

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**

**MERIT BRIEF OF PLAINTIFF-APPELLANTS,
JEREMY AND CHRISTINE PAULEY**

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INTRODUCTION

Plaintiff-Appellant, Jeremy Pauley, fractured his neck while sled riding in a park that was owned and maintained by Defendant-Appellee, City of Circleville. He is now a quadriplegic. Municipal workers had created large mounds of dirt on the City's grounds, which were littered with debris. Unbeknownst to Plaintiff, an object resembling the end of a railroad tie was jutting out from one of the larger mounds and was covered with snow. The youth struck the fixed object while sledding head first down the mound.

The pivotal question that is now before this Court is whether the "recreational user" immunity that is afforded by R.C. 1533.181 extends to man-made hazards that do not further the recreational value of the property. In a divided decision, the Fourth District agreed with Defendant that a "recreational user" is barred from pursuing any civil claims occurring on open lands so long as a "flying object" is not the cause of the injury. *Apx. 0003-16*. Such individuals are essentially "fair game" and can be maimed or killed with impunity by those who create and leave trash, scrap materials, dangerous chemicals, and other hazards on property that is available for public use.

This ruling is not unprecedented, but reflects a minority view that advocates an unduly expansive interpretation of the recreational user immunity statute. As reflected in Presiding Judge Abele's dissent, a number of other courts have held that man-made hazards that do not further or maintain the recreational value of the property are unworthy of such protections. *Apx. 00017-24*. Although this Court has yet to examine the conflict that has developed among the appellate districts, the latter view finds ample support in decisions such as *Miller v. City of Dayton*, 42 Ohio St. 3d 113, 114-115, 537 N.E. 2d 1294 (1989). The courts that have rationally construed recreational immunity have furthered the legislature's evident intentions by ensuring that only those conscientious property owners who avoid affirmatively creating unnecessary threats to

the safety of others are protected from liability.

The implications of the unjustifiably broad construction of R.C. 1533.181 are difficult to overstate. Property owners are now free in some counties to deposit hazardous materials and chemicals on lands that they know are being enjoyed by adults and children alike for recreational purposes. They no longer have to fear that they will be liable for the dangers they have created, as the bar against a civil recovery reaches anyone who dares to venture on the premises in a "recreational user" capacity. It is inconceivable that the General Assembly intended to encourage such frightening practices when the statute was enacted.

As Presiding Judge Abele explained in his dissent, a far more pragmatic interpretation of R.C. 1533.181 is available. *Apx. 00017-24*. While property owners should be free to add improvements to the premises that continue or enhance its recreational value, unnecessary man-made hazards raise entirely different concerns. Consistent with the consensus of authority, he reasoned that immunity does not extend to those who devalue the premises in a manner that only increases the risk of harm. *Id.* For the reasons that will be developed in this Brief, this Court should uphold the logic of the dissenting opinion and conclusively establish across Ohio that derelict property owners can indeed be held accountable in appropriate instances for the damages they inflict upon recreational users of the grounds.

STATEMENT OF THE CASE

Plaintiff-Appellants commenced this personal injury action in the Pickaway County Court of Common Pleas on October 6, 2008. The Complaint alleged that Plaintiff, Jeremy Pauley, had been rendered a quadriplegic when his neck was fractured while sled riding at Barthelmas Park on January 24, 2007. The high school senior had struck the end of a railroad tie head-first, which was covered with snow. The hazard had been created by City of Circleville employees, who were also responsible for identifying and eliminating dangerous conditions in the park. Plaintiff, Christine Pauley, asserted a claim for loss of consortium.

An Answer denying liability and interposing various affirmative defenses was submitted by Defendant, City of Circleville, on November 6, 2008. The parties proceeded with discovery.

On June 1, 2010, Defendant moved for summary judgment upon all claims (“Defendant’s Motion”). Plaintiffs’ timely Memorandum in Opposition followed on July 12, 2010 (“Plaintiffs’ Memorandum in Opposition”). Seven days later, Defendant submitted a Reply Memorandum.

In a Final Order dated August 23, 2010, Judge Knece granted the Motion for Summary Judgment solely on the basis of recreational user immunity. *Apx. 00026-31*. Plaintiffs filed their Notice of Appeal on August 27, 2010.

Following briefing and oral argument, the Fourth District affirmed the trial judge. *Apx. 0003-16*. The majority adopted the minority view that the statutory immunity barred any claim, except for “flying objects,” once Plaintiff acknowledged that he had been present in the park as a “recreational user.” *Id.* In his dissent, Presiding Judge Abele cited *Miller*, 42 Ohio St. 3d 113, and a number of intermediate appellate decisions recognizing that the nature of the premises and cause of the injury also have to be considered. *Id.*, at 00017-20. Since Defendant had never suggested that the concealed railroad tie had been dumped

in the park to enhance its recreational value, summary judgment had been erroneously granted. *Id.*, at 00020-24.

Plaintiffs filed another Notice of Appeal on July 9, 2012. *Apx. 0001*. This Court has now agreed to review the issues of public and great general importance that have been raised by the lower courts' rulings. *Pauley v. Circleville*, 133 Ohio St. 3d 1422, 2012-Ohio-4902, 976 N.E. 2d 913.

STATEMENT OF THE FACTS

The following undisputed facts were established during the summary judgment proceedings. Barthelmas Park is owned by Defendant, City of Circleville. *Deposition of Charles T. Taylor taken December 7, 2009, p. 18, pertinent portions appended to Plaintiffs' Memorandum in Opposition as Exhibit D.* There are a number of buildings and structures at the site, including a shelter house and concession stand. *Plaintiffs' Memorandum in Opposition, Exhibit D, pp. 18-20; Deposition of Phillip S. Riffle taken December 7, 2009, p. 9, pertinent portions appended to Plaintiffs' Memorandum in Opposition as Exhibit E.* The park remains open throughout the winter. *Id., Exhibit E, p. 25.* A fence surrounds the premises, but access is provided from Kingston Pike. *Deposition of Harold W. Gray, Jr., p. 18, pertinent portions appended to Plaintiffs' Memorandum in Opposition as Exhibit F.*

The supervisor of the street department, Phillip S. Riffle ("Riffle"), had seen children sledding on the hills in the park. *Plaintiffs' Memorandum in Opposition Exhibit E, p. 25.* Police Chief Harold W. Gray, Jr. ("Gray") testified as follows:

Q. *** Not unusual for kids to go to that park and sled; correct?

A. Not at all.

Plaintiffs' Memorandum in Opposition, Exhibit F, p. 22.

Street Superintendent Dane Patterson, Jr. ("Patterson"), oversaw the City's parks and recreations activities and also was responsible for building maintenance. *Deposition of Dane Patterson, Jr. taken March 16, 2010, pp. 10-12, pertinent portions appended to Plaintiffs' Memorandum in Opposition as Exhibit G.* He explained that while a Wal-Mart was being built in the city, the construction workers gave away the topsoil that had been removed from the site. *Id., Exhibit G, pp. 23-24.* Over a period of roughly two weeks, approximately 200 truck loads were hauled away by the City. *Id.,*

Exhibit G, pp. 26-28. The construction workers loaded the dirt into the trucks for Defendant's drivers. *Id., Exhibit G, p. 30.* Nobody was looking for or removing any debris in the topsoil. *Id., Exhibit G, pp. 29-30.*

The topsoil was dumped at Defendant's maintenance facility, but the workers ran out of space. *Plaintiffs' Memorandum in Opposition, Exhibit E, p. 33; Exhibit G, pp. 75-76.* Superintendent Patterson decided to start hauling the dirt to Barthelmas Park. *Id., Exhibit G, pp. 33-34.* Two mounds were created, one of which was "considerably" larger than the other. *Id., Exhibit G, p. 35.*

In 2007, Superintendent Patterson's duties included inspection of the parks.

Q. Part of your duty as maintenance is to inspect the park to make sure there is [sic] no dangerous hazards that would hurt people coming to use the facilities; correct?

