow to the head due to violent forces; there is no allegation that the posted warnings (*e.g.* heart condition, neck disorders, pregnancy, seizures, dizziness, motion sickness, back disorder, or other) are pertinent to the blow to the head she actually suffered which caused her injury.

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ARGUMENT

A. Catastrophic Blows to the Head Caused by Dangerous Amusement Rides at the Puyallup State Fair Do Not Happen in the Absence of Someone's Negligence; Under Washington Law, Defendants' Motion Must Be Denied as a Matter of Law.

1. Washington's Public Policy Is To Afford A Remedy To Innocent Plaintiffs.

Contributory fault requires a finding that a plaintiff's acts or omissions caused or contributed to her injury; in the same vein in Washington, where a plaintiff who has suffered bodily injury is not herself at fault, the defendants against whom judgment is entered "shall be jointly and severally liable[.]" RCW 4.22.070(1)(b).

In the context of rides at an amusement park, the Washington Supreme Court has described the evidentiary threshold to ascribe contributory fault to a plaintiff rider. In *Reynolds v. Phare*, a father and son purchased tickets to ride "Shoot the Chute", a 65' high slide with a chain-driven passenger "boat", riding down a 235' chute and across an artificial lake. 58 Wn.2d 904, 904-05, 365 P.2d 328 (1961). The father and son were put in the boat, though they were not instructed how to sit or hold the boat. *Id.* When the boat hit the water, the plaintiff suffered a compression fracture of one of his vertebra. *Id.*

> The trial court gave three general instructions to the jury that define contributory negligence and explain the burden of proving it. In addition, instruction No. 18 was given.
>
> 'You are instructed that if the plaintiff did not seat himself in the boat as an ordinary prudent person would under like or similar circumstances, and that his injury, if any, was sustained as a direct and proximate result of such failure, if any, on his part, then the plaintiff would be guilty of contributory negligence and cannot recover in this action.'
>
> Plaintiff does not contend that the three general instructions do not state the law correctly. (They appear to be King County Uniform Instructions.) Plaintiff (appellant) does contend,

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> however, that there is no evidence in the record to support even an inference of contributory negligence.

Id.

As explained by the *Reynolds* court, in that case "Plaintiff was not instructed how to sit in the boat. There is no evidence that plaintiff did not seat himself properly, nor that he did anything during the ride other than hold on to the bar furnished for that purpose. We find nothing in the testimony sufficient to present the issue of plaintiff's alleged contributory negligence." *Id.* at 906. Further, the *Reynolds* court explained that:

> We do not agree with defendants' contention that evidence of the number of persons who had ridden this particular amusement device without accident has probative value sufficient to raise an issue and to support an instruction on plaintiff's alleged contributory negligence. As one court held, this would open up a field of speculation that could not be covered in a lifetime.

Id. (internal citation omitted).

Here, the only direct evidence establishes, and under Washington law the Court must infer, that lacking any specific or direct evidence that Brugh somehow rode the ride wrong, Defendants' have no basis to assert contributory fault. Consequently, the Court's analysis proceeds under the principle of *res ipsa loquitur*, most recently described by the Washington Supreme Court in *Curtis v. Lien, infra.*

2. *The Puyallup State Fair is not in the habit of injuring paying customers. Since traumatic head injuries incurred while riding amusement rides at state fairs do not normally occur in the absence of negligence, Brugh is entitled as a matter of law to the presumption that her injury was caused by the negligence of one or more Defendants.*

A cause of action for negligence requires the plaintiff to establish: (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between

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the breach and the injury. *Tincani v. Inland Empire Zoological Soc'y,* 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994).

The legal duty of a landowner to a person entering the premises depends upon whether the person entering is a trespasser, licensee, or invitee. *Younce v. Ferguson*, 106 Wn.2d 658, 662, 724 P.2d 991 (1986). An invitee is either a public invitee or a business visitor. *Id.* at 667. To qualify as a business visitor, the person must enter the premises for the purpose connected with the business in which the owner or occupant is engaged. *Ford v. Red Lion Inns*, 67 Wn. App. 766, 769, 840 P.2d 198 (1992).

Here, there is no question that the Puyallup State Fair is a state fair which charges admission for its rides of amusement, and that such charges are connected with the business in which the Puyallup State Fair is engaged.

A possessor of land owes invitees the duty to use reasonable care, which includes an affirmative duty both to keep premises in a reasonably safe condition, and to discover dangerous conditions. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996); *Iwai v. State*, 129 Wn.2d 84, 93, 915 P.2d 1089 (1996). A landowner also has a duty to protect the invitee against known or obvious dangers where the possessor anticipates harm to the invitee, regardless of the obviousness of the danger or the knowledge of the invitee. *Suriano v. Sears, Roebuck Co.*, 117 Wn.App. 819, 826, 72 P.3d 1097 (2003).

A customer is entitled to expect that the business owner will exercise reasonable care to make the premises safe for his or her entry. *Tincani*, 124 Wn.2d at 138–39 (*quoting* RESTATEMENT § 343 cmt. b).

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Reasonable care requires the landowner to inspect for dangerous conditions, followed by repair, safeguards, or warnings that may be reasonably necessary for the invitee's protection under the circumstances. *Curtis v. Lein*, 169 Wn.2d 884, 890, 239 P.2d 1078 (2010).

More significantly for this case, if the injury which befalls the business invitee is one which does not normally occur in the absence of negligence, under the doctrine of *res ipsa loquitur*, the injured business invitee is entitled to an inference of negligence. *See Curtis*, *supra*.

In *Curtis v. Lein*, the Washington Supreme Court took the opportunity "to revisit our body of law involving *res ipsa loquitur*." *Curtis*, 169 Wn.2d at 887. In *Curtis*, the certain prior owners of the property in question purchased that property in 1978. *Id.* at 888. A few years later, the prior owners installed a wood dock over a pond. *Id.* Approximately a decade later, the prior owners sold the farm, though they continued to live there as tenants; also living with them as tenants were a hired farm manager and his girlfriend (Curtis). *Id.*

> On April 25, 2004, Curtis walked out onto the dock over the pond for the first time since she began living on the farm. A couple of steps onto the dock, the boards underneath her feet gave way, and her left leg plunged through the dock up to her hip. As a result of the fall, Curtis suffered a hairline fracture to her tibia.

Id. Significantly, the people who built the dock "testified that they had no reason to believe the dock was in need of repair or unsafe." *Id.*

The trial court granted summary judgment to the defendants, holding that "causes other than negligent maintenance... could have been at play[.]" *Id.* at 889. The Court of Appeals affirmed summary dismissal, "reasoning that, while res ipsa loquitur could be

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invoked as evidence of negligence, it did not relieve Curtis of the burden of proving that the dock's defect was discoverable." *Id.*

The Washington Supreme Court rejected both of those lines of reasoning, and reversed in favor of the injured plaintiff. The *Curtis* court began its analysis by noting that "[w]hether *res ipsa loquitur* applies in a given context is a question of law." *Id.* at 889 (internal citation omitted).

As described by the *Curtis* court:

> A plaintiff may rely upon res ipsa loquitur's inference of negligence if (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence.

Id. at 891. The *Curtis* court further explained that:

> The first element is satisfied if one of three conditions is present:
> " '(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.' "

Id. (internal citation and marks omitted).

As noted above, the Supreme Court in *Curtis* rejected the analysis provided by the trial court and the appellate court in affirming dismissal of the *Curtis* plaintiff's claim:

> The trial court granted the Leins' motion for summary judgment, reasoning that res ipsa loquitur did not apply to Curtis's claim because the court could conceive of "multiple

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> other causes which could have caused the failure of the step on the dock," such as improper construction or defective materials. Verbatim Report of Proceedings (VRP) at 25–26. The Court of Appeals affirmed the trial court, reasoning that while wooden docks do not ordinarily give way in the absence of negligence (thus implicating res ipsa loquitur), the doctrine could not be used to infer that dangerous docks exhibit discoverable defects. Curtis v. Lein, 150 Wash.App. 96, 107, 206 P.3d 1264 (2009). Rather, Curtis retained the burden under premises liability of proving the Leins knew or should have known of the dock's faulty condition.
>
> We reject this analysis.

Id. at 891 (internal citation omitted).

Referring to the three conditions which independently establish the first element of *res ipsa loquitur*, the *Curtis* court explained:

> Curtis relies upon the second scenario: general experience and observation teaches that a wooden dock does not give way under foot unless it is negligently maintained. *Curtis*, 150 Wash.App. at 106, 206 P.3d 1264. The Court of Appeals agreed with this argument but concluded that it "does not follow that dangerous docks ordinarily exhibit discoverable defects," and therefore res ipsa loquitur could not apply. *Id.* at 107, 206 P.3d 1264. The Court of Appeals explained that Curtis could not rely on res ipsa loquitur to meet her "burden of showing that the dock's defect was discoverable." *Id.* at 106, 206 P.3d 1264.
> The Court of Appeals erred when it parsed out the inference of negligence that can be drawn from res ipsa loquitur. When res ipsa loquitur applies, it provides an inference as to the defendant's breach of duty. *See Miller v. Jacoby*, 145 Wash.2d 65, 74, 33 P.3d 68 (2001). It therefore would apply an inference of negligence on the part of the Leins generally: what they knew or reasonably should have known about the dock's condition is part of the duty that they owed to Curtis. What the Leins knew or reasonably should have known about the dock is exactly the sort of information that res ipsa loquitur is intended to supply by inference, if the inference applies at all. *See Ripley v. Lanzer*, 152 Wash.App. 296, 307, 215 P.3d 1020 (2009) (accident's " 'occurrence is of itself sufficient to establish prima facie the fact of negligence on the part of the defendant, without further direct

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proof.' " (*quoting Metro. Mortgage & Sec. Co. v. Wash. Water Power*, 37 Wash.App. 241, 243, 679 P.2d 943 (1984))). The Court of Appeals erred when it held otherwise.

...

Taking the element of exclusive control first, the Leins argue that Curtis "failed to cite any legal authority in which courts have found that a wooden dock on a pond constitutes an 'instrumentality' and/or that ownership, alone, of the dock would be considered 'exclusive control' of such instrumentality." Br. of Resp't at 29. It cannot be seriously debated that the dock was not an injury-producing instrumentality in this instance. As for exclusive control, the Leins do not argue that anyone else had responsibility for the dock. *Id.* at 29–30. The Leins have offered no evidence that the dock was not in their exclusive control prior to Curtis's accident.

That leaves the first element: whether an accident of this sort ordinarily occurs in the absence of negligence. As noted, the Court of Appeals concluded that docks do not normally give way if properly maintained, but Curtis still had to prove the dock had obvious defects. As explained, the latter half of this reasoning was in error. However, the Court of Appeals was correct when it reasoned that general experience tells us that wooden docks ordinarily do not give way if properly maintained. That is, "[i]n the general experience of mankind," the collapse of a portion of a dock "is an event that would not be expected without negligence on someone's part." *Zukowsky*, 79 Wash.2d at 596, 488 P.2d 269.

The trial court concluded that res ipsa loquitur did not apply because "there are multiple other causes [than negligence] which could have caused the failure of the step on the dock," such as improper construction or defective wood. VRP at 25–26. This analysis misses the mark. A plaintiff claiming res ipsa loquitur is "not required to 'eliminate with certainty all other possible causes or inferences' in order for res ipsa loquitur to apply." *Pacheco*,149 Wash.2d at 440–41, 69 P.3d 324 (quoting *Douglas v. Bussabarger*, 73 Wash.2d 476, 486, 438 P.2d 829 (1968) (*quoting* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS222 (3d ed.1964))). Instead, "res ipsa loquitur is inapplicable where there is evidence that is completely explanatory of how an accident occurred and no other inference is possible that the injury occurred another way." *Id.* at 439–40, 69 P.3d 324. The rationale behind this rule

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> lies in the fact that res ipsa loquitur provides an inference of negligence.
>
> [T]he res ipsa loquitur doctrine allows the plaintiff to establish a prima facie case of negligence when he cannot prove a specific act of negligence because he is not in a situation where he would have knowledge of that specific act. Once the plaintiff establishes a prima facie case, the defendant must then offer an explanation, if he can. "'If then, after considering such explanation, on the whole case and on all the issues as to negligence, injury and damages, the evidence still preponderates in favor of the plaintiff, plaintiff is entitled to recover; otherwise not.'"
>
> *Id.* at 441–42, 69 P.3d 324 (*quoting Covey v. W. Tank Lines*, 36 Wash.2d 381, 392, 218 P.2d 322 (1950) (*quoting Hardman v. Younkers,* 15 Wash.2d 483, 493, 131 P.2d 177 (1942))). As with any other permissive evidentiary inference, a jury is free to disregard or accept the truth of the inference. The fact that the defendant may offer reasons other than negligence for the accident or occurrence merely presents to the jury alternatives that negate the strength of the inference of negligence res ipsa loquitur provides. The trial court therefore erred when it concluded that res ipsa loquitur was inapplicable as a matter of law due to the possibility that reasons other than negligence accounted for the dock's collapse.
>
> In sum, Curtis has shown each of the elements necessary for relying upon res ipsa loquitur in a jury trial: (1) she has shown the accident is of a type that would not ordinarily happen in the absence of negligence because general experience counsels that properly maintained wooden docks do not give way under foot; (2) there is no evidence before us that the dock was not in the exclusive control of the Leins; and (3) it is uncontested that Curtis herself did not contribute in any way to the accident. We therefore hold that Curtis may rely upon res ipsa loquitur in presenting her case to a jury. Whether the inference of negligence arising from res ipsa loquitur will be convincing to a jury is a question to be answered by that jury.

Id.

One case applying these principles in the context of an amusement park ride is *Coaster Amusement Co. v. Smith*, 141 Fla. 845, 194 So. 336 (1940). In *Coaster Amusement Co.*:

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> The record shows that while plaintiff was riding on this amusement device the car in which she was riding was by some means caused to perform a sudden and unusual jerk and lunge and to sway with a sudden, violent and unusual course from one side to the other, which threw the plaintiff from the car and caused her injury.

Id. at 336.

