FILED
Court of Appeals
Division II
State of Washington
1/11/2018 4:16 PM

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 51055-2

JODI BRUGH, an individual,

Appellant,

v.

FUN-TASTIC RIDES CO., et al.,

Respondents.

BRIEF OF APPELLANT

KSB LITIGATION, P.S.
William C. Schroeder
WSBA # 41986
221 N. Wall, Suite 210
Spokane, WA 99201
(509) 624-8988
WCS@KSBLit.legal

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR 3

III. STATEMENT OF THE CASE 3

A. Brugh, An Innocent Patron Of The State Fair, Suffered A Closed Head Injury While Riding The Rainer Rush Roller Coaster, Due To An Unusually Violent Jerk. 3

B. The Violent Jerking of the Rainer Rush Which Caused Brugh's Closed Head Injury Resulted in a Brain Bleed and Surgery. 5

C. The Trial Court Granted Summary Dismissal To State Fair. 7

IV. ARGUMENT 8

A. Standard of Review. 8

B. State Fair A Owes Duty To Members Of The Public It Invites To Use Its Thrill Rides To Adequately Warn Them And Refrain From Causing Or Allowing Injury To Occur. 9

C. The Trial Court Erred In Granting Summary Judgment, As Closed Head Injuries To Innocent Riders Of Roller Coasters Maintained By State Fairs Do Not Ordinarily Occur In The Absence Of Negligence.. 10

D. Other Jurisdictions Have Applied *Res Ipsa Loquitur* Under Similar Factual Circumstances. – Injuries on Roller Coasters. 18

E. No Evidence Or Allegation Implicates Contributory Negligence On Brugh's Part. 24

V. CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991) 8
Atkinson v Wiard, 109 P.2d 160, (Kan. 1941) 18
Bibeau v. Fred W. Pearce Corp., 217 N.W. 374 (Minn. 1928) 18, 19
Chavez v. Cedar Fair, LP, 450 S.W.3d 291 (Mo. 2014) 18
Coaster Amusement Co. v. Smith, 194 So. 336 (Fla. 1940) 18, 20
Curtis v. Lein, 169 Wn.2d 884, 239 P.3d 1078 (2010) ..... passim
Davidson v. Long Beach Pleasure Pier Co., 221 P.2d 1005 (Cal. Ct. App. 2d Dist. 1950) 18, 19
Durbin v. Humphrey Co., 14 N.E.2d 5 (Ohio 1938) 18, 21
Ford v. Red Lion Inns, 67 Wn. App. 766, 769, 840 P.2d 198 (1992) 9
Gromowsky v Ingersol, 241 S.W.2d 60 (Kansas City Ct. App. Mo. 1951) 18
Harrison v Southeastern Fair Ass'n., 122 S.E.2d 330 (Ga. Ct. App. Div. 1 1961) 18
Iwai v. State, 129 Wn.2d 84, 93, 915 P.2d 1089 (1996) 10
Jenkins v, Ferguson, 357 So.2d 39 (La. Ct. App. 3d Cir. 1978) 18
Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979) 8
Nat'l Sur. Corp. v. Travelers Ins. Co., 149 So.2d 438, 440 (La.Ct.App.1963) 12
Pacheco v. Ames, 149 Wn.2d 431, 437, 69 P.3d 324 (2003) 11
Reynolds v. Phare. 58 Wn.2d 904, 365 P.2d 328 (1961) 24, 25
Ripley v. Lanzer, 152 Wn. App. 296, 306, 215 P.3d 1020 (2009) 8
Robison v. Cascade Hardwoods, Inc., 117 Wn. App. 552, 557, 72 P.3d 244 (2003) 12
Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994) 9, 10
Waddle v. Brodbeck, 272 P.2d 1066 (Kan. 1954) 18, 20
Younce v. Ferguson, 106 Wn.2d 658, 662, 724 P.2d 991 (1986) 9

Statutes

RCW 4.22.005 24
RCW 4.22.070(1)(b) 24

Other Authorities

WPI 22.01 ..... 2, 3, 10

Rules

CR 56(c) 8

Treatises

16A Wash. Prac., Tort Law And Practice § 18:5 (4th ed.) 9
W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 39, at 243 (5th ed.1984) 10

I. INTRODUCTION

This case concerns the application of the evidentiary doctrine of *res ipsa loquitur* to a closed-head injury caused by a roller coaster located at the Puyallup State Fair, which is owned and operated by Respondents Fun-Tastic Rides and Midway Rides (hereinafter collectively "State Fair").

