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PLAINTIFF'S COUNTER-STATEMENT OF MATERIAL FACTS

1. On May 29, 2011, Plaintiff, Stela Bomtempo was at Six Flags Hurricane Harbor in Jackson, New Jersey. She was excited to try the park's new water slide, "The Tornado," a 75 foot attraction that reaches speeds of 35 feet per second. *(See Exhibit A Affidavit of Stela Bomtempo*; *See Exhibit D Video of Tornado Ride)*.

2. Plaintiff, her husband Eduardo, her cousin Luis Fernando Queiroz and a friend Biani Castro, made their way to the Tornado ride at approximately 10:30 a.m. (*See deposition of Stela Bomtempo, Exhibit C, pp. 21-22***)**. They rode it the first time without incident. (*See deposition of Stela Bomtempo, Exhibit C, p. 36); (See Exhibit A Affidavit of Stela Bomtempo*)

3. Their tube (raft) held the four of them. Biani Castro was seated at the top, plaintiff was seated below and on each side were the men, her husband Eduardo and Luis Fernando Queiroz *(See deposition of Stela Bomtempo, Exhibit C, pp. 22, 42); (See Exhibit A Affidavit of Stela Bomtempo*).

4. Biani Castro was the only member of their party on the ride that spoke English. No one ever went over any of the ride instructions on the signs with plaintiff before she rode the Tornado and was injured. Plaintiff also saw no warning signs before going on the ride and suffering the injury. *(See deposition of Stela Bomtempo, Exhibit C, pp. 24-25)*

5. Plaintiff testified in her deposition that she did not remember seeing the warning signs shown in pictures P-2, P-3 or P-3A marked in the deposition. *(See deposition of Stela Bomtempo*, *Exhibit C, p. 25*) Those pictures are attached hereto within Exhibit C.

6. Plaintiff, Stela Bomtempo, who speaks little to no English, testified she did not read the words on the signs before getting on the ride (*See deposition of Stela Bomtempo, Exhibit C, pp.*

28-29). She understood that the tube raft on the ride went up and down with water movement, but did not really understand defense counsel's questions regarding "free-falling" and "gravity" or how it exactly moved. (*See deposition of Stela Bomtempo, Exhibit C, pp. 31-32)*

7. It is not disputed in this case that the Tornado ride opened in May of 2010. "The Tornado" is essentially a slide in which patrons sit four to a tube (raft), are catapulted down a 132-foot long vortex and "swish[ed] side to side [up the walls of a 60 foot wide funnel] by more than 5,000 gallons of water."[1] *(See attached video of Tornado Ride, Exhibit D)*

8. Plaintiff Stela Bomtempo testified that she rode the ride once with the other three people in her party in the same tube (raft) positions on May 29, 2011. The tube (raft) had handles and they remained seated. (*See deposition of Stela Bomtempo, Exhibit C, pp.36-38)*; *(See Exhibit A Affidavit of Stela Bomtempo*).

9. The injury to the plaintiff occurred when they decided to ride the Tornado a second time. *(See deposition of Stela Bomtempo, Exhibit C, pp.35-37).* She did not remember the attendant saying to her "Do not allow your bottom to touch the slide during descent." *(See deposition of Stela Bomtempo, Exhibit C, p. 38); (See Exhibit A Affidavit of Stela Bomtempo*).

10. Plaintiff testified that she was injured during the second time riding the Tornado. She had no problem on the first ride (*See deposition of Stela Bomtempo, Exhibit C, p.36)*

11. During the second ride, while the tube (raft) was going up, plaintiff felt a sharp pain in her back as the tube reached its height . This occurred before the tube (raft) went down. This occurred while she was in the covered funnel. She felt the pain in her back at the time the tube (raft)

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[1] https://www.sixflags.com/hurricaneHarborNJ/info/TornadoOpen_news.aspx. See Exhibit D, video of Tornado ride showing its movements.

reached its height going up, before the tube (raft) started to go down (*See deposition of Stela Bomtempo, Exhibit C, pp. 39, 40, 41, 42, 43-44)* It is not disputed in this case that the first trip up the funnel achieves maximum height and subsequently coming down, the tube (raft) "swishes back and forth". *(See Exhibit A Affidavit of Stela Bomtempo*) (*See Exhibit D, Video of Tornado Ride*).

12. Plaintiff testified that she did not understand questions posed by defense counsel indicating the pitch of the ride causing the raft to move in different directions *(See deposition of Stela Bomtempo, Exhibit C, p. 31*) She did not really understand defense counsel's questions on tube (raft) movements (*See deposition of Stela Bomtempo, Exhibit C, p.31*) She had no understanding or memory of free-falling or being told the tube would leave the tunnel surface. *(See deposition of Stela Bomtempo, Exhibit C, pp. 35-37)*

13. Plaintiff and the three other people in her party ascended more than seven stories above the ground and were seated in the tube (raft) by a park attendant at the high top of the slide. *(See deposition of Stela Bomtempo, Exhibit C, p. 33); (See Exhibit D, video of Tornado Ride).*

14. Plaintiff was seated at the bottom of the tube with her friend Biani Castro on top. Her husband Eduardo and cousin, Luis Fernando Queiroz were seated on each side. It was a four person tube (raft) with handles. Plaintiff's cousin Luis Queiroz is heavy set. (*See deposition of Stela Bomtempo, Exhibit C, p. 42); (See* Exhibit *A, Affidavit of Stela Bomtempo*). After being seated in their tube, Plaintiff and her friends were pushed off by the attendant and proceeded to "plummet down a tunnel, [which] hurl[ed] [the group] into a giant funnel." *(See Exhibit A Affidavit of Stela Bomtempo)*; *(See Exibit D, video of Tornado Ride)*.

15. Advertised to spin patrons "around its 60-foot diameter like . . . wet rag doll[s]," nowhere does the slide claim to produce serious bodily injury to its riders. However, that is exactly

what occurred to Plaintiff when her tube (raft) first ascended and went up the wall of the funnel. *(See Exhibit A Affidavit of Stela Bomtempo)*; *(See Exhibit B, Affidavit of Eduardo Luiz de Araujo, her husband).*

16. At or around the first high point of the funnel, with full momentum from plummeting down the initial tunnel, Plaintiff felt her tube (raft) briefly lift off the slide, only to violently slam back down, causing severe pain to shoot up Plaintiff's spine. *Id. (See Exhibit A Affidavit of Stela Bomtempo)*; *(See Exhibit B Affidavit of Eduardo Luiz de Araujo, her husband).*

17. Despite following all instructions to stay seated and hold on to her raft handles, Plaintiff was caused to be injured while riding the "Tornado."*Id.* (*See deposition of Stela Bomtempo, Exhibit C, p.38).* At the end of the ride, both she and her husband noticed that the tube (raft) they had been on was deflating, losing air, and it was immediately taken away by the park attendant. *(See Exhibit A Affidavit of Stela Bomtempo)*; *(See Exhibit B Affidavit of Eduardo Luiz de Araujo, her husband).*

18. Neither Plaintiff nor any of her passengers disobeyed safety directives while on the ride, yet Plaintiff finished the ride held down by her husband and cousin, in such intense pain that she could not even exit the ride without assistance. *Id. (See deposition of Stela Bomtempo, Exhibit C, pp.46-48); (See Exhibit A Affidavit of Stela Bomtempo)*; *(See Exhibit B Affidavit of Eduardo Luiz de Araujo, her husband).*

19. At the end of the ride Plaintiff was helped out of the tube (raft) by her husband and assisted by park personnel to the side of the pool where she laid down in severe pain. (*See Deposition of Stela Bomtempo, Exhibit C, pp. 46-48); (See Exhibit A Affidavit of Stela Bomtempo)*; *(See Exhibit B Affidavit of Eduardo Luiz de Araujo, her husband).*

20. Park personnel then made Plaintiff stand as she waited for an ambulance, closed the ride and placed her in a backboard, neck stabilizer and placed her in the ambulance. *(See Exhibit A Affidavit of Stela Bomtempo); (See deposition of Stela Bomtempo, Exhibit C, pp. 47-48)*

21. Although Plaintiff had entered the "Tornado" with no back pains or injuries whatsoever, she left the park via ambulance, in a backboard and neck stabilizer with a seriously injured spine. She and her husband Eduardo Luiz de Araujo noticed that the tube was deflating, losing air in the pool at the end of the ride, which was immediately removed by park personnel. *(See Exhibit B Affidavit of Eduardo Luiz de Araujo, her husband).* Eduardo, plaintiff's husband and the other two people in the tube with Plaintiff were not deposed by defense counsel in this litigation.