Holding that the *res ipsa* doctrine applied, the *Coaster Amusement* court explained that:

> Three questions are presented by plaintiff in error, defendant in the court below, as follows:
> '1. When, in a suit for personal injuries sustained by the plaintiff in being thrown from a 'roller coaster' as it gave an unusual lunge, the same evidence which shows the injury and that it was caused by a device under the defendant's exclusive control, shows also that the defendant had neither actual nor constructive notice of any defects in the device, does the doctrine of res ipsa loquitur apply?'
> '2. If, under the circumstances stated in the preceding question, the doctrine is applicable, can it support a verdict for the plaintiff in spite of explanatory testimony by the defendant which is neither contradicted nor impeached by the plaintiff.'
> '3. If the doctrine is so applicable, should the Court charge the jury concerning it, even though the defendant has offered such explanatory testimony?'
>
> ...
>
> The proof shows conclusively that the roller coaster did just what plaintiff said it did and after the defendant proceeded to offer evidence tending to prove that the particular car or coaster involved was in perfect mechanical condition and gave no explanation of the cause of the unusual gyrations of it. The jury was warranted under such condition to draw the reasonable inference that there was a cause for the occurrence for which the defendant was responsible.
>
> ...

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> So it is that we think that each of the questions hereinbefore quoted must be answered, as they were answered in the court below, affirmatively.

Id.

Here, the injury happened at the Puyallup State Fair on a ride of amusement. There can be no question that state fairs like the Puyallup State Fair are not in the habit of intentionally injuring amusement riders, and that an injury to the rider of one of the fair's rides would not occur in the absence of someone's negligence. As confirmed in the pleadings filed by the moving defendants, it is uncontested that the ride in question has been owned and exclusively controlled by the moving defendants. Finally, no evidence has been submitted evidencing that Brugh 'rode the ride wrong' or otherwise contributed to her injury aside from riding the ride in the first place.

Pursuant to *Curtis*, the burden has now shifted to the moving defendants to provide "evidence that is completely explanatory of how [the] accident occurred and [that] no other inference is possible that the injury occurred another way." As is demonstrated by the moving defendants' pleadings, they have failed to meet this burden. The fact that moving defendants claim to have "inspected" the machine seven days prior to the injury, at most, answers the question of wantonness or recklessness. It neither answers the question of negligence nor absolves moving defendants from the presumption of their negligence based on the fact of their having injured an innocent patron at the state fair.

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B. Alternatively, Owning And Operating A Machine Designed To Create Fear And Apprehension Of Injury And Death Is An Abnormally Dangerous Activity To Which Strict Liability Applies As A Matter Of Washington Law.

The Rainier Rush, as described by the warning labels referenced by moving defendants, operates at high speeds and engenders a significant risk of bodily harm to each and every user. The purpose of the machine is to create fear and apprehension of death and harm for amusement, for profit, using extreme mechanical forces.

The Puyallup State Fair, by and through the moving defendants, having determined to seek profit through subjecting its patrons to fear of harm and immediate death by means of industrial machinery, is strictly liable under Washington law for engaging in an abnormally dangerous activity. Therefore, their references to ordinary care are incorrect as a matter of law.

In Washington, the lead case concerning ultrahazardous activities is *Klein v. Pyrodyne Corp.*, 117Wn.2d 1, 810 P.2d 917 (1991). In *Klein*, "an aerial shell at a public fireworks exhibition went astray and exploded near" the plaintiffs. *Id.* at 3. The plaintiffs were set afire, and suffered injuries. *Id.* The plaintiffs "further note that because all of the evidence exploded, there is no means of proving the cause of the misfire." *Id.* at 4.

> Section 519 of the Restatement provides that any party carrying on an "abnormally dangerous activity" is strictly liable for ensuing damages. The test for what constitutes such an activity is stated in section 520 of the Restatement. Both Restatement sections have been adopted by this court, and determination of whether an activity is an "abnormally dangerous activity" is a question of law. *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wash.2d 495, 500, 687 P.2d 212 (1984); *Langan v. Valicopters*, Inc., 88 Wash.2d 855, 567 P.2d 218 (1977); *Siegler v. Kuhlman*, 81 Wash.2d 448, 502 P.2d 1181 (1972), cert. denied, 411 U.S. 983, 93 S.Ct. 2275, 36 L.Ed.2d 959 (1973).

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> Section 520 of the Restatement lists six factors that are to be considered in determining whether an activity is "abnormally dangerous". The factors are as follows:
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.
> Restatement (Second) of Torts § 520 (1977). As we previously recognized in Langan v. Valicopters, Inc., supra, 88 Wash.2d at 861–62, 567 P.2d 218 (citing Tent. Draft No. 10, 1964, of*7 comment (f) to section 520), the comments to section 520 explain how these factors should be evaluated:
> Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.
> Restatement (Second) of Torts § 520, comment f (1977).

Id. Reviewing these factors, the *Klein* court found an abnormally dangerous activity. *Id.*

Here, as in *Klein*, the purpose of this machine is inherently dangerous in that it is designed to create the fear or apprehension of death for purposes of amusement. Since, as advertised, the machine when operating as designed flings patrons through the air at G-forces five times those experienced on earth, the likelihood is great that injury could result in the event of anyone's negligence. The danger cannot be eliminated without eliminating the ride

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itself since the purpose of the ride is to create the experience of danger. Use of such devices is so uncommon they are controlled only by the several carnivals and state fairs still operating in the United States – that is, these are devices unavailable to any normal consumer. Finally, in the event of injury to state fair patrons, since this is for mere amusement and no other purpose, any intrinsic value of the machine is outweighed by its inherent propensity to cause harm. Consequently, as in *Klien*, operation of dangerous machines of amusement, as Rainer Rush, should be considered abnormally dangerous for the purposes of a tort analysis, and therefore liability is strict and defendants motion must be denied.

C. Negligence Of The Owner Or Operator Of A Machine Is Independent From Product Liability As A Matter Of Washington Law.

Moving defendants argue, or at least imply, that if a product is defective, the owner or operator of that product is not liable for continuing to engage in the product's use. Washington law rejects this contention. In *Bostwick v. Ballard Marine, Inc.*, 127 Wn. App. 762, 773, 112 P.3d 571 (2005), the owner of a sandblasting pot was sued when the employee of its sublessee was injured while operating it. *Id.* at 764-65. The employee sued under theories of product liability and negligence. *Id.* at 765. The trial court granted summary dismissal on both theories; the appellate court reversed as to the negligence claim. *Id.*

The *Bostwick* court reversed dismissal of the negligence claim, explaining that "...one who is not a 'product seller' under the [Product Liability Act] may still be liable for negligence... Nothing in the WPLA relieves one who is not a product seller from liability for negligence... [Washington precedent] does not bar a negligence claim against [a defendant]. The trial court's ruling granting summary dismissal of this claim was incorrect." *Id.*

Here, as described *supra*, there is no dispute that traumatic head injuries caused by

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striking blows through operation of the Rainier Rush are not part of the machine's intended operation. As in Bostwick, with a thirty year old sand blasting pot, the fact that the owner and operator of an injury causing machine points the finger at the manufacturer of said machine does not absolve the owner and operator of liability. The fact of Brugh's injury must be presumed by the Court; the question of apportionment of responsibility between the owner/operator and the manufacturer is a jury question as a matter of law.

CONCLUSION

For the foregoing reasons, Brugh requests that the Court deny the moving Defendants' motion.

Submitted this 28 day of August, 2017, by:

KSB LITIGATION, P.S.

William C Schroeder, WSBA 41986
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of August, 2017, I caused to be served a true and correct copy of the foregoing document to the following:

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____	U.S. MAIL	Tamila N. Stearns
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____	FAX TRANSMISSION	LEITCH, INC., P.S.
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Angela Lundun

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF PIERCE

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 **DECLARATION OF RACHAEL E. GONZALEZ, MD**

I, RACHAEL E. GONZALEZ, MD declares as follows:

1) My name is Rachael E Gonzalez. I am a physician currently residing at 8770 Washington Blvd, Apt 408, Culver City, CA 90232. I relocated to California from Renton, Washington in September of 2016. I am a board certified family physician. I am over the age of 18 and have specific knowledge and recollection of the matters set out in the below paragraphs;

2) During the period of April 2005 through Sept of 2016 my practice was known as Paradigm Family Medicine, and was located at 700 SW. 39th St., Suite 216, Renton, WA 98057.

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3) On or about February 1, 2015, I received a letter from attorney Melissa Carter, who I understand was then counsel for Jodi Brugh in connection with a claim for injury suffered by Ms. Brugh on a roller coaster ride at the Puyallup fair on September 16, 2013. Attached to this declaration is a copy of my response letter to Ms. Carter, the contents of which I affirm;

4) Commencing in September, 2009, I began and continued as Ms. Brugh's primary care physician until she moved at some point following her accident at the Puyallup Fair. The focus of her primary care with my clinic was mainly on managing diabetes, a few episodes of abdominal discomfort and pain associated with carpal tunnel syndrome. I recall that Ms. Brugh was very compliant and consistent about managing her health and was proactive in her preventive health maintenance; and

5) At no time prior to September 16, 2013 did Ms. Brugh ever report or complaint of symptoms involving:

a. Headache
b. Neck pain
c. Difficulty with multitasking
d. Difficulty with retaining information
e. Difficulty with word recall
f. Executive function difficulties
g. Vision difficulties
h. Balance disturbance
i. Dizziness
j. Fatigue

Not only did Ms. Brugh fail to report any concerns regarding the above symptoms, but I did not observe her to have any such symptoms. In fact, prior to September 16, 2013, Ms. Brugh had a very sharp wit and a benign sarcastic and quick sense of humor that I found refreshing. She was always a very pleasant patient that I enjoyed seeing and I always looked

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forward to having intellectually stimulating conversations with her. Ms. Brugh was also open, honest and a reliable historian. It is my firm belief that if she was experiencing any of the symptoms listed above prior to September 16, 2013 I would have expected her to report them to me during a medical visit.

6) At no time prior to September 16, 2013 was it ever necessary for me to refer Ms. Brugh to any of the following specialists:

a. Neurosurgeon
b. Neurologist
c. Neuropsychologist
dt Cognitive rehabilitation therapist
e. Vestibular therapist
f. Vision specialist
g. Vocational therapist

7) During this time, the only referrals that I provided for Ms. Brugh included a podiatrist for a Morton's neuroma and an orthopedic surgeon for her carpal tunnel syndrome.

8) Prior to September 16, 2013, Ms. Brugh was in counseling to assist her with managing her ADD, depression and anxiety. She seemed to have these areas well under control whenever I saw her. I have no knowledge of these conditions ever causing a limitation In Ms. Brugh's ability to work at Boeing, or to participate in her activities of daily living prior to the rollercoaster incident.

9) I do recall I saw Ms. Brugh on Sept 13, 2013 for constant bilateral ear pain, dizziness, fullness in her ears, hearing deficits and loss of balance. I again saw Ms. Brugh, after the September 16, 2013, incident on September 17, 2013. My MA in the walk-in lab was concerned enough with Ms. Brugh's presentation that she pulled me out of my office to assess Ms. Brugh's condition. Ms. Brugh was in fact bleeding from her ears. Ms. Brugh never

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saw me for tympanic ruptures previously, but I was aware that she had a long-standing history of ear infections. Knowing this, I was mainly focused on assisting Ms. Brugh with her tympanic rupture, which seemed to be her chief complaint at that time. My assistant noted In the September 17, 2013 chart note that Ms. Brugh had an earache with an onset "three days ago" and that she also had "recent head trauma and roller coaster ride." I do recall specifically that Ms. Brugh's ear pain started three days prior to this encounter and that she struck her head while riding a rollercoaster on September 16, 2013, one day before this visit. The reference to "head trauma and roller coaster ride" refers to just one event. Stated more clearly, the note should say that Ms. Brugh suffered a head trauma on a roller coaster ride the day before. I believe that Ms. Brugh's earache was unrelated to the head trauma and subdural hematoma that she suffered from the September 16, 2013 rollercoaster ride.

10) Three weeks later, Ms. Brugh returned on October 7, 2013 to report that her head and neck pain had escalated to the point where it was severe and debilitating. Ms. Brugh is not a "complainer" and had never used "severe" to describe pain levels before. She was pale and was having trouble getting her words out during this visit. She could not eat or drive and was in obvious distress. I was immediately concerned and referred Ms. Brugh to a neurologist, Aaron Heide, MD, for an emergency consultation that day to assess her for a possible brain bleed. Shortly thereafter, Ms. Brugh was transported by ambulance to the Valley Medical Emergency Room for a subdural hematoma, and was then transferred to Harborview Medical Center to treat her subdural hematoma surgically on October 16, 2013.

11) My October 7, 2013 note states that the onset of pain was "3 days ago," which refers to the date that Ms. Brugh's pain had escalated to the point of being unbearable. That

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same note further states that Ms. Brugh had been having the pain since the rollercoaster ride on September 16, 2013. She did not suffer an intervening trauma after the rollercoaster event and before October 7, 2013.

12) Responding to their counsel's question about the temporal onset of "severe" head pain following a trauma, it is certainly a common presentation for someone with a slow bleed like Ms. Brugh to present to their physician three weeks following the traumatic event. It is also common in the case of subdural hematomas that there is a gradual and progressive increase in pain before the patient reports the pain as "severe" and before she becomes aware that something is very wrong. It would be erroneous for someone to say that Ms. Brugh's subdural hematoma was not related to the trauma of September 16, 2013, simply because Ms. Brugh's head pain took three weeks to become unbearable and severe to the point where she had to return to my office.

13) My diagnoses for Ms. Brugh include:

1. Severe traumatic brain injury, with sequelae to include vestibular disorder, visual disturbance, speech disorder, cognitive disorder, chronic fatigue and adjustment disorder
2. Subdural hematoma post head injury
3. Post-traumatic headache

Each of the foregoing are directly related to the head trauma Ms. Brugh suffered from the rollercoaster ride of September 16, 2013, more probably than not.

