

SC93658

IN THE SUPREME COURT OF MISSOURI

JESSICA CHAVEZ,

Respondent,

vs.

CEDAR FAIR, L.P.,

Appellant.

Appeal from the Circuit Court of Clay County, Missouri
Honorable A. Rex Gabbert

**SUBSTITUTE REPLY BRIEF
OF APPELLANT CEDAR FAIR, L.P.**

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RESPONSE TO THE SUPPLEMENTAL STATEMENT OF FACTS

A. Pervasive Disregard of the Standard of Review

The only submissibility issue in this appeal is Point II, which asks whether there is sufficient evidence that Respondent Jessica Chavez's ("Respondent") negligent conduct contributed to her injuries. To decide this question, the Court views all the evidence in the light most favorable to Appellant Cedar Fair, L.P. ("Cedar Fair"). *Berra v. Union Elec. Co.*, 803 S.W.2d 188, 190 (Mo.App. 1991). Respondent admits as much (*see* Respondent's Brief at 36), but nevertheless *repeatedly disregards* this standard by asserting facts favorable to *her*.

For example, Respondent argues that "Cedar Fair is not entitled to have this Court ignore or disregard other reasonable and permissible inferences from the evidence." *Id.* at 49. Respondent is simply wrong on the law: "The defendant is entitled to have all evidence considered in the light most favorable to its comparative fault instruction and is given the benefit of any favorable inferences. [The plaintiff's] evidence must be disregarded unless it tends to support the grounds of comparative fault submitted in the instruction." *Berra*, 803 S.W.2d at 190. The Court must therefore disregard Respondent's "facts," *e.g.*, that the raft "sandwiched," that Amy Cooper was "thrown" onto Respondent, that Cooper let go because she "couldn't hold on," that Respondent held on, or that rafters involuntarily let go because of aching hands. *See, e.g.*, Respondent's Brief at 9-12.

B. Misplaced Reliance on Ratings and Restraints

Respondent relies heavily on the level “5” thrill rating for Hurricane Falls, and tries to suggest that this is a binding safety standard rather than merely Cedar Fair’s “own rating system.” *See* T:158, 732-33, 736; *see also* T:292-301, 550. For example, Respondent argues that, unlike Hurricane Falls, the level “5” rides at Worlds of Fun (*e.g.*, the “Mamba” and “Timber Wolf” roller coasters) use restraints. *See* Respondent’s Brief at 9, 27-29. However, the Worlds of Fun rides use restraints to prevent *ejections*. *See* T:294-98. Respondent’s negligence claim is based on “bodily collisions” (not ejections) which Respondent believes Cedar Fair could eliminate through better warnings or with “friction” devices (not restraints). *See* II-LF:268; A:8; T:415-16, 481-82, 518-19, 696. What Respondent really wants is for this Court to play the role of ride designer even though: (1) Cedar Fair did not design or construct Hurricane Falls or the rafts (T:502, 506-07); (2) restraints cannot be used on Hurricane Falls due to a risk of drowning (T:459-61; *see also* T:300-01); and (3) the rafts and their safety devices were “state of the art” in 2000 (T:481).

C. Exaggeration and Speculation about Danger

Respondent exaggerates the dangers of Hurricane Falls by relying on: (1) manufacturer warnings about “bodily collisions”; (2) the alleged occurrence of “multiple” and “significant” injuries on Hurricane Falls; and (3) injuries on a “similar” slide at Dorney Park. Respondent’s Brief at 15-16, 29-31. The most significant injury on Hurricane Falls was arguably Respondent’s tooth incident—the other injuries were bumps, sprains and cuts that usually required first aid treatment

only. *See* Respondent’s Exhibits 35; A:19. Dorney Park experienced comparable injuries—bumps, bruises, cuts, one loose tooth, and a lost “false” tooth. Respondent’s Exhibits 14-24. Acknowledging the shortcomings in her evidence of danger, Respondent *speculates* that “better record keeping *might* have revealed more such injuries and details as to the severity of those noted.” Respondent’s Brief at 16 (emphasis added); *see also id.* at 30. However, speculation about possible injuries is no substitute for evidence of an “inherently great risk of injury or death” that would “require that the highest degree of care standard be applied.” *Herman v. Andrews*, 50 S.W.3d 836, 841 (Mo.App. 2001).

D. Credibility Issues

Respondent’s reliance on conflicting trial evidence, offered some 12 years after the accident, creates no submissibility issue. Rather, it presents a credibility issue, which is for a jury to decide. *See, e.g., Bailey v. Cameron Mut. Ins. Co.*, 122 S.W.3d 599, 605 (Mo.App. 2003) (“the resolution of conflicts in evidence is within the jurors’ exclusive province”).

For example, Respondent tries to disclaim the post-accident statements she and Angela Boyles gave to park ranger Ben Hutgren and paramedic Brit Adams immediately after the accident. *See* Respondent’s Brief at 12-13. Both reports state that the accident occurred because Respondent “let go,” which is consistent with the testimony of Candace Kelly, Respondent’s cousin and rafting companion. *See* T:182, 184, 194-196, 215-16, 649-650; *see also* Cedar Fair’s Exhibit 107. But at trial,

Respondent, Kelly and Ms. Boyles claimed they provided no information to Hutgren or Adams about the accident. T:188, 207-08, 607.

