Case No. S195031

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SMRITI NALWA, M.D. Plaintiff and Appellant, vs. CEDAR FAIR, L.P. Defendant and Respondent.	Case No. S195031 Court of Appeal: H034535 Santa Clara County Superior Court Case No. 1-07-CV089189

On Appeal from a Judgment of the California Court of Appeal, Sixth Appellate District, Reversing the Judgment of the Superior Court of the State of California for the County of Santa Clara, the Honorable James P. Kleinberg, Judge Presiding

APPELLANT'S ANSWER BRIEF ON THE MERITS

Ardell Johnson, Esq.
Law Offices of Ardell Johnson
State Bar No. 95340
111 N. Market Street, Suite 300
San Jose, CA 95113
Tel.: (408) 454-6009
Fax.: (408) 332-5875

Christi Jo Elkin, Esq.
Attorney at Law
State Bar No. 270649
4667 Torrey Circle, Suite 301
San Diego, CA 92130
Tel.: (707) 483-4859

Attorneys for Plaintiff and Appellant,
Smriti Nalwa, M.D.

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

STATEMENT OF ISSUES

I. Whether an amusement ride owner can establish primary assumption of risk excuses it from owing its duty of due care to its patron as a matter of law or policy when she was injured in a head-on collision on its bumper car ride?

II. Is there a triable issue of fact as to whether an amusement ride operator breached its duty of due care to a patron by failing to guard against head-on collisions on its bumper car ride, despite knowing of their danger and guarding against them at every other bumper car ride it operates?

III. Even if primary assumption of risk could apply to a bumper car ride, does that amusement ride's owner and operator, consistent with the doctrine, owe a duty to minimize the risks of the ride without altering its nature, or is that amusement ride owner and operator subject to a new version of the doctrine that exempts it from this duty?

STATEMENT OF FACTS

Rue Le Dodge is a regulated bumper car ride owned and operated by the defendant, Cedar Fair, L.P, at its Great America amusement park in Santa Clara, California. (Clerk's Transcript ["CT"] 112; Declaration of Jessica Naderman in Support of Motion for Summary Judgment ["Naderman Decl."][1] ¶ 3, 8.) Approximately 300,000 people ride Rue Le Dodge every year. (Naderman Decl. ¶ 10.) Once Cedar Fair's employees have started the ride, individual riders drive padded electric cars into one another within speed parameters set by Cedar Fair. (Naderman Decl. ¶ 4; CT 157.) Cedar Fair inspects the ride and performs maintenance on it. (CT 170-171, 172-173.) In addition to loading and unloading the ride, Cedar Fair's employees start and stop it and have the ability to do so at any time during its operation. (CT 155.) They ensure that, "in general, the overall safety of the ride [is] being enforced." (CT 156.) This means the employees ensure all riders have properly fastened their seat belts and all riders meet the minimum height requirement of 48 inches that Cedar Fair has set for the ride. (CT 153-154, 155, 156). This "overall safety" also includes enforcing Cedar Fair's rule in its operations manual that prohibits head-on collisions. (CT 156, 158.) However, this rule is only enforced by verbally reprimanding or removing the offending patrons after a head-on collision has already occurred. (CT 158.)

Great America is one of five amusement parks owned and operated by Cedar Fair. (CT 159-160.) All five amusement parks have bumper car rides owned and operated by Cedar Fair. (CT 159-160.) Cedar Fair knows that operating the bumper car rides as unidirectional rides so the bumper cars travel in only one direction reduces head-on collisions. (CT 210.)

---

[1] This declaration can be found in Exhibit A to Cedar Fair's Motion to Augment Record on Appeal.

Currently, all five of those bumper car rides are operated in this unidirectional manner. (CT 159-160.)

However, this was not the case on July 5, 2005, when the plaintiff, Smriti Nalwa, M.D., visited Great America with her two children. (CT 71, 72-73.) At that time, Cedar Fair had not yet decided to operate Rue Le Dodge as a unidirectional ride, despite having already done so at each of the other four parks it owned and operated. (CT 159-160.) Instead, Cedar Fair chose to operate Rue Le Dodge so the bumper cars travelled in any direction, including head-on into one another. (CT 87.)

When the family went on Rue Le Dodge that day, Dr. Nalwa was a passenger in a bumper car with her son, age 9, while her daughter, age 7, rode alone in another car. (CT 70, 78, 88.) During the ride, Dr. Nalwa and her son were involved in a collision where they were bumped head-on and from behind by drivers of other bumper cars. (CT 85-86, 101.) Dr. Nalwa's son described the collision as "two people banged into it [the bumper car] . . . someone bump[ed] into us from the front and someone in the back." (CT 101.) As a result, Dr. Nalwa braced herself with her left arm inside the car because she felt "pushed around." (CT 85.) Dr. Nalwa then felt pain in her left wrist and saw the park's paramedic after getting off the ride. (CT 88-89.) She left Great America and later went to the emergency room, where a doctor determined she had a radial fracture of her left wrist. (CT 75, 90, 91.)

It was not until a year later, in 2006, that Cedar Fair finally reduced the risk of head-on collisions on Rue Le Dodge by implementing unidirectional travel of the bumper cars on the ride. (CT 158-159, 210.)

STATEMENT OF THE CASE

On January 25, 2008, Dr. Nalwa filed her second amended complaint against Cedar Fair, alleging common carrier liability, willful misconduct, strict products liability and negligence causes of action. (CT 1-6.) Dr. Nalwa dismissed the products liability claims after Cedar Fair filed a summary judgment motion. (CT 230.)

The trial court granted Cedar Fair's summary judgment motion for all three remaining causes of action and entered judgment in favor of Cedar Fair on June 8, 2009. (CT 238, 244.) The trial court held primary assumption of risk barred Dr. Nalwa's negligence claim. (CT 238.) Although it determined Cedar Fair was not a common carrier, the trial court said that even if Cedar Fair was a common carrier, Dr. Nalwa's common carrier cause of action would still be barred by primary assumption of risk. (CT 238-239.)

Dr. Nalwa timely appealed the trial court's judgment to the Sixth District Court of Appeal. (CT 254-256.) Presiding Justice Rushing authored the majority opinion on June 10, 2011, reversing the trial court's judgment granting Cedar Fair's summary judgment motion on each of the three causes of action. (*Nalwa v. Cedar Fair, L.P.* (2011) 196 Cal.App.4th 566, 584, review granted Aug. 31, 2011, S195031.) Justice Duffy dissented, but all three justices agreed Dr. Nalwa was injured in a head-on collision. (*See id.* at pp.571, 582 (maj. opn. of Rushing, P.J.); *Id.* at pp. 584, 602, fn. 19 (dis. opn. of Duffy, J.).) The court reversed the judgment as to the common carrier and willful misconduct causes of action because Cedar Fair could not establish as a matter of law it was not a common carrier or did not engage in willful misconduct (*Id.* at pp. 582-584 (maj. opn. of Rushing, P.J.).)

The appellate court articulated many reasons for its reversal of the summary judgment motion for the negligence claim. It found primary

assumption of risk only applied to sports and variations of the firefighter's rule, and Cedar Fair's Rue Le Dodge could not be classified as either of those two categories. (*Id.* at pp. 578-579.) It held public policy reflected in regulatory statutes and common carrier case law imposed a duty on Cedar Fair. (*Id.* at pp. 576-578.) It also said primary assumption of risk did not apply because of Cedar Fair's role as owner and operator of Rue Le Dodge. (*Id.* at pp. 580-582.) However, the court held that even if primary assumption of risk could apply to Rue Le Dodge, Cedar Fair, as its owner and operator, owed Dr. Nalwa a duty to minimize head-on collisions on the ride. (*Id.* at p. 582.)

The Court of Appeal denied Cedar Fair's petition for rehearing on July 7, 2011. Cedar Fair filed a petition for review with this Court on July 21, 2011. In it, Cedar Fair only addressed the appellate court's decision as to the primary assumption of risk doctrine and the corresponding negligence claim. On August 31, 2011, this Court granted Cedar Fair's petition for review.

ARGUMENT

The appellate court's ruling should be affirmed because primary assumption of risk does not bar Dr. Nalwa's negligence claim. A defendant's summary judgment motion should be granted only if, viewing the facts in the light most favorable to the plaintiff, there is no triable issue of material fact so the defendant is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A defendant can establish this by showing a plaintiff cannot establish one of the elements of the plaintiff's claims. (*Ibid.*) Primary assumption of risk intersects with summary judgment law in negligence causes of action when a defendant can establish he did not breach a duty of care owed to a plaintiff because the doctrine negates the duty or breach elements of the plaintiff's negligence claim. (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342; See *Knight v. Jewett* (1992) 3 Cal.4th 296, 337 (dis. opn. of Kennard, J.).)