A. Yes.

Plaintiffs' Memorandum in Opposition, Exhibit G., pp. 77-78. Even though he was the "Street Superintendent[,]," this responsibility had been "thrown on [him.]" *Id., Exhibit G, p. 78.* No one was specifically delegated to inspect the parks, and Patterson would simply drive through and look for issues to address. *Id., Exhibit G, p. 79.* He explained that: "That's administration's fault." *Id., Exhibit G, p. 79.*

On January 24, 2007, Plaintiff Jeremy Pauley was an 18 year-old student at Logan Elm High School. *Deposition of Jeremy Pauley taken December 8, 2009, pp. 6-9, pertinent portions appended to Plaintiffs' Memorandum in Opposition as Exhibit A.* He and a friend, Kevin Baisden ("Baisden"), met Natasha Cox and Danielle Zeimert at a local McDonald's restaurant late that afternoon. *Deposition of Kevin Baisden taken March 16, 2010, pp. 14-15, pertinent portions appended to Plaintiffs' Memorandum in Opposition as Exhibit B; Deposition of Natasha Cox taken March 16, 2010, p. 16, pertinent portions appended to Plaintiffs' Memorandum in Opposition as Exhibit C.* The group decided to go sled riding at Barthelmas Park. *Plaintiffs' Memorandum in*

Opposition, Exhibit B, pp. 18-19; Exhibit C, p. 15. Plaintiff had been to the park previously, though never to sled ride. *Id., Exhibit A, pp. 40-41.*

Baisden could see from the tracks in the snow that others had been riding sleds on the two dirt mounds that day. *Plaintiffs' Memorandum in Opposition, Exhibit B, p. 23.* The two students spent approximately 30-45 minutes on the snow-covered piles. *Id., Exhibit B, p. 22.* For the most part, the girls just watched. *Id., Exhibit B, pp. 21-22.* Although it was almost completely dark outside, Plaintiff's truck had been positioned so that the headlights shined on the mounds. *Id., Exhibit B, p. 24.*

Plaintiff's final ride was down the smaller of the two mounds of topsoil. *Plaintiffs' Memorandum in Opposition, Exhibit G, p. 35.* Baisden had been on the other pile. *Id., Exhibit B, p. 23.* According to Plaintiff, this mound was approximately 15 feet tall and about 20 feet around. *Id., Exhibit A, pp. 48-49.* From the top, he could not see any obstructions or debris. *Id., Exhibit A, pp. 49-50.* The pile was covered with snow, as well as footprints and tracks. *Id., Exhibit A, p. 50.*

Plaintiff went down the mound while lying on his stomach on his sled. *Plaintiffs' Memorandum in Opposition, Exhibit A, p. 51.* At the bottom of the hill, he "hit an immovable object and stopped and instantly went numb." *Id., Exhibit A, p. 51.* He told Baisden that he could neither move nor breathe. *Id., Exhibit A, pp. 51-52.* Baisden called 911 and, after an agonizingly long wait, emergency rescue personnel arrived. *Id., Exhibit B, pp. 25-27.* Plaintiff was eventually flown to Grant Hospital in Columbus, where he was told by a doctor that his "chances of making it through the night were very slim." *Id., Exhibit A, pp. 55-57.*

Baisden also went to the hospital to be with his friend. *Plaintiffs' Memorandum in Opposition, Exhibit B, pp. 26-27.* When he returned to the park to get the sleds, he saw something that appeared to be a "railroad tie" near where Plaintiff was injured. *Id., Exhibit B, pp. 28-29.* When asked to describe the size of the object, he stated: "It was

big. It was big.” *Id.*, *Exhibit B*, p. 29. The railroad tie appeared to have been “just thrown onto the pile.” *Id.*, *Exhibit B*, p. 30.

Plaintiff, Jeremy Pauley, is now a quadriplegic. *Plaintiffs’ Memorandum in Opposition, Exhibit A*, p. 27. He has been in and out of medical facilities since the date of the incident. *Id.*, *Exhibit A*, p. 61. His fiancé broke off their engagement and he has few friends. *Id.*, *Exhibit A*, pp. 109-110. Plaintiff feels that his life ended when he struck the debris at the bottom of the man-made dirt mound in Barthelmas Park. *Id.*, *Exhibit A*, pp. 110-112.

ARGUMENT

PROPOSITION OF LAW: RECREATIONAL USER IMMUNITY DOES NOT EXTEND TO MAN-MADE HAZARDS UPON REAL PROPERTY THAT DO NOT FURTHER OR MAINTAIN ITS RECREATIONAL VALUE

I. THE RECREATIONAL USER STATUTE

The trial court granted summary judgment, and the Fourth District affirmed, solely on the basis of the “recreational user statute” that is codified in R.C. 1533.181. *Apx., pp. 00025-31*. In pertinent part, the enactment provides that:

- (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. ***

Apx. 00033. The third prong is plainly inapplicable in this case as it extends only to injuries caused by another “recreational user.” *See e.g., Ross v. Strasser*, 116 Ohio App.3d 662, 665, 688 N.E.2d 1120, 1121 (2nd Dist. 1996) (injuries caused when two rollerbladers collided); *Kasunic v. City of Euclid*, 8th Dist. No. 54741, 1988 W.L. 136014 (Dec. 15, 1988) (plaintiffs’ two-year-old son hit with golf balls struck by golfer while both are on city’s public park).

The term “premises” has been defined in R.C. 1533.18(A) to include private and state-owned lands and waterways, including buildings and structures. The enactment further provides that:

“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.

R.C. 1533.18(B); Apx. 00032.

It is readily apparent that the recreational user immunity statute is designed to preclude a right to a recovery of civil damages only in specified instances. As a general rule, legislation that seeks to override the common law must be strictly construed. *Danziger v. Luse*, 103 Ohio St. 3d 337, 339, 2004-Ohio-5227, 815 N.E. 2d 658, 660, ¶11; *Lemley v. Kaiser*, 6 Ohio St. 3d 258, 260, 452 N.E. 2d 1304, 1307 (1983). This Court has explained that:

Courts may not presume that the statute was intended to abrogate the common law. Such an intention must be expressly declared by the legislature or necessarily implied in the language of the statute. [citation omitted].

LaCourse v. Fleitz, 28 Ohio St. 3d 209, 212, 503 N.E. 2d 159, 162 (1986). As one would expect, these fundamental tenets are applicable to R.C. 1533.181. *Loyer v. Buchholz*, 38 Ohio St. 3d 65, 68, 526 N.E. 2d 300, 303, (1988), *fn.3* (refusing to extend recreational user immunity to private owners of residential swimming pools that are not held open to the general public).

II. THE RESTRICTIVE VIEW OF THE STATUTE

Consistent with these venerable principles of strict construction, the lower courts should have held that neither of the other two subsections, R.C. 1533.181(A)(1) & (2), barred the claim as a matter of law. *Apx. 00033*. Both provide that property owners do not owe recreational users any duty to keep or maintain “safe premises.” The oft recognized purpose of the statute is to “encourage owners of premises suitable for recreational pursuits to open their land to public use without fear of liability.” *Loyer*, 38 Ohio St. 3d at 66; *see also Vinar v. City of Bexley*, 142 Ohio App. 3d 341, 345, 755 N.E.

2d 922 (10th Dist. 2001). It has been observed that “[a] grant of immunity from liability was viewed as the quid pro quo for owners who made their private land available for public recreation free of charge.” *Thomas v. Coleco Indust., Inc.*, 673 F. Supp. 1432, 1434 (N.D. Ohio 1987) (citation omitted). Consistent with this legislative purpose, the statute has been employed to preclude claims based upon defects in the land or accidents that occur through no fault of the defendant. *See e.g. Miller*, 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*, 42 Ohio St.3d 109, 537 N.E.2d 1298 (1989) (plaintiffs fell over cables strung between two posts); *Sorrell v. Ohio Dept. of Nat. Res., Div. of Parks & Rec.*, 40 Ohio St.3d 141, 532 N.E.2d 722 (1988) (snowmobile rider injured after striking mound of dirt protruding above surface of a frozen lake); *Johnson v. Village of New London*, 36 Ohio St.3d 60, 521 N.E.2d 793 (1988) (snowmobiler was injured by striking above-ground cable); *Mitchell v. Cleveland Elec. Illum. Co.*, 30 Ohio St.3d 92, 507 N.E.2d 352 (1987) (father and son drowned after being caught in undertow while fishing unsupervised in Lake Erie); *Kendrick v. Cleveland Metroparks Bd. of Commrs.*, 102 Ohio App.3d 739, 658 N.E.2d 5 (8th Dist. 1994) (unsupervised child drown in creek in park).