14) I initially gave Ms. Brugh a Toradol injection for her extreme pain and referred her for an emergency neurology consultation. After her brain surgery at Harborview Medical Center, I saw Ms. Brugh in follow up and referred her to neurologist Sylvia Lucas, MD at the University of Washington to co-manage her recovery, which included cognitive therapy,

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speech therapy, fatigue and return to work challenges. She was also being monitored by her neurosurgical team with Harborview Medical Center. I will defer to Ms. Brugh's specialists to discuss her ongoing needs and prognosis related to her severe traumatic brain injury.

15) It was absolutely reasonable and necessary for Ms. Brugh to take time away from her job as a procurement agent with Boeing as she recovered from her traumatic brain injury and surgery. I do not believe that she is currently capable of that work on a full-time basis. Ms. Brugh continues to struggle with word finding, fatigue and memory. Her once razor sharp wit and unique humor are still gone. As of last time I saw her she was working very hard to recover from her injuries, but still had a long road ahead of her.

16) I found Ms. Brugh to be very motivated to heal from her injuries. I never detected any issues of secondary gain or malingering.

I CERTIFY UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 25TH day of August, 2017.

Rachael E. Gonzalez MD
RACHAEL E. GONZALEZ, MD

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____	FAX TRANSMISSION	LEITCH, INC., P.S.
X	ELECTRONIC MAIL	2112 Third Avenue, Suite 500
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		Attorneys for Defendant Fun-Tastic Rides And Midway Rides LLC

~~Michelle Hernandez~~
William Schroeder

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF PIERCE

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 **AFFIDAVIT OF ANGELA D. LUNDEN RE: GR 17**

STATE OF WASHINGTON)
)ss
County of Spokane)

ANGELA D. LUNDEN, being first duly sworn upon oath deposes and says:

I have reviewed the Declaration of Rachel E. Gonzalez and determined it consists of nine (9) pages. The first five (5) being the Declaration, the next one (1) being the signature which is complete

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and legible and the last one (1) being this affidavit page.

Dated: 8-28-17

Angela D Lunden
ANGELA D. LUNDEN

SUBCRIBED AND SWORN TO BEFORE ME this 28 day of August 2017.

Robin Hicks
Notary Public in and for the State of Washington, residing in Spokane County
My Commission expires: 05/20/2021

KSB LITIGATION, P.S.
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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF PIERCE

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 **DECLARATION OF COUNSEL RE: PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I, WILIAM C. SCHROEDER declare as follows:

1. I am over the age of 18, am competent to testify to the matters contained herein, and the matters contained herein are based upon personal knowledge. I am counsel for the Plaintiff in the above-captioned matter.

2. Attached hereto as **Exhibit A** is a true and correct copy of the relevant portions of the Deposition of Jodi Brugh taken on June 15, 2017.

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I CERTIFY UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 28 day of August, 2017.

WILLIAM C. SCHROEDER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August, 2017, I caused to be served a true and correct copy of the foregoing document to the following:

____	HAND DELIVERY	Patricia K. Buchanan
____	U.S. MAIL	Tamila N. Stearns
X	OVERNIGHT MAIL	PATTERSON BUCHANAN FOBES &
____	FAX TRANSMISSION	LEITCH, INC., P.S.
Y	ELECTRONIC MAIL	2112 Third Avenue, Suite 500
		Seattle, WA 98121
		Attorneys for Defendant Fun-Tastic Rides And Midway Rides LLC

Angela D. Lundun

Angela Lundun

KSB LITIGATION, P.S.
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Exhibit "A"

SUPERIOR COURT OF WASHINGTON, PIERCE COUNTY

JODI BRUGH, an individual, Plaintiff(s), vs. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendant(s).	)	16-2-10983-2

Videotaped Deposition Upon Oral Examination of

JODI BRUGH

10:10 a.m.

June 15, 2017

2112 Third Avenue, Suite 300

Seattle, Washington

REPORTED BY: Mindi L. Pettit, RPR, CCR #2519

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that's the same time period. So yes.
Q. And moving forward to page 3 of the document. There's a section assessment/plan. Do you see that?
A. Yes.
Q. There is a diagnosis of malaise and fatigue and a statement, "The patient appears to be completely overwhelmed with what may be work-related stress." Do you recall that?
A. As I said before, I didn't -- I don't remember the diagnosis. Apparently that was a partial diagnosis.
Q. Do you remember feeling completely overwhelmed because of work-related stress during the early months of 2010?
A. I don't remember specifically what work was like in 2010 specifically.
Q. Do you remember being completely overwhelmed by work-related stress at any time?
A. Yeah. At times, things . . . Things can get very stressful. I remember being completely overwhelmed with work-related stress at times, yes.
MR. PARKER: Okay. Off the record.
THE VIDEOGRAPHER: We are going off the record. The time is now 1:44 p.m.
(Recess taken.)

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THE VIDEOGRAPHER: We are back on the record. The time is now 1:48 p.m.
Q. (By Mr. Parker) Ms. Brugh, you're still under oath. Do you understand that?
A. Yes.
Q. I want to make sure that I've received a full response regarding our last exhibit. Did you have additional comments?
A. Not at this time.
Q. How were you feeling physically during July, August, and the first half of September 2013?
A. I believe fine. I don't remember anything specifically.
Q. Do you remember whether you were treating with a chiropractor or physical therapist during that period?
A. I might have been going to a chiropractor. I don't recall exactly.
Q. This occurrence on the Rainier Rush roller coaster took place on September 16, 2013; is that right?
A. Yes.
Q. What pharmaceutical prescriptions were you taking on that day?
A. I can't tell you just off the top of my head.

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I know that I would have been taking Ritalin.
Q. Do you know whether --
A. And --
Q. -- you were taking a narcotic painkiller at that time?
A. No, I was not.
Q. Do you know whether you were taking gabapentin at that time?
A. Yes, I was.
Q. Were you taking an antianxiety medication at that time?
A. I was taking Zoloft.
Q. Is Zoloft an antianxiety medication?
A. I don't know if it's an antidepressant or antianxiety. I -- I don't know. I -- I honestly do not know exactly the difference before -- between an antidepressant and an antianxiety.
Q. Do you know whether you were taking an antidepressant during this period?
A. Again, I don't know the difference between antidepressant and antianxiety. I know that during this period, I was taking Zoloft. And I know that I was taking Wellbutrin.
Q. Were you taking anything -- any prescription medication to help you sleep?

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A. I -- at that time, I took -- if I could not fall asleep at night, I would take -- I believe I was on Xanax at the time.
Q. Do you know whether you were on trazodone at the time?
A. I do not believe I was. I don't know for sure.
Q. Do you remember how you were feeling that day as you got up and headed toward the fair?
A. I -- I'm -- I seemed to be feeling fine.
Q. Who did you go to the fair with?
A. Colleen Cameron.
Q. Where does Colleen Cameron live?
A. Spokane, Washington.
Q. Where were you living at this time?
A. In Renton, Washington.
Q. Was Colleen over on a visit?
A. She came over specifically for the fair. I brought her.
Q. When did she arrive?
A. We got here on Sunday, the 15th of October.
Q. September?
A. September. Sorry. Yes.
Q. And you went to the fair on the 16th?
A. Yes.

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Q. And that was a Monday?
A. Yes.
Q. What time did you arrive at the Puyallup Fair on Monday, September 16, 2013?
A. Around noon.
Q. Did you have a plan for what you were going to do, or were you just --
A. We had planned on doing some rides when we first got there to kind of avoid the lines for when the kids got out of school.
Q. Did you go on rides?
A. Yes.
Q. What was the first ride you went on?
A. The Rainier Rush.
Q. What time was that?
A. I would say approximately 12:30.
Q. Was there a line out in front of the Rainier Rush?
A. A very short one.
Q. Were there employee operators of the Rainier Rush?
A. Yes.
Q. Did you have any interaction with any operators of the Rainier Rush?
A. Just when they told me which seat to get in.

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Q. Did they provide any verbal warnings regarding use of the ride?
A. Not that I recall.
Q. Do you recall any signage in front of the ride that would include warnings?
A. I don't remember seeing signs at the time. I'm sure they were there.
Q. Do you know whether there were height or weight restrictions in place for using the Rainier Rush?
A. I believe there was a height restriction.
Q. Please describe everything you can remember regarding the ride, including if you were in line before, if you received warnings when you boarded, what happened on the ride.
A. Oh, what I remember, I got in the line, walked up to the ride. There was not very many people there at the time. I showed -- gave them -- I can't remember if it was a special stamp that I had on my hand or had to give them a special ticket for the ride. And then they -- I believe they asked if I -- if I was -- if I was by myself. And I said yes.
Q. When you say "they asked," who -- who is that?
A. The ride -- I'm assuming he's a ride operator. Whoever I gave the ticket to. He had a shirt on that

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showed that he was with the establishment there. And then he motioned to a certain area to stand until we got in the car. Got in the car. I can't remember if I got in first or if the boy who was sitting next to me got in first. Sat down. Waited for everybody to get in. They -- we had to put a restraint down over our head -- over our shoulders. And I put the restraint down. And they started the ride. And we were going -- then we started on the track.

MR. PARKER: Before we get to the ride, Counsel, we're going to Tab 28.

Q. (By Mr. Parker) I do have some questions about your entry upon the ride.

(Deposition Exhibit 9 was marked for identification.)

Q. (By Mr. Parker) You've been handed what's marked Exhibit 9. Please take a moment to familiarize yourself with Exhibit 9.
A. Okay.
Q. Have you seen this sign before?
A. I don't recall it.
Q. Turning you to the first bullet point on the ride, "You should not ride if you have" -- do you see that?
A. Yes.

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Q. What does it say beneath that?
A. Heart condition, neck disorders, pregnancy, seizures, dizziness, motion sickness, back disorder, or other physical ailments that may be aggravated by the motion of the ride.
Q. During the year 2013, did you have any of those symptoms?
A. Yes.
Q. Which symptoms?
A. I had a heart condition, and I had -- I didn't have any other -- just the heart condition.
Q. Had you had neck or back pain or treatment for your neck and back during the year 2013?
A. Yes.
Q. The final clause provides that you should not ride if you have other physical ailments which may be aggravated by the motions of the ride. Do you believe you had any other physical ailments that could have been aggravated by the ride?
A. No.
Q. Before you rode the Rainier Rush in September 2013, did you have chronic ear problems?

MR. BROOM: Object to the form.

A. I --

MR. BROOM: You can answer.

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A. I have -- I have ear infections from time to time.
Q. (By Mr. Parker) Moving down to the third bullet point, "You should not ride if" -- will you read the clause that sits beneath that bullet point?
A. "You are under the influence of drugs, alcohol, or prescription medication."
Q. Had you taken any recreational drugs that day?
A. No.
Q. Had you consumed any alcohol?
A. No.
Q. Had you taken any prescription medication that day?
A. Yes.
Q. Had you taken Ritalin that day?
A. I believe so. I -- I will answer that I don't know just because there are times I'll leave the house with -- without -- without remembering to take it. But I -- normally, yes, I would have.
Q. Had you taken gabapentin that day?
A. Again, same answer. I -- actually, no, I had not.
Q. Had you taken Zoloft that day?
A. Again, that -- I believe I had.
Q. Had you taken Wellbutrin that day?

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A. Again, I believe I had.
Q. Had you taken Xanax that day?
A. No.
Q. Had you taken any other prescription medications that day?
A. Possibly. I do not recall the pres -- medications -- all the medications I was on at that time.
MR. BROOM: Counsel, I don't expect you to have to put this on the record, but I -- I don't know the date this was taken. I'm not necessarily doubting it was there, but I think it would be helpful if -- this exhibit, which is what? 8?
THE WITNESS: 9.
MR. BROOM: It was 9 -- page 1 of 9. I just am going to place on the record a reservation that it hasn't been identified as to date it was taken.
MR. PARKER: I had seen a photograph of -- of the plaintiff in front of this sign. And that will --
THE WITNESS: That --
MR. PARKER: -- be entered as an exhibit at some time or other.
MR. BROOM: I don't doubt that that probably is true. I'm just wondering when this photo

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was taken. This is a -- this is a Cinema Scope production.
Q. (By Mr. Parker) Turning back to the exhibit --
MR. BROOM: And I don't mean to slow you down. Just thought I'd put that on the record.
Q. (By Mr. Parker) -- that itemizes your prescriptions -- I forgot the number.
A. 4.
Q. What number is that?
A. 4.
Q. Turning your attention back to Exhibit 4. According --
MR. BROOM: Tab 16, is that?
MR. PARKER: Tab 18.
MR. BROOM: 18.
Q. (By Mr. Parker) You did have an active prescription for gabapentin during this period. Is that right?
A. Yes. I just do not take it in the morning.
Q. Did you have an active prescription for Xanax at that time?
A. Yes.
Q. Did you have an active prescription for Synthroid at that time?

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A. It appears so.
Q. Did you have an active prescription for Ritalin at that time?
A. Yes.
Q. Did you have an active prescription for Lopressor to treat SVT at that time?
A. No.
Q. The record shows the SVT prescription began in 2013. Is that right?
A. For verapamil, yes.
Q. Is that a drug used to treat SVT?
A. Yes.
Q. I am looking below that, if you can see on page 3 of Exhibit 4, an SVT in the left column?
A. Yes. And it says 2013. It was started when I was in the hospital after surgery.
Q. Were you taking Niaspan for cholesterol at that time?
A. Yes.
MR. BROOM: Still talking about the date of the accident?
MR. PARKER: Yes.
A. Yes.
Q. (By Mr. Parker) Were you taking Crestor at that time?

