Case No. S195031

SUPREME COURT
FILED
MAR 8 - 2012
Frederick K. Ohlrich Clerk

In the Supreme Court of California

SMRITI NALWA,

Plaintiff and Appellant,

vs.

CEDAR FAIR, L.P.,

Defendant and Respondent.

REPLY 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

MAR 7 - 2012

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.

REPLY 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 iv

1. THIS COURT HAS NEVER HELD OR SUGGESTED THAT THE DOCTRINE OF PRIMARY ASSUMPTION OF RISK IS ONLY APPLICABLE IN FACTUAL CIRCUMSTANCES SIMILAR TO THOSE AT ISSUE IN THIS COURT'S PREVIOUS DECISIONS INVOLVING THE DOCTRINE 1

2. A BUMPER CAR RIDE CLEARLY CARRIES AN INHERENT RISK OF INJURY, WHICH IS EXACTLY THE SITUATION TO WHICH THE PRIMARY ASSUMPTION OF RISK DOCTRINE IS INTENDED TO APPLY 5

3. THE PLAINTIFF WAS NOT INJURED IN A HEAD-ON COLLISION, AND EVEN IF SHE HAD BEEN, SUCH COLLISIONS *ARE* AN INHERENT RISK OF BUMPER CAR RIDES 9

   A. There Is No Evidence The Plaintiff Was Injured As A Result Of A Head-On Collision 9

   B. Head-On Collisions *Are* An Inherent Risk Of Riding In Any Bumper Car, Including Ones Operating On Unidirectional Tracks 11

4. THE DEFENDANT HAS NEVER CONTENDED THAT APPLICATION OF THE PRIMARY ASSUMPTION OF RISK DOCTRINE WOULD, OR SHOULD, ELIMINATE ALL DUTY OF CARE THE DEFENDANT OWED TO THE PLAINTIFF 14

   A. The Defendant's Role As Owner And Operator Of The Ride Does Not Preclude The Application Of Primary Assumption Of Risk In This Instance 15

B. Whether The Defendant's Alleged Role As A Common Carrier Precludes The Application Of Primary Assumption Of Risk Is Not Presently At Issue Before This Court 16

C. The Defendant's Role As A "Regulated Amusement Ride Operator" Does Not Preclude The Application Of Primary Assumption Of Risk In This Particular Instance 17

5. THERE IS NO FACTUAL SUPPORT FOR THE PLAINTIFF'S ASSERTION THAT THE DEFENDANT HAD A DUTY TO "GUARD AGAINST HEAD-ON COLLISIONS ON ITS BUMPER CAR RIDE" 21

6. THERE IS NO LEGAL SUPPORT FOR THE PLAINTIFF'S ASSERTION THAT THE DEFENDANT HAD A DUTY TO MINIMIZE THE RISKS INHERENT IN ITS BUMPER CAR RIDE 25

CONCLUSION 29

CERTIFICATE OF COMPLIANCE (CRC 8.520(c)(1)) 33

TABLE OF AUTHORITIES

CASES **Page**

Avila v. Citrus Community College District (2006) 38 Cal.4th 148 . . . . 15, 25, 26

Bush v. Parents Without Partners (1993) 17 Cal.App.4th 322 . . . . 6, 7

Kahn v. East Side Union High School District (2003) 31 Cal.4th 990 . . . . 3, 5, 27

Knight v. Jewett (1992) 3 Cal.4th 296 . . . . 2, 3, 5, 6

Nalwa v. Cedar Fair, L.P. (2011) 196 Cal.App.4th 566 . . . . . . 8, 19, 29, 31

Neighbarger v. Irwin Industries, Inc. (1994) 8 Cal.4th 532 . . . . 2, 5

Parsons v. Crown Disposal Co. (1997) 15 Cal.4th 456 . . . . 2, 5

Patterson v. Sacramento City Unified School District (2007) 155 Cal.App.4th 821 . . . . 6, 7

Priebe v. Nelson (2006) 39 Cal.4th 1112 3

Ratcliff v. San Diego Baseball Club (1938) 27 Cal.App.2d 733 . . . . . 26, 27

Rosencrans v. Dover Images, Ltd. (2011) 192 Cal.App.4th 1072 . . . . 27, 28

Saffro v. Elite Racing, Inc. (2002) 98 Cal.App.4th 173 28

Shannon v. Rhodes (2001) 92 Cal.App.4th 792 6

Shin v. Ahn (2007) 42 Cal.4th 482 3

STATUTES, REGULATIONS, AND RULES

California Code of Regulations, Title 8, section 3195.9 20

California Code of Regulations, Title 8, section 3900 18

1. THIS COURT HAS NEVER HELD OR SUGGESTED THAT THE DOCTRINE OF PRIMARY ASSUMPTION OF RISK IS ONLY APPLICABLE IN FACTUAL CIRCUMSTANCES SIMILAR TO THOSE AT ISSUE IN THIS COURT'S PREVIOUS DECISIONS INVOLVING THE DOCTRINE

In Section I.A.1. of her Answering Brief, the plaintiff argues that "[p]rimary 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". (Answering Brief, page 8.) The plaintiff offers no argument to justify her position; she simply asserts that since the activity at issue in this case is not similar to the activities at issue in prior cases, the doctrine should not apply. But in none of its decisions involving the doctrine of primary assumption of risk has this Court suggested, much less held, that the doctrine is applicable only to activities similar those to which this Court has previously applied the doctrine. In fact, just the contrary is true.

