Case No. S195031

In the

Supreme Court of California

SMRITI NALWA,

Plaintiff and Appellant,

v.

CEDAR FAIR, L.P.,

Defendant and Respondent

From a Decision Of The Court Of Appeal, Sixth Appellate District, Case No. H034535, Reversing the Judgment of the Superior Court, County of Santa Clara, Hon. James P. Kleinberg, Case No. 1-07-CV089189

AMICUS CURIAE BRIEF

IN SUPPORT OF PETITIONER AND DEFENDANT CEDAR FAIR, L.P.

DON WILLENBURG (No. 116377)
GORDON & REES LLP
275 Battery Street, Suite 2000
San Francisco, California 94111
Telephone: (415) 986-5900;
Facsimile: (415) 986-8054
dwillenburg@gordonrees.com

Attorneys for Amicus Curiae Association of Defense Counsel of Northern California and Nevada

JOSHUA C. TRAVER (No. 229778)
COLE PEDROZA LLP
200 South Los Robles Ave., Suite 300
Pasadena, CA 91101
Telephone: (626) 431-2787
Facsimile: (626) 431-2788
jtraver@colepedroza.com

Attorneys for Amicus Curiae Association of Southern California Defense Counsel

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I

INTRODUCTION

The parties' briefs discuss the cases specifically addressing the primary assumption of risk doctrine. That doctrine reflects principles applied in other areas as well (products liability, failure to warn, the "obvious danger" doctrine), which argue for a ruling in favor of the defense in this case, and which in any event this Court's decision in the present case should not contravene.

Most activities involve some level of risk. The law has traditionally been that in proper cases, a participant may be held to have assumed the risk of an activity, so that injuries inherent in the activity do not subject any third persons to tort liability. The court of appeal's decision in this case would expand liability, in an almost McDonalds-coffee-in-the-lap fashion, to those who provide standard, non-defective bumper car rides. The public would well think, in the McDonald's coffee case and this, "you mean you can sue for that and win money?" Such demeaning of the justice system is unnecessary, and unsupported by the law in this and other areas.

The primary question presented in this case is whether the doctrine of primary assumption of the risk applies to a variety of

activities which present inherent or obvious risks to the participants, or instead only to a new, narrow category of activities classifiable as "active sports." The former perspective is the most sound, avoids artificial and arbitrary distinctions, and would preserve the rule in many cases where it is sensibly applied. (See, e.g., *Lipson v. Superior Court* (1982) 31 Cal.3d 362 [applying doctrine in "fireman's rule"]; *Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 861 [applying the doctrine to a peace officer training class]; *Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 653 [applying the doctrine to a plaintiff who was "burned when he tripped and fell into the remnants of the Burning Man effigy while participating in the festival's commemorative ritual."])

Under the Court of Appeal's crabbed view of the doctrine, these cases were wrongly decided. Mr. Beninati would have a cause of action for being burned by the Burning Man at Burning Man, an assumed risk if ever there was one, on the rationale that attending Burning Man does not involve "a sport within any understanding of the word" and does not involve "physical exertion, skill or physical prowess" – certainly not the latter two. (*Nalwa v. Cedar Fair, L.P.* (2011) 196 Cal.App.4th 566, 579.) Under the Court of Appeal's view,

the "fireman's rule" would be an inexplicable outlier to assumption of risk's "active sport" definition, instead of (as properly understood) another example of an underlying principle: "the defense of assumption of risk arises when the plaintiff voluntarily undertakes to encounter a specific known risk imposed by defendant's conduct." (*Lipson*, 31 Cal.3d at 376.) Just as the "fireman's rule" is not limited to situations where the fireman predicts the specific injury resulting from encountering the known risk of fighting fires, the rule in this case should not be limited because Dr. Nalwa's injury may have occurred during a head-on bump versus another kind of bump.

The court of appeal's decision would unnecessarily limit the assumption of risk doctrine. This is a case about a M.D., an OB/GYN physician and surgeon, who claims that bumper cars bumping presented a risk of harm of which she was unaware. This is not a case about blaming a child for an injury that a child might not have anticipated. This is not a case about the bumper cars malfunctioning, or where anyone other than the M.D. and her child had control of her bumper car, or where the amusement park increased the risks inherent in riding a bumper car. This is not a case about any unexpected injury unrelated to the activity of bumper cars, like a bacterial infection or

the roof falling in. This is a case about bumper cars with padding, seat belts, and a warning sign, as if the possibility of being bumped were not obvious enough already.

