
In the Supreme Court of Ohio

ANGEL L. HORVATH, et al.,

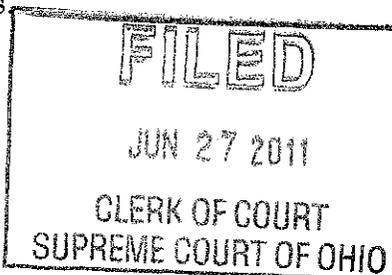
Plaintiffs-Appellees,

v.

DAVID ISH, et al.,

Defendants-Appellants

DISCRETIONARY APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE No 25442



MEMORANDUM IN SUPPORT OF JURISDICTION

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TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THE ISSUES RAISED IN THIS CASE ARE OF PUBLIC AND GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE AND OPINIONS BELOW	5
A. The Collision on Buttermilk Hill at Boston Mills Ski Resort.	5
B. The Lawsuit and Opinions Below.	8
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	9
<u>Proposition of Law No. I:</u> A collision between a down-hill skier and a snowboarder who are sharing a ski slope open for use by both skiers and snowboarders is an inherent and ordinary risk of recreational skiing primarily assumed by all skiers and snowboarders.	9
<u>Proposition of Law No. II:</u> Revised Code Chapter 4169 and the “responsibilities” of skiers listed in R.C. §4169.08(C) do not create legal duties owed between skiers and snowboarders which give rise to negligence per se.	11
<u>Proposition of Law No. III:</u> The common law sport and recreational activity rule is the legal standard which governs a skier’s liability for an injury to another skier resulting from an accidental collision on a ski slope. R.C. §4169.09 does not abrogate the common law requirement to prove intentional conduct or recklessness before liability will be imposed.	12
A. R.C. §4169.09 Does Not Abrogate the Common Law Sport and Recreational Activity Rule Announced in <i>Marchetti v. Kalish, Thompson</i> <i>v. McNeill</i> , and <i>Gentry v. Craycraft</i>	12
B. Without Evidence of Reckless or Intentional Conduct, There is No Liability for a Collision Between a Skier and Snowboarder.	14
CONCLUSION	15
PROOF OF SERVICE	16

TABLE OF CONTENTS (Cont'd.)

APPENDIX

Appx. Page:

Judgment Entry & Opinion Being Appealed:

Decision and Journal Entry of the Ninth Appellate District, Summit
County, Ohio, journalized on May 11, 2011 (2011-Ohio-2239) A1-A11

Other Opinions:

Final Order (Summary Judgment) of the Court of Common Pleas,
Summit County, Ohio, journalized on May 18, 2010 A12-A25

I.
**EXPLANATION OF WHY THE ISSUES RAISED IN THIS
CASE ARE OF PUBLIC AND GREAT GENERAL INTEREST**

The issues raised in this case are of public and great general interest to Ohioans because they relate to defining and clarifying the legal standard and rules for determining the civil liability of persons who engage in some of the most popular of wintertime sport and recreational activities in Ohio – skiing, snowboarding, sledding, tubing and tobogganing.¹ This case involves the interpretation of provisions of Revised Code Chapter 4169 – in particular R.C. §§4169.08(A) and (C) and §4169.09 – and the interplay of those statutory provisions with the common law of Ohio dictating that individuals who engage in recreational or sports activities assume the inherent risks of the activity and cannot recover for any injury resulting from negligent conduct unless it can be shown that the other participant’s conduct and actions were either “reckless” or “intentional.” *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, syllabus; *Thompson v. McNeill* (1990), 53 Ohio St.3d 102. This long-standing and well-established legal principle is in jeopardy for participants in wintertime snow activities like skiing, snowboarding, sledding, tobogganing and tubing, if the decision of the Ninth Appellate District in the case at bar is permitted to stand.

It has been several years since this Court addressed the sport and recreational activity rule, the last time being in 2004. See, *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379. But more importantly, this case presents the Court with the

¹While this case involves persons engaged in down-hill skiing and snowboarding, the statutory provisions at issue purport to govern a far wider range of wintertime activities based upon the statutory definition of “skier” “which includes, without limitation, sliding or jumping on snow or ice on skis, a snowboard, sled, tube, snowbike, toboggan, or any other device.” R.C. §4169.01(A).

opportunity to address important legal issues of first impression. This Court has never addressed the interplay between a statutory provision of the Revised Code and the sport and recreational activity rule. This Court has never interpreted the precise Revised Code provisions applicable in this case – R.C. §§4169.08(A) and (C) and §4169.09. In fact, before the Ninth Appellate District’s opinion in this case, no court in Ohio had ever interpreted these statutory provisions as imposing any duty between skiers or snowboarders.² (App. Op. at ¶11, Apx. p. A4; Trial Ct. Op. at pp. 8-9, Apx. pp. A19-A20)

Cases presenting issues of public or great general interest reach beyond the parties in a particular piece of litigation. *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254. The scope and impact of the legal issues presented in this case do just that. Ski areas open to the public are located throughout northern Ohio, including Geauga, Lake, Logan, Summit, and Richland counties.³ Tens of thousands of Ohioans, as well as citizens from other states and countries, frequent these ski areas every year to engage in the recreational activity of skiing and snowboarding. The individuals who engage in skiing or snowboarding (and persons employed by the skiing and snowboarding industry) contribute significantly to the economies of these ski areas and the communities where they are located. The related industries and businesses that support

²The cases that have dealt with these statutes and liability for injuries to skiers have done so in regard to the liability of the ski area operators and resorts. See, *Stone v. Alpine Valley Ski Area* (1999), 135 Ohio App.3d 540; *Shaheen v. Boston Mills Ski Resort, Inc.* (1992), 85 Ohio App.3d 285, *Otterbacher v. Brandywine Ski Center, Inc.*, (May 23, 1990), Summit App. No. 14269, 1990 Ohio App. LEXIS 4582.

³Alpine Valley is located in Chesterland, Ohio. www.alpinevalleyohio.com. Big Creek Ski Area is located in Concord Township, Ohio. www.bigcreekski.org. Mad River Mountain is located in Zanesfield, Ohio. www.skimadriver.com. Boston Mills Ski Resort is located in Peninsula, Ohio, and Brandywine Ski Resort & Polar Blast Snow Tubing is located in Sagamore Hills, Ohio. www.bmbw.com. Snow Trails Winter Resort is located in Mansfield, Ohio. www.snowtrails.com.

ski-related activities and events, like nearby lodging and restaurant establishments, rely upon and benefit greatly from the economic activity generated by skiers and snowboarders. Many organizations and schools sponsor ski clubs which coordinate regular trips to local ski areas and provide transportation for their members. Encouraging persons to utilize Ohio's ski facilities is vital to promoting wintertime tourism to this state. That can't happen if the uncertainty created by the Ninth Appellate District's opinion is permitted to stand.

Persons of all ages and varying skill and experience levels, who utilize or visit Ohio's ski areas, need to know what law will govern their conduct and activities while skiing, snowboarding, tubing or tobogganing on the snow-covered slopes and hills. Those who frequent ski areas need to know whether they are assuming the risk of a possible accidental collision with another skier or snowboarder. They need to know whether they might be held civilly liable or be able to recover for injuries caused by an accident or mere inattention due to simple negligence or whether liability is only imposed for "reckless" or "intentional" conduct of the other participant. This Court should address and answer these questions. Extending liability to acts of simple negligence as the Ninth Appellate District has suggested here will work to discourage and deter persons from taking-up and engaging in such recreational activities.

Horvath v. Ish, Summit App. No. 25442, 2011-Ohio-2239 (Apx. pp. A1 - A11), raises three important issues of public and great general interest. *First*, in its 2-1 decision, the appellate court held that the "responsibilities" of a skier listed in R.C. §4169.08(C) establish legal duties that skiers owe to other skiers for which negligence per se liability can be imposed pursuant to R.C. §4169.09. (App. Op. at ¶13, Apx. pp. A5-A6). Both the

dissenting judge and the trial court judge came to a different conclusion regarding the applicability of the statutory provisions to activities between skiers, finding that the statutory framework of R.C. Chapter 4169 was directed at regulating “ski area operators” and not activities and conduct between skiers. (App. Op. at ¶¶20-24 (Carr, J. dissent), Apx. pp. A8-A11; Trial Ct. Op. at pp. 7-9, Apx. pp. A18-A20).

