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COURT OF APPEALS 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.

BRIEF OF RESPONDENT

Patricia K. Buchanan, WSBA No. 19892
Tim T. Parker, WSBA No. 43674
Of Attorneys for Defendant

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

2112 Third Avenue, Suite 500
Seattle, WA 98121
Tel. 206.462.6700

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I. INTRODUCTION

This appeal concerns a legal question, not a factual dispute. Appellant ("Ms. Brugh") alleges injuries arising from a ride on Respondent's Rainier Rush roller-coaster ("roller-coaster," or "the Ride"). Clerk's Papers ("CP") 1-5, (Complaint for Damages). Ms. Brugh asserts *res ipsa loquitur* as a last resort, after a year-long discovery period that uncovered no evidence of negligence. CP, 66-85 (Response to Fun-Tastic's Motion for Summary Judgment). This Court should deny Ms. Brugh's request to apply *res ipsa* based on nothing more than unsupported speculation. Every case in which a court has applied *res ipsa loquitur* has involved something more than the speculation of a plaintiff, e.g., a safety harness gave way, a train fell off its tracks, brakes failed, or a locking mechanism broke.

No similar factor is present here. For instance:

- Ms. Brugh has failed to come forward with any allegation that the Ride did not operate exactly as expected;
- After one year of discovery there is no evidence of design defect, operator error or any other evidence of negligence; and

- Ms. Brugh has failed to submit any expert report or declaration from an engineer, inspector, or accident reconstructionist regarding the roller-coaster.

For these reasons, the trial court correctly ruled: (1) that Ms. Brugh had failed to meet her burden in responding to Fun-Tastic's summary judgment motion and (2) that *res ipsa loquitur* was inappropriate in this case.

After two hearings and two rounds of briefing on Fun-Tastic's summary judgment motion, the trial court correctly concluded: (1) that Ms. Brugh had failed to make a *prima facie* showing of an essential element of her negligence case, and (2) that Ms. Brugh's is not an appropriate *res ipsa* case. CP, 133-4 (Order Granting Fun-Tastic's Motion for Reconsideration).

II. STATEMENT OF CASE

A. Ms. Brugh's Ride on the Rainier Rush Roller-Coaster.

Before the roller-coaster was put into use at the Washington State Fair ("the Fair"), the Washington Department of Labor and Industries ("L&I") inspected it for safety. CP, 34-41 (Permit and Certificate of Inspection). L&I inspected the roller-coaster approximately one week before Ms. Brugh's ride, and then issued a permit that was valid at all relevant times. CP, 35 (Safety Permit). Additionally, Fun-Tastic

inspected the Ride for safety each day it was operated, including the date of Ms. Brugh's ride. CP 42-6 (Daily Inspection Checklists). No mechanical or other abnormalities were ever discovered during these inspections. Id.

Ms. Brugh states that she attended the Fair on September 16, 2013. CP, 2 (Complaint). While at the Fair, she rode several amusement rides, the first one being the Rainier Rush. CP, 101, 106 (Plaintiff's Deposition: 101:3-15, 124:1-15). Ms. Brugh claims to have struck her head on the Ride's safety harness during the roller-coaster's final turn. CP 105, (Plaintiff's Deposition, 121:22-25). But she has not claimed that the harness malfunctioned or was defective in any respect. Moreover, she has not presented any evidence to suggest that the roller-coaster did not operate as designed. In fact, after exiting the roller-coaster, Ms. Brugh rode several other rides at the Fair later in the day, and even attended a rock concert at the Fair that evening. CP 106 (Plaintiff's Deposition, 124:1 – 125:24).[1]

B. Ms. Brugh Neglects Her Case, Fun-Tastic wins Summary Judgment.

Ms. Brugh filed suit against Fun-Tastic in September 2016, alleging negligence and liability pursuant to the Washington Products Liability Act. CP 1-5 (Plaintiff's Complaint).

[1] Ms. Brugh did not report to the hospital with injuries until more than one month later.