The Court should reverse the decision below, and in any event should rule be consistent with other cases holding that the presence of objectively known or obvious risks restricts the imposition of tort liability.

II

ANALYSIS

A. "No One Needs Notice Of That Which He Already Knows."

"[N]o one needs notice of that which he already knows." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 65, citations omitted.) "Things happen according to the ordinary course of nature and the ordinary habits of life." (Civ. Code, § 3546.) Dr. Nalwa's lawsuit is contrary to these sound precepts. While the cases that follow in this section are mainly from the product liability context, they illustrate the principle that no duty or liability should attach where a danger is or should be known, perhaps shedding light on the decision to be made by this Court in this negligence case.

1. California recognizes the obvious danger rule.

As this Court has held, "California law ... recognizes the obvious danger rule, which provides that there is no need to warn of known risks under either a negligence or strict liability theory." (*Johnson*, 43 Cal.4th at 67.)

The obvious danger rule, under which there is no duty to warn of known risks or obvious dangers, has been applied in a variety of recreational and non-recreational settings. For example, *Bojorquez v. House of Toys, Inc.* (1976) 62 Cal.App.3d 930 held that there was no duty, in strict liability or in negligence, where someone was injured by the normal operation of a slingshot. *Bojorquez* rejected the claim that the maker of the slingshot should be strictly liable because it came unequipped with a warning.

> Is the slingshot defective because it did not have a warning it was dangerous? Strict liability is imposed where there are patent or latent defects which make a product unreasonably dangerous to users or consumers (Rest.2d Torts, § 402A). In some instances, the manufacturer of an unreasonably dangerous product may insulate himself from strict liability by adding a warning or giving directions on the container which keep the product from being deemed unreasonably dangerous. But *the seller does not need to add a warning when "the danger, or potentiality of danger is generally known and recognized.*" For example, it is unnecessary to warn persons of the dangerous nature of alcohol (Rest.2d Torts, § 402A, com. j; *Barth v. B. F. Goodrich Tire Co.*,

> [1968] 265 Cal.App.2d 228, 245 [71 Cal.Rptr. 306]). Is the potential danger of a slingshot generally known? Ever since David slew Goliath young and old alike have known that slingshots can be dangerous and deadly. (See *Morris v. Toy Box* [1962] 204 Cal.App.2d 468, 472 [22 Cal.Rptr. 572] [bow and arrow].) There is no need to include a warning; the product is not defective because it lacked a warning; there is no cause of action in strict liability.

(62 Cal.App.3d at 933-934, emphasis added. Compare *Wright v. Stang Mfg. Co.* (1997) 54 Cal.App.4th 1218, 1231 [distinguishing *Bojorquez* where dangers related to product neither generally known or actually known to plaintiff].)

Bumper cars do not have the Biblical pedigree of slingshots. All the same, that bumper cars bump is as obvious, as "generally known," as that slingshots sling.

The same rationale exempting slingshot sellers from liability for the obvious dangers of slingshots was later applied to CO2 cartridges used in a pellet gun. (*Holmes v. J. C. Penney Co.* (1982) 133 Cal.App.3d 216.)

> It is inconceivable that Damon Walker was unaware that an errant shot could strike a bystander such as appellant. The potentiality for harm arising incident to the firing of a pellet gun is as obvious as the potentiality for harm recognized in *Bojorquez*. (See also *Morris v. Toy Box* (1962) 204 Cal.App.2d 468, 471-473 [].) A warning, in this case, against the potentiality for injury would therefore serve no useful purpose.

(133 Cal.App.3d at 220.)

In both *Bojorquez* and *Holmes*, the obviousness of the risk compelled a finding of no duty and no liability. Likewise, the obviousness of the risk in the present case should compel a finding of no duty and no liability. Neither warning Dr. Nalwa that bumper cars bump, nor imposing liability because perfectly ordinary and non-defective bumper cars bump, serves any "useful purpose."