The majority opinion acknowledges an ambiguity in R.C. §4169.08(C)(1) and (2) because “the statute does not specifically state to whom these responsibilities are owed * * *.” (App. Op. at ¶13, Apx. p. A5). But the appellate court’s decision proceeds to construe and interpret R.C. §4169.08(C) and 4169.09 in a way that is in derogation of the common law sport and recreational activity rule and announces an aberrational rule that counters the basic tort law principal that for a statute to create a standard of conduct, the violation of which may serve as negligence per se or even evidence of negligence, the injured person must be a member of the class that the rule was designed and intended to protect.

Second, the appellate court determined that while R.C. §4169.08(A)(1) identifies the risks of skiing which a skier expressly assumes, “[a] collision with another skier is not a risk the legislature chose to specifically identify.” (App. Op., Apx. p. A5, at ¶13) Yet, the specified risks set forth in R.C. §4169.08(A)(1) are not an exhaustive list as the statute makes perfectly clear that the risks “include, *but are not limited to* * * * . (Emphasis added) See also, *Stone*, supra (under former version of R.C. §4169.08(A)(1), injured skier assumed the risk of collision with a fence even though fences were not expressly listed in the statute).

Third, the court of appeals created confusion in regard to the interplay between R.C.

§§4169.08(C) and 4169.09, the violation of which the court said could give rise to negligence per se, and the common law sport and recreational activity rule requiring “reckless” or “intentional” conduct before liability can be imposed upon one participant for injuries sustained by another participant in a sport or recreational activity. (App. Op. at ¶14 and 17, Apx. p. A6 and A7) While this interplay was a significant and dispositive legal issue in the case, the court of appeals confounded the issue and simply remanded the case to the trial court to resolve. (App. Op. at ¶17, Apx. p. A7) But then, with little discussion or analysis, seemed to foreclose the issue in the very next paragraph of the opinion. (App. Op. at ¶18, Apx. p. A7) This, despite the fact that both the dissenting judge and the trial court judge found no evidence of recklessness or intentional misconduct. (App. Op. at ¶25 (Carr, J. dissent), Apx. p. A11; Trial Ct. Op. at pp. 9-14, Apx. pp. A20-A25).

For the reasons set forth herein, the *Horvath* decision should not be the law in the Ninth Appellate District or any other appellate district in Ohio. This appeal presents important and far-reaching questions concerning the potential liability exposure of skiers, snowboarders, and many others who engage in similar wintertime recreational activities throughout Ohio and is deserving of review by this Honorable Court.

II. STATEMENT OF THE CASE AND OPINIONS BELOW

A. The Collision on Buttermilk Hill at Boston Mills Ski Resort.

On March 6, 2007, Defendant-Appellant, David A. Ish (“David Ish”), was snowboarding at Boston Mills Ski Resort in Peninsula, Ohio which is located in Summit County. He had gone there after school in the evening between 6:00 to 9:00 p.m. He

was with his brother, Tyler Ish, and cousins, Trina and Michael Ish. At the time, David Ish had previous experience as a snowboarder. He had participated in weekly snowboarding lessons with his high school ski club. He had taken snowboarding lessons outside of high school since 2002, and had received the black diamond certification, which was the highest level achievable. He was never suspended or not permitted to go on any ski slope.

On the same date, Plaintiff-Appellee, Angel Horvath, had gone to Boston Mills with her children and then boyfriend, now husband, Plaintiff-Appellee Eugene Horvath. Before getting on any of the ski slopes at Boston Mills Ski Resort that day, and well before the collision with David Ish, Angel Horvath testified that she appreciated that skiing is a hazardous activity. She was aware that one of the risks of skiing was a collision with another skier. On March 6, 2007, Angel Horvath signed a disclosure and waiver form in which she acknowledged her “understand[ing] that skiing/snowboarding/tubing is a hazardous activity” and that she was “agree[ing] to freely and expressly assume and accept any and all risks of injury while engaging in the sport of skiing/snowboarding/tubing at Boston Mills/Brandywine.”

It is undisputed that a collision did occur between Angel Horvath and David Ish. When the collision occurred, Angel Horvath was in front of Eugene Horvath and leading the way as they proceeded down a ski slope called Buttermilk Hill. It was not crowded, but there were other skiers and snowboarders on the slope. She did not see David Ish or anyone else near her before the collision. There were other skiers and snowboarders on the hill, but nobody right near her. The next person near her was a ways off, but not very close, as she proceeded down the hill. Angel Horvath could hear noise around her,

similar to playground noise, but she could not hear what anyone was saying as she headed down the slope. Angel Horvath was in the middle third of Buttermilk Hill when the collision with David Ish occurred. She was struck from the right rear by David Ish.

When the collision occurred, Eugene Horvath was some 50 to 60 feet behind Angel Horvath. He too was headed down Buttermilk Hill. He was far enough away from Angel Horvath that she probably could not hear him if he tried to communicate with her. They were 70% down the hill when he heard what seemed like a lot of screaming and a lot of commotion coming from his left. Eugene Horvath then observed a snowboarder cut between him and Angel Horvath. Eugene Horvath did not perceive any problem as this snowboarder passed between them. He believes the snowboarder was traveling at a very quick speed as it took 5 seconds for him to pass between them. After the person on the snowboard passed left to right, the snowboarder turned back from right to left in front of Eugene Horvath. There was no one else between Eugene Horvath and Angel Horvath when the collision occurred. The next closest snowboarder or skier was off to the left of Eugene Horvath.

Eugene Horvath heard a loud noise and the snowboarder looked up and to his left just as the collision with Angel Horvath occurred. Eugene Horvath testified that he does not believe the snowboarder saw Angel Horvath before the collision. But David Ish testified that he did see her. David Ish testified that, after he exited the terrain park at Boston Mills, Angel Horvath came up from behind him on his right and that the first contact he had with Angel Horvath was with his right shoulder

Tyler Ish also saw the collision between his brother and Angel Horvath. According to Tyler Ish, he observed the collision near the bottom of Buttermilk Hill towards the

center of the slope. Tyler Ish observed a skier going across the hill toward the ski lift. Tyler Ish observed Eugene Horvath skiing behind Angel Horvath and David Ish. As David Ish was turning his snowboard to stop, a collision occurred with the skier going from his left to right. It appeared to Tyler Ish that just as David Ish was starting to stop, he saw Angel Horvath.

B. The Lawsuit and Opinions Below.

Angel Horvath and Eugene Horvath filed their complaint against David Ish on March 6, 2009. A timely answer was filed by David Ish on May 18, 2009. On October 22, 2009, an amended complaint was filed naming as new party defendants, Defendants-Appellants Annette M. Ish and David S. Ish as the parents and next friends of David Ish.⁴ The amended complaint also named Boston Mills Ski Resort and its corporate owner and operator, Peak Resorts, as new party defendants.

On March 15, 2010, Boston Mills Ski Resort and Peak Resorts filed a joint motion for judgment on the pleadings based on the expiration of the statute of limitations which was granted by the trial court on April 16, 2010. Defendants-Appellants, David S. Ish, Annette M. Ish, and David Ish filed for summary judgment on April 19, 2010. The motion was granted as set forth within the trial court's judgment entry filed on May 18, 2010. (Trial Ct. Op., Apx. pp. A12-A25)

The Horvaths timely filed an appeal to the Ninth Appellate District for Summit County from the trial court's summary judgment in favor of the Ishes. They did not

⁴At the time of the incident, David Ish was a minor of fourteen years of age. When this case was filed in 2009, he was still a minor so his parents, Defendants-Appellants Annette M. Ish and David S. Ish, were named as parties, but only pursuant to Civ.R. 17(B). There are no causes of action asserted by the Horvaths against Defendants-Appellants Annette M. Ish and David S. Ish. Today, David Ish is nineteen years old.

appeal from the trial court's judgment in favor of Boston Mills Ski Resort and Peak Resorts. On May 11, 2011, in a 2-1 opinion, the Ninth Appellate District reversed the trial court's summary judgment and remanded the case. (App. Op., Apx. pp. A1-A11)

III.
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A collision between a down-hill skier and a snowboarder who are sharing a ski slope open for use by both skiers and snowboarders is an inherent and ordinary risk of recreational skiing primarily assumed by all skiers and snowboarders.

