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## NOTE

# The Supreme Court of Missouri Splashes with Precedent in Waterslide Injury Case

*Chavez v. Cedar Fair, LP*, 450 S.W.3d 291 (Mo. 2014) (en banc).

JOE KRISPIN\*

### I. INTRODUCTION

Amusement park rides generally offer patrons a fill for their thrill-seeking desires. In addition to roller coasters and spinning wheels, a popular ride during the summer months is the waterslide. Waterslides come in sizes appropriate for all ages, but some modern day waterslides have reached extraordinary heights, some reaching over eight stories high.<sup>1</sup>

As the slides grow taller, the importance of operator care and prudence also becomes greater. Water sliders place their lives in the hands of water park operators as they allow their bodies to descend freely down a slick slide, propelled along by rushing water. Not only are operators in total control of the rate at which the water propels patrons down the slides, but they are also in control of the implementation of safety warnings, safety harnesses, and other detailed factors that contribute to the water slide's overall safety. Patrons expect the waterpark operators to exercise enough caution and care to ensure their safety as they plummet down the plastic flume with minimal control over their bodies' movements.

Many waterslides come in different shapes and sizes, but a legal question remains about the appropriate standard of care to which water park slide operators should be held. Nearly a century ago, the Supreme Court of Missouri held that when determining the appropriate standard of care to which amusement park operators should be held, courts should consider the particular circumstances surrounding the amusement.<sup>2</sup> Subsequently, courts held that some situations required the operator to exercise merely ordinary care; other situations, particularly situations in which the operator exercised com-

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1. See *Verrückt – World's Tallest Waterslide!*, SCHLITTERBAHN WATERPARK, <http://www.schlitterbahn.com/kansas-city/rides/all-new-verruickt> (last visited Jan. 30, 2016).

2. *Berberet v. Elec. Park Amusement Co.*, 3 S.W.2d 1025, 1029 (Mo. 1928).

plete control over an amusement park ride, required the application of the highest degree of care.<sup>3</sup>

In 2014, the Supreme Court of Missouri shook up this area of law in *Chavez v. Cedar Fair, LP*.<sup>4</sup> The court appeared to abandon the original and longstanding method of reviewing the particular circumstances surrounding the amusement park ride and replaced it with a seemingly *per se* rule that amusement park operators need to exercise only ordinary care.<sup>5</sup> This decision is sure to change the outlook of personal injury cases involving large and dangerous amusement park rides.

This Note reviews the legal history of amusement park operator liability in Missouri, discusses the application of that law to a recent incident involving a young girl injured at a Kansas City waterpark, and analyzes the various applications of the law made by the Supreme Court of Missouri, the Missouri Court of Appeals, and the dissenting Supreme Court of Missouri judges. This Note concludes by discussing relevant public policy concerns.

## II. FACTS AND HOLDING

Twelve-year-old Jessica Chavez was enjoying a summer afternoon with her family at Kansas City's Oceans of Fun Water Park in 2000.<sup>6</sup> Chavez and her family decided to ride down Hurricane Falls, a giant water slide in which four riders share a circular raft and descend down the 680-foot flume.<sup>7</sup> The only safety feature on the raft was a nylon strap that ran across portions of the top of the tube.<sup>8</sup> Additionally, there was no way for patrons to control the raft as it proceeded down the slide.<sup>9</sup> The raft's descent was affected by several variables, including the raft's rotation, the contact made with the walls of the slide, and "the contour of the layout of the ride."<sup>10</sup> Expectant mothers, patrons with spinal, muscular, or skeletal issues, and persons shorter than forty-six inches tall were cautioned not to ride this water slide.<sup>11</sup>

After receiving a verbal instruction to "hold onto the straps at all times," Jessica Chavez and her family descended together down the large waterslide on their raft.<sup>12</sup> As the raft made the final turn, Chavez's mouth and her

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3. See *McCullum v. Winnwood Amusement Co.*, 59 S.W.2d 693, 697–98 (Mo. 1933); *Gromowsky v. Ingersol*, 241 S.W.2d 60, 63 (Mo. Ct. App. 1951); *Cooper v. Winnwood Amusement Co.*, 55 S.W.2d 737, 742 (Mo. Ct. App. 1932); *Brown v. Winnwood Amusement Co.*, 34 S.W.2d 149, 152 (Mo. Ct. App. 1931).

4. 450 S.W.3d 291, 292 (Mo. 2014) (en banc).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 293.

9. *Id.* at 292–93.

10. *Id.*

11. *Id.* at 293.

