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IN THE SUPREME COURT OF OHIO  
CASE NO.: 2012-1150

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Appeal from the Court of Appeals  
Fourth Appellate District  
Pickaway County, Ohio  
Case No. 2010CA0031

JEREMY PAULEY, et al.,

Plaintiffs-Appellants

v.

CITY OF CIRCLEVILLE

Defendant-Appellee

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**MERITS BRIEF OF DEFENDANT/APPELLEE CITY OF CIRCLEVILLE**

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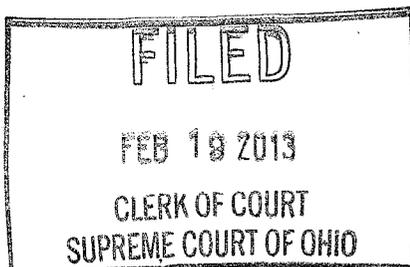
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## I. INTRODUCTION

There can be no dispute that this lawsuit has been filed in response to a tragic injury to a young man. On January 24, 2007, 18-year-old Jeremy Pauley fractured his neck while sled riding after dark at a City of Circleville park. Unfortunately, Pauley injured himself when he sledded headfirst down a small, snow-covered dirt mound that was illuminated only by his car's headlights so that his exploit could be captured on video. But, as the trial court and the Fourth District Court of Appeals in this case both held, the fact that this sad event occurred does not mean that the City of Circleville is in any way liable for it or that the Recreational User Statute does not apply.

The legislature has established a bright-line rule under Ohio's Recreational User Statute: If a premises is freely open to the public for recreational purposes and a person is injured while using the premises for a recreational purpose, the landowner has no duty to that user to keep the premises safe. The City simply does not "(1) [o]we[] any duty to a recreational user to keep the premises safe for entry or use; (2) [e]xtend[] any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use; [or] (3) assume[] responsibility for or incur[] liability for any injury to [a] person ... caused by any act of a recreational user." R.C. 1533.181(A)(1-3). Jeremy Pauley was a recreational user who was injured in a recreational area, a municipal park, while snow sledding, a recreational activity. That is all that is required under the Statute to ensure that the City cannot be held liable for Pauley's injury. *See Marrek v. Cleveland Metroparks Bd. of Com'rs*, 9 Ohio St.3d 194, 459 N.E.2d 873 (1984)(Landowners do not have a duty to supervise recreational users who are snow sledding to ensure they are safe from injury.).

The legislature designed this bright-line rule to produce predictable results to achieve the legislative "purpose of this statute [] 'to encourage owners of premises suitable for recreational pursuits to open their land to public use without worry about liability.' ... " *LiCause v. City of Canton*, 42 Ohio St.3d 109, 537 N.E.2d 1298 (1989), citing *Moss v. Dept. of Natural Resources*, 62 Ohio St.2d 138, 142, 404 N.E.2d 742 (1980). This statutory law is unambiguous by design and has made public – as well as private – landowners open their properties free to the public for decades. Consequently, landowners are assured that legal gamesmanship in the courts will not impair the Statute's purpose or put doubt in their heads about whether they, in fact, do not have to "worry about liability."

Plaintiffs improperly ask this Court to judicially create an exception or limitation to recreational immunity that does not exist in the Statute. Ohio law expressly prohibits this type of argument. *Akron v. Rowland*, 67 Ohio St.3d 374, 380, 618 N.E.2d 138 (1993) (courts must not "under the guise of construction, [] ignore the plain terms of a statute or to insert a provision not incorporated by the legislature."). Plaintiffs offer no statutory source for their new limitation for "man-made hazards upon real property that do not further or maintain its recreational value." (Plaintiffs' Proposition of Law) Plaintiffs disregard the plain text of the Statute and improperly insert terms that the legislature did not intend to be there. They also fail to cite any case that has adopted their overreaching proposition of law. In making this request, Plaintiffs seek to inject ambiguity into the law and put public and private landowners across Ohio in the crosshairs of liability. Their approach destroys the very purpose of the Statute.

Ohio law is clear. Landowners that freely open their premises for recreational purposes owe no duty to recreational users that are injured on their property. The lower courts rejected

Plaintiffs' improper effort to "read an exception into the statute when none exist." (See Fourth District's Opinion at ¶20; Apx. 15.) This Court must affirm the Fourth District's decision.

## **II. STATEMENT OF THE CASE AND FACTS**

### **A. Factual Background**

#### **1. Barthelmas Park is freely open to the public**

On January 24, 2007, Plaintiff Jeremy Pauley and his friends went snow sledding at the City of Circleville's Barthelmas Municipal Park. (Dep. of J. Pauley at 40, attached as Ex. "A" to Def.'s Mot. for Summ. J.) They did not pay to enter the Park. (*Id.* at 83.) The Park is open to the public and there has never been an entrance fee. (Dep. of Police Chief Gray at 18, attached as Ex. "F" to Pl.s' Br. in Op. to Summ. J.) The Park contains five baseball diamonds, a playground with recreational equipment, a soccer field, a basketball court, a shelter house for picnics, and restroom facilities. (Dep. of Street Supervisor Riffle at 9, attached as Ex. "E," to Pl.s' Br. in Op. to Summ. J.) People use the hill near the soccer field for snow sledding during the winter. (*Id.* at 25.)