Appellant Jodi Brugh ("Brugh") attended the State Fair on September 16, 2013; one week after the Rainer Rush roller coaster was set up for the first time at the State Fair. While on the ride, Brugh experienced a violent and forceful jerking turn, which caused her to strike her head on the machine's harness. Brugh suffered a closed head injury as a result; was diagnosed with a brain bleed; and ultimately underwent cranial surgery to repair the damage caused by the head strike on the Rainer Rush.

Seeking summary judgment, State Fair argued that because they inspected the Rainer Rush a week prior to the machine causing Brugh's injury, they bore no liability. Brugh responded that since there was no warning by State Fair that a head injury was an anticipated or expected outcome of riding the Rainer Rush; roller coasters do not usually cause head injuries in their riders in the absence of someone's negligence; and there is neither allegation nor evidence that she bore any fault; the

evidentiary doctrine of *res ipsa loquitur* applied, and a jury question was therefore presented.

Agreeing with State Fair, the trial court dismissed Brugh's claims. This decision is in error, as it is contrary to Washington law. Expressing the law described by the court in *Curtis v. Lein*, 169 Wn.2d 884, 239 P.3d 1078 (2010), the Washington Pattern Jury Instructions (Civil) provide:

> If you find that:
>
> (1) the occurrence producing the injury is of a kind that ordinarily does not happen in the absence of someone's negligence; and
>
> (2) the injury was caused by an agency or instrumentality within the exclusive control of the defendant; and
>
> (3) the injury-causing occurrence was not due solely to a voluntary act or omission of the plaintiff;
>
> then, in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the defendant was negligent and that such negligence produced the injury complained of by the plaintiff.

WPI 22.01.

Whether the *res ipsa* doctrine applies is a question of law for the court. While courts in other jurisdictions have generally found that under the same or substantially similar facts the *res ipsa* doctrine applies,

application of the doctrine to a roller coaster or other amusement park ride appears to be a matter of first impression in Washington.

Here, consistent with the law described by the *Curtis* court and expressed in WPI 22.01, and parallel to the similar holdings on the same issue in other jurisdictions, Brugh requests that the Court reverse the decision of the trial court granting summary judgment to the State Fair, and remand for proceedings on the issue of liability, as application of the *res ipsa loquitur* doctrine presents a question of fact for the jury.

II. ASSIGNMENT OF ERROR

The trial court erred in entering its order reconsidering its prior denial, and granting summary judgment to Defendants below, on September 29, 2017.

III. STATEMENT OF THE CASE

A. Brugh, An Innocent Patron Of The State Fair, Suffered A Closed Head Injury While Riding The Rainer Rush Roller Coaster, Due To An Unusually Violent Jerk.

On September 16, 2013, Brugh went to the Puyallup Fair, (CP 101-02, Depo. pp. 101 *ll* 24-25, 102 *ll* 1-5), with her friend Colleen Cameron and decided she wanted to ride a roller coaster. (CP 101-02, Depo. pp. 101 *ll* 12, 102 *ll* 6-10) The first ride Brugh went on was the Rainier Rush rollercoaster. (CP 102, Depo. p. 102 *ll* 13-14) Fun-tastic Rides operated the Rainer Rush rollercoaster. (CP 7, Ans. p. 7 *ll* 20-22) The State Fair's

website advertised Rainier Rush with the caption "Hold on tight and get ready for the ride of your life." (CP 67, Resp. p. 67 *ll* 23-24.)

The only restriction for riding the roller coaster was a height restriction. (CP 103 Depo. p. 103 *ll* 8-11) The warning sign did not warn against head injuries. (CP 105, Depo. p. 105 *ll* 2-5) A warning sign referred only to "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." (CP 105, Depo. p. 105 *ll* 2-5 quoting Exhibit 9) Brugh does not recall seeing this or any other warning sign outside of the roller coaster. (CP 103, Depo. p. 103 *ll* 4-6) Brugh was not given any verbal warnings before riding Rainier Rush. (CP 103, Depo. p. 103 *ll* 1-3) The only interaction she had with the operator was she was told what seat to sit in. (CP 102, Depo. p. 102 *ll* 23-25)

The roller coaster was secured to the ground by sitting on wooden blocks. (CP 119-20, Depo. 119 pp. *ll* 8-25, 120 *ll* 1-20)

At a point during the ride, the coaster car Brugh was riding in suddenly jerked and jolted violently causing her to bang both sides of her head on the shoulder restraints. (CP 116, 121-23, Depo. pp. 116 *ll* 4-8, 121 *ll* 22-25, 122 *ll* 1-25, 123 *ll* 1-23) This jerking motion was the product of an abrupt turn towards the end of the ride. (CP 117, Depo. p. 117 *ll* 8-12)