In Ohio, it is recognized "that skiing as a recreational sport is hazardous to skiers regardless of all feasible safety measures that can be taken." R.C. §4169.08(A)(1). A participant in any sport or recreational activity primarily assumes the risk of an injury from the inherent hazards of the activity. See, *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379; *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, syllabus; *Thompson v. McNeill*(1990), 53 Ohio St.3d 102, 104-106. The applicability of the primary assumption of the risk doctrine presents an issue of law for the courts to decide. *Gallagher v. Cleveland Browns Football Co.* (1996), 74 Ohio St.3d 427, 435. Primary assumption of the risk is a complete bar to recovery because the essential element of duty is negated. *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110, 114.

In regard to skiing, the General Assembly has set forth a list of some of the inherent risks assumed by skiers in R.C. §4169.08(A)(1). But that list is not exhaustive. The statute expressly provides that "a skier expressly assumes the risk of and legal responsibility for injury, death, or loss to person or property that results from the inherent risks of skiing, which include, *but are not limited to*" the identified risks. Skiers still assume the risk of injury resulting from other foreseeable and inherent

hazards associated with skiing, even if they are not expressly listed in R.C. §4169.08(A)(1). See, *Stone v. Alpine Valley Ski Area* (1999), 135 Ohio App.3d 540 (interpreting former version of R.C. §4169.08(A)).

Here, while acknowledging that “[t]he legislature has included a non-exhaustive list of some of the inherent risks associated with skiing,” the Ninth Appellate District declared that a collision between a down-hill skier and a snowboarder who were sharing the same hill at a public ski resort is not a risk ordinarily assumed by skiers for the sole reason that “collisions with other skiers is not one of the risks specifically enumerated [in R.C. §4169.08(A)].” (App. Op., Apx. p. A3, at ¶10). But a collision between skiers is an inherent risk in skiing. See, e.g., *Cheong v. Antablin* (1996), 50 Cal.App.4th 971, 978 (“Collision with other skiers is considered an inherent risk of the sport.”)

While there are no cases in Ohio dealing specifically with the inherent risk of a collision between skiers and/or snowboarders, there are cases where the courts have held that collisions between participants in other sporting and recreational activities are inherent and foreseeable. See, e.g., *Doody v. Evans*, 188 Ohio App.3d 479, 2010-Ohio-3523 (collision between catcher and base runner in a softball game); *Deutsch v. Birk*, 189 Ohio App.3d 129, 2010-Ohio-3564 (collision between two cyclists using a common bike path). As explained by the California Court of Appeals in *Cheong* at 980: “Recreational skiing includes certain risky activities, such as avoiding trees and lift towers, negotiating moguls, and avoiding collisions with other skiers.”

The law in Ohio should be the same. Collisions with other skiers are an inherent and ordinary risk assumed by recreational skiers and snowboarders for which there can be no recovery for injuries sustained as a result of the collision. That should be true

under the common law of Ohio and the catchall-all inclusive language of R.C. §4169.08(A)(1) despite the fact that such collisions between skiers are not included in the statute, should that statutory provision even apply here – as Plaintiffs-Appellees contend and the court of appeals held – to conduct and activities between skiers. If the rule were to be as the Ninth Appellate District has held in regard to skiing and snowboarding, the law of Ohio will frustrate the rationale for the sport and recreational activity rule, which seeks a “balance between encouraging vigorous and free participation in recreational or sports activities, while ensuring the safety of the players,” *Marchetti*, 53 Ohio St.3d at 99, and “might well stifle the rewards of athletic competition.” *Thompson*, 53 Ohio St.3d at 104.

Proposition of Law No. II: Revised Code Chapter 4169 and the “responsibilities” of skiers listed in R.C. §4169.08(C) do not create legal duties owed between skiers and snowboarders which give rise to negligence per se.

Here, the two judges in the majority on the court of appeals held that the provisions of R.C. Chapter 4169 apply to collisions and accidents between skiers. (App. Op. at ¶13, Apx. pp. A5-A6) The majority opinion reasoned that the violation of those “responsibilities” of skiers listed in R.C. §4169.08(C) could give rise to negligence per se which could overcome the common law sport and recreational activity rule. (App. Op. at ¶17, Apx. p. A7) However, before a violation of a statutory provision can give rise to negligence per se, the statutory duty must be owed to the person seeking application of the statute. See, *Scheetz v. Kentwood, Inc.*, 152 Ohio App.3d 20, 2003-Ohio-1209, at ¶11; *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38, 41-42.

Both Judge Carr, in her dissenting opinion, (App. Op. at ¶¶20-24 (Carr, J. dissent), Apx. pp. A8-A11), and Judge Burnham Unruh, in her summary judgment opinion, (Trial

Ct. Op. at pp. 7-9, Apx. pp. A18-A20), provide a thorough, legally sound and well-reasoned explanation of why the provisions of R.C. Chapter 4169 – and in particular R.C. §§4169.08(C) and 4169.09 – do not apply between skiers, but instead govern only the relationship between ski area operators and skiers. As Judge Carr aptly noted, R.C. Chapter 4169 expressly applies only to “skiers” at “ski areas,” as those terms are defined in R.C. §4169.01(A) and (D), and she correctly concludes that “[i]f the legislature had intended to enact specific tort duties between skiers, I believe that it would have imposed those duties on all participants in the sport, regardless of where they ski.” (App. Op. at ¶24 (Carr, J. dissent), Apx. p. A11) The law in Ohio should follow the opinions of Judges Carr and Burnham Unruh.

Proposition of Law No. III: The common law sport and recreational activity rule is the legal standard which governs a skier’s liability for an injury to another skier resulting from an accidental collision on a ski slope. R.C. §4169.09 does not abrogate the common law requirement to prove intentional conduct or recklessness before liability will be imposed.

A. R.C. §4169.09 Does Not Abrogate the Common Law Sport and Recreational Activity Rule Announced in *Marchetti v. Kalish*, *Thompson v. McNeill*, and *Gentry v. Craycraft*.

When R.C. Chapter 4169 – including R.C. §4169.09 – was enacted in 1981, the established common law in Ohio recognized that the doctrine of primary assumption of the risk applied to persons involved in sporting events, which dates back more than 85 years. *Anderson*, 6 Ohio St.3d at 114, citing *Cincinnati Base Ball Club Co. v. Eno* (1925), 112 Ohio St. 175, 180-181. The General Assembly’s intent in enacting R.C. Chapter 4169 was consistent with this common law rule: skiers should primarily assume the risk of skiing. See, *Stone v. Alpine Valley Ski Area*, 135 Ohio App.3d at 545, citing *Anderson*, 6 Ohio St.3d at 114.

When R.C. 4169.09 was amended in 2005, along with other provisions of R.C. Chapter 4169, this Court's decisions in *Marchetti*, *Thompson*, and *Gentry* had all been decided. At that time, the common law of this state clearly barred recovery by a participant in a sport or recreational activity for any injury unless it could be shown that the other participant's actions were either reckless or intentional.

R.C. §4169.09 is ambiguous. (App. Op. at ¶23 (Carr, J., dissent, Apx. p. A10). In Ohio, ambiguous statutes are construed in light of the common law. R.C. §1.49(D). Statutes are not read or interpreted in abrogation of the common law. Rather, “[s]tatutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law *unless the language employed by it clearly expresses or imports such intention.*” (Emphasis sic.) *Bresnik v. Beulah Park Ltd. Partnership, Inc.* (1993), 67 Ohio St.3d 302, 304, quoting *State ex rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, paragraph three of the syllabus. The General Assembly clearly understood this principle when it enacted R.C. Chapter 4169. When defining the relationship and liability between a ski area operator and skier, the General Assembly expressly stated that it was abrogating the common law principles governing premises owners and business invitees. See, R.C. §4169.08(B) (“The legal responsibilities of a ski area operator to a skier with respect to any injury, death, or loss to person or property resulting in any way from an inherent risk of the sport shall not be those of the common law duty of premises owners to business invitees.”) There is no comparable expression by the General Assembly anywhere in R.C. Chapter 4169 that R.C. §4169.09 was

intended to abrogate the common law sport and recreational activity rule set forth in this Court's opinions in *Marchetti*, *Thompson*, and *Gentry*.