#### **2. Pauley and his friends go sledding at the Park**

Pauley and his friend Kevin Baisden were sledding on the main hill leading from the shelter at the facility to the soccer fields. (Dep. of Pl.'s Friend Kevin Baisden at 36, attached as Ex. "B" to Pl.s' Br. in Op. to Summ. J.) They went down the main hill about a dozen times. (*Id.* at 21.) Two other friends watched. (*Id.*)

Pauley or his friends recorded on videotape the evening's events. They recorded themselves being pulled behind a motor vehicle on a sled (Dep. of J. Pauley at 83, attached as Ex. "A", to Def.'s Mot. for Summ. J.) and crashing into garbage cans while sledding on the hill.

(Dep. of J. Pauley at 107, attached as Ex. "A". to Def.'s Mot. for Summ. J.) They also filmed the incident giving rise this litigation.<sup>1</sup>

### 3. Pauley seriously hurts himself while sledding in the darkness

After sledding for an hour on the main hill, at around 6 p.m. Pauley noticed a snow-covered mound of dirt that was approximately 15 feet high and 20 feet wide that he wanted to try to sled down. (Dep. of J. Pauley at 43, 46, 49, attached as Ex. "A" to Def.'s Mot. for Summ. J.) At the time, it was almost "completely dark," according to Baisden. (Dep. of Pl.'s Friend Kevin Baisden at 24, attached as Ex. "B" to Pl.s' Br. in Op. to Summ. J.) Because of the darkness, they used the headlights of the car to illuminate the snow-covered mound. (*Id.* at 24, 39, attached as Ex. "B" to Pl.s' Br. in Op. to Summ. J.)

No one from the group had previously tried to sled down the mound. (Dep. of Pl.'s Friend Kevin Baisden at 21, attached as Ex. "B" to Pl.s' Br. in Op. to Summ. J.) Baisden said, "I wasn't going to go down that hill." (*Id.* at 39.) While his friend declined to do so, Pauley wanted to slide headfirst down the snow-covered mound while Baisden recorded the feat on the camera. Pauley went head first down the dirt mound on his sled and hit something, causing significant injuries. (Dep. of J. Pauley at 51, attached as Ex. "A" to Def.'s Mot. for Summ. J.) Pauley could not identify the cause of his injury or what he may have hit. (*Id.* at 108.)

That night, Baisden did not notice any debris or anything in the snow that Pauley may have hit when the injury occurred. (Dep. of Pl.'s Friend Kevin Baisden at 23, 27, attached as Ex. "B" to Pl.s' Br. in Op. to Summ. J.) When asked if it looked like Pauley struck something, Baisden said: "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

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<sup>1</sup> The video, however, is not part of the appellate record.

of the hill. I mean, yeah, there were sticks and stuff there. I meant there—there was nothing to stop him stop him. [sic]" (*Id.* at 28.)

**4. Although not apparent that night, Mr. Baisden discovered a five-foot railroad tie-like object on the hill the next day**

Although Baisden did not see any obstructions that night, Pauley's mother informed Baisden after the incident that there was a railroad tie near the area where Pauley was injured. (*Id.* at 48-49.) Subsequently, Baisden went back to the site to collect the sleds that were left there and noticed a railroad tie-like object the next day. (*Id.*) The object was on the hill and it was five feet long. (*Id.* at 29.)

The mound, which Pauley sledded down, consisted of topsoil that the City used in the Park. (Dep. of Dane Patterson, Jr. at 24, attached as Ex. "C" to Def.'s Mot. for Summ. J.) The City "use[d] a lot of [the top soil] there on the site, at the park for reseeding purposes." (Dep. of Phillip Riffle at 12, attached as Ex. "B" to Def.'s Mot. for Summ. J.) The City also used some of the top soil in other areas throughout the City. (Dep. of Phillip Riffle at 12, attached as Ex. "B" to Def.'s Mot. for Summ. J.)

**B. Procedural Background**

**1. The trial court correctly finds that Pauley was a recreational user and that the City could not be held liable**

Based on these facts, Plaintiffs sued the City of Circleville as a result of Jeremy Pauley's injuries. (Comp.) The parties fully briefed the issue of whether recreational user immunity under Ohio law precludes Plaintiffs' claims in the context of summary judgment.<sup>2</sup> The Pickaway County Court of Common Pleas observed that 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

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<sup>2</sup> The parties also addressed the applicability of several other defenses, including immunity under Revised Code Chapter 2744, which are not presently before this Court.

