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 BRIEF OF APPELLANT CEDAR FAIR L.P.

Thomas H. Stahl (21715)
David R. Frye (45071)
Chad E. Blomberg (59784)
Lathrop & Gage LLP
2345 Grand Boulevard, Suite 2200
Kansas City, Missouri 64108
Tel: (816) 292-2000
Fax: (816) 292-2001
tstahl@lathropgage.com
dfrye@lathropgage.com
cblomberg@lathropgage.com

ATTORNEYS FOR APPELLANT
CEDAR FAIR L.P.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

On August 25, 2005, Jessica Chavez ("Respondent") commenced this negligence action against Appellant Cedar Fair, L.P. ("Cedar Fair") for personal injuries she sustained while rafting the Hurricane Falls water slide at Oceans of Fun. I LF:16-21.[1] On February 9, 2012, following a three-day jury trial,[2] the circuit court entered judgment in favor of Respondent (II LF:274-75; A1:2); it then amended its judgment on February 22, 2012 to award Respondent pre-judgment interest (II LF:283-85; A:3-5). On March 22, 2012, Cedar Fair filed its Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial (II LF:290-306), which the circuit court denied on June 18, 2012 (III LF:337; A:6).

On June 28, 2012, Cedar Fair filed its Notice of Appeal. III LF:340-41. After briefing and argument, the Court of Appeals, Western District, affirmed the circuit court's judgment in its July 16, 2013 opinion. It then denied Cedar Fair's application for transfer on August 27, 2013. On November 18, 2013, this Court granted Cedar

---

[1] Cedar Fair cites the three-volume legal file ("LF") by volume and page number. It cites the supplemental legal file ("Supp. LF"), transcript ("T") and appendix items ("A") by page number.

[2] Before submitting the claims to the jury, Respondent's mother, Donna Chavez, dismissed her claim for loss of Respondent's services, and Respondent voluntarily dismissed from the lawsuit all defendants except Cedar Fair, which left Respondent and Cedar Fair as the only parties in the action. II LF:283-84; T:677-78.

Fair's application for transfer and now has jurisdiction pursuant to Rule 83.04 and Mo. Const. art. V, § 10.

STATEMENT OF FACTS

Respondent, then twelve years old, was injured on August 3, 2000 while rafting the Hurricane Falls water slide at Cedar Fair's Oceans of Fun water park in Kansas City, Missouri. I LF:18-21; T:212, 349. At trial, Respondent submitted a negligence claim based on two theories: (1) that Cedar Fair failed to provide friction devices[3] reasonably sufficient to prevent rafters from colliding with each other; and (2) that Cedar Fair failed to adequately warn of the risk of harm from colliding with other raft riders. II LF:268; A:8. For both of these theories, the circuit court instructed the jury that "negligence" meant the failure to use the highest degree of care. II LF:267; A:7. The circuit court also refused to submit a claim for Respondent's comparative fault, and did not instruct the jury to assess either party's percentage of fault. II LF:273; T:663, 668; *see also* Supp. LF:44, 48-49; A:20-22. The jury awarded Respondent $225,000. II LF:273.

[3] The "friction devices" were described as inflatable "baffles" or tubes inside the raft that would separate riders or give them something to push against during the ride; they were also described as a slip-resistant flooring on the rafts that would "grip" swimwear and prevent rafters from sliding. T:415, 481-82, 518-19, 696. Neither parties' expert witness was aware of any raft that included these features and could be used on Hurricane Falls. T:416-17, 481-82.

The Accident

Respondent was visiting Oceans of Fun with her aunt, uncle, cousins and family friends. T:178-80. The first ride the group went on was Hurricane Falls. T:206. Respondent had heard from friends that Hurricane Falls was "fun." T:614-15. She testified: "[t]hat's what you go to an amusement park for, is the thrills." T:615. To reach the starting point of Hurricane Falls, Respondent and her companions passed through a turnstile and walked up a flight of stairs. T:349-50. Respondent "probably saw" the signs along the turnstiles and stairs instructing her to hold on to the raft's straps at all times. T:615; *see also* II LF:227, 229, Respondent's Exhibits 12-13; A:9-10 (photographs of the signs). While waiting in line, Respondent watched rafters go down Hurricane Falls. T:616.

Respondent's cousin, Candace Kelly, testified that Respondent rafted Hurricane Falls with three companions: Kelly, Amy Cooper (also Respondent's cousin), and Angela Boyles (Respondent's aunt). T:180, 182. Kelly testified that Respondent was seated in the raft directly across from Cooper, with Kelly on her right and Boyles on her left. T:182.[4] Before commencing the ride at issue, a park employee instructed Respondent and her companions to "hold on to the straps at all times." T:158, 181, 214, 616. There was no doubt in Respondent's mind that she was supposed to hold on to the straps at all times. T:616.

---

[4] Boyles, however, testified that there were five rafters—the four identified by Kelly, plus a co-worker of Boyles's. T:206.

Boyles described the ride as being "rough" and "up and on the walls, and when you hit the pool, it was kind of a jolt." T:206. She also testified that the ride was not any different than she thought it would be. T:217. During the final turn of the slide, as the raft went up the slide's wall, Respondent "let go" of the straps causing her mouth to collide with the head of Cooper, who was seated directly across from her. T:182, 184, 194-196, 215-16, 649-650; *see also* Cedar Fair's Exhibit 107.[5] The collision knocked out one of Respondent's front teeth, and two other teeth showed signs of trauma. T:232-33. She ultimately lost three teeth. T:236-39.

After the accident, Ben Hutgren, an Oceans of Fun park ranger, arrived on the scene and been speaking to Boyles to determine exactly what had happened. T:643,

---

[5] The trial took place roughly twelve years after the accident. Some trial testimony conflicted with earlier statements and testimony by the witnesses. For example, Kelly testified at trial (at age 26) that she had a "fuzzy" recollection of the incident (at age 14), which could have been caused by Respondent letting go of the straps and striking Cooper, or by Cooper falling on Respondent, or by the raft folding in half. T:184-86, 190. In comparison, Respondent testified at trial that Cooper let go of the straps, and that the raft did not fold in half. T:618-19. Although there was inconsistent testimony, in determining whether a comparative fault instruction was warranted, 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. Ct. App. 2008).

650. He created an incident report that day stating: "[Boyles] told me that [Respondent] and Amy Cooper were coming down the slide, and [Respondent] let go of the raft which caused her to strike Ms. Cooper's head." T:184, 215-16, 343, 649-50; *see also* Cedar Fair's Exhibit 107; A:11-12. Brit Adams, a responding paramedic, created a similar incident report: "when questioning [Respondent] … on how the injury happened, she stated that during the ride, she let go of the straps." T:215-16, 344.