B. The Violent Jerking of the Rainer Rush Which Caused Brugh's Closed Head Injury Resulted in a Brain Bleed and Surgery.

Immediately after striking her head Brugh realized that her "hearing on the right side was gone – a lot less", and that she "couldn't hear hardly at all out the right side[.]" (CP 122, Depo. p. 122 *ll* 12-14) After exiting the ride she went to her friend Colleen Cameron and told her that she had hit her head on the ride and could not hear out of her right ear. (CP 123, Depo. p. 123 *ll* 6-8) At this time she felt as though she had "just had [her] eardrum blown." (CP 123, Depo. p. 123 *ll* 23-24) Nonetheless, Brugh went to the State Fair's first aid station, and told the first aid station that she thought that she had a "blown eardrum." (CP 125, Depo. p. 125 *ll* 4-6) She was advised by the first aid station to get proper medical attention. (CP 125, Depo. p. 125 *ll* 9-10)

The following day she went to Dr. Rachel Gonzalez's office for blood work and asked the nurse to examine her for a possible blown eardrum. (CP 127, Depo. p. 127 *ll* 11-18) Dr. Gonzalez testified that plaintiff's symptoms after riding the roller coaster were not in any way connected with her chronic ear infections. (CP 89, Decl. p. 89 *ll* 10-13) Upon arriving at the office, Dr. Gonzalez's staff was alarmed by Brugh's condition and summoned Gonzalez from her office to the blood lab,

because Brugh had blood dripping from her ears. (CP 88, Decl. p. 88 *ll* 22-25)

Three weeks later Brugh returned to Dr. Gonzalez's office, because "her head and neck pain had escalated to the point where it was severe and debilitating." (CP 89, Decl. p. 89 *ll* 14-15) Dr. Gonzalez testified that ""Ms. Brugh is not a "complainer" and has never used "severe" to describe pain levels before. She was pale and was having trouble getting her words out during this visit."" (CP 89, Decl. p. 89 *ll* 15-17) Prior to September 16, 2013, Brugh had never complained about symptoms involving: Headache, neck pain, difficulty with multitasking, difficulty with retaining information, difficulty with word recall, executive function difficulties, vision difficulties, balance disturbance, dizziness, fatigue. (CP 87, Decl. p. 87 *ll* 13-21)

Dr. Gonzalez was immediately concerned and referred Brugh to a neurologist for an emergency assessment for a possible brain bleed. (CP 89, Decl. p. 89 *ll* 22-25) From there she was transported by ambulance to the Valley Medical Emergency Room for a subdural hematoma. (CP 89, Decl. p. 89 *ll* 22-25) She was then transferred to Harborview Medical Center for brain surgery to repair the subdural hematoma. (CP 90, Decl. p. 90 *ll* 23-24)

Dr. Gonzalez diagnosed Brugh with: (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; and (3) Post-traumatic headache. (CP 90, Decl. p. 90 *ll* 15-18) According to Dr. Gonzalez the diagnoses are directly related to the head trauma Brugh suffered from riding Rainier Rush on September 16, 2013. (CP 90, Decl. p. 90 *ll* 19-20)

C. The Trial Court Granted Summary Dismissal To State Fair.

Brugh brought suit for her injuries sustained while riding State Fair's roller coaster in the Pierce County Superior Court on September 9, 2016. (CP 1-5, Compl. pp. 1-5) Fun-tastic Rides answered on September 30, 2016. (CP 6-13, Ans. pp. 6-13) Midway Rides answered January 3, 2017. State Fair then moved for summary dismissal of Brugh's claims on August 7, 2017. (CP 21-30, Mot. S.J. pp. 21-30) Brugh responded. (CP 66-85, Resp. pp. 66-85) State Fair replied to Brugh's response on September 5, 2017. (CP 129-32, Repl. pp. 129-132)

The Pierce County Superior Court denied State Fair's motion for summary judgement of September 8, 2017. (CP 117-18) State Fair timely filed a motion for reconsideration. (CP 119-124) Upon the trial court's request, Brugh responded to State Fair's motion for reconsideration on September 28, 2017. (CP 125-28) The Court granted State Fair's motion

for reconsideration and summarily dismissed Brugh's claims on September 29, 2017. (CP 133-34) Notice of appeal to this court was filed on October 24, 2017. (CP 135-41)

IV. ARGUMENT

A. Standard of Review.

Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. CR 56(c); *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). All reasonable inferences from the evidence must be construed in favor of the nonmoving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979). This court reviews an order of summary judgment de novo, considering the facts in the light most favorable to the nonmoving party." *Ripley v. Lanzer*, 152 Wn. App. 296, 306, 215 P.3d 1020 (2009).

