IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LAUREN FARRELL and	)	
STEVEN FARRELL,	)	
	)	
Plaintiffs,	)	
	)	C.A. No. 07C-09-175 PLA
v.	)	
	)	
UNIVERSITY OF DELAWARE	)	
	)	
Defendant.	)	

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
DENIED

Submitted: September 25, 2009
Decided: October 8, 2009

Arthur M. Krawitz, Esquire, and Cynthia H. Pruitt, Esquire, DOROSHOW, PASQUALE, KRAWITZ & BHAYA, Wilmington, Delaware, Attorneys for Plaintiffs.

William E. Manning, Esquire, James D. Taylor, Jr., Esquire, and Jennifer M. Becnel-Guzzo, Esquire, SAUL EWING LLP, Attorneys for Defendant.

ABLEMAN, JUDGE

I. Introduction

Plaintiff Lauren Farrell ("Farrell") instituted this personal injury action after she fell at defendant University of Delaware's ("UD") ice-skating rink. Farrell's fall allegedly resulted from an attempt to avoid a skater who was moving in the wrong direction. The parties now dispute whether Farrell's claims are barred by the doctrine of assumption of the risk, given that she even continued skating after she saw a child skating against the flow of skaters before her fall. Because Farrell's conduct in the circumstances did not relieve UD of its obligation of reasonable conduct towards her, the Court concludes that primary assumption of the risk does not apply. Thus, for the reasons discussed more fully herein, the defendant's Motion for Summary Judgment must be **DENIED**.

II. Factual Background

On January 16, 2006, Farrell took her son and daughter to the Fred Rust Ice Arena, a rink operated by UD in Newark, Delaware. Farrell had skated since childhood, but had only been to the Rust Ice Arena on one previous occasion. Farrell and her children took to the ice for a public skating session at approximately 1:30 P.M. The session was attended by skaters representing a broad range of abilities and age groups, including young children. Several ice guards were also on duty. As was apparently

customary for such sessions, skaters were directed to move around the oval-shaped rink in a uniform direction and then periodically told to reverse direction.

At some point after she began skating, Farrell noticed a young child skating clockwise when the other skaters were moving counterclockwise. While Farrell thought the child's actions were "not very safe," she nevertheless continued skating.[1] Farrell's thirteen-year-old son also saw a child "frequently going in the wrong direction" and "running into people."[2] Neither Farrell nor her son brought this child's behavior to the attention of the ice guards.

UD issues an Employee Operations Training Manual for the arena that details the ice guards' responsibilities. This manual instructs ice guards to "[p]rovide a safe skating environment for . . . skaters" by diligently observing their surroundings, patrolling for "any rule or regulation infractions and [taking] appropriate action."[3]

At approximately 3:00 P.M., Farrell was following the flow of skaters clockwise along the left-hand side of the rink. To her right, she noticed a

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[1] Docket 10, Ex. B (Dep. Tr. of Lauren Farrell), at 16:9.

[2] Docket 10, Ex. C (Dep. Tr. of Jacob Farrell), at 5:22-23.

[3] Docket 12, Ex. A.

child skating in her direction at what she perceived to be a high rate of speed.[4] Farrell expected that the child would veer off, and at first she did not attempt to alter her path. Instead, however, the child continued to skate directly towards Farrell. She fell onto the ice attempting to avoid him, landing on her arm and face. Farrell is not certain that the child she encountered at the time of her fall was the same one she saw skating in the wrong direction earlier, but she believes that he may have been.

As a result of her fall, Farrell suffered a fracture of her left distal radius and entrapment of the ulnar nerve in her left elbow. The injuries to Farrell's left arm have required multiple surgeries, and she alleges that she has experienced permanent physical damage.

On September 19, 2007, Farrell filed suit in this Court, alleging that UD negligently failed to supervised skaters, permitted an unsafe or dangerous condition to arise and persist on its premises, and failed to adequately warn or protect against that condition. Farrell's husband raised a loss of consortium claim.[5]

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[4] Docket 10, Ex. B, at 13:22.

[5] *See* Docket 1 (Pls'. Compl.).

III. Parties' Contentions

Now before the Court is a Motion for Summary Judgment filed by the defendant. In its motion, UD asserts that the doctrine of assumption of the risk acts as a complete bar to the plaintiffs' claims in this case. UD argues that Farrell was an experienced skater who admits she saw the very behavior to which she attributes her fall—a young skater moving against the flow of traffic in the rink—an hour before she was injured. UD suggests that Farrell was fully aware of the risk she encountered and assumed that risk by continuing to skate.

