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No. 97223-1

SUPREME COURT
OF THE STATE OF WASHINGTON

SUSAN SWARTWOOD, individually, CRYSTAL
GROTH, individually; and CRYSTAL GROTH as the
Legal Guardian of M.G.S., minor child,

Plaintiffs,

v.

FUN-TASTIC SHOWS, INC., an Oregon Corporation, HIGH-LITE
RIDES, INC., a South Carolina corporation,

Defendants.

PLAINTIFFS' OPENING BRIEF

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A. INTRODUCTION

This matter is presented on Certified Question from the Honorable Judge Settle of the United States District Court of the Western District of Washington relating to the Washington Product Liability Act, RCW 7.72 (“WPLA”). The Plaintiffs, Susan “Shawn” Swartwood, her spouse, Crystal Groth, along with their minor son, M.G.S. (“Swartwood-Groth Family”), were ejected from a Ferris wheel¹ at the Rhododendron Festival on May 18, 2017 suffering injuries.

Plaintiffs brought a personal injury action alleging products liability, premise liability and negligence-based theories against Defendant Fun-Tastic Shows, Inc., (“Fun-Tastic”) and a products liability claim against High-Lite Rides, Inc., (“High-Lite”). At trial, the Swartwood-Groth Family will prove WPLA “manufacturer” liability against Fun-Tastic for its role in the design, fabrication and construction of component parts, as well as the entire Ferris wheel, as if it was an original manufacturer. The Plaintiffs equally will prove Fun-Tastic is a product “seller” pursuant to the WPLA.

¹ The terms “Ferris wheel” and “Phoenix wheel” are used interchangeably and reference the same amusement park ride.

At the close of discovery, Fun-Tastic submitted a motion for summary judgment solely on the issue of its status as it relates to the WPLA. Fun-Tastic argued it merely provided a service by turning on the Ferris wheel.

However, the record before the Honorable Judge Settle and this Court demonstrates Fun-Tastic did not just “turn on” an amusement park ride but took affirmative actions to manufacture and sell a dangerous product and its components, which in turn harmed the Plaintiffs.

When requesting additional briefing, the Honorable Judge Settle indicated, “**...Plaintiffs have likely established a sufficient question of material fact on at least one of the four paths to liability under the WPLA to preclude summary judgment,**” but there was a “**lack of clarity...as to whether a product was for sale in this case and whether the seller manufactured or remanufactured that product...**”.

It is within that context that the Honorable Judge Settle submitted three questions for this Court. The Plaintiffs request this Court answer in the affirmative all three Certified Questions.

B. CERTIFIED QUESTIONS AND ANSWERS

1. Can a sale for the temporary use of a product such as an amusement ride constitute the sale of a product such that the product’s owner would be subject to liability under the WPLA?

2. Can the owner of an amusement ride be found to have manufactured or remanufactured the ride under the WPLA when it disassembles and reassembles, constructs, overhauls, and/or changes the ride before it is put into commerce?

3. Does the objective reliance test articulated in *Rublee v. Carrier Corp.*, 192 Wn.2d 190, 210–11 (2018) encompass all of the factors a court should consider to decide whether an entity holds itself out as a manufacturer under RCW 7.72.010(1), or may additional factors such as those articulated in *Cadwell Indus., Inc. v. Chenbro Am., Inc.*, 119 F.Supp.2d 1110, 1114–15 (E.D. Wash. Sept. 1, 2000) also be relevant?

The answer to all three Certified Questions is YES.