Neither Respondent nor her companions had any difficulty holding on to the straps during the ride. T:197, 216-17; *see also* T:363. Respondent's expert witness, William Avery, testified that rafters let go of the straps for "a lot of reasons" including "on purpose for a thrill." T:412. Avery opined that none of the rafters let go of the straps because the forces of Hurricane Falls were too strong. T:447. Cedar Fair's expert agreed: "I think [Respondent] was able to hold on to the straps." T:546.

There is no evidence suggesting that a person of Respondent's age or physical characteristics would have difficulty holding on to the raft's straps during the ride. T:475-76; *see also* T:477 (at no point during the ride is a person dangling from the straps or holding her entire body weight with her arms). Respondent's expert witness testified that the accident at issue "should not have happened" if the riders had held on to the straps. T:426. Cedar Fair's expert agreed that the accident "would not have happened if she [Respondent] had held on." T:503.

Hurricane Falls

Hurricane Falls is a 680-foot-long water slide, with a 71½-foot drop and a 6 percent grade. T:303. Riders sit in rafts as they go down the slide. T:304. The rafts are 96 to 98 inches in outside diameter; the inflatable section of the raft is 15 inches in diameter. T:354-55. Water flows down Hurricane Falls at approximately 8,000 gallons per minute. T:435. At the end of the ride, the raft comes to a stop in a splash pool two feet deep. T:486. Empty rafts are then returned to the top of the ride by a conveyor belt. T:484-85.[6]

In order to ride Hurricane Falls, riders must be 46 inches tall. T:349-50; II LF:227. Because of concerns with spacing and the weight of the riders, Cedar Fair initially allowed five riders per raft (the manufacturer allows six) and, later, reduced this to four riders. T:333. Oceans of Fun uses an internal grading system for the aggressiveness or thrill level of rides. T:292. The most "aggressive" rides, including Hurricane Falls, are rated as "5." T:293. At the same time, Hurricane Falls is a ride that is "made for the whole family" that "anyone can ride." T:497, 499. It is also a ride that is made for both the old and young. T:499.

---

[6] A representative photo of Hurricane Falls is available at the following website: http://www.worldsoffun.com/rides/Oceans-of-Fun/Hurricane-Falls. *See also* T:484-91; Cedar Fair's Exhibits 115, 135-41, 135-43, 135-47, 135-49; A:13-18. Short videos generally showing the final section of Hurricane Falls are available at Cedar Fair's Exhibit 134.

Every ride down Hurricane Falls is different because of variables with the oscillation and rotation of the rafts. T:408-09, 493. The rafts go up and down along the sidewalls of the slide as "the [raft] banks and makes the curves kind of following the contour of the layout of the ride." T:409. During the ride, some rafts go high up on the sidewall of the slide while others may not go nearly as high. T:408. The raft will also rotate "so when you start backwards, you then may go forwards or sideways or whatever." T:493. The manufacturer's manual for the Hurricane Falls slide indicates that body-to-body collisions may occur during the ride. T:328-29.

Because of a risk of drowning if the raft were to capsize, riders are not "buckled in" to the raft. T:459-61; *see also* T:300-01. As a safety device, nylon-webbing straps are attached to the rafts for riders to hold during the ride. T:301, 304. It is possible to sufficiently hold on to the straps with one arm. T:302. If a rider lets go of the straps, it creates an unsafe situation. T:305. The rafts and their safety devices were considered to be "state of the art" in 2000. T:481.

When riders are seated directly opposite each other in the rafts, a distance of 68 inches separates a rider's back from an opposite rider's back. T:355. Based on this distance, and if the riders are seated with their backs properly against the inflatable part of the raft and holding on to the straps, it is not possible for the heads of opposing riders to contact each other. T:355.

Hurricane Falls first opened at Oceans of Fun in May 1999. T:320, 352. Cedar Fair created a list of injuries that occurred on Hurricane Falls from 1999 until Respondent's accident in 2000. T:309-10; Respondent's Exhibit 35; A:19. There

were eleven injuries, which occurred at various stages of the ride and involved cuts, sprains and "bumped" heads. Respondent's Exhibit 35; A:19. The majority of the accidents "required first aid treatment only and the guests remained in the park." *Id.* Of the eleven accidents, five occurred while exiting the raft at the end of the ride, and two were caused by unknown reasons. *Id.*

POINTS RELIED ON

Point I: The circuit court erred in instructing the jury that negligence is the failure to use the highest degree of care because negligence by Cedar Fair should have been defined as the failure to use ordinary care in that the Supreme Court of Missouri has uniformly held, and should continue to hold, that ordinary care is the proper standard for operators of water slides and similar amusement activities.

Gold v. Heath, 392 S.W.2d 298 (Mo. 1965).

Kungle v. Austin, 380 S.W.2d 354 (Mo. 1964).

McCollum v. Winnwood Amusement Co., 59 S.W.2d 693 (Mo. 1933).

Point II: The circuit court erred in refusing to submit and instruct on comparative fault because parties are entitled to have the case submitted on such principles when, as here, there was sufficient evidence that Respondent's conduct was a contributing cause of her damages in that Respondent was objectively negligent and voluntarily encountered the risks of Hurricane Falls when she "let go" of the raft's safety straps in disregard of repeated warnings to "hold on."

Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983).

Smith v. Brown & Williamson Tobacco Corp.,

275 S.W.3d 748 (Mo. Ct. App. 2008).

Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982).

ARGUMENT

I. The circuit court erred in instructing the jury that negligence is the failure to use the highest degree of care because negligence by Cedar Fair should have been defined as the failure to use ordinary care in that the Supreme Court of Missouri has uniformly held, and should continue to hold, that ordinary care is the proper standard for operators of water slides and similar amusement activities.

A. Standard of review.

The appropriate duty or standard of care owed by a defendant in a negligence action is a question of law for the court. *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 158 (Mo. 2000); *see also Stonger v. Riggs*, 85 S.W.3d 703, 705 (Mo. Ct. App. 2002). Further, "[w]hether a jury was properly instructed is a question of law that this Court reviews *de novo*." *Bach v. Winfield-Foley Fire Protection Dist.*, 257 S.W.3d 605, 608 (Mo. 2008); *Abbott v. Missouri Gas Energy*, 375 S.W.3d 104, 107 (Mo. Ct. App. 2012) (applying *de novo* review to determine propriety of instruction defining "ordinary care").

Questions of law are reviewed *de novo* without granting any deference to the trial court. *Stonger*, 85 S.W.3d at 705; *see also Yahne v. Pettis Cnty. Sheriff Dep't*, 73 S.W.3d 717, 719 (Mo. Ct. App. 2002). "Where a jury instruction imposes upon a party a standard of care higher than that required by law, prejudice is presumed." *Syn, Inc., v. Beebe*, 200 S.W.3d 122, 133 (Mo. Ct. App. 2006) (citing *Root v. Mudd*, 981 S.W.2d 651, 656 (Mo. Ct. App. 1998)). "The Missouri Supreme Court has

consistently held that imposing upon a party a standard of care higher than the law requires is prejudicial, mandating a new trial." *Syn, Inc.,* 200 S.W.3d at 133 (citing *Lopez*, 26 S.W.3d at 158).

