UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PATRICK RICE, AND HIS WIFE, KATHY ANN RICE,	**:**	**CIVIL ACTION NO. 3:00-2243**
Plaintiffs	**:**	**(MANNION, M.J.)**
V.	**:**	
SKYTOP LODGE CORPORATION, AND POCONO HOTELS CORPORATION t/d/b/a SKYTOP LODGE,	**:**	
Defendants	:	

MEMORANDUM AND ORDER

On March 15, 2002, the defendant Skytop Lodge Corporation, filed a motion for summary judgment (Doc. No. 17); a brief in support (Doc. No. 18); and a statement of material facts. (Doc. No. 19) Thereafter, the plaintiffs filed a brief in opposition (Doc. No. 23); and an answer to the motion for summary judgment. (Doc. No. 24)

The defendant in its motion argues that summary judgment should be granted based upon the doctrine of assumption of risk. In essence, the defendant argues that the plaintiff assumed the risk of injury when he used the designated sledding area on the defendant's property.

There is little dispute concerning the material facts in this case. On December 30, 1998, the plaintiff was sledding at Skytop Lodge when he was injured at the conclusion of one of his sledding runs. Skytop had designated an area on its golf course to allow patrons to sled. At the bottom of the sledding hill is a lake, which, when frozen, allows patrons to finish their sledding run by sliding on the lake. However, when the lake is not frozen, or when conditions require otherwise, orange plastic fencing is placed at the bottom of the sledding hill to prevent people from continuing their run out onto the lake.

There is no dispute that the plaintiff was aware of the fencing at the bottom of the hill. In fact, the plaintiff had taken two previous runs before his injury on December 30, 1998. On his third run, he was unable to stop before hitting the fencing at the bottom of the hill. In an attempt to stop, he apparently lifted his right leg which came in contact with the fencing. As a result of this contact, according to plaintiff, he broke his leg.

The defendant raised assumption of risk, an affirmative defense, in the answer to the plaintiff's complaint. (Doc. No. 4) It now moves for summary judgment, based upon assumption of risk.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The Supreme Court has stated that:

> ". . . [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."

Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

The moving party bears the initial responsibility of stating the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. Id. The moving party can discharge that burden by "showing . . . that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Issues of fact are genuine "only if a reasonably jury, considering the evidence presented, could find for the nonmoving party." Childers v. Joseph, 842

F.2d 689, 693-94 (3d Cir. 1988)(citations omitted). Material facts are those which will effect the outcome of the trial under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court may not weigh the evidence or make credibility determinations. Boyle v. County of Allegheny, 139 F.3d 386, 393 (3d Cir. 1998). In determining whether an issue of material fact exists, the court must consider all evidence and inferences drawn therefrom in the light most favorable to the nonmoving party. Id. at 393.

If the moving party meets his initial burden, the opposing party must do more than raise some metaphysical doubt as to material facts, but must show sufficient evidence to support a jury verdict in its favor. Id.

Although the Pennsylvania Supreme Court has addressed the question of assumption of risk over the course of the last twenty (20) years, it "has not provided a definitive statement on the assumption of risk doctrine." Kaplan v. Exxon Corporation, 126 F.3d 221, 224 (3d Cir. 1997). Two of the major cases involving assumption of risk authored by the Pennsylvania Supreme Court have been plurality decisions. i.e. Rutter v. Northeast Beaver County School District, 496 Pa. 590, 437 A.2d 1198 (1981); Howell v. Clyde, 533 Pa. 151, 620 A.2d 1107 (1993). It is noteworthy that plurality opinions of the state supreme court are not binding precedent. Williams v. Workmen's Compensation Appeal Board,

687 A.2d 429, 430 (Pa. Cmmw. Court 1997). Both of these plurality decisions have held that the affirmative defense of assumption of risk was inconsistent with the doctrine of comparative negligence, except where assumption of risk is expressly permitted by the statute, is expressly assumed, or in cases of strict liability. (See Howell, Id. 620 A.2d at 1113, n. 10). The Third Circuit has predicted that the Pennsylvania Supreme Court would analyze the assumption of risk doctrine as being incorporated into the "duty" analysis. As such, it is the Rices' burden to prove that Skytop had a duty, and not Skytop's burden to prove Mr. Rice assumed the risk of his injury. Under Carrender, infra, this issue goes to the jury unless reasonable minds could not disagree. Kaplan, 126 F.3d at 225.

