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In the Supreme Court of Ohio

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*ANGEL L. HORVATH, et al.,*

Plaintiffs-Appellees,

v.

*DAVID ISH, et al.,*

Defendants-Appellants.

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

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**APPELLANTS' REPLY BRIEF**

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*I.*  
ARGUMENT

**A. Appellees' Straw Man Arguments Are Obvious.**

The Appellees' Brief is based upon faulty logic predicated upon a series of straw man arguments that bear absolutely no relation to the facts of this case or the legal principles involved. Appellees apparently hope the Court will accept their egregious examples and hypothetical arguments as accurate and true. But the truth is that Appellees have simply ignored Appellants' actual positions. Appellees have substituted their own distorted, exaggerated and misrepresented version of the Appellants' positions hoping to sway and influence the Court's opinion in this appeal.

There has been no "dramatic changes in the scope of this appeal" after jurisdiction was accepted. The three propositions of law in Appellants' Merit Brief are verbatim the same three propositions of law appearing in the Memorandum in Support of Jurisdiction. Never have Appellants argued for a "new form of judicially imposed skier/snowboarder immunity," or as Appellees disparagingly characterize Appellants' objective -- "the creation of 'litigation free' slopes." Never has it been suggested or advocated by Appellants that this Court should adopt any proposition of law that would license and condone drunken skiers "launch[ing]" themselves on their skies and snowboards down Ohio's crowded ski slopes, with eyes closed shut, where they could careen into other persons and skiers "without fear of being held civilly liable" for the inevitable collision and resulting injuries. The first proposition of law does not allow for "a form of absolute immunity for skiers and snowboarders." Appellees' positing otherwise is straw man logic at its worst.

Appellants also have never “abandoned . . . extreme positions” in favor of a “kindler, gentler version” of what the law should be in Ohio. Appellants have always and consistently advocated, and they advocate still, that (1) collisions between skiers are an inherent risk of the sport, (2) the law in Ohio should hold skiers -- and snowboarders -- liable for injuries but only when they have breached the duty owed to fellow skiers not to intentionally or recklessly injure them, and (3) Ohio’s Ski-Resort Statutes, R.C. §§4169.08 and 4169.09, must be construed in accordance with the long-standing and well-reasoned common law rule and standard governing sport and recreational activities.

Adoption of each of these three legal principles would not, as Appellees argue in opposing the first, “upend decades of established precedent.”

And Appellants are not “oddly surprised” that there are no Ohio cases dealing with the inherent risk of a collision between skiers. The lack of case law in this area of recreational activities is not a reflection of or commentary on the geographic reality that “Ohio is a relatively flat Midwestern state.” Appellees confidently suggest that “[t]he 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.” Perhaps. But such unfounded speculation must fail due to the much more logical and likely reason for the lack of case law in the area, as proposed recently by the court in *Fontaine v. Boyd*, No. WC-2007-0794, 2011 R.I.Super. LEXIS 27 (Feb. 21, 2011), when addressing the ski-resort law adopted in New

Hampshire.<sup>1</sup> The *Fontaine* court noted rhetorically whether the dearth of reported case authority in that state -- “a state replete with ski resorts” -- involving collisions between skiers “suggest a generally accepted view that, in the ordinary case, a skier has no liability for colliding with and causing injury to another skier[.]” *Id.* at \*17, n.4.

#### B. Appellees’ Silence on Prominent Arguments of the Case Is Deafening.

It is just as telling what isn’t addressed in the Appellees’ Brief. With but one exception, Appellees don’t bother addressing any of the case law from other jurisdictions cited and discussed at length in Appellants’ Merit Brief. The one case they do discuss, but only in passing, *Cheong v. Antablin*, 16 Cal.4th 1063, 68 Cal.Rptr.2d 859, 946 P.2d 817 (1997), supports Appellants’ position completely in this case.<sup>2</sup> *Id.* at 1068-1069. There is no effort made to distinguish the facts or criticize the legal holding in the *Cheong* case. Perhaps it is because there is no credible distinguishing or criticizing that can be made with the case at bar.

