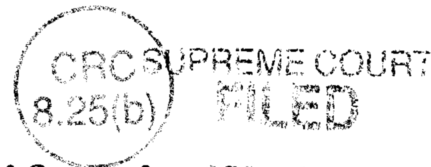
Case No. S195031



In the Supreme Court of California

DEC 15 2011
Frederick K. Ohlrich Clerk
Deputy

SMRITI NALWA,

Plaintiff and Appellant,

vs.

CEDAR FAIR, L.P.,

Defendant and Respondent.

OPENING BRIEF ON THE MERITS

Petition Following Published Opinion of the Court of Appeal,
Sixth Appellate District filed on June 10, 2011 in Case No. H034535,
Reversing the Judgment of the Superior Court of the State of California for
the County of Santa Clara, the Hon. James P. Kleinberg, Judge Presiding,
in Santa Clara County Superior Court Case No. 1-07-CV089189

Jeffrey L. Lenkov, Esq. (SBN 156478)
Steven J. Renick, Esq. (SBN 101255)
MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP
801 So. Figueroa St., 15th Floor
Los Angeles, California 90017
Telephone: (213) 624-6900

Patrick L. Hurley, Esq. (SBN 174438)
MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP
1 California St., Suite 1100
San Francisco, CA 94111
Telephone: (415) 217-6990

Attorneys for Defendant and Respondent,
CEDAR FAIR, L.P.

Case No. S195031

In the Supreme Court of California

SMRITI NALWA,

Plaintiff and Appellant,

vs.

CEDAR FAIR, L.P. ,

Defendant and Respondent.

OPENING BRIEF ON THE MERITS

Petition Following Published Opinion of the Court of Appeal,
Sixth Appellate District filed on June 10, 2011 in Case No. H034535,
Reversing the Judgment of the Superior Court of the State of California for
the County of Santa Clara, the Hon. James P. Kleinberg, Judge Presiding,
in Santa Clara County Superior Court Case No. 1-07-CV089189

Jeffrey L. Lenkov, Esq. (SBN 156478)
Steven J. Renick, Esq. (SBN 101255)
MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP
801 So. Figueroa St., 15th Floor
Los Angeles, California 90017
Telephone: (213) 624-6900

Patrick L. Hurley, Esq. (SBN 174438)
MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP
1 California St., Suite 1100
San Francisco, CA 94111
Telephone: (415) 217-6990

Attorneys for Defendant and Respondent,
CEDAR FAIR, L.P.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 1

INTRODUCTION 2

STATEMENT OF THE FACTS 5

STATEMENT OF THE CASE 10

LEGAL ARGUMENT 12

1. THE DEVELOPMENT OF THE DOCTRINE OF PRIMARY ASSUMPTION OF RISK DOCTRINE IN THIS COURT 12

2. THE DOCTRINE OF PRIMARY ASSUMPTION OF RISK SHOULD APPLY TO AMUSEMENT PARK RIDES WHICH INVOLVE INHERENT RISKS OF INJURY 20

3. THE FACT THAT AMUSEMENT PARKS ARE SUBJECT TO REGULATION DOES NOT PRECLUDE THE APPLICATION OF THE PRIMARY ASSUMPTION OF RISK DOCTRINE TO AMUSEMENT PARK RIDES 30

4. THE FACT THAT AMUSEMENT PARKS MAY OWE A HIGHER DUTY OF CARE TO THEIR CUSTOMERS DOES NOT PRECLUDE THE APPLICATION OF THE PRIMARY ASSUMPTION OF RISK DOCTRINE TO AMUSEMENT PARK RIDES 38

5. THERE IS NO EVIDENTIARY SUPPORT FOR THE MAJORITY'S CONCLUSION THAT HEAD-ON COLLISIONS ARE NOT RISKS INHERENT IN BUMPER CAR RIDES 42

CONCLUSION 48

TABLE OF AUTHORITIES

CASES **Page**

Beninati v. Black Rock City, LLC (2009) 175 Cal.App.4th 650 21

Cheong v. Antablin (1997) 16 Cal.4th 1063 . . . . 34, 35, 37

Finnegan v. Royal Realty Co. (1950) 35 Cal.2d 409 35

Fonseca v. County of Orange (1972) 28 Cal.App.3d 361 12

Ford v. Gouin (1992) 3 Cal.4th 339 . . . . 16, 35

Gardner v. G. Howard Mitchell (1931) 107 N.J.L. 311 28

Jekyll Island State Park Authority v. Machurick
(Ga.Ct.App. 2001) 250 Ga.App. 700 26

Kahn v. East Side Union High School District (2003) 31 Cal.4th 990 . . . 18

Knight v. Jewett (1992) 3 Cal.4th 296
. . . . 2, 3, 12, 14-18, 20, 21, 25, 29, 39, 40, 49

Leslie v. Splish Splash at Adventureland, Inc.
(N.Y.App.Div. 2003) 1 A.D.3d 320 . . . . 28, 29

Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 . . . . 13, 14

Murphy v. White City Amusement Co.
(Ill.App.Ct. 1926) 242 Ill.App. 56 26

Nalwa v. Cedar Fair, L.P. (2011) 196 Cal.App.4th 566
. . . . 1, 3, 21-25, 29-32, 36-47

Neighbarger v. Irwin Industries, Inc. (1994) 8 Cal.4th 532 . . . . . . 2, 16, 17

Parsons v. Crown Disposal Co. (1997) 15 Cal.4th 456 . . . . 17, 18

Pfisterer v. Grisham (Ind.Ct.App. 1965) 137 Ind.App. 565 27

Priebe v. Nelson (2006) 39 Cal.4th 1112 . . . . 2, 19, 20

Ramsey v. Fontaine Ferry Enterprises, Inc. (1950) 314 Ky. 218 . . . . 27, 28

Ratcliff v. San Diego Baseball Club (1938) 27 Cal.App.2d 733 39

Russo v. Range, Inc. (Ill.App.Ct. 1979) 76 Ill.App.3d 236 . . . . 26, 27

Shahinian v. McCormick (1963) 59 Cal.2d 554 36

Shin v. Ahn (2007) 42 Cal.4th 482 20

STATUTES, REGULATIONS AND RULES

California Code of Regulations, Title 8, section 3195.9 32

California Rules of Court rule 3.1354 11

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is the primary assumption of risk doctrine limited to active sports, i.e. activities "done for enjoyment or thrill, requir[ing] physical exertion as well as elements of skill, ... involv[ing] a challenge containing a potential risk of injury, and ... entail[ing] some pitting of physical prowess (be it strength based ... or skill based ...) against another competitor or against some venue" (*Nalwa v. Cedar Fair, L.P.* (2011) 196 Cal.App.4th 566, 579; citation and internal quotation marks omitted)?

2. Does the fact that amusement parks are subject to regulation mean that public policy entirely bars the application of the primary assumption of risk doctrine to amusement park rides?

3. Are the owners of amusement parks (and other purveyors of recreational activities) subject to a special version of the primary assumption of risk doctrine that imposes a duty on those owners to take steps to eliminate or decrease any risks inherent in their rides?

INTRODUCTION

This case arises from an incident in which the plaintiff allegedly broke her wrist as a result of a bumper car collision at an amusement park. The defendant park was granted summary judgment pursuant to the primary assumption of risk doctrine. The Court of Appeal reversed, holding that the doctrine did not apply to amusement park rides.

The Court of Appeal held that the doctrine of primary assumption of risk only applies to active sports, and thus could not be applied to amusement park rides – such as the bumper cars on which the plaintiff was riding at the time of her injury – because they not active sports. But in none of the cases in which this Court has addressed the issue of primary assumption of risk – including the seminal case of *Knight v. Jewett* (1992) 3 Cal.4th 296 – has this Court imposed such a restriction on the applicability of the doctrine, nor is such a limitation inherent in the rationale underlying the doctrine. In fact, this Court itself has applied the doctrine in cases which did not involve active sports. *See Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532 (fire-fighters) and *Priebe v. Nelson* (2006) 39 Cal.4th 1112 (kennel workers).

There is nothing about the doctrine of primary assumption of risk that precludes it from being applied in situations other than active sports; and in particular nothing to prevent it from being applied to amusement park rides.

