

IN THE SUPREME COURT OF OHIO

JEREMY PAULEY, et al.	:	
	:	Case No. 2012-1150
Plaintiffs-Appellants,	:	
	:	
vs.	:	On Appeal from the
	:	Pickaway County Court of Appeals
CITY OF CIRCLEVILLE,	:	Fourth Appellate District
	:	
Defendant-Appellant.	:	Court of Appeals
	:	Case No. 10CA31

**BRIEF OF *AMICI CURIAE* COUNTY COMMISSIONERS ASSOCIATION OF OHIO,
OHIO TOWNSHIP ASSOCIATION AND OHIO PARKS AND RECREATION
ASSOCIATION**

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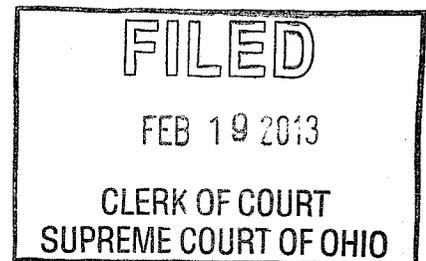


TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

I. INTRODUCTION AND STATEMENTS OF INTEREST OF AMICI CURIAE..... 1

II. STATEMENT OF THE CASE AND FACTS4

III. LAW AND ARGUMENT4

Response to Proposition of Law I: The owner of a recreational property has no duty to a recreational user for the condition of the property under R.C. § 1533.181, irrespective of the nature of instrumentality on which the recreational user was injured4

A. Recreational Use Immunity Applies To “Man Made” Conditions.6

B. An owner Of Recreational Premises Does Not Owe A Duty To A Recreational User, Even With Regard To The Creation Of A Hazardous Condition.....7

C. Neither R.C. § 1533.181 Nor Prior Case Law Supports An Exception To Recreational Use Immunity For Conditions on Recreational Premises That Do No Furtherance or Enhance the Recreational Use of the Premises.9

IV. CONCLUSION.....12

V. CERTIFICATE OF SERVICE14

TABLE OF AUTHORITIES

CASES

<i>Erbs v. Cleveland Metroparks System</i> , Cuyahoga App. No. 53247, (Dec. 24, 1987).....	8
<i>Estate of Finley v. Cleveland Metroparks</i> , 189 Ohio App. 3d 139, 152 (8 th Dist. 2010)	7, 8
<i>Huffman v. City of Willoughby</i> , 11 th Dist. No. 2007-L-040, 2007-Ohio-7120	10
<i>Look v. Cleveland Metroparks System</i> , 48 Ohio App. 3d 135 (8 th Dist. 1988)	8
<i>Marrek v. Cleveland Metroparks Bd. of Commissioners</i> , 9 Ohio St. 3d 194, 198 (1984).....	2, 5
<i>Meiser v. ODNR</i> , Ohio Court of Claims No. 2003-10392-AD, 2004-Ohio-2097	5
<i>Miller v. Dayton</i> , 42 Ohio St.3d 113, 537 N.E.2d 1294 (1989).....	6, 7, 8, 10, 11
<i>Milliff v. Cleveland Metroparks System</i> , Cuyahoga App. No. 52315, 1987 Ohio App. LEXIS 7300 (June 4, 1987), at *5.....	4, 5, 8
<i>Moss v. Dept. of Natural Resources</i> , 62 Ohio St. 2d 138, 142 (1980).....	6
<i>Ryll v. Columbus Fireworks Display Co.</i> , 95 Ohio St. 3d 467, 2002-Ohio-2584, 769 N.E.2d 372 (2002).....	4
<i>Shockey v. ODNR</i> , Ohio Court of Claims No. 2004-09509-AD, 2005-Ohio-641	5
<i>Tepker v. Hueston Woods State Park</i> , Court of Claims No. 2009-08799-AD, 2010 -Ohio-5453	8
<i>Thatcher v. Marina</i> , Scioto App. No. 95CA2394, 1996 Ohio App. LEXIS 5374 (Nov. 20, 1996).....	2
<i>Tomba v. Wickliffe</i> , 114 Ohio Misc. 2d 10, 12 (Lake Cty. 2001).....	2

STATUTES

R.C. § 1533.18	6
R.C. § 1533.18(A).....	4, 5, 6, 9
R.C. § 1533.181	1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

I. INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae, the County Commissioners Association of Ohio (“CCAO”), the Ohio Township Association (“OTA”) and the Ohio Parks and Recreation Association (“OPRA”) respectfully request that this Court affirm the decision of the Fourth District Court of Appeals in this matter in its application of R.C. § 1533.181, Ohio’s Recreational User statute.

