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NO. 65463-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MONIKA JOHNSON,

Respondent,

v.

RECREATIONAL EQUIPMENT, INC.,

Petitioner.

BRIEF OF RESPONDENT MONIKA JOHNSON

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ORIGINAL

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I. INTRODUCTION

There is no question that REI fits the definition of a product manufacturer under the Washington Product Liability Act (“WPLA”). As such, it is entirely responsible to Ms. Johnson for any defects in the product it elected to market under REI’s exclusive brand, Novara. Whatever right of indemnity and contribution REI may be able to establish against other entities is not a defense to its own manufacturer’s liability owed to Ms. Johnson, and should not serve to prejudice her in her pursuit for relief from REI.

Moreover, REI errs in its assertion that it would be entirely precluded from seeking contribution from Aprebic in the event Aprebic is not a party against whom judgment is entered in the instant lawsuit. While REI may be correct that it would be precluded from seeking contribution from Aprebic under RCW 4.22.070(1)(b), it is not precluded from seeking contribution under other remedies to which they may be entitled, such as equitable indemnity or breach of contract, because these alternative remedies would not require judgment to be entered against Aprebic. That REI is free to assert claims other than contribution renders its argument regarding contribution moot.

The record does not support REI’s contentions that the trial court erroneously resolved purported issues of material fact against it and

erroneously denied its CR 56(f) motion. REI did not present any evidence to preclude a finding that it is strictly liable for Ms. Johnson's injuries. REI's expert had the same opportunity as Ms. Johnson's expert to inspect and opine on the Fork. However, after doing so, REI's expert could not dispute the findings of Ms. Johnson's expert, and makes only speculative assertions that factual issues may still remain. These musings do not create a genuine issue of material fact.

REI's motion for a CR56(f) continuance was properly denied because Ms. Johnson's pertinent testimony had been made available in her declaration and Aprebic's design specifications are immaterial to the issue of product defect in this case. REI failed to state what additional evidence would be obtained through further discovery to create a genuine issue of material fact.

Finally, the trial court was well within its discretion in ordering separate trials for any claims REI may bring to recover any or all amounts for which it might be liable on its manufacturer liability, in order to avoid unnecessary delay and prejudice to Ms. Johnson.

II. COUNTERSTATEMENT OF THE CASE

Contrary to REI's assertions, Ms. Johnson did not alter the Fork in any way prior to the November 19, 2007 accident. Shortly before the July 2005 rebuild of the bicycle, Ms. Johnson consulted with an REI bicycle

technician about re-painting her bicycle a more visible color than black, which was the original color of the Frame and Fork. (CP 56-57.) The REI technician recommended the type of paint to use, and Ms. Johnson purchased it. (CP 57.) Ms. Johnson took the Frame and Fork home and painted them. (*Id.*) She then gave the Fork and Frame back to the bike technician at the REI bike shop, and REI assembled the Fork and Frame, as well as the brakes, wheels, cables, seat, handlebars, pedals and drive train. (*Id.*)

The Fork and Frame were not altered, disassembled or modified in any way between the REI rebuild in the summer of 2005 and November 19, 2007. (*Id.*) Ms. Johnson was involved in a very minor accident on the bike on September 13, 2006. (*Id.*) The bike only sustained a flat front tire. (*Id.*) She took the bike to REI and the technician there fixed the flat tire, inspected the bike, and found no other damage. (*Id.*) The accident was so minor, the front wheel did not even need to be re-trued. (*Id.*) Aside from this minor accident, the bike did not sustain any damage of any kind between the rebuild in 2005 and November 19, 2007. (*Id.*) There is no evidence that indicates otherwise.

Ms. Johnson never noticed anything amiss or out of the ordinary with respect to the Fork before the accident. (CP 57.) She did not notice any cracks, dings or irregularity in shape. (*Id.*) From her perspective, the

Fork looked completely normal and just the same as a front fork on any other road bicycle. (*Id.*) Similarly, she did not notice any flaws or irregularity with the performance of the Fork when she rode. (*Id.*) Ms. Johnson's bicycle did not exhibit any outward signs of damage or defect prior to the November 19, 2007 accident. (*Id.*)

The fork involved in this case is constructed of layers of carbon fiber infused with resin, joined with a steerer tube of aluminum alloy. The catastrophic failure of the fork occurred at a key structural joint – the junction between the steerer tube (the part of the fork that inserts into the head tube, which is front part of the bike frame) and the “crown” (or top of the divided portion of the fork.) Gerald Zamiski, plaintiff's engineering expert, examined the fork microscopically and documented photographically that, when manufactured, there were only a small number of layers of carbon fiber, which were formed into a hard 90-degree corner. (CP 106.) This interface is a region of higher stress. (*Id.*) The small number of carbon fiber layers and their orientation interface resulted in the nucleation and propagation of cracking. (*Id.*) The cracking of this joint led to the catastrophic fracture and failure of the Fork. (*Id.*) In addition, the interface layers displayed voids, gaps, separations, and kinks, which are all indicative of defective manufacturing. (*Id.*) These manufacturing defects caused a sudden and unexpected fracture, resulting in a complete,

catastrophic failure of the Fork. (*Id.*; CP 58, 73-74.) REI's expert, David Mitchell, does not contest this finding. He obviously cannot dispute what is physically present in the remnants of the Fork that both Dr. Zamiski and he have examined.

Where the failure occurred, the carbon fiber layers, or plies, were thinner and oriented parallel to the maximum stress at the joint between the crown of the Fork and the steerer tube (the site of the failure). (CP 106-107.) The thickness of the carbon fiber layering, or layup, was just a fraction of the thickness of the carbon fiber layup elsewhere in the Fork and steerer tube. (*Id.*) The failure originated in this region of thinner carbon fiber layup. (*Id.*) Additionally, the exposed carbon fiber layers that failed were starved of epoxy, which made the plies of carbon fiber more susceptible to failure. (CP 107.) This is because the epoxy acts to hold the carbon fiber layers together. (*Id.*) Without sufficient epoxy holding them together, the carbon fiber layers were more prone to fail. (*Id.*)

Dr. Zamiski's findings, without dispute, document defective manufacturing (assembly) at the factory. (CP 108-109, 115-118.) The orientation and makeup of the carbon fiber layers can only occur during manufacturing; they are not defects that can occur after the product has been manufactured. (*Id.*) Once the carbon fiber is infused with resin and sets up, the defects are frozen in space and time, revealed to Dr. Zamiski

during his microscopic examination. Moreover, these manufacturing defects are not visible to the bicycle user. (*Id.*) The location of the failure is right at the joint where the steerer tube inserts into the head tube of the frame of the bicycle. (*Id.*) Therefore, even if Ms. Johnson had examined this area with a microscope before the accident, she would not have seen any indication of structural instability. (*Id.*) Ms. Johnson had no way of knowing that the steerer tube on the Fork suffered from the manufacturing defects that caused the Fork to fail. (*Id.*)

Mr. Mitchell does not dispute Dr. Zamiski's conclusion that the fracture resulted from a manufacturing defect that could not have occurred at any time other than the time the Fork was built. Dr. Zamiski states succinctly: "Photo C4 shows the steerer tube sectioned with the fracture at the bottom. There is a substantial number of plies going left to right, but there is a relatively small number that transition out of the bottom of the steerer tube to mate, or join, with the crown. **This demonstrates a flaw in the carbon fiber layup. [9] My findings with respect to Ms. Johnson's bicycle are indicative of defective manufacturing (assembly) at the factory.**" (CP 107; photo found at CP 118)(Emphasis added). There is no evidence in this record that a fork manufacturer would purposely design and construct a carbon fiber fork with deficient layers of carbon fiber and voids in the infused resin, especially at this critical high stress junction.

III. ARGUMENT

A. Summary Judgment Standard.

The standard of review for this court with respect to the summary judgment decisions is *de novo* review, undertaking the same analysis as did the trial court. Under CR 56(c), summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

In applying this standard of review the court must view the record as articulated in *Grimwood v. Univ. Puget Sound, Inc.*, 110 Wn.2d 355 (1988), an oft-cited decision describing the type of evidence necessary to create a genuine issue of material fact:

It is apparent that the emphasis is upon *facts* to which the affiant could testify from personal knowledge and which would be *admissible in evidence*. Thus, there is a dual inquiry as to whether an affidavit sets forth “material facts creating a genuine issue for trial”: does the affidavit state material facts, and, if so, would those facts be admissible in evidence at trial? If the contents of an affidavit do not satisfy both standards, the affidavit fails to raise a genuine issue for trial, and summary judgment is appropriate. A fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. The “facts” required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory

statements of fact will not suffice.

Grimwood, 110 Wn.2d at 359-60 (internal cites omitted).

Rather than addressing the facts, i.e. the actual condition of the product that catastrophically failed, REI takes broad liberties with inadmissible speculation and conclusory opinions to try and embellish its case. Here, as below, REI cites to language from its expert David Mitchell (CP 175-178) as if the statements constitute “facts” that oppose the testimony of Dr. Zamiski. However, Mr. Mitchell’s comments simply attempt to discredit Mr. Zamiski’s opinions by suggesting there was insufficient information available.

