UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYVLVANIA

DARREN SMITH and ANGELA SMITH,	:
	:CIVIL ACTION NO. 3:11-CV-773
Plaintiffs,	:
	:(JUDGE CONABOY)
v.	:
	:
RAUL S. DEMETRIA, JR.,	:
	:
Defendant.	:
	:

MEMORANDUM

Here we consider Defendant's Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) (Doc. 4) filed on May 6, 2011. Defendant filed Defendant's Brief in Support of Motion to Dismiss under F.R.C.P. 12(b)(6) (Doc. 5) on May 11, 2011, and Plaintiff filed Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss Pursuant to F.R.Civ.P. 12(b)(6) (Doc. 9) on May 24, 2011. With the filing of Defendants' Reply Brief to Plaintiffs' Brief in Opposition to Motion to Dismiss (Doc. 11) on June 1, 2011, this motion was fully briefed and ripe for disposition. For the reasons discussed below, we deny Defendant's motion.

I. Background

Plaintiffs Darren and Angela Smith are husband and wife who reside in Philadelphia, Pennsylvania. (Doc. 1 ¶¶ 1-3.) Defendant Raul S. Demetria, Jr., lives in Nutley, New Jersey. (*Id.* ¶ 4.)

On January 14, 2011, at approximately 9:15 p.m. at Blue Mountain Ski Area, Carbon County, Pennsylvania, Defendant was snowboarding and Plaintiff Darren Smith ("Plaintiff") was skiing

when Defendant ran into Plaintiff. (Doc. 9 at 7.) Plaintiff was on the ski slope called "Main Street" and was either stopped or skiing slowly at the time of the collision. (*Id.*) Plaintiff alleges that Defendant made no attempt to slow down, stop or avoid impact with Plaintiff and the impact sent him airborne. (*Id.* at 7-8.)

The Blue Mountain Area ski patrol provided emergency care at the ski area and Plaintiff was transported to Lehigh Valley Hospital by ambulance. (*Id.* at 8.) He required surgery and alleges he will also require further medical treatment. (*Id.*) Plaintiff's injuries include a concussion, brain bleeding, fractured clavicle, shattered clavicle, fractured ribs and chipped vertebrae. (Doc. 1 ¶ 12.)

Plaintiff asserts that at the time of the impact, Defendant was "bomb[ing] the hill" and was snowboarding at approximately thirty to thirty-five miles per hour. (Doc. 9 at 8.) As a sanction for his conduct, Blue Mountain Ski Area revoked Defendant's ski privileges for one week. (*Id.*)

Plaintiffs filed their Complaint in this Court on April 21, 2011, with federal jurisdiction based on diversity of citizenship. (Doc. 1 ¶¶ 1-4.) Count I of Plaintiffs' Complaint is brought on behalf of Darren Smith against Defendant for negligence. (Doc. 1 at 2.) Count II is brought on behalf of Plaintiff Angela Smith against Defendant for loss of consortium. (*Id.* at 6.) Count III

is brought on behalf of both Plaintiffs against Defendant for punitive damages. (*Id.* at 7.)

As noted above, Defendant filed this motion to dismiss (Doc. 4) on May 6, 2011, and the motion became ripe for disposition with the filing of Defendant's reply brief (Doc. 11) on June 1, 2011. With this motion, Defendant seeks dismissal of all claims against him on the basis that Plaintiffs' claims are not actionable under Pennsylvania law. (Doc. 4 at 2-3.)

II. Discussion

A. Motion to Dismiss Standard

In *McTernan v. City of York*, 577 F.3d 521, 530 (3d Cir. 2009), the Third Circuit Court of Appeals set out the standard applicable to a motion to dismiss in light of the United States Supreme Court's decisions *Bell Atlantic Corp. v. Twombly*, 550 U.S. 433 (2007), and *Ashcroft v. Iqbal*, ---U.S.---, 129 S. Ct. 1937 (2009).

> "[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true to 'state a claim that relief is plausible on its face.'" *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). The Court emphasized that "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950. Moreover, it continued, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (citation omitted).

McTernan, 577 F.3d at 530. The Circuit Court discussed the effects

of *Twombly* and *Iqbal* in detail and provided a road map for district courts presented with a motion to dismiss for failure to state a claim in a case filed just a week before *McTernan*, *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009).