Pauley's tragic injury." (Decision and Entry of August 23, 2010 at 5; Apx. 5.) The trial court correctly held that under R.C. "1533.181, Defendant City of Circleville owed no duty to Plaintiff Jeremy Pauley." (*Id.*) The court granted summary judgment in favor of the City. (*Id.*)

**2. The Fourth District "declines" Plaintiffs' invitation to judicially create an exception to the Recreational User Statute**

Plaintiffs appealed to the Fourth District Court of Appeals. There, Plaintiffs again admitted that Pauley was a recreational user. Yet, they argued that the City was not entitled to summary judgment because the alleged railroad tie had no relationship to the recreational nature of the premises. Plaintiffs also argued that the pile of topsoil somehow changed the nature of the Park, putting it outside the protection of the recreational user immunity statute.

After setting forth established recreational user law and the undisputed facts, the Fourth District refused to judicially create an exception to recreational user immunity. In the Fourth District's words, "Appellants request, in essence, that we read an exception into the statute when none exist. We decline to do so." (Fourth District Opinion at ¶20; Apx. 15.)

Plaintiffs appealed to this Court. In a divided decision, this Court accepted review. *Pauley v. Circleville*, 133 Ohio St.3d 1422, 976 N.E.2d 913, 2012-Ohio-4902 (Oct. 24, 2012) (Justices Lundberg Stratton, O'Donnell and Cupp, dissenting). This case is now before this Court on the following proposition of law.

**III. LAW AND ARGUMENT**

**PLAINTIFFS/APPELLANTS' PROPOSITION OF LAW I:**  
RECREATIONAL USER IMMUNITY DOES NOT EXTEND TO MAN-MADE HAZARDS UPON REAL PROPERTY THAT DO NOT FURTHER OR MAINTAIN ITS RECREATIONAL VALUE.

- A. Landowners that freely open their premises for recreational purposes have no duty to recreational users to keep those premises safe for use.**

Despite Plaintiffs' arguments, Ohio law is clear. If a person qualifies as a recreational user, the premises owner has no duty to the recreational user to keep the premises safe. R.C. 1533.181(A); *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St.3d 467, 2002-Ohio-2584, 769 N.E.2d 372, ¶15. The legislature simply did not create an additional limitation for "man-made hazard[s]" on the premises that do "not further or maintain its recreation value," as Plaintiffs advocate in their proposition of law.

Setting aside Plaintiffs' wishful belief, the Recreational User Statute expressly provides:

No owner ...

- (1) [o]wes any duty to a recreational user to keep the premises safe for entry or use;
- (2) [e]xtends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use; [or]
- (3) assumes responsibility for or incurs liability for any injury to [a] person ... caused by any act of a recreational user.

R.C. 1533.181(A)(1-3). The Statute applies to premises owned by political subdivisions, like the City of Circleville. *LiCause v. Canton* (1989), 42 Ohio St.3d 109, 537 N.E.2d 1298, at the syllabus, citing to *Johnson v. New London* (1988), 36 Ohio St.3d 60, 521 N.E.2d 793.

The purpose of the Recreational User Statute is "to encourage owners of premises suitable for recreational pursuits to open their land to public use without worry about liability.' ... [emphasis added]" *LiCause v. City of Canton, supra*, citing *Moss v. Dept. of Natural Resources*, 62 Ohio St.2d 138, 142, 404 N.E.2d 742 (1980). Ohio courts broadly construe the Statute. See generally *Miller v. City of Dayton*, 42 Ohio St.3d 113, 115, 537 N.E. 2d 1294 (1989) (Statute broadly applies when recreational users are doing everything from merely watching others swim or play sports, to riding motorcycles).

**1. The City freely opened Barthelmas Park to Pauley for sledding.**

A "recreational user" is defined as "a person to whom permission has been granted, without the payment of a fee or consideration to the owner ... to enter upon premises to ... engage in ... recreational pursuits." R.C. 1533.18(B). At the time of his injury, Pauley was snow sledding at the City of Circleville's Barthelmas Municipal Park. Snow sledding is a recreational pursuit. *Marrek v. Cleveland Metroparks Bd. of Commrs.*, 9 Ohio St.3d 194, 459 N.E.2d 873 (1984). In fact, Plaintiffs admit that Pauley was a recreational user.

Barthelmas Municipal Park is a quintessential recreational area. The Park contains five baseball diamonds, a playground with recreational equipment, a soccer field, a basketball court, a shelter house for picnics, and restroom facilities. (Dep. of Philip Riffle at 9, attached as Ex. E, to Pl.s' Br. in Op. to Summ. J.) This multi-use park is open to the public for use all year around, including snow sledding in the winter. The Park is open to the public and there is no entrance fee. (Dep. of H. Gray at 18, attached as Ex. "F" to Pl.s' Br. in Op. to Summ. J.)

