

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**

**MERIT BRIEF OF
PLAINTIFF-APPELLEES, ANGEL AND EUGENE HORVATH**

James A. Sennett, Esq. (#0022775)
SENNETT FISHER, L.L.C.
One Chagrin Highlands
2000 Auburn Drive, Suite 200
Beachwood, OH 44122
(216) 378-7888
jsennett@sennettfisher.com

Timothy J. Fitzgerald, Esq. (#0042734)
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, Ohio 44115-2108
(216) 241-5310
FAX: (216) 241-1608
tfitzgerald@gallaghersharp.com

Paul W. Flowers, Esq. (#0046625)
[COUNSEL OF RECORD]
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
FAX: (216) 344-9395
pwf@pwfco.com

*Attorney for Defendant-Appellants,
David Ish, et al.*

FILED
FEB 01 2012
CLERK OF COURT
SUPREME COURT OF OHIO

*Attorneys for Plaintiff-Appellees,
Angel and Eugene Horvath*

RECEIVED
FEB 01 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF CONTENTSii

TABLE OF AUTHORITIES.....iii

INTRODUCTION..... 1

STATEMENT OF THE CASE AND FACTS3

ARGUMENT7

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.7

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...... 10

A. PREMATURE CONSIDERATION OF NEGLIGENCE *PER SE* 10

B. APPLICABILITY OF NEGLIGENCE *PER SE*..... 12

C. APPLICABILITY OF THE STATUTE TO SKIER/SNOWBOARDERS 14

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...... 17

CONCLUSION 20

CERTIFICATE OF SERVICE..... 20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Anderson v. Lynn</i> (May 10, 1999), 12 th Dist. No. CA98-10-097, 1999 W.L. 296756	18
<i>Board of Edn. of Pikedelta-York Loc. Sch. Dist. v. Fulton Cty. Budget Comm'n</i> (1975), 41 Ohio St. 2d 147, 156, 324 N.E.2d 566, 571	13
<i>Brown v. Columbus All-Breed Training Club</i> (10 th Dist. 2003), 152 Ohio App.3d 567, 651, 2003-Ohio-2057, 789 N.E.2d 648, 651, ¶ 10	8, 9, 13
<i>Burnell v. Dulle</i> (12 th Dist. 2006), 169 Ohio App. 3d 792, 797, 2006-Ohio-7044, 865 N.E. 2d 86	18
<i>Chambers v. St. Mary's School,</i> 82 Ohio St.3d 563, 565, 1998-Ohio-184, 697 N.E.2d 198, 201-202.....	12
<i>Cheong v. Antablin</i> (1997), 16 Cal. 4 th 1063, 68 Cal.Rptr.2d 859, 946 P. 2d 817.....	1, 2, 8
<i>Cheong v. Antablin</i> (2 nd Dist. 1996), 50 Cal. App. 4 th 971,978, 57 Cal. Rptr. 2d 581, 584. <i>Defendants' Memorandum, p. 10</i>	1
<i>Chesher v. Neyer</i> (6 th Cir. 2007), 477 F.3d 784, 802	17
<i>Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.</i> (1 st Dist. 1964), 4 Ohio App. 2d 4, 6, 211 N.E. 2d 57, 59	16
<i>Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt. Dist.,</i> 73 Ohio St. 3d 590, 598, 1995-Ohio-301, 653 N.E. 646, 653	11
<i>Dohme v. Eurand Am., Inc.,</i> 130 Ohio St. 3d 168, 174, 2011-Ohio-4609, 956 N.E. 2d 825, 831, ¶27	10
<i>Fitzpatrick v. Spencer</i> (Apr. 16, 2004), 2 nd Dist. No. 20067, 2004-Ohio-1940, 2004 W.L. 829945	18
<i>Fleming v. Ashtabula Area City Sch. Bd. of Edn.</i> (Apr. 18, 2008), 11 th Dist. No. 2006-A-0030, 2008-Ohio-1892, 2008 W. L. 1777833	18, 19
<i>Guear v. Stechschulte</i> (1928), 119 Ohio St. 1, 7, 162 N.E. 46, 48	13

