

IN THE MISSOURI SUPREME COURT

No. SC 93658

JESSICA CHAVEZ,
Respondent,

v.

CEDAR FAIR, LP
Appellant.

Appeal from the Circuit Court of Clay County, Missouri
Seventh Judicial Circuit
Hon. A. Rex Gabbert, Circuit Judge

RESPONDENT'S SUBSTITUTE BRIEF

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I. The court correctly informed the jury in Instruction No. 6 that Cedar Fair had the duty to exercise the highest degree of care to passengers on its Hurricane Falls ride because Missouri court decisions have held for over 80 years that an amusement part ride operator, while not technically a common carrier, is held to that same standard of care for the reason that it transports in its own apparatus, over which it maintains complete control and management, patrons who have turned over their freedom and safety to the care of the ride operator 19

II. The trial court did not err in refusing to submit Cedar Fair’s proffered instructions on comparative fault because:

(A) its instructions were not correct in all essential respects and would have caused reversible error if given in that (1) its verdict director failed to submit the elements of the plaintiff’s knowledge and appreciation of the actual danger posed by the Hurricane Falls ride (bodily collisions between riders); (2) its verdict director referred to plaintiff’s failure “to hold on to the restraints and safety devices” in the raft when only one safety device was ever identified in

the evidence; and (3) its instruction defining “negligence” was based on and identical to MAI 11.07 (negligence of an adult) instead of MAI 11.04 (negligence of a minor); and

(B) Cedar Fair did not present substantial evidence to submit the issue and to establish by a preponderance of the evidence that Jessica Chavez contributed to cause her own injuries through negligence in that (1) there was no evidence of her knowledge and appreciation of the specific danger of bodily collisions; and (2) the circumstantial evidence afforded no more than equal support for two inconsistent and contradictory factual inferences -- that she innocently or accidentally became separated from the nylon strap, or that she negligently or unreasonably let go of the strap. 35

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SUPPLEMENTAL STATEMENT OF FACTS

In order to present a more complete and accurate rendition of the occurrence in which Jessica Chavez was injured and of the evidence presented at trial (Rule 84.04(c)), these additional facts are necessary.

Jessica Chavez had never been to Oceans of Fun before August 3, 2000 (Tr. 604). She and her family arrived at opening time (10:00 a.m.) (Tr. 562-3). After setting out their towels on chairs around the Wave Pool (Tr. 179-80, 605), Jessica, her aunt Angela Boyles, cousins Candace Kelly and Amie Cooper proceeded directly to the Hurricane Falls ride and got in line (Tr. 179, 605). Her uncle Jeff Boyles stayed at the Wave Pool with his and Angie's two children (Tr. 181, 207, 563-4).

The Hurricane Falls ride was described by appellant's corporate representative and its expert as a "family raft ride" (Tr. 274-5, 470). Patrons climb a long set of stairs to reach the elevated loading area (Plt.Exh. 25; Tr. 350). Up to five people climb into a circular raft and sit cross-legged on the floor (Tr. 181, 332-3, 531). In August 2000, the rafts had a nylon strap running along the top of the tube behind the riders to hold onto (Tr. 181, 304, 480-1). After the riders get in, employees launch the rafts for the descent (Tr. 497). Each raft is pushed along by a water flow of 8,000 gallons per minute, and rides down a fiberglass flume, up and down and side to side around corners to a splash pool at the end where the riders get out (Plt.Exh. 25; Tr. 497-98). A conveyor takes empty rafts from the splash pool to the loading platform at the top for another set of riders (Tr. 485).

Rides at Oceans of Fun and Worlds of Fun are given a grade according to their aggressiveness (Tr. 292-3). Hurricane Falls has an Activity Rating of “5,” the highest rating possible, meaning it was an “aggressive thrill ride” that can generate “high speeds or heights, aggressive and unexpected forces” and “rapid directional changes” (Tr. 292-3, 551-3). On the Worlds of Fun side of the park, the Mamba roller coaster also has a rating of “5” and its riders use lap restraints for their safety (Tr. 294-5). The Detonator, a shot tower, is rated “5” and riders use a shoulder harness to avoid being ejected (Tr. 295). The Timber Wolf, another roller coaster, is rated “5” and has both a seat belt for riders and a lap restraint that locks into place to keep them in their seats (Tr. 295-6). The ThunderHawk, a roller coaster also rated a “5”, has a tee-bar lap restraint and a shoulder harness to protect the riders from ejection and prevent injuries (Tr. 296-7). The Boomerang, another roller coaster rated “5”, uses a shoulder harness system to prevent ejections and protect riders (Tr. 297-8). The Spinning Dragons roller coaster, rated “5”, has a tee-bar lap restraint and seat belts to prevent injuries (Tr. 298). The Fury of the Nile, a “high thrill” raft ride, is classified at “4”; its riders use seat belts (Tr. 298-9).

The rafts can oscillate up to 90° and gravity pulls riders away from the air tubes (Tr. 305-6, 408-9, 477, 525-6, 547-9; Plt.Exh. 71). Each Hurricane Falls raft is equipped with a nylon webbing strap that runs along portions of the top of the raft, as shown in Plt.Exh. 40 (Tr. 304). Patrons are instructed to hold onto the strap at all times (Tr. 615-6). There is no other restraint or safety device on a raft. Appellant’s corporate representative and its expert

agreed with plaintiff's expert that each rider's hand is really the only safety device in the raft (Tr. 300-1, 305, 452, 543). If the rider's hand separates from the nylon strap, "there is no longer any safety device for that patron" (Tr. 305, 543-4). "If there's a release or separation for any reason, regardless of what it is, there's no other protection" (Tr. 411). At that point, everyone in the raft faces potential danger (Tr. 452-3, 544).

Although Cedar Fair reminds riders to hold on to the strap at all times, "the reality of it is that it's not always the case for a number of [riders], all kinds of reasons that people can separate and become separated from the strap that you're holding onto" (Tr. 411). The ride operator must "have that expectation and understand that that's a reality and then take steps to try to prevent that" (Tr. 411-3).

Riders can become separated from the strap for several reasons: "They can do it on purpose for a thrill. They can be scared, frantic, [have] wet hands or their hands starting to ache and they want to release and re-grip real quick" (Tr. 412).

"This kind of phenomenon is known at any kind of park and water parks" (Tr. 412, 543). From a safety perspective, the ride operator has to consider the broad spectrum of patrons, "everything from someone who could be elderly to the youngest person allowed to ride. It's down to 46 inches [tall] and everything in between, body shape, sizes, weight, strength levels. There's all kinds of things that will vary because the riding population is not necessarily ever going to be the same on any one given day or any one given ride" (Tr. 413).

The sharpest turn of the ride is the final one, where Jessica was injured (Plt.Exh. 25;

Tr. 183, 307, 606). Only two eyewitnesses testified, Jessica (Tr. 604-27) and her cousin Candace Kelly (Tr. 178-218). Of the other two known occupants in the raft, Angie Boyles did not see the girls collide (Tr. 215), and Amie Cooper never testified, at trial or by deposition.

Angie Boyles described Hurricane Falls as “a rough ride, up and on the walls” (Tr. 206). Candace Kelly said the ride was “a lot rougher than I thought it would be” (Tr. 182). The water “threw us up pretty high as we were going down it” (Tr. 182, 194-5). Jessica agreed that it got “rougher” as they went down the flume (Tr. 605).

According to Candace, as the raft went up the splash wall at the final turn, the high side where Amie Cooper was sitting “tipped over,” sandwiched “a little bit,” “and that’s how they knocked each other so it obviously went a little too high” (Tr. 182). Candace had given a telephone statement on May 30, 2008, in which she said Amie fell onto Jessica (Tr. 185). In deposition testimony on March 30, 2011, she said Jessica had been on the high side (Tr. 184). In trial testimony she said, “One of them flipped forward and hit the other one” (Tr. 184), but could not say which (Tr. 186). She noted that each girl says the other fell into her (Tr. 191-2). Candace did not see Jessica let go of the strap, never told anyone Jessica had done so, and “[does not] believe anybody let go” (Tr. 184-5).

Jessica testified she was at the bottom and Amie was on the high side at the final turn (Tr. 606). Amie was “thrown” (Tr. 618-9) and went “airborne” (Tr. 426, quoting deposition testimony), and Amie’s head hit Jessica in the face (Tr. 606, 619). Amie told Jessica

immediately afterward, “I’m sorry I couldn’t hold on” to the strap (Tr. 606, 618-9, 624).

Jessica testified that she also had difficulty holding on to the strap during the ride, saying it “was very hard to hold onto” the nylon strap “if you get your hands wet” and because “[y]ou get jerked around [and] [y]ou’re changing directions” during the ride (Tr. 605, 617). She does not believe Amie “would have let go on purpose” (Tr. 618). In deposition testimony Jessica said that at the final turn, “you’re almost leaning forward and the straps, I guess, they were cutting into her hand from what I understand, pinching it really hard, and she couldn’t hold on” (Tr. 618-9, 624). “All I know is that she said she couldn’t hold on” (Tr. 619). Jessica agrees it would not have happened “if she [Amie] had been able to hold on” (Tr. 624).