B. Ordinary care is the correct standard of care for operators of water slides and other amusement activities.

Rather than instructing the jury that Cedar Fair was required to use "ordinary care" as defined in M.A.I. 11.05 or 11.07, the circuit court applied the more demanding "highest degree of care" standard as defined in M.A.I. 11.03. II LF:267. The trial court instructed the jury as follows:

> Instruction No. 6
>
> The term "negligent" or "negligence" as used in these instructions means the failure to use the highest degree of care. The phrase "highest degree of care" means that degree of care that a very careful person would use under the same or similar circumstances.

II LF:267; A:7.

The circuit court undoubtedly erred because this Court has specifically held that a water slide operator owes its patrons the duty of ordinary care. In *McCollum v. Winnwood Amusement Co*., 59 S.W.2d 693, 694 (Mo. 1933), the plaintiff, a 12-year-old girl, brought suit against an amusement park operator for injuries she suffered while sliding down a water slide at the park. This Court held the jury was instructed "very properly" 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." *Id.* at 697 (emphasis added).

McCollum is far from an isolated opinion because Missouri courts have consistently applied ordinary care to the operators of amusement activities. For example, in *Kungle v. Austin*, 380 S.W.2d 354 (Mo. 1964), a 13-year-old girl broke her jaw while jumping on a trampoline at the defendants' indoor trampoline center. This Court held that "the proper test of the defendants' conduct as negligence was whether or not they exercised the care which a *reasonable person* would exercise under like circumstances." *Id.* at 360 (emphasis added).

Similarly, in *Gold v. Heath*, 392 S.W.2d 298 (Mo. 1965), an 11-year-old boy was riding a merry-go-round at the defendant's drive-in theater when another boy threw a rock, striking him in the eye. This Court again held: "[i]n Missouri the owner of a … place of public amusement *must exercise ordinary or reasonable care* for the safety of patrons [.]" *Id.* at 302 (emphasis added). Likewise, in *Berberet v. Elec. Park Amusement Co.*, 3 S.W.2d 1025, 1029 (Mo. 1928), this Court held that the "rule in this state, and generally" is that a amusement operator owes its patrons the duty of "ordinary care or reasonable care for their safety." *See also Boll v. Spring Lake Park, Inc.*, 358 S.W.2d 859, 862 (Mo. 1962) (swimming pool operator "bound to use reasonable care"); *Hudson v. Kansas City Baseball Club*, 164 S.W.2d 318, 320 (Mo. 1942) (applying standard of ordinary care to baseball club in an action by spectator injured by a foul ball).

In harmony with this Court's opinions above, the Court of Appeals has held

that ordinary care is the appropriate standard for the operators of amusement activities ranging from snow skiing to a mechanical punching game. *See, e.g.*, *Lewis v. Snow Creek, Inc.*, 6 S.W.3d 388, 392 (Mo. Ct. App. 1999) (ordinary care applied to ski resort where skiers were injured after falling as a result of icy conditions); *Schamel v. St. Louis Arena Corp.*, 324 S.W.2d 375, 378 (Mo. Ct. App. 1959) (skating rink operator owed ordinary care in an action by a plaintiff who was knocked down by a third party); *Reay v. Reorg. Inv. Co.*, 224 S.W.2d 580, 582 (Mo. Ct. App. 1949) (same); *Moordale v. Park Circuit & Realty Co.,* 58 S.W.2d 500, 501 (Mo. Ct. App. 1933) (ordinary care applied to a park operator in an action by a plaintiff who broke his arm playing a mechanical game designed to test his punching force).

In short, based on the abundant Missouri case law above, the circuit court erred when it instructed the jury that Cedar Fair, as the operator of an amusement activity, was required to use the highest degree of care. This Court has "consistently held that imposing upon a party a standard of care higher than the law requires is prejudicial, mandating a new trial." *Syn, Inc.*, 200 S.W.3d at 133 (citing *Lopez*, 26 S.W.3d at 158). This Court should reverse the judgment below and remand for a new trial.

C. Other states uniformly hold that ordinary care is the proper standard for operators of water slides.

Missouri law is in accord with that of its sister states, which uniformly hold that ordinary care is the proper standard for the operator of a water slide. For example, in *Boyd v. Magic Golf, Inc.*, 52 So. 3d 455 (Miss. Ct. App. 2011), a minor female sustained an injury to her tooth and gums while riding a mat down a water slide. The

Court held that the water park owed a duty to exercise "a reasonable degree of watchfulness to guard against injuries likely to happen in view of the character of the amusement." *Id.* at 459; *see also Volcanic Gardens Mgmt. Co., Inc. v. Beck*, 863 S.W.2d 780, 781 (Tex. Ct. App. 1993) (water park owed a duty to "exercise ordinary and reasonable care" for a park guest who was injured while riding an inner tube down a water slide); *Sweet v. Clare-Mar Camp, Inc.*, 526 N.E.2d 74, 78 (Ohio Ct. App. 1987) (applying "ordinary care" in a claim arising from injuries sustained while using a water slide at the defendant's campground); *Rivere v. Thunderbird, Inc.*, 353 So. 2d 346, 347 (La. Ct. App. 1977) (amusement park owed duty of ordinary care to a patron injured while sliding head-first down a 30-foot-high water slide).

In addition, at least one state has rejected attempts to increase the standard of care for water park operators. *Gabaldon v. Erisa Mortgage Co.*, 990 P.2d 197, 198 (N.M. 1999). In *Gabaldon*, a nine-year-old boy nearly drowned in a 700,000-gallon wave pool at a water park. The plaintiff argued that the water park was required to exercise a higher degree of care because wave pools are more dangerous than traditional swimming pools. In rejecting this argument, the New Mexico Supreme Court held that "the increased risks potentially posed by wave pools are not sufficiently great to require, as a matter of public policy, application of a legal rule more stringent than ordinary negligence." *Id.* at 201.

Other than the now-vacated Court of Appeals opinion below, Cedar Fair is not aware of any appellate opinion from any state that has imposed the highest degree of care on the operator of a water slide. Counsel for Respondent admitted as much at

trial. *See* T:12. This Court should reject Respondent's efforts to increase the standard of care owed by the operators of water slides and similar amusement activities.

D. The risks of Hurricane Falls do not warrant the expansion of the highest degree of care beyond the "relatively few" situations in which that standard has been historically applied.