The plaintiff writes that this Court has only applied the primary assumption of risk doctrine to sports and to "firefighter's rule" cases (and variations on that rule). (Answering Brief, pages 11-13.) Yet this Court's opinions are unswerving in describing these situations as merely examples of when primary assumption of risk is applicable.

In *Knight v. Jewett* (1992) 3 Cal.4th 296, 309, 313, this Court wrote that:

> "the 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. . . . . [T]he question of the existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport ***or*** activity in question and on the parties' general relationship to the ***activity,*** and is an issue to be decided by the court, rather than the jury." (emphasis added)

In *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538, this Court wrote 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." (emphasis added)

In *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482, this Court explained that "*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." (emphasis added)

In *Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1004, this court observed that primary assumption of risk cases "frequently arise in the context of active sports," but did not suggest that they only arise in such circumstances, quoting the same portion of *Knight* quoted above that the question depends "on the nature of the activity ***or*** sport in which the defendant is engaged". (*Ibid.;* emphasis added.)

In *Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1121-1122, this Court described sports activities, the firefighter's rule, and the veterinarian's rule as ***"example[s]*** of the doctrine of primary assumption of risk" (emphasis added), not as the only circumstances in which the doctrine could be applied.

Thus, there is no support in this Court's prior decisions for the plaintiff's argument that the doctrine of primary assumption of risk is applicable only to activities similar those to which this Court has previously applied the doctrine. In fact, this Court's prior decisions have made clear that sports activities and the firefighter's rule and its variations are merely examples of when the doctrine of primary assumption of risk is applicable; that the doctrine has general applicability. As this Court explained in *Shin v. Ahn* (2007) 42 Cal.4th 482, 498-499:

> "the primary 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 duty analysis

depends on the nature of the activity or sport and the parties' relationship to it. . . . . The primary assumption of risk doctrine operates to limit the duty owed by the defendant. ... The primary assumption of risk doctrine articulates what kind of duty is owed and to whom." (Citation and internal quotation marks omitted.)

The question of duty obviously arises in numerous situations other than sports activities and the firefighter's rule and its variations, and so there is no reason why the doctrine of primary assumption of risk, which addresses the scope of the duty owed by a defendant to a plaintiff, should be limited to that handful of situations.[1]

---

[1] In the last portion of this section of the Answering Brief (at pages 14-15), the plaintiff argues that the defendant, in citing several out-of-state decisions, was "hop[ing] this Court will change California's primary assumption of risk doctrine to that adopted in other states so it can apply the doctrine to amusement rides." The defendant made no such argument, explicitly or implicitly. The defendant cited these opinions simply to show that a number of other states have recognized that many amusement park rides have risks inherent in them, and that these states have declined to hold the owners and operators of those amusement parks liable for injuries that arise from those inherent risks. Thus it is not relevant whether those states had adopted the primary assumption of risk doctrine.

The point underlying the defendant's citation to these out-of-state cases is that since it is generally recognized that there are risks inherent in the operation of amusement park rides, and since numerous states have decided – under whatever legal theory – that liability should not attach for injuries caused by risks inherent in the operation of amusement park rides, there is no good policy reason for California to decline to apply the primary assumption of risk doctrine – which limits a defendant's duty of care in regard to risks inherent in an activity – to amusement parks rides, such as the bumper car ride at issue here.

2. A BUMPER CAR RIDE CLEARLY CARRIES AN INHERENT RISK OF INJURY, WHICH IS EXACTLY THE SITUATION TO WHICH THE PRIMARY ASSUMPTION OF RISK DOCTRINE IS INTENDED TO APPLY

In Section I.A.2. of her Answering Brief, the plaintiff argues that:

> "[w]hile 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. . . . . 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." (Answering Brief, pages 16, 17.)

The plaintiff's argument reflects a misunderstanding of the nature of the primary assumption of risk doctrine.

First, as formulated by this Court, the test is not whether an activity is "inherently dangerous"; rather, it is whether there are risks inherent in the activity. Neither the phrase "inherently dangerous" or any variation of that phrase is found in this Court's opinions in *Knight, Neighbarger*, or *Parsons*, each of which uses variations of the phrases "inherent risks" and "risk of harm". The same is true for this Court's opinion in *Kahn,* except for one paragraph that uses the phrase "inherently dangerous" and "inherent dangers". The test for whether the doctrine is applicable thus is not whether the danger

reaches a certain specified level, but rather whether there is some of risk of harm inherent in the activity.

