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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SMRITI NALWA, Plaintiff and Appellant, v. CEDAR FAIR, LP, Defendant and Respondent.	H034535 (Santa Clara County Super. Ct. No. CV089189)

After appellant, Smriti Nalwa, M.D., broke her wrist on a bumper car ride at Great America amusement park, she sued respondent owner of the park, Cedar Fair L.P., for damages. She appeals from a judgment entered after the trial court granted respondent's motion for summary judgment on the grounds that the primary assumption of risk doctrine barred recovery. We will hold that primary assumption of risk is inapplicable to regulated amusement parks, that it does not apply to cases where the illusion of risk (as opposed to actual risk) is marketed and finally that in this case issues of fact predominate. Based on these holding we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On July 5, 2005, appellant, an OB/GYN physician and surgeon took her son, age 10 and daughter, age 7, for a day of fun at Great America Amusement Park, located in Santa Clara California. While there, the family decided to ride the two minute Rue Le Dodge bumper car ride. The ride consisted of a number of small car-like vehicles that moved in any direction around a flat surface track powered by electricity. In addition to

an exterior bumper, the cars were padded throughout the interior and had seatbelts. The driver of each bumper car controlled both the steering of the car as well as its speed. Once the ride started, the respondent had no control over the individual cars.

In addition to Great America, respondent owns and operates four amusement parks in the United States and Canada. Each of these parks has a bumper car ride. In 2005, the four other parks configured their bumper car rides so that the cars were more likely to be driven in only one direction. Respondent knew that unidirectional travel helped to significantly reduce the number of head-on collisions. However, in 2005, although head-on collisions were prohibited, the only precaution employed at Great America against such collisions was *post*-collision admonitions to riders from the ride operators. At all times the two operators of the ride could turn off the electrical power and stop the cars.

Although respondent maintained control over any design or design modification of the ride, the California Code of Regulations, title 8, section 35, which regulates the operational safety of all amusement park rides, required respondent to conduct regular safety testing and report any accidents or injuries. (Cal. Code Regs., tit. 8, § 3900 et. seq.) The California Department of Industrial Relations, Division of Occupational Health and Safety (DOSH) inspected the ride annually and in 2004 and 2005 found no safety-related problems with the ride. On the morning of the incident, Great America staff inspected the ride and found it to be working within normal parameters.

Prior to boarding the ride, appellant saw posted warnings about the possibility of bumping and sudden movement and direction changes. However, there was no warning regarding the prohibition against head-on bumping. Appellant chose to ride as a passenger in the bumper car with her son while her daughter went in a bumper car by herself. During the ride, appellant's bumper car was hit head-on and then immediately hit from behind. Feeling "pushed around," and needing to "brace" herself, appellant put her hand on the dash and fractured her wrist.

In 2004 and 2005, 55 people, including appellant, were injured on the bumper car ride, however, appellant was the only one who suffered a fracture. In 2006, respondent finally modified the Rue Le Dodge ride at Great America to make it consistent with their other parks, by adding an island in the middle of the track so that riders all drive in the same direction.

On January 25, 2008, appellant filed her second amended complaint for personal injuries sustained on the Rue Le Dodge ride. The complaint alleged causes of action for common carrier liability, willful misconduct, strict products liability and negligence. After respondent filed a motion for summary judgment, appellant dismissed the products liability causes of action. The trial court granted the motion as to the remaining claims.

The court found that the doctrine of primary assumption of risk barred recovery both as to the regular negligence and the common carrier claims because appellant's injuries arose from bumping, a risk inherent in the activity of riding bumper cars. Further, the court stated that, "Defendant did not have a duty to reduce risks that are inherent to bumper car riding. [Citation.]" The court also found that there were no triable issues of material fact as to the willful misconduct cause of action because defendant established that "it did not act with the knowledge that injury was likely to result or with wanton and reckless disregard of the possible consequences. [Citation.]" Thereafter the trial court entered judgment in favor of defendant, and this appeal ensued.

DISCUSSION

This case is about a woman who took her children on a ride at an amusement park and broke her wrist: hardly an expected turn of events for a surgeon spending a family day of fun at Great America. She now seeks to recover from the park owners for this injury. The trial court found that the park owed her no duty under the primary assumption of risk doctrine, and thus, was not liable to her for the injury. The broad question before us is whether, and under what circumstances, an amusement park owner can be held liable for such a personal injury. The more specific question is whether the

primary assumption of risk exception applies to this case, barring recovery. That "is a question of law which must be decided on a case-by case basis." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472, citing *Isaacs v. Hunting Memorial Hospital* (1985) 38 Cal.3d 112, 124.)

Standard of Review

"A defendant moving for summary judgment must show either (1) that one or more elements of the plaintiff's cause of action cannot be established, or (2) 'that there is a complete defense to that cause of action.' [Citation.] '[T]he defendant has the initial burden to show that undisputed facts support each element of the affirmative defense.' [Citation.]." (*Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 796 (*Shannon*).) "Once the defendant … has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or defense thereto. . . ." (Code of Civ. Proc., § 437c, subd. (p)(2). Code of Civil Procedure section 437c, subdivision (c) provides, "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." The papers are to be construed strictly against the moving party and liberally in favor of the opposing party; any doubts regarding the propriety of summary judgment are to be resolved in favor of the opposing party. (*Branco v. Kearny Moto Park, Inc.* (1995) 37 Cal.App.4th 184, 189.) Here, respondent moved for summary judgment on the ground that the doctrine of primary assumption of risk barred recovery on the negligence based causes of action and that

plaintiff could not establish the elements of her causes of action for common carrier liability or willful misconduct.

On review from an order granting or denying summary judgment, we examine the facts presented to the trial court and determine their effect as a matter of law. (*Parsons v. Crown Disposal Co., supra,* 15 Cal.4th at p. 464.) "The application of the affirmative defense of primary assumption of risk requires a legal conclusion that 'by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury.' [Citation.]" (*Shannon v. Rhodes, supra,* 92 Cal.App.4th at pp. 795 -796) Where, as here, a defendant asserts that "plaintiff's evidence failed to establish the 'duty' element of plaintiff's cause of action for negligence," the trial court resolves the existence or nonexistence of a duty as a matter of law. (*Parsons v. Crown Disposal Co., supra,* 15 Cal.4th at pp. 464-465.) Issues of law are reviewed by this court de novo. (*Shannon v. Rhodes, supra,* at pp. 795-796.) Accordingly, we independently analyze the nature of appellant's activity at respondent's amusement park and both appellant's and respondent's relationships to that activity in order to determine whether, "as a matter of public policy, the [respondent] should owe the [appellant] a duty of care." (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 541.)

Primary Assumption of Risk Does Not Bar Recovery

"As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person. (See Civ. Code, § 1714.) Thus, for example, a property owner ordinarily is required to use due care to eliminate dangerous conditions on his or her property. [Citation.]" (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315 (*Knight*), referencing *Rowland v. Christian, supra,* 69 Cal.2d 108.) According to respondent, however, a park owner cannot be held liable for such an injury. The risk of being bumped and breaking a bone, respondent contends, is inherent in the nature of a bumper car ride; therefore, recovery is barred by the primary

assumption of risk doctrine. Respondent's position flies in the face of both California public policy and the law of torts. Therefore, we decline respondent's invitation to extend the doctrine of primary assumption of risk to amusement park rides.

"The traditional doctrine of assumption of the risk was a potent defense that sheltered negligent defendants from liability to injured plaintiffs in a wide variety of settings ranging from injuries at sporting events to employees injured on the job prior to the enactment of workers' compensation legislation." (Ursin & Carter, *Clarifying Duty: California's No-Duty-For-Sports Regime* (2008) 45 San Diego L.Rev. 383, 384, fn. omitted.) The pre-1986 liberal California Supreme Court had narrowed the assumption of risk doctrine to the "point of virtual extinction." (*Ibid*.) However, in 1992, a more conservative Supreme Court reinvented the doctrine in *Knight v. Jewett, supra,* 3 Cal.4th 296 and *Ford v. Gouin* (1992) 3 Cal.4th 339. *Knight* has since become the seminal case delineating the primary assumption of risk doctrine in light of the Supreme Court's adoption of comparative fault principals in *Li v. Yellow Cab Co*. (1975) 13 Cal.3d 804. The *Knight* court, in a plurality opinion, held that the primary assumption of risk doctrine bars liability between co-participants in a sport when one is injured by rough play. To allow liability in such a context, the court held, would chill "vigorous participation in" the sport and could "alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity." (*Knight, supra,* 3 Cal.4th at pp. 318-319.) In its subsequent decision in *Kahn v, East Side Union High School District* (2003) 31 Cal.4th 990 (*Kahn*), the court summarized the scope of its holding in *Knight*. The court stated, "[W]e held that the plaintiff's claim should be barred entirely because of a *legal* determination that the defendant did not owe a duty to protect the plaintiff from the particular risk of harm involved in the claim. [Citation.] We observed that such cases frequently arise in the context of active sports, and warned that 'the question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm . . . turn[s] on . . . the nature of the activity or sport in which the defendant is engaged and the

relationship of the defendant and the plaintiff to that activity or sport.' [Citations.]" (*Id.* at pp. 1003-1004.) Therefore, in the post-*Knight* world, the application of the primary assumption of risk doctrine depends on two factors: 1) the nature of the activity or sport, and 2) the relationship between the parties.

The nature of the sport or activity is critical because *Knight* held that "defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself . . . ." (*Knight, supra,* 3 Cal.4th p. at 315.) As a result, post-*Knight* courts have, on a case-by-case basis, grappled with whether a sport or activity is of the type subsumed by the doctrine and, if so, what the inherent risks of such an activity are. In addition to the activity itself, courts must also look at the relationship of the parties to each other and to the sport. The *Knight* court hypothesized that sports injury cases could involve, "diverse categories of defendants whose alleged misconduct may be at issue" and "the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue." (*Id.* at p. 318.) The court in *Kahn* echoed the importance of the role played by the defendant. The court stated that, "Duties with respect to the same risk may vary according to the role played by particular defendants involved in the sport." (*Kahn, supra,* 31 Cal.4th at p. 1004.) The *Knight/Kahn* framework suggests that a court looking to apply the primary assumption of risk doctrine to non-participant defendants should first identify the category of defendant seeking the doctrine's protection and the role they play. Then a court should examine the policies applicable to that category of defendant, and in the commercial context, assess the policy impact of imposing a "no-duty" finding. (See Ursin & Carter, *Clarifying Duty: California's No-Duty-For-Sports Regime, supra,* 45 San Diego L.Rev. at p. 406.)

In suggesting that primary assumption of risk bars recovery, respondent contends that amusement park rides are the type of sport or activity encompassed by the *Knight* doctrine. Respondent urges us to conclude that being bumped in a bumper car ride is an inherent risk of the activity, and that, even though, respondent is the proprietor of the

park, it did not owe the appellant a duty of care to protect her from any injury resulting from being bumped. Respondent can point to no case, and we have found none, where a post-*Knight* California court has applied the primary assumption of risk doctrine to an amusement park owner.[1]

The dissent proposes to abandon the sport-based analysis set out by *Knight* entirely and to expand the doctrine to any activity with an inherent risk. Such an expansion is unwarranted and unsupported by the case law. While any general analysis of risk surely begins with an idea that we all assume the risks of living, the primary assumption of risk doctrine in its modern, post-*Knight* construction is considerably narrower in its application. The dissent's expansive reading of *Knight* is unwarranted and an inappropriate exercise of judicial authority. *Knight*, by its own terms, limited the primary assumption of risk doctrine to sporting-type activities. In fact, the *Knight*

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[1] Respondent relies on several out of state authorities which purportedly barred recovery against amusement parks because injuries sustained as a result of risks inherent in the ride. Respondent fails to explain how these cases are persuasive or even relevant under a post-*Knight* analysis. We do note that the most auspicious Judge Cardozo, in *Murphy v. Steeplechase Amusement Co*. (N.Y. 1929) 166 N.E. 173, a case where the plaintiff broke a kneecap on an amusement park ride called the flopper, held that "Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary . . . ." Judge Cardozo suggested that "The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation. . . . The timorous may stay at home." (*Id*. at pp. 482-483.) While we certainly wouldn't presume to question Judge Cardozo's poetic alliteration, his reasoning does not apply here. First of all, Cardozo was reviewing a case after a jury verdict, not on motion for summary judgment. Second, Cardozo's discussion focuses on plaintiff's knowing acceptance of the risk, not on the absence of duty, as the doctrine is now crafted in California. **(***Knight, supra*, 3 Cal.4th at pp. 309, 311-312, & fn. 5.) Finally, we cannot know, as the case does not reveal, what, if any, regulations New York had at the time regarding amusement park rides. Judge Cardozo's opinion makes no mention of any such protective legislation or regulations. Respondent's cases can be similarly distinguished. Our playing field is quite different. While amusement parks in 21st century California are still not retreats for meditation for the timid, riders here and now do get assurances of safety from a stringent regulatory scheme.

majority specified that primary assumption of risk, post-*Li*, survives only in the limited context of sporting activities and the firefighter rule. (*Knight*, supra, 3 Cal.4th at p. 309, fn. 5.)

Instead of beginning our analysis, as most courts do, with an analysis of the nature of the activity and its inherent risks, we begin by looking at the special relationship between the amusement park owner and its patrons, and the duties that flow therefrom. This analysis is dispositive.