Even should a skier have liability to another skier pursuant to R.C. §4169.09, that liability must be predicated upon a finding of either recklessness or intentional conduct as required by the common law rule in *Marchetti*, *Thompson*, and *Gentry*.⁵ Instead of relying upon R.C. §4169.09, the trial court did apply the common law standard. (Trial Ct. Op., Apx. pp. A20-A25) While the court of appeals found that "the premise of the trial court's conclusion is faulty," (App. Op. at ¶17, Apx. p. A7), the trial court's reliance upon the common law standard was in fact correct. There was no need to remand the case for the trial court to "consider the interplay of R.C. Chapter 4169 and the common law." (App. Op. at ¶17, Apx. p. A7).

B. Without Evidence of Reckless or Intentional Conduct, There is No Liability for a Collision Between a Skier and Snowboarder.

In order for one to act recklessly, the person must perform "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." *Marchetti*, 53 Ohio St.3d at 96, footnote 2, quoting Restatement (Second) of Torts (1965), 587, Section 500; *Thompson*, 53 Ohio St.3d at 104-105. Applying that standard in *Marchetti*, the Court held that summary judgment for the defendant was appropriate

⁵The issue in this case is distinguishable from *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362. In *Robinson*, the statutory and common law standard for liability of a landlord were one and the same: negligence. The common law reckless/intentional standard was the established rule when R.C. §4169.09 was enacted, and it should be the heightened standard that applies here.

because the plaintiff's own testimony demonstrated that the defendant did not act either recklessly or intentionally. *Marchetti*, 53 Ohio St.3d at 110.

Here, the court of appeals found that a question of fact exists as to whether David Ish was reckless, not based upon the legal standard articulated in *Marchetti* and *Thompson*, but rather because the two witnesses to the collision, Plaintiff-Appellee Eugene Horvath and David Ish's brother Tyler Ish, "each described a slightly different version of events during their depositions." (App. Op. at ¶18, Apx. p. A7). This observation of "slightly different versions of events" does not establish that David Ish was reckless or intentional. It ignores the articulated basis for the trial court's finding no evidence of recklessness, which was based upon the testimony of Angel Horvath's companion and future husband, Defendant-Appellee Eugene Horvath. (Trial Ct. Op. at 13, Apx. p. A24)

Because there was no reckless or intentional conduct by David Ish, summary judgment was appropriately granted. The Court should accept jurisdiction over this case to clarify that the liability for injuries sustained in a collision during recreational skiing must be based upon recklessness or intentional conduct.

IV. CONCLUSION

WHEREFORE, Appellants David A. Ish, and Annette M. Ish and David S. Ish as Parents and Next Friends of David A. Ish respectfully request and move the Supreme Court of Ohio to accept jurisdiction over this appeal.

Respectfully submitted,



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Friends of David A. Ish*

PROOF OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction* was sent by regular U.S. Mail, postage pre-paid, this 27th day of June, 2011 to the following:

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APPENDIX

STATE OF OHIO)
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HORRIGAN
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2011 MAY 11 AM 7:57

ANGEL L. HORVATH, et al.)
SUMMIT COUNTY) C.A. No. 25442
CLERK OF COURTS)

Appellants

v.

DAVID ISH, et al.

Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2009 03 1831

DECISION AND JOURNAL ENTRY

Dated: May 11, 2011

BELFANCE, Judge.

{¶1} Appellants, Angel and Eugene Horvath, appeal the summary judgment ruling granted in favor of Appellees, David Ish, and his parents, Annette and David Ish, by the Summit County Court of Common Pleas. We reverse.

BACKGROUND

{¶2} On March 6, 2007, Angel Horvath was skiing at Boston Mills Ski Resort with her husband, Eugene Horvath. Fourteen-year-old David Ish was also at Boston Mills, snowboarding with his brother and cousins. While Angel was skiing down one of the hills at the resort, David cut across the hill from the snowboarding area. In doing so, he collided with Angel from behind. Angel suffered serious, permanent injuries as a result of the collision.

{¶3} The Horvaths filed a complaint against David and his parents alleging that David acted negligently, carelessly, recklessly, willfully and wantonly, causing him to collide with Angel. The Horvaths also named Boston Mills Ski Resort, Inc. and Peak Resorts, Inc. in a

subsequent amended complaint. Boston Mills and Peak Resorts were dismissed after the trial court granted their motion for judgment on the pleadings.

{¶4} On April 19, 2010, the Ishes filed a motion for summary judgment. In support of the motion, the Ishes argued that Angel assumed the risk of colliding with another skier, that the danger of such a collision was open and obvious, and that the Revised Code does not create a statutory duty between skiers. The Horvaths opposed the motion, but the trial court granted the motion on May 18, 2010.

{¶5} The Horvaths have appealed the trial court's decision, assigning two errors for our review.

STANDARD OF REVIEW

{¶6} This Court reviews a trial court's ruling on a motion for summary judgment *de novo* and applies the same standard as the trial court. *Chuparkoff v. Farmers Ins. of Columbus, Inc.*, 9th Dist. No. 22712, 2006-Ohio-3281, at ¶12. Pursuant to Civ.R. 56(C), summary judgment is appropriate when: "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 448.

{¶7} The moving party has the burden of demonstrating that no genuine issues of material fact exist. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. *Id.* at 293. Pursuant to Civ.R. 56(E), the nonmoving party may not simply rest on the

allegations of its pleadings; it must provide the court with evidentiary material, such as affidavits, written admissions, and/or answers to interrogatories, to demonstrate a genuine dispute of fact to be tried. See, also, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

ASSIGNMENTS OF ERROR

Assignment of Error I

“The Trial Court erred in granting summary judgment in favor of Appellees Ish when it concluded that Revised Code Chapter 4169 did not apply to causes of action between skiers.”

{¶8} In their first assignment of error, the Horvaths argue that R.C. 4169.08(C) imposes duties upon skiers owed to other skiers, and that David violated these duties, thereby making him liable to the Horvaths for the injuries caused to Angel. The Ishes counter that the statute does not impose duties between skiers rather, the duties described in R.C. 4169.08 are owed by a skier to a ski area operator.

{¶9} We begin by noting that even though David was snowboarding, he fits within the definition of skier provided by the statute. See R.C. 4169.01(A) (“‘Skier’ means any person who is using the facilities of a ski area * * * for the purpose of skiing, which includes, without limitation, sliding or jumping on snow or ice on skis, a snowboard, sled, tube, snowbike, toboggan, or any other device.”).

{¶10} R.C. 4169.08 is entitled “Skiing inherently hazardous; limitation of liability; duties of operator” and appears in the R.C. Chapter governing skiing safety. Subsection (A) recognizes that skiing is an inherently dangerous activity and that a skier assumes the risk and liability of injury and damage that arises from the inherent dangers of skiing. R.C. 4169.08(A). The legislature has included a non-exhaustive list of some of the inherent risks associated with skiing, however, collisions with other skiers is not one of the risks specifically enumerated. See

id. Further, R.C. 4169.08(A) relieves a ski area operator from liability so long as the ski area operator complies with applicable statutes. R.C. 4169.08(B) outlines the “legal responsibilities of a ski area operator to a skier.” R.C. 4169.08(B). Finally, R.C. 4169.08(C) lists a skier’s responsibilities:

“A skier shall have the following responsibilities:

“(1) To know the range of the skier’s ability to negotiate any slope or trail or to use any passenger tramway that is associated with a slope or trail, to ski within the limits of the skier’s ability, to ski only on designated slopes and trails, to maintain control of speed and course at all times while skiing, to heed all posted warnings, and to not cross the track of a passenger tramway except at a designated area;

“(2) To refrain from acting in a manner that may cause or contribute to the injury of another person, to refrain from causing collision with any person or object while skiing, and to not place any object in a ski area that may cause another skier or a passenger to fall;

“* * *”

In addition, R.C. 4169.09 states that “[a] * * * skier is liable for injury, death, or loss to person or property caused by the * * * skier’s failure to fulfill any of the responsibilities required by this chapter.”

{¶11} No Ohio courts have interpreted the above statutes as creating a statutory cause of action as between skiers. Nor have any courts in this state held that the responsibilities enumerated in R.C. 4169.08(C) are owed to ski area operators, but not to skiers, as the Ishes have suggested. Thus, the interpretation of this statute is a matter of first impression. If the language of the statute is unambiguous, we must apply the clear meaning of the words used according to the rules of grammar and common usage. *Roxane Laboratories, Inc. v. Tracy* (1996), 75 Ohio St.3d 125, 127; R.C. 1.42. If, however, the language is ambiguous, susceptible to more than one reasonable interpretation, we may interpret the meaning of the statute. *State v. Myers*, 9th Dist. Nos. 3260-M, 3261-M, 2002-Ohio-3195, at ¶15.