The plaintiff cites two cases that she asserts support her argument that the inherent danger must reach a certain level before primary assumption of risk will apply. However, in both of those cases, each Court of Appeal predicated its refusal to apply the doctrine on its conclusion that the activities involved were not sports, based on its interpretation of *Knight* as making that a prerequisite for the application of the doctrine. See *Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322, 328 and *Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 796.

There is a second way in which the plaintiff misunderstands the doctrine of primary assumption of risk. The test is not whether there is ***any*** risk associated with the activity, but rather, whether there is a risk ***inherent*** in the activity. This is ***not*** a distinction without a difference. There are risks that are inherent in life, and so inevitably will manifest themselves in a host of activities. Then there are risks that arise specifically because of the nature of the activity. The very first case cited by the plaintiff in this section of her brief provides a good example of this distinction.

In *Patterson v. Sacramento City Unified School District* (2007) 155 Cal.App.4th 821, 825, the plaintiff was enrolled in a truck driving class given

by the defendant school district. He was injured when he fell from the bed of a truck while the class was attempting to load wooden bleachers onto the truck. (*Id.* at 826.) The Court of Appeal found that the accident occurred because of a lack of supervision of the class by the defendant. (*Id.* at 841-842.)

The defendant argued that primary assumption of risk should apply because "'[w]henever gravity is at play … , the risk of injury is inherent.'" (*Id.* at 840.) The Court of Appeal rejected this argument, noting that "[g]ravity is similarly 'at play' when a person climbs up a ladder, walks across a bridge or leans against a porch railing. The District cites no case that holds assumption of risk applies to such common, everyday work activities." (*Ibid.*)

That same argument applies to another case cited by the plaintiff, *Bush, supra,* 17 Cal.App.4th at 324, in which the plaintiff "slipped and fell while dancing". As the Court of Appeal noted, "[i]t 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 329.)

Thus the question that arises when a court must determine whether to apply the primary assumption of risk doctrine is whether the risk that caused the injury was one inherent in the activity itself, or whether it was just an

everyday risk of life that happened to manifest itself during the plaintiff's participation in the particular activity in question.

The plaintiff argues that "[c]ommon sense dictates that Rue Le Dodge is not an inherently dangerous activity." (Answering Brief, page 17.) But that statement relates to the plaintiff's mistaken belief that the application of the primary assumption of risk doctrine requires that a minimum level of danger to be present. But all that is actually required is that there be ***a*** risk of injury inherent in the nature of the activity.

There can be no dispute that such a risk is inherent in any bumper car ride. When such vehicles collide with each other, there is a small, but real, risk that a rider may suffer injury.[2] Thus, the majority below erred when they concluded "that riding as a passenger in a bumper car is too benign to be subject to *Knight.*" (*Nalwa v. Cedar Fair, L.P.* (2011) 196 Cal.App.4th 566, 579; quoted by plaintiff at page 17 of her Answering Brief.)

---

[2] As the record below indicated, there were 55 reported injuries to riders of the Rue Le Dodge during 2004 and 2005, out of the 600,000 persons who rode the ride during those two years, an injury rate of less than 1/100 of 1%. (55/600,000 = 0.00009166667, which is equivalent to 0.009166667%.) (See CT 108 and Declaration of Jessica Naderman in Support of Motion for Summary Judgment at ¶ 10 [found in the record as Exhibit A to Cedar Fair's Motion to Augment Record on Appeal].)

3. THE PLAINTIFF WAS NOT INJURED IN A HEAD-ON COLLISION, AND EVEN IF SHE HAD BEEN, SUCH COLLISIONS *ARE* AN INHERENT RISK OF BUMPER CAR RIDES

In Section I.A.3. of her Answering Brief, the plaintiff argues that the defendant "completely distorts [the] inherent risk analysis" by contending that "Dr. Nalwa was not injured by an inherent risk of Rue Le Dodge because she was injured by bumping, which is the fundamental nature of the ride." (Answering Brief, page 20.) Rather, the plaintiff asserts that "Dr. Nalwa was injured by just any bump on the ride; she was specifically injured by a head-on collision. This is not an inherent risk of riding bumper cars." (Answering Brief, page 21; footnote omitted.) But there is no evidence at all to support either of the plaintiff's contentions.

A. There Is No Evidence The Plaintiff Was Injured As A Result Of A Head-On Collision

In footnote 5 of her Answering Brief (at page 21), the plaintiff asserts that "all of the justices from the appellate court accept Dr. Nalwa was injured in a head-on collision." But as the plaintiff herself points out, that is a question of fact, so the supposed unanimous conclusion of the appellate justices is only as good as the evidence on which it is based. But there literally

is no evidence in the record to support such a conclusion, even if all of the facts are viewed in the light most favorable to the plaintiff.

The only evidence the plaintiff cites to support her claim is the "deposition testimony of both Dr. Nalwa and her son, who was in the bumper car with her, [which] indicate[s] their bumper car was hit from behid and head-on, nearly, if not actually, simultaneously." (Answering Brief, page 21, footnote 5.) However, the plaintiff's son offered no definitive narrative as to the order of the two bumps, or as to when his mother's injury occurred in relation to those bumps. (See CT 101.)

