

No. S118489

In the Supreme Court of California

Johana Gomez, as Administrator, etc.,
Petitioner,

vs.

The Superior Court of Los Angeles County,
Respondent,

The Walt Disney Company, *et al.*,

Real Parties In Interest.

After a Decision by the Court of Appeal,
Second Appellate District, Division 8, Case No. B163651
Los Angeles County Superior Court, Case No. BC258512

**Opening Brief on the Merits of
Real Parties in Interest,
The Walt Disney Company, *et al.***

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Issue Presented

Is an amusement ride, contained within the confines of a single building, and which starts and stops at the same location having no transportation function, a common carrier under Civil Code section 2168 subject to the utmost duty of care and diligence under Civil Code section 2100?

Statement of the Facts and Procedural History

The Indiana Jones attraction at Disneyland Park simulates the off-road adventures of movie hero Indiana Jones while patrons ride in Jeep-type vehicles on a track set within scenes and situations like those encountered by Indiana Jones in the series of motion pictures featuring that character. [Ex. 1 at 8; Ex. 6 at 4.]¹ In June 2000, Cristina Moreno rode the Indiana Jones attraction. [Ex. 1 at 3.] According to the complaint, she allegedly sustained a brain injury as a result of being “shaken” because of the ride’s design. [Ex. 1 at 3, 15-16.] She was not struck by any object; the ride operated as designed; and she left the ride under her own power apparently uninjured. Several hours later she began to suffer from a brain injury and died weeks later in September 2000. [Ex. 1 at 3.]

Moreno’s estate and heirs sued Walt Disney World Co. (and other Disney entities, collectively, “Disneyland”) on various theories. Two of the causes of action sought to fix common carrier liability on Disneyland. The trial court sustained Disneyland’s demurrer to the common carrier causes of action, holding that operating the Indiana Jones attraction did not make Disneyland a common carrier. [Ex. 10 at 1-2, 13.] Gomez filed a mandate petition in the Court of Appeal challenging the sustaining of the demurrer.

¹ References to exhibits are to the exhibits in support of plaintiffs’ petition for writ of mandate filed in the Court of Appeal.

The Court of Appeal called for opposition, heard the petition on its merits, and issued a published opinion reinstating the common carrier causes of action. On Disneyland's petition, this Court granted review.

Legal Discussion

I

The Statutory Scheme Defining and Discussing Common Carriers Excludes Amusement Park Attractions

The overriding goal of statutory construction is to ascertain the intent of the Legislature. *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276. To that end, a court will employ well-established principles of statutory construction. Applying those principles here, an amusement park attraction is not properly classified as a common carrier.

A. When Civil Code section 2168 was enacted in 1872, common carriers included only those companies that actually transported people, freight, or messages for a practical purpose from place to place

As originally enacted in 1872, Civil Code section 2168 read, "Every one who offers to the public to carry persons, property or messages, is a common carrier of whatever he thus offers to carry." It has been amended only once, in the Legislature's 1873-74 session at the behest of the telegraph industry to insert an exception that remains in the statute as it reads today:

Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry.

Civ. Code § 2168.

The words of a statute “are to be interpreted in the sense in which they would have been understood at the time of the enactment.” *People v. Cruz* (1996) 13 Cal.4th 764, 774. When the Legislature enacted section 2168 in 1872, it understood that common carrier status applied only to those who transported people, packages, and messages for a practical purpose. Not a single case decided by this Court predating section 2168’s enactment applied common carrier status to anything remotely similar to an amusement ride.

To the contrary, all of the common carrier cases this court decided before section 2168 was enacted arose in the context of transporting persons, freight, or messages. *E.g., Wells Fargo & Co. v. Pacific Ins. Co.* (1872) 44 Cal. 397 (steamship line); *Yeomans v. Contra Costa Steam Navigation Co.* (1872) 44 Cal. 71 (steamboat and train); *Turner v. The North Beach and Mission Railroad Company* 34 Cal. 594 (1868) (streetcar); *Wheeler v. San Francisco & Alameda Railroad Co.* (1866) 31 Cal. 46 (railroad); *Jones v. Wells Fargo & Co.* (1865) 28 Cal. 259 (delivery of bank draft; exact form of conveyance not specified); *Agnew v. Steamer Contra Costa* (1865) 27 Cal. 425 (steamer); *Hooper v Wells Fargo & Co.* (1864) 27 Cal. 11 (tug boat transporting goods from shore to ship); *Griffith v. Cave* (1863) 22 Cal. 534 (ferryman); *Fairchild v. The California Stage Co.* (1859) 13 Cal. 599 (stagecoaches); *Parks v. Alta California Telegraph Company* (1859) 13 Cal. 422, 424 (treating telegraph company as a common carrier: “The physical agency may be different, but the essential nature of the contract is the same”); *May v. Hanson* (1855) 5 Cal. 360 (ferryman).