On appeal, the de novo standard of review applies to rulings regarding the duty of care a defendant owes a plaintiff. (*Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 795; *Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1003.) In its opening brief, Cedar Fair attacks the appellate court's majority opinion, but this Court's independent review of this case should still lead to the conclusion that the appellate court's judgment should be affirmed. This is the same decision this Court made in *Gomez v. Superior Court* (2005) 35 Cal.4th 1125 when it held amusement park operators owe a duty of care to their patrons. (*Id.* at p. 1127.) Cedar Fair has not established primary assumption of risk bars Dr. Nalwa's negligence claim as a matter of law or policy or that it did not breach its duty of due care to her. It has also not established that even if primary assumption of risk applies to this case, it did not breach its duty to minimize the risk of head-on collisions in Rue Le Dodge.

I. AN AMUSEMENT RIDE OPERATOR CANNOT ESTABLISH PRIMARY ASSUMPTION OF RISK EXCUSES IT FROM OWING ITS DUTY OF DUE CARE TO ITS PATRON AS A MATTER OF LAW OR POLICY WHEN SHE WAS INJURED IN A HEAD-ON COLISION ON ITS BUMPER CAR RIDE

Civil Code section 1714 outlines the general rule that all persons owe a duty of due care to one another and can be held liable for any injury caused by their careless conduct. (Civ. Code § 1714.) This Court recognizes that "[w]hether a given case falls within an exception to this general rule, or whether a duty of care exists in a given circumstance, 'is a question of law to be determined on a case-by-case basis.' [Citation.]" (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472.) This Court articulated several policy factors in *Rowland v. Christian* (1968) 69 Cal.2d 108 that help determine what this duty of due care entails. (*Id.* at p. 113.) Primary assumption of risk is a limited exception to this general rule that:

> operates as a complete bar to a plaintiff's action only in instances in which, in view of the nature of the activity at issue and the parties' relationship to that activity, the defendant's conduct did not breach a legal duty of care owed to the plaintiff.

(*Ford v. Gouin, supra,* 3 Cal.4th 339, 342.)

This exception is, "in essence, a determination, reached as a matter of law, that the defendant should be excused from the usual duty of care based on some clear, overriding statutory or public policy. [Citation.]" (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1121.)

Cedar Fair should not be excused from owing this duty to Dr. Nalwa because the nature of Rue Le Dodge and the relationship of Cedar Fair to that ride do not trigger the application of primary assumption of risk as a matter of law or policy. This is precisely what the appellate court concluded

after undertaking this multi-tiered analysis. (*Nalwa, supra,* 196 Cal.App.4th 566, 582.) This Court should therefore affirm the appellate court's reversal of the trial court's order granting Cedar Fair's summary judgment motion.

A. Cedar Fair cannot establish the nature of Rue Le Dodge eliminates its duty of due care because Dr. Nalwa was not injured by an inherent risk of a sport or inherently dangerous activity

The primary assumption of risk doctrine requires a multi-tiered analysis. The first factor to consider in such an analysis is the nature of the activity in which the plaintiff was injured. (*Knight, supra,* 3 Cal.4th 296, 309 (plur. opn. of George, J.).) Primary assumption of risk only applies when the nature of the activity in which the plaintiff was injured is such that barring the plaintiff's claim as a matter of law is justified by public policy. (See *Priebe, supra,* 39 Cal.4th 1112, 1121.) The nature of Rue Le Dodge is neither factually similar to this Court's other primary assumption of risk cases, nor can it be rationalized by their same policies. Rue Le Dodge is not a sport, variation of the firefighter's rule, or inherently dangerous activity. Dr. Nalwa was not injured by an inherent risk of Rue Le Dodge, so not exempting Cedar Fair from its duty of due care will not fundamentally alter Rue Le Dodge or inhibit vigorous participation in bumper car riding. Cedar Fair cannot establish as a matter of law or policy that the nature of Rue Le Dodge triggers the narrow primary assumption of risk doctrine to excuse it from its duty of due care.

1. Primary assumption of risk is a limited exception that should not be changed to encompass Rue Le Dodge because that ride is not similar to activities to which this Court has applied the doctrine

The current primary assumption of risk principles are the product of this Court's redefinition of California's assumption of risk doctrine in 1992 in the companion cases *Knight v. Jewett, supra,* 3 Cal.4th 296 and *Ford v.*

Gouin, supra, 3 Cal.4th 339. In *Knight*, the plaintiff sued the defendant for negligence after she was injured while they played a touch football game because the defendant stepped on her hand. (*Knight*, at pp. 300, 301.) The defendant maintained the plaintiff's action was barred by assumption of risk, but the plaintiff argued that doctrine was extinguished in California after this Court adopted comparative fault principles in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804. (*Knight*, at p. 301.) This Court heard the case to clarify "the proper application of the assumption of risk doctrine in light of the adoption of comparative fault principles in *Li*." (*Id.* at p. 303.) It began this clarification by differentiating between "primary assumption of risk" and "secondary assumption of risk." (*Id.* at pp. 314-15.)

In primary assumption of risk cases, "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," so "the doctrine continues to operate as a complete bar to the plaintiff's recovery." (*Ibid.*) In secondary assumption of risk cases, "the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty," so "the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties." (*Id.* at p. 315.)

A plurality of this Court applied this framework in the context of co-participant liability for an injury sustained during the active sport of touch football. (*Knight, supra,* 3 Cal.4th 296, 318.) After analyzing the nature of touch football and the relationship of the parties as co-participants to that sport, this Court classified the case as one involving primary assumption of risk. (*Id.* at p. 321.) This Court recognized that ordinarily the defendant would owe the plaintiff a duty of due care to protect her from injury. (*Id.* at p. 315.) However, it concluded primary assumption of risk is an exception

to this general rule because when it applies, "defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself." (*Ibid.*) Instead, they "have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." (*Id.* at p. 316.) Furthermore, they have a duty not to intentionally injure another player or to engage "in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport. [Fn. omitted.]" (*Id.* at p. 320.) Coupled with these duties, this Court also recognized recreational facility owners are obligated "to minimize the risks without altering the nature of the sport. [Citations.]" (*Id.* at p. 317.)

Knight articulated two policy rationales for limiting the defendant's duty of care. First, that "vigorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct." (*Knight, supra,* 3 Cal.4th 296, 318.) Second, that "imposition of legal liability for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging" in the sport. (*Id.* at p. 319.) This Court ultimately held primary assumption of risk negated the duty element of the plaintiff's negligence claim in *Knight* by relieving the defendant of his duty of due care with respect to the plaintiff's injury, which this Court determined to be an inherent risk of playing football. (*Id.* at pp. 320-321.)

The companion case to *Knight*, *Ford v. Gouin, supra,* 3 Cal.4th 339, underscored this Court's reformulation of the primary assumption of risk doctrine. Again, this Court explained that primary assumption of risk:

> operates as a complete bar to a plaintiff's action only in instances in which, in view of the nature of the activity at issue and the parties' relationship to that activity, the defendant's conduct did not breach a legal duty of care owed to the plaintiff.

(*Id.* at p. 342.)

In *Ford*, this Court considered whether primary assumption of risk barred a barefoot water-skier's negligence action against the boat driver pulling him when the driver accidentally drove so the water-skier collided with a branch. (*Id.* at pp. 342-343.) This Court applied the same rules as *Knight* because the plaintiff was injured by an inherent risk of the active sport of water-skiing. (*Id.* at p. 345.) It held primary assumption of risk applied so the driver, a co-participant in water-skiing, could not be liable for that inherent risk because of his negligent conduct. (*Id.* at p. 345.) This Court used the same policy justifications outlined in *Knight* for its decision, reasoning:

> Imposition of legal liability on a ski boat driver for ordinary negligence . . . likely would have the same kind of undesirable chilling effect on the driver's conduct that the courts in other cases feared would inhibit ordinary conduct in various sports. As a result, holding ski boat drivers liable for their ordinary negligence might well have a generally deleterious effect on the nature of the sport of waterskiing as a whole.

(*Ibid.*)

This Court now acknowledges the plurality's holdings in *Knight* as controlling law since a majority of this Court reaffirmed those principles in *Neighbarger v. Irwin Industries* (1994) 8 Cal.4th 532. (*Id.* at pp. 537-538; *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1067.) Recognizing primary assumption of risk is a limited exception to the general rule of the duty of due care, this Court has continued to apply the doctrine using the multi-tiered analysis outlined in *Knight* of examining both the nature of the activity at issue and the relationship of the parties to that activity. In doing so, it has continued to emphasize the policy considerations surrounding such an analysis.