In contrast, the plaintiff herself was very specific in her deposition testimony: she was bumped from the front, then from the back, and then her wrist was injured. (CT 85-86; set out at length on page 6 of the defendant's Opening Brief on the Merits.) In other words, the plaintiff's own testimony is that if either collision caused her to suffer her injury, it was the one from the rear, not the one from the front. The plaintiff has failed to point to any actual ***evidence*** that supports her claim that her injury was caused by a head-on collision, for the very simple reason that there literally is no such evidence in the record.

Since not even the plaintiff disputes that bumps other than head-on collisions ***are*** an inherent risk of riding on bumper cars, and since the only

evidence in the record shows that the plaintiff was injured as a result of a collision which was not a head-on collision, the evidence conclusively establishes that the plaintiff was injured as a result of a risk inherent in the nature of the activity at issue: riding in a bumper car.

B. Head-On Collisions *Are* An Inherent Risk Of Riding In Any Bumper Car, Including Ones Operating On Unidirectional Tracks

It would not make any difference even if the plaintiff had been injured as a result of a head-on collision, because there is no evidence to support the plaintiff's claim that such collisions are not an inherent risk of riding bumper cars. In fact, the evidence in the record shows just the opposite: such collisions are an inherent risk of riding in ***any*** bumper car, even ones operating on unidirectional tracks.

The plaintiff asserts that "[b]y not operating Rue Le Dodge as a unidirectional ride, Cedar Fair deliberately allowed the risk of head-on collisions to exist in the ride". (Answering Brief, page 17.) But in fact, as the plaintiff herself repeatedly acknowledges, even if the ride had been converted to unidirectional travel, that would only have "minimized" the risk of head-on collisions, not eliminated them. (Ibid.) To the same effect:

--- "Cedar Fair knows that operating bumper car rides as unidirectional rides so the bumper cars travel in only one direction reduces head-on collisions." (Answering Brief, page 2.)

--- "[I]n 2006, ... 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." (Answering Brief, page 3.)

--- "At every park it owned, other than Great America, Cedar Fair operated its bumper car rides as unidirectional rides that reduced head-on collisions." (Answering Brief, page 21.)

In other words, even if the defendant had done exactly what the plaintiff is asserting it should have done – converted the Rue Le Dodge ride to unidirectional travel – there still would have remained a risk of head-on collisions, meaning the risk of such collisions ***is*** inherent in the nature of the ride, no matter how the ride is configured.

As the Statement of Facts in the defendant's Opening Brief revealed, the plaintiff observed the ride in operation before she got into a car. So she was well-aware that it was not a unidirectional ride. The plaintiff complained in her Answering Brief (at page 20) that the defendant was not being "precise" enough in identifying the inherent risks at issue here. But perhaps that complaint is better directed at the plaintiff. A unidirectional bumper car ride

has one set of inherent risks, while a non-unidirectional ride has a different set. The plaintiff was not injured while riding a unidirectional bumper car ride, so it is irrelevant that head-on collisions are allegedly less likely on such rides. The plaintiff voluntarily went on a non-unidirectional ride, and so all that is relevant is that head-on collisions unquestionably are an inherent risk of ***that*** version of the ride.

At most, the plaintiff has shown that it may be possible to reduce the risk of injury from the inherent risk of head-on collisions by configuring the ride for unidirectional travel. But as will be discussed at length later in this Reply (in Section 6, beginning at page 25), there was no legal obligation on the defendant to reduce that risk; its only obligation was not to increase the risk of injury. Not even the plaintiff claims that the defendant did that.

Finally, there is literally nothing in the record to show that there is any qualitative difference between head-on collisions and any other type of bumper car collisions, either in the nature of the event or the likelihood of injury. So there is no justification for distinguishing head-on collision from any other type of bumper car collisions. They are merely one of the several types of collisions possible when riding in a bumper car, and so all these collisions, as a group, are a risk inherent in the ride.

In short, no matter how the facts are parsed, the same conclusion has to be reached: the plaintiff was injured as a result of a risk inherent in the nature of bumper car rides.

4. THE DEFENDANT HAS NEVER CONTENDED THAT APPLICATION OF THE PRIMARY ASSUMPTION OF RISK DOCTRINE WOULD, OR SHOULD, ELIMINATE ALL DUTY OF CARE THE DEFENDANT OWED TO THE PLAINTIFF

In Section I.B. of the Answering Brief (beginning at page 23), the plaintiff offers several arguments as to why the defendant should not be "excused from its duty of care" to the plaintiff by virtue of the primary assumption of risk doctrine. But the defendant never took such a position. The defendant has never disputed that it had a general duty of care to the plaintiff. All that the defendant has contended here is that, under the primary assumption of risk doctrine, there was a specific limitation on that duty: the defendant did not have a duty to eliminate the risk of collisions from its bumper car ride. Thus this entire line of argument by the plaintiff is without merit.