<i>Hoellrich v. Padda</i> (Jan. 13, 2010), U.S. Dist. Ct., N.D. Ohio Case No. 3:08CV01537, 2010 W.L. 184144.....	12
<i>Horvath v. Ish</i> (9 th Dist. 2011), 194 Ohio App. 3d 8, 13, 2011-Ohio-2239, 954 N.E.2d 196, 200, ¶14	passim
<i>Horvath v. Ish</i> , 129 Ohio St. 3d 1503, 2011-Ohio-5358, 955 N.E. 2d 386.....	7
<i>Kalan v. Fox</i> (11 th Dist. 2010), 187 Ohio App. 3d 687, 692, 2010-Ohio-2951, 933 N.E. 2d 337, 341, ¶22	2
<i>Konesky v. Wood County Agr. Soc.</i> (6 th Dist. 2005), 164 Ohio App. 3d 839, 843-844, 2005-Ohio-7009, 844 N.E. 2d 408, 411-412, ¶22	9
<i>Montalto v. Yeckley</i> (1941), 138 Ohio St. 314, 34 N.E. 2d 765, 768.....	16
<i>Neal-Pettit v. Lahman</i> , 125 Ohio St.3d 327, 331, 2010-Ohio-1829, 928 N.E.2d 421, 425, ¶22	14
<i>Nganga v. College of Wooster</i> (9 th Dist. 1989), 52 Ohio App. 3d 70, 72, 557 N.E. 2d 152, 154	2
<i>Pond v. Leslein</i> , 72 Ohio St. 3d 50, 53, 1995-Ohio-193, 647 N.E. 2d 477, 479. No	12
<i>Pope v. Willey</i> (Sept. 12, 2005), 12 th Dist. No. CA2004-10-077, 2005-Ohio-4744, 2005 W.L. 2179317	9
<i>Sicard v. University of Dayton</i> (2 nd Dist. 1995), 104 Ohio App.3d 27, 660 N.E.2d 1241, 1243	8, 13
<i>Siegfried v. Everhart</i> (9 th Dist. 1936), 55 Ohio App. 351, 354, 9 N.E. 2d 891, 892.....	14
<i>Skinner v. Pennsylvania R. Co.</i> (1933), 127 Ohio St. 69, 71-72, 186 N.E. 2d 722, 723.....	12
<i>State ex rel. Stokes v. Probate Ct. of Cuyahoga Cty.</i> (8 th Dist. 1969), 17 Ohio App. 2d 247, 255, 246 N.E. 607, 614	14
<i>Thompson v. McNeill</i> (1990), 53 Ohio St. 3d 102, 104-105, 559 N.E. 2d 705, 708	17
<i>Wingrove v. Forshey</i> (S.D. Ohio 2002), 230 F.Supp.2d 808, 827.....	18

<i>Woods v. Brown's Bakery</i> (1960), 171 Ohio St. 383, 386, 171 N.E. 2d 496, 499	12
<i>Zachariah v. Roby</i> (10 th Dist. 2008), 178 Ohio App. 3d 471, 483, 2008-Ohio-4832, 898 N.E. 2d 998, 1007, ¶39	12

STATUTES

R.C. §4169.01(A)	16
R.C. §4169.08.....	7, 8, 12, 14, 15, 16
R.C. §4169.08(A)(1)	9
R.C. §4169.08(C).....	passim
R.C. §4169.08(C)(2).....	10, 17
R.C. §4169.08(C)(5).....	9
R.C. §4169.09	passim
R.C. §4511.21(A)	12

OTHER AUTHORITIES

Civ.R. 15(D)	3
Civ.R. 56(E).....	4, 17
RESTATEMENT OF THE LAW, TORTS (1965)	17

INTRODUCTION

Now that this Court has accepted jurisdiction over this personal injury action, there have been dramatic changes in the scope of this appeal. Defendant-Appellants, David A. Ish, Annette M. Ish, and David S. Ish, had been proposing earlier in their first Proposition of Law that this Court should expand the doctrine of “primary assumption of the risk” to preclude any and all claims between skier/snowboarders. *Defendant-Appellants’ Memorandum in Support of Jurisdiction, dated June 27, 2011 (“Defendants’ Memorandum”)*, p. 9. They had proclaimed that:

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. [emphasis added].