On appeal, Respondent offers a jury argument suggesting that Jeff Boyles was the only person who spoke with Hutgren and Adams. *See* Respondent's Brief at 13. But Mr. Boyles *did not* witness the accident and only had *limited discussions* with Oceans of Fun personnel about Respondent needing medical attention. T:563-66; T:656-66; *see also* Cedar Fair's Exhibit 107; A:11-12 (noting that Adams gave Mr. Boyles directions to the hospital).

Thus, in Respondent's view, Hutgren and Adams simply fabricated facts and witness statements in their reports. Yet, Respondent offers no evidence explaining how Hutgren and Adams were able to accurately record so many facts, *e.g.*, how the accident happened, Respondent's birthday, address, height, weight, her family relationship with Ms. Boyles, and the names and residences of the other rafters. *See* Cedar Fair's Exhibit 107; A:11-12. In the end, Respondent is straining to discredit damaging post-accident statements despite this Court's holding that such statements have greater probative value. *See Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423, 426 (Mo. 1985).

POINT I: ORDINARY CARE IS THE PROPER STANDARD

This Court has specifically held that ordinary care is the proper standard of care for a water slide operator. *McCollum v. Winnwood Amusement Co.*, 59 S.W.2d 693, 697-98 (Mo. 1933). Respondent cites no contrary holding by this Court, and instead relies on a line of three opinions from the court of appeals—two involving the

“Whirl Winn” roller coaster (*Brown and Cooper*), and one involving an “airplane” ride (*Gromowsky*). Those opinions cannot be controlling in light of *McCollum* and the *several* opinions by this Court (both before and after *McCollum*) that have *uniformly* applied the standard of ordinary care to amusement operators. *See* Cedar Fair’s Brief at 12-13 (citing *Berberet, Boll, Hudson, Kungle and Gold*).

Significantly, Respondent cites *no* case from *any* jurisdiction imposing the highest degree of care on a water slide operator. Without applicable authority, she: (A) manufactures immaterial distinctions between this case and the Missouri cases cited by Cedar Fair; (B) conflates the elements of duty and *breach* by proposing a “sliding scale” for the standard of care; and (C) advocates a rule imposing the highest degree of care on “all rides” based on out-of-state decisions holding that certain rides (*e.g.*, roller coasters) are common carriers. Clearly, Respondent is the only party seeking an “abrupt change” in Missouri law. *See* Respondent’s Brief at 31.

A. Respondent’s Meaningless Distinctions

Respondent expends much effort drawing meaningless distinctions between this case and decisions cited by Cedar Fair. For example, Respondent claims that “all of the cases cited by Cedar Fair involve premises liability[.]” Respondent’s Brief at 24. But Respondent cannot ignore that she was an invitee and injured on Cedar Fair’s premises. *See* I-LF:17-18 at ¶¶ 3, 6, 11. Respondent also claims there is a difference between an amusement “proprietor” and an amusement “operator.” Respondent’s Brief at 22 n.2. However, this Court recognized no such distinction when it held that “defendants in *operating* for hire a place of public amusement owed the patrons the

duty of using *ordinary or reasonable care* for their safety[.]” *McCollum*, 59 S.W.2d at 697 (emphasis added).

Respondent tries to limit *McCollum* by labeling it a “negligent construction” case (Respondent’s Brief at 24) even though she claimed that Cedar Fair had a duty to re-construct the rafts on Hurricane Falls by adding “friction devices.” II-LF:268; A:8; *see also* T:683 (arguing Cedar Fair should have re-engineered the rafts). Respondent also points out that the plaintiff in *McCollum* claimed the amusement operator was “bound to provide ‘a chute or slide free from unnecessary danger.’” *See* Respondent’s Brief at 25. Yet, Respondent asserted the same claim here—that Cedar Fair was bound to “provide friction devices reasonably sufficient to prevent a raft rider from colliding with another rider.” II-LF:268; A:8.

Respondent’s theory that Cedar Fair should have added protection to the rafts is identical to the claim in *Hudson v. Kansas City Baseball Club*, 164 S.W.2d 318, 319 (Mo. 1942). Specifically, the plaintiff in *Hudson* claimed the defendant should have erected wire netting as a protection device. *Id.* at 320. Here, Respondent asserted that Cedar Fair should have provided “friction devices” on the rafts or provided helmets for rafters to wear (T:684). Likewise, no meaningful distinction exists between: (1) a claim against a water slide operator for the failure to add inflatable baffles (essentially pads) to a raft; and (2) a claim against a trampoline center operator for improper placement of pads around trampolines. *See Kungle v. Austin*, 380 S.W.2d 354 (Mo. 1964).

Respondent also claims the “particular conditions and circumstances” in the cases cited by Cedar Fair warranted a lower standard of care. Respondent’s Brief at 27. She then claims Hurricane Falls is different because of the dangers arising from “body collisions” between rafters. Respondent’s Brief at 29-30. However, ordinary care was the proper standard for the skating rink operators in *Schamel v. St. Louis Arena Corp.*, 324 S.W.2d 375, 378 (Mo.App. 1959) and *Reay v. Reorg. Inv. Co.*, 224 S.W.2d 580, 582 (Mo.App. 1949), *even though* the injuries in both cases arose from “body collisions” between skaters.