Whether the doctrine of *res ipsa loquitur* is applicable to a particular case is a question of law, which this court reviews *de novo*. *Id.* at 308.

B. State Fair A Owes Duty To Members Of The Public It Invites To Use Its Thrill Rides To Adequately Warn Them And Refrain From Causing Or Allowing Injury To Occur.

A negligence cause of action requires a plaintiff to establish: (1) the existence of a duty owed, (2) a breach of that duty, (3) a resulting injury, and (4) a proximate causal connection between the breach and the injury. *Tincani v. Inland Empire Zoological Soc'y,* 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994).

A landowner's legal duty to a person entering upon their premises, depends on that person's status as 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 State Fair is a business that charges admission for amusement rides, and that Brugh was there for that purpose. There is no question that Brugh was a business invitee.

"Of the three classifications—invitee, licensee, and trespasser—the highest duty of care is owed to invitees." § 18:5. Duty to invitees—Generally, 16A Wash. Prac., Tort Law And Practice § 18:5 (4th ed.). This is a duty to use reasonable care, which includes an affirmative duty to both

keep the premises in a reasonably safe condition, and to discover dangerous conditions. *Iwai v. State*, 129 Wn.2d 84, 93, 915 P.2d 1089 (1996).

In sum, a customer entering a business's premises for the purpose of that business, is entitled to expect that the business owner will exercise reasonable care to make the premises safe for his or her entry. *See Tincani*, 124 Wn.2d at 138-39 (quoting RESTATEMENT § 343 cmt. b).

C. The Trial Court Erred In Granting Summary Judgment, As Closed Head Injuries To Innocent Riders Of Roller Coasters Maintained By State Fairs Do Not Ordinarily Occur In The Absence Of Negligence.

When negligence is obvious and intuitive yet difficult to prove, Washington Courts rely on the doctrine of *res ipsa loquitur* to empower an injured plaintiff to present her claim to a jury. See *Curtis*, 169 Wn.2d at 889 (*citing* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 39, at 243 (5th ed.1984)). Under *res ipsa loquitur* the jury is allowed to infer negligence, when the negligence "speaks for itself." *Id.*

The elements of *res ipsa loquitur* are (1) an act that doesn't usually occur without negligence, (2) caused by an instrumentality in the exclusive control of the defendant, (3) and a plaintiff free of contributory fault. *Curtis*, 169 Wn.2d at 891. *See also* WPI 22.01.

Evidence that the accident could have occurred without negligence on the part of the defendant does not render the doctrine inapplicable. *Pacheco v. Ames,* 149 Wn.2d 431, 437, 69 P.3d 324 (2003). Only evidence that is completely explanatory, which conclusively rules out any ability to infer negligence on the part of the defendant, renders a prima facie case of *res ipsa loquitur* inapplicable. *Id.* However bare testimony offered by the defendant, even if completely and conclusively explanatory, will not render *res ipsa loquitur* inapplicable. *Id.*

The balance of allowing a plaintiff to have the jury infer negligence in the presence of an evidentiary gap, is that the inference is permissible only against a person with full and exclusive control over the instrumentality, who is therefore in a position to explain and rebut the cause of plaintiff's injuries. *Id.*

In *Pacheco*, a man suffered numbness in his mouth and lip when his dentist drilled the wrong side of his jaw during a wisdom tooth extraction. *Pacheco,* 149 Wn.2d at 434. The Court held that a "res ipsa loquitur instruction should not be denied to a plaintiff when all the elements for application of the doctrine are present although there is evidence to explain the incident." *Id.* 440. The court found that partially explanatory evidence, and evidence that points to other possible theories, do not warrant summary judgement unless that alternative evidence is

totally conclusive so as to remove any possible inferences once the prima facie elements of *res ipsa loquitur* have been met. *See id.* In sum, once a plaintiff sets forth a prima facie case of *res ipsa loquitur*, the defendant is not entitled to summary dismissal, unless it presents evidence or an explanation that totally rebuts the inference that the defendant was negligent.

In *Robison v. Cascade Hardwoods, Inc.,* 117 Wn. App. 552, 557, 72 P.3d 244 (2003), a plaintiff was electrocuted while operating an electric trailer loader during a rainstorm, even though he was wearing rubber gloves. He suffered severe internal burns requiring five surgeries, and other permanent lifelong injuries. *Id.* The defendant argued that *res ipsa loquitur* was not applicable on two grounds: because it had offered evidence that the type of burns could not come from a twelve-volt battery, and that the plaintiff could not offer any evidence that the electrical shock did not come from lightning or plaintiff's own truck. *Id.* at 566.