12. *Id.*

cousin's head collided, causing Chavez to bleed and lose a tooth.<sup>13</sup> As a result of the accident, Chavez needed extensive dental work and lost two more teeth.<sup>14</sup>

Chavez then filed suit against Cedar Fair, LP, the corporate owners of Oceans of Fun.<sup>15</sup> The petition alleged negligence by: “(1) failing to provide friction devices reasonably sufficient to prevent a raft rider from colliding with another rider and (2) failing to adequately warn of the risk of harm from colliding with other raft riders.”<sup>16</sup> At trial, there was conflicting testimony as to whether Chavez and her cousins had voluntarily or involuntarily let go of the safety strap.<sup>17</sup> In addition, both parties called expert witnesses to testify about whether Cedar Fair took adequate measures to ensure passenger safety on Hurricane Falls.<sup>18</sup>

The trial court instructed the jury to apply the highest degree of care standard to determine Cedar Fair's possible liability.<sup>19</sup> Specifically, the jury was told to determine whether Cedar Fair exercised “that degree of care that a very careful person would use under the same or similar circumstances.”<sup>20</sup> Cedar Fair objected, arguing that the ordinary standard of care instruction was appropriate.<sup>21</sup> The trial judge overruled the objection, and the jury awarded Chavez \$225,000.<sup>22</sup> Cedar Fair appealed, alleging that the trial judge applied the wrong standard of care in the jury instruction.<sup>23</sup>

The Missouri Court of Appeals for the Western District affirmed the verdict.<sup>24</sup> In an unpublished opinion,<sup>25</sup> the court relied on four early-twentieth century decisions to hold that the highest degree of care was appropriate in this case.<sup>26</sup> The court held that Cedar Fair should be held to the

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 293–94.

23. *Id.* Cedar Fair also appealed on account of the trial judge refusing to instruct the jury on comparable fault. *Id.* That issue was barely discussed in this case because it was dependent on the issue of whether the appropriate standard of care was given. *Id.* at 301. Additionally, that issue is beyond the scope of this Note.

24. Chavez v. Cedar Fair, LP, No. WD75373, 2013 WL 3660372, at \*1 (Mo. Ct. App. July 16, 2013), *rev'd*, 450 S.W.3d 291.

25. The opinion was unpublished because the case was transferred to the Supreme Court of Missouri before its scheduled publishing in the South Western Reporter. See MO. CONST. art. V, § 10.

26. Chavez, 2013 WL 3660372, at \*2–5 (citing McCollum v. Winnwood Amusement Co., 59 S.W.2d 693, 697 (Mo. 1933); Gromowsky v. Ingersol, 241 S.W.2d 60, 63 (Mo. Ct. App. 1951); Cooper v. Winnwood Amusement Co., 55

highest degree of care because it had complete control of the water slide, riders completely depended on Cedar Fair for their safety, and Cedar Fair did more than merely construct the slide.<sup>27</sup>

The case was transferred to the Supreme Court of Missouri, which reversed and remanded for a new trial that would apply the ordinary standard of care.<sup>28</sup> The court reasoned that the highest standard of care is reserved for persons using inherently dangerous materials, common carriers, and automobile drivers.<sup>29</sup> The court also rejected the appellate court's distinction between waterslide builders and waterslide operators and instead made all waterslide injury suits subject to the ordinary standard of care.<sup>30</sup> Two judges dissented, arguing that the court should have applied the highest standard of care because Cedar Fair had complete control over the water slide.<sup>31</sup>

### III. LEGAL BACKGROUND

One of the first Missouri decisions to apply the common law rules of negligence to amusement parks was *Berberet v. Electric Park Amusement Co.* in 1928.<sup>32</sup> In *Berberet*, the fifty-seven-year-old plaintiff fell on some loose floorboards on a boardwalk and sustained injuries while meeting her son as he exited a merry-go-round.<sup>33</sup> After the trial court awarded the plaintiff \$2500 in damages, the defendant appealed, arguing that the plaintiff had failed to state a claim.<sup>34</sup> Specifically, the defendant challenged the plaintiff's petition for not alleging sufficient facts to show that the defendant had failed to exercise ordinary care.<sup>35</sup>

The Supreme Court of Missouri agreed and reversed the trial court's judgment.<sup>36</sup> The court relied on several decisions to determine the factors and considerations for deciding which standard of care applied to amusement park proprietors.<sup>37</sup> As the court stated,

[T]he care required of the proprietor of a place of public amusement is that which is reasonably adapted to the character of the exhibitions given, the amusements offered, the places to which patrons resort, and also, in some cases, the customary conduct of spectators of such exhi-

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S.W.2d 737, 742 (Mo. Ct. App. 1932); *Brown v. Winnwood Amusement Co.*, 34 S.W.2d 149, 152 (Mo. Ct. App. 1931)).

27. *Id.* at \*5.

28. *Chavez*, 450 S.W.3d at 296.

29. *Id.*

30. *Id.* at 298.

31. *Id.* at 301.

32. 3 S.W.2d 1025 (Mo. 1928).

33. *Id.* at 1027.

34. *Id.* at 1026.

35. *Id.* at 1029.

36. *Id.* at 1030.