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A. Yes.
Q. I am seeing another line item for SVT and another prescription for verapamil --
A. Verapamil.
Q. -- from 2011 to 2013; is that right?
A. Yes. They -- I was on verapamil until just after my -- just after the accident -- after the surgery. They switched me from verapamil to the . . . What's it called? Verapamil . . . I'm missing it here. They switched me from the verapamil to the Lopressor after I -- after I got out of the hospital. They used the Lopressor when I was in the hospital, after my surgery. And that's -- and then after -- after I got out of the hospital, I had to see my regular cardiologist, and he actually increased the Lopressor and -- and kept me off the verapamil. Or -- he -- no, he reduced -- I'm sorry. He did reduce the amount of verapamil and increased the Lopressor. So they had me on both right after I got out of the hospital.
Q. It's correct that you had an active prescription for gabapentin during this time; is that right?
A. Yes.
Q. And what time of day would you take gabapentin

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and in what dose?
A. At lunchtime approximately -- lunchtime, 300 milligrams. Bedtime, 1,200 milligrams.
Q. Were you on any other painkillers during that period?
A. I wasn't on any painkillers. I was prescribed a painkiller in September -- just -- just a matter of days afterward, I believe. Because on the 19th of September 2013, I had a ganglion cyst removed from the back of my wrist.
(Deposition Exhibit 10 was marked for identification.)
Q. (By Mr. Parker) You've been handed what's marked Exhibit 10. Please take a moment to familiarize yourself with Exhibit 10.
THE WITNESS: Which tab is that for Dave?
MR. BROOM: No, I've got it.
THE WITNESS: Oh, okay.
MR. BROOM: Excuse me. Exhibit 10?
THE WITNESS: Yeah.
MR. BROOM: And -- yeah, thanks. What is the tab again?
MR. PARKER: 28.
MR. BROOM: Oh, same?

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MR. PARKER: Yeah.
MR. BROOM: Where we were. Okay. Thank you.
A. Okay.
Q. (By Mr. Parker) Have you seen this sign before?
A. I don't believe so. There was one that may have been similar at the time I rode it, but I don't recall this specific one.
Q. Do you contend that this sign was not on display on the date that you rode the Rainier Rush?
A. No.
MR. BROOM: Object to the form.
Q. (By Mr. Parker) Please read the warning within the green box on the sign.
A. This is a high speed thrill ride. You must have the physical ability and strength to maintain the required passenger position. There will -- there will be forces front, back, and side to side. Sit upright with your back against the back of the seat. Keep yours legs in front of you and hold on. Riders whose size does not allow use of safety device may not ride. Keep hands, all body parts in car at all times. Remove all loose articles, hats, glasses, et cetera. No gum or candy.

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(Deposition Exhibit 11 was marked for identification.)
Q. (By Mr. Parker) You've been handed Exhibit 11. Please take a moment to familiarize yourself with Exhibit 11.
A. Okay.
Q. What does Exhibit 11 depict?
A. A car -- amusement ride car.
Q. Does Exhibit 11 depict the Rainier Rush roller coaster?
A. I can't -- I can't verify or deny that from this picture.
Q. Do you contend that Exhibit 11 does not depict the Rainier Rush roller coaster?
A. No.
MR. BROOM: Object to the form.
Q. (By Mr. Parker) Is there a date posted on the bottom right of Exhibit 11?
A. It says September 10th, 2013.
Q. Please describe what the Rainier Rush roller coaster cars looked like.
A. There's four seats in a car. I'm -- this may be it. Like I said, I -- I can't, from the picture itself, tell you --
Q. Please describe what you remember about the

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appearance of the Rainier Rush roller coaster.
A. There were cars that were four people. They had the harnesses that come over the top, over your shoulders. And they were tall enough that your head was -- the seat was tall enough that your head was approximately, you know, just below the top of the seat. Like I said, this could be it. I just can't tell you exactly from this picture.
MR. BROOM: Excuse me. If I can just ask on voir dire, are -- the comments you just made, are you referring to Exhibit 11 when you say "this may be it"?
THE WITNESS: Yes. Yes.
MR. BROOM: Because he's asking you to -- excuse me, Counsel -- but your own recollection, as I understand, as well. But if she -- she's allowed to refer to that exhibit and make assumptions, that's fine, but -- whatever. Just recall what the question is.
THE WITNESS: Yeah. I just -- yeah, a car with four -- four seats in it. There's two in front, two in the back. There's restraints that come over the shoulders. And --
Q. (By Mr. Parker) Were you sitting in the front row or the second row?

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A. If I remember correctly, the second row.
Q. Which seat in the second row?
A. I don't recall specifically.
Q. Was a harness present on the Rainier Rush on September 16, 2013?
A. Can you verify what you mean by "harness."
Q. A safety harness that would hold you in place in the seat similar to the one depicted in Exhibit 11.
A. Yes.
Q. Do you remember what it looked like?
A. It was a bar that came down over your shoulders. And it had -- it had a shoulder -- I mean, it had a bar that went in front of you.
Q. Did that bar lock into place?
A. Yes.
Q. Did it lock into place when you entered the Rainier Rush ride?
A. Yes.
Q. Did that bar have padding similar to that depicted in Exhibit 11?
A. I believe so. I . . .
Q. So you've boarded the Rainier Rush and have been harnessed into place. What happens next?
A. They start the ride.
Q. What do you remember about the ride?

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A. It was -- it was a bumpy ride. It's a -- you know, high speed. There were parts that you went upside down. There -- you know, parts around corners. Towards the end of the ride, about one of the last corners we went around, the cars jerked kind of violently. And at that point is when I hit both sides of my head against the restraints that came over my shoulders.
And at that point, I had grabbed on to the harness up by my head and I held myself as tight as I could so that I didn't move at all. I -- I was trying not to let anything move. And -- and it was -- it was like the last curve right before the end because I remember being glad that it was over. And so right then, we went into the end station right after that.
MR. BROOM: Can we take a break, Counsel?
MR. PARKER: Sure.
THE VIDEOGRAPHER: We are going off the record. The time is now 2:17 p.m. This is the end of Disk No. 2 in the continuing deposition.
(Recess taken.)
THE VIDEOGRAPHER: We are back on the record. The time is now 2:25 p.m. This is the beginning of Disk No. 3 in the continuing deposition of

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Jodi Brugh.
Q. (By Mr. Parker) Ms. Brugh, you're still under oath. Do you understand that?
A. Yes.
MR. PARKER: Will you please read the last question.
(Reporter read back as requested.)
Q. (By Mr. Parker) You testified that there was a rough turn toward the end of the ride that caused your head to contact the shoulder harness; is that right?
A. Yes.
Q. Were there any other incidents before the ride came to an end?
A. No.
Q. Was that the only incident that occurred during the ride?
A. Yeah.
Q. Was there -- when you say that -- well, strike that.
How did you describe that turn that caused your head to contact the harness?
A. I believe violent.
Q. Okay. Was the violent turn part of the normal operation of the ride?

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A. I can't tell you that. I don't know.
Q. Did you notice anything about the ride that seemed unusual or that seemed like it was not in working order?
A. I can't tell you what the working order is -- I -- I can't -- I guess I can't speak to the mechanics of the ride. I . . .
Q. Is that a no then? You didn't see -- you didn't notice anything that appeared not to be in working order?
A. Not that I was aware of.
Q. Did you notice whether any parts of the ride seemed to be unsteady or unstable or falling apart or out of order?
A. Not that I noticed.
Q. Do you have any reason to believe that your ride on the Rainier Rush did not play out in an ordinary fashion?
A. Besides the violent jolt, hitting my head, no.
Q. When you say "violent jolt," did -- did you feel the cars come off the tracks or some other possible mechanical failure?
A. I can't speak to what caused it.
Q. Do you know whether the ride was shut down at any point during the 2013 Puyallup Fair?

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A. I know that there were times that it was shut down, yes.
Q. When?
A. I don't know the specifics. There were -- it was shut down, I believe -- actually later that day. I assumed that the cause was to rain, because it did rain that day.
Q. Was there anything else about the ride -- anything at all about the ride that was out of order or locked out of order to you?
A. Nothing that looked out of order. At -- I didn't notice at the time there -- later I -- when I saw the pictures, I did see it was sitting on wood blocks, which seemed odd to me.
Q. What do you mean "it was sitting on wood blocks"?
A. The bottom of the ride is sitting -- you can even see it in this picture, if this is the same ride. They're sitting on wooden blocks.
MR. BROOM: What are we referring to here?
THE WITNESS: The supports.
MR. BROOM: That's Tab 28, Exhibit 11? Is that what --
THE WITNESS: Yeah.

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MR. BROOM: -- we've referred to?
THE WITNESS: Yeah.
MR. BROOM: Yeah, that's fine. I just want to make sure we know what we're looking at.
Q. (By Mr. Parker) Will you, using this pen right here, circle what you contend are wood blocks. Please circle every wood block you see on this image.
A. What appear to be wood blocks to me. I know in the photos my friend took, there was several. There seems to be concrete or wood on top of concrete on top of wood. I don't know. Can't tell.
Q. And may I see the exhibit, please? Other than the wood blocks --
MR. BROOM: May I see that exhibit, please? Are you -- I'll just look at it for a second, and I'll give it right back to her if you're going to . . . Oh. Excuse me. Thanks.
Q. (By Mr. Parker) Other than the apparent wood blocks, was there anything about the Rainier Rush ride that appeared to be unusual that day?
A. Not by appearance, no.
Q. And how about by operation? Was anything about the operation of the Rainier Rush unusual?
A. The jerk, I assume, was not normal. I can't tell you for sure. I rode it that one time only.

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Q. Did you hear comments from any other passengers regarding the ride?
A. Not at that time, no.
Q. Were your interactions with the operators of the ride ordinary and as you would have expected?
A. Yeah.
Q. Do you recall receiving a verbal warning before the ride?
A. I don't.
Q. Do you recall receiving a verbal warning once you were harnessed into the ride?
A. I don't recall. They may have. I -- I don't recall.
Q. I know it happened very quickly, so you might not have the clearest of memories, but please describe for us everything you can recall about the final jerk that caused your head to contact the harness.
A. I thought I just did.
Q. Please describe what you recall about the final jerk that caused your head to contact the harness.
A. We were going around a corner. And I believe it was one of the last corner or two on the ride. And suddenly the car jerked really violently, and I hit -- I believe it was the left side and then the right.

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I . . . No, I don't -- I think -- actually I think it was the right side and then the left, but I don't remember exactly.

I just know I hit both sides of my head, and as soon as that happened, I -- I don't remember where my hands were. I know they weren't up in the air. I don't know if they were lower on the bar or where exactly, but I remember that I brought my hands up and held the bar next to my head and tried to hold my head as still -- I tried to hold my head so it wouldn't move.

And I noticed that my hearing on the right-hand side was gone -- a lot less. I -- I couldn't hear hardly at all out the right side. And then -- and then we -- I think we just -- we rolled into the station right -- right shortly after that.

Q. What portion of your head came in contact with the harness?

A. The sides, like my -- where my ears are.

Q. Your ear contacted the harness?

A. Yeah.

Q. Did both ears contact the harness?

A. Yeah.

Q. Did any other part of your head contact the harness?

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A. I -- I don't know.

Q. So the ride came to an end. You exited the ride?

A. Yes.

Q. Then what happened?

A. I went to Colleen Cameron and told her that I hit my head on the ride and that I couldn't hear out of my right ear.

Q. What time was it when you exited the ride?

A. I can't tell you exactly.

Q. What time was it when you entered the ride?

A. Approximately --

MR. BROOM: Asked and answered.

A. Around 12:30.

MR. BROOM: Go ahead.

A. I can't -- I can't tell you exact times. I -- I did not have a phone or anything with me on the ride. I gave everything to Colleen. One of these says don't have any loose items. So I gave everything to Colleen. I didn't have anything with me. I can't tell you.

Q. (By Mr. Parker) So how were you feeling when you exited the ride?

A. I felt like I had just had my eardrum blown.

Q. What did you do next?

A. We talked for a little bit. She was asking if

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I -- if I wanted to go to the first aid station. And I said that I knew that there was nothing they could do for a blown eardrum short of putting -- giving me cotton to put in it. So I said no. And then we decided to go on some less violent rides.

Q. What other rides did you ride that day?

A. The -- what I think was called the Mighty Mouse roller coaster and the sky one that goes from one end to the fair to the other. I don't remember any others specifically.

Q. Did you do any other fair activities that day?

A. Yeah, we -- we went and looked at the booths -- the 4H booths, the -- went and looked at some of the stuff they were selling. We bought a few things. We watched some of the programs they had going on.

And then that night, we went -- that evening about -- just before -- I think it was just about 5:00, my ear started hurting a little bit. So we decided to go to the first aid station to see if they had possibly a -- what I -- what I said to be an otoscope, which I don't know if that's the correct term for it. I believed that the instrument to look into your ear was called an otoscope.

So what I told my -- Colleen was, you know,

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let's go see if they have an otoscope and can, you know, verify for sure that it is blown and, you know, maybe if they have something to put into -- put in it.

And we walked into the first aid station. And I asked them -- we told them that I thought I had blown my eardrum on the Rainier Rush. And we asked them if they had a otoscope to verify that. And they said they didn't.

They told me to go to my doctor the next day or to go to urgent care. And at that point, we went and had something to drink before we went to -- into the -- the arena where Alabama was playing that night.

Q. Is Alabama a band?

A. Yes.

Q. Did you purchase a ticket to that show?

A. Yes.

Q. When did you purchase a ticket to that show?

A. We purchased tickets months in advance.

Q. What time did the show start?

A. I think it was 6:00. I -- I don't remember for sure.

Q. What time did the show end?

A. I don't know for sure. I -- I'm assuming 8:00 or 9:00.

Q. Was it reserved seating or general admission?

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A. Reserved seating.
Q. And where were your seats?
A. They were on the floor area. I don't remember the exact row, but I think about halfway back on the floor.
Q. Do you remember which side of the arena?
A. They were kind of in the middle section. I think maybe left of the middle.
Q. Who drove to the fair that day?
A. I did.
Q. Who drove home to -- from the fair?
A. I believe I did.
Q. After the concert concluded at 8:00 or 9:00, did you do any other fair activities?
A. No. The -- the fair was closed by then.
Q. So you left when the fair was closed?
A. Yeah.
Q. It was closing down as you left?
A. Yeah. The concert is the last event of the fair.
Q. You rode the Mighty Mouse roller coaster after the Rainier Rush; is that right?
A. Yes.
Q. Did you ride any other roller coasters after that?