Therefore, the first principle of statutory construction — that a statute’s words “are to be interpreted in the sense in which they would have been understood at the time of the enactment” — limits the meaning of

common carriers to commercial carriage or practical transportation. It does not encompass a ride in an amusement park.²

B. The statutory scheme includes provisions that are incompatible with treating a ride as a common carrier

Statutes are not considered in isolation. Instead, courts consider “portions of a statute in the context of the entire statute and statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative process.” *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063. Indeed, it has been said that a court “must follow the cardinal rule of construction . . . that . . . making some words surplusage is to be avoided.” *State of South Dakota v. Brown* (1978) 20 Cal.3d 765, 776-77. This Court does not “construe statutes in isolation, but rather read[s] every statute “with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness.”” *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1253. Treating amusement rides as common carriers violates these rules because it renders part of the common carrier statutory scheme utterly irrelevant.

The Civil Code defines a “contract of carriage” to mean “a contract for the conveyance of property, persons, or messages, from one place to another.” Civ. Code § 2085. Interpreting this statute, one court has said that a common carrier “is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to

² The Court of Appeal stated that the common carrier statutes “have been applied to numerous modes of *transportation* that were unknown in 1872.” [Typed Op’n at 5 (emphasis added).] Disneyland’s point is not that amusement rides were unknown, but that the Legislature’s codification of this Court’s pre-1872 authority showed that common carrier status had only been conferred on practical transportation.

place for a profit.” *Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1508, citing *Samuelson v. Public Utility Comm’n* (1951) 36 Cal.2d 722, 728-30.

The requirement that a common carrier transport persons from place to place exactly connotes there is a practical reason for the carriage, altogether missing in amusements. Practical functionality is a continuing theme in the statutes dealing with common carriers. The law requires a carrier to travel “without unreasonable delay, or deviation from his proper route.” Civ. Code § 2104. Similarly, “[a] common carrier must start at such time and place as he announces to the public, unless detained by accident or the elements, or in order to connect with carriers on other lines of travel.” Civ. Code § 2172. “A common carrier of persons must provide a sufficient number of vehicles to accommodate all the passengers who can reasonably be expected to require carriage at any one time.” Civ. Code § 2184.

The requirement in section 2104 that a carrier must proceed without unreasonable delay or deviating from a proper route applies to normal, everyday travel, not to an amusement ride where the vehicle only moves in a confined space and travels nowhere. Section 2172’s requirement that a carrier’s timing is interdependent with connecting to other routes and carriers also shows that treating an amusement ride as a common carrier can only be done by violating the cardinal rule of statutory construction and treating some language as surplusage.

The Court of Appeal opinion simply brushed aside any need to treat the statutory scheme as a whole. It takes no account at all of section 2085, which contains the definition of a contract of carriage as a conveyance “from one place to another.” Having ignored this statute in its entirety, the court did not explain how an amusement ride confined in a single building

involves carriage “from one place to another.” Moreover, rather than recognize that sections 2104, 2172, and 2184 help shape the type of conveyance and contract of carriage that the Legislature intended to be treated as a common carrier, the court simply stated that “even if a particular requirement does not easily apply in the context of an amusement park ride, that in itself is not reason to ignore the clear language of section 2168.” [Op’n at 7.] But it is, because it demonstrates a limitation on the scope of section 2168 just as surely as do this Court’s decisions predating the statute.

II

Apart from Statutory Construction, an Amusement Ride Should Not Be Treated as a Common Carrier

A. The Court of Appeal opinion is inconsistent with the modern cases from other states which decline to treat amusement rides as common carriers

The more recent cases around the country have uniformly concluded that amusement rides should not be treated as common carriers. *See generally*, Casenote, *A Tale Involving the Magic Kingdom, Pirates, and a Court’s Broad Interpretation of Common Carrier Liability*, 1 Chap. L. Rev. 171, 173 (1998) (“Generally, amusement ride operators are required to exercise a level of reasonable and ordinary care under the circumstances. However, a few jurisdictions demand a higher duty of care comparable to that owed by a common carrier.”). Though both sides cited to the Court of Appeal decisions of sister states on this issue, the court’s opinion does not cite or discuss any of them.