**a. R.C. 1533.181(A)(1) and (2) bar Plaintiffs' claims.**

The Recreational User Statute provides that the City of Circleville does not "owe any duty to a recreational user to keep the premises safe for ... use." And, the City also does not "extend[] any assurance to a recreational user, through the act of giving permission, that the premises are safe for ... use." R.C. 1533.181(A)(2). Other than the requirement that Pauley was a recreational user and the City freely opened the Park for recreational purposes, no other limitations exist under the Statute.

The Fourth District properly determined that Plaintiffs "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, [the

City] 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." (Fourth District Opinion at ¶24; Apx. 18.)

The Fourth District's decision is firmly supported by the record and established law. Plaintiffs claim that Pauley hit a piece of debris that the City should have known about and removed. The City does not have a duty to keep the premises safe for Pauley's use of the premises for sledding. Similarly, the City does not make any assurance to Pauley that the premises would be safe for use. The Statute is easily applied in this situation and bars Plaintiffs' claims under every section of R.C. 1533.181(A)(1-3).

**b. R.C. 1533.181(A)(3) also bars Plaintiffs' claim.**

The City also does not "assume [] responsibility for or incur[] liability for any injury to person ... caused by any act of a recreational user." R.C. 1533.181(A)(3).

Candidly, Pauley hurt himself during an imprudent recreational pursuit. Pauley sledged headfirst down a small, snow-covered mound that was illuminated only by his car's headlights so that his exploit could be captured on video. The mound was not a gentle slope; it was a 15-foot tall, 20-foot wide hill. In geometric terms, it was essentially a pyramid. Neither Pauley nor his friends previously tried riding it. At the time, it was almost "completely dark," according to Pauley's friend Kevin Baisden. Because it was dark, Pauley could not see anything that would impair his ride. Despite it being dark and untried, Pauley nevertheless decided to slide headfirst into the darkness. To this day, Pauley does not know what he crashed into. The next day in the fullness of light, however, Pauley's friend found a five-foot railroad tie-like object on the mound.

Plaintiffs casually disregard R.C. 1533.181(A)(3), claiming the third prong is "plainly inapplicable." (Merits Br. at 9.) While Plaintiffs suggest the Section only applies to injuries caused by "others," the legislature specified otherwise. A landowner does not "assume [] responsibility for or incur[] liability for any injury to person ... caused by any act of a recreational user." R.C. 1533.181(A)(3). The Section applies to injuries caused by the recreational user himself because the legislature unequivocally defined the term "recreational user" as "a person to whom permission has been granted, without the payment of a fee or consideration to the owner ... to enter upon premises to ... engage in ... recreational pursuits." R.C. 1533.18(B). Pauley was a recreational user – even the Plaintiffs admit this. Therefore, Section R.C. 1533.181(A)(3) applies. This Court's decision in *Ryll* also rejects Plaintiffs' overly restrictive interpretation. See *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St.3d 467, 2002-Ohio-2584 (applying R.C. 1533.181(A)(3) to the plaintiffs' own conduct, but ultimately concluding that the plaintiffs' "injuries were not 'caused by any act' of Daniel Ryll [the recreational user/plaintiff]. His only act was to be present.").

Even if this Court was to adopt Plaintiffs' proposition of law – which it should not -- R.C. 1533.181(A)(3) nevertheless precludes Plaintiffs' claim.

**2. Ohio precedent uniformly holds that a property owner does not have a duty to keep recreational premises safe for recreational pursuits.**

Specifically, landowners do not have a duty to supervise recreational users who are snow sledding to ensure they are safe from injury. *Marrek v. Cleveland Metroparks Bd. of Com'rs*, 9 Ohio St.3d 194, 459 N.E.2d 873 (1984).

In *Marrek*, the Court applied the statutory analysis that should be followed here. The Court, first, determined whether the plaintiff was a recreational user; and, second, determined whether the premises was freely open to the public for recreational pursuits. Applying the text of

the Statute, the Court explained that a "recreational user is defined in R.C. 1533.18(B) as 'a person to whom permission has been granted, without payment of a fee or consideration to the owner ... to enter upon premises to ... engage in other recreational pursuits.'" *Marrek* at 198. The Court held that snow sledding is a recreational activity. The Court concluded it "is not disputed that Marrek was a gratuitous user and that she entered the premises for sledding, a recreational pursuit. Therefore, 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.*

Similar to Marrek, Pauley was a gratuitous user that entered the Park for sledding. Whether Pauley was hit by another sled rider or whether Pauley imprudently tried to sled in a new area in the dark as he did in this case, the legal result is exactly the same. The City as the owner of the Park has no duty to ensure that Pauley was safe from injury while sledding.

The Court also emphasized that this result is what the legislature intended, because "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." The Court noted 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.*, citing *Moss, supra*, at 62 Ohio St.2d at 142. Similar, the Fourth District's decision applied the Statute and, in doing so, properly effectuated the intent of the law, despite the tragic facts.