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A. No. Not that I recall. I think there's only one other roller coaster there -- the wooden one, and we did not ride that one.
Q. What did you do after leaving the ride -- or leaving the fair?
A. Went home, I believe.
Q. What did you do when you got home?
A. We probably sat up and talked for a while before we went to bed.
Q. What happened the next day?
A. Next day, when we got up, I had to go have blood work drawn at my doctor's office, so we went to my doctor's office. And while I was there, I asked the nurse if she was able to verify real quick that I had blown my eardrum from the ride at the -- at the fair the night before. And so she actually put me on the schedule and put me in an exam room. And I saw the doctor.
Q. Was this a scheduled doctor visit?
A. No.
Q. What was the purpose of the blood work?
A. It -- I believe it was my diabetes checkup blood work.
Q. So the blood work was scheduled?
A. I just had to go in before my diabetes

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appointment to have the blood work done at some time, so . . .
MR. PARKER: We'll go to Tab 17. Please staple this exhibit.
(Deposition Exhibit 12 was marked for identification.)
Q. (By Mr. Parker) You've been handed what's marked Exhibit 12. Please take a moment to familiarize yourself with Exhibit 12.
A. Okay.
Q. Have you familiarized yourself with Exhibit 12?
A. I've seen it a few times.
Q. What is Exhibit 12?
A. It is the, I guess, doctor's note from the date of September 17th, 2013, at 8:45 a.m.
Q. All right. Under history of present illness, Section 1, states "earache"; is that right?
A. Yes.
Q. And the onset is noted as three days ago. Is that right?
A. That's what it states.
Q. And what's the date of this record?
A. As I stated, September 17th, 2013.
Q. Did your earache begin on September 14, 2013?

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A. Not that I recall.
Q. Does this record provide that your earache came about on September 14, 2013?
A. That's what it appears.
Q. Did you see Dr. Gonzalez for this?
A. Yes, I did.
Q. Dr. Gonzalez is in the clinic that day?
A. Yes, she was.
Q. Did Dr. Gonzalez prescribe anything for the earache?
A. She prescribed medication for the bleeding in my ears.
Q. What medication is that?
A. It was actually an eyedrop.
Q. Does this record mention bleeding in the ears?
A. No. I'm sorry. It says that the right eardrum was perforated.
Q. On page 242, based on the bottom right Bates numbering -- let me know when you've arrived there.
A. Bottom right Bates --
Q. Each page has a number --
A. Oh, okay. Yes. 242. Yes.
Q. Under assessment/plan toward the top of the page, it provides that "The patient will avoid loud noises, in ear buds and will keep her ears dry. I did

Honorable Kathryn J. Nelson
Hearing Date/Time: September 8, 2017/9:00 AM
With Oral Argument

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 DEFENDANTS FUN-TASTIC RIDES CO. AND MIDWAY RIDES LLC'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. *RES IPSA LOQUITUR* DOES NOT APPLY TO THIS CASE

Plaintiff's reliance on *res ipsa loquitur* is an admission that there is no evidence of negligence. For that reason, this motion should be granted. *Res ipsa loquitur* means "the thing speaks for itself." The doctrine is "ordinarily sparingly applied, 'in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.'" *Curtis v. Lein*, 169 Wn.2d, 884, 889, 239 P.2d 1078 (2010). A common example is a piano falling from the sky onto a sidewalk. That does not ordinarily happen in the absence of negligence. A falling piano speaks for itself.

Res ipsa loquitur does not apply to this case. The doctrine asks whether the accident or occurrence that caused plaintiff's injury would not ordinarily happen in the absence of

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negligence. *Id.* at 891 (emphasis supplied). Ms. Brugh asserts that her alleged injury would not ordinarily have occurred in the absence of negligence. She has misapplied the doctrine. The doctrine focuses on the act or occurrence because the injury-causing instrument is in the exclusive control of the defendant. When the instrument is in the exclusive control of the defendant, it is not accessible to the plaintiff. That circumstance is the basis for excusing a lack of evidence regarding negligence. For example, the *Curtis* plaintiff was injured when a wood plank on a dock gave way. The dock was later destroyed. The plaintiff never had access to inspect the dock before it was destroyed. She could not investigate its condition. The destruction of the dock deprived plaintiff of the opportunity to gather evidence regarding negligence. *Res ipsa loquitur* was applied for those two reasons (1) a wooden plank on a dock does not ordinarily give way without negligence, and (2) plaintiff never had access to inspect the dock to determine its condition.

Neither of those factors are present in this case. As to (1), Plaintiff has incorrectly focused on her alleged injury and claims it would not ordinarily have occurred without negligence. Proper application of the doctrine requires focus on the act or occurrence, not the injury. As to (2), Plaintiff had an opportunity to inspect and investigate the roller-coaster. She has chosen not to do so.

Plaintiff claims she was injured when the roller-coaster took a left turn. Regardless of how she characterizes the turn ("violent" or "jolting"), the roller-coaster ran exactly as it was designed to run. Plaintiff has no evidence to the contrary. For support Plaintiff has cited to a 1940 case out of Florida that involved a roller-coaster injury. That case differs from our case because Ms. Brugh was not thrown from the coaster, and there is no evidence to support her allegation that the ride did not operate as it should have operated. *See Coaster Amusement Co. v. Smith*, 141 Fla. 845, 194 So. 336 (1940). The question under *res ipsa* is whether, in the absence of negligence, the roller-coaster would not ordinarily have followed the tracks and turned left. Of course, the answer is yes. There is nothing out of the ordinary about the Plaintiff's ride

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on the Rainier Rush. The roller-coaster operated the same way the week before when it was inspected and permitted by the State of Washington. It has run the same way each and every day since that time.

Another example of proper application of *res ipsa* involved a scaffolding on the side of a building that collapsed while a painter was standing on it, causing injury. *Penson v. Inland Empire Paper Co.*, 73 Wash. 338, 132 P. 39 (1913). The question in that case was whether, in the absence of negligence, a scaffolding would ordinarily collapse. The focus was on the act or occurrence, not that painter's injury. Because the scaffolding had been destroyed the plaintiff did not have access to same and could not inspect or investigate whether negligence caused or contributed to the collapse. For that reason, the court determined that *res ipsa* applied.

Res ipsa loquitur does not apply to this case because nothing about the operation of the Rainier Rush on the day the Plaintiff rode it suggests anything out of the ordinary operation of the ride occurred, let alone negligence. Additionally, the roller-coaster is accessible to Plaintiff for inspection. She has chosen not to hire an expert to investigate and submit a declaration regarding the same.[1]

A verdict cannot be founded on mere theory or speculation. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999) (ruling that plaintiff's vague allegations and speculative theories of how the accident occurred and speculation that a defect in the machine caused the accident were insufficient to support claim of negligence). The mere occurrence of

[1] The only declaration submitted by the Plaintiff is from one of her medical providers. This declaration is irrelevant to the issue of breach. Furthermore, the declaration is invalid because Dr. Gonzalez does not have personal knowledge and relies on inadmissible hearsay evidence, in contravention of CR 56(e). For instance, Dr. Gonzalez did not witness the Plaintiff suffering a head trauma and is devoid of personal knowledge about whether or not there was any impact, let alone trauma after the Rainier Rush ride and before October 7, 2013 as she was not a witness to any such events. Dr. Gonzalez moved to California in September of 2016, so she does not have personal knowledge about whether or not the Plaintiff continues to suffer any symptoms related to the alleged incident. She is a Family Medicine Practitioner rather than a neurologist or neurosurgeon and the Plaintiff has not established that she is qualified to opine on head trauma or its severity or whether or not the Plaintiff is able to work full time. It is also notable that plaintiff has received treatment from over 15 medical professionals in the State of Washington since the date of loss, yet relies upon a doctor from California.

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an accident and an injury does not necessarily lead to an inference of negligence. *Id.* at 377. For that matter, there is no evidence in this case of an accident.

In the instant case the Plaintiff merely speculates that her medical condition, subdural hematoma, was due to the ride on the Rainier Rush a month prior to the discovery of the condition. A claim of liability resting only on a speculative theory will not survive summary judgment. *Marshall*, 94 Wn. App. At 381. The Plaintiff has not provided any evidence to support her claims besides speculative theories; thus, her claims should be dismissed.

II. A ROLLER-COASTER IS NOT ABNORMALLY DANGEROUS

Plaintiff contends that a roller-coaster is an abnormally dangerous activity such that strict liability should be imposed. Plaintiff has not cited any roller-coaster or amusement ride cases in support of this claim. Nor could the undersigned uncover a single case that even found a question of fact regarding whether a roller-coaster is abnormally dangerous.

The case cited by the Plaintiff involves a fireworks display at which an aerial shell went astray and exploded near the plaintiffs. *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 810 P.2d 917 (1991). Because all of the evidence exploded, there was no means of proving the cause of the misfire. *Id.* at 4. The imposition of strict liability for fireworks displays was supported by the problem of proof resulting from destruction of evidence as to what caused the misfire of shells. *Id.* at 11. The disasters caused by those who engage in abnormally dangerous or extra-hazardous activities, such as explosions of dynamite, large quantities of gasoline, or other explosives, frequently destroy all evidence of what occurred, other than that the activity was being carried on. *Id.*

The *Klein* case also notes that no other jurisdiction has adopted a common law rule of strict liability for fireworks displays. *Id.* at 19.

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Washington has adopted Section 520 of the Restatement (Second) of Torts regarding abnormally dangerous activities. Under that section the following factors are considered.

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

This doctrine evolved from the holding in *Rylands v. Fletcher*, 159 Eng.Rep 737 (1865), in which the defendant's reservoir flooded plaintiff's mine shafts. That court held that a defendant will be liable when "he damages another by a thing or activity unduly dangerous and inappropriate to the area where it is maintained, in the light of the character of that place and its surroundings." At 547-48.

(a) Existence of a high degree of risk of some harm to the person, land or chattels of others.

There is no evidence in support of this factor. Plaintiff has not presented the Court with any reports of injury on this roller-coaster, or any other. Nor has Plaintiff cited a single case, from any jurisdiction, where a court determined that roller-coasters are abnormally dangerous.

(b) Likelihood that the harm that results from it will be great.

This factor is also unsupported except for Plaintiff's statement that "the likelihood is great that injury could result in the event of anyone's negligence." *Plaintiff's Response*, 17:24-25.

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Plaintiff has added an element of negligence to this factor, which takes it out of the realm of strict liability and is tantamount to an admission that Plaintiff cannot make a showing as to (b).

(c) Inability to eliminate risk by the exercise of reasonable care.

This factor is not addressed in Plaintiff's response.

(d) Extent to which the activity is not a matter of common usage.

Section 520 of the Restatement provides that "the essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability." Roller-coasters are not so unusual as to justify the imposition of strict liability. Washington courts have determined that detonating dynamite satisfies this factor in some cases. *Foster v. Preston Mills Co.*, 44 Wash.2d 440, 268 P.2d 645 (1954). But dynamite is much more difficult to control than a roller-coaster. Its danger is belied by the restrictions on who can detonate dynamite, when and where. Roller-coasters are very common compared to the detonation of dynamite.

(e) Inappropriateness of the activity to the place where it is carried on

This roller-coaster was operated at the Puyallup Fair – an appropriate place for operation of the same.

(f) Extent to which its value to the community is outweighed by its dangerous attributes.

Plaintiff has not attempted to make a showing under this factor.

III. FUN-TASTIC RIDES AND MIDWAY RIDES ARE NOT LIABLE TO PLAINTIFF UNDER THE PRODUCTS LIABILITY ACT

Plaintiff's third basis of opposition to Fun-tastic Rides and Midway Rides' motion provides that the operator of a product will be liable for continuing to engage in a defective product's use. Whether that is true is irrelevant where there has been no showing of a defective product. In this case, Plaintiff has not presented any evidence that supports her claim that the

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roller-coaster is defective. It follows necessarily that Fun-tastic Rides and Midway Rides cannot be liable for continuing to operate a defective product.

Under traditional product liability theory, the plaintiff must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product. *Martin v. Abbott Laboratories,* 102 Wn.2d 581, 590, 689 P.2d 368 (1984). In order to have a cause of action, the plaintiff must identify the particular manufacturer of the product that caused the injury. *Id.* The Plaintiff has not established any connection between the injury, the roller coaster, and the manufacturer. She cannot maintain a cause of action when she has not sought to identify the manufacturer of Rainier Rush. Instead Plaintiff filed a Confirmation of Joinder of Parties, Claims and Defenses attesting to the fact that all parties against whom the causes of action apply have been joined. Product liability theories do not apply to the Defendants and the Plaintiff cannot seek to recover from Defendants for any potential liability due to a manufacturer or any other party that Plaintiff has not identified.

Even if negligence and product liability theory are separate causes of action and neither preempts the other, the fact remains that neither applies to our case because Plaintiff has not proven negligence or that Defendants are manufacturers or product sellers of the Rainier Rush. Thus, Plaintiff's negligence and product liability claims should be dismissed.

IV. CONCLUSION

Plaintiff's reliance on *res ipsa loquitur* is an admission that there is no evidence of negligence. She asks the Court to deny Fun-tastic Rides and Midway Rides' motion because her head injury would not ordinarily have occurred without negligence. As discussed above that constitutes a misapplication of the doctrine. The question under *res ipsa* is whether the act or occurrence would ordinarily happen in the absence of negligence. In this case, there is no evidence that the Rainier Rush did not operate exactly as designed. It was inspected and

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permitted for safety by the State of Washington. For this reason, Plaintiff's invocation of *res ipsa* fails.

Ms. Brugh relies on speculation that negligence must have occurred because she has no evidence of breach. Mere speculation is insufficient to overcome a summary judgment motion. Ms. Brugh is required to prove all elements of negligence. Plaintiff is unable to present evidence regarding an essential element of her claim. Fun-tastic Rides and Midway Rides' motion should be granted.

DATED this 5th day of September, 2017.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

I certify that this memorandum is under 12 pages, in compliance with the Local Civil Rules.

