IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION

WEGEYAN ALDOSARI AND	:	
SUHAYLAH MUTALQ W. ALDOSARI	:	
AS INDIVIDUALS AND HUSBAND AND	:	
WIFE P/N/G ALREEM ALDOSARI,	:	
Plaintiff	:	
vs.	:	NO. 17-0626
THE TUTHILL CORPORATION,	:	
INDIVIDUALLY AND D/B/A	:	
BLUE MOUNTAIN RESORT,	:	
Defendant	:	

Civil Law - Skier's Responsibility Act - Downhill Skiing - Assumption of the Risk - Inherent Risks – No-Duty Rule

1. The Skier's Responsibility Act expressly preserves assumption of the risk as a defense to claims for personal injuries sustained while downhill skiing.

2. In Hughes v. Seven Springs Farm, Inc., the Pennsylvania Supreme Court held that when a skier is injured (1) while engaged in the sport of downhill skiing and (2) the injury is caused by an inherent risk of the sport, there is no duty owed at common law by a ski resort to protect against such risk and, pursuant to the Pennsylvania Skier's Responsibility Act, the skier is prohibited from recovering damages for such injuries.

3. The sport of downhill skiing encompasses not only the act of skiing downhill, but also those other activities directly and necessarily incident to the act of downhill skiing, including but not limited to boarding the ski lift, riding the lift up the mountain, alighting from the lift, skiing from the lift to the trail and, after a run is completed, skiing towards the ski lift to begin another run or skiing toward the base lodge or other facility at the end of the day, as well as the presence of other skiers.

4. As a matter of law, a person who participates in the sport of downhill skiing is charged with knowing and accepting the risk of injury from risks inherent and necessary to the sport, even if the skier is in fact ignorant of such risks and does not expressly agree to assume them.

5. The inherent risk/no-duty rule applied in Hughes provides that the owner/operator of an activity owes no duty of care to warn, protect, or insure against risks which are "common, frequent and expected" and thus "inherent" in the activity.

6. An "inherent risk" is one that cannot be removed without altering the fundamental nature of the activity or which is necessary to preserve the essential character of the activity.

7. The inherent risk/no-duty rule applies to hazards and dangers of the activity itself or which are directly and necessarily incident to the activity, and not to the reasonableness or unreasonableness of an individual's decision to engage in the activity.

8. The decision of a first-time skier not to ski downhill for fear of being injured after riding a chairlift to the top of the mountain and looking down a snow-covered slope is not an inherent risk of downhill skiing so as to alter the common law standards of reasonableness in determining whether the resort owes a duty of care to the skier under these circumstances.

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INDIVIDUALLY AND D/B/A	:	
BLUE MOUNTAIN RESORT,	:	
Defendant	:	

Matthew B. Weisberg, Esquire — Counsel for Plaintiffs
Anthony W. Hinkle, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – December 13, 2019

In Hughes v. Seven Springs Farm, Inc., 762 A.2d 339 (Pa. 2000), the Pennsylvania Supreme Court held that when a skier is injured (1) while engaged in the sport of downhill skiing and (2) the injury is caused by a risk inherent to the sport, there is no duty owed at common law by the ski resort to protect against such risk, nor is there a corresponding right of the skier to recover damages for personal injuries against the ski resort, the defense of assumption of the risk, as preserved by the Pennsylvania Skier's Responsibility Act, 42 Pa.C.S.A. § 7102(c) (the "Act"), precluding the recovery of damages on such claim. Unanswered in Hughes, was what risks of skiing are inherent risks.

Specifically, as presented in the case *sub judice*, is a first-time skier's fear and consequent decision not to ski downhill, made after riding a chairlift to the top of the mountain, an inherent risk of skiing such that, as a matter of law, no duty is owed by the

resort to provide an alternate means of getting to the bottom of the mountain? If this is a correct statement of the law, and there is no other way for the skier to reach the bottom of the mountain other than by skiing down on her own, is the skier then barred from recovering damages if, while attempting to do so, she loses control and is in fact injured?

For Defendant's pending Motion for Summary Judgment to be granted, both of these questions must be answered in the affirmative.