37. *Id.* at 1029.

bitions. It is a care commensurate with the particular conditions and circumstances involved in the given case.<sup>38</sup>

The court held that under the factual circumstances of *Berberet*, the appropriate standard was the ordinary degree of care because the boardwalk was similar to ordinary property that the owner has a duty to keep reasonably safe.<sup>39</sup> Since the petition failed to allege that the defendant should have known of the loose floorboard, the plaintiff failed to allege that the defendant breached its duty to exercise ordinary care.<sup>40</sup>

Three years later, in *Brown v. Winnwood Amusement Co.*,<sup>41</sup> a case involving another amusement park accident, the Missouri Court of Appeals suggested applying a higher standard of care for some amusement park incidents.<sup>42</sup> The plaintiff was injured when the rollercoaster on which she was riding made an unexpected “jerk,” causing severe injuries to her hip and side.<sup>43</sup> After a jury verdict for the plaintiff in the amount of \$2500, the defendant appealed.<sup>44</sup>

*Brown*’s main holding concerned the application of the *res ipsa loquitur* doctrine, but the appellate court discussed the appropriate standard of care to which the amusement park operator should be held:

There have been several cases before the higher courts of this country involving devices similar to the one in the case at bar and, while the courts have been slow in holding that the operator of such devices (roller coasters) is technically a common carrier and that all the rules governing such carriers are applicable to him, they do hold that the rule in reference to the degree of care required of a common carrier applies to the operation of such devices . . . .<sup>45</sup>

The court equated the duty of amusement park operators with that of a common carrier.<sup>46</sup> Rather than ordinary care, the standard of care for a common carrier is “the greatest possible care and diligence.”<sup>47</sup> The court gave very little explanation, but it stated that because the amusement park operator has complete control over the device being used to transport riders from one

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38. *Id.*

39. *Id.*

40. *Id.*

41. 34 S.W.2d 149 (Mo. Ct. App. 1931).

42. *Id.* at 152.

43. *Id.* at 151.

44. *Id.* at 150.

45. *Id.* at 152 (citing *Best Park & Amusement Co. v. Rollins*, 68 So. 417 (Ala. 1915); *Pontecorvo v. Clark*, 272 P. 591 (Cal. 1928); *O’Callaghan v. Dellwood Park Co.*, 89 N.E. 1005 (Ill. 1909); *Bibeau v. Pearce Corp.*, 217 N.W. 374 (Minn. 1928); *Sand Springs Park v. Schrader*, 198 P. 983 (Okla. 1921)).

46. *Id.*

47. *Sawyer v. Hannibal & St. Joseph R.R. Co.*, 37 Mo. 240, 260 (1866).

destination to another, the common carrier standard – the highest degree of care – should apply to amusement park operators.<sup>48</sup> Subsequently, the Court of Appeals affirmed the verdict.<sup>49</sup>

The next year, the Court of Appeals reaffirmed its decision to hold amusement park operators to the highest standard of care.<sup>50</sup> In *Cooper v. Winnwood Amusement Co.*, the plaintiff was riding a rollercoaster in which the restraining mechanism failed to keep the plaintiff secured to her seat.<sup>51</sup> At the bottom of a long descent, the plaintiff, who at that time was hovering over a foot above her seat, was slammed back down to her seat by the force of the ride, causing significant injury to the lumbar region of her back.<sup>52</sup> The jury found the amusement park liable and awarded the plaintiff \$15,000.<sup>53</sup>

On appeal, the amusement park, relying on *Berberet*, alleged that the jury instruction holding it to the highest degree of care was in error, and that the ordinary degree of care was all it was required to exercise.<sup>54</sup> The appellate court rejected that argument, relying on *Brown* and finding support from a leading civil law treatise.<sup>55</sup> The court specifically held that “the operators of such devices [amusement park rides] are required to use the highest degree of care for the safety of their passengers.”<sup>56</sup> The court dismissed the defendant’s other claims of error and affirmed the judgment for the plaintiff.<sup>57</sup>

Not a year had passed before Winnwood Amusement Company was sued again for injuries sustained at its amusement parks.<sup>58</sup> This time, the appeal reached the Supreme Court of Missouri.<sup>59</sup> In *McCullum v. Winnwood*

48. *Brown*, 34 S.W.2d at 152.

49. *Id.* at 154.

50. *Cooper v. Winnwood*, 55 S.W.2d 737, 742 (Mo. Ct. App. 1932).

51. *Id.* at 739.

52. *Id.*

53. *Id.* at 740.

54. *Id.* at 742 (quoting *Berberet v. Elec. Park Amusement Co.*, 3 S.W.2d 1025, 1029 (1928)) (“The rule in this state, and generally, is that the proprietor of a place of public amusement owes to his patrons that duty which, under the particular circumstances, is ordinary care or reasonable care for their safety.”).

