

# Court of Claims of Ohio

The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
www.cco.state.oh.us

PATRICIA NUNGESTER

Plaintiff

v.

RISK MANAGEMENT

Defendant

Case No. 2007-03196-AD

Deputy Clerk Daniel R. Borchert

## MEMORANDUM DECISION

{¶1} On November 17, 2006, at approximately 7:10 p.m., plaintiff, Patricia Nungester, suffered personal injury while attending an intercollegiate hockey game at the ice arena located on the campus of defendant, Bowling Green State University (“BGSU”). Plaintiff stated she was seated in Section F Row 7 Seat 2 at the BGSU Ice Arena, during the course of the hockey game, when an errant puck entered the stands and struck her on the right temple. Plaintiff further stated she experienced “considerable swelling and much pain” from being struck in the temple area by the errant hockey puck. Immediately after the injury incident occurred, on duty medics treated plaintiff with ice packs and then transported her to the Wood County Hospital for further treatment. At the hospital, plaintiff was diagnosed with a bruise on her head and swelling. Plaintiff was treated and released from medical care that same day.

{¶2} Plaintiff has contended defendant should bear liability for the medical expenses she incurred after being struck by a hockey puck while watching a game at the BGSU Ice Arena. Plaintiff filed this complaint seeking to recover \$746.78, the amount of unreimbursed medical costs she paid to treat her head injury. The filing fee was paid.

{¶3} Defendant denied liability in this claim based on the contention plaintiff assumed the risk of being struck by a hockey puck when she attended the November 17, 2006 hockey game, thereby constituting a complete bar to recovery as a matter of

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law. Defendant related when plaintiff was interviewed by telephone she acknowledged she had attended many hockey games prior to November 17, 2006 at BGSU and elsewhere and was aware of the fact hockey pucks sometimes enter the spectator stands during the course of the game. In the telephone interview transcript submitted by defendant, plaintiff noted, “[a]bout five minutes before I was hit with the puck, I had just warned my youngest grandson that he needed to pay attention to the game and watch for pucks because they sometimes come into the seats.” Plaintiff also noted she was watching the game when she was struck. Plaintiff related, “I wasn’t messing around, I just wasn’t looking at the right place at the right time.” Defendant asserted the evidence suggests plaintiff was not only aware of the dangers presented from errant hockey pucks entering the spectator stands, but she assumed the risk of being injured from a flying puck when she attended the game.

{¶4} Furthermore, defendant observed BGSU took measures to notify hockey game spectators of the risk of being struck by pucks. Defendant stated these measures included placing large signs at the three entrances to the ice arena that read: “BGSU would like to advise all spectators of the potential dangers associated with pucks that can leave the ice at any time. Please be vigilant and aware at all times to avoid the possibility of injury.” Also, defendant explained tickets for admission to BGSU hockey

games bear a written notice containing the following language: "Ticket holder expressly assumes all risks and dangers incidental to the events for which this ticket is issued, whether occurring prior to, during, or subsequent to same, including specifically, but not exclusively, the danger of being injured by hockey pucks \*\*\*\*" Defendant submitted a copy of a BGSU hockey game ticket for February 23, 2007 (2006-2007 season) bearing the printed assumption of the risk notice. Defendant maintained plaintiff held a ticket for the November 17, 2006, BGSU hockey game which contained the same printed notice as the submitted copy of the February 23, 2007 ticket. Additionally, defendant pointed out the BGSU Ice Arena General Facilities Policies document contains the written statement that, "Participation in any area of the Ice Arena is at the user's own risk." However, it is unclear whether or not plaintiff had access to or was aware of the Ice Arena Policies document.

{¶5} Defendant submitted a written statement by BGSU employee, Buddy Powers, Director of the Ice Arena. The statement generally encompassed safety measures implemented at the Ice Arena pursuant to a January 2002 review. In regard to spectator safety measures advanced involving arena construction, Powers wrote the following:

{¶6} "The review also indicated that at that time (2002) our tempered glass mounted on the boards for spectator safety should be raised. Industry standards suggested boards should be 48" in height and spectator glass should be 72" on the ends of the arena and 36" on the sides of the arena. And in 2002 our boards were 42" and our glass was 98" on the ends and 52.5" along the sides of the arena mounted on the boards (the combination boards and glass exceeded standards but the boards were 6" too short).

{¶7} "As a reaction to the recommendation from the review, in summer 2006 all of the side boards and plexi glass in the arena were replaced and raised by a minimum of 18". The boards are now 48", glass on the ends is 99.5" and 75.5" on the sides of the arena. This past season the ice arena had far fewer pucks fly into the stands than ever

before after replacing the glass.”

{¶8} Defendant cited the case of *Morris v. Cleveland Hockey Club* (1952), 157 Ohio St. 225, 47 O.O. 147, 105 N.E. 2d 419, for the position that a plaintiff’s knowledge regarding the dangers involved in attending a hockey game is determinant of whether or not assumption of the risk applies to bar recovery for injuries received from being struck by an errant hockey puck entering the spectator area from the ice rink. Defendant contended the principle of knowledge about the risk advanced in *Morris* is applicable to the instant action to bar plaintiff from recovery in her claim against BGSU. Defendant essentially asserted the defense of assumption of the risk is appropriate based on plaintiff’s acknowledgment that she was familiar with dangers of hockey pucks entering the spectator area.