PROCEDURAL AND FACTUAL BACKGROUND

On January 9, 2016, Alreem Aldosari (hereinafter the "Plaintiff") was injured while downhill skiing at the Blue Mountain Resort (hereinafter "Resort") in Lower Towamensing Township, Carbon County, Pennsylvania. The injury occurred when Plaintiff turned to avoid hitting another skier who was stopped on the trail, lost control, fell, and skid or rolled into a wooded area beyond the edge of the trail where she came to an abrupt stop against one or more rocks. Plaintiff was seventeen years old at the time of the accident, had never skied before and was, in general, unfamiliar with the necessary skills skiing involves or the inherent risks of the sport. Plaintiff was a resident of Saudi Arabia visiting this country for the first time and, according to Plaintiff, had never observed anyone ski before.

Plaintiff claims that after disembarking from the chairlift on her first trip to the top of the slope, she was too scared to ski downhill, asked the lift attendant if there was another way for her to reach the bottom of the slope without skiing, was told there was none, and was, accordingly, forced to assume the risk of skiing downhill on her own as the only means of returning to the bottom of the slope.[1] In failing to provide an alternate

[1] The Resort disputes that Plaintiff was denied assistance and claims that while Plaintiff "may have been advised she could not ride the lift back down the mountain, as that is proscribed by code, [ ] had she asked for help because she was scared as alleged, or for any reason, assistance would have arrived by way of

means for Plaintiff to descend the mountain under these circumstances, Plaintiff claims the Resort was negligent and breached the duty of care it owed to a business invitee. The Resort claims any injury Plaintiff may have sustained was a direct result of one or more of the inherent risks of skiing for which Plaintiff had assumed the risk of injury and that Plaintiff's claims are barred by the Skier's Responsibility Act, 42 Pa.C.S.A. § 7102(c). Before us is the Resort's Motion for Summary Judgment.[2]

DISCUSSION

As a matter of law and with limited exceptions, the common law doctrine of assumption of the risk has been replaced in Pennsylvania with a system of recovery premised on principles of comparative negligence as set forth in the Comparative Negligence Act, 42 Pa.C.S. § 7102(a)-(a.1). Among these exceptions is the Skier's Responsibility Act which specifically preserves voluntary assumption of the risk as a defense in cases involving downhill skiing injuries. Hughes v. Seven Springs Farm, Inc., 762 A.2d 339, 341 (Pa. 2000). The Act states:

> (c) Downhill Skiing.—
>
> (1) The General Assembly finds that the sport of downhill skiing is practiced by a large number of citizens of this Commonwealth and also attracts to this Commonwealth large numbers of nonresidents significantly contributing to the economy of this Commonwealth. It is

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the National Ski Patrol within minutes." (Resort's Reply Brief in Support of Motion for Summary Judgment, p.7).

[2] As stated in Hughes v. Seven Springs Farm, 762 A.2d 339 (Pa. 2000):

> Summary judgment may be entered only in those cases where the record clearly demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Dean v. Commonwealth, Dep't of Transp., 561 Pa. 503, 507, 751 A.2d 1130, 1132 (2000). The record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Id*. When the facts are so clear that reasonable minds cannot differ, summary judgment is appropriate. Cochran v. GAF Corp., 542 Pa. 210, 215, 666 A.2d 245, 248 (1995).

Id. at 340-41. It is in this light that the foregoing facts have been stated.

> recognized that as in some other sports, there are inherent risks in the sport of downhill skiing.
>
> (2) The doctrine of voluntary assumption of the risk as it applies to downhill skiing injuries and damages is not modified by [the Comparative Negligence Act].

42 Pa.C.S.A. § 7102(c).

In Hughes, the Pennsylvania Supreme Court held that with respect to risks or dangers "inherent" in the "sport of downhill skiing" - those which are common, frequent and expected - the operator of a ski resort owes no duty to a skier to guard against such risks. Hughes, 762 A.2d at 343; *see also* Chepkevich v. Hidden Valley Resort, L.P., 2 A.3d 1174, 1186 (Pa. 2010).[3] In Jones v. Three Rivers Management Corporation, 394 A.2d 546, 552-53 (Pa. 1978), relied upon in Hughes, 762 A.2d at 343-344, the Court made a further distinction between risks that are not only inherent in a sporting activity, but are also *necessary* to the activity. *See also* Loughran v. The Phillies, 888 A.2d 872, 880 (Pa.Super. 2005) (Bender, J., *dissenting*) ("A careful reading of Jones, reveals that