During discovery, Fun-Tastic asked Ms. Brugh to provide a factual basis to support her claims. CP 47-53 (Plaintiff's Discovery Responses). Fun-Tastic's Interrogatory No. 31 asked Ms. Brugh to provide a factual basis for her allegation that the roller-coaster was unreasonably unsafe. CP 52. Ms. Brugh responded "The Rainier Rush ride was held out to be safe and I had a reasonable expectation that being a paying passenger on that ride would not result in a traumatic brain injury requiring surgery . . . as discovery continues the response to this Interrogatory will be updated." CP 52.

The response to Interrogatory No. 31 was never updated.

In addition, Interrogatory No. 32 asked Ms. Brugh to cite to any statute, rule, regulation or ordinance that is a factor in this litigation. CP 53. Ms. Brugh responded "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." CP 53.

The response to Interrogatory No. 32 was never supplemented.

After receiving Ms. Brugh's discovery responses, her deposition was taken on June 15, 2017. During her deposition, Ms. Brugh acknowledged that written and verbal safety warnings were made. She was asked whether the roller-coaster operated as designed, and testified 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.

CP 63 (Plaintiff's Deposition, 118:2-23).

In August 2017, Fun-Tastic moved for summary judgment regarding breach of duty. CP 21-30 (Motion for Summary Judgment). In particular, Fun-Tastic argued that Ms. Brugh failed to make a *prima facie* showing of an essential element of her case, as required by *Celotex*

Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). CP 23-26.

In support of its motion, Fun-Tastic provided the trial court with the safety inspection report and permit issued by L&I, daily safety inspection reports, and Ms. Brugh's deposition testimony and discovery responses, all of which are devoid of evidence regarding breach of duty. CP 31-65.

In opposition to the motion, Ms. Brugh submitted a declaration from retired family doctor Rachel Gonzalez regarding causation. CP 86-92. Ms. Brugh did not submit any evidence regarding the alleged breach of duty. Instead, Ms. Brugh simply asked the court to apply *res ipsa loquitur* and deny the motion. CP 66-70 (Portions of Plaintiff's Response to Motion for Summary Judgment).

At oral argument, Ms. Brugh mistakenly focused on whether the alleged injury would ordinarily occur without negligence, stating "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 . . . to identify which is the more culpable party." Verbatim Report of Proceedings, Vol. 1, 10:8-13. (emphasis supplied). The correct inquiry is whether the event would ordinarily occur without negligence. The focus is not on the alleged injury. The trial court

initially denied the motion. But after additional briefing and argument on reconsideration, summary judgment was granted. CP 138-9 (Order Granting Motion for Reconsideration). Ms. Brugh took appeal.

III. ARGUMENT

A. Standard of Review

The Court of Appeals reviews a trial court's summary judgment decision de novo, performing the same inquiry as the trial court. *Bostain v. Food Express, Inc.*, 159 Wash.2d 700, 708, 153 P.3d 846 (2007). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admission on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Civil Rule 56(c). If the plaintiff fails to make a showing sufficient to establish the existence of an element essential to their case, then summary judgment is proper. *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989)(quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

A party may not rely on speculation that unresolved factual matters remain. *Halvorsen v. Ferguson*, 46 Wn.App. 708, 721, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (2007). Mere allegations, argumentative assertions, conclusory statements, and speculation do not

raise issues of material fact that preclude a grant of summary judgment. *Greenhalgh v. Dep't of Corrections*, 160 Wn.App. 706, 714, 248 P.3d 150 (2011).

B. Ms. Brugh Relies Upon *Res Ipsa Loquitur* as a Last Resort.

Ms. Brugh relies upon *res ipsa loquitur* as a last resort, after a year of discovery failed to uncover any evidence of negligence.[2] Whether *res ipsa loquitur* applies in a given context is a question of law. *Pacheco v. Ames*, 149 Wash.2d 431, 436, 69 P.3d 324 (2003).

Ms. Brugh is asking the Court for an unprecedented application of *res ipsa loquitur*. She seeks an inference of negligence based on nothing more than her speculative characterization of the roller-coaster ride. Appellant's Brief, 5-7. In every case cited by Ms. Brugh, something more than bare speculation was present. Thus, none of the cases cited by Ms. Brugh support the position that *res ipsa* should be applied based only on speculation.