CCAO is a private, not-for-profit statewide association of county commissioners and county council members founded in 1880 to promote the best practices and policies in the administration of county governments for the benefit of Ohio residents. CCAO’s membership consists of the county of commissioners of 86 of Ohio’s 88 counties and the members of the Summit and Cuyahoga County Councils.

OTA is a statewide professional organization dedicated to the promotion and preservation of township government in Ohio. Established in 1928 and organized in 87 counties across the state, the OTA has more than 5,230 active members and over 4,000 associate members and is comprised of elected township trustees and township fiscal officers from Ohio’s 1,308 townships. OTA’s many functions include working at the General Assembly relative to legislation that affects local governments in general, and providing members with educational material and opportunities to assist township officials.

Not only do the CCAO and OTA offer guidance to counties and townships, they also work to articulate and protect the legislative interests of their members. These interests include the advancement of a sound construction of statutory immunity for political subdivisions, including the immunity for claims by recreational users under R.C. § 1533.181.

In addition, OPRA joins with CCAO and OTA in its support of the City of Circleville and the decision of the Fourth District Court of Appeals. OPRA, which was originally formed in

1934, is a non-profit, public interest organization representing over 1,300 professionals and citizen board members striving to provide quality parks and recreational facilities for all Ohioans while protecting and preserving Ohio's natural resources.

As representatives of local governments and property owners throughout Ohio with land open for recreational use by the public, *Amici* are concerned about the major shift in the interpretation of R.C. § 1533.181 that is urged by the Appellant in this case. Statutory immunity for landowners promotes the development and availability of property for recreational use. *Marrek v. Cleveland Metroparks Bd. of Commissioners*, 9 Ohio St. 3d 194, 198 (1984). The purpose of the recreational use statute is “centered on the idea that the legislature extended immunity to landowners in order to encourage landowners to open their recreational land to the general public. The immunity was a *quid pro quo* for opening the land to the public for recreational purposes.” *Tomba v. Wickliffe*, 114 Ohio Misc. 2d 10, 12 (Lake Cty. 2001); see, also, *Thatcher v. Marina*, Scioto App. No. 95CA2394, 1996 Ohio App. LEXIS 5374 (Nov. 20, 1996) (“[R]ecreational use statutes are intended to reduce the growing tendency of landowners to withdraw land from recreational use access by removing the risk of gratuitous tort liability***). Thus, in exchange for opening their land for no-fee recreational use by the public, the statute removes any duty that the premises might otherwise have to recreational users with respect to the condition of the premises.

The statute has worked. The entities represented by the *Amici*, as well as the State of Ohio, have opened thousands of acres of land for public recreational use, including hunting, fishing, public parks, trails and walking and bicycle paths, among other recreational uses. Hunting is a major recreational activity in Ohio, with hunters taking over 86,000 deer during the

2012 gun season alone.¹ Ohio fishermen have an enormous variety of opportunities for fishing throughout the state, from Lake Erie to the Ohio River. Boat access points alone number in the hundreds². There are over 4000 miles of paths and trails throughout the state for recreational use by the public³. There are thousands of governmentally-owned recreational areas around the state's reservoirs and natural waters, providing fishing and boating opportunities to the public. On a smaller level, local governments have developed thousands of local metro parks, nature preserves and playgrounds throughout the state. These opportunities are available at no cost to the public because, under the recreational user statute, property owners cannot be sued for injuries to recreational users on their land. This *quid pro quo* arrangement—open access for the public to land in exchange for immunity from suit—has long served the purpose for which it was intended.