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[3] In Hughes, the Pennsylvania Supreme Court noted the four different senses in which the defense of assumption of the risk has been applied by the courts as summarized in Comment (c) to the Restatement (Second) of Torts, § 496A. Hughes v. Seven Springs Farm, Inc., 762 A.2d 339, 341-42 (Pa. 2000). In contrast to its common, simplest form where a plaintiff "deliberately and *with awareness of specific risks inherent in the activity* nonetheless engaged in the activity that produced his injury," Staub v. Toy Factory, Inc., 749 A.2d 522, 527 (Pa.Super. 2000) (*en banc*) (emphasis added), the type of assumption of risk at issue in the present case, sometimes referred to as the inherent risk/no-duty rule, involves the plaintiff voluntarily entering "into some relation with the defendant which he knows to involve the risk, and is so regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances." Restatement (Second) of Torts, § 496A, Comment (c)(2) (1965).

As explained in greater detail in Chepkevich v. Hidden Valley Resort, L.P., the Supreme Court's decision in Hughes

> made clear that this "no-duty" rule applies to the operators of ski resorts, so that ski resorts have no duty to protect skiers from risks that are "common, frequent, and expected," and thus "inherent" to the sport of downhill skiing. Where there is no duty, there can be no negligence, and thus when inherent risks are involved, negligence principles are irrelevant – the Comparative Negligence Act is inapplicable – and there can be no recovery based on allegations of negligence.

2 A.3d 1174, 1186 (Pa. 2010). In essence, a skier is presumed to assume these inherent risks by operation of law.

the no-duty rule applies not just when one's injury is caused by a risk inherent to the activity, but also when the risk in question is necessary to the activity."; "[R]isks that will be immunized are those that are not only inherent to the activity, but those necessary to preserve the essential nature of the activity."), *appeal denied*, 906 A.2d 543 (Pa. 2006). Such risks include not only snow and ice, elevation, contour, speed and weather conditions, but also the presence of other skiers. Hughes, 762 A.2d at 344.

As a matter of law, a person who participates in the sport of downhill skiing is charged with knowing and accepting the risk of injury from risks inherent and necessary to the sport, even if the skier is in fact ignorant of these risks and does not consent to assume them.[4] Hughes, 762 A.2d at 343 (holding that the risk of colliding with another skier at the base of a ski slope is an inherent risk of downhill skiing); Chepkevich, 2 A.3d at 1188 (collecting cases where the risk of colliding with manmade or natural objects at or off the edge of a trail was recognized as an inherent risk of downhill skiing). But, is a

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4 As to risks inherent and necessary to the activity, the participant is presumed to be cognizant of the dangers involved. *See* Schentzel v. Philadelphia National League Club, 96 A.2d 181, 186-87 (Pa.Super. 1953) where the Court held plaintiff's claim of being struck by a foul ball in the stands at a baseball game was barred by the "no duty" rule, even though there was no evidence plaintiff, who claimed to have never seen a baseball game before, was aware of this risk, the risk being one inherent to the game. In Schentzel, quoting Prosser on Torts, the Court stated:

> Since the basis of assumption of risk is not so much knowledge of the risk as the consent to assume it, it is possible for the plaintiff to assume risks of whose specific existence he is not aware. He may, in other words, consent to take his chances as to unknown conditions. * * * In general, the boundaries of an assumption of risk coincide with those of the defendant's obligation of care. They are not, however, invariably identical, since the defendant may be free to proceed upon the supposition that the plaintiff understands the risk and undertakes to protect himself against it, although the plaintiff is in fact ignorant of the risk and does not consent to assume it. The distinction is well illustrated by a New York case [Ingersoll v. Onondaga Hockey Club, 245 App.Div. 137, 281 N.Y.S. 505], in which it was held that the owner of a hockey rink was not required to ask each entering patron whether he had ever witnessed a hockey game before, but might reasonably assume that the danger of being hit by the puck would be understood and accepted.

96 A.2d at 186.

first-time skier's fear of injury and decision not to ski down a mountain after being taken to the top, an inherent and necessary risk of skiing: should a first-time skier be charged with knowing that once she rides a chairlift to the top of the mountain, she cannot change her mind, that she must then ski down – there will be no other way down, no failsafe provided by the resort – that this is a risk she will be deemed to have assumed by riding a chairlift to the top of the mountain.