{¶9} Plaintiff filed a response explaining she was merely watching the hockey game when she was hit with a puck. Plaintiff submitted a copy of the ticket for the hockey game she attended on November 17, 2006. Plaintiff asserted this ticket does not bear any notice language concerning ticket holders assuming the risks of all dangers associated with attending a hockey game. The copy of the ticket plaintiff submitted does not contain any printed notice.

{¶10} Primary assumption of the risk is a defense generally applied in cases where there is a lack of duty owed by the defendant to plaintiff and is a complete bar to recovery. *Anderson v. Ceccardi* (1983), 6 Ohio St. 3d 110, 114, 6 OBR 170, 45 N.E. 2d 780. “In that form, while there is a knowledge of the danger and acquiescence in it on the part of the plaintiff, there is no duty owed by defendant to plaintiff.” *Willoughby v. Harrison Radiator, Div. of General Motors Corp.* (May 11, 1989), Montgomery App. No. 11225. This type of assumption of the risk is typified by the baseball cases where a plaintiff is injured when a baseball is hit into the stands. *Anderson*, at 114, citing *Cincinnati Baseball Club Co. v. Eno* (1925), 112 Ohio St. 175, 147 N.E. 86.

{¶11} Also, it has been determined, under the doctrine of primary assumption of the risk, that an individual injured while engaged in a recreational activity is generally

barred from recovery because she is presumed to have assumed the ordinary risks of that activity unless it can be proved another individual acted recklessly or intentionally in causing the injury claimed. *Marchetti v. Kalish* (1990), 53 Ohio St. 3d 95, 559 N.E. 2d 699; *Gentry v. Craycraft*, 101 Ohio St. 3d 141, 2004-Ohio-379, 802 N.E. 2d 1116. The doctrine of primary assumption of the risk serves to remove liability for mere negligence under circumstances involving recreational activity injuries. The trial court applied a three-part test for primary assumption of the risk set forth in *Gallagher v. Cleveland Browns Football Co. Inc.* (1994), 93 Ohio App. 3d 449, 638 N.E. 2d 1082, reversed on other grounds, 74 Ohio St. 3d 427, 1996-Ohio-320, 659 N.E. 2d 1232. The test requires that: 1) the danger is ordinary to the game; 2) it is common knowledge that the danger exists; and 3) the injury occurs as a result of the danger during the course of the game.

{¶12} It is well settled that spectators attending baseball games who are injured by batted balls flying into the stands are denied recovery based on the primary assumption of the risk doctrine. The following standard was enunciated in *Cincinnati Baseball Club Co.*, 112 Ohio St. 175, 147 N.E. 86, in regard to the spectators assumption of the risk at a baseball game. “The consensus of \*\*\* opinions is to the effect that it is common knowledge that in baseball games hard balls are thrown and batted with great swiftness, that they are liable to be thrown or batted outside the limits of the diamond, and that spectators in positions which may be reached by such balls assume the risk thereof” at 180-181. Furthermore, in *Borchers v. Winzler Excavating Co.* (1992), 83 Ohio App. 3d 268, 273, 614 N.E. 2d 1065, the court stated: “In baseball games, management performs its duty towards spectators when it provides screened seats in the grandstand and gives spectators the opportunity of occupying them. *Cincinnati Baseball Club.*”

{¶13} “The nature of the sporting activity is highly relevant in defining the duty of care owed by a particular defendant: ‘What constitutes an unreasonable risk under the circumstances of a sporting event must be delineated with reference to the way the particular game is played, i.e. the rules and customs that shape the participant’s ideas

of foreseeable conduct in the course of the game.” *Bundschu v. Naffah*, 147 Ohio App 3d 105, 112, 2002-Ohio-607, 768 N.E. 2d 1215 (citation omitted). Any analysis of primary assumption of the risk turns on whether or not the injured spectator was subjected to risk or hazards that a reasonable participant would or would not expect to encounter in the particular sporting activity.

{¶14} In reference to the instant claim, the court can find no difference between baseball and hockey when applying the doctrine of primary assumption of the risk to spectators who are injured by flying objects leaving the area of play and entering the stands. Whether the spectator is hit by a flying puck or a flying baseball, the situations are analogous when applying the law. There is no obligation on the part of the operator of a hockey game such as BGSU to protect a spectator against being hit by a flying puck, a danger incident to the entertainment, which any reasonable spectator could and did foresee. The risk of being hit was well known to plaintiff and she acknowledged that fact. Evidence has shown defendant did take measures by erecting glass and boards around the perimeter of the Ice Arena to provide some safety to spectators from errant pucks. The boards and glass were extended in height in 2006, thus providing additional security to spectators. Nevertheless, pucks do enter the stands; an inherent risk in the game of hockey, which is common, expected, and frequent. The baseball rule of primary assumption of the risk is applicable to hockey considering the degree of familiarity a person such as plaintiff has with the game and her admitted knowledge of the inherent danger involved. The facts of the instant action establish the danger of flying pucks was so open and obvious to plaintiff that she assumed the risk of injury therefrom. Consequently, plaintiff's claim is denied since defendant owed her no duty to protect her from the know danger presented.

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MEMORANDUM DECISION

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### ENTRY OF ADMINISTRATIVE DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff.

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DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

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