IN THE SUPREME COURT OF OHIO

RICHARD COMBS, Plaintiff-Appellee, v. OHIO DEPARTMENT OF NATURAL RESOURCES, Defendant-Appellant.	Case No. 2014-1891 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

BRIEF OF *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEE RICHARD COMBS

COUNSEL FOR *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE:

Paul Giorgianni (0064806)
(Counsel of Record)
Giorgianni Law LLC
1538 Arlington Avenue
Columbus, Ohio 43212-2710
Phone: 614-205-5550
Fax: 614-481-8242
E-mail: Paul@GiorgianniLaw.com

COUNSEL FOR PLAINTIFF-APPELLEE RICHARD COMBS:

Arthur C. Graves (0031027)
(Counsel of Record)
Arthur C. Graves Co., LPA
2929 Kenny Road, Suite 295
Columbus, Ohio 43221
Phone: 614-442-7903
E-mail: AttyGraves@aol.com

COUNSEL FOR DEFENDANT-APPELLANT THE STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES:

Michael DeWine (0009181)
Attorney General of Ohio
Eric E. Murphy (0083284)
State Solicitor
(Counsel of Record)
Michael J. Hendershot (0081842)
Chief Deputy Solicitor
Matthew R. Cushing (0092674)
Deputy Solicitor
Eric A. Walker (0040801)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Phone: 614-466-8980
Fax: 614-466-5087
E-mail: Eric.Murphy@
OhioAttorneyGeneral.gov

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R.C. 1533.181(A) immunizes landowners from liability for injuries to recreational users arising from the condition of the land, including maintenance of the land.

INTEREST OF *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE

The Ohio Association for Justice ("OAJ") is Ohio's largest victims-rights advocacy association, comprised of 1,500 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The OAJ is devoted to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable.

STATEMENT OF THE CASE AND FACTS

The Ohio Association for Justice accepts the Statement of the Case and Facts in the briefs of Appellant the State of Ohio and Appellee Richard Combs.

SUMMARY OF ARGUMENT

This Court should affirm the judgment of the court of appeals and hold that R.C. 1533.181 immunizes a tortfeasor only when the recreational user is injured by the condition of the premises.

R.C. 1533.181, Ohio's "recreational-user immunity" statute, eliminates the "duty to a recreational user to keep the premises safe for entry or use." R.C. 1533.181(A)(1). In this case, it is undisputed that the plaintiff Mr. Combs is a "recreational user." The dispute is over the meaning of the phrase "duty . . . to keep the premises safe for entry or use."

R.C. 1533.18(A) defines "premises" as "lands, ways, and waters, and any buildings and structures thereon." "Premises" means the premises itself—the tangible things conventionally known as "real estate," such as land, fixtures, and bodies of water. Here, it was not the condition of the premises that injured Mr. Combs. Mr. Combs was injured by the negligent operation and/or maintenance of a boom mower being operated 100 yards away from him. Therefore, R.C. 1533.181 does not apply.

The lead opinion in *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St.3d 467, 2002-Ohio-2584, and the decision in *Pauley v. City of Circleville*, 137 Ohio St.3d 212, 2013-Ohio-4541, confirm the plain meaning of the text of R.C. 1533.181—that the statute immunizes a tortfeasor only when the recreational user

is injured by the condition of the premises. In *Ryll*, a recreational user was killed by shrapnel from an exploding firework shell during a municipal fireworks display. In the lead opinion—the only opinion relevant to this case—Justice Pfeifer and Justice Resnick opined that R.C. 1533.181 does not apply when the injury is caused by something other than the condition of the premises. *Id.* at ¶¶ 9-17 (Pfeifer, J.) In *Pauley*, the recreational user was injured when his sled struck something like a railroad tie protruding from a mound of snow-covered construction debris. *Pauley*, ¶¶ 3-7. This Court distinguished *Ryll* and held that R.C. 1533.181 applied because the injury was caused by the condition of the premises. *Id.* at ¶ 32

The high courts in California, Iowa, Maine, and Utah, plus intermediate appellate courts in New York and Arizona, have ruled that recreational-user statutes similar to R.C. 1533.181 immunize a tortfeasor only when the recreational user is injured by the condition of the premises.

Although the State's brief officially presents only one proposition of law, the State's brief actually presents three substantially different propositions of law.

The State's official proposition of law is:

> R.C. 1533.181(A) immunizes landowners from liability for injuries to recreational users **arising from the condition and maintenance of the land**."

(Emphasis added.) The Court should reject this proposition of law, because to pre-

tend that the statute singles out for immunity "maintenance" from the universe of possible negligent behaviors is to rewrite the statute.

The proposition of law presented in Part A of the State's brief is that R.C. 1533.181 immunizes **all** negligent behaviors of owners, lessees, and occupants as long as the recreational user is injured on the premises. If it were the General Assembly's intent to categorically immunize landowners, lessees, and occupants of all liability to injured recreational users, the General Assembly would have said so, instead of circumscribing the immunity in terms of the "duty . . . to keep the premises safe for entry or use." Moreover, the State's "Part A" proposition of law, because it would make the cause of injury irrelevant, would allow arbitrary and unjust results.