In response, the plaintiffs argue that the risk of an "erratic and therefore dangerous skater"[6] was beyond the dangers inherent to a public skating session, and thus was not a risk Farrell assumed by participating. Furthermore, the plaintiffs contend that Farrell did not expressly assume this risk and relieve UD of its obligations towards her by remaining on the ice.

IV. Standard of Review

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a

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[6] Docket 12 (Pls.' Resp. to Def.'s Mot. for Summ. J.), ¶ 5.

matter of law.[7] Summary judgment will not be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[8]

<u>V. Analysis</u>

In Delaware, the concept of assumption of the risk has been divided into the distinct doctrines of primary and secondary assumption of the risk.[9] Distinguishing between the two types of assumption of risk is necessary because of their differing effects upon negligence claims.

Primary assumption of the risk involves the plaintiff expressly consenting to "relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone."[10] The plaintiff's express consent need not take the form of specific spoken or written words.[11] Rather, "[d]epending upon the situation at hand, express consent may be manifested

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[7] Super. Ct. Civ. R. 56(c).

[8] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. 2005).

[9] *Koutoufaris v. Dick*, 604 A.2d 390, 397-98 (Del. 1992); *Storm*, 898 A.2d at 880.

[10] *Storm*, 898 A.2d at 882 (quoting *Fell v. Zimath*, 575 A.2d 267, 267-68 (Del. Super. 1989)).

[11] *Id.*

by circumstantial words or conduct."[12] By establishing that the defendant was relieved of any duty or standard of conduct towards the plaintiff, primary assumption of the risk acts as a complete bar to a claim of negligence.[13]

Secondary assumption of the risk is implicated where the plaintiff "voluntarily encounter[s] a known unreasonable risk which is out of proportion to the advantage gained."[14] Under Delaware law, secondary assumption of the risk has been completely subsumed into the concept of comparative negligence; thus, secondary assumption of the risk does not ordinarily bar a claim, but rather serves as "a basis for apportionment of fault under the comparative negligence scheme."[15] This apportionment is generally a factual matter for the jury.[16]

The Delaware Supreme Court has expressed the view that "adoption of a comparative negligence standard . . . manifests a legislative intention . . . [to evaluate] the plaintiff's conduct on a case-by-case basis," rather than

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[12] *Croom v. Pressley*, 1994 WL 466013, at *5 (Del. Super. July 29, 1994).

[13] *Storm*, 898 A.2d at 882.

[14] *Koutoufaris*, 604 A.2d at 397-98.

[15] *Spencer v. Wal-Mart Stores East, LP*, 930 A.2d 881, 886 (Del. 2007) (quoting *Halpern v. Wheeldon*, 890 P.2d 562, 565 (Wyo. 1995)).

[16] *Id.*

continuing the historical approach of treating any assumption of risk as an absolute bar to the plaintiff's claim.[17] This nuanced approach is of particular value in a case such as this one. As both parties acknowledge, primary assumption of the risk is frequently applied to bar claims brought by plaintiffs injured in sports activities and at sporting events.[18] Indeed, Farrell concedes that she did assume the risks of "accidental collisions, mistakes, and inexperienced skaters"—dangers that are indisputably "inherent in a public ice skating session."[19] On the other hand, a plaintiff's participation in a sport does not imply that she has assumed the risk of all possible harms that could occur. Based upon the specific facts of this case, the Court concludes that UD has not established that Farrell assumed the risk of reckless conduct by another skater such that she relieved UD of its duty to act reasonably towards her as a business invitee.

The Court finds persuasive the reasoning of jurisdictions that have found that plaintiffs in similar contexts did not assume the risk of other skaters' preventable reckless conduct. In *Shorten v. City of White Plains*, for example, the Appellate Division of the New York Supreme Court found that

[17] *Koutoufaris*, 605 A.2d 390, 398.

[18] *See Storm*, 898 A.2d at 883.

