

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-1150

JEREMY PAULEY; CHRISTINE PAULEY  
Plaintiff-Appellants,

-vs-

CITY OF CIRCLEVILLE  
Defendant-Appellee.

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

PLAINTIFF-APPELLANTS, JEREMY AND CHRISTINE PAULEYS'  
MOTION FOR RECONSIDERATION

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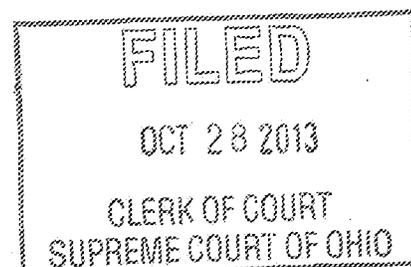
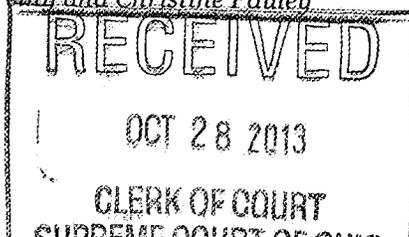
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## MOTION

As permitted by Sup. Ct. Prac. R. 18.02, Plaintiff-Appellants, Jeremy and Christine Pauley, request that this Court reconsider only the mandate that was ordered in this appeal on October 16, 2013. In striking a middle ground between the parties' respective positions, the majority held that recreational property must be viewed "as a whole" in determining whether the existence of a defect falls within the immunity conferred by R.C. 1533.181. *Pauley v. Circleville*, \_\_\_ Ohio St.2d \_\_\_, 2013-Ohio-4541, \_\_\_ N.E.2d \_\_\_ ¶37. Manmade hazards are therefore unworthy of such protection if they sufficiently alter the "essential character" of lands that are open for public use. *Id.*, ¶ 36. The prior precedents that had been established in *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St.3d 467, 2002-Ohio-2584, 769 N.E.2d 372, and *Miller v. Dayton*, 42 Ohio St.3d 113, 537 N.E.2d 1294, were distinguished on the grounds that they did involve defects in the premises. *Pauley*, 2013-Ohio-4541, ¶32-33.

Plaintiffs have no intention of re-arguing their positions on the merits of the appeal. They are requesting only that this Court modify the conclusion to reflect that the case is being remanded for further proceedings consistent with the decision.

Rather obviously, neither the parties nor the trial judge had the benefit of *Pauley* opinion during the summary judgment proceedings below. Judge Knece's decision of August 23, 2010 never addressed the "essential character" of the property at issue. As Defendant had been arguing, the trial judge concluded that Plaintiff Jeremy Pauley's mere engagement in recreational activities on the premises was sufficient to impose immunity upon all claims. *Id.*, pp. 4-5. This Court stopped well short of adopting this harsh view in the decision that was ultimately rendered. *Pauley*, 2013-Ohio-4541, ¶21-39.

There can be no serious disagreement that *Pauley* adopts a construction of the recreational user immunity statute that had never previously been established in this

Court's precedents. In the interests of fairness and justice, Plaintiffs should be afforded an opportunity to submit evidence and argumentation on the issue of whether the "essential character" of the city park had been altered by the municipality's dumping activities. As one would expect, their Memorandum in Opposition to Defendant's Motion for Summary Judgment had been focused upon the state of the law that existed at the time. Plaintiffs' claims should not be extinguished simply because their counsel could not foresee that this Court would adopt a construction of R.C. 1533.181 that did not appear in either *Ryll*, 95 Ohio St.3d 467, *Miller*, 42 Ohio St.3d at 113, or any other controlling decision.

### CONCLUSION

In order to afford Plaintiffs the benefits of this Court's ruling, and avoid an unjust termination of a potentially viable lawsuit, this Court should reconsider the mandate in this appeal and direct instead that the action is being remanded to the Pickaway County Court of Common Pleas for further proceedings consistent with the majority opinion.

*S.Ct.Prac.R.18.02.*

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Motion** has been sent by e-mail on this 28<sup>th</sup> day of October, 2013 to:

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