The proposition of law presented in Parts B and C of the State's brief is that R.C. 1533.181(A) applies to negligence claims arising out of **injuries caused by the premises**. The State demands a literal application of its proposed phrase "injuries caused by the premises," such that the State would be immune in this case because it was a piece of the premises—a projectile rock—that was the instrument of Mr. Combs's harm. The Court should reject this proposition of law for four reasons:

(1) It ignores the phrase "for entry or use," which appears twice in R.C. 1533.181(A) and which denotes that immunity is limited to injuries caused by the premises **as the recreational user**

finds the premises upon entry or use—which is to say, the **condition** of the premises.

(2) By irrationally placing significance upon whether the instrument of harm happens to be a piece of the premises or a foreign object, it would allow arbitrary results.

(3) Making a distinction between "foreign" instruments of harm and "piece of the premises" instruments of harm has nothing to do with the purpose of the statute, which is to encourage recreation.

(4) It completely ignores the grand bargain that underlies R.C. 1533.181 and all recreational-user immunity statutes: that recreational users get free access to premises on the condition that they take the premises as they find it.

The State's position generally is supported by only two Ohio decisions, both of them wrongly-decided, lower-court decisions.

The State's public-policy argument that immunity should be broad so as to encourage recreation (State's Brief 11-14) is wrong in two respects. *First:* It is wrong as a matter of the law of statutory construction, because this Court has already held that to the extent R.C. 1533.181 is ambiguous, it is to be construed narrowly, so as to minimize the scope of immunity. *Loyer v. Buchholz*, 38 Ohio St.3d 65, 68, n. 3 (1988). *Second:* The State's supreme interest is public safety, and a law that categorically absolves a class of persons from tort liability is a law that discourages safety. Moreover, it is not at all clear that affirming the court of appeals in this case would diminish recreational use through property closure more than it would increase recreational use by assuring the public that the only risks

they assume as recreational users are the risks of being injured by the condition of the premises. The State's public-policy argument is particularly misplaced with respect to the State as landowner, because the State needs no incentive from the tort law to make public land available for recreation. Indeed, the purpose of R.C. 1533.181 and the similar recreational-user immunity statutes enacted across the country in the mid-1960s was to encourage **private** landowners to open their land to the general public without charge. The plain meaning of the text of R.C. 1533.181(A) strikes the right balance between encouraging availability of recreational areas and promoting safety.

Finally: Under *Pauley*, R.C. 1533.181 already immunizes too much malfeasance. Adopting any of the State's expansive interpretations of R.C. 1533.181 would further encourage hidden dangers and eliminate remedies for innocent victims of negligence.

This Court should affirm the judgment of the court of appeals and hold that R.C. 1533.181 immunizes a tortfeasor only when the recreational user is injured by the condition of the premises.

ARGUMENT

R.C. 1533.181 immunizes a tortfeasor only when the recreational user is injured by the condition of the premises.

A. Standard of review.

The State's proposition of law presents a question of statutory interpretation—a question of law that this Court reviews *de novo*.

B. Rule of statutory construction.

To the extent R.C. 1533.181 is ambiguous, it is to be construed narrowly, so as to minimize the scope of immunity:

> R.C. 1533.181 abrogates the common law. Statutes in derogation of the common law must be strictly construed.

Loyer v. Buchholz, 38 Ohio St.3d 65, 68, n. 3 (1988).

C. The plain meaning of the text is that R.C. 1533.181 immunizes a tortfeasor only when the recreational user is injured by the condition of the premises.

The operative text of Ohio's "recreational-user immunity" statute is:

> 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**; . . . .

R.C. 1533.181(A) (emphasis added.) R.C. 1533.181(A) eliminates only the duty "to keep the premises safe for entry or use."

R.C. 1533.18(A) defines "premises":

> "Premises" means all privately owned **lands, ways, and waters, and any buildings and structures thereon**, and all privately owned and state-owned **lands, ways, and waters** leased to a private person, firm, or organization, **including any buildings and structures thereon**.

R.C. 1533.18(A) (emphasis added). "Premises" means the premises itself—the tangible things conventionally known as "real estate," such as land, fixtures, and bodies of water.

Here, it was not the condition of the premises that injured Mr. Combs. Mr. Combs was injured by the negligent operation and/or maintenance of a boom mower being operated 100 yards away from him. Therefore, R.C. 1533.181 does not apply.

The lead opinion in *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St.3d 467, 2002-Ohio-2584, and the decision in *Pauley v. City of Circleville*, 137 Ohio St.3d 212, 2013-Ohio-4541, confirm the plain meaning of the text of R.C. 1533.181—that the statute immunizes a tortfeasor only when the recreational user is injured by the condition of the premises.