Appellant is now urging this Court to create a broad new exception to recreational immunity that would eviscerate this necessary protection. Presently, the recreational immunity statute is focused on whether a premises is offered for recreational purposes and whether the injured party was a recreational user. If a person is a “recreational user,” the premises owner owes no duty to the user, regardless the condition of the premises. Appellant, however, argues that this Court should monumentally change the recreational user statute by imposing an affirmative duty on premises owners for the condition of the premises, the breach of which could result in liability for a premises owner. That is, Appellant would move the focus of the recreational immunity analysis away from the question of whether the injured party was a recreational user (as required in the statute) and instead focus on whether the specific

¹ www.ohiodnr.com/home_page/NewsReleases/tabid/18276/EntryId/3093/Hunters-Harvest-more-than-86-000-Deer-during-Ohios-Deer-Gun-Season.aspx

² <http://www.dnr.state.oh.us/website/watercraft/watercraftfacilities2/viewer.htm>

³ Table 2-4, Ohio Department of Transportation Technical Memorandum, Bicycle/Pedestrian, Nov. 2012

instrumentality existing on the recreational property was an “enhancement” of the recreational value of the premises. If this view is adopted, this change will interject overwhelming uncertainty for premises owners regarding the applicability of recreational user immunity, and will invite a torrent of lawsuits relating to injuries occurring on recreational property. Where there is uncertainty and the risk of exposure to liability, the inevitable (and reasonable) response by local governments will be to close or limit the use of their property for recreational use, which undercuts the very purpose of the recreational user statute. This would affect not only thousands of Ohio local governments faced with making hard decisions about access to their lands, but also the millions of hunters, fisherman and other recreational users in Ohio who presently use those recreational lands. In considering this case, *Amici* urge this Court to bear in mind the interests of these millions of recreational users whose access to recreational land depends on the viability of recreational use immunity under R.C. § 1533.181 and to decline to adopt the broad exception to recreational use immunity that the Appellant is proposing in this case.

II. STATEMENT OF THE CASE AND FACTS

Amici adopt and incorporate by reference, the Statement of the Case and Facts contained within the Merit Brief of Appellee City of Circleville.

III. LAW AND ARGUMENT

Response to Proposition of Law I: The owner of a recreational property has no duty to a recreational user for the condition of the property under R.C. § 1533.181, irrespective of the nature of instrumentality on which the recreational user was injured.

R.C. § 1533.181 is a straightforward statute: a premises owner owes no duty to a recreational user to keep the premises safe for entry or use and extends no assurance to a recreational user that the premises are safe for entry or use. Thus, if a person meets the definition of a “recreational user” under R.C. § 1533.18(A), the premises owner has no duty to

the recreational user to keep the premises safe. *Ryll v. Columbus Fireworks Display Co.*, 95 Ohio St. 3d 467, 2002-Ohio-2584, 769 N.E.2d 372 (2002). Absent a duty on the part of a premises owner to keep the premises safe for recreational users, a recreational user cannot maintain a tort claim against the premise owner for injury arising from use of the property. *Milliff v. Cleveland Metroparks System*, Cuyahoga App. No. 52315, 1987 Ohio App. LEXIS 7300 (June 4, 1987), at *5. This applies even where the recreational user alleges that the premises owner affirmatively created a hazard on the property. *Id.*; see, also, *Shockey v. ODNR*, Ohio Court of Claims No. 2004-09509-AD, 2005-Ohio-641; *Meiser v. ODNR*, Ohio Court of Claims No. 2003-10392-AD, 2004-Ohio-2097. The focus of the inquiry under R.C. § 1533.181, therefore, is squarely on the whether the injured party was a “recreational user” under R.C. § 1533.18(A). As set forth above, this immunity is based on the recognition that property owners will be unwilling to open their lands for recreational free of charge to the public if they face tort liability to recreational users as a reward for their effort. *Marrek, supra*.

In this case, Appellant concedes that he was a “recreational user” at the time of his injury and that he was in a classic recreational property, i.e. a park, and that he was engaged in a recreational activity. This should end the inquiry. In an effort to avoid recreational user immunity, however, Appellant urges the Court to fundamentally alter the nature of recreational user immunity by adding a broad exception to that immunity that does not exist in the statute and for which there is no basis in prior case law from this Court or any other court. Appellant asks this Court to hold that recreational user immunity does not apply to “man-made hazards” that “do not further or maintain its recreational value.” To recognize this exception would be to go far beyond the express language of the statute, defeating the purpose of the statute itself, which is “to encourage owners of premises suitable for recreational pursuits to open their land to public

use without the worry about liability.” *Moss v. Dept. of Natural Resources*, 62 Ohio St. 2d 138, 142 (1980).