Contrary to the majority's conclusion below, refusing to apply primary assumption of risk to amusement park rides will not result in "mak[ing] them safer." (*Nalwa, supra,* 196 Cal.App.4th at 579.) Rather, if the doctrine does not apply to amusement park rides, then the operators of amusement parks will be obliged to eliminate the risks inherent in the rides they offer at their parks, even if that requires altering the fundamental nature of those rides. That will not result in the rides being made safer. Rather those rides will cease to exist, to be replaced by rides that are fundamentally different. In essence, the majority below has stated a public policy that amusement park operators can only offer rides that truly do provide only "the illusion of danger", without any actual risk of injury. (*Id.* at 607.)

This Court has not recognized such a policy, and its opinions addressing primary assumption of risk indicate that it would not support such a policy. The defendant would suggest that this Court's opinion in *Knight* stands for the proposition that it is the policy of this state to permit people to engage in a broad variety of recreational activities, even if some of those activities do involve an inherent risk of injury to the participants, and that the persons and entities that enable these individuals to participate in these activities will not be held liable if on occasion those inherent risks cause a participant to suffer injury. Applying the doctrine of primary assumption of risk to amusement

park rides is fully consistent with ***that*** policy.

The majority below held that applying primary assumption of risk to amusement parks would be contrary to the public policy encompassed by the "protective regulatory scheme" governing the operation of amusement parks. However, a review of those regulations offers no support for the majority's conclusion, and in fact shows that the policy reflected these regulations explicitly permits amusement parks to operate bumper car rides, despite the risks that may arise from the collisions that are an inherent part of such rides.

Finally, the majority below concluded that amusement park operators owe a higher duty of care to their customers and that this precludes the application of the primary assumption of risk doctrine to amusement park rides. However, there is no support in the case law for such a conclusion. Complying with such an interpretation of the law would force amusement parks to alter the fundamental nature of many of their rides in order to comply with it, and there is no public policy justification for imposing such a duty on amusement park operators.

None of the grounds offered by the majority below for their decision to reverse the summary judgment has any merit. Accordingly, this Court should reverse the decision of the Court of Appeal and reinstate the trial court's order granting the defendant's motion for summary judgment.

STATEMENT OF THE FACTS

On July 5, 2005, plaintiff Smriti Nalwa, M.D. went to California's Great America amusement park in San Jose, California with her nine year old son and six year old daughter. (Clerk's Transcript ["CT"] 61, 70-71.) While at the park, plaintiff and her children decided to go on the Rue Le Dodge bumper car ride. Plaintiff watched the ride while they were waiting in line to get on the ride. (CT 76-77.)

When it was their turn to ride, plaintiff and her son got into one bumper car and her daughter got into another by herself. Plaintiff's son drove and plaintiff sat next to him in the bumper car. (CT 78, 88.) Plaintiff and her son knew that, during the ride, they would be bumped by the other cars. According to plaintiff and her son, getting bumped by other cars was what made the ride fun. (CT 80-81, 100-01.)

After the ride started, plaintiff's son controlled the bumper car in which he and plaintiff were riding. Plaintiff's son steered the car and bumped into several other cars during the ride. (CT 79, 81, 100.) Near the end of the ride, plaintiff's bumper car was bumped from the front and then from behind. When she was bumped from behind, plaintiff put her left hand out to brace herself and fractured her wrist, as the plaintiff explained in her deposition.

"Q. Sure. Describe for us how the actual collision occurred –

A. Sure.

Q. – which injured your left wrist.

A. Right. We were on – already a couple of minutes. Sanjit was driving. He was at the wheel. And after some time, I felt – I saw a car coming in front – bump us from front, and then I felt a bump from the back, and I felt myself moving – you know being pushed – pushed around.

And I had no way to hold, and ***at that point*** as I – to brace myself, I put my palm on the dashboard – whatever it was in front, I knew that was the dashboard; and I put my hand over there.

Q. So you were bumped from the front –

A. And the back.

Q. – and from the back?

A. Yes.

Q. Which bump occurred first, front or back?

A. You know, I think the – I – the front – the front.

Q. Okay. But you knew – you knew from watching the bumper car and you knew from sitting in the bumper car during the experience that you were going to be bumped.

A. That's correct. But I felt that I had – I felt I was being almost thrown out, you know, so I needed to brace myself. I was being pushed around – " (CT 85:14 - 86:20; emphasis added.)[1]

---

[1] Plaintiff asserted in her Appellant's Reply Brief (at page 5) that "Respondent argues, for the first time, that Appellant's injuries were not caused by a head-on collision" and therefore the issue was "not properly before this Court." Defendant explained in its Petition for Rehearing (at pages 13-17) that plaintiff was incorrect. This issue is discussed at length in footnote 4 below, at pages 47-48.

The Rue Le Dodge bumper car ride consisted of a number of small, car-like vehicles that moved around a flat surface track powered by electricity. (Declaration of Jessica Naderman in Support of Motion for Summary Judgment at ¶ 3 and Ex. A to Naderman Decl. [found in the record as Exhibit A to Cedar Fair's Motion to Augment Record on Appeal].) The cars were surrounded by a rubber bumper. (Naderman Decl. at ¶ 3, Ex. A to Naderman Decl.) The driver of each bumper car controlled both the steering of the car as well as its speed. (CT 79, 87; Naderman Decl. at ¶ 4.) Once the ride started, Cedar Fair did not control the individual bumper cars. (Naderman Decl. at ¶ 4.) Each bumper car had a padded seat, padded sides, a padded steering wheel, and a padded dash board. The cars were also equipped with two seat belts to restrain the driver and passenger during the ride. (Naderman Decl. at ¶ 5.) The ride lasted approximately two minutes. (Naderman Decl. at ¶ 4.)

There were warning signs posted at the entrance of the bumper car ride in July 2005. One warning sign was entitled "RIDE WARNING - PLEASE READ" and informed people waiting in line for the ride that "Rue Le Dodge cars are independently controlled electric vehicles. The action of this ride subjects your car to bumping." (Naderman Decl. at ¶ 6.) Another posted sign informed guests that the bumper car ride "is a medium speed ride where riders

may encounter unexpected changes in direction and/or speed during portions of the ride." (Naderman Decl. at ¶ 7.) Plaintiff saw these signs before she got on the ride. (CT 92.)

The Rue Le Dodge ride was reconfigured in 2006 (i.e. after the incident at issue in the underlying lawsuit) to add an island in the middle of the track which encouraged riders to ride in the same direction. (CT 158.) This change was made to make the Rue Le Dodge track consistent with bumper car tracks at other amusement parks owned by Cedar Fair. (CT 159.) The change in the track reduced, but did not eliminate, head-on collisions. (CT 210.)

The bumper car ride was inspected annually for safety by the California Department of Industrial Relations, Division of Occupational Health and Safety ("DOSH"). DOSH inspected the bumper car ride in 2004, 2005 and 2006 and found no safety-related problems with the operation of the ride. (Naderman Decl. at ¶ 8.) The ride was inspected every morning by both the maintenance and ride operations departments of the amusement park. On the morning of the incident, the ride was inspected and was found to be working normally. (Naderman Decl. at ¶ 9.)

Approximately 300,000 people ride the Rue Le Dodge ride every year. (Naderman Decl. at ¶ 10.) In 2004, there were only twenty-eight injuries reported as having occurred on or around the bumper car ride, including four

contusions, fourteen abrasions, three lacerations, and four strains. In 2005 there were twenty-seven injuries reported (including plaintiff's injury) as having occurred on or around the bumper car ride, including six contusions, thirteen abrasions, and two strains. Other than plaintiff, there were no fractures reported as a result of the bumper car ride in 2004, 2005, or 2006. (CT 108.)

STATEMENT OF THE CASE

On January 25, 2008, plaintiff filed a Second Amended Complaint against Cedar Fair containing causes of action for (1) common carrier liability, (2) willful misconduct, (3) strict liability [design defect], (4) strict liability [distribution of defective product], and (5) negligence. (CT 1-7.)

Cedar Fair filed a motion for summary judgment as to the Second Amended Complaint. In response to the motion, plaintiff dismissed the two products liability causes of action. As to the remaining claims, the trial court granted summary judgment on April 3, 2009. (CT 238-40.)

In granting the motion, the trial court found that "Plaintiff's injury arose from being bumped during a bumper-car ride, which is a risk inherent in the activity of riding bumper cars." (CT 238.) The trial court found that the duty of care for common carriers did not apply because Cedar Fair "had no control over the steering and orientation of the individual bumper cars." (CT 238-39.) Even if Cedar Fair were considered a common carrier, the trial court found that the doctrine of primary assumption of risk barred plaintiff's claims because Cedar Fair did not have a duty to protect plaintiff from risks inherent in the activity. (CT 239.)