In *Ryll*, the recreational user was killed by shrapnel from an exploding firework shell during a municipal fireworks display. *Ryll*, ¶ 1. The recreational user

was seated in a designated spectator safety area 660 feet from the discharge area. *Id.* at ¶ 3. This Court affirmed the trial court's denial of the defendants' motions for summary judgment. But the Court was fractured into three camps:

- In the lead opinion—the only opinion relevant to this case—Justice Pfeifer and Justice Resnick opined that R.C. 1533.181 does not apply when the injury is caused by something other than the condition of the premises. *Id.* at ¶¶ 9-17 (Pfeifer, J.).

- Justice Douglas and Justice F.E. Sweeney concurred in judgment only, opining that political subdivisions are not entitled to R.C. 1533.181 immunity. *Id.* at ¶¶ 40-46 (Douglas, J., concurring).

- Chief Justice Moyer, Justice Lundberg Stratton, and Justice Cook opined that there was no final appealable order. *Id.* at ¶¶ 47-53 (Cook, J., dissenting).

The lead opinion confirms that the plain meaning of R.C. 1533.181(A) is that a tortfeasor is immunized only when the recreational user is injured by the condition of the premises:

> R.C. 1533.181(A)(1) does not state that a recreational user is owed no duty. Instead, R.C. 1533.181(A)(1) immunizes an owner, lessee, or occupant of premises only from a duty "to keep the *premises* safe for entry or use." (Emphasis added.) The cause of the injury in this case had nothing to do with "premises" as defined in R.C. 1533.18(A). The cause of the injury was shrapnel from fireworks, which is not part of "privately-owned lands, ways, waters, and * * * buildings and structures thereon." Id. Accordingly, R.C. 1533.181(A)(1) and (2) do not immunize Reynoldsburg. To hold otherwise would allow R.C. 1533.181 to immunize owners, lessees, and occupants for any of their negligent or reckless acts that occur on "premises." The plain language of the statute indicates that the General Assembly had no such intention.

In *Pauley*, an 18-year-old was injured while sledding in a city park. What this recreational user mistook for a 15-foot natural hill underneath the snow was actually a pile of topsoil and construction debris dumped there by the city. The recreational user struck something like a railroad tie protruding from the hill. *Pauley,* ¶¶ 3-7. This Court held that the fact that the condition of the premises is the result of human negligence is irrelevant for purposes of R.C. 1533.181:

> [A]n owner cannot be held liable for injuries sustained during recreational use even if the property owner affirmatively created a dangerous condition. . . . . [T]he city owed [the recreational user] no duty to keep the premises safe, and the city's alleged creation of a hazard on the premises does not affect its immunity.

Id. at ¶¶ 21-22 (quotation marks omitted). The Court expressly rejected the argument the State makes here, that the cause of injury is irrelevant (State's Brief 5-7). The Court approved and distinguished the lead opinion in *Ryll* on the ground that in *Ryll* the injury was **not** caused by the condition of the premises, while in *Pauley* the injury **was** caused by the condition of the premises:

> In *Ryll* a spectator was attending a fireworks show sponsored by the city of Reynoldsburg when he was fatally injured by shrapnel from a fireworks shell. . . . . Because the shrapnel was not a defect *in the premises,* immunity did not apply.
>
> . . . .
>
> We find that the instant case is distinguishable from both *Ryll* and *Miller.* In *Ryll* the injury was caused by a fireworks shell, **not by a defect on the city's premises**, **so R.C. 1533.181 did not immunize the city from liability**. In the instant case, the railroad-tie-like object was **embedded in a mound of dirt** that was part of the park

> at the time Jeremy suffered his accident. Therefore, the injury was **caused by a defect in the premises**, making *Ryll* inapplicable.

Pauley at ¶ 32 (italicized emphasis in original; bold-faced emphasis added).

Thus, both *Pauley* and the lead opinion in *Ryll* confirm the plain meaning of R.C. 1533.181—that the statute immunizes a tortfeasor only when the recreational user is injured by the condition of the premises.

D. The highest courts in four states, interpreting similar recreational-user immunity statutes, have ruled that the statutes immunize a tortfeasor only when the recreational user is injured by the condition of the premises.

Because most recreational-user immunity statutes in the United States are based upon a model act, the highest courts in four states have addressed the question presented here under statutes substantially similar to R.C. 1533.181. All four high courts ruled that the statutes immunize a tortfeasor only when the recreational user is injured by the condition of the premises.

In California, the recreational-user statute provided:

> An owner of any estate or any other interest in real property, whether possessory or nonpossessory, **owes no duty of care to keep the premises safe for entry or use** by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section."