Sports are one such limited category to which this Court has applied primary assumption of risk. In *Cheong v. Antablin, supra,* 16 Cal.4th 1063, this Court held primary assumption of risk barred a skier's negligence

claim against another skier who collided with her. (*Id.* at pp. 1065, 1071-1072.) It reasoned they were co-participants in the sport of skiing and the collision was an inherent risk of that sport. (See *id.* at pp. 1065, 1069.) In *Kahn v. East Side Union High School District, supra,* 31 Cal.4th 990, this Court held primary assumption of risk could potentially bar a student's negligence claim against a swimming coach when she was injured by an inherent risk of the sport of swimming. (*Id.* at pp. 996, 1013.) *Avila v. Citrus Community College District* (2006) 38 Cal.4th 148 was another sports case where this Court held primary assumption of risk barred a baseball player's negligence claim. (*Id.* at p. 152.) The player sued the school hosting the game when he was injured by the inherent risk of being hit by a baseball. (*Id.* at pp. 152, 153, 165.) In the most recent sports case, *Shin v. Ahn* (2007) 42 Cal.4th 482, this Court held primary assumption of risk could apply to a negligence suit by a golfer who was hit by another golfer's errant ball during a golf game, which was an inherent risk of the sport. (*Id.* at pp. 486, 487, 488.)

In *Knight, supra,* 3 Cal.4th 296, this Court recognized primary assumption of risk "also comes into play in the category of cases often described as involving the 'firefighter's rule.' [Citation.]" (*Id.* at p. 309, fn. 5.) The firefighter's rule says a person who negligently starts a fire is not liable to a firefighter injured in fighting that fire. (*Ibid.*) Its premise is that "the party who negligently started the fire had no legal duty to protect the firefighter from the very danger that the firefighter is employed to confront." (*Ibid.*) In *Neighbarger, supra,* 8 Cal.4th 532, this Court stated:

> The 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. [Citation.]

(*Id.* at p. 538.)

Although *Neighbarger* did not involve a firefighter plaintiff, this Court examined the policy rationales behind the firefighter's rule to see if those same policies applied to claims by private safety employees burned at work due to the negligence of a third party maintenance crew. (*Neighbarger, supra,* 8 Cal.4th 532, 547.) This Court concluded a variation of the firefighter's rule did not apply to bar the injured employees' claims because the defendant had "established no policy reason justifying relieving it of a duty of care towards plaintiffs." (*Ibid.*)

In *Priebe v. Nelson, supra,* 39 Cal.4th 1112, this Court acknowledged the veterinarian's rule, a variation of the firefighter's rule, is "another application of the doctrine of primary assumption of risk." (*Id.* at p. 1122.) Just as it did with the firefighter's rule in *Neighbarger, supra,* 8 Cal. 4th 532, this Court analyzed the policy rationales behind the veterinarian's rule to see if those policies applied to the facts before it. (*Id.* at pp. 1129-1132.) This Court ultimately concluded the veterinarian's rule applied to bar a kennel worker's negligence claim against the owner of the dog that bit her, but it did so only once it determined the policy rationales matched to justify exempting the dog owner from liability. (*Ibid.*)

Since the *Knight* and *Ford* decisions in 1992, this Court has never applied the doctrine of primary assumption of risk outside these limited circumstances. Specifically, the appellate court could find no post-*Knight* case in any California court, including this one, where primary assumption of risk excused an amusement park owner from owing a duty to its injured patron. (*Nalwa, supra,* 196 Cal.App.4th 566, 575.) It is undisputed this case does not involve the firefighter's rule or a variation and Rue Le Dodge is

not a sport.[2] The nature of Rue Le Dodge is not similar to the activities to which this Court applies primary assumption of risk.

Cedar Fair tries to establish amusement rides, such as Rue Le Dodge, are the types of activities subject to primary assumption of risk. It references antiquated assumption of risk cases from out-of-state only because they, too, involve plaintiffs injured on amusement rides. However, these cases focus on "whether [the] plaintiff subjectively knew of, and voluntarily chose to encounter, the risk of [the] defendant's conduct,"[3]

---

[2] This Court has not explained how to determine whether an activity is a "sport." Many appellate courts have adopted the definition of "sport" as first articulated in *Record v. Reason* (1999) 73 Cal.App.4th 472. The *Record* court said "an activity falls within the meaning of 'sport' if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury." (*Id.* at p. 482; See, e.g., *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 116 [skateboarding is a sport]; *Shannon v. Rhodes, supra,* 92 Cal.App.4th 792, 800 [riding in a boat for transportation is not a sport].) The appellate court below found, "On a common sense level, we simply cannot conclude that riding in a bumper car as a passenger implicates a *sport* within any understanding of the word. [Citation.]" (*Nalwa, supra,* 196 Cal.App.4th 566, 579.)

[3] See *Jekyll v. Machurick* (Ga.Ct.App. 2001) 552 S.E.2d 94, 95 [assumption of risk requires plaintiff "'(1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed [herself] to those risks.' (Citation.)"]; *Russo v. The Range, Inc.* (Ill.App.Ct. 1979) 395 N.E.2d 10, 13 ["Essential . . . is specific knowledge on the part of the plaintiff of the risk . . . . (Citation.)"]; *Murphy v. White* (1926) 242 Ill.App. 56, 58 [emphasizing "Plaintiff knew that she was contracting for a swift ride down a steep incline in a boat which bounced violently"]; *Pfisterer v. Grisham* (Ind.Ct.App. 1965) 210 N.E.2d 75, 78 [assumption of risk may apply where "plaintiff voluntarily assumes a danger or risk of which he possesses actual or constructive knowledge."]; *Leslie v. Splish Splash at Adventureland, Inc.* (N.Y.App.Div 2003) 1 A.D.3d 320, 321 [summary judgment proper against plaintiff injured on defendant's water slide in part because defendant established "plaintiff understood . . . risks"].

rather than on the proper analysis under *Knight* of the nature of the activity and the relationship of the parties to that activity. (*Knight, supra,* 3 Cal.4th 296, 315.) Therefore, this Court should follow the appellate court's rejection of these cases because they go against the reformulation of the primary assumption of risk doctrine in California.

Cedar Fair relies on *Ramsey v. Fontaine Ferry Enterprises, Inc.* (Ky. 1950) 234 S.W.2d 738 and *Gardner v. G. Howard Mitchell* (N.J. 1931) 153 A. 607, two dated cases that ordered directed verdicts in favor of amusement park defendants. (*Ramsey*, at p. 739; *Gardner*, at pp. 608, 609.) Yet, Cedar Fair again "fails to explain how these cases are persuasive or even relevant under a post-*Knight* analysis," other than a quote from Justice Duffy's dissent that they "provide support for the conclusion that the primary assumption of risk doctrine may be applied to an activity involving an amusement park ride."(*Nalwa, supra,* 196 Cal.App.4th 566, 575, fn. 1 (maj. opn. of Rushing, P.J.); *Id.* at p. 600 (dis. opn. of Duffy, J.).) However, these cases have no value in a California primary assumption of risk case.

Essentially, Cedar Fair hopes this Court will change California's primary assumption of risk doctrine to that adopted by other states so it can apply the doctrine to amusement rides. In order to do so, this Court would have to regress back to considering a plaintiff's subjective knowledge in primary assumption of risk cases, which is precisely what *Knight* prohibits. Just as the appellate court did below, this Court should "decline [Cedar Fair's] invitation to extend the doctrine of primary assumption of risk to amusement park rides." (*Nalwa, supra,* 196 Cal.App.4th 566, 573.)

2. Primary assumption of risk does not apply to Rue Le Dodge because it is not an inherently dangerous activity

As Chief Justice Cantil-Sakauye explained while still a justice at the Court of Appeal in *Patterson v. Sacramento City Unified School District* (2007) 155 Cal.App.4th 821 (maj. opn. of Cantil-Sakauye, J.), some

California appellate courts "have expanded the scope of the assumption of risk doctrine to encompass dangerous activities in other contexts where the activity is inherently dangerous. [Citations.]" (*Id.* at p. 839.) This Court has not provided a standard for determining whether the nature of an activity is inherently dangerous.[4] While many of life's activities involve some danger, that is not enough to make an activity inherently dangerous and bring it within the purview of primary assumption of risk.

Bush v. Parents without Partners (1993) 17 Cal.App.4th 322 concluded primary assumption of risk did not bar a dancer's negligence claim against the sponsor of a dance when she fell on its slippery dance floor. (*Id.* at pp. 324-325.) In doing so, the court emphasized, "It is no answer to say that dancing is inherently dangerous because some dancers have been known to injure themselves by falling. The same could be said of driving a vehicle or virtually any human activity." (*Id.* at p. 329.)

Shannon v. Rhodes, supra, 92 Cal.App.4th 792 echoed this concern when it held primary assumption of risk did not bar a boat passenger's negligence claim against the boat driver when she fell off the boat. (*Id.* at p. 798.) The court properly focused on the nature of the activity before it and said:

> regardless of the "risks" that may be inherent in riding in a boat, the existence of risk does not automatically call for the application of the doctrine of assumption of risk. Rather, unless being a passenger in a boat is considered by this court as the equivalent of being a participant in a sporting or recreational activity covered by *Knight*, then assumption of risk simply does not apply.

(*Id.* at p. 798, fn. 3.)

---

[4] However, *Knight, supra,* 3 Cal.4th 296, did use skydiving and mountain climbing as examples of "highly dangerous" sports. (*Id.*at p. 314.) Rue Le Dodge's danger level is hardly comparable to that of these sports.