A. The Defendant's Role As Owner And Operator Of The Ride Does Not Preclude The Application Of Primary Assumption Of Risk In This Instance

The plaintiff argued in Section I.B.1. of her Answering Brief (beginning at page 23) that there "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." (Answering Brief, page 26.) But this Court has not held that the operator of a facility that offers a sport or other activity with inherent risks is precluded from claiming the benefits of the primary assumption of risk doctrine simply because of that status, as if shown by the very first case cited by the plaintiff in this section of her brief.

In *Avila v. Citrus Community College District* (2006) 38 Cal.4th 148, 152, the plaintiff, a collegiate baseball player, alleged he was injured when the opposing pitcher intentionally hit him with a pitch. Despite "the economic and marketing benefits" (*id.* at 162) the host college derived from maintaining a sports program and hosting intercollegiate games, the defendant was nonetheless entitled to invoke the doctrine of primary assumption of risk to defeat the plaintiff's claim.

So the mere fact that Cedar Fair's predecessor owned and operated the amusement park where the bumper car ride was located does not automatically preclude the application of primary assumption of risk to this incident.

B. Whether The Defendant's Alleged Role As A Common Carrier Precludes The Application Of Primary Assumption Of Risk Is Not Presently At Issue Before This Court

The plaintiff argued in Section I.B.2. of her Answering Brief (beginning at page 26) that "Dr. Nalwa maintains Cedar Fair was a common carrier when it operated Rue Le Dodge [and] Cedar Fair has not challenged that on this appeal." (Answering Brief, page 27.) But it is not the plaintiff's allegations that are being addressed in this Court's review; it is the Court of Appeal's opinion. In that opinion, the majority concluded that:

> "it will ... be for the trier of fact to determine whether the nature of the bumper car ride raised respondent to the status of a common carrier as set forth in *Gomez* [*v. Superior Court*], *supra*, [(2005)] 35 Cal.4th 1125. ... The similarity or dissimilarity of a bumper car ride from a roller coaster ride is a question of fact which cannot be determined as a matter of law, therefore, we leave that question for the trier of fact."

Since there had not been a legal or factual finding in either of the lower courts that operation of the bumper car ride made the defendant a common carrier, that issue was not ripe for review by this Court, and accordingly was not raised by the defendant in either its Petition for Review or its Opening Brief on the Merits. That also meant that the issue of the extent to which

primary assumption of risk applies to common carriers also was not ripe for review in this proceeding.

But even if it were, there is no policy reason why the doctrine should be categorically barred in common carrier situations. While common carrier status imposes a ***higher*** duty of care on a defendant, it does not make the carrier strictly liable for any injury that may be suffered by a passenger. Thus, in any common carrier situation, it would seem logical that the specific scope of that higher duty would determine the extent to which primary assumption of risk would be applicable in any particular situation.

The defendant does not suggest that even when primary assumption of risk doctrine is applicable that it would eliminate all of the duty of care a common carrier owed to its passenger. The defendant would merely contend that the doctrine can limit the scope of that duty in regard to risks that are inherent in the activity being provided by the common carrier.

C. The Defendant's Role As A "Regulated Amusement Ride Operator" Does Not Preclude The Application Of Primary Assumption Of Risk In This Particular Instance

In Section I.B.3. of her Answering Brief, the plaintiff argues that "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 care." (Answering Brief, pages 27-28.) But again, the defendant never argued that it was exempt from all of its duty of care owed to the plaintiff by virtue of primary assumption of risk; just that its duty of care was limited by the doctrine. Further, the plaintiff is reading far too much into the regulatory scheme that governed the operation of the bumper car ride at issue.

The plaintiff asserts that "compliance with [specific] 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 the policy supports holding Cedar Fair legally responsible for the harm it caused Dr. Nalwa." (Answering Brief, pages 29-30.) The plaintiff argues that "amusement rider safety [is the] relevant policy concern" that can be derived from the regulations. But the plaintiff's argument ignores the full language of the sole regulation on which she bases her conclusion.

California Code of Regulations, Title 8, section 3900 provides that the purpose of enacting regulations relating to 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." Thus, the general public

policy expressed by these regulations is ***not*** that amusement ride operators must ensure rider safety at all costs, as the plaintiff suggests. Rather, it is that in order to protect persons using amusement rides, the operators of those rides must met certain minimum standards, as established by the state.

Thus, contrary to the plaintiff's suggestion, compliance with specific regulations is an essential question to answer in determining whether primary assumption of risk applies to a particular amusement ride. If the operator has failed to comply with a specific regulation, primary assumption of risk cannot excuse that failure. But if the operator has complied with all of the relevant regulations, then the operator has met the standards the state has established for rider protection, in which case the policy underlying the regulations will not be impacted by the application of primary assumption of risk. This is confirmed by the fact 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." (*Nalwa, supra,* 196 Cal.App.4th at 570-571.)

The plaintiff's argument is also inconsistent with the fact that the regulations explicitly authorize the operation of bumper cars and their collisions.