The trial court rejected plaintiff's argument that Cedar Fair was negligent in failing to reconfigure the bumper car track prior to the injury

because "any type of bumping – either head-on or from the rear – is inherent in the activity of riding bumper cars. Defendant did not have a duty to reduce risks that are inherent to bumper-car riding. (*See Balthazor v. Little League Baseball* (1998) 62 Cal. App. 4th 47, 52.)" (CT 239.) The trial court declined to rule on plaintiff's objections to evidence submitted in support of the motion on the ground that the objections did not comply with California Rules of Court rules 3.1354(b)(3) and (c). (CT 239-40.) Judgment was entered in Cedar Fair's favor on June 8, 2009. (CT 244.)

The plaintiff appealed from the judgment. (CT 254) The Court of Appeal issued its opinion on the plaintiff's appeal on June 10, 2011, reversing the judgment. Justice Wendy Clark Duffy dissented from the decision. The defendant filed a petition for rehearing following the filing of the appellate court's opinion. That petition was denied on July 7, 2011. Justice Duffy indicated that she would have granted the petition.

On July 21, 2011, the defendant filed a petition for review with this Court. The plaintiff declined to file an answer. On August 31, 2011, this Court granted the defendant's petition for review.

LEGAL ARGUMENT

1. THE DEVELOPMENT OF THE DOCTRINE OF PRIMARY ASSUMPTION OF RISK DOCTRINE IN THIS COURT

This case presents a fundamental question: what is the proper scope of the primary assumption of risk doctrine? Should it apply only to active sports, as the majority below concluded? Or should it apply to all activities which involve inherent risks? Or should the limits of the doctrine's applicability be placed somewhere in between? To answer this question, it will help if we first examine the history of the doctrine.

As this Court noted in *Knight v. Jewett, supra* (1992) 3 Cal.4th 296, 303, "the assumption of risk doctrine long has caused confusion both in definition and application, because the phrase 'assumption of risk' traditionally has been used in a number of very different factual settings involving analytically distinct legal concepts." In *Fonseca v. County of Orange* (1972) 28 Cal.App.3d 361, 368-369, the Court of Appeal offered an example of how this problem had manifested itself in California.

> "It has been repeatedly noted that contributory negligence and assumption of risk are separate and distinct defenses. Assumption of risk involves the negation of defendant's duty; contributory negligence is a defense to a breach of such duty; assumption of risk may involve perfectly reasonable conduct on

plaintiff's part; contributory negligence never does; assumption of risk typically embraces the voluntary or deliberate incurring of known peril; contributory negligence frequently involves the inadvertent failure to notice danger.

> The courts have frequently recognized that there is an area of overlap between the two doctrines, so that identical facts may give rise to both defenses. The overlap has been described as follows: '[The] plaintiff's conduct in encountering a known risk may be in itself unreasonable, because the danger is out of all proportion to the advantage which he is seeking to obtain. . . . If that is the case, his conduct is a form of contributory negligence, in which the negligence consists in making the wrong choice and voluntarily encountering a known unreasonable risk. ...'" (citations omitted)

The relationship between assumption of risk and contributory negligence required this Court to address the continuing viability of the assumption of risk doctrine when it adopted comparative negligence in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 824-825.

> "The third area of concern, the status of the doctrines of last clear chance and assumption of risk, involves less the practical problems of administering a particular form of comparative negligence than it does a definition of the theoretical outline of the specific form to be adopted. ... As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. 'To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence . . . . Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve

> contributory negligence, but rather a reduction of defendant's duty of care.' We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence." (citations omitted)

As this Court discussed in *Knight,* the *Li* court's decision regarding the extent to which assumption of risk survived the adoption of comparative negligence unfortunately did not definitively resolve the issue.

> "Prior to the adoption of comparative fault principles of liability, there often was no need to distinguish between the different categories of assumption of risk cases, because if a case fell into either category, the plaintiff's recovery was totally barred. With the adoption of comparative fault, however, it became essential to differentiate between the distinct categories of cases that traditionally had been lumped together under the rubric of assumption of risk. This court's seminal comparative fault decision in *Li, supra,* 13 Cal.3d 804, explicitly recognized the need for such differentiation, and attempted to explain which category of assumption of risk cases should be merged into the comparative fault system and which category should not. . . . . "[T]he *Li* decision, *supra,* 13 Cal.3d 804, clearly contemplated that the assumption of risk doctrine was to be partially merged or subsumed into the comparative negligence scheme. Subsequent Court of Appeal decisions have disagreed, however, in interpreting *Li,* as to what category of assumption of risk cases would be merged into the comparative negligence scheme." (*Knight, supra,* 3 Cal.4th at 304, 306.)

This Court resolved this uncertainty about how *Li* should be interpreted by providing this definitive explanation of the relevant portion of that opinion.

> "[W]e believe it becomes clear that the distinction in assumption of risk cases to which the *Li* court referred in this passage was not a distinction between instances in which a plaintiff unreasonably encounters a known risk imposed by a defendant's negligence and instances in which a plaintiff reasonably encounters such a risk. Rather, the distinction to which the *Li* court referred was between (1) those instances in which the assumption of risk doctrine embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular risk – the category of assumption of risk that the legal commentators generally refer to as 'primary assumption of risk' – and (2) those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty – what most commentators have termed 'secondary assumption of risk.' Properly interpreted, the relevant passage in *Li* provides that the category of assumption of risk cases that is not merged into the comparative negligence system and in which the plaintiff's recovery continues to be completely barred involves those cases in which the defendant's conduct did not breach a legal duty of care to the plaintiff, i.e., 'primary assumption of risk' cases, whereas cases involving 'secondary assumption of risk' properly are merged into the comprehensive comparative fault system adopted in *Li*. . . . . [T]he question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport." (*Knight, supra,* 3 Cal.4th at 308, 309; footnotes omitted.)

This Court summarized its "general conclusions as to the current state of the doctrine of assumption of risk in light of the adoption of comparative fault principles in *Li*" as follows:

> "In cases involving 'primary assumption of risk' – where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury – the doctrine continues to operate as a complete bar to the plaintiff's recovery." (*Knight, supra,* 3 Cal.4th at 314-315.)

This Court, having resolved the uncertainty regarding the nature of the assumption of risk doctrine after the adoption of comparative negligence, then proceeded to apply that rule to the case before it, which happened to involve a sporting activity (touch football). (*Knight, supra,* 3 Cal.4th at 315.) Thus there necessarily was a lengthy discussion by this Court of the issue of the extent of the duty imposed on particular defendants by a plaintiff's participation in a sporting activity. However, at no point did this Court state that the doctrine of primary assumption of risk that it had recognized in *Knight* was limited to sports. Nor it did make such a statement in *Knight's* companion case, *Ford v. Gouin* (1992) 3 Cal.4th 339, which also happened to involve a sporting activity. To the contrary, the discussion in *Knight* referred to above was specifically about "the application of the assumption of risk doctrine in a sports setting" (*Knight, supra,* 3 Cal.4th at 313; *see also id.* at 312), clearly indicating that this Court believed that there were other settings in which the doctrine could be applied.

This Court's opinion in *Neighbarger v. Irwin Industries, Inc., supra* (1994) 8 Cal.4th 532 also indicates that this Court did not view the doctrine of

primary assumption of risk as being limited to sporting activities. In *Neighbarger,* this Court considered the scope of the application of the "firefighter's rule" – under which "a member of the public who negligently starts a fire owes no duty of care to assure that the firefighter who is summoned to combat the fire is not injured thereby" – in light of the primary assumption of risk doctrine. (*Id.* at 538-539.) This Court concluded that "[t]he firefighter's rule should not be viewed as a separate concept, but as an example of the proper application of the doctrine of assumption of risk, that is, an illustration of when it is appropriate to find that the defendant owes no duty of care." (*Id.* at 538.)

In *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 481-482, this Court rejected the Court of Appeal's interpretation of *Knight* as providing "support for a general duty not to increase the risk inherent in whatever sporting or recreational activity a plaintiff happens to be pursuing, regardless of the lack of relationship between the parties."

> "We did not impose such a general duty in *Knight, supra,* 3 Cal. 4th 296. On the contrary, *Knight,* consistently with established case law, simply requires courts in each instance to examine the question of duty in light of the nature of the defendant's activities and the relationship of the parties to that activity. (*Knight, supra,* 3 Cal. 4th at pp. 309, 313, 318; accord, *Neighbarger, supra,* 8 Cal. 4th at p. 541 ['We . . . keep in mind . . . the nature of the defendant's activities and the relationship of the plaintiffs and the defendant to that activity to decide

> whether, as a matter of public policy, the defendant should owe the plaintiffs a duty of care.'].)" (*Parsons, supra,* 15 Cal.4th at 482.)