55. *Id.* (quoting 10 C.J. 609, § 1035) (“The owner and operator of a scenic railway in an amusement park is subject, where he has accepted passengers on such railway for hire, to the liabilities of a carrier of passengers generally.”). See also 30A C.J.S. *Entertainment and Amusement* § 104 (2015) (footnotes omitted) (“[I]n the case of inherently dangerous devices the owner or proprietor must, like a common carrier, use the highest degree of care for the safety of the patrons consistent with the practical operation of the business, as with respect to such amusement devices as scenic railways or roller coasters, and amusements of like type. The operator of such devices owes the care which the most prudent person would be expected to exercise under similar circumstances.”).

56. *Cooper*, 55 S.W.2d at 742.

57. *Id.*

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

59. *Id.*

*Amusement Co.*, the twelve-year-old plaintiff was injured when attempting to slide down the defendant's waterslide.<sup>60</sup> Specifically, the plaintiff alleged,

[The slide] was constructed and maintained in a faulty and defective manner in that the top . . . was not of sufficient length and size to properly admit plaintiff's body . . . and so particularly because of its limited space to receive the body of a user without coming in contact with the open balustrade . . . .<sup>61</sup>

The plaintiff's leg rose beyond the edge of the slide and smashed into one of the slide's supporting pipes, which caused her femur to break.<sup>62</sup> The amusement park argued that the plaintiff's own negligence caused the injury by purposefully causing her body to reach above the sides of the slide, possibly by riding the slide while sitting on her brother's back.<sup>63</sup> The plaintiff denied that accusation, claiming the incident occurred at the top of the slide.<sup>64</sup> The jury believed the plaintiff's story and awarded her \$10,000.<sup>65</sup>

The defendant appealed, claiming that the evidence showed that the plaintiff's version of the story was physically impossible.<sup>66</sup> The Supreme Court of Missouri did not agree, deferred to the jury's determinations of credibility, and speculated that the plaintiff could have been injured at the top of the slide.<sup>67</sup> However, the court also determined that the plaintiff's older brother must have been contributorily negligent under the circumstances, and that the jury's instruction which did not mention contributory negligence was in error.<sup>68</sup>

The court devoted one sentence to the appropriate standard of care, relying on *Berberet*: "[The] principal instruction, the only one authorizing a verdict for plaintiff, very properly told the jury that defendants in operating . . . a place of public amusement owed the patrons the duty of using ordinary or reasonable care for their safety . . . ."<sup>69</sup> The court did not mention or discuss the recent developments in *Brown* or *Cooper*, which held amusement park operators should be held to the highest standard of care, probably because the standard was not a contested issue in this case.<sup>70</sup> The court instead focused

60. *Id.*

61. *Id.* at 694.

62. *Id.* at 696.

63. *Id.* at 694.

64. *Id.* at 695.

65. *Id.* at 694.

66. *Id.* at 695.

67. *Id.*

68. *Id.* at 696–97.

69. *Id.* at 697. The *Chavez* court relied heavily on this sentence, even though it was uncontested in *McCollum*. See *Chavez v. Cedar Fair, LP*, 450 S.W.3d 291, 295 (Mo. 2014) (en banc).

70. See generally *McCollum*, 59 S.W.2d at 697.

on the issue of the slide's construction.<sup>71</sup> Under the facts of the case, the court determined that the jury should have been instructed to determine whether the slide was negligently constructed.<sup>72</sup> The court remanded for a trial with jury instructions that: (1) contemplated the presence of multiple people on the slide and (2) considered any negligence in constructing the slide.<sup>73</sup>

Nearly twenty years passed before a Missouri court decided the next important amusement park case, *Gromowsky v. Ingersol*, in 1951.<sup>74</sup> The plaintiff was riding the "airplane ride," a swinging device suspended from a sixty-foot tower by heavy cables, at the defendant's amusement park.<sup>75</sup> A cable snapped and the plane suddenly fell, causing an iron bar to violently strike the plaintiff's back.<sup>76</sup> Under the theory of *res ipsa loquitur*, the jury awarded the plaintiff \$4500 for the negligence claim.<sup>77</sup>

After quickly dispensing of the defendant's weak argument that *res ipsa loquitur* should not apply, the Missouri Court of Appeals moved on to the issue of the appropriate standard of care.<sup>78</sup> The defendant argued that the jury instruction applying the highest degree of care was erroneous and misleading.<sup>79</sup> The court disagreed, strictly relying on *Brown's* holding that it was not error to instruct the jury that amusement park ride operators must be held to the highest degree of care when the device is "under the sole and exclusive care, operation, supervision, control and maintenance of the defendant[]." <sup>80</sup> The court determined that the highest standard of care was the appropriate standard for the amusement park operator and affirmed the judgment for the plaintiff.<sup>81</sup>

The *Chavez* opinion from the Missouri Court of Appeals for the Western District was not published, but it is worth mentioning how the court discussed the legal principles derived from *Berberet*, *Brown*, *Cooper*, *McCullum*, and *Gromowski*.<sup>82</sup> Rather than dismissing the prior appellate court decisions in *Brown*, *Cooper*, and *Gromowski* – because of the Supreme Court of Missouri

71. *Id.*

72. *Id.* at 697–98 ("The jury should have been required to find not only that the slide in question was in fact constructed and operated in the condition mentioned, but that such construction was negligence, that is, such that a reasonably careful and prudent person would not have constructed and operated it in that condition.")