The court rejected the defendant's argument and stated that "[w]e know from general experience and observation that, absent evidence of an act of God, individuals ordinarily do not suffer severe electrical shocks unless someone has been negligent." *Id.*; *see also Nat'l Sur. Corp. v. Travelers Ins. Co.,* 149 So.2d 438, 440 (La.Ct.App.1963) ("Cases involving injuries inflicted on the plaintiff by steam, electricity, fire, gas,

complicated industrial machinery, and other dangerous instrumentalities furnish the clearest instances of the use of the doctrine of res ipsa loquitur.") (emphasis added).

The court, in reversing summary judgement, held that the plaintiff had "established all of the res ipsa loquitur prerequisites. Because Cascade has merely challenged Robison's evidence and has not responded with affirmative evidence of an alternate cause, Robison has raised a permissive inference of negligence that necessarily creates a jury question." *Id.* 573-74. The court clarified what was required to bring a cause of action under *res ipsa loquitur* in Washington:

> That a plaintiff does not know how the injury was caused does not defeat his use of the res ipsa loquitur "tool"—the inference of the defendant's negligence—where the plaintiff has shown all of the required elements of the doctrine of res ipsa loquitur. Where, as here, the elements of res ipsa loquitur are satisfied, a plaintiff is entitled to the doctrine even if the defendant's evidence suggests, but does not completely explain, how the event causing injury to the plaintiff may have occurred.

Id. (*citing Pacheco*, 149 Wn.2d at 440-42)

The Washington Supreme Court in *Curtis* recently articulated the threshold to survive a motion for summary judgement under *res ipsa loquitur*. *Curtis*, 169 Wn.2d 884.

In *Curtis*, a plaintiff was injured when she broke through an old dock and broke her leg. *Curtis*, 169 Wn.2d at 884. The plaintiff was living

on a farm as the girlfriend of the farm manager, and thus was entitled to the duty of reasonable care owed an invitee. *Id.* at 890. The possessor of the land, who also built the dock, "testified that they had no reason to believe the dock was in need of repair or unsafe." *Id.* The dock was destroyed shortly after the incident, and so the plaintiff could not inspect the dock, and proceeded under the theory of *res ipsa loquitur*. *Id.*

The trial court granted summary judgement, reasoning that *res ipsa loquitur* did not apply because other causes besides "negligent maintenance" could have caused the fall. *Id.* at 889. The Court of Appeals affirmed the dismissal on an alternative basis, holding that *res ipsa loquitur* did not apply because, although "res ipsa loquitur could be 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 these lines of reasoning, and reversed in favor of the injured plaintiff. *Id.* at 891. In doing so, the Court enunciated the elements of a negligence claim under *res ipsa loquitur*:

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

Id.

As in the case at bar, and most cases under *res ipsa loquitur*, the last two elements were indisputably met, and only the first element of 'something that does not happen in the absence of negligence' was the subject of disagreement and litigation. *Id.* The Court discussed the application of this element:

> 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 quotation marks omitted).

The Court in *Curtis* noted that the plaintiff was relying on the second scenario, where general experience and intuition teach that "a wooden dock does not give way under foot unless it is negligently maintained." *Id.* The Supreme court specifically rejected the Court of Appeals' assertion that plaintiff was estopped from using *res ipsa loquitur* "meet her burden that the dock's defect was discoverable." *Id.* (internal quotation marks omitted)

In fact, the Supreme Court ruled that this was the "exact[ ] sort of information that *res ipsa loquitur* is intended to supply by inference",

because its whole purpose is to allow the jury to infer negligence, when negligence seems obvious and apparent, but there is a gap in the evidentiary chain of negligence. *Id.* at 892. The Supreme Court affirmed the Court of Appeals statement that docks don't normally give way in the absence of negligence, but specifically rejected the assertion that plaintiff had to prove the dock had *obvious* defects. *Id.* (emphasis added)

The *Curtis* court held that *res ipsa loquitur* is applicable despite other plausible explanations besides negligence, and is only "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 894. The rationale is that *res ipsa loquitur* provides an "inference of negligence", allowing a 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." *Id.* Once a *prima facie* case has been made, the defendant then "offer[s] an explanation if he can", and subsequently, when considering all evidence, including the prima facie case, the explanation, and any other evidence, the jury decides if the evidence "preponderates in favor of the plaintiff." *Id.*

The Court in *Curtis* found that the plaintiff had satisfied the requisite elements for *res ipsa loquitur* and so was entitled an opportunity to persuade a jury. *Id.* It held that:

> (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.