Outside the recreational context as well, courts refuse to impose liability where, on an objective basis, the danger is known or knowable to the injured party. Sometimes this is expressed as a matter of causation, sometimes as a matter of duty.

For example, this Court long ago held that a building contractor's decision to use a plank that it knew was unsuitable was a superseding cause of plaintiff's injury, breaking any chain of causation and relieving from liability the lumber company that sold that plank. (*Stultz v. Benson Lumber Co.* (1936) 6 Cal.2d 688.) This was because it was not "contended that the condition of the plank was concealed in any manner or unknown to the purchasers." (*Id.* at 691.)

Similarly, "[s]trict liability for failure to warn does not attach if the dangerous propensity is either obvious or known to the injured

person at the time the product is used." (*Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143, 1151-1152.)

2. The obvious danger rule has been expanded to additional contexts where "knew or should have known" – an objective test – determines liability.

In *Johnson* this Court applied the rationale underlying the "obvious danger" rationale in adopting the "sophisticated user" doctrine in California. The doctrine "negate[s] a manufacturer's duty to warn of a product's potential danger when the plaintiff has (or should have) advance knowledge of the product's inherent hazards. The defense is specifically applied to [those] who knew or should have known of the product's hazards, and it acts as an exception to manufacturers' general duty to warn consumers." (*Johnson*, 43 Cal.4th at 61.) *Johnson* held that the defense bars liability for failure to warn, in both strict liability and negligence, where the plaintiff "knew or should have known of [the] risk, harm or danger." (43 Cal.4th at 71.) "[N]o one needs notice of that which he already knows," or should know. (43 Cal.4th at 65, citations omitted.)

> Although the Court of Appeal was aware that "no California court has squarely adopted the [sophisticated user] doctrine," the court observed that "it is a natural outgrowth of the rule that there is no duty to warn of known risks or obvious dangers." As the Court of Appeal

> reasoned, the sophisticated user defense simply recognizes the exception to the principle that consumers generally lack knowledge about certain products, for example, heavy industrial equipment, and hence the dangers associated with them are not obvious. For those individuals or members of professions who do know or should know about the product's potential dangers, that is, sophisticated users, the dangers should be obvious, and the defense should apply. Just as a manufacturer need not warn ordinary consumers about generally known dangers, a manufacturer need not warn members of a trade or profession (sophisticated users) about dangers generally known to that trade or profession.

(*Johnson*, 43 Cal.4th at 67.)

Similarly, the Restatement would impose failure to warn liability only if, among other conditions, the manufacturer "has no reason to believe that those for whose use the chattel is supplied will realize" possible dangers. (Rest.2d Torts, § 388.) This "has been interpreted to mean that there is no duty to warn if the user knows or should know of the potential danger, especially when the user is a professional who should be aware of the characteristics of the product." (*Strong v. E.I. DuPont de Nemours Co., Inc. (*8th Cir. 1981) 667 F.2d 682, 686, citations omitted.)

Even before *Johnson*, this Court acknowledged the sophisticated user defense. "[J]udicially created doctrines such as the 'sophisticated purchaser' and 'bulk supplier' defenses have become

familiar parts of product liability law" under which "a product manufacturer may reasonably rely upon an intermediary in the chain of distribution to convey any necessary warnings." (*Macias v. State of California* (1995) 10 Cal.4th 844, 853 [unnecessary to reach issue in case involving malathion; no duty to warn because spraying ordered in State-declared emergency].)

Because the test is "knew or should have known," it is an objective test, like the "obvious danger" rule. (See, e.g., *Bowersfield*, 111 F.Supp.2d at 622 ["Whether a danger is open and obvious is an objective inquiry, not dependent upon the actual knowledge of the product's user or his actual awareness of the danger"]; *Sauder Custom Fabrication, Inc. v. Boyd* (Tex. 1998) 967 S.W.2d 349, 350 [same].) As this Court recognized, a singularly unperceptive plaintiff, like perhaps Dr. Nalwa, is not thereby exempted from the bar on liability.

