FILED
Court of Appeals
Division II
State of Washington
3/21/2018 1:51 PM

No. 97503-5

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 51055-3

JODI BRUGH, an individual,

Appellant,

v.

FUN-TASTIC RIDES CO., et al.,

Respondents.

REPLY OF APPELLANT

KSB LITIGATION, P.S.
William C. Schroeder
WSBA # 41986
William R. Kincaid
Rule 9 Intern
221 N. Wall, Suite 210
Spokane, WA 99201
(509) 624-8988
WCS@KSBLit.legal

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. Brugh Has Properly Stated A Claim For Negligence Under The Doctrine Of Res Ipsa Loquitur. 2

B. Access to Inspect the Roller-Coaster does not Control the Application of Res Ipsa Loquitur. 4

1. There is no Duty to Inspect Under Res Ipsa Loquitur in Washington. 5

2. There is no Duty to Inspect Under Curtis or Penson 8

C. Brugh Has Adequately Identified The Violent Jerk Which Banged Her Head Against The Shoulder Restraint Which As A Matter Of Common Sense Is Not Part Of The Intended Design And Would Not Ordinarily Occur Without Negligence. 10

1. The Rollercoaster did not Operate as Expected 11

2. The Violent Jerk and the Banging of Brugh's Head Against the Shoulder Rest was an Incident and Would not be Expected Without Negligence. 12

3. Violent Jerks that Cause Heads to be unexpectedly struck are Evidence of Negligence. 14

D. The Extra-Jurisdictional Cases Cited By Brugh Are Appropriate Here, Whereas the Extra-Jurisdictional Cases Cited By State Fair Do Not Apply 16

III. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Atkinson v Wiard, 109 P.2d 160, (Kan. 1941) 20
Benedick v. Potts, 40 A. 1067, 1069 (Md. Ct. App. 1898) 24
Benton v. Farwest Cab Co., 63 Wn.2d 859, 860, 389 P.2d 418 (1964).....14, 15
Bibeau v. Fred W. Pearce Corp., 217 N.W. 374 (Minn. 1928) 2, 20, 21
Bone v. Gen. Motors Corp., 322 S.W.2d 916, 922 (Mo. 1959) 6
Chavez v. Cedar Fair, LP, 450 S.W.3d 291 (Mo. 2014) 20
Coaster Amusement Co. v. Smith, 194 So. 336 (Fla. 1940) 2, 17, 18, 19
Curtis v. Lein, 169 Wn.2d 884, 891, 239 P.3d 1078 (2010) 5, 8, 10, 13
Davidson v. Long Beach Pleasure Pier Co. 221 P.2d 1005 (Cal Ct. App. 2d Dist. 1950)17
Durbin v. Humphrey Co., 14 N.E.2d 5 (Ohio 1938).....2, 17, 19
Frost v. Des Moines Still Coll. of Osteopathy & Surgery, 79 N.W.2d 306, 311 (1956).....6
Gromowsky v Ingersol, 241 S.W.2d 60 (Kansas City Ct. App. Mo. 1951).....20
Harrison v Southeastern Fair Ass'n., 122 S.E.2d 330 (Ga. Ct. App. Div. 1 1961).....20
Hawk v. Wil-Mar, Inc., 123 A.2d 328, 329 (Ct. App. Md. 1956) 23, 24, 25
Jenkins v. Ferguson, 357 So.2d 39, 41 (La. Ct. App. 3rd Cir. 1978).....17
Keller v. City of Seattle, 200 Wn. 573, 574, 94 P.2d 184 (1939).....14, 15
Menth v. Breeze Corp., 73 A.2d 183, 187 (1950) 7
Pacheco v. Ames, 149 Wn.2d 431, 437, 69 P.3d 324 (2003).....4, 7
Penson v. Inland Empire Paper Co., 73 Wash. 338, 346-47, 132 P. 39 (1913).....8, 9
Reynolds v. Phare, 58 Wn.2d 904, 365 P.2d 328 (1961).....2
Robison v. Cascade Hardwoods, Inc., 117 Wn. App. 552, 567, 72 P.3d 244 (2003) 12
Schmidt v. Fontaine Ferry Enterprises, Inc., 319 S.W.2d 468, 469 (1958).....21, 22, 23
Waddle v. Brodbeck, 272 P.2d 1066 (Kan. 1954).....17, 18
Warner v. Terminal R. Ass'n of St. Louis, 257 S.W.2d 75, 81 (1953).....6
Wile v. N. Pac. Ry. Co., 72 Wn. 82, 129 P. 889 (1913); 14, 15

Other Authorities

WPI 22.01 .....6, 8

Treatises

David W. Louisell and Harold Williams, *Res Ipsa Loquitur--Its Future in Medical Malpractice Cases,* 48 Cal L Rev 254, 255 (1960).....7