> [D]istrict courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. [*Iqbal*, 129 S. Ct. at 1949.] Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." *Id.* at 1950. In other words, a complaint must do more than allege a plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts. *See Philips* [*v. Co. of Alleghany*], 515 F.3d [224,] 234-35 [(3d Cir.2008)]. As the Supreme Court instructed in *Iqbal*, "[w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'--'that the pleader is entitled to relief.'" *Iqbal*, 129 S. Ct. at 1949. This "plausibility" determination will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Fowler, 578 F.3d at 210-11.

The Circuit Court's guidance makes clear that legal conclusions are not entitled to the same deference as well-pled facts. In other words, "the court is 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Guirguis v. Movers Specialty Services, Inc.*, No. 09-1104, 2009 WL 3041992, at

*2 (3d Cir. Sept. 24, 2009) (*quoting Twombly*, 550 U.S. at 555) (not precedential).

B. Defendants' Motion

Defendant first asserts the Court should dismiss all claims with prejudice because, under the Pennsylvania Skier's Responsibility Ac, 42 Pa. C.S. § 7102(c), and relevant case law, the type of incident which occurred here is not actionable. (Doc. 4.) In his supporting brief, Defendant alternatively requests that the Court should dismiss Plaintiffs' claim for punitive damages if the Court is unwilling to dismiss the case. (Doc. 5 at 5.) We conclude Defendant's motion is properly denied as is his request for dismissal of the punitive damages claim.

As a federal court sitting in diversity, we are required to apply the substantive law of the state whose concerns govern the action. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The parties here agree that Pennsylvania law applies. When ascertaining Pennsylvania law, the decisions of the Pennsylvania Supreme Court are the authoritative source. *State Farm Mut. Auto. Ins. Co. v. Coviello*, 233 F.3d 710, 713 (3d Cir. 2000). "In the absence of a definitive ruling by a state's highest court, we must predict how that court would rule if faced with the issue." *Covington v. Continental General Tire, Inc.*, 381 F.3d 216, 218 (3d Cir. 2004) (citing *Packard v. Provident Nat. Bank*, 994 F.2d 1039, 1046 (3d Cir. 1993)). In making such a decision, the court sitting

in diversity

> "look[s] to decisions of state intermediate appellate courts, of federal courts interpreting that state's law, and of other state supreme courts that have addressed the issue" as well as to "analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand."

Spence v. ESAB Group, Inc., 623 F.3d 212, 216-17 (3d Cir. 2010).

1. Pennsylvania Skier's Responsibility Act

Defendant asserts that Plaintiffs' Complaint should be dismissed with prejudice for failure to state a claim based on the Pennsylvania Skier's Responsibility Act, 42 Pa. C.S. § 7102(c), and interpretive case law. (Doc. 4.) For the reasons discussed below, we disagree.

Pursuant to 42 Pa. C.S. § 7102(c), downhill skiers in Pennsylvania are subject to the assumption of risk doctrine.

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

42 Pa. C.S. § 7102(c). This provision is known as the Skier's Responsibility Act. *Hughes v. Seven Springs Farm, Inc.*, 762 A.2d

339, 340 (Pa. 2000).

In *Hughes*, the Pennsylvania Supreme Court determined that this provision and the doctrine of assumption of the risk barred a skier's suit against a ski resort where the skier was at the base of the mountain heading toward a lift when she was struck and injured by another skier. 762 A.2d at 345-46. The court reasoned that "the possibility that one skier may collide with another in this common area at the base of the slope is one of the common risks of the sport of downhill skiing. As such, we hold, [the ski area] had no duty to protect [the skier] against this inherent risk." *Id.* at 345.

Noting the attendant "complexities" and "difficulties" of the assumption of the risk doctrine, *Hughes* looked to the Restatement Second of Torts, § 496A as a starting point for its analysis. *Id.* at 341. Section 496A states that "[a] plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover from such harm." *Hughes* then set out the Restatement comment which explains the many ways courts have interpreted the doctrine.[1]

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[1] Restatement (Second) of Torts § 496A comment C provides the following explanation of the assumption of the risk doctrine.

> *c. Meanings of assumption of risk.* "Assumption of risk" is a term which has been surrounded by much confusion, because it has been used by the courts in at least four different senses, and the distinctions seldom have been made clear. These meanings are as

follows:

1. In its simplest form, assumption of risk means that the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care for his protection, and agrees to take his chances as to injury from a known or possible risk. The result is that the defendant, who would otherwise be under a duty to exercise such care, is relieved of that responsibility, and is no longer under any duty to protect the plaintiff. As to such express assumption of risk, see § 496B.