{¶12} Here, the trial court found that based on the language of the statute, R.C. 4169.08 was inapplicable to collisions between skiers. In examining the plain language of the statute, we find that the trial court erred in its determination.

{¶13} R.C. 4169.08 begins by identifying the risks of skiing a skier expressly assumes. A collision with another skier is not a risk the legislature chose to specifically identify. R.C. 4169.08(A)(1). Next, the section describes situations in which a ski area operator is not liable for property loss, injury, or death and outlines the legal responsibilities of the operator to the skier. See R.C. 4169.08(A)(2), (3), (B)(1)-(5). In light of the language used, these portions of the statute are intended to protect the ski area operator from liability. See, generally, *Otterbacher v. Brandywine Ski Center, Inc.* (May 23, 1990), 9th Dist. No. 14269, at *4. Finally, R.C. 4169.08(C) defines the responsibilities of a skier. It requires a skier "to maintain control of speed and course at all times[.]" "[t]o refrain from acting in a manner that may cause or contribute to the injury of another person, [and] to refrain from causing collision with any person[.]" R.C. 4169.08(C)(1)-(2). Although the statute does not specifically state to whom these responsibilities are owed, a logical conclusion to be drawn from the plain language of the statute would be that if the skier has a duty to refrain from colliding with another person, that duty would be owed to that other person; thus, in this case David owed a duty to Angel, and to any other person he would encounter while skiing, to refrain from colliding with the other person. This conclusion is further supported by the next section of the statute which directly states that "[a] * * * skier is liable for injury, death, or loss to person or property caused by the * * * skier's failure to fulfill any of the responsibilities required by this chapter." R.C. 4169.09. By reading R.C. 4169.08(C) in conjunction with R.C. 4169.09, it is evident that the legislature

intended that skiers would be liable for injuries caused to others while skiing. Thus, the statutes apply to accidents between skiers.

{¶14} In the trial court, the parties' primary focus was whether R.C. Chapter 4169 was applicable to accidents between skiers. In conjunction with the Horvaths' argument that the statutes applied, they argued that a skier's violation of his statutory duties led to a finding of negligence per se. Because the trial court found that a skier's statutory duties were not owed to other skiers, the court did not reach the question of whether David violated any of the responsibilities described in R.C. 4169.08(C) and, if so, whether any such violation invoked the doctrine of negligence per se. See, e.g., *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, at paragraphs two through three of the syllabus; *Butler v. Rejon* (Feb. 2, 2000), 9th Dist. No. 19699, at *3 (explaining the doctrine of negligence per se). Accordingly, we do not decide for the first time on appeal whether negligence per se applies to the Horvaths' claims. On remand, the trial court shall determine those issues.

{¶15} Because the trial court erred when it concluded that R.C. 4169.08 et seq., did not pertain to actions between skiers, the Horvaths' first assignment of error is sustained.

Assignment of Error II

"The Trial Court erred in granting summary judgment in favor of Appellees Ish because there is a genuine issue of material fact as to whether the conduct of Appellee David Ish was reckless when the evidence is construed most strongly in favor of Appellants."

{¶16} Upon concluding that R.C. Chapter 4169 did not govern the Horvaths' action against the Ishes, the trial court determined that Ohio common law applied. The trial court further concluded that because Angel and David were both participants in a recreational activity, they each assumed the risks ordinarily associated with that activity, thus, Angel could only recover for her injuries if David's actions were reckless or intentional.

{¶17} As outlined in our discussion of the first assignment of error, because R.C. Chapter 4169 applies, the premise of the trial court's conclusion is faulty. On remand, the trial court must consider the interplay of R.C. Chapter 4169 and the common law. In other words, if violation of the statutory duties of skiers gives rise to negligence per se; does that supplant the common law with respect to assumption of the risk in recreational activities? Because these issues were not explored in the trial court, this Court will not undertake them on appeal. Thus, we do not reach the merits of the second assignment of error.

{¶18} Assuming without deciding that the Horvaths may only recover if David was acting in a reckless manner, a question of fact exists as to whether David was reckless. Eugene Horvath and Tyler Ish both witnessed the collision that resulted in Angel's injuries, however, each described a slightly different version of the events during their depositions. Moreover, pursuant to the summary judgment standard, the facts must be construed in favor of the non-movant, here, the Horvaths. See *Tompkins*, 75 Ohio St.3d at 448. For these reasons, summary judgment may not be appropriate regardless of the trial court's findings concerning negligence per se.

CONCLUSION

{¶19} The trial court erroneously granted summary judgment in favor of the Appellees, David Ish, and his parents, Annette and David Ish. The judgment of the Summit County Court of Common Pleas is reversed and the matter is remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.



EVE V. BELEANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶20} I respectfully dissent because I disagree with the majority's conclusion that R.C. 4169.08(C) establishes a statutory duty of care between skiers. This provision should be construed within the context of the overall framework of R.C. Chapter 4169 and the legislature's intent in codifying specific "responsibilities" of a skier. See *Shroades v. Rental Homes, Inc.* (1981), 68 Ohio St.2d 20, 24-26 (focusing on the intent of the general assembly in enacting the

entire Chapter 5321 to determine whether R.C. 5321.04 created a civil standard of care by a landlord to a tenant).

{¶21} The Ohio General Assembly enacted R.C. 4169.01 through 4169.10 and R.C. 4169.99 in 1980, as part of a comprehensive statutory scheme similar to others around the country. Responding to the decision of the Vermont Supreme Court in *Sunday v. Stratton Corp.* (1978), 390 A.2d 398, in which it upheld a \$1.5 million damage award in favor of a skier injured at a ski area, many states enacted similar statutes “to limit liability of ski area operators and thereby preserve the economic benefit reaped by the states from the ski industry.” McCafferty, *Skiers Find the “Fall Line” in Challenging the Constitutionality of Modern Ski Legislation* (1991), 1 Seton Hall J. Sport L. 269. Although most are identified as ski safety statutes, as observed by the Supreme Court of Connecticut, the specific intention of the legislation was to “preclude ski area operator liability for injuries arising out of inherent risks of the sport, while at the same time allowing claims sounding in negligence arising out of the risks that are preventable by the ski area operator.” *Jagger v. Mohawk Mountain Ski Area, Inc.* (2004), 849 A.2d 813, 825.

{¶22} This intent is evident in R.C. Chapter 4169. In R.C. 4169.08(A)(1), the General Assembly explicitly “recognizes that skiing as a recreational sport is hazardous to skiers regardless of all feasible safety measures that can be taken. It further recognizes that a skier expressly assumes the risk of and legal responsibility for injury, death, or loss to person or property that results from the inherent risks of skiing[.]” The statute sets forth a lengthy, but nonexhaustive, list of certain specific risks that are inherent in skiing that skiers expressly assume. R.C. 4169.08(B) then enumerates specific “legal responsibilities of a ski area operator to a skier with respect to any injury, death, or loss to person or property” and, if the operator fails

to comply with those responsibilities, it will be subject to liability for skiers' resulting injuries. In turn, subsection (C) sets forth certain reciprocal responsibilities that skiers owe to the ski area operator to keep the area safe by protecting themselves and others. Although the responsibilities include maintaining control of speed and course and refraining from causing a collision with another person while skiing, I do not believe that this language was intended to create a specific standard of care owed by one skier to another. See R.C. 4169.08(C)(1) and (2).

{¶23} Reading the language of R.C. 4169.08 along with R.C. 4169.09 does not defeat such a construction. R.C. 4169.09 provides, in relevant part, that a "skier is liable for injury, death, or loss to person or property caused by the *** skier's failure to fulfill any of the responsibilities required by this chapter." Although the majority construes this language as imposing civil liability on a skier who causes another skier's injury by failing to comply with R.C. 4169.08(C), this language can also be construed to mean that a skier is liable for her own injuries if she fails to comply with her responsibilities to the ski area operator under R.C. 4169.08(C). Given the ambiguity, I would apply the latter construction of R.C. 4169.09 in keeping with the intention of this legislation to define the parameters of liability on the part of the ski area operator, not to codify a new standard of care for those who participate in the sport of skiing. See R.C. 1.49(A) and (B).