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS

I. Background Information and Plaintiff's Claims Against Defendant Six Flags Great Adventure

1. Admitted as to the filing of an Amended Complaint;

2. Admitted as to the filing of an Answer;

3. Admitted as to the spinal injuries suffered by Plaintiff as a result of riding the "Tornado";

4. Admitted as to Defendant's negligence under the legal doctrine of res ipsa loquitur and case law set forth in the Plaintiff's attached legal brief;

II. Description of the Tornado Ride

5. Admitted as to operation of the ride since 2010;

6. Admitted; however, Plaintiff did not receive any operations manual prior to riding on the Tornado. A video of the Tornado ride is attached to Plaintiff's submission as Exhibit D;

7. Admitted as to patrons climbing up to the top of the ride; Denied as to the attendant properly checking the tube Plaintiff rode in, since it lost air as per Plaintiff Stela Bomtempo's affidavit, Exhibit A and her husband Eduardo Luiz Araujo's affidavit, Exhibit B;

III. Plaintiff Rode the Tornado Once Before the Subject Ride Without Incident

8. Admitted. See Exhibit A, affidavit of Plaintiff Stela Bomtempo;

9. Admitted as to the first ride only;

10. Denied. Specifically Plaintiff described the tube movement on the second ride as different since the tube ascended, skipped off the surface, and then slammed down hard, which caused a compression fracture and severe spinal injuries. (See Exhibit A, affidavit of Stela Bomtempo, See Exhibit C, deposition of Stela Bomtempo, pp. 39, 40, 41-44)

11. Denied.

12. Admitted. See further explanation of tube movement set forth in Exhibit A, the affidavit of Stela Bomtempo.

13. Denied due to incompleteness. See complete description of tube movement within

Exhibit A, the affidavit of Stela Bomtempo.

14. Admitted.

15. Admitted. See complete description of tube movement within Exhibit A, and affidavit of Stela Bomtempo and within Exhibit C, Deposition of Stela Bomtempo, pp. 39-44.

16. Admitted.

IV. Defendant Six Flags Conducted Four Inspections of the Tornado Ride Each Day

17. Denied. No first hand personal knowledge.

18. Denied. No first hand personal knowledge.

19. Denied. No first hand personal knowledge.

20. Denied. No first hand personal knowledge.

V. Defendant Six Flags Had Signs Posted at the Entrance and Top of the Tornado Providing Riders with Warnings and Instructions on How to Properly Ride the Tornado

A. Sign at the Entrance to Tornado

21. Denied. Plaintiff did not see or read the warning signs prior to riding the attraction. She speaks little to no English. (See Exhibit C, Deposition of Stela Bomtempo, pp. 24-24, 28-29)

22. Denied. See 21 above. Denied for reasons set forth in 21.

23. Denied. See 21 above. Denied for reasons set forth in 21.

24. Denied. See 21 above. Denied for reasons set forth in 21.

VI. Plaintiff Understood the Ride Description of the Tornado

25. Denied. See Exhibit C, Deposition of Plaintiff Stela Bomtempo, pp. 31, 33, 35-37 and Plaintiff's Counter Statement of Facts attached hereto about what she did not understand regarding defense counsel's questions on tube movements.

26. Denied. See 25. above. Denied for reasons set forth in 25. above.

27. Admitted.

28. Denied. See Exhibit A, affidavit of Stela Bomtempo; See Plaintiff's Counter Statement of Material Facts detailing the tube movements that caused her spinal fracture. (See Exhibit C, Deposition of Stela Bomtempo, pp. 35-37, 38)

VII. Six Flags Had a Ride Attendant at the Top of the Tornado

29. Admitted as to presence of ride attendant. Denied as to enforcement of policies. No personal first hand knowledge.

30. Admitted; however, see 29. above.

VIII. Defendant Six Flags Did Not Design or Manufacture the Tornado Nor the Warning Signs; Six Flags Merely Operated and Ensured the Proper Function of the Tornado

31. Admitted as to not designing or manufacturing the ride or warnings signs. Denied as to proper functioning as per the theory of res ipsa loquitur.

32. Denied. No first hand personal knowledge.

33. Plaintiff has not sued the manufacturer. Plaintiff has sued Six Flags Great Adventure under the theory of res ipsa loquitur and cases within Plaintiff's attached legal brief.

IX. Plaintiff Has No Liability or Engineering Expert to Opine That Six Flags Violates Any Duty or Standard of Care

34. Admitted. They took the tube away immediately and it disappeared. (See Exhibit A, Affidavit of Stela Bomtempo; See Exhibit B, Affidavit of Eduardo Luiz de Araujo)

35. Denied because Plaintiff's cause of action as to liability is set forth under res ipsa loquitur, as demonstrated by the accompanying legal memorandum brief. Expert not required for prima facie case. (See Exhibit E, *Jerista* and *Lazarus* cases)

X. Defendant Six Flags Summary Judgment Motion

36. The motion should be denied under res ipsa loquitur and the cases cited in the accompanying legal memorandum brief attached.

STATEMENT OF THE FACTS

This matter concerns an incident that occurred on the Tornado ride at Great Adventure Amusement Park in Jackson, New Jersey on May 29, 2011. Plaintiff, Stela Bomtempo, a native of Brazil, who speaks little to no English, was accompanied by her friend Biani Castro, her husband Eduardo Luiz de Araujo, and her cousin, Jose Fernando Queiroz. They all climbed a high ladder to embark upon a water rafting slide ride approximately 75 feet high, that reaches speeds of 35 feet per second. *(See Exhibit D, video of Tornado Ride)* The ride involved all four people sitting in one yellow tube (raft) with handles, as it embarked down a funnel into a pool below. As they rode the Tornado ride on the tube (raft) that all four were sitting in, the Plaintiff was injured when the tube ascended before going down and travelling fully through the funnel. The video provided as part of this submission shows the water swishing and turning as the tube makes it way up and down the funnel to end in a pool where participants get off at the end of the ride. It is essentially a slide where patrons sit four to a tube and are catapulted down a 132 foot funnel, swished from side to side up a 60 foot tunnel by over 5,000 gallons of water. The Plaintiff's Counter-Statement of Material Facts, which follows, demonstrates plaintiff obeyed all instructions and rode the ride as she was instructed. However, she left the ride with a severe spinal fracture injury due to the defendant's actions and/or omissions.