1. Sister state cases Disneyland cited are newer and show a trend that amusement ride operators are not common carriers

The following cases (by states in alphabetical order) are among those that reach a result contrary to that reached by the Court of Appeal here:

Florida. *Sergermeister v. Recreation Corp. of America* (Fla. App. 1975) 314 So.2d 626, 631-32 (“Plaintiffs go on to urge that the amusement device here is analogous to a common carrier We have found no Florida case so holding. [¶] Since we do not equate the amusement park ride with a common carrier, the implied warranty claim permitted against common carriers . . . cannot be utilized here.”).

- **Georgia.** *Harlan v. Six Flags Over Georgia, Inc.* (Ga. 1982) 297 S.E.2d 468, 469 (“We disagree with [plaintiff’s] contention that ‘The Wheelie’ is a public conveyance, therefore rendering Six Flags a carrier owing its passengers an extraordinary duty of care”).

- **Iowa.** *Wright v. Midwest Old Settlers & Threshers Ass’n* (Iowa 1996) 556 N.W.2d 808 (operation of train at special event “for the amusement and comfort of the attendees” does not make operator “a common carrier subject to the highest degree of care in the operation of the service or facility”).

- **New Hampshire.** *Siciliano v. Capitol City Shows, Inc.* (N.H. 1984) 475 A.2d 19 (“The general rule is that the owner and operator of an amusement ride has a duty to exercise reasonable care. The owner or proprietor of a place of amusement is not an insurer of the safety of the patrons; rather, he must exercise that degree of care which, under the same

or similar circumstances, would be exercised by an ordinarily careful or prudent individual.”).

- **New Jersey.** *Gray v. Great American Recreation Ass’n, Inc.* (2d Cir. 1992) 970 F.2d 1081 (conversion claim; operator of amusement park is “neither an innkeeper nor a common carrier”).
- **Oregon.** *Eliason v. United Amusement Co.* (Or. 1972) 504 P.2d 94 (under Oregon statute, a carousel ride is not a common carrier).
- **Texas.** *Gates v. Astroworld, Inc.* (Tex. App. 1999) 1999 WL 417311 (not precedential) (“Astroworld operates an amusement park ride that moves patrons along a specified track and returns them to the same point at which the ride began. [T]here is no case law to support [plaintiffs’] contention that Astroworld operates as a common carrier.”).

Though plaintiff relied heavily below (Petition for Writ of Mandate at 20-24) on a Texas court of appeals case, *Elmer v. Speed Boat Leasing, Inc.* (Tex. App. 2002) 89 S.W.3d 633, to support her argument, just last month — after this Court granted review of Disneyland’s petition — the Texas Supreme Court reversed that decision. *Speed Boat Leasing, Inc. v. Elmer* (Tex., December 19, 2003) ___ S.W.3d ___, 2003 WL 23018578. Since *Speed Boat Leasing* is the most recent case Disneyland has been able to locate, it bears some discussion.

In *Speed Boat Leasing*, the defendant offered a speedboat thrill ride in the Gulf of Mexico aboard a boat named the “Gulf Screamer.” The boat offered “fun packed cruises for all” during which customers would “THRILL to a refreshing, exhilarating ride in open waters SCREAMING past South Padre Island’s beautiful sand beaches.” 2003 WL 23018578 at *1. The plaintiff suffered a spinal fracture from bouncing around in the

course of the ride. She sued, and after a defense verdict, claimed error in the trial court's refusal to instruct the jury on the high standard of care required of common carriers. The Texas Supreme Court held that the instruction was properly refused because the speedboat ride was not a common carrier.

Texas does not have a statute defining common carriers, but the Texas Supreme Court pointed to a predecessor statute identifying "railroad companies and other carriers of passengers, foods, wares, merchandise for hire, within this state, on land, or in boats or vessels" as being subject to the duties and liabilities of common carriers. *Id.* at *2. The Texas Supreme Court further observed that that Texas courts have "defined a common carrier as 'a person who engages in the *transportation* of persons or things from place to place for hire . . .'" (*Id.*) — just as do California Civil Code sections 2085 and 2168.