Id., p. 10. In support of this new form of judicially imposed skier/snowboarder immunity, they relied upon a California appellate court’s remark that: “Collisions with other skiers is considered an inherent risk of the sport.” *Cheong v. Antablin* (2nd Dist. 1996), 50 Cal. App. 4th 971,978, 57 Cal. Rptr. 2d 581, 584. *Defendants’ Memorandum*, p. 10.

Plaintiff-Appellees, Angel and Eugene Horvath, observed in response that the creation of “litigation free” slopes would allow an intoxicated skier to launch himself down a hill with his eyes closed, without fear of being held civilly liable for the injuries that would inevitably ensue. *Plaintiff-Appellees’ Memorandum Opposing Jurisdiction, dated July 27, 2011 (“Plaintiffs’ Memorandum”)*, p. 7. They further noted that the intermediate appellate court decision that had been rendered in *Cheong*, 57 Cal. Rptr. 2d 581, had been 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 recognized the more sensible rule that:

*** [U]nder 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. California thus fell in line with Ohio, as well as virtually every state, by acknowledging that the doctrine of primary assumption of the risk does not preclude claims of reckless or intentional misconduct. *Nganga v. College of Wooster* (9th Dist. 1989), 52 Ohio App. 3d 70, 72, 557 N.E. 2d 152, 154; *Kalan v. Fox* (11th Dist. 2010), 187 Ohio App. 3d 687, 692, 2010-Ohio-2951, 933 N.E. 2d 337, 341, ¶122.

Defendants have abandoned the extreme positions they had been advocating in their effort to pique this Court's interest in this otherwise routine personal injury action. Their kinder, gentler version now recognizes that: "If one skier engages in reckless, intentional or other risk enhancing wrongdoing, then the Plaintiff should be able to pursue a claim." *Appellants' Merit Brief, dated January 3, 2012 ("Appellants' Brief")*, p. 26 (citation omitted). Defendants are, in essence, asking this Court to reaffirm a common law standard that has been followed in Ohio for the last several decades, including throughout the course of the proceedings below.

Defendants would also have this Court believe that the Ninth Judicial District "held that the 'responsibilities' of a skier listed in R.C. §4169.08(C) established legal duties that skiers owed to other skiers for which negligence per se liability can be imposed pursuant to R.C. §4169.09." *Appellants' Brief, p. 2* (citations omitted). In truth, the majority had stopped well short of issuing such a proclamation and had specifically observed that "we do not decide for the first time on appeal whether negligence per se applies to the [Plaintiffs'] claims." *Horvath v. Ish* (9th Dist. 2011), 194 Ohio App. 3d 8, 13, 2011-Ohio-2239, 954 N.E.2d 196, 200, ¶14.

The opinion does not suggest, moreover, that damages can be recovered from a skier/snowboarder upon a demonstration of "simple negligence." *Id.*, 194 Ohio App.3d at 13, ¶¶16-17. Defendants' representations to the contrary are patently untrue. *Appellants' Brief, p. 2.*

There was no need for the Ninth District to reach these issues of law because, in the eyes of the majority, the evidentiary record can support a finding of recklessness. *Id.* at 13, ¶18. That is, and always has been, what this appeal is about. Not surprisingly, Defendant David A. Ish disagrees with this determination. He and his parents are now before this Court seeking nothing more than a “correction” of the appellate court’s analysis of the summary judgment evidence.

As will be developed further in this Brief, the Ninth District’s resolution of this fact-intensive dispute is unassailable. Defendant Ish continues to rely upon his own contrived version of the events, as supported somewhat by the devoted family members and friends who had accompanied him that day. Throughout these proceedings, he has steadfastly refused to accept the reality that reasonable fact-finders could well conclude that he and his supporters lack credence. If Plaintiffs’ version of the events is accepted as true, as is required during summary judgment proceedings, a far more disturbing scenario emerges. Accordingly, the appellate court’s determination that genuine issues of material fact exists over the claim of recklessness should be affirmed in all respects.