> "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."*** (8 C.C.R. §3195.9(a); emphasis added)

The plaintiff attempts to evade this problem by asserting that "[i]t is fully consistent with [8 C.C.R. §3195.9(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." (Answering Brief, page 30.) The plaintiff does not explain how a specific regulation that does not distinguish head-on collisions from any other type of collision can be interpreted to contain such a distinction, nor does she suggest that such a distinction can be derived from any other provision of the California Code of Regulations. In any case, the plaintiff's argument relies on her unfounded assertions that she was injured in a head-on collision and that head-on collisions are not risks inherent in bumper car rides. (These assertions were discussed, and refuted, above in Section 3 above, beginning at page 9.)

The plaintiff concludes this section of her brief with another claim that has no support whatsoever in the record. "The ride would have been safer for [the plaintiff] if Cedar Fair had operated it as a unidirectional ride because then she would not have been injured in a head-on collision." (Answering Brief,

page 31.) This claim is contrary to the evidence actually introduced in the trial court.

As was discussed in Section 3.B. above (beginning at page 11), and as the plaintiff herself repeatedly admits, converting the ride to unidirectional travel would, at most, have reduced the incidence of head-on collisions, not have eliminated them. Thus it is the sheerest of speculation for the plaintiff to assert that she would not have been involved in a head-on collision if the bumper car ride on which she was injured had been operating as a unidirectional ride.

5. THERE IS NO FACTUAL SUPPORT FOR THE PLAINTIFF'S ASSERTION THAT THE DEFENDANT HAD A DUTY TO "GUARD AGAINST HEAD-ON COLLISIONS ON ITS BUMPER CAR RIDE"

In Section II of her Answering Brief, the plaintiff argues that the defendant had a "duty to guard against head-on collision on its bumper car ride". (Answering Brief, page 31.) But the facts simply do not support this assertion.

The plaintiff argues that "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 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." (Answering Brief, page 33.) Almost every element of this assertion is refuted by the facts.

As has been discussed above, even the plaintiff acknowledges that if the ride had been converted to unidirectional travel, there still would have been head-on collisions. There is nothing in the record to support the plaintiff's implication that every head-on collision results in an injury. And, as has been discussed above, the plaintiff's own deposition testimony shows conclusively that she was not injured as the result of a head-on collision.

The plaintiff next argues that "Cedar Fair knew of this danger because it specifically prohibited head-on collisions to ensure 'the overall safety of the ride.'" (Answering Brief, page 33.) The plaintiff lifted the phrase "the overall safety of the ride" from the deposition of Jessica Naderman. (See Answering Brief, page 2, referring to CT 156.) But the plaintiff's assertion as to the owner's supposed knowledge cannot be drawn from Ms. Naderman's actual statement.

> "Q. Were there other aspects of the ride in 2005 that ride operators were responsible for ensuring the riders followed?
>
> ....
>
> THE WITNESS: They ensured that all people were riding properly throughout the course of the ride, they were following

> the rules, arms, hands were inside the car, no head-on bumping, that, you know, in general, the overall safety of the ride was being enforced." (CT 156, lines 4-13.)

There is nothing in this statement to indicate that the owner had any factual basis for "knowing" that head-on collisions – or, for that matter, riding with arms or hands outside the car, or otherwise not following the rules – represented any greater danger to passengers than the any other aspect of the ride (such as side-to-side or rear-end bumping). There is literally nothing in the record to show that there is, in fact, any qualitative difference between head-on collisions and any other type of bumper car collisions, either in the nature of the event or the likelihood of injury.

The plaintiff next asserts that "[t]his is precisely why Cedar Fair made sure to operate every other bumper car ride its 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." (Answering Brief, page 34.) As noted several times above, unidirectional travel does not eliminate head-on collisions.

Further, there is no evidence to support the plaintiff's assertion that the defendant's predecessor operated its other bumper car rides in a unidirectional manner in order to minimize head-on collisions. The evidence merely shows that they were operated in that manner, but not the reason why. See, e.g., the

deposition testimony of Jessica Naderman, in which she explained that the change of the Rue Le Dodge ride to unidirectional travel (after the plaintiff's injury), was not for the purpose of making it "easier to prevent people from violating the head-on bumping rule" (CT 159, lines 3-4), but simply "for consistency with the other Paramount parks at the time" (CT 159, lines 7-8). See also Section 5 of the Opening Brief on the merits, quoting from the discussion in the defendant's Petition for Rehearing that there was no evidentiary support for statements in the majority opinion about why bumper car rides in the other parks operated by the defendant's predecessor were operated in a unidirectional manner. (Opening Brief on the Merits, pages 43-46, items nos. 1, 6, 7, and 9.)

Thus there is no factual support in the record for the plaintiff's assertion that her injury was foreseeable and could have been prevented had the defendant guarded against head-on collisions on its bumper car ride. That means that there is no triable dispute of fact as to this issue, and thus no factual justification for reversing the summary judgment granted to the defendant in the underlying action.