2. A second, and closely related, meaning is that the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances. Thus a spectator entering a baseball park may be regarded as consenting that the players may proceed with the game without taking precautions to protect him from being hit by the ball. Again the legal result is that the defendant is relieved of his duty to the plaintiff. As to such implied assumption of risk, see § 496C.

3. In a third type of situation the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it. For example, an independent contractor who finds that he has been furnished by his employer with a machine which is in dangerous condition, and that the employer, after notice, has failed to repair it or to substitute another, may continue to work with the machine. He may not be negligent in doing so, since his decision may be an entirely reasonable one, because the risk is relatively slight in comparison with the utility of his own conduct; and he may even act with unusual caution because he is aware

762 A.2d at 341-42.

From the Restatement starting point, *Hughes* was guided by the Pennsylvania Supreme Court's earlier decision in *Carrender v. Fitterer*, 469 A.2d 120 (Pa. 1983), which "addressed the interplay of the assumption of the risk doctrine and the more fundamental question of the duty owed an invitee by a possessor of land." 762 A.2d at 342. *Hughes'* quoted excerpt from *Fitterer* focuses on the possessor's duty and includes the following analysis:

> It is precisely because the invitee assumes the risk of injury from obvious and avoidable dangers that the possessor owed the invitee no duty to alleviate those dangers. Thus, to say that the invitee assumed the risk of injury from a known and avoidable danger is simply
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> of the danger. The same policy of the common law which denies recovery to one who expressly consents to accept a risk will, however, prevent his recovery in such a case. As to such implied assumption of risk, see § 496C. **As to the necessity that the plaintiff's conduct be voluntary, see § 496E.**
>
> **4. To be distinguished from these three situations is the fourth, in which the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence. There is thus negligence on the part of both plaintiff and defendant; and the plaintiff is barred from recovery, not only by his implied consent to accept the risk, but also by the policy of the law which refuses to allow him to impose upon the defendant a loss for which his own negligence was in part responsible. (See § 467.)**

Restatement (Second) of Torts § 496A comment C.

> another way of expressing the lack of any duty on the part of the possessor to protect the invitee against such dangers. *See Jones v. Three Rivers Management Corp.*, 483 Pa. 75, 394 A.2d 546 (1978) (operator of baseball park owes no duty to guard against common, frequent, and expected risks of baseball: duty extends only to foreseeable risks not inherent in baseball activity).

Id. at 342-43 (quoting *Fitterer*, 469 A.2d at 125). *Hughes* found *Fitterer's* reliance on *Jones* of particular significance "since *Jones*, like this case, involves an injury arising out of a sporting activity open to the public." 762 A.2d at 343. *Hughes* also noted that *Jones* emphasized "the 'no-duty' rule 'in no way affect[s] the duty of theatres, amusement parks and sports facilities to protect patrons from foreseeably dangerous conditions not inherent in the amusement activity.'" 762 A.2d at 343-44 (quoting *Jones*, 394 A.2d at 551). Throughout the opinion, the "no-duty" rule was analyzed in the context of the duty of the facilities involved with no mention of the duty of fellow patrons/participants.

The Pennsylvania Supreme Court revisited the application of § 7102(c) in *Chepkevich v. Hidden Valley Resort, LP*, 2 A.3d 1174 (Pa. 2010). Where a skier alleged negligence on the part of the lift operator caused her to fall off the lift, the Court held that the ski area owed no duty to the plaintiff: "boarding and riding a ski lift are inherent to the sport of downhill skiing and inherently dangerous activities, the most obvious danger of which--a risk that is common, frequent and expected--is undoubtedly falling from the

lift." *Id.* at 1187.