Cal. Civ. Code § 846 (emphasis added). In *Klein v. United States*, 235 P.3d 42 (Cal. 2010), the plaintiff was riding a bicycle in a public park when he was struck

head-on by an automobile driven by a park volunteer. *Id.* at 44. The Supreme Court of California ruled that the immunity statute did not apply, because "[t]he duty to drive a motor vehicle safely . . . does not arise from ownership or possession of land." *Id.* at 49. The Court reasoned:

> By providing . . . that a landowner owes no duty to "keep the premises safe," the Legislature has selected language implying a narrower immunity, focused on premises liability claims arising from property-based duties.
>
> . . . .
>
> The landowner's status as landowner does not result in the imposition of additional duties or a higher standard of care, but neither does it relieve the landowner from the general duty imposed on all, landowner and recreational user of land alike, to exercise due care while performing activities that could result in injuries to others.

Id. at 49, 52.

In Iowa, the recreational-user statute provided:

> [A]n owner of land owes **no duty of care to keep the premises safe for entry or use** by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

Iowa Code § 111C.3 (emphasis added). In *Scott v. Wright*, 486 N.W.2d 40 (Iowa 1992), the driver of a farm tractor giving a hay ride lost control of the tractor, injuring one of the passengers. *Id.* at 41. The Supreme Court of Iowa ruled that the immunity statute did not apply:

> By its terms, section 111C.3 immunizes landowners from only two specific duties of care toward persons using agricultural property

> for recreational purposes: to keep the premises safe and to warn of dangerous conditions. Nothing in the language of chapter 111C suggests a legislative intent to immunize all negligent acts of landowners, their agents, or employees.

Id. at 42.

In Maine, the recreational-user statute provided:

> An owner, lessee, manager, holder of an easement or occupant of premises **does not have a duty of care to keep the premises safe for entry or use** by others for recreational or harvesting activities or to give warning of any hazardous condition, use, structure or activity on these premises to persons entering for those purposes.

Me. Rev. Stat., tit. 14, § 159-A(2) (emphasis added). In *Dickinson v. Clark*, 767 A.2d 303 (Me. 2001), the landowner negligently allowed a minor to operate a wood-splitter, which severed the minor's hand. *Id.* at ¶ 2. The Supreme Judicial Court of Maine ruled that the immunity statute did not apply, because the statute "only limits claims that allege premises liability." *Id.* at ¶ 7.

In Utah, the recreational-user statute provided:

> [A]n owner of land owes **no duty of care to keep the land safe for entry or use** by any person entering or using the land for any recreational purpose or to give warning of a dangerous condition, use, structure, or activity on the land.

Former Utah Code § 57-14-3 (emphasis added) (currently numbered § 57-14-201). In *Young v. Salt Lake City Corp.*, 876 P.2d 376 (Utah 1994), the plaintiff was riding her bicycle in a recreational area when she collided with a city-owned mainte-

nance vehicle. *Id.* at 377. The Supreme Court of Utah ruled that the immunity statute did not apply:

> The Act's plain language relieves landowners of two specific duties of care toward recreational users: (i) to keep their premises safe, and (ii) to warn of dangerous conditions. The operative language of the Act does not purport to relieve landowners of their separate duty to conduct themselves in a reasonably safe manner while on the premises.

Id. at 378.

In two other states, intermediate appellate courts have interpreted similar recreational-user immunity statutes the same way.

In New York, the recreational-user statute provided:

> [A]n owner, lessee or occupant of premises, whether or not posted as provided in section 11-2111 of the environmental conservation law, owes **no duty to keep the premises safe for entry or use** by others for hunting, fishing, organized gleaning as defined in section seventy-one-y of the agriculture and markets law, canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, **snowmobile operation**, cutting or gathering of wood for non-commercial purposes or training of dogs, or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes.

N.Y. Gen. Oblig. Law § 9-103(a) (emphasis added). In *Del Costello v. Delaware & Hudson Ry. Co.*, 711 N.Y.S.2d 77 (App. 2000), a snowmobiler collided with a moving train. The defendant railroad company owned both the train and the right-

of-way adjacent to the railroad track. *Id.* at 78. The court ruled that the immunity statute did not apply:

> [A]n owner of recreational land is not immune from liability under the statute arising out of the manner in which it or one of its employees operates a vehicle on that land when the allegations of negligence stem solely from the manner of operation of that vehicle. Said differently, the statute does not immunize a landowner from its separate and distinct duty to operate a vehicle on its recreational property with reasonable care.

Id. at 80 (citing *Scott*).

In Arizona, the recreational-user immunity statute was written more broadly than that of Ohio, California, Iowa, Maine, Utah, or New York. The Arizona statute used the phrase "is not liable" without qualification (as opposed to the phrase "no duty to keep the land safe for entry or use"). The Arizona statute provided

> A public or private owner, easement holder, lessee or occupant of premises **is not liable** to a recreational or educational user . . . .

Ariz. Rev. Stat. § 33-1551(A) (emphasis added). In *Smith v. Arizona Bd. of Regents*, 986 P.2d 247 (Ariz. App. 1999), a university student was injured "while using a carnival-type apparatus temporarily placed on [defendants'] property." *Id.* at ¶ 1. The court ruled that Arizona's recreational-user immunity statute did not apply, because the plaintiff "was not injured by a condition of the land but by a piece of equipment stationed temporarily on the campus premises." *Id.* at ¶ 14.

