ORIGINAL

IN THE SUPREME COURT OF OHIO

JEREMY PAULEY, *et al.*,	:	CASE NO. 2012-1150
Plaintiffs-Appellants,	:	On Appeal from Fourth District Court of Appeals, Pickaway County No. 2010CA0031
v.	:	
CITY OF CIRCLEVILLE,	:	
Defendant-Appellee.	:	

BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS, IN SUPPORT OF DEFENDANT-APPELLEE CITY OF CIRCLEVILLE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE AND STATEMENT OF FACTS 3

LAW AND ARGUMENT 3

OHIO'S RECREATIONAL USER STATUTE ESTABLISHES A BRIGHT-LINE LEGAL STANDARD THAT ENSURES THAT NO OWNER, LESSEE OR OCCUPANT OF PROPERTY HELD OPEN TO THE PUBLIC FOR RECREATIONAL USE OWES ANY LEGAL DUTY TO A RECREATIONAL USER TO KEEP THE PREMISES SAFE FOR ENTRY OR USE 3

A. Ohio's Recreational User Statute Establishes A Bright-Line Legal Standard That Protects Both Public and Private Property Owners From Liability If They Open Their Property To The General Public For Recreational Use. 3

B. The Court Should Not Create An Exception That Would Impose A New Legal Duty Upon Property Owners To Protect Recreational Users From "Man-Made Hazards" That "Do Not Further Or Maintain" The Property's "Recreational Value." 7

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Cases

Bodnar v. Hawthorn of Aurora Ltd. Partnership, 11th Dist. No. 2006-P-0002, 2006-Ohio-6874 4

Estate of Finley v. Cleveland Metroparks, 189 Ohio App.3d 139, 2010-Ohio-4013, 937 N.E.2d 645 (8th Dist. 2010) 5

Estate of Heintzelman v. Air Experts, Inc., 126 Ohio St.3d 138, 2010-Ohio-3264, 931 N.E.2d 548 8

Fetherolf v. State of Ohio Dept. of Natural Resources, 7 Ohio App.3d 110, 454 N.E.2d 564 (10th Dist. 1982) 5, 6

Gladon v. Greater Cleveland Regional Transit Authority, 75 Ohio St.3d 312, 1996-Ohio-137, 662 N.E.2d 287 4

Henley v. Youngstown Bd. Of Zoning Appeals, 90 Ohio St.3d 142, 2000-Ohio-493, 735 N.E.2d 433 10

Hubbard v. Canton City School Bd. of Edn., 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543 8

Hubbard v. City of Norwood, 1st Dist. No. A-9403465, 1995 WL 734053 (Dec. 13, 1995) 11

LiCause v. City of Canton, 42 Ohio St.3d 109, 537 N.E.2d 1298 (1989) 7

Light v. Ohio Univ., 28 Ohio St.3d 66, 502 N.E.2d 611 (1986). 4

Look v. Cleveland Metroparks, 48 Ohio App.3d 135, 548 N.E.2d 966 (8th Dist. 1988) 5

Marrek v. Cleveland Metroparks Bd. Of Commissioners, 9 Ohio St.3d 194, 459 N.E.2d 873 (1984) 1, 5, 6

Miller v. City of Dayton, 42 Ohio St.3d 113, 537 N.E.2d 1294 (1989) 8, 9, 10, 11

Mitchell v. Cleveland Electric Illuminating Co., 30 Ohio St.3d 92, 507 N.E.2d 352 (1987) 4

Moss v. Dept. of Natural Resources, 62 Ohio St.2d 138, 404 N.E.2d 742 (1980) 5

Mussivand v. David, 45 Ohio St.3d 314, 544 N.E.2d 265 (1989). 4, 10

Pauley v. City of Circleville, 4th Dist. No. 10CA31, 2012-Ohio-2378, 971 N.E.2d 410 ..... 2, 10

Pratte v. Stewart, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415 8

Price v. Village of New Madison, 2d Dist. No. 1348, 1994 WL 587548 (Oct. 26, 1994) 6, 7

Sorrell v. Ohio Dept. of Natural Resources, 40 Ohio St.3d 141, 532 N.E.2d 722 (1988) 1, 4, 6

State v. Williams, 2012-Ohio-5699 (Dec. 6, 2012) 10

Wallace v. Ohio Dept. of Commerce, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018 ..... 4, 10

Statutes

R.C. 1533.181 ..... 1, *passim*

STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is an organization of more than 500 attorneys, corporate executives, and managers who devote a substantial portion of time to the defense of civil lawsuits and the management of claims against individuals, corporations and governmental entities. The legal question presented in this case directly concerns OACTA and its members because of the widespread new source of potential tort liability that may result to both public and private property owners if the Court were to adopt the Appellants' Proposition of Law and create a new judicial exception to Ohio's recreational user statute, R.C. 1533.181.