A) Public Policy Bars the Application of the Primary Assumption of Risk

We do not go to amusement parks expecting to be injured. Common sense dictates that, while amusement park rides present a possibility of harm, breaking a bone is not a natural or expected consequence of going on a ride; whether that ride is a fast roller coaster, a stage coach, a train or a bumper car ride of moderate speed which children are allowed to control. Respondents themselves admit that of the 600,000 people who rode the bumper car in the years 2004 and 2005, only 55 people sustained injuries, most of those minor. If park goers did fear injury, Walt Disney Parks would surely not be grossing annual revenues nearing 11 billion dollars.[2]

The very reason we go on amusement park rides is because we "seek the *illusion of danger* while being assured of [a ride's] actual safety. The rider expects to be surprised and perhaps even frightened, but not hurt." (*Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1136 (*Gomez*), emphasis added.) While some rides may have inherent dangers owning to speed or mechanical complexities, parks which operate for profit hold out their rides as being safe with the expectation that thousands of people, many of them children, will be riding. (*U.S. Fidelity & Guaranty Co. v. Brian* (5th Cir.1964) 337 F.2d 881, 883.) In California, this "thrilling-while-safe" illusion is maintained not only through complex

[2] (The Walt Disney Company Reports, Fourth Quarter Earnings, p. 2 <http://corporate.disney.go.com/investors/quarterly_earnings/2010_q4.pdf >(as of June 6, 2011.)

design, but also by a protective regulatory scheme governing amusement parks, administered by the DOSH. (Cal. Code Regs., tit. 8, § 3900.) These regulations set standards for every aspect of amusement park ride safety, including "design, maintenance, construction, alteration, operation, repair, inspections, assembly, disassembly, and use of amusement rides . . . ." (*Ibid.*; *id.* § 3907, subd. (b) [passenger carrying . . . rides].) The Supreme Court itself has recognized that a statute, ordinance or regulation could, under the proper circumstances, "impose a duty of care on defendant that may otherwise be precluded under the principals set forth in *Knight*." (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1071, citing *Ford, supra,* 3 cal.4th 339; see also Evid. Code, § 669; *Davis v. Gaschler* (1992) 11 Cal.App.4th 1392, 1399.) The elaborate regulatory scheme governing California amusement parks, was, by its own terms, established "for the protection of persons using such rides." (Cal. Code Regs., tit. 8, § 3900.) This is exactly the type of regulation which imposes a duty on the operators of such rides irrespective of *Knight's* no-duty rule

We may draw a parallel between one regulated industry and another. The Occupational Safety and Health Administration (OSHA) (29 U.S.C. § 651), for example, has as its aim to control safety and health in the workplace. Many of the regulated activities are activities and conditions encountered within the normal scope of the work environment. The public policy behind assuring safety in the workplace is well settled. (29 U.S.C. § 651(b).) No one would argue that an employer could escape liability for a dangerous condition on its premises simply because the injury resulted from a job risk and that there was no specific OSHA regulation addressing it. Any determination regarding liability for work place injury begins with the overriding public policy requiring an employer to provide a safe workplace. So here, any determination regarding liability of an amusement park owner must begin with the overriding public policy requiring the owners of amusement parks to make the parks safe for their patrons.

In reinventing the primary assumption of the risk doctrine for sports injury cases, the *Knight* court was heavily influenced by policy considerations underlying the application of the doctrine to the sports setting. (Bright, *Reconciling an Old Dog's New Tricks*: *The California Supreme Court Remodels Assumption of Risk in Knight and Ford* (1993) 26 Beverly Hills Bar J. 149, 152.) The Court was primarily concerned with the "chilling effect" imposing liability may have on the "vigorous participation" in sport. (*Knight, supra,* 3 Cal.4th p. at 318.) Those policy considerations are reversed in the amusement park setting. As the regulatory scheme bears out, the concern is not to excuse possible dangerous conditions in order to increase the thrill of a ride. Instead, rider safety is of paramount concern. Public policy, under the facts here, supports the imposition of a duty on amusement park owners, to protect the public from the possible grave dangers of amusement park rides. (Cal. Code Regs, tit. 8, § 3900.)

Recognizing this public policy, California courts have held owners of recreational rides to the higher standard of care usually imposed on common carriers. "There is an unbroken line of authority in California classifying recreational rides as common carriers . . . ." (*Gomez , supra,* 35 Cal.4th 1125, 1132.) In *Kohl v. Disneyland, Inc.* (1962) 201 Cal.App.2d 780, the court of appeal held that the operators of a stagecoach ride at Disneyland were common carriers. In a subsequent case against Disneyland, the Federal District Court in California, held the park to the higher common carrier standard where a plaintiff riding on the Pirates of the Caribbean ride was injured after a boat in which she was sitting was struck from behind by another boat. (*Neubauer v. Disneyland, Inc.* (C.D.Cal.1995) 875 F.Supp. 672, 673.) The court stated that "At the 'Pirates of the Caribbean,' defendant offered to the public to carry patrons. Under these allegations, the duty of utmost care and diligence would apply to Disneyland." (*Ibid.*) Most recently, in *Gomez,* the California Supreme Court reaffirmed this duty of "utmost care" imposed on proprietors of amusement park rides. (*Ibid.*) The Court explained that the higher duty is "based on the recognition that ' "[t]o his diligence and fidelity are entrusted the lives and

safety of large numbers of human beings." ' [Citation.]." (*Gomez, supra,* 35 Cal.4th at p. 1136.)

Despite this history of holding the owners and operators of amusement park rides to a higher standard of care in our society, respondent now crafts its argument to suggest that not only does it not owe a duty of care, but that it owes *no* duty at all to protect riders. The dissent dismisses these important public policy considerations, concluding only that respondent didn't violate any regulations. These conclusions miss the point. It would be inconsistent with the duties imposed by regulation, as well as by the case law to find that respondent has no duty to protect the appellant who entrusted her life to respondent from the risks associated with its rides. (*Gomez, supra,* 35 Cal.4th at p. 1136.)

B. Knight is Inapposite

1. Amusement Park Rides are Not the Type of Sport or Activity Susceptible to the Primary Assumption of Risk Analysis.

Even if the policy considerations were not dispositive in precluding the application of the primary assumption of risk, *Knight* directs us to look at the nature of the activity and its inherent risks before applying the doctrine. It is not the case that all activities with an inherent risk fall within the *Knight* no-duty for sports injury rule.

In *Knight* and its progeny "The court's major focus . . . ha[d] been the development of no-duty rules applicable to sporting activities." (Ursin & Carter *Clarifying Duty*: *California's No-Duty-For-Sports Regime, supra*, 45 San Diego L.Rev. at p. 385.) *Knight* itself described the doctrine of primary assumption of risk as surviving in two limited contexts: In sporting events and the firefighter rule. **(***Knight, supra,* 3 Cal.4th at pp. 309, 311 -312 & fn. 5.) Although commentators have speculated how far the *Knight* doctrine would extend, some even speculating that amusement parks would attempt to bootstrap the doctrine to avoid liability, California courts have not hesitated to limit the application of the doctrine to its proper narrow focus, especially in the context of

owners of facilities. (Ursin & Carter *Clarifying Duty: California's No-Duty-For-Sports Regime, supra,* 45 San Diego L.Rev. at p. 397; see *Shannon* 92 Cal.App.4th 792 [recreational boating not the type of activity susceptible to primary assumption of risk]; *Bush v. Parents without Partners* (1993) 17 Cal.App.4th 322, 328 [recreational dancing not the type of activity susceptible to primary assumption of risk].)

In *Shannon, supra*, 92 Cal.App.4th 792, the court considered whether the primary assumption of risk doctrine applied to a passenger in a recreational speed boat being used to ride around on a lake. After reviewing a variety of cases involving different types of activities and sports where the doctrine did and did not apply, the court analyzed whether boating fell within the definition of a sport as it has been developed in the context of the primary assumption of risk. *(Id.* at p. 797.) The court accepted the existing rule which defines a sport as an activity " 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury,' " and added that to be considered a sport "as intended by the *Knight* court," an activity must entail "some pitting of physical prowess(be it strength based [i.e., weight lifting], or skill based, [i.e. golf]) against another competitor or against some venue." (*Ibid.*, citing *Record v. Reason* (1999) 73 Cal.App.4th 472, 482.) The court concluded that being a passenger in a boat under the circumstances of that case was "too benign to be subject to *Knight.*" (*Shannon, supra*, 92 Cal.App.4th at p. 798.)

Applying these factors to the facts before us, we conclude, as did the court in *Shannon,* that riding as a passenger in a bumper car is too benign to be subject to *Knight.* On a common sense level, we simply cannot conclude that riding in a bumper car as a passenger implicates a *sport* within any understanding of the word. (*Shannon, supra*, 92 Cal.App.4th at p. 800.) Nothing within the common knowledge or the record before us suggests that this activity requires *any* amount of physical exertion, skill or physical prowess. Riding as a passenger in a bumper car in a closed circuit may provide bumps and jolts and some laughs, but that is where the adventure ends. Given these facts, like

riding as a passenger in a boat, riding as a passenger in a bumper car is too benign an activity to be considered a sport in the *Knight* context. (*Id.* at p. 798.)

There can be no other logical conclusion under *Knight.* Amusement park owners liability for injuries on their rides will affect the "nature" of rides. It will make them safer. However, given the regulatory requirements to assure safety on amusement park rides, we conclude that any effect on the rides can only be a positive one consistent with public policy.

We agree with the dissent in its characterization of the amusement as low risk. Indeed this point is emphasized in respondent's brief as well it should be. For regulatory and policy based reasons, its rides must be safe else its visitors would not use them.

The dissent's proposition that bumping is an inherent risk of the ride is no substitute for a risk analysis. Such a pure "inherency" analysis could be used to bar liability for almost any life activity. Many daily activities including doing laundry, cleaning gutters or taking out the garbage involve some "inherent" risk. To properly apply the primary assumption of risk, we must also look at the question of safety. For example ice climbing is so obviously risky no one would undertake it without rationally envisioning death. First, it is a sport. Primary assumption of risk would bar recovery not only because falling is an inherent risk, but because the chances of falling are so high, that one who undertakes the activity should anticipate injury up to and including death. As such, both the risk and the probability of injury are relevant to the inquiry. It is, therefore, rationally inconsistent to claim the safety of an activity and to also suggest that primary assumption of risk doctrine bars recovery. If the purveyor of an activity is both legally bound to make an activity safe and sells its activity, in large part based on its safety, he cannot escape liability by raising primary assumption of risk.

C. Respondent's Position as Owner Imposes a Higher Duty

Assuming for the sake of argument we were to find that an amusement park ride is the type of sport or activity contemplated by the *Knight* and its progeny, respondent's

position as owner of park nonetheless would invoke a higher duty of care even under the current construction of the primary assumption of risk doctrine. Some commentators have suggested that "As a matter of policy, it is desirable to hold those who financially profit from participation in or attendance at an athletic event to a higher standard than mere contestants," simply because of the nature of their position of control and authority. (Battersby, *Running on Empty* (2003) 1 DePaul J. Sports Law & Contemporary Problems 97, 99.) *Knight* itself held that proprietors should be obligated to take steps "in order to minimize the risk [to their patrons] without altering the nature of the sport." (*Knight, supra,* 3 Cal.4th at p. 317.) Other courts have followed suit, finding a duty to minimize risks based on the defendant's control over the instrumentalities of the injury. (See *Kahn, supra*, 31 Cal.4th at p. 1005; *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112 [order granting motion for summary judgment reversed, held: Primary assumption of risk did not bar recovery because organizer of volleyball game had a duty to minimize the risk of tripping over volleyball net tie-downs]; *Giardino v. Brown* (2002) 98 Cal.App.4th 820, 834 [order granting motion for summary judgment reversed, held: Primary assumption of risk did not bar recovery because provider of horses had a duty to use due care in selection of horse]; *Vandyke v. S.K.I. Ltd.* (1998) 67 Cal.App.4th 1310, 1317 [order granting motion for summary judgment reversed, held: Primary assumption of risk did not bar recovery because ski resort had a duty to properly post signs visible to skiers]; *Branco v. Kearney Moto Park* (1995) 37 Cal.App.4th 184,193 [order granting motion for summary judgment reversed, held: Primary assumption of risk did not bar recovery because owner of motor cross facility had a duty to design jumps in a manner so as not to create an extreme risk of injury]; *Morgan v. Fugi Country USA, Inc.*(1995) 34 Cal.App.4th 127, 129, 134-135 [order granting motion for summary judgment reversed, held: Primary assumption of risk did not bar recovery because golf course owner owed a duty to plaintiff to minimize dangers in design]; *Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 358, 364 [order granting motion for summary judgment reversed, held:

Primary assumption of risk did not bar recovery because ski resort had a duty to warn a skier when it converted a normal ski area into a more dangerous racing area]; *Eriksson v. Nunnick* (2011) 191 Cal.App.4th 826, 847, 850, 853 [order granting motion for summary judgment reversed, held: Primary assumption of risk did not bar recovery because one who has authority to make decisions regarding a horse's participation in an event had the duty to assure the horse's fitness. Triable issues remained regarding scope of duty, breach and causation.].)