If Plaintiff had been injured in an area of the park that had been left in its natural state or improved to promote recreational activities, all courts agree that immunity would be imposed by R.C. 1533.181(A)(1) & (2). But, that is not what happened. His neck was fractured on a mound of dirt and debris, which was entirely man-made and concealed with snow. According to the municipality’s logic, no suit could be brought if the city workers had discarded glass shards, rusted nails, or even hazardous chemicals throughout the premises. Under this wildly expansive construction of R.C. 1533.181, every “recreational user” is denied a civil remedy in all instances. *Defendant’s Motion*, p. 6.

No immunity should be conferred, however, when the property owner has rendered the land more dangerous without promoting or preserving recreational activities. The statute is concerned with protecting “natural resources,” not buildings and structures. *Light v. Ohio Univ.*, 28 Ohio St. 3d 66, 68, 502 N.E. 2d 611, 613 (1986). No serious person would suggest that recreational user immunity should be available if a child is injured by noxious chemicals or scrap metal that has been carelessly dumped by the property owner’s employees. In lawsuits involving man-made objects, liability has been precluded only when such improvements enhance the recreational activities on the property. *See e.g., Miller*, 42 Ohio St. 3d 113 (softball player injured while sliding into second base at a city owned field). This Court took care to explain that:

The significant query is whether such improvements change the character of the premises and put the property outside the protection of the recreational-user statute. To consider the question from a different perspective: Are the improvements and man-made structures consistent with the purpose envisioned by the legislature in its grant of immunity? In other words, are the premises (viewed as a whole) those which users enter upon “*** to hunt, fish, trap, camp, hike, swim, or engage in other recreational pursuits?” [emphasis added].

Id., 42 Ohio St. 3d at 114-115. Significantly, Defendant has not disputed that such fact-intensive determinations are ordinarily left for juries to resolve. *Jackson v. Plusquellic*, 58 Ohio App. 3d 67, 68, 568 N.E. 2d 727 (9th Dist. 1989). As the dissent found, reasonable minds could certainly conclude in this instance that the discarded object resembling a railroad tie did nothing to enhance or improve Barthelmas Park. *Apx. 00020*.

This principle was applied in *Huffman v. City of Willoughby*, 11th Dist. No. 2007-L-040, 2007-Ohio-7120, 2007 W.L. 4564384 (Dec. 28, 2007). Two boys had drowned when a raft they were paddling on the Chagrin River was pulled over a dam by the current. *Id.* at p. *1. Their families alleged that the local municipality had “created and

maintained an attractive nuisance[.]” *Id.* With regard to recreational user immunity, the Eleventh District first noted that the burden of proof rested upon the municipality. *Id.* at p. *4. The majority upheld the trial judge’s refusal to dismiss the wrongful death claim on that basis and explained *inter alia* that:

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.

Id. at p. *6.

The same sound logic applies with equal force in the instant case. No sensible juror would ever believe for a moment that the two piles of dirt and debris enhanced the “recreational use” of Barthelmas Park. In essence, the park was merely serving as a convenient (and free) dumping ground. As Plaintiff’s tragic episode confirms, the piles rendered the premises substantially more dangerous, particularly after the hazards were concealed by snow. Given that the dirt and debris had been stored in the park only because no more space was available at Defendant’s maintenance facility, reasonable minds could certainly conclude that the natural setting was neither enhanced nor preserved by their presence. *Plaintiffs’ Memorandum in Opposition, Exhibit E, p. 33; Exhibit G, pp. 33-34.*

This Court’s decision in *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St. 3d 467, 469, 2002-Ohio-2584, 769 N.E. 2d 372, 375, tacitly rejects the position that once a defendant has established that the plaintiff was a “recreational user” of open lands, that is game-set-and-match. In that wrongful death action, the decedent had been killed by shrapnel from an exploding firework shell during a Fourth of July celebration. *Id.* at 467, ¶1. A township had been conducting the fireworks display in a public park. *Id.* at ¶2. The decedent’s survivors maintained in their lawsuit that the negligence and carelessness of township employees had produced the fatality. *Id.* at

467-468, ¶¶2-4. Just as in the instant case, there was no dispute that the decedent was a “recreational user” on “recreational property.” *Id.* at ¶¶1-4. In rejecting the claim to recreational user immunity, Justice Pfeifer’s opinion reasoned that:

R.C. 1533.181(A)(1) does not state that a recreational user is owed no duty. Instead, R.C. 1533.118(A)(1) immunizes an owner, lessee, or occupant of premises only from a duty “to keep the *premises* safe for entry or use.” (Emphasis added.) The cause of the injury in this case had nothing to do with “premises” as defined in R.C. 1533.181(A). The cause of the injury was shrapnel from fireworks, which is not part of “privately-owned lands, ways, waters, and *** buildings and structures thereon.” *Id.* Accordingly, 1533.118(A)(1) and (2) do not immunize Reynoldsburg. To hold otherwise would allow 1533.118 to immunize owners, lessees, and occupants for any of their negligent or reckless acts that occur on “premises.” The plain language of the statute indicates that the General Assembly had no such intention.

Id. at 469, ¶15. In addition to considering whether the plaintiff was a “recreational user” within the meaning of R.C. 1533.18(B), courts must also determine whether the cause of the injury is attributable to premises that are truly recreational.

III. THE FLAWED EXPANSIVE CONSTRUCTION

In joining a minority of courts that have addressed the issue of how far R.C. §1533.181 is to be extended, the Fourth District held that Plaintiff’s “recreational user” status was enough to invoke immunity. *Apx. 00011* (“Thus, if a person qualifies as a recreational user, the premises owner has no duty to the recreational user to keep the premises safe.”) In the process, the majority constrained *Ryll*, 95 Ohio St.3d 467, to “flying object[s.]” *Apx. 00015*. The restriction is purely artificial, and advances no discernible purpose, apart from extinguishing otherwise potentially meritorious claims for damages. The *Ryll* opinion will cease to serve any meaningful purpose if the holding is confined to the occasional “flying object” injuries.

Where, as here, an unnecessary man-made hazard exists that was negligently created and maintained by the defendant’s employees, R.C. 1533.181 has no application.

As both *Ryll*, 95 Ohio St. 3d 467, and *Miller*, 42 Ohio St. 3d 113, instruct, the General Assembly never intended to afford blanket immunity for a property owner's careless and reckless acts.

The notion that a lawsuit is conclusively barred once the injured victim is identified as a "recreational user" cannot be reconciled with *Henney v. Shelby City Sch. Dist.*, 5th Dist. No. 2005-CA0064, 2006-Ohio-1382, 2006 W.L. 747475 (Mar. 23, 2006). The plaintiff had been injured during a pole vault event at a high school and plainly qualified as a "recreational user" under R.C. 1533.18(B). But, the Fifth District unanimously concluded that the recreational user immunity statute was inapplicable. *Id.* at p.*3, ¶¶20-21. Since the personal injury claim was predicated upon the negligent placement of equipment, and not the grounds or structures themselves, neither subsection (A)(1) nor (2) precluded relief from being furnished. *Id.* at p. *3, ¶20.

Toward the end of its analysis of this defense in the proceedings below, Defendant finally recognized the flaws in its logic. The municipality has conceded that "The analysis in *Ryll* and *Henney* looks to the cause of the injury not just the location." *Defendant's Court of Appeals Brief*, p. 15, (emphasis added). Plaintiffs could not agree more, as this is the critical distinction that separates the two competing views of the statute. The Fourth District held that – except when "flying objects" are involved – no further analysis is required once the Plaintiff has been identified as a "recreational user" of property that is open for public use. *Apx. 0003-16*. The dissent, on the other hand, adhered to *Miller*, 42 Ohio St. 3d 113, by looking to the cause of the injury on the premises. *Id.*, 00017-24. The overly-simplistic view that every aspect of a park is "recreational property" was tacitly rejected. Presiding Judge Abele reasoned that:

Here, [Defendant] added an unnatural structure to the park premises—the dirt mounds. [Defendant's] stated purpose in placing the dirt mounds on the park premises was because it had no space to store the dirt at its storage facility. [Defendant] has not suggested that it added the dirt mounds

to enhance the recreational nature of the property. Thus, I believe that the addition of the dirt mounds transformed the character of that part of the park premises from recreational to storage and maintenance. [emphasis added].