In rejecting common carrier status for this speedboat ride, the Texas Supreme Court stated that in "determining whether someone who provides transportation is a common carrier, we look to their primary function. It must be determined whether the *business* of the entity is public transportation or whether such transportation is only 'incidental' to its primary business." *Id.* The court went on to say that although the defendant "transports its passengers across the waters of the Gulf of Mexico, its primary purpose is to entertain, not to transport from place to place. [¶] Thus, the Gulf Screamer is more analogous to an amusement ride, which we have held to an ordinary standard of care, than a common carrier. [¶] The trial court did not err in instructing the jury that the standard of care to be applied was ordinary care." *Id.* at *3.

If a real ride on a real boat in a real ocean is not a common carrier, then it follows that neither can a simulated entertainment trip in the confines of a single building be classified as a ride on common carrier.

- **Utah.** *Lamb v B&B Amusements Corp.* (Utah 1993) 869 P.2d 926, 930-31 (“[T]he circumstances in which common carriers and amusement ride operators function differ in important respects. The heightened standard of care required of common carriers is predicated on the principle that ‘persons using ordinary transportation devices, such as elevators and buses, normally expect to be carried safely, securely, and without incident to their destination. [¶] Consistent with the majority of courts that have ruled on the issue, we hold that the care required of amusement ride operators is the care that reasonably prudent persons would exercise under the circumstances.”).

- **Virginia.** *Bregel v. Busch Entertainment Corp.* (Va. 1994) 444 S.E.2d 718, 719 (“[Plaintiff] argues that Busch Entertainment is a common carrier because the Skyride transports patrons from one location of the park to another We disagree. [¶] Unlike [an] elevator . . . Busch Entertainment’s Skyride is used to entertain patrons of the amusement park and any transportation function is purely incidental to the amusement function.”).

2. Sister state cases plaintiff cited are for the most part older, and in any event, do not treat amusement rides as common carriers

The sister-state cases that plaintiff relied upon, however, for the most part, pre-date the modern trend. Moreover, these cases do not hold

amusement park operators to be common carriers, but simply apply a higher standard of care without that holding.³

- **Colorado.** *Lewis v. Buckskin Joe's, Inc.* (Colo. 1964) 396 P.2d 933, 938-39 (stagecoach ride — finding instruction on ordinary care improper, but stating, “It is not important whether defendants were serving as a carrier or engaged in activities for amusement,” focusing instead on defendant’s control of the stagecoach ride). Similarly, the Colorado ski-lift cases plaintiff cites do not hold ski-lifts to be common carriers, but simply apply the higher standard of care under *Buckskin Joe's* because riders on ski lifts lack control. *Bayer v. Crested Butte Mountain Resort, Inc.* (Colo. 1998) 960 P.2d 70; *Summit County Development v. Bagnoli* (Colo. 1964) 441 P.2d 658.

- **Florida.** *Coaster Amusement Co. v. Smith* (Fla. 1940) 194 So. 336 (applying *res ipsa loquitur* to roller coaster accident but not holding operator to be a common carrier).⁴

- **Illinois.** *O'Callaghan v. Dellwood Park Co.* (Ill. 1909) 89 NE 1005, 1007 (refusing to hold scenic railway to be a common carrier, but holding that operator should be held to the same degree of care “as a common carrier”).

³ As explained in Part IV, California adheres to the rule that there is a single standard of care that remains constant, but that a trier of fact may take the facts and circumstances into account in deciding whether the defendant’s conduct met that standard.

⁴ As noted above, the 1975 Florida decision in *Sergermeister v. Recreation Corp. of America* — 35 years after *Coaster Amusement* — concluded that it had not found any Florida decision equating an amusement park ride to a common carrier.

- **Minnesota.** *Bibeau v. Fred W. Pearce Corp.* (Minn. 1928) 217 N.W. 374, 376 (proprietor of place of amusement “is required to use due care. . . . The duty is commensurate to the risk involved. The rule is now quite well established that the proprietor of a roller coaster must exercise the highest degree of care . . .”).
- **Missouri.** *Cooper v. Winwood Amusement Co.* (Mo. Ct. App. 1932) 55 S.W.2d 737, 742 (refusing to hold roller coaster to be a common carrier, but holding that operator to same degree of care).
- **Oklahoma.** *Sand Spring Park v. Schrader* (Okla. 1921) 198 P. 983, 987 (refusing to hold operator of scenic railway to be a common carrier, but holding that operator to same degree of care: “We are not seeking to draw an analogy between the rule that applies to the common carrier of passengers for hire and those who carry passengers on scenic railways for hire. We doubt the practicality and necessity of drawing such an analogy . . .”).
- **Tennessee.** *Lyons v. Wagers* (Tenn. App 1966) 404 S.W.2d 270, 274 (refusing to hold roller coaster to be a common carrier, but holding that operator to same degree of care).