This matter involves liability premised upon the theory of "**res ipsa loquitor**"--the thing speaks for itself. Simply put, patrons, such as Stela Bomtempo, do not normally fracture their spines on water rafting rides unless negligence by the defendant is present . Here, **res ipsa loquitor** is a viable theory of liability since "the thing speaks for itself". Significantly, this case is analogous to

earlier New Jersey Supreme Court cases where res ipsa loquitor was utilized to permit an inference of negligence without the necessity of an expert in escalator and elevator cases where an automatic door unexpectedly closed on a plaintiff. The **res ipsa loquitor** doctrine in this case will permit the jury to infer, based upon common knowledge, that water rafting rides ordinarily do not malfunction causing serious injuries unless there is negligence present on the defendant's part. The leading New Jersey Supreme Court case of *Jerista v. Murray, 185 N.J. 175 (2005),* involved automatic doors closing on a plaintiff. The Court allowed plaintiff to utilize "res ipsa loquitor", and did not require an expert to establish a prima facie case. Here, similarly in this litigation, the trier of fact does not need the assistance of an expert, engineer or otherwise, to reach the conclusion of defendant's negligence. Defense counsel's arguments to the contrary have no merit. The *Jerista* case and recent case of *Lazarus v. Port Authority of NY and NJ, A-0519-13T3 (App. Div. 2014)*, are attached within Exhibit C. Those decisions demonstrate this premise in cases involving injuries on elevators, escalators and those involving automatic doors. The inference of negligence here will carry plaintiff to the jury without the need for expert testimony under the doctrine of res ipsa loquitor. Defendant's contentions as to the necessity of expert proofs relative to a "complex instrumentality" have already been rejected in these cases in analogous circumstances. Likewise, they have no merit here to support an award of summary judgment.

LEGAL ARGUMENT

I. DEFENDANT'S NEGLIGENCE CAN BE PREDICATED ON THE BASIS OF *Res Ipsa Loquitur*

Simply put, people do not typically break their backs while on a ride designed for "family" enjoyment, absent an act of negligence. While the actual act of neglect which led to Plaintiff's injury need not be identified, circumstantial evidence and the simple maxim of "the thing speaks for itself," or legally, res ipsa loquitur, provides Plaintiff with an adequate remedy for her injuries. *Kahalili v. Rosecliff Realty, Inc., 26 N.J. 595 at 606 (1958)*. Res ipsa loquitur is a legal doctrine "grounded in principles of equity . . . [which] places a strong incentive on the party with superior knowledge to explain the cause of an accident and to come forward with evidence in its defense... *See Exhibit E, Jerista v. Murray, 185 N.J. 175, 192 (2005)*. *See, also, Kahalili v. Rosecliff Realty Inc., 26 N.J. 595 at 606 (1958)* (doctrine of res ipsa loquitur "has its foundation in probability and the procedural policy of placing the onus of producing evidence upon the party who is possessed of superior knowledge or opportunity for explanation of the causative circumstances"). Ultimately, res ipsa loquitur acts as an evidentiary doctrine which enables a plaintiff to establish a prima facie case without showing direct proof of the defendant's actual negligent conduct. *See Exhibit E , Jerista, 185 N.J. at 191.* When applicable, res ipsa loquitur allows the trier of fact to draw an inference of the defendant's lack of due care. *Id. at 193; Brown v. Racquet Club of Bricktown, 95 N.J. 280, 288-89 (1984); Kahalili v. Rosecliff Realty Inc., 26, 595 N.J. at 606 (1958); Myrlak v. Port Auth. of NY and NJ, 157 N.J. 84, 99 (1999)* ("Res ipsa loquitur is a doctrine created under the fault theory of negligence as a means of circumstantially proving a defendant's lack of due care").

Res ipsa loquitur allows for a presumption of negligence as an allowable inference where the

occurrence itself bespeaks negligence, the instrument that led to that occurrence was within Defendant's exclusive control, and where there is no indication that the plaintiff acted negligently. *Bornstein v. Metro. Bottling Co., 26 N.J. 263, 269 (1958)*. In *Bornstein,* the Supreme Court of New Jersey held that a jury could use the maxim of res ipsa loquitur as a justification for thinking that an accident happened as the consequence of negligence. *Id. at 275.* The opinion further states that the jury was justified in determining that circumstantial evidence was a sufficient basis for satisfying the presumption of negligence in the case. *Id.*

Ideal for a scenario in which a patron is injured where it is very atypical to become injured absent negligence, res ipsa loquitur is an appropriate means for Plaintiff to make a prima facie case of Defendant's negligence. The doctrine applies to this case involving Stela Bomtempo, and is examined in the analysis that follows.

A. Elements of a Res Ipsa Claim: the Occurrence or Accident Itself Bespeaks Negligence

A res ipsa claim is essentially comprised of three elements. After a plaintiff establishes a defendant owes them a duty, they are entitled to prove their claim by demonstrating the following preconditions: (1) the occurrence or accident itself must ordinarily bespeak negligence; (2) the instrumentality that causes the injury must have been within the defendant's exclusive control; and (3) there must be no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect. *See*, *Walsh v. Madison Park Properties, Ltd., 102 N.J. 134, 142 (App.Div. 1968); Jerista, 185 N.J. at 192; Brown, 95 N.J. at 288; Kahalili, 26 N.J. at 606*. Plaintiff Stella Bomtempo, in the present matter, can demonstrate that each of the aforementioned elements has been met.

Regarding the first element, courts have held that an injury on an amusement park ride can in and of itself bespeak negligence. *See, e.g., Kahalili, 26 N.J. at 605-6.* Where a patron, in a seated position, was thrown from a roller coaster following a "sudden lurch," the Court held that this incident in and of itself created "a presumption or inference of negligence to carry the case to [a] jury." *Id. at 602, 606*. Factually, the patron in *Kahalili* and Plaintiff Stela Bomtempo were similarly situated. Both individuals were riding an attraction for the second consecutive time, the first ride proceeding without incident. *Id. at 601.* Neither individual acted any differently or disobeyed safety instructions while riding. Significantly, both were injured during the second time riding the attraction. *Id.* Resultantly, the conclusion in the present matter should be the same. The defendant's negligence is "fairly deducible from all the circumstances" and it is an issue for "the jury to determine whether the evidence sustain[s] the circumstantial inference embodied in the presumption." *Id.* at 607-8. Therefore, Plaintiff here can demonstrate the first element of her res ipsa claim and it is an issue for the jury, not for summary judgment, as to whether negligence can be presumed.

Furthermore, courts nationwide have held that injuries occurring on amusement park rides can be assumed to bespeak negligence under res ipsa loquitur and are issues best suited for a jury to examine. Where a plaintiff was injured when she fell out of an inner tube near the end of a ride, the Court stated "[w]e believe that it is up to the jury to decide 'whether the event (injury) is of a kind which ordinarily does not occur in the absence of negligence'" and held that summary judgment was inappropriate. *Dantzler v. S.P. Parks, Inc., 715 F. Supp. 680, 683 (E.D. Pa. 1989)*. In this case, Plaintiff Stela Bomtempo was also injured on a tube on a water ride. Likewise, where a plaintiff was injured when he was inexplicably thrown from an amusement ride featuring twists and turns, the

court held it was an issue for the jury to determine whether the motion that threw plaintiff from the ride was one which bespoke negligence. *Brennan v. Ocean Amusement Co., 289 Mass. 587, 592 (1935)*. Specifically, the Court held that:

> "[i]n view of the high degree of care which the jury might think it reasonable to expect and of the intimate knowledge which they might think the defendant would have or should have as to the condition of its structure and appliances, we are of the opinion that they might take the final step of finding it more likely than not that the negligence of the defendant had brought about the condition which caused the accident or had permitted it to continue when it should have been remedied."

Id. at 593.