Furthermore, Respondent claims that *Boll v. Spring Lake Park, Inc.*, 358 S.W.2d 859 (Mo. 1962) is inapplicable because it merely concerned a “negligent failure to warn of a dangerous condition.” Respondent’s Brief at 26. But there is only a trivial difference between a claim for “failing to warn [a diver] of the danger of diving in the pool at the place he did” (*Boll*, 358 S.W.2d at 862) and Respondent’s claim that Cedar Fair “failed to adequately warn of the risk of harm from colliding with other raft riders” (II-LF:268; A:8).

Finally, Respondent makes the incredible assertion that Cedar Fair has cited “no other state court decision involving a ride similar to Hurricane Falls” and that “none [of its cases] involved a ride operator[.]” Respondent’s Brief at 32 (emphasis in original). This whopper requires the Court to ignore that *McCollum*, 59 S.W.2d at 694, concerned an *operator* pumping water down a curved water slide that ended in a pool of water. It also requires the Court to ignore that *Volcanic Gardens Mgmt. Co. v. Beck*, 863 S.W.2d 780, 781 (Tex.App. 1993) was a suit against an “operator” for

injuries sustained after riding an “inner tube” down a water slide. Thus, Respondent expects this Court to believe that the round, inflatable rafts on Hurricane Falls are entirely different than the *inner tubes* that were ridden on the *water slide* in *Volcanic Gardens*. Respondent’s utter inability to distinguish her claim from the cases cited by Cedar Fair could not be more obvious.

B. No Sliding Scale for the Standard of Care

Respondent argues that the standard of care in a negligence action should vary depending on whether the injury arose from the negligent operation of an amusement ride or the negligent maintenance of amusement premises. She then proposes a fact-intensive test for the standard of care that will depend on the “circumstances of each case and the particular activity in which the defendant is engaging.” *See* Respondent’s Brief at 21.

Specifically, Respondent stresses 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 ... *It is a care commensurate with the particular conditions and circumstances involved in the given case.*” *See* Respondent’s Brief at 22 (quoting *Berberet v. Elec. Park Amus. Co.*, 3 S.W.2d 1025, 1029 (Mo. 1928)) (emphasis by Respondent). Respondent also quotes the court of appeals opinion below that ““several factors must be considered in determining the appropriate standard of care[.]” *Id.* at 23 (quoting Slip. Op. at 9). This argument and the rationale below suffer from the same fundamental flaws.

First, Respondent and the court of appeals are conflating the standard of care (a legal question) with breach of duty (a factual question). *See Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 158 (Mo. 2000) (“The appropriate standard of care is a question of law.”); *Hellmann v. Droege’s Super Mkt., Inc.*, 943 S.W.2d 655, 658 (Mo.App. 1997) (“Whether a defendant’s conduct fell below that standard of care is a question of fact for the jury.”). For example, this Court has held:

Negligence depends upon the surrounding circumstances, as well as the particular conduct involved, because an act or omission which would clearly be negligence in some circumstances might not be so in other situations. ... It is clear that, though the varied facts of different situations *may not alter the legal standard of care required* to avoid an accident, they often multiply the precautions that must be observed to comply with the standard; that is, to satisfy the law. It is also true that the question whether *acts or conduct measure up to the legal standard* is to be considered in a relation to the opportunity of forecasting danger and knowing the need of obviating it. So it has been broadly stated that *ordinary care is a relative term, and its exercise requires precautions commensurate with the dangers* to be reasonably anticipated under the circumstances.

Fortner v. St. Louis Pub. Serv. Co., 244 S.W.2d 10, 13 (Mo. 1951) (internal citations and quotations omitted; emphasis added); *see also Davidson v. Otis Elevator Co.*, 811 S.W.2d 802, 805 (Mo.App. 1991) (the exercise of ordinary care “requires precautions

commensurate with the dangers to be reasonably anticipated under the circumstances”). *Woods v. Wabash R. Co.*, 86 S.W. 1082, 1086 (Mo. 1905) (Respondent’s Brief at 31) states the same rule: “what constitutes ordinary care is a question to be determined by the circumstances of the particular case.”

Second, Missouri’s jury instructions mirror the case law above. The “‘highest degree of care’ ... means that degree of care that a very careful person would use *under the same or similar circumstances.*” M.A.I. 11.01 (emphasis added). Likewise, “‘ordinary care’ ... means that degree of care that an ordinarily careful person would *use under the same or similar circumstances.*” M.A.I. 11.05 (emphasis added). Thus, the “particular conditions and circumstances” of a case do not affect the *standard* of care. Rather, they are for the jury to use in deciding whether the applicable standard (as decided by the court) was *breached*. This flexibility is why ordinary care can be used in negligence cases involving children, brain surgery, or an amusement ride—the jury reviews the facts and determines whether the care exercised by a defendant was that which would be “ordinarily” used by a child, doctor, or amusement operator in the same or similar circumstances. *See* M.A.I. 11.04, 11.05, 11.06.

