

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2011-1089

ANGEL L. HORVATH; EUGENE J. HORVATH
Plaintiff-Appellees,

-vs-

DAVID S. ISH; ANNETTE M. ISH, DAVID A. ISH
Defendant-Appellants.

ON APPEAL FROM THE NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO CASE NO. 25442

MEMORANDUM OPPOSING JURISDICTION OF
PLAINTIFF-APPELLEES, ANGEL AND EUGENE HORVATH

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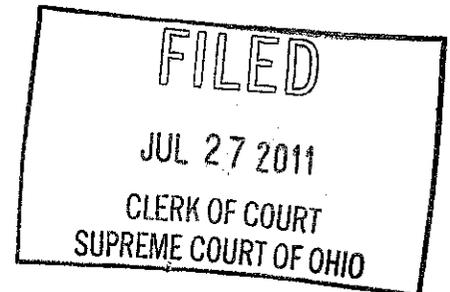


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EXPLANATION OF WHY THIS CASE PRESENTS NO ISSUES OF PUBLIC OR GREAT GENERAL INTEREST

Despite all the colorful rhetoric, this personal injury action involves nothing more than a fact-intensive dispute over whether Defendant-Appellant, David Ish, could be found to have acted recklessly or intentionally. The demand for summary judgment was based solely upon (1) primary assumption of the risk and (2) the open-and-obvious defense. Citing *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, 802 N.E. 2d 1116, Defendants argued that either reckless or intentional misconduct had to be established to justify an award of damages. *Motion for Summary Judgment of Defendants dated April 19, 2010, pp. 5-6.*

The Ninth Judicial District Court of Appeals simply determined that a legitimate factual dispute did indeed exist over whether sufficient recklessness had been established. *Horvath v. Ish*, 9th Dist. No. 25442, 2011-Ohio-2239, 2011 W.L. 1847939 ¶ 18. Defendants have failed to cite a single judicial decision that has reached a contrary conclusion under analogous facts. Nor does it appear that the legal standards that were recognized are inconsistent with any other Ohio authorities. The sole purpose of the instant appeal is simply to secure a correction of a perceived mistake in the appellate court's ruling.

Defendants have nevertheless assured this Court that 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." *Defendants' Memorandum in Support of Jurisdiction, p. 11 (citation omitted)*. In reality, the appellate court was careful to note that this issue had not been addressed below and thus they would "not decide for the first time on appeal whether negligence per se applies to the [Plaintiff's] claims." *Horvath*, 2011-Ohio-2239, ¶ 14. Defendants' promise of an intriguing legal issue that is ripe for Supreme Court

review is thus unfounded.

The Ninth District's decision merely overturned the entry of summary judgment and provided the trial court with unerring guidance as to how the remaining issues were to be evaluated upon remand. Defendants have conceded *sub silentio* that none of the opinions from other judicial districts that have evaluated R.C. Chapter 4169 conflict with this ruling. As they have acknowledged, ski resorts are only operated in five of Ohio's eighty-eight counties, the largest of which is Summit County. *Defendants' Memorandum in Support of Jurisdiction*, p. 2. The Ninth District has simply recognized and applied time-tested common law tort standards, consistent with R.C. §4169.08 and §4169.09, in a manner that is in line with every other judicial opinion on the topic. Given that claims of negligence and recklessness between skiers and snowboarders are still relatively rare in this State, no issues of public or great general interest have been implicated by the majority's eminently sensible determination.

STATEMENT OF CASE AND FACTS

Plaintiff-Appellees, Angel and Eugene Horvath, originally commenced this personal injury action on March 6, 2009 in the Summit County Court of Common Pleas against Defendant-Appellant, David Ish.¹ Damages were sought as a result of the serious and permanent injuries that had been inflicted when the snowboarder failed to yield the right-of-way while looking backward toward the all-terrain park and crashed into the woman skiing in front of him. Defendant denied liability and interposed various affirmative defenses in an Answer that was filed on April 19, 2009.

With leave of Court, Plaintiff filed an Amended Complaint on November 29, 2009 that joined Defendant's parents, Annette and David Ish, as well as Boston Mills Ski Resort, Inc. and Peak Resorts, Inc., to the civil action. Answers were again submitted

¹ Several John Doe Defendants were also included in the pleading as permitted by Civ.R. 15(D).

denying liability and raising affirmative defenses. The ski resorts were eventually dismissed from the proceedings in a Judgment Entry dated April 16, 2010.