This Court has also recognized that man-made hazards on recreational property that cause injury do not divest an owner of recreational user immunity. *Sorrell v. Ohio Dept. of Natural Resources, Div. of Parks and Recreation*, 40 Ohio St.3d 141, 532 N.E.2d 722 (1988). In *Sorrell*, a snowmobiler riding at night was injured when he struck a mound of dirt protruding above the surface of a lake in a state park. He sued the landowner and alleged his injuries were caused by

the landowner's intentional and/or negligent conduct that had apparently caused a mound of dirt to exist through dredging operations. In *Sorrell*, the court recognized the legislative limitation that the immunity conferred by R.C. 1533.181 extends only to those persons who have (1) been given permission, (2) to gratuitously, (3) engage in a recreational pursuit. The Court, again applying the express text of the Recreational User Statute, found there simply was no duty. The Court declined to address the plaintiffs' argument that there was a willful or wanton conduct exception to the Recreational User Statute because those arguments were not raised. Of course, those arguments would have no merit as the legislature plainly did not create an exception for willful or wanton conduct. See R.C. 1533.181.

**B. The Court must reject Plaintiffs' request to judicially create limitations that do not already exist in the Recreational User Statute.**

The only limitations on the Recreational User Statute are those that are expressly contained within that Statute. Yet, Plaintiffs improperly want to limit the legislative protections through the judiciary. They offer no statutory source for the proposition of law that there is a limitation on the Statute for "man-made hazards upon real property that do not further or maintain its recreational value."

As the Fourth District plainly recognized, Plaintiffs want the courts to "read an exception into the statute when none exist." (Fourth District's Opinion at ¶20; Apx. 15.) The Fourth District properly rejected the Plaintiffs' invitation.

The Fourth District had to reject that contention. This Court has long held that courts must not "under the guise of construction, [] ignore the plain terms of a statute or to insert a provision not incorporated by the legislature." *Akron v. Rowland*, 67 Ohio St.3d 374, 380, 618 N.E.2d 138 (1993). Plaintiffs want to create legislative change through advocacy in the courts. Of course, the law is well established that "it is not the court's role to apply a judicially created

doctrine when faced with statutory language that cuts against its applicability." *Wallace v. Ohio DOC*, 96 Ohio St.3d 266, 278, 2002-Ohio-4210.

The Ohio legislature is adept at crafting statutory exceptions when it intends to do so. The Ohio legislature did not in this case. In other jurisdictions with less restrictive recreational user laws, other state's legislatures have legislatively created "willful and malicious" exceptions or other limitations to recreational user immunity. *See, e.g.*, Utah Code Section 57-14-3; see further *e.g.*, Colorado Revised Statute Section 33-41-104(1)(a)(no limitation of liability for "willful and malicious failure to guard or warn against a known dangerous condition, use, structure, or activity likely to cause harm."); New York Consolidated Laws Section 9-103(2)(a)(same). While Plaintiffs disagree with the wisdom of Ohio's legislative choices, this Court has made clear that the "wisdom of legislation is beyond the purview of the courts." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 455 (1999). This Court has also recognized "The primary duty of a court in construing a statute is to give effect to the intention of the Legislature enacting it." *Brown v. Martinelli* 66 Ohio St.2d 45, 49, 419 N.E.2d 1081, 1083 (1981).

Here, the legislature's purpose was clear: to encourage landowners to freely open their property for recreational uses in exchange for the promise that those landowners are protected from civil lawsuits so they do not have to "worry about liability." *LiCause, supra*, citing *Moss v. Dept. of Natural Resources*, 62 Ohio St.2d 138, 142, 404 N.E.2d 742 (1980). This statutory law is unambiguous by design and has made public – as well as private -- landowners open their properties free to the public for decades. Consequently, landowners are assured that legal gamesmanship in the courts will not impair the Statute's purpose or put doubt in their heads about whether they, in fact, do not have to "worry about liability." Plaintiffs improperly want to

disregard the text and the intent of the statute. Plaintiffs' argument is not supported by the language or purpose of the Recreational User Statute and must be disregarded.

**1. Ohio precedent does not authorize the judicial creation of a new limitation on the Recreational User Statute.**

No Ohio case has ever adopted the Plaintiffs' novel limitation contained in their proposition of law. Eschewing the clear intent of the Statute, Plaintiffs vainly try to patch together cases to convince this Court to judicially create a limitation that does not exist in the Statute.

Again, Ohio law prohibits this type of argument. *See Rowland, supra*, at 380 (courts must not "under the guise of construction, [] ignore the plain terms of a statute or to insert a provision not incorporated by the legislature.").

Fatal flaw aside, Plaintiffs' cases are inapposite, misconstrued, or irrelevant.