As discussed more fully below, Ohio's recreational user statute establishes a bright-line legal rule that provides that "no owner, lessee, and occupant" of any property open to the public for recreational pursuits "owes any duty to a recreational user to keep the premises safe for entry or use." *See* R.C. 1533.181(A)(1). Here, it is undisputed that the "premises" at issue is an outdoor municipal park, Barthelmas Park, that has always been open to the public for recreational pursuits. Thus, as the Fourth District properly held, the City of Circleville owed no legal duty to a recreational user to keep the premises safe for entry or use, and thus could not be held liable for the tort claims alleged by Jeremy Pauley ("Pauley"), a recreational user who was injured while sledding, after-dark, within the park. *See Marrek v. Cleveland Metroparks Bd. Of Commissioners*, 9 Ohio St.3d 194, 459 N.E.2d 873 (1984) (no liability to sledder who was injured while sledding in the Hinckley Reservation of the Cleveland Metroparks); *Sorrell v. Ohio Dept. of Natural Resources,* 40 Ohio St.3d 141, 532 N.E.2d 722 (1988) (no liability under recreational user immunity statute to a snowmobile rider who was injured when he struck a mound of dirt that created by dredging operations on a lake).

In their Merit Brief, Appellants urge this Court to carve out a new exception to the blanket immunity granted by R.C. 1533.181 by holding that property owners may be held liable to a recreational user if they affirmatively create a "man-made hazard" on the premises that "does not further or maintain its recreational value." (*See* Appellant's Merit Brief, Proposition of Law No. 1). The Court should reject this invitation. The statute clearly and unambiguously provides that property owners owe no legal duty of care to a recreational user, period. There are no exceptions. Thus, as the Fourth District properly concluded, the Court would be re-writing the statute if it were to impose a new legal duty upon property owners that does not presently exist under Ohio law. *See Pauley v. City of Circleville*, 4th Dist. No. 10CA31, 2012-Ohio-2378, 971 N.E.2d 410, ¶ 20 ("Appellants request, in essence, that we read an exception into the statute when none exists. We decline to do so").

Indeed, if adopted by this Court, Appellant's proposition of law would significantly undermine the purpose and intent of the recreational user statute by imposing a new legal duty of care upon both public and private property owners that would discourage them from opening up their premises to the public for recreational use. OACTA's members have a pointed interest, therefore, in ensuring that the recreational user statute is properly interpreted by this Court, and not wrongfully expanded to open the door to a whole new set of premises liability claims by recreational users, such as the plaintiff, who allege that the property owner owed them a legal duty to keep the premises safe for recreational use. The Fourth District Court of Appeals properly applied the recreational user statute to the facts of this case, and its holding should be affirmed by this Court. Accordingly, this Court should reject Appellant's proposition of law and affirm the judgment that has been entered in the City of Circleville's favor.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici OACTA incorporates by reference the Statement of Case and Statement of Facts set forth in Appellee City of Circleville's Merit Brief.

LAW AND ARGUMENT

PROPOSITION OF LAW: OHIO'S RECREATIONAL USER STATUTE ESTABLISHES A BRIGHT-LINE LEGAL STANDARD THAT ENSURES THAT NO OWNER, LESSEE OR OCCUPANT OF PROPERTY HELD OPEN TO THE PUBLIC FOR RECREATIONAL USE OWES ANY LEGAL DUTY TO A RECREATIONAL USER TO KEEP THE PREMISES SAFE FOR ENTRY OR USE.

A. Ohio's Recreational User Statute Establishes A Bright-Line Legal Standard That Protects Both Public and Private Property Owners From Liability If They Open Their Property To The General Public For Recreational Use.

As previously discussed, the recreational user statute, R.C. 1533.81, establishes a bright-line legal standard that provides that "no owner, lessee or occupant" of any premises open to the public for recreational use "owes any duty to a recreational user to keep the premises safe for entry or use," and thus cannot incur any liability "for any injury to person or property caused by any act of a recreational user." *Id.* In particular, the statute provides:

> (A) No owner, lessee, or occupant of the 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.