On April 19, 2010, Defendant Ish and his parents moved for summary judgment on the grounds of (1) primary assumption of the risk and (2) the open-and-obvious defense. Their position was that the personal injury claim had to be established strictly under principles of common law as “the ski resort operator immunity statute does not create liability on an individual skier.” *Motion for Summary Judgment of Defendants dated April 19, 2010, p. 5*. They further maintained that: “In order to recover and overcome the primary assumption of the risk defense a Plaintiff must establish reckless or intentional conduct.” *Id., p. 5 (citation omitted)*. Their Motion concluded with an argument that “the open and obvious doctrine” was a further bar to recovery. *Id., pp. 6-8*.

Plaintiffs submitted their Brief in Opposition on May 11, 2010. While they disputed that the doctrines of primary assumption of the risk and open-and-obvious applied, evidentiary materials were submitted establishing that Defendant Ish had intentionally raced down the hill while looking backward and recklessly disregarded the safety of others on the ski slope. The demonstration that was furnished in compliance with Civ.R. 56(E) painted a picture that was considerably more egregious than that which Defendants had been willing to admit in their Motion.

More specifically, Plaintiff Angel Horvath travelled to Boston Mills on March 6, 2007 with her then boyfriend, now husband, Plaintiff Eugene Horvath. *See Deposition of Angel Horvath, p. 94 (hereinafter "A. Horvath Depo.")* The couple started skiing down Buttermilk Hill, with Angel leading. *Id., p. 95*. Angel skied in front of Eugene all the way down the beginner slope until she was hit from behind by Defendant David Ish. *See Deposition of Eugene Horvath, p. 31, lines 3-8 (hereinafter "E. Horvath Depo.")*; see also *A. Horvath Depo., p. 96, line 25, p. 97, lines 1-4*.

Although Angel Horvath was aware that there were other skiers and snowboarders on Buttermilk Hill, she did not see anyone near her as she skied down the gentle beginner's hill. *A. Horvath Depo.*, p. 110, lines 6-11. Angel suddenly heard "playground noises" and "loud hollering." *Id.*, p. 110, lines 24-25. Almost immediately, she was hit from the right rear, was sent flying through the air, and landed on the packed base of Buttermilk Hill. *Id.*, p. 96, line 25; p. 97, lines 1-4.

Eugene Horvath saw Defendant Ish crash into Angel Horvath. He describes the collision as follows:

... [Angel] was out in front of me about 50 or 60 feet ... she was skiing well in control at a moderate speed to slow speed. And I was behind her and there seemed to be - we were about 70% of the way down the hill and I heard a lot of screaming and a lot of commotion, but I continued to follow her.

And there were some snowboarders to my left and one of them cut in front of me at a very quick speed and then there was another loud yell or something, it was a loud yell and then that individual that was snowboarding that had just cut in front of me [David Ish] -well he looked back where the noise came from, which was from the left, and then he cut into Angel and hit her almost at the same time-well, it was at the time he looked back. I don't think he saw her at all.

E. Horvath Depo. at pp. 35-36. Eugene Horvath confirmed that Defendant Ish had emerged from the terrain park to the left, and then cut out in front of him. *Id. at p. 38, lines 2-7 and lines 22-25.* Defendant Ish looked back and to the left. *Id. at p. 41, lines 15-25.* There were additional snowboarders to Eugene's left at the time of the collision, and the loud noises could be heard coming from them. *Id. at p. 48, lines 23-25; p. 50, lines 10-14.* The events observed by Mr. Horvath are further detailed in his Affidavit, which was attached as Exhibit A to Plaintiffs' Brief n Opposition to Summary Judgment.