As in *Hughes*, in *Chepkevich* the Pennsylvania Supreme Court focused the analysis on the duty of the facility involved. "The assumption of the risk defense, as applied to sports and places of amusement, has also been described as a "no-duty" rule, *i.e.*, as the principle that an owner or operator of a place of amusement has no duty to protect the user from any hazards inherent in the activity." 2 A.3d at 1186. *Chepkevich* then stated the *Hughes* decision "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.'" *Id.*

Hughes announced, and *Chepkevich* confirmed, that a two-part inquiry should be undertaken to determine whether a skier assumed the risk of a certain injury. First, the court must determine whether the plaintiff "was engaged in the sport of downhill skiing at the time of her injury." *Hughes*, 762 A.2d at 344; *Chepkevich*, 2 A.3d at 1187. If that answer is affirmative, the court then must determine whether the injury arose out of a risk inherent to the sport of downhill skiing. *Id.*

Our review of Pennsylvania Supreme Court cases shows that the precise issue before us has not been decided by the Pennsylvania Supreme Court. The Court has not addressed the application of § 7102(c) in the context of an action by an injured skier against an

allegedly reckless skier. Importantly, in discussing the history of § 7102(c) and its application by lower courts, neither Pennsylvania Supreme Court case even mentions the application of § 7102(c) outside the ski area defendant context and the reasoning in both cases relies heavily upon traditional assumption of the risk principles as found in the context of a possessor of land to an invitee.

Because we conclude the Pennsylvania Supreme Court has not addressed the precise issue before us, we must make a prediction of how the Court would rule. *Covington*, 381 F.3d at 218. To do so, we will next look to whether or how the state's intermediate court, here the Pennsylvania Superior Court, has addressed the issue. *See Spence*, 623 F.3d at 216-17.

The Pennsylvania Superior Court has discussed the application of § 7102(c) in two ski accident cases, both involving collisions between skiers: *Crews v. Seven Springs Mountain Resort*, 874 A.2d 100 (Pa. Super. 2005), and *Bell v. Dean*, 5 A.3d 266 (Pa. Super. 2010). In *Crews*, the Superior Court found the trial court had improperly granted summary judgment to the defendant ski resort where the plaintiff was struck by another skier who was "an underage drinker on a snowboard" because this could not be considered an inherent risk of downhill skiing. 874 A.2d at 104. The court noted that if the case had merely been a collision with another skier, it would have been "a common risk of downhill

skiing." *Id.*

In *Bell*, the Pennsylvania Superior Court considered an injured skier's suit against another skier and determined the suit was barred by § 7102(c). The Court found the case distinguishable from *Crews*: there the holding was based on the fact that the particular circumstances took the case out of the "mere collision" category where § 7102(c) would apply and the *Bell* case had no such factual underpinning. *Id.* at 270.

The circumstances in *Bell* were that the defendant was snowboarding and the plaintiff was skiing on an expert slope when they collided, causing physical injury to the plaintiff. *Id.* at 267. The plaintiff claimed he was going slowly across the slope and the defendant was coming straight down at a high speed. *Id.* Other than the rate of speed and asserting that the defendant failed "to keep a proper lookout," the Court noted the plaintiff did not claim the defendant "deviated in any other way in the manner he was snowboarding." *Id.*

The Superior Court first reviewed whether the Skier's Responsibility Act applied in the context of one skier suing another for injuries sustained and reasoned that "nothing in the Act's language precludes its application to negligence between patrons (whether they be skiers or snowboarders) of the ski resort or ski area. Rather the Act simply retains the common law doctrine of assumption of the risk 'as it applies to downhill

skiing.'" *Id.* at 269 (quoting 42 Pa. C.S.A. § 7102(c)(2)). Thus, *Bell* concluded "the Act and the 'no duty' common law doctrine of assumption of the risk, which it preserves, . . . apply equally to a potential bar to negligence actions between patrons and ski resorts and between two or more patrons of a ski resort." *Id.*

The Court noted that the crux of the plaintiff's argument was that "the risk of another skier or snowboarder's negligence is not a risk inherent to the sport of downhill skiing," an argument rejected by the Pennsylvania Supreme Court in *Chepkevich*. 5 A.3d at 271. In making this determination, the *Bell* Court carefully reviewed the facts and parties' testimony. The plaintiff had testified that he had made a slow turn to the right while looking down the hill and didn't remember anything after that. *Id.* The defendant had testified that he was snowboarding down the slope and looking down the run when a skier came from behind him from left to right and cut him off. *Id.* The defendant added that he did not notice the plaintiff until a "split second" before impact. *Id.* Based on these facts, the Court commented "there is nothing to suggest that [the defendant] intentionally struck [the plaintiff] or was snowboarding abnormally. Rather we are presented only with [the plaintiff's] unsupported allegations that [the defendant] was snowboarding 'out of control,' 'beyond his abilities,' and without keeping a 'proper lookout' to avoid colliding with [the plaintiff]." *Id.* The court noted that causes

of collisions between skiers "would certainly include incidents, similar to [the plaintiff's] allegations, of ordinary carelessness or inadvertence." *Id.* at 272.