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

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

Resort, Inc. and Peak Resorts, Inc., to the civil action. Answers were again submitted, 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. 94-95; Supp. 0003-4.*² Angel skied in front of Eugene all the way down the beginner slope until she was hit from behind by

² The Supplement to the Merit Brief of Plaintiff-Appellees, Angel and Eugene Horvath, that is being filed simultaneously herewith will be abbreviated as “Supp.”

Defendant David Ish. See *Deposition of Eugene Horvath*, p. 31, lines 3-8 (hereinafter "E. Horvath Depo.") Supp. 0010; see also A. Horvath Depo., p. 96, line 25, p. 97, lines 1-4; Supp. 0005.

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; Supp. 0007. Angel suddenly heard "playground noises" and "loud hollering." *Id.*, p. 110, lines 24-25; Supp. 0007. 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; Supp. 0005.

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. [emphasis added]

E. Horvath Depo. at pp. 35-36; Supp. 0011-12. 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; Supp. 0013. Defendant Ish looked back and to the left. *Id.* at p. 41, lines 15-25; Supp. 0014. 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; Supp. 0015. The events observed

by Mr. Horvath are further detailed in his Affidavit, which was attached as Exhibit A to Plaintiffs' Brief in Opposition to Summary Judgment. *Supp. 0001.*

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."); Supp. 0022.* 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; Supp. 0018.* 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; Supp. 0020.*

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."); Supp. 0026.* 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; Supp. 0025.* According to this version, Angel Horvath was downhill of Defendant Ish. *Id. at p. 36, lines 21-24; Supp. 0028.* She was skiing from the left to the right at the moment of the impact. *Id. at p. 30, lines 8-10; Supp. 0027.* 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; Supp. 0025.* 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; Supp. 0027.*

Plaintiff 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; Supp. 0008.* 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; Supp. 0023.*

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 him, 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*, 194 Ohio App.3d 8, 11-13, ¶¶ 10-15. A remand was ordered to address the dispute over whether principles of negligence *per se* could apply. *Id.* at 12-13, ¶ 14. The appellate court also concluded that "a question of fact exists as to whether [Defendant Ish] was reckless." *Id.* at 13, ¶ 18. The panel thus observed that "summary judgment may not be appropriate regardless of the trial court's findings concerning negligence *per se*." *Id.*

In a 4-3 decision, this Court accepted jurisdiction over this appeal. *Horvath v. Ish*, 129 Ohio St. 3d 1503, 2011-Ohio-5358, 955 N.E. 2d 386.

ARGUMENT

Defendants have fashioned three Propositions of Law in response to the Ninth District's ruling, none of which possess merit.

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.

As drafted by Defendants, 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. No allowance has been made for the exceptions for reckless and intentional misconduct that have long existed in Ohio, California, and numerous other states. *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; *Cheong*, 16 Cal. 4th at 1066. Adopting this Proposition of Law would therefore upend decades of established precedent.

In an effort to manufacture a reversible error, Defendants have resorted to simply distorting the Ninth District's opinion. This Court has been assured that:

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 skier[s] 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., at ¶10, Apx. p. A6).*** [emphasis added].

Appellants' Brief, p. 11. At no point in the opinion did the majority actually express any views as to whether skiers/snowboarders assume the risk of collisions with others on the slopes. The portion of the ruling that Defendants have cited furnished nothing more than a description of R.C. §4169.08. *Horvath*, 194 Ohio App. 3d 8, 11, ¶10.

Defendants appear to be oddly surprised that “there are no cases in Ohio dealing specifically with the inherent risk of a collision between skiers and/or snowboarders[.]”

Appellants' Brief, p. 12. It seems to have been forgotten that Ohio is a relatively flat Midwestern state. The dearth of authority is undoubtedly attributable to the fact that there are only a handful of small ski slopes in this jurisdiction, and thus lawsuits arising from collisions between skiers/snowboarders are relatively rare. It is therefore difficult to fathom how Defendants can continue to believe that issues of public and great general

importance have been implicated by the majority's narrow holding.