For his part, Defendant Ish testified that he was using a shorter board because it was lighter and made jumping tricks easier. *See Deposition of David Ish at p. 62, lines 23-25; p. 63, lines 1-13 (hereinafter "D. Ish Depo.")*. Defendant had flown over jumps

and hit the "fat box rail" before he exited the terrain park. *Id. at p. 34, lines 13-16; p. 41, lines 16-21.* Defendant testified that Angel came up from behind him on his right and that he first contacted the woman with his right shoulder. *Id. at p. 46, lines 12-20; p. 51, lines 19-22.*

Tyler Ish saw the collision between the snowboarder and skier. *See Deposition of Tyler Ish at p. 27, lines 3-7 (hereinafter "T. Ish Depo.")*. His description of the crash differs markedly from his brother's unlikely account. Tyler Ish testified that Defendant was the first to start down Buttermilk Hill and he followed. *Id., at p. 20, line 9-12.* According to this version, Angel Horvath was downhill of Defendant Ish. *Id. at p. 36, lines 21-24.* She was skiing from the left to the right at the moment of the impact. *Id. at p. 30, lines 8-10.* Defendant was snowboarding from the left to the right, and made a cut to turn at the time of the collision. *Id. at p. 21, lines 17-23.* Defendant's front side struck the right side of Angel, causing her to hit the ground. *Id. at p. 33, lines 2-3; p. 31, lines 1-5.*

Angel Horvath is familiar with the skier responsibility code, which required her to stay in control and provided that downhill skiers enjoy the right of way. Accordingly, uphill skiers must yield to them and maintain a lookout for downhill skiers. *A. Horvath Depo. at p. 146, lines 3-15.* Defendant Ish conceded that he knew that the skier further down the slope had the right of way. *D. Ish Depo. at p. 71, lines 8-16.*

In a ruling dated May 18, 2010, the trial judge granted the Motion for Summary Judgment. First, the court concluded that R.C. §4169.08 had no application to personal injury claims between individual skiers/snowboarders. *Id., pp. 7-9.* Despite the uncontroverted evidence of loud yelling coming from the snowboarders' terrain park, and the fact that Defendant Ish was cutting across Buttermilk Hill while looking behind himself, the court proceeded to find there was "absolutely no evidence of horse play or rowdy behavior on the part of David Ish." *Id., p. 13.* Summary judgment was then

granted because neither reckless nor intentional misconduct purportedly had been demonstrated. *Id.*, p. 14.

Plaintiffs pursued an appeal of this ruling and the Ninth Judicial District reversed the entry of summary judgment. The majority initially held that the responsibilities set forth in R.C. §4169.08(C) were indeed owed to everyone, including other skiers and snowboarders on the slopes. *Horvath*, 2011-Ohio-2239 ¶ 10-15. A remand was ordered to address the dispute over whether principles of negligence *per se* could apply. *Id.*, ¶ 14. The appellate court also concluded that “a question of fact exists as to whether [Defendant Ish] was reckless.” *Id.*, ¶ 18. The panel thus observed that “summary judgment may not be appropriate regardless of the trial court’s findings concerning negligence *per se*.” *Id.*

Defendants are now seeking further review in the Supreme Court, which Plaintiffs oppose.

ARGUMENT

Defendants have fashioned three Propositions of Law that have been designed to pique this Court’s interest in this straightforward personal injury action. None of them merit Supreme Court review.

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.

The first Proposition of Law seeks a form of absolute immunity for skiers and snowboarders that the General Assembly has never seen fit to adopt in Ohio. Defendants have predicated their analysis upon the appellate court decision that was rendered in *Cheong v. Antablin* (1996), 50 Cal. App. 4th 971. *Defendants’ Memorandum*

in *Support of Jurisdiction*, p. 10. That ruling, moreover, was superseded by the Supreme Court of California in *Cheong v. Antablin* (1997), 16 Cal. 4th 1063, 68 Cal.Rptr.2d 859, 946 P. 2d 817. The opinion announced that:

*** We conclude that, under the applicable common law principles, a skier owes a duty to fellow skiers not to injure them intentionally or to act recklessly, but a skier may not sue another for simple negligence, and we further conclude that the ordinance at issue in this case does not alter this rule. [emphasis added]

Id., 16 Cal. 4th at 1066. The entry of summary judgment was affirmed because no evidence of intentional or reckless misconduct had been presented, which the plaintiff did not appear to be disputing. *Id.* at 1069. She had unsuccessfully attempted to argue that a local ordinance imposed a higher duty than the common law. *Id.*

While *Cheong* is thus completely consistent with the Ninth District's ruling, Defendants seem to be under the impression that California cloaks skiers and snowboarders with an impermeable shield of immunity that now belongs in Ohio. They have complained that:

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 recoveries for injuries sustained as a result of the collision. That should be true under the common law of Ohio and the catch-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 ***. [emphasis added]

Defendants' Memorandum in Support of Jurisdiction, pp. 10-11.