For example, Mr. Mitchell states that the “nature of the fracture was not determined.” (CP 177) To the contrary, the undisputed evidence, coming from Ms. Johnson’s own declaration, is that the fracture occurred suddenly, completely, and without warning – i.e., catastrophically. Dr. Zamiski testified that “[t]he small number of carbon fiber layers and their orientation interface resulted in the nucleation and propagation of cracking. The cracking of this joint led to the catastrophic fracture and failure of the fork.” (CP 106)

As another example, Mr. Mitchell discusses the type of testing that could be done on an exemplar fork, which, for reasons only he would know, he never performed in the many months this suit was pending prior

to summary judgment. (CP 177) Whatever may have been revealed in this exemplar testing that he did not perform, it would not change what actually occurred to this fork and would certainly not alter the physical facts revealed in the post-fracture examination.

As a final example, Mr. Mitchell speculates that “[i] an element of [Ms. Johnson’s “prior crash” involving the flat tire to the rear wheel] involved the front fork without creating visible damage, then it could be considered an initiating event for the fracture that serves as the basis for this law suit.” (CP 178). Perhaps Mr. Mitchell did not read Ms. Johnson’s declaration describing the part of the bike involved in the September 13, 2006 incident, “which resulted in minor damage to the rear wheel. The front wheel and Fork were not impacted or damage in any way.” (Dec. of Johnson, CP 57). He need not speculate further. It is undisputed that “[t]he Fork never sustained any damage until it failed on November 19, 2007 . . .” (Dec. of Johnson, CP 57).

When the facts are separated from REI’s speculation and conclusory allegations, there are no genuine issues of material fact and Ms. Johnson is entitled to have this court affirm the summary judgment decisions below.

B. The Trial Court Properly Interpreted RCW 7.72.040(2)(e)'s Ramifications on Fault Allocation.

On Ms. Johnson's motion for partial summary judgment, the trial court properly reconciled RCW 7.72.040(e)'s plain language with that of RCW 4.22.015 and 4.22.070(1). There can be no questions that REI was the manufacturer of the Fork for purposes of plaintiff's claim pursuant to RCW 7.72.040, which provides, in relevant part:

A product seller, other than a manufacturer, shall have the liability of a manufacturer to the claimant if: ... (e) The product was marketed under a trade name or brand name of the product seller.

RCW 7.72.040(2).

The significance of this statute is that it allows REI to be held strictly liable for Ms. Johnson's damages as provided in RCW 7.72.030(2). The Legislature enacted RCW 7.72.040(2) to provide a remedy to plaintiffs when the manufacturer of a product is insolvent, judgment-proof, or not subject to service of process. Senate Select Committee on Tort and Product Liability Reform, Senate Journal, Vol. I, Bill 3158 at 625 (1981) (CP 132.) The Legislature enacted subpart (e) of RCW 7.72.040(2) to provide a product liability plaintiff with a convenient and equitable remedy in tort where the non-manufacturing product seller adopts the product as its own. *Id.*

Further, the Select Committee believes that in those

instances in which a non-manufacturing product seller is so intertwined with the manufacturing process or adopts the product as its own, the non-manufacturing seller has, in a sense, waived its right to immunity and should be subject to a manufacturer's liability.

Id.

Despite the Legislature's specific intent that a plaintiff need not sue the actual manufacturer of a product where a product seller assumes the liability of a manufacturer, REI insists that it can still apportion fault to the actual manufacturer, Aprebic. The absurd result of this proposition would be that REI can simply apportion its fault, which would be 100% fault of the manufacturer, to Aprebic, wash its hands of the matter, and force Ms. Johnson to expend attorney's fees and costs collecting from Aprebic. This would frustrate the entire purpose of RCW 7.72.040(2)(e) and render the statute toothless.

While REI may be correct that it would be precluded from seeking contribution from Aprebic under RCW 4.22.070(1)(b), REI is not precluded from seeking contribution under other remedies to which it is entitled, such as equitable indemnity or breach of contract. *See Cottler v. State*, 136 Wn.2d 437, 447 (1998) ("... parties settling before judgment is entered may be jointly and severally liable and may seek contribution, but not under RCW 4.22.070(1)(b)."). Because equitable indemnity or breach of contract would not require judgment to be entered against Aprebic, REI

would not be precluded from seeking contribution under any applicable theory aside from RCW 4.22.070(1)(b). *Id.*

Moreover, nothing precluded REI from asserting a third party claim against Aprebic, as it has now done, earlier in the litigation. The fact that it chose not to do so should not prejudice Ms. Johnson, who is entitled to recover damages proximately caused by the Fork failure directly from REI in its capacity as a “manufacturer” under the Product Liability Act.