Although the Ninth District never reached the issue, a serious question exists over whether the defense of primary assumption of the risk is available under the particular facts of this case. 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, p. *2, ¶12. If collisions with out-of-control snowboarders careening down hills at excessive speeds while looking backwards are indeed "inherent" to the sport of skiing, then few individuals – particularly children and older adults – will dare to venture onto the slopes. According to Defendants' twisted logic, anyone who enjoys recreational sailing assumes the risk of potentially fatal collisions with high speed motor boats. Since more sensible jurors could find that Plaintiff's debilitating injuries were not a foreseeable and accepted consequence of the new sport she was learning, she should be entitled to recovery under traditional principles of negligence. *Brown*, 152 Ohio App. 3d 567, 571-572, ¶¶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, p. *2, ¶¶10-13 (holding that while ATV riding was a recreational activity, collisions with pick-up trucks were 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).

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 risk of collision with others" was required to be assumed only in "a tubing park[.]" *R.C. §4169.08(C)(5)*. The legislature has further 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 were fully appreciated when this enactment was adopted, but were not included as risks that are assumed by operation of law.

In the remainder of Defendants’ analysis under this Proposition of Law, they have sought to portray themselves as the true champions of ski slope safety. *Appellants’ Brief*, pp. 15-17. But, no attempt has been made to explain how irresponsible and dangerous behavior will be discouraged if establishing civil liability is made more difficult. *Id.* The unmistakable objective of this appeal is to convince this Court to tightly circumscribe, if not eliminate, the injury victim’s right of recovery. If anything, such a holding would serve only to reward individuals – such as Defendant Ish – who display an astonishing indifference for the safety of others. Ohio’s fledgling ski industry can hardly be expected to survive if thrill seekers and X-Games wannabes are assured that they can take unacceptable risks with the safety of others with virtual impunity. There simply is no merit to this first 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.

A. PREMATURE CONSIDERATION OF 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*, 194 Ohio App.3d 8, 12-13, ¶14. Any ruling that this Court opts to issue in this regard would be purely advisory. *Dohme v. Eurand Am., Inc.*, 130 Ohio St. 3d 168, 174, 2011-Ohio-4609, 956 N.E. 2d 825, 831, ¶27 (“It is well settled that this court does not issue advisory opinions.”)

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 seemingly unobjectionable determination that these provisions do indeed require skiers and snowboarders to avoid injuring each other. *Horvath*, 194 Ohio App.3d 8, 12-13, ¶¶ 12-14.

But even if this Court were inclined to reverse this eminently sensible 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 has yet to be resolved at any level in these proceedings. This Court has long refused to render anticipatory rulings, and should continue to do so. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d 590, 598, 1995-Ohio-301, 653 N.E. 646, 653.

B. APPLICABILITY OF NEGLIGENCE *PER SE*

If and when the issue is ripe for adjudication, ample judicial authority will certainly support the contention that a violation of the responsibilities imposed by R.C. §4169.08(C) constitutes negligence *per se*. In the seminal decision that was rendered in *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184, 697 N.E.2d 198, 201-202, this Court recognized that:

Where a legislative enactment imposes a specific duty for the safety of others, failure to perform that duty is negligence *per se*. [citation omitted].

See also Zachariah v. Roby (10th Dist. 2008), 178 Ohio App. 3d 471, 483, 2008-Ohio-4832, 898 N.E. 2d 998, 1007, ¶39; *Hoellrich v. Padda* (Jan. 13, 2010), U.S. Dist. Ct., N.D. Ohio Case No. 3:08CV01537, 2010 W.L. 184144, p. *2.

To their credit, Defendants have not wasted this Court's time by suggesting that R.C. §4169.08 is devoid of specific safety duties. The only conceivable purpose of requiring skiers and snowboarders to control their speed, avoid collisions with each other, and heed all posted warnings is to reduce the potential for injuries. Basically the same common sense obligations have been established for motorists by R.C. §4511.21(A), which has long directed that:

No person shall operate a motor vehicle, trackless trolley, or streetcar at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no person shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit the person to bring it to a stop within the assured clear distance ahead. [emphasis added].