C. STATEMENT OF THE CASE

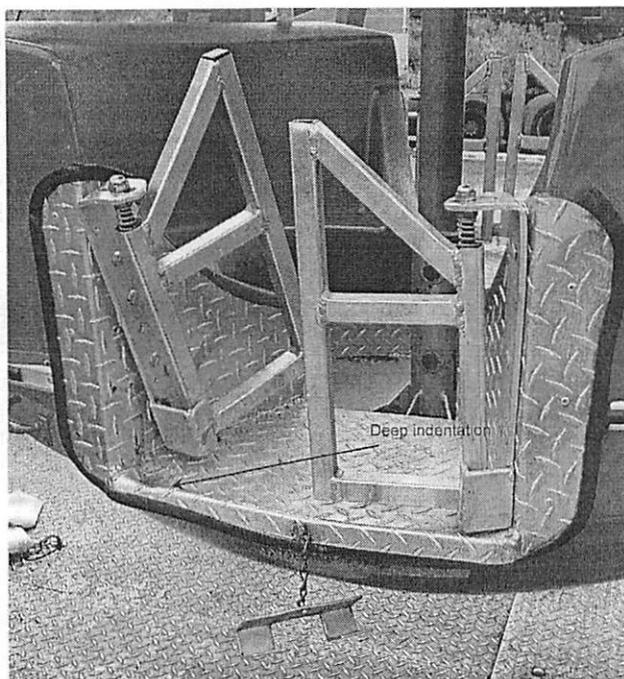
The Swartwood-Groth Family attended the Rhododendron Festival on May 18, 2017. (Dkt. 37-1 at 11) They made their way to the Ferris wheel and boarded. Unbeknownst to the Plaintiffs, the Ferris wheel typically requires six (6) employees to operate. (*Id.* at 9). When the Plaintiffs arrived, there were only two (2) Fun-Tastic employees. (Dkt. 15 at 3-4.) There was one (1) individual stationed at the controls and one (1) employee to scan tickets, allow customers to exit and board passengers. (*Id.*)

The Ferris wheel at issue, the Phoenix Wheel, was originally manufactured by High-Lite in 2006 but purchased by Fun-Tastic in 2014.

(Dkt. 37 at 9.). It consists of sixteen (16) gondolas, stands sixty-five (65) feet tall and sixty-five (65) feet long. (*Id.* at 9). It is completely disassembled, transported via trailer and then reassembled at each fair or festival (*Id.* at 9, 11).

The gondolas have aluminum doors that are designed to open inward towards the passengers. (*Id.* at 9.) At the time of the incident there were “metallic clips” attached via chain to the exterior of the gondola that were intended to be placed on the doors keeping them from opening. (Dkt. 40 at 3-6.). The “metallic clips” were not a part of the original design or placed on the gondola with consent of High-Lite and Plaintiffs’ expert opined that one of the causes of this incident were in fact the, “metal clips used at the bottom of the door...”. (*Id.*)

Ms. Swartwood sat on one side of the gondola while Ms. Groth and M.G.S. sat on the other (Dkt. 37-1 at 18). The sole employee helping people onto the ride did ensure the entry door was closed and the “metallic clip” attached. (*Id.*) However, the employee did not walk around to the exit side of the gondola and did not ensure the “metallic clip” was attached. (*Id.*) Ms. Groth testified the exit doors looked like a “soft V”, facing outward toward the structure of the ride. (*Id.*) Below is a picture of the gondola door and “metallic clip” following the incident:



(Dkt. 40 at 3.)

After the Plaintiffs boarded the Ferris wheel, it rotated counter-clockwise to approximately the ten (10) o'clock position, at which time the Plaintiffs felt as if the gondola was "stuck on something" and noticed the exit gondola doors (those not inspected) were "jammed". (Dkt. 37 at 18.) The base of the gondola was stuck and the top rotated until the Plaintiffs were ejected onto the ride's platform. (*Id.*) Ms. Swartwood was unresponsive and taken via helicopter to Harborview Medical Center. (*Id.*) Ms. Groth and M.G.S. were transported locally for medical attention. (*Id.*)

At purchase, Fun-Tastic admits to receiving the product manual, which required a "10 Year Overhaul". (Dkt. 41 at 4.) The "overhaul" was

“industry standard” and to be overseen by the original manufacturer, High-Lite. (Dkt. 42 at 2-3). A third-party could supervise the “overhaul” but only if High-Lite had provided a checklist for the inspection and approved of such. (*Id.*)

Fun-Tastic opted not to perform a “10 Year Overhaul” with High-Lite or a third party designated by High-Lite, choosing instead to perform the work itself. (Dkt. 41 at 6.) The CEO of Fun-Tastic testified it was “...easier and cheaper...” to do the work themselves. (*Id.*) In contrast, High-Lite Rides’ CEO testified that had Fun-Tastic performed the “overhaul” properly, the “metallic clips” would have been removed. (Dkt. 42 at 2-3.)