REI cites to *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248 (1999), for the proposition that RCW 4.22.015 and 4.22.070(1) somehow vitiate RCW 7.72.040(2) and allow REI to deflect liability and simply apportion fault to the actual manufacturer. However, *Hiner* addressed a product liability claim for negligent failure to warn brought under RCW 7.72.030(1) – it did not address a case like this where the product seller (REI) assumes the strict liability of a manufacturer (Aprebic) by virtue of RCW 7.72.040. *Hiner*, 138 Wn.2d at 255. While *Hiner* addresses the ability of one of several manufacturing defendants to apportion fault to **other manufacturers and an installer**, it does not address a situation like the one presented here.

Hiner is clearly distinguishable in that the defendant manufacturer in that case sought to assert contributory fault not against other

“manufacturers” of the product at issue, but against other entities, including manufacturers, who may have also contributed to the accident (i.e., the manufacturer of the automobile, the manufacturer of the other tires that were on the vehicle, as well as the installer who placed the subject tires on the car). 138 Wn.2d at 259.

Here, the seller (REI) becomes, by operation of law, the legal equivalent of Aprebic, the only manufacturer of the Fork. This is a key distinction, because there is no other manufacturer to whom REI could seek to attribute fault. Therefore, by asking to apportion fault to Aprebic, REI is asking to apportion fault to itself. Under RCW 7.22.040(2)(e), REI and Aprebic, so far as the law and Ms. Johnson are concerned, are one and the same.

Contrary to REI’s argument, *Hiner* does not stand for the proposition that a product seller who bears the liability of a manufacturer under RCW 7.72.040(2) can avoid liability by apportioning fault to the actual manufacturer of the very same product it is deemed to have manufactured. Such a holding would completely subvert the intent of RCW 7.72.040(2). In *Lundberg v. All-Pure Chemical Co.*, 55 Wn. App. 181 (1989), also cited by REI, the court addressed whether the trial court’s comparative fault instruction for contributory negligence was proper. *Id.* at 183-84. The plaintiff in that case asserted that the manufacturer

defendant could not assert contributory negligence against the plaintiff because it was strictly liable for failure to warn. *Id.* Ms. Johnson makes no such argument in this case.¹ Thus, *Lundberg* is not instructive on the issue at play here.

In a further attempt to obfuscate the issue, REI asserts that a conflict between RCW 7.72.040(2)(e) and RCW 4.22.070(1) is created by the trial court's holding that REI has the liability of Aprebic. This is a flawed argument for two reasons: (1) it ignores that RCW 7.72.040(2)(e) was enacted so that a plaintiff need not sue the actual manufacturer; and (2) it ignores that there is nothing preventing REI from seeking redress from Aprebic in a separate cause of action based on breach of contract, breach of warranty, equitable indemnity, or violation of the consumer protection act. The purpose behind RCW 7.72.040(2)(e) is to ensure that the injured plaintiff need not bear the cost and delay of such an action. The point of RCW 4.22.070 is that a defendant can seek to have fault allocated to *another* entity, but not to itself. These two statutory schemes, as applied to this case, are completely consistent.

Contrary to REI's assertion otherwise, this situation is similar to that in *Farmers Ins. Co. v. Waxman Indus., Inc.*, 132 Wn. App. 142,

¹ In his summary judgment ruling, Judge Gonzalez stated "[t]his ruling does not preclude REI from asserting that plaintiff was contributorily negligent if any facts to support this are developed." (CP 196) Ms. Johnson does not contest this ruling.

review denied, 159 Wn.2d 1017 (2007). In *Waxman*, the defendant plumbing company installed a supply line, affixed with a label identifying it as its own product. *Id.* at 144. The line ruptured and leaked. *Id.* Farmers Insurance Company covered the damage to the house, then sued Waxman under a subrogation claim. *Id.* Waxman failed to answer and the court entered default judgment against it, holding it strictly liable as the manufacturer of the faulty line under RCW 7.72.040(2)(e). *Id.* at 145.

The trial court vacated the default judgment, accepting Waxman's argument that one of two other companies actually manufactured the pipe, and therefore it could not be held liable as the manufacturer. *Farmers Ins. Co.*, 132 Wn. App. at 145. The Court of Appeals reversed that decision holding that the fact that some other company was the actual manufacture had no bearing on Waxman's liability under RCW 7.72.040(2)(e). *Id.* at 146-48. In dicta, the court reasoned, "[t]he materials submitted by Waxman do not explain how Waxman could avoid a finding of liability simply by proving that some other entity actually manufactured the supply line." *Id.* at 147.