> Under the "should have known" standard there will be some users who were actually unaware of the dangers. However, the same could be said of the currently accepted obvious danger rule; obvious dangers are obvious to most, but are not obvious to absolutely everyone. The obvious danger rule is an objective test, and the courts do not inquire into the user's subjective knowledge in such a case. In other words, even if a user was truly unaware of a product's hazards, that fact is irrelevant if the danger was objectively obvious. (3 American Law of Products Liability (3d ed. 1993) Warnings, § 32.66, p. 113-114; *Bowersfield v. Suzuki*

> *Motor Corp.* (E.D.Pa.2000) 111 F.Supp.2d 612, 622; see *Solen v. Singer* (1949) 89 Cal.App.2d 708, 714, 201 P.2d 869 [there is no obligation " 'to give warning of an obvious danger or one which should have been perceived by the invitee' " (italics added)]; see also *Simmons v. Rhodes & Jamieson, Ltd.* (1956) 46 Cal.2d 190, 194, 293 P.2d 26.) Thus, under the sophisticated user defense, the inquiry focuses on whether the plaintiff knew, or should have known, of the particular risk of harm from the product giving rise to the injury.

(*Johnson*, 43 Cal.4th at 71.)

While this Court used the phrase "sophisticated," the focus is on the "obviousness" of the danger to the user or consumer. "Although manufacturers are responsible for products that contain dangers of which the public is unaware, they are not insurers, even under strict liability, for" injuries to "consumers who should know of the dangers involved." (*Johnson*, 43 Cal.4th at 70.)

Under product liability law in this State, people "need not be warned about dangers of which they are already aware or should be aware." (*Johnson*, 43 Cal.4th at 65.) In fact, this Court has suggested that the relevant "awareness" need not even be of the plaintiff, but of a plaintiff's employer:

> The rationale supporting the defense is that "the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers."

(*Johnson*, 43 Cal.4th at 65, citation omitted.) In this passage, the Court expanded the range of relevant knowledge cutting off liability from the consumer/individual user (the precise situation present in *Johnson*) to the user's employer (not at issue in *Johnson*).

Johnson cited other cases holding the same. For example, *Fierro v. International Harvester Co.* (1982) 127 Cal.App.3d 862, 866 found no liability on the part of a truck manufacturer for a potential hazard, because "[a] sophisticated organization like [employer] does not have to be told that gasoline is volatile and that sparks from an electrical connection or friction can cause ignition." (Cf. *Stultz*, *supra*, 6 Cal.2d 688 [employer's knowledge about plank meant no liability on part of supplier].)

Similarly, *Johnson* quoted a case holding the manufacturer of a medical device not strictly liable to a patient who died after doctors implanted the manufacturer's product: "We are aware of no authority which requires a manufacturer to warn of a risk which is readily known and apparent to the consumer, in this case the physician. Further, if the risk ... is universally known in the medical profession, the failure to warn the physician of that risk cannot be the legal cause

of the decedent's death." (43 Cal.4th at 67, quoting *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362.)

Thus, it is not "sophistication" that is the issue but knowledge. An objectively "obvious" danger does not require a warning or justify the imposition of potential liability– irrespective of whether the plaintiff actually recognized the danger.

3. If a risk is known or obvious, under an objective test, that argues against imposing liability.

While the present case is not a product liability case, these same principles resonate here. "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.'" (*Nalwa*, 196 Cal.App.4th at 596.) The focus should be on whether the risk of getting bumped is something that the doctor knew or should have known. Given the long history of bumper cars, and the fact that what is involved in the enterprise is obvious on even casual observation, getting bumped while riding bumper cars is something of which Dr. Nalwa should be charged with knowledge.

B. Primary Assumption Of The Risk Should Not Be Limited To "Active Sports."

When this Court in *Knight v. Jewett* (1992) 3 Cal.4th 296, 315 said that courts are to look at "the nature of the activity or sport," did it mean "or;" or did it mean instead only "sport;" or did it mean some combination, "active sport?" The language and logic of *Knight* suggest the disjunctive first alternative. The Court of Appeal decision reads the words "activity or" right out of the *Knight* formulation. *Knight* itself recognized that the doctrine also applies in non-sport activity contexts, like the firefighter rule.