The Plaintiffs rely on *Ryll*, a case that had nothing to do with a premises-related injury. (Merits Br. at 13, citing *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St.3d 467, 2002-Ohio-2584.) In *Ryll*, the decedent had been killed by an exploding firework shell that was hurled at him at a Fourth of July celebration. This Court concluded that the flying shrapnel was not part of the premises and, therefore, R.C. § 1533.181(A)(1) did not apply. *Id.* at 469. The shrapnel, like a bullet from a gun, had nothing to do with the premises or legislature's elimination of the duty to keep the premises safe. The decedent in *Ryll* was merely standing as a spectator when he was hit with a firework. Unlike the decedent in *Ryll*, Pauley was actively using the premises for recreational purposes. The City had no duty to keep the premises safe for that use.

Plaintiffs' rely on *Huffman*, a case decided under Civ.R. 12(B)(6) that no court had ever cited for its ruling on recreational user immunity, except for the dissent in this case. (Merits Br. at 12, citing *Huffman v. City of Willoughby*, 11th Dist. No. 2007-L-040, 2007-Ohio-7120, 2007

WL 4564384.) *Huffman* involved an injury that occurred when two rafters paddled into a dam that pulled them under water. In this divided unreported decision, the majority found that “unless the complaint on its face demonstrates the existence of a defense that conclusively bars the plaintiff's claim, a Civ.R.12(B)(6) motion based on an affirmative defense cannot result in the dismissal of a complaint.” *Id.* at ¶ 23. To the extent that Plaintiffs suggest it means landowners must segment their recreational property to be entitled the protections of the Statute, *Huffman* would be wrongly decided and should not be followed by this Court or any other. Furthermore, the *Huffman* court presumed the entire river was not recreational. Here, the Park as a whole was unequivocally recreational.

Plaintiffs next turn to *Henney*, another case that no court has ever cited for its recreational user statements. (Merits Br. at 15, citing *Henney v. Shelby City School Dist.*, 5th Dist. No. 2005 CA 0064, 2006-Ohio-1382, 2006 WL 747475.) *Henney* involved a pole-vaulter who was injured when he fell off of the pads designed to cushion his fall. The court improperly determined that the landowner did not make the premises safe enough. The fifth district's decision is demonstrably wrong on its face. The court disregarded the Statute's elimination of the duty to the recreational user. Further, the present case does not involve a landowner's structured athletic event. *Henney* has no application to the present case.

Plaintiffs misconstrue *Miller v. Dayton*. (Pl.s' Merits Br. at 12.) The question in that case was **not** whether man-made instrumentalities or improvements “furthered or maintained” recreational activities. Rather, *Miller* dealt with the issue of whether a person “qualifies as a recreational user.” *See Miller v. Dayton*, 42 Ohio St.3d 113, 537 N.E.2d 1294 (1989), syllabus at 1 and 2. On that issue, the *Miller* Court explained the question to ask is “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.* at 114–115.

Here, Pauley was a recreational user. Plaintiffs admitted this.

Plaintiffs have waived the argument that the mound of soil somehow changed the character of the Park, as the dissent in the intermediate appellate court appreciated. (Fourth District Opinion at ¶ 29; Apx. 21.) This Court has expressly held that it will not review an argument raised for the “first time in this court,” finding it “well settled that ‘[a] party who fails to raise an argument in the court below waives his or her right to raise it here.’” *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, at ¶34, citing *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993).

Even assuming that they did not waive this argument, Plaintiffs' claim would have no merit. In making the determination of whether a person is a recreational user, *Miller* requires a court to analyze the “essential character” of the premises “viewed as a whole” to make this determination.

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.

*Miller* at 115. Here, Barthelmus Park is a quintessential recreational area that is open to the public with no entrance fee. The Park contains five baseball diamonds, a playground with recreational equipment, a soccer field, a basketball court, a shelter house for picnics, and restroom facilities. People use the park year round, including snow sledding during the winter. The premises, “viewed as whole,” is unequivocally designed for those users who want to engage in recreational pursuits of all types, including sledding.

Plaintiffs argue that the dirt mound somehow transformed the character of the park from recreational to storage and maintenance. (Pl.s' Merits Br. at 16.) But, the record demonstrates that a 15-foot high, 20-foot wide pile of topsoil that was used for re-seeding in the park and other areas does not somehow transform Barthelmus Park with its extensive recreational amenities and benefits into a "municipal dumping ground," as Plaintiffs improperly claim. (*Id.*) Further, despite Plaintiffs' claim, this is not a factual question. (Pl.s' Merit Brief at 12.) 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. (Fourth District Opinion at ¶ 16; Apx. 13.) The interpretation and application of a statute to the established record facts also is a question of law. *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"). Likewise, the determination of duty is a question of law, and therefore, is a suitable basis for summary judgment. *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).