The same rationale applies here. To allow REI to apportion fault under RCW 4.22.070(1) and point to an empty chair at trial that would have otherwise been occupied by the manufacturer of the very product it branded as its own, would circumvent the purpose of RCW 7.72.040(2)(e)

and force Ms. Johnson to sue Aprebic, even though the Legislature expressly intended that she need not do so.² RCW 7.72.040(2)'s entire purpose is to eliminate the possibility that this exact situation arises. Following REI's argument to its logical conclusion, a non-manufacturing product seller will *always* be allowed to effectively avoid liability by apportioning fault to the actual manufacturer of the product it has branded as its own. RCW 7.72.040(2) would lose its purpose of favoring the consumer. Under REI's theory, there would be no point in suing the liable seller because it would just point to the actual manufacturer, even where the manufacturer is insolvent or not subject to service of process. This is a perverse result that completely undermines the legislative intent of the WPLA. REI has the legal liability of Aprebic to Ms. Johnson by virtue of its decision to market the Aprebic Fork under its Novara brand. It cannot now avoid liability by seeking to apportion fault to Aprebic, since the two companies are viewed as one and the same through the spectrum of the WPLA.

To the extent there is a conflict between RCW 7.72.030(2) and RCW 4.22.070(1), REI is mistaken in its assertion that the 1986 comparative fault system of 4.22.070 controls. REI's suggestion that a more recent statute takes priority over an older statute does not accurately

² Because the three-year anniversary of this accident will occur while this matter is pending on interlocutory review, Ms. Johnson has timely filed suit against Aprebic.

state the law. Rather, when two conflicting statutes cannot be reconciled, the earlier enacted statute prevails over the latter enacted statute if the earlier statute is more clear and explicit than the latter one. *Elford v. Battle Ground*, 87 Wn.App. 229, 234 (Div. II, 1997). RCW 7.72.040(2) clearly states that REI, as a product seller, “shall have the liability of a manufacturer” to Ms. Johnson because it chose to market bikes under its exclusive Novara brand name. RCW 7.72.040(2)(e).³ This is an explicit, unambiguous expression of the scope of REI’s liability to Ms. Johnson. It is not clear in the least by the language of the comparative fault statute that REI can somehow apportion this fault among other “manufacturers” of the subject product. In fact, the statute itself raises doubt in RCW 4.22.040(1), which states, in relevant part: “... However, the court may determine that two or more persons are to be treated as a single person for purposes of contribution.”

This Court should affirm the denial below of REI’s motion for summary judgment.

C. REI Has Not Presented Conflicting Evidence Sufficient to Challenge the Fork’s Defect and REI’s CR 56(f) Motion Was Properly Denied.

The record does not support REI’s contentions that the trial court

³ Where, as here, the manufacturer -- Aprebic -- is known, the clear interpretation of this language is that REI “shall have the liability” of Aprebic, not that of a generic manufacturer or some manufacturer not involved in this case.

erroneously resolved purported issues of material fact against it and erroneously denied its CR 56(f) motion.

1. *The Trial Court Did Not Invert the Summary Judgment Standard.*

It is well-settled that at summary judgment, after the moving party has submitted adequate affidavits, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclosing the existence of issues of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (1989). The non-moving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Marshall v. Bally's PacWest*, 94 Wn.App. 372, 377 (Div. II 1999).

REI did not present any evidence to preclude a finding that it is strictly liable for Ms. Johnson's injuries. This is not for the lack of opportunity to develop such facts, but rather because, given the physical evidence, such facts do not exist. REI's expert had the same opportunity as Ms. Johnson's expert to inspect and opine on the Fork, having inspected it at the same time as Ms. Johnson's expert. However, after doing so, REI's expert could not dispute Dr. Zamiski's findings. Instead, REI simply relies on speculative assertions that factual issues may still remain.

a. *Design Specifications Were Not Required.*

REI asserts that because Ms. Johnson did not present evidence of

Aprebic's design specifications, she was not entitled to summary judgment on the manufacturing defect claim. (REI's Brief, p. 33.)⁴ REI ignores the fact that it is undisputed that a defect in manufacturing caused the sudden and catastrophic failure of the Fork and that reasonable minds could reach but one conclusion: that the Fork was unreasonably safe.

REI errantly contends that the absence of Aprebic's design specifications prohibits a decision on summary judgment. This misapplies the law to the evidence that *does* exist. The elements of strict liability are as follows: (1) a defect, either in design *or* in manufacturing, (2) which existed at the time the product left the hands of the manufacturer, (3) and not contemplated by the user, (4) which renders the product unreasonably dangerous or not reasonably safe, and (5) which was the proximate cause of plaintiff's injury. *Bich v. General Electric Co.*, 27 Wn. App. 25, 28 (1980) (internal cites omitted) (emphasis added). "A 'product is defective if it fails to perform reasonably, adequately and safely the normal, anticipated or specified use to which the manufacturer intends that it be

⁴ This is ironic indeed. Aprebic is a foreign corporation, not easily subject to the reach of Ms. Johnson's discovery tools. REI, on the other hand, not only does business with Aprebic, but brands Aprebic's forks as its own. A separate question is why REI would not have design specifications of one of its own branded products, but that need not be answered here. REI's argument is essentially this – even though we have the liability of Aprebic by virtue of branding its product as our own, you cannot establish strict liability against us because you don't have the design specifications." The obvious flaw in this argument is that the statute allows proof of strict liability without design specifications where, as here, there is a manufacturing defect as Dr. Zamiski's declaration – and photographs – describe.

put, and it is unreasonably dangerous to the plaintiff.” *Bich*, 27 Wn. App. at 31 (citing *Bombardi v. Pochel’s Appliance & TV Co.*, 10 Wn. App. 243, 246 (1973)). The statute uses “or,” not “and” – a defect can be the result of the way in which the product was designed or the way in which a product was manufactured.