Apx. 00020. This compelling logic is entirely consistent with Defendant's acknowledgement that courts should consider "the cause of the injury not just the location." *Defendant's Court of Appeals Brief, p. 15.* The dirt mounds that Defendant's employees had created were nothing more than large waste piles, which appeared to be perfectly suitable for sled ridding once they were blanketed with snow.

There is thus no merit to Defendant's vacuous declaration that Plaintiff "has failed to show, and cannot show that the dirt mound changed the character of Barthelmas Park." *Defendant-Appellee's Memorandum Opposing Jurisdiction, p. 6.* Just as the dissenting Judge did, reasonable jurors certainly could conclude from the evidence in the record that the youth had fractured his neck on nothing more than a municipal dumping ground. Although the burden of proof in the summary judgment proceedings rested squarely upon Defendant, no evidence at all was submitted even remotely suggesting that the recreational value of the park was somehow furthered or protected by the mounds of dirt and debris. *Dresher v. Burt*, 75 Ohio St. 3d 280, 293, 1996-Ohio-107, 662 N.E. 2d 264, 274; *Vahila v. Hall*, 77 Ohio St. 3d 421, 428-430, 1997-Ohio-259, 674 N.E. 2d 1164. A jury therefore should have been empanelled to determine whether the precise situs of the incident still qualified as recreational property. *Miller*, 42 Ohio St. 3d at 114-115; *Jackson*, 58 Ohio App. 3d at 68.

The lower courts' rulings appear even rasher when the foreseeability test is applied. In *Byer v. Lucas*, 7th Dist. 08-NO-351, 2009-Ohio-1022, 2009 W.L. 581710 (Mar. 9, 2009), the Seventh District recognized that the statute only extends to those ordinary risks one would associate with the recreational activity. *Id.* at p. **4-7, ¶¶23-39. In that instance, the plaintiff was seriously injured when she was thrown off a

wagon during a hayride. *Id.* at p. *1, ¶4. The operator of the tractor had been consuming alcoholic beverages and lost control at the top of a steep hill. *Id.* at ¶¶3-4. The panel concluded that the hayride was indeed “recreational activity” within the meaning of the statute. *Id.* at pp. *2-3, ¶¶12-16. But, summary judgment was nevertheless denied because “a farm tractor and its wagon cascading down a steep hill out of control and jackknifing to a stop throwing passengers from it is not an inherent risk of a hayride.” *Id.* at p. *7, ¶39; *see also Aber v. Zurz*, 175 Ohio App. 3d 385, 389, 2008-Ohio-778, 887 N.E. 2d 381, 384, ¶¶12-15 (9th Dist. 2008) (finding that “tubing” was a recreational activity, but holding that the speeding boat’s sharp turn in a crowded ski lane was neither customary nor foreseeable as a matter of law.)

Here, Plaintiff had absolutely no reason to believe that any railroad ties or other debris would be lurking under the snow on the sled riding hills in Barthelmas Park. While bumps and bruises may certainly be expected when one rides a sled, a collision into a fixed object that has been carelessly discarded or knowingly left is hardly foreseeable. Since reasonable minds could conclude that the teenager’s fractured neck was not a predictable consequence of his “recreational activities” that day, summary judgment was improvidently granted on the basis of recreational user immunity.

IV. DEFENDANT’S INAPPOSITE AUTHORITIES

There can be no solace for Defendant in the authorities that have been cited that do not involve man-made hazards. While it is true that sled riding was found to be a recreational activity in *Marrek v. Cleveland Metroparks Bd. of Commrs.*, 9 Ohio St. 3d 194, 195, 459 N.E. 2d 873 (1984), the plaintiff had been injured when she was struck in the face by the foot of another sledder. The sole theory of liability that was alleged against the park district was for negligent supervision. *Id.*, 9 Ohio St.3d at 196. This Court stopped well short of suggesting that no recovery is ever available to sled riding children, who are injured by discarded waste material that has been left buried under

the snow.

The Fourth District has also relied upon a trio of Eighth District opinions that were issued before this Court confirmed in *Miller*, 42 Ohio St.3d at 114-115, that changes to the character of the recreational property can indeed remove the premises from the protection of the statute. *Apx. 00011-13*. In *Milliff v. Cleveland Metroparks Syst.*, 8th Dist. No. 52315, 1987 W.L. 11969 (June 4, 1987), *Apx. 00011-12*, the panel examined a recreational user's claim that she had been injured when she collided into "a rock barrier that was used to block access to a washed out area" while riding her bicycle in a park. *Id.* at p. *1. The court rejected the argument that liability could still be imposed with regard to hazards that had been negligently created by the property owner. *Id.* at pp. *2-3. A hard-and-fast rule was adopted instead to the effect that once the plaintiff is established as a "recreational user" of "recreational property," all claims are barred as a matter of law. *Id.*

The Eighth District did not need to go so far in *Milliff*. While the hazard was arguably man-made in that instance, the rock barrier plainly enhanced the value of the recreational property by precluding access to a potentially dangerous area. *Id.*, 1997 W.L. 11969, p. *1. In essence, the recreational user had crashed into a structure that was supposed to protect her from perhaps even greater harm. The same outcome therefore could have been reached in *Milliff* if the court had simply held that the claim was barred because the injury had been caused by an improvement that had furthered the recreational value of the premises.

Likewise, in *Erbs v. Cleveland Metroparks Syst.*, 8th Dist. No. 53247, 1997 W.L. 30512 (Dec. 24, 1987), a bicyclist lost control on a path in a public park and was seriously injured when she careened into a culvert. *Id.* at p. *1. The panel recognized that the plaintiff was still a "recreational user," notwithstanding the creation of hazardous conditions on the premises. *Id.* at pp. *2-3. Consistent with the majority rule

in Ohio, the *Erbs* court should have simply held that the bicycle path was intended to facilitate the recreational use of the park and thus immunity applied.

For the same reason, the lower court's reliance upon *Look v. Cleveland Metroparks Syst.*, 48 Ohio App. 3d 135, 548 N.E. 2d 966 (8th Dist. 1988), is equally unavailing. *Apx. 00013*. A hiker had fallen into a ravine when one of the planks on a footbridge he was crossing collapsed. *Id.*, 48 Ohio App. 3d at 135-136. Since reasonable minds could only conclude that the footbridge did indeed enhance the recreational value of the park, the entry of summary judgment was appropriate. However, the Eighth District proceeded to remark that: "The creation of a hazardous condition does not change the determinative factor of [the hiker's] status as a recreational user." *Id.* at 137. This isolated sentence from the *Look* opinion is both inaccurate and unnecessary, as R.C. 1533.181 stops well short of immunizing all hazardous conditions that can be conceivably left upon lands that are open for public use.

The Fourth District majority should have distinguished *Estate of Finley v. Cleveland Metroparks*, 189 Ohio App.3d 139, 2010-Ohio-4013, 937 N.E.2d 645 (8th Dist. 2010). *Apx. 00013-15*. A motorcycle operator had been injured, and his passenger killed, when they struck a tree that had fallen into the roadway in a park. *Id.*, 189 Ohio App.3d at 142, ¶3. There can be no legitimate disagreement that trees properly belong in parks, and will eventually fall at some point in time. Given that there was no evidence that a man-made hazard had been created or that the accident was unforeseeable, it is hardly surprising that the panel concluded that R.C. 1533.181 applied. *Id.* at 151-153, ¶¶ 47-55. The *Finley* court undoubtedly would have reached a very different conclusion if a park employee had carelessly left a railroad tie in the path of the oncoming motorcycle.

The legislative objectives behind the recreational user statute will be furthered, and responsible property management will be encouraged, if this Court holds that

injuries and fatalities that occur on open lands are still actionable, so long as they are attributable to man-made hazards that do not improve or further recreational activities on the premises.