While a half-hearted attempt is made in Appellees’ Brief to challenge the first proposition of law that collisions between skiers are an inherent risk of skiing, Appellees appear to concede, as they must, that “the more sensible rule” in *Cheong* regarding a skier’s civil liability to other skiers for collisions on the ski slopes “fell in line with Ohio, as well as virtually every state.” Appellants couldn’t agree more.

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<sup>1</sup>Judicial notice probably can be taken that New Hampshire is not “a relatively flat Midwestern state.”

<sup>2</sup>Appellees note that the appellate case cited in Appellants’ Jurisdictional Memorandum for the general proposition that collisions between skiers is an inherent risk of skiing, *Cheong v. Antablin*, 50 Cal.App.4th 971, 57 Cal. Rptr.2d 581 (Cal. App. 2d Dist. 1996), was “superceded” by the California Supreme Court. But significantly, the California appellate opinion was not overruled by the California Supreme Court which also did not disavow the observation that collisions between skiers are an inherent risk of skiing. Notably, Appellees have cited not a single case holding that collisions between skiers are not an inherent risk of the sport.

Equally surprising is the fact that Appellees don't bother addressing the contention that the ski-resort provisions of R.C. Chapter 4169 must be construed in accordance with the common law for sporting activities established in precedent from this Court dating as far back as 1925. *Anderson v. Ceccardi*, 6 Ohio St.3d 110, 114, 451 N.E.2d 780 (1983), citing *Cincinnati Base Ball Club Co. v. Eno*, 112 Ohio St. 175, 180-181, 147 N.E. 86 (1925). It is the progeny of the *Eno* opinion in cases like *Marchetti v. Kalish*, 53 Ohio St.3d 95, 559 N.E.2d 699 (1990) and *Thompson v. McNeill*, 53 Ohio St.3d 102, 559 N.E.2d 705 (1990) that dictate the law to be written and outcome here.

The utter silence from Appellees' Brief on all these major points and prominent issues is deafening.

**C. The Ninth Appellate District Did Address and Resolve the Issue Raised in Proposition of Law No. II.**

In the hopes of avoiding a decision on the merits from this Court, Appellees have argued that the Ninth Appellate District did not resolve the legal issues raised by Appellants regarding the scope of R.C. §§4169.08 and 4169.09. They assert that any opinion from this Court "would be purely advisory." Appellees have missed the entire focus of the second proposition of law. Appellees' argument that the Ninth Appellate District never resolved the negligence per se question is a red-herring. Before a violation of any statutory provision can give rise to negligence per se, the statutory duty must be owed to the person seeking application of the statute. See, *Hurst v. Enterprise Title Agency, Inc.*, 157 Ohio App.3d 133, 2004-Ohio-2307, 809 N.E.2d 689, ¶¶26-27 (11th Dist.); *Scheetz v. Kentwood, Inc.*, 152 Ohio App.3d 20, 2003-Ohio-1209, at ¶11 (11th Dist.); *Debie v. Cochran Pharmacy-Berwick, Inc.*, 11 Ohio St.2d 38, 41-42, 227 N.E.2d

603 (1967); 70 O.Jur.3d, Negligence, §60 at 156-157.