If merely some element of danger was sufficient to trigger primary assumption of risk, then the doctrine would no longer be a limited exception to the general rule of the duty of due care; the exception would swallow the rule.

Rue Le Dodge riders bump their cars within parameters controlled by Cedar Fair. By not operating Rue Le Dodge as a unidirectional ride, Cedar Fair deliberately allowed the risk of head-on collisions to exist in the ride even though it knew operating it as a unidirectional ride would have minimized that risk. Cedar Fair's argument that bumping is a risk of bumper cars is not enough to make Rue Le Dodge an inherently dangerous activity that warrants the application of primary assumption of risk. Rue Le Dodge is regulated for safety and children are permitted to ride on it. Dr. Nalwa's youngest child, then age 7, even rode the ride alone. Common sense dictates Rue Le Dodge is not an inherently dangerous activity. Furthermore, Cedar Fair has not established being a bumper car ride passenger is "the equivalent of being a participant in a sporting or recreational activity covered by *Knight*." (*Shannon, supra,* 92 Cal.App.4th 792, 798.) Thus, the appellate court below properly identified "riding as a passenger in a bumper car is too benign to be subject to *Knight*." (*Nalwa, supra,* 196 Cal.App.4th 566, 579.) Cedar Fair therefore cannot establish Rue Le Dodge is an inherently dangerous activity to which primary assumption of risk applies.

3. Primary assumption of risk does not exempt Cedar Fair from its duty because there are no policy rationales for doing so and Dr. Nalwa was not injured by an inherent risk of Rue Le Dodge

Courts have also analyzed the nature of an activity by focusing on whether the cause of the plaintiff's injury was an inherent risk of the activity so that applying primary assumption of risk made sense from a policy perspective. *Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th

248 stated, "The overriding consideration in the application of primary assumption of risk is to avoid imposing a duty which might chill vigorous participation in the implicated activity and thereby alter its fundamental nature." (*Id.* at p. 253.) In *Kahn, supra,* 31 Cal.4th 990, this Court emphasized how these policy rationales developed in *Knight, supra,* 3 Cal. 4th 296 are intertwined with the designation of inherent risks: "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." (*Id.* at p. 1003.) It follows that a non-inherent danger or risk is one that can be mitigated without altering the nature of the activity or inhibiting vigorous participation in it. Then, the nature of the activity is not analogous enough to *Knight* in order for primary assumption of risk to apply.

Hemady v. Long Beach Unified School District (2006) 143 Cal.App.4th 566 held that a plaintiff getting hit with a golf club by a fellow student during a physical education class at the defendant's school was not an inherent risk that triggered the application of primary assumption of risk. (*Id.* at p. 576.) The court found imposing a duty of due care on the school district for this non-inherent risk would not deter vigorous participation in golf during physical education classes or fundamentally alter the golf instruction during such classes. (*Ibid.*) The court concluded, "Because the policy considerations underlying the *Knight* and *Kahn* cases do not apply here . . . the prudent person standard of care governs defendants' potential liability." (*Id.* at p. 579.) Primary assumption of risk did not apply because the plaintiff was not injured by an inherent risk.

Kindrich v. Long Beach Yacht Club (2008) 167 Cal.App.4th 1252 held primary assumption of risk did not apply to a passenger injured while disembarking a boat because holding the boat owner liable would not "'alter fundamentally the nature of the sport by deterring participants from

vigorous participation.' [Citation.]" (*Id.* at p. 1262.) Using similar reasoning, *Shannon, supra,* 92 Cal.App.4th 792 elaborated:

> It simply cannot be said that the "nature" of the activity of recreational boating will be altered if boat drivers are required to exercise due care, especially when, as here, they have small children on board. To the contrary, in our view the activity is more likely to be enhanced if all boaters are under a duty to not engage in negligent or careless conduct.

(*Id.* at p. 800.)

Even cases to which primary assumption of risk could apply are instructive on determining whether a risk is inherent in an activity. In *Avila, supra,* 38 Cal.4th 148, this Court considered primary assumption of risk in the context of an intercollegiate baseball game. This Court did not have to spend time analyzing whether primary assumption of risk could apply to baseball because it already suggested in *Knight* this sport was the type of activity to which the doctrine applied. (See *Knight, supra,* 3 Cal. 4th 296, 316, 317.) However, this Court did analyze whether the intentional pitch that injured the plaintiff was an inherent risk of baseball. (*Id.* at pp. 163-166.) It focused on how "[s]ome of the most respected baseball managers and pitchers have openly discussed the fundamental place throwing at batters has in their sport." (*Id.* at p. 164.) It quoted *Knight* and said that even though the intentional pitch was in violation of game rules, "'imposition of legal liability for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.' [Citation.]" (*Id.* at p. 165.) This Court worried imposing liability would result in "chill[ing] any pitcher from throwing inside, i.e., close to the batter's body - a permissible and essential part of the sport - for fear of a suit over an errant pitch." (*Ibid.*) This Court ultimately used policy to justify its conclusion that "being intentionally thrown at is a

fundamental part and inherent risk of the sport of baseball. [Fn. omitted.]" (*Ibid.*) However, this Court narrowed its holding, cautioning:

> The conclusion that being intentionally hit by a pitch is an inherent risk of baseball extends only to situations such as that alleged here, where the hit batter is at the plate. Allegations that a pitcher intentionally hit a batter who was still in the on deck circle, or elsewhere, would present an entirely different scenario.

(*Id.* at p.165, fn. 11.)

Zipusch v. LA Workout, Inc. (2007) 155 Cal.App.4th 1281 also relied on *Knight's* policies when it held the defendant's negligent inspection and maintenance of the treadmill on which the plaintiff was injured was not an inherent risk of exercising at a health club. (*Id.* at p. 1292.) It said, "The main concern animating inherent risk analysis is the potential for chilling vigorous participation and altering the fundamental nature of a particular sport [fn. omitted]." (*Ibid.*) It said, "[i]nstead of chilling exercise at a health club, reasonably inspecting and maintaining exercise equipment should have the opposite effect." (*Ibid.*) *Zipusch* emphasized the defendant "already monitor[ed] and clean[ed] the exercise facility," so imposing a duty on the defendant to continue doing so would not fundamentally alter the nature of exercising at the health club. (*Ibid.*) While primary assumption of risk could apply to exercising at a health club, it did not apply to the facts before *Zipusch* because the plaintiff was not injured by an inherent risk.

Cedar Fair completely distorts this inherent risk analysis, first by not properly identifying the risk that injured Dr. Nalwa, and then by misarticulating the policy rationales behind the primary assumption of risk doctrine. Cedar Fair argues Dr. Nalwa was injured by an inherent risk of Rue Le Dodge because she was injured by bumping, which is the fundamental nature of the ride. This reasoning is not precise enough. While

Avila recognized a batter's injury from a pitcher's intentionally thrown baseball was an inherent risk of baseball, this Court was careful to distinguish that an intentionally thrown ball may not have been an inherent risk if the person it hit was not a batter at the plate. All intentionally thrown balls in baseball were not the same in the eyes of this Court, and so the injuries from them were not all inherent risks of baseball. Here, too, not all bumps on Rue Le Dodge are the same and not all bumps are inherent risks of riding on Rue Le Dodge.

Dr. Nalwa was not injured by just any bump on the ride; she was specifically injured by a head-on collision.[5] This is not an inherent risk of riding bumper cars. Cedar Fair knew head-on collisions are distinct from other bumps in a bumper car, which is why it enforced a rule prohibiting head-on collisions on Rue Le Dodge "for the safety of the riders." At every park it owned, other than Great America, Cedar Fair operated its bumper car rides as unidirectional rides that reduced head-on collisions. It did this because it knew head-on collisions presented an additional risk of injury that was not presented by other bumps. For these reasons, it cannot be said that head-on collisions are an "essential part" of or have a "fundamental

---

[5] Cedar Fair argues Dr. Nalwa was not injured by a head-on collision. This is a question of fact that cannot be used to bar Dr. Nalwa's negligence claim as a matter of law. Furthermore, this Court must view all facts in favor of Dr. Nalwa, as the opposing party to Cedar Fair's summary judgment motion. (*Aguilar, supra,* 25 Cal.4th 826, 843.) All of the justices from the appellate court accept Dr. Nalwa was injured in a head-on collision. (See *Nalwa, supra,* 196 Cal.App.4th 566, 571, 582 (maj. opn. of Rushing, P.J.); *Id.* at p. 602, fn. 19 (dis. opn. of Duffy, J.).) The deposition testimony of both Dr. Nalwa and her son, who was in the bumper car with her, indicate their bumper car was hit from behind and head-on, nearly, if not actually, simultaneously. Even in her dissenting opinion, Justice Duffy believes the time for Cedar Fair to argue Dr. Nalwa was not injured in a head-on collision was in its summary judgment motion, and its failure to do so constitutes a waiver of arguing the issue on appeal. (*Id.* at p. 602, fn. 19 (dis. opn. of Duffy, J.).)

place" in Rue Le Dodge. (*Avila, supra,* 38 Cal.4th 148, 164.) Therefore, Cedar Fair's own actions and statements disprove "there is nothing in the evidence . . . that there is anything different from a head-on collision than any other type of collision in a bumper car." (Opening Brief ["Op. Br."] at p. 46.)