Id.[1]

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[1] In their Brief, Appellants argue that subsection (A)(3) does not apply because Pauley was not injured by *another* recreational user. This argument misconstrues subsection (A)(3). On its face, subsection (A)(3) provides that the property owner incurs no "liability for any injury to person or property caused by *any* act of a recreational user." *Id.* This does not mean the act of *another* recreational user. It means any act of *any* recreational user, including the Plaintiff.

The lack of *any* legal duty of care to recreational users is critical to understanding how the General Assembly intended for the recreational user statute to apply. Under Ohio law, the existence of a duty of care owed by the defendant to the plaintiff is one of the essential elements of a negligence claim. *See Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 274, 2002-Ohio-4210, 773 N.E.2d 1018; *Mitchell v. Cleveland Electric Illuminating Co.*, 30 Ohio St.3d 92, 507 N.E.2d 352 (1987). "For a plaintiff to be able to recover under a negligence theory, *all of the elements of negligence must be demonstrated*." *See Bodnar v. Hawthorn of Aurora Ltd. Partnership*, 11th Dist. No. 2006-P-0002, 2006-Ohio-6874, ¶ 31 (emphasis in original). If there is no legal duty owed to the plaintiff, therefore, a property owner cannot be held liable for any alleged claims arising from the alleged failure to keep the premises in a safe condition.

In general, the question of whether a duty exists is a question of law for the determination of the trial court. *Wallace*, 96 Ohio St.3d at 274; *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). With respect to premises liability claims, it is the "status of the person who enters upon the land of another (*i.e.*, trespasser, licensee, or invitee)" that defines the "scope of the legal duty that the landowner owes the entrant." *See Gladon v. Greater Cleveland Regional Transit Authority*, 75 Ohio St.3d 312, 315, 1996-Ohio-137, 662 N.E.2d 287. As this Court has held, the owner of the premises ordinarily owes a duty to exercise ordinary care and protect an "invitee" from harm by maintaining the premises in a safe condition. *See Light v. Ohio Univ.*, 28 Ohio St.3d 66, 68, 502 N.E.2d 611 (1986). Conversely, "a landowner owes no duty to a licensee or trespasser except to refrain from willful, wanton or reckless conduct which is likely to injure him." *Gladon*, 75 Ohio St.3d at 317; *see also Sorrell v. Ohio Dept. of Natural Resources*, 40 Ohio St.3d 141, 144, 532 N.E.2d 722 (1988).

Against this common law backdrop, the General Assembly adopted a statute that broadly protects all property owners (both public and private) from potential tort liability that may arise if they open their premises to the general public for recreational use. As this Court has recognized, "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.'" *See Marrek v. Cleveland Metroparks Bd. Of Commissioners*, 9 Ohio St.3d 194, 198, 459 N.E.2d 873 (1983) (citing *Moss v. Dept. of Natural Resources*, 62 Ohio St.2d 138, 404 N.E.2d 742 (1980)). Otherwise, public and private landowners may elect to close off their property to the general public out of fear of potential tort liability that may be incurred to persons who enter and use their lands for recreational pursuits. Thus, the General Assembly adopted a bright-line legal standard that provides that "no owner, lessee, or occupant" of any premises open to the general public for recreational use "owes any duty to a recreational user to keep the premises safe for entry or use." *See* R.C. 1533.181(A)(1).

In this regard, Ohio's recreational user statute does not provide any exceptions for claims arising from "dangerous" or "hazardous" conditions that are "affirmatively created" upon the premises by the property owner. *See Estate of Finley v. Cleveland Metroparks*, 189 Ohio App.3d 139, 2010-Ohio-4013, 937 N.E.2d 645, ¶ 50 (8th Dist. 2010) (rejecting argument that "R.C. 1533.181 does not afford immunity . . . for the affirmative creation of a 'dangerous condition'"); *Look v. Cleveland Metroparks*, 48 Ohio App.3d 135, 137, 548 N.E.2d 966 (8th Dist. 1988) (rejecting argument that R.C. 1533.181 does not apply if the property owner creates a "hazardous condition" on the property). Similarly, there is no exception for willful, wanton or reckless misconduct. *See Fetherolf v. State of Ohio Dept. of Natural Resources*, 7 Ohio App.3d 110, 112, 454 N.E.2d 564 (10th Dist. 1982) (rejecting argument that R.C. 1533.181 "bars only

claims predicated on ordinary negligence," explaining that "there can be no wanton misconduct unless one breaches a duty which he owes to another"). Rather, in R.C. 1533.181, the General Assembly established a bright-line legal standard that clearly establishes that there is *no* legal duty to recreational users to keep the premises safe for entry or use, period. *Id.*