Similarly, where a passenger on a roller coaster was caused by a sudden dip to be injured, the court allowed for an inference of res ipsa loquitur and held that, "the application of the maxim [of res ipsa loquitur] called for an explanation and required the case to go to the jury." *Bibeau v. Fred W. Pearce Corp., 173 Minn. 331 (1928).*

Finally, on point, where a woman inexplicably injured her back on a water rafting slide ride, the court allowed for a reliance on res ipsa loquitur to demonstrate defendant's negligence. *Hipps v. Busch Entertainment Corp., 1997 WL 535181 (E.D.Pa. July 31, 1997)*. The facts in the present Bomtempo matter are in line with these established precedents indicating that an injury on an amusement park ride often in and of itself bespeaks negligence. *Kahalili, 26 N.J. at 605-6.* In this Bomtempo litigation the "sudden" and "forceful" drop which caused Plaintiff's spinal fracture while she was in the tube on the water ride, in and of itself bespeaks negligence. No sudden movement on a properly designed and maintained attraction should be powerful enough to severely injure a person's back. Yet, that is what happened in the present matter. Since the incident in and of itself bespeaks negligence, the first prong of the res ipsa claim is satisfied and it is for a

finder of fact to discern Defendants' liability.

Significantly, in *Hipps v. Busch Entertainment Corp.,* Plaintiff participated in a water amusement ride that involved riding as a group in a giant raft-like tube through various slides, during which plaintiff sustained serious injuries to her back. *Hipps v. Busch Entertainment Corp., 1997 WL 535181 (E.D.P.A. July 31, 1997).* Here, Stela Bomtempo was also riding a water tube (raft) as part of a group. Plaintiff alleged that the doctrine of res ipsa loquitur supported an inference of negligence surrounding plaintiff's injury. *Id. at 4*. The Pennsylvania Eastern District Court denied Defendant's motion to dismiss Plaintiff's complaint, stating that the availability of that doctrine in determining negligence would depend on the fact finder's evaluation of the evidence at trial, and would be preserved for later use. *Id. at 5*. Multiple neighboring jurisdictions have supported the doctrine of res ipsa loquitur in Plaintiff's favor.

In *Rose v. Port of New York Authority*, plaintiff brought forth an expert witness, who concluded that the sliding door that knocked plaintiff to his feet was unsafe in several ways. *Rose v. Port of New York Authority, 61 N.J. 129, 135-136 (1972)*. That expert was unable to point to a specific malfunction with the door, which transferred the burden to the defendant to explain why the door operated improperly. *Id. at 137.* The court held that res ipsa loquitur was properly invoked, as there was no indication that plaintiff's injuries were the result of anything but contact with the sliding door, and the incident itself pointed to negligence by the defendant. *Id. at 138.* Generally speaking, people pass through automatic doors without sustaining injury, and the fact that the accident was unusual suggests a malfunction, which in turn suggests neglect. *Id. at 136-137*. Since the plaintiff did point to the fact that the door was not functioning properly, it was too high of a burden to require the plaintiff to come forward with proof of the specific failure that occurred and

resulted in the accident, as this would be nearly impossible. *Id. at 137.*

The Court of Claims of New York ruled in favor of Plaintiff after she was injured at the New York State Fair. *Covey v. State, 106 N.Y.S.2d 18, 19 (Ct. Cl. 1951).* Plaintiff was standing in front of a platform when a steel gate fell towards her and injured her. *Id. at 20*. Plaintiff invoked res ipsa loquitur to support her claim. The court held that since the State of New York was the owner of the premises and Plaintiff had a right to be at the fair, res ipsa loquitur supported the presumption of negligence for those injuries. *Id. at 21*. Other New Jersey decisions follow this analysis in applying res ipsa loquitur.

Whether an occurrence ordinarily bespeaks negligence is based on the probabilities in favor of negligence. *Luciano v. Port Auth. Trans-Hudson Corp., 306 N.J. Super. 310, 313 (App. Div. 1997)*. At issue in *Luciano* was whether a metal gate was in the defendant's exclusive control. The court stated it did not require a plaintiff to exclude all other possible causes of an accident. Plaintiff only had to prove by a preponderance that the defendant's negligence was the proximate cause of the accident. *Id. at 313.* The trial judge originally dismissed plaintiff's complaint for failure to establish a prima facie case. He concluded that the absence of expert testimony offered by plaintiff did not prove that the mechanism that caused the gate to cause plaintiff's injuries was in the exclusive control of the defendant. *Id. at 312.* The Appellate Division determined that a jury could reasonably conclude that the defendant was negligent in not maintaining safe premises. The Appellate Division overturned the dismissal, maintaining that res ipsa loquitur was applicable here. *Id. at 314.* The plaintiff was not required to eliminate other potential causes of the accident. Plaintiff only needed to offer enough evidence from which a reasonable person could say it was more likely than not that the accident was caused by the negligence of the defendant. *Id. at 314.* Since

the facts in this case were not too complicated for a jury to understand, the dismissal was inappropriate and the lack of expert testimony was not dispositive in the case. *Id. at 314.* Plaintiff made a prima facie case under the doctrine of res ipsa loquitur.

Furthermore, expert testimony was not necessary in a case involving an elevator that dropped three floors, injuring passengers inside, The injured plaintiffs sued under the basis of res ipsa loquitur. *Rosenberg v. Otis Elevator Co., 366 N.J. Super. 292, 305 (App. Div. 2004).* While such evidence might be helpful, jurors would be able to use their common judgment and experience to determine whether there was negligence in such a case. *Id. at 305*. Further, the Appellate Division stated that judicial evaluation on the necessity of expert testimony should consider the complexity of evidence related to the instrumentality involved in an accident, rather than focusing only on whether the instrumentality itself is complex. *Id. at 305*.

B. The Instrumentality Causing Plaintiff's Injury Was in the Defendant's Exclusive Control

To succeed on a res ipsa claim, a plaintiff also must demonstrate that the instrumentality which caused an injury was in defendant's exclusive control. *Jerista, 185 N.J. at 192; Brown, 95 N.J. at 288; Kahalili, 26 N.J. at 606.* Generally, when a plaintiff is seeking to prove a premises-liability type case, such as an injury occurring on amusement park property, this requirement is typically noncontroversial to prove. *See, e.g., Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 401 (2005); Brown v. Raquet Club of Bricktown, 95 N.J. 280, 289-90 (1984).* This is so especially where, as here, a plaintiff is injured on a ride such as the Tornado. Like most amusement park rides of the same nature, the Tornado is a ride in which patrons relinquish the control of their rafts to both gravity and a trust in the defendant's adequate design, operation, and maintenance of the attraction.

Perhaps best explaining this phenomenon, when riding an amusement ride such as the Tornado, the ride being operated is:

> "under the exclusive control and management of [amusement park owners]; the construction of the track was [the park's] exclusive handiwork; the rate of speed of the [raft] upon the [slide] was due solely to the construction thereof, this because the momentum of the [raft] was due wholly and solely to the degree or acuteness of the angle or incline over which it passed."

Dickinson v. Bounds, 190 Ark. 86 (1934). Acknowledging that all control is in the hands of parties such as Defendants, the court in the aforementioned case held, "that the facts and circumstances here presented come clearly within the rule of res ipsa loquitur." *Id., See generally, Chesapeake Beach Ry. Co. v. Brez, 39 App. D. C. 58; Martin v. Sentker, 12 Ohio App. 46; O'Callaghan v. Dellwood Park Co., 242 Ill. 336, 89 N. E. 1005, 26 L. R. A. (N. S.) 1054, 134 Am. St. Rep. 331, 17 Ann. Cas. 407; Haun v. Tally, 40 Cal. App. 585, 181 P. 81; Carlson v. Swenson, 197 Ill. App. 414; Sand Springs Park v. Schrader, 82 Okl. 244, 198 P. 983, 22 A. L. R. 593; Carlin v. Smith, 148 Md. 524, 130 A. 340, 44 A. L. R. 193.* Likewise, the Tornado ride on which Plaintiff Stela Bomtempo was injured involved a forfeiting of control to Defendants. Defendants not only had a responsibility to maintain the ride, but also were the only ones truly capable of ensuring that incidents, such as the one involving Stela Bomtempo, do not occur.