Cedar Fair does not properly articulate the policy rationales that drive an inherent risk analysis. Rather than quoting binding precedent from this Court, Cedar Fair largely bases its policy examination on an appellate court decision that stated primary assumption of risk applies to an "inherent risk of injury . . . 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, emphasis added.) However, rather than focusing on the complete elimination of risks, this Court has focused on the mitigation of risks and whether "[i]mposing a duty to mitigate . . . inherent dangers could alter the nature of the activity or inhibit vigorous participation." (*Kahn, supra,* 31 Cal.4th 990, 1004.) Therefore, Cedar Fair's policy concerns about being forced to eliminate inherent risks of its ride are irrelevant to the policy discussion on the effects of mitigating head-on collisions.

Imposing a duty on Cedar Fair to mitigate the risk of head-on collisions will not fundamentally alter the nature of Rue Le Dodge. Just as the defendant in *Zipusch* already monitored and cleaned the treadmill on which the plaintiff was injured, Cedar Fair now already guards against head-on collisions by operating Rue Le Dodge as a unidirectional ride. Cedar Fair would not do so if it chilled vigorous participation in the ride or fundamentally altered its nature. Ultimately, "the policy considerations underlying the *Knight* and *Kahn* cases do not apply here." (*Hemady, supra,* 143 Cal.App.4th 566, 579.)

The primary assumption of risk doctrine grew out of identifying inherent risks. This was justified based on the policy considerations identified in *Knight, supra,* 3 Cal.4th 296. Just as this Court decided *Neighbarger, supra,* 8 Cal.4th 532 and *Priebe, supra,* 39 Cal.4th 1112 only after examining whether the policy rationales matched with other cases to which this Court had applied primary assumption of risk, this Court should decline to apply the doctrine here because the policy rationales are not present. This is because Dr. Nalwa was injured in a head-on collision, which is not an inherent risk of Rue Le Dodge.

B. Cedar Fair cannot establish it is excused from its duty of due care because of its role as a regulated owner, operator, and common carrier

Still following the multi-tiered analysis required by *Knight*, the second factor to consider in a primary assumption of risk analysis is the relationship of the parties to each other and to the activity. (*Knight, supra,* 3 Cal.4th 296, 315; *Parsons, supra,* 5 Cal.4th 456, 472, 482.) However, Cedar Fair does not even discuss its relationship to Dr. Nalwa or Rue Le Dodge, let alone establish why those relationships exempt it from its duty of due care. The appellate court below properly continued the multi-tiered analysis dictated by this Court and concluded primary assumption of risk does not apply here. Specifically, it focused on the policy implications of Cedar Fair's roles as a common carrier and owner and operator of Rue Le Dodge to justify imposing the general rule of a duty of due care on Cedar Fair. (*Nalwa, supra,* 196 Cal.App.4th 566, 577-578, 580-582.)

1. Cedar Fair is not excused from its duty of due care because of its role as owner and operator of Rue Le Dodge

This Court has specifically focused on the defendant's relationship to the activity in its past examinations of the relationship factor of the primary assumption of risk analysis. (See, e.g., *Avila, supra,* 38 Cal.4th

148, 161 ["Under this duty approach, a court . . . must evaluate the fundamental nature of the sport and the *defendant's* role in or relationship to that sport," emphasis added].) This relationship is essential because "the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue in a given case." (*Knight, supra,* 3 Cal.4th 296, 318.) Many policy rationales exist for imposing liability on defendants who are owners and operators of recreational facilities, including the level of control they have over the recreational activity and the economic benefits they derive from it.

This Court examined the applicability of primary assumption of risk to an owner and operator defendant in *Avila, supra,* 38 Cal.4th 148. In determining there was an organized relationship between a host school that owned and operated a baseball field and a player who was injured during a baseball game on that field, this Court explained:

> Intercollegiate competition allows a school to . . . reap the economic and marketing benefits that derive from maintenance of a major sports program. [Fn. omitted.] These benefits justify removing a host school from the broad class of those with no connection to a sporting contest and no duty to the participants.

(*Id.* at p. 162.)

The defendant's role did not justify excusing the defendant from owing the plaintiff a duty. (*Ibid.*)

Calhoon v. Lewis, supra, 81 Cal.App.4th 108 explained how this Court in *Parsons v. Crown Disposal Co., supra,* 15 Cal.4th 456 was able to distinguish defendants such as purveyors of recreational activities from defendants who had no organized relationship with the activity. *Calhoon* said, "Imposing liability on these defendants . . . was justified because they were responsible for, or in control of, the conditions under which the plaintiff engaged in the sport." (*Calhoon*, at p. 117.) This aspect of control

was crucial in *Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, where the court held the organizer of a baseball tryout event owed a duty to a player who was instructed to continue pitching even after he injured his arm. (*Id.* at p. 749.) *Wattenbarger* reasoned:

> Defendants decided what would be done and when. They controlled the simulated game in the sense of determining who would play what positions, including pitcher, and for how long. They supplied necessary equipment, such as bats and batting helmets, and took it upon themselves to restrict the participation of players with injuries.

(*Id.* at p. 755.)

Even though these cases dealt with a nature of activity to which primary assumption of risk applies, their discussion of the factor of the defendant's relationship to the activity is still relevant to determining whether the doctrine applies here. Cedar Fair has not discussed this factor, even after this Court has emphasized its importance in a primary assumption of risk analysis. As discussed below, Cedar Fair is regulated with respect to its amusement park rides, including Rue Le Dodge. Cedar Fair maintained and operated Rue Le Dodge. Its employees started and stopped the ride and determined its duration. It restricted who could ride on Rue Le Dodge with a minimum height requirement and set rules governing Rue Le Dodge, including a prohibition against head-on collisions. These are all aspects that made Cedar Fair "responsible for, or in control of, the conditions under which the plaintiff" rode Rue Le Dodge so that imposition of a duty on Cedar Fair is justified. (*Calhoon, supra,* 81 Cal.App.4th 108, 117.)

This Court can also emphasize the economic benefits reaped by Cedar Fair just as it did in *Avila* to support Cedar Fair owes a duty of due care. As the appellate court below stated, "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." (*Nalwa, supra,* 196 Cal.App.4th 566, 582.) These are compelling policy reasons for not exempting Cedar Fair from its duty of due care because of its role as owner and operator of Rue Le Dodge.

2. Primary assumption of risk does not exempt a common carrier from owing its duty of due care to its passenger

In *Parsons, supra,* 15 Cal.4th 456, this Court explained, "there are circumstances in which the relationship between defendant and plaintiff gives rise to a duty on the part of the defendant . . . ." (*Id.* at p. 482.) This Court has identified and focused on relationships between the parties such as instructor and student (e.g., *Kahn, supra,* 31 Cal.4th 990), co-participants (e.g., *Ford, supra,* 3 Cal.4th 339), and owner and patron (see, e.g., *Knight, supra,* 3 Cal.4th 296, 317-318.) Here, Dr. Nalwa was a patron of the amusement park owned and operated by Cedar Fair, which alone is a significant relationship. However, once she was on Rue Le Dodge, she was even more than a patron; Dr. Nalwa was a passenger and Cedar Fair was her common carrier.

In *Gomez, supra,* 35 Cal.4th 1125, this Court continued the "unbroken line of authority in California classifying recreational rides as common carriers" and held Disneyland, in its capacity as the owner and operator of its Indiana Jones attraction, was a common carrier. (*Id.* at pp. 1127, 1132, 1141.) Civil Code sections 2100 and 2101 hold common carriers to the duty of "utmost care and diligence" and require them "to provide vehicles safe and fit for the purposes to which they are put." (Civ. Code, §§ 2100, 2101.) *Gomez* affirmed the policy reasons for this duty of utmost care articulated in the federal case, *U.S. Fidelity & Guaranty Co. v. Brian* (5th Cir. 1964) 337 F.2d 881, which explained amusement rides "'are operated for profit and are held out to the public to be safe. They are

operated in the expectation that thousands of patrons, many of them children, will occupy their seats.'" (*Gomez*, at p. 1136, citing *U.S. Fidelity & Guaranty Co.*, at p. 883.)