Third, Missouri does not use a sliding factual scale to adjust the degree of care for a particular case because “there are no legal degrees of negligence.” *See, e.g., Fowler v. Park Corp.*, 673 S.W.2d 749, 755 (Mo. 1984). Instead, the standard of care in Missouri is highly compartmentalized: (1) ordinary care, the default standard; and

(2) the highest degree of care, which applies in “relatively few” situations. *See Syn, Inc. v. Beebe*, 200 S.W.3d 122, 132-33 (Mo.App. 2006).

Fourth, Missouri law has refused to blur the standard of care based on factual variations that come close to—but do not fit strictly within—the highest degree of care. This Court held in *Lopez* that an electrical co-op was required to use ordinary care to warn a helicopter pilot about the presence of electrical power lines. *Lopez*, 26 S.W.3d at 158. The facts in *Lopez* did not fit within the highest degree of care because “the circumstances of the accident did not involve the inherently dangerous properties of electricity.” Missouri law has similarly held that users of air rifles must use ordinary care because air rifles are not firearms. *Herman v. Andrews*, 50 S.W.3d 836, 840-41 (Mo.App. 2001). Likewise, elevator *repairmen* must use ordinary care because they are not elevator *operators*. *Davidson*, 811 S.W.2d at 804-05.

In short, the standard of care is a legal question for the court, which is decided after applying a limited factual analysis to determine whether a particular case does or does not fall within a particular standard of care. Hurricane Falls does not fit squarely into one of the “relatively few” situations to which the highest degree of care has been historically applied (common carrier, a user of firearms, explosives or electricity, or a statutorily-defined “motor vehicle” operator). As a result, the appropriate standard of care for this case is the default standard of care—ordinary care.

C. Respondent’s Attempts to Expand a Limited, Minority Rule

Respondent rejects the traditional categories for the highest degree of care and instead advocates a new category that applies to any amusement that transports

participants in “a vehicle, vessel or apparatus.” She also believes that water slides should be lumped together with “roller coasters,” “bumper cars” and “scenic rides,” allegedly because *all* such rides warrant a higher standard of care. *See* Respondent’s Brief at 19-20. However, Respondent overlooks that Missouri law does not treat water slides and amusement “rides” equally. In fact, Missouri specifically excludes water slides from its amusement ride regulations. *See* RSMo § 316.203(1)(b); *see also* 11 CSR § 40-6.025.

Respondent’s “all rides” argument also finds no support in the out-of-state decisions limited to: (1) roller coasters;¹ (2) a mechanical “Merry Mixer” ride;² (3) a “circuitous ... uphill and down” horse-drawn “stagecoach” ride;³ and (4) a “Ferris” wheel.⁴ Respondent cites no case from Missouri or any other jurisdiction applying the highest degree of care to any ride remotely similar to a *water slide*. Respondent’s “all rides” argument fails for a multitude of reasons.

¹ *Gomez v. Super. Ct.*, 113 P.3d 41 (Cal. 2005); *Coaster Amus. Co. v. Smith*, 194 So. 336 (Fla. 1940); *Bibeau v. Fred W. Pearce Corp.*, 217 N.W. 374 (Minn. 1928); *Sand Springs Park v. Schrader*, 198 P. 983 (Okla. 1921); *Best Park & Amus. Co. v. Rollins*, 68 So. 417 (Ala. 1915).

² *Lyons v. Wagers*, 404 S.W.2d 270 (Tenn.App. 1966).

³ *Lewis v. Buckskin Joe’s, Inc.*, 396 P.2d 933 (Colo. 1964).

⁴ *Pajak v. Mamsch*, 87 N.E.2d 147 (Ill.App. 1949).

First, the decisions from California (*Gomez*), Florida (*Coaster Amusement*), Minnesota (*Bibeau*), Tennessee (*Lyons*), Illinois (*Pajak*) and Alabama (*Best Park*) imposed the highest degree of care on an amusement operator after finding the operator was a common carrier. Here, and despite misinforming the circuit court that “an amusement park ride is a common carrier and is subject to the rules that any other carrier is” (T:676), Respondent admits that amusement operators “are not treated” as common carriers under Missouri law and “have never been cast as common carriers” in any Missouri decision. Respondent’s Brief at 20. Thus, Respondent’s out-of-state “common carrier” decisions carry no weight in Missouri.

Second, Respondent’s reliance on California and Florida law is misplaced because those states have rejected the sweeping “all rides” rule advocated by Respondent here. For example, the court in *Sergermeister v. Recreation Corp. of Am., Inc.*, 314 So.2d 626 (Fla.App. 1975), applied ordinary care in a claim by a passenger injured while exiting from a “car” on the “Lover’s Coach” ride. The court rejected *Coaster Amusement* in favor of *Firszt v. Capitol Park Realty Co.*, 120 A. 300, 303 (Conn. 1923), which applied ordinary care to an “aeroplane” ride. Respondent, without citation, also claims the highest degree of care applies to “bumper cars.” Respondent’s Brief at 20. Notably, she cited *Gomez* (a roller coaster case) but missed a more recent decision from the same court holding that bumper cars “are dissimilar to roller coasters in ways that disqualify their operators as common carriers.” *Nalwa v. Cedar Fair, L.P.*, 290 P.3d 1158, 1166 (Cal. 2012).