Since the Court of Appeal opinion here is contrary to the modern trend not to treat amusement rides as common carriers, this Court should reverse.

B. Earlier California state and federal cases reach inconsistent results and do not contain any compelling reason to treat amusement rides as common carriers

While the Court of Appeal did not write on a completely clean slate, the preceding opinions (including one California federal district court

opinion) are, to say the least, unclear and inconsistent in their treatment of the issue presented by this case.

Three cases dealing with amusement rides reached inconsistent results. In *Davidson v. Long Beach Pleasure Pier Co.* (1950) 99 Cal.App.2d 384 the court held the operator of a “Tilt-a-Whirl” amusement ride only to a duty of “reasonable care,” without any suggestion that the ride could somehow constitute a common carrier or that the duty of “utmost care and diligence” was somehow implicated. *Id.* at 387. Conversely, though, in *Barr v. Venice Giant Dipper Co., Ltd.* (1934) 138 Cal.App. 563, where the plaintiff was injured while a passenger on a roller coaster “in the nature of a miniature scenic railway,” the court found that there was “no error in the instructions to the jury charging the appellant with the utmost care and diligence required of a common carrier” *Id.* at 563, 564.⁵ Just like the Court of Appeal here, the court did not cite or discuss Civil Code section 2085 that defines a contract of carriage as “a contract for the conveyance of . . . persons . . . from one place to another.” Nor did the court discuss the entire common carrier statutory scheme to see if an amusement ride could fit within its contours. In a third court of appeal case dealing with an amusement ride, *Pontecorvo v. Clark* (1928) 95 Cal.App. 162, 176-77, the defendant stipulated to common carrier status, so the court did not have occasion to analyze the issue.

A fourth case involving a horse-drawn surrey at Disneyland Park is no more enlightening because the court referred solely in dicta to the “passenger-carrier” relationship. *Kohl v. Disneyland, Inc.* (1962) 201 Cal.App.2d 780, 783. The reference was dicta because common carrier

⁵ One cannot tell from the opinion whether the “miniature scenic railway” had any transportation function independent of its roller coaster aspects.

status was not in issue on appeal. Disneyland had prevailed in the trial court so it did not have occasion to challenge jury instructions imposing on it the duty of utmost care and diligence. For that reason, the court of appeal did not further discuss common carrier status or section 2085.

Two cases not involving amusement rides acknowledge the transportation requirement necessary for common carrier status and are distinguishable for that reason. *McIntyre v. Smoke Tree Ranch Stables* (1962) 205 Cal.App.2d 489; *Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499. *McIntyre* involved a mule ride from Palm Springs to Tahquitz Falls. The defendant argued that he simply rented a mule to the plaintiff, but the court rejected this contention, holding that plaintiff had “purchased a ride” and that the “transaction between them constituted an agreement of carriage.” 205 Cal.App.2d at 492. Thus, while *McIntyre* failed to discuss section 2085, it did recognize the transportation element underlying common carriage. Moving people between Palm Springs and Tahquitz Falls is “transporting them “from one place to another,” unlike an attraction within a building that starts and stops at the same place.

Similarly, *Squaw Valley* explicitly acknowledged the transportation requirement in holding a ski-lift to be a common carrier. To be a common carrier the court said, the entity must “transport goods or persons from place to place for profit.” 2 Cal.App.4th at 1508. The ski-lift did just that, taking skiers “at a fixed rate from the bottom to the top of the [ski] run, [so] it logically comes within the Civil Code section 2168 definition of a common carrier.” *Id.* The ski-lift is transportation *to* the thrill ride; it is not itself the amusement ride like the Indiana Jones attraction.