According to this result-driven reasoning, a heavily intoxicated skier could launch himself straight down a crowded hill with his eyes closed without fear of any potential liabilities. In the world that Defendants envision, there would be "no recoveries for injuries sustained" in the inevitable collision that ensued. *Id.*, p. 10. In order to discourage such dangerous dereliction, Ohio courts (as in California) have long

recognized that the defense of primary assumption of the risk is unavailable when the defendant acts intentionally or recklessly. *Brown v. Columbus All-Breed Training Club* (10th Dist. 2003), 152 Ohio App.3d 567, 651, 2003-Ohio-2057, 789 N.E.2d 648, 651 ¶ 10; *Sicard v. University of Dayton* (2nd Dist. 1995), 104 Ohio App.3d 27, 660 N.E.2d 1241, 1243.

Under the particular facts of this case, a serious question exists over whether the defense of primary assumption of the risk is available in the first place. Ohio courts have long “held that the doctrine does not apply in situations where the risk is not one that is inherent in the recreational activity itself.” *Pope v. Willey* (Sept. 12, 2005), 12th Dist. No. CA2004-10-077, 2005-Ohio-4744, 2005 W.L. 2179317 ¶12. If collisions with out-of-control snowboarders careening down hills at excessive speeds while looking behind themselves was indeed “inherent” to the sport of skiing, then few individuals – particularly children and older adults – would dare to venture onto the slopes. Since reasonable minds could find that Plaintiff’s debilitating injuries were not a foreseeable and accepted consequence of the activity she was enjoying, she will be entitled to recovery under traditional principles of negligence. *Brown*, 152 Ohio App. 3d at ¶14-15 (finding that triable issue of fact existed over whether collision between participants in a “chase” was a foreseeable and customary part of a dog training class); *Pope*, 2005-Ohio-4744 ¶10-13 (holding that while ATV riding was a recreational activity, collisions with pick-up trucks was not an inherent risk); *Konesky v. Wood County Agr. Soc.* (6th Dist. 2005), 164 Ohio App. 3d 839, 843-844, 2005-Ohio-7009, 844 N.E. 2d 408, 411-412 ¶22 (concluding that the risk of being trampled by a runaway horse was not inherent to harness racing). If Defendants’ ill-conceived view is upheld, there will be little incentive for thrill-seeking skiers and snowboarders to remain in control and refrain from endangering others.

It is certainly significant that the General Assembly included a long list of

“risk[s]” that are assumed when one visits a ski slope that does not include collisions with other participants. R.C. §4169.08(A)(1). This omission was undoubtedly no accident. Elsewhere in the same statute, the legislature has directed that skiers and snowboarders must “refrain from acting in a manner that may cause or contribute to the injury of another person[.]” R.C. §4169.08(C)(2). The unavoidable import of this plain and unambiguous directive is that the dangers posed by reckless skiers and snowboarders was fully appreciated when this enactment was adopted, but was not included as one of the risks that is assumed by operation of law.

In their effort to avoid liability at any cost, Defendants are urging this court to judicially expand R.C. §4169.08 in a manner that will override the common law doctrine of primary assumption of the risk. *Defendants’ Memorandum in Support of Jurisdiction*, pp. 10-11. But Ohio courts have never been in the business of re-writing legislation through judicial fiat. *State ex rel. Stokes v. Probate Court of Cuy. Cnty.* (8th Dist. 1969), 17 Ohio App. 2d 247, 255, 246 N.E. 607, 614. Regardless of the policy implications, plain and unambiguous language may not be ignored. *Board of Edn. v. Fulton Cnty. Budget Comm.* (1975), 41 Ohio St. 2d 147, 156; *Guear v. Stechschulte* (1928), 119 Ohio St. 1, 7, 162 N.E. 46. This Court should therefore decline the invitation to engraft unlimited immunity into R.C. §4169.08 for those who recklessly or intentionally threaten the safety of others and reject this Proposition of Law.