After getting out of the raft at the end, Jessica took her hand away from her mouth and saw a tooth in it, noticed she was dripping blood into the water, and called to her aunt (Tr. 606). Her front teeth were missing “and her braces were shoved up into her gums” (Tr. 206-7, 231-2). Jessica was bleeding profusely, screaming and crying (Tr. 606), in shock and in tears (Tr. 187). She dropped her tooth into the splash pool, kept searching for it, “thinking maybe they could put it back,” but it was never found (Tr. 608). Jessica “had a lot of trauma” to her teeth requiring extensive repair, both past and future (Tr. 232-47).

While Def.Exh. 107 purports to quote Angie Boyles as saying Jessica “let go of the craft” and fell into Amie (Tr. 215-6), Angie denied giving any statement to Oceans of Fun personnel, to paramedics, or to anyone else (Tr. 208, 215-6, 218), and said her husband Jeff

did all the talking (Tr. 208, 209, 216). Jessica stated that her aunt never left her side after the ride ended and that her Uncle Jeff Boyles talked with a paramedic (Tr. 607, 620-1, 625).

Def.Exh. 108 purports to contain a statement by Jessica on the day of the injury that “she let go of the straps” (Tr. 216). Jessica testified that as she stood bleeding beside the splash pool and looking in it for her missing tooth, her Uncle Jeff arrived first, and then “a paramedic person” who brought some gauze she put in her mouth (Tr. 606-7, 620). After she bled through that, a towel was given to her (Tr. 607). A bit later, the paramedic or a lifeguard came over to ask for her mother’s telephone number, so she took the bloody towel out of her mouth and gave the work number (Tr. 607, 620, 626). She never gave a statement to anyone (Tr. 607, 619-20). Angie agreed with that (Tr. 209-10).

After being told of her injuries, Jeff Boyles ran from the wave pool to the Hurricane Falls ride, passing the paramedics who did not appear to be in a hurry (Tr. 564-5). He stayed by Jessica “from start to finish” until they left for the hospital (Tr. 567). None of the EMTs asked her any questions, she offered them no information, and no one took a statement from her (Tr. 567-8). He did not hear Jessica provide her mother’s phone number (Tr. 567), but remembers asking someone at Oceans of Fun to call the mother (Tr. 568). He personally called Jessica’s mother Donna from NKC Hospital (Tr. 577). Donna was a preschool teacher at Cathedral Daycare in St. Joseph (Tr. 581), and worked that day until 3:00 pm (Tr. 594).

Ben Hultgren, a park ranger at Worlds of Fun/Oceans of Fun at the time, prepared Def.Exh. 107 and said he had spoken with both Angie and Jeff Boyles that morning (Tr. 643,

649-51). He attempted to call Jessica's mother Donna Chavez but had an incorrect phone number (Tr. 652, 656). He telephoned Angie Boyles at NKC Hospital to get the correct number, and then spoke with Donna and explained why it had taken so long to call her (Tr. 661, 657). Donna testified she never received such a phone call from Oceans of Fun that day, only a call from Jeff Boyles (Tr. 581, 594, 597-8). A report made that day by Oceans of Fun (Def.Exh. 111) stated that a call was made to Donna Chavez at the phone number, but the phone was "disconnected" (Tr. 658-9). That number is for Cathedral Daycare in St. Joseph (Tr. 594-5). It had not been disconnected, and Jeff Boyles called it that day to reach Donna (Tr. 577, 578, 626-7).

After getting some treatment at North Kansas City Hospital, they returned to Oceans of Fun to get the Boyles' son Justin and their clothes and belongings (Tr. 626). At that time, Jeff Boyles made a handwritten statement to Oceans of Fun (Tr. 570-2). They then returned to St. Joseph and Donna took Jessica to Dr. Mark Bagby, the dentist (Tr. 583).

Plaintiff put on evidence of Cedar Fair's notice or knowledge of the danger of injury to riders from bodily impacts from two sources. The first was the incident and injury reports at Oceans of Fun between June 1999 and July 15, 2000, three weeks before Jessica's injury. These reports show multiple incidents of face and head lacerations and bumped heads (Plt.Exh. 35) and at Dorney Park (Plt.Exh. 14-24), another water park in Allentown, PA, owned by Cedar Fair with a family raft ride its corporate representative described as "similar" to Hurricane Falls (Tr. 221-22, 273-75, 277-80, 320-23). The latter incident reports

(July 1997-August 2000) show several significant injuries from bodily impacts, including head, face and mouth injuries (Tr. 533).

The second source came from the manufacturer of that ride, Whitewater West Industries Ltd., which provided a Waterslides Operations & Maintenance Manual to Cedar Fair when construction of the ride was completed (Tr. 360-61), which was admitted as Plt.Exh. 36 (Tr. 363). It contains three entries relating to notice of the risk of injury from passenger collisions:

- At Page 4 of 6 in the General Operating Guidelines section, part 4. **Accidents**, it states, “The most common accidents in water parks are slips and falls, *collisions between one riding customer and another customer*, impact with the splashdown pool, and abrasion from sidewalks” (Tr. 361-62, 530).
- On the following page (Page 5 of 6), part 4.3 **Bodily Collisions**, it states, “*Bodily collisions occur in the flumes and the splash pools* as a result of riders traveling at different speeds and riders slowing or stopping in the flume. *Bodily collisions can be minimized* by restricting traffic flow to one vehicle or passenger in the flume at a time.” The Manual does not state that bodily collisions can be eliminated.
- At Page 1 of 3 in the Specific Operating Guidelines for The BIG ONE (GR) Family Raft Ride, it states, “Safety considerations include: slips and falls in the entry and exit areas, abrasions from the sidewalls, and *passenger-to-passenger impacts*” (Tr. 362, 368).

There was also testimony about Cedar Fair's poor record-keeping and retention practices, including vague and sporadic entries (Tr. 310-28, 330-2, 334-5, 341-3, 359-60, 363-7, 534-6, 538). At least one other injury occurred at Hurricane Falls that was omitted from Plt.Exh. 35, and better record-keeping might have revealed more such injuries and details as to severity of those noted (Tr. 310-19). The lack of detail in these reports was discussed by plaintiff's safety expert and defendant's engineer because their vagueness precluded an effective root cause analysis of the actual cause of the injuries (Tr. 404-06, 408, 410, 437-42, 534-36, 538).

Plaintiff's verdict director (Instruction No. 7; LF 268) submitted Cedar Fair's negligence in failing to provide "a friction device reasonably sufficient to prevent a raft rider from colliding with another rider" and in failing "to adequately warn of the risk of harm from colliding with other raft riders," all of which was based upon the testimony of plaintiff's expert (Tr. 377, 404-5, 413-6, 419-20, 451, 458).

Angie Boyles testified that, had she known there was a potential danger of injury from bodily collisions, that it had happened in the past, she would not have allowed the children in her care on the Hurricane Falls ride that day (Tr. 213).

Plaintiff's counsel showed the jury a proposed warning while cross-examining defense expert Douglas Ferrell that warned of body impacts with other occupants and that "serious injuries may result" (Tr. 531-2). Ferrell later conceded that "that warning could be put up" (Tr. 541). Plaintiff moved for admission (Plt.Exh. 72) but it was excluded (Tr. 558-9).

POINTS RELIED ON

I. THE COURT CORRECTLY INFORMED THE JURY IN INSTRUCTION NO. 6 THAT CEDAR FAIR HAD THE DUTY TO EXERCISE THE HIGHEST DEGREE OF CARE TO PASSENGERS ON ITS HURRICANE FALLS RIDE BECAUSE MISSOURI COURT DECISIONS HAVE HELD FOR OVER 80 YEARS THAT AN AMUSEMENT PARK RIDE OPERATOR, WHILE NOT TECHNICALLY A COMMON CARRIER, IS HELD TO THAT SAME STANDARD OF CARE FOR THE REASON THAT IT TRANSPORTS IN ITS OWN APPARATUS, OVER WHICH IT MAINTAINS COMPLETE CONTROL AND MANAGEMENT, PATRONS WHO HAVE TURNED OVER THEIR FREEDOM AND SAFETY TO THE CARE OF THE RIDE OPERATOR.