The final case in the series preceding this one is a United States District Court case holding an attraction at Disneyland Park, Pirates of the Caribbean, to be a common carrier. *Neubauer v. Disneyland, Inc.* (C.D. Cal. 1995) 875 F.Supp. 672. *Neubauer*, though involving an attraction at Disneyland Park, is utterly unpersuasive.⁶

The opinion contains virtually no analysis. *Neubauer* does not cite any rules of statutory construction, does not cite Civil Code section 2085, and does not analyze the reasons why a majority of courts around the country (Part II, above), have held amusement rides not to be common carriers. It does not consider the policy implications for the millions of amusement park patrons if the higher standard were to be applied. (See Part IV, below.) It simply cites *McIntyre* and *Squaw Valley* (neither of which involves an amusement ride), acknowledges that a “reasonable argument can be made that common carrier status should *not* apply to an amusement park ride,” yet concludes that because section 2168 is “broad,” it does apply. That is the sum total of the court’s analysis. See Casenote, *supra* 1 Chap. L. Rev. at 177 (criticizing *Neubauer* for failing to address “several major issues and distinctions that have developed in determining what activities constitute a common carrier”).

In sum, the court of appeal opinions and the federal district court opinion on this topic provide little guidance in analyzing the issues presented in this case. The opinions dealing with amusement rides are not consistent, nor are they well-reasoned. *McIntyre* and *Squaw Valley* do not involve amusement rides that go nowhere, but instead practical transportation to a destination. This Court should disapprove of those cases holding amusement attractions to be common carriers.

⁶ Nor does a United States District Court opinion have any stare decisis effect. *In re Javier A.* (1984) 159 Cal.App.3d 913, 924 n.4.

C. New administrative regulations bolster the conclusion that amusement rides should not be held to a common carrier standard of care

Labor Code section 7923, effective January 1, 2000, directs the proposal, formulation, and adoption of rules and regulations for the “safe installation, repair, maintenance, use, operation, and inspection of all permanent amusement rides” Effective July 12, 2003, the Office of Administrative Law approved what are known as the “Permanent Amusement Ride Technical Regulations,” which are dense, specific, technical regulations regulating permanent amusement ride safety incorporating standards adopted by ASTM International (www.astm.org, formerly known as American Society for Testing and Materials). The regulations can be found at California Code of Regulations, Title 8, Division 1, Chapter 4, subchapter 6.2, starting with section 3195.1.

Where complex technical issues guide parties’ behavior, this Court has deferred to regulatory standards as setting an appropriate standard of care, stating that “there is some room in tort law for a defense of statutory compliance.” *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539 548. *Ramirez* involved the question of whether a warning label on children’s aspirin was required to be in Spanish as well as English. After analyzing the regulations surrounding drug packaging and experience of administrative bodies with expertise in this technical field, this Court concluded that “the prudent course is to adopt for tort purposes the existing legislative and administrative standard of care on this issue.” *Id.* at 553. This Court went on to say that it would reject plaintiff’s attempt to “place on nonprescription drug manufacturers a duty to warn that is broader in scope and more onerous than that currently imposed by applicable statutes and regulations. . . . To preserve that uniformity and clarity . . . and in deference to the superior technical and procedural lawmaking resources of legislative and

administrative bodies, we adopt the legislative/regulatory standard of care” *Id.* at 555.

So too, here, an administrative body with “superior technical and procedural lawmaking resources” has now promulgated specific regulations dealing with permanent amusement ride safety standards. *See Pessl v. Bridger Bowl* (Mont. 1974) 524 P.2d 1101 (standards for passenger tramways interpreted to require standard of reasonable care, replacing common carrier standard of duty of “utmost care and diligence of a very cautious person”). This Court should do the same as *Pessl* and conclude that the standards promulgated by the Department of Industrial Relations should be deemed at trial to supply the appropriate standard of reasonable care.

III

The Reason Common Carriers Are Held to a Higher Standard Cannot Be Used to Determine *Whether* an Amusement Ride Is, in Fact, a Common Carrier

Plaintiff also argued below that the duty of utmost care and diligence should apply because an amusement park ride operator exercises exclusive control over the equipment used in the ride and the passenger exercises no control. As plaintiff put it, “Because of the riders’ helplessness and inability to exercise control over the ride, operators of amusement rides such as roller coasters should be held to the highest standard of care.” [Petition at 15.]

This argument should be rejected. It just begs the question. It confuses *why* the Legislature has chosen to hold a common carrier to a higher standard of due care with the issue of *whether* an amusement park ride is a common carrier in the first place.

The falsity of plaintiff's reasoning was exposed in *Spath v. Federal Ins. Co.* (D. Mass. 2000) 101 F.Supp.2d 49, where the plaintiff's husband lost his life in a whitewater rafting accident on a trip organized and run by a rafting company. The issue in *Spath* was whether the rafting company should be treated as a common carrier. The plaintiff argued that the focus should be "whether or not the passenger has placed him or herself wholly within the control of the operator," as opposed to the question whether "the purpose of the carriage was recreation or transportation." *Id.* at 51.