Although bundled as a single Proposition of Law, Appellant actually suggests a three factor test for removing recreational immunity for premises owners. The first two factors—whether the condition was man-made and whether the condition constitutes a hazard created by the premises owner—have been rejected by this court as exceptions to recreational immunity. The third factor—whether the instrumentality of the plaintiff’s injury “improved or furthered recreational activities on the property”—has no basis in the statute. Each proposed factor is addressed below.

A. Recreational Use Immunity Applies To “Man Made” Conditions.

In his Merit Brief, Appellant argues that for the purposes of determining whether recreational immunity applies, there is a distinction between injuries caused by natural conditions and injuries from conditions on the premises that are “man-made,” suggesting recreational user immunity should not be available for the latter. (Appellant’s Merit Brief, p. 11-12). Appellant argues that recreational immunity would apply if the park had been “left in its natural state,” but that immunity should not apply, at least in part, because the specific condition that caused his injury was “entirely man-made.” (Appellant’s Merit Brief, p. 11). This contention has been rejected by this Court.

In *Miller v. Dayton*, 42 Ohio St.3d 113, 537 N.E.2d 1294 (1989), this Court determined that the mere presence of man-made improvements on a parcel of real property does not exclude the property from the application of R.C. 1533.18 and 1533.181. The test for recreational use immunity is based upon the “nature and scope of activity for which the premises are held open to the public” and “the goal is to determine the character of the premises.” *Miller v. Dayton*, supra,

at 115. As such, the nature of the instrumentality of the injury—whether it was natural or man-made—is not and should not be relevant in determining whether recreational immunity applies, unless the essential character of the premises “*on the whole*” was not recreational. *Miller, supra*, at 115.

In this case, there is no dispute that the essential character of Barthelmas Park was recreational, and that is sufficient under R.C. § 1533.181. The statute makes no distinction between man-made conditions or improvements in the application of the recreational user statute.

B. An Owner Of Recreational Premises Does Not Owe A Duty To A Recreational User, Even With Regard To The Creation Of A Hazardous Condition.

Appellant also incorporates into his new proposed limitation on R.C. § 1533.181 the notion that recreational user immunity is inapplicable where the premises owner has “rendered the land more dangerous without promoting or preserving recreational activities.” In his Merit Brief, Appellant repeatedly returns to the theme that the recreational user statute should not be applicable where the premises owner was at fault in causing or creating the condition that caused the injury, even to the point of incorrectly stating that the statute has been employed to preclude claims only where accidents occur “through no fault of the defendant [premises owner].” (Appellant’s Merit Brief, p. 11). This argument is simply the reiteration of a position that been rejected in the past and which has no foundation in the recreational user statute.

There is nothing in the language of R.C. § 1533.181 that suggests that the availability of recreational user immunity may depend on whether the premises owner was at fault for creating the condition that causes injury. The statute states that a premises owner has no duty to a recreational user to keep its property safe for use, period. The availability of the immunity is based on the status of the injured party as a recreational user, not the nature of the instrumentality

of his injury. *Estate of Finley v. Cleveland Metroparks*, 189 Ohio App. 3d 139, 152 (8th Dist. 2010). The concept of “fault” presumes the existence of a duty and the breach of that duty by the premises owner. Interjecting any concept of fault (or negligence, recklessness, wantonness, etc.) by premises owner in the recreational use immunity analysis is incompatible with the language of R.C. § 1533.181, which states that a premise owner *owes no duty* to a recreational user. If there is no duty, a premises owner cannot be liable for breaching the duty. If the General Assembly intended an exception to recreational immunity for conditions that were affirmatively created by the premises owner, the General Assembly would have included that exception into the statute. The fact that it did not is meaningful. An exception should not be read into the statute.

