

FILED
SUPREME COURT
STATE OF WASHINGTON
6/13/2019 3:50 PM
BY SUSAN L. CARLSON
CLERK

NO. 97223-1

SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA, WA
IN

SUSAN SWARTWOOD, individually,
CRYSTAL GROTH, individually; and
CRYSTAL GROTH as 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.

BRIEF OF RESPONDENT FUN-TASTIC SHOWS, INC. ON
CERTIFIED QUESTIONS

Patricia K. Buchanan, WSBA No. 19892
Tim T. Parker, WSBA No. 43674
Nicholas A. Carlson, WSBA No. 48311
Of Attorneys for Defendant

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.
2112 Third Avenue, Suite 500
Seattle, WA 98121
Tel. 206.462.6700

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. INTRODUCTION.....	1
II. CERTIFIED QUESTIONS.....	2
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT.....	5
A. The standard of review is <i>de novo</i>.	5
B. QUESTION 1: Selling the temporary use of a product is not selling the product under the WPLA	6
1. Leasing—selling the temporary use of a product— is not “selling” a product under the WPLA	8
2. If selling the temporary use of a product is “selling” the product under the WPLA, a host of industries will now be exposed to product liability.....	11
C. QUESTION 2: An owner of an amusement ride does not “manufacture” the ride when it assembles and disassembles the ride according to design specifications or when it performs maintenance to keep the ride in its as purchased condition.....	12
1. Fun-Tastic assembled and disassembled the Wheel according to design specifications	13
2. Fun-Tastic performed routine maintenance to keep the Wheel in its as purchased condition	14
3. Fun-Tastic did not “adopt” the design of the metal clips	15

D.	QUESTION 3: An entity cannot hold itself out as a manufacturer if no products are sold	16
	1. The additional factors mentioned by the trial court should be rejected as inappropriate	18
	2. If selling the temporary use of a product is “selling” the product under the WPLA, owner-operators will be deemed manufacturers for marketing their businesses	20
V.	CONCLUSION	23

TABLE OF AUTHORITIES

Washington Cases

Almquist v. Finley Sch. Dist. No. 53, 114 Wn. App. 395, 57 P.3d 1191
(2002)..... 12

Bostwick v. Ballard Marine, Inc., 127 Wn. App. 762, 112 P.3d 571 (2005)
..... 8

Buttelo v. S.A. Woods-Yates Am. Mach. Co., Inc., 72 Wn. App. 397, 864
P.2d 948 (1993)..... 8

Carlsen v. Global Client Solutions, LLC, 171 Wn.2d 486, 256 P.3d 321
(2011)..... 5

Christensen v. Ellsworth, 162 Wn.2d 365, 173 P.3d 228 (2007) 6

City of Seattle v. Winebrenner, 167 Wn.2d 451, 219 P.3d 686 (2009)..... 6

Conaway v. Time Oil Co., 34 Wn.2d 884, 210 P.2d 1012 (1949) 10

Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 43 P.3d 4
(2002)..... 5

Finnesey v. Seattle Baseball Club, 122 Wn. 276, 210 P. 679 (1922)..... 10

Jametsky v. Olsen, 179 Wn.2d 756, 317 P.3d 1003 (2014) 5, 6

Johnson v. Recreational Equipment, Inc., 159 Wn. App. 939, 247 P.3d 18
(2011)..... 9, 16, 21, 22

Macias v. Saberhagen Holdings, Inc., 175 Wn.2d 402, 282 P.3d 1069
(2012)..... 7

Perez-Farias v. Global Horizons, Inc., 175 Wn.2d 518, 286 P.3d 46
(2012)..... 6

Ruble v. Carrier Corp., 192 Wn.2d 190 (2018)..... 2, 16, 17, 18, 19, 20

Simonetta v. Viad Corp., 165 Wn.2d 341, 197 P.3d 127 (2008) 7

Spokane Cty. v. Dep't of Fish & Wildlife, 192 Wn.2d 453, 430 P.3d 655
(2018)..... 11, 14, 16, 19, 22

<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003)	11, 14, 16, 19, 22
<i>Wagner v. Beech Aircraft Corp.</i> , 37 Wn. App. 203, 680 P.2d 425 (1984)	15, 19
<i>Weyerhaeuser Co. v. Tri</i> , 117 Wn.2d 128, 814 P.2d 629 (1991).....	10
<i>Whatcom County v. City of Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	9
<i>Wright v. Lyft, Inc.</i> , 189 Wn.2d 718, 406 P.3d 1149 (2017).....	20