Here, like the plaintiff in *Curtis*, Brugh has met all of the elements required to bring a claim for negligence under *res ipsa loquitur*. (1) She has shown that her accident was not the type that ordinarily happens without negligence because 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; (2) it is undisputed that defendant was in sole and total control of the rollercoaster (CP 7, Ans. p. 7 ll 20-22); and (3) Brugh did not in any way contribute to her injuries, she merely rode a ride she was strapped into, a passive action. (CP 102, Depo. p. 102 ll 1-25).

D. Other Jurisdictions Have Applied *Res Ipsa Loquitur* Under Similar Factual Circumstances. – Injuries on Roller Coasters.

Res ipsa loquitur has been applied in cases involving theme parks and amusement park rides, where blameless passengers have been injured, and no one knew conclusively what caused the accident. *See Jenkins v, Ferguson,* 357 So.2d 39 (La. Ct. App. 3d Cir. 1978); *Bibeau v. Fred W. Pearce Corp.*, 217 N.W. 374 (Minn. 1928); *Davidson v. Long Beach Pleasure Pier Co.,* 221 P.2d 1005 (Cal. Ct. App. 2d Dist. 1950); *Waddle v. Brodbeck*, 272 P.2d 1066 (Kan. 1954); *Coaster Amusement Co. v. Smith*, 194 So. 336 (Fla. 1940); *Durbin v. Humphrey Co.*, 14 N.E.2d 5 (Ohio 1938); *Harrison v Southeastern Fair Ass'n.*, 122 S.E.2d 330 (Ga. Ct. App. Div. 1 1961); *Atkinson v Wiard*, 109 P.2d 160, (Kan. 1941); *Gromowsky v Ingersol,* 241 S.W.2d 60 (Kansas City Ct. App. Mo. 1951) (*abrogated on other grounds by Chavez v. Cedar Fair, LP,* 450 S.W.3d 291 (Mo. 2014))

In *Jenkins,* the court found the application of *res ipsa loquitur* to be warranted and proper when two girls were violently thrown from an amusement park ride because a locking mechanism that had been regularly maintained, and tested that day, gave way, and the amusement park could not offer any evidence or explanation as to why. *Jenkins,* 357 So.2d at 41. In explaining the application of *res ipsa loquitur,* the court stated that

"something went wrong" and "no one knows what happened", and therefore the jury was permitted to make an inference of negligence. *Id.*

In *Bibeau*, a girl who was injured by a rollercoaster was allowed to proceed under *res ipsa loquitur* where a violent and sudden jerking slammed her face into the ride car severely breaking her nose. *Bibeau*, 217 N.W. at 376-77. She followed a warning sign to sit erect and not lean forward, but was injured following an "unusual" and "violent jerk" by the roller coaster. *Id.* at 375. The court found, where the plaintiff followed all instructions, and that in the rollercoaster business "such accidents were [not] ordinary occurrences", that the jury could find the severe facial trauma was caused by an "unusually violent jerk." *Id.*

In *Davidson*, a passenger was riding a "tilt-a-whirl" when the safety bar suddenly flew up and she was thrown violently from the car she was riding in, and suffered a broken femur that left her bedridden for weeks and permanently injured. *Davidson,* 221 P.2d at 1007. There was conflicting evidence as to the cause of her injury, with an expert for the defendants stating that the injury could not have occurred without contributory fault, or a sudden jerk of the car. *Id.* Competing witnesses contradicted what occurred preceding and during the accident. *Id.*

On appeal, the Court held that it was error not to instruct the jury on *res ipsa loquitur* stating that "[w]hen a thing which causes injury is

shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen if those who had the management used proper care, res ipsa loquitur applies." *Id. at* 1007-08.

In *Brodbeck*, the plaintiff was seriously injured when she was thrown from an amusement park ride that sped around in circles, when the car she was riding in came off the track. *Brodbeck*, 272 P.2d at 1068. The evidence presented could not convincingly prove or disprove whether defendant was negligent, as there was no conclusive testimony regarding whether the faulty bearing that caused the car to come off the track, could have been discovered through due care. *Id.* at 1069. The Jury's verdict under *res ipsa loquitur* was upheld as plaintiffs had made out a prima facie case, and defendants had failed to successfully rebut the plaintiff's position that the jury had found convincing. *Id.* at 1070.