Courts of appeal have disagreed whether primary assumption of the risk is limited to "active sports" or applies more broadly to other recreational or cultural activities. (Compare, e.g., *Record v. Reason* (1999) 73 Cal.App.4th 472, 481-482 with *Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 658-660.) The decision below relied on the restrictive view. (*Nalwa supra*, 196 Cal.App.4th at578-580.) Amici respectfully advocate that this Court adopt the broader view. There is no policy justification for categorically limiting primary assumption of the risk doctrine to what are classically considered "active sports." Even the considerations that led the court

below to decide that primary assumption of the risk did not apply do not support limiting the *Knight* rule to "active sports."

1. There is no policy justification for limiting primary assumption of the risk to "active sports."

Application of primary assumption of the risk doctrine involves a legal determination that defendant does not owe a duty to protect plaintiff from the particular risk of harm involved in the claim. (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1003.) As several of this Court's cases make clear, this legal determination is made by evaluating (1) "the nature of the activity or sport in which the defendant is engaged" and (2) "the relationship of the defendant and the plaintiff to that activity to that sport." (*Knight*, 3 Cal.4th at 309; see also *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068.) The policy reason for determining that a particular defendant does not owe a duty of care to a particular plaintiff is "to avoid imposing a duty which might chill vigorous participation in the implicated activity and thereby alter its fundamental nature.'" (*Amezcua v. Los Angeles Harley-Davidson* (2011) 200 Cal.App.4th 217, 229.)

In fostering "vigorous participation" and avoiding the imposition of duties which "chill ... participation in the implicated

activity," there is no reason to distinguish between active sports on the one hand, and non-sporting activities on the other. This Court in *Knight* noted that it is the physical exertion and competitive nature of some sporting activities that give rise to the potential for careless conduct or injury. (3 Cal.4th at 318-319.) Sports are not the only activities for which such inherent risks exist. Nor, is there any reason to single out "active sports" as the only class of activities for which the law should be reluctant to chill vigorous participation.

Drawing distinctions between such sporting activities as touch football (*Knight, supra*, 3 Cal.4th 296), and such cultural activities as participating in the Burning Man event (*Beninati, supra,* 175 Cal.App.4th 650) is as unfair as it has proven to be unsound.

As Justice Duffy aptly explained in her dissent below, courts have struggled with determining what activities constitute "active sports." (196 Cal.App.4th at 594 & fn. 12.) Many activities that do not fit into this category nevertheless enrich the experience of living – be they recreational, cultural, or just amusing – but may cease to exist if the imposition of tort liability is allowed to chill participation, or if tort liability changes the nature of the activity.

The parties and the opinions below disagreed whether head-on collisions are an "inherent risk" of bumper cars. (See Opening Brief on the Merits, pp. 42-47; Answer Brief on the Merits, pp. 20-21; see also Nalwa, 196 Cal.App.4th at 582 (maj. opn.); 196 Cal.App.4th at 602-604 (diss. opn.).) Both plaintiff and the majority below base their contention on the fact that head on collisions were against the rules at Great America. (Answer Brief on the Merits, p. 21; 196 Cal.App.4th at 582.) This reasoning flies in the face of this Court's holdings that conduct that violates an *internal rule* of a particular activity may nevertheless be an inherent risk, "part of the game," and not a breach of any legal duty of care. (See, e.g., *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 164 [intentional throwing of beanball is an inherent risk in baseball, even though against the rules].) In this case, even if head-on collisions are prohibited by the amusement park's rules, their occurrence is still an inherent risk – much like being hit by a pitch is an inherent risk of playing baseball, even if against the rules.

This Court's decision would affect more than amusement park operators. It could affect those who market or engage in a wide variety of activities, including but not limited to recreational activities.

If a member of a church that practices adult immersion baptism gets baptized and thereafter catches pneumonia, is that not an assumed risk, because baptism is not a recognized sport? Should a member of a hiking club, or someone who comes along for a club-sponsored walk, be able to sue the group for sore feet or a twisted ankle?

All of these are activities, outside traditional sports or acknowledged daredevilry, where the participant assumes the risks inherent in the activity. This Court should not create an exception for Dr. Nalwa or similarly situated persons here.

2. Many of the factors identified by the majority below in support of its decision do not support a categorical limitation of the defense to the confines of "active sports."