[19] Docket 12, ¶ 4.

a plaintiff did not assume the risk of being pushed down by a skater, even though she had seen him skating “recklessly” and acting “particularly aggressive” prior to her accident and still continued to skate.[20] Although the rink could not be liable for harms caused by the inherent dangers of skating or by unpreventable events, the court considered assumption of the risk inapplicable to injuries resulting from “the reckless actions of another skater which the defendant, by adequate supervision, could have prevented.”[21]

The Court emphasizes that it need not address whether participants in *unsupervised* public skating sessions assume the risk of unruly youngsters moving against the flow of other skaters. During the session Farrell attended, UD personnel were actively directing the skaters to maintain a uniform direction and ice guards were on duty, ostensibly to monitor ice conditions and ensure that skaters did not endanger themselves or others by

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[20] 637 N.Y.S.2d 791 (N.Y. App. Div. 1996).

[21] *Id.*; *see also Wagner v. Thomas J. Obert Enters.*, 396 N.W.2d 223, 226 (Minn. 1986) (noting that the doctrine of primary assumption of the risk did not operate to relieve roller-skating rink of “its duty to safely supervise skating activities or to maintain the premises in a safe condition. Negligent maintenance and supervision of a skating rink are not inherent risks of the sport itself.”); *Phillips v. Skate Country East*, 420 So.2d 730, 732 (La. Ct. App. 1982) (reversing jury verdict in favor of defendant roller-skating rink where jury was not instructed that participant in recreational activities assumes only foreseeable and ordinary risks of that activity; “If the jury had been told that Plaintiff only assumed the ordinary risks attendant upon skating at defendant's facility, they could . . . have arrived at the conclusion that defendant was not exonerated by assumption of the risk from liability for the danger created by skaters who were speeding around, and the negligence of the operators in failing to enforce their own rules.”).

acting recklessly. On this basis, the Court finds *Fowler v. Alpharetta Family Skate Center, LLC*,[22] cited by the defendant, to be distinguishable. In that case, the plaintiff skater was injured when he collided with another skater who was moving backwards without watching his path. Although the recitation of facts in *Fowler* leaves unclear whether the defendant rink deployed skate guards, it does establish that the plaintiff in that case "had *no expectation* that patrols would be [on the ice]."[23] Here, by contrast, ice guards were on the ice throughout the session, and the record raises a factual issue as to whether they could have prevented the conduct that allegedly caused Farrell's fall.

That Farrell observed a young skater moving in the wrong direction before her fall does not alter the Court's conclusion that she never relieved UD of its duty to perform reasonable supervision. Although Farrell's son

[22] 601 S.E.2d 818 (Ga. Ct. App. 2004).

[23] *Id.* at 819-20 (emphasis added). The Court finds *Vega v. County of Westchester*, another case relied upon by Defendant, similarly unhelpful. 282 A.D.2d 738, 724 N.Y.S.2d 72 (N.Y. App. Div. 2001). In *Vega*, the plaintiff fell at a skating rink in an attempt to avoid five skaters who had linked arms to skate in a row, in violation of a rink policy. *Id.* at 738. The *Vega* Court held that the plaintiff, having previously seen the five skaters perform the same maneuver, assumed the risk of a "sudden collision with other skaters." *Id.* The *Vega* opinion, however, does not indicate that ice guards were on duty to monitor for violations. Moreover, in *Vega*, there was "no evidence that [the five skaters'] conduct was reckless." *Id.* at 739. In this case, by contrast, the presence of ice guards on the ice necessarily informs how the plaintiff's conduct is to be perceived, and the parties apparently agree that skating rapidly against the direction set by rink personnel was reckless conduct.

saw the same child skating erratically for a significant time period, Farrell recounts that she only noticed the child once, approximately an hour before the accident. Farrell was not privy to her son's observations of ongoing recklessness. She thus may not have been aware that the ice guards were apparently ignoring rule violations. Therefore, her decision to continue skating—the very conduct that UD claims demonstrates her assumption of the risk—could indicate that she reasonably relied on the guards to supervise and, if necessary, remove unruly skaters.

In these circumstances, the Court cannot conclude that Farrell relieved UD of its duty to supervise either by participating in the public session in the first instance or by continuing to skate after she witnessed a single incident of a young skater moving in the wrong direction around the rink. To the extent Farrell could be considered negligent, her potential responsibility is an issue of comparative negligence that must be determined by the jury.[24]

[24] *Spencer*, 930 A.2d at 886.

VI. Conclusion

Therefore, the Court holds that Defendant University of Delaware's Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

Original to Prothonotary

cc: Cynthia H. Pruitt, Esq.
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