Missouri only applies the highest degree of care "in a relatively few situations." *See, e.g., Syn, Inc.*, 200 S.W.3d at 133; *Burrows v. Union Pac. R. Co.,* 218 S.W.3d 527, 537 (Mo. Ct. App. 2007). Specifically, Missouri has applied the highest degree of care only to: (1) electric companies, (2) common carriers,[7] (3) users of explosives, (4) users of firearms, and (5) motor vehicle operators. *See, respectively, Burk v. Missouri Power & Light Co.*, 420 S.W.2d 274, 277 (Mo. 1967); *Atcheson v. Braniff Int'l Airways*, 327 S.W.2d 112, 118 (Mo. 1959); *Mooney v. Monark Gasoline & Oil Co.*, 298 S.W. 69, 78 (Mo. 1927); *McLaughlin v. Marlatt*, 246 S.W. 548, 553 (Mo. 1922); and *Jarrett v. Jones,* 258 S.W.3d 442, 448 (Mo. 2008) (applying RSMo § 304.012).

---

[7] This Court's application of the highest degree of care to "common carriers" has been limited to commercial airlines, railroads, streetcars, buses and elevator operators. *See, respectively, Atcheson*, 327 S.W.2d at 112; *Nix v. Gulf, M. & O. R. Co.*, 240 S.W.2d 709, 717 (Mo. 1951); *Gott v. Kansas City Rys. Co.*, 222 S.W. 827 (Mo. 1920); *McVey v. St. Louis Public Service Co.*, 336 S.W.2d 524, 527 (Mo. 1960); and *Goldsmith v. Holland Bldg. Co.*, 81 S.W. 1112, 1114 (Mo. 1904).

The circuit court erred because amusement activities, including water slides, are not one of these "few situations" in which a higher degree of care has been applied. A review of the history of the highest degree of care also confirms that there is no basis for expanding the higher standard so that it applies here. Specifically, the public policy that resulted in the application of the highest degree of care to electricity, explosives, firearms, and even motor vehicles and common carriers is the same. At some point, these essential activities were considered to be so inherently or extremely dangerous that the law required protection from even the slightest negligence.

For example, this Court applied the highest degree of care ("utmost care") to an electric utility because "[e]lectricity is one of the most dangerous agencies ever discovered by human science[.]" *Geismann v. Missouri Edison Elec. Co.*, 73 S.W. 654, 659 (Mo. 1903). The inherently dangerous qualities of firearms and explosives have likewise warranted a higher degree of care. *Paisley v. Liebowits*, 347 S.W.2d 178, 183 (Mo. 1961) (noting the "highly dangerous" nature of explosives); *McLaughlin*, 246 S.W. at 553 (discussing the "dangers attendant upon the use of firearms"); *Wagstaff v. City of Maplewood*, 615 S.W.2d 608, 612-13 (Mo. Ct. App. 1981) ("Due to the dangers involved, there is no doubt that an ordinarily careful person when handling firearms is required to exercise a very high degree of care.")

Automobiles and common carriers share this history. The highest degree of care for common carriers "was widely adopted at the advent of the age of steam railroads in 19th century America." *Bethel v. New York City Transit Auth.*, 703

N.E.2d 1214, 1216 (N.Y. 1998). "Their primitive safety features resulted in a phenomenal growth in railroad accident injuries and with them, an explosion in personal injury litigation, significantly affecting the American tort system." *Id.* This Court, too, was concerned about the danger of steam railroads when, in 1866, it held that those who "undertake to carry persons by the *powerful and dangerous agent of steam*" are held to "*the greatest possible care and diligence*." *Sawyer v. Hannibal & St. J.R. Co.*, 37 Mo. 240, 260 (1866) (emphasis added).

Moreover, at the time Henry Ford introduced his "Model T," Missouri enacted its first statute requiring motor vehicle operators to use the highest degree of care. RSMo § 8523 (1909); *see also Ex parte Kneedler*, 147 S.W. 983, 984 (Mo. 1912) (citing Session Acts 1911, p. 322 at § 12). Discussing the legislative purpose for this standard, the Court of Appeals commented: "It is a matter of common knowledge and universal concern that the millions of motor vehicles operating daily on our highways constitute one of the deadliest and most destructive agencies in our present society." *Hay v. Ham*, 364 S.W.2d 118, 121-22 (Mo. Ct. App. 1962).

Unlike the newly-invented steam railroads of the 1800s or the primitive automobiles of the early 1900s, amusement rides are not such a new, essential and dangerous technology that they justify the highest degree of care. Unfortunately, Respondent lost three teeth as a result of her accident. Other rafters have sustained bumped heads, cuts, and sprains while (or after) rafting Hurricane Falls.

Respondent's Exhibit 35; A:19.[8] But the eleven minor incidents documented by Cedar Fair are nothing compared to the serious and often fatal injuries caused by firearms, electricity or explosives.

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. *Hudson*, 164 S.W.2d at 323 ("One of the circumstances incident to some forms of public amusements or sports is that the patron actually and actively takes part in them, for example skating or the thrill devices in an amusement park."). Imposing a higher degree of care would force amusement park operators to reduce or eliminate risk and concomitantly reduce or eliminate the desired thrill. "There would have been no point to the whole thing, no adventure about it, if the risk had not been there." *Id.*

At any rate, the expansion of the highest degree of care is unnecessary because an adequate standard already exists. For example, in abolishing a higher degree of care for common carriers, New York's highest court held that the reasonable person standard was sufficiently flexible to permit courts and juries "to take into account all of the hazardous aspects of public transportation in deciding whether due care was

[8] The majority of the accidents "required first aid treatment only and the guests remained in the park." Respondent's Exhibit 35; A:19. Of the eleven accidents, five occurred while exiting the raft at the end of the ride, and two were caused by unknown reasons.

exercised in a particular case." *Id*. at 1217. Missouri's court and juries also have a sufficiently flexible tool—the standard of "ordinary care," which 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). This is, after all, the same standard by which Missouri juries measure the negligence of a brain surgeon. *See, e.g.*, *Crump v. Piper*, 425 S.W.2d 924, 927 (Mo. 1968). In short, the applicable standard of care for amusement park operators is—and should be—ordinary care.

E. The circuit court's vague basis for applying the highest degree of care to Cedar Fair is erroneous for a multitude of reasons.

Although the circuit court was "troubled" both pre- and post-trial by this Court's holding in *McCollum* that a water slide operator owes its patrons a duty of ordinary care (T:17, 730), it never stated its rationale for imposing a more exacting standard on Cedar Fair.[9] Whatever the rationale, reversal is required because: (i) the Missouri cases the circuit court relied upon are factually distinguishable and (ii) have

[9] At best, the circuit court may have believed that a higher degree of care was warranted because Cedar Fair marketed Hurricane Falls as having a thrill level of "5." T:732-33, 736; *see also* T:293-96, 550. It may also have accepted Respondent's argument that Hurricane Falls was "just like a roller coaster" (T:19) or agreed that Cedar Fair was a common carrier engaged in the business of "transporting people for money from one place to another" (T:676).

been implicitly overruled by this Court's decisions; and (iii) Cedar Fair is not a common carrier as a matter of law.

i. The circuit court relied on factually distinguishable Court of Appeals opinions.