The court of appeals did resolve the issue presented in Proposition of Law No. II when it held that the provisions of R.C. Chapter 4169 apply to collisions and accidents between skiers. Even though “the statute does not specifically state to whom these responsibilities are owed,” the majority opinion expressly held that R.C. §§4169.08(C) and 4169.09 “apply to accidents between skiers.” *Horvath v. Ish*, 194 Ohio App.3d 8, 2011-Ohio-2239, ¶13 (9th Dist.) (Apx. p. A9). This holding is contrary to the legislative history for the enactment of R.C. Chapter 4169. The Ninth Appellate District’s holding is at odds with the legal authority from other jurisdictions cited in Appellants’ Merit Brief with comparable statutes. Instead of addressing this authority, Appellees simply try to avoid the issue actually decided by the Ninth Appellate District by claiming it is premature for this Court to address the negligence per se issue because the court of appeals opinion simply “sets the stage for the procedure that is to be followed upon remand.” But before even addressing the negligence per se question in order to determine whether a remand was necessary, it first had to be determined that the legislation under consideration was intended to protect the person allegedly injured. *Hernandez v. Martin Chevrolet, Inc.*, 72 Ohio St.3d 302, 303, 1995-Ohio-200, 649 N.E.2d 1215. That is what the Ninth Appellate District did by holding that R.C. §§4169.08(C) and 4169.09 apply to collisions and accidents between skiers. That is the precise legal flaw in the opinion which Proposition of Law No. II addresses directly.

Appellees also try to confuse the real issue by analogizing R.C. §§4169.08 and 4169.09 to the law established for motorists by Ohio’s assured clear distance statute, R.C. §4511.21(A). However, R.C. §4511.21(A) is not analogous to the statutes at issue

here. First, this Court has already declared that the assured clear distance statute sets forth a rule of conduct that applies for the safety of the public generally. *Skinner v. Pennsylvania R. Co.*, 127 Ohio St. 69, 71, 186 N.E.2d 722, 723 (1933). Other than the Ninth Appellate District here, no other court in Ohio, including this Court, has ever held that R.C. §§4169.08 and 4169.09 apply to and between skiers. The dissent in this case explains why those sections don't establish a rule of conduct between skiers. *Horvath*, at ¶¶22-24 (Carr., J., dissent) (Apx. pp. A12-A14). The trial judge did as well. (Trial Ct. Op. at pp. 7-9, Apx. pp. A21-A23). The well-reasoned authority cited in Appellants' Merit Brief also establish why R.C. §§4169.08 and 4169.09 shouldn't apply to and between skiers. See, *Wolfson v. Glass*, 301 A.D.2d 843, 844-845, 754 N.Y.S.2d 82 (N.Y.App.Div. 2003)(interpreting the Massachusetts Ski Safety Act). Appellees have cited no case from any jurisdiction to the contrary. Finally, there is no comparable provision in Title 45 of the Revised Code providing that driving is a "hazardous" activity wherein a motorist "expressly assumes the risk of and legal responsibility for injury, death, or loss to person or property that results from the inherent risks of" driving. But Ohio's ski safety statute does just that. See, R.C. §4169.08(A)(1).

#### D. R.C. §4169.09 Does Not Impose Liability for Injury to Another "Skier."

As used throughout R.C. Chapter 4169, the term "skier" has a very specific and defined meaning. In pertinent part, "[s]kier' means any person *who is using the facilities of a ski area \* \* \* for the purpose of skiing\* \* \**" R.C. §4169.01(A) (Emphasis added). The General Assembly felt it necessary to set forth this special definition to the term "skier." As noted by the dissent, "[i]f the goal of R.C. Chapter 4169 were 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."

*Horvath*, at ¶24 (Carr, J., dissent)(Apx. p. A13)

Moreover, nowhere in R.C. §4169.09 is it stated that the liability provided for therein is for injury to another "skier." The reason for this is 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 ... ." R.C. §4169.08(A)(1). It would make no logical sense to provide in one section of R.C. Chapter 4169 that "a skier expressly assumes the risk of and legal responsibility for injury" to himself or herself from the inherent risks of skiing (i.e., colliding with another skier) but in the next section to say that another skier is still civilly liable to the injured skier for that very same injury from the same inherent risk. When one assumes the risk of injury, it relieves another of the duty that may have been owed. One skier cannot be held liable in negligence for an injury resulting from a risk assumed by another skier, absent evidence of intentional or reckless conduct. That is why R.C. §§4169.08(C) and 4169.09 must be construed in accordance with the common law sport and recreational activities rule.