In *Pearson Const. Co. v. Intertherm, Inc.*, 18 Wn. App. 17 (1977), a fire started because of an electric arc in the cord of a portable heater. *Id.* at 18. The defendant argued the plaintiff could not prove the product was defective when it left the hands of the manufacturer because there was no evidence of the date the heater was manufactured, the condition it was in when it left the factory, or what the deliverer did with it prior to delivery. *Id.* This Court rejected defendant’s arguments and, citing to *Bombardi, supra*, held that the plaintiff did not even need to present evidence of what exactly caused the fire. *Id.* at 18-19.

No evidence was presented of what, other than a manufacturing flaw, caused the cord to be defective. The Pearsons were not required to eliminate all other possible causes. *Kuster v. Gould Nat’l Batteries, Inc.*, 71 Wn.2d 474, 429 P.2d 220 (1967). The jury was justified in drawing the reasonable inference that the arc in the cord came about as a result of a manufacturing defect.

Pearson Const. Co., 18 Wn. App. at 19.

As the *Bombardi* court held, “there are some accidents as to which there is common experience dictating that they do not ordinarily occur

without a defect, and as to which the inference that a product is defective should be permitted.” *Bombardi*, 10 Wn. App. at 246. Here, the evidence conclusively establishes, without *any* need to draw reasonable inferences, that the manufacturing defect described by Dr. Zamiski cause the accident. Ms. Johnson satisfied all five elements of strict liability. REI’s expert does not dispute Dr. Zamiski’s conclusion that a manufacturing defect caused the failure of the Fork. She need not present evidence of design specifications or performance standards. The type of sudden, catastrophic failure of an otherwise undamaged front fork of a bicycle while riding on flat ground at slow speed does not occur without a defect. Here, Dr. Zamiski not only described the defect, he photographed it. These physical facts are beyond debate. There were too few carbon fiber layers in the proper orientation at the critical stress junction of the crown and the steerer tube. This allowed a crack to form, not visible to the naked eye, that failed suddenly and without warning.

Reasonable minds can reach but one conclusion: that a fork manufacturer’s design standards do not allow for such a catastrophic failure during the course of ordinary use of a bicycle at low speed. REI did not present any evidence that refuted this inescapable conclusion. *See Bunnell v. Barr*, 68 Wn2d 771, 775-76 (1966) (where the physical facts are uncontroverted and speak with a force that overcomes all testimony to

the contrary, reasonable minds must follow the physical facts). Certainly if there were industry standards to support REI's position that this Fork was designed properly, Mr. Mitchell would have presented this evidence with his declaration. Here, REI cannot reasonably suggest that this Fork met industry standards, even had it been manufactured to design specifications articulated by Aprebic. Either Aprebic's design was defective, or the manner in which the product was manufactured was defective. Inasmuch, Aprebic's design specifications are immaterial to the issue of product defect in this case.⁵

In a case like this, where it is undisputedly established that a defect caused the failure of the Fork, and no bicycle Fork manufacturer would design a Fork to have too few carbon fiber layers and inadequate epoxy at the crown joint, the court properly ruled as a matter of law that the Fork deviated from the manufacturer's performance standards. "Evidence" of Aprebic's design specifications or performance standards would do nothing to change the liability in this case.

b. The Trial Court Properly Ruled on Cause in Fact as a Matter of Law.

REI next asserts that the trial court erroneously ruled that the

⁵ If it were true that fork manufactures designed "break away" forks, that would fracture suddenly and without warning to the rider, certainly Mr. Mitchell would have told us so in his declaration. The same would be true if manufacturers "manufacture" break away forks. But of course, a break away fork, whether by design or by manufacturing process, would be equally defective. Neither would perform reasonably, adequately, or safely.