I. INTRODUCTION

The crux of State Fair's argument is twofold: (1) That to proceed under the doctrine of *res ipsa loquitur* in Washington, Brugh had a duty to inspect the rollercoaster. This argument fails because Washington law does not impose a duty of inspection under *res ipsa*; and *res ipsa* applies when the accident 'speaks for itself' so as to not require specific proof of negligence, and the instrumentality remains in the exclusive control of the defendant. (2) State Fair argues that Brugh's ride on Rainier Rush was normal, ordinary, and expected. This argument fails because it requires the Court to construe facts in the light most favorable to the moving party, State Fair, and essentially asks the Court to presume Brugh is a liar. Further, unless State Fair contends that violent jerks which cause patrons to strike their heads and suffer injuries are a 'normal, ordinary, and expected' outcome of the Rainier Rush ride, the fact of the violent jerk causing the injury requiring a cranial surgery is itself the evidence of negligence under *res ipsa*.

Application of the *res ipsa* doctrine under these factual circumstances – *i.e.*, an unexplained injury suffered on a ride of amusement at a state fair, with the injured plaintiff bearing no fault – appears to be a matter of first impression in Washington. Consistent with the other jurisdictions that have considered substantially similar

circumstances, Brugh requests that the Court reverse the trial court's summary dismissal of her claims. *See, e.g. Bibeau v. Fred W. Pearce Corp.*, 217 N.W. 374 (Minn. 1928); *Coaster Amusement Co. v. Smith*, 194 So. 336 (Fla. 1940); and *Durbin v. Humphrey Co.*, 14 N.E.2d 5 (Ohio 1938). *Cf. Reynolds v. Phare*, 58 Wn.2d 904, 365 P.2d 328 (1961).

II. ARGUMENT

A. Brugh Has Properly Stated A Claim For Negligence Under The Doctrine Of *Res Ipsa Loquitur.*

State Fair states, "Ms. Brugh mistakenly focused on whether the alleged injury would ordinarily occur without negligence, ... The correct inquiry is whether the event would ordinarily occur without negligence. The focus is not on the alleged injury." (Response at 6.) This distinction makes no sense. The event is the abnormal roller coaster ride which caused an unexpected head injury, requiring a life saving surgery. The barrel unexpectedly comes out of the window, and strikes the pedestrian. The woman rides the roller coaster, and the roller coaster unexpectedly strikes her head. State Fair owns and operates the roller coaster; the event that caused the injury, the violent jolting which banged both sides of her head into the shoulder rest (CP 116, 121-23, Depo. pp. 116 *ll* 4-8, 121 *ll* 22-25, 122 *ll* 1-25, 123 *ll* 1-23), and the banging itself, would not have occurred without negligence, unless State Fair contends that it regularly strikes the heads of its patrons who ride the roller coaster. (Appellant Brief

at pp. 19, 23, 24, 25) What State Fair actually argued to the trial court, and what State Fair is asking of this Court, is to find that Brugh is a liar, that the event and injury did not actually happen, and therefore the roller coaster 'operated as expected.' Application of the summary judgment standard demonstrates that the trial court erred in accepting this argument, and this Court should reverse.

State Fair states that "[b]ut she has not claimed that the harness malfunctioned or was defective in any respect." (Response at 3) However, this is a misstatement of Brugh's argument, and a misapplication of *res ipsa.* The malfunction was the violent and unexpected jolt which caused her to strike her head, causing injury and requiring surgery. (Appellant Brief at pp. 19, 23, 24, 25) The point of the doctrine is that the controller of the instrumentality, not the innocent injured plaintiff, is in the best position to determine if the injury producing event was caused by negligent design, negligent maintenance, or negligent operation.

State Fair states "[i]n fact, after exiting the rollercoaster, Ms. Brugh rode several other rides at the Fair later in the day, and even attended a rock concert at the Fair Friday evening." (Response at 3) Once again, what State Fair actually argued to the trial court, and what State Fair is asking of this Court, is to find that Brugh is a liar, the event and injury did not actually happen, and therefore the roller coaster 'operated as

expected.' Application of the summary judgment standard demonstrates that the trial court erred in accepting this argument, and this Court should reverse. Brugh went to the fair's first aid station the day of the injury believing that she had blown an eardrum as she could not hear out of her right ear, (CP 125, Depo. p. 125 *ll* 4-6) and was advised by the first aid station to get medical care as soon as possible. (CP 125, Depo. p. 125 *ll* 9-10) As Brugh is not a doctor, she lacked the specialized knowledge, and had no reason to know she had a subdural hematoma. The following day she went to Dr. Rachel Gonzalez's office for blood work and asked the nurse to examine her for a possible blown eardrum. (CP 127, Depo. p. 127 *ll* 11-18)

B. Access to Inspect the Roller-Coaster does not Control the Application of *Res Ipsa Loquitur.*

Res ipsa is appropriate where the 'thing speaks for itself', the prima facie elements have been met, and the defendant has not conclusively shown that an inference of negligence is inappropriate. *Pacheco v. Ames*, 149 Wn.2d 431, 437, 69 P.3d 324 (2003). Only evidence that is completely explanatory, which conclusively rules out any ability to infer negligence on the part of the defendant, renders a prima facie case of *res ipsa loquitur* inapplicable. *Id.* Washington Courts have never established a duty to inspect to proceed under res ipsa.