With great power comes great responsibility.[3] Because of their position of control over the premises they hold open to the public for profit, proprietors are uniquely positioned to eliminate or minimize certain risks, and are best financially capable of absorbing the relatively small cost of doing so. (See *Kahn, supra*, 31 Cal.4th at p. 1004; *Saffro v. Elite Racing, Inc.* (2002) 98 Cal.App.4th 173, 179.) Holding owners responsible for minimizing risk is just good policy. Failure to do so could expose the public to unnecessary risk. "Organizers looking to turn a greater profit could skimp on simple measures that would greatly minimize the risks of their particular sport . . . [while in]

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[3] This age old truth and expression, most recently popularized by Stan Lee in the pop book and movie, *Bat Man*, finds it origins in antiquity. "[F]rom the one who has been entrusted with much, much more will be asked" (Luke 12:48.); "With great power comes great responsibility" (Beuchot and Miger et. al., Œuvres de Voltaire, Volume 48. (Lefèvre 1832), quoting Jean Adrien Voltaire); "Rule worthy of might" (Socrates). Additional more modern sources/usages include: "Today we have learned in the agony of war that great power involves great responsibility" (Zevin, Nothing to Fear, (1961) p. 464, quoting Franklin D. Roosevelt.); "In a democratic world, as in a democratic nation, power must be linked with responsibility. . . ." (Commager, Living Ideas in America (1951) p. 703, quoting Franklin D. Roosevelt.); ". . . I believe in power; but I believe that responsibility should go with power . . . ." (Brands, T.R.: The Last Romantic (Basic Books 1997) pp. 628-9 quoting a 1908 letter from Theodore Roosevelt as cited in The Letters of Theodore Roosevelt, 8 volumes,(Harvard Press 1951-54). Other variations include: "Power without responsibility . . . the prerogative of the harlot throughout the ages." (Rudyard Kipling); "To whom much is given, much is required." (John F. Kennedy) (Evanier, *With Great Quotes, There Must Also Come Many Letters* (October 2005) Povonline" <http//www.newsfromme.com/archives/2005_10_06.html> (as of Jun. 8, 2011).)

most cases, the costs of minimizing the risks inherent in an athletic event are minimal when balance with the danger of the risk they diminish." (Battersby, *Running on Empty*, *supra,* 1 DePaul J. Sports Law & Contemporary Problems at p. 99.) It is entirely consistent with both *Knight* and the prevailing commercial premises liability case law to impose reasonable duties to minimize risk on defendants who hold their premises open to the public for profit. (See *Ortega v. K-Mart Corp.* (2001) 26 Cal.4th 1200, 1211.) The trial court erred in finding that respondent owed appellant no duty at all.

Here, respondent is the owner of an amusement park. It holds the park open to the public with the promise of safe fun and excitement. Within the confines of state regulation, respondent maintains complete control over the design, maintenance and operation of the bumper car ride. Without question, it is best situated to minimize any risks associated with its rides, both because of its control and because of the profits such parks make.

Although bumping is part of the experience of a bumper car ride, head-on bumping is not. In fact, it is a prohibited activity. The evidence submitted in support and opposition of the motion showed that respondent was aware of the perils of allowing head-on collisions, and, as owner of the park, respondent had a duty to take reasonable steps to minimize those risks without altering the nature of the ride. (*Knight*, *supra,* 3 Cal.4th at p. 317; *Kahn*, *supra,* 31 Cal.4th at p. 1004.) Respondent had taken steps to eliminate or reduce the likelihood of head-on collisions at *every other* park prior to appellant's injury. However at Great America, the only precaution in place was for staff to admonish riders after a head-on collision had occurred. Since respondent had done so at its other parks, it can hardly claim that taking additional steps to minimize this risk of head-on collisions would have altered the nature of the bumper car experience. Therefore, there remain triable issues of material fact which cannot be resolved as matter of law. It is for the trier of fact to determine, given the respondent's exclusive control over the design and operation of the ride, and the obvious steps they could, and ultimately

did, take to minimize the risks of head on collisions, whether respondent breached its duty to appellant, and whether that failure caused appellant's injury.

Common Carrier Liability

Because the negligence claims are not barred by the primary assumption of risk, it will also be for the trier of fact to determine whether the nature of the bumper car ride raised the respondent to the status of a common carrier as set forth in *Gomez, supra*, 35 Cal.4th 1125. In *Gomez* the Supreme Court, reviewing an order sustaining demurrer, decided that the park owner could be a common carrier for the purposes of amusement park roller coaster ride. However, the court was careful to specify that their holding did not address whether "other, dissimilar, amusement rides or attractions can be carriers of person for reward." (*Id.* at p. 1136, fn. 5.) The similarity or dissimilarity of a bumper car ride from a roller coaster ride is a question of fact which cannot be determined as a matter of law, therefore, we leave that question for the trier of fact.

Willful Misconduct

Finally, respondent contends that there is no triable issue of material fact as to the cause of action for willful misconduct. "Willful misconduct means something different from and more than negligence, however gross. It involves ' "conduct of a *quasi* criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its possible consequences.' " [Citation.] 'To constitute willful misconduct, . . . more must be shown than the bare possibility of injury. Otherwise, there would be little distinction between willful misconduct and negligence, since negligence is predicated upon a breach of duty which is imposed when there exists a foreseeable, or potential, risk of harm.' [Citation.]" (*Perez v. Southern Pacific Transportation Co*. (1990) 218 Cal.App.3d 462, 471-472. To show willful misconduct, a plaintiff must establish, that there is "'actual or constructive knowledge of the peril to be apprehended . . . actual or constructive knowledge that injury is a probable, as opposed to possible, result of the danger, and . . . [a] conscious failure to

act to avoid the peril.' [Citation.]" (*Baines v. Western Pacific R.Co.* (1976) 56 Cal.App.3d 902, 905.)

If respondent has simply failed to modify the ride to prohibit head-on collisions, we would agree with respondent that the evidence would not suggest anything more than mere negligence. However, the evidence here shows that respondent designed its bumper car ride to prevent head-on collisions at *every other* park it owned *except* Great America. It is undisputed that they knew the dangers of head-on collisions, and the failure to act in regards to the Great America ride could be characterized as intentional, because they had taken steps to prevent the risk everywhere except Great America. The only issue here is whether they knew or should have known that the injury was probable as opposed to possible. By its nature, that is a qualitative determination not easily susceptible to determination as a matter of law. The evidence presented at summary judgment showed that there were 55 injuries over a two year period on that ride among hundreds of thousands of riders.[4] The question, however, is not whether the ride itself produced a lot of injuries, but how many of those 55 injuries resulted from head-on collisions, or how many head-on collisions produced injuries. Only that information would be instructive on whether injury was merely possible or rose to the level of probable from a head-on collision. Defendant has the burden on summary judgment to show that plaintiff cannot establish an element of her case. (*Shannon v. Rhodes*, *supra*, 92 Cal.App.4th at pp. 795-796.) Defendant has failed to carry that burden as to this element. We note, however, that even if we had that information, we would be hard pressed to conclude, as a matter of law, that a particular rate of injury makes injury possible versus probable. This is a qualitative determination which should be left to the trier of fact.

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[4] Safer by far than driving or taking a shower. If head on collisions were foreseeable by the operator before they occurred, then measures taken to reduce or eliminate them might be relevant on the issue of misconduct. Respondent's brief attempts to demonstrate that the ride was safe.

DISPOSITION

The judgment is reversed. Appellant to recover her costs on appeal.

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RUSHING, P.J.

I CONCUR:

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PREMO, J.

Nalwa v. Cedar Fair, LP
H034535

Duffy, J., Dissenting.

Under the primary assumption of risk doctrine, in certain limited instances—usually (but not exclusively) involving sports—there is no legal duty to use due care to eliminate or protect a participant against risks inherent in the sport or activity itself. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315 (*Knight*).) As recognized in 1996 and reiterated in 2005, " '[t]he full scope of the defense of primary assumption of risk has yet to be established.' [Citation.]" (*Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 870 (*Saville*), quoting *Bushnell v. Japanese-American Religious & Cultural Center* (1996) 43 Cal.App.4th 525, 530.) Here, the defendant, an amusement park, urges that the scope of the doctrine extends to its bumper car ride.

In July 2005, Smirti Nalwa, a physician, was injured on the Rue Le Dodge bumper car ride at California's Great America Amusement Park in Santa Clara (Great America). She was a passenger, and her nine-year-old son was the driver of the bumper car. Nalwa sued the park's owner, Cedar Fair, L.P., alleging, inter alia, claims for negligence, common carrier liability, and willful misconduct. Cedar Fair moved successfully for summary judgment. The court, applying *Knight, supra*, 3 Cal.4th 296, concluded that the primary assumption of risk doctrine barred the negligence claim. The court also found Nalwa's claim for common carrier liability to be meritless, rejecting her contention that under *Gomez v. Superior Court* (2005) 35 Cal.4th 1125 (*Gomez*), Cedar Fair, as an amusement park operator, was a common carrier that owed a heightened duty of care to its patrons. Lastly, the court found that there was no triable issue of material fact as to Nalwa's claim for willful misconduct.

The majority holds that (1) the primary assumption of risk doctrine as enunciated in *Knight* does not apply here because Nalwa's injuries resulted from her participation in a ride at a "regulated amusement park[]" (maj.opn. at p. 1); (2) it is for the trier of fact to determine whether Cedar Fair, under *Gomez*, was a common carrier owing its bumper car

patrons a heightened duty of care (maj. opn. at p. 18); and (3) there are triable issues of fact that preclude summary adjudication of the willful misconduct claim (maj. opn. at p. 19). I respectfully disagree with each conclusion.

Here, Nalwa participated in the Rue Le Dodge ride knowing that she would be jostled about in her car as a result of bumping into other cars. The sole purpose of a bumper car ride is to enjoy the experience and thrill of minor-impact bumping. The name of the game is to bump and to attempt to avoid (often unsuccessfully) being bumped. My independent review of the record discloses no evidence that Cedar Fair increased the risk inherent in riding Rue Le Dodge. Accordingly, based upon the nature of, and the inherent risks associated with, the activity, along with the parties' relationship to the activity, I would find that the primary assumption of risk doctrine bars Nalwa's negligence claim. Further, under *Gomez, supra*, 35 Cal.4th at page 1141, the Supreme Court held that an operator of a "roller coaster or similar amusement park ride" owes its patrons a heightened duty of care as a common carrier. The *Gomez* court, however, "express[ed] no opinion regarding, whether other, dissimilar, amusement rides or attractions can be carriers of persons for reward." (*Id.* at p. 1136, fn. 5.) Based upon this caveat and the narrow holding in *Gomez*, because the bumper car ride here is not similar to a roller coaster ride, I would hold that Cedar Fair was not a common carrier. Lastly, I find no evidence that Cedar Fair either acted with knowledge that injury was likely to result or with a wanton and reckless disregard of the possible consequences. Accordingly, I would conclude that summary adjudication of the willful misconduct claim was likewise proper.

I. *Negligence Claim*

Generally, a person owes a duty of due care to others, and he or she may be held liable if his or her careless conduct causes injury. (See Civ. Code, § 1714, subd. (a).)[1] In

[1] "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the

cases in which the doctrine of primary assumption of risk applies, however, the defendant is deemed to "owe[] no duty to protect the plaintiff from a particular risk of harm." (*Knight, supra*, 3 Cal.4th at p. 309.)

Cedar Fair argued successfully below that the doctrine of primary assumption of risk barred Nalwa's negligence claim because her injuries resulted from her being bumped while riding as a passenger in a bumper car. Because being bumped and the attendant (but low) risk of injury were inherent in the bumper car activity itself, Cedar Fair (it argued) owed no duty to Nalwa to protect her against such risk.

An extended review of the primary assumption of risk doctrine is essential in order to determine whether the court properly applied it in this instance to bar Nalwa's negligence claim.

A. *Primary Assumption of Risk Doctrine*

1. Knight v. Jewett

In *Knight, supra*, 3 Cal.4th 296—a plurality opinion authored by then-Justice George—the high court addressed the doctrine of assumption of the risk in connection with a woman's suit for personal injuries sustained during a coed touch football game among friends and acquaintances during a Super Bowl party. The court[2] considered whether, in light of the court's prior "adoption of comparative fault principles in *Li v.*

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management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself. . . ." (Civ. Code, § 1714, subd. (a).)

All further statutory references are to the Civil Code unless otherwise specified.

[2] Although *Knight* was a plurality opinion signed by only three justices, "Justice Mosk wrote a concurring opinion generally agreeing with its analysis. (*Knight*, *supra*, 3 Cal.4th at pp. 321-322 (conc. opn. of Mosk, J.).)" (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1067 (*Cheong*).) And five years after deciding *Knight*, the high court reaffirmed that "the basic principles of *Knight*'s lead opinion [are] the controlling law." (*Cheong* at p. 1067.) Therefore, while acknowledging that *Knight* was a plurality opinion, I will refer to *Knight*'s basic precepts concerning primary assumption of risk as being established law of the high court.

Yellow Cab Co. (1975) 13 Cal.3d 804" (*id.* at p. 300), the doctrine barred the plaintiff's claims. It acknowledged that historically there had been confusion "because the phrase 'assumption of the risk' traditionally has been used in a number of very different factual settings involving analytically distinct legal concepts. [Citations.]" (*Id.* at p. 303.)[3] *Knight* identified the distinction between *primary* and *secondary* assumption of the risk, explaining that the former "embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular risk," and the latter involving "instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty." (*Knight,* at p. 308.) The court concluded that the category of cases involving primary assumption of the risk was not merged into the system of comparative negligence (*ibid.*), and its application was not inconsistent with comparative fault principles. (*Id.* at p. 310.)