By: _____

Patricia K. Buchanan, WSBA No. 19892
Timothy T. Parker, WSBA No. 43674
Tamila N. Stearns, WSBA No. 50000
Attorneys for Defendants Fun-tastic Rides, Co. and Midway Rides

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CERTIFICATE OF SERVICE

I, Christopher Moore, hereby declare that on this 5th day of September, 2017, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

ATTORNEY NAME & ADDRESS	METHOD OF DELIVERY
Mr. William J. Schroeder Ms. Anne Schroeder Mr. David Broom KSB Litigation, P.S. 221 North Wall, Suite 210 Spokane, WA 99201	■ Electronic Mail ■ ABC Legal Messenger Service □ Regular U.S. Mail □ Other: Pierce County Linx

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

DATED this 5th day of September, 2017 at Seattle, Washington.

Christopher Moore
Legal Assistant

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Honorable Kathryn J. Nelson
Hearing Date/Time: September 8, 2017/9:00 AM
With Oral Argument

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

JODI BRUGH, an individual,

Plaintiff,

v.

FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity,

Defendants.

No. 16-2-10983-2

Denying

~~[PROPOSED]~~ ORDER ~~GRANTING~~ DEFENDANTS FUN-TASTIC RIDES CO. AND MIDWAY RIDES LLC'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court for hearing on Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment.

The Court reviewed the pleadings and files herein, including:

1. Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment;
2. Plaintiff's Response(s), if any;
3. Defendant's Reply, if any.

//

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Based on the foregoing, Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment is ~~GRANTED~~ DENIED. The above-captioned lawsuit shall be dismissed with prejudice.

IT IS SO ORDERED.

DATED this 8 day of ~~August~~ SEPTEMBER, 2017.

By: _____
HONORABLE KATHRYN J. NELSON

Presented by:

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: _____
Patricia K. Buchanan, WSBA No. 19892
Timothy T. Parker, WSBA No. 43674
Attorneys for Defendants Fun-tastic
Rides, Co. and Midway Rides, LLC

FILED
DEPT. 13
IN OPEN COURT
SEP 08 2017
By _____ DEPUTY

Approved as to form, notice of presentation waived:

KSB LITIGATION, P.S.

By: _____
William J. Schroeder, WSBA No. 41986
Anne Schroeder, WSBA No. 47952

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Honorable Kathryn J. Nelson

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

JODI BRUGH, an individual,

Plaintiff,

v.

FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity,

Defendants.

No. 16-2-10983-2

DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION FOR SUMMARY JUDGMENT

I. RELIEF REQUESTED

Pursuant to Civil Rule 59(a)(7) and 59(a)(9), Defendants Fun-tastic Rides, Co. ("Fun-tastic") and Midway Rides, LLC ("Midway") respectfully request this Court to reconsider its order denying Defendants' motion for summary judgment. Defendants further request that the Court instead enter an order granting its previously filed motion for summary judgment.

II. STATEMENT OF FACTS

Defendants moved the Court to grant summary judgment in its favor because Plaintiff failed to present any evidence that (1) Defendants breached their duty of care; or (2) that Defendants are manufacturers or sellers of a roller-coaster called the Rainier Rush, which Plaintiff alleges to have caused her injuries on September 16, 2013. *See* Defendants Fun-tastic Rides Co. and Midway Rides LLC's Motion for Summary Judgment. In support of its motion

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for summary judgment, Defendants presented declarations evincing the state-verified safety of the ride; Plaintiff's own admission that verbal warnings were given and warning signs for the ride were posted; and even one of Plaintiff's interrogatory answers, which admitted that Plaintiff could not cite a single statute, rule, regulation, or ordinance that Defendants allegedly violated.

Plaintiff filed a response that relied upon inapposite case law and an unfounded theory of strict liability. *See* Plaintiff's Response to Defendants Fun-tastic Rides Co. and Midway Rides LLC's Motion for Summary Judgment.

After argument on September 8, 2017, this Court held that a material issue of fact existed which precluded summary judgment in this case. The Court appears to have agreed with Plaintiff's assertion that *Reynolds v. Phare*, 58 Wn.2d 904, 365 P.2d 328 (1961) is applicable to the present case. It is this decision and the Court's order denying summary judgment that Defendants now request the Court to reconsider and ultimately reverse.

Defendants incorporate by reference their motion for summary judgment and its supporting documents, as well as the order under reconsideration.

III. LEGAL ARGUMENT

A. Standard for Granting Reconsideration.

The Court may reconsider and vacate its order denying summary judgment if there is a lack of evidence justifying the decision or if the decision contradicts with the law, among other reasons. CR 59(a). Reconsideration under CR 59 is proper when a court denies a defendant's motion for summary judgment, as occurred here. *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 810 P.2d 31 (1991). An order should be reconsidered where the evidence, viewed in a light most favorable to the nonmoving party, cannot sustain a decision for the nonmoving party. *Kohfeld v. United Pacific Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997).

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In this case, Plaintiff failed to produce any evidence demonstrating the existence of any genuine issue of material fact, and therefore, denial of summary judgment is not supported by the evidence, nor is it consistent with the law.

B. Plaintiff Relied upon Inapposite Case Law, which Cannot Serve as Precedent for the Present Case.

In her response to Defendants' motion for summary judgment, Plaintiff cited the 1961 case of *Reynolds v. Phare*, *supra*, to support her argument that Defendants were negligent and such negligence led to Plaintiff's injuries. However, *Reynolds* is distinct from and inapplicable to the present case for three primary reasons: (1) Its procedural posture was wholly different from the current case; (2) it concerned facts that differ from the present case in significant ways; and (3) it featured theories of liability that do not exist in our case.

1. *Reynolds* Did Not Concern a Motion for Summary Judgment.

Reynolds came to the Washington State Supreme Court on appeal after a jury found in favor of defendants in an action involving injuries related to riding a roller-coaster-like amusement device. Importantly, the appeal focused on the trial court's prejudicial error in giving contributory negligence instructions to the jury. The court held that the jury instructions were erroneous because there was no evidence to support even an inference that the plaintiff in that case had been contributorily negligent.

Defendants in the present case, however, presented this Court with a motion for summary judgment devoid of any reference to jury instructions. Aside from having no bearing on motions for summary judgment in general, nothing in the *Reynolds* court's analysis of a jury question appeal supports a denial of Defendants' motion for summary judgment in this case.

2. *Reynolds* is Factually Distinct from the Current Case.

Even if the present case did concern a disagreement regarding jury instructions, Plaintiff's argument would still fail because, unlike *Reynolds*, there is no genuine issue of material fact in the present case as to whether Plaintiff was contributorily negligent. Unlike the

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defendant in *Reynolds,* neither Fun-tastic Rides nor Midway Rides has argued that Plaintiff was contributorily negligent for her injury. Defendants here have never argued that but for Plaintiff's own negligence in riding the Rainier Rush, she would not have been injured. Instead, Defendants are principally concerned with Plaintiff's total lack of factual evidence demonstrating that Defendants were negligent in any way or that any purported negligence was in breach of Defendants' duty of care. In short, both *Reynolds* and the present case include claims arising from injuries that allegedly occurred while riding on amusement devices, but this is the extent of the factual similarities between the cases.

As one example, in *Reynolds*, the injured rider and his father were never instructed, orally or by sign, how to hold on or how to sit in the ride. *See Reynolds*, 58 Wn.2d at 905. Here, however, there is evidence that Plaintiff was secured in her seat by a locking restraint and that warning signs for the ride were posted on the premises. *See* Buchanan Decl. Ex. E at 103, 117-119, 121. Plaintiff has not presented any evidence to establish that further instructions were necessary or that she did not receive instructions from Defendants. This essential difference goes to the heart of why *Reynolds* would reach the state Supreme Court on a faulty jury instruction and why, on the other hand, summary judgment should be granted to Defendants in the present case. The fact that Plaintiff was secured, warned of risks associated with riding the ride (at least by signage), and may have received oral instructions distinguish this from *Reynolds* to the extent that it renders *Reynolds* inapposite.

3. *Reynolds* Presents Different Theories of Liability from this Case.

It is notable that the *Reynolds* opinion does not clearly indicate *any* theory of liability. We do not know why the *Reynolds* plaintiff believed the defendant in that case was liable for his injury. Yet, this Court relied on *Reynolds* when denying the current Defendants' motion for summary judgment. The lack of any parallel theory of liability between *Reynolds* and the present case should have rendered that case further irrelevant and inapplicable.

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However, assuming that contributory negligence was essential to the dispute between the parties in *Reynolds*, the present case is distinguished by the fact that Defendants do not argue that Plaintiff was contributorily negligent. Again, Defendants do not argue that Plaintiff was injured; instead, Defendants argue that Plaintiff has not presented *any* evidence that Defendants breached their duties of care.

Finally, in Plaintiff's response to Defendant's motion for summary judgment, she argues for the applicability of *res ipsa loquitur* to the present case. Not only should Plaintiff's argument have failed in that she admits there is no evidence of negligence, *res ipsa loquitur* was not asserted in *Reynolds* and should be irrelevant to the Court's analysis.

C. Plaintiff Failed to Provide Evidence that the Product Liability Act Applies, and Any Claim Related to that Act Should be Dismissed.

Under CR 56, summary judgment for the moving party is required unless the non-moving party presents "specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." *Meyer v. Univ. of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). Reliance on "speculation or argumentative assertions" does not meet this burden. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

In this case, Defendants moved for summary judgment because, among other reasons, theories of product liability only apply to manufacturers and product sellers under the Washington Product Liability Act of 1981. *See* RCW 7.72.010. Again, when given an opportunity in the discovery process to identify any statute, rule, regulation, or ordinance that Defendants allegedly violated, Plaintiff could only *speculate* that a statute had been violated, but failed to identify one—namely, the Product Liability Act. Further, as Defendants previously argued, neither Fun-tastic Rides nor Midway Rides is a manufacturer or product seller of the roller-coaster which Plaintiff claims caused her injuries. Neither defendant designed, produced, fabricated, constructed, manufactured, sold, leased, or distributed the ride.

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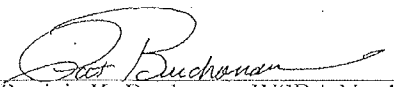
Plaintiff had an opportunity in its response to Defendants' motion for summary judgment to provide specific facts to indicate a genuine issue of material fact, but it failed to do so. Instead, Plaintiff argued that Defendants may be liable for her injuries by continuing to engage in a defective product's use. In making this argument, Plaintiff attempted to circumvent the scope of the Product Liability Act. However, whether Defendants operated a defective product's use is ultimately irrelevant because Plaintiff failed to present any evidence that the roller-coaster in this case was defective. Speculating that an unidentified statute was violated, which would serve to substantiate Plaintiff's product liability claims, does not meet the necessary factual threshold to survive Defendants' motion for summary judgment.

IV. CONCLUSION

For the foregoing reasons, Fun-tastic Rides and Midway Rides respectfully request that this Court reconsider its prior order, and instead grant summary judgment in Defendants' favor.

DATED this 18th day of September, 2017.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: 
Patricia K. Buchanan, WSBA No. 19892
Of Attorneys for Defendant FUN-TASTIC RIDES CO.

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF PIERCE

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 **PLAINTIFF'S RESPONSE TO DEFENDANTS FUN-TASTIC RIDES CO. AND MIDWAY RIDES LLC'S CR 59 MOTION FOR RECONSIDERATION**

- **Is a closed head injury caused by a strike to the head a bug or a feature of the Rainer Rush ride?**

For the purpose of this CR 59 motion, the Court must assume that Plaintiff Jodi Brugh ("Brugh") suffered a closed head injury caused by a striking blow while riding the Rainer Rush at the Puyallup State Fair, one week after the Ride's debut in September 2013.[1]

Brugh has previously called the Court's attention to *Reynolds* and *Curtis*. The answer to the question posed above determines which line of cases is applicable. If blows to the head

[1] Brugh incorporates by this reference her prior briefing on the Summary Judgment Motion.

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are a feature of the Rainer Rush, then the *Reynolds* case is instructive, because a fair patron is entitled to warnings both that head blows are an expected outcome, and the manner in which to avoid head blows if possible. In *Reynolds*, the amusement patron rode a roller coaster and broke a bone on a particularly violent bump. There, as here, the ride operator contends nothing is wrong with the machine and therefore the injury must somehow be the amusement patron's fault, for riding the ride wrong. The case turned on whether the amusement patron was warned of the type of injury suffered and how to avoid the same. Here, if blows to the head are an expected outcome, then the owner and/or operator of the ride is required to warn of the same, and a jury question is presented.

If on the other hand, blows to the head are a bug in the Rainer Rush ride at the Puyallup State Fair, then the *Curtis* line of cases is applicable, and a question of law is presented concerning burdens of proof, which can only be answered by the Court, and for which there is no specific authority on point.[2]

Under *Curtis*, the question of law for the Court is whether the injury suffered is of a type which would not ordinarily happen in the absence of someone's negligence. If the injury is of such a type, then the burden shifts to the owner or operator of the instrumentality to demonstrate to the jury that the cause of the injury is something other than negligence.

The question on this record is whether a closed head injury caused by a blow to the head while riding the Rainer Rush at the Puyallup State Fair is the type of injury which would not ordinarily happen in the absence of someone's negligence? Consistent with *Curtis*, *Klein*,

---

[2] The most factually similar case in Washington is *Reynolds*, though the procedural posture is different.

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RCW 4.22.070, and CR 12(i), the law in Washington should be that head trauma suffered by a patron at the state fair while riding a newly-installed roller coaster does not ordinarily happen in the absence of someone's negligence, and that the tortfeasors should be required to determine among themselves their proportion of liability for any problems in the design, maintenance, and/or operation of the machine.

As to the remainder of the arguments in the Reconsideration Motion, Brugh's response to the Summary Judgment Motion has already addressed those arguments; to avoid repetition they are incorporated here.

CONCLUSION

For the foregoing reasons, Brugh requests that the Court deny the moving Defendants' motion.

Submitted this 28th day of September, 2017, by:

KSB LITIGATION, P.S.