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.

Defendants’ second Proposition of Law is based upon a fallacy. As previously noted, the Ninth District specifically declined to consider whether a violation of the statutory responsibilities set forth in R.C. §4169.08(C) constitutes negligence *per se*.

Horvath, 2011-Ohio-2239 ¶14. Any ruling that his Court opted to issue in this regard would be purely advisory.

And approving this second Proposition of Law would not alter the outcome of the parties' dispute. The Ninth District had examined the responsibilities that have been imposed upon skiers and snowboarders by R.C. §4169.08(C), which include:

(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; ***

[emphasis added]

Defendants are now taking issue with the appellate court's determination that these provisions do indeed require skiers and snowboarders to avoid injuring each other.

Horvath, 2011-Ohio-2239 ¶ 12-14.

But even if this Court were inclined to reverse this seemingly unobjectionable construction, the end result would still be the same. Because genuine issues of material fact exist in the record over whether Defendant Ish had engaged in intentional or reckless misconduct, a jury trial would still be necessary. The Ninth District's discussion of R.C. §4169.08(C) merely sets the stage for the procedure that is to be followed upon remand. The question of whether principles of negligence *per se* will apply have yet to be resolved at any level in these proceedings.

That said, the logic of the Ninth District's analysis of R.C. §4169.08(C) cannot be doubted. Subsection (2) specifically requires care to be exercised to avoid injury to "another person," which most logically refers to other skiers and snowboarders on the

hill. If the General Assembly had some other intention in mind, such broad language undoubtedly would not have been employed.

It is evident that R.C. §4169.08(A) and (B) are concerned with the “ski area operator” and afford immunity to such facilities and resorts. But the same cannot be said of subsection (C), which contains no reference to operators. While protecting these businesses from lawsuits may have been one of the objectives of the statutory enactment and amendments, the plain and unmistakable terms of subsection (C) reflect that responsibilities have been imposed upon skiers and snowboarders that apply at all times that they are enjoying the slopes. Defendants appear to expect this Court to establish an arbitrary, and unwritten, restriction that could not possibly serve any legitimate objective.

Defendants insist that “R.C. §4169.09 is ambiguous.” *Defendants’ Memorandum in Support of Jurisdiction*, p. 13 (citation omitted). This certainly is not true for the first two sentences of the statute, which plainly provide that liability will be imposed for violating one of the “responsibilities” imposed by the Chapter but not for failing to ensure that “another” abides by the statutory directives. In other words, one is only accountable for his/her own failure to comply. The third sentence is somewhat cryptic, but can only be viewed as establishing that an individual cannot recover for his/her own violations of the statutory responsibilities.

Defendants would have this Court construe both R.C. §4169.08 and §4169.09 to “govern only the relationship between ski area operators and skiers.” *Defendants’ Memorandum in Support of Jurisdiction*, p. 12. It is difficult to believe that the General Assembly would have taken the time and effort to draft, debate, and adopt a prohibition against out-of-control skiing that comes into play only in the unlikely instance that a resort operator happens to wander onto the slope. Defendants’ contrived interpretation is irreconcilable with the maxim that laws should never be interpreted in

a manner that renders them a nullity. *Montalto v. Yeckley* (1941), 138 Ohio St. 314, 34 N.E. 2d 765, 768. In *Commonwealth Loan Co. v. Downtown Lincoln Mercury Company* (1st Dist. 1964), 4 Ohio App. 2d 4, 6, 211 N.E. 2d 57, 59, the court reasoned that:

It is the duty of a court called upon to interpret a statute to breathe sense and meaning into it; to give effect to all its terms and provision; and to render it compatible with other and related enactments whenever and wherever possible.

If the General Assembly had really intended for the responsibilities codified in R.C. §4169.08(C) to protect only ski operators, one would have expected the term “operators” to appear somewhere within the subsection. But the substantially broader term “person” was used instead, not once, but twice. *R.C. §4169.08(C)(2)*.

