

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-1150

JEREMY PAULEY; CHRISTINE PAULEY
Plaintiff-Appellants,

-vs-

CITY OF CIRCLEVILLE
Defendant-Appellee.

ON APPEAL FROM THE OHIO FOURTH APPELLATE DISTRICT,
PICKAWAY COUNTY, CASE NO. 2010CA0031

MEMORANDUM IN REPOSE OF DEFENDANT-APPELLEE,
CITY OF CIRCLEVILLE

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In accordance with S. Ct. Prac. R. 3.2 Defendant-Appellee offers the following in support of the Memorandum in Response.

THE LOWER COURT RULINGS DO NOT CREATE AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

Plaintiff-Appellant attempts to create a disparity between the Appellate Districts were none exists. The differences in the appellate decisions can be traced to the facts of the cases and the Ohio Rules of Civil Procedure governing the motions. Using a combination of colorful, inflammatory writing and limited analysis the Plaintiff-Appellant seeks to present conflict where none exists. It is through this limited analysis that Plaintiff-Appellant seeks jurisdiction before this court

The Pickaway Common Pleas court correctly granted summary judgment and the Fourth District rightly upheld the decision on the basis of the “recreational user statute,” which is codified in R.C. 1533.181. The recreational user statute in Ohio states that no owner of privately owned property, non-residential premises, owes any duty to a recreational user to keep the premises safe for entry or use (see R.C. 1533.181 and R.C. 1533.18(B)). The Ohio Supreme Court has expanded the statute to apply to municipal property as well. *See LiCause v. City of Canton* (1989), 42 Ohio St.3d 109, 537 N.E.2d 1298

R.C. § 1533.181

(A) No owner, lessee, or occupant of premises:

- (1) Owes any duty to a recreational user to keep the premises safe for entry or use;
- (2) Extends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use;
- (3) Assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user.

(B) Division (A) of this section applies to the owner, lessee, or occupant of privately owned, nonresidential premises, whether or not the premises are kept open for public use and whether or not the owner, lessee, or occupant denies entry to certain individuals.

R.C. § 1533.18

(A) "Premises" means all privately owned lands, ways, and waters, and any buildings and structures thereon, and all privately owned and state-owned lands, ways, and waters leased to a private person, firm, or organization, including any buildings and structures thereon.

(B) "Recreational user" means a person to whom permission has been granted, without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency of the state, or a lease payment or fee paid to the owner of privately owned lands, to enter upon premises to hunt, fish, trap, camp, hike, or swim, or to operate a snowmobile, all-purpose vehicle, or four-wheel drive motor vehicle, or to engage in other recreational pursuits.

(C) "All-purpose vehicle" has the same meaning as in section 4519.01 of the Revised Code.

The statutory language in R.C. 1533.181 requires that the defendant must establish the following elements in order to be protected from suit by statutory immunity: (1) defendant is an owner, lessee, or occupant of the premises, (2) the plaintiff is a recreational user, and (3) the suit at issue arose out of an incident that occurred upon the premises. The analysis requires no more or no less. Pauley seeks to reinterpret and change the law, adding additional steps and requirements to the already well established law in *Miller v. City of Dayton* (1989), 42 Ohio St.3d 113, 114, 537 N.E.2d 1294, 1296. The analysis for the recreational user defense is well-established. Pauley failed to provide a reason why they want to change the law as drafted by the Ohio State Legislature and interpreted by this Court.

LAW AND ARGUMENT

**THE DIRT MOUND DID NOT CHANGE THE CHARACTER OF THE PROPERTY –
THEREFORE THE RECREATIONAL USER IMMUNITY IS APPLICABLE**

Ohio courts have decided that in analyzing the recreational user statute the court must look primarily to the character of the property. "The analysis should focus on the character of the property upon which the injury occurs and the type of activities for which the property is held open to the public." See *Light v. Ohio University* (1986), 28 Ohio St.3d 66, 28 OBR 165, 502

N.E.2d 611; *Loyer v. Buchholz* (1988), 38 Ohio St.3d 65, 526 N.E.2d 300; *Fryberger v. Lake Cable Recreation Assn., Inc.* (1988), 40 Ohio St.3d 349, 533 N.E.2d 738; *Sorrell v. Ohio Dept. of Natural Resources* (1988), 40 Ohio St.3d 141, 532 N.E.2d 722; *Miller v. City of Dayton* (1989), 42 Ohio St.3d 113, 114, 537 N.E.2d 1294, 1296.