1. There is no Duty to Inspect Under Res Ipsa Loquitur in Washington.

State Fair states that "Ms. Brugh has failed to submit any expert report or declaration from an engineer, inspector, or accident reconstructionist regarding the roller-coaster" (Response at 2, *see also* Response at 9-11 (misstating that Washington law requires a *res ipsa* plaintiff to inspect the instrumentality)) State Fair in doing so attempts to add an additional element to Washington *res ipsa* law. *See Curtis v. Lein,* 169 Wn.2d 884, 891, 239 P.3d 1078 (2010) (setting out prima facie elements of *res ipsa*: (1) an act that doesn't usually occur without negligence, (2) caused by an instrumentality in the exclusive control of the defendant, (3) and a plaintiff free of contributory fault).

However, *res ipsa* does not incorporate a duty to inspect, and rather is based on an inference of negligence when negligence is intuitively and self-evidently inferable from an accident, and the defendant is in a better position to explain away this inference of negligence than the plaintiff is in to prove it.

> If you find that:
>
> (1) the occurrence producing the injury is of a kind that ordinarily does not happen in the absence of someone's negligence; and
> (2) the injury was caused by an agency or instrumentality within the exclusive control of the defendant; and

> (3) the injury-causing occurrence was not due solely to a voluntary act or omission of the plaintiff;
> then, in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the defendant was negligent and that such negligence produced the injury complained of by the plaintiff.

WPI 22.01.

The same is true in other jurisdictions. *See, e.g., Frost v. Des Moines Still Coll. of Osteopathy & Surgery*, 79 N.W.2d 306, 311 (1956) (holding in burn injury case where plaintiff was under anesthesia at total mercy of doctors that plaintiff was not "forced to use the right" of pretrial discovery, or that pretrial discovery would be adequate in *res ipsa* case, and holding further that plaintiff need only identify the harming instrumentality to satisfy the diligence requirement of *res ipsa*); *Bone v. Gen. Motors Corp.,* 322 S.W.2d 916, 922 (Mo. 1959) (rejecting duty of discovery); *Warner v. Terminal R. Ass'n of St. Louis*, 257 S.W.2d 75, 81 (1953) (explicitly rejecting contention that inspection or pretrial procedures were required, because "*res ipsa* is part of the law of evidence", discovery procedures "have nothing to do with what facts are essential to state a claim or with what evidence is sufficient to justify the submission of a plaintiff's case[ ]", and that there is no way to ensure that when evidence is in the purview of the defendant, that discovery and

inspection could fully induce the necessary evidence); *Menth v. Breeze Corp.*, 73 A.2d 183, 187 (1950) (stating defendant "insists that the rule is not applicable here because, *inter alia*, plaintiffs made no attempt to seek further evidence through interrogatories, depositions or pretrial hearings... **We see no merit in this attempt to circumvent the application of the rule and therefore hold that plaintiff's failure to use such pretrial procedures in an effort to elicit specific acts of defendant's negligence does not bar the application of the Res ipsa loquitur rule if its other requirements are satisfied. A contrary conclusion would tend to undermine the effectiveness of the rule**.") (*emphasis added*). *See also* David W. Louisell and Harold Williams, *Res Ipsa Loquitur--Its Future in Medical Malpractice Cases,* 48 Cal L Rev 254, 255 (1960) (noting that placing discovery burden on plaintiff in *res ipsa* cases is economically impractical as it is "expensive").

Here, all the elements of *res ipsa* are met and it is appropriate to require State Fair to explain away this inference of negligence in order to take the case from the jury. Since State Fair has not conclusively rebutted the inference of negligence as Washington law requires, summary judgement is inappropriate. *Pacheco,* 149 Wn.2d at 437, 69 P.3d 324 (holding that only evidence that is completely explanatory, which

conclusively rules out any ability to infer negligence on the part of the defendant, renders a prima facie case of *res ipsa loquitur* inapplicable).