The circuit court disregarded this Court's holding in *McCollum* (and *Berberet, Boll, Hudson, Kungle* and *Gold*)[10] in favor of three decisions from the Court of Appeals: *Brown v. Winnwood Amusement Co.*, 34 S.W.2d 149 (Mo. Ct. App. 1931), *Cooper v. Winnwood Amusement Co.*, 55 S.W.2d 737 (Mo. Ct. App. 1932) and *Gromowsky v. Ingersol*, 241 S.W.2d 60 (Mo. Ct. App. 1951). *See* T:11-14, 16-19; *see also* T:663, 674-76. In *Brown*, 34 S.W.2d at 149, and *Cooper*, 55 S.W.2d at 737, the Court of Appeals applied the highest degree of care to the operator of the same roller coaster—the "Whirl Winn." It later applied this standard to the operator of a ride that swung "airplanes" around a central tower. *Gromowsky*, 241 S.W.2d at 60.

These opinions are not controlling because Hurricane Falls is a water slide, *not* a roller coaster or swinging airplane ride. For example, the passenger "cars" or "airplanes" in *Brown*, *Cooper* and *Gromowsky* were all secured in place (*e.g.*, to a track or a central tower) such that each ride followed the same pre-determined route. In contrast, every ride down Hurricane Falls is different because the rafts rotate and

[10] At the risk of stating the obvious, the circuit court was "constitutionally bound" to follow the decision of this Court. *Doe v. Roman Catholic Diocese of St. Louis*, 311 S.W.3d 818, 822 (Mo. Ct. App. 2010); *see also* Mo. Const. art. V, § 2.

go up and down the walls at varying degrees. T:408-09, 493. The only time a raft follows a specific route is when it is returned, empty, to the top of the ride. T:484-85.

Nevertheless, the Court of Appeals, in its now-vacated opinion, equated Hurricane Falls with the fixed-route rides in *Brown*, *Cooper*, and *Gromowsky* because the raft and flume were under Cedar Fair's "complete control." *See* Slip Op. at 11. Although Cedar Fair did control some aspects of Hurricane Falls—such as the height of riders, the flow of water, or the number of passengers per raft—merely controlling some aspect of an amusement activity is not a sufficient reason for expanding the highest degree of care. Indeed, Missouri courts *have applied ordinary care* to, *inter alia*, ski resorts, trampoline centers and punching game operators *even though* the dispersing of artificial snow on a ski run (*Lewis*, 6 S.W.3d at 388), the position of a trampoline and its surrounding padding (*Kungle*, 380 S.W.2d at 354), and the mechanical function of a punching game (*Moordale,* 58 S.W.2d at 500) are all under the complete control of the amusement operator.

An *operator's* control over *some* aspect of the amusement should not be a basis for increasing the standard of care because it ignores the factors over which the operator does *not* have control, *e.g.*, a skier's speed (*Lewis*), the manner of jumping on a trampoline (*Kungle*), the speed or actions of other skaters at a rink (*Schamel,* 324 S.W.2d at 375 and *Reay*, 224 S.W.2d at 580), or the misbehavior of other children on a playground (*Moordale*). Significantly, there was evidence that Respondent "let go" of the raft's straps, but no evidence that she could not hold on because of any aspect of the water slide under Cedar Fair's control.

ii. The circuit court relied on decisions implicitly overruled by this Court.

Brown, *Cooper* and *Gromowsky* are not only factually distinguishable—they conflict with this Court's decisions and therefore have been implicitly overruled. The conflict was started by *Brown*—a 1931 decision limited to whether there was evidence of a specific act of negligence that would prohibit the application of the *res ipsa loquitur* doctrine.[11] *Brown* noted in *dicta,* and without any citation to Missouri law, that the operator of the "Whirl Winn" roller coaster was subject to the rules for common carriers. *Brown*, 34 S.W.2d at 152. The next year, *Cooper* transformed this *dicta* into law: "We hold to our ruling in the Brown Case … 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.

In reaching its decision, *Cooper* acknowledged this Court's holding in *Berberet*, 3 S.W.2d at 1029, that amusement park operators owe their patrons the duty of "ordinary care or reasonable care for their safety," but ultimately rejected that holding in favor of *Brown*. Any rebellion in the law existing between *Berberet* (in 1928) and *Cooper* (in 1932) was immediately quelled by this Court in *McCollum* (in

[11] The *res ipsa loquitur* doctrine has no application here because there was evidence of a specific act of alleged negligence, *e.g.*, failing to provide friction devices and failing to warn of the risk of harm from colliding with other rafters. *See, e.g., Belding v. St. Louis Pub. Serv. Co.*, 215 S.W.2d 506, 510 (Mo. 1948).

1933), when it cited *Berberet* with approval, again held that amusement operators owe a duty of ordinary care, and thereby effectively overruled *Brown* and *Cooper*. Thus, in 1951, when *Gromowsky* (another *res ipsa loquitur* case) held that an amusement operator owed the highest degree of care to passengers in an "airplane" ride, it was relying on superseded law. *See* 241 S.W.2d. at 63. Importantly, *Gromowsky* based its holding on *Brown*, without any citation to this Court's decisions in *McCollum* or *Berberet*.

A review of the history of Missouri law confirms that the rules announced in *Berberet* and *McCollum* and their progeny have prevailed. Indeed, any confusion caused by *Gromowsky* was again put to rest by this Court's more recent holdings in *Boll*, 358 S.W.2d at 862, *Kungle*, 380 S.W.2d at 360, and *Gold*, 392 S.W.2d at 302, that an amusement operator owes its patrons a duty of ordinary care. This is the law of Missouri today. *See, e.g.*, *Lewis*, 6 S.W.3d at 392. In short, the instruction below that Cedar Fair owed the highest degree of care was erroneous and based on superseded case law.

iii. A water slide cannot be equated with a common carrier.

The circuit court seems to have believed that Cedar Fair is a common carrier, and therefore subject to a higher standard of care, because it is engaged in the business of "transporting people for money from one place to another." *See* T:676. However, by definition, a water park charging thrill seekers to raft down a slide for fun is not the same as a common carrier who, as an essential component of modern

life, transports at large the public, utilities and goods. Missouri law defining "common carrier" makes this point:

> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines a "common carrier" as:
>
> 1: one that undertakes for hire the carrying of goods … treating its whole clientele without individual preference or discrimination and being responsible for all losses and injuries [with some exceptions] 2: a public utility or public service company 3 *in federal regulatory use*: a carrier offering its services to all comers for interstate transportation by … motor vehicle… [.]