This Court confirmed amusement ride operators owe a duty of utmost care to riders of certain amusement rides. Dr. Nalwa maintains Cedar Fair was a common carrier when it operated Rue Le Dodge. Cedar Fair has not challenged that on this appeal. Instead, Cedar Fair only asserts any such finding does not preclude the application of primary assumption of risk here. However, the policies this Court articulated in its classification of amusement ride operators such as Cedar Fair as common carriers indicate primary assumption of risk should not excuse Cedar Fair from its duty of due care. It would be inconsistent to find public policy does not support an amusement ride operator owing its injured passenger a duty of due care when public policy imposes a duty of utmost care on that same amusement ride operator to that same injured passenger under a theory of common carrier liability. Just as the policy of amusement rider safety supported the imposition of a duty of utmost care in *Gomez*, the policy of amusement rider safety supports the imposition of, at the very least, a duty of due care on Cedar Fair in this case.

Cedar Fair essentially asks this Court to ignore this well-established common carrier policy on the basis that primary assumption of risk exempts it from its duty of due care. This Court should decline to do so because of its policy of classifying amusement ride operators as common carriers and holding them to a duty of utmost care.

3. The public policy of amusement rider safety is not served by excusing a regulated amusement ride operator from its duty of due care to its injured patron

Cedar Fair's role as a regulated amusement ride operator is crucial to understanding the policy reasons for not exempting Cedar Fair from its

duty of due care. Cedar Fair attempts to circumvent this policy discussion by simply stating it allegedly did not violate any regulations that govern Rue Le Dodge. This Court has reviewed a rule's or regulation's effect on primary assumption of risk, but it has done so in the context of a plaintiff's unsuccessful argument that Evidence Code section 669, subdivision (a)[6] precluded the application of the doctrine.[7] This Court has similarly rejected arguments that a non-legislative rule creates an independent basis for a duty of care that precludes the application of primary assumption of risk.[8] In those cases, the nature of the activity was already one in which this Court determined primary assumption of risk could apply, so it was not necessary to examine the policies behind the rules and regulations for help deciding whether the doctrine could apply.

---

[6] Evidence Code section 669, subdivision (a) states:

> The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(Evid. Code, § 669, subd. (a).)

[7] See, e.g., *Ford v. Gouin*, *supra,* 3 Cal.4th 339, 351 [water-skiing plaintiff not member of class intended to be protected by statute]; *Cheong, supra,* 16 Cal.4th 1063, 1071 [skiing plaintiff not member of class intended to be protected by ordinance].

[8] See, e.g., *Avila, supra*, 38 Cal.4th 148, 163 [defendant did not owe plaintiff independent duty to not host preseason games as prohibited by college rules]; *Shin, supra,* 42 Cal.4th 482, 497 [appellate court wrong to find primary assumption of risk did not apply because etiquette rule required golfers to look for others near them before taking golf swing].

Those cases focused on whether alleged violated rules and regulations independently imposed a duty on the defendants, rather than on whether the rules and regulations themselves reflected a public policy that did not support exempting the defendants from their duty of care. However, *Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703 examined rules for their utility in a public policy analysis. The court looked beyond the defendant's compliance with National Collegiate Athletic Association ("NCAA") standards when the plaintiff was injured by a baseball hit with a metal bat manufactured and designed by the defendant. (*Id.* at pp. 706, 707, 715.) Even though the court acknowledged that, "[a]t the time of the accident, the NCAA allowed the use of metal bats, and the bat in use was apparently in compliance with NCAA standards," it nonetheless found there was a triable issue of fact as to whether the defendant increased the inherent risk of being struck by a baseball during a baseball game. (*Id.* at p. 713.) Finding the defendant complied with rules did not foreclose discussing whether the compliant conduct could be a breach of its duty.

All amusement park rides in California, including Cedar Fair's bumper car ride, are regulated by the California Code of Regulations. (Cal. Code Regs., tit. 8, §§ 3195.1 et seq., 3900 et seq.) Cedar Fair alleges Rue Le Dodge complied with these the year Dr. Nalwa was injured. It specifically alleges it complied with California Code of Regulations, title 8, section 3195.9, subdivision (a), which is the only applicable regulation to mention bumper cars by name.[9] However, any compliance with these regulations is irrelevant to determining whether primary assumption of risk applies here. Instead, the proper focus is on what public policy is reflected in these regulations and whether that policy supports holding Cedar Fair

---

[9] The regulation states, in part, "Low speed vehicles designed for controlled collisions, such as bumper cars, do not require emergency stopping controls." (Cal. Code Regs., tit. 8, § 3195.9, subd. (a).)

legally responsible for the harm it caused Dr. Nalwa. Therefore, Cedar Fair's reliance on cases based on Evidence Code section 669, subdivision (a), including this Court's decision in *Cheong, supra,* 16 Cal.4th 1063, is misplaced.

The purpose of the regulations governing general industry safety orders for amusement rides is to "establish minimum standards for design, maintenance, construction, alteration, operation, repair, inspections, assembly, disassembly, and use of amusement rides *for the protection of persons using such rides*." (Cal. Code Regs., tit. 8, § 3900 et seq., emphasis added.) The appellate court thus correctly identified amusement rider safety as a relevant policy concern articulated by the legislature. (*Nalwa, supra,* 196 Cal.App.4th 566, 576-577.) Cedar Fair argues this policy is not served if primary assumption of risk does not apply here. However, as the appellate court indicated, holding amusement park owners such as Cedar Fair liable for the injuries caused on their rides due to their careless conduct will force them to operate the rides more safely. (*Id* at p. 579.)

The regulations do not "compel" the application of primary assumption of risk, as Cedar Fair argues. (Op. Br. at p. 33.) It is fully consistent with California Code of Regulations, title 8, section 3195.9, subdivision (a) for Cedar Fair to owe a duty to guard against head-on collisions on Rue Le Dodge, while still having other bumps on the ride. Nothing about the imposition of this duty runs afoul with the policy behind the primary assumption of risk doctrine. The policy of this state to exempt certain recreational facility owners and operators from their duty of due care owed to their patrons with respect to inherent risks of an activity coexists comfortably with the policy of amusement rider safety and holding amusement ride operators owe a duty of due care to their patrons who are injured by non-inherent risks of their rides.

Dr. Nalwa urges this Court to consider in its duty determination the policy of amusement rider safety reflected in these regulatory statutes and to recognize that such a consideration extends well beyond whether Cedar Fair allegedly complied with the regulations governing Rue Le Dodge. Dr. Nalwa was an amusement rider injured on Rue Le Dodge. The ride would have been safer for her if Cedar Fair operated it as a unidirectional ride because then she would not have been injured in a head-on collision. Cedar Fair cannot establish the policies behind the regulations exempt it from its duty of due care because the application of the primary assumption of risk doctrine here would contravene public policy.

II. THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER AN AMUSEMENT RIDE OPERATOR BREACHED ITS DUTY OF DUE CARE TO A PATRON BY FAILING TO GUARD AGAINST HEAD-ON COLLISIONS ON ITS BUMPER CAR RIDE, DESPITE KNOWING OF THEIR DANGER AND GUARDING AGAINST THEM AT EVERY OTHER BUMPER CAR RIDE IT OPERATES

Civil Code Section 1714 provides the general rule of a duty of due care. (Civ. Code § 1714.) Even Cedar Fair acknowledges that if primary assumption of risk does not apply here, this duty includes "a duty to eliminate – or otherwise protect the plaintiff from – the risk of injury." (Op. Br. at p. 22.) There is a triable issue of fact as to whether Cedar Fair breached this duty of due care by not operating Rue Le Dodge as a unidirectional ride.

Even if Cedar Fair had not conceded this duty exists in the absence of the application of primary assumption of risk, this Court's independent analysis should still lead to the same conclusion that Cedar Fair owes a duty to minimize head-on collisions on Rue Le Dodge. In *Parsons v. Crown Disposal Co., supra,* 15 Cal.4th 456, this Court identified that when

primary assumption of risk does not apply, it is proper to analyze the policy factors set forth by this Court in *Rowland v. Christian, supra,* 69 Cal.2d 108:

> Some of the considerations that courts have employed in various contexts to determine the existence and scope of duty are: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]" [Citation.]

(*Parsons*, at pp. 472-473.)

This Court clarified the foreseeability factor requires an analysis of "'whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced [so] that liability may appropriately be imposed. . . .'(Italics omitted.)" (*Id.* at p. 476, citing *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572-573, fn. 6.) This Court also identified "'the social value of the interest which the actor is seeking to advance' [citation]" as an additional factor to consider. (*Parsons*, at p. 473, italics omitted.) After analyzing each factor, this Court held a garbage truck operator owed no duty to guard against frightening a horse that injured its rider when it was scared by the garbage truck's loud noises. (*Id.* at p. 477.) This Court emphasized the social utility of the defendant's garbage collection and the burden on the community if the Court held those near horses had a duty to guard against frightening them. (*Id.* at pp. 473-475.) This Court assumed the defendant had liability insurance, but it was "not confident that the same may be said as to the myriad other actors (i.e., potential defendants) whose everyday and reasonable conduct might cause similar fright to horses." (*Id.* at pp. 476-477.) Therefore, a majority of the *Rowland* factors

justified not imposing a duty on the defendant to guard against frightening horses.