73. *Id.* at 698.

74. 241 S.W.2d 60 (Mo. Ct. App. 1951), *abrogated by Chavez*, 450 S.W.3d 291.

75. *Id.* at 61.

76. *Id.*

77. *Id.*

78. *Id.* at 62.

79. *Id.*

80. *Id.* at 63.

81. *Id.* at 64.

82. *Chavez v. Cedar Fair, LP*, No. WD75373, 2013 W.L. 3660372 (Mo. Ct. App. W.D. July 16, 2013), *rev'd*, 450 S.W.3d 291 (Mo. 2014) (en banc).

decisions that reached different results – the Court of Appeals synthesized and distinguished all five cases.<sup>83</sup>

First, the court mentioned that *Berberet* involved an injury sustained from loose footing on a boardwalk in an amusement park.<sup>84</sup> Unlike the four following cases, *Berberet* did not involve an injury sustained while actually riding on an amusement park ride.<sup>85</sup> Rather, *Berberet* appeared more similar to a premises liability claim than to a negligent operation claim.<sup>86</sup>

Then, the court emphasized that, even though *Berberet* applied the ordinary standard of care, the court actually held that the appropriate standard of care must be determined by the particular circumstances.<sup>87</sup> The court provided a small list of factors to consider when determining the appropriate standard of care: (1) “the character of the exhibitions given”; (2) “the amusements offered”; (3) “the places which patrons resort”; and (4) “the customary conduct of spectators of such exhibitions.”<sup>88</sup> Most importantly, *Berberet* stated that the appropriate standard of care must “commensurate with the particular conditions and circumstances involved in the given case.”<sup>89</sup> In *Berberet*, the dangerous condition was a part of a boardwalk, not an amusement park ride, so the standard of ordinary care was appropriate.<sup>90</sup>

The court then examined the specific circumstances of the four decisions that followed *Berberet*.<sup>91</sup> In *Brown*, *Cooper*, and *Gromowski*, the plaintiffs alleged negligent operation of the amusement park ride on which they were injured.<sup>92</sup> The court emphasized that the defendants in those cases had sole control over the amusement park rides, and that the plaintiffs had “turned their safety over to the care of the operator.”<sup>93</sup> Therefore, the court found it appropriate to apply the highest standard of care in those three decisions.<sup>94</sup> On the contrary, the plaintiff in *McCollum* primarily focused on the negligent construction, rather than negligent operation, of the defendant’s waterslide.<sup>95</sup> The court determined that *McCollum* was really a premises liability case, similar to *Berberet*, and therefore appropriately applied the ordinary standard of care.<sup>96</sup>

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83. *See id.* at \*2–5.

84. *Id.* at \*4 (citing *Berberet v. Elec. Park Amusement Co.*, 3 S.W.2d 1025, 1028 (Mo. 1928)).

85. *Id.*

86. *Id.* (citing *Berberet*, 3 S.W.2d at 1028).

87. *Id.*

88. *Id.* (quoting *Berberet*, 3 S.W.2d at 1029).

89. *Id.* (quoting *Berberet*, 3 S.W.2d at 1029).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (citing *Brown v. Winnwood Amusement Co.*, 34 S.W.2d 149, 152 (Mo. Ct. App. 1931)).

94. *Id.*

95. *Id.* at \*5.

96. *Id.*

The Western District then determined that the incident involving Jessica Chavez was most like *Brown*, *Cooper*, and *Gromowski* and held that the highest standard of care should be applied against Cedar Fair.<sup>97</sup> The court determined that since Hurricane Falls was under Cedar Fair's complete control, the highest standard of care was appropriate.<sup>98</sup> The court concluded that the jury instructions were properly given and denied Cedar Fair's point of appeal.<sup>99</sup> However, the cause was transferred to the Supreme Court of Missouri, pursuant to Article V, Section 10 of the Missouri Constitution.<sup>100</sup>

#### IV. INSTANT DECISION

The Supreme Court of Missouri held that *McCollum* was binding, because it was decided after *Brown* and *Cooper* and was decided by a higher court than *Gromowsky*.<sup>101</sup> Rather than synthesizing the four decisions as the appellate court had, the Supreme Court of Missouri applied *McCollum* broadly, holding that the ordinary standard of care always applies to water slide accidents.<sup>102</sup>