Plaintiffs try to convince this Court that they are espousing the majority position by citing various inapposite, misconstrued, or irrelevant precedent. But, they are improperly trying to create new statutory law out of whole cloth.

**2. Plaintiffs' arguments otherwise do not overcome the plain language and intent of the Recreational User Statute.**

"Fault" is not a consideration under the Statute. Plaintiffs mistakenly argue that the Recreational User Statute is merely designed to protect landowners for "accidents that occur through no fault of the defendant." (Merits Br. at 11.) The malleable issue of "fault" (e.g., negligence, reckless etc.) is not a consideration. The Statute by its terms expressly removes the

landowner's duty to the recreational user. See, e.g., R.C. 1533.181(A)(1)(A landowner does not "(1) [o]we[] any duty to a recreational user to keep the premises safe for entry or use[.]").

"[I]n order to establish actionable negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom." *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). The Statute eliminates the duty element, so Plaintiffs' allegations of negligent or reckless culpability (i.e., fault) are irrelevant. Simply put, with no duty, a plaintiff has no claim.

The Plaintiffs' string citation contained on page 11 of their merits brief exemplifies that fault is not at issue under the Recreational User Statute. In those cases, the plaintiffs alleged that the defendants were civilly culpable in some way. Yet, this Court recognized that the Recreational User Statute protects those landowners, despite allegations of fault. (See Pl.s' Merits Br. at 11, citing *Miller, supra*, (plaintiff injured while sliding into an allegedly negligently secured softball base, but no liability); *LiCause, supra*, (plaintiffs fell over a man-made cable allegedly negligently strung between two posts, yet no liability); *Sorrell, supra*, (snowmobile rider injured after striking mound of dirt protruding above surface of frozen lake, this mound of dirt was apparently occasioned by the dredging operations, yet no liability); *Johnson, supra*, (snowmobile rider was injured when he struck an man-made above-ground cable "negligently" installed, yet no liability).) "Fault" simply has nothing to do with whether liability exists under the Recreational User Statute.

Plaintiffs also mistakenly argue that the Recreational User Statute only applies to natural states or man-made improvements that promote recreational activities. (Merits Br. at 11-12.) The Recreational User Statute, however, has long applied to man-made structures or instrumentalities, irrespective of whether a civil litigant could characterize a structure or

instrumentality as sufficiently promoting a recreational activity. See *Miller, supra*, at 114 ("[T]he presence of man-made improvements on a property does not remove the property from statutory protection" under R.C. 1533.18.); *Shockey v. Ohio Dept. of Natural Resources*, N.E. 2d, 2005 WL 376609 (Ohio Ct.Cl.), 2005-Ohio-641 (rejecting vehicle damaged by exposed metal rebar avoids recreational immunity); *Masters v. Ohio Dept. of Natural Resources*, N.E.2d, 2005 WL 3642703 (Ohio Ct.Cl.), 2005-Ohio-7100. (rejecting that a boat that sustained damage when it struck a submerged dredge pipe at a state park marina avoided recreational immunity.). The 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, 937 N.E.2d 645, 2010-Ohio-4013, ¶ 50 (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").

Like their effort to insert the malleable concept of fault that does not exist in the statute, Plaintiffs try to insert the malleable concept of whether something "furthers or maintains" recreational value, which also does not exist in the Statute. If Plaintiffs' theory were the law, the protections that this Court has repeatedly applied in numerous cases -- such as *Miller, Johnson*

and *Sorrell, supra* – would be so uncertain to landowners that it would invite lawsuits. In *Miller, supra*, the plaintiff would have contested whether a jagged anchor to a softball base sufficiently promoted a recreational value. Likewise, in *Johnson, supra*, the plaintiffs would have contested whether a "negligently installed" metal cable strung across a recreational area sufficiently maintained recreational value when it injured a recreational user. Further, in *Sorrell, supra*, the plaintiffs would have contested whether a mound of dirt created by dredging operations somehow "furthered or maintained" the recreational value of the land. In all of those cases, this Court determined that the no-duty rule under the Recreational User Statute barred the plaintiffs' claims. The devastating uncertainty that would accompany Plaintiffs' proposition would effectively defeat the purpose of the statute.

Plaintiffs want to segment the landowner's property that has been open for recreational purposes to an instrumentality on the land (e.g., a railroad tie or mound). The legislature did not endorse a segmenting approach. Rather, the legislature provided that if the premises is freely open to the public for recreational purposes and a recreational user is injured while using the premises for that recreational purpose, the landowner has no duty to that user to keep the premises safe. Furthermore, this Court has rejected such contention. To determine whether a person is a recreational user, *Miller* requires a court to analyze the "essential character" of the premises "viewed as a whole" to make this determination. See *Miller, supra*. In the present case, Pauley was engaged in a recreational pursuit in a City Park. As shown, the essential character of the City's Park was recreational.