manufacturing defect was the cause in fact of Ms. Johnson's injury. Cause in fact is usually a question for the jury; it may be determined as a matter of law, however, when reasonable minds cannot differ. *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 322 (2005) (citing *Daugert v. Pappas*, 104 Wn.2d 254, 257 (1985)). REI claims its expert offered "conflicting testimony" to rebut Ms. Johnson. (REI Brief, pp. 37-38.) A review of Mr. Mitchell's declaration reveals that he does *not* rebut Dr. Zamiski's testimony in any way. Instead, he floats immaterial hypotheticals ("*if* an element of Ms. Johnson's prior crash involved the front fork, then it *could* be considered an initiating event for the fracture that serves as the basis for this law suit")(CP 178) and critiques of Dr. Zamiski's failure analysis. (CP 177-78.) Mr. Mitchell's declaration does not create an issue on any *material fact*. Mr. Mitchell does not even address Dr. Zamiski's core conclusion that the catastrophic failure was caused by a manufacturing defect that could not have occurred at any point after the manufacturing process. (CP 106-8.) Nor does he present any evidence as a basis for his speculation and conclusory allegations or explain how additional information could support REI's defenses. For example, Mr. Mitchell does not suggest that better maintenance of the bike by Ms. Johnson would have prevented the Fork from fracturing or revealed the defect, allowing her to replace it and avoid the accident. His suggestion that the Fork's failure may have been

the result of years of use and substantial wear and tear does not serve to establish a material issue of fact. Mr. Mitchell provides no basis for the suggestion that significant use of a carbon fiber fork is a cause of failure like the one experienced by Ms. Johnson.

In addition, Mr. Mitchell presents no basis for his suggestion that the minor accident in which Ms. Johnson's bike was struck in the rear would be a possible cause of the fork to fail as it did.⁶ In the absence of any factual dispute to the findings of Dr. Zamiski, summary judgment on liability is appropriate.

c. The Fork Was Unsafe to an Extent Beyond That Contemplated by an Ordinary User.

Recognizing it would be incredulous to try to do so, REI did not present *any* evidence to refute the fact that the manufacturing defect that caused Ms. Johnson's accident rendered the Fork unsafe to an extent beyond that which would be contemplated by an ordinary user. Again, reasonable minds cannot differ on the fact an ordinary bicycle user would not contemplate his or her bicycle suffered from a latent and virtually invisible defect in the Fork that even "after two years of heavy use"⁷ would cause it to suddenly sheer from the frame. REI's only argument on

⁶ In fact, this suggestion is in direct conflict with the fact that an REI technician inspected Ms. Johnson's bicycle after this accident and found no damage to the Fork. (CP 57.)

⁷ Mr. Mitchell's testimony. (CP 176.)

this point is that the determination of what is contemplated by an ordinary user is usually for the trier of fact to determine. (REI's brief, 38-39.) However, in a case such as this, where there is no evidence that creates a genuine issue of material fact on the undisputedly dangerous condition of the Fork, the trial properly decided that issue as a matter of law.

2. *The Trial Court Properly Denied REI's CR 56(f) Motion.*

A trial court's denial of a CR 56(f) motion is reviewed for abuse of discretion. *Pitzer v. Union Bank*, 141 Wn.2d 539, 556 (2000). A court may properly deny a continuance under CR 56(f) if: (1) the requesting party fails to offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party fails to state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. *Gross v. Sunding*, 139 Wn. App. 54, 68 (2007). Only one of the qualifying grounds is needed for denial. *Pelton v. Tri-State Mem'l Hosp.*, 66 Wn. App. 350, 356 (1992).

REI contends that it needed two pieces of evidence in order to respond to Ms. Johnson's motion: Ms. Johnson's testimony and design specifications from Aprebic. (CP 151-3.) First, Ms. Johnson's testimony had already been provided by virtue of her declaration. (CP 55-74) It was up to Mr. Mitchell to consider this testimony, as well as that of Dr. Zamiski, in forming his opinion. (CP 178.) Second, as set forth above,

Aprebic's design or performance standards were not needed in order to rule as a matter of law that the Fork suffered from a manufacturing defect that would not be contemplated by the ordinary user. REI fails to articulate how the discovery it sought would create a genuine issue of material fact that could rebut the undisputed fact that a manufacturing defect in the Fork caused the November 19, 2007 accident. No one designs or intentionally manufactures a break away fork.

As confirmed to Ms. Johnson by REI shop technicians, the September 13, 2006 accident did not damage the Fork in any way. (CP 57.)⁸ Furthermore, the defect that caused the November 19, 2007 accident could not have occurred at any time other than the manufacturing process. REI's cite to *Coggle v. Snow*, 56 Wn. App. 499, 507 (1990) demonstrates the lack of merit its CR 56(f) motion had. In *Coggle*, unlike in this case, the plaintiff could not obtain an expert declaration to rebut defendant's expert in a timely fashion because plaintiff's counsel had withdrawn and a new attorney appeared for plaintiff just days before the response brief was due. *Id.* at 502-503. On reconsideration, the trial court either failed to consider the newly submitted expert declaration, or considered it but ruled it did not create a genuine issue of material fact. *Id.* at 508-509. By

⁸ Certainly should there exist evidence to the contrary REI, as the entity who inspected and repaired the bike after the September 13, 2006 accident, would be best situated to discovery and produce the same.

contrast, in this case, REI's expert conducted testing on the Fork and had the benefit of Ms. Johnson's and Dr. Zamiski's testimony. He had every opportunity to perform tests on exemplar forks – something entirely in REI's control – but chose not to do so.