D. ARGUMENT

1. Certified Questions Law

A certified question from a federal court is a question of law reviewed de novo. *Brady v. Autozone Stores, Inc.*, 188 Wash.2d 576, 580, 397 P.3d 120 (2017). Certified Questions are not considered in the abstract but instead considered in light of the certified record from the Federal Court. *Carlsen v. Glob. Client Sols., LLC*, 171 Wash.2d 486, 493, 256 P.3d 321 (2011); *see also* RCW 2.60.030(2).

2. Background of WPLA

The Legislature enacted the WPLA in 1981 after considerable controversy over that issue and other proposed tort law reforms. Philip A.

Talmadge, *Washington's Product Liability Act*, 5 U. Puget Sd. L. Rev. 1, 1-2 (1981) ("Talmadge"). The WPLA was based on the United States Commerce Department's Model Uniform Product Liability Act. *Id.* The WPLA was enacted after extended hearings of a Senate Select Committee on the issue. *Id.* at 2-6.

The WPLA distinguishes between and imposes different standards of liability on manufacturers and product sellers for harm caused by defective products. *See* RCW 7.72.030, RCW 7.72.040, *see also Id.* As a general rule, manufacturers of defective products are held to a higher standard of liability, including strict liability where injury is caused by a manufacturing defect or a breach of warranty. RCW 7.72.030(2), *see also, Id.*

3. Certified Question No. 1

Can a sale for the temporary use of a product, such as an amusement ride, constitute the sale of a product such that the product's owner would be subject to liability under the WPLA? **Yes.**

i. Fun-Tastic is a "Manufacturer" and Thus A "Seller" of a Product

RCW 7.72.010(1) defines a product seller as:

Any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also

includes a party who is in the business of leasing or bailing such products.

The WPLA defines a product manufacturer as:

A product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. The term also includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

RCW 7.72.010(2).

The Act specifically contemplates that a product seller may be a product manufacturer if it “remanufactures” the product.

A product seller acting primarily as a wholesaler, distributor or retailer of a product may be a “manufacturer” but only to the extent that it designs, produces, makes, fabricates, constructs, or *remanufactures* the product for its sale. A product seller who performs minor assembly of a product in accordance with the instructions or the manufacturer shall not be deemed a manufacturer.

Id. (emphasis added).

In *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1993), this Court made it clear that whether an entity was a product manufacturer under RCW 7.72.010(2) is a *question of fact*. *Id.* at 257-63. There, a contractor hired to make, fabricate, and construct a pipeline system

was held to be a manufacturer because it sold the pipeline system and completed the product. *Id.* at 262-63.²³

Here, Fun-Tastic is a “seller” of a product. Plaintiffs paid to ride the Ferris wheel in question and Fun-Tastic was the entity that “remanufactured”, “constructed”, “made”, “refabricated” the ride. It adopted, by choice and to save money, the role of the manufacturer when it permitted the dangerous “metallic clips” to stay fastened to the exterior of the gondola, which ultimately became entrapped, flipping the gondola at issue and causing injuries.

Fun-Tastic was also the entity that constructed, assembled, moved, disassembled and made the ride at each fair or festival.

Fun-Tastic’s anticipated argument regarding “leasing” is misplaced. Fun-Tastic argued that “leasing is not selling” within the WPLA. This is incorrect. RCW 7.72.010(1) is clear on its face in the definition of a “seller”, that being to “include[] a party who is in the business of leasing or bailing such products.”

² Manufacturers of component parts that cause harm have the status of manufacturers under the WPLA. *Parkins v. Van Doren Sales, Inc.*, 45 Wn. App. 19, 724 P.2d 389 (1986).

³ As persuasive authority the Plaintiffs submitted the trial Court, *Britton v. Dallas Airmotive, Inc.*, 2010 WL 797177, which discussed as similar application of facts to a strict liability statute.

Fun-Tastic is a product seller and this Court should answer Certified Question No. 1 in the Affirmative.

4. Certified Question No. 2

Can the owner of an amusement ride be found to have manufactured or remanufactured the ride under the WPLA when it disassembles and reassembles, constructs, overhauls, and/or changes the ride before it is put into commerce? **Yes.**

i. Fun-Tastic Is Liable As A “Manufacturer” For Its Role In Designing and Construction of the Ferris Wheel

The record before the Court demonstrates Fun-Tastic is a “manufacturer” of a product, that being the Ferris wheel, and is a “manufacturer” because it “disassembles” “reassembles”, “constructs”, “overhauls” and “changes” the ride before it was put into commerce and injured the Plaintiffs.