Finally, it is impossible to predict how recreational users will use a specific part of a property or instrumentality that is on a larger recreational premises. One could imagine endless situations where a person is engaged in recreational pursuits on the premises designed for

recreational activities but the Plaintiff decides to use property or instrumentalities in unconventional ways that result in injury. This should not divest landowners of their entitlement to recreational user immunity, or require an inquiry into the ambiguous nature of what "maintains or promotes recreational value." For instance, a skateboarder in a city park decides to try to slide on his skateboard down a handrail at a police station that is also housed in the park; he is injured when the handrail gives way. Did the police station handrail sufficiently further or maintain the recreational value of the land? The legislature says it does not matter because there is no duty when a landowner opens his land free of charge to a recreational user. If Plaintiffs' proposition were the law, then the Recreational User Statute's protections would be fatally uncertain. For further instance, a private landowner allows recreational vehicles to cross his large rural property, and also uses some part of the land to keep gravel. The ATV rider decides to try to use the gravel pile as a ramp and is injured. Does the pile of gravel adequately promote or facilitate the recreational value of the land?

Under the Recreational User Statute, it does not matter; there is no duty and therefore no liability. Under Plaintiffs' improper theory, there would always be questions, litigation, and potentially liability. The legislature, on the other hand, intentionally avoided that ambiguity by eliminating the duty a landowner has to the recreational user when he or she freely opens his land for recreation.

The parties agree that the purpose of the Recreational User Statute is "to encourage owners of premises suitable for recreational pursuits to open their land to public use without worry about liability.' ... " *LiCause, supra*. Yet, Plaintiffs' theory would have the opposite effect that the Statute was designed to promote. That is, the legislature wanted to encourage private landowners, municipalities and the State to open their properties to recreational pursuits. It is not

difficult to imagine that private and public landowners would make the decision to not open their properties for recreational pursuits under Plaintiffs' proposition of law.

Under the express text of the Recreational User Statute, a landowner does not have to anticipate the various ways that people might use or misuse its property that is freely open to the public for recreational purposes. The primary questions are whether the person is a recreational user and whether the property was freely open to the public for recreational activities. In the present case, the answers to those questions are yes. Therefore, the City was entitled to protections under the Recreational User Statute.

#### IV. CONCLUSION

This Court must affirm the lower courts.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

A copy of the foregoing Merits Brief has been sent by regular U.S. Mail, postage prepaid,  
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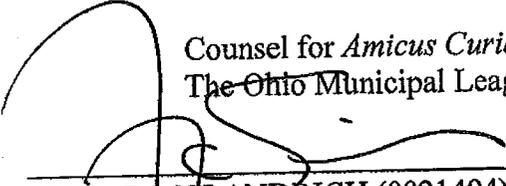
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**APPENDIX**

Pickaway Common Pleas Court Decision dated August 23, 2010 .....Apx. 1

Fourth District Court of Appeals Decision dated May 23, 2012 .....Apx. 7

FILED-COMMON PLEAS

IN THE COURT OF COMMON PLEAS  
PICKAWAY COUNTY, OHIO

2010 AUG 23 P 121

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. Leibrecht 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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MAY 29 2012

FILED-COURT OF APPEALS

OF DOUGLAS J. MAY

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,

:

: Case No. 10CA31

vs.

:

CITY OF CIRCLEVILLE, et al.,

:

DECISION AND JUDGMENT ENTRY

Defendants-Appellees.

:

APPEARANCES:

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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,<sup>1</sup> 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 hill<sup>2</sup> 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

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<sup>1</sup> 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.

<sup>2</sup>The "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."

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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."<sup>3</sup>

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

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<sup>3</sup>Riffle, 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.<sup>4</sup>

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<sup>4</sup> 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.<sup>5</sup> 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).

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<sup>5</sup> 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.

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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 park<sup>6</sup> with immunity. The court determined

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<sup>6</sup> 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

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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.

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

JUDGMENT AFFIRMED.

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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

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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

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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

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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.<sup>7</sup>

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<sup>7</sup> 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

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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

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(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.

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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

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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.

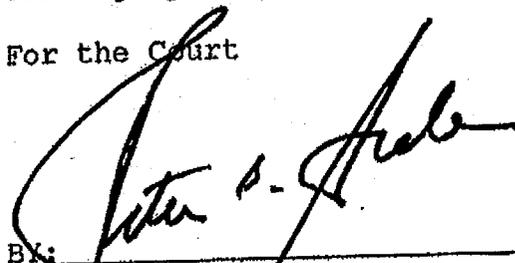
The Court finds there were reasonable grounds for this appeal.

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.

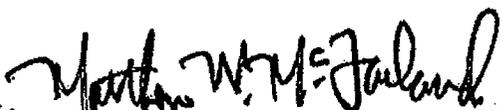
Harsha, J. & McFarland, J.: Concur in Judgment & Opinion  
Abele, P.J.: Dissents with Dissenting Opinion

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.