{¶24} Moreover, R.C. Chapter 4169 applies only to those who ski at ski areas, as the term "skier" is defined to include only those who use the "facilities of a ski area," not those who ski elsewhere. R.C. 4169.01(A). If the goal of R.C. Chapter 4169 was to create new standards of care between those who participate in the sport of skiing, the legislature could have defined the term "skier" more broadly to include those who ski at public parks, private slopes, and on other property that does not qualify as a ski area. The majority's construction of R.C.

4169.08(C) imposes specific duties between skiers, but only when they are skiing at a ski area. See R.C. 1.49(E). If the legislature had intended to enact specific tort duties between skiers, I believe that it would have imposed those duties on all participants in the sport, regardless of where they ski.

{¶25} Therefore, I would overrule the first assignment of error. I would also overrule the second assignment of error because the Horvaths failed to oppose the motion for summary judgment with any evidence that the collision, and Horvath's resulting injuries, were the result of any reckless or intentional misconduct by David Ish. I would affirm the trial court's decision to grant summary judgment to the Ishes.

APPEARANCES:

JAMES A. SENNETT, and LAURA A. JAMES, Attorneys at Law, for Appellants.

WILLIAM M. KOVACH, Attorney at Law, for Appellees.

DANIEL M. HARRIGAN

2010 MAY 18 PM 1:46

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

ANGEL L. HORVATH, <i>et al.</i> ,)	CASE NO. CV 2009 03 1831
)	
Plaintiffs,)	JUDGE BURNHAM UNRUH
)	
vs.)	
)	
DAVID ISH, <i>et al.</i> ,)	<u>JUDGMENT ENTRY</u>
)	
Defendants.)	(Final and Appealable)
)	

This matter comes before the Court on the Motion for Summary Judgment filed by Defendants David S. Ish, Annette M. Ish, and David Ish ("Defendants"). The Court has considered the Defendants' Motion, the Brief in Opposition filed by Plaintiffs Angel and Eugene Horvath ("Plaintiffs"), the facts of this matter, Civ.R. 56(C), and applicable law. Upon due consideration, the Court GRANTS the Defendants' Motion for Summary Judgment.

STATEMENT OF CASE AND ANALYSIS

1. Factual Background.

It is undisputed that, on or about March 6, 2007, a collision occurred between skier Angel Horvath and snowboarder David Ish, who was a minor at the time, on the Buttermilk Hill located at Boston Mills Ski Resort, Inc.¹ Plaintiff Eugene Horvath, who was uphill, witnessed the collision. Mr. Horvath testified that he was about 50 or 60 feet behind Angel at the time; that he

¹ On April 16, 2010, the Court granted Boston Mills and Peak's Motion for Judgment on the Pleadings. Accordingly, there are no remaining claims in this litigation as against either Boston Mills or Peak Resorts, Inc.

did not see any problem with David Ish's snowboarding prior to the collision; and that he did not have any reason to believe that David Ish collided with Angel with the intent to harm her. *See*, Depo. of E. Horvath at pages 35-36, 40, 78, 81. Angel Horvath was hit from the right rear. Mr. Horvath was far enough away from Mrs. Horvath that she probably would not have heard him if he tried to communicate to her. *Id.* at pages 31-32.

Angel Horvath testified at her deposition that she did not see David Ish or anyone else near her before the collision. *See*, Depo. of A. Hovath at pages 96-97. Mrs. Horvath does not know what direction David Ish came from or what he was doing. *Id.* at page 98. There were other skiers and snowboarders on the hill, but nobody was right near Mrs. Hovath. *Id.* at page 110. Mrs. Horvath could hear noise, like playground noise, but could not hear what anyone was saying as she headed down the slope. *Id.* at pages 110-111; 147-148.

Before the date of the collision, Mrs. Horvath was aware that skiing is a hazardous activity. *Id.* at page 104. Mrs. Horvath signed the disclosure forms and was aware of the hazards. *Id.* at pages 104-105. Mrs. Horvath was aware that she could collide with someone while skiing. *Id.* at pages 138-139.

Prior to the March 6, 2007 incident, Defendant David Ish testified that he took snowboarding lessons ever week with his high school ski club. *See*, Depo. of D. Ish at page 23. David testified that, since 2002, he has also taken snowboarding lessons outside of high school and that he received the black diamond certification, which is the highest-level certification. *Id.* at pages 22-24. David Ish testified that he has never been suspended or prohibited from going on a ski slope. *Id.* at page 24. David Ish frequently went to Boston Mills. *Id.* at pages 7, 22.

David Ish testified that he was using a shorter snowboard on March 6, 2007. *Id.* at pages 62-63. A shorter snowboard is lighter, easier to handle, and easier to do tricks with. *Id.* David

testified that, after he exited the terrain park on March 6, 2007, Plaintiff Angel Horvath came up from behind him on his right and that the first contact he had with Angel was with his right shoulder. *Id.* at pages 46, 51.

On the date of the incident, March 6, 2007, Tyler Ish was skiing at Boston Mills with his brother, David Ish. *See*, Depo. of Ty. Ish at pages 7, 12. As they headed down the hill on their last run, David Ish was first, Tyler was next, and their cousins Trina and Michael were behind. *Id.* at page 20. Tyler Ish was approximately 25 yards behind David Ish when he saw David slow down and exit the terrain park. *Id.* at pages 24-25. The cousins were still behind him. *Id.* at page 25. Tyler Ish observed the collision near the bottom of Buttermilk Hill towards the center of the slope. *Id.* at page 27.

Tyler Ish testified that he observed a skier going across the hill to the lift. *Id.* Tyler Ish observed Mr. Horvath behind Mrs. Horvath and David Ish. *Id.* at page 28. Tyler Ish testified that, as David Ish was turning and starting to stop, a collision occurred with the skier going from his left to right. *Id.* at pages 30-31. Tyler testified that there was no yelling while going down the hill. *Id.* at pages 35-36.

Neither Trina Ish nor Michael Ish witnessed the collision. *See*, Depo. of T. Ish at page 23; *see also*, Depo. of M. Ish at pages 21-22.

The Plaintiffs commenced the instant action on March 6, 2009. After leave was granted, the Plaintiffs filed an Amended Complaint on October 21, 2009. As against David Ish and his parents, Plaintiff Angel Horvath alleges:

1. On March 6, 2007, Plaintiff, Angel L. Horvath, was downhill skiing on the Buttermilk Run located at the Boston Mills Ski Resort located in Peninsula, Ohio.

2. As Angel L. Horvath approached the bottom of the run, Defendant, David Ish, negligently, carelessly, willfully and wantonly operated his snowboard in a manner that caused him to collide with Angel L. Horvath from behind.

3. David Ish failed to maintain the proper attention while snowboarding downhill.

4. David Ish failed to yield to Angel L. Horvath's right-of-way as a skier who was ahead of him and further down the hill.

5. David Ish's actions were in violation of his duties and responsibilities as set forth in Ohio Revised Code §4169.08(C)(2).

6. On March 6, 2007, Defendants David S. Ish and Annette M. Ish were the parents and next friends of minor David Ish and, as such, they are competent to defend on behalf of the minor David Ish, pursuant to Ohio Civil Rule 17(B).

* * *

See, Amended Complaint at ¶¶ 1-6. Plaintiff Eugene Horvath asserts a loss of consortium claim. *Id.* at ¶¶ 15-17. In their Answer, Defendants Ish deny the material allegations of the Complaint. *See*, November 16, 2009 "Joint Answer of Defendants David S. Ish, Annette M. Ish, and David Ish to the Amended Complaint".

Currently before the Court is the Motion for Summary Judgment filed by Defendants David S. Ish, Annette Ish, and David Ish. The Defendants argue that they are entitled to summary judgment on the basis that the Plaintiffs' claims are barred by primary assumption of the risk and the open and obvious doctrine. It is further asserted that "R.C. 4169.08 is the ski resort operated immunity statute and does not create liability on an individual skier." *See*, Defendants' Motion for Summary Judgment at page 5. The Defendants assert:

* * * In sport and recreational activities, such as skiing, primary assumption of the risk is based on the conduct of the Defendant, not the Plaintiff. The actions of the Defendant must far exceed negligence to void the primary assumption of the risk defense. Here, no facts exist that would show Ish was being reckless or that Ish intentionally caused the collision. Plaintiff did not see Ish and did not know what he was doing before the collision. (Angel Horvath depo. Pg. 98). According to

Eugene, the person who actually saw the accident, Ish may have been traveling quickly, but Eugene perceived no problem with Ish's snowboarding before the collision. (Eugene Horvath depo. Pgs. 40, 78). Further, Eugene stated at deposition that he did not know of any reason to believe Ish collided with Plaintiff with the intent to harm her. (Eugene Horvath depo. Pg. 81).