The court of appeal below advanced various reasons seemingly unique to the for-profit, amusement park context for concluding that primary assumption of the risk did not absolve the Cedar Fair of a duty to Dr. Nalwa. Even if this Court agrees with the majority's analysis as to some of these factors (it should not), these factors do not support a categorical limitation of the primary assumption of risk defense to the confines of active sports.

The court of appeal pointed out that the defendant in this case is a for-profit entity subject to regulation. Neither regulation nor profit

motive has anything to do with whether primary assumption of the risk doctrine should be limited to "active sports." Many commercial entities – both regulated and unregulated – do not offer "active sports," but do offer enriching activities that (1) have apparent risks and (2) are voluntarily sought out by consumers who participate in the activity despite an objectively apparent possibility of harm. The post-*Knight* duty that has been fashioned for businesses selling such recreational opportunities – be they sporting or not – is a duty not to increase the risks inherent in the activity in which the patron has paid to engage. (See, e.g., *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482; *Harrold v. Rolling J Ranch* (1993) 19 Cal.App.4th 578 [recreational horse riding]; *Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248 [white water rafting]; *Branco v. Kearny Moto Park, Inc.* (1995) 37 Cal.App.4th 184 [motocross course]; *Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8 [snow skiing].) This sound standard is obviously not dependent on the activity fitting any particular definition of an "active sport," nor should it be.

The decision below was also based on the unhelpful observation that people do not "expect" to be injured at amusement

parks. (196 Cal.App.4th at 576.) This, too, fails to support a categorical limitation of primary assumption of the risk doctrine to "active sports" activities. People who participate in active sports likewise do not expect to be injured. The primary assumption of the risk doctrine applies in the "active sports" context not because there is an expectation of injury, but rather because there is a *possibility* of injury that is inherent in the sport. The concern is that imposition of a duty to minimize or avoid injury will chill vigorous participation. Since a possibility of injury is inherent in many non-sporting activities, too, the doctrine of primary assumption of the risk should not be limited to the context of active sports.

3. Primary assumption of the risk should apply to activities, whether or not "active sports," where (1) the risk or possibility of injury is obvious, (2) imposing a duty would alter the purpose or nature of the activity, or (3) imposing a duty would chill vigorous participation in the activity and thereby alter its fundamental character

Whether primary assumption of the risk applies is determined by evaluating (1) "the nature of the activity or sport in which the defendant is engaged" and (2) "the relationship of the defendant and the plaintiff to that activity to that [activity or] sport." (*Kahn, supra*, 31 Cal.4th at, 1004.) With respect to the first part of this two-part

analysis, amici urge this Court to adopt a test along the lines of that proposed by the dissenting Justice Duffy below, that courts make a "focused evaluation 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, [or](3) imposing a duty would chill vigorous participation in the activity and thereby alter its fundamental character." (196 Cal.App.4th at 594, citing *Saville, supra*, 133 Cal.App.4th at 867; *Peart v. Ferro* (2004) 119 Cal.App.4th 60, 72 [primary assumption of risk applies to "Sea-Doo personal watercraft"].) Unlike Justice Duffy's opinion, which would require all three factors to be present, amici suggest a balancing test in which any one or two might suffice to invoke assumption of the risk doctrine in a proper case.

Amici share in Justice Duffy's view that "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.'" (196 Cal.App.4th at 594.) Amici urge this Court to disapprove of prior decisions to the extent they suggest that primary assumption of the risk doctrine applies only in the context of "active sports." (E.g.,

Calhoon v. Lewis (2000) 81 Cal.App.4th 108, 115; *Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1632; *Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322, 328; *Record v. Reason* (1999) 73 Cal.App.4th 472, 481-482.)

The majority below contended that under Justice Duffy's analysis, defendants would have *no* duty with respect to *any* activities that have an inherent risk, such as doing laundry, cleaning gutters, and taking out the trash. (196 Cal.App.4th at 580.)