Spath rejected this argument in no uncertain terms, stating that the argument confused the standard of care imposed on common carriers with the issue of whether the defendant has that status at all:

This rationale is instructive in determining whether or not to impose the high standard of care that is normally required of common carriers. However, it is inapplicable to determining whether or not an entity may be considered a common carrier in the first place. . . . Whitewater rafting companies are in the business of providing recreation in the outdoors: not transportation.

Id. at 52. See also *Deutsch v. Chubb Group of Ins. Cos.* (D. Colo. 1995) 1995 WL 584394 at *3 (whitewater rafting company is not a common carrier; transportation is incidental to "thrill, adventure, fun, and excitement of this recreational experience"); *Beavers v. Federal Ins. Co.* (N.C. App. 1994) 437 S.E.2d 881 (same).

The rationale of *Spath*, *Deutch*, and *Beavers* applies with even more force to amusement attractions. Visitors to an amusement park are not there for practical transportation to a different physical location, they are *in* the location for a diverting experience that goes nowhere except in their imaginations.

IV

Public Policy Precludes Common Carrier Status for Amusement Rides

Refusing to treat amusement rides as common carriers is not only consistent with the rules of statutory interpretation — reading and applying section 2085 rather than ignoring it — but would also be consistent with sound public policy. The common carrier standard of care is designed to protect persons who need transportation for business or personal reasons and to ensure that transportation is available to everyone on equal terms. As these persons are beholden to, and reliant upon, the carrier, it makes sense that the carrier should bear unique obligations. Amusement rides, however, are fundamentally different. They are voluntary, and never required for some business or personal necessity. They are not designed to provide transportation “from one place to another,” or to provide an uneventful and comfortable trip. Instead, they are designed to thrill and amuse through motion and other effects, the motion being purely incidental to this entertainment function.

To apply the common carrier standard to an attraction that is, for instance, intended to make the rider free-fall 100 feet, or to spin the rider to the point of pleasurable dizziness, subverts the whole purpose of the standard. Riders board amusement rides to be entertained, dropped, spun, shaken, and even scared, all for the fun of it.

When a rider suffers an injury on an amusement ride, the “reasonable person” standard of care provides the perfect balance of protection to the rider and the operator alike. This standard of care would compare the operator’s actions to the actions of a reasonably prudent person operating that ride — be it a ferris wheel, a merry-go-round, or a high-

speed, triple-loop roller coaster — thus taking into account the nature of the ride and the rider’s expectations.

This common-sense approach protects the rider by providing a standard of care commensurate with the risk the rider believes he or she is undertaking. It also protects the operator by not forcing it to comply with a standard of care that has no logical connection to the operation or the movement of the particular ride at issue. For example, assume that the gravitational forces on a ride are sufficiently high to make it fun enough to attract riders, but well within the limit considered safe by reasonable engineering standards. A plaintiff is nonetheless injured in some way. Is the operator liable for not exercising “utmost care and diligence” because the gravitational forces could have been less despite uncontroverted evidence they were well within the margin of reasonable safety? The operator, after all, in this hypothetical could have made the gravitational forces much less, but at the cost of making the ride less interesting to riders. In other words, there is a tension in thrill rides not present in ordinary modes of transportation that demonstrate that the ordinary standard of reasonable care — and not a higher standard — is properly applied.

That does not mean, however, that a ride operator is either insulated from liability or that the jury cannot take the ride’s characteristics into account in deciding the case. In *Flowers v. Torrance Memorial Hosp. Med. Center* (1994) 8 Cal.4th 992, this Court discussed that “ordinary care” is a constant standard, but one that is applied to the particular circumstances before the court. Thus, while the standard of care, *i.e.*, “ordinary” or “reasonable” care, may be constant, whether conduct is reasonable depends on the particular circumstances:

[A]s a general proposition, one is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. Because application of this principle is inherently situational, the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances. There are no ‘degrees’ of care, as a matter of law; there are only different amounts of care, as a matter of fact.