There is a duty by the amusement park to use reasonable care and diligence to construct and maintain the device properly. *Kahalili v. Rosecliff Realty, Inc., 46 N.J. Super. 1, 6 (Super. Ct. App. Div. 1957)*. That includes affirmative efforts to inspect the device. *Ibid*. "If a defect is discoverable by proper and due inspection it is immaterial that defendant has no actual knowledge of it." *Id. at 6-7.* The operator of a recreational park owes its invitees "the duty of exercising reasonable care for his safety." *McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 303 (1970)*. Applied here, Defendant

owes Plaintiff the duty of reasonable care and diligence. Further, Plaintiff's injuries, a compression fracture, are not the obvious risks that one would reasonably expect to undertake while on an amusement park ride. As such, the proprietor is bound to protect patrons against non-obvious risks. Plaintiff's injury is not the sort of injury that would have happened in the absence of negligence on the part of the defendant. Both Plaintiff and her husband noticed the tube losing air at the end of the ride, which was swiftly taken away by park personnel. That should have been discoverable by proper inspection, which points to a breach of duty by the defendant.

In this case, park personnel are stationed at the top of the ride and exercise exclusive controlover when rafts are sent down the initial chute. *(See Exhibit D - Video of Tornado Ride)*. Then, once the ride begins, patrons are at the mercy of the design and upkeep of the attraction. Clearly, control is in the hands of Defendants. Accordingly, the second prong of the res ipsa loquitur claim is satisfied as well.

On October 12, 2005, the Supreme Court of New Jersey explored whether the doctrine of res ipsa loquitur permitted a jury to conclude, based on common knowledge, that negligence was present in the malfunctioning of an automatic door, or if expert testimony was necessary to prove that negligence. *(See Exhibit E, Jerista v. Murray, 185 N.J. 175, 180 (2005)).* Res ipsa loquitur "permits an inference of defendant's negligence where (a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality was within defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the result of plaintiff's voluntary act or neglect." *Id. at 192.*

In *Jerista*, plaintiff was shopping when an automatic door swung backwards, pinning her body and causing a contusion to her right wrist and a central disc bulge in her cervical spine. *Id. at 182.* Within a year of the accident, she received physical therapy and surgery to address those issues.

Id. at 182. Plaintiffs did not have an expert testify as to the specific malfunction of the **automatic door** (emphasis added). *Id. at 186.* The trial court granted defendant's summary judgment motion, stating that the suit could not reach a jury under the doctrine of res ipsa loquitur. *Id. at 187.* This was reversed, as common knowledge by a jury of how an automatic door operates was sufficient to entitle plaintiffs to the res ipsa inference. *Id. at 195.* The court reasoned that "a jury does not need an expert to tell it what it already knows." *Id. at 197.* Expert testimony was only required for a res ipsa inference that falls outside of the common knowledge of the factfinder and depends on some specialized knowledge. *Id. at 375.* Even though an automatic door is a highly sophisticated piece of machinery, it does not usually close on someone walking through it unless negligence in the maintenance is involved, a fact which a jury would be able to comprehend without the testimony of an expert witness. *Id. at 197.* The *Jerista* case is authority for Plaintiff Bomtempo's position in this case under the doctrine of res ipsa loquitur and is attached as Exhibit E.

The case of *Knight v. Essex Plaza* was decided in May of 2005, and involved a plaintiff who entered through an automatic door, which closed prematurely and hit her, causing her to slip and fall, sustaining serious injuries. *Knight v. Essex Plaza, 377 N.J. Super. 562, 566 (App. Div. 2005).* Summary judgment was granted to defendants on the basis that plaintiff had failed to provide an expert report regarding the technicalities of the incident, rejecting the applicability of res ipsa loquitur. *Id. at 567-568.* The Appellate Division upheld that ruling. However, on October 20, 2005, the Supreme Court of New Jersey granted a petition for certification, and summarily remanded the matter to the trial court for reconsideration in light of *Jerista v. Murray, 185 N.J. 175 (decided October 12, 2005 - See Exhibit E).* This decision overruled *Knight*. An expert opinion was <u>not</u> necessary to support an inference of res ipsa loquitur. *Knight v. Essex Plaza, Etc., 2005 N.J. LEXIS*

1398 (2005). In the Bomtempo litigation, similarly, defendants contentions as to the necessity of an expert are without merit.

C. **<u>There Are No Indications in the Circumstances That the Injury Was the Result of Plaintiff's Own Voluntary Act or Negligence</u>**

The final element of a res ipsa claim requires that a plaintiff was not injured as a result of his or her own voluntary act or negligence. *(See Exhibit E) Jerista*, *185 N.J. at 192; Brown, 95 N.J. at 288; Kahalili, 26 N.J. at 606.* Simple acts of enjoying an amusement park ride are not acts of comparative negligence nullifying a res ipsa loquitur claim. See, e.g*., Kahalili, 26 N.J. at 601-602* (where plaintiff did not stand during a ride and, at one point, held onto a safety bar with only one hand, the court found her not to be injured as a result of an act of neglect and allowed the res ipsa claim to proceed). Conversely, the fact that evidence existed that a plaintiff followed all safety precautions and yet was still injured, strengthened plaintiff's res ipsa loquitur claim and imputed the presumption of negligence squarely onto defendants. *Id. at 607.* The same facts apply in the present scenario. At no point did Plaintiff Stela Bomtempo or any of her party depart from safety guidelines, or make any improper movements while riding the "Tornado". This is not disputed by the defense. Plaintiff stayed seated at all times, as did her entire party, yet Stela Bomtempo still exited the ride with a broken spine. Since Plaintiff took no voluntary actions nor acted in a negligent way while riding the Tornado, the cause of her injury can be attributed solely to defendants. Resultantly, the final element of the res ipsa loquitur claim is met as well. Other cases indicate that the doctrine of res ipsa loquitur is available to Stela Bomtempo in this litigation.

Expert testimony might have been helpful, but was not required in a case involving the shattering of a glass vase that caused injuries to the holder's hands. *Mayer v. Once Upon a Rose,*

Inc., 429 N.J. Super. 365, 377 (App. Div. 2013). The incident was one that fell within the common knowledge of a typical juror, and the trial court erred in insisting that the plaintiff had to present a liability expert to the jury before drawing a res ipsa inference. *Id. at 376.* A jury could understand that excessive pressure placed on glass causes it to shatter, which is why expert testimony was not required. *Id. at 376.*

The doctrine of res ipsa loquitur was available to plaintiffs who demonstrated that the vehicle they were in was struck by a wheel that had become detached from a passing truck, and that expert testimony was not necessary to support this claim. *Apuzzio v. J. Fede Trucking, Inc.*, 355 *N.J. Super. 122, 128 (App. Div. 2002)*. The trial judge granted summary judgment to the defendants, finding that in the absence of expert testimony, the allegations were insufficient to raise an issue of material fact. *Id. at 125.* The Appellate Division reversed and determined that the mechanism involved in conjunction with the detached tire was complex, but not complex enough to require expert testimony in conjunction with the doctrine of res ipsa loquitur. *Id. at 131.*

II. DEFENDANTS OWED PLAINTIFF A HEIGHTENED STANDARD OF CARE

Generally, "[t]he existence of a duty is a question of law to be determined by a judge and, ultimately, is a question of fairness and policy." *Arvanitis v. Hios, 307 N.J.Super. 577, 581 (App.Div.1998)*. The concept of legal duty emanates from the responsibility each person bears to exercise due care to avoid unreasonable risks of harm to others. *Carter Lincoln-Mercury, Inc., Leasing Division v. EMAR Group, Inc., 135 N.J. 182, 194 (1994).* The question of whether a duty exists is one of fairness and policy that essentially "involves identifying, weighing, and balancing several factors--the relationship of the parties, the nature of the attendant risk, the opportunity and

ability to exercise care, and the public interest in the proposed solution." *Hopkins v. Fox & Lazo Realtors*, *132 N.J. at 439.* When an individual is invited onto a landowner's property for business or employment purposes, the landowner "owes a higher degree of care . . . because that person has been invited on the premises for purposes of the owner that often are commercial or business related." *Hopkins v. Fox & Lazo Realtors, 132 N.J. at 433-34 (1993)*. Therefore, amusement park operators are held to a stricter standard of care since patrons frequenting their property are often there for commercial purposes and to bring owners an economic benefit.