6. THERE IS NO LEGAL SUPPORT FOR THE PLAINTIFF'S ASSERTION THAT THE DEFENDANT HAD A DUTY TO MINIMIZE THE RISKS INHERENT IN ITS BUMPER CAR RIDE

In Section III of her Answering Brief, the plaintiff argues that "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". (Answering Brief, page 36.) However, as this court stated in *Avila, supra,* 38 Cal.4th at 166, the primary assumption of risk doctrine imposes "'a duty not to increase the risks inherent in the sport, not a duty to decrease the risks.' [Citations.]"

The plaintiff here is making the same sort of demand that this Court rejected in *Avila*. As noted above, in that case, the plaintiff, a collegiate baseball player, alleged he was injured when the opposing pitcher intentionally hit him with a pitch. (*Id.* at 152.)

> "The third way in which Avila alleges the District breached its duty of care, by failing to provide umpires, likewise did not increase the risks inherent in the game. Baseball may be played with umpires, as between professionals at the World Series, or without, as between children in the sandlot. Avila argues that providing umpires would have made the game safer, because an umpire might have issued a warning and threatened ejections after the first batter was hit. Whatever the likelihood of this happening and the difficulty of showing causation, the

> argument overlooks a key point. The District owed 'a duty not to increase the risks inherent in the sport, not a duty to decrease the risks.' [Citations.] While the provision of umpires might – might – have reduced the risk of a retaliatory beanball, Avila has alleged no facts supporting imposition of a duty on the District to reduce that risk." (*Id.* at 166.)

Here, the plaintiff asserts that the defendant breached its duty of care by failing to re-configure the Rue Le Dodge ride to make it unidirectional, because such a reconfiguration would have decreased the risks faced by riders such as the plaintiff. But as this Court made clear in *Avila,* the doctrine of primary assumption of risk merely imposes a duty not to increase risks associated with the activity; it does not impose a duty to decrease those risks. Since that is exactly what the plaintiff is demanding here, her contention is without merit.

None of the cases cited by the plaintiff in this section of her brief hold otherwise. None of them required the defendant to take steps to minimize the actual risk inherent in the activity. Rather, each merely indicates that such defendants may have a duty to take reasonable steps to protect its customers from the consequences of those inherent risks. (See discussion in Opening Brief on the Merits at pages 39-40.)

Ratcliff v. San Diego Baseball Club (1938) 27 Cal.App.2d 733, 734 involved a claim by a baseball spectator who was injured when she was hit by

an accidentally thrown bat. The Court of Appeal did not hold that the owner of the stadium had a duty to prevent bats from being thrown. Rather, it held that the defendant had a duty to protect its patrons from the injuries that could be caused if by the inherent risk of a thrown bat came to fruition, by providing adequate screening for the seats at risk. (*Id.* at 736.)

Kahn v. East Side Union High School District, supra, 31 Cal.4th 990, 995 arose when a member of a high school swim team "executed a practice dive into a shallow racing pool ... and broke her neck." There is an inherent risk associated with shallow-water dives (*id.* at 1011 and footnote 3), but this Court did not find that the defendant had a duty to minimize that risk. Rather, it held that the defendant had a duty to protect its students from the injuries that could be suffered in executing such dives by providing adequate training and supervision to the athletes who were going to perform those dives. (*Id.* at 996.)

Rosencrans v. Dover Images, Ltd. (2011) 192 Cal.App.4th 1072, 1083, involved motocross racing, in which there is an inherent risk that riders will fall onto the track. The Court of Appeal did not find that the operator of the track had a duty to eliminate that risk. Rather, it found that the operator had a duty to take reasonable steps to protect those fallen riders from the consequences of that inherent risk – specifically, to protect them from being

struck by other riders. "[W]e 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." (*Id.* at 1084.)

Saffro v. Elite Racing, Inc. (2002) 98 Cal.App.4th 173, 179 involved a marathon, which carries the inherent risk that runners may suffer dehydration and hyponatremia. The Court of Appeal found that the race organizer had a duty to take reasonable steps to protect the runners from the consequences of that inherent risk "by providing adequate water and electrolyte fluids along the 26-mile course". (*Ibid.*)

Applying the rationale of these cases to the present one, the defendant did not have a duty to minimize the risks associated with the collisions that are inherent in the operation of bumper cars (including head-on collisions). Its duty was to minimize the risk of injury arising from those collisions, and there is no dispute that the defendant's predecessor fulfilled that duty. Each bumper car had a padded seat, padded sides, a padded steering wheel, and a padded dash board, and each was equipped with seat belts to restrain the driver and passenger during the ride. The plaintiff has not suggested – much less offered evidence – 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, even from a head-on direction.

Contrary to the plaintiff's contention, there is no basis in the law for holding that the defendant had a duty to minimize the risks inherent in the operation of its bumper cars. While the defendant may have had an obligation to take reasonable steps to protect its customers from the consequences of those inherent risks, it fully met any such obligation. So there is no legal justification for reversing the summary judgment granted to the defendant in the underlying action.