2. *There is no Duty to Inspect Under Curtis or Penson.*

State Fair claims that *Curtis* imposes upon a plaintiff a duty to discover by inspection. (Response at 9-11) However *Curtis* explicitly rejected this analysis when it said that the plaintiff carries no burden to show that the defects were discoverable. *Curtis*, 169 Wn.2d at 891. Under Washington law, the information that would be discovered, i.e. specific proof of negligence, is the "exact[ ] sort of information that res ipsa loquitur is intended to supply by inference." *Id.* at 892. *Res ipsa* under *Curtis* focuses on whether the event speaks for itself, not on pretrial procedure. *Id.* The duty to inspect and discover under *Curtis,* is a duty owed by a possessor of land to an invitee to make the premises safe. *Id.* at 890; *see also Penson v. Inland Empire Paper Co.,* 73 Wash. 338, 346-47, 132 P. 39 (1913) (stating there was no duty on painter to inspect the scaffolding provided by employer). Nowhere in the decision in *Curtis*, nor anywhere under Washington law, does *res ipsa* create a duty to inspect. *See generally id.* See also WPI 22.01. Juries in Washington are not instructed that "inspection" is an element of the *res ipsa* doctrine, because it is not. This is why the *Curtis* court rejected the burden on the plaintiff to show that an instrumentality in fact exhibited discoverable defects that

could have or would have been uncovered through inspection by the landowner. *Id.* at 891.

State Fair cites *Penson* for the same assertion of a duty to inspect. (Response at 11) *Penson* likewise does not create a duty to inspect to proceed under *res ipsa*. 73 Wn. at 346-47. *Penson* stood for, as State Fair notes, the proposition that the act speaks for itself and the injuring party is in a better position to explain the cause of the event than the plaintiff is; therefore, the burden shifts to the defendant to explain the cause of the injury because of its superior position to offer an explanation. (Response at 11)

Here as in *Penson*, the rollercoaster operators are in a superior position to explain why the rollercoaster malfunctioned on that day.

The putative duty to inspect under *Penson* and *Curtis* is inapplicable and unrealistic. Brugh could not simply get off the ride, demand that the roller coaster be stopped, and inspect the roller coaster. Ordinary persons cannot inspect a roller coaster and know the cause. A roller coaster is not like a dock or a scaffolding, where an inspection could possibly uncover a crack, weak sections, or missing nails or screws. A roller coaster is specialized. Under State Fair's theory an inspection that did not uncover negligence would likely be used as evidence against a

plaintiff in spite of the fact that the event was one which does not ordinarily occur in the absence of negligence.

Res ipsa is expressly an evidentiary burden shifting framework. *See Curtis*, 169 Wn.2d at 895. The requirement of no fault on the plaintiff, exclusive control by defendant, and self-evident nature of the accident, limit its application and justifies the shifted evidentiary burden. *See Id.*

State Fair concedes that elements 1 and 3 are met. (Response at 9) Element 2, an event that does not ordinarily occur in the absence of negligence, is met because violent jerks that bang both sides of one's head upon the shoulder rests are not ordinary, expected, or intended aspects of a roller coaster ride, and do not occur without negligence.

Finally, State Fair has not met its burden to be entitled to summary judgment. It has not shown, or even attempted to show, how the injury causing event could have happened without negligence. Brugh has met her burden and State Fair has not. Summary judgement was inappropriate, and the trial court erred in granting summary dismissal.

C. Brugh Has Adequately Identified The Violent Jerk Which Banged Her Head Against The Shoulder Restraint Which As A Matter Of Common Sense Is Not Part Of The Intended Design And Would Not Ordinarily Occur Without Negligence.

State Fair asserts that when a roller coaster jerks so violently that it bangs both sides of a rider's head into the shoulder rests causing the

rider's brain to bleed and necessitating life saving surgery, that such an event is intended, expected, and can occur without negligence on the part of the party in control of the instrumentality. (Response at 9) As shown *infra*, no rollercoaster, has or would ever be designed in such a way, and no reasonable person would ever consider such an event ordinary.

1. The Rollercoaster did not Operate as Expected

State Fair states that "she has not presented any evidence to suggest that the roller coaster did not operate as designed." (Response at 3, see also Response at 1) However, this is nonsensical as Brugh's entire case is based on the fact that the roller coaster abnormally jolted around a turn so violently that it struck both sides of her head, causing her brain to bleed and necessitating life saving surgery. (CP 116, 121-23, Depo. pp. 116 ll 4-8, 121 ll 22-25, 122 ll 1-25, 123 ll 1-23)

Brugh's evidence that the rollercoaster did not operate as designed (that it took a violent turn which injured her) is her testimony, her injury, and the evidence flowing from that injury. The roller coaster was not and logically would not be, designed to exhibit such jolts, and Brugh presents testimonial evidence of a jerk so violent that its unexpected nature speaks for itself.

State Fair claims that "Ms. Brugh has failed to identify any aspect of the ride that would not ordinarily occur without negligence." (Response

at 12) However the entire crux of the argument, the entire point of the lawsuit was that the violent jerk which banged both sides of her head into the shoulder rest would not occur without negligence.