Ohio courts have held over and over that there is no exception to recreational user immunity where the condition causing an injury to the recreational user was created by the actions of the premises owner. See *Estate of Finley, supra*, at 152 (“[T]he creation of hazardous conditions does not change the determinative factor i.e., whether the plaintiff was a recreational user.”); *Tepker v. Hueston Woods State Park*, Court of Claims No. 2009-08799-AD, 2010 Ohio 5453 (“Even if defendant's conduct would be characterized as ‘affirmative creation of hazard,’ it still has immunity from liability under the recreational user statute.”); *Milliff v. Cleveland Metroparks System*, Cuyahoga App. No. 52315, 1987 Ohio App. LEXIS 7300 (June 4, 1987); *Look v. Cleveland Metroparks System*, 48 Ohio App. 3d 135 (8th Dist. 1988) (“R.C. 1533.181 makes no distinction between active and passive negligence.”); *Erbs v. Cleveland Metroparks System*, Cuyahoga App. No. 53247, (December 24, 1987). These courts rightly determined that there is no basis for an exception for recreational use immunity, even where the plaintiff alleges that the condition that causes the injury was created by the premises owner.

As set forth above, the incentive for premises owners to open their lands for no-cost recreational use by the public depends on immunity for conditions on the premises. Premises owners may open their land for free precisely because they do not have to incur the cost of insuring against risk to recreational users or paying judgments for injuries based on the conditions of the premises. Without immunity, premises owners will not open their lands without compensation to offset the cost of insurance and/or the potential liability to recreational users. This is no different for local governments. If blanket recreational immunity is removed, local governments will find themselves exposed to liability and will simply cease allowing the public to use their lands, defeating the purpose of R.C. § 1533.181.

C. Neither R.C. § 1533.181 Nor Prior Case Law Supports An Exception To Recreational Use Immunity For Conditions On Recreational Premises That Do Not Further Or Enhance The Recreational Use Of The Premises.

In his Merit Brief, Appellant also asks this Court to adopt an entirely new requirement for recreational user immunity that has no basis in any prior case law or in R.C. § 1533.181. According to the Appellant, recreational immunity should not apply if the specific instrumentality of the injury to the plaintiff does not “enhance the recreational value” of the premises. Stated another way, Appellant claims that the recreational immunity should not apply if “the precise *situs* of the incident” did not qualify as recreational property. (Appellant’s Merit Brief, p. 16). Thus, Appellant urges this Court to shift the focus of the recreational user immunity analysis from the nature of property as a whole and the use to which it was put by the plaintiff to whether the specific condition upon which the plaintiff was injured was “recreational” or not.

Foremost, there is no basis for this shift in the language of the statute or in prior case law. The statute speaks to whether the injured party was a recreational user under R.C. § 1533.18(A)

and whether “the premises *viewed as a whole* [are] those which users enter upon to hunt, fish, trap, camp, hike, swim, or engage in other recreational pursuits[.]” *Miller, supra*, at 115. Thus, the question is whether the essential character of the premises is recreational on the whole, not whether the specific instrumentality or condition on which the plaintiff was injured was “recreational” in nature. There is no prior case law from this Court or any other court that has held that recreational immunity does not apply to an injury to an admitted recreational user engaging in a recreational injury within a recreational premises because the specific instrumentality of the injury (in this case, a dirt pile) on the premises was not in furtherance of the recreational use of the recreational premises. Whether the condition that caused the injury is in furtherance of the recreational purposes of the premises is not and should not be relevant, as long as the premises is essentially recreational in nature.

Appellant relies heavily *Huffman v. City of Willoughby*, 11th Dist. No. 2007-L-040, 2007-Ohio-7120, a case involving the drowning death of a two minors on a low-head dam maintained by the City. Appellants’ reliance is misplaced. Hoffman was a decision by the court of appeals affirming the denial of a motion to dismiss based on the recreational use statute. For the decision, the court was required to accept all of the allegations in the Complaint, including the allegation that the municipal property was not recreational property. This is not the case here. Moreover, even if *Huffman* was applicable, the facts in *Huffman* are distinguishable because the *Huffman* court presumed that the entire portion of the river (and not just the low-head dam) was not recreational. In this case, the record here establishes beyond dispute that the essential nature of Barthelmas Park taken on the whole was recreational (unlike the segment of river in Hoffman).