There is further no evidence of horseplay or rowdy activity on the part of David Ish. He was not trying to race the plaintiff, see how close he could pass her, or attempt a jump or trick. David Ish, according to Eugene Horvath, looked up and to his left, where a noise came from at the time of the collision. Such conduct is no more than negligence at best. The complaint is thus barred by primary assumption of the risk pursuant to Ohio law.

In addition to primary assumption of the risk, no duty is owed to the plaintiff under the open and obvious doctrine. * * * Angel Horvath stated on deposition, she knew of the risk and hazards of skiing. She signed exhibit A which states, 'I further understand that skiing/snowboarding/tubing is a hazardous activity * * * . * * * *'

Further, R.C. 4169.08(C)(2) creates no duty between skiers. This is the ski resort immunity statute, and is not applicable to an accident between skiers. * * *

See, Defendants Ish's Motion for Summary Judgment at pages 6-7. Defendants Ish's Motion for Summary Judgment was filed on April 19, 2010.

On May 11, 2010, the Plaintiffs filed a Brief in Opposition to Motion for Summary Judgment. The Plaintiffs assert in their Opposition that the defense of primary assumption of the risk does not apply to this case and does not bar the Plaintiffs' claims; that R.C. 4169.08(C) sets forth statutory responsibilities of skiers and applies to this case; that Defendants Ish are liable because the conduct of Defendant David Ish was reckless; and, that the open and obvious doctrine does not apply to this case and does not bar the Plaintiffs' claims. The Plaintiffs argue:

Primary assumption of the risk does not apply in this case. Uphill snowboarders colliding from behind with downhill skiers is not an inherent risk of the activity of skiing.

Revised Code Section §4169.08(C) imposes a specific statutory duty on all skiers to maintain control of speed and course, to refrain from acting in a manner that may cause injury to another person, and to refrain from causing a

collision with any person while skiing. The violation of these duties by defendant David Ish is negligence *per se* which supports liability in favor of plaintiffs Horvath.

Defendant David Ish's conduct was reckless in nature, on March 6, 2007, the date of the subject skiing collision. Snowboarding downhill at a high rate of speed while looking backwards and up the hill, totally oblivious to the existence of any skiers downhill, is clearly reckless conduct. Defendant Ish should have known that this conduct could cause the consequences that did in fact occur.

The open and obvious doctrine argued by defendants Ish herein is clearly inapplicable. It applies to protect landowners. Defendants Ish are not landowners. This doctrine does not apply and does not bar the plaintiffs' claims herein.

Since defendants Ish have not met their burden, under Rule 56 of the Ohio Rules of Civil Procedure, their motion for summary judgment should be denied in its entirety.

See, Plaintiffs' Brief in Opposition at page 14.

2. Standard of Review on Summary Judgment.

In reviewing a motion for summary judgment, the Court must consider the following: (1) whether there is no genuine issue of material fact to be litigated; (2) whether in viewing the evidence in a light most favorable to the non-moving party it appears that reasonable minds could come to but one conclusion; and (3) whether the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280; *Wing v. Anchor Media, L.T.D.* (1991), 59 Ohio St.3d 108. If the Court finds that the non-moving party fails to make a sufficient showing on an essential element of the case with respect to which it has the burden of proof, summary judgment is appropriate. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317; *Schremp v. Haugh's Products* (Nov. 19, 1997), Lorain App. No. CA 006655, unreported.

Rule 56(C) of the Ohio Rules of Civil Procedure states the following, in part, in regards to summary judgment motions:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of the evidence in the pending case, and written stipulations of fact, if any timely filed in the action, 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.

3. Analysis.

For the sake of clarity, and not necessarily in the order in which they are presented, the Court will address the arguments asserted in the Defendants' Motion for Summary Judgment and the Plaintiffs' Opposition thereto.

a. Whether R.C. 4169.08 is applicable such that the Defendants may be liable for negligence *per se*.

The Defendants argue that they are entitled to summary judgment on the basis that Plaintiff Angel Horvath assumed the risk of injury. It is asserted that the Plaintiff assumed the risk of injury on the ski slope and that the only way to overcome this defense is to establish that Defendant David Ish acted recklessly or intentionally. The Defendants argue that no evidence has been introduced to establish either reckless or intentional conduct and that, therefore, they prevail on their assumption of the risk defense and summary judgment is appropriate.

The Plaintiffs argue that Defendant David Ish breached statutory duties under R.C. 4169.08(C)(2) and that, therefore, the Defendants are liable under negligence *per se*. Because the Defendants are liable under a negligence *per se* theory, the Plaintiffs argue that they do not need to establish reckless or intentional conduct. The Plaintiffs argue that Defendant David Ish breached the duties owed under R.C. 4169.08(C).

While the Defendants argue that R.C. 4169.08 applies to ski resorts, and is not applicable to an accident between individual skiers, the Plaintiffs argue that R.C. 4169.08 can apply to claims between individual skiers. The Court finds that the Defendants' argument is supported by Ohio law as well as R.C. 4169 *et seq.*

Among other issues, R.C. Chapter 4169, titled "Ski Tramway Board" addresses the responsibilities and duties of ski resorts. The statute addresses the establishment of the ski tramway board (R.C. 4169.02); registration requirements (R.C. 4169.03); inspection requirements (R.C. 4169.04); written complaints (R.C. 4169.05); emergency orders (R.C. 4169.06); responsibilities of the ski area operators and tramway passengers (R.C. 4169.07); risks that skiers assume and the responsibilities of the ski resort operators to the skiers, and vice versa (R.C. 4169.08); the liability of ski resort operators, tramway passengers, freestyler, competitor, or skier (R.C. 4169.09); the operator's liability to violators of theft (R.C. 4169.10); and penalties (R.C. 4169.99). Every provision of R.C. 4169, including R.C. 4169.08, applies to the operator of a ski resort.

Under R.C. 4169.08, a ski resort operator is immune from liability. R.C. 4169.08 grants immunity to ski resorts for common law causes of action. R.C. 4169.08(B) creates the specific duties that exist between a ski resort and a skier. While a ski resort owes duties to its skiers, skiers also owe duties to ski resorts under R.C. 4169.08(C). These duties include, but are not limited to, skiing within the limits of ones own ability; skiing only on designated slopes and trails; maintaining control of speed and course; abiding by all posted warnings; ensuring that the skier does not cause or contribute to the injury of another person; refraining from causing collision with any person or object while skiing; and not placing any object in a ski area that may cause a fellow skier or a passenger to fall. R.C. 4169.08(C).

The Court conducted its own independent research on the issue of whether R.C. 4169 *et seq.* creates a duty between skiers and whether, if a skier violates a duty under R.C. 4169 *et seq.*, he/she can be held liable for a fellow skier's injury under a negligence *per se* theory. The Court

did not find any case directly addressing this issue. Further, neither the Plaintiffs nor Defendants produced a directly relevant case.

As set forth above, every provision under R.C. 4169 applies to ski resorts. The Court finds that this statute applies to ski resorts and does not apply to accidents between skiers. *See, Stone v. Alpine Valley Ski Area* (1999), 135 Ohio App.3d 540, 544-545 (recognizing that R.C. 4169 addresses the responsibilities of ski area operators and skiers and that the common law duties have not been abrogated); *Shaheen v. Boston Mills Ski Resort, Inc.* (1992), 85 Ohio App.3d 285, 288 (recognizing that R.C. 4169.08 was applicable where lawsuit filed by skier against the ski resort operator; lawsuit was not a personal injury action between two skiers).

The only claims remaining in this litigation are the Plaintiffs' claims against Defendants Ish. There are no remaining claims against the ski resort or the ski resort operator. Accordingly, the Court finds that R.C. 4169.08 is inapplicable and that Ohio common law is controlling.

b. Whether Defendant David Ish acted recklessly or intentionally.