Both parties have conceded that the City of Centerville is the owner of Barthelmas Municipal Park and that Pauley's injuries arose while he was on the park premises. The only question remaining is whether Pauley qualifies as a recreational user as defined in R.C. 1533.18(B). Ohio law classifies him as a recreational user. Pursuant to R.C. 1533.18(B), a person is a recreational user if he or she must have had (1) permission to access premises, (2) without the payment of a fee or consideration to the owner, lessee, or occupant of the premises (3) to engage in recreational pursuits.

Oddly the Appellant's do not contest the Pauley was a recreational user, and based on the above case law, Pauley clearly meets the statutory requirements needed to constitute a recreational user under R.C. 1533.181. Pauley was sledding in Barthelmas Park, which was opened to the public free of charge. There are no facts to otherwise prove that sledding activities were prohibited on the park premises. Furthermore, the Ohio Supreme Court has held that sledding constituted a "recreational pursuit" under R.C. 1533.181. *See Marrek v. Cleveland Metroparks Bd. of Commissioners* (1984), 9 Ohio St. 3d 194, 198, 459 N.E. 2d 873, 876-77.

Due to Pauley's status as a "recreational user" as defined by R.C. 1533.18(B), the City of Circleville has satisfied all three prongs of R.C. 1533.181 to invoke statutory immunity. Therefore, the City owed no duty to Pauley to keep or maintain the premises safe for use and in turn, could not be negligent or liable for the injuries that Pauley sustained. Again, the analysis is no more or no less. Pauley attempts to add complicated steps and cites several non-applicable

appellate court decisions in support of his drive to change the well established law and analysis of R.C. 1533.181.

First, Pauley state that Barthelmas Park must be left in its “natural state” as “no immunity should be conferred, when the property owner has rendered the land more dangerous than the recreational users would expect.” see Memorandum in Support of Jurisdiction pg 8. Yet, Pauley then go on to cite a string of cases that are in direct opposition to their claim: See e.g. *Miller v. City of Dayton* (1989), 42 Ohio St.3d 113, 537 N.E.2d 1294 (**plaintiff injured while sliding into second base during soft ball tournament**); *LiCause v. City of Canton*, (1989), 42 Ohio St.3d 109, 537 N.E.2d 1298 (**plaintiffs fell over a cable strung between two posts**); *Sorrell v. Ohio Dept. of Natural Resources, Div. of Parks and Recreation*, (1988), 40 Ohio St.3d 141, 141-142, 532 N.E.2d 722 (**snowmobile rider injured after striking mound of dirt protruding above surface of frozen lake, this mound of dirt was apparently occasioned by the dredging operations**); *Johnson v. Village of New London* (1988), 36 Ohio St.3d 60, 60, 521 N.E.2d 793 (**snow mobile rider was injured when he struck an above-ground cable**)....(**emphasis added**). Memorandum in Support, p. 8. Pauley would have this Court believe that softball fields, cables strung between posts, and mounds of dirt from dredging operations are all the “natural state” of the land. Notably, all the Supreme Court cases listed above and cited by Pauley rightly grant recreational user immunity to the defendants. Stare decisis demands that the rule of law be followed and this court should deny jurisdiction.

In an effort to change the already well established law Pauley mistakenly relies upon *Huffman v. City of Willoughby*. Pauley’s reliance is misplaced. *Huffman* was a 12(B) (6) motion and as such the court was limited by the facts and admissions in the plaintiff’s complaint, we are under no such restriction here. “*Since a court considering a Civ.R. 12(B)(6) motion is confined*

to the allegations of the complaint, it cannot consider matters outside the complaint. Thus, unless the complaint on its face demonstrates the existence of a defense that conclusively bars the plaintiff's claim, a Civ.R.12(B)(6) motion based on an affirmative defense cannot result in the dismissal of a complaint.(emphasis added" Huffman v. Willoughby 2007 WL 4564384, 3 (Ohio App. 11 Dist.) (Ohio App. 11 Dist., 2007). Pauley has failed to show how a mound of dirt changed the character of Barthelmas Park and this court is under no obligation to accept Pauley's speculation and conjecture.

It is improper for Pauley to represent *Huffman* as a case on point because *Huffman* was a 12(B)(6) motion and as such the court was bound by the allegations contained in the plaintiff's complaint. The court stated as much in their decision; "*Based on the allegations of the complaint, the trial court in its judgment entry found "the lowhead dam was clearly created for purposes other than to draw rafters onto the river."* It found that "*the construction of the lowhead dam changed the character of this portion of the river, and that this improvement is not consistent with the purpose of Ohio's Recreational User statute."* The court found the creation of the dam was not an improvement that was made to encourage the recreational use of this part of the river. Instead, the court found it made *that part of the river inherently dangerous and thus not suitable for recreational use (emphasis added).* *Huffman v. Willoughby 2007 WL 4564384, 6 (Ohio App. 11 Dist.) (Ohio App. 11 Dist., 2007).* Pauley has failed to show, and cannot show that the dirt mound changed the character of Barthelmas Park.