In his Merit Brief, Appellant derisively calls this Court's approach from *Miller*, which looks at whether a property is recreational based on its usage viewed as a whole, as an "overly-simplistic view" of R.C. § 1533.181. In fact, this view is appropriate and necessary, particularly for governmental land owners. Given the fact that much publicly owned land serves both recreational and non-recreational uses, Appellant's proposed distinction would be confusing and unworkable for many municipal properties.

Fortunately for the millions of active Ohioans, the state and many local governments have become adept at creating recreational uses for property originally purchased and developed for non-recreational purposes. This is a common occurrence, given that many local governments have limited resources to create purely recreational facilities from scratch. Thus, local governments often use properties for more than one use. Utility right of ways are used for bike paths, old landfills and brownfields are turned into parks and athletic fields, and unused public lands become nature preserves. The list of examples could go on and on. Local governments throughout the state have even turned large scale public works projects into major recreational areas. For example, there are dozens of dams that have been built throughout Ohio to impound water in reservoirs for consumption. These same dams and reservoirs, however, serve as sprawling recreational areas for fishing, boating, running and bicycling. And, like Circleville in this case, many local governments use their recreational properties for both recreational and non-recreational uses for purpose of conserving their financial resources. The point is this: plaintiff's proposed amendment to R.C. § 1533.181 will serve only to compel local governments to withdraw their property from recreational use. Local governments will have no incentive to open their property for recreational use by the public if the result is liability because some small

aspect or portion of their otherwise recreational property is non-recreational. This is the opposite result intended by the General Assembly in enacting R.C. § 1533.181.

Moreover, the Appellant's proposed exception to the recreational user statute would be confusing and impractical in the application, as the proposed exception would require courts to make extremely fine distinctions between different parts and aspects of a premises to determine which part is recreational and which is not. Most publically owned properties (as well as private), even where open for recreational use, have some public utility fixtures upon them, like manholes, pipe heads and sewer and drainage grates, signage, lighting and utility poles, all of which have little or nothing to do with enhancement of the recreational use of the property. Under the Appellant's theory, in a personal injury accident for injuries on a recreational property, a court would have to decide if these types of conditions "enhanced" the recreational value of the premises or not. Appellant's theory would invite parties to engage in endless litigation over whether conditions like these or thousands of others would be covered by the recreational user statute, even where the essential use of the property on the whole was recreational and the injured party was a recreational user. This Court's present view of R.C. § 1533.181, holding that recreational user immunity applies to any claim by a recreational user on a property whose essential character on the whole is recreational, without reference to the specific instrumentality of the injury, properly addresses and resolves the confusion that would result if the Appellant's position was adopted. The Court's present view is also consistent with the General Assembly's intention that premise owners be afforded immunity as an incentive to allow for the recreational use of their property, without fear of liability for the condition of the premises.

The 1308 Townships and 88 Counties, as well as the employees and board of the parks represented by *Amici* are proud to be able to provide recreational opportunities to the public on

their public lands, which is in no small part the result of the immunity from liability afforded by R.C. § 1533.181. The ability and willingness of local governments to continue to keep their land open to the public for recreational use would be severely compromised by the adoption of the Appellant's position in this matter. As a result, *Amici* urge this Court reaffirm this Court's prior view of R.C. § 1533.181 and reject the broad exception for which the Appellant is advocating. The decision of the Fourth District Court of Appeals should be affirmed.

IV. CONCLUSION

For the foregoing reasons, *Amici Curiae* County Commissioners Association of Ohio, the Ohio Township Association and the Ohio Parks and Recreation Association respectfully ask this Court to affirm the decision of the Fourth District Court of Appeals in this matter and refuse to the adopt the Proposition of Law as set forth by the Appellant.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 19th day of February, 2013, upon the following

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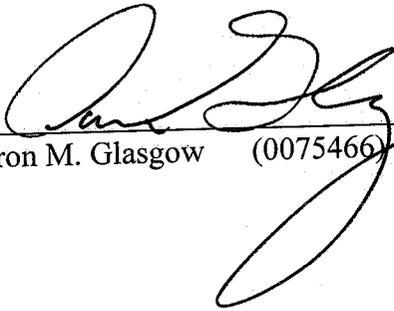
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