State Fair attempts to distinguish *Robison,* from the case at bar to say that violent jerks and the banging of both sides of one's head against a shoulder rest occur in the absence of negligence. (Response at 12-13) However, the court in *Robison* did not hold as it did due to the evidentiary facts referenced by State Fair, but because "[w]e know from general experience and observation that, absent evidence of an act of God, individuals ordinarily do not suffer severe electrical shocks unless someone has been negligent." *Robison v. Cascade Hardwoods, Inc.,* 117 Wn. App. 552, 567, 72 P.3d 244 (2003).

Just as electric shocks don't normally occur in industrial equipment without negligence, neither do the events here occur in rollercoasters without operator negligence.

2. *The Violent Jerk and the Banging of Brugh's Head Against the Shoulder Rest was an Incident and Would not be Expected Without Negligence.*

State Fair claims that "[t]he result of Ms. Brugh's ride – the roller coaster running without incident – would be expected without negligence." (Response at 14) It is a gross misstatement to say that Brugh's ride was without incident. There was a violent jerk that struck both sides of Brugh's head causing a subdural hematoma. (CP 89, Decl. p.

89 ll 22-25). This is why the application of *res ipsa* is so important to the law and important here, because State Fair is in the best and proper position to explain why this happened.

State Fair states that Ms. Brugh did not discover the cause of the accident nor did she "allege[ ] that the Ride took place at greater speed, the Ride's brakes failed, the Ride's safety harness gave way, etc." (Response at 14) However this is the type of information, specific evidence of negligence, that the inference of *res ipsa* is intended to provide once the prima facie elements of its application have been met. *Curtis*, 169 Wn.2d at 892.

State Fair states that "If the Court were to permit an application of *res ipsa* to the present facts, then every amusement ride case would survive summary judgement as long as the plaintiff described the ride as 'jolting.'" (Response at 15) This is patently false. The issue is a head strike, brain bleed, and cranial surgery, suffered by an innocent state fair patron riding the State Fair's roller coaster. State Fair's response has been that Brugh is a liar and the event didn't really happen, therefore the roller coaster worked properly. Such position is only appropriate to be adjudicated by the trier of fact; the trial court erred in accepting State Fair's factual contentions as true, in contravention to the summary judgment standard.

The unnatural, unusual, unexpected, and un-warned of jolting caused Brugh to bang both sides of her head, (CP 116, 121-23, Depo. pp. 116 ll 4-8, 121 ll 22-25, 122 ll 1-25, 123 ll 1-23) giving her a subdural hematoma. (CP 89, Decl. p. 89 ll 22-25) This injury evidence substantiates the claim of an unusually violent jerk and any *res ipsa* plaintiff would need equally substantiating evidence. The injury itself doesn't raise the inference of *res ipsa*, but the injury is evidence of the underlying event, the violent jerk and the banging of the head, which supports the application of *res ipsa*. A plaintiff would need something much more than bare testimony of a jolt; they would need substantiating evidence such as an injury that corroborates the testimony regarding the underlying event.

3. *Violent Jerks that Cause Heads to be unexpectedly struck are Evidence of Negligence.*

State Fair cites *Wile v. N. Pac. Ry. Co.,* 72 Wn. 82, 129 P. 889 (1913); *Keller v. City of Seattle*, 200 Wn. 573, 574, 94 P.2d 184 (1939); and *Benton v. Farwest Cab Co.*, 63 Wn.2d 859, 860, 389 P.2d 418 (1964), for the proposition that the violent jerk that caused Brugh's head to slam into the shoulder rest, and the banging itself, are not evidence of negligence. (Response at 15)

Wile was a case involving a disabled man on a freight train who walked with a limp due to one leg being shorter than the other and who at the time of the jolt didn't have his cane. *Wile,* 72 Wn. at 83. The court

stated that the passenger did not show that the "thing complained of was something more than the ordinary jerking or jolt necessarily incident to the operation of freight trains[.]" *Id.* at 84. The court found that "[b]ecause of his crippled condition," and because "he left his stick in his seat", that the ordinary jerking of the train caused him to fall. *Id.* The accident stemmed in part from the plaintiff's actions and condition. Freight trains are different than rollercoasters. They cannot move without a jolt start. *Id.* at 85. *Wile* is completely inapplicable here.

Keller was a case in which a woman was injured when she got up from her seat, and fell when the street car proceeded to move forward. *Keller,* 200 Wn. at 575. However, the court found that the plaintiff was arguing not for "a jerk and jolt, 'unusual or extraordinary in its nature.'" but for "all operating jerks and jolts." *Id.* at 584. **The court stated that if the plaintiff there had argued on the basis of extraordinary jolts, she would have survived summary judgment.** *Id. Keller* supports Brugh's case and affirms that her jolt is sufficient to survive summary judgment.