This analysis of *Knight* does not suggest that this Court viewed the primary assumption of risk doctrine as being limited to sporting activities.

In *Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, this Court addressed the question of the proper application of the doctrine of primary assumption of risk when there is an allegation that an athletic coach's negligence contributed to an athlete's injury. In the course of its opinion, this Court explained the rationale for the existence of the primary assumption of risk doctrine.

> "Although persons generally owe a duty of due care not to cause an unreasonable risk of harm to others (Civ. Code, § 1714, subd. (a)), some activities – and, specifically, many sports – are inherently dangerous. Imposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation. In a game of touch football, for example, there is an inherent risk that players will collide; to impose a general duty on coparticipants to avoid the risk of harm arising from a collision would work a basic alteration—or cause abandonment—of the sport. We addressed this problem in *Knight, supra,* 3 Cal.4th 296." (*Kahn, supra,* 31 Cal.4th at 1003.)

Later in its opinion this Court noted that primary assumption of risk cases "frequently arise in the context of active sports". (*Kahn, supra,* 31 Cal. 4th at 1004.) Thus this Court again indicated that primary assumption of risk is not limited to sporting activities.

In *Priebe v. Nelson, supra* (2006) 39 Cal.4th 1112, 1115, this Court was asked to extend "the so-called veterinarian's rule" to "a commercial kennel worker [who] ... was bitten and seriously injured by [defendant's] dog while it was boarded at the kennel that employed her." This Court explained that:

> "[u]nder that rule, which is a recognized application of the doctrine of primary assumption of risk, a dog owner who contracts with a veterinarian to treat his or her dog is generally exempt from liability should the dog bite or injure the veterinarian or veterinarian's assistant during such medical treatment." (*Ibid.*)

Once again, this Court indicated that the primary assumption of risk doctrine applies to more than just sporting activities.

What can be drawn from this series of cases is that, while the primary assumption of risk doctrine may find its greatest applicability in the sporting arena, this Court has not limited its scope to sporting activities. Thus, contrary to the conclusion of the majority below, the doctrine can, at least in theory, be applied to an activity such as a bumper car ride at an amusement park. As will be discussed below, that "theory" should become the practice in this state. If an amusement park ride, such as the bumper car attraction on which the plaintiff was riding at the time of her injury, contains an inherent risk of injury, the doctrine of primary assumption of risk should apply to bar a plaintiff from suing the defendant who made that ride available to the plaintiff, so long as the defendant has not acted to increase the risk inherent in that ride.

2. THE DOCTRINE OF PRIMARY ASSUMPTION OF RISK SHOULD APPLY TO AMUSEMENT PARK RIDES WHICH INVOLVE INHERENT RISKS OF INJURY

As the cases discussed in Section 1 above make clear, the doctrine of primary assumption of risk "imposes categorical limits on the defendant's duty of care. Thus, the doctrine of primary assumption of risk is a limitation on the plaintiff's cause of action rather than an affirmative defense." (*Priebe, supra,* 39 Cal.4th at 1135.) In other words, "[t]he primary assumption of risk doctrine operates to limit the duty owed by the defendant." (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499 [in which this Court held that the primary assumption of risk doctrine applies to golf.])

Therefore, in order to determine whether the doctrine of primary assumption of risk should apply to amusement park rides which involve inherent risks of injury, we first must understand the nature of the duty that would otherwise be imposed on the operator of an amusement park if the doctrine were not to apply.

This Court explained in *Knight, supra,* 3 Cal.4th at 315-316 that:

> "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport."

Thus, where the doctrine of primary assumption of risk applies, it extinguishes any duty that might otherwise exist for a defendant to eliminate the risks inherent in the activity at issue. Conversely then, where the doctrine is found not to be applicable, a plaintiff can argue that a duty should be imposed on the defendant to eliminate those risks or to protect persons such as the plaintiff from those risks, even if those risks are inherent in the activity. That is what the plaintiff here sought in arguing that the doctrine should not be applied to amusement park rides, and that is exactly what the majority below held: that the defendant's predecessor did have a "duty to protect appellant ... from the risks associated with its rides." (*Nalwa, supra,* 196 Cal.App.4th at 578.)

But in deciding that such a duty exists, the majority below raises the fundamental issue that led to this Court's holding in *Knight*: the concern that imposing such a duty may fundamentally alter the nature of the activity. (*Knight, supra,* 3 Cal.4th at 319.)

> "Although *Knight* involved injuries occurring during a game of touch football, it is clear from the opinion that the doctrine applies not only to sports, but to other activities involving an inherent risk of injury to voluntary participants like Beninati, where the risk cannot be eliminated without altering the fundamental nature of the activity." (*Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 658.)

The majority below acknowledged that "[r]iding as a passenger in a bumper car in a closed circuit ... provide[s] bumps and jolts ..." (*Nalwa, supra,* 196 Cal.App.4th at 579.) "Prior to boarding the ride, appellant saw posted warnings about the possibility of bumping and sudden movement and direction changes." (*Id.* at 571.) This is the fundamental nature of a bumper car ride. As Justice Duffy commented in her dissent below:

> "Here, Nalwa participated in the Rue le Dodge ride knowing that she would be jostled about in her car as a result of bumping into other cars. The sole purpose of a bumper car ride is to enjoy the experience and thrill of minor-impact bumping. The name of the game is to bump and to attempt to avoid (often unsuccessfully) being bumped." (*Id.* at 585; dis. opn. of Duffy, J.)

The plaintiff here was injured because of a risk inherent in this activity: her bumper car was bumped by another bumper car. If primary assumption of risk does not apply, then the defendant had a duty to eliminate – or otherwise protect the plaintiff from – that risk of injury. As noted in the Statement of Facts above (at page 7), each bumper car had a padded seat, padded sides, a padded steering wheel, and a padded dash board. The cars were equipped with seat belts to restrain the driver and passenger during the ride. (Naderman Decl. at ¶ 5.) Yet all of that was not sufficient to prevent the plaintiff from suffering an injury while on the ride, and the plaintiff has not suggested that there were any other safety devices that could have been added to the individual bumper

cars to protect her from the potential of injury when one bumper car strikes another. How then could the defendant meet a duty to eliminate the possibility that a passenger might suffer injury while on the ride?

The most direct solution would be to eliminate any bumping from the ride. But this method of meeting the defendant's duty would unquestionably change the fundamental nature of the activity. As the majority below acknowledged, "bumping is part of the experience of a bumper car ride ..." (*Nalwa, supra,* 196 Cal.App.4th at 582.)

Alternatively, the defendant could substantially decrease the speed of the bumper cars, so that any impacts that do occur would lack sufficient power to cause injury. As the majority below recognized, "[r]iding as a passenger in a bumper car in a closed circuit ... provide[s] bumps and jolts ..." (*Id.* at 579.) It is those jolts that have the potential to cause harm, and those are what would have to be eliminated to completely protect the riders from any risk of injury. This too would fundamentally alter the nature of the activity. As Justice Duffy observed in her dissent below, "who would want to ride a *tapper car* at an amusement park?" (*Id.* at 597; dis. opn. of Duffy, J.; italics in original, footnote omitted.)

Similar difficulties would confront the defendant in trying to meet this duty in regard to other amusement park thrill rides. Can you eliminate the

risks associated with a roller coaster without eliminating the twists, turns, and sudden drops that are inherent to the ride? Or the risks associated with a Scrambler without eliminating the sudden changes in direction that are its hallmark? Or the risks associated with a Tilt-A-Whirl without eliminating its random changes in spinning motion?

The majority below concluded that none of this matters; that the only concern is "the overriding public policy requiring the owners of amusement parks to make the parks safe for their patrons." (*Nalwa, supra,* 196 Cal.App.4th at 577.)

> "Amusement park owners' liability for injuries on their rides will affect the 'nature' of rides. It will make them safer. However, given the regulatory requirements to assure safety on amusement park rides, we conclude that any effect on the rides can only be a positive one consistent with public policy." (*Id.* at 579.)

The majority fails to appreciate the reality of what they are requiring. They are not making the rides safer. Rather, they are requiring amusement parks operators to eliminate their existing rides and to replace them with rides that are fundamentally different. In essence, the majority is stating a public policy that amusement park operators can only offer rides that truly do provide only "the illusion of danger" without any actual risk of injury. (*Id.* at 607.)