Federal Case

<i>Cadwell Indus., Inc. v. Chenbro Am., Inc.</i> , 119 F.Supp.2d 1110 (E.D. Wash. 2000).....	2, 18
---	-------

Statutes

Product Liability Act, Laws of 1981, ch. 27, § 1.....	22
RCW 2.60.010(5).....	5
RCW 2.60.030(2).....	5
RCW 67.42	21
RCW 67.42.020	21
RCW 7.72.010	9, 19, 21, 23
RCW 7.72.010(1).....	2, 6, 8, 10, 12
RCW 7.72.010(2).....	1, 12, 13, 14, 16
RCW 7.72.040	19, 20, 21
WAC 296-403A-120(1)(b)(i).....	21
WAC 296-403A-190.....	13

Other Authorities

Talmadge, Washington's Product Liability Act, 5 U. Puget Sound L. Rev.
1 (1981)..... 8-9

Webster's II New Riverside University Dictionary 682 (1988) 9

Black's Law Dictionary (10th ed. 2014) 9

I. INTRODUCTION

The United States District Court certified three questions. They essentially boil down to one predominating question: Does selling a ride on a Ferris wheel constitute “selling” the Ferris wheel—the product—under the Washington Product Liability Act (WPLA)? Well-established principles of statutory interpretation compel this Court to answer no.

The second certified question asks whether an owner of an amusement ride can be found to have manufactured or remanufactured the ride by disassembling and reassembling, constructing, overhauling, or changing the ride? To be a “manufacturer” under the WPLA requires the sale of a product. RCW 7.72.010(2) (“‘Manufacturer’ includes a product seller . . .”). Regardless, in this particular case, the answer to the second certified question must still be no. Fun-Tastic operates a portable Ferris wheel, which is intended to be assembled and disassembled for transport. Plaintiffs presented no evidence that Fun-Tastic did anything other than maintain and assemble the Ferris wheel in accordance with design specifications, which precludes this activity from falling within the definition of manufacturing under RCW 7.72.010(2).

The third certified question asks the Court to decide the proper test to apply under the WPLA when determining if an entity holds itself out as a manufacturer and whether *Rublee* encompasses all of the factors a court

should consider. Fun-Tastic believes that *Rublee* is sufficient, and under this test, Fun-Tastic did not hold itself out as a manufacturer.

II. CERTIFIED QUESTIONS

The U.S. District Court for the Western District of Washington certified the following questions (Dkt. 67):

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?

III. STATEMENT OF THE CASE

Fun-Tastic is the owner-operator of the Ferris wheel (the “Wheel”), known as the “Phoenix Wheel,” that is the subject of Plaintiffs’ personal injury lawsuit. Dkt. 38 (Declaration of Ronald Burbach). While Fun-Tastic owns and operates amusement rides, it does not sell or manufacture them. *Id.*

High-Lite Rides, Inc., manufactured the Wheel. Dkt. 42 (affidavit of Michael O. Howard). In 2010, after the Wheel had left High-Lite

Ride’s possession, an individual named Larry K. Sloan added “locks to hold the gates shut.” *Id.* at ¶¶ 6, 9; 42-3 (handwritten note from Larry K. Sloan). Plaintiffs allege that these locks contributed to the accident causing their injuries.¹ Pls.’ Op. Br. at 4 (calling the locks “metallic clips”).

Fun-Tastic purchased the Wheel on or around December 31, 2014, from Frasier Equipment, LLC. *See* Dkt. 38-1 (bill of sale). Since purchasing the Wheel, Fun-Tastic has not altered or modified it. Dkt. 38, ¶ 6. Fun-Tastic, however, has performed routine maintenance, such as replacing bolts, to maintain the Wheel in its as purchased condition. Dkt. 41-1, 68:8–18 (excerpts from deposition of Fun-Tastic’s president, Ronald Burback).

The Wheel itself is a portable amusement ride, intended to be assembled and disassembled for transport. Dkt. 37-1 at 6, 17 (U.S. Consumer Product Safety Commission Investigative Report); Dkt. 41-1, 68:8–18. Fun-Tastic has disassembled and reassembled the Wheel in

¹ Although Plaintiffs argue that their expert opined that the metal clips—the “locks”—were one of the causes of the accident, the expert report does not include this purported causal opinion. Rather, Plaintiffs’ expert mentions the metallic clip in providing the opinion that “[t]he doors [on the Wheel] are not well designed and the materials of construction are not strong enough for the application.” Dkt. 41-3 at 22–26 (expert report of adbForensic, Inc.). The report does not contain a causal opinion regarding what role, if any, the metal clips played in the accident. *See id.*

accordance with the operator's manual that Fun-Tastic received from Frasier Equipment, LLC. Dkt. 41-1 at 13:12–14:8; Dkt. 38-1.