As stated above, the analysis goes to the character of the property. The 11th District had to accept the allegations that the building of a "low head dam" changed the character of the river by creating a dangerous area because it was stated in plaintiff's complaint. No evidence has been submitted that the mound of dirt changed the character of the Barthelmas Park. The mound

of dirt was no different than the other hills located in the park. Pauley would have this court believe the character of the park changed because he was injured on the mound of dirt. While Pauley's accident was tragic, it does not automatically imply that someone was negligent. It was not the mound of dirt that injured Pauley. Pauley's injuries were the result of his sledding down the mound of dirt in the dark of night.

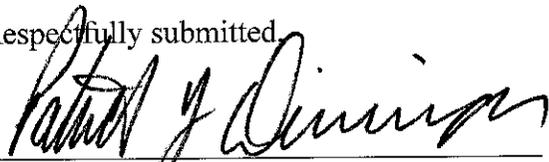
In a continuing effort to change the analysis of the recreational user statute Pauley cites to *Ryll v. Columbus Fireworks Display Co.* 95 Ohio St. 3d 467, 2002-Ohio2584, 769 N.E. 2d 372, and the subsequent citing case *Henney v. Shelby City School District* (Mar. 23 2006), 5th Dist. No. 2005CA0064, 2006-Ohio-1382, 2006 WL 747475. Again, Pauley's reliance is misplaced. The analysis in *Ryll* and *Henney* looks to the cause of the injury not just the location. In both cases it was determined that the cause of injury had nothing to do with the premises as defined under R.C. 1533.18(A), the cause of the injury in *Ryll* was the shrapnel from fireworks, and the cause of injury in *Henney* was the lack of properly placed safety equipment. Pauley's injuries have everything to do with the premises, and are a direct result of Pauley's sledding down a hill in Barthelmas Park. It is only through speculation and clever editorializing of testimony that Plaintiff-Appellant can compare Pauley to *Ryll* and *Henney*.

In a more recent case the recreational statute does not distinguish between passive and active negligence by an owner of the land who retains immunity under R.C. 1533.181. The Eighth District Court of Appeals stated that:

We hold that the recreational users' statute does not contemplate a distinction between what appellant terms as passive and active negligence. The statute protects all owners of land who fall within it from all acts of negligence. Its application simply turns on the status of the plaintiff." *Milliff v. Cleveland Metroparks Sys.* (June 4, 1987) Cuyahoga App. No. 52315, 1987 WL 11969 as cited in *Estate of Finley v. Cleveland Metroparks*, August 26, 2010, 189 Ohio App. 3d 139)

The Eighth District Court of Appeals simply applies the statute as written to the factual situation presented. Due to Pauley's status as a "recreational user" as defined by R.C. 1533.18(B), the City of Circleville owes no duty to Pauley to maintain the premises, in accordance with R.C. 1533.181. If no duty is owed then there can be no negligence. If there is no negligence then the City of Circleville is not liable and should prevail. Precedent dictates that recreational user immunity apply to those defendants who can prove that (1) defendant is an owner, lessee, or occupant of the premises, (2) the plaintiff is a recreational user, and (3) the suit at issue arose out of an incident that occurred upon the premises – City of Circleville is the owner of Barthelmas Park, Jeremy Pauley was a recreational user and he was injured while sled-riding on the premises; none of these facts are in dispute. The analysis is no more or no less. For the reasons stated above the City of Circleville requests that this honorable court deny jurisdiction.

Respectfully submitted,



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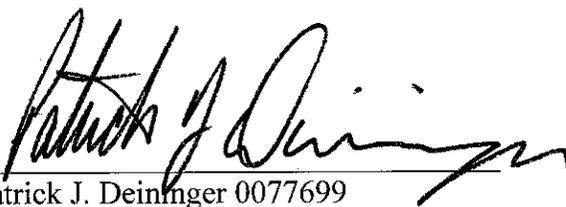
CERTIFICATE OF SERVICE

The undersigned certifies a true and accurate copy of the foregoing Memorandum in Response of Defendant-Appellee City of Circleville has been served by regular US Mail on counsel or parties of record as follows this 8 day of August, 2012:

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