In *Coaster Amusement*, the Florida Supreme Court affirmed a verdict for the plaintiff where the case had proceeded under the theory of *res ipsa loquitur*. *Coaster Amusement,* 194 So. at 340. The plaintiff was injured when the roller coaster suddenly "jerk[ed] and lung[ed]" despite the fact that the defendant demonstrated evidence that the rollercoaster was in perfect mechanical condition and that it was used without mishap by many other people the evening that plaintiff was injured as well as the

next evening. *Id. at* 336-37. In so holding that *res ipsa loquitur* applied the court stated:

> The question whether the speed, method, and manner of operation, and the character and force of the jolts, were consistent with the exercise of due care under the circumstances, and their causative relation to appellee's injuries, are questions of fact for the jury. The evidence here adduced, as disclosed by the record, is not such as to warrant a trial court in saying that reasonable minds could reasonably be of one accord as to the inferences to be drawn therefrom. On the contrary, it is our opinion that the evidence is such that it is reasonably possible for impartial men and women to fairly draw different conclusions therefrom. A motion to arrest such testimony from the jury should not be sustained.

Id. at 340.

In *Durbin*, a plaintiff sustained injuries when she was jolted forward by an amusement park ride that she testified was operated faster, and at a greater tilt than usual. *Durbin,* 14 N.E.2d at 7. Plaintiff alleged that the speed, and force of the jolts created an inference of negligence, and that the operator had a duty to warn her to sit in a particular location in the ride car. *Id.* Plaintiff offered no evidence of negligence other than her own testimony that she had ridden the ride before, and that the injury causing ride was a faster, more jolting ride. *See Generally id.*

The *Durbin* Court ruled that "[t]he question whether the speed, method, and manner of operation, and the character and force of the jolts, were consistent with the exercise of due care under the circumstances, and

their causative relation to appellee's injuries, are questions of fact for the jury." *Id.*

Here, we have a plaintiff who was riding a roller coaster that jerked so violently that it struck her head around so hard (CP 116, 121-23, Depo. pp. 116 *ll* 4-8, 121 *ll* 22-25, 122 *ll* 1-25, 123 *ll* 1-23), as to cause a subdural hematoma (CP 89-90, Decl. pp. 89 *ll* 22-25, 90 *ll* 19-20). This type of violent jerking action that causes brain bleeding is not ordinary in rollercoasters, if it was then, as the court in *Bibeau,* 217 N.W. at 375, stated, "[o]ne would hardly suppose it possible for defendant to continue the roller-coaster business."

Put simply, violent jerks that tortiously cause plaintiffs to strike their heads against the shoulder guards of rollercoasters, are not normal, and do not happen absent of negligence on the part of the operator. Rollercoasters are not perfect, there is a reason why they are inspected and licensed, and regularly maintained, because they are dangerous, and problems can arise. Brugh is entitled to have the jury be allowed to infer that State Fari was negligent, when the evidence already presented, speaks for itself.

Sate Fari argued below that *res ipsa loquitur* does not apply because the doctrine is based on the injury causing event and not the injury itself. (CP 109, Repl. p. 109 *ll* 1-16). Brugh agrees, as the injury is

not plaintiff's basis for invoking *res ipsa loquitur*, it is merely evidence of the violent jerk. The violent unusual jolt is the basis of Brugh's claim, as it has been the basis, as shown *supra,* of claims by roller coaster passengers throughout the country.

The fact that plaintiff banged her head (CP 116, 121-23, Depo. pp. 116 *ll* 4-8, 121 *ll* 22-25, 122 *ll* 1-25, 123 *ll* 1-23) and did so in such a violent manner as to cause a subdural hematoma (CP 89-90, Decl. pp. 89 *ll* 22-25, 90 *ll* 19-20), is conclusive evidence of a violent jerk of an unusual character. The fact that the coaster is open to the public is evidence that the injury does not ordinarily occur. The fact that these types of injuries do not ordinarily occur, coupled with testimony and evidence of a violent jerking (CP 116, 121-23, Depo. pp. 116 *ll* 4-8, 121 *ll* 22-25, 122 *ll* 1-25, 123 *ll* 1-23), speaks strongly to application of the doctrine.

State Fair argued to the trial court that Brugh cannot point to the specific evidence that they were negligent; yet this is the entire purpose of *res ipsa loquitur*, to allow the jury to infer a defendant's negligence, when the obviousness of the negligence outweighs the availability of the evidence.

Where, as here, a plaintiff has made out a prima facie case and the defendant has not offered any explanatory evidence, much less totally

conclusive explanatory evidence, summary judgement in favor of defendants was inappropriate and the trial court erred.

E. No Evidence Or Allegation Implicates Contributory Negligence On Brugh's Part.

It is the policy of Washington courts to afford a remedy to innocent plaintiffs. It is also the policy of Washington to relieve defendants of liability in the proportion of contributory fault attributable to the plaintiff. RCW 4.22.005. When a plaintiff is not contributorily at fault, all defendants against whom judgement is entered "shall be jointly and severally liable" for the damages. RCW 4.22.070(1)(b).