On or around May 18, 2017, Fun-Tastic was operating the Wheel and other amusement rides at a carnival at the Rhododendron Festival in Port Townsend, Washington. Dkt. 15 at ¶¶ 3.1–3.2 (Plaintiffs' First Amended Complaint). The carnival opened around 3:00 pm. Dkt. 37-1 at 9. Plaintiffs boarded the Wheel around 5:30 pm. *Id.* at 10. They received warnings to remain seated during the ride. *Id.* at 2, 19. Yet, they were observed standing and moving around inside the gondola while it was in motion. *Id.* at 11. Immediately thereafter, they fell from the gondola. *Id.*

The Plaintiffs filed suit against Fun-Tastic alleging negligence, premises liability, and product liability under the WPLA. Dkt. 15 at ¶¶ 4.1–4.3. Plaintiffs' First Amended Complaint alleges:

Fun-Tastic is a product seller . . . Fun-Tastic owns the Phoenix Wheel, a product the use of which is offered for sale. Fun-Tastic's business includes in substantial part receiving money in exchange for taking their product to fairgrounds and offering their product for use and consumption by those who pay admission to the fair. *Id.* at 17:13-17.

The Complaint continues: "Fun-Tastic and/or High-Lite are both a manufacturer and/or a seller of products as defined by the Washington State Products [sic] Liability Act." *Id.* at 18:19-22

Fun-Tastic moved for partial summary judgment to dismiss Plaintiffs’ product liability claims on the ground that it does not sell a product—the Wheel—within the meaning of the WPLA, and it did not manufacture the Wheel. Dkt. 36. The trial court reserved ruling and stayed proceedings pending the certification of questions to this Court. Dkt. 67.

IV. ARGUMENT

A. The Standard of review is *de novo*.

Certified questions from a federal court present questions of law that this Court reviews *de novo*. *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011). The Court's consideration is based on the certified record provided by the federal court. *Id.*; RCW 2.60.030(2). The record, however, may be supplemented if the Court deems additional material desirable. RCW 2.60.010(5).

Statutory interpretation is also a question of law reviewed *de novo*. *Jametsky v. Olsen*, 179 Wn.2d 756, 761–62, 317 P.3d 1003 (2014) (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) ("*DOC*"). The Court's primary goal is to ascertain and to carry out the Legislature's intent. *Id.* at 762. Whenever possible, courts ““must give effect to [the] plain meaning [of a statute] as an expression of legislative intent.”” *Id.* (quoting *DOC*, 146 Wn.2d at 9-10).

Courts derive plain meaning “from the context of the entire act.” *Id.* Plain language does not require construction, so courts do not need to consider outside sources if the statute is unambiguous. *Id.* Thus, when a statute is clear and unambiguous, the statute’s meaning is derived from its language. *Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 527, 286 P.3d 46 (2012). All language must be given effect so that no portion is rendered meaningless or superfluous. *Id.* at 526.

A statute is ambiguous when “it is subject to more than one reasonable interpretation.” *Jametsky*, 179 Wn.2d at 762 (quoting *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009)). If so, courts may look beyond the words to determine legislative intent. *Perez-Farias*, 175 Wn.2d at 527. They “may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Jametsky*, 179 Wn.2d at 762 (quoting *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)).

B. QUESTION 1: Selling the temporary use of a product is not selling the product under the WPLA.

The WPLA, RCW 7.72.010(1), states:

Product seller. ‘Product seller’ means 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 . . . such products.

The meaning of this provision can be derived from plain language alone. The first sentence means that a product seller is an entity in the business of selling products, and it does not matter, after the product is sold, whether the purchased product will be used, consumed, or resold. The second sentence means that everyone in the chain of selling the product, including wholesalers and retailers, falls within the meaning of product seller, not merely the last entity that sold the product. *See, e.g., Simonetta v. Viad Corp.*, 165 Wn.2d 341, 355, 197 P.3d 127 (2008) (citing pre-WPLA rule that parties in chain of distribution, including product sellers, have strict liability for claims relating to unsafe products); *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 411, 282 P.3d 1069 (2012) (holding chain of distribution rule applies to WPLA duty to warn claims). Finally, the third sentence means that an entity in the business of leasing has the same liability as an entity in the business of selling products.