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[2] Ms. Brugh's reliance on *res ipsa loquitur* is an admission that no evidence of negligence is present. 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). The mere occurrence of an accident and an injury does not necessarily lead to an inference of negligence. *Id.* at 377.

C. *Res Ipsa Loquitur* does not Apply to this Case Because Ms. Brugh had Access to inspect the Roller-Coaster.

1. The Elements of *Res Ipsa Loquitur*.

For *res ipsa loquitur* to apply in this case, Ms. Brugh must prove: (1) the accident or occurrence that caused her injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused her injury was in the exclusive control of Fun-Tastic, and (3) she did not contribute to the accident or occurrence. *Curtis v. Lien*, 169 Wn.2d 884, 239 P.3d 1078, 1082 (2010). The only element at issue on appeal is whether the accident or occurrence that caused Ms. Brugh's injury would not ordinarily happen in the absence of negligence.

In turn, this element may be satisfied if one of three conditions are met: (a) 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; (b) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (c) when proof by experts in an esoteric field creates an inference that negligence caused the injuries. *Id.*

On appeal, Ms. Brugh claims that sub-element (b) has been met and that general experience teaches that the alleged event would not be expected without negligence.[3]

2. The Doctrine is Only Applied in Peculiar and Exceptional Cases, and Should not be Applied Here.

Res ipsa loquitur is "ordinarily sparingly applied, 'in peculiar and exceptional cases,' and only where the facts and the demands of justice make its application essential." *Id.*, at 1081. An often-cited 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. And once the piano has been destroyed, the plaintiff no longer has the opportunity to inspect the same for evidence of negligence. The plaintiff's inability to access the evidence justifies the doctrine.

Another example is found in the *Curtis* case. There, the plaintiff was injured when a wood plank on a dock gave way. *Id.* at 1080. The dock was later destroyed. *Id.* 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 the plaintiff of the opportunity to gather evidence regarding negligence. *Res ipsa loquitur* was applied in that case

[3] During discovery and at the motion for summary judgment hearing Ms. Brugh mistakenly focused on whether the injury would ordinarily occur. Now that discovery has closed and Fun-Tastic's motion has been granted, Ms. Brugh has changed her position and asserts that the alleged event would not ordinarily occur without negligence.

because (1) a wooden plank does not ordinarily give way without negligence, and (2) the plaintiff never had access to inspect the dock to determine its condition. The *Curtis* court ruled that "[t]he doctrine permits an inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person." *Id.* at 1081 (quoting *Pacheco*, 149 Wash.2d at 436, 69 P.3d 324).

The requirement that the plaintiff be without access to the evidence has long been the rule in Washington. *Penson v. Inland Empire Paper Co.*, 73 Wash. 338, 132 P. 39 (1913). In *Penson*, a painter was injured when the scaffolding on which he stood collapsed. *Id.* at 339. The scaffolding was constructed by defendant. *Id.* In applying *res ipsa loquitur*, the Court observed that:

> A circumstance necessary to its application is that the injured party, from the nature of the case, is not in a position to explain the cause, while the party charged is in a position where he is, or if he has exercised reasonable care should be, able to explain and show himself free from negligence, if in fact he was so.

Id. at 346 (emphasis supplied).

Ms. Brugh had full access to the roller-coaster. She has ignored this requirement. Ms. Brugh had every opportunity to access and inspect

the roller-coaster at any time while her case was pending. She did not. She could have made a Civil Rule 34 request to inspect the Ride. She did not. Therefore, on this basis alone, her case is distinguishable from *Curtis* and *Penson*.

D. Ms. Brugh has Failed to Identify any Aspect of the Ride that Would not Ordinarily Occur Without Negligence.

1. The Roller-Coaster Operated as Expected.

Ms. Brugh has offered no evidence to suggest that the Ride did not operate as expected. No expert inspection or other discovery was conducted on this subject, as set forth above. This reality is fatal to Ms. Brugh's lawsuit.