Third, Respondent's reliance on *Gomez* is misplaced because that decision turned on the "extremely broad" definition of common carrier in California statutory law. *Gomez*, 113 P.3d at 44. In comparison, Missouri's definition of common carrier is limited to persons engaged "in the *transportation by motor vehicle* of passengers or property for hire or compensation *upon the public highways* and airlines engaged in intrastate commerce." RSMo § 390.020(6) (emphasis added); *see also Cook Tractor Co. v. Director of Revenue*, 187 S.W.3d 870, 873-74 (Mo. 2006) (defining a common carrier as one "required by law to transport passengers or freight, without refusal"). Hurricane Falls does not satisfy Missouri's common carrier definition because a rafter is not being transported by "motor vehicle" or "upon the public highways." Moreover, Cedar Fair can refuse to carry "passengers" (*e.g.*, because of their height). *See* T:349-50; II-LF:227.

Fourth, Colorado law (*Lewis*) is inapplicable here. *Lewis* applied a higher degree of care because passengers in a "stage coach" ride had "given up their freedom of movement and actions; *there was nothing they could do to cause or prevent the accident.*" *Lewis*, 396 P.2d at 939 (emphasis added). In sharp contrast, rafters on Hurricane Falls do *not* give up their freedom of movement—they also have the unique ability to *cause* or *prevent* an accident by letting go or holding on to the straps.

Fifth, Respondent relies on a 1921 Oklahoma decision (*Sand Springs Park*), which purports to find no difference between riders on a scenic railway and riders on a passenger train. But this is the opposite of Missouri law and that of several other

states.⁵ Specifically, Missouri has clearly (and more recently) drawn a line between amusement “rides” and public transportation and found that only the latter constitutes a common carrier. *See Branson Scenic Ry. v. Director of Revenue*, 3 S.W.3d 788 (Mo.App. 1999).

While some states (in typically older decisions) hold that certain amusement rides (usually roller coasters) are common carriers and thus subject to the highest degree of care, it remains uncontested that, other than the now-vacated opinion below, no state has imposed the highest degree of care on the operator of a water slide. Indeed, Missouri⁶ and its sister states⁷ specifically hold that water park operators must exercise ordinary care. Moreover, several states (in modern decisions) hold that amusement operators are *not* common carriers. *Beavers v. Fed. Ins. Co.*, 437 S.E.2d 881 (N.C.App. 1994) (rafting operator held not common carrier); *Lamb v. B&B Amus. Corp.*, 869 P.2d 926 (Utah 1993) (roller coaster operator not common carrier); *U.S. Fidelity & Guaranty Co. v. Brian*, 337 F.2d 881, 883 (5th Cir. 1964) (amusement ride operator not a common carrier).

Sixth, Missouri is aligned with the states applying ordinary care to amusement activities in general. *See Wright v. Midwest Old Settlers & Threshers Ass’n*, 556

⁵ *See, e.g.*, the Texas, Virginia and Georgia cases (Cedar Fair’s Brief at 26) that have recognized the distinction between “rides” and public transportation.

⁶ *McCollum*, 59 S.W.2d at 694.

⁷ *See* Cedar Fair’s Brief at 13-14.

N.W.2d 808, 811-12 (Iowa 1996) (rejecting highest degree of care for train operator transporting guests for their amusement); *Griffin v. Rogers*, 653 P.2d 463, 471-72 (Kan. 1982) (ordinary care applied to recreational steamboat); *Centers v. Leisure Int'l, Inc.*, 664 N.E.2d 969, 970 (Ohio 1995) (applying ordinary care to carousel operator); *Eliason v. United Amus. Co.*, 504 P.2d 94 (Or. 1972) (applying ordinary care to merry-go-round operator); *Kahalili v. Rosecliff Realty, Inc.*, 133 A.2d 688, 691 (N.J.App. 1957) (applying reasonable care to roller coaster operator; reversed on other grounds); *Brennan v. Ocean View Amus. Co.*, 194 N.E. 911, 913 (Mass. 1935) (rejecting heightened standard of care for roller coaster operator); *Cloutier v. Oakland Park Amus. Co.*, 152 A. 628, 630 (Maine 1930) (amusement proprietor must exercise ordinary care).

In the end, this Court need not go outside Missouri law when Hurricane Falls is a water slide and when this Court (in *McCollum*) has specifically held that ordinary care is the proper standard for a water slide operator. Respondent's out-of-state opinions also carry no weight in this state when this Court has repeatedly held that ordinary care is the proper standard for amusement activities in general.

D. Respondent's Flawed Policy Arguments

Cedar Fair previously set forth the history and public policy underlying the application of the highest degree of care to electric companies, common carriers, users of explosives, users of firearms, and motor vehicle operators. Missouri once considered these activities to be so inherently or extremely dangerous that the law required protection from even the slightest negligence.