The defendant further argues it would have no duty to Rice if he "discover(ed) dangerous conditions which (were) both obvious and avoidable and nevertheless proceed(ed) voluntarily to encounter them." See Carrender v. Fitterer, 530 Pa. 178, 469 A.2d at 125 (1983). The defendant also argues that "to say that an invitee assumed a risk of injury from a known and avoidable danger is simply another way of expressing a lack of any duty on the part of the possessor to protect the invitee against such dangers. (Doc. No. 18, p. 6 citing Carrender) To put it another way, it is the defendant's contention that because

the orange fence was clearly visible, a fact not disputed by the plaintiff, he was aware of the existence of the risk and voluntarily assumed that risk when he sledded down the hill.

In order, however, to assume the risk, the plaintiff must have knowledge or awareness of the risk or hazard. The determination of whether or not one has knowledge of the existence of a risk and whether one appreciates the magnitude and unreasonable character of the risk, are questions of fact to be determined by a jury. Staymates v. ITT Holub Industries, 364 Pa. Super. 37, 49 (1987). Once the plaintiff has shown that there is a duty upon the defendant, here the duty of a commercial invitee to his guest, the burden shifts to the defendant to prove, that the plaintiff fully understood the specific risk and yet voluntarily chose to encounter it. Fish v. Gonsell, 316 Pa. Super. 565, 577 (1983). Therefore, the question in this case is whether or not the plaintiff fully understood the risk that contact with the fence could result in a serious injury such as a broken leg.

The defendant would argue that the risk was voluntarily taken and assumed because the plaintiff saw the netting at the bottom of the hill and spoke with another individual who was standing at the bottom of the hill to prevent his daughter from possibly traveling into the net. The court, however, finds that

even if a jury decided that the defendant was aware of the fence at the bottom of the hill, it would still have to find that plaintiff understood the possible consequences of colliding with the fence. The plaintiff's contention, among other things, is that the construction and fastening of the net to the ground was a specific cause of the plaintiff's injury. The plaintiff, even if he knew there was plastic fencing at the bottom of the hill, designed to keep him from traveling out onto the lake, could assume that the fence was placed and constructed in such a way as to stop a sledder without causing him injury.

In fact, it is fair to say that one might assume that the reason the fence was placed at the bottom of the hill by the defendant in the first place, was to stop and protect from injury invitees sledding at that location. One would assume that if the defendant set up an area specifically designated for sledding, and constructs a safety fence around that area, an invitee would expect the fence to protect, rather than injure him. Said in another way, if the plaintiff noticed the safety device at the bottom of the area, it is fair to assume that a jury could find that while aware of its presence, the plaintiff would not be aware that the safety device itself would cause him injury, but rather he would assume that the safety device would protect him and others from injury.

The defendant's argument in this case seems to boil down to sledding is

a dangerous activity and anyone who sleds assumes the risk of an injury. In this regard, the highways of our state and nation are also dangerous. Daily we hear of accidents involving car, trucks and pedestrians. One may be aware of the danger on a highway, however, it would be silly to argue that merely by driving on a highway, you assume the risk of injury and therefore are unable to sue someone who causes you injury because of their negligence.

The defendant has not shown the court that reasonable minds could not differ as to the conclusion that the plaintiff assumed the risk of injury so as to preclude this matter from being tried before a jury. As such, the question of whether the danger was known or obvious will be left for a jury, since reasonable minds could disagree whether Rice acted "under circumstances that manifest(ed) a willing to accept" that risk, Kaplan, 126 F.3d at 226 (citing Berman v. Radnor Rolls, Inc., 374 Pa. Super. 118, 542 A.2d 525, 533 (1988).

Based on the foregoing, the defendant's motion for summary judgment is

DENIED.

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MALACHY E. MANNION
United States Magistrate Judge

Dated: April 2 3, 2002

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