Berberet v. Electric Park Amusement Co., 319 Mo. 275, 3 S.W.2d 1025 (1928)

Brown v. Winnwood Amusement Co., 225 Mo.App. 1180, 34 S.W.2d 149 (1931)

Cooper v. Winnwood Amusement Co., 227 Mo.App. 608, 55 S.W.2d 737 (1932)

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO SUBMIT CEDAR FAIR'S PROFFERED INSTRUCTIONS ON COMPARATIVE FAULT BECAUSE:

(A) ITS INSTRUCTIONS WERE NOT CORRECT IN ALL ESSENTIAL RESPECTS AND WOULD HAVE CAUSED REVERSIBLE ERROR IF GIVEN IN THAT (1) ITS VERDICT DIRECTOR FAILED TO SUBMIT THE ELEMENTS OF PLAINTIFF'S KNOWLEDGE AND APPRECIATION OF THE ACTUAL DANGER

POSED BY THE HURRICANE FALLS RIDE (BODILY COLLISIONS BETWEEN RIDERS); (2) ITS VERDICT DIRECTOR REFERRED TO PLAINTIFF'S FAILURE "TO HOLD ON TO THE RESTRAINTS AND SAFETY DEVICES" IN THE RAFT WHEN ONLY ONE SAFETY DEVICE WAS EVER IDENTIFIED IN THE EVIDENCE; AND (3) ITS INSTRUCTION DEFINING "NEGLIGENCE" WAS BASED ON AND IDENTICAL TO MAI 11.07 (NEGLIGENCE OF AN ADULT) INSTEAD OF MAI 11.04 (NEGLIGENCE OF A MINOR); AND

(B) CEDAR FAIR DID NOT PRESENT SUBSTANTIAL EVIDENCE TO SUBMIT THE ISSUE AND TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT JESSICA CHAVEZ CONTRIBUTED TO CAUSE HER OWN INJURIES THROUGH NEGLIGENCE IN THAT (1) THERE WAS NO EVIDENCE OF HER KNOWLEDGE AND APPRECIATION OF THE SPECIFIC DANGER OF BODILY COLLISIONS; AND (2) THE CIRCUMSTANTIAL EVIDENCE AFFORDED NO MORE THAN EQUAL SUPPORT FOR TWO INCONSISTENT AND CONTRADICTORY FACTUAL INFERENCES -- THAT SHE INNOCENTLY OR ACCIDENTALLY BECAME SEPARATED FROM THE NYLON STRAP, OR THAT SHE NEGLIGENTLY OR UNREASONABLY LET GO OF THE STRAP.

Cluck v. Union Pacific R. Co., 367 S.W.3d 25 (Mo.banc 2012)

Bollman v. Kark Rendering Plant, 418 S.W.2d 39 (Mo. 1967)

Parker v. Roszell, 617 S.W.2d 597 (Mo.App. 1981)

ARGUMENT

I. THE COURT CORRECTLY INFORMED THE JURY IN INSTRUCTION NO. 6 THAT CEDAR FAIR HAD THE DUTY TO EXERCISE THE HIGHEST DEGREE OF CARE TO PASSENGERS ON ITS HURRICANE FALLS RIDE BECAUSE MISSOURI COURT DECISIONS HAVE HELD FOR OVER 80 YEARS THAT AN AMUSEMENT PARK RIDE OPERATOR, WHILE NOT TECHNICALLY A COMMON CARRIER, IS HELD TO THAT SAME STANDARD OF CARE FOR THE REASON THAT IT TRANSPORTS IN ITS OWN APPARATUS, OVER WHICH IT MAINTAINS COMPLETE CONTROL AND MANAGEMENT, PATRONS WHO HAVE TURNED OVER THEIR FREEDOM AND SAFETY TO THE CARE OF THE RIDE OPERATOR.

Discussion. Hurricane Falls is a “family raft ride” (Tr. 274-5, 470). Along with several other states¹ Missouri places upon amusement park *ride operators* (roller coasters,

¹*See, e.g., Gomez v. Superior Court*, 35 Cal.4th 1125, 29 Cal.Rptr.3d 352, 113 P.3d 41 (Cal. 2005); *Lyons v. Wagers*, 55 Tenn.App. 667, 404 S.W.2d 270 (1966); *Lewis v. Buckskin Joe’s, Inc.*, 156 Colo. 46, 396 P.2d 933 (1964); *Pajak v. Mamsch*, 338 Ill.App. 337, 87 N.E.2d 147 (1949); *Coaster Amusement Co. v. Smith*, 141 Fla. 845, 194 So. 336 (1940); *Bibeau v. Fred W. Pearce Corp.*, 173 Minn. 331, 217 N.W. 374 (1928); *Sand Springs Park v. Schrader*, 82 Okla. 244, 198 P. 983 (1921); *Best Park & Amusement Co. v. Rollins*, 192 Ala. 534, 68 So. 417, 418 (1915).

boat rides, scenic rides, bumper cars, etc.) the duty to use the highest degree of care. Brown v. Winnwood Amusement Co., 225 Mo.App. 1180, 34 S.W.2d 149, 152 (1931) (Appdx A10); Cooper v. Winnwood Amusement Co., 227 Mo.App. 608, 55 S.W.2d 737, 742 (1932) (Appdx A19); and Gromowsky v. Ingersol, 241 S.W.2d 60, 63 (Mo.App. 1951) (Appdx A27). These cases involved amusement park *ride operators* who transported persons from place to place in a vehicle, vessel or apparatus furnished and completely maintained and controlled by the defendant -- roller coasters and an airplane swing ride.

Ride operators are not “common carriers” in any traditional sense, and are not treated as such under Missouri law. They have never been cast as common carriers by any Missouri court decision either, including the Court of Appeals’ opinion in this case (slip op. at 5-6, 9 n.6). Brown v. Winnwood carefully explained (34 S.W.2d at 152):

There have been several cases before the higher courts of this country involving devices similar to the one in the case at bar and, *while the courts have been slow in holding that the operator of such devices is technically a common carrier and that all the rules governing such carriers are applicable to him, they do hold that the rule in reference to the degree of care required of a common carrier applies to the operation of such devices*; [and] that the apparatus is under the control and management of the operator thereof

Cooper quoted the same passage and concluded: “We hold to our ruling in the Brown Case, *supra*, that the operators of such devices as the ‘Whirl Winn’ are required to use the highest

degree of care for the safety of their passengers.” 55 S.W.2d at 742. Gromowsky also quoted and followed that passage. 241 S.W.2d at 63 (“the degree of care required of a common carrier applies to the operation of [amusement] devices”). Cedar Fair’s lengthy argument aimed at disproving an unstated and non-existent rationale (Br. 22-27) is merely tilting at windmills.

The distinction drawn between a negligent ride operator and a negligent premises owner/occupier centers upon the circumstances of each case and the particular activity in which the defendant is engaging. That distinction is critical to understanding why Brown, Cooper and Gromowsky, as Judge Ellis’ careful opinion noted, correctly announce the standard of care in this case and have not been overruled.

The starting point is Berberet v. Electric Park Amusement Co., 319 Mo. 275, 3 S.W.2d 1025 (1928) (Appdx A1), a premises liability case. The plaintiff and her family walked from the merry-go-round on a wooden board walk which inclined somewhat toward a concrete walk. “When they were close to where the board walk joined upon the concrete walk, the plaintiff fell, sustaining the injuries for which she sued.” Id. S.W.2d at 1027. The petition as amended averred that the defendant had left “loose, unfastened, and dangerous boards, which were liable to trip people going over same,” that it negligently failed “to provide a safe approach to said merry-go-round, and said defendant was guilty of careless and negligent acts in permitting and leaving a board in said sidewalk in an unsafe and dangerous condition” which it could have discovered by using ordinary care. Id.

In its discussion of the appropriate standard of care, the Berberet Court's actual holding reads:

The rule in this state, and generally, is that the proprietor of a place of public amusement² owes to his patrons that duty which, under the particular circumstances, is ordinary care or reasonable care for their safety. * * * However, one who invites another to come upon his premises is not an insurer of the safety of such other person * * * and that general rule applies to proprietors of places of public amusement. * * * The rulings in the cases mentioned show that the care required of the proprietor of a place of public amusement is that which is reasonably adapted to the character of the exhibitions given, the amusements offered, the places to which patrons resort, and also, in some cases, the customary conduct of spectators of such exhibitions. *It is a care commensurate with the particular conditions and circumstances involved in the given case.* In the case at bar, the particular place involved is a board walk, for the use of patrons visiting a merry-go-round and returning thence to a concrete walk. It is an instance under the general rule which charges an owner of property with a duty toward those he

²Cedar Fair misstates the holding by replacing "the proprietor of a place of public amusement" with "a [*sic*] amusement operator" (Br. 12), a change that tends to obscure the distinction between an owner/occupier and a ride operator.

invites upon it. *The nature of the use itself created the corresponding duty -- a duty appropriate to the nature of the object, and of its use by the plaintiff--* the duty to keep the walk in reasonably safe condition for persons walking thereon.

Id. at 1029 (citations omitted; emphasis added). As Judge Ellis observed, “several factors must be considered in determining the appropriate standard of care owed by amusement park proprietors, including the types of amusements offered and the places to which patrons resort.” Slip op. at 9. These factors are key to a full understanding of the reason that ride operators are held to a higher standard of care than park proprietors. These two distinct lines of cases are not in conflict and are not irreconcilable.