CONCLUSION

This Court should establish a sensible construction of R.C. 1533.181 that is consistent with the readily apparent legislative intention, reverse the Fourth District Court of Appeals, and remand this action for a jury trial upon all claims.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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

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IN THE SUPREME COURT OF OHIO

CASE NO. _____ 12-1150

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

NOTICE OF APPEAL OF
PLAINTIFF-APPELLANTS, JEREMY AND CHRISTINE PAULEY

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FILED
JUL 09 2012
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE

Notice is hereby served that Plaintiff-Appellants, Jeremy and Christine Pauley, are seeking further review of the Fourth District Court of Appeal's final order of May 23, 2012. The appellate Court's ruling presents issues of public and great general importance.

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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

2012 MAY 23 AM 10:38

JAMES W. DEAN
CLERK OF COURTS
PICKAWAY COUNTY

JEREMY PAULEY, et al.,
 Plaintiffs-Appellants,
 vs.
 CITY OF CIRCLEVILLE, et al.,
 Defendants-Appellees.

:
 : Case No. 10CA31
 :
 : DECISION AND JUDGMENT ENTRY
 :

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CIVIL APPEAL FROM COMMON PLEAS COURT
 DATE JOURNALIZED:

PER CURIAM.

This is an appeal from a Pickaway County Common Pleas Court
 summary judgment in favor of the City of Circleville, defendant
 below and appellee herein.

Jeremy and Christine Pauley, plaintiffs below and appellants
 herein, raise the following assignment of error for review:

"THE TRIAL JUDGE ERRED, AS A MATTER OF LAW,
BY GRANTING SUMMARY JUDGMENT AGAINST
PLAINTIFF[S]-APPELLANTS."

On January 24, 2007, eighteen-year-old Jeremy Pauley tragically was rendered a quadriplegic while sledding with friends at Barthelmas park. He and his mother filed a negligence complaint and alleged that appellee "failed to fulfill [its] duty of inspecting the park and removing the physical defects which posed a hazard to the public. [Appellee] had further failed to warn the citizens using the park of the physical defects which were known, or should have been known, to be threatening their safety." Appellants alleged that "[t]he waste and debris which had been left on the grounds surrounding the public buildings created an inherently dangerous situation which no user of the park could have anticipated and thus substantially altered the nature and characteristic of the public property."

On June 1, 2010, appellee requested summary judgment and argued that: (1) the recreational user statute relieves it of liability for Jeremy's injury; (2) Jeremy could not identify the unsafe condition that caused his injury; (3) it is entitled to political subdivision immunity under R.C. Chapter 2744; and (4) the assumption of the risk doctrine bars appellants' claims.

Appellants opposed appellee's summary judgment motion and argued, in part, that the recreational user statute does not apply when the premises contain manmade mounds of construction

debris that are not consistent with the recreational nature of the premises.

In his deposition,¹ Jeremy stated that although he had previously visited the park, he had never participated in snow sledding at the park before the day of the accident. He stated that after he "hit an immovable object," he went numb.

Kevin Baisden, Jeremy's friend who went sledding with him, stated that when he first approached Jeremy after the accident, Baisden observed that the area was snow-covered. Thus, he did not notice any debris or anything that Jeremy may have hit. Baisden stated that he watched Jeremy go down the hill² and when asked if it looked like Jeremy struck something, Baisden stated: "Not really. I mean not even on the videotape, it didn't, I mean, that I recall. It didn't look like he hit something. It just looked like he went and just stopped toward the bottom of the hill. I mean, yeah, there were sticks and stuff there. I meant there--there was nothing to stop him stop him. [sic]" Baisden stated that he went back to the park after the accident

¹ The parties attached partial depositions to their respective filings, but the record contains nothing to indicate that the parties officially filed the full depositions. Because neither party has objected to the partial depositions attached to the filings, we consider them.

²The "hill" mentioned here and throughout the opinion was described at oral argument as a mound of dirt approximately fifteen feet tall with a diameter of approximately twenty feet. This structure or object is also referred to as a "mound," a "pile" and a "dirt pile."

and discovered that "there was a railroad tie-well, at least something that looked like a railroad tie."

Circleville City employee Philip S. Riffle stated that appellee decided to place dirt piles at the park when it started to run out of room at the storage facility. He explained that the city used the dirt "for various things, backfill material. It was topsoil. Any areas that, like we do digging in, or we use it in various locations throughout the town. We use a lot of it there on the site, at the park for reseeding purposes."³

Dane Patterson, Jr., another city employee, stated that appellee obtained the dirt from a Wal-Mart construction site. Like Riffle, Patterson also explained that appellee ran out of room at its storage facility, it was decided to store the dirt at the park.

On August 23, 2010, the trial court awarded appellee summary judgment. The court determined that no genuine issues of material fact remained as to whether appellee is entitled to recreational user immunity. This appeal followed.

In their sole assignment of error, appellants assert that the trial court improperly entered summary judgment in appellee's

³Riffle, when asked about the purpose of the dirt pile, stated that it is also used for backfill for other areas of town: "Well, we'll dig out old curbs, pour new curbs, so you'll need topsoil to put back in the curb and reseed. You know, like, storm sewer repairs, sometimes we make large holes, and we usually just haul off a lot of the junk material and put the good topsoil back in."

favor. They contend that the trial court wrongly determined that appellee is entitled to immunity under the recreational user statute, R.C. 1533.181.

I

STANDARD OF REVIEW

Appellate courts conduct a de novo review of trial court summary judgment decisions. E.g., Grafton v. Ohio Edison Co., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. See Brown v. Scioto Bd. of Commrs., 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (1993); Morehead v. Conley, 75 Ohio App.3d 409, 411-12, 599 N.E.2d 786 (1991). Thus, to determine whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law.

Civ. R. 56(C) provides, in relevant part, as follows:

* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made,

that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Thus, pursuant to Civ.R. 56, a trial court may not award summary judgment unless the evidence demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and after viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. See, e.g., Vahila v. Hall, 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164 (1997).

II

RECREATIONAL USER IMMUNITY

Appellants assert that the trial court wrongly determined that appellee is entitled to immunity under the recreational user statute. Although appellants admit that Jeremy was a "recreational user," appellants assert that appellee is not entitled to immunity under the statute when the cause of Jeremy's injury (i.e., the alleged railroad tie) had no relation to the recreational nature of the premises. They further argue that appellee's storage of the dirt mounds on the park premises changed the nature of the premises and put the premises outside the protection of the recreational user immunity statute.

Immunity issues ordinarily present questions of law that an appellate court reviews independently and without deference to the trial court. See Conley v. Shearer, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992), quoting Roe v. Hamilton Cty. Dept. Of Human Serv., 53 Ohio App.3d 120, 126, 560 N.E.2d 238 (1988) (citation omitted) ("Whether immunity may be invoked is a purely legal issue, properly determined by the court prior to trial, and preferable on a motion for summary judgment."); see, also, Hubbell v. Xenia, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶21 (stating that whether political subdivision entitled to immunity under R.C. Chapter 2744 is a question of law); see, also, Theobald v. Univ. of Cincinnati, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573, ¶14 (stating that issue of personal immunity under R.C. 9.86 presents question of law); Greenwald v. Shayne, Franklin App. No. 09AP-599, 2010-Ohio- 413, ¶4 (stating that whether party entitled to arbitral immunity is a question of law); Cook v. Cincinnati, 103 Ohio App.3d 80, 85, 658 N.E.2d 814 (1995) (stating that whether qualified immunity applies is a question of law). Thus, whether a premises owner is entitled to recreational user immunity is a question of law.⁴

⁴ Although we were unable to locate a case that specifically sets forth the standard of review that applies to recreational user immunity, we observe that most of the cases cited in this opinion appear to use a de novo standard of review without expressly stating so.

The recreational user statute, R.C. 1533.181, states:

- (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. 1533.181.

R.C. 1533.181 applies to "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." R.C. 1533.18(A). The Ohio Supreme Court has further construed the statute to apply to state and municipal property. See LiCause v. City of Canton, 42 Ohio St.3d 109, 111-112, 537 N.E.2d 1298 (1989), citing Moss v. Dept. of Natural Resources, 62 Ohio St.2d 138, 404 N.E.2d 742 (1980), and McCord v. Division of Parks & Rec., 54 Ohio St.2d 72, 375 N.E.2d 50 (1978).

R.C. 1533.18(B) defines a "recreational user" as follows:

[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.