The proper application of the recreational use statute, therefore, should ordinarily be a straight-forward proposition. If the "premises" are open to the general public for recreational pursuits, then the owners, lessees, and occupants of the premises owe no legal duty to a recreational user to keep the premises safe for entry or use, and thus cannot be held liable for any claim arising from a recreational user's entry or use of the premises. In *Marrek*, for example, this Court considered whether the recreational user statute applied to a plaintiff who was injured while sledding in the Hinckley Reservation of the Cleveland Metroparks System. In that case, it was undisputed that "Marrek was a gratuitous user and that she entered the premises for sledding, a recreational pursuit." *Id.*, 9 Ohio St.3d at 198. Given this fact, this Court concluded that "the requirements of R.C. 1533.181 have been met and we find that the park district does not owe a duty to Marrek, a recreational user, to keep the premises safe for use." *Id.*

Similarly, in *Sorrell v. Ohio Department of Natural Resources*, 40 Ohio St.3d 141, 532 N.E.2d 722 (1988), the plaintiff was injured when he was riding a snowmobile across a frozen lake in a state park and struck a large mound of dirt that was created by the defendant's dredging operations. As in *Marrek*, it was undisputed that the state park was open for recreational use by the general public. *Id.*, 40 Ohio St.3d at 144. Accordingly, based upon the plain language of the statute, this Court concluded that R.C. 1533.181 applied, and that ODNR owed no legal duty to the snowmobiler to keep the premises safe for recreational use. *Id.*; *see also Price v. Village of New Madison*, 2d Dist. No. 1348, 1994 WL 587548 (Oct. 26, 1994) (holding that the recreational

user statute applied to a snowmobile operator who was injured when he struck a cable strung between an utility pole and fence).

Under the statute, therefore, it is clear that the City of Circleville owed no legal duty to Jeremy Pauley to keep the premises safe for his recreational use. As this Court has held, "a person who enters or uses municipal land which is held open to the general public free of charge for recreational pursuits is a recreational user." *LiCause v. City of Canton*, 42 Ohio St.3d 109, 112, 537 N.E.2d 1298 (1989). Here, Pauley clearly falls within the scope of this definition because it is undisputed that he was injured while sledding in a municipal park that was open to the general public free of charge for recreational pursuits. Thus, the City of Circleville "owe[d] no duty to [Pauley] who [was a] recreational user[]" under R.C. 1533.181. *Id.* at 113.

B. The Court Should Not Create An Exception That Would Impose A New Legal Duty Upon Property Owners To Protect Recreational Users From "Man-Made Hazards" That "Do Not Further Or Maintain" The Property's "Recreational Value."

In their Merit Brief, Appellants do not dispute that Barthelmas Park is a municipal park that has always been open to the general public for recreational pursuits, and that Pauley was injured in the park while engaging in a recreational pursuit, *i.e.* sledding. Notwithstanding this fact, Appellants argue that the Court should not grant immunity in this case because the statute does not apply to a property owner who creates a "man-made hazard" that does "not further or maintain its recreational value." (Appellants' Proposition of Law No. 1). By so doing, Appellants are essentially advocating that the Court impose a new legal duty upon property owners to recreational users who are injured by any "man-made hazard" on the premises that does not "further or advance" its recreational value. (*Id.*)

While Appellants attempt to articulate a number of public policy reasons for their new exception, there are two fatal flaws with their arguments. First, Appellants' arguments ignore

the plain language of the statute, which, on its face, does not create any exceptions for "man-made hazards" that "do not further or maintain" the "recreational value" of the premises. This is a critical point because, as this Court has repeatedly held, it is well-established that the courts cannot rewrite statutes under the guise of statutory interpretation. "[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *See Estate of Heintzelman v. Air Experts, Inc.*, 126 Ohio St.3d 138, 2010-Ohio-3264, 931 N.E.2d 548, ¶ 15 (quoting *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 14). Otherwise, this Court "would invade the province of the legislature and violate the separation of powers" by imposing a new legal duty upon property owners that was not imposed by the General Assembly. *See Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415, ¶ 45. Accordingly, even if there are good public policy reasons for imposing tort liability for man-made hazards, the fact remains that this Court must "leave it to the General Assembly to rewrite the statute if it deems it necessary." *Id.*