Cook Tractor Co. v. Dir. of Revenue, 187 S.W.3d 870, 873-74 (Mo. 2006) (quoting *Webster's Third New Int'l Dictionary* 458 (Unabridged 1993)) (alterations in original).

A common carrier has also been defined as a "carrier that is required by law to transport passengers or freight, without refusal, if the approved fare or charge is paid." *Id.* (quoting *Black's Law Dictionary* 205 (7th ed. 1999)).[12] Missouri statutes further prescribe that a common carrier is "any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for

[12] A common carrier carries passengers "without refusal"; whereas, Hurricane Falls is limited to riders who are at least 46 inches tall. T:349-50; II LF:227.

hire or compensation upon the public highways and airlines engaged in intrastate commerce[.]" *Id.* (quoting RSMo § 390.020(6)).

At least one Missouri court has rejected arguments attempting to impose "common carrier" status upon those who transport passengers for purposes of amusement. In *Branson Scenic Railway v. Director of Revenue*, 3 S.W.3d 788, 791-92 (Mo. Ct. App. 1999), the court held that a scenic railway was not a common carrier and, thus, was not entitled to an interstate commerce tax exemption. The court also recognized the distinction between amusement "rides" and public transportation:

> Indeed, our world offers all kinds of mobile places of amusements which involve carrying people but which are not involved in the transportation business. Carousels, pony rides, riverboat rides, trail rides, miniature train rides, *and the antique car ride at Worlds of Fun in Kansas City* come to mind. Each offers to carry (transport) patrons in a circuitous route. Patrons see sights along the way—perhaps vistas that would not otherwise be visible. *Yet, no one could argue persuasively that these rides were transportation rather than amusement.* * * *
> When a carrier offers rides for fun, as opposed to offering them for the purpose of actually getting the rider to a particular place, then the carrier is providing amusement rides. *It is not in the transportation business*, even though its mode of amusement is mobile.

Id. 792 (emphasis added).

The following decisions have likewise recognized the distinction between transportation and amusement "rides": *Speed Boat Leasing, Inc. v. Elmer*, 124 S.W.3d 210, 211 (Tex. 2003) ("Although Speed Boat Leasing transports its passengers across the waters of the Gulf of Mexico, its primary purpose is to entertain, not to transport from place to place."); *Bregel v. Busch Entm't Corp.*, 444 S.E.2d 718, 719 (Va. 1994) ("[The Skyride], which offers patrons an aerial view of the amusement park, is for entertainment purposes, and the transportation function is incidental to the entertainment function."); *Harlan v. Six Flags Over Georgia, Inc.*, 297 S.E.2d 468, 469 (Ga. 1982) (unlike "instruments of transportation that must be used by people to travel from one place to another … [a]musement ride passengers intend to be conveyed thrillingly to a place at, or near to, the point they originally boarded, so that carriage is incidental"). It is similarly unpersuasive here to argue that Hurricane Falls, a water slide that "transports" rafters a total of 680 feet from the top of the slide to a splash pool at the bottom, is doing so for public transportation rather than amusement.

Despite the distinction between transportation and amusement rides, the circuit court may have instructed the jury to apply a higher degree of care because it believed Cedar Fair or Hurricane Falls is *like* a common carrier. The Court of Appeals used this same rationale in its opinion below. *See* Slip. Op. at 9, n.6. But this rationale fails because Missouri courts have rejected attempts to expand the highest degree of care to activities that are *like* the one of few categories to which that standard has been historically applied.

For example, Missouri applies ordinary care to gas companies even though natural gas, like electricity, presents a great risk of injury or death. *Stephens v. Kansas City Gas Co.,* 191 S.W.2d 601, 609 (Mo. 1946); *see also McCord Rubber Co. v. St. Joseph Water Co.,* 81 S.W. 189, 193 (Mo. 1904) (applying ordinary care to a water utility). Similarly, Missouri has rejected efforts to expand the highest degree of care to the users or air rifles, even though air rifles are like firearms. *Herman v. Andrews*, 50 S.W.3d 836, 840 (Mo. Ct. App. 2001).

F. Summary of Point One: This Court should reverse the judgment below and remand for a new trial.

The circuit court broke new ground in Missouri (if not the nation) when it imposed the highest degree of care on the operator of a water slide. The unprecedented decision below also: (1) relied on superseded Court of Appeals decisions; (2) defied this Court's decisions; and (3) ignored the public policy and history underlying the highest degree of care.

If the purpose of *stare decisis* is to promote certainty and predictability in the law, this Court should continue to confine the highest degree of care to those very few situations in which that standard has been historically applied. Departure from settled law and its underlying policy would result in confusion about the applicable standard of care and invite litigation as the parties and courts wrestle with whether an activity requires a higher standard of care because the activity or its associated dangers are *like* one of the five categories discussed above.

In short, this Court specifically held in *McCollum* that a water slide operator

owes its patrons the duty of ordinary care. It has also *uniformly* held that ordinary care is the appropriate standard for amusements activities in general. The circuit court committed a patent error when it instructed the jury that Cedar Fair was required to use the highest degree of care. The prejudice caused by this improper instruction requires a reversal of the judgment and a new trial.

II. The circuit court erred in refusing to submit and instruct on comparative fault because parties are entitled to have the case submitted on such principles when, as here, there was sufficient evidence that Respondent's conduct was a contributing cause of her damages in that Respondent was objectively negligent and voluntarily encountered the risks of Hurricane Falls when she "let go" of the raft's safety straps in disregard of repeated warnings to "hold on."

A. Standard of review.

In determining whether there was substantial evidence to support the submission of comparative fault, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to Cedar Fair. *See Smith*, 275 S.W.3d at 806, 808-09; *see also Hayes v. Price*, 313 S.W.3d 645, 650 (Mo. 2010) ("This Court reviews the record in the light most favorable to submission of the instruction."). "Whether a jury was properly instructed [on issues of comparative fault] is a question of law this Court reviews *de novo.*" *Hayes*, 313 S.W.3d at 650; *see also Smith,* 275 S.W.3d at 806 (sufficiency of comparative fault evidence is reviewed *de novo*).

B. Comparative fault is favored in Missouri law and should be submitted when supported by sufficient evidence.

This Court first adopted a comprehensive system of comparative fault in *Gustafson v. Benda*, 661 S.W.2d 11, 14, 16 (Mo. 1983) because it was in the "best interest of all litigants." Since then, Missouri courts have often emphasized that comparative fault is favored under Missouri law because it supports equal treatment of plaintiffs and defendants.

> [I]t can be seen that the concepts underlying the adoption of the doctrine of comparative fault are directed toward the elimination of the inequities inherent in legal doctrines which irrationally imposed total responsibility upon one party for the consequences of the conduct of both parties. Accordingly, where there is evidence that the conduct of both parties combined and contributed to cause damage, the fact finder should not be precluded from comparing the respective contributions toward such causation made by each.