Respondent has no real response to the history or policy underlying this body of law, so she exaggerates the dangers of Hurricane Falls, hoping that “better record keeping” would have revealed more severe injuries that would warrant a higher degree of care. Although there have been injuries on this slide, Hurricane Falls cannot seriously be compared to electricity (“one of the most dangerous agencies ever discovered,” *Geismann v. Mo. Edison Elec. Co.*, 73 S.W. 654, 659 (Mo. 1903)) or automobiles (“one of the deadliest and most destructive agencies in our present society,” *Hay v. Ham*, 364 S.W.2d 118, 122 (Mo.App. 1962)). As such, there is no basis for expanding the highest degree of care here.

Respondent also claims that a “passenger’s motive is irrelevant in determining the ride operator’s liability.” Respondent’s Brief at 33. While children do sometimes play on escalators or elevators, no one steps on an escalator or elevator *expecting* drops, turns, or thrills. *See id.* Again, there is clear distinction between amusement rides and common carriers like escalators and elevators—only the former exists *because* of thrills and risks. *See Hudson*, 164 S.W.2d at 323.

Finally, as thoroughly discussed in *Bethel v. New York City Transit Auth.*, 703 N.E.2d 1214 (N.Y. 1998), the highest degree of care is a common law relic from a different century. New York’s highest court held that the reasonable person standard was sufficiently flexible to decide “whether due care was exercised in a particular case.” *Id.* at 1217. Respondent never explains why ordinary care is insufficient to protect thrill seekers from harm. In a state that has repeatedly held that there are “no legal degrees of negligence” (*Fowler*, 673 S.W.2d at 755), the “highest degree of

care” relic should remain strictly limited, and not expanded to a new category of activities.

POINT II: RESPONDENT’S COMPARATIVE FAULT

As demonstrated in Point II, Respondent contributed to her accident by voluntarily letting go of the straps despite repeat warnings to hold on. Although there was conflicting evidence about the cause of the accident, such conflicts were credibility issues for the jury—they did not allow the circuit court to refuse to *submit* comparative fault. Respondent’s counter argument is two-fold. First, Respondent consumes several pages criticizing the form of instructions the trial court never considered and had no intention of giving. Second, Respondent challenges the submissibility of comparative fault by disregarding the standard of review and pervasively citing “facts” and inferences *favorable to her*.

A. The Ruling Below Was Limited to Submissibility

Respondent’s multi-page attack on the form of Cedar Fair’s proposed comparative fault instruction is baseless for at least three reasons. First, the circuit court’s ruling was limited to the *sufficiency* of comparative fault evidence. Indeed, reviewing the entire appellate record reveals no ruling on, discussion about, or objection to, the language of Cedar Fair’s instructions. Second, Respondent is pointlessly attacking instructions that the circuit court never gave or even considered giving. Finally, Respondent cites no authority holding that the failure to submit perfect instructions precludes this Court’s review of the *submissibility* question

presented here. In fact, Respondent’s cases all turn on the language of instructions for claims that were *submitted* or held to be *submissible* by the trial court.

i. No challenge to, or ruling on, instructional defects.

Just after the close of all evidence (*see* T:662), and based solely on Respondent’s “objection” to the “submission of comparative fault” (T:665)⁸ the circuit court essentially directed a verdict in favor of Respondent: “I’ve ruled in favor of the plaintiff on comparative fault *not being submitted*.” T:663 (emphasis added). Consistent with her objection, Respondent argued that Cedar Fair “did not submit sufficient evidence that ... [Respondent] let go of the nylon strap.” T:666; *see also id.* (“there is a failure of proof”; “there is no evidence that [Respondent let go] negligently”); T:668 (“the evidence is insufficient to submit the issue on ... comparative fault”).⁹

Moreover, the circuit court, ignoring the applicable standard of review, found “multiple inferences in this case” and “based on the *Akers* case” ruled that Cedar Fair had failed to make a submissible case of comparative fault. *See* T:668. A review of *Akers v. Lever Bros. Co.*, 432 S.W.2d 200 (Mo. 1968)—a decision about the

⁸ The objection appears to have been raised during an off-the-record discussion after the close of all evidence. *See* T:665 (referring to an argument that was “presented back in chambers”).

⁹ Respondent’s post-trial briefing likewise discussed the submissibility of comparative fault, rather than the form or language of instructions. III-LF:310-12.

sufficiency of evidence—further cements that the circuit court’s ruling was based solely on submissibility.

By the time of the instruction conference, the circuit court was so committed to rejecting comparative fault that the proposed instructions were a mere formality “for the record.” *See* T:677; *see also* T:676, 680 (indicating that Cedar Fair’s counsel should hurry up because the jurors were waiting). Cedar Fair’s proposed instructions were summarily refused “based on the Court’s previous rulings [on submissibility of comparative fault.]” T:678.

ii. Perfect instructions would have been futile.

Despite having no challenge below to the language of Cedar Fair’s instruction, Respondent now asserts that Point II is for naught due to Cedar Fair’s alleged failure to submit a perfect instruction. *See, e.g.*, Respondent’s Brief at 37-38. This tactic is known as “sandbagging,” which “is the practice in which counsel remains silent at the instruction conference with the hope that his opponent will request an erroneous jury instruction.” *See Gilbert v. K.T.I., Inc.*, 765 S.W.2d 289, 295 (Mo.App. 1988). Apparently anticipating this argument, Respondent claims that “where an instruction is refused by the trial court, the opposing party has no obligation to lodge objections to it at the instruction conference.” Respondent’s Brief at 38 (citing *Hampton v.*

Jecman, 50 S.W.3d 897, 902-03 (Mo.App. 2001)).¹⁰ This argument ignores the purpose and function of Rules 70.02 and 70.03.