But if this is to be the public policy of California, how can we logically limit its application to amusement parks? If it is the policy of the state to

protect its citizens by ensuring that they do not participate in activities that present any real risk of injury, how can we justify applying the primary assumption of risk doctrine to a host of sports and recreational activities which are conducted across California? Each year, individuals – adults and children alike – break bones and suffer other injuries using the numerous ski resorts that are permitted to operate throughout the state. People fall while rock climbing, sometimes suffering fatal injuries. People are thrown from horses they are riding, while others crash driving off-road vehicles. Logically, shouldn't the policy espoused by the majority below apply equally to these activities, precluding the application of primary assumption of risk to them as well? Yet primary assumption of risk has been applied in all of these circumstances. (See the cases collected in footnote 7 of the dissent below. [*Nalwa, supra,* 196 Cal.App.4th at 591, fn.7; dis. opn. of Duffy, J.])

The defendant would contend that this Court in *Knight* came to the opposite conclusion, implicitly finding that it is the policy of this state to permit people to engage in a broad variety of recreational activities, even if some of those activities do involve the risk of injury to the participants, and concluding that the persons and entities that enable these individuals to participate in these activities should not be held liable if on occasion the risks inherent in those activities cause a participant to suffer injury.

Other states have reached similar conclusions regarding the extent to which amusement park operators should be held liable for injuries suffered by guests.

> "Georgia courts have addressed the issue of assumption of risk in connection with amusement park rides on a number of occasions and have held that a person who uses such rides assumes the risk of injury arising 'as a result of the natural and obvious hazards necessary to the purpose of the device.' [Citation omitted.]" (*Jekyll Island State Park Authority v. Machurick* (Ga.Ct.App. 2001) 250 Ga.App. 700, 701)[2]

In Illinois, "the doctrine of assumption of risk presupposes that the danger which caused the injury was one which ordinarily accompanied the activities of the plaintiff and that the plaintiff knew or should have known both the danger and the possibility of the injury existed before the occurrence." (*Russo v. Range, Inc.* (Ill.App.Ct. 1979) 76 Ill.App.3d 236, 237.)

The *Russo* court explained "[t]he theory operates as a valid defense in three separate situations", including "where a plaintiff involved in some type of relationship with the defendant, is said to 'impliedly consent' to excusing a defendant from a legal duty which would otherwise exist." (*Id.* at 238.) The court offers as an example the case of *Murphy v. White City Amusement Co.*

---

[2] Georgia's version of assumption of the risk appears to be similar to California's before the adoption of comparative negligence. *See Jekyll Island State Park Authority, supra,* 250 Ga.App. at 700.

(Ill.App.Ct. 1926) 242 Ill.App. 56, in which the Court of Appeals of Illinois "held that a patron at an amusement park who knew how a ride operated and was aware of the risk that its violent bouncing might injure her, assumed the risk of the injury she suffered on the ride." (*Russo, supra,* 76 Ill.App.3d at 238.)

In *Pfisterer v. Grisham* (Ind.Ct.App. 1965) 137 Ind.App. 565, 566, the plaintiff was injured while using a slide at a "public lake and amusement area". The Court of Appeals of Indiana concluded that, under the facts presented, the trial court had erred in giving an instruction on assumption of risk (*id.* at 569-570), explaining that while the "Appellant assumed or incurred the risks inherent and incident to the use of this slide, ... she did not assume or incur the risk that the slide might be defectively constructed." (*Id.* at 572.)

In *Ramsey v. Fontaine Ferry Enterprises, Inc.* (1950) 314 Ky. 218, the defendant offered a motor scooter attraction at its amusement park. (*Id.* at 219.) The plaintiff alleged that one of the other motor scooter riders "struck plaintiff's scooter in the side, causing her to run into an island in the center of the rink, and before she could regain control of her scooter, other scooters collided with her knocking her against the wall and injuring her." (*Ibid.*) The Kentucky Court of Appeals (then the Commonwealth's highest court) concluded that:

> "The entire device is arranged to provide thrills for its users by bumping into or dodging each other. There is no other lure. The game has its hazards, but one cannot be ignorant of them. Plaintiff entered the scooter for the purpose of engaging in the frolic. She deliberately exposed herself to the contingency which occurred. ... [P]laintiff assented to the engagement which brought about her injury and in such circumstances the law will enforce the maxim volenti non fit injuria (no legal wrong is done to him who assents)." (*Id.* at 220; citations omitted.)

In *Gardner v. G. Howard Mitchell* (1931) 107 N.J.L. 311, 312-313, the plaintiff was injured when she was bumped while on a bumper car ride. The New Jersey Court of Errors and Appeals (then the state's highest court) concluded that:

> "It was for the thrill of bumping and of the escape from being bumped that plaintiff entered the contrivance and remained there after opportunity for exit had occurred. The chance of a collision was that which gave zest to the game upon which plaintiff had entered. She willingly exposed herself to the contingency of a collision. It is an ancient maxim that that to which a person assents is not esteemed in law an injury; or, in more technical language, *volenti non fit injuria.* ... [O]ne who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, ..." (*Id.* at 314-315; citations omitted.)

In *Leslie v. Splish Splash at Adventureland, Inc.* (N.Y.App.Div. 2003) 1 A.D.3d 320, 321, "[t]he plaintiff allegedly sustained personal injuries while riding a water slide at the defendant's water park. The defendant moved for summary judgment dismissing the complaint based upon the doctrine of

assumption of risk. The Supreme Court denied the motion ..." The Appellate Division of the New York Supreme Court reversed, explaining that:

> "A plaintiff is barred from recovery for injuries which occur during voluntary sporting or recreational activities if it is determined that he or she assumed the risk as a matter of law. A voluntary participant in a sporting or recreational activity consents to those commonly-appreciated risks which are inherent in and arise out of the nature of such activity generally, and which flow from the participation." (*Ibid.*; citations omitted.)

As Justice Duffy noted in her dissent below, "[t]hese out-of-state authorities are not binding precedent here. [Citation.] They, however, provide support for the conclusion that the primary assumption of risk doctrine may be applied to an activity involving an amusement park ride such as Rue le Dodge." (*Nalwa, supra,* 196 Cal.App.4th at 600; dis. opn. of Duffy, J.)

In *Knight,* this Court concluded that the "question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm" turns "on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport." (*Knight, supra,* 3 Cal.4th at 309.) Here, the plaintiff voluntarily chose to participate in an activity – a bumper car ride – being offered by the defendant, an activity which entailed a small, but inherent, risk of injury. That risk of injury cannot be eliminated from that ride without changing its fundamental nature. As will be discussed below, the majority below has not

offered a convincing policy reason why amusement park operators should be held liable if an injury does result from the risks inherent in such an activity.

3. THE FACT THAT AMUSEMENT PARKS ARE SUBJECT TO REGULATION DOES NOT PRECLUDE THE APPLICATION OF THE PRIMARY ASSUMPTION OF RISK DOCTRINE TO AMUSEMENT PARK RIDES

The majority below concluded that applying the doctrine of primary assumption of risk to amusement park rides would violate public policy because the amusement park industry is subject to state regulation. Specifically, the majority rejected the application of the primary assumption of risk doctrine to the present case because amusement parks are subject to a "protective regulatory scheme" administered by the California Department of Industrial Relations, Division of Occupational Health and Safety ("DOSH"). (*Nalwa, supra,* 196 Cal.App.4th at 576.). The majority explained that:

> "These regulations set standards for every aspect of amusement park ride safety, including 'design, maintenance, construction, alteration, operation, repair, inspections, assembly, disassembly, and use of amusement rides . . . .' The Supreme Court itself has recognized that a statute, ordinance or regulation could, under the proper circumstances, 'impose a duty of care on defendant that may otherwise be precluded under the principals set forth in *Knight.*' The elaborate regulatory scheme governing California amusement parks, was, by its own terms, established 'for the protection of persons using such rides.' This is exactly the type

> of regulation which imposes a duty on the operators of such rides irrespective of *Knight*'s no-duty rule." (*Id.* at 576-577; citations omitted.)

The majority continued that "[a]s the regulatory scheme bears out, the concern is not to excuse possible dangerous conditions in order to increase the thrill of a ride. Instead, rider safety is of paramount concern." (*Id.* at 577.) The majority therefore concluded that the regulations impose on the owners of amusement parks a duty "to protect the public from the possible grave dangers of amusement park rides." (*Ibid.*)

The majority thus essentially held that the mere fact that California has put in place regulations to protect persons using amusement park rides was sufficient to preclude the application of the primary assumption of risk doctrine to such rides, on the theory that permitting the doctrine to be applied to such rides would amount to a finding that the amusement park owner "has no duty to protect the appellant who entrusted her life to respondent from the risks associated with its rides." (*Id.* at 578.)