CONCLUSION

A constant theme runs through the plaintiff's Answering Brief: that head-on collisions are not a risk inherent in the operation of bumper car rides, and therefore the primary assumption of risk doctrine has no application to this case. However, as the defendant pointed out in its Opening Brief on the Merits, this was a fall-back position adopted by the majority below to bolster its decision to reverse the summary judgment granted to the defendant even if the majority's conclusions about the scope of the applicability of the primary assumption of risk doctrine were to be successfully challenged. (See Opening Brief on the Merits, page 42, referring to *Nalwa, supra,* 196 Cal.App.4th at 582.)

This was not the main thrust of the majority's opinion, and it was not the issue that required this Court to review the appellate court's decision. The majority below overturned the trial court's grant of summary judgment because it concluded that the primary assumption of risk doctrine could not be applied in a non-active sports situation such as riding on a bumper car, additionally concluded that the doctrine could not be applied when the activity at issue was subject to safety regulation, and finally concluded that the defendant had a duty to eliminate the risks inherent in its bumper car ride even if the doctrine did apply.

The defendant, in its Opening Brief on the Merits, showed why none of the majority's arguments on any of these issues was compelling, and why the better view of the law was that the primary assumption of risk doctrine ***can*** be applied in a non-active sports situation such as riding on a bumper car, that the doctrine ***can*** be applied when the activity at issue is subject to safety regulations, and that the defendant did ***not*** have a duty to eliminate the risks inherent in its bumper car ride.

The plaintiff, in her Answering Brief, failed to refute the defendant's showing or to otherwise bolster the majority's conclusion that the summary judgment was erroneously granted by the trial court. So instead, the plaintiff has chosen to rely on the majority's fall-back position, which the defendant

contends is all that will be left of the majority's opinion after this Court reviews it.

However, as was shown above, there is no factual basis for the plaintiff's claim that she was injured in a head-on collision, nor is there any legal or factual basis for her assertion that a head-on collision is not an inherent risk of riding a bumper car. Thus, not even the Court of Appeal's fall-back position is sufficient to save the plaintiff here.

What is at issue here is a fundamental question of public policy: should the citizens of California be permitted to voluntarily participate in activities that have risks inherent in them? If the answer is yes, then it is unfair to allow the persons and entities which provide the means for persons to participate in those activities to be held liable for injuries that result from these inherent risks.

That is the issue squarely presented here. The fundamental nature of a bumper car is that it bumps. If we are going to hold amusement park operators liable for injuries that occur as a result of such bumps, we are going to force those operators to either stop offering such rides to the public, or to so alter the nature of the rides as to make them something entirely different: "tapper car[s]" as Justice Duffy put it in her dissent to the majority's opinion. (*Nalwa, supra,* 196 Cal.App.4th at 597; dis. opn. of Duffy, J.)

This situation is not unique to bumper car rides. There are a myriad of activities in which Californians regularly participate on a voluntary basis, and it does not make good policy sense to punish the persons and entities that make such participation possible by holding them liable for injuries caused not by their own negligence but by risks inherent in the nature of the activity.

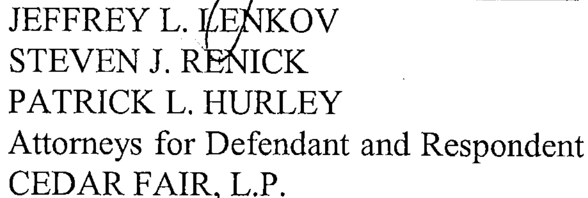
This Court should confirm that the primary assumption of risk doctrine is not the very limited rule described by the majority below, but rather is a rule that can be applied in a variety of circumstances, so long as the basic formula is met: that there are risks inherent in the activity that cannot be eliminated without changing the fundamental nature of that activity.

Accordingly, the defendant urges this Court to reverse the decision of the Court of Appeal and reinstate the trial court's order granting the defendant's motion for summary judgment.

DATED: March 6, 2012

Respectfully submitted,

MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP

By: 

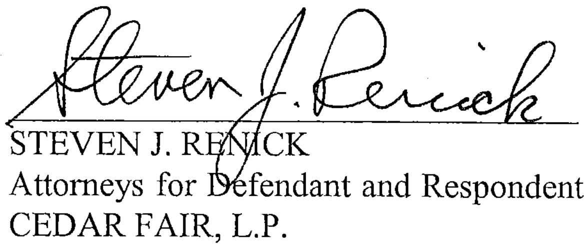
JEFFREY L. LENKOV
STEVEN J. RENICK
PATRICK L. HURLEY
Attorneys for Defendant and Respondent
CEDAR FAIR, L.P.

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

The word count for the foregoing **REPLY BRIEF ON THE MERITS** is 7,354 words, based on the word count provided by the word processing system on which this brief was composed.

DATED: March 6, 2012

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 **March 6, 2012,** I served by overnight delivery the foregoing document described as **REPLY 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 **March 6,** **2012** at Los Angeles, California.