The court began by explaining that the highest standard of care is applied in only a few circumstances, such as common carriers, firearms users, and motor vehicle drivers.<sup>103</sup> The court then stated that *McCollum* "rejected the highest degree of care standard for amusement park operators," even though that court's opinion never mentioned that standard of care.<sup>104</sup> The court noted that although the standard of care was not an issue, *McCollum*'s decision to apply the ordinary standard of care was consistent with *Berberet* because both cases involved amusement parks.<sup>105</sup> The court then, without going into much detail, listed a series of decisions that applied the ordinary standard of care in amusement or quasi-amusement park settings.<sup>106</sup>

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97. *Id.*

98. *Id.*

99. *Id.*

100. Chavez v. Cedar Fair, LP, 450 S.W.3d 291, 292 (Mo. 2014) (en banc).

101. *Id.* at 295.

102. *Id.* at 295–96.

103. *Id.* at 294. Specifically, the court mentioned the instances where the highest standard of care is applied: "[(1)] common carriers, . . . [(2)] electric companies; [(3)] users of explosives; [(4)] users of firearms; and, [(5)] motor vehicle operators." *Id.* at 296.

104. *Id.* at 295; see generally *McCollum v. Winnwood Amusement Co.* 59 S.W.2d 693 (Mo. 1933).

105. *Chavez*, 450 S.W.3d at 295.

106. *Id.* (citing *Gold v. Heath*, 392 S.W.2d 298 (Mo. 1965) (merry-go-round); *Boll v. Spring Lake Park, Inc.*, 358 S.W.2d 859 (Mo. 1962) (swimming pool); *Hudson v. Kan. City Baseball Club*, 164 S.W.2d 318 (Mo. 1942) (baseball stadium); *Lewis v. Snow Creek, Inc.*, 6 S.W.3d 388 (Mo. Ct. App. 1999) (ski operator); *Schamel v. St. Louis Arena Corp.*, 324 S.W.2d 375 (Mo. Ct. App. 1959) (ice rink)).

After reviewing instances in which the highest standard of care has been applied in Missouri,<sup>107</sup> the court discussed *Brown*, *Cooper*, and *Gromowski*.<sup>108</sup> While reviewing the facts of those cases, the court reiterated that *Brown* and *Cooper* were decided before *McCollum*.<sup>109</sup> The court also took issue with the fact that *Cooper* and *Gromowski* relied so heavily on *Brown*'s language, which it considered dicta, and also criticized all three opinions for not offering sufficient reasoning for why the highest standard of care was appropriate.<sup>110</sup>

Next, the court declined to synthesize and distinguish the five decisions as the Missouri Court of Appeals had.<sup>111</sup> The court construed *McCollum* as a negligent operation case, rather than as a negligent construction or premises liability case.<sup>112</sup> The court then stated that even if *McCollum* were a premises liability case, Chavez's case would be too because of the similarities of the two claims.<sup>113</sup> The court made no mention of *Berberet*, let alone the language suggesting that the appropriate standard of care should be determined by the surrounding circumstances.<sup>114</sup>

Finally, the court explained *stare decisis* and declined to add amusement park operation to the short list<sup>115</sup> of instances in which the highest standard of care could apply.<sup>116</sup> The court determined that Hurricane Falls was not a common carrier because its primary purpose was entertainment and the water ride had a height restriction.<sup>117</sup> The court also did not consider Hurricane Falls as inherently dangerous as electric companies, explosives, guns, or cars.<sup>118</sup> Though the court recognized that some dangers are associated with amusement park rides, the court opined that those dangers do not rise to a level where the ordinary standard of care would not be appropriate.<sup>119</sup> Therefore, the court determined that the trial court erred by instructing the jury to

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107. See *supra* note 103 and accompanying text. The court also described instances where the highest degree of care is appropriate like with activities "so inherently or extremely dangerous, with such a risk of widespread injury, that the law require[s] higher protection." *Chavez*, 450 S.W.3d at 296.

108. *Chavez*, 450 S.W.3d at 296.

109. *Id.* at 297–98.

110. *Id.* Ironically, *McCollum*, the case used for support by the court, provided even less reasoning when justifying the application of the ordinary degree of care. See *McCollum v. Winnwood Amusement Co.*, 59 S.W.2d 693, 697–98 (Mo. 1933); *supra* note 69.

111. *Chavez*, 450 S.W.3d at 298.

112. *Id.*

113. *Id.*

114. *Id.*

115. See *supra* note 103 and accompanying text.

116. *Chavez*, 450 S.W.3d at 299.

117. *Id.* The court indicated that a distinguishing characteristic of a common carrier is that it accepts all comers. *Id.*

118. *Id.* at 300.