Courts analyzing application of the *res ipsa* doctrine consider whether the plaintiff was in any way at fault. *See Curtis,* (holding lack of contributory fault is vital prima facie element of res ipsa claim); *Jenkins v, Ferguson,* 357 So.2d 39, 41 (1978) (applying *res ipsa loquitur* in amusement park injury case, when plaintiff was "completely free of negligence", "something went wrong" and no one knew why); *Robinson*, 117 Wn. App. at 557 (holding for plaintiff specifically because the evidence of contributory negligence was not persuasive or conclusive);

In the context of contributory fault on amusement park rides, the Washington Supreme Court enunciated the applicable standard in *Reynolds v. Phare.* 58 Wn.2d 904, 365 P.2d 328 (1961). In *Reynolds*, a

father was injured while riding down a 65' high, 235' long slide, in a chain-driven passenger "boat". *Id.* at 904-05. The plaintiff was put inside the boat but was not given any instructions on how to sit in the boat or hold on to it. *Id.* When the boat hit the water the plaintiff suffered a compression fracture to one of his vertebrae. *Id.*

The defense argued that evidence of a number of people who had rode the ride without injury or accident supported a jury instruction that the plaintiff was contributorily negligent. *Id.* at 906. The Court disagreed stating that there was absolutely no evidence that the plaintiff had done anything to contribute to his injuries. *Id.* It held that defendant's allegations of contributory negligence based on the different experiences of other passengers was pure conjecture that would "open up a field of speculation that could not be covered in a lifetime." *Id.* The court refused to deny relief to plaintiff simply because other passengers didn't suffer the same injuries. *See, generally, Id.*

Brugh did not contribute at all to her own injuries. She simply got on a roller coaster, was strapped in, and got off severely injured. She is totally free of contributory negligence.

Operators of amusement parks have a duty to protect their customers, many of whom are children, from injury. Here, where reasonable minds could differ as to whether defendants were negligent in

their operation of the roller coaster; and where as a matter of law a jury question is created and the jury should be given WPI 22.01, the *res ipsa* instruction; summary judgement was inappropriate, and the trial court erred in granting the same to State Fair.

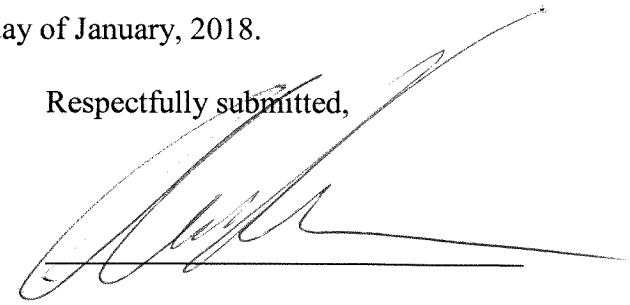
V. CONCLUSION

For the foregoing reasons, Brugh requests that the Court reverse the trial court's order granting summary judgment to State Fair, and remand for further proceedings.

Brugh requests her costs on appeal, consistent with the Rules of Appellate Procedure.

DATED this 11th day of January, 2018.

Respectfully submitted,



William C. Schroeder, WSBA #41986
KSB Litigation, P.S.
221 N. Wall, Suite 210
Spokane, WA 99201
(509) 624-8988
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of January, 2018, I caused to be served a true and correct copy of the foregoing document to the following:

_____ HAND DELIVER	Patricia K. Buchanan
X U.S. MAIL	Tamila N. Stearns
_____ OVERNIGHT MAIL	PATTERSON BUCHANAN
_____ FAX TRANSMISSION	FOBES & LEITCH, INC., P.S.
X Email	2112 Third Avenue, Suite 500
	Seattle, WA 98121
	Attorneys for Defendants Fun-Tastic Rides and Midway Rides LLC

William C. Schroeder

KSB LITIGATION

January 11, 2018 - 4:16 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51055-3
Appellate Court Case Title:	Jodi Brugh, Appellant v. Fun-Tastic Rides Co., Respondent
Superior Court Case Number:	16-2-10983-2

The following documents have been uploaded:

- 510553_Briefs_20180111161506D2589304_1162.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was Appellant Brief.pdf

A copy of the uploaded files will be sent to:

- klo@pattersonbuchanan.com
- mhernandez@ksblit.legal
- pkb@pattersonbuchanan.com
- ttp@pattersonbuchanan.com

Comments:

Sender Name: Michelle Hernandez - Email: mhernandez@ksblit.legal
Filing on Behalf of: William Christopher Schroeder - Email: WCS@KSBlit.legal (Alternate Email:)

Address:
221 N Wall Street
Suite 210
Spokane, WA, 99201
Phone: (509) 624-8988

Note: The Filing Id is 20180111161506D2589304