This distinction is starkly drawn where, for example, a department store is sued for personal injuries in a slip and fall case. If the injury occurred on the sidewalk outside the building, or on any of its floors, the store owner is liable only if it failed to exercise ordinary care in keeping its premises reasonably safe for its business invitees. A cause of action under those circumstances is categorized as premises liability. However, if an injury occurred in that store’s elevator or on its escalator, the operator of that conveyance is held liable if it failed to exercise the highest degree of care. See, e.g., Goldsmith v. Holland, 182 Mo. 597, 81 S.W. 1112, 1114-5 (1904); Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 S.W. 1062, 1064 (1906); Haley v. May Dept. Stores Co., 287 S.W.2d 366, 370 (Mo.App. 1956) (escalator).

The common feature among the amusement park ride operators and elevator and

escalator operators, of course, is not that they are common carriers³ but that they transport patrons from one place to another in an apparatus furnished, controlled and managed by the operator. For that reason, all are held to the highest degree of care.

By contrast, all of the cases cited by Cedar Fair involved premises liability -- defects or dangerous conditions on the property, or failure to supervise or warn -- where the defendant's duty was to use ordinary care. It relies heavily on McCollum v. Winnwood Amusement Co., 332 Mo. 779, 59 S.W.2d 693 (1933), but does not accurately set out the facts. There the plaintiff sought to hold the amusement park liable for negligent construction of a stationary water slide. She had climbed the stairs to the platform, crouched down at the top of the slide, "and as she started forward and over the turn downward she extended her legs backward and upward and her right leg caught in the opening of [the wooden] balustrade" or scaffold surrounding the platform. Id. at 695. Her upper right leg was

³Cedar Fair lists elevator cases in the category of "common carriers" (Br. 15 n.7), as some courts have done. But that is an ill-fitting label under most generally accepted definitions of the term -- elevator operators are not engaged in interstate commerce on public highways or in the skies, are not taxed as a common carrier by revenue laws, and are not highly regulated like railroads, airlines or trucking companies. It is more accurate to say, as the court did in Brown, that while not "technically a common carrier . . . the rule in reference to the degree of care required of a common carrier applies to the operation of such devices." 34 S.W.2d at 152. And for the same reasons.

fractured in this process. Id. “The negligence alleged is in the construction of this slide” (id. at 781) “in that the top or starting place was not of sufficient length and size to properly admit plaintiff’s body, and was surrounded by a scaffold or railing which was open and likely to cause a person’s limbs to be caught and ensnared while using the same.” Id. at 782. The verdict directing instruction, which advised the jury that the defendants “owed the patrons the duty of using ordinary or reasonable care for their safety” and were bound to provide “a chute or slide free from unnecessary danger,” was “a correct declaration of law in the abstract.” Id. at 697 (citing Berberet⁴).

Because the plaintiff was not transported in an apparatus furnished and maintained by the park operator, McCollum is factually distinguishable from Brown and Cooper and did not overrule them *sub silentio*. So, too, Gromowsky does not conflict with McCollum. Every other case cited by Cedar Fair involves ordinary premises liability:

- Kungle v. Austin, 380 S.W.2d 354 (Mo. 1964) -- the plaintiff was injured when she lost her balance and fell as she jumped on a trampoline at a trampoline center. She submitted specifications of negligent construction and maintenance of the trampoline

⁴McCollum also cited Steinke v. Palladium Amusement Co., 28 S.W.2d 440, 441 (Mo.App. 1930), which Cedar Fair has omitted, for the proposition that ordinary care was a proper declaration of the law. Steinke is also a premises liability case in which the plaintiff was injured while roller skating and alleged the defendant’s faulty construction of the roller rink as the cause of his injuries.

frame and failure to provide instruction. Judgment in her favor was reversed and the cause remanded because evidence of the latter theory was insufficient. *Id.* at 358-9.

- Gold v. Heath, 392 S.W.2d 298 (Mo. 1965) -- the plaintiff, while riding a merry-go-round, was struck in the eye by a rock thrown by another child on a swing in a playground area of a drive-in theater. He alleged defendant's negligent failure to provide a safe place for him to play, failure to supervise, and failure to provide an attendant at the playground to prevent such conduct.

- Boll v. Spring Lake Park, Inc., 358 S.W.2d 859 (Mo. 1962) -- the plaintiff broke his neck diving into shallow, muddy water at a swimming pool, where the depth was unmarked and no life guard was on duty. He submitted negligent failure to warn of the dangerous condition, and judgment in his favor was affirmed.

- Hudson v. Kansas City Baseball Club, 349 Mo. 1215, 164 S.W.2d 318 (1942) -- the plaintiff was struck by a foul ball while sitting in the grandstand but not behind a protective screen. He sued on the theory that the defendant's premises were not reasonably safe and that it did not furnish reasonable protection to the plaintiff by erecting some protection for all patrons in the grandstand. The defendant was viewed as a mere possessor of land.

- Lewis v. Snow Creek, Inc., 6 S.W.3d 388 (Mo.App. 1999) -- two plaintiffs each fell on ice that was hidden under a dusting of snow on the ski slopes. The defendant was treated as an ordinary possessor of land.

- Schamel v. St. Louis Arena Corp., 324 S.W.2d 375 (Mo.App. 1959) -- the plaintiff broke her wrist after falling when a skater, who was passing her at high speed and weaving in and out among the patrons, allowed his skate to strike one of hers.
- Reay v. Reorg. Inv. Co., 224 S.W.2d 580 (Mo.App. 1949) -- a boy who was skating fast and zigzagging in and out bumped into the plaintiff, who fell and broke her wrist.
- Moordale v. Park Circuit & Realty Co., 58 S.W.2d 500 (Mo.App. 1933) -- the defendant provided at its park a mechanical punching bag designed to register the force of a blow delivered against the bag by the plaintiff's fist. The plaintiff's arm was fractured when the bag struck the registering device, rebounded and struck him.

The “particular conditions and circumstances” in all those cases called for a lower standard of care than what Jessica Chavez encountered and others face on Hurricane Falls.

Cedar Fair appears to raise three other policy arguments. First, it asserts that activities upon which the highest degree of care has been imposed are *truly* dangerous, unlike “amusement activities, including water slides” that are merely sought out for fun and thrills and the illusion of risks or danger (Br. 15-19); second, Missouri should join other states for the sake of collegiality (Br. 13-15); and third, patrons are not deserving of the highest degree of care when they ride for entertainment or amusement (Br. 18, 22-23, 25-26).

The first argument ignores the evidence presented and also acts as a Trojan horse. Cedar Fair owns and operates both Worlds of Fun and Oceans of Fun. It has four roller

coasters on the Worlds of Fun side -- the Mamba, the Timber Wolf, the ThunderHawk and the Boomerang (Tr. 294-8), as well as the Detonator, a shot tower (Tr. 295). Every one of these rides is characterized as an “aggressive thrill ride” and given an Activity Rating of “5” (Tr. 294-8). No higher rating is possible. Contrary to its argument (Br. 20-21), those rides and the Hurricane Falls raft ride -- also rated “5” (Tr. 292-3) -- share this very same level of inherent danger. That number signifies that each ride can generate “high speeds or heights, aggressive and unexpected forces” and “rapid directional changes” (Tr. 292-3, 551-3).

This was borne out on the date of Jessica’s injury. The eyewitnesses described it as “a rough ride, up and on the walls” (Tr. 206), “a lot rougher than I thought it would be” (Tr. 182); the water “threw us up pretty high as we were going down it” (Tr. 182, 194-5); it got noticeably “rougher” as they went down the flume (Tr. 605). Rafts can oscillate up to 90° at points along the flume and gravity pulls riders away from the air tubes (Tr. 305-6, 408-9, 477, 525-6, 547-9; Plt.Exh. 71). As the raft went up the splash wall at 90° on the final turn where the girls collided, the high side “tipped over” and sandwiched “a little bit” (Tr. 182).

These raft riders have nothing but a nylon strap to hold as a “safety device,” which is only as effective as the strength and endurance of the hand(s) of the patron grasping it (Tr. 304-5), no matter his/her peculiar age and circumstances (Tr. 413). If the rider’s hand separates from the nylon strap for any reason, “there is no longer any safety device for that patron” and “no other protection” (Tr. 305, 411, 543-4). At that point, everyone in the raft faces potential danger (Tr. 452-3, 544).

Yet unlike the Hurricane Falls rafts, each roller coaster and the shot tower have other kinds of passive safety devices to avoid being ejected -- lap restraints, shoulder harnesses, seat belts, or tee-bars, or a combination of these (Tr. 294-8). And yet fatalities on them, though rare, have not been altogether prevented, and serious injuries occur as well.