Ms. Brugh relies on *Robison v. Cascade Hardwoods, Inc.*, 117 Wash.App. 552, 72 P.3d 244 (2003) in an attempt to persuade the Court that the "violent jerk" she claims to have experienced justifies application of *res ipsa*. In *Robison*, the plaintiff was electrocuted while unloading logs from his truck. *Id.* at 557. It was raining heavily at the time. *Id.* He was using the defendant's equipment. *Id.* The *Robison* court determined that people do not ordinarily get electrocuted while unloading logs, and such event gave rise to an inference of negligence. *Id.* at 563.

But there are several important differences between *Robison* and the instant case. In *Robison*, several other logging truck drivers had

reported "tingles," "buzzes," or "the bite" of an electrical shock at the location where plaintiff was injured. *Id.* at 560. In fact, less than 90 minutes before plaintiff's injury an electric shock was reported at the location in question. *Id.* The individual who reported that shock stated that "he could feel kind of a little surge," and he knew that something was "haywire." *Id.*

Additionally, after the accident in *Robison*, an agent from L&I inspected the equipment at issue. *Id.* at 561. The inspector noted that there was torn rubber around the equipment's control button. *Id.* L&I then cited the defendant for failure to ensure that the pendent control switches were installed in a weatherproof enclosure. *Id.*

In the instant case, Ms. Brugh has not presented evidence of any other complaints regarding the roller-coaster. Unlike the loading equipment in *Robison*, the roller-coaster was determined to be in good working order, and permitted for operation. Fun-Tastic was never cited for any failures associated with the operation of its ride—either before or after the alleged injury. And unlike the plaintiff in *Robison*, Ms. Brugh has not presented the opinions of any expert witness regarding the condition of the roller-coaster. Ms. Brugh compares her "violent jerk" to the electrocution experienced by Mr. Robison. But the *Robison* court did not apply *res ipsa* based solely on plaintiff's unsupported and speculative

theories. Many additional pieces of evidence were present to justify application of the doctrine, none of which are present in this case.

2. The Result of Ms. Brugh's Ride -- the Roller-Coaster Running Without Incident -- Would be Expected Without Negligence.

In support of her position, Ms. Brugh argues "general experience counsels that properly inspected, maintained, and operated roller coasters, do not slam heads into shoulder rests." Appellant's Brief, 17. She contends that this allegation alone satisfies the second element in *Curtis*, i.e., that the result would not be expected without negligence.

But unlike *Curtis* and the other cases upon which she relies, Ms. Brugh has failed to explain why hers is a peculiar and exceptional case warranting the application of *res ipsa loquitur*. Ms. Brugh had a full and fair opportunity to discover whether the Ride was properly inspected, maintained and operated. The plaintiff in *Curtis* had no such opportunity, as the evidence was destroyed. Here there was no event or occurrence that suggests negligence. Ms. Brugh characterizes the Ride as "violent," but she did not do any discovery on this claim, or even present a theory as to how her roller-coaster ride was different from any other ride on the Rainier Rush. Despite every opportunity to do so, Ms. Brugh has not alleged that the Ride took place at a greater speed, the Ride's brakes failed, the Ride's safety harness gave way, etc. If the Court were to permit

an application of *res ipsa* to the present facts, then every amusement ride case would survive summary judgment as long as the plaintiff described the ride as "jolting." This is not the law in Washington, however, as something more is needed.

Several Washington cases have declined to apply *res ipsa* where the plaintiff's alleged injury was caused by a bump or jerk that is an ordinary occurrence in the context of the activity, i.e., a bump on a freight train, or a cable car that "jerks." *See Wile v. Northern Pac. Ry. Co.,* 72 Wash. 82, 84-5, 129 P. 889 (1913)("negligence cannot be inferred from the mere fact that a passenger's injury resulted from a jar caused by the sudden stopping of such a train. In other words, a jar or jerk in a freight train is not, of itself, evidence of negligence."); *Keller v. City of Seattle*, 200 Wash. 573, 583-4, 94 P.2d 184 (1939)("No such showing [of *res ipsa*] is made in this case, the undisputed evidence being that jerks of a cable car are of ordinary occurrence, consistent with careful operation, and that they frequently happen without any act of negligence.") and *Benton v. Farwest Cab. Co.*, 63 Wn.2d 859, 864, 389 P.2d 418 (1964)(declining to apply *res ipsa loquitur* where plaintiff's alleged injury was caused by a bump while riding in a taxi. The Washington Supreme Court

determined that the alleged bump was an ordinary part of riding in a taxi up a hill.).