The Superior Court rejected plaintiff's assertion that the decision "would somehow act as a bar to all claims arising out of collisions on a ski slope, thus leading to an absurd level of disorder on the ski slopes of the Commonwealth." *Id.* at 273. The Court pointed to its decision in *Crews v. Seven Springs Mountain Resort*, 874 A.2d 100 (Pa. Super. 2005), where recovery was not barred by § 7102(c) when a skier was injured in a collision with a teenager who was intoxicated because this was not a risk inherent to the sport of downhill skiing. *Bell* added

> [m]ore importantly, . . . neither the Act's language nor the decisions cited herein lend credence to [the plaintiff's] fear that skiers or snowboarders alike "would be free to ski as fast as they want and as out of control as they want" and "injure each other with impunity." . . . Rather, plaintiffs are barred by the Act from recovery for injuries sustained while engaged in the sport of downhill skiing where the injury arises from an inherent risk of skiing, defined as those risks that are "common, frequent, or expected." *Hughes*, *supra*; *Chepkevich*, *supra*. Our Supreme Court has, therefore, clearly defined, as a matter of law, the scope within which recovery is barred and permitted. Thus, [the plaintiff's] assertion is unfounded.

Bell, 5 A.3d at 273.

A review of these Pennsylvania Superior Court cases reveals that injuries arising from collisions between skiers are not

barred in all circumstances. Importantly, although *Bell* ultimately held the plaintiff's action was barred by § 7102(c), from the manner in which the court analyzed the facts of the case and the dicta quoted above, it appears that under different circumstances (not just those found in *Crews*) a collision between skiers may not be barred because it would not arise from circumstances that are common, frequent or expected.

Defendants argue that, based on *Hughes* and *Bell*'s application of *Hughes* to essentially the same allegations made here, the Court should dismiss Plaintiff's claims with prejudice for failure to state a cause of action. (Doc. 5 at 5.) Defendants add that if the Court is not willing to dismiss the case at this stage, "at the very least the punitive damages claim must be dismissed because there is absolutely no basis upon which to impose punitive damages upon the Defendant who was only participating in snowboarding down a ski slope." (*Id.* at 5-6.)

Plaintiffs respond that this Court is not bound by the Superior Court's holding in *Bell* "and should not apply it in this case because it does not represent how the Pennsylvania Supreme Court would address the issue raised." (Doc. 9 at 13.) Plaintiffs make two arguments in support of their position: 1) the "no duty" rule applied in *Hughes* and § 7102(c) does not protect reckless skiers (Doc. 9 at 13-19); and 2) the no-duty rule does not immunize other skiers -- the duty between participants in an

activity differs from that discussed in the Pennsylvania Supreme Court cases (*id.* at 19-23). Plaintiffs urge the Court to follow the decision of the Carbon County Court of Common Pleas in *Cruz v. Gloss*, 57 Pa. D. & C.4th 449 (Pa. Comm. Pl. May 1, 2002), where the court considered a ski collision in the context of one skier suing another and determined that the defendant snowboarder owed a "duty to skiers not to intentionally, recklessly, or even negligently cause harm." (Doc. 9 at 23 (citing *Cruz*, 57 Pa. D. & C.4th at 470-71).) Plaintiffs conclude the Pennsylvania Supreme Court would analyze and decide the issue of skier immunity in the same way as *Cruz*. (*Id.*)

In his reply brief, Defendant argues that it would be inappropriate for the Court to adopt the *Cruz* standard as the Pennsylvania Superior Court weighed in on the issue (*Bell v. Dean*) since *Cruz* was decided. (Doc. 2 at 8.) Defendant also contends that "the clear line of appellate cases conclusively establish that a collision on a ski slope between two patrons is a risk inherent to the activity of downhill skiing. There is no wiggle room . . . . The two-part test is met in this case and as such, the case must be dismissed as a matter of law." (*Id.* at 6.)

We do not adopt the positions or reasoning set out by the parties: Defendant's categorical approach to the application of § 7102(c) does not acknowledge the fact-specific inquiries exhibited in the relevant opinions; Plaintiffs' urging to adopt the

reasoning of *Cruz* does not mesh with Pennsylvania Superior Court guidance in *Bell*.