In applying the defense of assumption of risk to injuries claimed by a plaintiff against a ski resort operator, the Hughes Court set forth a two-part test:

> First, [the] [c]ourt must determine whether [the plaintiff] was engaged in the sport of downhill skiing at the time of her injury. If that answer is affirmative, [the court] must then determine whether [the cause of plaintiff's injury] is one of the "inherent risks" of downhill skiing, which [the plaintiff] must be deemed to have assumed under the Act. If so, then summary judgment [is] appropriate because, as a matter of law, [the plaintiff] cannot recover for her injuries.

Hughes, 762 A.2d at 344. The Court further noted that this so called "no duty" rule in no way affects the duty of a ski resort to protect patrons from foreseeably dangerous conditions not inherent in downhill skiing, and that when the plaintiff alleges an injury caused by a risk inherent in a sporting activity, the plaintiff must "introduce[ ] adequate evidence that the [sports] activity in which [she] was injured deviated in some relevant respect from an established custom [in order] for an 'inherent-risk' case to go to the jury." Hughes, 762 A.2d at 343-344 (citing and quoting Jones v. Three Rivers Management Corp., 394 A.2d 546, 550-51 (Pa. 1978)).[5]

[5] Were we to find that a resort's failure to provide a first-time skier afraid to ski downhill with another means of getting to the bottom of the mountain is an inherent risk of skiing, we would agree with the Resort that Plaintiff has presented no evidence on the record before us from which to conclude that this failure deviated in some relevant respect from an established custom.

As to what constitutes the "sport of downhill skiing" the Supreme Court in Hughes stated that

> the sport of downhill skiing encompasses more than merely skiing down a hill. It includes those other activities directly and necessarily incident to the act of downhill skiing. Such activities include boarding the ski lift, riding the lift up the mountain, alighting from the lift, skiing from the lift to the trail and, after a run is completed, skiing towards the ski lift to start another run or skiing toward the base lodge or other facility at the end of the day.

Hughes, 762 A.2d at 344.

As applied to the undisputed facts of this case, Plaintiff was clearly engaged in the recreational sport of downhill skiing at the time of her injury. The entire continuum of Plaintiff boarding, riding, and departing the ski lift, skiing to the trail which she eventually descended, and then falling while skiing down this trail was part of the sport of downhill skiing. Hughes, 762 A.2d at 344. Consequently, to conclude that Plaintiff, who was literally skiing downhill at the time she was injured, was not engaged in the sport of downhill skiing would defy logic.

As to the second prong of analysis - whether the cause of Plaintiff's injury was an inherent risk of downhill skiing - Plaintiff contends the failure of a ski resort to provide a first-time skier who has ridden a chairlift to the top of the mountain and is too scared to ski back down with an alternate means of descent is not on its face an inherent risk of downhill skiing and presents a genuine issue of fact which precludes summary judgment in this case. The Act does not define what the "inherent risks" of downhill skiing are. However, in Crews v. Seven Springs Mountain Resort, 874 A.2d 100 (Pa.Super. 2005), *appeal denied*, 890 A.2d 1059 (Pa. 2005), the Pennsylvania Superior Court stated that "an 'inherent risk' is one that cannot be removed without altering the fundamental nature

of skiing." *Id*. at 105. *But see* Chepkevich, 2 A.3d at 1186-87 n.14, where the Supreme Court questioned, without deciding, whether the Court in Crews too narrowly and in a hyper-technical fashion defined what is an "inherent" risk.

In essence, Plaintiff argues that it is foreseeable, and in fact should be anticipated, that a person who has never skied before and who is taken to the top of a mountain to ski downhill for the first time may have second thoughts and be too scared to ski to the bottom of the mountain; that under these circumstances, a duty exists on the ski resort operator to provide assistance and some other means of returning to the base of the mountain besides skiing; and that recognizing this risk and imposing an obligation on the ski resort to address it, does not fundamentally alter the nature of skiing or involve a risk which Plaintiff should be charged with having assumed. We agree.