E. Every Extra-Jurisdictional Case Relied Upon by Ms. Brugh Includes More than the Unsupported Claims of the Plaintiff.

Ms. Brugh has cited to cases from several jurisdictions regarding *res ipsa loquitur*. And every case cited by Ms. Brugh involves something more than plaintiff's testimony.

In *Jenkins v. Ferguson*, 357 So.2d 39 (La. Ct. App. 3d Cir. 1978), two amusement park riders were ejected from a ride when a lock gave way. *Id.* at 41. The court reasoned that something "went wrong," and therefore the jury should be permitted to infer negligence. *Id.*

Ms. Brugh has not attempted to apply *Jenkins* to her case. Nor has she attempted to explain why this Court should rely on *Jenkins* in overturning the decision below. In reality, *Jenkins* is more useful for distinguishing the present appeal. Nothing "went wrong" while Ms. Brugh was on the roller-coaster. There is no allegation of a lock breaking or any other mechanical failure.

All the other cases cited by Ms. Brugh include proof problems or other additional factors that are not present in this case.

In *Davidson v. Long Beach Pleasure Pier Co.*, 221 P.2d 1005 (Cal. Ct. App. 2d Dist. 1950), the plaintiff was on an amusement ride when the

safety harness gave way, causing her to fall from the ride. *Id.* at 1007. In *Waddle v. Broadbeck*, 272 P.2d 1066 (Kan. 1954), the plaintiff was seriously injured when an amusement park ride fell off its tracks. An investigation revealed that a faulty bearing was the cause of the accident. *Id.* at 1069. In *Coaster Amusement Co. v. Smith*, 194 So. 335 (Fla. 1940), a ride malfunctioned, causing plaintiff to be thrown from her seat onto the ground. The malfunction was proved by evidentiary sources other than the plaintiff's testimony. *Id.* at 847. Additionally, plaintiff was thrown from her seat onto the ground. In *Durbin v. Humphrey Co.*, 14 N.E.2d 5 (Ohio 1938), the plaintiff claimed injuries as a result of an amusement ride that jolted forward. Plaintiff offered evidence that she had ridden the ride once before. *Id.* at 7. The Plaintiff also testified that, during the second, injury-causing ride, the amusement ride operated at a much faster speed and at a different angle, thereby causing her injury.[4]

No such claim is made by Ms. Brugh.

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[4] *Id.* In fact, *Durbin* does not apply to the present case because it did not involve *res ipsa loquitur*. At the close of plaintiff's case, defendant moved for a directed verdict. The motion was granted, and plaintiff filed for a new trial. The court did not rely upon *res ipsa loquitur* in making its decision. The plaintiff in that case did not even claim that the doctrine applied. Instead, the new trial was granted on the basis of plaintiff's testimony regarding the differences between the two occasions on which she rode the amusement. Based on those claims, the court concluded that a directed verdict was inappropriate, and remanded the case for trial. *Id.* at 8.

F. Other Jurisdictions Have Dismissed Amusement Ride Cases Where There was no Evidence That the Ride did not Operate as Expected.

As set forth above, none of the cases relied upon by Ms. Brugh permit application of *res ipsa* based solely on plaintiff's speculation. All the cases Ms. Brugh has cited involve something more. Other jurisdictions are uniform in their refusal to apply *res ipsa* to cases where there is no evidence that a given amusement ride malfunctioned.

For example, in *Schmidt v. Fontaine Ferry Enterprises, Inc.*, 319 S.W.2d 468, 69 A.L.R.2d 1062 (1958), the plaintiff sued for personal injuries allegedly caused by defendant's negligence in the operation and maintenance of an amusement device known as the Sliding Board. The Sliding Board is a slide that stood three stories tall. *Id.* at 469. It had a few humps and dips, spaced evenly down the slide. *Id.* Plaintiff stated that he sat on a "pad" and was given a customary push down the ride by an attendant. *Id.* He testified that he slid down "like a man shot out of a canon." He claimed that one of the humps or dips caused him to fall and sustain injuries. He described the slide as "slick as glass." *Id.* The court held that plaintiff had failed to introduce evidence sufficient to support the application of *res ipsa loquitur*. *Id.* at 471. No mechanical or operational defects were alleged. *Id.* The ride operated as expected.