Cedar Fair argues the illusion of danger and tries to minimize its reality and the frequency and severity of injuries by noting only those at Oceans of Fun from June 1999 when that ride first started to July 2000, before Jessica's injury (Br. 17-18 & n.8). That ignores material evidence, notably incident and injury reports from July 1997 to August 4, 2000, from Dorney Park (Plt.Exh. 14-24), another Cedar Fair water park in Allentown, PA with a "similar" family raft ride (Tr. 221-2, 273-5, 277-80, 320-3). Those reports show significant injuries from bodily collision, including head, face and mouth injuries, the loss of a front tooth and the loosening of another (Plt.Exh. 14, Plt.Exh. 21; Tr. 533). Another source of notice to Cedar Fair of the probability of injuries from bodily collisions on this ride was the Waterslides Operations & Maintenance Manual provided by the ride's manufacturer when construction of Hurricane Falls was completed (Tr. 360-1). The Manual (Plt.Exh. 36) contains three entries relating to passenger collisions: at Page 4 of 6 in the General Operating Guidelines section, part 4. **Accidents** ("The most common accidents in water parks are slips and falls, *collisions between one riding customer and another customer*, impact with the splashdown pool, and abrasion from sidewalks"; Tr. 361-2, 530); at Page 5 of 6, part 4.3 **Bodily Collisions** ("*Bodily collisions occur in the flumes and the splash pools*

as a result of riders traveling at different speeds and riders slowing or stopping in the flume,” noting that “*Bodily collisions can be minimized* [but not eliminated] by restricting traffic flow to one vehicle or passenger in the flume at a time”); and at Page 1 of 3 in the Specific Operating Guidelines for The BIG ONE (GR) Family Raft Ride (“Safety considerations include: slips and falls in the entry and exit areas, abrasions from the sidewalls, and *passenger-to-passenger impacts*”) (Tr. 362, 368). There was also much testimony of Cedar Fair’s poor record-keeping and retention practices, including vague and sporadic entries (Tr. 310-28, 330-2, 334-5, 341-3, 359-60, 363-7, 534-6, 538).⁵ Better record-keeping and retention might have revealed more such injuries and greater detail of them (Tr. 310-19).

The Trojan horse is the request that this Court throw out the “highest degree of care” standard for all of these rides,⁶ roller coasters and rafts alike. But members of the public,

⁵The lack of detail in these reports was discussed by plaintiff’s safety expert and defendant’s engineer because their vagueness precluded an effective root cause analysis of the actual cause of the injuries (Tr. 404-6, 408, 410, 437-42, 534-6, 538).

⁶“*[A]musement activities, including water slides, are not one of these ‘few situations’ in which a higher degree of care has been applied*” (Br. 16); and, “Even if there are some dangers associated with a ‘thrill’ ride, those dangers do not warrant the imposition of the highest degree of care. Indeed, amusement rides exist *because* of thrills and risks. * * * Imposing a higher degree of care would force amusement park operators to reduce or eliminate risk and concomitantly reduce or eliminate the desired thrill.” (Br. 18).

largely uninformed about the risks and frequency of serious injuries at these parks, have been and will continue to be best served and protected from injury on these kinds of aggressive rides by a rule that shields ride operators from liability only when they use the highest degree of care in operating and managing them. Sound public policy demands nothing less.

The rule in Berberet, carried down through Brown, Cooper and Gromowsky, has deep roots and broad application. Over two decades earlier, in quite different circumstances, this Court expressed it thus: “The care, caution, and diligence required by the law is always measured by the circumstances of the particular case; and the rule of admeasurement is, the greater the hazard, the greater the care required.” Woods v. Wabash R. Co., 188 Mo. 229, 86 S.W. 1082, 1086 (banc 1905).

That rule has served the state’s populace well and has not outlived its purpose. No compelling reason has been shown for an abrupt change in this state’s legal fabric that would encourage amusement park ride operators to use *less* than the utmost care in operating and maintaining aggressive rides that uninformed and trusting children, adults, the elderly and the infirm alike are invited and enticed to experience.

Cedar Fair’s second policy argument calls for this Court to join other states in lowering the protection demanded of aggressive water ride operators with a proven history of injuries to patrons who are not warned of the risks and dangers (Br. 13-15). But the trial court (and the Court of Appeals) followed established principles from Missouri tort law. Guidance from other jurisdictions is not necessary because of the abundance of these cases.

And Cedar Fair offers no persuasive reason to depart from them. It cites no other state court decision involving a ride similar to Hurricane Falls whose lead this Court should follow (Br. 13-15). The cases it cites are impressive only in that none involved a ride operator where the plaintiff was injured while being transported in an apparatus maintained and controlled by the defendant. They are simple premises-liability decisions like Berberet, McCollum and Steinke. In Boyd v. Magic Golf, Inc., 52 So.3d 455 (Miss.App. 2011), the child slid down a cement slide on a mat provided by the park, and court treated the case as merely one of premises-liability. In Volcanic Gardens Management Co., Inc. v. Beck, 863 S.W.2d 780 (Tex.App.-El Paso 1993), the plaintiff was injured when, after she came to a stop at the bottom of a water slide, a child crashed into her back; both evidently had earlier “lost” the inner tubes they were supposed to be using. In Sweet v. Clare-Mar Camp, Inc., 38 Ohio App.3d 6, 526 N.E.2d 74 (Ohio App. 1987), a man slid down a stationary slide into shallow water, hit the bottom of the lake and injured his ankle. In Rivere v. Thunderbird, Inc., 353 So.2d 346 (La.App. 1977), the plaintiff slid head first down a fixed slide into shallow water, hitting the bottom and sticking in the sand up to his ears. In Gabaldon v. Erisa Mortgage Co., 128 N.M. 84, 990 P.2d 197 (1999), the child plaintiff almost drowned while swimming in a wave pool; the court found that operating a wave pool was not an inherently dangerous activity.

Cedar Fair’s third argument -- that a passenger’s personal motive determines the level of care she deserves (Br. 18, 22-3, 25-6) -- is no more compelling. Certainly many people

go to amusement parks for entertainment; but many people also utilize elevators and escalators to get to theaters and other places of entertainment and to shop on occasion, and at times children find it amusing to ride and play on them. A passenger's motive is irrelevant in determining the ride operator's liability. Missouri courts do not impose a lower standard of care merely because ride operators engage in the entertainment, amusement or "merrymaking" business.

That argument was necessarily rejected in Brown, Cooper and Gromowsky. The defendant in Brown expressly and unsuccessfully made the argument that it was "not in the transportation business" but rather "their business was carrying merrymakers in their park." Supra, 34 S.W.2d at 152. *See also* Gomez v. Superior Court, supra 35 Cal.4th 1125, 29 Cal.Rptr.3d 352, 113 P.3d at 45-9 (rejecting contrary authority and reiterating prior holding that "A passenger's purpose in purchasing transportation, whether it be to get from one place to another or to travel simply for pleasure or sightseeing, does not determine whether the provider of the transportation is a carrier for reward"); Lewis v. Buckskin Joe's, Inc., supra 396 P.2d at 939 ("It is not important whether defendants were serving as a carrier or engaged in activities for amusement. The important factors are, the plaintiffs had surrendered themselves to the care and custody of the defendants; they had given up their freedom of movement and actions; there was nothing they could do to cause or prevent the accident. Under the circumstances of this case, the defendants had exclusive possession and control of the facilities used in the conduct of their business and they should be held to the highest

degree of care”); Sand Springs Park v. Schrader, *supra* 198 P. at 987-8 (“The fact that the passenger on a scenic railway might be seeking pleasure and recklessly accepts the risks, it may be stated, would be no more different than would a passenger riding a passenger train on a pleasure trip”); and O’Callaghan v. Dellwood Park Co., 242 Ill. 336, 89 N.E. 1005, 1007 (1909) (holding that passenger’s motive for seeking transportation was irrelevant in determining carrier’s liability and that carrier owed same high duty of care whether passenger rode for pleasure or business).

The single Missouri case it has cited in support (Branson Scenic Ry. v. Director of Revenue, 3 S.W.3d 788 (Mo.App. 1999)), construed a revenue statute and the meaning of “interstate commerce.” It did not address the duty owed by an amusement park ride operator to a patron-passenger injured on its ride.

The trial court utilized the correct standard of care owed by Cedar Fair in Instruction No. 6 and made no error of law.