Regarding design defects, RCW 7.72.030(1) states a product manufacturer is liable if the claimant’s harm was caused by the manufacturer in that the product was not reasonably safe as designed. A party who seeks to establish a defective design claim may do so in one or two ways. A plaintiff may attempt to establish liability by showing that, at the time of manufacture, the likelihood that the product would cause plaintiff’s harm, or similar harms, and the seriousness of those harms,

outweighs the manufacturer's burden to design a product that would have prevented those harms and any adverse effect a practical, feasible alternative would have on the product's usefulness. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 326, 971 P.2d 500 (1999). This is labeled by our courts as the "risk-utility test."

As an alternative to the "risk-utility" test, a plaintiff may independently establish a WPLA design defect case under the "consumer expectations" test, which requires the plaintiff to show the product was "unsafe to an extent beyond that which would be contemplated by the ordinary consumer." *Falk v. Keene Corp.*, 113 Wn.2d 645, 654, 782 P.2d 974 (1984).¹¹ The applicability of consumer expectations test to design defects cases was reaffirmed by our Supreme Court in *Ayers v. Johnson & Johnson*, 117 Wn.2d 747 at 765-66 (1991), and *Soproni*, 137 Wn.2d at 327.

With regard to the design theories, there are multiple "relevant products" at issue. First, there is the "metallic clips" that Fun-Tastic permitted to remain during the "10 Year Overhaul" process and chose not to remove.

Second, the gondola itself was of negligent design as described by Plaintiffs' expert Alan Black. The entire gondola, which was assembled, reassembled, constructed, fabricated and overhauled can also be considered a "relevant product" here.

Finally, the “relevant product” could also be the entire Ferris wheel because it was entirely constructed, overhauled and fabricated by Fun-Tastic. Each of these theories with the facts presented and inferences given on summary judgment produce triable issues for a jury to decide.

Plaintiffs submitted material issues of fact on the issue of whether the jury must resolve design liability pursuant to RCW 7.72.030(1) as against Fun-Tastic. When Fun-Tastic “overhauled” in-house, versus going through High-Lite for cost saving purposes, it adopted the “metallic clip” as part of its design and operation of the Ferris wheel. The Plaintiffs at trial will show that at the time of manufacture (10 year overhaul), the likelihood that the product would cause plaintiff’s harm, or similar harms, and the seriousness of those harms, outweighs the manufacturer’s burden (none) to design a product that would have prevent those harms and any adverse effect a practical, feasible alternative (not having the clip as it was originally designed) would have on the product’s usefulness.⁴

A jury equally could find Fun-Tastic liable because it constructed the Ferris wheel on a regular and ongoing basis. Plaintiffs will prove, consistent with RCW 7.72.030(2), “[Their] harm was proximately caused by the fact that the product was not reasonably safe in construction” because

⁴ Any argument that the doors were not staying shut without the “metallic clips” only further supports (1) that the original manufacturer should have been brought in or (2) there was negligent maintenance and upkeep on the Ferris wheel.

it, “deviated in some way (metallic clips) from the design specifications or performance standards of the manufacturer...”. RCW 7.72.030(2). The Ferris wheel had to be completely disassembled at each event, placed on a trailer and then driven to the next location where it was reassembled and then operated. Each and every time it constructed the Ferris wheel, it did so inconsistent with the WPLA and is liable. This is in addition to the fact that it was constructed in a materially improper way.

Any argument that Fun-Tastic just merely “turns on” a ride that was manufactured by someone else ignores the record. It was not as if this was an arcade game merely wheeled on and off a truck at each show. Fun-Tastic completely assembled, disassembled, made, constructed and remanufactured this ride continually and most importantly, in an unsafe way.

5. Certified Question No. 3

Does the objective reliance test articulated in *Rublee v. Carrier Corp.*, 192 Wn.2d 190, 210–11 (2018) encompass all of the factors a court should consider to decide whether an entity holds itself out as a manufacturer under RCW 7.72.010(1), or may additional factors such as those articulated in *Cadwell Indus., Inc. v. Chenbro Am., Inc.*, 119 F.Supp.2d 1110, 1114–15 (E.D. Wash. Sept. 1, 2000) also be relevant? **Yes.**

i. *Rublee Factors Are Not Exclusive Factors When Considering Whether an Entity Holds Itself Out as a Manufacturer*

In the abstract, this Certified Question should be answered in the affirmative but; however, this Court need not necessarily answer given the record. Here, Fun-Tastic was a “product seller” and “product manufacturer” under the statute, discussed above. The Swartwood-Groth Family will provide a further analysis on this Certified Question as presented but, given the facts, this Court may only be answering the question to provide “broad statements” outside the narrow question and certified record. See *Ruiz-Guzman v. Anvac Chem. Corp.*, 141 Wn.2d 493, 508, 7 P.3d 795 (2000).