An instruction conference exists to give the parties and trial court the opportunity to accurately instruct the jury on the issues and to preserve instructional challenges for appeal. In *Hampton*, 50 S.W.3d at 903, the court explained that Rule 70.03 “was intended to give the trial court notice of any claimed defect or problem with the instructions *it planned to give to the jury* so that it could consider the claim and, if necessary, correct any defect before submission.” (emphasis added). Similarly, in *Cluck v. Union P. R. Co.*, 367 S.W.3d 25, 27 (Mo. 2012), this Court affirmed the trial court’s rejection of an instruction on a *respondeat superior* theory because the plaintiff, despite making a submissible case on that theory, “repeatedly failed to prepare a verdict director that correctly submitted the *respondeat superior* issue.” *Id.*

Unlike the *six opportunities* to submit a “correct” instruction during the conference in *Cluck*, the circuit court here afforded no opportunity to discuss or modify any part of Cedar Fair’s instructions. And unlike *Hampton*, which allows counsel to evaluate the instructions the court *plans* to give, it would have been futile here to discuss or modify instructions the circuit court had no intention of giving. Addressing an analogous situation, this Court has held that where the trial judge

¹⁰ *Hampton* was overruled, in part, by *Marion v. Marcus*, 199 S.W.3d 887 (Mo.App. 2006), because it improperly held that the refusal of an instruction is reviewed under an abuse of discretion standard.

makes it clear that he will not permit a party to pursue a defense to which it is entitled, “further pursuit of the point would have been futile” and is open for development on remand. *Hagen v. Celotex Corp.*, 816 S.W.2d 667, 675 (Mo. 1991).

iii. Inapposite case law does not prevent review.

Respondent cites no authority preventing this Court’s review of Cedar Fair’s challenge to the submissibility ruling below. Instead, her cases involve a challenge to the form or language of a particular instruction for claims that were *submitted*. See *Egelhoff v. Holt*, 875 S.W.2d 543, 549 (Mo. 1994) (plaintiff appealed from a defense verdict and challenged instructional language concerning her comparative fault); *Marion*, 199 S.W.3d at 896 (plaintiff made a submissible case of negligence but, after a defense verdict, appealed the trial court’s refusal to give instructions which were held to be duplicative and in improper form); *Wulfing v. Kansas City S. Indus., Inc.*, 842 S.W.2d 133, 155 (Mo.App. 1992) (plaintiff made a submissible case of damages in a breach of contract case; on appeal the refusal of defendant’s proffered instruction improperly defining the measure of damages was affirmed).

In short, Respondent’s attack on the form of Cedar Fair’s proposed instruction is an attack on a straw man—a misguided appeal to technicalities in an effort to avoid review of the merits of comparative fault.

B. Substantial Evidence of Comparative Fault

Given Respondent’s heavy reliance on facts favorable to her, it is worth repeating that, in reviewing the submissibility question in Point II, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to

Cedar Fair. *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 806, 808-09 (Mo.App. 2008). Moreover, plaintiff’s evidence “must be disregarded unless it tends to support” comparative fault. *Berra*, 803 S.W.2d at 190.

Cedar Fair’s comparative fault verdict director (below) was based on a straightforward, and factually-supported theory—Respondent caused or contributed to her injuries because she “let go” despite warnings to “hold on.”

INSTRUCTION No. ____

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[.]

Supp.LF:44; A:20-22.

Under Missouri law, a comparative fault “instruction may be based on any theory supported by the evidence as construed most favorably to defendant[.]” *Wendt v. Gen. Acc. Ins. Co.*, 895 S.W.2d 210, 215 (Mo.App. 1995). The record contains plenty of evidence supporting Cedar Fair’s comparative fault theory:

- The accident occurred because Respondent “let go” of the straps. T:182, 184, 194-196, 215-16, 649-650; *see also* Cedar Fair’s Exhibit 107 (admitted at T:652).
- Respondent admitted she “let go” despite knowing that she was supposed to hold on at all times. T:168, 215-16, 345, 616.
- It was “impossible” for Cooper to have fallen onto Respondent. T:196.
- When the accident occurred “it had to be [Respondent] coming toward [Cooper.]” T:196.
- None of the rafters let go of the straps because the forces of Hurricane Falls were too strong. T:447.

Respondent attempts to evade these core facts in numerous ways. For starters, she asserts there is no evidence she voluntarily exposed herself to danger. Respondent’s Brief at 39-40. Respondent then claims *she* had no knowledge of the risk of bodily collisions. But the fault of a child is an *objective* question “based upon that degree of care *exercised by children of the same or similar age*, judgment, and experience.” *Lester v. Sayles*, 850 S.W.2d 858, 867 (Mo. 1993) (emphasis added). Respondent claims a “subjective” standard controls, but relies on the pre-comparative fault decision in *Dorrin v. Union Elec. Co.*, 581 S.W.2d 852, 857 (Mo.App. 1979), which focused on “the particular plaintiff” rather than *ordinary children* of the same or similar judgment and experience. *See also* M.A.I. 11.04 (“negligence” ... means the failure to use that degree of care which an ordinarily careful [boy] [girl] of the

same age, capacity and experience would use under the same or similar circumstances.”).