The majority's analysis does not take into account the actual regulatory scheme that California has put in place regarding amusement park rides. The majority does not discuss the specific regulations that applied to the defendant's bumper car ride, nor is there any suggestion that the operation of

the defendant's bumper car ride in any way breached the protective scheme actually created by these regulations.

The majority acknowledges in its opinion that "[t]he California Department of Industrial Relations, Division of Occupational Health and Safety (DOSH) inspected the ride annually and in 2004 and 2005 found no safety-related problems with the ride." (*Id.* at 570-571.) The majority never explains how DOSH could have made those findings if, as the majority appears to have concluded, the manner in which the ride was being maintained or operated created a safety hazard in violation of the governing "protective regulatory scheme".

The problem with the majority's conclusion is that the actual regulations do not support it. As Justice Duffy noted in her dissent below, "there is no suggestion here that Cedar Fair failed to comply with any statute or regulation as a result of which Nalwa was injured." (*Nalwa, supra,* 196 Cal. App. 4th at 600; dis. opn. of Duffy, J.) In fact, the only reference to "bumper cars" found anywhere in the California Code of Regulations is found in section 3195.9(a) of Title 8, which provides that:

> "Ride conveyance vehicles shall be provided with emergency brakes or other equally effective emergency stopping controls, if upon failure of normal stopping controls, collision may reasonably be expected to occur and result in patron injury

> or equipment damage. ***Low speed vehicles designed for controlled collisions, such as bumper cars, do not require emergency stopping controls."*** (emphasis added)

In other words, the "protective regulatory scheme" on which the majority based its conclusion that "public policy bars the application of the primary assumption of risk" to amusement park rides in fact explicitly permits the maintenance and operation of bumper car rides and their attendant collisions. If it is public policy to permit amusement parks to offer bumper car rides in which collisions will occur, then that public policy necessarily permits amusement parks to engage in that activity despite the risk of injury inherent in it.

Given that the majority itself recognized the significance of there being a regulatory scheme governing bumper car rides, its conclusion that public policy precludes the application of the primary assumption of the risk doctrine is inconsistent with – and indeed would undermine – the public policy that is disclosed by the actual provisions of that regulatory scheme. The defendant would thus contend that the actual public policy embraced by the state's regulatory scheme not only does not bar the application of the primary assumption of the risk doctrine in these circumstances, it actually compels its application here.

This Court's decision in *Cheong v. Antablin* (1997) 16 Cal.4th 1063 undermines the majority's apparent conclusion that the mere existence of a regulatory scheme precludes the application of the doctrine of primary assumption of risk to the regulated industry – even when the evidence reveals no violation of those regulations by the defendant and explicit authorization in those regulations for the very activity that the majority suggests is barred by the regulatory scheme.

Cheong involved a claim arising from a collision between two skiers. (*Id.* at 1065.) The issue before this Court was "whether the injured skier has a valid action in tort against the uninjured skier." (*Id.* at 1065-1066.) This Court concluded that the trial court properly granted summary judgment in favor of the defendant. (*Id.* at 1066.)

The plaintiff had argued that the trial court erred in finding that primary assumption of risk barred his claim. He argued that a Placer County ordinance relating to skiing "impose[d] a higher duty on defendant than *Knight* establishes." (*Id.* at 1069.) This court disagreed.

> "We recognize that *Knight* was a development of the common law of torts. Within constitutional limits, the Legislature may, if it chooses, modify the common law by statute. [Citations.] Whether a local ordinance such as the Placer Code can modify *Knight* is less clear. We need not decide this question here because we conclude that the ordinance does not modify the *Knight* standard even if we assume it could. [¶] The ordinance

> evinces no clear intent to modify common law assumption of risk principles." (*Ibid.*)

If the mere existence of a regulatory scheme were sufficient to bar application of the primary assumption of risk doctrine – as the majority below seems to have concluded – this Court would have reached the opposite conclusion in *Cheong*. But it didn't, thereby conclusively refuting the conclusion reached by the majority below. Indeed, this Court has applied primary assumption of risk in at least two situations where the activity was regulated: *Cheong* (snow skiing) and *Ford, supra* (water skiing).

This is not to say that statutes – and perhaps regulations and local ordinances – cannot impose duties on defendants that are not subject to primary assumption of risk, as this court foretold in *Finnegan v. Royal Realty Co.* (1950) 35 Cal.2d 409, 430-431:

> "Where an ordinance is a police regulation, made for the protection of human life, it is an obligation imposed upon the defendant by a salutary police regulation and the doctrine of assumption of the risk does not apply. ... In *Friedman v. Pacific Outdoor Adv. Co.*, 74 Cal.App.2d 946, 952-953, it was said that the doctrine of *volenti non fit injuria* is not applicable where the injury arises from a violation of an ordinance. ... Even though a person may waive the benefit of a law enacted for his own benefit an ordinance enacted for the public good cannot be contravened by private agreement. Public policy requires that duties imposed by statute be discharged and that those who are affected cannot suspend the operation of the law either by waiver or by express contract." (citations omitted)

(*See also Ford, supra,* 3 Cal.4th at 355-356.)

Similarly, in *Shahinian v. McCormick* (1963) 59 Cal.2d 554, 558, which related to a water skiing accident, this Court commented that:

> "The key question in such is whether public policy as declared by a statute or ordinance precludes a defendant from asserting the defense of assumption of risk against a plaintiff. [Citations.] That is a legislative not a judicial question. The legislative body here involved has fixed that policy in the instant case." (*Id.* at 565.)

These cases indicate that the determination of whether the enactment of a statute or ordinance precludes the application of primary assumption of risk to a particular duty encompassed by that statute or ordinance depends on the legislative act itself. That makes even more significant the majority's failure to point to any evidence that would suggest that the park operator here "failed to comply with any statute or regulation as a result of which Nalwa was injured." (*Nalwa, supra,* 196 Cal. App. 4th at 600; dis. opn. of Duffy, J.) Absent the identification of some specific regulation which the defendant allegedly violated in regard to its bumper car ride, there is no way to even begin to evaluate "whether public policy as declared by [that regulation] precludes a defendant from asserting the defense of assumption of risk against a plaintiff." (*Shahinian, supra,* 59 Cal.2d at 565.)

So, contrary to the conclusion of the majority below, the mere fact that amusement parks are subject to regulation does not preclude the application of the primary assumption of risk doctrine to amusement park rides. While

there may be circumstances where a particular regulatory scheme "evinces [a] clear intent to modify common law assumption of risk principles" (*Cheong, supra,* 16 Cal.4th at 1069), the majority failed to support its conclusion that such an intent can be found in the regulatory scheme at issue here.

Rather, the majority merely concluded that because "[t]he elaborate regulatory scheme governing California amusement parks, was, by its own terms, established 'for the protection of persons using such rides.' (Cal. Code Regs., tit. 8, § 3900.)" it is therefore "the type of regulation which imposes a duty on the operators of such rides irrespective of *Knight*'s no-duty rule." (*Nalwa, supra,* 196 Cal.App.4th at 576-577.) The majority failed to show that the "protection of persons using such rides" contemplated by these regulations explicitly or implicitly incorporated a requirement that amusement park operators eliminate all risks inherent in those rides.

The majority thus failed to show that the regulations reflect a "clear intent to modify common law assumption of risk principles" (*Cheong, supra,* 16 Cal.4th at 1069). To the contrary, as shown above, the regulations clearly contemplate that amusement park operators such as the defendant ***will*** offer rides in which the risk of injury is inherent.

Thus, the majority in its opinion failed to establish that the existence of the regulatory scheme at issue here precluded the trial court from applying

the primary assumption of risk doctrine to the incident in which the plaintiff here was injured.

4. THE FACT THAT AMUSEMENT PARKS MAY OWE A HIGHER DUTY OF CARE TO THEIR CUSTOMERS DOES NOT PRECLUDE THE APPLICATION OF THE PRIMARY ASSUMPTION OF RISK DOCTRINE TO AMUSEMENT PARK RIDES

The majority in its opinion held that even if "an amusement park ride is the type of sport or activity contemplated by ... *Knight* and its progeny, respondent's position as owner of [the] park nonetheless would invoke a higher duty of care even under the current construction of the primary assumption of risk doctrine." (*Nalwa, supra,* 196 Cal.App.4th at 580.)