These foreign cases are worthy models. This Court should reject the State's propositions of law and hold that R.C. 1533.181 immunizes a tortfeasor only when the recreational user is injured by the condition of the premises.

E. The Court should reject the State's three propositions of law.

1. Introduction.

The State's brief officially presents only one proposition of law, that being:

> R.C. 1533.181(A) immunizes landowners from liability for injuries to recreational users **arising from the condition and maintenance of the land**."

(Emphasis added.) But the body of the State's brief presents two alternative propositions of law.

In Part A of its brief, the State proposes that R.C. 1533.181(A) be interpreted to apply regardless of the nature of the tortfeasor's negligent behavior—that is, regardless of whether the recreational user's injury was caused by the premises, by maintenance of the premises, or by any other behavior. This "Part A" proposition differs from the official proposition of law in that in the official proposition of law, the means by which the tortfeasor injures the recreational user is relevant: the injury must "arise[] from the condition and maintenance of the land."

In Parts B and C of its brief, the State proposes that R.C. 1533.181(A) be interpreted to apply to "[n]egligence claims arising out of **injuries caused by the**

premises." (State's Brief 6, Heading B (emphasis added).) This "Part B/C" interpretation is narrower than the State's official proposition of law in that

- under the "Part B/C" proposition, the injury must be "caused by the premises"— which means that there is no immunity for an act of maintaining the premises (such as mowing grass) unless such act uses a piece of the premises (such as a projectile rock) as an instrument to injure the recreational user; while
- under the official proposition of law, negligent "maintenance of the land" is immunized, regardless of whether the premises (or any piece thereof) causes the recreational user's injury.

This Court should reject all three of the State's propositions of law and hold that R.C. 1533.181 immunizes a tortfeasor only when the recreational user is injured by the condition of the premises.

2. The Court should reject the State's official proposition of law.

The official proposition of law as set forth in the State's brief is:

> R.C. 1533.181(A) immunizes landowners from liability for injuries to recreational users arising from the condition **and maintenance** of the land."

(Emphasis added.)[1] Delete the words "and maintenance" from the State's official

[1] The official proposition of law presented in the State's brief is slightly different from the proposition of law presented in the State's October 31, 2014 Memorandum in Support of Jurisdiction, which was: "R.C. 1533.181(A) immunizes landowners from liability for injuries to recreational users **arising from the condition of the land, including maintenance of the land**." (Emphasis added.) This *amicus curiae* brief assumes that the difference between the official proposition of law

(footnote continues on next page)

proposition of law, and one is left with a correct statement of the plain meaning of the statute's text. The State cites no authority for pretending that R.C. 1533.181 contains the word "maintenance." To pretend that the statute singles out for immunity "maintenance" from the universe of all possible negligent behavior is to rewrite the statute.

This is only to say that R.C. 1533.181 does not immunize **every** act of premises maintenance. As *Pauley* teaches, a negligent act of premises maintenance **is** immunized if the resulting injury is caused by the condition of the premises. But the negligent premises maintenance in this case is **not** immunized, because Mr. Combs's injury was not caused by the condition of the premises.

3. The Court should reject the proposition of law presented in Part A of the State's brief.

Part A of the State's brief argues for an interpretation of R.C. 1533.181 under which the means by which the tortfeasor injures the recreational user is irrelevant—that it does not matter whether the injury was caused by maintenance of the premises, by the condition of the premises, or by anything else in particular. Part A of the State's brief argues that R.C. 1533.181 immunizes all behavior of owners,

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in the State's brief and the proposition of law in the State's Memorandum in Support of Jurisdiction is immaterial.

lessees, and occupants as long as the recreational user is injured on the premises. The State argues:

> This Court has noted that the manner in which the plaintiff is injured is of "no significance" to the analysis, because the focus is whether "[t]he essential character of [the land on which plaintiff was injured] is that of premises held open to the plaintiff, without fee, for recreational purposes." *Miller v. Dayton*, 42 Ohio St.3d 113, 115 (1989).

(State's Brief 5.)[2]

The State's characterization of *Miller* is erroneous in two respects.

First: This Court in *Miller* did **not** say that the manner in which the recreational user is injured is of no significance. What this Court said in *Miller* is that the **recreational user's activity** is of no significance. In *Miller*, the recreational user was injured sliding into second base during a softball game. *Miller*, 42 Ohio St.3d at 113. The complete quotation that the State misrepresents demonstrates that the Court meant that the recreational user's specific activity is irrelevant as long as the premises is open to the public for recreational activity:

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[2] The State articulates this "Part A" proposition in at least two other ways:

- "The General Assembly's grant of immunity is broad, and covers all non-intentional harms . . . ." (State's Brief 1.)
- "[A] landowner is immune from suit if: (1) the injured party was a 'recreational user'; (2) the injury occurred on 'premises'; and (3) the 'recreational user' did not pay for the privilege of using the covered 'premises.'" (State's Brief 5.)