Patterson, supra, 155 Cal.App.4th 821 considered whether a school district defendant owed a duty of reasonable care to its unsupervised student plaintiff who was injured during the defendant's truckdriver training course. (*Id.* at pp. 824, 842.) The court concluded the defendant owed the plaintiff a duty of reasonable care after a majority of the *Rowland* factors supported the imposition of that duty. (*Id.* at p. 833.) Although there was no moral blame attributed to the defendant's conduct, such a determination was not dispositive. (*Ibid.*) In particular, the court stated:

> Any increased burden of providing supervision for future community service projects was minimal because the instructors were already tasked with teaching the "hands on" segment of the class and had already provided the students with some level of instruction, supervision and critique.

(*Ibid.*)

It also assumed "the District already carrie[d] liability insurance and [was] in the best position to insure against the risk created by lack of supervision in these circumstances." (*Ibid.*) Rather than excusing the defendant from a duty, the *Rowland* factors supported imposing a duty of reasonable care on the defendant.

Here, too, an analysis of the *Rowland* factors supports imposing a duty of due care on Cedar Fair that includes the duty to guard against head-on collisions on Rue Le Dodge. Dr. Nalwa's harm was foreseeable because failing to operate Rue Le Dodge as a unidirectional ride meant there would be head-on collisions between the bumper cars and those involved would be injured, just as Dr. Nalwa was here when her wrist was fractured as a result of the head-on collision. Cedar Fair knew of this danger because it specifically prohibited head-on collisions to ensure "the overall safety of the ride." This is precisely why Cedar Fair made sure to operate every other

bumper car ride it owned, except for Rue Le Dodge, as a unidirectional ride so the bumper cars only travelled in one direction, not head-on into one another. Thus, there is a direct connection between Dr. Nalwa's injury and Cedar Fair's failure to guard against head-on collisions. While the moral blame attached to Cedar Fair's failure to operate Rue Le Dodge as a unidirectional ride, despite having done so at all of its other bumper car rides, is not dispositive,[10] there are strong policy reasons for preventing future harm on Rue Le Dodge. It is a regulated amusement park ride that hundreds of thousands of people ride each year, many of whom are young children. This policy is emphasized in the regulations that govern Rue Le Dodge.

Just as *Patterson* found it was not burdensome to require the defendant to do what it was already tasked with doing, it is not burdensome here to require Cedar Fair to guard against head-on collisions. Cedar Fair has now already changed Rue Le Dodge to be a unidirectional ride, so it is just like every other one of its bumper car rides at its four other amusement parks. Dr. Nalwa requests that Cedar Fair guard against the very specific risk of head-on collisions on its bumper car ride, while the plaintiff in *Parsons* argued for the defendant to guard against the more general risk of horses being frightened. Imposing such a duty in *Parsons* could have implicated anyone in the community who was near horses. However, imposing a duty to guard against head-on collisions in bumper car rides will

---

[10] Dr. Nalwa maintains a willful misconduct claim against Cedar Fair in a separate cause of action. The appellate court reversed the trial court's order granting Cedar Fair's summary judgment motion as to this claim. Cedar Fair has not addressed this portion of the Court of Appeal's decision in its appeal to this Court. Dr. Nalwa argues Cedar Fair consciously failed to guard against head-on collisions on Rue Le Dodge knowing that doing so would cause injury. This is morally blameworthy and is a factor that justifies not excusing Cedar Fair from its duty to guard against head-on collisions.

only affect bumper car ride operators such as Cedar Fair. Therefore, the burden on the community that weighed so heavily in this Court's analysis in *Parsons* is not present under the limited facts here. Cedar Fair, as an amusement ride operator, carries liability insurance, and, like the defendant in *Patterson*, "is in the best position to insure against the risk created" by its negligence. (*Patterson, supra,* 155 Cal.App.4th 821, 833.) This Court need not worry as it did in *Parsons* about the effect on "the myriad other actors" in finding insurance is prevalent and available to Cedar Fair, because, again, the facts here are specifically limited to this amusement ride operator defendant and do not implicate the community at large. (*Parsons, supra,* 15 Cal.4th 456, 477.) Finally, the social utility of Cedar Fair's bumper car ride does not justify excusing it from a duty to guard against head-on collisions. Cedar Fair's role in society is to provide amusement, not essential living functions like the garbage collector defendant in *Parsons*.

Rowland's policy factors support finding Cedar Fair has a duty of due care that includes the duty to guard against head-on collisions. The facts demonstrate Cedar Fair breached this duty by not operating Rue Le Dodge as a unidirectional ride even though it knew of the dangers of head-on collisions and guarded against them at every other park it owned. Cedar Fair's rule prohibiting head-on collisions was not adequate to satisfy this duty, because the rule only functioned to address head-on collisions after they had occurred. Cedar Fair has not argued the *Rowland* policy considerations justify exempting it from its duty of care. It has also not argued it did not breach this duty of care. Therefore, there is a triable issue of fact as to whether Cedar Fair breached this duty.

III. EVEN IF PRIMARY ASSUMPTION OF RISK COULD APPLY TO A BUMPER CAR RIDE, THAT AMUSEMENT RIDE'S OWNER AND OPERATOR, CONSISTENT WITH THE DOCTRINE, OWES A DUTY TO MINIMIZE THE RISKS OF THE RIDE WITHOUT ALTERING ITS NATURE

Although this Court held primary assumption of risk barred the plaintiff's negligence claim in *Knight, supra,* 3 Cal.4th 296, 321, it still articulated duties a defendant owes a plaintiff even in light of the application of primary assumption of risk. In particular, *Knight* emphasized the unique role of owners and operators of recreational facilities and recognized they have a duty "to minimize the risks without altering the nature of the sport. [Citations.]" (*Id.* at p. 317.) It did so in the context of favorably citing *Ratcliff v. San Diego Baseball Club* (1938) 27 Cal.App.2d 733, which stated a stadium owner had a duty to provide a reasonably safe stadium. (*Id.* at p. 736; *Knight*, at p. 317.) Again, this Court explained "the scope of the legal duty owed by a defendant frequently will also depend on the defendant's role in, or relationship to, the sport." (*Knight*, at p. 317.) This is why the *Ratcliff* court was able to find two duties applied when a spectator was injured by a thrown bat:

> (1) the duty of the ballplayer to play the game without carelessly throwing his bat, and (2) the duty of the stadium owner to provide a reasonably safe stadium with regard to the relatively common (but particularly dangerous) hazard of a thrown bat.

(*Ibid.*)

Likewise, there was "no inconsistency in the jury verdict absolving the batter of liability but imposing liability on the stadium owner for its failure to provide the patron 'protection from flying bats . . . . [Citation.]'" (*Ibid.*) In *Kahn, supra,* 31 Cal.4th 990, this Court elaborated:

> Duties with respect to the same risk may vary according to the role played by particular defendants involved in the sport. In the sport of baseball, for example, although the batter would not have a duty to avoid carelessly throwing the bat after getting a hit - vigorous deployment of a bat in the course of a game being an integral part of the sport - a stadium owner, because of his or her different relationship to the sport, may have a duty to take reasonable measures to protect spectators from carelessly thrown bats. For the stadium owner, reasonable steps may minimize the risk without altering the nature of the sport. [Citation.]

(*Id.* at p. 1005.)

Cedar Fair mischaracterizes the emphasis of this passage. Cedar Fair focuses on the distinction between inherent risks and their consequences when it explains, "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." (Op. Br. at p. 39.) First, the proper emphasis of this passage is on the defendant's relationship to the activity. While not all cases in which primary assumption of risk applies will necessarily require the defendant to minimize risks without altering the nature of the sport, that duty does apply where the defendant's relationship to the activity is that of owner or operator. Second, this passage highlights the importance of properly determining inherent risks. As discussed above, risks that can be mitigated without altering the nature of the activity or deterring vigorous participation in it are not inherent risks. This is why a proper restatement of an owner's duty under *Knight* is a duty to minimize non-inherent risks. Whether or not a duty is owed does not turn on whether an injury was an inherent risk or a consequence of an inherent risk; it turns on whether the injury was an inherent risk or a non-inherent risk.

In *Ratcliff*, injury from a thrown bat was an inherent risk of baseball. The defendant who was a participant in the sport had no duty to guard

against that risk, because imposing such a duty would implicate the policy concerns of deterring vigorous participation in the sport or fundamentally altering it. However, injury from that thrown bat due to the stadium owner failing to provide a reasonably safe stadium by not minimizing that risk was not an inherent risk of baseball. A stadium owner owed a duty to minimize that non-inherent risk because doing so would not alter baseball or deter vigorous participation in it.