Plaintiffs propose a strained reading of the “for use or consumption” language in the first sentence. They argue that selling the use or consumption of a product, without selling the product itself, falls within the meaning of “product seller” under the WPLA. Dkt. 15 at ¶¶ 3.34–3.35 (Pls.’ First Amended Complaint). This reading, however, would render the above clause regarding “leasing” superfluous, contrary to well-established rules of statutory interpretation.

Additionally, Plaintiffs’ reading would transform any business that owns and operates a product—such as a bus—to provide services—such as rides—into a product seller under the WPLA, even though the business does not sell the product. Puget Sound Transit, for example, would become a “product seller” of its buses.

1. Leasing—selling the temporary use of a product—is not “selling” a product under the WPLA.

The WPLA includes a party in the business of “leasing” in the definition of “product seller.” RCW 7.72.010(1) (“The term [product seller] also includes a party who is *in the business*² of leasing”) (emphasis added). Notably, the WPLA does not define “leasing” as selling the product. Rather, for policy reasons, the Legislature decided that someone in the business of leasing products should be held to the same standard as someone in the business of selling products. *See Buttelo v. S.A. Woods-Yates Am. Mach. Co., Inc.*, 72 Wn. App. 397, 401–04, 864 P.2d 948 (1993). Washington courts have recognized, though, that leasing a product is distinct from “selling” a product within the meaning of the WPLA. *Id.* (discussing policy reasons for holding lessors to the standard of product sellers); *Bostwick v. Ballard Marine, Inc.*, 127 Wn. App. 762, 767–68, 112 P.3d 571 (2005). *See also* Talmadge, *Washington's Product*

² Leasing products is not by itself sufficient to create liability under the WPLA; the lessor must be “in the business” of leasing products. *See e.g., Buttelo v. S.A. Woods-Yates Am. Mach. Co., Inc.*, 72 Wn. App. 397, 401–04, 864 P.2d 948 (1993).

Liability Act, 5 U. Puget Sound L. Rev. 1, 10 n.48 (1981) (“The Act also indicates that sellers of products include those who sell products and those who lease products.”).

Indeed, if leasing a product constituted selling a product under the WPLA, the separate clause including lessors in the meaning of “product seller” would be superfluous, contrary to well-established rules of statutory interpretation, as the term product seller already means someone who sells products, including when the sale is for “use.” See RCW 7.72.010; see, e.g., *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996); *Johnson v. Recreational Equipment, Inc.*, 159 Wn. App. 939, 946, 247 P.3d 18 (2011).

Selling the temporary use of a product is captured within the concept of leasing. A lease means “[a] contract granting occupation or use of property during **a certain period** in exchange for a specified rent.”³ *Lease*, *Webster’s II New Riverside University Dictionary* 682 (1988) (emphasis added). Because, as explained above, leasing is not selling, it follows that selling the temporary use of a product is also not “selling” the product within the meaning of the WPLA. Thus, under the WPLA, to fall within the definition of “product seller,” the arrangement for the

³ “Lease” also means “[a] contract by which the rightful possessor of personal property conveys the right to use that property in exchange for consideration.” *Lease*, Black’s Law Dictionary (10th ed. 2014).

temporary use of a product must amount to a lease. *See* RCW 7.72.010(1). By explicitly using the term “leasing,” the Legislature expressed its intent to exclude other possible legal relationships from the definition of product seller. *See Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 133–34, 814 P.2d 629 (1991) (“[W]hen a statute specifies the class of things upon which it operates, it can be inferred that the Legislature intended to exclude any omitted class.”).

Washington law, however, has long held that a ticket of admission to a place of amusement is a mere “license” revocable at will. *Finnesey v. Seattle Baseball Club*, 122 Wn. 276, 281, 210 P. 679 (1922). A license is distinct from a lease. *Conaway v. Time Oil Co.*, 34 Wn.2d 884, 893, 210 P.2d 1012 (1949). In other words, while a license may permit someone to use a product, it is not a lease. *See id.*

In this case Fun-Tastic did not enter into a lease agreement with Plaintiffs. Plaintiffs do not allege that they had a lease to use the Wheel, and they have presented no evidence of a lease agreement. Plaintiffs, for example, did not have the exclusive right, enforceable against Fun-Tastic, to use the Wheel as a whole or to use any particular gondola. *See id.* (holding exclusive right enforceable against others arises in lease). Consequently, because Fun-Tastic was not a lessor and because selling the

temporary use of a product is not “selling” within the meaning of the WPLA, Fun-Tastic is not a “product seller” under the WPLA.