Based on Pennsylvania Superior Court decisions, we predict the Pennsylvania Supreme Court would acknowledge that at least some collisions may give rise to skier liability. As noted above, *Crews* so held and *Bell* inferred the same in dicta. If the Pennsylvania Supreme Court were to agree with *Bell* that in "mere collision" cases § 7102(c) would preclude one skier's liability for injury to another skier, 5 A.3d at 270, Defendant would not be entitled to judgment as a matter of law at this stage of the proceedings because the record is not sufficiently developed to conclude that this is a "mere collision" case. The importance of a more complete record is exhibited in *Bell* where the Superior Court looked at the specific circumstances of the case, including the testimony of the parties, before determining the evidence did not support a finding that the collision arose from something more than "ordinary carelessness or inadvertence." 5 A.3d at 272.

Guided by Pennsylvania Superior Court decisions and comparing the facts of this case to those in *Crews* and *Bell*, we find no absolute bar to liability. Particularly because *Bell* left the door open to the possibility that a skier or snowboarder behaving "abnormally" may provide a different result than the Superior Court reached in the circumstances of the case, 5 A.3d at 272, and

the allegations here arguably concern more egregious conduct than those alleged in *Bell*, we conclude the record here would be insufficient to decide the applicability of § 7102(c).[2]

The dicta in *Bell* which forms a basis for our conclusion is not inconsistent with *Hughes'* findings that "other skiers are as much a part of the risk in downhill skiing, if not more so, than the snow and ice, elevation, contour, speed and weather conditions," 762 A.2d at 344, and "the risk of colliding with another skier at the base of a ski slope is one of the 'common, frequent and expected risks inherent in downhill skiing,'" *id.* at 345. Basing its decision in part on the fact that "skiing is a sport in which it is common for the participants to lose control" and "the possibility that one skier may collide with another in [the] common area at the base of the slope is one of the common risks of the sport," the Supreme Court did not address collisions in which a skier did not "lose control" but is instead skiing in the manner differentiated in *Bell*: where a defendant may have been skiing or snowboarding "abnormally" as supported by the record, *see* 5 A.3d at 272, or where a skier or snowboarder *chose* to ski at the edge of or out of control, *id.* at 273.

In terms of the two-part test set out above, here there is no question Plaintiff "was engaged in the sport of downhill skiing at

[2] *Bell* was decided at the summary judgment stage of proceedings. 5 A.3d at 267.

the time of her injury," *Hughes*, 762 A.2d at 344; *Chepkevich*, 2 A.3d at 1187. The question of whether the injury arose out of a risk inherent to the sport of downhill skiing, *id.*, is one we have determined we cannot answer at this stage of the proceedings. The question is whether this is a "mere collision" where § 7201(c) would bar recovery or something more egregious which would take the collision out of the realm of "common, frequent and expected risks inherent in downhill skiing," 762 A.2d at 511. Because the record is not sufficiently developed to answer this question, Defendant's motion to dismiss is properly denied.[3]

2. Punitive Damages

Defendant asserts that "at the very least" Plaintiffs' claim for punitive damages must be dismissed because "there is absolutely no basis to impose punitive damages upon the Defendant who was only participating in snowboarding down a ski slope." (Doc. 5 at 5-6.) Defendant does not further develop this argument. We conclude Defendant's request is properly denied both because he has not met his burden on the issue and because any decision regarding punitive damages at this stage of the proceedings would be premature.

The standard for evaluating an award for punitive damages in

[3] Assuming, as did *Bell*, that § 7102(c) applies to an action against a skier, we render no opinion as to which meaning of "assumption of the risk" would be applied where another skier is the defendant. *See supra* n.1.

Pennsylvania is set out in *Hutchinson ex rel. Hutchinson v. Luddy*, 870 A.2d 766 (Pa. 2005). *See also Daniel v. Wyeth Pharmaceuticals, Inc.*, 15 A.3d 909, 928-29 (Pa. Super. 2011).