The court in *Knight* recognized that "whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport." (*Knight, supra,* 3 Cal.4th at p. 309; see also *Ford v. Gouin* (1992) 3 Cal.4th 339, 342.) It explained that the doctrine has been applied in sports settings as an exception to the general rule that persons must use due care to avoid injuries to others because "conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. . . . [Citation.] . . . [T]he nature of

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[3] See also *Knight, supra,* 3 Cal.4th at page 322 (conc. and dis. opn. of Mosk, J.) (assumption of risk term "now stands for so many different legal concepts that its utility has diminished"); 4 Harper, James and Gray on Torts (3d ed. 2007) Assumption of Risk, § 21.0, p. 231 (term "has led to no little confusion because it is used to refer to at least two different concepts, which largely overlap, have a common cultural background, and often produce the same legal result" (fn. omitted); 1 Dobbs, The Law of Torts (2001) § 211, p. 538: " '[W]hen we are tempted to say "assumption of risk" we should say something else. (Fn. omitted.)' ")

a sport is highly relevant in defining the duty of care owed by the particular defendant." (*Knight*, at p. 315.) As a caveat to this no-liability exception, the court stated, "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant. [Citation.]" (*Id.* at pp. 315-316.)

Justice George next observed in *Knight* that the primary assumption of risk cases have dealt with defendants having a variety of relationships with the sport at issue, including owners of facilities, manufacturers of equipment, sports coaches and instructors, and coparticipants. (*Knight, supra*, 3 Cal.4th at p. 318.) In the context of the case there, the defendant was a coparticipant. (*Ibid.*) Agreeing with the vast majority of cases in California and throughout the country, the court held that "a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Id.* at p. 320, fn. omitted.) Because it was undisputed that the defendant's conduct— characterized by the plaintiff as "rough play" (*ibid.*)—was not outside the range of ordinary activity for a touch football game, the court in *Knight* held that he owed no duty to the plaintiff. (*Id.* at p. 321.)

The doctrine, when applicable, operates as a "complete bar to the plaintiff's recovery." (*Knight, supra*, 3 Cal.4th at p. 315.) A court's determination that the primary assumption of risk doctrine applies constitutes a legal conclusion that no duty is owed.

(*Id.* at p. 308.) Accordingly, the issue is often one that may be decided by summary judgment. (*Id.* at p. at 313.) A defendant claiming that the doctrine is applicable bears the burden on summary judgment of establishing the absence of legal duty. (*Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1395.)[4]

2. *Post*-Knight *cases*

A host of cases following *Knight* have applied the primary assumption of risk doctrine in various contexts. In the interests of providing sufficient context to the application of the doctrine to this case, I discuss some of these appellate decisions.

a. *Supreme Court decisions*

In *Ford v. Gouin, supra,* 3 Cal.4th 339 (*Ford*), the companion case to *Knight*, the court upheld the trial court's granting of summary judgment in favor of the defendant, a ski boat operator/coparticipant who had been sued as a result of injuries sustained by a water-skier he was towing, who had been skiing backwards and barefoot in the Sacramento River Delta. In holding, inter alia, that the primary assumption of risk doctrine barred the claim, the court, in the lead opinion of Justice Arabian, rejected the plaintiff's contention that *Knight*'s limitation of a coparticipant's liability to intentional or reckless conduct applied only to competitive sports and not to a cooperative sport such as waterskiing. (*Ford*, at p. 345.) Justice Arabian wrote, "As noted in *Knight*, the decisions that have recognized the existence of only a limited duty of care in a sports situation

[4] Although appellate courts often erroneously refer to it as an affirmative defense (see, e.g., *Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1543; *Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 795), "the doctrine of primary assumption of risk is a limitation on the plaintiff's cause of action rather than an affirmative defense." (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1135.) Since a defendant may move successfully for summary adjudication under Code of Civil Procedure section 437c, subdivision (f)(1), by establishing an affirmative defense to the claim, that the claim has no merit, or that the defendant owes no duty to the plaintiff, it is of little practical significance here whether appellate review is couched as a determination of whether Cedar Fair established under the doctrine of primary assumption of risk that it owed no duty to Nalwa, or, alternatively, that it established an affirmative defense to the negligence claim.

generally have reasoned that vigorous participation in the sport likely would be chilled, and, as a result, the nature of the sport likely would be altered, in the event legal liability were to be imposed on a sports participant for ordinary careless conduct. [Citation.] This reasoning applies to waterskiing. Even when a water-skier is not involved in a 'competitive' event, the skier has undertaken vigorous, athletic activity, and the ski boat driver operates the boat in a manner that is consistent with, and enhances, the excitement and challenge of the active conduct of the sport. Imposition of legal liability on a ski boat driver for ordinary negligence in making too sharp a turn, for example, or in pulling the skier too rapidly or too slowly, likely would have the same kind of undesirable chilling effect on the driver's conduct that the courts in other cases feared would inhibit ordinary conduct in various sports. As a result, holding ski boat drivers liable for their ordinary negligence might well have a generally deleterious effect on the nature of the sport of waterskiing as a whole." (*Ibid.*; see also *Shin v. Ahn* (2007) 42 Cal.4th 482, 497 [doctrine applied to claim of golfer injured by errant tee shot of partner; partner as coparticipant only liable for intentional misconduct or reckless conduct outside the range of ordinary activity involved in sport]; *Cheong*, *supra*, 16 Cal.4th at p. 1068 [claim of snow-skier injured by friend and fellow skier after collision on slopes was barred under doctrine because defendant, as coparticipant in active sport, was liable only for intentionally or recklessly caused injuries].)[5]

In *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990 (*Kahn*), the court applied the primary assumption of risk doctrine to a sports instructor, i.e. a

[5] The recent, highly publicized, intentional tripping of a Miami Dolphin football player by a New York Jets strength-and-conditioning coach while the cornerback was running down the sideline covering a punt return offers an example—assuming hypothetically that an injury and a lawsuit by the player had resulted—of an instance in which a participant in a dangerous and violent sport suffered an injury as a result of intentional or reckless conduct completely outside the range of the sport's ordinary activity. (See *Jets' Sal Alosi Sorry for Tripping a Dolphin* (Dec. 13, 2010) at http://www.cbsnews.com/stories/2010/12/13/sportsline/main7144350.shtml>.)

swimming coach. The high court acknowledged that the athlete-coach relationship differed from that of coparticipants, but concluded nonetheless that "because a significant part of an instructor's or coach's role is to challenge or 'push' a student or athlete to advance in his or her skill level and to undertake more difficult tasks, and because the fulfillment of such a role could be improperly chilled by too stringent a standard of potential legal liability, . . . the same general standard [of *Knight*] should apply in cases in which an instructor's alleged liability rests primarily on a claim that he or she challenged the player to perform beyond his or her capacity or failed to provide adequate instruction or supervision before directing or permitting a student to perform a particular maneuver that has resulted in injury to the student." (*Id.* at p. 996.) It therefore held that "[i]n order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' [citation] involved in teaching or coaching the sport." (*Id.* at p. 1011; see also *id.* at p. 996.)[6]

The high court addressed a personal injury claim by a batter hit by a beanball (pitch intentionally thrown at batter by pitcher) during an intercollegiate baseball game in *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148 (*Avila*). The batter brought claims against the community college district that hosted the game. (*Id.* at p. 153.) Applying the primary assumption of risk doctrine, the court observed that "the host school's role is a mixed one: its players are coparticipants, its coaches and managers

[6] The court nonetheless held that there were triable issues of fact that precluded summary judgment in favor of the defendant concerning whether the conduct of the swimming coach in allegedly pressuring the plaintiff to perform a racing (shallow-water) dive in competition without proper training constituted recklessness in the sense that "it was totally outside the range of the ordinary activity involved in teaching or coaching the sport of competitive swimming." (*Kahn*, *supra*, 31 Cal.4th at p. 1013.)

have supervisorial authority over the conduct of the game, and other representatives of the school are responsible for the condition of the playing facility. We have previously established that coparticipants have a duty not to act recklessly, outside the bounds of the sport [citation], and coaches and instructors have a duty not to increase the risks inherent in sports participation [citation]; we also have noted in dicta that those responsible for maintaining athletic facilities have a similar duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities [citation]." (*Id.* at pp. 161-162.) The court held that the doctrine barred the claim against the school district. (*Id.* at pp. 163-166.)

b. *Court of Appeal decisions*

In the 19 years since the Supreme Court decided *Knight*, there have been numerous reported decisions in which this state's courts of appeal have applied the primary assumption of risk doctrine to various factual settings, usually to various sports ranging from baseball to river rafting. (See *Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1261 [courts have applied primary assumption of risk in over 100 published cases].)[7] Courts have emphasized that the analysis is an objective one.

[7] These sports have included volleyball (*Luna v. Vela* (2008) 169 Cal.App.4th 102); snowboarding (*Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577); jet skiing (*Whelihan v. Espinoza* (2003) 110 Cal.App.4th 1566); an organized long-distance bicycle ride (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211); collegiate baseball (*Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703); hockey, where spectator injured by stray puck flying off the ice during pregame warm-ups (*Nemarnik v. Los Angeles Kings Hockey Club* (2002) 103 Cal.App.4th 631 (*Nemarnik*); tae kwon do (*Rodrigo v. Koryo Martial Arts* (2002) 100 Cal.App.4th 946); off-road motorcycling (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249); skateboarding (*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108 (*Calhoon*); tubing behind a motorboat (*Record v. Reason* (1999) 73 Cal.App.4th 472 (*Record*); wrestling (*Lilley v. Elk Grove Unified School Dist.* (1998) 68 Cal.App.4th 939 (*Lilley*)); little league baseball (*Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47); training and exercising racehorses (*Shelly v. Stepp* (1998) 62 Cal.App.4th 1288); participation in a cattle roundup (*Domenghini v. Evans* (1998) 61 Cal.App.4th 118); sport fishing (*Mosca v. Lichtenwalter* (1997) 58 Cal.App.4th 551); golf (*Dilger v. Moyles* (1997) 54 Cal.App.4th 1452);

(*Saville, supra*, 133 Cal.App.4th at p. 866, citing *Knight, supra*, 3 Cal.4th at p. 309.) Thus, the determination is not influenced by the plaintiff's subjective knowledge or appreciation of the potential risk of the sport or activity (*ibid.*), or whether the plaintiff's conduct was reasonable or unreasonable (*ibid.*). Rather the court undertakes a two-step analysis in determining the applicability of the primary assumption of risk doctrine to a given case. It first inquires about "the objective nature of the subject sport activity, . . . and [second, assesses] the parties' general relationship to that activity. [Citations.]" (*Distefano v. Forester, supra,* 85 Cal.App.4th at p. 1262; see also *Saville*, at p. 866.)

Courts viewing the nature of the sport or activity generally apply the doctrine when "conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport [or activity] itself." (*Knight, supra*, 3 Cal.4th at p. 315.) Where the doctrine is found to apply, "the integral conditions of the sport [or activity] or the inherent risks of careless conduct by others render the possibility of injury obvious, and negate the duty of care usually owed by the defendant for those particular risks of harm. [Citation.] A duty imposed in those situations would significantly change the very purpose or nature of the activity. 'The overriding consideration in the application of primary assumption of risk is to avoid imposing a duty which might chill vigorous participation in the implicated activity and thereby alter its fundamental nature.' [Citations.]" (*Saville, supra*, 133 Cal.App.4th at p. 866, quoting *Ferrari v. Grand*

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participating in a touch football class (*Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430); figure ice skating (*Staten v. Superior Court* (1996) 45 Cal.App.4th 1628 (*Staten*)); judo (*Bushnell v. Japanese American Religious & Cultural Center, supra*, 43 Cal.App.4th 525); rock climbing (*Regents of University of California v. Superior Court* (1996) 41 Cal.App.4th 1040); snow skiing (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8 (*Connelly*)); motocross bicycle racing (*Branco v. Kearny Moto Park, Inc.* (1995) 37 Cal.App.4th 184 (*Branco*),); discus throwing (*Yancey v. Superior Court* (1994) 28 Cal.App.4th 558); horseback riding (*Harrold v. Rolling J Ranch* (1993) 19 Cal.App.4th 578); and sailing (*Stimson v. Carlson* (1992) 11 Cal.App.4th 1201).

Canyon Dories (1995) 32 Cal.App.4th 248, 253 (*Ferrari*).) At the heart of it, "[p]rimary assumption of risk is a policy-driven doctrine." (*Childs v. County of Santa Barbara* (2004) 115 Cal.App.4th 64, 73.)

B. *Application of Doctrine to Activity in this Case*

As noted, the determination of whether the primary assumption of risk doctrine applies in a given case is made from an evaluation of the nature of the activity involved and the parties' relationship to that activity. (*Distefano v. Forester*, *supra*, 85 Cal.App.4th at p. 1262.) I adhere to this two-part analysis below in determining whether Nalwa's negligence claim is barred by the doctrine.

1. *Nature of Activity*

a. *classification as a sport*

Nalwa argues that "[t]ypically, the doctrine of primary assumption of risk applies to sports activity." From this statement, she suggests that the doctrine should not apply to an activity clearly not a sport such as riding a bumper car. The majority agrees with this position. (See maj. opn. at p. 13: "On a common sense level, we simply cannot conclude that riding in a bumper car as a passenger implicates a *sport* within any understanding of the word." (Original italics.) I would reject Nalwa's contention that because the activity was clearly not a sport, the doctrine is inapplicable.