The Plaintiffs acknowledge that, when individuals engage in recreational or sport activities, they assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant's actions were either "reckless" or "intentional". *See, Plaintiffs' Brief in Opposition at page 11, citing Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, syllabus; *Gentry v. Craycraft* (2004), 101 Ohio St.3d 141.

The Supreme Court of Ohio, as explained by the Plaintiffs, has defined "reckless conduct" as follows:

'The actor's conduct is in reckless disregard of the safety of others 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 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.'

Thompson v. McNeill (1990), 53 Ohio St.3d 102, 105, quoting Restatement (Second) of Torts (1965), 587, Section 500.

By requiring that a tortfeasor in a recreational activity be found to have acted either recklessly or intentionally before an injured party can recover damages, the Supreme Court of Ohio has stated that the tortfeasor must have actually intended the consequences of his act or that he have known, or should have known, that his conduct could cause such consequences. *Marchetti v. Kalish, supra*, 53 Ohio St.3d at 100.

The incident that occurred on March 6, 2007 was very unfortunate. Although this is an unfortunate matter, the Court finds that summary judgment is appropriate. Absolutely no evidence has been introduced to establish that Defendant David Ish acted recklessly or intentionally on March 6, 2007.

In researching the underlying issues, the Court discovered *Bentley v. Cuyahoga Falls Bd. of Ed.* (1998), 126 Ohio App.3d 186. In *Bentley*, the Ninth District Court of Appeals affirmed the lower court's award of summary judgment in favor of the defendant and the lower court's finding that recklessness had not be established.

In *Bentley*, plaintiff-appellant Kristine Bentley ("Kristine") was injured during a high school soccer game. Kristine sustained a broken fibula and tibia after she was "slide-tackled" by defendant-appellee Eleanor Boxler ("Ellie"). After the trial court granted Ellie's motion for summary judgment, Kristine appealed.

Kristine argued on appeal that there were material issues of fact regarding whether Ellie's conduct was reckless. Kristine further argued that evidence that Ellie performed an "illegal" slide tackle and was red-carded and thrown out of the game should have been submitted to the

jury for a determination of whether reckless conduct occurred. The Ninth District Court of appeals disagreed and held that summary judgment was properly granted.

In affirming the lower court's award of summary judgment, the Ninth District provided in

Bentley:

* * * The Ohio Supreme Court has defined recklessness in the sporting and recreational activity context as the following:

The actor's conduct is in reckless disregard of the safety of others if he does an act * * * 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. * * * 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 participants' ideas of foreseeable conduct in the course of a game.

* * *

Kristine claims that because the referee red-carded Ellie and threw Ellie out of the game, Kristine proffered evidence supporting the elements of reckless conduct. Kristine argues that because Ellie violated a rule of soccer and made contact with Kristine * * *, Kristine did not assume the risk of having her legs knocked out from under her from a slide tackle. Kristine also contends that such an occurrence was unforeseeable. **However, Kristine must show that having her legs knocked out from under her by a slide tackle * * * was unforeseeable in light of the nature of a soccer game.**

Kristine avers that Ohio law supports the proposition that a player who has violated a rule created for the purpose of safety has created an unreasonable risk and thus has been reckless. * * * However, the violation of a safety rule applies only to the determination of what may be an unreasonable risk, which is only one part of the recklessness analysis. * * * In deciding whether recklessness occurred, the Ohio Supreme Court considered whether the specific conduct was both within the rules and foreseeable. * * * **Ohio law has not abandoned an inquiry into foreseeability.**

When we construe the facts as Kristine has presented them, we find that Kristine has failed to demonstrate that a genuine issue of material fact exists regarding whether being knocked down by a slide tackle * * * was foreseeable in light of the physical nature of the sport of soccer. Therefore, no genuine issues of

material fact exist regarding whether Ellie was reckless in the context of a sporting activity. Viewing the facts in a light most favorable to Kristine, we find that reasonable minds could only conclude that having her legs taken out from under her was not an unreasonable risk in light of the foreseeable conduct of a soccer game.

[Citations omitted.] [Emphasis added.] *Id.* at pages 189-193; see also, *Lindsey v. Akron County Children's Services Bd.* (May 27, 1009), Ninth App. C.A. No. 24352, 2009 Ohio 2457 (Ninth District Court of Appeals affirmed the trial court's award of summary judgment; Ninth District agreed that "recklessness" had not been established and that, therefore, summary judgment was appropriate); *Thompson v. McNeill* (1990), 53 Ohio St.3d 102 (Supreme Court of Ohio affirmed decision issued by the Summit County Court of Common Pleas granting summary judgment in favor of tortfeasor; golfer who hit fellow golfer with a golf ball did not act recklessly or intentionally).

Thompson v. McNeill, supra, 53 Ohio St.3d 102 also warrants consideration. In *Thompson*, JoAnn Thompson ("JoAnn") was hit in the eye by a golf ball that had been hit by fellow golfer Lucille McNeill ("Lucille"). JoAnn and her husband sued Lucille for negligence and Lucille raised the defenses of assumption of the risk and comparative negligence. After the Summit County Court of Common Pleas granted Lucille's motion for summary judgment, JoAnn appealed.

On appeal, the Ninth District Court of Appeals reversed the trial court's decision and the matter was remanded. Lucille then appealed to the Supreme Court of Ohio. The Supreme Court of Ohio agreed with the trial court and found that summary judgment in favor of Lucille, the tortfeasor, was proper.

In affirming summary judgment, the Supreme Court of Ohio in *Thompson* provided:

The issue before us is the degree of care owed between participants in a sport, in this instance the game of golf. * * * we hold that between participants in

such sporting events, only injuries caused by intentional conduct, or in some instances reckless misconduct, may give rise to a cause of action. There is no liability for injuries caused by negligent conduct.

* * *

Thompson v. McNeill, supra, 53 Ohio St.3d at 103. The Supreme Court of Ohio held that, in determining whether a tortfeasor acted recklessly or intentionally, the court should consider: “* * * the nature of the sport involved, the rules and regulations which govern the sport, the customs and practices which are generally accepted and which have evolved with the development of the sport, and the facts and circumstances of the particular case.” *Id.* at 105, quoting *Hanson v. Kynast* (1987), 38 Ohio App.3d 58, 64.

In affirming summary judgment in favor of the tortfeasor, the Supreme Court of Ohio held in *Thompson* that the tortfeasor’s shot was not a prohibited or reckless shot and that it was foreseeable that the tortfeasor’s (*i.e.* Lucille’s) next shot would be coming from the fairway. *Id.* at 106. The Court also held that Lucille “did not recklessly expose [JoAnn] Thompson to more danger than any golfer faces in participating in the game of golf.” *Id.*

The Court has reviewed all deposition testimony. Upon review, the Court finds that no evidence has been introduced to establish that Defendant David Ish acted recklessly or intentionally while on the Buttermilk slope on March 6, 2007. Plaintiff Eugene Horvath, the only person who actually witnessed the accident, testified that he did not see any problem with David Ish’s snowboarding prior to the collision. *See*, Depo. of E. Horvath at pages 40, 78. Eugene Horvath testified that he did not know of any reason to believe that David Ish collided with Angel with the intent to harm her. *Id.* at page 81. There is absolutely no evidence of horseplay or rowdy behavior on the part of David Ish.

As acknowledged by the Plaintiffs, when individuals engage in recreational or sport activities, they assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant's actions were either "reckless" or "intentional". Because neither reckless nor intentional conduct has been established, summary judgment is appropriate.

CONCLUSION

For the reasons set forth above, and upon due consideration, the Court GRANTS the Defendants' Motion for Summary Judgment. No evidence has been introduced to establish that Defendant David Ish acted recklessly or intentionally on March 6, 2007 when he collided with Plaintiff Angel Horvath. Because the Plaintiff and Defendant were engaging in a recreational or sport activity, Plaintiff Angel Horvath assumed the ordinary risks of that activity and, without proof of reckless or intentional conduct, she cannot recover for her injuries.

IT IS ORDERED.



JUDGE BRENDA BURNHAM UNRUH

Pursuant to Civ.R. 58(B), the Clerk of Courts shall serve upon all parties notice of this judgment and its date of entry on the Journal.



JUDGE BRENDA BURNHAM UNRUH

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