Therefore, the Court should answer no to the first certified question: selling the temporary use of a product, not amounting to a lease, does not fall within the meaning of “product seller” under the WPLA.

2. If selling the temporary use of a product is “selling” the product under the WPLA, a host of industries will now be exposed to product liability.

The government, through Puget Sound Transit, sells rides—the temporary use of its buses—to the public. Similarly, airlines, such as Alaska Airlines, Delta, and United, sell tickets—selling the temporary use of their planes—to the public. Under Plaintiffs’ strained reading of the WPLA, Puget Sound Transit is a product seller of its buses, and Alaska Airlines is a product seller of its planes. This cannot be the law.

“[A] reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.” *Spokane Cty. v. Dep’t of Fish & Wildlife*, 192 Wn.2d 453, 458, 430 P.3d 655 (2018) (quoting *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003)).

C. QUESTION 2: An owner of an amusement ride does not “manufacture” the ride when it assembles and disassembles the ride according to design specifications or when it performs maintenance to keep the ride in its as purchased condition.

As an initial matter, a “manufacturer” under the WPLA is a particular category of “product seller.” *See* RCW 7.72.010(1) and (2). Thus, whether assembling a ride converts someone into a manufacturer depends, in part, on whether the Court concludes that selling a ticket for a ride on the Wheel is selling the Wheel itself—the product—under the WPLA (Question 1).

Nevertheless, the Court should answer no to the second certified question based on the record. Fun-Tastic assembled and disassembled the Wheel, a portable amusement ride, and performed maintenance to maintain the Wheel in its as purchased condition. While an overbroad reading of “construct” under RCW 7.72.010(2) could encompass this activity,⁴ the WPLA excludes from the definition of “manufacturer” a product seller “that did not participate in the design of a product and that constructed the product in accordance with the design specifications of . . . another product seller” RCW 7.72.010(2). The WPLA also excludes product sellers who perform minor assembly according to manufacturer instructions. *Id.* The record demonstrates that Fun-Tastic assembled the

⁴ *See Almquist v. Finley Sch. Dist. No. 53*, 114 Wn. App. 395, 405, 57 P.3d 1191 (2002) (“‘Construct’ includes ‘to form, make, or create by combining parts or elements.’”).

Wheel in accordance with the design specifications and instructions of High-Lite Rides and Frazier Equipment.

1. Fun-Tastic assembled and disassembled the Wheel according to design specifications.

When Fun-Tastic purchased the Wheel from Frazier Equipment, it received an operator's manual. The president of Fun-Tastic testified that Fun-Tastic assembled and disassembled the Wheel in accordance with this manual. Moreover, Fun-Tastic applied for and obtained an operating permit to operate the Wheel, and the Wheel passed a safety inspection. Dkt. 37-1 at 2 (U.S. Consumer Product Safety Commission Investigative Report).

Passing the safety inspection means that a certified amusement ride inspector found that the Wheel complied with all applicable manufacturer specifications. *See* WAC 296-403A-190. Thus, when the Wheel passed a safety inspection, the certified safety inspector concluded that Fun-Tastic had assembled the Wheel according to specification. To the extent that Fun-Tastic "constructed" the Wheel under the WPLA, Plaintiffs have presented no evidence or allegation that it did not assemble the Wheel according to applicable design specifications and instructions. Consequently, under these circumstances, an amusement ride owner does not manufacture the ride under RCW 7.72.010(2).

2. Fun-Tastic performed routine maintenance to keep the Wheel in its as purchased condition.

Plaintiffs allege that Fun-Tastic should be deemed a manufacturer because it performed maintenance on the Wheel, including replacing bolts on an annual basis. Plaintiffs presented no evidence, however, that any maintenance performed by Fun-Tastic changed the Wheel from its as purchased condition, thereby transforming it from the design of High-Lite Rides or Frazier Equipment. For example, while Fun-Tastic replaced bolts, Plaintiffs presented no evidence or allegation that the bolts were nonconforming or different in some way from the original.