> The standard governing the award of punitive damages in Pennsylvania is settled. "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742, 747 (1984) (quoting Restatement (Second) of Torts § 908(2) (1979)); *see also Chambers v. Montgomery*, 411 Pa. 339, 192 A.2d 355, 358 (1963). As the name suggests, punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct. *See SHV Coal, Inc. v. Continental Grain Co.*, 526 Pa. 489, 587 A.2d 702, 704 (1991); *Feld*, 485 A.2d at 747-48; *Chambers*, 192 A.2d at 358. *See also* Restatement (Second) of Torts § 908, comment b. The purpose of punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others like him from similar conduct. *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800, 803 (1989); Restatement (Second) of Torts § 908(1) . . . . Additionally this Court has stressed that, when assessing the propriety of the imposition of punitive damages, "[t]he state of mind of the actor is vital. The act, or failure to act, must be intentional, reckless or malicious." *See Feld*, 485 A.2d at 748; *see also Martin v. Johns-Manville Corp.*, 508 Pa. 154, 494 A.2d 1088, 1097 n.12 (1985) (plurality opinion).
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> In *Martin*, this Court considered the requisite state of mind which would constitute reckless indifference in this context, and we set forth the standard the courts are to apply when called upon to determine whether the evidence supports a punitive damages award on such a basis. Noting that Comment *b* to Section 908(2) of the Restatement refers to Section 500

as defining the requisite state of mind for punitive damages based on reckless indifference, this Court turned to Section 500, which states

> § 500 Reckless Disregard of Safety Defined
>
> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts § 500.

Noting that Section 500 sets forth two very different types of state of mind as to reckless indifference, *Martin* stated that the first is "where the 'actor knows, or has reason to know, . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk;' and that the second is "where the 'actor had such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.'" *Martin*, 494 A.2d at 1097 (quoting Restatment § 500 Comment a). *Martin* recognized that the first type of reckless conduct described in Section 500 "demonstrates a higher degree of culpability than the second on the continuum of mental states which range from specific intent to ordinary negligence[,]" because "[a]n 'indifference' to a known risk under Section 500[,] is closer to an intentional act than the failure to appreciate the degree of risk from a known danger." *Id.*

The *Martin* Court then stated that "[u]nder Pennsylvania law, only the first type of reckless conduct described in comment *a* to Section 500, is sufficient to create a jury question on the issue of punitive damages[,]" rejecting as insufficient the second type of recklessness, which is premised on a "reasonable man standard." *Id.* at 1097-98. In other words, this Court concluded that "an appreciation of the risk [of harm] is a necessary element of the mental state required for the imposition of [punitive] damages." *Id.* at 1097 n.12. In this regard, we reasoned that:

> The only purpose of damages is to deter outrageous conduct. It is impossible to deter a person from taking risky action if he is not conscious of the risk. Thus, in *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984), we addressed the issue when punitive damages are warranted and stressed that, in determining whether certain conduct is outrageous, "[t]he state of mind of the actor is vital. The act, or failure to act, must be intentional, reckless, or malicious." Similarly, the Restatement explains that "reckless indifference to the rights of others and conscious action in *deliberate* disregard of them . . . may provide the necessary state of mind to justify punitive damages." Comment *b* (emphasis added). Therefore, an appreciation of the risk is a necessary element of the mental state required for the imposition of such damages.

Id.

Thus, in Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to

> which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk. *Id.* at 1097-98.

870 A.2d at 770-72.

The detailed analysis provided in *Hutchinson* and repeated in *Daniel*, makes clear that the determination of whether punitive damages are appropriate in a given case is very fact specific. Here the record is not sufficiently developed to conclude damages are not warranted as a matter of law. Therefore, we deny Defendant's request and allow all claims to go forward.

III. Conclusion

For the reasons set out above, Defendant's Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) (Doc. 4) is denied. Defendant's request to dismiss Plaintiffs' claim for punitive damages is also denied. An appropriate Order follows.

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge

DATED: June 14, 2011

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYVLVANIA

DARREN SMITH and ANGELA SMITH,	:
	:CIVIL ACTION NO. 3:11-CV-773
Plaintiffs,	:
	:(JUDGE CONABOY)
v.	:
	:
RAUL S. DEMETRIA, JR.,	:
	:
Defendant.	:
	:

ORDER

AND NOW, THIS 14th DAY OF JUNE 2011, FOR THE REASONS DISCUSSED IN THE ACCOMPANYING MEMORANDUM, IT IS HEREBY ORDERED THAT:

1. Defendant's Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) (Doc. 4) is DENIED;
2. Defendant's request to dismiss Plaintiffs' claim for punitive damages is DENIED;
3. This case goes forward in its entirety.

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge