**No. 97503-5**

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**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

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JODI BRUGH, an individual,

Respondent,

v.

FUN-TASTIC RIDES CO., an Oregon corporation; MIDWAY RIDES, LLC, a Washington limited liability company,

Petitioners,

and

JOHN DOE MANUFACTURER, an unknown entity,

Defendant.

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# ANSWER TO PETITION FOR REVIEW

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# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

## Rules

## INTRODUCTION

Petitioners/Defendants below ("Fun-Tastic"), at the trial court and in Brief of Respondent, did not contest, and conceded for purposes of the summary judgment motion the facts of the injury and medical causation, including testimony of Respondent/Plaintiff below (Jodi "Brugh") and an un-rebutted declaration from Brugh's treating medical doctor. *Brugh v. Fun-Tastic Rides Co.*, 8 Wn. App. 2d 176, 178-79, 181, 184-85, 437 P.3d 751 (2019). (See also CP 121 and Br. of Resp. at 5) Once the appellate court issued its decision on the legal issue presented - application of the evidentiary doctrine of *res ipsa loquitur* - Fun-Tastic filed a motion for reconsideration, identifying new factual issues. (Compare *Brief of Respondent* with *Motion for Reconsideration*) Since neither the trial court, nor an appellate court on *de novo* review, may resolve contested issues of material fact under the Rule 56 standard, the court of appeals properly denied the reconsideration motion.

Fun-Tastic's Petition for Review to this Court focuses almost entirely upon misleading factual contentions, which are predicated upon argument of counsel, as Fun-Tastic submitted no evidence at the trial court to rebut the evidence submitted by Brugh. Further, said misleading factual contentions, which are answered by the uncontested medical doctor's declaration and the uncontested testimony of Brugh, were not raised by Fun-

Tastic until its motion for reconsideration to the appellate court, and cannot be resolved on the CR 56 standard either by trial court or by this Court. Fun-Tastic's contentions that the appellate court erred in (1) 'not considering' argument of counsel masquerading as disputed facts, and (2) presumably resolving them in Fun-Tastic's favor, simply misunderstands the procedural posture of this case and the CR 56 standard.

Finally, Fun-Tastic's contention that the decision of the court of appeals is in conflict with other appellate decisions and precedent of this Court is based upon the same misunderstanding of the procedural posture referenced above – in each instance, for each case cited, Fun-Tastic first asks (either implicitly or explicitly) that this Court resolve factual matters and inferences against Brugh, and then use said factual resolutions as the basis to reject the court of appeals' holding.

Fun-Tastic has failed to demonstrate that further review by this Court is warranted under RAP 13.4(b). The Petition should be denied, and this matter remanded to the trial court for further proceedings.

## STATEMENT OF THE CASE

### A. Brugh Received A Blow To The Head On Fun-Tastic's Roller Coaster, Suffered A Subdural Hematoma, And Needed A Craniotomy.

The "Rainer Rush", a used roller coaster, was purchased by Fun-Tastic and set up in Puyallup in 2013.

> Fun-Tastic operated a roller coaster at the Washington Fun-Tastic. 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.

*Brugh*, 8 Wn. App. 2d at 178.

"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." *Id.* at 178. (See also CP 101-02, 116, 121-23) "As a result of the jolt, she struck both sides of her head on the roller coaster's safety harness." *Id.* (See CP 116, 121-23) "Subsequently, she lost hearing in her right ear." *Id.* (See CP 123) "Fearing that she had a blown eardrum, she went to the Fair's medical tent for assistance." *Id.* (See CP 125) "The Fair's medical staff recommended that she either go to urgent care or see her doctor the next day." *Id.* "The next day, Brugh saw her primary care physician, Dr. Rachael Gonzalez." *Id.* (See CP 127) "Brugh was bleeding from her ears." *Id.* (see CP 88-90) "Because Brugh had a history of ear infections, Dr. Gonzalez attributed the bleeding to an ear infection." *Id.* at 179. (See CP 88-90)

> 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.

*Id.* at 179.[1]

### B. Fun-Tastic Did Not Rebut Brugh's Evidence Of The Event, The Injury, Or Medical Causation Before The Trial Court Or In Brief of Respondent To The Court Of Appeals.

Fun-Tastic, in its motion for summary judgment (and successful trial court reconsideration motion) argued that "[t]o prove negligence, Plaintiff must establish breach of an applicable duty. [Brugh] has no evidence to establish breach", and "[a]gain, Defendants do not argue that Plaintiff was not injured; instead, Defendants argue that Plaintiff has not presented *any evidence* that Defendants breached their duties of care." (See CP 121) (italics in original). Fun-Tastic reiterated this point in Brief of Respondent. (Br. of Resp. at 5)

Fun-Tastic did not rebut Brugh's evidence before the trial court, nor did it move to strike the Declaration of Dr. Gonzalez. The trial court did not strike the Declaration. (CP 131-132) Fun-Tastic did not challenge Dr.

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[1] Washington cases discussing subdural hematomas are predominantly criminal. "There are three categories of subdural hematomas, acute, subacute, and chronic. An acute subdural hematoma is a newer area of bleeding and a chronic subdural hematoma is an older subdural hematoma." *In re Personal Restraint of Brooks*, No. 33020–2–II, not reported at 138 Wn. App. 1005, 2007 WL 1129655 (Div. 2 April 17, 2007). See *In re Fero*, 190 Wn.2d 1, 9-10, 409 P.3d 214 (2018) (subdural hematoma in a child through extreme shaking, with no blow to the head); and *In re Dependency of D.P.*, No. 73918–2–I, not reported at 196 Wn. App. 1036, 2016 WL 6534931 (Div. I, October 24, 2016) ("...P.D.'s acute subdural hematomas were a couple of days old and her chronic subdural hematomas were at least three weeks old, but not so old as to be an injury from P.D.'s birth.").

Gonzalez's Declaration in its Brief of Respondent to the court of appeals. As a consequence, the Decision provides: "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." *Brugh*, 8 Wn. App. 2d at 181.

> 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.").

*Id.* at 184-85.

### C. Fun-Tastic Alleges A New Theory Involving Factual Disputes In Reconsideration On Appeal, And In Its Petition To This Court.

In Fun-Tastic's appellate reconsideration motion, and in its Petition to this Court, Fun-Tastic focuses almost entirely upon misleading factual contentions, themselves based upon argument of counsel. (Compare *Brief of Respondent, passim*, with *Motion for Reconsideration* and *Petition for*

*Review*) These misleading factual contentions are answered by the uncontested medical doctor's declaration, and the testimony of Brugh. (See CP 86-94; 95-107)

## ARGUMENT

### A. Standard of Review – CR 56.

"On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." *Johnson v. Lake Cushman Maint. Co.*, 5 Wn. App. 2d 765, 780, 425 P.3d 560 (2018) (quoting RAP 9.12).

An argument that was neither pleaded nor argued to the superior court on summary judgment cannot be raised for the first time on appeal. *Id.*; *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), review denied, 165 Wn.2d 1017, 199 P.3d 411 (2009). Additionally, questions of fact may not be raised for the first time on appeal. See *Malo v. Anderson*, 76 Wn.2d 1, 4, 454 P.2d 828 (1969). Argument of counsel is not evidence. See *Jones v. Hogan*, 56 Wn.2d 23, 31, 351 P.2d 153, 159 (1960).

On review of summary judgment, an appellate court considers 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 only 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). Argument contesting medical causation, raised for the first time on appeal, and even if entertained by this Court, only creates more questions of fact for the jury. See *Wuthrich v. King Cty.*, 185 Wn.2d 19, 28, 366 P.3d 926 (2016).

The failure of the moving party to make a motion to strike an expert declaration filed in opposition to the summary judgment motion waives any claimed deficiencies in the declaration (if existent) for purposes of adjudication of the motion. *Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 728, 309 P.3d 711 (2013) (citing CR 56(e)).

### B. Authorities Cited By Fun-Tastic Do Not Demonstrate That The Decision Conflicts With Other Decisions Of This Court Or With Other Appellate Decisions.

#### *1. The Court of Appeals' decision does not conflict with the authorities consistently cited by Fun-Tastic to the Court of Appeals and this Court.*

Fun-Tastic has consistently cited three (3) cases concerning *res ipsa* across the Brief of Respondents, Motion for Reconsideration, and Petition for Review: *Curtis v. Lein*, 169 Wn.2d 884, 239 P.3d 1078 (2010); *Pacheco v. Ames*, 149 Wn.2d 431, 69 P.3d 324 (2003); and *Robison v. Cascade Hardwoods, Inc.*, 117 Wn. App. 552, 72 P.3d 244 (2003).[2]

[2] Compare the Table of Authorities in Brief of Respondent, the Table of Authorities in the Petition for Review, and the authorities cited in the Motion for Reconsideration.

As described by this Court, the elements of *res ipsa* are:

> (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.

*Curtis*, 169 Wn.2d at 889 (internal quotation marks omitted).

As to the issue of whether "the accident or occurrence that caused the plaintiffs' injury would not ordinarily happen in the absence of negligence", this Court 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.

*Curtis*, 169 Wn.2d at 889.

In the present case, the second condition is applicable.

Fun-Tastic contends *res ipsa* imposes upon Brugh a duty to have an expert inspection of the Rainer Rush roller coaster. As to Brugh's burden under the doctrine, this Court in *Curtis* explicitly rejected that *res ipsa* imposes an expert inspection duty on the injured plaintiff, when it said that the plaintiff carries no burden to show that the defects were discoverable.

*Curtis*, 169 Wn.2d at 891. Under Washington law[3], the information that would be discovered, *i.e.* specific proof of negligence, is the "exact[ ] sort of information that *res ipsa loquitur* is intended to supply by inference." *Id.* at 892. *Res ipsa* concerns a determination by the court of whether the event speaks for itself, and is not reliant upon use of particular pretrial procedures.[4] *Id.*

In *Pacheco v. Ames*, 149 Wn.2d 431, 69 P.3d 324 (2003), this Court explained: "[t]he reason for the prerequisite of exclusive control of the offending instrumentality is that the purpose of the rule is to require the

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[3] Examples from other jurisdictions (discussed at Reply of Appellant pp. 5-10): *Frost v. Des Moines Still Coll. of Osteopathy & Surgery*, 79 N.W.2d 306, 311 (1956) (holding in burn injury case where plaintiff was under anesthesia at total mercy of doctors that plaintiff was not "forced to use the right" of pretrial discovery, or that pretrial discovery would be adequate in *res ipsa* case, and holding further that plaintiff need only identify the harming instrumentality to satisfy the diligence requirement of *res ipsa*); *Bone v. Gen. Motors Corp.*, 322 S.W.2d 916, 922 (Mo. 1959) (rejecting duty of discovery); *Warner v. Terminal R. Ass'n of St. Louis*, 257 S.W.2d 75, 81 (1953) (explicitly rejecting contention that inspection or pretrial procedures were required, because "*res ipsa* is part of the law of evidence", discovery procedures "have nothing to do with what facts are essential to state a claim or with what evidence is sufficient to justify the submission of a plaintiff's case[ ]", and that there is no way to ensure that when evidence is in the purview of the defendant, that discovery and inspection could fully induce the necessary evidence); *Menth v. Breeze Corp.*, 73 A.2d 183, 187 (1950) (stating defendant "insists that the rule is not applicable here because, *inter alia*, plaintiffs made no attempt to seek further evidence through interrogatories, depositions or pretrial hearings... We see no merit in this attempt to circumvent the application of the rule and therefore hold that plaintiff's failure to use such pretrial procedures in an effort to elicit specific acts of defendant's negligence does not bar the application of the *res ipsa loquitur* rule if its other requirements are satisfied. A contrary conclusion would tend to undermine the effectiveness of the rule.")

[4] If, arguendo, it is possible for an expert to medically rule out the blow to the head Brugh suffered on the Rainer Rush as the cause of the subdural hematoma for which she underwent the craniotomy, then Fun-Tastic had both the opportunity and the burden to do so at the trial court.

defendant to produce evidence explanatory of the physical cause of an injury which cannot be explained by the plaintiff."

> In adopting the rule that the doctrine of *res ipsa loquitur* is inapplicable only where the evidence completely explains the plaintiff's injury, we have noted that a plaintiff is not bound by the testimony of the defendant or his witnesses. Thus, the plaintiff may be entitled to rely on the *res ipsa loquitur* doctrine even if the defendant's testimony, if believed by the jury, would explain how the event causing injury to the plaintiff occurred. ...
>
> Even where the defendant offers weighty, competent and exculpatory evidence in defense, the doctrine may apply. In sum, the plaintiff is not required to eliminate with certainty all other possible causes or inferences in order *for res ipsa loquitur* to apply. ...
>
> It makes little sense to deny an instruction on the doctrine of *res ipsa loquitur* simply because the defendant offers evidence that provides a possible explanation of the event. As noted above, the *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.

140 Wn.2d at 440-42 (internal citations omitted).

*Robison*, also relied upon by Fun-Tastic, is demonstrative of the manner in which *res ipsa* applies to the present case:

> [Plaintiff] does not own the property; does not have access to all the cables, lines, circuits or other routes in the power distribution system; and does not know of historical changes that have been made to the electrical system. There is little doubt that [Defendant] is in the best position to explain how [Plaintiff] could suffer severe electrical injuries while operating electrical machinery on [Defendant's] property. But rather than producing any affirmative evidence, [Defendant] moved for summary judgment, challenging [Plaintiff's] ability to pinpoint a source. This is inconsistent with the purpose of the *res ipsa* doctrine[.]

*Robison*, 117 Wn. App. at 571-72.

Fun-Tastic cited three (3) additional cases both in its appellate motion for reconsideration, and also its Petition to this Court: *Zukowsky*, *ZeBarth*, and *Swanson*.

*Zukowsky v. Brown*, 79 Wn.2d 586, 488 P.2d 269 (1971), provides, in pertinent part:

> Here, [plaintiff] has shown that she was injured when a helm seat on which she was sitting collapsed. 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. Plaintiff's evidence showed that defendant was in ownership and control of the boat and had removed and replaced this helm seat several times. This evidence was sufficient to support a legitimate inference that defendant's control extended to the instrumentality causing injury. We find nothing so unreasonable or abnormal in [plaintiff's] use of the seat as to support a claim of contributory negligence, or prevent the inference of defendant's negligence from arising in the first instance. Plaintiffs' evidence as to the manner and circumstances of this event are sufficient to support a reasonable inference that defendant was negligent. Since that inference was not refuted as a matter of law,

> plaintiffs were entitled to the benefits of the inference of negligence arising from the circumstances.

*Id.* at 596-97 (citation omitted).

*ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wn.2d 12, 499 P.2d 1 (1972) is a medical malpractice case. Here, only Brugh offered medical causation testimony, and Fun-Tastic waived challenge to it. Moreover, *ZeBarth* was a different type of *res ipsa* case: unlike the present case, which concerns whether the roller coaster injury would be expected without negligence in "the general experience and observation of mankind", *ZeBarth* was a "proof by experts in an esoteric field" case. *Id.* at 19-20.

Fun-Tastic cites *Swanson v. Brigham*, 18 Wn. App. 647, 571 P.2d 217 (1977), in which a patient admitted to the hospital for treatment of mononucleosis died of asphyxiation. *Id.* at 650. The *Swanson* court found that while the injury was rare, as the injury's cause was not "palpably negligent", like the sponge left in the body; under the facts general experience would not teach that the event would not happen in the absence of negligence; and no "proof by experts in esoteric fields" had been offered. *Id.*

Here, as held by the appellate court, it is outside the general experience that a subdural hematoma requiring life-saving surgery would occur through routine use of a roller coaster, in the absence of negligence. There is no threshold requirement of expert testimony in order for the *res*

*ipsa* doctrine to apply; expert testimony is expressly only one of three ways in which the first element of *res ipsa* can be established.

2. *The Court of Appeals' decision does not conflict with the authorities newly referenced by Fun-Tastic in its Petition, but not previously cited below.*

In addition to the above-discussed authorities, Fun-Tastic refers this Court to eleven cases it did not previously cite to the appellate court, either in Brief of Respondent, or on reconsideration. Of them, one (1) concerns *res ipsa* and burden shifting under CR 56, although it is factually and procedurally distinguishable, and therefore inapplicable; six (6) concern issues specific to *res ipsa* in medical malpractice cases; and the final four (4) authorities are not *res ipsa* cases, and are likewise factually and/or procedurally inapplicable, for the reasons described *infra*.

*Marshall v. Western Airlines, Inc.*, 62 Wn. App. 251, 813 P.2d 1269 (1991) concerns evidentiary burden shifting under CR 56 and *res ipsa*. More specifically, when the *Marshall* plaintiff invoked *res ipsa* in the summary judgment context, the *Marshall* defendant (the airline) responded by submitting expert testimony to rebut the *res ipsa* inference of negligence, and the *Marshall* plaintiff was then unable to meet the burden which shifted back to her to demonstrate that either *res ipsa* applied or there was otherwise a question of fact. *Id.* at 255, 259-60. Here, as referenced above, Fun-Tastic did not rebut or move to strike Brugh's injury causation or medical

causation evidence, nor did Fun-Tastic submit expert testimony in support of its motion or in opposition to Brugh's evidence, unlike the *Marshall* defendant. Instead, Fun-Tastic asks the Court to disregard Brugh's evidence and to draw inferences against her, which his impermissible under the Rule 56 standard.

*Horner v. Northern Pac. Beneficial Ass'n Hospitals, Inc.*, 62 Wn.2d 351, 359-60, 382 P.2d 518 (1963), is a medical malpractice case. This Court explained that "the case at bar falls within both the second and third situations", referring to "(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.* at 360. The present case concerns the second situation.

Similarly, in *Douglas v. Bussabarger*, 73 Wn.2d 476, 482, 438 P.2d 829 (1968), also a medical malpractice case, the court found that the *res ipsa* doctrine applied under both the 'second and third situations'. *Id.* at 482-83.

In *Younger v. Webster*, 9 Wn. App. 87, 94, 510 P.2d 1182 (1973), the appellate court reversed a trial court's summary dismissal of a medical malpractice claim, and held that *res ipsa* applied to the medical malpractice

claim, under both the 'second and third situations'. See 9 Wn. App. at 94 (citing *Horner*, *supra*, and *Douglas*, *supra*).

Fun-Tastic cites *Miller v. Kennedy*, 11 Wn. App. 272, 278, 522 P.2d 852 (1974), another medical malpractice case. In that case, the jury was not given a *res ipsa* instruction; on appeal, the plaintiff contended the jury should have been given a *res ipsa* instruction. *Id.* at 276-77. Agreeing, the *Miller* court explained that "Washington law entitled the plaintiff to [a *res ipsa*] instruction".

> It cannot be said from the vantage point of an unskilled person that the insertion of a biopsy needle into the calyceal area was so palpably negligent that an inference of negligence follows, nor can it be said that the general experience of most people indicates this would not have happened without negligence.
>
> This leaves only the inquiry whether the third situation as recognized under Washington law was present, to wit, an instruction should be given on *res ipsa loquitur* when medical doctors testify that the injury would not have happened but for some negligent action on the part of the treating physician.

*Id.* at 278 (citing *ZeBarth v. Swedish Hosp., supra,* 81 Wn.2d at 19).

Fun-Tastic cites *Tate v. Perry*, 52 Wn. App. 257, 263, 758 P.2d 999 (1988), a medical malpractice case, in which the side effects from a particular diagnostic test experienced by the plaintiff were known, were disclosed to plaintiff, and which do occur in the absence of negligence. *Id.* at 263-64.

Lastly as to medical malpractice cases, Fun-Tastic cites *Reves v. Yakima Health District*, 191 Wn.2d 79, 90, 419 P.3d 819 (2018), in which this Court explained that "The act of prescribing isoniazid is not so 'palpably negligence' as leaving foreign objects in a body or amputating the wrong limb. Nor can a layperson's 'general experience and observation' show that it is negligent. That is why expert testimony is required." *Id.*

Fun-Tastic cites *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002), which does not discuss *res ipsa loquitur* or its application. Rather, *Overton* concerns questions of fact on the summary judgment standard, and whether the *Overton* plaintiff knew or had reason to know at the time he purchased certain insurance policies that the property he sought to insure had PCB contamination. *Id.* at 429-30. The defendant insurers demonstrated that the *Overton* plaintiff knew or had reason to know *of* the PCB contamination prior to purchasing the policies because the *Overton* plaintiff had been visited by EPA, and had received authenticated reports from EPA. *Id.* Overton had testified in deposition that he did not recall the EPA visiting. *Id.* Later, in response to summary judgment, Overton testified that the EPA visit did not occur. *Id.* The *Overton* court held that this contradiction did not create a question of fact for purposes of summary judgment, particularly in light of the *Overton* plaintiff having received the authenticated EPA report. *Id.*

Fun-Tastic refers the Court to *State v. Bond*, 62 Wn.2d 487, 491, 383 P.2d 288 (1963), which does not concern *res ipsa*, and which provides, in pertinent part: "Facts asserted by the nonmoving party and supported by affidavits or any other proper evidentiary material must be taken as true. It is not the function of the trial court to resolve factual issues." *Id.*

Fun-Tastic cites *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998), which does not concern *res ipsa*, and which discusses cause in fact and legal causation at the page cited. The *Schooley* court held that the trial court erred in dismissing on summary judgment a claim against the provider of alcohol to a minor, and remanded.

Finally, Fun-Tastic cites *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005), which concerns criminal sentencing, and which references RAP 13.4(b)(4) and RAP 3.1. The instant case turns on the summary judgment standard, and the application of an evidentiary doctrine to the particular facts of this case. Application of an evidentiary doctrine to the specific facts of one civil tort case does not involve "an issue of substantial public interest" for purposes of RAP 13.4(b)(4).

### C. Fun-Tastic's New Theory Of The Case On Appeal, Developed After The Court Of Appeals' Decision, Supplies No Basis For Further Review By This Court.

In its motion for summary judgment before the trial court, Fun-Tastic stated "[t]o prove negligence, Plaintiff must establish breach of an

applicable duty. Plaintiff has no evidence to establish breach", and in its trial court motion for reconsideration argued, "[a]gain, Defendants do not argue that Plaintiff was not injured; instead, Defendants argue that Plaintiff has not presented any evidence that Defendants breached their duties of care." (CP 121; see also Br. of Resp. at 5)

Fun-Tastic now argues that it challenges the onset, cause, and diagnosis of Brugh's subdural hematoma. Fun-Tastic did not do so previously, and Fun-Tastic waived its challenges to the evidence — *i.e.* the unrebutted testimony of Brugh and of Dr. Gonzalez—for purposes of this review by failing to rebut (or move to strike) the evidence when it was presented. See *Becerra*, 176 Wn. App. at 728; *Johnson*, 5 Wn. App. 2d at 780; and *Sourakli*, 144 Wn. App. at 509.[5] As Fun-Tastic did not rebut Brugh's evidence regarding medical causation on summary judgment or trial court reconsideration, Fun-Tastic conceded said facts and inferences arising therefrom, for purposes of summary judgment, and arguments to the contrary provide no basis for further review by this Court.

[5] Moreover, contentions made for the first time in a footnote in a reply brief to the trial court concerning the Declaration of Dr. Gonzalez, and then never referenced again until reconsideration on appeal, were not 'raised'. (CP 129-32) See, e.g., *State v. Johnson*, 69 Wn. App. 189, 194 n. 4, 847 P.2d 960 (1993) (argument raised in footnote will not be addressed); *State v. N.E.*, 70 Wn. App. 602, 606 n. 3, 854 P.2d 672 (1993) (arguments in footnotes not considered).

Fun-Tastic's contention that 'Brugh has not even presented evidence', is simply contradicted by the record. (See CP 86-94; 101-102, 116, 121-23, 125, 127) Fun-Tastic's contention that 'Brugh was not diagnosed with an injury that could only have come from a roller coaster', is contradicted by the unrebutted testimony of Dr. Gonzalez. (CP 86-94) Fun-Tastic's contention, that a subdural hematoma requiring surgery, as "general experiences teaches", either 'could not have happened', or is what patrons of the Fun-Tastic should expect when they ride the Rainer Rush, is, at best, a disguised request for a resolution of facts against Brugh, contrary to the summary judgment standard.

As described by the appellate court:

> 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 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.

*Brugh*, 8 Wn. App. 2d at 184-85.

## CONCLUSION

For the foregoing reasons, Brugh requests that the Court deny Fun-Tastic's Petition for Review.

Submitted this 9th day of September, 2019.

**KSB LITIGATION, P.S.**

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of September, 2019, I caused to be served a true and correct copy of the foregoing Answer to Petition for Review to the following:

_____ HAND DELIVER

_____ U.S. MAIL

_____ OVERNIGHT MAIL

x_____ E-TRANSMISSION

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## KSB LITIGATION

## September 09, 2019 - 1:12 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 97503-5 |
| **Appellate Court Case Title:** | Jodi Brugh v. Fun-Tastic Rides Co., et al. |
| **Superior Court Case Number:** | 16-2-10983-2 |

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