> 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). Thus, *Miller* means that the recreational user's specific activity is irrelevant and does **not** mean that the means by which the tortfeasor injures the recreational user is irrelevant. *Miller* would have been a very different case had Mr. Miller been struck by a rock hurled by a park employee from 100 yards away while Mr. Miller stood on second base.

Second: The State misrepresents the context of its *Miller* quotation. The State presents the quotation as saying that the cause of the recreational user's injury is of no significance to any part of the R.C. 1533.181 analysis. In fact, this part of the *Miller* opinion is limited to the "issue [of] whether Miller was a 'recreational user' at the time of his injury." *Id.* at 113. The dispute in *Miller* was whether Mr. Miller was a "recreational user." Here, in contrast, it is undisputed that Mr. Combs is a "recreational user." The question presented here is whether R.C. 1533.181 immunizes a tortfeasor when the recreational user is not injured by the condition of the premises.

The State similarly misrepresents *Pauley*. The State says:

> [T]his Court has usually focused the inquiry on whether the plaintiff was a recreational user, not the cause of the plaintiff's injury: "The determination of whether R.C. 1533.181 applies depends not on the property owner's actions, but on whether the person using the property qualifies as a recreational user." *Pauley*, 2013-Ohio-4541 at ¶ 21 . . . .

(State's Brief 9, ¶ 3.) But in *Pauley*, the question presented was whether R.C. 1533.181 immunity "extend[s] to man-made hazards upon real property." *Pauley*, ¶ 1. The complete quotation that the State misrepresents demonstrates that the Court meant that the fact that the condition of the premises was the result of the owner's conduct was irrelevant:

> [A]n owner cannot be held liable for injuries sustained during recreational use **even if the property owner affirmatively created a dangerous condition**. The determination of whether R.C. 1533.181 applies depends not on the property owner's actions, but on whether the person using the property qualifies as a recreational user.

Pauley at ¶ 21 (citations and quotation marks omitted) (emphasis added). *Pauley* would have been a very different case had Mr. Pauley been struck by a rock hurled by a park employee from 100 yards away while Mr. Pauley was sledding.

The proposition of law that the State presents in Part A of its brief is inconsistent with the plain meaning of the statute's text, which limits the scope of the immunity to relief from the "duty . . . to keep the premises safe for entry or use." If it were the General Assembly's intent to categorically immunize landowners,

lessees, and occupants of all liability to injured recreational users, the General Assembly would have said so, instead of circumscribing the immunity in terms of the "duty . . . to keep the premises safe for entry or use."

The proposition of law that the State presents in Part A of its brief, because it would make the cause of injury irrelevant, would allow arbitrary results. For example, a recreational user on a group nature hike who injures another recreational user cannot have R.C. 1533.181 immunity, because that tortfeasor is not an owner, lessor, or occupant. But under the State's "Part A" proposition of law, an owner, lessor, or occupant in the same hiking group who injures a fellow hiker in the exact same manner **would** be entitled to immunity.

The State's "Part A" proposition of law would also allow for unjust results. As the State would have it, a private owner or government maintenance worker could operate a lawnmower or other dangerous machine with tortious impunity in an area filled with children, and R.C. 1533.181 would bar recovery for any resulting injury.

Another unjust result of the proposition of law that the State presents in Part A of its brief is that it would immunize negligent assurances of safety. In *Ryll*, for example, the recreational user was seated in a designated safety zone. Under the State's "Part A" proposition of law, both the negligent mishandling of the fireworks and the negligent assurance of safety would be immunized. Similarly, here,

under the State's "Part A" proposition of law, the State could have posted signs assuring recreational users that the boom mower posed no risk to them—effectively luring recreational users into danger—and still be immune from liability. Surely the State's interest in promoting recreation is not so great as to allow an interpretation of R.C. 1533.181 under which owners, lessor, and occupants are immune from liability for affirmatively luring recreational users into danger with false assurances of safety.

Under R.C. 1533.181, the means by which a tortfeasor injures a recreational user is relevant. The statute does not immunize a landowner's behavior merely because the recreational user was injured on the premises. R.C. 1533.181 immunizes a tortfeasor only when the recreational user is injured by the condition of the premises.