Mechanical pieces need maintenance. Cars, for example, need new tires. Under Plaintiffs' interpretation of the WPLA, if car owners replace tires on their cars, they have thereby manufactured their vehicles. Thus, someone who maintains their own vehicle and drives for Uber is now the "manufacturer" along with, for example, Ford. Similarly, Puget Sound Transit must maintain its buses. If it replaces a bolt on its bus, it has now manufactured the bus according to Plaintiffs. "[A] reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results." *Spokane Cty.* 192 Wn.2d at 458 (quoting *Delgado*, 148 Wn.2d at 733).

The Court should reject Plaintiffs' interpretation of manufacturing. Maintenance that merely maintains a product in its as purchased condition cannot be manufacturing under the WPLA.

3. Fun-Tastic did not “adopt” the design of the metal clips.

The Court should reject Plaintiffs' argument that Fun-Tastic “adopted” the design of the metal clips on the Wheel, thereby making Fun-Tastic a manufacturer, because it did not remove the metal clips. Pls.' Op. Br. 7–9.

A manufacturer's duty to design a reasonably safe product is nondelegable. *See, e.g., Wagner v. Beech Aircraft Corp.*, 37 Wn. App. 203, 209, 680 P.2d 425 (1984) (citing pre-WPLA authority for facts arising before WPLA). Fun-Tastic did not design the clips or install them. They were added to the Wheel in 2010; Fun-Tastic purchased the Wheel in 2014. To the extent that adding the clips constituted manufacturing under the WPLA, the entity that designed and installed the clips bears that liability. The manufacturer cannot shove manufacturing liability to the product purchaser—Fun-Tastic—like a game of hot potato.

If a manufacturer could convert a product purchaser into a manufacturer under the WPLA through “design adoption,” the manufacturer would effectively delegate its liability: no allocation of fault occurs between “manufacturers” where liability arises from the same acts.

See Johnson, 159 Wn. App. at 952–53 (holding no allocation of fault between manufacturers where liability is vicarious, arising from the same acts). Thus, the product purchaser would bear full liability, as a manufacturer, for the manufacture’s defective design. Because a manufacturer’s duty to design a safe product is nondelegable, Plaintiffs’ adoption theory cannot be the law.

Moreover, Plaintiffs’ arguments, when viewed together, seek to convert a product purchaser into a manufacturer just for purchasing a product. On the one hand, Plaintiffs argue that Fun-Tastic “adopted” the Wheel’s design by not modifying the Wheel by removing the clips. On the other hand, if Fun-Tastic had actually modified the Wheel, Plaintiffs would certainly argue that Fun-Tastic “remanufactured” or “refabricated” it, thereby making Fun-Tastic a manufacturer. *See Pls.’ Op. Br. 9.*

Because this result would be absurd, it cannot be the law. *See Spokane Cty*, 192 Wn.2d at 458 (quoting *Delgado*, 148 Wn.2d at 733).

D. QUESTION 3: An entity cannot hold itself out as a manufacturer if no products are sold.

In 2018, this Court articulated the test it would follow in assessing whether a product seller holds itself out as a manufacturer under the WPLA, RCW 7.72.010(2): the objective reliance test. *Rublee v. Carrier Corp.*, 192 Wn.2d 190, 201–03, 428 P.3d 1207 (2018). Under this test, the plaintiff must show that an ordinary, reasonable consumer could have

“(1) inferred from the defendant’s representations in the advertising, distribution, **and sale of the product** that the defendant manufactured the product; and (2) relied on the defendant’s reputation as an assurance of the product’s quality.” *Id.* at 210–211 (emphasis added).

As a prerequisite to being an “apparent manufacturer,” a product must be sold.⁵ *See id.* And as explained above, under Question 1, selling the temporary use of a product—a ride—is not “selling” a product within the meaning of the WPLA. Thus, because Fun-Tastic did not sell the Wheel, it did not hold itself out as the apparent manufacturer of the Wheel.⁶

Furthermore, as the district court recognized, Fun-Tastic did not hold itself out as the Wheel’s maker, and it participated in no marketing or distribution of the Wheel. Dkt. 51 at 11. Additionally, Plaintiffs submitted no evidence showing that Fun-Tastic labeled the Ferris wheel with its own name. *Id.* Therefore, even if Fun-Tastic “sold” the Wheel within the meaning of the WPLA, Plaintiffs cannot meet the *Rublee* test,

⁵ “The apparent manufacturer doctrine is primarily a ‘species of estoppel’: a nonmanufacturing seller who, through its labeling or advertising of a product, causes the public to believe it is the manufacturer of the product **and to purchase the product** in reliance on that specific belief is estopped from later denying its identity as the manufacturer for purposes of liability.” *Rublee*, 192 Wn.2d at 200 (emphasis added).