Earll v. Consol. Aluminum Corp., 714 S.W.2d 932, 936 (Mo. Ct. App. 1986).

Missouri courts have further held that, absent an agreement otherwise, "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. Ct. App. 2000) (emphasis added); *see also Kramer v. Chase Resorts, Inc.*, 777 S.W.2d 647, 652 (Mo. Ct. App. 1989) (noting the

"mutual" benefits produced by comparative fault due to its "evenhanded treatment of both plaintiffs and defendants").

Here, however, the circuit court instructed the jury to take an all-or-nothing approach to liability even though, as more fully discussed below, Respondent's conduct in letting go of the raft's safety straps caused or contributed to her accident. As a result, Cedar Fair was entitled to have comparative fault submitted to the jury with an instruction that it must weigh each party's percentage of fault.[13]

C. The circuit court's basis for rejecting comparative fault was the result of a misapplication of law and the standard of review.

The circuit court refused to submit or instruct on comparative fault because it agreed with Respondent that there was insufficient proof of the subjective reason she "let go" of the raft's straps. *See* T:663 ("I've ruled in favor of the plaintiff on comparative fault not being submitted."); *id.* at 666-68 (agreeing with Respondent that a comparative fault instruction was not warranted because of "multiple inferences" from the evidence and the "different" testimony about how the accident occurred); *id.*at 667-668 (rejecting Cedar Fair's comparative fault instruction because the "Court has already made its ruling [to not submit comparative fault]"); *see also* Supp. LF:44; A:20-22 (Cedar Fair's proposed comparative fault instruction).

The Court of Appeals employed this same, flawed rationale—it agreed (as did Respondent) that there was evidence that Respondent let go of the raft's straps, but

[13] Cedar Fair pleaded comparative fault as an affirmative defense. I LF:130.

held "there was no evidence whatsoever" of the reason *why* Respondent let go (*e.g.*, "letting go to experience a greater thrill, as opposed to non-negligently releasing the straps because of the force of the ride.") Slip. Op. at 13-14.

The lower courts' rejection of comparative fault is the product of an improper application of Missouri law and the use of the wrong standard of review.[14] Cedar Fair was not required to prove *why* Respondent let go because negligence is an *objective* evaluation of *conduct*. In addition, applying the appropriate standard of review, the evidence and only permissible inference therefrom is that Respondent's conduct was negligent because she *voluntarily* let go of the straps despite warnings to hold on.

i. Negligence is an objective evaluation of conduct.

It is, literally, a hornbook principle of tort law that "[n]egligence *is conduct, and not a state of mind*." *Hyde v. City of Columbia*, 637 S.W.2d 251, 272 (Mo. Ct. App. 1982) (quoting Prosser, *The Law of Torts* § 31, 145 (4th ed. 1971)) (emphasis

[14] The Court of Appeals applied an abuse of discretion standard. Slip. Op. at 11-12 (citing *McCullough v. Commerce Bank*, 349 S.W.3d 389, 396 (Mo. Ct. App. 2011)). However, this is the standard for determining the propriety of a trial court's refusal to give a not-in-MAI instruction. *See McCullough*, 349 S.W.3d at 396. The Court of Appeals must have overlooked its own precedent holding that "[t]he refusal to give a verdict director supported by the law and the evidence *is not a matter for the trial court's discretion*." *Marion v. Marcus*, 199 S.W.3d 887, 893 (Mo. Ct. App. 2006) (emphasis added).

added). "The standard imposed by society is an external one, which is not necessarily based upon any moral fault of the individual; and a failure to conform to it is negligence, even though it may be due to stupidity, forgetfulness, an excitable temperament, or even sheer ignorance." *Id.*

The definition of "fault" in the Uniform Comparative Fault Act further makes it clear that fault should be based on "conduct" and not the reasons for conduct.[15] In relevant part, the Act defines "fault" as "*acts or omissions* that are in any measure negligent or reckless toward the person or property of the actor or others"; the definition also includes the "unreasonable *failure to avoid an injury* or to mitigate damages." Uniform Comparative Fault Act at § 1(b) (emphasis added).

Moreover, the jury decides whether conduct is negligent by making an *objective* determination. "[C]ontributory negligence is 'conduct which … falls short of the standard to which the reasonable man should conform in order to protect himself from harm.'" *Kramer*, 777 S.W.2d at 650 (emphasis omitted); *see also Walley v. La Plata Volunteer Fire Dep't*, 368 S.W.3d 224, 229 (Mo. Ct. App. 2012) (defendant is entitled to a comparative fault instruction "[i]f there is evidence from which a jury could find that plaintiff's *conduct* contributed to cause some of the damages the plaintiff sustained[.]") (emphasis added).

---

[15] This Court adopted the Uniform Comparative Fault Act in *Gustafson*, 661 S.W.2d at 15-16. It provided a copy of the Act in Appendix A of its opinion. *Id.* at 17-27.

Simply put, there is no requirement in Missouri that a party prove an opposing party's subjective reasons for engaging in conduct claimed to be negligent. Were it otherwise, proof that a party was speeding prior to an automobile collision would be insufficient to make a submissible case of negligence unless there was also evidence of the *reason why* that party was speeding. The *conduct* of speeding itself is sufficient to prove a claim of negligence. Similarly, Respondent's conduct in letting go of the safety straps was sufficient to submit a comparative fault claim; there was no requirement for Cedar Fair to prove *why* she engaged in this conduct.

ii. Evidence of comparative fault must be viewed in the light most favorable to Cedar Fair.

The record below contains conflicting testimony about how Respondent's accident occurred. Statements taken at the time of the accident established that Respondent caused the accident and was injured because she let go of the raft's straps. However, at the time of trial—12 years after the accident—the witnesses' recollection of the events had changed.[16] In fact, Kelly, Respondent's cousin and rafting

[16] This Court has recognized that previous statements and testimony have greater indicia of reliability than trial testimony. *See Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423, 426 (Mo. 1985) ("[t]he prior statement is always nearer and usually very much nearer to the event than is the testimony. The fresher the memory, the fuller and more accurate [any statement] is.") (alterations in original).

companion, admitted that, by time of trial, she only had a "fuzzy" recollection of the incident. T:184-86, 190.

Conflicting evidence is apparently what caused the circuit court to refuse to submit comparative fault. *See* T:668 (finding "multiple inferences in this case" and "different" testimony). But this was an erroneous basis for rejecting comparative fault—it was the jury's duty to resolve conflicting evidence, and the circuit court's duty to determine whether to submit comparative fault after viewing the "[e]vidence and any inferences drawn therefrom" in the light most favorable to Cedar Fair. *Smith*, 275 S.W.3d at 806, *see also Fujita v. Jeffries*, 714 S.W.2d 202, 206 (Mo. Ct. App. 1986) ("Substantial evidence is that which a reasonable mind would accept as sufficient to support a particular conclusion, granting all reasonable inferences which can be drawn from it, *and deferring all issues of weight and credibility, to the fact finder*.") (emphasis added). It was also the circuit court's duty to disregard Respondent's evidence that did not support the submission of comparative fault. *See Berra v. Union Elec. Co.*, 803 S.W.2d 188, 190 (Mo. Ct. App. 1991).