The *Schmidt* court reasoned that "[p]laintiff's contention that defendant was guilty of negligence is solely focused upon the claim that the latter had allowed the ride to become extremely slick. . . the slickness of the slide, however, was not a defect in its structure or maintenance, but was an intentional attribute." *Id.* The court also observed that the ride must be slick in order to carry out its purpose – to provide riders with "a novel sensation by affording a quick transit down its incline." *Id.*

The exact same situation is present in Ms. Brugh's case. She has not alleged that any mechanical failure occurred. She only claims that the last turn on the roller-coaster gave her a jolt. This is identical in concept to the *Schmidt* plaintiff's claim that he felt he had "been shot out of a canon." As stated in *Schmidt*, "A certain feeling of hazard will arise in the minds of those who ride on it, and this is the thing that makes it attractive." *Id.* at 472.

In *Hawk v. Wil-Mar*, 210 Md. 364, 123 A.2d 328 (1956), a plaintiff was injured while riding a roller-coaster. Witnesses testified that plaintiff's seat in the roller-coaster had ripped upholstery, but no other defects in condition were noted. *Id.* at 369. The ride featured several jerks, dips, and twists. But the testimony of an eye witness showed none of those features were unusual, "every mountain speedway has jolts. Some have a little more than others, depending on the size, so I would say

as a mountain speedway it has its normal jolts and jars." *Id.* at 370. The witness was asked specifically about the turn in the tracks where plaintiff was thrown out. He testified "a roller coaster has unusual jerks, which is normal. That's the fun of riding it. It was a jolt like it always had." *Id.* Based on that testimony, and a lack of evidence that the ride did not operate as designed, plaintiff's case was dismissed before reaching the jury, which dismissal was affirmed on appeal.

In Ms. Brugh's case, there is nothing to suggest that the dips, twists and turns of the roller-coaster were out of the ordinary. Just like the roller-coaster at issue in *Hawk*, the Rainier Rush has dips, twists, and turns as part of its design. There is no evidence that Ms. Brugh's ride was out of the ordinary.

IV. CONCLUSION

Ms. Brugh acknowledges that there is no evidence that Fun-Tastic was negligent. Therefore, under the doctrine of *res ipsa loquitur*, her obligation is to make a showing that the alleged injury-causing event would not ordinarily happen without negligence. She has failed to raise a question of fact on that issue.

She had access to inspect the roller-coaster in order to develop her liability theories, but chose not to do so. She did not request a Civil Rule 34 inspection. She did not serve discovery requests designed to

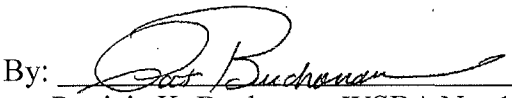
uncover evidence of negligence. She did not take any depositions, and she did not retain an expert witness regarding the condition and operation of the roller-coaster.

When Fun-Tastic moved for summary judgment regarding breach of duty, Ms. Brugh simply opposed the same with a declaration regarding causation.

If *res ipsa* is applied to overturn summary judgment in this case, then it could be applied to defeat summary judgment in every case where plaintiff describes her experience as "jolting." For these reasons, this Court should affirm the summary dismissal of Ms. Brugh's case.

RESPECTFULLY SUBMITTED this 12th day of February 2018.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., PS

By: 
Patricia K. Buchanan, WSBA No. 19792
Tim T. Parker, WSBA No. 43674
Of Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that on the 12th day of February 2018, I caused a true and correct copy of this Designation of Additional Parts to be served on the following in the manner indicated below:

Counsel for Appellant William C. Schroeder #41986 KSB Litigation, P.S. 221 North Wall, Suite 210 Spokane, WA 99201-3505	(X) U.S. Mail ( ) Hand Delivery (X) Electronic Mail

By: _____
Aaron J. Taylor
Legal Assistant

PATTERSON BUCHANAN FOBES & LEITCH

February 12, 2018 - 12:31 PM

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