In the field of amusement parks, courts unequivocally impose a duty on park operators to protect patrons from the reasonably foreseeable risks created by the rides and attractions of the park. *Kahalili v. Rosecliff Realty, Inc., 26 N.J. 595, 603-4 (1958); Garafola v. Rosecliff Realty Co., Inc., 24 N.J.Super. 28, 36-37 (App.Div. 1952).* Encompassed in that duty, is a requirement that park officials make regular inspections of a ride's mechanisms and equipment, make sure rides have been properly constructed and fitted with appropriate safety equipment and are in good repair. *See, Friel v. Wildwood Ocean Pier Corp., 129 N.J.L 376, 377 (E.&A. 1943); Schellack v. Biers, 109 N.J.L. 61, 63 (E.&A. 1932); Schnoor v. Palisades Realty, &c., Co., 112 N.J.L. 506, 509 (E.&A. 1934); Gardner v. G. Howard Mitchell, Inc., 107 N.J.L. 311, 314 (E.&A. 1931); Fenner v. Atlantic Amusement Co., 84 N.J.L. 691, 693 (E.&A. 1913); Garafola, 24 N.J.Super. at 38* (in constructing and choosing attraction locations, amusement-park operator must anticipate "unpredictable proclivities of children"); *Connolly v. Palisades Realty and Amusement Co., 11 N.J.Misc. 841, 842 (Sup.Ct. 1933) aff'd o.b. 112 N.J.L. 502 (E.&A. 1934)* (a ride operator has a duty to supervise riders and prevent conduct or activities that endanger other riders). As a result, established precedent as well as principles of equity require that Defendants, as amusement-park operators, owed a duty of care to

Plaintiff Stela Bomtempo.

Courts have further held that amusement parks owe a heightened duty of care similar to common carriers, namely that, "[t]he care and diligence required [of an amusement park] is proportioned to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised. ***Where the danger is great, the utmost care and diligence must be employed. In such cases the law requires extraordinary care and diligence***." *Kahalili., 26 N.J. at 603 (emphasis added); See also, O'Callaghan v. Dellwood Park Co., 242 Ill. 336, 343 (Sup.Ct. 1909); Treadwell v. Whittier, 80 Cal. 574 (Sup.Ct. 1889).*

The New Jersey Supreme Court has articulated a strict heightened standard of duty and care regarding amusement parks, stating that:

> **[i]n a word, the standard of conduct laid down by the law is care commensurate with the reasonably foreseeable risk of harm, such as would be reasonable in the light of the apparent risk; for negligence is essentially a matter of risk, that is to say, of recognizable danger of injury. And there are compelling considerations of social, moral and ethical principles and policy for according protection to others against the reasonably foreseeable risk of death and severe bodily injury. Duty is largely grounded in the natural responsibilities of societal living and human relations, such as have the recognition of reasonable men; and fulfillment is had by a correlative standard of conduct. *Compare, Imre v. Riegel Paper Corporation*, 24 N.J. 438 (1957). *See also Schellack v. Biers*, 109 N.J.L. 61 (E. & A. 1932); *Zappala v. Stanley Company of America*, 124 N.J.L. 569 (E. & A. 1940); *Friel v. Wildwood Ocean Pier Corporation*, 129 N.J.L. 376 (E. & A. 1943); *Griffin v. De Geeter*, 132 N.J.L. 381 (E. & A. 1945); *Prosser on Torts* (24 ed.) ss 30, 36.**

Kahalili, 26 N.J. at 603-04.

In this case, the "Tornado" is a seven story tall water slide. It clearly presents a greater than normal danger. The risk to Plaintiff and other passengers, as well as social, moral and ethical principles, imposes a duty of extraordinary care and diligence on defendants in this case involving Stela Bomtempo. As a result, defendants in the present matter unquestionably owed Plaintiff this

duty of a strict and heightened standard of care.

There is a duty by the amusement park to use reasonable care and diligence to construct and maintain the device properly. *Kahalili v. Rosecliff Realty, Inc., 46 N.J. Super. 1, 6 (Super. Ct. App. Div. 1957).* That includes affirmative efforts to inspect the device. *Ibid.* "If a defect is discoverable by proper and due inspection it is immaterial that defendant has no actual knowledge of it." *Id. at 6-7.* The operator of a recreational park owes its invitees "the duty of exercising reasonable care for his safety." *McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 303 (1970).* Applied here, defendant owes Plaintiff the duty of reasonable care and diligence. Further, Plaintiff's injuries, a compression fracture, are not the obvious risks that one would reasonably expect to undertake while on an amusement park ride. As such the proprietor is bound to protect patrons against non-obvious risks. Plaintiff's injury is not the sort of injury that would have happened in the absence of negligence on the part of the defendant. Both Plaintiff and her husband noticed the tube losing air at the end of the ride, which was swiftly taken away by park personnel. That should have been discoverable by proper inspection, which points to a breach of duty by the defendant.

III. DEFENDANTS BREACHED THEIR STANDARD OF CARE

Distinct from duty, issues of breach, foreseeability and proximate cause are questions for the jury. *Arvanitis, 307 N.J.Super. at 582; La Russa v. Sheraton Hotel, 360 N.J.Super. 156 (App.Div. 2003); Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439, 449 (1993)* ("[d]etermining the scope of tort liability has traditionally been the responsibility of the courts. ... the trier of fact must ultimately determine whether under the circumstances of this case the broker breached a duty to Mrs. Hopkins."); *Anderson v. Sammy Redd & Assocs., 278 N.J.Super. 50, 56 (App.Div.1994)* ("[a]lthough

the existence of a duty is a question of law, whether the duty was breached is a question of fact"); *see also Alloway v. Bradlees Inc., 157 N.J. 221 (1999)*. Therefore, the issue of whether defendant breached their duty in this case is a question of fact best left to a jury.

Significantly, when examining the facts pertinent to whether an amusement park breached their duty, a patron may rely on circumstantial evidence. *Friel, 129 N.J.L. at 377* (worn covering and protruding nails on bumper at bottom of slide were circumstantial pieces of evidence that supported inference of negligent maintenance); *Schellack, 109 N.J.L. at 62* (frayed ends of broken rope on swing slide allowed inference of negligence); *Kahalili, 46 N.J.Super. at 7* (jury could infer improper inspection from plaintiff's testimony that safety bar in roller coaster car was loose); *Jackson v. Dreamland Coaster Co., 4 N.J.Misc. 924, 925 (Sup.Ct. 1926)* (evidence of sudden jerk by roller coaster as well as low position of safety rail in coaster car gave rise to inference of improper inspection). Therefore, circumstantial evidence can be used by Plaintiff to raise an inference of negligence. As demonstrated by the affidavits in Exhibits A and B, both Plaintiff and her husband noticed the tube (raft) losing air at the end of the ride, which was swiftly taken away by park personnel. That should have been discoverable on an inspection and is circumstantial evidence to raise an inference of negligence (res ipsa loquitur).