Viewed in the proper light, there was abundant evidence to support the submission of comparative fault. For starters, Kelly admitted at trial that she had previously testified that the accident occurred *because* Respondent "let go" of the straps. T:182, 184, 194-96, 215-16, 649-50; *see also* Cedar Fair's Exhibit 107. Second, an Oceans of Fun park ranger created an incident report *on the day of the accident* that described the incident the same way as Kelly did—Respondent "let go of the raft which caused her to strike Ms. Cooper's head." T:184, 215-16, 343, 649-

50; A:11-12. Third, a responding paramedic's report *on the day of the accident* is also consistent: "[W]hen questioning [Respondent] … on how the injury happened, she stated that during the ride, she let go of the straps." T:215-16, 344.

Respondent's expert also testified that the accident at issue "should not have happened" if the riders had held on to the straps. T:426. Cedar Fair's expert agreed that the accident "would not have happened if she [Respondent] had held on." T:503. There was even evidence that it is physically impossible for the heads of opposing riders to contact if rafters are seated properly and holding on to the straps. T:355. The reasonable inference from this evidence is that Respondent must have let go because the accident could not have happened without her doing so.

In addition, the only permissible inference from the evidence is that Respondent *voluntarily* let go of the straps. For example, Respondent was so sufficiently warned by Cedar Fair that she admitted there was no doubt in her mind that she was supposed to hold on the raft's straps at all times. T:616. Yet minutes after the accident, Respondent told a paramedic that the injury happened because she let go. T:215-16, 344. Such testimony suggests that Respondent was candidly informing a paramedic that the accident had happened because she had done precisely what she was thoroughly instructed not to do—let go.

In contrast, the evidence and reasonable inferences therefrom readily negate the conclusion that Respondent *involuntarily* released the straps. Respondent's expert testified that rafters let go of the straps for "a lot of reasons" including "on purpose for a thrill." T:412. Moreover, neither Respondent nor her companions had any difficulty

holding on to the straps during the ride. T:197, 216-17; *see also* T:363. And both Respondent's expert and Cedar Fair's expert agreed that the forces of Hurricane Falls did *not* prevent Respondent from holding on. T:447, 546.

Finally, evidence that Respondent assumed the risk of riding Hurricane Falls also supports the submission of comparative fault.[17] Specifically, the doctrine of implied secondary assumption of risk "occurs when the defendant owes a duty of care to the plaintiff but the plaintiff knowingly proceeds to encounter a known risk imposed by the defendant's breach of duty." *Sheppard v. Midway R-1 Sch. Dist.*, 904 S.W.2d 257, 262 (Mo. Ct. App. 1995). "If the plaintiff's *conduct* in voluntarily encountering a known risk is itself unreasonable, it amounts to contributory negligence and is therefore subsumed as an element of fault to be compared by the jury." *Id.* (emphasis added).

Here, Respondent proceeded on a theory that Cedar Fair had a duty to warn her of the potential dangers of rafting Hurricane Falls. Cedar Fair posted multiple signs warning Respondent to "hold on" at all times, which she "probably saw" as she progressed through the turnstiles and stairs toward the ride's launching point. *See* T:615; *see also* II LF:227, 229; Respondent's Exhibits 12-13; A:9-10 (photographs of the signs). These signs also warned her that Hurricane Falls was "aggressive" and

[17] Cedar Fair pleaded assumption of the risk as an affirmative defense. I LF:131.

that it presented a risk of injury: "Expectant mothers, or guests with back, neck, muscular, skeletal, or other infirmities should not use this ride." II LF:227; A:9.

Respondent had heard from friends that Hurricane Falls was "fun" and went to Oceans of Fun for "the thrills." T:614-15. She even assessed the risks of riding Hurricane Falls when she watched rafters while standing in line. T:616. From this vantage point she would have observed the speed and movements of the rafts.

Respondent then made the voluntary decision to raft down a 680-foot-long water slide, with a 70-plus-foot drop, a 6 percent grade (T:303), and water flowing down it at approximately 8,000 gallons per minute (T:435). Despite knowledge that Hurricane Falls was a thrill ride, and despite repeat instructions to hold on, Plaintiff voluntarily encountered a risk by letting go of the straps on the raft.

D. Summary of Point Two: This Court should reverse the judgment below and remand for a new trial.

Applying the appropriate standard of review to the evidence of record, Cedar Fair was *entitled* to have comparative fault submitted to the jury. *Rudin*, 30 S.W.3d at 841. Failure to submit comparative fault was also inherently prejudicial to Cedar Fair because it required the jury to apply "legal doctrines which irrationally imposed total responsibility upon one party for the consequences of the conduct of both parties." *Earll,* 714 S.W.2d at 936. A new trial is therefore warranted so that the jury can consider and apply the evidence in a way that results in "evenhanded" treatment of Respondent *and* Cedar Fair. *Kramer*, 777 S.W.2d at 652. In short, the trial court's

refusal to submit and instruct the jury as to Respondent's comparative negligence warrants a new trial.

CONCLUSION

Appellant Cedar Fair, L.P. respectfully requests that the Court reverse the judgment below and remand this case for a new trial.

Respectfully submitted,

LATHROP & GAGE LLP

By: */s/ Chad E. Blomberg*

Thomas Stahl #21715
David R. Frye #45071
Chad E. Blomberg #59784
2345 Grand Boulevard, Suite 2200
Kansas City, MO 64108
Tel: (816) 292-2000
Fax: (816) 292-2001
tstahl@lathropgage.com
dfrye@lathropgage.com
cblomberg@lathropgage.com

ATTORNEYS FOR APPELLANT
CEDAR FAIR L.P.

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 9,534 words.

/s/ Chad E. Blomberg
An Attorney for Appellant
Cedar Fair, L.P.

CERTIFICATE OF SERVICE

The undersigned certifies that on December 10, 2013, a copy of the foregoing Substitute Brief of Appellant, together with the Certificate of Compliance, this Certificate of Service and the Appendix, was served via the Court's electronic filing system on the counsel of record below who have registered with Missouri's electronic filing system:

H. William McIntosh
Steven L. Hobson
Meredith R. Peace
1125 Grand Boulevard, Suite 1800
Kansas City, MO 64106

Attorneys for Respondent
Jessica Chavez

/s/ Chad E. Blomberg
An Attorney for Appellant
Cedar Fair, L.P.