⁶ This would be a much different case if Fun-Tastic was in the business of selling Ferris wheels to third-parties.

as Fun-Tastic made no representations in the advertising, distribution, or sale of the Wheel that it manufactured the Wheel.

1. The additional factors mentioned by the trial court should be rejected as inappropriate.

The federal district court asks if additional factors beyond *Rublee* should be considered, which may create apparent manufacturer liability for Fun-Tastic. The district court mentions three possible factors from *Cadwell Industries, Inc.*, 119 F. Supp. 2d at 1114-15, that would conflict with *Rublee*. See Dkt. 51 at 10–11. First, whether the entity participates in manufacturing the product. *Id.* Second, whether the entity derives economic benefit from the product. *Id.* Third, whether the entity is in a position to eliminate the unsafe character of the product. *Id.*

Regarding manufacturing participation, this factor should be rejected. Even assuming Fun-Tastic somehow could be viewed as manufacturing the Wheel, how would a reasonable consumer purchasing a ticket know about this activity? Plaintiffs presented no evidence to support this finding. Essentially, manufacturing occurs behind the scenes, away from the consumer and before the product reaches the consumer. Weighing evidence that a reasonable consumer would not know about in support of finding apparent manufacturer liability contravenes the entire basis for the doctrine. See *Rublee*, 192 Wn.2d at 200, 210–11.

The apparent manufacturer doctrine is primarily a ‘species of estoppel’: a nonmanufacturing seller who, through its labeling or advertising of a product, causes the public to believe it is the manufacturer of the product **and to purchase the product** in reliance on that specific belief is estopped from later denying its identity as the manufacturer for purposes of liability.

Id. at 200 (emphasis added).

The economic benefit factor should be rejected for conflicting with the WPLA’s distinction between product sellers and manufacturers. *See* RCW 7.72.010–.040. Both product sellers and manufacturers presumably derive economic benefit through selling products. *See* RCW 7.72.010. Determining that a product seller, who derives economic benefit through selling products, thereby holds itself out as a manufacturer would conflict with the WPLA’s limitation on product seller liability under RCW 7.72.040. This cannot be the law. *See Spokane*, 192 Wn.2d at 458 (quoting *Delgado*, 148 Wn.2d at 733).

The final factor essentially weighs in favor of holding a product owner liable because, in theory, it can eliminate the “unsafe character” of a product that it owns, controls, and maintains. This factor should be rejected for two reasons. First, it improperly allows a manufacturer to delegate its nondelegable duty to produce a reasonably safe product onto the product owner. *See, e.g., Wagner* 37 Wn. App. at 209. Second, much like Plaintiffs’ entire argument, this factor not only blurs but entirely

eliminates the distinction between a product owner and a manufacturer. This factor implies that a reasonable consumer could reasonably infer that a product owner who controls and maintains a product is the manufacturer. *See Rublee*, 192 Wn.2d at 210–11. For this conclusion to be reasonable would mean that no distinction exists between product owners and manufacturers.

The Court should answer yes to Certified Question 3. *Rublee* is the appropriate standard. And under this standard, Fun-Tastic did not hold itself out as a manufacturer.

2. If selling the temporary use of a product is “selling” the product under the WPLA, owner-operators will be deemed manufacturers for marketing their businesses.

To determine the meaning of a statutory provision, courts must view the provision in the context of the larger statutory scheme. *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 723, 406 P.3d 1149 (2017).

RCW 7.72.040(e) states that a product seller has the liability of a manufacturer when “[t]he product was marketed under a trade name or brand name of the product seller.” If selling the temporary use of a product—a ride—is selling the product—the Wheel—then a host of owner-operator industries will now be deemed manufacturers through RCW 7.72.040(e).

Amusement rides are a regulated industry. RCW 67.42. To operate the Wheel, the Wheel had to pass inspection by a certified inspector, and Fun-Tastic had to obtain an operating permit. RCW 67.42.020. In applying for an operating permit, regulations require amusement ride operators to identify each ride individually by a trade name or title. WAC 296-403A-120(1)(b)(i). Thus, if in complying with the law regulating the amusement ride industry, Fun-Tastic labels its Wheel with its trade name, it has now arguably marketed the “product” under its trade name. Under RCW 7.72.040(e), an amusement ride operator, like Fun-Tastic, would thereby have manufacturer liability. *See Johnson*, 159 Wn. App. at 942 (determining REI was a manufacturer under RCW 7.72.040(e) for selling bicycle under its brand name).