Likewise, artificially confining R.C. §4169.09 in the manner that has been proposed makes absolutely no sense, given that liability has been explicitly imposed for “injury, death, or loss to person or property caused by the operator’s, passenger’s, freestyler’s, competitor’s, or skier’s failure to fulfill any of the responsibilities required by this chapter (emphasis added).” There is no reason to believe that the legislature really meant to authorize civil recoveries for personal injuries solely between operators and skiers, but not skiers and skiers. Accordingly, no plausible justification exists for this Court to consider the second Proposition of Law.

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.

Near the end of third Proposition of Law, Defendants finally reach the real issue in this appeal. *Defendants’ Memorandum in Support of Jurisdiction*, pp. 12-15. In no

uncertain terms, they are seeking correction of the Ninth District's determination that sufficient evidence of recklessness had been submitted in accordance with Civ.R. 56(E). *Id.*, pp. 14-15. There is no shortage of judicial opinions analyzing this familiar tort concept, and the standard that has been developed over the years is not particularly demanding.

The *sine qua non* of recklessness is conduct that creates risks substantially greater than those that are traditionally associated with mere negligence. *Chesher v. Neyer* (6th Cir. 2007), 477 F.3d 784, 802. In adopting the definition set forth in the RESTATEMENT OF THE LAW, TORTS (1965), this Court previously explained in *Thompson v. McNeill* (1990), 53 Ohio St. 3d 102, 104-105, 559 N.E. 2d 705, 708, that:

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 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.

"Each case must be reviewed under the totality of the circumstances." *Fitzpatrick v. Spencer* (Apr. 16, 2004), 2nd Dist. No. 20067, 2004-Ohio-1940, 2004 W.L. 829945, p. *3 (citation omitted). When reasonable minds can differ over the significance of the evidence, the issue should be submitted to a jury. *Wingrove v. Forshey* (S.D. Ohio 2002), 230 F.Supp.2d 808, 827 ("The issue of whether an officer's actions were reckless is usually appropriate for resolution by the trier of fact."); *Burnell v. Dulle* (12th Dist. 2006), 169 Ohio App. 3d 792, 797, 2006-Ohio-7044, 865 N.E. 2d 86 ("Whether a person acted in a reckless and wanton manner is usually a question of fact for the jury"); *Anderson v. Lynn* (May 10, 1999), 12th Dist. No. CA98-10-097, 1999 W.L. 296756, p. *3 ("[B]ecause the line between willful and wanton misconduct and ordinary negligence can be a fine one, the issue of whether conduct was willful or wanton should be

submitted to the jury for consideration in light of the surrounding circumstances when reasonable minds might differ as to the import of the evidence.”) (citations omitted); *Fleming v. Ashtabula Area City Sch. Bd. of Edn.* (Apr. 18, 2008), 11th Dist. No. 2006-A-0030, 2008-Ohio-1892, 2008 W. L. 1777833, pp. *8-9 (emphasizing that legitimate jury issue existed upon immunity defense because the merits of the tort claims had not been reached).

Given this wealth of judicial authority on the subject, no perceptible reason exists for this Court to once again expound upon “what is reckless.” The Ninth District simply concluded that – based upon the relatively unique facts surrounding the skiing/snowboarding accident that produced a devastating injury – a legitimate dispute exists that justifies a jury trial. Competent evidence had been presented establishing that Defendant Ish had been gazing behind himself toward the raucous emanating from the terrain park while snowboarding across a gentle “green circle” ski run at a rapid pace. His actions in this regard were “intentional” in every sense of the term. He fully appreciated his duty to yield to downhill traffic, yet could have possibly been complying while his head was turned over his back shoulder. The collision that ensued was both relatively predictable and easily preventable. Had a young child been lying in his path after falling on the slope, the consequences could have been even more catastrophic. Reasonable minds could certainly find that such frightening and deliberate indifference to the safety of others is far more than just negligent, and qualifies as recklessness (if not worse). The Ninth District’s sensible resolution of the motion for summary judgment should be left intact and jurisdiction should be declined over this third Proposition of Law.

CONCLUSION

For the foregoing reasons, this Court should conclude that no issues of public or great general interest are at stake in that appeal that merit further Supreme Court review.

Respectfully Submitted,

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I hereby certify that a copy of the foregoing **Memorandum** has been sent by regular U.S. Mail, on this 27th day of July, 2011 to:

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