> "With great power comes great responsibility. Because of their position of control over the premises they hold open to the public for profit, proprietors are uniquely positioned to eliminate or minimize certain risks, and are best financially capable of absorbing the relatively small cost of doing so. Holding owners responsible for minimizing risk is just good policy. Failure to do so could expose the public to unnecessary risk. . . . . It is entirely consistent with both *Knight* and the prevailing commercial premises liability case law to impose reasonable duties to minimize risk on defendants who hold their premises open to the public for profit. . . . . Without question, [the respondent] is best situated to minimize any risks associated with its rides, both because of its control and because of the profits such parks make." (*Id.* at 581-582; citations and footnote omitted.)

The problem with this argument is that it reflects a misunderstanding of *Knight.* The majority contends that it is merely following this Court's holding in *Knight* "that proprietors should be obligated to take steps 'in order to minimize the risk [to their patrons] without altering the nature of the sport.' (*Knight, supra,* 3 Cal.4th at p. 317.)" (*Nalwa, supra,* 196 Cal.App.4th at 580.) The majority cites several cases that the majority explains "followed suit, finding a duty to minimize risks based on the defendant's control over the instrumentalities of the injury." (*Ibid.*)

At the portion of the *Knight* opinion cited by the majority, this Court was discussing the case of *Ratcliff v. San Diego Baseball Club* (1938) 27 Cal.App.2d 733, in which a baseball spectator was injured when she was hit by an accidentally thrown bat. (*Knight, supra,* 3 Cal.4th at 317.) This Court explained that what was at issue in that case was not a duty on the part of the stadium owner to prevent the bat from being thrown, but rather the owner's duty "to provide a reasonably safe stadium with regard to the relatively common (but particularly dangerous) hazard of a thrown bat." (*Ibid.*)

In other words, what this Court was pointing out was that, while a purveyor of recreational activities does not have a duty to eliminate the risks inherent in an activity, it may have a duty to take reasonable steps to protect its customers from the consequences of those inherent risks. In the case of

the baseball stadium, while the owner did not have a duty to eliminate the likelihood of a bat being thrown, the owner did have a duty "to provide the patron 'protection from flying bats, at least in the area where the greatest danger exists and where such an occurrence is reasonably to be expected.' (*Ratcliff* v. *San Diego Baseball Club, supra,* 27 Cal.App.2d at p. 736.)" (*Knight, supra,* 3 Cal.4th at 317.) This is the same rule followed in the various other cases cited by the majority on this issue, to the extent that the defendants in those cases exercised "control over the instrumentalities of the injury" (as shown by the majority in its brief description of these cases in its opinion). (*Nalwa, supra,* 196 Cal.App.4th at 580.)

However, the majority is not applying that rule to the defendant in this case. It is not saying that the defendant failed to take adequate steps to protect the plaintiff and its other patrons from the consequences of the risk of collisions inherent in the bumper car ride, such as by failing to have adequate padding on the vehicles or by failing to provide a seat belt. (The evidence shows just the opposite.)

Rather, the majority held that the defendant had a duty to actually eliminate the risk of its patrons being involved in a potentially injury causing collision in the first place. That is not what this Court held in *Knight*; in fact, it is directly contrary to that holding.

The fact that an amusement park operator may be "uniquely positioned to eliminate or minimize certain risks" associated with their rides (*Nalwa, supra,* 196 Cal.App.4th at 581) does not justify impose such a duty on the operator if the net effect will either be to force the operator to fundamentally change the nature of the ride or to eliminate it altogether.

The fundamental error of the majority's analysis can be seen in its statement that "[h]olding owners responsible for minimizing risk is just good policy. Failure to do so could expose the public to unnecessary risk." (*Id.* at 581-582.) If a risk of injury is inherent in a ride, and that risk cannot be eliminated without fundamentally altering the nature of the ride, then "expos[ing] the public" to that risk is not "unnecessary"; rather, it is inevitable, unless it is the public policy of this state that amusement park operators are not to expose their guests to any risk of injury on any of their rides. Yet, as was discussed in Section 3 above, the majority has not shown that such a public policy exists.

Thus, there is no support in the case law for the majority's attempt to impose on owners of amusement parks a special version of the primary

assumption of risk doctrine that imposes a duty on those owners to take steps to eliminate even those risks inherent in their rides.[3]

5. THERE IS NO EVIDENTIARY SUPPORT FOR THE MAJORITY'S CONCLUSION THAT HEAD-ON COLLISIONS ARE NOT RISKS INHERENT IN BUMPER CAR RIDES

The majority's opinion contains what amounts to a fall-back position justifying its decision even if its conclusions about the scope of the applicability of the primary assumption of risk doctrine were to be successfully challenged.

> "Although bumping is part of the experience of a bumper car ride, head-on bumping is not. In fact, it is a prohibited activity. The evidence submitted in support and opposition of the motion showed that respondent was aware of the perils of allowing head-on collisions, and, as owner of the park, respondent had a duty to take reasonable steps to minimize those risks without altering the nature of the ride. (*Knight, supra,* 3 Cal.4th at p. 317; *Kahn, supra,* 31 Cal.4th at p. 1004.) Respondent had taken steps to eliminate or reduce the likelihood of head-on collisions at every other park prior to appellant's injury." (*Nalwa, supra,* 196 Cal.App.4th at 582.)

---

[3] This analysis would also apply to the majority's implicit conclusion that the higher standard of care imposed on common carriers precludes the application of primary assumption of risk in those situations as well. *See Nalwa, supra,* 196 Cal.App.4th at 582-583.) Thus, the trial court was correct in concluding that primary assumption of risk required the granting of summary judgment as to the common carrier cause of action, just as it required the granting of the motion as to the plaintiff's negligence cause of action. (*Id.* at 571.)

The actual evidence before the trial court does not support any of this, as the defendant pointed out in its Petition for Rehearing (at pages 1-5). The following is a direct quotation of the relevant portions of that Petition:

1) "In 2005, the four other parks configured their bumper car rides so that the cars were more likely to be driven in only one direction." ([*Nalwa, supra,* 196 Cal.App.4th at 570.]) The evidence does not support this statement. Rather it merely shows that in 2005, the bumper car rides at the four other parks were configured for unidirectional travel. (CT 159-160.) There is nothing in the record to indicate that in 2005 – or at any other time – there was a ***re***-configuration of the rides at these other parks changing the rides into a unidirectional configuration.

....

4) "Although bumping is part of the experience of a bumper car ride, head-on bumping is not." ([*Nalwa, supra,* 196 Cal.App.4th at 582.]) There is nothing in the record to support this conclusory statement. In fact, the evidence supports exactly the opposite conclusion. The evidence makes clear that head-on bumping will happen on bumper car rides unless the ride is changed to prevent such collisions or rules are put in place to prevent head-on bumping from occurring. Thus, head-on bumping ***is*** part of the experience of

a bumper car ride unless the ride is modified or the riders' freedom of action is restricted.

5) "The evidence submitted in support and opposition of the motion showed that respondent was aware of the perils of allowing head-on collisions, ..." ([*Nalwa, supra,* 196 Cal.App.4th at 582.]) There is no evidence to support this statement. All the evidence shows is that the defendant's predecessor had put rules in place to limit head-on collisions, but there was no specific evidence offered as to why that decision was made. All that can be found in the record is Jessica Naderman's answer in the affirmative to the question of whether she personally regarded the "no head-on bumping rule ... as a rule that was put in place for the safety of riders on the Rue Le Dodge bumper car." (CT 161:20 - 162:2.) But there is nothing in that statement that indicates that either Ms. Naderman or any other of the defendant's predecessor's employees had any knowledge or "awareness" of any supposed "perils" of allowing head-on collisions, much less what these supposed "perils" might be.

6) "Respondent had taken steps to eliminate or reduce the likelihood of head-on collisions at *every other* park prior to appellant's injury." ([*Nalwa, supra,* 196 Cal.App.4th at 582]; emphasis in original.) As discussed in regard to item No. 1 above, there is nothing in the record to indicate that the defendant's predecessor had re-configured the rides at its

other parks to change them into a unidirectional configuration, or had taken any other steps at those other parks to "eliminate or reduce the likelihood of head-on collisions". The evidence merely shows that the bumper car rides at those other parks were configured for unidirectional travel. (CT 159-160.) There is nothing in the record to indicate that there was a change from how those particular rides had originally been designed and manufactured, nor is there anything in the record to indicate that if the unidirectional configuration was a change from the original design, such re-configuration was done to "eliminate or reduce the likelihood of head-on collisions".