William C Schroeder, WSBA 41986
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of September, 2017, I caused to be served a true and correct copy of the foregoing document to the following:

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X	U.S. MAIL	Tamila N. Stearns
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___	FAX TRANSMISSION	LEITCH, INC., P.S.
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William C Schroeder

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Honorable Kathryn J. Nelson

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS FUN-TASTIC RIDES CO. AND MIDWAY RIDES LLC'S CR 59 MOTION FOR RECONSIDERATION

I. REPLY

Lacking evidence and authority, Plaintiff's entire case rests on speculation and boils down to this: Brugh sustained an injury. Therefore, Defendants must have been negligent. Contrary to this theory, the mere occurrence of an injury does not by itself allow for an inference of negligence. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999). Plaintiff must present evidence, and she has provided only speculation.

Plaintiff originally cited *Reynolds* to support her argument that she did not act negligently. Pl.'s Summary Judgment Resp. 6–7. But this argument is irrelevant. Defendants never argued that she did. Consequently, Reynolds—a case dealing with an improper jury instruction on contributory negligence—should not have determined Defendants' summary judgment motion. Because the Court relied on it, however, Plaintiff now misreads *Reynolds*

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beyond what it actually supports. Indeed, an analysis of *Reynolds* shows that Plaintiff's case should be dismissed because she relies on nothing but speculation.

The defendant operators in *Reynolds* obtained a jury verdict based on plaintiff's contributory negligence for sitting improperly on the ride. *Reynolds v. Phare*, 58 Wn.2d 904, 905, 365 P.2d 328 (1961). The plaintiff rider argued that the operators lacked evidence to support a finding that he sat negligently. *Id.* at 905. The Washington Supreme Court agreed. The operators only presented evidence that many other people rode the same ride without injury, and for that reason alone, they argued the jury should conclude that the plaintiff must have sat improperly. *Id.* at 906. The court held this theory insufficient because the jury would have to speculate about how the plaintiff acted negligently, if at all. *Id.*

Plaintiff now attempts to argue *Reynolds* in reverse: based on the fact that she was injured and nothing more, the jury should conclude that Defendants acted negligently. She wants the jury to speculate about what the Defendants may have done, if anything, just as the defendant operators in *Reynolds* wanted the jury to speculate about what the plaintiff may have done. Because this utter lack of evidence forces the jury to rely on speculation, it cannot sustain a verdict. *Id.* at 906.

Additionally, Brugh speculates about the injured rider's theories of liability in *Reynolds*. Pl.'s Resp. Mot. Recon. 2. We do not know what theories the plaintiff presented. For example, investigation may have discovered a metal bar protruding from the seat, which rammed into the rider's back when the boat hit the water. We can merely speculate about the precise theories, as the court does not tell us. But nothing in the case says that the plaintiff argued *res ipsa loquitur*, which suggests that, unlike Brugh, the *Reynolds* plaintiff provided actual evidence of the defendants' negligence. Plaintiff here speculates that the *Reynolds* plaintiff argued that the defendants were negligent based on the lack of warnings—the case does not say this. *See id.* at 905–06. The court, instead, mentions the lack of warnings among the types of evidence that defendants did not present regarding how the plaintiff sat on the ride. They did not, for

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example, instruct the rider on how to sit, show that he seated himself improperly, or show that he did anything but hold onto the ride's grab bar as intended. *Id.* at 906. The defendant operators had nothing but speculation that the plaintiff acted negligently. *See id.* at 905–06. As here, Plaintiff has nothing but speculation. Like the defendants in *Reynolds*, Plaintiff lacks evidence to support her negligence claim as a matter of law.

Furthermore, *res ipsa loquitur* does not apply just because an injury occurred. Proper application of the doctrine focuses on the accident or occurrence, not the injury. *Curtis v. Lein*, 169 Wn.2d 884, 891, 239 P.2d 1078 (2010). Plaintiff has incorrectly focused on her alleged injury and nothing more. Unlike *Curtis*, where the dock gave way—an occurrence or event that does not ordinarily happen in the absence of negligence—and was later destroyed, preventing plaintiff the plaintiff from inspecting it, Brugh has had an opportunity to inspect and investigate the roller-coaster. She has chosen not to do so. *Res ipsa loquitur* does not apply as a substitute for the plaintiff investigating and presenting evidence.

II. CONCLUSION

Plaintiff has presented no evidence that Defendants acted negligently. A jury cannot find negligence based only on speculation and conjecture. Consequently, Plaintiff's claims should be dismissed as a matter of law.

In addition, a roller-coaster ride is not an abnormally dangerous activity and Plaintiff has conceded that Defendants are not manufacturers or sellers of the Rainier Rush. Therefore, the product liability and strict liability claims should be dismissed as a matter of law.

DATED this 28th day of September, 2017.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

"Tim Campbell"

By: Tim Campbell WSBA 46164, for
Patricia K. Buchanan, WSBA 19892
Of Attorneys for Defendant Fun-tastic Rides Co. and Midway Rides LLC.

PATTERSON BUCHANAN
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CERTIFICATE OF SERVICE

I, Christopher Moore, hereby declare that on this 20th day of September, 2017, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

ATTORNEY NAME & ADDRESS	METHOD OF DELIVERY
Mr. William J. Schroeder Ms. Anne Schroeder Mr. David Broom KSB Litigation, P.S. 221 North Wall, Suite 210 Spokane, WA 99201	■ Electronic Mail □ ABC Legal Messenger Service ■ Regular U.S. Mail ■ Other: Pierce County Linx

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

DATED this 20th day of September, 2017 at Seattle, Washington.

Christopher Moore
Legal Assistant

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.
2112 Third Avenue, Suite 500, Seattle WA 98121
Tel. 206.462.6700 Fax 206.462.6701

Honorable Kathryn J. Nelson
September 29, 2017

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

JODI BRUGH, an individual,

Plaintiff,

v.

FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity,

Defendants.

No. 16-2-10983-2

~~[PROPOSED]~~ ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court for hearing on Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Reconsideration of Order Denying Motion for Summary Judgment.

The Court reviewed the pleadings and files herein, including:

1. Defendants' Motion for Reconsideration of Order Denying Motion for Summary Judgment;
2. Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment;
3. Plaintiff's Response; and
4. Defendants' Reply.

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Based on the foregoing, Defendants' Motion for Reconsideration of Order Denying Motion for Summary Judgment is GRANTED, and the Court's Order Denying Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment is REVERSED. The above-captioned lawsuit shall be dismissed with prejudice and without costs.

IT IS SO ORDERED.

DATED this 29 day of September, 2017.

By: _____
HONORABLE KATHRYN J. NELSON

Presented by:

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: */s/ Timothy T. Parker*
Patricia K. Buchanan, WSBA No. 19892
Timothy T. Parker, WSBA No. 43674
Attorneys for Defendants Fun-tastic
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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF PIERCE

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 **NOTICE OF APPEAL TO DIVISION II OF THE COURT OF APPEALS**

Plaintiff Jodi Brugh seeks review by the designated appellate court of the Order Granting Defendants' Motion for Reconsideration of Order Denying Motion for Summary Judgment, entered on September 29, 2017. A copy of the Order is attached to this notice.

Contact information for defense counsel is:

Patricia K. Buchanan
Tamila N. Stearns
PATTERSON BUCHANAN FOBES & LEITCH, INC., P.S.
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Submitted this 24th day of October, 2017, by:

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William C Schroeder, WSBA 41986
KSB Litigation, P.S.
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509 624 8988
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October, 2017, I caused to be served a true and correct copy of the foregoing document to the following:

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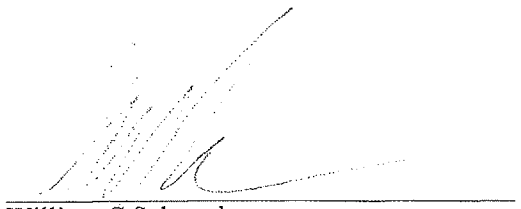
X	U.S. MAIL	Tamila N. Stearns
_____	OVERNIGHT MAIL	PATTERSON BUCHANAN FOBES &
_____	FAX TRANSMISSION	LEITCH, INC., P.S.
X	ELECTRONIC MAIL	2112 Third Avenue, Suite 500
		Seattle, WA 98121
		Attorneys for Defendant Fun-Tastic Rides And Midway Rides LLC

	HAND DELIVERY	COURT OF APPEALS, DIVISION II
X	U.S. MAIL	950 Broadway, Ste 300
	OVERNIGHT MAIL	Tacoma, Washington, 98402
	FAX TRANSMISSION	
	ELECTRONIC MAIL	



William C Schroeder

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Honorable Kathryn J. Nelson
September 29, 2017

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

JODI BRUGH, an individual,

Plaintiff,

v.

FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity,

Defendants.

No. 16-2-10983-2

~~[PROPOSED]~~ ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court for hearing on Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Reconsideration of Order Denying Motion for Summary Judgment.

The Court reviewed the pleadings and files herein, including:

1. Defendants' Motion for Reconsideration of Order Denying Motion for Summary Judgment;
2. Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment;
3. Plaintiff's Response; and
4. Defendants' Reply.

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Based on the foregoing, Defendants' Motion for Reconsideration of Order Denying Motion for Summary Judgment is GRANTED, and the Court's Order Denying Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment is REVERSED. The above-captioned lawsuit shall be dismissed with prejudice and without costs.

IT IS SO ORDERED.

DATED this 29 day of September, 2017.

By: _____
HONORABLE KATHRYN J. NELSON

Presented by:

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: */s/ Timothy T. Parker*
Patricia K. Buchanan, WSBA No. 19892
Timothy T. Parker, WSBA No. 43674
Attorneys for Defendants Fun-tastic
Rides, Co. and Midway Rides, LLC

FILED
DEPT. 13
IN OPEN COURT
SEP 29 2017
By _____ DEPUTY

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Honorable Kathryn J. Nelson
Hearing Date/Time: September 8, 2017/9:00 AM
With Oral Argument

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

JODI BRUGH, an individual,

Plaintiff,

v.

FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity,

Defendants.

No. 16-2-10983-2

Denying

~~[PROPOSED]~~ ORDER ~~GRANTING~~ DEFENDANTS FUN-TASTIC RIDES CO. AND MIDWAY RIDES LLC'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court for hearing on Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment.

The Court reviewed the pleadings and files herein, including:

1. Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment;
2. Plaintiff's Response(s), if any;
3. Defendant's Reply, if any.

//

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0306

9/12/2017 2061

Based on the foregoing, Defendants Fun-tastic Rides, Co. and Midway Rides, LLC's Motion for Summary Judgment is ~~GRANTED~~ DENIED. The above-captioned lawsuit shall be dismissed with prejudice.

IT IS SO ORDERED.

DATED this 8 day of ~~August,~~ SEPTEMBER 2017.

By: _____
HONORABLE KATHRYN J. NELSON

Presented by:

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: _____
Patricia K. Buchanan, WSBA No. 19892
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Attorneys for Defendants Fun-tastic
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FILED
DEPT. 13
IN OPEN COURT
SEP 08 2017
By _____ DEPUTY

Approved as to form, notice of presentation waived:

KSB LITIGATION, P.S.

By: _____
William J. Schroeder, WSBA No. 41986
Anne Schroeder, WSBA No. 47952

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF PIERCE

JODI BRUGH, an individual, Plaintiff, v. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, an unknown entity, Defendants.	No. 16-2-10983-2 Court of Appeals Div. II No. 51055-2-II **DESIGNATION OF CLERK'S PAPERS**

Plaintiff, Jodi Brugh, asks the Clerk of the Pierce County Superior Court to transmit the following pleadings to the clerk of the Washington State Court of Appeals, Division II, in the above captioned matted under appellate case no. 51055-3-II.

Date	Title
09/09/2016	COMPLAINT
09/30/2016	FUN-TASTIC RIDES CO.'S ANSWER TO COMPLAINT
01/03/2017	ANSWER
08/07/2017	MOTION FOR SUMMARY JUDGMENT
08/07/2017	DECLARATION OF PATRICIA K BUCHANAN
08/29/2017	PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGEMENT

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08/29/2017	DECLARATION OF RACHAEL E. GONZALEZ, MD
08/29/2017	AFFIDAVIT/DECLARATION OF COUNSEL
09/05/2017	REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
09/08/2017	ORDER DENYING MOTION FOR SUMMARY JUDGMENT
09/18/2017	MOTION FOR RECONSIDERATION
09/28/2017	RESPONSE
09/28/2017	REPLY
09/29/2017	ORDER ON MOTION FOR RECONSIDERATION
10/24/2017	NOTICE OF APPEAL WITH FEE

DATED this 27 day of November, 2017.

KSB LITIGATION, P.S.

By: _____

WILLIAM C. SCHROEDER, WSBA #41986
ANNE K. SCHROEDER, WSBA #47952
DAVID L. BROOM, WSBA #2096
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of November, 2017, I caused to be served a true and correct copy of the foregoing document to the following:

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	OVERNIGHT MAIL	LEITCH, INC., P.S.
	FAX TRANSMISSION	2112 Third Avenue, Suite 500
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APPENDIX D

Verbatim Report of Proceedings, Volume 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

JODI BRUGH, an individual, Plaintiff, vs. FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES LLC, a Washington limited liability company; JOHN DOE MANUFACTURER, and unknown entity, Defendants.	COA No. 51055-2-II No. 16-2-10983-2

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 8th day of September, 2017, the above-captioned cause came on duly for hearing before the HONORABLE KATHRYN J. NELSON, Department 13, Superior Court Judge in and for the County of Pierce, State of Washington;

WHEREUPON, the following proceedings were had and done, to wit:

Reported by: Dana S. Eby, CCR

APPEARANCES

For the Plaintiff:

William Christopher Schroeder
Attorney at Law
221 N. Wall Street, Suite 210
Spokane, Washington 99201

For the Defendant:

Timothy T. Parker
Attorney at Law
2112 Third Avenue, Suite 500
Seattle, Washington 98121

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Decision	17

SEPTEMBER 8, 2017

MORNING SESSION

* * * * * * *

THE CLERK: Brugh versus Fun-tastic.

THE COURT: 16-2-10983-2. Brugh versus Fun-tastic Rides Co.