Likewise, a mishap on an amusement park ride may in and of itself sustain an inference of negligence. *Kahalil, 46 N.J.Super. at 605-6.* When Plaintiff Stela Bomtempo entered the "Tornado" she had a reasonable expectation that precautions had been taken to avert any dangers or risk of serious bodily injury. *See, O'Callaghan, 242 Ill. at 336.* This was clearly not the case. This case does not involve a simple assumption of risk case as in *Murphy v. Steeplechase Amusement Co., 250 N.Y. 479 (Ct.App. 1929)*, where a ride displayed obvious and inherent dangers. Unlike *Murphy*,

where a patron fell to the ground and sustained injuries on a ride called, "the Flopper," this is not a case of a ride simply doing what it is supposed to and along the way injuring a patron. *Id. at 481*. In his famous opinion, Justice Cardoza in *Murphy*, in regards to "the Flopper," indicated the risk, at greatest, was a fall. [A fall] was the very hazard that was invited and foreseen." *Id. at 482.*

In the present matter involving Stela Bomtempo, the risk invited and foreseen as to the "Tornado" was a "swishing" back and forth. Instead, the tube skipped off the surface and then came down hard in a slamming type motion, which was the alleged feeling and happening that caused Plaintiff Stela Bomtempo's spinal fracture (*See Exhibit A - Affidavit of Stela Bomtempo)* She described it coming down hard in a slamming type of motion, which proximately caused her injuries.

As a result, Plaintiff cannot be said to have foreseen the type of harm that befell her. Conversely, Plaintiff could not have expected this type of injury absent some neglect and negligence on the part of the persons in control of the ride, here, the defendants. Therefore, defendants can be said to have breached their standard of care since they did not take proper steps to ensure that Plaintiff's reasonable expectation of freedom from bodily injuries would be protected.

IV. SUMMARY JUDGMENT IS NOT APPROPRIATE IN THE PRESENT MATTER

In any action alleging negligence, the plaintiff must prove defendant owed plaintiff a duty, that there was breach of the duty, and the breach was a proximate cause of damages. *LaBracio Family P'ship v. 1239 Roosevelt Ave., Inc., 340 N.J.Super. 155, 161 (App.Div.2001)*. Generally, "[t]he existence of a duty is a question of law to be determined by a judge and, ultimately, is a question of fairness and policy." *Arvanitis v. Hios, 307 N.J.Super. 577, 581 (App.Div.1998)*. In contrast, issues of breach, foreseeability and proximate cause are questions for the jury. *Id. at 582. La Russa v. Sheraton Hotel, 360 N.J.Super. 156 (App.Div. 2003)*; *Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439, 449 (1993)* ("Determining the scope of tort liability has traditionally been the responsibility of the courts. ...the trier of fact must ultimately determine whether, under the circumstances of the case, the broker breached a duty to Mrs. Hopkins."); *Anderson v. Sammy Redd & Assoc., 278 N.J.Super. 50, 56 (App.Div.1994)* ("Although the existence of a duty is a question of law, whether the duty was breached is a question of fact."); *See also Alloway v. Bradlees Inc., 157 N.J. 221 (1999)*. Therefore, defendant's motion for summary judgment should be denied due to the jury questions presented.

Defendants are not entitled to Summary Judgment since there are genuine disputes of material facts as to whether defendants were the direct and proximate cause of Plaintiff's injuries. A defendant is not entitled to Summary Judgment unless it can be shown that there is no genuine issue as to any material fact and that the moving party is entitled to the judgment as a matter of law. *R. 4:46-2*. Summary judgment will be granted only where a "discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly does not present any genuine issue of material fact requiring disposition at trial." *Brill v.*

Guardian Life Insurance, 142 N.J. 520 (1995); Judson v. Peoples National Bank & Trust Co., Westfield, 17 N.J. 67, 74 (1954); see also; Rule 4:46-2. As such, on a summary judgment motion, a court must consider "whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party, in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Id. at 523.* This is the same standard adopted by the Supreme Court of the United States in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, *475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986).* "[T]he essence of the inquiry" under this standard is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)(quoting Anderson v. Liberty Lobby,Inc., supra, 477 U.S. at 251-52).* Under this standard genuine "[c]redibility determinations . . . continue to be made by a jury and not the judge." *Id. at 540.*

Accordingly, there are genuine disputes of material fact concerning whether Defendants failed in their duty to protect Plaintiff, an invitee of the water park, from reasonably foreseeable harm and whether their failure to do so was a proximate cause of Plaintiff's injury. Summary Judgment is not appropriate. Instead, these issues are factual, and best left in the hands of a jury.

V. THE CASES CITED IN DEFENDANT'S SUMMARY JUDGEMENT BRIEF DO NOT SUPPORT A DISMISSAL OF THE PLAINTIFF'S CAUSE OF ACTION

Defendant relies in its brief on the case *Amabile v. Cape Hotel Corp.*, which is improperly cited. The proper name for this case is *Ocean Cape Hotel Corp. v. Masefield Corp*. It involves an appeal of a summary judgment alleging deceitful representations of statements of structural defects

in leased remises. *Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 375 (Super. Ct. App. Div. 1960)*. While summary judgment in favor of defendants was affirmed in this particular case, it was affirmed on the basis that fraud was not established and could only be established by evidence that was inadmissible due to the parole evidence rule. *Id. at 382*. This is not the same as what defendant states the case says in its brief which is that issues of material facts "cannot be based on the mere argument of counsel, or the bare assertion of a conclusion in opposition to the factual position of the adversary." (Defendant's Legal Argument, page 12).

Defendant cites to *Long v. Landy*. The case states that "in the absence of direct evidence, it is incumbent upon the plaintiff to prove not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant." *Long v. Landy, 171 A.2d 1, 6 (citing Hansen v. Eagle-Pitcher Lead Co., 8 N.J. 133, 141 (1951))*. This is directly relevant to Plaintiff's case. It can reasonably be inferred that Plaintiff's injury was caused by negligence on the part of the defendant, because it is unclear what could have caused it aside from that negligence.

Defendant cites to *Brody v. Albert Lifson and Sons*. The case states that a breach of duty must be found by action or inaction on the part of defendant that if observed, would have avoided the injury. *Brody v. Albert Lifson and Sons, 17 N.J. 383, 389 (1955)*. That case further states that the proprietor of premises to which the public is invited owes a duty to exercise reasonable care to see that persons entering the premises have a reasonably safe place to do so within the scope of the invitation. *Ibid*. Applied to the facts here, Plaintiff Stela Bomtempo was owed a duty of reasonable care. She entered the premises of defendant for a business purpose. Defendant's duty in inspecting the tubes of the ride could have avoided Plaintiff's injury.

Defendant cites to *Dwyer v. Skyline Apartments*. The case states that a nexus between duty and breach of that duty can prove negligence. *Dwyer v. Skyline Apartments, Inc.*, *123 N.J. Super. 48, 52 (App. Div. 1973)*. That case refers to the negligence of a landlord in breaching a duty of care against a tenant, which is not at issue in this case. Ibid. In this case, there is a nexus between plaintiff's injury and the defendant's negligence. But for the defendant's negligence, plaintiff Stela Bomtempo would not have been injured under the doctrine of res ipsa loquitur. Expert testimony is not required.

Defendant argues that all necessary signs with warnings and ride instructions were posted at the ride entrance as well as at the top of the ride. However, the plaintiff does not speak English. She testified in her deposition she did not see them, and they were not explained to her. A reasonable person in the plaintiff's position would not have considered those warnings to be adequate.