119. *Id.*

apply the highest standard of care against Cedar Fair.<sup>120</sup> The judgment was reversed, and the cause was remanded for a new trial.<sup>121</sup>

Judge Teitelman authored a brief dissenting opinion, in which Judge Draper joined.<sup>122</sup> First, the dissent emphasized the fact that Cedar Fair invited its patrons to ride the giant water slide.<sup>123</sup> Additionally, the dissent observed that Cedar Fair exercised complete control of Hurricane Falls as its owner and operator.<sup>124</sup> Those considerations led the dissenting judges to the conclusion that a higher standard of care was appropriate under these circumstances.<sup>125</sup>

The dissent then shed light on the ruling in *Berberet* and stated, “while amusement park proprietors generally owe patrons a duty of ordinary care, the general rule yields to the specific activity at issue.”<sup>126</sup> The dissent acknowledged that Chavez alleged that her injuries were caused by Cedar Fair’s negligent operation of Hurricane Falls, and that Chavez was “dependent on Cedar Fair for her safety because Cedar Fair controls the slide.”<sup>127</sup> Under those circumstances, the dissent would have applied the highest degree of care and affirmed the trial court’s judgment.<sup>128</sup>

## V. COMMENT

It is interesting that the Supreme Court of Missouri relied so heavily upon *McCullum*, which was in line with *Berberet*, yet overlooked *Berberet*’s fundamental holding. Rather than applying a *per se* ruling that amusement park operators need exercise only ordinary care, *Berberet* held that the appropriate standard of care must be determined based on the “particular conditions and circumstances.”<sup>129</sup> *Berberet* even provided a small list of factors to consider when determining the appropriate standard of care.<sup>130</sup> However, *Chavez* rejected three holdings where the conditions and circumstances indicated that the highest standard of care was appropriate.<sup>131</sup> Furthermore, *Chavez* appears to preclude the application of the highest standard of care against any amusement park operator, regardless of how much control the operator exercises and how dependent upon the operator amusement park patrons are for their safety and well-being.

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120. *Id.* at 301.

121. *Id.*

122. *Id.* (Teitelman, J., dissenting).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 301–02 (citing *Berberet v. Elec. Park Amusement Co.*, 3 S.W.2d 1025, 1029 (Mo. 1928)).

127. *Id.* at 302.

128. *Id.*

129. *Berberet*, 3 S.W.2d at 1029.

130. *Id.*

131. *Chavez*, 450 S.W.3d at 298–99.

While Hurricane Falls certainly is not a common carrier, the public policy interest in holding common carriers to the highest degree of care is also applicable to rides like Hurricane Falls. Patrons rely on the amusement park's operators for their health and safety when they partake in amusement park rides. Similar to common carriers, amusement park ride operators have nearly complete control over the instrumentality carrying its patrons.

In exchange for an entrance fee, the amusement park operator must ensure the safety of its patrons on its rides, especially when the patrons are placed helplessly within the sole control of the amusement park's instrumentality. The amusement park operator does not transport its patrons between significant locations like the common carrier, but the same public policy interests in holding the operator, who has nearly complete control over the instrumentality, to the highest standard of keeping its patrons safe also apply.

It would be unfortunate to preclude the application of the highest standard of care merely because of the technical definition of a common carrier. As the Supreme Court of Missouri pointed out, Hurricane Falls fell outside of the traditional definition of a common carrier, because the primary purpose for patrons to use amusement park equipment is entertainment, and there is a height restriction.<sup>132</sup> However, despite those factors, patrons are still entrusting their health and safety to the operator of a dangerous, moving instrumentality. While patrons participate in amusement park rides for thrill and excitement, patrons do not anticipate a risk of actually sustaining physical harm. Furthermore, the operator exercises complete control over the ride. As such, the giant, dangerous water slide's operator should be held to the highest standard of care, despite how much fun fully grown people are allowed to have on the ride.

It is difficult to understand how the same standard of care is applied to the operator of a 680-foot water slide, whose riders have minimal control of their movements, and the owner of an ordinary boardwalk within the park. Despite the clear differences in type and character of the two circumstances, amusement park operators need be only as careful with people wildly descending down the giant, slippery waterslide as they are with people walking across a boardwalk. Yet, that is the result reached by this court, relaxing the standards of the park operators who have sole control over the instrumentality in which thrill-seekers regularly place their lives.

In some ways, the application of the highest degree of care in automobile cases<sup>133</sup> can be instructive as applied to amusement park accidents. In both instances, the injured party suffered harm from an instrumentality that was under the complete control of another. Also, the injured person had relied on the other party to take care to control its instrumentality for the sake

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132. The *Chavez* court pointed to precedent defining a common carrier as a mode of transport open to "everyone who asks." *Id.* at 299 (citing *Balloons Over the Rainbow, Inc. v. Dir. of Revenue*, 427 S.W.3d 815, 826–27 (Mo. 2014) (en banc)). Thus, a hot air balloon operator who exercised discretion regarding which passengers could fly was not a common carrier. *Id.*

133. MO. REV. STAT. § 304.012(1) (2000).

of the injured person's safety. Unlike the owner of a boardwalk, both amusement park operators and automobile drivers exercise complete control over a dangerous instrumentality, and those nearby rely on the diligence of those in operation of the dangerous machines for their safety. The analogy is not foolproof, but it likely provides more guidance than the comparison to the owner of a boardwalk.