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO SUBMIT CEDAR FAIR'S PROFFERED INSTRUCTIONS ON COMPARATIVE FAULT BECAUSE:

(A) ITS INSTRUCTIONS WERE NOT CORRECT IN ALL ESSENTIAL RESPECTS AND WOULD HAVE CAUSED REVERSIBLE ERROR IF GIVEN IN THAT (1) ITS VERDICT DIRECTOR FAILED TO SUBMIT THE ELEMENTS OF PLAINTIFF'S KNOWLEDGE AND APPRECIATION OF THE ACTUAL DANGER POSED BY THE HURRICANE FALLS RIDE (BODILY COLLISIONS BETWEEN RIDERS); (2) ITS VERDICT DIRECTOR REFERRED TO PLAINTIFF'S FAILURE "TO HOLD ON TO THE RESTRAINTS AND SAFETY DEVICES" IN THE RAFT WHEN ONLY ONE SAFETY DEVICE WAS EVER IDENTIFIED IN THE EVIDENCE; AND (3) ITS INSTRUCTION DEFINING "NEGLIGENCE" WAS BASED ON AND IDENTICAL TO MAI 11.07 (NEGLIGENCE OF AN ADULT) INSTEAD OF MAI 11.04 (NEGLIGENCE OF A MINOR); AND

(B) CEDAR FAIR DID NOT PRESENT SUBSTANTIAL EVIDENCE TO SUBMIT THE ISSUE AND TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT JESSICA CHAVEZ CONTRIBUTED TO CAUSE HER OWN INJURIES THROUGH NEGLIGENCE IN THAT (1) THERE WAS NO EVIDENCE OF HER KNOWLEDGE AND APPRECIATION OF THE SPECIFIC DANGER OF BODILY COLLISIONS; AND (2) THE CIRCUMSTANTIAL EVIDENCE AFFORDED NO MORE THAN EQUAL SUPPORT FOR TWO INCONSISTENT

AND CONTRADICTORY FACTUAL INFERENCES -- THAT SHE INNOCENTLY OR ACCIDENTALLY BECAME SEPARATED FROM THE NYLON STRAP, OR THAT SHE NEGLIGENTLY OR UNREASONABLY LET GO OF THE STRAP.

Standard of Review. The trial court's refusal to give proffered instructions is reviewed *de novo*. Cluck v. Union Pacific R. Co., 367 S.W.3d 25, 32 (Mo.banc 2012). The Court must evaluate whether the instructions were supported by the evidence and the law. Id. "An issue submitted in an instruction must be supported by substantial evidence from which the jury reasonably could find such issue." Egelhoff v. Holt, 875 S.W.2d 543, 548 (Mo.banc 1994). All evidence and inferences are viewed "in the light most favorable to the submission of the instruction." Id. "[T]he finding of an essential fact may not 'rest upon guesswork, conjecture or speculation beyond inferences reasonably to be drawn from the evidence.'" Linneman v. Freese, 362 S.W.2d 585, 587 (Mo. 1962) (citation omitted).

These rules and criteria "do not go so far as to permit a disregard of the dictates of common reason and to accept as correct or true that which obviously under all the circumstances in evidence cannot be correct or true, to supply missing evidence, give [a party] the benefit of unreasonable, speculative or forced inferences, or consider only isolated parts of [the party's] case." Carthen v. Jewish Hosp. of St. Louis, 694 S.W.2d 787, 794 (Mo.App. 1985). In deciding whether evidence can sustain an issue of fact, the Court "must reject that which of itself discloses its inherent infirmity." Dugan v. Rippee, 278 S.W.2d 812, 815 (Mo.App. 1955).

A proffered instruction must be “in proper form” (Marion v. Marcus, 199 S.W.3d 887, 892 (Mo.App. 2006)), “correct in every essential respect” (Wulfing v. Kansas City Southern Industries, Inc., 842 S.W.2d 133, 155 (Mo.App. 1992)). The trial court has the duty to refuse a legally incorrect instruction. Cluck v. Union Pacific R. Co., *supra* 367 S.W.3d at 33-4. A party is “not entitled to have the trial court submit a faulty instruction to the jury.” *Id.* at 33.

Where appellate review is *de novo*, the trial court’s judgment “may be affirmed in this Court on an entirely different basis than that posited at trial.” ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 388-9 (Mo.banc 1993); Rice v. Shelter Mut. Ins. Co., 301 S.W.3d 43, 46 (Mo.banc 2009). In this situation the reviewing court “is primarily concerned with the correctness of the result, and not the route taken by the trial court to reach it.” Felling v. Giles, 47 S.W.3d 390, 393 (Mo.App.E.D. 2001).

A. CEDAR FAIR’S PROFFERED COMPARATIVE FAULT INSTRUCTIONS

WERE NOT CORRECT IN EVERY ESSENTIAL RESPECT

Rule 70.02(a) required Cedar Fair, the party with the burden of proving comparative fault, to “submit written requests for instructions on the law applicable to the issues.” “Whenever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject.” Rule 70.02(b).

The responsibility for tendering legally correct instructions lies with the parties. Cluck v. Union Pacific R. Co., *supra* 367 S.W.3d at 34. A proffered instruction may be given

only if it is “*in proper form.*” Marion v. Marcus, *supra* 199 S.W.3d at 892 (emphasis added); Wulfig v. Kansas City Southern Industries, Inc., *supra* 842 S.W.2d at 155 (“correct in every essential respect”). A party is “not entitled to have the trial court submit a faulty instruction to the jury.” Cluck, *supra* at 33.

Furthermore, where an instruction is refused by the trial court, the opposing party has no obligation to lodge objections to it at the instruction conference. Hampton v. Jecman, 50 S.W.3d 897, 902-3 (Mo.App. 2001) (“The clear language of Rule 70.03 is to require objection to the ‘giving’ or ‘failure to give’ (i.e., refusal of) an instruction”; on appeal the respondent’s right “to argue in support of the trial court’s action [in not giving his opponent’s tendered instruction] is not dependent upon an objection by him at the instruction conference to an instruction the trial court was not planning to give”).

Appellant tendered a comparative fault verdict director based upon MAI 32.01(1) (Suppl.LF 44; Appdx 34) that reads:

In your verdict you must assess a percentage of fault to plaintiff, whether or not defendant was partly at fault, if you believe:

First, plaintiff failed to hold on to the restraints and safety devices pursuant to the oral instructions during the ride on Hurricane Falls, and

Second, plaintiff was thereby negligent, and

Third, such negligence of plaintiff directly caused or directly contributed to cause any damage plaintiff may have sustained [.]

Cedar Fair has not attempted to justify the correctness of this instruction by citing legal authorities or by specific references to the record. It cannot do so.

FIRST, that instruction fails to submit Jessica Chavez's knowledge of the dangerous condition that existed with the Hurricane Falls ride -- bodily collisions between riders in the raft. As a minor, her knowledge is an essential element of comparative fault as explained in the pre-Gustafson case⁷ of Bollman v. Kark Rendering Plant, 418 S.W.2d 39, 46 (Mo. 1967):

While the minority of a plaintiff does not preclude the defense of contributory negligence, the standard for judging the conduct of a minor is not that care and prudence that would be exercised by an adult but only that ordinarily exercised by one of the age, intelligence, discretion, knowledge and experience of the particular plaintiff, under the same or similar circumstances. * * * Other principles pertinent to an inquiry such as this are that *an essential element of contributory negligence is "a voluntary exposure to known danger," and that it is knowledge and appreciation of the danger and risk of injury in an instrumentality or condition that bars recovery for contributory negligence,*

⁷Cases and authorities addressing a child's contributory negligence "apply equally well with reference to a child's comparative fault" because under both systems "the jury must decide the same question: whether plaintiff's conduct was in any measure negligent." Lester v. Sayles, 850 S.W.2d 858, 865 n.2 (Mo.banc 1993).

and not merely knowledge of the physical characteristics of the instrumentality or condition; that “[m]ere knowledge that injury might result, without appreciation of the risk of injury to which his conduct exposed him, is not sufficient.” Capacity to appreciate the danger is of vital importance in making the determination. [Emphasis added; citations omitted.]

Cedar Fair’s failure to warn its patrons of the danger of bodily collisions was beyond dispute. Breach of its duty to warn was a central issue and was one of two submissions of negligence in plaintiff’s verdict directing instruction (LF 268). Plaintiff’s expert testified to defendant’s knowledge and notice of this danger and its failure to provide a meaningful warning to patrons (Tr. 377, 383, 405-6, 419, 423, 457, 458). Defendant’s corporate representative admitted no warnings had ever been put up concerning this danger (Tr. 329, 335, 362-3), and no oral warnings were given (Tr. 334). Plaintiff’s counsel even wrote out a warning (Tr. 531-2) that Cedar Fair’s expert conceded could have been used (Tr. 541).

No evidence was adduced that Jessica Chavez possessed any knowledge of this danger to which she was soon to be exposed. She had never been to Oceans of Fun before (Tr. 604). She was not asked whether she saw any such collisions in the brief period she waited in line, but her aunt Angie Boyles (also in line with her) did not mention any, testified that no warning of bodily collisions was given, and stated she had no idea they could occur (Tr. 213).