Defendant argues that the Tornado ride operated in the manner intended. However it is hard to believe that could be true since Plaintiff sustained a spinal compression fracture after riding it. Defendant also states that because Plaintiff has no expert to proffer an opinion on negligence, there can be no inference of negligence. However, Plaintiff does not need to proffer an expert's opinion because a prima facie case of negligence has been established under the doctrine of res ipsa loquitur. The recent case of *Lazarus v. Port Auth. of N.Y. & N.J., 2014 N.J. Super. Unpub. LEXIS 2970 (App. Div. Dec. 29, 2014)* is attached which puts forth a description of the doctrine of res ipsa loquitur (See case within Exhibit E). In that case, plaintiff's complaint was originally dismissed and judgment was granted in favor of defendants. *Id. at *1.* The Appellate Division stated that the trial court erred in granting summary judgment. Expert testimony was not required for the claim to proceed under a theory of res ipsa loquitur. *Id. at *4.* The case involved an elevator that malfunctioned, abruptly

rising several inches and causing plaintiff to fall. *Id. at *9.* The Appellate Division stated that common knowledge led to the inference that an accident does not normally occur without negligence, and that an expert's opinion on this would not be necessary. *Ibid*. The malfunction was not so complex or specialized so that the fact-finder would be unable to understand it without an expert witness. *Id. at *10*.

It is the same here in Stela Bomtempo's case. Common knowledge here leads to the inference that people do not break their backs on water rides normally without negligence.

Expert testimony was also not required in another case involving an elevator that dropped three floors. The court reasoned that the jurors could make a rational inference based on common experience that an elevator wouldn't fall in such a manner unless there was some breach of duty that caused the malfunction. *Rosenberg v. Otis Elevator Co., 366 N.J. Super. 292 (App. Div. 2004). Similarly, in Mayer v. Once Upon a Rose, 429 N.J. Super 365 (App. Div. 2013)*, res ipsa loquitur allowed for the inference of negligence even though there was no expert testimony. Jurors could infer from common knowledge that a glass shatters after pressure is placed on it. *Mayer, 429 N.J. Super. at 376. In Jerista v. Murray*, expert testimony was not required for a res ipsa inference of negligence to be made for injuries caused by an automatic door. *Jerista v. Murray, 185 N.J. 175 (2005)*. Even though an automatic door is a complex instrumentality, jurors could rely on their common knowledge to infer negligence. *Id. at 199* (See *Jerista* and *Lazarus* cases within Exhibit E).

Applying that case law to the facts here, a rational jury can find that without some sort of negligence, plaintiff Stela Bomtempo would not have sustained the injuries that she did from the Tornado ride. While the ride is a complex instrumentality, it is common knowledge that most people

who ride on a tubing water ride at an amusement park do not receive serious injuries like the one that Plaintiff sustained. As such, expert testimony is not required for the res ipsa loquitur doctrine, and an inference of negligence can be drawn by a jury.

Defendant relies on *Butler v. Acme Markets*, which states that expert testimony is required when the subject matter is "so esoteric that jurors of common knowledge and experience cannot form a valid judgment as to whether the conduct of the party was reasonable." *Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982)*. That case further states that while expert testimony would be helpful to a jury, its "absence is not fatal." *Ibid*. Specifically in that case, it was determined that expert testimony was unnecessary for the jury to decide on the reasonableness of the defendant's behavior. *Id. at 284* (holding that expert testimony was not required where jury was asked to determine the duty of a business owner toward patrons).

Defendant relies on *Lauder*, in which a products liability suit was brought against the manufacturer of a gurney because of a malfunctioning lock device. *Lauder v. Teaneck Volunteer Ambulance Corps*, *368 N.J. Super. 320, 331 (App. Div. 2004)*. That case further stated that expert testimony was needed to understand "the mechanical intricacies of the instrumentality." *Ibid.* The facts at issue here can be distinguished from those in *Lauder*. *Lauder* involved a products liability claim for a malfunctioning lock device, clearly a complex instrumentality. Defendants are not being sued for products liability in this case, as they did not manufacture the Tornado ride. It is not necessary to bring forth an expert to testify as to exactly what went wrong with the Tornado ride. The fact that plaintiff is injured speaks for itself and points to negligence on the part of the defendant under res ipsa loquitur. Plaintiff is not alleging any complicated malfunction that could not be understood by a layperson. While it is true that a jury is not permitted to testify without aid of expert

testimony where a layperson wouldn't "have sufficient knowledge or experience," it is likely that jurors here could reasonably understand that a water ride that is functioning normally would not have caused the spinal injuries that plaintiff sustained. *Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997). Rule of Evidence 702* provides for situations in which expert testimony may be helpful, however the rule states that an expert "may testify" and does not explicitly require expert testimony. *N.J. R. Evid*. 702.

Defendant further cites *Davis v. Brickman Landscaping*, which identifies the types of cases in which the plaintiff is required to bring forth expert testimony. Significantly, none of the listed examples from that case apply to the situation here. *Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 98 A.3d 1173, 2014 WL 4494264 (2014)*. It is a matter of common knowledge that a tubing ride operates by water sliding a tube with passengers on it down a slide. The guidelines involved with the Tornado ride are not so complex as to cause jurors to speculate as to esoteric subject matters. Further, as the *Lazarus* decision recently held, just because a complex instrumentality is involved in a lawsuit that does not mean that an expert is needed to testify about that instrumentality. Negligence can be inferred on the basis of res ipsa loquitur and the common knowledge of jurors (See Exhibit E) *Lazarus, 2014 N.J. Super. Unpub. LEXIS 2970 at *10, (App. Div. Dec. 29, 2014)*.

Defendant further relies on *Morgan*, an unpublished case decided in 2013 in which summary judgment was granted and affirmed on appeal after plaintiff alleged products liability claims. *Morgan v. Six Flags Great Adventure, L.L.C., 2013 N.J. Super. Unpub. LEXIS 1274 (App. Div. May 28, 2013)*. In that case, plaintiff was riding a water slide when she fractured her fifth left metatarsal. *Id. at *2.* Plaintiff stated that she was seated in the raft according to instructions, but then the raft became airborne and landed on the edge of the slide, rather than in the water as it was supposed to,

sandwiching her food between the slide and her body. *Id. at *2-3.* Summary judgment was granted because defendant did not design, manufacture, or sell the ride. *Id. at 5*.

This litigation involving Stela Bomtempo has several key distinctions. Plaintiff has not alleged in this case that defendant designed or manufactured the ride, unlike in Morgan. Further, plaintiff acknowledges here that the ride attendant gave adequate instruction as to the proper way to ride the Tornado, which was properly followed by plaintiff. In this case involving Stela Bomtempo, plaintiff did not allege product liability claims, and did not seek an expert because it was not necessary to do so. See Lazarus, *2014 N.J. Super. Unpub. LEXIS 2970 at *10; Mayer, 429 N.J. Super. at 376; Jerista, 185 N.J.at 199; Rosenberg, 366 N.J. Super. at 305.* Defendant did owe a duty toward Plaintiff Stela Bomtempo, which was breached. See *Kahalili*, 46 *N.J. Super*. *at 6.* An inference of negligence on the part of the defendant here can be inferred based on res ipsa loquitur, as plaintiff's injuries could only have happened because of defendant's negligence.

CONCLUSION

______Summary Judgment is an extreme and inappropriate mechanism at this point, especially considering Plaintiff can demonstrate a prima facie case of negligence under a res ipsa loquitur standard. As a result, Plaintiff's claim should not be dismissed and Defendants should be held liable for their negligent conduct. Although it is an issue best left to the jury, it is obvious that Defendants breached their standard of care towards Plaintiff, since persons do not simply break their backs on a water slide absent an act of negligence. Res ipsa loquitur is a viable theory in Plaintiff's cause of action.

Respectfully Submitted,
CLARK LAW FIRM, PC
Attorney for Plaintiffs

By:____________________________
CYNTHIA P. LIEBLING

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SJ- opp- Combined Brief.wpd