Once a defendant has been found to have violated this statutory duty, principles of negligence *per se* apply. *Skinner v. Pennsylvania R. Co.* (1933), 127 Ohio St. 69, 71-72, 186 N.E. 2d 722, 723 (involving section 12603 of the General Code); *Woods v. Brown's Bakery* (1960), 171 Ohio St. 383, 386, 171 N.E. 2d 496, 499; *Pond v. Leslein*, 72 Ohio St. 3d 50, 53, 1995-Ohio-193, 647 N.E. 2d 477, 479. No explanation has been offered by

Defendants for why R.C. §4169.08(C) should be treated differently.

There is actually little need for an in-depth analysis of principles of negligence *per se*, as the General Assembly has specifically provided that liability will be imposed when the statutory responsibilities have been violated. R.C. §4169.09 explicitly directs that:

A ski area operator, a tramway passenger, freestyler, competitor, or skier is liable 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].

A clearer expression of legislative intent is difficult to fathom. There would have been no need for this enactment if the General Assembly had intended for damage claims between skiers/snowboarders to be governed solely by more stringent common law standards. Regardless of the policy implications, plain and unambiguous language may not be ignored. *Board of Edn. of Pikedelta-York Loc. Sch. Dist. v. Fulton Cty. Budget Comm'n* (1975), 41 Ohio St. 2d 147, 156, 324 N.E.2d 566, 571; *Guear v. Stechschulte* (1928), 119 Ohio St. 1, 7, 162 N.E. 46, 48.

The creation of a statutory remedy under R.C. §4169.09 does not necessarily mean, as Defendants seem to believe, that the General Assembly intended to "abrogate the common law sport and recreational activity rule[.]" *Appellants' Brief, p. 24*. As is often the case, injury victims will simply have two separate causes of action available to them in certain instances. If damages are sought under a theory of common law negligence, then reckless or intentional misconduct will have to be shown with regard to any inherent risks that were assumed. *Brown*, 152 Ohio App. 3d 567, 651; *Sicard*, 104 Ohio App.3d 27, 30. When one of the responsibilities that had been established in R.C. Chapter 4169 has been violated, however, the statutory remedy will also be available. The legislature has simply furnished a less demanding route to a recovery in specified circumstances. No requirement for recklessness or intentional wrongdoing was

incorporated into R.C. §4169.09, and this Court should decline the invitation to engraft the missing terms through judicial fiat. *See generally State ex rel. Stokes v. Probate Ct. of Cuyahoga Cty.* (8th Dist. 1969), 17 Ohio App. 2d 247, 255, 246 N.E. 607, 614. “In construing a statute, it is the duty of the court to give effect to the words used in [the] statute, not to insert words not used.” *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 331, 2010-Ohio-1829, 928 N.E.2d 421, 425, ¶122, quoting *State of Ohio v. S.R.* (1992), 63 Ohio St.3d 590, 595, 589 N.E.2d 1319.

At Defendants’ considerable urging, the dissenting judge went astray by speculating as to what the legislature really intended to enact. *Horvath*, 194 Ohio App. 3d 8, 14-15. The theory seems to be that since the bill was adopted for the primary purpose of immunizing ski area operators from civil lawsuits, its supporters could never have meant to adopt additional protections for skiers and snowboarders. This is, of course, a classic *non-sequitur*. Perhaps the General Assembly should be given credit for attempting to address not just one, but two, public policy concerns. It is certainly possible that the legislators had envisioned that operators would be protected from liability and out-of-control skiers/snowboarders would be held liable in specified instances upon a demonstration of a statutory violation. The two objectives are hardly incompatible. But, such guesswork is plainly unwarranted, as the appropriate question should be “not what the General Assembly intended to enact, but what the meaning is of that which it did enact.” *Siegfried v. Everhart* (9th Dist. 1936), 55 Ohio App. 351, 354, 9 N.E. 2d 891, 892.