State Fair cites *Benton* for the proposition that Brugh's jolt was ordinary. (Response at 15) However the jolt in *Benton* involved a taxicab on a public road. *Benton,* 63 Wn.2d at 861. A roller coaster is on a track not a road. The court in Benton found that the bump was ordinary. *Id.* at 863. Brugh alleges that the jolt was extraordinary. *Benton* does not apply.

D. The Extra-Jurisdictional Cases Cited By Brugh Are Appropriate Here, Whereas the Extra-Jurisdictional Cases Cited By State Fair Do Not Apply.

State Fair claims that the extra-jurisdictional cases cited by Brugh do not apply. (Response at 1) However, the cases cited by Brugh all substantiate her claims. They all involve testimony of an injury causing event, and in all the cases the evidence provided by the injury corroborates the testimony. (Appelant Brief at pp. 20-23) All the cases involve an event, testimony of an event, corroboration of testimony provided by the injury, and a lack of specific evidence of negligence. (*Id.*) In all the cited cases, where the evidence corroborated the testimony regarding the event, and the defendant who was in control of the ride and in a position to explain the event but could not, *res ipsa* was used to supply the missing information of specific proof of negligence. (*Id.*) Brugh is in the same position here, and the jury ultimately decides whether or not the evidence is sufficiently persuasive to find liability.

State Fair claims that *Jenkins* is distinguished because "there something went wrong", and here "[n]othing went wrong while Ms. Brugh was on the roller-coaster. There is no allegation of a lock breaking or any other mechanical failure." (Response at 16) However, what the court in *Jenkins* held was that "something went wrong" and "no one knows what happened" and therefore the jury was permitted to make an inference of

negligence. *Jenkins v. Ferguson,* 357 So.2d 39, 41 (La. Ct. App. 3rd Cir. 1978). What went wrong in *Jenkins* was the lock mechanism malfunctioning. *Id.* at 40. Here what went wrong was an unusually violent turn that caused Brugh's head to bang into the side of the headrest. (CP 116, 121-23, Depo. pp. 116 ll 4-8, 121 ll 22-25, 122 ll 1-25, 123 ll 1-23) The reason for which no one has yet determined.

State Fair briefly addresses *Davidson v. Long Beach Pleasure Pier Co.* 221 P.2d 1005 (Cal Ct. App. 2d Dist. 1950); *Waddle v. Brodbeck*, 272 P.2d 1066 (Kan. 1954); *Coaster Amusement Co. v. Smith*, 194 So. 336 (Fla. 1940); *Durbin v. Humphrey Co.*, 14 N.E.2d 5 (Ohio 1938), for the proposition that these cases are factually different, and thus don't apply to Brugh. (Response at 18). However these cases all support the application of *res ipsa* to the facts at bar.

In *Davidson,* the plaintiff met the prima facie elements, the competing evidence presented by the parties was contradictory, and the cause of the injury was unknown. *Davidson,* 221 P.2d at 1007. Therefore, the case proceeded to the jury who found in favor of the plaintiff. *Id.* Here, Brugh has met the prima facie elements, and the finding of fault is a jury determination.

In *Brodbeck,* a faulty bearing caused the injury, however whether the amusement park was negligent regarding the faulty bearing was

unknown and unexplained. *Brodbeck,* 272 P.2d at 1069. The court found that *res ipsa* applied because

> the thing which caused the injury complained of is shown to be under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care

Id. at 583. Here, Brugh was strapped in on a ride under the management and control of the defendant, and in such a situation a head does not bang violently into the shoulder rest in the absence of negligence.

State Fair states that "the malfunction [in *Coaster Amusement*] was proved by evidentiary sources other than plaintiff's testimony." (Response at 17) The only other evidence cited in *Coaster Amusement* was additional witness testimony. *Coaster Amusement,* 194 So. at 337. The court there found that, the plaintiff was the only injured party out of 1236 persons who rode the roller coaster that night, the roller coaster was inspected daily, and that nothing was found wrong with the track or car which were inspected the next day. *Id.* In affirming judgement for the plaintiff, the court held "[a] verdict should not be directed for one party unless the evidence is such that under no view of it a verdict could be rendered for

the opposite party." *Id.* Here, the circumstances are parallel to *Coaster Amusement.*

In *Durbin,* the plaintiff asserted that her ride operated faster than usual causing her to jolt forward throwing her out, as she was not strapped in. *Durbin,* 14 N.E.2d at 7. The plaintiff there offered bare testimony. *Id.* at 369. The defendant did not offer conclusive explanatory evidence but responded with bare testimony that the ride was not unusual and only appeared to plaintiff to be so. *Id.* The court reversed the directed verdict stating that there were factual determinations for the jury. *Id.* at 8.