**E. Appellees' Distorted Factual Recitation is Misleading.**

Appellees accuse Appellants of reciting a "contrived version of the events" in their Merit Brief. But it is actually Appellees who have manipulated the facts to suit their own needs. By distortion of the facts, Appellees have tried to couch what happened between Appellant Angel Horvath and Appellee David Ish at the bottom of Buttermilk Hill as "a far more disturbing scenario." They do this in trying to give the impression

that the terrain park played an immediate role in the collision. The collision did not occur in the terrain park. (Second Supp. at p. 19 - D. Ish. Tr. at 38:14-15) The terrain park played no such role. David Ish was not doing “jumping tricks” and had not “flown over jumps and hit the ‘fat box rail’” just before colliding with Angel Horvath. But that is the wrong impression that is created in the first full paragraph of page 6 in Appellees’ Brief.

In their brief at page 5, Appellees also incorrectly assert that Eugene Horvath “confirmed” that David Ish had emerged from the terrain park just before the collision. But in his deposition, Eugene Horvath made no such confirmation in his testimony. He testified instead that he only “believe[d] it was from [the] terrain park.” (Second Supp. at p. 13 - E. Horvath Tr. at 38:6-7) Eugene Horvath never actually saw when or where David Ish had exited the terrain park because he didn’t see David Ish until “he cut out in front of me.” (Second Supp. at p. 13 - E. Horvath tr. at p. 38:24-25) That was the very first time he saw David Ish. (Second Supp. at p. 13 - E. Horvath Tr. at 39:1-9)

Moreover, Eugene Horvath and Angel Horvath were in “the middle of the hill,” whereas the terrain park was some distance away and ran along the left side of the hill. (Second Supp. at p. 13 - E. Horvath Tr. at 38:13-21) According to Eugene Horvath, he and Angel Horvath were about 70 percent of the way down Buttermilk Hill before he first heard any yelling from behind; then the collision occurred even further down toward the bottom of the hill. (Supp. p. 81 - E. Horvath Tr. at 35:24-25, 64:19-65:11) On March 6, 2007, the terrain park was not located near the bottom of the hill. It started near the upper part of Buttermilk Hill and ran about half the distance of the hill. (Second Supp. p. 18-19 - D. Ish Tr. at 37:13-39:1) The collision was at the bottom of the

hill. (Second Supp. p. 19 - D. Ish Tr. at 39:2-4)

In the end, it was Eugene Horvath who testified that he “did not perceive any problem” regarding the way David Ish was snowboarding “until the impact” with Angel Horvath. (Supp. p. 83 - E. Horvath Tr. at 40:14-17) This is not a “contrived version of the events.” This is not the testimony of “the devoted family members and friends who had accompanied [David Ish] that day.” It is the testimony of Angel Horvath’s own spouse, who is also a named party in this case. To whatever extent Eugene Horvath’s affidavit sought to change this testimony given under oath during his deposition in order to overcome summary judgment, his affidavit cannot be considered. See, *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, paragraph 3 of the syllabus (“An affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat the motion for summary judgment.”)

Finally, Appellees maintain at page 9 of their Brief that Angel Horvath was a novice skier just starting out in the “new sport she was learning.” This accident happened in March 2007. Angel Horvath had been skiing since the beginning of the ski season the year before in 2006. She considered herself an “intermediate skier” who owned her own skies and equipment, had skied about 25 times before this accident, had received extensive private and group instruction for two full weeks from Austrian ski instructors at Boyne Highlands, a ski resort in Michigan, where she won a trophy for finishing third in a race, and at Peek ‘n Peek in New York. (A. Horvath Tr. at 86:10-90:25) She had been to Boston Mills five or six times. (A. Horvath Tr. at 91:11-13)

**F. Whatever Variations May Exist in the Testimony Does Not Demonstrate the Perversity Needed to Establish Recklessness.**

This case does not involve a re-writing of the standard for recklessness. That standard is well-established in precedent from this Court, like *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, paragraph 3 of the syllabus, where this Court held:

Recklessness is a perverse disregard of a known risk. Recklessness, therefore, necessarily requires something more than mere negligence. The actor must be conscious that his conduct will in all probability result in injury.