C. APPLICABILITY OF THE STATUTE TO SKIER/SNOWBOARDERS

Adhering closely to sound principles of judicial restraint, the Ninth District was only willing to go as far as confirming that the protections afforded by R.C. §4169.08 are not limited to ski slope operators. *Horvath*, 194 Ohio App. 3d 8, 11-12, ¶¶9-12. Based upon the plain and ordinary terms selected by the legislature, the validity of this ruling cannot be doubted. Subsection (C)(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 certain lawsuits certainly was 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’ reconstruction of the majority’s opinion continues with the representation that: “As noted by the Ninth Appellate District, the statute is ambiguous.” *Appellants’ Brief*, p. 18. In truth, no such remark was ever made. The appellate court was able to reach a sensible *in pari materia* construction based upon the plain and unambiguous terms employed. *Horvath*, 194 Ohio App. 3d 8, 11-12, ¶¶9-13. While the majority observed that “the statute does not specifically state to whom these responsibilities are owed,” other portions of the enactment confirmed that the obligations extended to every other “person” on the slopes. *Id.* at 12, ¶13.

There certainly can be no confusion with regard to the General Assembly’s creation of a damage remedy through R.C. §4169.09. The first two sentences of the statute plainly provide that liability will be imposed for violating one of the “responsibilities” set forth in the Chapter, but not for failing to ensure that “another” abides by the statutory directives. *Id.* 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. *Id.*

The dissenting judge's interpretation of the statutory terms is puzzling. *Horvath*, 194 Ohio App. 3d 8, 15. It was initially recognized that the statutory liability imposed by R.C. §4169.01(A) was limited to those who use the "facilities of a ski area[.]" *Id.* at 15, ¶24. The dissent then reasoned that if the legislature had meant allow civil claims when one skier/snowboarder is injured by another, the duties would have been imposed upon "all participants in the sport, regardless of where they ski." *Id.* The dissenting judge concluded from this that no one except a ski area operator should be allowed to exercise the statutory remedy. With all due respect, abiding by the plain and ordinary meaning of the terms selected by the legislature will result in the majority of skiing/snowboarders being allowed to seek damages in appropriate cases. While those who make use of public parks and private slopes may be excluded from the statutory remedy, such was the General Assembly's prerogative.

Defendants would nevertheless have this Court construe both R.C. §4169.08 and §4169.09 to "govern only the relationship between ski area operators and skiers." *Appellant's Brief*, p. 22. It is difficult to believe that the General Assembly would have taken the time and effort to draft, debate, and adopt a code of responsibilities that comes into play only in the unlikely event that a resort operator happens to wander onto the slope and is injured by a skier/snowboarder. Defendants' ill-conceived 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 Co.* (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 provisions; 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 little 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 adopt 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. *Appellant’s Brief*, pp. 25-26. 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.* 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).

Consistent with this long line of authority, 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 noise emanating from the terrain park while careening across a gentle "green circle" run populated with novice skiers. *Supp. 0001 & 0011-14*. 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 not have possibly been complying while his head was turned over his back shoulder. *Id.* If a speeding motorist had caused a collision while gazing out his back window, no sane person would dare suggest that his dereliction had been something less than reckless.

There is no dancing around the simple verity that the collision that ensued between the skier and snowboarder was both relatively predictable and easily preventable. Had a young child been lying in Defendant Ish's 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 this third Proposition of Law should be rejected.

CONCLUSION

For the foregoing reasons, this Court should affirm the Ninth District Court of Appeals in all respects.

Respectfully Submitted,

James A. Sennett (per authority)
James A. Sennett, Esq. (#0022775)
SENNETT FISHER, L.L.C.

*Attorneys for Plaintiff-Appellees, Angel
and Eugene Horvath*



Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A.
[COUNSEL OF RECORD]

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Brief** has been sent by e-mail and regular U.S. Mail, on this 31st day of January, 2012 to:

Timothy J. Fitzgerald, Esq.
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, Ohio 44115-2108
*Attorney for Defendant-Appellants,
David Ish, et al.*



Paul W. Flowers, Esq., (#0046625)
PAUL W. FLOWERS CO., L.P.A.
Attorney for Plaintiff-Appellees