MR. PARKER: Good morning, Your Honor. Tim Parker, representing Fun-tastic Rides and Midway Rides.

THE COURT: Other counsel?

MR. SCHROEDER: I'm sorry, Your Honor. I'm Will Schroeder.

THE COURT: Appearing --

MR. SCHROEDER: Will Schroeder for Ms. Brugh, the plaintiff.

THE COURT: And this is -- and this is Defendant's motion for summary judgment.

MR. PARKER: Thank you, Your Honor. This is Fun-tastic and Midway Ride's motion for summary judgment as to the second element of negligence only. That is, breach of duty.

Preliminarily, there is a statement in the plaintiff's response to the effect that the defendants do not dispute how Plaintiff's injury was caused. We

very much dispute how Plaintiff's injury was caused. In fact, the intake records at Harborview before Plaintiff's surgery provide that she explained she hurt herself during a fall. There's no mention of a roller coaster. I only bring that up to focus today's argument. It is not what we're here to talk about today. This motion doesn't address causation. This motion addresses breach of duty only.

For a brief factual background, the plaintiff rode the Rainier Rush roller coaster at the Puyallup Fair on September 16, 2013. She alleges injuries as a result of that ride. The plaintiff has not come forward with any allegation that the roller coaster did not operate exactly as it was designed to run. She didn't observe any irregularities in terms of an excessive speed or a stop or one car bumping into another. The Rainier Rush roller coaster was inspected and permitted for safety by the State of Washington just one week before the plaintiff rode the roller coaster. Additionally, it was inspected for safety and given a test run on each operational day between the day it was permitted and the day the plaintiff rode it.

One month later, the plaintiff underwent a craniotomy surgery at Harborview. As I mentioned, the

papers there provide that she fell over, and that's why she needed the surgery.

So that gets us to what we are moving on, which is a lack of evidence regarding breach of duty. The case law shows that the existence of an injury on its own is not evidence of negligence. The plaintiff has an obligation to come forward with more than just speculation as to the defendant's breach or alleged breach.

In that regard, the plaintiff in this case has not come forward with an expert report that the roller coaster is unsafe or a declaration along those lines, nor has the plaintiff provided any statements from witnesses that there was something unsafe or out of the ordinary about the operation of the roller coaster. The plaintiff has not requested, under Civil Rule 34, the opportunity to inspect the roller coaster. The plaintiff had access to do so. In fact, the roller coaster was never taken out of use. It is still in use at the Puyallup Fair even this season. In light of all that, there is no evidence of breach of duty, and the plaintiff's response essentially admits to that fact by invocation of the doctrine of res ipsa loquitur.

Res ipsa loquitur, you're familiar with, is a

doctrine that would excuse a plaintiff's obligation of offering proof if certain factors are met. The premise of the doctrine when it was originated was that the plaintiff did not have access to the evidence. That's why the plaintiff would be excused from offering proof. A helpful example might be a scaffolding on the side of a building on which a painter is standing. If the scaffolding collapses and falls into a pile of two-by-fours on the ground, the plaintiff does not have access anymore to inspect the scaffolding. It's no longer in existence. The same is true in the case cited by Plaintiff regarding a wooden dock on which Plaintiff fell through when a plank gave way. That dock was later destroyed. The plaintiff did not have an opportunity to inspect the dock. It didn't exist anymore. So the Court excused Plaintiff of his obligation to offer proof.

That factor is not present in this case. The roller coaster remains in existence, has been available for inspection. No request for inspection has been made.

The second question under res ipsa loquitur is whether the act or occurrence would have occurred without negligence. Put another way, this is something that would ordinarily happen without

negligence. The focus there is on the act or the occurrence. The focus is not on the injury, as Plaintiff's response suggests. And the reason for that is the -- the instrument and the occurrence is in the exclusive control of the defendant, so the question in this case would be, when the roller coaster took a turn, was that -- would that ordinarily happen without negligence? And the defendant submits, of course. It ran along the track line exactly as it was designed. There's no suggestion anywhere before the Court that something unusual happened.

Instead, or to get around that fact, the plaintiff has focused on her injury and said, well, my injury would not have happened without negligence. But the proper application of res ipsa focuses on the occurrence and not the issue. Therefore, neither of the two factors of res ipsa have been met in this case, and it doesn't apply.

The balance of the motion relates to Plaintiff's claims under the Product Liability Act. Those should be dismissed as well. The plaintiff doesn't really contend that my client, Fun-tastic or Midway Rides, is a manufacturer or a product seller under the statute such that the statute would apply. There's no evidence that Fun-tastic or Midway are manufacturers

or sellers. On its face, the Product Liability Act doesn't apply. Those claims should be dismissed.

And finally, the plaintiff has submitted to the court that a roller coaster ride is an abnormally dangerous activity upon which strict liability should attach. In support of that claim, the plaintiff has not cited any case from any jurisdiction regarding amusement park rides, much less a roller coaster. I'm very happy to go through the restatement factors if it would be helpful to the Court. Other than that, we will submit that the defendant's motion should be granted.

THE COURT: Thank you. Response.

MR. SCHROEDER: Thank you, Your Honor. Again, I'm William Schroeder for the plaintiff. To back up slightly, we're here on summary judgment, meaning that the standard is that all facts are -- as stated by my client are presumed true and all inferences are drawn in her favor.

Contrary to Counsel's statement about what the papers do and don't provide, you have the statement from the doctor and from the testament of the plaintiff herself that the cause and only cause of her injury was she rides the roller coaster, it goes around a particular corner violently, and she strikes

her head. This must be presumed true by the Court. The medical doctor then says that the cause and only cause of her injury was her striking her head on the metal on this roller coaster, necessitating the surgery. So those are the background facts that the Court must presume true as the non-moving party.

So, in terms of the injury itself, the question for the Court is, as Counsel points out, res ipsa loquitur. The doctrine originates from a barrel falling out of the top floor of a window. More recently Washington State, in Curtis v. Lein in 2010, the Supreme Court, as it expressly stated, clarified and defined how that doctrine works in Washington. In Curtis, the land owner, original land owner, built a dock, later sold the land some 20 years later. The tenant on the land, who was a business invitee, walks across the dock. The dock fails, and the person injures her leg. There's later a lawsuit about it. The property owners, for their portion, claimed that they had no idea that there was anything wrong with the dock. The trial court dismissed the case, saying that the plaintiff had failed to specify exactly who was responsible in a negligence sense. The appellate court in Division II, I believe it was, affirmed, although on alternate grounds, again finding that she

couldn't identify particularly who should have inspected or been responsible for the dock. The Supreme Court reversed and explained that, with something like falling through a dock and hurting yourself, it doesn't ordinarily happen in the absence of negligence, and that, in Washington, being under 4.20.070 and our principles of joint and several liability concerning innocent plaintiffs, when there's no question that the plaintiff herself didn't do anything wrong and the injury wouldn't happen in the absence of negligence, then the burden is on the various defendants, if there are multiple, to identify which is the more culpable party. It becomes an allocation problem.

Here, we have a roller coaster. Now, it doesn't tell you to wear a helmet. It doesn't say you'll crack your head if you get on it. None of the warnings bear any relationship to the injuries she suffered. She is a frequent and familiar roller coaster rider, so that's not unusual. The Rainier Rush was installed in 2013, and in the first week of its operation, she gets on the ride and cracks her head.

So, in the absence of negligence, you don't normally get injured by being a normal, innocent

person riding a roller coaster. It's a venerable case, but our Supreme Court talked about that back in the 1940's where a very similar scenario happened. A person gets on the roller coaster with his daughter, rides the coaster. Because of something -- design, maintenance, or operation -- he cracks his -- I think its coccyx as he jumps up over a ledge and is slammed back down into the ground. The Supreme Court both affirmed res ipsa in that case and also rejected the spectrum of arguments that he somehow rode the ride wrong because there wasn't any evidence of that.

Here, the same is true. The testimony before the Court on summary judgment is that she rode the ride, she experienced a particularly violent turn, she cracked her head, and then later had to have her head cut open and surgery performed. She wasn't warned that she had to wear a helmet. None of the signs say that you need to wear a helmet, nor did the signs say that head injuries are an expected occurrence when you ride this.

Since there is not a warning nor since head injuries don't normally occur in the absence of negligence when paying to ride a roller coaster at the State Fair, the inference is sufficient for, as described in Curtis v. Lein, for a jury to determine

where the allocation should be.

Now, if the defense's argument is that the -- they were running the machine correctly but that the machine was underlying poorly designed, that's answered by the Supreme Court in the Bostwick case that says that the fact that a machine has a bad design does not excuse, on a negligence tort, the owner and operator of the machine, which is precisely what happened there. The -- let's see. Yeah, so it becomes an allocation question.

In terms of ultra hazardous, this is actually interesting and separate and independent from the res ipsa issue and the negligence issue. Washington appears to be a minority jurisdiction in that public displays like fireworks at the Puyallup State Fair, when they go awry, because they're inherently dangerous, the Washington courts, unlike courts in other jurisdictions, apply the doctrine of ultra hazardous activities because the -- the proprietor is intentionally and advertising that they're doing something that's dangerous and death-defying. They actually do that, and when it goes awry, they're held responsible for it. It's true for fireworks at the Puyallup State Fair, which is the case we cited from, I believe, 1998 where exactly that happened, and the

same is true here. The advertisement for these -- I'm sorry, Your Honor.

THE COURT: Slow down.

MR. SCHROEDER: I apologize.

THE COURT: You're a little too fast.

MR. SCHNEIDER: I have a horrible problem with that. I'm almost finished. I'm sorry. Thank you.

THE COURT: Thank you.

MR. SCHROEDER: Just as the fireworks which are inherently dangerous when they go awry and harm members of the public, flinging people through the air to make them fear and apprehend that they will die for their amusement, likewise, shooting explosives at people is inherently dangerous, and you should be held to that standard.

Your Honor, for these reasons, mostly under Curtis v. Lein, which has a remarkably similar fact pattern but for a dock for a roller coaster, this becomes a jury question for the jury.

Oh, one final note, Your Honor. In Curtis v. Lein, and this is important, there was an argument in front of the Supreme Court contained within that case that the -- one of the key elements was the destruction or unavailability to view the item or the

premises, and the Court said that that's not one of the elements. And they list out the elements, and that's not one of them. But one further thing, and, Your Honor, I got this case two or three days before the statute of limitations ran and filed suit. The prior counsel, as I understand, and I have several letters to this effect, spent a couple of years asking to inspect the machine and were not allowed to do so. The case had been filed three years later. If it's a question of operation and maintenance, there's not much to see after all that time.

I guess the last thought, Your Honor, is, for res ipsa, there are going to be three things you can talk about with an instrumentality. There is the design of the instrumentality, there's the maintenance of the instrumentality, and there's the operation of the instrumentality. When it came to the classic barrel case, the design would be, why do you have a pitched floor on the third floor with an aperture big enough for a barrel to come out? Maintenance: How long was the rope there, did it fray, and what happened to it? Operation: Did somebody intentionally or unintentionally remove the rope or bump the barrel, causing it to roll out? In the classic case, originally they required the plaintiff to figure out

who did what, when, and where, and the law lords changed that by saying, given this patent example, it's among the defendants to determine what happened, rather than among the plaintiff.

The same would be true here. She doesn't have to chase down any of these different designers or manufacturers or operators because she, under Washington law, is an innocent plaintiff and is entitled to recovery for someone else's negligence, and the responsibility on multiple defendants is to allocate among themselves. Thank you, Your Honor.

THE COURT: Reply.

MR. PARKER: The first series of opposing arguments from Plaintiff related to causation and an opinion from a medical doctor as to how Plaintiff's injury was caused. This motion is about breach of defendant. That is totally irrelevant to the question before the Court today.

THE COURT: Well, you're the one that brought it up.

MR. PARKER: The Washington Supreme Court in Pacheco v. Ames established that the doctrine of res ipsa loquitur permits an inference of negligence on the basis that the evidence of the cause of the injury is accessible to Defendant but inaccessible to the

injured person. That justifies the existence of the doctrine. A plaintiff's obligation of coming forward with proof is excused because they have no opportunity to do so. That's an essential fact of the doctrine that is not present here.

The roller coaster has been in existence, has been available. This case was filed a year ago. No request to inspect under Civil Rule 34 has been made, and it's important that res ipsa loquitur, as the courts establish, is to be used sparingly only in exceptional cases.

THE COURT: How do you distinguish Curtis?

MR. PARKER: The dock in Curtis was destroyed.

THE COURT: No, no. I'm talking about the case where the guy hit his tailbone. I'm sorry.

MR. PARKER: So the Reynolds case.

THE COURT: Reynolds.

MR. PARKER: I printed out the Reynolds case, if Your Honor would like to see it. It was postured completely differently. In that case, the defendant requested a jury instruction regarding comparative fault, and the trial court gave an instruction to the jury regarding comparative fault. The issue on appeal was whether there was any evidence of comparative

fault, and the appellate court found that there was not. That's why they looked to what instructions the plaintiff was given on the ride. The defendant's argument essentially at trial was, well, thousands of other people rode this ride without injury. You must have been negligent. And the plaintiff's response was, well, no one told me. No one instructed me how to sit on the ride, so there were no instructions for me to violate.

It's not a summary judgment case. It doesn't apply here because it's -- this is a question as to the defendant's breach. It's a narrower, more specific question than that presented in Reynolds. I do have the Reynolds case.

THE COURT: I see what you mean, that Reynolds didn't address kind of the underlying basis, but I do think Reynolds is instructive because it got as far as it did and I am going to deny this summary judgment motion.

MR. SCHROEDER: Thank you, Your Honor.

(Proceedings concluded.)

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I, Dana S. Eby, Official Court Reporter for Department 13 of the Pierce County Superior Court, do hereby certify that the foregoing transcript entitled, "Verbatim Report of Proceedings," was taken by me stenographically and reduced to the foregoing typewritten transcript at my direction and control, and that the same is true and correct as transcribed.

DATED at Tacoma, Washington, this 8th day of November, 2017.

_____

Dana S. Eby, CCR

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