Similarly, Puget Sound Transit affixes its name to the buses that it operates, and it sells bus rides. Assuming Puget Sound Transit advertises its buses on its website and in other media, it would thereby market products under its own brand name. Thus, Puget Sound Transit becomes a manufacturer. Likewise, airlines, such as Alaska Airlines, Delta, and United, affix their names and logos to planes that they own and operate, and they sell tickets for plane rides. If Plaintiffs’ proposed interpretation of RCW 7.72.010 is correct, selling a plane ride carries the same liability

as selling the plane itself. Thus, by branding their planes, airlines now have the liability of a manufacturer.

While this is an absurd result and therefore cannot be the law, the result would occur if selling the temporary use of a product is selling the product itself. *See Spokane*, 192 Wn.2d at 458 (quoting *Delgado*, 148 Wn.2d at 733. Moreover, these industries could bear all of the potential manufacturer liability for the products that they own and operate, as no allocation of fault would occur to the actual manufacturer. *See Johnson*, 159 Wn. App. at 952–53.

This result is not only absurd but would also undermine the Legislature’s purpose in passing the Product Liability Act:

The purpose of this amendatory act is to enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault.

Of particular concern is the area of tort law known as product liability law. Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted in disincentives to industrial innovation and the development of new products. High product liability premiums may encourage product sellers and manufacturers to go without liability insurance or pass the high cost of insurance on to the consuming public in general.

Laws of 1981, ch. 27, § 1 (preamble).

Plaintiffs’ interpretation of the WPLA will create new liability for owner-operators. It is difficult to imagine how Plaintiffs’ application of

the Product Liability Act will not result in higher prices and higher insurance premiums, which the Legislature was particularly concerned about in passing the Act. *See id.*

Fun-Tastic is no more the manufacturer or “product seller” of the Wheel than Puget Sound Transit or Alaska Airlines are manufacturers or product sellers of buses and airplanes, respectively.

V. CONCLUSION

The Court should answer no to certified questions one and two, but it should answer yes to certified question three.

First, Selling the temporary use of a product—such as a ride—is not selling the product itself under RCW 7.72.010. The answer to certified question 1 is no.

Second, assembling and disassembling a product in accordance with instructions and design specifications is not manufacturing under the WPLA. Similarly, maintaining a product in its as purchased condition is not manufacturing. The answer to certified question 2 is no.

Finally, the *Rublee* apparent manufacturer test is appropriate for determining when an entity holds itself out as a manufacturer. The answer to certified question 3 is yes. No other factors are appropriate.

RESPECTFULLY SUBMITTED this 13th day of June , 2019.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., PS



By: _____
Patricia K. Buchanan, WSBA No. 19792
Tim T. Parker, WSBA No. 43674
Nicholas A. Carlson, WSBA No. 48311
Of Attorneys for Defendant

PATTERSON BUCHANAN FOBES & LEITCH

June 13, 2019 - 3:50 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97223-1
Appellate Court Case Title: Susan Swartwood, et al. v. Fun- Tastic Shows, Inc., et al.

The following documents have been uploaded:

- 972231_Briefs_20190613133411SC660808_4174.pdf
This File Contains:
Briefs - Respondents
The Original File Name was FunTastics Response Brief on Certified Questions.pdf

A copy of the uploaded files will be sent to:

- ashton@washingtonlawcenter.com
- cpl@pattersonbuchanan.com
- daniel@washingtonlawcenter.com
- jds@pattersonbuchanan.com
- jennifer@washingtonlawcenter.com
- jrf@pattersonbuchanan.com
- lincolnb@connelly-law.com
- mfolsom@connelly-law.com
- ttp@pattersonbuchanan.com

Comments:

Sender Name: Julie Larm-Bazzill - Email: jlb@pattersonbuchanan.com

Filing on Behalf of: Patricia Kay Buchanan - Email: pkb@pattersonbuchanan.com (Alternate Email: klo@pattersonbuchanan.com)

Address:
2112 3rd Avenue
Seattle, WA, 98121
Phone: (206) 462-6700

Note: The Filing Id is 20190613133411SC660808