It is true that the doctrine has been applied predominantly to activities which may be considered to be sports. (See fn. 7, *ante*.) And there has been some debate among appellate courts whether the doctrine of primary assumption of risk applies where the activity that resulted in the plaintiff's injury cannot be classified as a "sport." Some appellate courts have taken the restrictive view that the doctrine applies simply to "active sports." (*Calhoon*, *supra*, 81 Cal.App.4th at p. 115; *Staten*, *supra*, 45 Cal.App.4th at p. 1632; see also *Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322, 328 [recreational dancing "not a sport, within the ambit of *Knight*"].) Indeed, one court's oft-followed test for determining the application of the primary assumption of risk doctrine is

"that an activity falls within the meaning of '*sport*' if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury." (*Record, supra,* 73 Cal.App.4th at p. 482, italics added.)[8] Others have applied the doctrine more expansively, concluding that it may apply in a given case to "a recreational activity" (*Distefano, supra,* 85 Cal.App.4th at p. 1253, fn. 1), or "to other activities involving an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity. [Citation.]" (*Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 658 (*Beninati*), citing *Knight, supra,* 3 Cal.4th at pp. 314-316; see also *Rostai v. Neste Enterprises* (2006) 138 Cal.App.4th 326, 333 (*Rostai*).) Certainly there is language in *Knight* supporting both viewpoints.[9]

I believe that the broader view of the doctrine's application as expressed in *Beninati, supra,* 175 Cal.App.4th at page 658, is the correct one. In *Knight*, then-Justice George, enunciating the basis upon which courts decide whether primary assumption of risk may apply, used the broad language that courts are to look to "the nature of the *activity or sport* in which the defendant is engaged and the relationship of the defendant and the plaintiff to that *activity or sport.*" (*Knight, supra,* 3 Cal.4th at p. 309, italics added; see *Saville, supra,* 133 Cal.App.4th at p. 870 [*Knight* held that doctrine "applied

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[8] A number of courts have utilized the test enunciated in *Record, supra,* 73 Cal.App.4th at page 482. (See, e.g., *Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 888; *Peart v. Ferro* (2004) 119 Cal.App.4th 60, 68, 71; *Whelihan v. Espinoza, supra,* 110 Cal.App.4th at p. 1572; *Moser v. Ratinoff, supra,* 105 Cal.App.4th at p. 1221.)

[9] There are numerous instances in which the court in *Knight* uses language that might suggest that the doctrine applies only to sports (see, e.g., *Knight, supra,* 3 Cal.4th at p. 312 ["application of the assumption of risk doctrine in the sports setting"]; id. at p. 315 ["nature of a sport is highly relevant in defining the duty of care owed"]), while there are other times the court suggests that primary assumption of risk may bar a plaintiff's injuries sustained in sports or other activities (see, e.g., *id.* at p. 309 [under the doctrine, a defendant owes no duty, regardless of "whether the plaintiff's conduct in undertaking the activity was reasonable *or unreasonable*"; *ibid.* [application of doctrine depends on "the nature of the activity or sport in which the defendant is engaged . . . ."]).

to *activities* or sports . . . [and did not] limit the scope of activities subject to the defense only to sports"].)[10] And the Supreme Court itself acknowledged that the primary assumption of risk doctrine applied in at least one class of nonsports cases, namely, cases "involving the 'firefighter's rule' [citation] . . . [citation] . . . [i.e., cases founded on the theory] that the party who negligently started the fire had no legal duty to protect the firefighter from the very danger that the firefighter is employed to confront. [Citations.]" (*Knight*, at pp. 309-310, fn. 5; see also *Neighbarger v. Irwin Industries, Inc.*, *supra*, 8 Cal.4th at pp. 538-544; *Walters v. Sloan* (1977) 20 Cal.3d 199, 202.)

Further, I believe that a determination of the existence of a legal duty to a plaintiff injured in connection with his or her voluntary participation in a particular activity should not be left to the vagaries of assessing whether the activity constitutes a "sport." For example, although appellate courts have held differently, it is foreseeable that some courts might find the primary assumption of risk doctrine inapplicable to certain activities, such as fitness training (*Rostai*, *supra*, 138 Cal.App.4th 326), lifeguard training (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428), cheerleading (*Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112),[11] tubing (*Record*, *supra*, 73 Cal.App.4th 472), and river rafting (*Ferrari*, *supra*, 32 Cal.App.4th 248), based simply upon the view that they are not true sports.[12] Based upon my review of *Knight* and its

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[10] "The opinion [in *Knight*, *supra*, 3 Cal.4th at pp. 313, 314-315] concluded that the doctrine of assumption of risk properly bars a plaintiff's claim only when it can be established that, because of the nature of the *activity* involved and the parties' relationship to the *activity*, the defendant owed the plaintiff no duty of care. [Citation.]" (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538, italics added.)

[11] To illustrate the point made in the text, see *Biediger v. Quinnipiac University* (D.Conn. 2010) 728 F.Supp.2d 62, where a district court judge recently held that a competitive cheer team at a private university in Connecticut did not qualify as a Title IX varsity sport.

[12] The sport-not-a-sport debate is a common topic among jocks, weekend warriors, and armchair athletes. The debate is the subject of various, and often entertaining, articles, blogs, and web sites. (See, e.g., Begel, *Bowling: Sport or not?* (Nov. 23, 2010) at <http://www.onmilwaukee. com/sports/articles/bowlingisnotasport.html>; Wetzel,

progeny, I conclude that in determining the potential applicability of the doctrine, rather than attempting to pigeonhole the activity as a sport, courts should make a more focused evaluation of whether (1) the integral conditions of the activity make obvious the possibility of injury, (2) imposing a duty would vastly alter the purpose or nature of the activity, and (3) imposing a duty would chill vigorous participation in the activity and thereby alter its fundamental character. (See *Saville*, *supra*, 133 Cal.App.4th at p. 867; *Peart v. Ferro*, *supra*, 119 Cal.App.4th at p. 72.)

Moreover, appellate courts have applied the primary assumption of risk doctrine in instances in which the activities were undoubtedly *not* sports. (See, e.g., *Beninati*, *supra*, 175 Cal.App.4th 650 [ritual "Burning Man" event]); *McGarry v. Sax* (2008) 158 Cal.App.4th 983 (*McGarry*) [product-toss following skateboarding exhibition]; (*Saville*, *supra*, 133 Cal.App.4th 857 [peace officer training class]; *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 [probation officer training course]; *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 [caregiver assaulted by hospital patient with dementia]). In *Beninati,* the activity centered on the plaintiff's attendance at the Burning Man festival in which large throngs congregate annually in the desert to witness the burning of a 60-foot combustible sculpture of a man, which is held upright by wire cables. (*Beninati*, at pp. 658-659.) The plaintiff apparently tripped over the wire cables and was himself burned. (*Id.* at p. 655.) The court rejected the plaintiff's contention that because the activity was not a sport, the primary assumption of the risk doctrine was inapplicable to bar the claim. (*Id.* at pp. 658-659.) It held that "[t]he risk of injury to

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Why Figure Skating is not a Sport (Feb. 27, 2010) at <http://www.sports.yahoo.com/olympics/vancouver/figure_ skating/news?slug=dw-figureskating022610>; Hollander, *Is Golf a Sport? Seriously.* (May 12, 2008) at <http://www.huffingtonpost.com/dave-hollander/is-golf-a-sport-seriously_b_100906.html?>; Lovinger, *Does Poker Qualify as a Sport?* (June 11, 2004) at http://sports.espn.go.com/espn/page2/story?page=lovinger/040614; <http://www.sportnonsport.com>.)

those who voluntarily decide to partake in the commemorative ritual at Burning Man is self-evident. . . . Once much of the material had burned, and the conflagration had subsided but was still actively burning, . . . the risk of stumbling on buried fire debris, including the cables . . . , was an obvious and inherent one. Thus, the risk of falling and being burned by the flames or hot ash was inherent, obvious, and necessary to the event, and [the plaintiff] assumed such risk." (*Ibid*.)

The court similarly applied the doctrine of primary assumption of risk in a nonsport setting in *McGarry v. Sax*, *supra*, 158 Cal.App.4th 983. There, the court held that the doctrine barred the plaintiff's claims for injuries that arose from trying to grab a skateboard deck thrown into the crowd during a skateboard competition. It concluded that the risks of participating in the product toss were "self evident. The products were not distributed to customers who waited politely in line for their turn; a limited supply of products was thrown into a throng of competitors. . . . That a competitor might fall and others land around and on him in an effort to secure the prize is an inherent risk of the competition." (*Id.* at p. 1000, fn. omitted.)

I conclude therefore that the fact that Nalwa was injured as a result of participating in an activity that was not a sport is not, of itself, an impediment to the application of the primary assumption of risk doctrine. (See *McGarry v. Sax*, *supra*, 158 Cal.App.4th at p. 999 [doctrine's application not limited to sports]; *Rostai*, *supra*, 138 Cal.App.4th at p. 333 [same].)

b. *qualitative view of activity*

The "integral conditions" of the bumper car activity at issue here are such that they "render the possibility of injury obvious." (*Saville*, *supra*, 133 Cal.App.4th at p. 867.) The fundamental nature of Rue Le Dodge is the bumping of cars. Riders are continually jostled about during the ride. The purpose of the amusement park ride is to provide thrills and entertainment to its riders from bumping fellow riders while attempting to avoid being bumped by others. (Cf. *Ferrari*, *supra*, 32 Cal.App.4th at pp. 253-254

[inherent risk of injury from being jostled while passenger in raft during white water rafting].) In her deposition, Nalwa agreed that the fun in the ride was the bumping, and that "[y]ou pretty much can't have a bumper car unless you have bumps." A sign posted at the ride's entrance entitled "RIDE WARNING – PLEASE READ" informed guests: "Rue Le Dodge cars are independently controlled electric vehicles. The action of this ride subjects your car to bumping. To experience this ride, you must be in good health and free from physical limitations. Expectant mothers and children under four (4) years of age should not ride. Children under 54 inches in height must be accompanied by an adult." (Original underscoring.) Another sign containing a description of the ride itself indicated that "riders may encounter unexpected changes in direction and or/speed [*sic*] . . . . This ride requires rider body control." Nalwa read these signs while waiting her turn with her children.[13] An activity that subjects a person to abrupt changes in direction naturally involves a risk of injury. Injuries resulting from head-on, rear, or side bumps between the minicars are thus inherent and obvious risks associated with the ride. As stated by Justice Cardozo in a classic case applying the maxim of *volenti non fit injuria* (" 'to a willing person it is not a wrong' " (Black's Law Dict. (9th ed. 2009) p. 1710, col. 2) as a bar to a plaintiff's claim from injuries sustained from an amusement park ride, "[t]he timorous may stay at home." (*Murphy v. Steeplechase Amusement Co.* (N.Y. 1929) 166 N.E. 173, 174.)

Given that the whole point of the Rue Le Dodge ride is bumping, imposing a duty of care for *any* injury resulting from a participant being bumped would clearly "either require that an essential aspect of the [activity] be abandoned, or else discourage vigorous participation therein." (*Peart v. Ferro*, *supra*, 119 Cal.App.4th at p. 72; cf. *Rodrigo v.*

[13] Of course, as previously stated, the fact that Nalwa was aware of any risks associated with the activity is not germane to our inquiry, since "the question of whether [the] plaintiff's action properly [is] barred under the assumption of risk doctrine does not depend on . . . whether [the] plaintiff subjectively knew of the specific risk of harm posed by [the] defendant's [actions]." (*Ford*, *supra*, 3 Cal.4th at p. 344.)

Koryo Martial Arts, *supra*, 100 Cal.App.4th 946 [tae kwon do activity of kicking, punching, and being punched and kicked carried inherent risk of injury].)[14] Imposing liability would have the likely effect of the amusement park either eliminating the ride altogether or altering its character to such a degree—by, for example, significantly decreasing the speed at which the minicars could operate—that the fun of bumping would be eliminated, thereby discouraging patrons from riding. Indeed, who would want to ride a *tapper car* at an amusement park?[15]

Therefore, based upon an evaluation of the integral conditions of Rue Le Dodge and the conclusion that imposing a duty would alter the fundamental nature of the ride (*Saville*, *supra*, 133 Cal.App.4th at p. 867), I would tentatively conclude that the primary assumption of risk doctrine applies to an activity such as a bumper car ride. Before removing the "tentative" label to this conclusion, I examine two issues: (1) whether the

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[14] Obviously, if liability were imposed upon a coparticipant causing an injury to another from bumping—not the issue presented here—it is likely that participation in the bumper car ride would be significantly chilled due to the participant's fear of being sued by the overly sensitive or litigious rider.

[15] My colleagues assert that "[w]e do not go to amusement parks expecting to be injured" (maj. opn. at p. 9), and that amusement "parks which operate for profit hold out their rides as being safe . . . ." (Maj. opn. at p. 9.) These assertions are no doubt true. But a spectator attending a baseball or hockey game likewise does not expect to be injured. Nonetheless, there is no guarantee that he or she will not be struck by a baseball or a puck. Because foul balls and errant pucks are inherent risks of baseball and hockey, respectively, the proprietor of the stadium or rink has no duty to eliminate those risks, and will not be held liable absent a showing that they did something to increase them, such as by designing the facility in a manner that exacerbated the risk of injury. (See *Nemarnik*, *supra*, 103 Cal.App.4th 631 [fan injured by errant hockey puck]; *Neinstein v. Los Angeles Dodgers, Inc.* (1986) 185 Cal.App.3d 176 [fan injured by foul baseball denied recovery in pre-*Knight* decision].) There is no allegation in this case that Cedar Fair negligently designed or maintained the Rue Le Dodge. Nalwa testified that she had no information that the ride was not functioning properly or that the minicars were operating at excessive speeds. Therefore, I respectfully disagree with the majority's implication that because amusement park patrons do not expect to be injured, if they are, the amusement park is therefore liable for the injury regardless of whether it occurred at a properly maintained ride where the park did nothing to increase inherent risks associated with it.

nature of the participant's involvement in the activity here renders the doctrine inapplicable; and (2) whether the fact that the activity is an amusement park ride suggests that the doctrine should not apply.

c. *nature of participant's involvement in activity*

Nalwa argues that the doctrine is inapplicable because "[(1) n]o skill is required to take part and [(2)] the driving or riding in bumper cars is not supposed to present a risk of injury to the participants." I have addressed the second argument above: the fact that Rue Le Dodge minicar riders are subjected to the possibility of repeated jostling as a result of bumping and being bumped rendered the possibility of injury, albeit slight, an obvious one.

As to the claim that operating a bumper car requires little or no skill—and the concomitant assertion that being a passenger in the minicar (such as was the case with Nalwa) requires no skill at all—I reject Nalwa's contention that the doctrine should for these reasons not apply. Not all of the cases applying the primary assumption of risk doctrine involved an activity that required particular skill or athleticism. In *Ferrari, supra*, 32 Cal.App.4th 248, the plaintiff was simply a passenger in a rubber raft whose sole job was to hold onto the raft while it navigated the Colorado River rapids. In *Truong v. Nguyen*, *supra*, 156 Cal.App.4th 865, this court held that the primary assumption of risk doctrine barred the claims of a passenger riding on personal watercraft: "[R]iding a personal watercraft requires physical exertion and balance by the passenger to hold on to the operator or grips or handles on the vessel to avoid being thrown off or rolling off the craft." (*Id.* at p. 889.) And this court observed further that "the thrill of riding the vessel is shared by both the operator *and* the passenger." (*Ibid.*, italics added.)[16]

[16] Compare with *Shannon v. Rhodes*, *supra*, 92 Cal.App.4th 792, where the court held the primary assumption of risk doctrine inapplicable to a child-passenger's claim for injuries resulting from falling out of a ski boat. In so holding, the court concluded that the plaintiff's role as a mere passenger was "too benign to be subject to *Knight*" (*id.* at p. 798); nothing in the record supported the conclusion that "the use of the boat . . .

Likewise, in *Beninati*, *supra*, 175 Cal.App.4th at page 655, the plaintiff's activity involved no skill or athleticism—he was injured after he apparently tripped over cable used to secure the burning effigy while he was attempting to place the photograph of a recently deceased friend in the embers of the Burning Man fire. The court rejected his argument that the primary assumption of risk doctrine was inapplicable to " ' "low impact" cultural activities of the sort found herein.' " (*Id.* at p. 656.) And in *McGarry*, *supra*, 158 Cal.App.4th at pages 988 to 989, the plaintiff was a spectator who participated in a product toss and was injured by others in the crowd after he caught the skateboard deck and fell to the ground—again, an activity that involved little skill or athleticism on the plaintiff's part.[17]

I therefore reject Nalwa's assertion—and disagree with my colleagues (see maj. opn. at p. 14: ["riding as a passenger in a bumper car is too benign an activity to be considered a sport in the *Knight* context"])—that the primary assumption of risk doctrine is inapplicable due the passive nature of her participation in Rue Le Dodge. The fact that her participation as a passenger in the bumper car ride involved little skill or

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reasonably implicate[d] a 'sport' within any understanding of the word" (*id.* at p. 800); and "the boat here was [nothing] more than a mode of transportation" (*ibid.*). Apart from the court's apparent conclusion that the primary assumption of risk doctrine applies only "to a sports setting" (*id.* at p. 796)—a proposition with which I disagree with my colleagues (see pt. I.B.1.a., *ante*)—the circumstances of the plaintiff's participation in the activity and the activity itself in *Shannon* differ from those here. In this instance, Rue Le Dodge is not "simply a pleasurable means of transportation" (*id.* at p. 798); rather, it is an amusement park ride in which voluntary participants, including Nalwa, subject themselves to the jostling associated with bumping and being bumped *that is the entire point of the activity*.

[17] One notable instance of a product toss, of sorts—a spectator's catching a home run ball—demonstrates vividly the random nature and the apparent lack of skill or athleticism involved in the activity. On May 28, 2006, a fan, while waiting in line at a concession stand to buy beer and peanuts, caught the historic 715th home run ball hit by the San Francisco Giants' Barry Bonds that moved Bonds ahead of Babe Ruth to second place on Major League Baseball's all-time home run list. (See *Fan Snags No. 715—in Concessions Line* (May 30, 2006) at <http://www.nbcsports.msnbc.com/id/13025452/l>.)

athleticism—and, indeed consisted of her being able to react to bumps inflicted by the minicar driven by her son or by other minicars—does not preclude the application of the doctrine.

d. *amusement park ride*

Nalwa correctly points out that no California court has applied the primary assumption of risk doctrine to an injury claim arising out of participating in an amusement park ride. The absence of such authority, however, does not suggest that there should be an across-the-board rule precluding application of the doctrine to such activities. Indeed, several courts from other jurisdictions have denied recovery to plaintiffs injured on amusement park rides.

In *Ramsey v. Fontaine Ferry Enterprises, Inc.* (Ky. 1950) 234 S.W.2d 738, the plaintiff was injured in a bumper-car type ride involving motor scooters. Affirming the trial court's directed verdict in favor of the defendant amusement park, the court applied *volenti non fit injuria* to conclude that "the plaintiff assented to the engagement which brought about her injury." (*Id.* at p. 739.) In so holding, the court observed that the ride was "arranged to provide thrills for its users by bumping into or dodging each other. There is no other lure. The game has its hazards, but one cannot be ignorant of them. [The p]laintiff entered the scooter for the purpose of engaging in the frolic. She deliberately exposed herself to the contingency which occurred. . . . Whilst the management had control of the electric current used by all of the scooters to propel their vehicles, [the plaintiff] had independent control of the motion of the scooter she was using." (*Id.* at pp. 738-739.)

Similarly, in *Gardner v. G. Howard Mitchell, Inc.* (N.J. 1931) 153 A. 607, the plaintiff's claim for injuries resulting from being bumped during a Dodgem bumper car ride were held to have been barred. The court, also applying the maxim of *volenti non fit injuria*, held that "[i]t was for the thrill of bumping and of the escape from being bumped that [the] plaintiff entered the contrivance . . . . The chance of a collision was that which

gave zest to the game upon which [the] plaintiff had entered. She willingly exposed herself to the contingency of a collision." (*Id.* at p. 609; see also *Jekyll Island State Park Authority v. Machurick* (Ga.App. 2001) 552 S.E.2d 94 [rider on amusement park water slide assumed risk]; *Leslie v. Splish Splash Adverntureland, Inc.* (N.Y. 2003) 1 A.D.3d 320 [same].)

These out-of-state authorities are not binding precedent here. (See *Gentis v. Safeguard Business Systems, Inc.* (1998) 60 Cal.App.4th 1294, 1307.) They, however, provide support for the conclusion that the primary assumption of risk doctrine may be applied to an activity involving an amusement park ride such as Rue Le Dodge.

The majority concludes, however, that public policy dictates that the primary assumption of risk doctrine not apply in this instance. (Maj. opn., p. 12.) My colleagues note that amusement parks are subject to a "protective regulatory scheme . . . administered by the DOSH" (maj. opn. at p. 10); "California courts have held owners of recreational rides to the higher standard of care usually imposed on common carriers" (maj. opn. at p. 11); and public policy requires the imposition of a duty on amusement parks "to protect the public from the possible grave dangers of amusement park rides." (Maj. opn. at p. 11.)[18] Amusement parks have an obligation to design and maintain their rides in the interests of the safety of their patrons, and I acknowledge the importance of the regulatory scheme under which the state seeks to promote that safety. But there is no suggestion here that Cedar Fair failed to comply with any statute or regulation as a result of which Nalwa was injured. Further, I find no legal basis for exempting amusement

[18] In noting decisions in which amusement parks have been found to be common carriers (including *Gomez*, *supra*, 35 Cal.4th 1125) to support its view that the doctrine of primary assumption of the risk does not apply here for public policy reasons, the majority seemingly concludes that Cedar Fair is a common carrier with respect to the Rue Le Dodge ride. But later on, the majority holds that the trier of fact should make that determination on remand. (See maj. opn. at p. 18.) For the reasons I discuss in part II, *post*, Cedar Fair did not assume common carrier liability here.

parks from the potential application of the primary assumption of risk doctrine for any public policy reason.

The majority asserts further that "[d]espite this history of holding owners and operators of amusement park rides to a higher standard of care in our society, [Cedar Fair] now crafts its argument to suggest that not only does it not owe a duty of care, but that it owes *no* duty at all to protect riders." (Maj. opn. at p. 12, original italics.) I do not believe Cedar Fair is arguing it owed no duty at all to its patrons; rather, it claims that under *Knight*, it was not liable for Nalwa's injuries that were the result of known risks associated with being bumped in the Rue Le Dodge ride, where it "did nothing to increase that inherent risk . . . ."

For the reasons discussed above, I would find that the doctrine is potentially applicable to the bumper car activity here, and I continue to the second part of the analysis, namely, the relationship of parties to the activity.

2. *Relationship of parties to activity*

Under the primary assumption of risk doctrine, duty is determined not only by the nature of the activity, but also from "the 'role of the defendant whose conduct is at issue in a given case.' [Citation.]" (*Kahn, supra*, 31 Cal.4th at p. 1004, quoting *Knight, supra*, 3 Cal.4th at p. 318.) The duties may vary depending on the specific role played by the defendant with respect to the sport or activity. (*Kahn*, at p. 1004.) "For example, a purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage. [Citations.]" (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482 (*Parsons*).) Thus, as the court explained in *Knight*, although a ski resort owes no duty to eliminate risks such as moguls inherent in the sport itself, it may not increase the risks to participants by providing faulty equipment. (*Knight, supra*, 3 Cal.4th at pp. 315-316; see also *Bjork v. Mason* (2000) 77 Cal.App.4th 544, 555-556 [doctrine inapplicable where defendant supplied defective towrope to tubing participants]; *Harrold v. Rolling J Ranch, supra,* 19 Cal.App.4th at

pp. 586-587 [stable owed duty to patrons to provide horses that were not unduly dangerous].)

Here, Cedar Fair, as "a purveyor of recreational activities" (*Parsons, supra*, 15 Cal.4th at p. 482)—the owner and operator of an amusement park—did not owe a duty to Nalwa to eliminate or decrease the risks inherent in the bumper car ride; it was only bound to do nothing to increase those risks. (*Knight, supra*, 3 Cal.4th at pp. 315-316.) Just as the risks in skiing posed by moguls (*id.* at p. 315) or unpadded lift towers (*Connelly, supra*, 39 Cal.App.4th at pp. 12-13) are part of the sport itself, the risks associated with contacts between bumper cars are an inherent part of a bumper car ride. Rue Le Dodge was not intended as a benign, jostle-free experience; its purpose was to provide its participants with the fun of bumping and being bumped. Bumps at Rue Le Dodge—as Nalwa realized from her observations of the ride before entering the minicar with her son—could occur from any direction. The bumping subjected riders to sudden shifts in momentum, as indicated in the signs posted at the ride, thereby posing a risk of injury. Under the doctrine of primary assumption of risk, Cedar Fair had no legal duty to eliminate or protect Nalwa against the risk of injury associated with bumping. (Cf. *Branco, supra*, 37 Cal.App.4th at p. 193 [designer of motocross bicycle course required to refrain from designing jumps which created extreme risk of injury]; *Galardi v. Seahorse Riding Club* (1993) 16 Cal.App.4th 817, 822-823 [notwithstanding inherent risks of horse jumping, riding club and instructor owed duty to student rider not to design course with jumps at unsafe heights or intervals that would create unreasonable risk of injury].)

The undisputed evidence is that Cedar Fair complied with its duty not to increase the risks to its bumper car riders, including Nalwa, over and above those inherent in the activity itself. A rubber bumper surrounded the minicars, and they were equipped with padded seats, steering wheels, and dashboards, and with seatbelts for the driver and passenger. Warning signs were posted at the entrance of the ride, cautioning that the cars

were independently controlled electric vehicles subject to bumping and that guests with certain medical conditions should refrain from riding. In addition, the ride was inspected daily and weekly by the defendant's maintenance and ride operations departments, as well as annually by DOSH. And on the day of Nalwa's injury, the ride was inspected and found to be working properly. Very few injuries from Rue Le Dodge were reported in 2004 and 2005, and all of them, except Nalwa's, appear to have been minor ones. (Cf. *Lupash v. City of Seal Beach, supra,* 75 Cal.App.4th at p. 1435 [emphasizing absence of prior accidents involving particular beach where the plaintiff was injured during lifeguard training].) Cedar Fair thus provided equipment in a "safe, working condition." (*Knight, supra,* 3 Cal.4th at p. 316.)