It appears this Court has not yet had the occasion, post-*Knight*, to hold that a defendant before it owes a plaintiff this duty to minimize non-inherent risks. However, appellate courts have recognized and applied this duty, often by following *Knight's* favorable reference to *Ratcliff's* holding that an owner has a duty to provide a reasonably safe facility. In *Rosencrans v. Dover Images, LTD* (2011) 192 Cal.App.4th 1072, the plaintiff was injured when he fell off his motorcycle at the defendant's motocross racing facility and other riders crashed into him. (*Id.* at p. 1077.) The collisions occurred because the defendant did not use a caution flagger at the collision site to notify other riders when a fellow motorcyclist had fallen. (*Id.* at p. 1087.) The court first identified, "An owner/operator of a sports facility has a duty to provide a reasonably safe course or track [Citations]." (*Id.* at p. 1084.) It then applied this duty to the owner and operator defendant before it:

> In the sport of motocross, an owner/operator of a track has a duty to minimize the risk of a coparticipant crashing into a second coparticipant who has fallen on the track. Providing a warning system of some sort, such as caution flaggers to alert riders of a fallen participant, would assist in minimizing the risk of riders colliding with one another. If a rider received adequate warning of a fallen rider on the track, then the rider could change his or her course to avoid the fallen rider. Further, providing a warning system, such as caution flaggers, would not alter the sport, because it would not prevent riders from jumping and traveling at high speeds,

> rather it would provide the riders with information so that they could alter their course as necessary. In sum, we conclude that the owner/operator of a motocross track has a duty to provide a warning system, such as caution flaggers, to alert other riders of a fallen participant on the track.

(*Ibid.*)

In *Saffro v. Elite Racing* (2002) 98 Cal.App.4th 173, the plaintiff had a seizure after participating in a marathon sponsored by the defendant, who did not provide the water and sports drinks it promised would be available. (*Id.* at pp. 176-178.) The court held:

> the organizer of a marathon has a duty to produce a reasonably safe event. This duty requires it to take reasonable steps to "minimize the risks without altering the nature of the sport" - which includes providing sufficient water and electrolyte replacement drinks as represented in the informational materials provided to the participants. [Citation.]

(*Id.* at p. 175.)

The court is *Rosencrans* found *Saffro's* holding instructive on "understanding the type of steps that must be taken to minimize the risks involved to sports participants." (*Rosencrans, supra,* 192 Cal.App.4th 1072, 1085.) It explained:

> For instance, there is no duty to eliminate the risk of dehydration in marathon runners; however, there is a duty to minimize the risk of dehydration occurring by providing adequate refreshment stations. In a similar vein, there is no duty to eliminate the risk of motocross riders colliding with one another; however, there is a duty to minimize the risk by providing an adequate warning system.

(*Ibid.*)

These cases reinforce how important it is to properly identify inherent risks in an activity. In *Rosencrans*, injury in a collision was an inherent risk of motocross racing. However, injury in a collision because the racetrack operator failed to provide a reasonably safe racetrack with a

fallen rider warning system was not an inherent risk of motocross racing. *Saffro* demonstrated that dehydration is an inherent risk of participating in a marathon. However, dehydration because a race organizer failed to put on a safe marathon and provide adequate water and electrolyte replacement drinks is not an inherent risk of a marathon. It was consistent with *Knight* to hold that while primary assumption of risk applied to these activities, the owners and operators still owed a duty to the plaintiffs to minimize the non-inherent risks of the activities.

At the very least, Cedar Fair has a duty to operate a reasonably safe bumper car ride and to minimize non-inherent risks. Head-on collisions are not an inherent risk of riding Rue Le Dodge because they are easily minimized without altering the nature of the ride by configuring it so the bumper cars all travel in only one direction. This is such a simple step that Cedar Fair already had all of its other bumper car rides at all of its other amusement parks configured as unidirectional rides when Dr. Nalwa was injured. Since her injury, Cedar Fair has reconfigured Rue Le Dodge to operate in the same, unidirectional way. If such a configuration altered the nature of bumper car rides, Cedar Fair would not have voluntarily implemented the design at all of its parks. A triable issue of fact exists as to whether Cedar Fair was negligent for failing to do so before Dr. Nalwa's injury.

Cedar Fair argues that imposing this duty will herald the end of bumper car rides as we know them, effectively altering the very nature of bumper car rides.[11] Cedar Fair misinterprets the duty to minimize non-inherent risks as a duty to eliminate all risks, whether they are inherent or

---

[11] Chief Justice Cantil-Sakauye rejected a similar argument in *Patterson, supra,* 155 Cal.App.4th 821 as "speculative and therefore untenable on this record. [Citation.]" (*Id.* at p.884 [imposing a duty on a school district to supervise its adult truckdriving students would not result in the district refusing to offer truckdriving classes].)

not. As discussed above, head-on collisions are quite different from other bumps in a bumper car ride. *Knight* does not require Cedar Fair to eliminate all bumps in Rue Le Dodge in the myriad of ways Cedar Fair has suggested. Not once does Cedar Fair argue that requiring it to minimize head-on collisions by operating Rue Le Dodge as a unidirectional ride will fundamentally alter the nature of the ride. This is because it simply is not true. Cedar Fair has already reconfigured Rue Le Dodge so that it is now operated as a unidirectional ride. The consequences of applying the correct duties under *Knight* to this case are not as dire as Cedar Fair makes them appear.

Cedar Fair tries to present this duty as a "special version" of primary assumption of risk. (Op. Br. at p. 1.) To the contrary, the imposition of this duty is exactly what is dictated by *Knight* because Cedar Fair is an owner and operator. This is not a "special version" of the doctrine; it is what is mandated by the doctrine itself. This Court will only be subjecting Cedar Fair to a "special version" of the doctrine if it does not impose this duty on Cedar Fair even though any other owner and operator defendant would have a duty to minimize risks without altering the nature of the activity. Therefore, the appellate court correctly found that even if *Knight* applies to this case, there is a triable issue of fact as to whether Cedar Fair breached its duty to minimize the risks of head-on collisions without altering the nature of Rue Le Dodge. (*Nalwa, supra,* 196 Cal.App.4th 566, 581, 582.)

CONCLUSION

This case is about whether primary assumption of risk has expanded from a limited doctrine to one that functions to exempt an amusement ride operator from the duty of care it owes its injured patron. This is not simply a case where a plaintiff was injured when "her bumper car was bumped by another bumper car." (Op. Br. at p. 22.) The facts before this Court are much narrower and implicate the defendant more substantially than Cedar Fair's characterization suggests. Dr. Nalwa sued Cedar Fair for negligence because she was injured in a head-on collision on its Rue Le Dodge bumper car ride. Cedar Fair is attempting to use primary assumption of risk to dodge liability and exempt it from its duty of due care. Primary assumption of risk is still a viable doctrine in California, but this case is not one to which it applies. It does not apply because neither the nature of Rue Le Dodge nor the relationship of Cedar Fair and Dr. Nalwa to each other and to Rue Le Dodge justify exempting Cedar Fair from owing Dr. Nalwa its duty of due care. This conclusion is strongly supported by the public policy of amusement rider safety articulated both legislatively and judicially. Even if primary assumption of risk applies here, Cedar Fair still owes a duty to minimize the risk that caused Dr. Nalwa's injury. There is a triable issue of fact as to whether Cedar Fair breached either of these duties of care. Based on the foregoing reasons, Dr. Nalwa respectfully requests this Court affirm the appellate court's judgment reversing the trial court's order granting Cedar Fair's summary judgment motion.

Dated: February 11, 2012

Respectfully submitted,

CHRISTI JO ELKIN
Attorney for Appellant,
Smriti Nalwa, M.D.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204 (c)(1), the undersigned hereby certifies that APPELLANT'S ANSWER BRIEF ON THE MERITS, including footnotes, contains 13,510 words and was printed in Times New Roman font of 13-point.

Dated: February 14, 2012

CHRISTI JO ELKIN

Attorney for Appellant
Smirti Nalwa, M.D.

PROOF OF SERVICE BY PRIORITY MAIL
(C.C.P Section 1013(a); Section 2015.5)

I declare that:

I am a citizen of the United States and employed in the County of San Diego, State of California. I am over the age of eighteen (18) years and not a party to the within-entitled action. My business address is 4667 Torrey Circle, Suite 301, San Diego, California 92130.

On February 14, 2012, I served the attached:

APPELLANT'S ANSWER BRIEF ON THE MERITS

on the parties in said action, by placing a true copy of said document in a sealed envelope with fully prepaid priority postage in the United States mail at San Diego, California addressed as follows:

Clerk, Court of Appeal Sixth Appellate District 333 W. Santa Clara Street Suite 1060 San Jose, CA 95113	The Hon. James P. Kleinberg Santa Clara County Superior Court 191 N. First Street, San Jose, CA 95113
Patrick L. Hurley, Esq. Steven J. Renick, Esq. Manning & Kass Ellrod, Ramirez, Trester LLP 1 California St., Suite 1100 San Francisco, CA 94111 *Attorneys for Defendant*	Jeffrey M. Lenkov, Esq. Manning & Kass Ellrod, Ramirez, Trester LLP 801 S. Figueroa St., 15th Floor Los Angeles, CA 90017 *Attorney for Defendant*

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct.

DATED: February 14, 2012

CHRISTI JO ELKIN, ESQ.