Second, Appellants' arguments misconstrue the applicable case law, particularly this Court's opinion in *Miller v. City of Dayton*, 42 Ohio St.3d 113, 115, 537 N.E.2d 1294 (1989). In *Miller,* this Court held that the recreational user statute applies to any "premises" that is "open to the public for recreational activity." *See Miller*, 42 Ohio St.3d at 113. As was explained in *Miller*, "[i]f the premises qualify as being open to the public for recreational activity," then the recreational user statute applies, "regardless of the specific activity pursued by the plaintiff at the time of injury." *Id.*, 42 Ohio St.3d at 115, 537 N.E.2d at 1297. Indeed, in *Miller*, this Court held that "the presence of man-made improvements" in the City of Dayton's municipal park "did *not* remove the property from statutory protection." *Id.* at 114 (emphasis added). Rather, this

Court explained that the "premises" must be viewed "as a whole" to determine whether the man-made improvements "change the character of the premises and put the property outside the protection of the recreational-user statute." *Id.* at 114-115.

In this regard, *Miller* did not hold that the Court should examine whether the specific "man-made improvement" at issue "furthers" or "maintains" the park's recreational value. To the contrary, in *Miller*, this Court re-affirmed that the key inquiry is whether the "essential character" of the park (when viewed as a whole) "is that of premises held open to the plaintiff, without fee, for recreational purposes." *Id.* at 115. Indeed, an outdoor municipal park, like the City of Circleville's Barthelmas Park, is the classic example of the type of property that falls within the protection of the recreational user statute. In *Miller*, for example, the premises was also an outdoor municipal park that was open to the public for recreational pursuits without a fee. Although the City of Dayton had constructed a number of man-made improvements on a softball field within the park, this Court ultimately held that the recreational user statute applied because "essential character" of the premises, when viewed as a whole, was "that of premises held open to the plaintiff, without fee, for recreational purposes." *Id.* at 115. Accordingly, this Court concluded that the City of Dayton's park "meets the definition of 'premises' under the Ohio recreational-user statute." *Id.*

The same legal conclusion should be reached here. Like the municipal park in *Miller*, the City of Circleville's Barthelmas Park is an outdoor municipal park that has always been open to the general public to engage in recreational activities, free of charge. The existence of two dirt mounds in one portion of the park did not change the "essential character" of the premises, when viewed as a whole. In other words, with or without the dirt mounds, the premises, when viewed as a whole, remains an outdoor municipal park that is open to the general public, without a fee,

for recreational pursuits. Accordingly, as in *Miller*, the City did not "owe any duty of care to a recreational user to keep the premises safe for entry or use." *Id.*

In their Merit Brief, Appellant argues that the question of whether "man-made" improvements "change the character of the premises" is a factual question that should be answered by a jury, not the courts. (Appellant's Merit Brief, pg. 12). The Court should reject this meritless argument. As the Fourth District properly held, the question of "whether a premises owner is entitled to recreational user immunity is a question of law" subject to *de novo* review. *Pauley*, 2012-Ohio-2378, ¶ 16. Indeed, it is well-established that the application of a statute or ordinance to the facts of an individual case is a question of law. *See, e.g., State v. Williams*, 2012-Ohio-5699, ¶ 25 (Dec. 6, 2012); *see also Henley v. Youngstown Bd. Of Zoning Appeals,* 90 Ohio St.3d 142, 148, 2000-Ohio-493, 735 N.E.2d 433 (holding that the application of a municipal ordinance to the facts of an individual case is a "question of law," and the fact that the inquiry "involve[s] a consideration of facts or the evidence [does] not turn this question into a question of fact"). Moreover, as previously discussed, it is well-established that the question of whether a duty exists is a question of law for the determination of the trial court, not a jury. *Wallace*, 96 Ohio St.3d at 274; *Mussivand,* 45 Ohio St.3d at 318. Thus, the question of whether City of Circleville owed a legal duty to Pauley to keep the premises safe for recreational use is a question of law for the Court, not a jury.