Nalwa asserts that the doctrine of primary assumption of the risk does not apply because Cedar Fair had a duty to protect her from the risk of injury from head-on bumps, a risk not inherent in the ride. In support of this argument, Nalwa points to Cedar Fair's rule prohibiting head-on bumps at Great America, and the installation of center islands in the bumper car rides at its four other amusement parks. My colleagues agree with Nalwa, asserting that "[a]lthough bumping is part of the experience of a bumper car ride, head-on bumping is not." (Maj. opn. at p. 17.) I disagree.[19]

In *Avila, supra,* 38 Cal.4th at page 163, a baseball player struck by a pitch alleged that the school district breached its duty not to enhance the inherent risks in baseball by

[19] In addition to other arguments that the primary assumption of risk doctrine is a bar to the negligence claim, Cedar Fair argues in its respondent's brief that Nalwa was not injured as a result of a head-on bump; rather, she was injured when bracing herself after being bumped from behind. It contends that summary judgment was therefore proper because Nalwa cannot demonstrate the failure to install a center island to reduce head-on bumps had anything to do with Nalwa's injury. This argument was not presented by Cedar Fair below and I would thus deem it forfeited. "[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court. [Citation]." (*Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal.App.3d 9, 26; see also *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 592.)

hosting a preseason game despite the rule prohibiting such preseason games. The high court rejected that claim, concluding that the district, in hosting the game, did nothing more than expose the plaintiff to the inherent risks of the sport. (*Ibid*.) The court also rejected the plaintiff's claim that the district breached its duty of care by failing to provide umpires under the theory that doing so "would have made the game safer" (*id.* at p. 166), reasoning that "the argument overlook[ed] a key point. The District owed 'a duty not to *increase* the risks inherent in the sport, not a duty to decrease the risks.' [Citations.]" (*Ibid*., italics added.)

Similarly, Cedar Fair had no duty to protect its patrons from the specific risk of head-on bumps. There is no evidence in the record that operation of Rue Le Dodge without a center island materially increased the risk of injury inherent in the ride. Nalwa and my colleagues point to the rule at Great America in 2005 prohibiting head-on bumps. Further, the majority asserts that the record shows that Cedar Fair "was aware of the perils of allowing head-on collisions . . . ." (Maj. opn. at p. 17.) There is nothing in the record showing that the possibility that Rue Le Dodge patrons might be subjected to head-on bumps presented a risk of injury (or "peril[]") beyond the risk of injury from any other bumping.

Nalwa also emphasizes that Cedar Fair's four other amusement parks operated with a center island to encourage unidirectional travel.[20] The installation of these islands

[20] Nalwa argues that a Cedar Fair representative admitted in deposition that the company knew at the time of the accident that "operating bumper cars in one direction of travel only was an effective way to eliminate injuries from head-on collisions." Great America's ride operations manager responded "Yes," in response to the question at her deposition, "[W]as the one direction of operation for the bumper car ride an effective means of *reducing or* eliminating head-on collisions on that ride?" (Italics added.) But before Nalwa filed her opposition to the motion, the deponent corrected the foregoing deposition testimony as follows: "The one direction of operation reduced, but did not eliminate, head-on collisions on the Rue Le Dodge ride." Nalwa contends that this correction raises an issue of the witness's credibility that precluded the granting of summary judgment. I disagree. The question was in the disjunctive and therefore

at other parks notwithstanding, given that bumps sustained by a rider of a minicar on Rue Le Dodge from any direction—and the attendant risk of injury—were inherent in the activity itself, Cedar Fair had no duty to take measures to reduce or lessen head-on bumps. Further, the existence of Cedar Fair's rule preventing head-on bumps did not create a duty on the park owner to prevent them from occurring. Risks of careless conduct by others—here, risks that included a rider bumping others head-on, either because he or she may not have heard ride operators announcing the rule, or may have heard the announcement and disregarded it—may be an inherent risk of the activity itself. (*Lilley*, *supra*, 68 Cal.App.4th at p. 943.) "If a risk is inherent in a sport, the fact that a defendant had a feasible means to remedy the danger does not impose a duty to do so. A duty is not created because safer materials are available to remedy the danger." (*American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [golf course had no duty to protect golfers from inherent risk of injury from errant shots]; see also *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262, 270 [ski resort owed no duty to minimize risk to skier of colliding with plainly visible snowmaking hydrant]; *Connelly*, *supra*, 39 Cal.App.4th at pp. 12-13 [no duty of ski resort to pad ski lift towers, where no evidence it did anything to increase inherent risk of skiers colliding with towers].)

Therefore, given the nature of the bumper car ride involved here and the relationship of Nalwa and Cedar Fair to that activity, I would hold that the primary assumption of risk doctrine applied. Since Cedar Fair (1) owed no duty to protect its patrons, including Nalwa, from the risk of injury from bumps inherent in the activity, and

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ambiguous. The deponent's affirmative answer to it thus could be construed as indicating that the rule against head-on bumps was effective to *reduce* head-on bumps, an answer that was entirely consistent with her corrected testimony. Further, whether unidirectional travel *reduced* or *eliminated* the head-on collisions is irrelevant, because bumps, including head-on bumps, were an inherent risk of the ride. Cedar Fair had no duty to eliminate risks inherent in the activity itself. (See *Knight*, *supra*, 3 Cal.4th at p. 315.)

(2) did nothing to increase those inherent risks, summary adjudication of Nalwa's negligence cause of action was proper.[21]

II. *Common Carrier Liability Claim*

Nalwa alleged in the first cause of action of her complaint that Cedar Fair was a common carrier in its operation of Rue Le Dodge. The trial court concluded that under *Gomez, supra*, 35 Cal.4th 1125, the heightened duty of care of a common carrier did not apply to the bumper car ride. The majority concludes that this was error and that the matter of whether the bumper car ride was similar to a roller coaster ride—and thus whether common carrier liability under *Gomez* attaches here—must be resolved by the trier of fact. (Maj. opn. at p. 18.) I disagree. Based upon the undisputed facts, I conclude that the ride in question is dissimilar to the roller coaster ride, and there is no sound basis for extending *Gomez* to find Cedar Fair to be a common carrier. There is thus no factual question that needs to be considered by the trier of fact in resolving this issue. (See *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6 ["question of 'duty' is decided by the court, not the jury"]; *Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1506 [common carrier liability is matter of law when material facts are not in dispute].)

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[21] The majority asserts that "[t]he trial court erred in finding that [Cedar Fair] owed [Nalwa] no duty at all." (Maj opn. at p. 17.) What the trial court in fact held was that the primary assumption of risk doctrine applied to the activity here; under that doctrine, "a defendant owes no duty to protect against the risks inherent in a sport, but generally owes a duty not to increase the risks of the activity beyond the risks inherent in the sport"; Nalwa's "injury arose from being bumped during a bumper car ride, which is a risk inherent in the activity of riding bumper cars"; and Cedar Fair did not have a duty to reduce those inherent risks. My colleagues conclude further that even if the "amusement park ride here is the type of sport or activity contemplated by [] *Knight* and its progeny, [Cedar Fair's] position as owner of [the] park nonetheless would invoke a higher duty of care even under the current construction of the primary assumption of risk doctrine." (Maj. opn. at pp. 14-15.) They assert that amusement parks are in the position "to eliminate or minimize certain risks . . ." (Maj. opn. at p. 16.) To the extent that my colleagues suggest that amusement parks should be treated differently under *Knight* than other proprietors, such as sports stadium owners, I find no authority for that conclusion.

Carriers hired to transport passengers are generally subjected to a heightened standard of care in a majority of jurisdictions in this country. (See 3 Harper, James and Gray on Torts (3d ed. 2007) The Nature of Negligence, § 16.14, p. 565.) "This heightened duty imposed upon carriers of persons for reward stems from the English common law rule that common carriers of goods were absolutely responsible for the loss of, or damage to, such goods. [Citation.]" (*Gomez, supra*, 35 Cal.4th at pp. 1128-1129.) In California, a common carrier "must use the utmost care and diligence for [the] safe carriage [of its passengers, and] must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." (§ 2100; see also CACI No. 902.) A common carrier, however, is not an insurer of its passengers' safety. (*Gomez, supra*, 35 Cal.4th at p. 1130; *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785 (*Lopez*).) "Rather, the degree of care and diligence which they must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the business of the carrier. [Citations.]" (*Lopez*, at p. 785.)

Section 2168 defines a common carrier as "[e]veryone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages . . . ." Under the statute, therefore, "a common carrier . . . is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit. [Citations.]" (*Squaw Valley Ski Corp. v. Superior Court, supra*, 2 Cal.App.4th at p. 1508; see also Black's Law Dict. (9th ed. 2009) p. 242, col. 1: "***common carrier***. A commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee.") Some examples of common carriers include railways (*Metz v. California Southern R. R. Co.* (1890) 85 Cal. 329; *Kerrigan v. Southern Pac. R. R. Co.* (1889) 81 Cal. 248); buses (*Lopez, supra*, 40 Cal.3d 780, *Prunty v. Allred* (1946) 73 Cal.App.2d 67); stage coaches (*Fairchild v. The California Stage Company* (1859) 13 Cal. 599); guided tours provided by mule train (*McIntyre v. Smoke Tree Ranch Stables*

(1962) 205 Cal.App.2d 489 (*McIntyre*)); streetcars or cable cars (*Kline v. Santa Barbara etc. Ry. Co.* (1907) 150 Cal. 741; *Finley v. City and County of San Francisco* (1952) 115 Cal.App.2d 116); taxicabs (*Larson v. Blue & White Cab Co.* (1938) 24 Cal.App.2d 576, 578); elevators (*Treadwell v. Whittier* (1889) 80 Cal. 574; escalators (*Vandagriff v. J. C. Penney Co.* (1964) 228 Cal.App.2d 579); airplanes (*Smith v O'Donnell* (1932) 215 Cal. 714); and chair lifts at ski resorts (*Squaw Valley Ski Corp. v. Superior Court*, *supra*). Further, amusement parks have been held to be common carriers for purposes of operating a rollercoaster in the nature of miniature scenic railway (see *Barr v. Venice Giant Dipper* (1934) 138 Cal.App. 563 (*Barr*)), and a horse-drawn surrey (see *Kohl v. Disneyland, Inc.* (1962) 201 Cal.App.2d 780 (*Kohl*)). (See also *Neubauer v. Disneyland, Inc.* (C.D.Cal.1995) 875 F.Supp. 672 [amusement park operating "Pirates of the Caribbean" ride involving boats held common carrier].)

In *Gomez, supra*, 35 Cal.4th 1125, a woman's estate and her heirs brought a wrongful death action against an amusement park owner after the decedent sustained a fatal brain injury while riding the Indiana Jones attraction at Disneyland. The trial court sustained without leave to amend the defendant's demurrer to claims based upon section 2100, rejecting the contention that the amusement park was a common carrier. (*Gomez*, at p. 1127.) The Court of Appeal granted the plaintiffs' writ of mandate and directed that the court overrule the demurrer. (*Id.* at p. 1128.) The Supreme Court affirmed.

The court's four-member majority in *Gomez* observed that "common carrier" had been broadly defined by the Legislature (*Gomez, supra*, 35 Cal.4th at p. 1130) and that an "expansive definition" (*id.* at p. 1131) had been applied by California courts over a number of years. The high court's majority noted further—citing *McIntyre, supra*, 205 Cal.App.2d 489, *Squaw Valley Ski Corp. v. Superior Court, supra*, 2 Cal.App.4th 1499, *Barr, supra*, 138 Cal.App. 563, and *Kohl, supra*, 201 Cal.App.2d 780—that "[t]here is an unbroken line of authority in California classifying recreational rides as common carriers. . . ." (*Gomez*, at p. 1132; cf. *Simon v. Walt Disney World Co.* (2004) 114

Cal.App.4th 1162 [rejecting contention that defendant, in its general operation of Disneyland as a whole, as opposed to its operation of any specific ride, was a common carrier with respect to all park patrons].)

The high court further rejected the view that an amusement park could not be a common carrier because the purpose of the ride was to provide entertainment. It held: "A passenger's purpose in purchasing transportation, whether it be to get from one place to another or to travel simply for pleasure or sightseeing, does not determine whether the provider of the transportation is a carrier for reward. The passenger's purpose does not affect the duty of the carrier to exercise the highest degree of care for the safety of the passenger. [¶] Certainly there is no justification for imposing a lesser duty of care on the operators of roller coasters simply because the primary purpose of the transportation provided is entertainment. As one federal court noted, 'amusement rides have inherent dangers owing to speed or mechanical complexities. They are operated for profit and are held out to the public to be safe. They are operated in the expectation that thousands of patrons, many of them children, will occupy their seats.' [Citation.] Riders of roller coasters and other 'thrill' rides seek the illusion of danger while being assured of their actual safety. The rider expects to be surprised and perhaps even frightened, but not hurt. The rule that carriers of passengers are held to the highest degree of care is based on the recognition that ' "[t]o his diligence and fidelity are intrusted the lives and safety of large numbers of human beings." ' [Citation.] This applies equally to the rider of a roller coaster as it does to the rider of a bus, airplane, or train." (*Gomez*, *supra*, 35 Cal.4th at p. 1136, fn. omitted.)

Accordingly, in finding that the court should have overruled the demurrer, the high court concluded that "the operator of a roller coaster or similar amusement park ride can be a carrier of persons for reward under sections 2100 and 2101." (*Gomez*, *supra*, 35

Cal.4th at p. 1141.)[22] In so holding, however, the court expressed the following caveat, important to us here: "We hold only that the operator of a roller coaster or similar amusement park ride can be a carrier of persons for reward under [Civil Code] sections 2100 and 2101. We do not address, and express no opinion regarding, whether other, dissimilar, amusement rides or attractions can be carriers of persons for reward." (*Id.* at p. 1136, fn. 5.)[23]

Therefore, the facially simple question confronting the court is this: Is a bumper car ride at an amusement park "similar" to a roller coaster? I would conclude that it is not.