Thus, if a person qualifies as a recreational user, the premises owner has no duty to the recreational user to keep the premises safe. Ryll v. Columbus Fireworks Display Co., Inc., 95 Ohio St.3d 467, 2002-Ohio-2584, 769 N.E.2d 372, ¶15; Estate of Finley v. Cleveland Metroparks, 189 Ohio App.3d 139, 152, 2010-Ohio-4013, 937 N.E.2d 645, ¶54; accord Marrek v. Cleveland Metroparks Bd. of Com'rs, 9 Ohio St.3d 194, 198, 459 N.E.2d 873 (1984).

In the case at bar, appellants concede in their reply brief that "there is no dispute that * * * [Jeremy] qualified as a 'recreational user.'" Therefore, appellee is entitled to recreational user immunity. Appellants nevertheless assert that even though Jeremy qualified as a recreational user, the recreational user statute does not apply when the premises owner creates a hazardous condition on the premises. Appellants request, in essence, that we read an exception into the statute when none exists. We decline to do so.

The Eighth District Court of Appeals has rejected any argument that the recreational user statute contains an exception from immunity when a dangerous condition exists on the premises, Milliff v. Cleveland Metroparks Sys., Cuyahoga App. No. 52315

(June 4, 1987), and we do as well.⁵ In Milliff, the plaintiff suffered injuries when she collided with a rock barrier that was used to block access to a washed out area of the park. The plaintiff argued that the recreational user statute did not protect the defendant from liability when the defendant affirmatively created a dangerous condition. The appellate court rejected the plaintiff's argument and explained:

" * * * This court has already determined that the creation of hazardous conditions does not change the determinative factor, i.e., whether the plaintiff was a recreational user.

It is clear that appellant did not pay a fee or consideration for admission or entrance to the Metropark. Appellant testified that she entered the Metropark to take a 'casual, leisurely bicycle' ride. We conclude that a bicycle ride is a recreational pursuit within the meaning of R.C. 1533.18(B).

Appellant's status was one of a recreational user and as a result the Metroparks owed her no duty to keep the premises safe. * * * Further, 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 (citations omitted); see, also, Erbs v. Cleveland Metroparks Sys., Cuyahoga App. No. 53247 (Dec. 24, 1987).

⁵ Some Court of Claims decisions also have reached this same conclusion. Shockey v. Ohio Dept. of Natural Resources, Ohio Court of Claims No. 2004-09509-AD, 2005-Ohio-641, ¶11 ("Even if defendant's conduct would be characterized as 'affirmative creation of hazard,' it still has immunity from liability under the recreational user statute."); Meiser v. Ohio Dept. of Natural Resources, Ohio Court of Claims No. 2003-10392-AD, 2004-Ohio-2097.

The court reached the same conclusion in Look v. Cleveland Metroparks Sys., 48 Ohio App.3d 135, 137, 548 N.E.2d 966 (1988). In Look, the plaintiff suffered injuries when a wood plank in a footbridge collapsed, causing him to fall into a ravine. The plaintiff asserted that the defendant failed to properly maintain the bridge. The court rejected the plaintiff's argument that the recreational user statute did not apply when the defendant created a dangerous condition. The court explained:

"* * * R.C. 1533.181 makes no distinction between active and passive negligence. The creation of a hazardous condition does not change the determinative factor of [the plaintiff]'s status as a recreational user. As such, Metroparks owed no duty to [the plaintiff] to keep the footbridge safe."

(Citations omitted).

In Estate of Finley v. Cleveland Metroparks Sys., 189 Ohio App.3d 139, 2010-Ohio-4013, 937 N.E.2d 645, Finley and his wife's motorcycle collided with a tree that had fallen into the roadway of a park. Finley suffered injuries and his wife died. Finley and his wife's estate later filed a negligence action against the city and the park. The city and the park subsequently sought summary judgment. The trial court denied their summary judgment motions, and the appellate court reversed the trial court's judgment. The appellate court held that the recreational user statute provided the park⁶ with immunity. The court determined

⁶ The appellate court determined that the plaintiffs' claims against the city were time-barred and, thus, did not enter any

that the Finleys were recreational users when the evidence indicated that they were enjoying a leisurely ride through the park when the accident occurred.

In the present case, appellants have admitted that Jeremy was at the park for sledding and that he was a recreational user. There is no dispute that Jeremy was using the mound for purely recreational purposes. Thus, because he was a recreational user, appellee owed him no duty to keep the premises safe. The statute provides blanket immunity for injuries that occur to a recreational user on the premises. Here, the use of the mound for a recreational purpose did not change the essential character of the park.

When defining who qualifies as a recreational user, the statute focuses upon the character of the property and the use to which it is put. Miller v. Dayton, 42 Ohio St.3d 113, 537 N.E.2d 1294 (1989), paragraph one of the syllabus. As the Miller court explained: "In determining whether a person is a recreational user under R.C. 1533.18(B), 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." Id. If the property's essential character is recreational, then a user of that property will ordinarily be a recreational user. Id. at 114-115. In seeking to define

holding regarding the city's immunity.

recreational premises, the Miller court explained:

"Generally speaking, recreational premises include elements such as land, water, trees, grass, and other vegetation. But recreational premises will often have such features as walks, fences and other improvements. The significant query is whether such improvements change the character of the premises and put the property outside the protection of the recreational-user statute. To consider the question from a different perspective: Are the improvements and man-made structures consistent with the purpose envisioned by the legislature in its grant of immunity? In other words, are the premises (viewed as a whole) those which users enter upon '* * * to hunt, fish, trap, camp, hike, swim, or engage in other recreational pursuits?"

Id. at 114-115.

The parties also argue the applicability of Ryll v. Columbus Fireworks Display Co., Inc., 95 Ohio St.3d 467, 2002-Ohio-2584, 769 N.E.2d 372. Appellants suggest that under the Ryll logic, the recreational user statute does not bar their claims. In Ryll, the court determined that the recreational user statute did not bar an injured party's claim when the injury occurred, not as a result of a condition on the premises, but as a result of flying shrapnel from a fireworks display. Ryll is inapposite to the case sub judice. Here, Jeremy's injury did not occur from a flying object. Instead, his injury resulted from some condition, whether a railroad tie or some other object, that existed on the premises. Thus, appellants' assertion that Ryll removes Jeremy's injury from the recreational user statute is unavailing. While the instant case is undeniably tragic, we cannot disregard the law in order to allow appellants' claims to proceed.

Accordingly, based upon the foregoing reasons, we overrule appellants' assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

ABELE, P.J., dissenting

I respectfully dissent. In this instance, I do not believe that the recreational user statute provides the premises owner with immunity from liability for an injury that occurred to a user as a result of the premises owner's active creation of a hazard that had absolutely nothing to do with the recreational nature of the premises.

Although appellants concede that Jeremy was a recreational user, thus potentially foreclosing their ability to argue that the addition of the dirt mounds changed the character of the property, I believe that Miller is not necessarily as limited as the majority suggests. Miller speaks in terms of defining a recreational user by examining the character of the property, yet it also speaks of the premises being protected under the recreational user statute. The court stated: "To qualify for recreational-user immunity, property need not be completely natural, but its essential character should fit within the intent of the statute." *Id.* at 114. The court further defined recreational premises and explained:

"Generally speaking, recreational premises include elements such as land, water, trees, grass, and other vegetation. But recreational premises will often have such features as walks, fences and other improvements. The significant query is whether such improvements change the character of the premises and put the property outside the protection of the recreational-user statute. To consider the question from a different perspective: Are the improvements and man-made structures consistent with the purpose envisioned

by the legislature in its grant of immunity? In other words, are the premises (viewed as a whole) those which users enter upon '* * * to hunt, fish, trap, camp, hike, swim, or engage in other recreational pursuits?"

Id. at 114-115.