Here, plaintiff was strapped into the roller-coaster, totally at the mercy of the care exercised by the State Fair. State Fair has not offered an explanation other than to say that the ride operated "as expected". (Response at 12) As noted above, the roller coaster only operated "as expected" if one of two things are true: 1) State Fair expects patrons who ride the roller coaster to strike their heads and be injured, despite the lack of a warning at the roller coaster by State Fair to that effect; or 2) Brugh is a liar and nothing happened. If the latter, then the trial court erred in misapplication of the summary judgment standard; if the former, then the trial court erred in dismissing because it is undisputed State Fair failed to warn patrons that 'head strike' was an expected outcome of riding the roller coaster.

State Fair is unpersuasive in its attempt to distinguish the foregoing extra-jurisdictional cases. State Fair however has not even attempted to distinguish the other extra-jurisdictional cases offered by Brugh: *Bibeau v. Fred W. Pearce Corp.*, 217 N.W. 374 (Minn. 1928); *Harrison v Southeastern Fair Ass'n.*, 122 S.E.2d 330 (Ga. Ct. App. Div. 1 1961); *Atkinson v Wiard*, 109 P.2d 160, (Kan. 1941); *Gromowsky v Ingersol,* 241 S.W.2d 60 (Kansas City Ct. App. Mo. 1951) (*abrogated on other grounds by Chavez v. Cedar Fair, LP,* 450 S.W.3d 291 (Mo. 2014)). (Response at 16-17) In particular State Fair has failed to address *Bibeau.* (Response at 16-17) This omission is telling as the facts of *Bibeau* are identical to the case at bar.

In *Bibeau*, a girl was injured when her face was slammed into the ride following an "unusual" and "violent jerk" by the roller coaster. *Bibeau*, 217 N.W. at 375. The evidence of the unusual jerk was supported only by testimony. *Id.* The court stated that "[t]he evidence would support a finding of the jury that the passenger experienced an unusually violent jerk which caused her injuries. One would hardly suppose it possible for defendant to continue the roller-coaster business if such accidents were ordinary occurrences." *Id.* The court stated further that the "defendant was not entitled to more than to have that question submitted to the jury." *Id.* at

376. Here, State Fair is entitled to no more than to present its defense to the jury.

All the extrajudicial cases cited by Brugh show that when a plaintiff testifies as to the unusual jolt of a roller coaster causing her head to bang, and that testimony is supported by injury evidence that so obviously proceeds from that jolt and bang, that the determination of negligence is one for the jury.

Defendant proffers the extra-jurisdictional *res ipsa* cases *Schmidt* and *Hawk* for the proposition that the injury causing event (violent jerk), was an intentional attribute of the Rainier Rush. (*See* Response at 18-19.) However, the facts and holding of *Schmidt* and *Hawk* differ greatly from the facts in the case at bar.

In *Schmidt* the Court said that "the slide was built to be slick[,]" was supposed to be fast, and a rider was meant to be "shot out like a cannon." *Schmidt v. Fontaine Ferry Enterprises, Inc.,* 319 S.W.2d 468, 469 (1958). Furthermore, the court in Schmidt did not decide the outcome of the case based on whether or not the slide operated as intended, that was merely addressed in dicta. *See id. at 471.* The court based its decision on the plaintiff's assumption of the risk. *Id.* ("The defense of assumption of the risk <u>which controls the disposition of this case</u>, rests upon the principle that when the plaintiff enters voluntarily into a relation or

situation involving obvious danger, he may be taken to assume the risk and to relieve the defendant of responsibility.") The court found that the plaintiff was injured "due to his voluntary act", as he had ridden the slide for "the length of four or five years", and that "it could be said that his knowledge concerning it equaled that of defendant's." *Id.* at 470-71. Finally, the court said that the plaintiff was "unquestionably aware of its slickness", since it was obvious, and the plaintiff was very familiar with the slide. The court only addressed the slickness of the slide as part of its rebuke of plaintiff's allegations of defendant's negligence. *Id.* at 471.

The intended operation of a roller coaster is that it be thrilling but safe, take turns fast but smoothly and safely, and not in such a way that results in violent jerks and head strikes. No roller coaster would ever be designed that way, and whether or not it was, such a danger would never be obvious. Roller coaster patrons are strapped in, roller coasters move on fixed tracks, and absent negligence, their operation is predictable.

Here State Fair has never and would never say that the roller coaster was built to create such violent jerks, or that violent jerks were an intentional design attribute of the roller coaster. Whereas there is an obviousness of the danger involved in riding down a fast slide with bumps and dips that by virtue of physics throw you into the air, that obviousness is not present in a rollercoaster. In fact, the idea of being strapped in

makes safety, and freedom from harm seem obvious. In the absence of intended design, Brugh is entitled to an inference that such a jerk, and such a slamming of a rider's head, in contravention of design, were a product of negligence. Furthermore, *Schmidt* is wholly inapplicable because State Fair concedes that Brugh has not in any way contributed to her own injuries. (*See* Response at 9) (conceding that contributory negligence is not at issue). The facts of *Schmidt* differ greatly from the facts here, was decided on a different basis than what is at issue here, and if applicable at all would speak for and not against Brugh's case.