This Court should not restrict to the specific factors in *Rublee v. Carrier Corporation*, 192 Wash.2d 190, 428 P.3d 1207 (2018) as to when an entity holds itself out as a manufacturer because that specific case is a discussion as to facts predating the WPLA and not congruent with the evolution of this area of the law. In *Rublee*, a surviving spouse brought a claim following the death of her husband from mesothelioma from exposure to asbestos at the Puget Sound Naval Shipyard between 1966 and 1980. *Rublee v. Carrier Corporation*, 192 Wash.2d 190, 195-96, 428 P.3d 1207 (2018). This Court opined that “[a]t the center of this case is the so-called

“apparent manufacturer” doctrine, derived from § 400 of Restatement (second).” *Id.* at 200. This is because it was a “pre-WPLA product liability claim”. *Id.* at 198.

Here, the evidence shows that the product was “remanufactured” potentially as late as 2016 as Fun-Tastic performed the “10 Year Overhaul” in house to save money. It was “constructed” just days or hours before the Swartwood-Groth family was injured. This Court need not limit the scope of whether an entity holds itself out as a manufacturer based upon *Rublee* as it dealt with pre-WPLA unless it intends to clear.

In answering this Certified Question this Court should look at WPLA matters as well as other jurisdiction to guide trial courts when determining whether an entity “holds itself out as a manufacturer”. The Honorable Judge Settle asked whether the five (5) factors in *Cadwell Indus., Inc. v. Chenbro Am., Inc.*, 119 F.Supp.2d 1110, 1114–15 (E.D. Wash. Sept. 1, 2000), too, should be considered. The answer is yes; however, when viewing this particular record, there is no dispute that Fun-Tastic did in fact manufacture the relevant product by performing the “10 Year Overhaul”, disassembly, reassembly and regular construction the Ferris wheel. In *Cadwell*, it appeared from the record that defendant Chenbro “does not [do] actual manufacturing” but according to the plaintiffs “*has held and does hold itself out*” as the manufacturer of the relevant computer chassis.

Cadwell Indus., Inc. v. Chenbro Am., Inc., 119 F.Supp.2d 1110, 1114–15 (E.D. Wash. Sept. 1, 2000) (emphasis in original).

Again, there are multiple distinct reasons that Fun-Tastic is a manufacturer. Fun-Tastic admits to not having the “10 Year Overhaul” overseen by High-Lite or a third party, which would have, at a minimum, removed the dangerous “metallic clips”. Thus it “remanufactured” the ride at issue.

Further, Fun-Tastic has to completely disassemble, reassembled, make and construct the ride at issue at each location. This product may be unique that the ultimate purchaser of the ride is also a manufacturer by the very nature of the product but that is precisely what the records supports. A similar argument could be made as against a company that sells large high-rise cranes to a business for their use. That business would have to completely disassemble, reassemble, make and construct the crane at each place it was used.

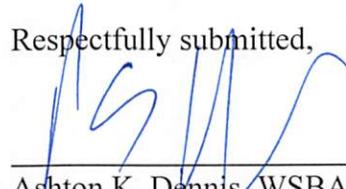
To the extent that this Court wishes to answer this Certified Question No. 3, the answer should be yes.

E. CONCLUSION

Fun-Tastic is both a product manufacturer and product seller based on the record and reading of the WPLA. This Court should answer all three Certified Questions in the affirmative and award costs to the Plaintiffs.

DATED this 23rd day of May, 2019.

Respectfully submitted,



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CERTIFICATE OF SERVICE

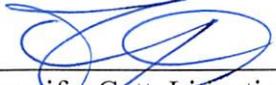
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I, Jennifer Cott, employee of Washington Law Center, certify that on this day I caused to be served Plaintiff's Opening Brief on the following parties of record and/or interested parties in the manner identified as follows:

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