That Jessica selected the Hurricane Falls ride for its “thrills,” that friends had told her it was “fun,” and that she observed other rafts going down the flume ahead of hers, their

speed and movements (Tr. 614-6) do not, singly or collectively, infuse her with knowledge and appreciation of the danger of bodily collisions. That the ride was 680 feet long, with a 70-plus foot drop and a 6 percent grade, and some 8,000 gallons of water flowed down the flume each minute (Tr. 303, 435) were unknown to her -- or at least her knowledge of them was not elicited. Those additional technical details also fail to convey to an ordinary 12 year-old knowledge and appreciation of the specific danger she faced, unless familiarity with the laws of physics is imputed to her. Cedar Fair warned no one of this danger in any manner.

“When knowledge of a condition and appreciation of the danger are essential controverted elements of a defense, . . . such issues must be submitted to the jury.” Cline v. Carthage Crushed Limestone Co., 504 S.W.2d 102, 111 (Mo. 1973). Omission of those elements rendered that instruction faulty. An essential element of a verdict directing instruction may not be omitted therefrom unless such element is conceded. Vasquez v. Village Center, Inc., 362 S.W.2d 588, 595 (Mo. 1962). (The lack of substantial evidence on these elements to support the giving of this instruction is addressed below at pp. 45-46).

SECOND, that instruction’s reference to “the restraints and safety devices” is not supported by the evidence in the case and is ambiguous, misleading and confusing. Each raft is equipped with a nylon webbing strap that runs along portions of the top of the raft, as shown in Plt.Exh. 40 (Tr. 304), and patrons are instructed to hold onto it at all times (Tr. 615-6). There is no other “restraint” or “safety device” associated with this ride, except perhaps

each rider's own hand.⁸ If the rider's hand separates from the nylon strap, "there is no longer any safety device for that patron" (Tr. 305, 543-4). "If there's a release or separation for any reason, regardless of what it is, there's no other protection" (Tr. 411). Instructions should not be given if there is no evidence to support them, and giving an instruction that misdirects, misleads or confuses the jury is prejudicial error. Doe 1631 v. Quest Diagnostics, Inc., 395 S.W.3d 8, 15 (Mo.banc 2013) (instruction directing jury to consider nonexistent written authorization was improper, confusing and misleading, requiring reversal).

THIRD, although Cedar Fair was required to define "negligent" and "negligence" as used in its verdict director (MAI 32.01(1) Notes on Use (1991 Revision)), that instruction did not contain a definition of either term. Instead, Cedar Fair tendered a separate instruction based upon MAI 11.07 (Suppl.LF 40; Appdx 35), which defines the negligence of an adult:

The term "negligent" or "negligence" as used in these instructions means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

On August 3, 2000, Jessica Chavez was 12 years old (Tr. 212, 584), and a minor. The "standard for judging the conduct of a minor is not that care and prudence that would be

⁸The corporate representative and its expert agreed with plaintiff's expert that each rider's hand is really the only "true" safety device in the raft (Tr. 300-2, 305, 452, 543). But holding one's own hand, as the instruction curiously suggests, provides no safety.

exercised by an adult but only that ordinarily exercised by one of the age, intelligence, discretion, knowledge and experience of the particular plaintiff, under the same or similar circumstances.” Bollman v. Kark Rendering Plant, supra 418 S.W.2d at 46. Unlike the standard for an adult, the standard for a minor is a subjective one. Dorrin v. Union Elec. Co., 581 S.W.2d 852, 856-7 (Mo.App. 1979).

Cedar Fair never proffered an instruction that follows the substantive law by correctly defining the negligence of a minor -- MAI 11.04. Consequently, the trial court would have committed reversible error by instructing the jury that it should be guided by the definition in MAI 11.07 in evaluating Jessica’s conduct. Parker v. Roszell, 617 S.W.2d 597, 599 (Mo.App. 1981). It would have been equally erroneous for the court to have simply refused Cedar Fair’s proffered MAI 11.07, leaving only MAI 11.01 (highest degree of care) to guide the jury in considering Jessica’s conduct. MAI 11.04 had to be given.

A trial court must submit legally correct instructions and is duty-bound to refuse incorrect or faulty instructions. Cluck v. Union Pacific R. Co., supra 367 S.W.3d at 33-4. It has no duty to prepare instructions, or to offer to correct an instruction tendered by a party in any respect, or to submit a correct instruction in place of an improper one. Id. at 33; Southwestern Bell Tel. Co. v. Chester A. Dean Const. Co., 370 S.W.2d 270, 279 (Mo. 1963); Henderson v. Terminal R.R. Ass’n of St. Louis, 736 S.W.2d 594, 599 (Mo.App. 1987) (“There is no duty on the part of the trial court to prepare instructions or to offer to correct an instruction offered by a party”).

When counsel fails to tender “proper instructions which support that party’s claim . . . the trial judge should refuse to submit the case to the jury.” Cluck, at 33-4. The trial court commits no reversible error in refusing to submit faulty instructions. Id. at 34; Southwestern Bell, at 279 (“The trial court will not be convicted of reversible error for refusing to give an instruction which is not substantially correct”).

B. CEDAR FAIR DID NOT PRESENT SUBSTANTIAL EVIDENCE THAT
PLAINTIFF NEGLIGENTLY CONTRIBUTED TO CAUSE HER OWN INJURIES

To bolster its argument Cedar Fair has cited inapplicable law, misstated evidence, cited obviously untrue “facts,” urged unreasonable, speculative or forced inferences, and relied on only isolated parts of the evidence. Carthen v. Jewish Hosp. of St. Louis, supra 694 S.W.2d at 794. Contrary to its position (Br. 31), the negligence of a child involves a subjective standard for evaluating her conduct:

[T]he standard for judging the conduct alleged to be contributory negligence is altered from the objective standard of the ordinarily prudent person to the *subjective standard* of the level of care ordinarily exercised by one of the age, intelligence, discretion, knowledge and experience *of the particular plaintiff* under the same or similar circumstances. * * * Thus, in applying the duty of lookout to a minor plaintiff, the circumstances surrounding the accident, as well as the minor’s age, intelligence, knowledge and experience, must be considered and analyzed.

Dorrin v. Union Elec. Co., supra 581 S.W.2d at 856-7 (emphasis added). *See also* Bollman v. Kark Rendering Plant, supra 418 S.W.2d at 46.

Jessica's conduct must be scrutinized to determine whether it was negligent in light of all the circumstances including her knowledge and appreciation of the specific danger -- that is, whether it reflects "any contributory *fault* chargeable to" her. Kramer v. Chase Resorts, Inc., 777 S.W.2d 647, 650 (Mo.App. 1989) (quoting Uniform Comparative Fault Act §1(b)) (emphasis added). In other words, "[i]n the light of the recognizable risk, the conduct, to be negligent, must be unreasonable." W. Page Keeton, et al., *Prosser and Keeton on Torts*, §31 p. 170 (5th ed. 1984) (emphasis added). Conduct that is innocent or accidental, but not careless or unreasonable, is not negligence and cannot constitute "contributory fault," "comparative fault" or "comparative negligence."

Respondent concedes that the hearsay testimony in this case would allow a jury to find only that Jessica was on the high side of the raft at the final turn, that her hand became separated from the nylon strap and that she collided with Amie Cooper, but no more. This is a circumstantial evidence case on the question of Jessica's comparative negligence and it necessarily rests upon inferences drawn therefrom. Considered in the most favorable light, the evidence and the reasonable inferences were insufficient to submit the issue of Jessica's comparative fault because they do not show she most likely was negligent or unreasonable.

FIRST, as noted above, Cedar Fair failed to adduce any evidence to establish the necessary element of Jessica's knowledge and appreciation of the actual danger and risk of

injury from bodily collisions. Cline v. Carthage Crushed Limestone Co., supra 504 S.W.2d at 111; Moeller v. United Rys. Co., 242 Mo. 721, 147 S.W. 1009, 1012 (banc 1912) (“facts to be taken into account” in judging minor’s liability for his own conduct include “the peculiar circumstances of the particular case, the knowledge and experience of the child in reference to those circumstances, and his capacity to appreciate the danger”). A minor’s “[m]ere knowledge that injury might result, without appreciation of the risk of injury to which his conduct exposed him, is not sufficient.” Dorin v. Union Elec. Co., supra 581 S.W.2d at 858. By itself this lack of an evidentiary basis establishing her knowledge and appreciation of the danger precluded submission. Egelhoff v. Holt, supra 875 S.W.2d at 548.

SECOND, Cedar Fair had to show with substantial evidence that it was “more probable than not” that Jessica *negligently* or *unreasonably* let go of the strap. Hudson v. Whiteside, 34 S.W.3d 420, 427 (Mo.App. 2000) (“A [party] has made a submissible case if, in viewing the evidence in this light, the [party’s] theories of negligence are more probable than not”). Substantial evidence is that which, “if true, is probative of the issues and from which the jury can decide the case.” Hayes v. Price, 313 S.W.3d 645, 650 (Mo.banc 2010).