A bumper car ride is quite different from a roller coaster. A roller coaster is defined as "[a] steep, sharply curving elevated railway with small open passenger cars that is operated at high speeds as a ride, especially in an amusement park." (American Heritage Dict. (4th ed. 2000) p. 1510.) A roller coaster is constrained to a track and subject to the exclusive control of the operator. Those choosing to ride a roller coaster " 'surrender[] themselves to the care and custody of the [operator]; they . . .give[] up their freedom of movement and actions. . . .' [Citation.]" (*Gomez*, *supra*, 35 Cal.4th at p. 1137.) In addition, "[r]iders of roller coasters and other 'thrill' rides seek the illusion

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[22] In a lengthy dissent in which two members of the court joined, Justice Chin wrote that the majority, in holding that the defendant was a common carrier in connection with the roller coaster ride, (1) reached a conclusion contrary to the intent of the Legislature (*Gomez*, *supra*, 35 Cal.4th at pp. 1143-1149 (dis. opn. of Chin, J.)); (2) "ignore[d] a fundamental principle [in prior Supreme Court cases that] [b]ecause ' "the law applicable to common carriers is peculiarly rigorous, . . . it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it" ' " (*id.* at p. 1149); and (3) relied on California decisions not supportive of its ultimate conclusion (*Gomez*, at pp. 1150-1157 (dis. opn. of Chin, J.)).

[23] In his dissent, Justice Chin criticized the majority's holding further, indicating that by its caveat the majority opened the door to future cases holding that amusement park rides "similar to" roller coaster rides such as merry-go-rounds and mechanical bulls may be subject to the heightened common carrier standard of liability. (See *Gomez*, *supra*, 35 Cal.4th at p. 1148 (dis. opn. of Chin, J.).)

of danger while being assured of their actual safety. The rider expects to be surprised and perhaps even frightened, but not hurt." (*Id.* at p. 1136.)

In contrast, a bumper car ride such as Rue Le Dodge consists of small electric cars that operate at medium speeds around a flat surface track. The amusement park concededly exercises some degree of control over Rue Le Dodge and is responsible for its overall safety. Cedar Fair and its employees maintain and inspect the ride; set maximum speeds for the minicars; load and unload riders; activate the ride; have control over an emergency switch disabling the electricity powering the minicars; and enforce various riding instructions and safety rules. But once the ride commences, patrons exercise independent control over the steering and acceleration of the cars. Unlike roller coaster riders, they do not surrender their freedom of movement and actions. Rue Le Dodge riders have control over the entertainment element of the ride, the bumping, as they determine when to turn and accelerate. (Cf. *Lewis v. Mammoth Mountain Ski Area* 2009 U.S. Dist. Lexis 13050, 2009 WL 426595, *33 (E.D.Cal. Feb. 20, 2009) *33-36 [common carrier liability not applicable to resort operating guided snowmobile tour where rider had complete control over vehicle].) A rider of a roller coaster has no control over the elements of thrill of the ride; the amusement park predetermines any ascents, drops, accelerations, decelerations, turns or twists of the ride. Moreover, although the allure of a roller coaster is the "the illusion of danger" (*Gomez*, *supra*, 35 Cal.4th at p. 1136), the appeal of a bumper car is the entertainment promised by the generally harmless fun of bumping other cars (and avoiding being bumped) at modest speeds.

Because I conclude that the bumper car ride here is not "a roller coaster or similar amusement park ride" (*Gomez*, *supra*, 35 Cal.4th at p. 1136), I would find *Gomez* distinguishable and that Cedar Fair was not a common carrier in connection with its operation of Rue Le Dodge. I would therefore hold that the court below properly held that Nalwa's first cause of action was without merit.

III. *Willful Misconduct Claim*

Nalwa alleges in her second cause of action that Cedar Fair's decision to operate Rue Le Dodge at the time of the 2005 incident without a center island, despite allegedly knowing that its absence presented an unreasonable risk of injury, constituted willful misconduct. She cites the portion of Cedar Fair's operating manual prohibiting head-on bumps and the fact that bumper car rides at its other amusement parks were unidirectional as evidence that it knew head-on bumps presented a risk of injury. Nalwa argues that Cedar Fair consciously chose to expose Rue Le Dodge riders to risk of injury from head-on bumps by not installing a center island.

The majority holds that there was a triable issue of fact that precluded the granting of summary judgment in favor of Cedar Fair on this willful misconduct claim. (Maj. opn. at p. 19.) I disagree.

Willful misconduct is "not a separate tort, but simply ' " 'an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care' [citations]." ' [Citation.]" (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 526.) A willful misconduct claim has pleading requirements stricter than those of a negligence claim. (*Ibid.*; see also *Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 361.) "Negligence is an unintentional tort, a failure to exercise the degree of care in a given situation that a reasonable man under similar circumstances would exercise to protect others from harm. [Citations.] A negligent person has no desire to cause the harm that results from his carelessness. [Citation.]" (*Donnelly v. Southern Pacific. Co.* (1941) 18 Cal.2d 863, 869.) In contrast, willful misconduct involves the defendant's positive intent to harm another or action taken " ' "with a positive, active and absolute disregard of its consequences." ' " (*Cope v. Davison* (1947) 30 Cal.2d 193, 201, quoting *Meek v. Fowler* (1935) 3 Cal.2d 420, 425; see also *Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32.) Stated otherwise, "[w]illful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible

results. [Citation.]" (*O'Shea v. Claude C. Wood Co.* (1979) 97 Cal.App.3d 903, 912 (*O'Shea*), superseded on another ground by statute as stated in *Hubbard v. Brown* (1990) 50 Cal.3d 189, 194-195; see also Rest.2d Torts, § 500, com. g, p. 590.)

Three elements must be present to elevate a potentially negligent act to one that may constitute willful misconduct. (*Bains v. Western Pacific R. R. Co.* (1976) 56 Cal.App.3d 902, 905 (*Bains*).) First, there must be " 'actual or constructive knowledge of the peril to be apprehended . . . . [Second, the evidence must show] actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger . . . . [And third, there must be a] conscious failure to act to avoid the peril.' [Citation.]" (*Ibid.*; see also *Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 859.)

In determining the existence of willful misconduct, "constructive knowledge must be measured by an objective standard, since there is no other way to measure it. . . . [Citation.] 'The . . . test . . . is whether a reasonable [person] under the same or similar circumstances as those faced by the actor would be aware of the dangerous character of his conduct.' [Citation.] 'If conduct is sufficiently lacking in consideration for the rights of others, reckless, heedless to an extreme, and indifferent to the consequences it may impose, then, regardless of the actual state of mind of the actor and his [or her] actual concern for the rights of others, we call it willful misconduct, and apply to it the consequences and legal rules which we use in the field of intended torts.' " (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 690.)

Our high court has held that whether a case involves willful misconduct "presents questions of both fact and law. Insofar as the issues may relate to the credibility of witnesses, the persuasiveness or weight of the evidence and the resolving of conflicting inferences, the questions are of fact. But as to what minimum factual elements must be proven in order to constitute serious and wilful misconduct, and the sufficiency of the evidence to that end, the questions are of law." (*Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102, 115.) Therefore, summary judgment may be appropriate

where the plaintiff has failed to present sufficient facts to support a willful misconduct claim. (See *Towns v. Davidson* (2007) 147 Cal.App.4th 461, 470-473 [court properly granted summary judgment where facts were insufficient to show that defendant skier acted recklessly in colliding with fellow skier, plaintiff]; *O'Shea*, *supra*, 97 Cal.App.3d at p. 913 [plaintiff failed to present evidence tending to show defendant's willful misconduct in maintaining dirt pile over which plaintiff rode motorcycle and sustained injuries; summary adjudication of willful misconduct issue proper].)

From the evidence presented in connection with the motion, a trier of fact could not reasonably conclude that Cedar Fair's conduct met all three elements required to support a willful misconduct claim. (See *Bains*, *supra*, 56 Cal.App.3d at p. 905.) Indeed, I conclude there was insufficient evidence to support a finding in favor of Nalwa as to *any* of the three elements.

The first element is " 'actual or constructive knowledge of the peril to be apprehended . . . .' " (*Bains*, *supra*, 56 Cal.App.3d at p. 905.) A reasonable inference from the evidence is that Cedar Fair had actual or constructive knowledge of the *possibility* that some injury could result from head-on bumps while riding Rue Le Dodge. That evidence included the rule in Cedar Fair's operations manual that prohibited head-on bumps; the fact that operators were charged with enforcing the rule and were instructed to first reprimand patrons who violated the rule and, if necessary, eject them from the ride; the fact that Cedar Fair employed a center island to promote unidirectional travel at bumper car rides in its four other amusement parks; and Cedar Fair's knowledge that a center island was effective in reducing head-on bumping.

But knowledge of the *mere possibility* of injury is insufficient to satisfy this first element. In *Bains*—a case arising out of the death of a person at a railroad crossing that had no automatic gate—the court rejected the plaintiffs' assertion that because the railroad was aware that injuries at railroad crossings without automatic gates were more likely, this satisfied the "peril" aspect of the first element of a willful misconduct claim.

"[The plaintiffs] seem to contend that the 'peril to be apprehended' is the potentiality of a collision between a vehicle and a train at an ungated crossing. To constitute willful misconduct, however, more must be shown than the bare possibility of injury. Otherwise, there would be little distinction between willful misconduct and negligence, since negligence is predicated upon a breach of duty which is imposed when there exists a foreseeable, or potential, risk of harm. . . . [¶] Almost every venture involves some risks, especially in the field of transportation. In the present case, [the plaintiffs] established that crossing accidents are reduced by 90 percent when automatic gates are installed at railroad crossings. All this demonstrates is that there is still the potentiality of a collision between a vehicle and a train even at gated crossings. Conceivably, if railroad bridges were constructed over all crossings, collisions would be totally eliminated. If such bridges were not constructed, under [the plaintiffs'] reasoning, a factual issue of willful misconduct would arise. The law does not impose such a burdensome duty, let alone label such inaction as willful or wanton misconduct. While it can always be contended that a particular accident should have been anticipated, it is only in situations where a defendant's conduct amounts to wantonness as opposed to a mere failure to perform a duty, that he [or she] will be held liable for willful misconduct [citation]." (*Bains, supra*, 56 Cal.App.3d at pp. 905-906; see also *Perez v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 462, 471.) Thus, there was no evidence here to support the first element enunciated in *Bains*.

Likewise, the evidence does not support a finding on the second element required for a willful misconduct claim. There must be a showing of " 'actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger . . . .' " (*Bains, supra*, 56 Cal.App.3d at p. 905.) As noted, there is no evidence here that the risk of injury from bumping—from any direction in particular, including head-on bumping—was *probable*. Instead, the record reflects that the risk of minor injury from riding Rue Le Dodge was a possible one. While approximately 600,000 guests in toto rode Rue Le

Dodge during the 2004 and 2005 operating seasons, only fifty-five injuries were reported; only one (Nalwa's) was a fracture. Cedar Fair therefore had no notice or knowledge that injuries, including fractures, were a *probable* consequence of bumps between riders of the bumper car attraction.

Finally, the evidence does not support a finding in favor of Nalwa as to the third element of willful misconduct, i.e., that Cedar Fair was guilty of a " 'conscious failure to act to avoid the peril.' [Citation.]" (*Bains*, *supra*, 56 Cal.App.3d at p. 905.) Because there was no evidence that serious injury was probable, as opposed to a mere possibility, there was no "peril," and thus no conscious failure on Cedar Fair's part to take action to avoid it.

Cedar Fair's operation of Rue Le Dodge in 2005 without a center island did not constitute willful misconduct. The operation of an amusement park and the rides within it involves some risk to the park's patrons. Rue Le Dodge is no exception. Bumps between bumper cars—the whole point of the ride—naturally subject riders to sudden jarring and changes in direction. The fact that few, and—except for Nalwa's—relatively minor injuries were reported from Rue Le Dodge over the years is contrary to Nalwa's contention that Cedar Fair operated a dangerous ride with willful disregard for the likelihood of prospective injuries to be suffered by its patrons. Further, there is no evidence that the potential for head-on bumps at Rue Le Dodge made injury to patrons a probable occurrence, or that Cedar Fair was on notice of the probability of injury. The installation of a center island to discourage head-on bumps may have reduced any risk of injury. But as discussed above (see pt. I.B., *ante*), Cedar Fair had no legal duty to reduce risks inherent in the bumper car activity itself. Its decision to implement those safety features it employed, excluding a center island, did not present an issue of fact from which it might be concluded that Cedar Fair intended to harm its patrons or acted in reckless disregard for their safety.

I agree with my colleagues that where sufficient facts are presented from which it may be concluded that the defendant acted " ' "with a positive intent actually to harm another or . . . with a positive, active and absolute disregard of [the] consequences [of defendant's actions]" ' " (*Cope v. Davison*, *supra*, 30 Cal.2d at p. 201), the inquiry "is a qualitative determination which should be left to the trier of fact." (Maj. opn. at p. 19.) Here, however, the facts presented were legally insufficient to support a claim of willful misconduct, and the court properly concluded that such claim was without merit.

IV. *Conclusion*

I would affirm the judgment entered on the order granting summary judgment.

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DUFFY, J.

Nalwa v. Cedar Fair
No. H034535

Trial Court:	Santa Clara County Superior Court Superior Court No.: CV089189
Trial Judge:	The Honorable James P. Kleinberg
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