This Court is being called upon in this case to determine whether and how the common law rule governing sport and recreational activities applies to skiing in light of R.C. Chapter 4169. Applying the recklessness standard to different circumstances and factual situations is not beyond this Court's jurisdiction or prior practice. The Court frequently is asked to interpret Ohio's Sovereign Immunity Statute, R.C. Chapter 2744, and to decide whether liability attaches to conduct engaged in by the sovereign or a political subdivision or one of its employees for allegedly reckless conduct. Appellees' argument that this Court should refrain from doing so here ignores this prior practice by the Court.

Appellees' colorful and inflammatory rhetoric aside,<sup>3</sup> the actual facts and evidence in this case do not rise to that level of perversity to establish recklessness. Recklessness requires conduct which 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. And

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<sup>3</sup>See Appellees' Brief at p. 10 where David Ish is accused of "display[ing] an astonishing indifference for the safety of others" and compared to "thrill seekers and X-Games wannabes."

therein lies the fatal flaw in the Ninth Appellate District's ultimate conclusion.

In reversing summary judgment, the Ninth Appellate District concluded that a question of fact remained as to whether David Ish was "reckless" because two witnesses, Eugene Horvath and Tyler Ish, "each described a slightly different version of the events during their depositions." *Horvath*, at ¶18 (Apx. p. A10). Appellees try to pick-up on this determination in their Brief by noting that Tyler Ish's "description of the crash differs markedly from his brother's unlikely account." But, whether "slightly" or "markedly" different, neither the Ninth Appellate District majority in its opinion nor Appellees in their Brief here have pointed to any facts or evidence in the record that could be found to rise to the level of perversity needed to constitute "recklessness." It cannot be forgotten that Eugene Horvath testified that he "did not perceive *any problem*" regarding the way David Ish was snowboarding "until the impact" with Angel Horvath. (Supp. p. 83 - E. Horvath Tr. at 40:14-17 (emphasis added)).

In almost every case of simple negligence, witnesses' testify to different facts and versions of the events. Such conflicting testimony cannot be the basis for elevating a case of simple negligence to one of recklessness, which is precisely what the Ninth Appellate District has done here. Allowing the Ninth Appellate District's reported opinion here to stand will "upend decades of established precedent."

Revised Code Sections 4169.08 and 4169.09 are intended to encourage and promote safety on the ski slopes. Those statutes are analogous to the rules governing any recreational or sporting activity like baseball, golf and the game of kick-the-can. Such rules are intended to avoid injury to other participants. It is "eminently sensible" that all participants in sport or recreational activities comply with the rules of the game. No

one seriously would suggest that baseball players should conduct themselves or act in a way that is designed to inflict an injury on another participant. The same is true for football, basketball, volleyball, or cheerleading. Even a high-contact sport like martial arts recognizes the limits of liability. See, *Barakat v. Pordash*, 164 Ohio App.3d 328, 2005-Ohio-6095, 842 N.E.2d 120 (8th Dist.). But when a participant fails, due to negligence or otherwise, to abide by those rules designed to enhance the safety of the sport, absent intentional or recklessness, there is no liability. Revised Code Sections 4169.08 and 4169.09 should be construed in accordance with the common law rule in Ohio. See, *Marchetti*, 53 Ohio St.3d at 99-100 (“Before a party may proceed with a cause of action involving injury resulting from a recreational or sports activity, reckless or intentional conduct must exist.”) That degree of conduct did not occur here.

## *II* 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 the adopt of their three propositions of law, reversal of the judgment of the Ninth District Court of Appeals, reinstatement of the trial court’s summary judgment and entry of final judgment in their favor as a matter of law.

Respectfully submitted,



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PROOF OF SERVICE

A copy of the foregoing *Appellants' Reply Brief* was sent by regular U.S. Mail, postage pre-paid, this 21st day of February, 2012 to the following:

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