In this regard, this Court also should reject Appellant's suggestion to examine the "purpose" or "value" of each man-made improvement, in isolation, from the premises as a whole. This argument cannot be reconciled with the holding in *Miller* that the essential character of the premises must be "viewed as a whole" to determine whether the premises are open, without a fee, for recreational purposes. *Id.*, 42 Ohio St.3d at 114-115. Nothing in *Miller* or any

other case suggests that the Court should examine whether each and every man-made improvement "furthers" or "maintains" the property's "recreational value." In *Hubbard v. City of Norwood*, 1st Dist. No. A-9403465, 1995 WL 734053 (Dec. 13, 1995), for example, the plaintiff stepped in a hole and broke her ankle at the Norwood Waterworks Park. Although *Hubbard* argued that she was injured in an area of the park that was not intended for recreational purposes, the First District Court of Appeals, citing *Miller*, rejected this argument as a matter of law. "Any 'premises' made available for recreational purposes," the court held, "meets the statutory requirements for immunity from liability." *Id.* at *2. "Because the grassy area containing the hole is part of the park," the First District held that it fell "under the definition of 'recreational premises.'" *Id.*

The same result should be reached in this case. As the First District correctly observed in *Hubbard,* "R.C. 1533.181 does not limit immunity to specific portions of the property used for recreational purposes." *Id.*, 1995 WL 734053, at *2. Indeed, in this case, there is nothing in the record to establish that the essential character of the premises, when viewed as a whole, was <u>not</u> to be an outdoor municipal park that would be open to the public for recreational pursuits. The fact that the plaintiffs *allege* that the two dirt mounds did not "further" or "maintain" the park's recreational value, therefore, is <u>immaterial</u> and <u>irrelevant</u> to the outcome of this appeal. The recreational "value" of the dirt mounds is not the key inquiry. Rather, the key inquiry is whether the essential character of the premises, when viewed as a whole, is "that of premises held open to the plaintiff, without fee, for recreational purposes." *Miller*, 42 Ohio St.3d at 115. If the answer to this question is "Yes," then the recreational user statute applies, and the City owes no legal duty to the recreational user to keep the premises safe for his entry and use. *Id.*

Indeed, Plaintiff's proposed exception would establish an unworkable legal standard that would open the door to a host of new lawsuits and new tort liabilities for both public and private property owners that would undermine the purpose and intent of the recreational user statute. As previously discussed, the entire purpose of the recreational user statute is to create a bright-line *legal* standard that establishes that a recreational property owner owes no legal duty to a recreational user, period. There are no exceptions. Under Appellant's Proposition of Law, however, property owners that open up their lands for recreational use will now have a *new* judicially-imposed duty to make sure that any "man-made hazard" on their property does not pose a risk of potential harm to a recreational user who may enter or use their lands for recreational pursuits. Otherwise, they may become subject to a lawsuit and incur the significant risk of potential tort liability if a judge or a jury later determines that their "man-made improvement" was actually a "man-made hazard" that did not "further or maintain" the property's "recreational value."

In this regard, this Court's disposition of this case will not only affect municipalities, it will significantly affect the potential liability of private property owners, particularly in rural areas, who have opened up their lands to the general public for recreational use. Such private property owners specifically rely upon the recreational user statute in deciding to permit hunting, fishing, hiking, snowmobiling, and sledding on their lands. They in fact will often have dirt mounds or other "man-made" improvements on their property that may potentially trigger liability if a recreational user suffers an injury on the premises. Such property owners therefore may elect, out of fear of potential liability, to close off their lands and erect fences or "No Trespassing" signs that would directly undermine the purpose and intent of the recreational user statute.

OACTA and its members (both public and private) have a significant interest, therefore, in ensuring that the Court does not adopt Appellant's Proposition of Law and undermine the bright-line statutory protections that have long been afforded to recreational property owners who open their lands to the general public for recreational use. If a recreational property owner, lessee, or occupant opens their premises to the public for recreational pursuits, then the statute provides that they owe no legal duty to a recreational user to keep their premises safe for entry or use. No duty means no duty. It establishes a bright-line legal standard that assures property owners that they will not become subject to potential tort liability if they permit the public to enter or use their land for recreational pursuits. This bright-line standard should not be undermined or eroded in the manner advocated by Appellants. Accordingly, the Court should reject Appellant's Proposition of Law and affirm the Fourth District's judgment in this case.

CONCLUSION

For these reasons, the Court should affirm the judgment of Fourth District Court of Appeals in favor of the Defendant-Appellee City of Circleville, Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2013, a true and correct copy of the foregoing *Amicus Curiae Brief of the Ohio Association of Civil Trial Attorneys* was served, via regular U.S. Mail, postage prepaid, on the following counsel of record:

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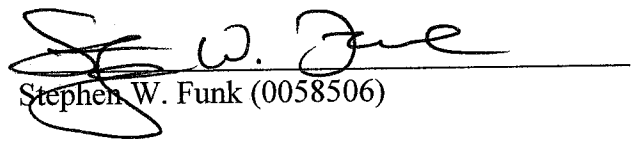

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