Amici believe that the concern expressed by the majority is misplaced. To be sure, if one becomes injured while cleaning gutters and the injury can be traced to the conduct of another, it is hard to imagine how the "fundamental character" of cleaning gutters would be altered by imposing a duty of reasonable care. It is also true that the common activity of driving a car also has inherent risks. Yet, it is axiomatic that one does not assume the risk of negligent conduct of other motorists that causes automobile accidents. The imposition of duties of reasonable care upon motorists does not change the fundamental nature of the activity of driving, quite like the imposition of a duty upon bumper car owners to protect against bumping above and beyond what regulations require.

Amici agree with the observation below that since this Court's decision in *Knight*, courts have "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." (196 Cal.App.4th at 574.) In litigating primary assumption of the risk cases, amici have observed that the "active sport" / non-active sport dichotomy has only served to contribute to this difficulty and – even worse – has distracted the courts from consideration of more appropriate (and indeed traditional) factors. The recent decision of *Amezcua v. Los Angeles Harley-Davidson* (2011) 200 Cal.App.4th 217, is illustrative. In that case, plaintiffs sued the organizers of a motorcycle procession in which they rode, for injuries sustained in a collusion that occurred during the procession. In determining that primary assumption of the risk applied, the court of appeal was compelled to express that motorcycle riding involves "physical exertion" and "athletic risks" in addition to noting that plaintiffs had willingly participated in the activities and that the risks of riding in a motorcycle procession on Los Angeles freeways was objectively apparent. (*Id.* at 231-232.) Only the latter factors are truly relevant to the primary assumption of risk analysis –

not the level of athleticism required to ride a Harley-Davidson motorcycle.

Similarly, in *McGarry v. Sax* (2008) 158 Cal.App.4th 983, 1000, a case in which the plaintiff was injured while participating in a promotional "product toss," the court of appeal expressed that "[t]he activity ... in question has aspects of a competitive sporting event. A product is tossed into a crowd of young people who has chosen to try and retrieve it in competition with others." (158 Cal.App.4th at 1000.) The *McGarry* court made these observations *before* noting that plaintiff "was a willing participant," and that the risk of being injured while participating in the product toss was "self-evident." (*Ibid.*) It should have been unnecessary for the *McGarry* court to ascertain some level of similarity between the product toss and a "competitive sport event" in order to determine that primary assumption of the risk doctrine applied.

By approving a test that is not limited to whether the activity at issue constitutes an active sport, this Court will prevent unnecessary lawsuits, and will not do any harm to *Knight* and its post-*Knight* primary assumption of the risk jurisprudence.

With respect to the majority's concern that courts struggle to determine which risks are "inherent" in a given activity, amici submit that in most cases, the particular duty that the plaintiff asserts exists, as well as the particular harm complained of, will inform the court whether the fundamental nature of the activity will be changed by imposition of the duty.

Irrespective of what this Court decides with respect to Cedar Fair, L.P., Dr. Nalwa and the Rue Le Dodge, application of primary assumption of the risk should not turn on whether an activity at issue constitutes an "active sport." There is no apparent policy reason supporting such a categorical limitation of primary assumption of the risk doctrine, nor do most of the reasons expressed by the majority below for imposing a duty upon Cedar Fair, L.P. support such a categorical limitation.

C. The Existence Of A Protective Regulatory Regime Does Not Preclude Application Of The Primary Assumption Of The Risk Doctrine.

The court of appeal based its decision in part on the regulated nature of the defendant's activities, suggesting that the mere existence of safety regulations governing amusement parks precludes any

application of primary assumption of the risk. (196 Cal.App.4th at 578.)

Regulation should, if anything, lead to the opposite result. Mere regulation should not eliminate assumption of risk. To the contrary, it should make us more confident that the risk is already managed and relatively confined, and that no undue burden or injustice is worked by holding that the remaining risk is assumed by the participant.

By categorically excluding amusement parks from primary assumption of the risk doctrine, the court of appeal erroneously departed from the analysis set forth in this Court's opinion in *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1069-1072. Even worse, the Court of Appeal created a new categorical limitation to the primary assumption of the risk doctrine that has no support in law or policy.

Cheong involved downhill skiers who collided when one of the skiers, believing he was skiing too fast for existing conditions, made a sudden turn into the other skier with the intention of stopping. (16 Cal.4th 1063, 1066.) Plaintiff contended that the defendant violated Placer County ordinances which prohibited skiing faster than is safe, and also imposing a duty that skiers ski in safe and reasonable

manner, under sufficient control to be able to stop or avoid other skiers or objects. (*Id.* at 1069.)

