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STATE OF WASHINGTON
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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' REPLY BRIEF

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A. STATEMENT OF THE CASE ON REPLY

Defendant / Respondent Fun-Tastic Shows, Inc., (“Fun-Tastic”) continues to over-simplify its acts and omissions relating to the Ferris wheel at issue. The following will correct such errors and inaccuracies.

First, as to Certified Question Number One, Fun-Tastic frames the issue as whether an operator of a Ferris wheel is selling a product within the meaning of the Washington Products Liability Act (“WPLA”). (Response Brief at 1 ¶ 1). There is ample evidence proving Fun-Tastic manufactured, remanufactured, assembled and constructed the Ferris wheel each and every time the ride was moved and did so inappropriately. (Dkt. 42). This is not just a “negligent operation” case.

Second, Fun-Tastic doubles down by suggesting it operated the ride consistent with the “design specifications”. (Response Brief at 1 ¶ 2 and pg. 3-4). Such assertion is misleading, at best. The original manufacturer, CEO Michael Howard of High-Lite, testified he did *not* “build, supply or approve of the construction” of the “metallic clips”, which are one of the offending products at issue.

(Dkt. 42 at 2). Fun-Tastic asserts it constructed the ride consistent with the “design specifications” of a third party it purchased the ride from, and this too is *false*. The owner’s manual supplied to Fun-Tastic indicates contrary construction and the “Ten Year Over-Haul” process and never permits the “metallic clips” to be installed. (Dkt. 42).

Third, Fun-Tastic suggests it never “altered or modified” the Ferris wheel. (Response Brief at 3 ¶ 2). Yet, the CEO of Fun-Tastic, Ronald Burbach, testified he chose to perform the “Ten Year Over-Haul” in-house as a cost-saving measure instead of having the original manufacturer, as mandated by the operator’s manual, perform this function. (Dkt. 41-1 at 5, Dkt. 42). Sufficient material facts demonstrate this tragic incident would have been prevented had Fun-Tastic not constructed, assembled, disassembled, fabricated and/or “over-hauled” the product in such an inappropriate way.

B. REPLY ARGUMENT

1. Fun-Tastic Is a Product Seller

Fun-Tastic seems to misunderstand the theory of liability as it relates to the WPLA or is simply ignoring it.

Fun-Tastic argues it sold “the use or consumption of a product [ride], without selling the product itself”, and thus is not a “Product Seller” as defined in the WPLA.

First, this reading of the definition blindly skips over the second sentence of the definition of a “Product Seller” in RCW 7.72.010(1) which states, “[t]he term [Product Seller] includes a manufacturer.... of the relevant product”.

Fun-Tastic purchased a Ferris wheel – which is a product by any definition of the word.

As a separate and distinct matter, Fun-Tastic itself then assembled, disassembled, constructed and “over-hauled” that product *inconsistent* with the original manufacturer’s express direction and design specifications. It did so for cost-saving purposes.

Fun-Tastic, in its “over-haul” of the Ferris wheel, also permitted the offending “metallic clips” to stay on the ride, which in turn were a cause of the catastrophic event at issue. These “metallic clips” are in fact “Products” within the definition of the WPLA. *See* RCW 7.72.010(3).

In this case, and not in some hypothetical world as proposed by Fun-Tastic, the record clearly reflects that on

May 18, 2017, the Plaintiffs paid to ride on or “use” the Ferris wheel that Fun-Tastic assembled, disassembled, constructed and “over-hauled” inconsistent with the express direction of the original manufacturer. Without question, Fun-Tastic is a Product Seller within the meaning of RCW 7.72.010(1).

This Court should not be swayed by the suggestion that by agreeing there is a jury question on liability for Fun-Tastic pursuant to the WPLA, that every operator, such as Sound Transit, is a “Product Seller” for every collision on the road. Such example is misplaced as discussed *infra*. Accordingly, Certified Question Number One must be yes.

2. Fun-Tastic Was Not Leasing To the Plaintiffs

Fun-Tastic posits an argument that it is not in the “business of leasing” and instead is providing a “license” thus could not be placed within the definition of a “Product Seller”. Fun-Tastic relies upon *Finnesey v. Seattle Baseball Club*, 122 Wn. 276, 281, 210 P. 679 (1922) for support.

First, *Finnesey* pre-dates the WPLA and is actually much more of a discussion on Washington’s then discrimination laws versus a products liability action. *See*

generally, *Id.* In *Finnesey*, the plaintiff purchased a ticket to enter a baseball game and was forced to leave because previously he “gave money to players” and then bet on games. *Id.* at 279-80. Plaintiff went on to argue baseball parks were required to follow the common-carrier doctrine (in its 1922 form) with regard to permitting and allowing the public to attend. *Id.* at 280-281. In the 1922 opinion, this Court then found that admission to a baseball game was a license and revocable at will and the Club’s action proper. *Id.* at 282. Fun-Tastic now argues that it provided a license to the Plaintiffs to ride the Ferris wheel and not in the “business of” leasing, therefore not subject to WPLA liability.