REI failed to state specifically what evidence would be obtained in additional discovery and how that evidence would create a genuine issue of material fact. Judge Gonzalez did not abuse his discretion by denying REI's CR 56(f) motion. Absent any evidence from REI that could have possibly created a genuine issue of material fact for trial, Judge Gonzalez properly granted Ms. Johnson's motion for partial summary judgment.

D. Bifurcation Of REI's Third-Party Claims is Appropriate.⁹

A trial court's decision on bifurcation is reviewed for an abuse of discretion. *Myers v. Boeing*, 115 Wn.2d 123, 140 (1990). CR 42(b) defines the Court's authority to order separate trials on any issue:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of

⁹ By virtue of this interlocutory appeal, the issue of trying to hold onto the September 20, 2010 trial date has been rendered moot. Subsequent to the appeal being filed, REI has filed a third party complaint against Aprebic and Ms. Johnson has filed an amended complaint against Aprebic. Aprebic has now appeared through counsel. However, the issue of bifurcation has not been rendered moot. Once this appeal is completed and the case remanded, the trial court will establish a new case schedule. Depending on the outcome of this appeal, Ms. Johnson may or may not have to proceed against Aprebic directly. The trial court may well set up separate case schedules for Ms. Johnson's claims against REI – when the only issue left is proof of damages – from the claims against Aprebic.

any separate issue or of any number of claims, cross-claims, counterclaims, third party claims, or issues, always preserving inviolate the right of trial by jury.

Unless a party is prejudiced, a court's decision to bifurcate a trial is not an abuse of discretion. *Slippern v. Briggs*, 66 Wn.2d 1, 3 (1964).

The trial court acted within its discretion by allowing REI to sue Aprebic as a third-party and ordering separate trials under CR 20(b). CR 20(b) provides that the “court may make such orders as will prevent a party from being... delayed, or put to expense by the inclusion of a party against whom [s]he asserts no claim...and may order separate trials or make other orders to prevent delay or prejudice.” Judge Gonzalez ordered separate trials under CR 20(b) “to prevent delay and prejudice to plaintiff.” (CP 198.)¹⁰

Presumably, REI will have a right to indemnity under its contracts with Aprebic. By branding the defective Fork as its own, REI took ownership of the Fork as if it were the manufacturer. Ms. Johnson should not bear the burdens of delay and excessive discovery that will necessarily flow from REI’s third-party complaint against Aprebic.

The statute of limitations for breach of a written contract is six years. RCW 4.16.040. Claims under the Uniform Commercial Code

¹⁰ For these same reasons, this Court has granted Ms. Johnson’s motion for accelerated review. The effects of her head injury from this accident impact her every day. She remains on a reduced work schedule with real economic consequence.

(RCW 62A) are subject to a four-year statute of limitations. RCW 62A.2-725. A claim for contribution can be brought up to one year following a judgment, or other arrangement (i.e. settlement), for which contribution may be available. RCW 4.22.050(3).

Ms. Johnson should not be unfairly prejudiced and delayed by REI's efforts to seek reimbursement from Aprebic.

IV. CONCLUSION

REI portrays a dire scenario in which it will fall victim to a statutory scheme that denies it purported rights to which it believes it is entitled. However, the legal reality is different. The laws, which favor plaintiffs in product liability claims, do not preclude REI from asserting its rights against Fairly and/or Aprebic in this lawsuit, or by separate action. The scheme merely allows Ms. Johnson, as plaintiff, to pursue her product liability claim against only REI because it has adopted the product at issue as its own, and therefore accepted the liability of the manufacturer.

The undisputed facts conclusively established that the Fork suffered from a manufacturing defect that could *only* have occurred during the manufacturing process. That defect proximately caused the November 19, 2007 catastrophic failure and resulting accident at issue in this lawsuit. To allow REI to apportion fault to Aprebic – the very manufacturer whose liability it assumes by virtue of having elected to brand the fork as its own-

-would completely undermine the legislative intent of RCW 7.72.040(2) and render it useless.

The trial court never limited REI to only suing Aprebic under a contribution claim. REI is free to assert whatever viable claims it may have against that entity.

By confirming the court's decisions below, this Court will give effect to both the Product Liability Act and the comparative fault statutes as the Legislature and the courts have intended.

Respectfully submitted this 27th day of October, 2010.

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