The court then examined prior cases that explained what types of activities constitute "other recreational pursuits." The court then noted a caveat to the cases defining recreational pursuits and stated:

"The existence of statutory immunity does not depend upon the specific activity pursued by the plaintiff at the time of the plaintiff's injury. Rather, the inquiry should focus on the nature and scope of activity for which the premises are held open to the public. The goal is to determine the character of the premises. If the premises qualify as being open to the public for recreational activity, the statute does not require a distinction to be made between plaintiffs depending upon the activity in which each was engaged at the time of injury. For example, we recognize immunity to the owner of a park (which qualifies as recreational premises), whether the injury is to one who is jogging in the park, tinkering with a model airplane or reading poetry to satisfy a school homework assignment. Thus we attach no significance to the fact that Miller's injury may have occurred during a highly competitive softball tournament. The essential character of Dayton's Kettering Field is that of premises held open to the plaintiff, without fee, for recreational purposes."

Id. at 115 (emphasis added).

The Miller court applied the foregoing principles and determined that premises do not lose recreational user immunity simply "because (1) the park includes a softball field with dugouts, fences, base plates and similar manmade structures * * *." Id. at 115. The court reasoned that because the manmade

structures enhanced the recreational nature of the premises, the plaintiff, a user of those premises, was a recreational user.

I believe that Miller not only defines who qualifies as a recreational user, but also defines the type of property that falls within the definition of premises within the recreational user statute.

In Huffman v. Willoughby, Lake App. No. 2007-L-040, 2007-Ohio-7120, the court applied the Miller principles and affirmed the trial court's decision to deny the city's motion to dismiss the complaint. In Huffman, the complaint alleged that the plaintiffs drowned while rafting down a river toward a dam. They asserted that the dam was built for purposes that the dam no longer serves and has not served for quite some time. The city filed a motion to dismiss the complaint. In opposition to the city's motion, the plaintiffs argued that the city's placement of a lowhead dam in the river changed the nature of the river such that the recreational user statute did not apply. The trial court agreed that the construction of the dam changed the character of the part of the river where the dam was located. The trial court determined that the dam was not constructed to encourage the recreational use of this part of the river. *Id.* at ¶9. Instead, the court found that the dam was inherently dangerous and was not suitable for recreational use.

On appeal, the court framed the issue as whether the face of

PICKAWAY, 10CA31

the complaint showed that the recreational user statute barred the plaintiffs' claims. The appellate court looked to the complaint and concluded that it failed to show that the decedents had permission to enter the area where the dam was located. The court therefore determined that the city was not entitled to a dismissal based upon the recreational user statute. The court further noted that the complaint alleged that the premises were inherently dangerous and exposed any user to the risk of imminent death. It thus concluded that the plaintiffs "were entitled to the reasonable inference that the dam was not installed for recreational pursuits." *Id.* at ¶49.

I believe that an application of Miller and Huffman results in the conclusion that in the case sub judice appellee is not entitled to recreational user immunity. Here, appellee added an unnatural structure to the park premises—the dirt mounds. Appellee's stated purpose in placing the dirt mounds on the park premises was because it had no space to store the dirt at its storage facility. Appellee has not suggested that it added the dirt mounds to enhance the recreational nature of the property. Thus, I believe that the addition of the dirt mounds transformed the character of that part of the park premises from recreational to storage and maintenance.⁷

⁷ One case that went before the Ohio Supreme Court involved similar facts. See Sorrel v. Ohio Dept. Of Natural Resources, Division of Parks and Rec., 40 Ohio St.3d 141, 532 N.E.2d 722

Furthermore, granting appellee immunity under these circumstances does not appear consistent with the goal of the recreational user statute.

"Statutory immunity for landowners in this situation promotes the development and availability of property for recreational use and is consistent with the public policy reflected in R.C. 1533.181. According to Moss, supra, the purpose of the statute is "to encourage owners of premises suitable for recreational pursuits to open their land to public use without worry about liability." Id., 62 Ohio St.2d at 142, 404 N.E.2d 742[, quoting Moss, (Feb. 6, 1979), Franklin App. Nos. 78AP-578, 78AP-579]."

Marrek v. Cleveland Metroparks Bd. of Com'rs, 9 Ohio St.3d 194, 198, 459 N.E.2d 873 (1984). To allow immunity when a premises owner chooses to use part of recreational premises as a dirt

(1988). In Sorrel, the Ohio Department of Natural Resources (ODNR) engaged in dredging operations on a lake. ODNR apparently left a mound of dirt on the surface of the lake. The plaintiff suffered injuries when the snowmobile he was riding struck the dirt mound. The plaintiff subsequently sued ODNR. On appeal to the supreme court, the court determined that the plaintiff was a recreational user and that ODNR was therefore entitled to immunity.

Interestingly, the plaintiff had requested the Ohio Supreme Court to consider "whether the statutory immunity would apply where injuries are caused by artificial and willfully created hazards, such as the mound of dredge material herein." Id. at 142, fn.1. The supreme court, however, found that the plaintiff failed to raise this argument in the lower courts and thus, declined to consider this argument. Instead, the court considered and rejected the plaintiff's argument that the recreational user statute did not apply because he was snowmobiling during a prohibited time period and thus using the park without permission. The court explained: "The immunity granted by R.C. 1533.181 to owners, lessees, or occupants of premises who hold such premises open for gratuitous recreational use by the general public can not be lost where a person violates state park rules and regulations while using a park for permitted, gratuitous recreation purposes." Id. at 144-145.

storage facility does not fulfill the purpose of encouraging a recreational premises owner to open the land to the public for recreational use without fear of liability. The purpose of the statute is not to encourage landowners to use their what-would-otherwise-be recreational property as a storage facility and then be shielded behind the recreational user statute when a person suffers injury from the addition of this non-recreational aspect of the premises.

I recognize that appellee states in its brief that appellants "cannot show that the dirt mound changed the character of Barthelmas Park." Appellee does not elaborate on this statement. I believe, however, that the evidence the parties submitted during the summary judgment proceedings does indeed show that the dirt mounds changed the character of the park. Appellee's employees stated that the dirt mounds were placed on the park premises for storage purposes. No one stated that the dirt mounds were placed on the park premises for sledding or other recreational pursuits. Thus, I believe that the evidence supports a conclusion that the addition of the dirt mounds changed the essential character of the premises where Jeremy suffered his injuries.

Additionally, as the party moving for summary judgment, appellee bore the burden to point to evidence in the record to establish the absence of a material fact regarding whether the

addition of the dirt mounds changed the essential character of the park. See Dresher v. Burt, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); Ray v. Wal-Mart, Washington App. No. 08CA41, 2009-Ohio-4542, 17. As the Dresher court explained:

"[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied."

Id. In the case at bar, appellee has not pointed to any evidence to show the absence of a material fact regarding whether the dirt mounds changed the essential character of the premises. Instead, appellee has offered a conclusory assertion that appellants cannot demonstrate this fact. Appellee's conclusory assertion is not sufficient to warrant summary judgment.

Furthermore, I disagree with the majority's view of Milliff, Look, and Finley. In those cases, the alleged negligently created hazard did not change the essential character of the premises. In the case at bar, however, the hazard—the dirt mounds—did change the character of the premises.

Therefore, based upon the foregoing reasons, I believe that the trial court improperly determined that appellee is entitled to recreational user immunity and, thus, wrongly granted appellee summary judgment on this basis. Accordingly, I respectfully dissent.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellants the costs herein taxed.

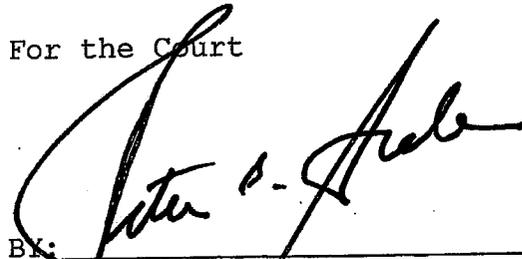
The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

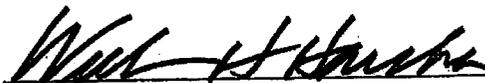
A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

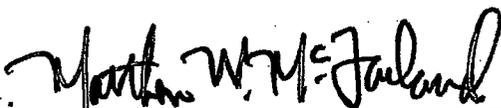
Harsha, J. & McFarland, J.: Concur in Judgment & Opinion
Abele, P.J.: Dissents with Dissenting Opinion

For the Court



BY: _____
Peter B. Abele
Presiding Judge

BY: 
William H. Harsha, Judge

BY: 
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

IN THE COURT OF COMMON PLEAS
PICKAWAY COUNTY, OHIO

2010 AUG 23 P 1:21

Jeremy Pauley, et al.,

JAMES W. DEAN
CLERK OF COURTS
PICKAWAY COUNTY
Plaintiffs,

:

CASE NO. 2008-CI-0578

:

vs.