8 Cal.4th at 997 (internal quote marks and citations omitted).

If an amusement ride operator were held to the duty of utmost care and diligence, however, a jury would be instructed that the operator must use the “highest care and diligence of a very cautious person.” CACI 902. *See Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 27. As the court of appeal long ago explained, that standard is tantamount to the operator being an insurer of its passengers’ safety:

The difference between the statement that common carriers are charged with the highest care to protect or preserve the safety of their passengers and the statement that such carriers are not insurers of the absolute safety of their passengers, is merely verbal and involves the statement of practically the same rule of law as applicable to common carriers in an affirmative and a negative form. The slightest neglect cannot be the highest care, so when it is said that common carriers are charged with the highest care to protect the safety of their passengers it necessarily means that they are insurers of such safety as against the slightest neglect.

Pontecorvo v. Clark (1928) 95 Cal.App. 162, 182.

More modern authority supports the *Pontecorvo* court's statement that even the most minor neglect amounts to liability under this higher standard of care. *Andrews v. United Airlines, Inc.* (9th Cir. 1994) 24 F.3d 39. In *Andrews*, a passenger was injured when a briefcase fell out of an overhead compartment. To show that United Airlines did not meet its duty as a common carrier, the plaintiff presented the testimony of two witnesses. The first testified that in 1987 United had received 135 reports of items falling from overhead bins and that as a result of these incidents, United added a warning to its arrival announcements that items stored overhead might have shifted during flight and that passengers should use caution. The second witness was a human factors expert who testified that United's announcement was ineffective and that United could have taken steps to prevent the hazard, such as retrofitting its overhead bins with baggage nets.

United argued that plaintiff presented too little evidence to satisfy her burden since 135 reports, compared to the millions of passengers traveling on the airline, were trivial. United argued that the low incidence of injuries was incontrovertible proof that safety measures would not merit the additional costs suggested by plaintiff's expert.

The Court of Appeals for the Ninth Circuit found that the plaintiff had made a sufficient case to overcome summary judgment, noting that the case turned on whether the hazard was serious enough to warrant more than a warning. The court then stated: "Given the heightened duty of a common carrier . . . even a small risk of serious injury to passengers may form the basis of liability if that risk could be eliminated 'consistent with the character and mode of [airline travel] and the practical operation of [that] business.'" 24 F.3d at 41. The court then concluded that since United had not shown that it would be "prohibitively expensive" to retrofit its overhead baggage bins with safety netting, nor that "such steps would grossly

interfere with the convenience of passengers,” a jury “could find that United has failed to do ‘all that human care, vigilance, and foresight reasonably can do under all the circumstances.’” *Id.*

If applied to an amusement ride operator though, the duty of utmost care and diligence would in fact mean that the operator becomes the absolute insurer of its patron’s safety. For example, any ride can be slowed down, but at the cost of making it less enjoyable for its riders. Under this higher duty, an amusement ride operator would necessarily be liable solely for failing to take steps within its power without regard for its effect on the ride — in addition to nullifying the standards incorporated into the administrative regulations.

On the other hand, holding an amusement ride operator to the ordinary standard of care is consistent with *Flowers* and in no way insulates a ride operator from the proper consequences of its conduct. That is, the circumstances of the Indiana Jones attraction may be taken into account when the jury ultimately deliberates, but those circumstances are required to be measured against the ordinary standard of reasonable care, not the standard of “utmost care and diligence” found in Civil Code section 2100.

In sum, applying the ordinary standard of care would be good public policy because it provides the proper balance for the competing factors applicable to rider and operator alike.

Conclusion

This court should reverse the Court of Appeal and affirm the trial court's dismissal of the common carrier causes of action.

Dated: January 12, 2004

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Enterprises, Inc.

Certificate of Word Count

The undersigned certify under rule 29.1(c) that according to the word count feature of the word processor used to prepare this petition, it contains 6,593 words, exclusive of the matters that may be omitted under rule 29.1(c)(3).

Dated: January 12, 2004

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Proof Of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 1920 Main Street, Suite 1200, Irvine, California 92614-7230.

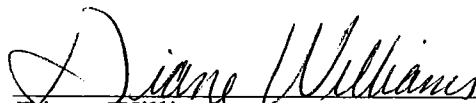
On January 12, 2004, I served, in the manner indicated below, the foregoing document described as **Opening Brief on the Merits of Real Parties In Interest, The Walt Disney Company, et al.** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Irvine, addressed as follows:

Please see attached Service List

- BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Irvine, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).
- BY FACSIMILE: (C.C.P. § 1013(e)(f)).
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 12, 2004, at Irvine, California.


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