This Court held that there was no limitation on primary assumption of the risk, in part because there was no clear intent in the local ordinances to impose tort liability upon the defendant. (16 Cal.4th at 1069.) The same analysis can, and should, be employed in this case. As implicitly conceded by the majority below, Cedar Fair did not breach *any* regulation in its operation of the bumper cars, much less a regulation which evinced an intent to impose tort liability for its breach.

The court of appeal's decision not to apply primary assumption of the risk was premised in part on the general safety purpose underlying the regulatory scheme. However, if application of primary assumption of the risk is dependent upon the absence of regulation, the contexts in which it will apply will be too greatly limited. Most obviously, the doctrine would cease to apply in connection with such activities as martial arts and boxing, which are extensively regulated. (See, e.g., Title 4, Division 2, California Code of Regulations.) Of course, it would be absurd to suggest that primary assumption of the

risk would have no application in the context of boxing simply because boxing is a regulated sport.

Furthermore, a rule categorically excluding regulated activities from primary assumption of the risk doctrine is inconsistent with the purpose for which the defense is recognized. As discussed above, primary assumption of the risk doctrine is a narrow exception to the general policy favoring safety, which instead favors one's freedom to participate in activities that, while they entail inherent risks, are nevertheless beneficial. The mere existence of regulations governing a particular activity is not a reason to decline to apply primary assumption of the risk where the particular activity giving rise to the plaintiff's injury is not proscribed.

III

CONCLUSION

Most activities involve some level of risk; riding bumper cars is no exception. The law has traditionally been that in proper cases, a participant may be held to have assumed the risk of an activity, so that injuries inherent in the activity do not subject any third persons to tort liability. Here, Dr. Nalwa assumed the risk that she would be bumped while riding Rue Le Dodge.

Amici respectfully urge this Court to consider the effect of the obvious danger rule in deciding that primary assumption of the risk bars Dr. Nalwa's claim. Amici also urge this Court to clarify that the categorical limitations of primary assumption of the risk that informed the decision below are not the law. Specifically, this Court should hold that primary assumption of the risk doctrine is not limited to "active sports" and variations of the firefighter's rule. This Court should also hold that the mere existence of regulations governing a particular activity do not preclude application of the primary assumption of risk defense.

Respectfully submitted,

Dated: April 6, 2012

GORDON & REES LLP

By: _____
Don Willenburg
Attorneys for Amicus Curiae
Association of Defense
Counsel of Northern
California and Nevada

Dated: April 6, 2012

COLE PEDROZA LLP

By: _____
Joshua C. Traver
Attorneys for Amicus Curiae
Association of Southern
California Defense Counsel

CERTIFICATE OF WORD COUNT

I certify pursuant to Rules of Court, rule 8.504(d) that the word count of this brief is 6,892 words, as calculated by the word processing program used to produce the brief.

Dated: April 6, 2012

Don Willenburg

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NALWA v. CEDAR FAIR, L.P.
Supreme Court Case Number S195031

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Eileen F. Spiers

SERVICE LIST

Ardell Johnson
Law Offices of Ardell Johnson
111 North Market Street, Suite 300
San Jose, CA 95113

Christi Jo Elkin
Attorney at Law
4667 Torrey Circle #301
San Diego, CA 92130
Attorneys for Plaintiff and Appellant Smriti Nalwa

Jeffrey Myles Lenkov
Steven Jeff Renick
Manning & Kass, Ellrod, Ramirez, Trester LLP
801 South Figueroa Street, 15th Floor
Los Angeles, CA 90017

Patrick L. Hurley
Manning & Kass, Ellrod, Ramirez, Trester LLP
1 California Street, Suite 1100
San Francisco, CA 94111
Attorneys for Defendant and Respondent Cedar Fair, LP

California Court of Appeal
Sixth Appellate District
333 West Santa Clara Street
Suite 1060
San Jose, CA 95113

The Honorable James P. Kleinberg
Superior Court of California
County of Santa Clara
191 N. First St.
San Jose CA 95113