Respondent’s knowledge of danger can be inferred from the multiple signs warning Respondent to “hold on” at all times, which she “probably saw.” *See* T:615; *see also* II-LF:227, 229; Respondent’s Exhibits 12-13; A:9-10. Respondent does not dispute that these signs warned her that Hurricane Falls was “aggressive” and that it presented a risk of injury: “guests with back, neck, muscular, skeletal, or other infirmities should not use this ride.” II-LF:227; A:9. Respondent also necessarily assessed the risks of riding Hurricane Falls when she watched rafters go down Hurricane Falls. T:616.

In an attempt to downplay these facts, Respondent claims there was no evidence “she saw any collisions” on Hurricane Falls while she waited in line. Respondent’s Brief at 40. Thus, according to Respondent, a 12-year-old must actually witness an accident before she can comprehend the risk of danger. Respondent further asserts she did not know the specific height, length or water flow rate of Hurricane Falls (Respondent’s Brief at 41), but gravity, heights and rushing water are not completely foreign concepts to 12-year-old standing atop a 70-foot-tall slide. In any event, Kelly, Respondent’s similarly-aged rafting companion, testified that she expected the ride would be “rough” and that it would “toss you about a bit.” T:181-82, 186. Thus, the evidence showed that ordinary children similar in age to Respondent had the capacity to appreciate the dangers of rafting down Hurricane Falls without holding on at all times.

Respondent further claims that Cedar Fair’s instruction was improper because it referenced “restraints and safety devices” in plural rather than singular form. Respondent’s Brief at 41. But this petty dispute about an instruction that was not given does not change evidence that Respondent knew she was supposed to hold on to the “straps” at all times. T:616. Kelly also agreed that everybody knew to hold on to the “two-hand grips” at all times. T:196. Respondent also likens the reason she “let go” to losing hand strength while “hanging from a cliff.” Respondent’s Brief at 48. This Respondent-favorable inference is untenable because at no point during the ride is a person dangling from the straps or holding her entire body weight with her arms. T:477.

Finally, Cedar Fair does not need “inferences” or “circumstantial” evidence when it has Respondent’s admission of fault. The responding paramedic’s report stated: “when questioning [Respondent] ... on how the injury happened, *she stated that during the ride, she let go of the straps.*” See T:168, 215-16, 345, 616 (emphasis added). Respondent’s counsel admitted during opening statement that there were “reports filled out by their EMT’s” and “[t]hey’re going to say, ‘Patient stated she let go of the strap.’” T:168.

Respondent’s admission was itself sufficient to submit the case on comparative fault. See, e.g., *Deskin v. Brewer*, 590 S.W.2d 392, 399 (Mo.App. 1979) (“a party’s admission of a material fact relevant to an issue in the case is competent against him as substantive evidence of the fact admitted”). Moreover, Respondent’s denial of her statement (see Respondent’s Brief at 13) does not alter the fact that it is “prima facie”

evidence—the denial “simply raises an issue of credibility for the trier of fact to resolve.” *Benner v. Johnson Controls, Inc.*, 813 S.W.2d 16, 19 (Mo.App. 1991).

C. Cedar Fair Was Entitled to the Submission of Comparative Fault

This Court adopted comparative fault because it was in the “best interest of all litigants.” *Gustafson v. Benda*, 661 S.W.2d 11, 15 (Mo. 1983). Subsequent Missouri opinions have held “the doctrine of comparative fault” works to eliminate the “inequities inherent in legal doctrines which irrationally imposed total responsibility upon one party for the consequences of the conduct of both parties.” *Earll v. Consol. Aluminum Corp.*, 714 S.W.2d 932, 936 (Mo.App. 1986). For these reasons, “parties to a negligence action are *entitled* to have their case submitted to the jury under comparative fault principles” when there is “evidence from which a jury could find that plaintiff’s conduct was a contributing cause of her damages[.]” *Rudin v. Parkway Sch. Dist.*, 30 S.W.3d 838, 841 (Mo.App. 2000) (emphasis added). Based on the substantial evidence of comparative fault in this case, the circuit court clearly erred in rejecting a defense that Cedar Fair was entitled to have submitted to the jury.

CONCLUSION

The trial court erred by imposing a heightened duty of care and by refusing to submit the case on comparative fault. These errors were highly prejudicial and require a new trial. *See, e.g.*, Cedar Fair’s Brief at 10, 37. Appellant Cedar Fair, L.P. respectfully requests that the Court reverse the judgment below and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. The brief includes the information required by Rule 55.03;
2. The brief complies with the limitations contained in Rule 84.06(b);
3. According to the word count function of counsel's word processing software (Microsoft® Word), the brief, excluding those portions as defined by Rule 84.06(b) contains 7,663 words.

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 14, 2014, a copy of the foregoing Substitute Reply Brief of Appellant, together with the Certificate of Compliance, was served via the Court’s electronic filing system on the counsel of record below who have registered with Missouri’s electronic filing system:

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