4. The Court should reject the proposition of law presented in Parts B and C of the State's brief.

In Parts B and C of its brief, the State presents a third proposition of law, one narrower in scope than both the official proposition of law and the proposition of law presented in Part A of the State's brief. In Parts B and C of its brief, the State proposes that R.C. 1533.181(A) be interpreted as applying to "[n]egligence claims arising out of **injuries caused by the premises**." (State's Brief 6, Heading B (emphasis added).) The phrase "injuries caused by the premises" is so similar to

the phrase "injuries caused by the condition of the premises" that one would be forgiven for thinking that the State agrees with the *amicus curiae* Ohio Association for Justice that R.C. 1533.181 immunizes a tortfeasor only when the recreational user is injured by the condition of the premises. But the State is demanding a literal application of its proposed phrase "injuries caused by the premises." The State contends that behavior is immunized any time a piece of the premises is an instrument of harm. Thus, the State

- distinguishes *Ryll* on the ground that in *Ryll* the injurious projectile was a foreign object (a firework shell), while in this case the injurious projectile is a piece of the premises (a rock) (State's Brief 14-16); and
- approvingly cites *Mitchell v. Blue Ash*, 181 Ohio App.3d 804, 2009-Ohio-1887 (1st Dist.), because in *Mitchell* the court of appeals ruled that there was immunity because the tortfeasor injured the recreational user using a piece of the premises (a fence gate) (State's Brief 15-16).

Applying its proposition of law to this case, the State argues that it is immune because the projectile that struck Mr. Combs was a piece of the premises—a rock.

There are four reasons why this Court should reject the State's "Part B/C" proposition that R.C. 1533.181 immunizes any negligence in which a piece of the premises is the instrument of harm.

First: The State's proposition of law ignores the qualifying phrase "for entry or use," which appears twice in R.C. 1533.181(A). R.C. 1533.181(A) provides:

> 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**; . . . .

R.C. 1533.181(A) (emphasis added.) In both instances, the phrase "for entry or use" qualifies and limits the scope of the immunity. The phrase "for entry or use" denotes that immunity is limited to injuries caused by the premises **as the recreational user finds the premises upon entry or use**—which is to say, the **condition** of the premises. For example, a tortfeasor has immunity for negligently placing a rock, or construction debris, or a fence upon the premises, resulting in a recreational user tripping over the rock, or striking the debris while sledding, or falling from the fence. But neither the act of negligently hurling a rock in the direction of recreational users nor the act of negligently crushing a recreational user's hand in a fence gate is immunized, because those acts do not affect the condition of the premises.

Second: The State's "Part B/C" proposition of law, by irrationally placing significance upon whether the instrument of harm happens to be a piece of the premises or a foreign object, would allow arbitrary results. For example, under the State's "Part B/C" proposition of law:

- The State would be liable if a park ranger negligently drove a vehicle directly into a recreational user. But the State would **not** be liable if the park ranger negligently drove a vehicle into a tree and the tree fell on the recreational user.

- The State would be liable if a park worker, bringing a load of new rocks into the park, dropped the rocks on a recreational user. But the State would **not** be liable if the worker dropped rocks while moving the rocks from one spot within the park to another.

Third: Making a distinction between "foreign" instruments of harm and "piece of the premises" instruments of harm has nothing to do with the purpose of the statute. The purpose of the statute is to encourage recreational use of "lands, ways, and waters"—"premises." This purpose is not promoted by an interpretation of R.C. 1533.181 that produces different results depending upon whether an injurious projectile resulting from negligent operation/maintenance of a machine happens to be a piece of the premises or, say, a loose bolt that fell from the machine.

Fourth: The State's "Part B/C" proposition of law completely ignores the grand bargain that underlies R.C. 1533.181 and all recreational-user immunity statutes. That grand bargain is that recreational users get free access to premises on the condition that they take the premises as they find it—regardless of the extent to which the premises has been altered, maintained, or not maintained, by humans or by nature. The reason this grand bargain is fair is that recreational users generally understand—and thus can protect themselves from—the risks associated with the "lands, ways, and waters." Hikers generally know that they must watch

their footing; swimmers know there are multifarious risks of drowning; softball players know there are multifarious risks associated with that sport. Recreational users take the "lands, ways, and waters" "as is" and can make an informed, calculated decision whether to assume the risks of use and how to go about protecting themselves. The State's "Part B/C" argument ignores this grand bargain and foists upon recreational users all the risks of the entire universe of possible negligent behaviors that owners, lessors, and occupants might choose to engage in—negligent behaviors that would only be encouraged by the suspension of negligence law.

If this Court construes the phrase "duty … to keep the premises safe for entry or use" in R.C. 1533.181(A)(1) as not distinguishing between a rock lying on the ground and a person hurling a rock 100 yards, then the Court should adopt the State's proposition of law and reverse. But this Court should acknowledge that the phrase "for entry or use" denotes that immunity is limited to injuries caused by the premises as the recreational user finds the premises upon entry or use—that is, by the condition of the premises.

5. The State's position generally is supported by only two Ohio decisions, both of them wrongly-decided, lower-court decisions.

The State argues that R.C. 1533.181 "has always covered both active and passive negligence" and that this case is merely another example of "active negligence." (State's Brief 6-11.) The State's characterization of various prior deci-

sions as involving "active negligence" is the State's mischievous way of trying to make the facts of this case compare favorably to the facts of those precedents. But except for two wrongly-decided lower-court cases, the significance of these precedents is not that they involved "active negligence" but that they involved negligence **that affected the condition of the premises**. These precedents are materially distinguishable from this case, in which the injury was **not** caused by the condition of the premises.