7) "However, the evidence here shows that respondent designed its bumper car ride to prevent head-on collisions at *every other* park it owned *except* Great America." ([*Nalwa, supra,* 196 Cal.App.4th at 583]; emphasis in original.) As discussed above in regard to item No. 6 above, there is nothing in the record to indicate that the bumper car rides at the other parks were designed "to prevent head-on collisions", or even that the defendant's predecessor had anything to do with the design of the bumper car rides found at its various parks.

8) "It is undisputed that they knew the dangers of head-on collisions, ..." ([*Nalwa, supra,* 196 Cal.App.4th at 583.]) As discussed above in regard to item No. 5 above, there is nothing in the record to indicate that the

defendant's predecessor or any of its employees "knew of the dangers of head-on collisions," or what those supposed dangers might be.

9) "... they had taken steps to prevent the risk everywhere except Great America." ([*Nalwa, supra,* 196 Cal.App.4th at 583.]) As discussed above in regard to item No. 6 above, there is nothing in the record to show that the defendant's predecessor had "taken steps to prevent the risk" of head-on collisions at any of its parks, or what that supposed risk might allegedly have been.

[*End of quotation from Petition for Rehearing*]

So, even if the plaintiff were injured as a result of a head-on collision, there is nothing in the evidence that was before the Court of Appeal to support the majority's conclusion that there is anything different about a head-on collision than any other type of collision in a bumper car. All such collisions are a risk inherent in the ride. Contrary to the majority's conclusion, it is simply irrelevant whether the plaintiff was injured in a head-on collision.

Significantly, the majority never states that the plaintiff actually was injured as the result of a head-on collision. It writes that the accident happened as follows:

> "During the ride, appellant's bumper car was hit head on and then immediately hit from behind. Feeling 'pushed around,' and

> needing to 'brace' herself, appellant put her hand on the dash and fractured her wrist." (*Nalwa, supra,* 196 Cal.App.4th at 571.)

The majority's description of how this accident occurred is thus same as the defendant's description (see page 5 above), and both are consistent with the way the plaintiff described the accident in her deposition testimony. (See page 6 above.)

Therefore, even if there were factual support for the majority's fall-back position, it would still not justify the majority's reversal of the granting of the motion for summary judgment. It simply makes no difference here whether or not head-on bumping is a risk inherent in bumper car rides, because the plaintiff was not injured as a result of a head-on collision.[4]

---

[4] The plaintiff argued in her Appellant's Reply Brief (at page 5) that it was only on appeal that the defendant raised the claim that the plaintiff's injuries were not caused by a head-on collision and that therefore any such arguments had been waived. There was, and is, no merit to that assertion.

The defendant agrees that it did not raise the causation issue as a basis for granting its motion for summary judgment. It raised the issue on appeal to establish that the plaintiff's argument as to why the already granted summary judgment should be reversed had no basis in fact, and thus could not provide a legitimate basis for reversing the summary judgment.

The defendant does not dispute that its motion for summary judgment was not made or granted on the basis that there was no causal link between its alleged breach of duty and the injuries suffered by the plaintiff. Rather, summary judgment was requested and granted on the basis that the defendant had no duty to protect the plaintiff from injuries caused by any bumping of the bumper car in which she was riding – regardless of the direction from which

(continued on next page)

CONCLUSION

While the specific issue presented in this case is whether, and to what extent, the primary assumption of risk doctrine applies to amusement park rides, the resolution of that issue depends in resolving a more general one: what is the proper scope of the primary assumption of risk doctrine? The majority below concluded that it should only apply to active sports.

(continued from previous page)

that bumping came, that the defendant was not subject to the higher duty of a common carrier, and that the defendant's actions did not arise to the level of willful misconduct.

The defendant did not need to raise the issue of causation in order to make any of these arguments, and in particular did not need to establish that the plaintiff was not injured in a head-on collision – a fact which is conclusively shown by the plaintiff's own deposition testimony, a copy of which ***was*** including the defendant's moving papers in support of its motion for summary judgment. It was the plaintiff who needed to raise the issue of head-on collisions in order to come up with a theory for reversing the summary judgment that had already been granted.

The defendant, in pointing out that the plaintiff herself admitted that she was not injured in a head-on collision, was merely pointing out that the ***plaintiff's*** argument did not provide a legitimate basis for reversing the summary judgment. The defendant was ***not*** arguing that the fact that the plaintiff was not injured in a head-on collision provided a separate and independent basis for granting summary judgment or for affirming that judgment.

So there was no waiver of this issue by the defendant, and so it was properly raised on the appeal, and it is proper for the defendant to refer to it in this brief.

But when this Court recognized the doctrine in *Knight*, it explained that it applies "where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury". (*Knight, supra,* 3 Cal.4th at 314-315.) There is nothing in that description that would limit the applicability of the doctrine to active sports – or just to sports and recreational activities in general.

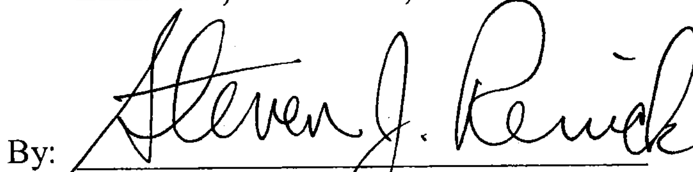
As has been discussed above, and as was shown in great detail in the dissent of Justice Duffy to the majority's opinion here, once you get past the argument that primary assumption of risk cannot apply to amusement park rides because they are not "sports", there is no justification for refusing to apply the doctrine to such rides. The mere fact that a regulatory scheme applicable to amusement park rides exists does not bar application of the doctrine, nor do the actual provisions of those regulations preclude the application of primary assumption of risk to amusement park rides. Nor does the existence of any higher standard of care that may apply to the operators of amusement parks impose a special duty on those operators that is beyond the limits otherwise imposed by the doctrine of primary assumption of risk.

The simple reality here is that the plaintiff suffered injury here because of a risk inherent in the activity in which she chose to participate: she was bumped while riding in a bumper car. The trial court correctly concluded that the doctrine of primary assumption of risk applied. Accordingly, this Court should reverse the decision of the Court of Appeal and reinstate the trial court's order granting the defendant's motion for summary judgment.

DATED: December 14, 2011

Respectfully submitted,

MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP



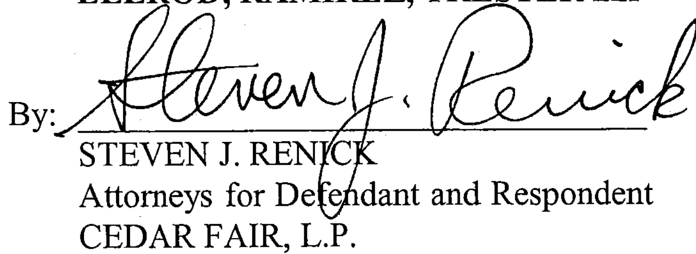
By: ______________________________
JEFFREY L. LENKOV
STEVEN J. RENICK
PATRICK L. HURLEY
Attorneys for Defendant and Respondent
CEDAR FAIR, L.P.

CERTIFICATE OF COMPLIANCE (CRC 8.520(c)(1))

The word count for the foregoing **OPENING BRIEF ON THE MERITS** is 12,018 words, based on the word count provided by the word processing system on which this brief was composed.

DATED: December 14, 2011

MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP



By: ______________________
STEVEN J. RENICK
Attorneys for Defendant and Respondent
CEDAR FAIR, L.P.

PROOF OF SERVICE BY OVERNIGHT DELIVERY

(C.C.P. §1013(c))

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 801 South Figueroa Street, 15th Floor, Los Angeles, California 90017.

On **December** 14, **2011**, I served by overnight delivery the foregoing document described as **OPENING BRIEF ON THE MERITS** on the parties herein in this action by placing true copies thereof enclosed in a sealed envelope designated by the express service carrier (Overnite Express) for overnight delivery with delivery fees paid or provided for, in a box or other facility at Los Angeles, California regularly maintained by the express service carrier, addressed as follows:

Ardell Johnson, Esq.
LAW OFFICES OF ARDELL JOHNSON
111 N. Market Street, Suite 300
San Jose, CA 95113-1116

CHRISTI JO ELKIN, Esq.
4667 Torrey Circle # 301
San Diego, CA 92130

I declare under the penalty of perjury under the law of the State of California that the foregoing is true and correct. Executed on **December** 14, **2011** at Los Angeles, California.