It could be understood if the court applied the test laid out in *Berberet* and determined that Hurricane Falls was a safe enough ride to only warrant the application of ordinary care. Unfortunately, the court made no mention of such a test. Instead, the court seems to have suggested that amusement park operators *always* need to exercise only ordinary care. As technology advances and the thrill-seeker's appetite requires more daring and risky amusement park rides, one hopes that ride operators will be expected to exercise more care than what is expected of an ordinary person.

It appears now that no matter how strongly the particular conditions and circumstances indicate that a higher standard of care is appropriate, amusement park operators need exercise only ordinary care as they control potentially dangerous rides and devices. Regardless of how much dependence patrons surrender to amusement park ride operators for their safety, those operators will not be required to be any more careful than an ordinary person. Though the Supreme Court of Missouri relied on *Berberet* when it decided *Chavez*, only *Berberet's* result survived this opinion. With little explanation from the court, the reasoning and fundamental holding seem to have been lost to the history books and dissenting opinions.

## VI. CONCLUSION

In *Berberet*, the Supreme Court of Missouri held that an amusement park operator should be held to the ordinary standard of care when operating common pathways and boardwalks along the premises.<sup>134</sup> However, the court acknowledged that other circumstances could arise within amusement parks that would require the amusement park operator to exercise a higher degree of care.<sup>135</sup> Although the appellate courts that decided *Gromowski*, *Cooper*, and *Brown* did not provide a thorough analysis of their reasoning behind applying a higher standard of care, those decisions were instances where courts determined that the particular circumstances surrounding the plaintiff's injury warranted the application of the highest standard of care.<sup>136</sup>

Similar to the plaintiffs in those three cases, Jessica Chavez was riding an amusement park ride that was completely under the control of the amuse-

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134. *Berberet*, 3 S.W.2d at 1029.

135. *Id.*

136. *Gromowsky v. Ingersol*, 241 S.W.2d 60, 63 (Mo. Ct. App. 1951); *Cooper v. Winnwood Amusement Co.*, 55 S.W.2d 737, 742 (Mo. Ct. App. 1932); *Brown v. Winnwood Amusement Co.*, 34 S.W.2d 149, 152 (Mo. Ct. App. 1931).

ment park operator, Cedar Fairs.<sup>137</sup> Chavez had no control of her raft's descent and was completely dependent on Cedar Fair for her well-being and safety as she voyaged down the 680-foot water slide.<sup>138</sup> Rather than exiting Hurricane Falls with feelings of adrenaline and excitement, Chavez left Cedar Fair's ride with a mouthful of blood, a three-tooth gap in her smile, and substantial medical bills.<sup>139</sup>

Despite clear language in *Berberet* requiring courts to consider the particular circumstances of the amusement park's operations, the Supreme Court of Missouri applied a *per se* rule holding amusement park operators to the ordinary standard of care from two fact-specific decisions.<sup>140</sup> *Berberet* allowed courts to apply different standards of care based on different amusement park instrumentalities,<sup>141</sup> but *Chavez* holds operators of extravagantly large and heart-pounding thrill rides to the same standard as the operator of a simple pathway.<sup>142</sup> Surely amusement park patrons would want the amusement park to be more careful as it operates a giant winding waterslide than when it operates its walkways. Unfortunately, *Chavez* does not distinguish between these circumstances, instead choosing to lump all particularities within amusement parks into the same category.<sup>143</sup> *Chavez* appears to indicate that the operator of the most dangerous ride in the country will be held to the same standard of care as the operator of the safest children's rides.

For as much as *Chavez* rejected the plaintiff's arguments as contrary to *stare decisis*, it is concerning that the court omitted any discussion of the process established in *Berberet* for determining the appropriate standard of care.<sup>144</sup> The public policy behind holding common carriers to the highest standard of care should also apply to amusement park rides where patrons completely depend on the operator for their safety and the operator has total control over the instrumentality.

The Supreme Court of Missouri should at least have considered reasons why the operation of Hurricane Falls, pursuant to *Berberet*'s holding, may necessitate a higher standard of care than ordinary reasonableness. Instead, the court established a *per se* rule for amusement park operators, resulting in a law that essentially states that no matter how large, dangerous, and controlling of its riders an amusement park ride is, the operator need only exercise ordinary care.<sup>145</sup>

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137. *Chavez*, 450 S.W.3d at 293.

138. *Id.*

139. *Id.*

140. *Berberet*, 3 S.W.2d at 1029.

141. *Id.*

142. *Chavez*, 450 S.W.3d at 299.

143. *Id.* at 296.

144. *Id.* at 294.

145. *Id.* at 295–96.