Certain risks, such as avoiding another skier on the trail below, losing control on an icy surface, and falling, are inherently part of downhill skiing and cannot be eliminated without altering the fundamental nature of this sport. As to these common, frequent and expected risks, a skier can be fairly said to have impliedly assumed the risk of injury, and because there is no duty on the ski resort to protect against risks of this type, the resort cannot be held liable in negligence for injuries caused as a result thereof. The no-duty rule "provides that a defendant owes no duty of care to warn, protect, or insure against risks which are 'common, frequent and expected' and 'inherent' in an activity." Craig v. Amateur Softball Association of America, 951 A.2d 372, 375 (Pa.Super. 2008) (citing Jones, 394 A.2d at 551). Given this effect, "a practical and logical interpretation of what risks are inherent to the sport" must be applied. Chepkevich, 2 A.3d at 1187-88.

In contrast, the decision not to ski downhill – even if made out of fear of being hurt

after having ridden a chairlift to the top of a mountain – is not a risk which arises out of the act of skiing itself (such as the risk of falling on an icy surface, losing control, or running into another skier), and is, therefore, not a risk inherent to downhill skiing.[6] The risk that a person will change their mind and decide to turn back, rather than ski down a steep, icy slope, is qualitatively different than the risk of being injured by a physical danger or hazard inseparable from and integral to the sport of downhill skiing. Nor is it the type of risk which is impracticable or impossible to address without altering the fundamental nature of skiing. The risk that a first-time skier will vacillate and change her mind is beyond the scope of the Act and does not alter the common law standards of reasonableness in determining whether the Resort owed a duty of care to Plaintiff after she reached the top of the

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[6] The question of whether the risk or danger that ultimately results in a plaintiff's injury was an inherent risk of skiing appears to have been treated as a question of law by our appellate courts as part of the Court's duty analysis, and not a matter for jury determination. *See*, *e.g.*, Hughes, 762 A.2d at 344; Chepkevich, 2 A.3d at 1188. However, this may not always be the case. In addressing the question of whether the cause of a plaintiff's injury was an inherent risk of skating to be decided by the Court as an issue of law, the Pennsylvania Superior Court in Berman v. Radnor Rolls, Inc., stated:

> The fact that [some] cases were decided as a matter of law does not clearly indicate to us that in every case the court makes this decision. . . .
>
> We believe the better analysis is as follows. Whether there is sufficient evidence to enable a jury reasonably to conclude that the risk that produced the injury was a normal incident of skating that plaintiff is charged with knowledge of, as defined by existing case law, is a question of law. . . .
>
> There are also cases where the evidence so clearly shows that the risk was a normal incident of the activity involved that the case is decided as a matter of law. . . .
>
> But it is equally likely that there would be a case where the evidence was such that a jury could equally reasonably conclude that the risk that produced the injury either was a normal incident or was not. In such a case, where the facts are not similar enough to those presented in any decided case so as to make the resolution clear as a matter of law, the issues is for the jury pursuant to an adequate charge on the legal standard that will guide its decision. . . .

542 A.2d 525, 535 n.2 (Pa.Super. 1988) (citations omitted).

In the present case, after reviewing numerous decisions, we believe that the inherent risk/no-duty rule applies to hazards and dangers of the activity itself or which are directly and necessarily incident to the activity, and not to the reasonableness or unreasonableness of an individual's decision to engage in the activity.

mountain and advised the lift attendant that she was too scared to ski downhill and needed help.

Moreover, whether Plaintiff voluntarily engaged in the sport of downhill skiing at the time of her injury is also in dispute. A first-time skier who loses confidence after reaching the top of a mountain and is too scared to ski down, but who has no other means of getting to the bottom and is, therefore, compelled to attempt to ski down on her own, does not voluntarily assume the risks which are an inherent and necessary part of skiing in the same sense as one who freely and by choice elects to ski down a snow-covered mountain, whether or not she is fully aware of all the risks involved. *See* Staub v. Toy Factory, Inc., 749 A.2d 522, 531 (Pa.Super. 2000) (*en banc*) ("The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to exercise or protect a right or privilege of which the defendant has no right to deprive him.") (quoting Restatement (Second) of Torts § 496E(2)(b) (1965)).

CONCLUSION

Under the facts presented, the question becomes whether the Plaintiff voluntarily chose to ski downhill or was compelled to do so by the circumstances, and whether the Resort breached a duty of care for which it may be held liable in damages. Because the facts necessary to answer these questions are in dispute, Defendant's Motion will be denied.

BY THE COURT:

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P.J.