To begin with, Jessica consistently denied she was on the high side, let go, or fell onto Amie Cooper (Tr. 606, 617-9, 624). Disbelief of her denial is not affirmative evidence that could support Cedar Fair’s theorized scenario. State v. Taylor, 422 S.W.2d 633, 637 (Mo. 1968) (“Certainly in civil cases the effect of disbelief [of a witness’ testimony] is not proof of the opposite”); Merriman v. Johnson, 496 S.W.2d 326, 331 (Mo.App. 1973).

Cedar Fair must rely on an inference that Jessica let go of the strap because of *negligence* and not some *non-negligent* (i.e., innocent or accidental) reason or cause. In a circumstantial case, an inference must be drawn from established facts. “No fact essential to liability . . . may be found or inferred in the absence of a substantial evidentiary base therefor and, of course, the finding of an essential fact may not ‘rest upon guesswork, conjecture or speculation beyond inferences reasonably to be drawn from the evidence.’ ” Linneman v. Freese, *supra* 362 S.W.2d at 587 (citation omitted). An inference “is more than, and cannot be predicated on, mere surmise or conjecture. *It is not a possibility that a thing could have happened or an idea founded on the probability that a thing may have occurred.*” * * * We liberally view the legitimacy of inferences in [a party’s] favor, however, such liberal view does not include speculative free leaps to the desired inference.” Wright v. Over-The-Road and City Transfer Drivers, Etc., 945 S.W.2d 481, 495 (Mo.App. 1997) (emphasis added). Proof of essential facts may be accomplished by circumstantial evidence so long as the desired inference is established “with such certainty as to cause it to be *the more probable of the conclusions to be drawn.*” Vaughan v. Taft Broadcasting Co., 708 S.W.2d 656, 661 (Mo.banc 1986) (emphasis added).

Cedar Fair’s theory is that, because Jessica “let go” of the strap after being instructed against that and because G-forces should not have been powerful enough to force a separation, the “only” permissible inferences are that she did so “voluntarily” and therefore negligently or unreasonably (Br. 35-36).

But this argument contravenes Missouri law. For example, collisions occur even though motorists must obey known traffic laws designed to prevent them and highways are laid out with traffic signals to eliminate them, but “the mere fact of [a] collision is not sufficient to establish defendant’s negligence.” Herr v. Ruprecht, 331 S.W.2d 642, 647 (Mo. 1960). “The mere fact of an injury to plaintiff does not necessarily create a liability or warrant an inference of defendants’ negligence.” Blanton v. Dold, 109 Mo. 64, 18 S.W. 1149, 1151 (1892). In a medical malpractice action, “[n]o presumption of negligence is indulged in because of an adverse result.” Swope v. Printz, 468 S.W.2d 34, 39 (Mo. 1971). “Nor is there any presumption of liability to be drawn from the mere fact that an accident occurred and caused injury.” Clymer v. Tennison, 384 S.W.2d 829, 834 (Mo.App. 1964). And a person hanging from a cliff who lets go because he lacks the strength to hold on any longer is not negligent or reckless for doing so.

Cedar Fair fails to acknowledge that a child might let go of or become separated from the nylon strap for non-negligent (innocent or accidental) reasons or causes. Exploring them does not lead this inquiry off on a tangent of “subjective reasons” for an actor’s behavior (Br. 33). It involves proof of both negligence and causation. This is not the kind of happening that is of such a nature as to carry in a mere statement of its occurrence an implication of some negligence, like a chair flying out of a third-floor window.

If adopted, Cedar Fair’s argument -- merely “letting go” allows the jury to infer or presume negligence sufficient to support a finding, and simultaneously crowds out any other

reasonable non-negligent inference -- would impose strict liability in the form of comparative fault *without* showing any actual negligence or fault, or would create an irrebuttable presumption of negligence (since Jessica can give the jury no explanation inasmuch as she denies letting go), or would eliminate its burden of proving the affirmative defense.

In determining submissibility Cedar Fair is not entitled to have this Court ignore or disregard other reasonable and permissible inferences from the evidence. And certainly other inferences can be drawn as to why this 12 year-old child might “let go” or become separated from the nylon strap. The trial testimony (expert and lay) comports with common experience that negligence is not the only or even the best explanation -- there are “all kinds of reasons that people can separate and become separated from the strap that you’re holding onto” (Tr. 411). They “can be scared, frantic, [have] wet hands or their hands [are] starting to ache and they want to release and re-grip real quick” (Tr. 411-2). Jessica testified she had difficulty holding on to the strap⁹ because the ride was rough, “you’re almost leaning forward,” she was getting jerked around, her hands were wet, and the strap can cut into the rider’s hand, “pinching it really hard” (Tr. 605, 617-9, 624). Even Amie Cooper’s confession pointed to the same non-negligent cause -- “I’m sorry I couldn’t hold on” (Tr. 606, 618-9, 624).

⁹Contrary to Cedar Fair’s description (Br. 35-36), Jessica did not *ever* say she had no difficulty holding on to the strap: “Q. [Y]ou held onto the straps all the way? A. Yes. Q. And you did so without any difficulty, correct? A. I didn’t say that it wasn’t difficult. I was just able to do it. It was a rough ride though at the time.” (Tr. 617).

To make comparative faultmissible, the evidence upon which Cedar Fair relies “should have a tendency to *exclude every reasonable conclusion other than the one desired.*” Akers v. Lever Brothers Co., 432 S.W.2d 200, 203 (Mo. 1968) (emphasis added). But the evidence from the expert and lay witnesses showing sensible, *non-negligent* reasons why Jessica could have “let go” or become separated supports an entirely different inference, equally valid, and it cannot be shunned. At the very best, one can only say that it was possible that negligence was a cause of her injury, while it is also possible that it was not.

“Although an inference need not be justified beyond all doubt, where the evidence affords no more than equal support for either of two inconsistent and contradictory inferences as to the ultimate and determinative fact, liability is left in the field of conjecture, and there is a failure of proof.” Stark v. American Bakeries Co., 647 S.W.2d 119, 125 (Mo.banc 1983); Pipes v. Missouri Pacific Railroad Company, 338 S.W.2d 30, 36 (Mo.banc 1960) (“Probabilities, not possibilities, are controlling. . . . If two or more inferences may be deducted of equal reasonableness, then there is no inference that may be indulged without mere speculation”); Bates v. Brown Shoe Co., 342 Mo. 411, 116 S.W.2d 31, 33 (1937) (where two reasonable minds “might conjecture that one thing happened . . . or something else happened and a third might not agree with either,” liability cannot be established and a verdict cannot be sustained).

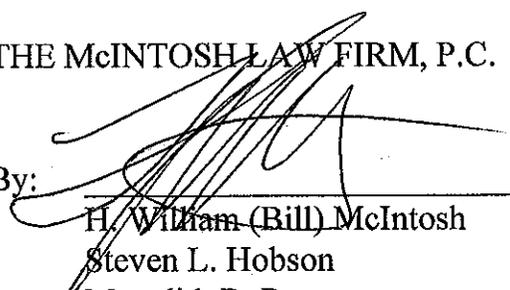
With no evidence to establish Jessica’s knowledge and appreciation of the danger from bodily collisions or that her negligence was more likely than not the cause of the injury,

Cedar Fair did not make a submissible case and did not tender a comparative fault verdict director and a definition of Jessica's alleged negligence that were correct in all respects.

CONCLUSION

Regardless of the particular rationale employed by the trial court, it committed no error of law. The court correctly instructed the jury that Cedar Fair owed the highest degree of care to Jessica Chavez, and correctly refused to instruct the jury on her supposed comparative fault. Its judgment should be affirmed. Rice v. Shelter Mut. Ins. Co., supra 301 S.W.3d at 46.

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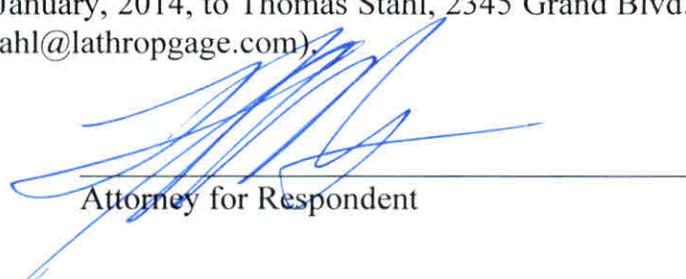
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CERTIFICATE OF COMPLIANCE AND OF SERVICE

I hereby certify that the foregoing Brief fully complies with the provisions of Rule 55.03; that it contains 13,027 words/1,010 lines and complies with the word/line limitations contained in Rule 84.06(b); and that a copy of Respondent's Brief was served by electronic mail, in pdf format, this 15 day of January, 2014, to Thomas Stahl, 2345 Grand Blvd., Ste. 2200, Kansas City, MO 64108 (tstahl@lathropgage.com).



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