State Fair cites *Hawk* for the proposition that there was "a lack of evidence that the ride did not operate as designed[.]" (Response at 20) However, the facts, analysis, and disposition of *Hawk* are dissimilar and unrelated to the case at bar. The plaintiff in *Hawk* speculated that a slit in the upholstery exposed underlying wood and defeated the padding, and therefore she hit her head knocking her unconscious. *Hawk v. Wil-Mar, Inc.*, 123 A.2d 328, 329 (Ct. App. Md. 1956).

However, the plaintiff, nor anyone else could testify why she became unconscious or whether she even hit her head on the device. *Id.* at 330-31. She only speculated that she hit her head to explain why she thought she became unconscious, and her becoming unconscious itself was also mere speculation. *Id.* The Court also found that there was nothing

to show that the exposed boards were capable of making contact with a rider's head or whether the upholstery minus the slit would have prevented the putative contact. *Id.* The Court stated conclusively that "[t]here is no evidence that the appellant hit her head on anything, much less an exposed board." *Id.* at 331. The court cited *Benedick*, for the proposition that:

> Until you know *what* did occasion an injury, you cannot say that the defendant was guilty of some negligence that produced that injury. There is, therefore, a difference between inferring as a conclusion of fact what it was that did the injury, and inferring from a known or proven act occasioning the injury that there was negligence in the act that did produce the injury. * * * In no case where the thing which occasioned the injury is unknown has it ever been held that the maxim applies, because when the thing which produced the injury is unknown it cannot be said to speak or to indicate the existence of causative negligence.

Benedick v. Potts, 40 A. 1067, 1069 (Md. Ct. App. 1898) (discussing applicability of res ipsa loquitur).

The court in *Hawk* was also unable to rule out contributory negligence because of the plaintiff's speculative testimony. *Hawk,* 123 A.2d at 331. Finally, the court in *Hawk* distinguished the facts there from one of the cases cited by that plaintiff because in the cited case, "the testimony was that the jerk or jolt which caused the injury was an unusually violent one such as had never before been experienced." *Id.* The

court looked at this distinction in deciding that the operation of the device in Hawk was not unexpected. *Id.*

Hawk was a case where the cause of the injury was unknown. The plaintiff there didn't even know if she hit her head, if that was why she became unconscious, or if she became unconscious at all. Furthermore, the jerk involved there wasn't unusual. Here, Brugh knows that she hit her head, what caused it, and was categorically not contributorily negligent. (*See* Response at 9) Finally, the violent jerk here was of the kind distinguished by the *Hawk* court.

III. CONCLUSION

For the foregoing reasons, Brugh requests that the Court reverse the trial court's summary dismissal of her claims, and remand with instruction that the application of the doctrine of *res ipsa loquitur* under these factual circumstances permits a jury to infer negligence on the part of State Fair, and thus that a jury question as to liability exists.

DATED this 21st day of March, 2018.

KSB LITIGATION, P.S.

William C. Schroeder, WSBA #41986
William R. Kincaid, Rule 9 Intern
221 N. Wall, Suite 210
Spokane, WA 99201
(509) 624-8988
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of March, 2018, I caused to be served a true and correct copy of the foregoing document to the following:

_____ HAND DELIVER	Patricia K. Buchanan
_____ U.S. MAIL	Tamila N. Stearns
_____ OVERNIGHT MAIL	PATTERSON BUCHANAN
_X_ E-TRANSMISSION	FOBES & LEITCH, INC., P.S.
	2112 Third Avenue, Suite 500
	Seattle, WA 98121
	Attorneys for Defendants Fun-Tastic Rides and Midway Rides LLC

_____
William C. Schroeder

KSB LITIGATION

March 21, 2018 - 1:51 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51055-3
Appellate Court Case Title:	Jodi Brugh, Appellant v. Fun-Tastic Rides Co., Respondent
Superior Court Case Number:	16-2-10983-2

The following documents have been uploaded:

- 510553_Answer_Reply_to_Motion_20180321134941D2093229_9909.pdf
  This File Contains:
  Answer/Reply to Motion - Reply to Response
  The Original File Name was Reply of Appellant.pdf

A copy of the uploaded files will be sent to:

- klo@pattersonbuchanan.com
- pkb@pattersonbuchanan.com
- ttp@pattersonbuchanan.com

Comments:

Sender Name: Michelle Hernandez - Email: mhernandez@ksblit.legal
Filing on Behalf of: William Christopher Schroeder - Email: WCS@KSBlit.legal (Alternate Email:)

Address:
221 N Wall Street
Suite 210
Spokane, WA, 99201
Phone: (509) 624-8988

Note: The Filing Id is 20180321134941D2093229