Finnesey is not congruent with the facts before this Court. The instant matter deals with the Plaintiffs using the Defendant’s product after paying to do so. At no time did Fun-Tastic ask the Plaintiffs to leave nor is there any claim of discrimination as there was in *Finnesey*.

More importantly, the Plaintiffs are not suggesting they leased a product in this matter, and most importantly, not arguing that Fun-Tastic is in the “business of” leasing.

The Plaintiffs purchased a ride on the Ferris wheel that was manufactured, constructed and “over-hauled” by Fun-Tastic. Any argument regarding leasing is misguided with the present facts.

3. Fun-Tastic Manufactured the Ferris Wheel

Defendant’s own admission supports the contention that Fun-Tastic is a “manufacturer” within the meaning of RCW 7.72.010(2) when describing the construction of the ride. *See* Response Brief at 13.

Also of utmost importance, the record before this Court does not support the contention Fun-Tastic assembled the product “...in accordance with the design specifications of another seller...” *See* Respondent’s Brief at 12. Here, the original manufacturer has provided sworn testimony that Fun-Tastic did in fact construct the Ferris wheel *inconsistent with the design specifications* each and every time it was operated and did so, according to Fun-Tastic, to save money. Consequently, the answer to Certified Question Number Two must be yes.

4. Fun-Tastic is Not a Mere Purchaser

Fun-Tastic errs in suggesting Plaintiffs are pursuing a novel “design adoption” comparable to RCW 7.72.040(2) and it is a mere purchaser of a product. Such assertion is incorrect. Fun-Tastic is the original manufacturer when it completely performed the “Ten Year Over-Haul” inconsistent with the express directions of the original manufacturer. Fun-Tastic’s reliance on *Johnson v. Recreational Equipment, Inc.*, 159 Wash. App. 939, 247 P.3d 15 (2011), is inapplicable.

In *Johnson*, the plaintiff purchased a bike from Recreational Equipment, Inc. (“REI”), which was constructed, fabricated and manufactured by a third party but then marketed under REI’s brand name. *Id.* at 944. The issue before the Court dealt strictly with RCW 7.72.040(2) and vicarious liability. These facts are not analogous.

Compared to REI, Fun-Tastic *did* construct, assemble and disassemble the product at issue and did so on a regular basis. Fun-Tastic did so contrary to the specific original manufacturer’s design specifications. Fun-Tastic could have had the original manufacturer perform the “Ten

Year Over-Haul” which would have eliminated an injury-causing product but did not do so. The answer to Certified Question Number Two must be yes.

5. Fun-Tastic Does Not Understand What Products Are at Issue

With regard to Certified Question Number Three, it appears Fun-Tastic does not understand its role in this action and what products are at issue. A jury must decide, due to disputed material facts, whether Fun-Tastic is a “manufacturer” of the relevant products in this case. A jury will determine that Fun-Tastic ultimately “manufactured” the ride, which is a separate and distinct function than operating the ride. A jury equally could find that the relevant product was the “metallic clip” that Fun-Tastic did not remove during the “Ten-Year Overhaul” process. Again, this is separate and distinct from the operation of the ride.

Each and every case is unique and Plaintiffs request that the factors in *Cadwell Indus., Inc., v. Chenbro Am., Inc.*, 119 F.Supp.2d 11110, 1114-15 (E.D. Wash. Sept. 1, 2000) when determining whether an entity, like Fun-Tastic, holds itself out as a manufacturer.

6. Fun-Tastic is Not Sound Transit or Alaska Airlines

Fun-Tastic repeatedly submits rhetorical questions to this Court suggesting there would be an “absurd” result if the Court were to answer yes to the Certified Questions. It argues that all service providers, such as Sound Transit, Delta Airlines and Alaska Airlines would now be subjected to WPLA liability merely because they “sold tickets” to customers. *See* Respondent’s Brief at 8 and 11. This is not the Plaintiffs’ position nor is it consistent with the facts of this particular case.

RCW 7.72.010(4) states a “Product liability claim” includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product...” Here, the facts of this case more than support the finding that Fun-Tastic did far more than merely “sell tickets” and did in fact construct, manufacture, assemble, test and “over-haul” the relevant product at issue. In some cases, the construction was done

on a weekly basis. Fun-Tastic misses this key link from its analysis.

But for arguments sake, yes, if Alaska Airlines or Sound Transit completely disassembled, re-assembled, fabricated, “over-hauled”, constructed or permitted unsafe components to remain on a particular vehicle or plane, there would be liability pursuant to the WPLA.

Plaintiffs have indeed brought claims for the negligent operation of the Ferris wheel, just like one would if a bus driver caused a collision or a pilot erred in the operation of a plane, but also have sufficient facts for the jury to determine, whether in its actions, it too is subject to WPLA liability.

C. CONCLUSION

The matter before the Court is straight forward. Fun-Tastic manufactured a product then sold the Plaintiffs the ability to use that product and were injured. It is respectfully requested that each Certified Question be answered in the affirmative.

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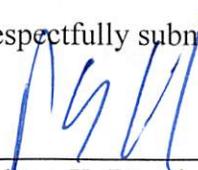
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DATED this 19th day of June, 2019.

Respectfully submitted,



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

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