:

JUDGE P. RANDALL KNECE

City of Circleville, et al.,

:

DECISION AND ENTRY
(Final Appealable Order)

Defendants.

:

This matter is before the Court on a Motion for Summary Judgment filed on behalf of the Defendant City of Circleville (hereinafter "Defendant" or "Defendant City"). Plaintiffs have filed a memorandum in opposition thereto, to which the Defendant has filed its reply.

It is well-settled law in Ohio that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Bruns v. Cooper Indus., Inc. (1992), 78 Ohio App.3d 428, citing Harless v. Willis Day Warehousing Co., Inc. (1978), 54 Ohio St.2d 64. Summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Id.* In construing Civ.R. 56, the Ohio Supreme Court has stressed that its language formulates a tripartite test whereby the moving party must establish: "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come

to but one conclusion, and that conclusion is adverse to the party against whom the motion . . . is made . . .” *Id.*

In responding to a motion for summary judgment, the nonmoving party may not rest on “unsupported allegations in the pleadings.” Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64. Rather Civ.R. 56 requires the nonmoving party to respond with competent evidence that demonstrates the existence of a genuine issue of material fact. Specifically, Civ.R. 56(E) provides:

“* * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party’s pleadings, but the party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.:

Consequently, once the moving party satisfies its Civ.R. 56 burden, the nonmoving party must demonstrate, by affidavit or by producing evidence of the type listed in Civ.R. 56(C), that a genuine issue of material fact remains for trial. A trial court may grant a properly supported motion for summary judgment if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that there is a genuine issue for trial. Dresher v. Burt (1996), 75 Ohio St.3d 280; Jackson v. Alert Fire & Safety Equip., Inc. (1991), 58 Ohio St.3d 48. Furthermore, the nonmoving party is entitled to rely solely on the evidence presented by the moving party and is entitled to have such evidence construed most strongly in his favor. Bruns supra at 434. However, in order for the Court to determine the existence of a genuine issue of fact, there must be a conflict arising from irreconcilable affirmative allegations of fact. *Id.* No conflict arises from the nonmoving party’s mere denial of the truth of the evidence presented by the movant. *Id.* When a party seeks to avoid summary judgment, it must produce some evidence on each issue for which it bears the burden of

production at trial. Leibreich v. A.J. Refrigeration, Inc. (1993), 67 Ohio St.3d 266; Wing v. Anchor Media, Ltd. (1991), 59 Ohio St.3d 108; Trader v. People Working Cooperatively, Inc. (1994), 104 Ohio App.3d 690.

On January 24, 2007, at approximately 5:00 p.m., Plaintiff Jeremy Pauley began sled riding with his friends at Barthelmas Municipal Park. Barthelmas Park is owned by Defendant City of Circleville. After approximately one hour, Jeremy Pauley rode his sled down a large dirt pile while one of his friends videotaped the ride. The dirt pile was being illuminated by the headlights of Mr. Pauley's vehicle. Mr. Pauley was riding the sled lying on his stomach and going head first. When he reached the bottom of the dirt pile, Jeremy struck an object and sustained a serious neck injury that rendered him a quadriplegic.

Defendant City claims that they should prevail on summary judgment because the Plaintiff was a recreational user; he is unable to specifically identify the unsafe condition on the park premises; the exercise of a governmental function immunizes Defendant City from liability; and Plaintiff assumed the risk of his injuries by his actions.

Plaintiffs claim that Defendant City loses its immunity status imposed by O.R.C. Section 1533.181 because Plaintiff Jeremy's neck was fractured on a mound of dirt and debris, which was entirely man-made and concealed with snow.

A person who enters or uses municipal land that is held open to the general public free of charge for recreational pursuit is a recreational user. Johnson v. New London (1988), 36 Ohio St.3d 60. There is no dispute that Plaintiff Jeremy Pauley was a recreational user of Barthelmas Park. O.R.C. Section 1533.181 states:

(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.

Although not originally enacted to provide immunity with regard to public land, O.R.C. Section 1533.181 has been construed by the Ohio Supreme Court to apply to state and municipal property. See, Moss v. Dept. of Natural Resources (1980), 62 Ohio St.2d 138; McCord v. Division of parks & Recreation (1978), 54 Ohio St.2d; Johnson v. New London (1988), 36 Ohio St.3d 60; and LiCause v. City of Canton (1989), 42 Ohio St.3d 109. Therefore, a person who enters or uses municipal land that is open to the general public free of charge for recreational pursuit is a recreational user as defined by O.R.C. Section 1533.181. If such recreational user is injured while engaged in recreational pursuit on such land, the municipality is immune from suit due to the exemption from liability to recreational users.

In Ryll v. Columbus Fireworks Display Co., Inc. 95 Ohio St.3d 467, 2002-Ohio-2584, the plaintiff brought suit against the defendants when her husband was killed when shrapnel from an exploding firework shell hit him during a Fourth of July fireworks display. The Ohio Supreme Court found that O.R.C. Section 1533.181(A)(3) does not immunize the City of Reynoldsburg from liability because the injuries were not "caused by any act" of Daniel Ryll. His only act was to be present.

In the case at bar, it is undisputed that Mr. Pauley entered the park without payment of a fee to engage in the recreational pursuit of sled riding. Mr. Pauley was not just present at Barthelmas Park, as was the case in Ryll. Therefore, the decision rendered in Ryll is inapposite to the instant case and the Plaintiffs' reliance thereon is misplaced. Thus, O.R.C. Section 1533.181(A)(3) is applicable because Defendant City, the owner of Barthelmas Park, does not assume responsibility for or incur liability for any injury to person or property caused by any act

of a recreational user. It was the act of sledding head-first down a dirt mound after dark with only the illumination of his vehicle's headlights that contributed to Jeremy Pauley's tragic injury.

Having thoroughly considered Defendant City's Motion and the evidence provided in support thereof, the Court's finds that Defendant City of Circleville's Motion is well taken and grants same. As a matter of law, there are no genuine issues of material fact as to whether Plaintiff Jeremy Pauley was a recreational user of Barthelmas Municipal Park, which is owned by Defendant City of Circleville. Thus under O.R.C. Section 1533.181, Defendant City of Circleville owed no duty to Plaintiff Jeremy Pauley. Even construing the evidence in favor of the Plaintiffs, Defendant City of Circleville is entitled to the judgment requested as a matter of law.

Therefore, it is hereby **ORDERED, ADJUDGED, and DECREED**, that Summary Judgment is hereby **GRANTED** for the Defendant City of Circleville and against the Plaintiffs. This Court also *sua sponte* dismisses the claims against the Defendants Does.

This is a final appealable order and within three (3) days of the entering of this Judgment upon the Journal, the Clerk of this Court shall serve the parties as provided for in Civil Rule 5(B) with notice of the filing of a final appealable order and note such service upon the appearance docket pursuant to Civil Rule 58.


P. RANDALL KNECE, JUDGE

Date: 08-23-10

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Baldwin's Ohio Revised Code Annotated Currentness

Title XV. Conservation of Natural Resources

▣ Chapter 1533. Hunting; Fishing (Refs & Annos)

▣ Hunting and Trapping Generally Recreational Users

→ → **1533.18 Premises, recreational user, all-purpose vehicle defined**

As used in sections 1533.18 and 1533.181 of the Revised Code:

(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.

CREDIT(S)

(2007 H 67, eff. 6-30-07; 2004 S 80, eff. 4-7-05; 2002 S 106, eff. 4-9-03; 131 v S 352, eff. 10-30-65; 130 v H 179)

Current through all 2011 laws and statewide issues and 2012 Files 70 through 157 of the 129th GA (2011-2012).

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Baldwin's Ohio Revised Code Annotated Currentness

Title XV. Conservation of Natural Resources

▣ Chapter 1533. Hunting; Fishing (Refs & Annos)

▣ Hunting and Trapping Generally Recreational Users

→→ **1533.181 Exemption from liability to recreational users**

(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.

CREDIT(S)

(1995 H 117, eff. 9-29-95; 130 v H 179, eff. 9-24-63)

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