In *Milliff v. Cleveland MetroParks System*, 8th Dist. No. 52315, 1987 WL 11969 (June 4, 1987), the plaintiff "collided with a rock barrier that was used to block access to a washed out area." *Id.* at *1. The injury was caused by the condition of the premises—the premises as the recreational user found the premises.

In *McCord v. Ohio Division of Parks & Recreation*, 54 Ohio St.2d 72 (1978) (*per curiam*), a recreational user drowned in a lake. *Id.* at 72. The plaintiff's complaint alleged multiple instances of non-feasance and malfeasance. *Id.* at 72-73. But all of those allegations constituted allegations of failure to keep the premises safe[3]—the only conduct immunized by R.C. 1533.181. The death was caused by

[3] The plaintiff in *McCord* alleged multiple instances of non-feasance and malfeasance, but all of those allegations were merely allegations of failure to keep the premises safe:

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the condition of the premises—the premises as the recreational user found the premises.

In *Gudliauskas v. Lakefront State Park*, Ct. Claims No. 2004-08464, 2005-Ohio-5598, the plaintiff fell while roller-blading, trying to avoid a parked truck. The plaintiff appeared *pro se* throughout the case, and following a trial the Court of Claims entered judgment for the State based upon R.C. 1533.181. It is unclear from both the court's opinion and the plaintiff's complaint[4] what wrongdoing the plaintiff alleged. It is unclear the extent to which the plaintiff alleged negligent de-

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> The complaint alleges . . . that [the State] and its employees were negligent in that they "failed to fulfill their duty of reasonable care to supervise and watch over the minor children known to be swimming in said lake; * * * (failed) to supervise the operation of the lake or the persons swimming therein; * * * (failed) to have adequately trained lifeguards at the lake for the protection and supervision of persons swimming therein; * * * (failed) to train lifeguards adequately before permitting them to assume such a role at the lake; * * * (failed) to have proper guidelines and or instructions for lifeguards assigned to the lake * * *." The complaint also alleges that, at the time of the drowning, [a lifeguard on duty] . . . "refused to act or make any investigation of [the recreational user's] disappearance"; and that she "failed to make any investigation of * * * (his) disappearance until approximately 30 minutes after having been first informed * * *."

Id. at 72-73. The gist of all these allegations is that the premises was unsafe without visitor supervision, trained lifeguards, and lifeguards doing the job of lifeguarding.

[4] The plaintiff's complaint in *Gudliauskas* is available on the Court of Claims's website.

sign/maintenance of the premises or the extent to which the plaintiff alleged wrongdoing on the part of the park ranger who had parked the truck. Moreover, it is unclear how long the ranger's truck had been parked before the plaintiff took evasive action. *See id.* at ¶¶ 2-3 (noting that "Plaintiff testified that the truck had stopped just as [Plaintiff] applied his brakes" and that the park ranger testified that "he was driving slowly down a path at the park when he saw two people he knew; that he pulled his vehicle off to the side of the path to stop and talk to them; and that he then saw plaintiff come down the path toward him and fall [despite] sufficient room in front of his vehicle for plaintiff to have safely passed"). It is also unclear who had the right of way at this intersection of park paths. Thus, *Gudliauskas* does not provide any guidance for the decision of this case.

The State cites *Mason v. Bristol Local School Dist.*, 11th Dist. No. 2005-T-0067, 2006-Ohio-5174, but that case hurts rather than helps the State's argument. In *Mason*, a middle-school athlete was injured by a discus thrown by another athlete. *Id.* at ¶ 5. The Court stated that R.C. 1533.181 applied because the plaintiffs alleged that their injury was caused in part "by the negligent construction, design and maintenance of the discus pit, which would be 'buildings and structures thereon' the premises." *Id.* at ¶ 63. On that basis, the court distinguished the case from *Ryll*, in which the recreational user "was killed by shrapnel from fireworks which 'had nothing to do with the "premises."'" *Id.* (quoting *Ryll*).

In *Fetherolf v. State of Ohio*, 7 Ohio App.3d 110 (10th Dist. 1982), the plaintiff was injured when he fell as he "stepped from the concrete pad onto a muddy area which was negligently maintained." *Id.* at 109-11 (quotation marks omitted). The injury was caused by the condition of the premises—the premises as the recreational user found the premises.

In *Cantu v. Ohio Department of Natural Resources*, Ct. Claims No. 2013-00386-AD, 2014 WL 1193848 (Mar. 21, 2014) (clerk's administrative decision), the recreational user was injured "'swinging from rope attached to tree limb, jumping into lake.'" *Id.* at *1. The injury was caused by the condition of the premises—the premises as the recreational user found the premises.

In *Hill v. Beaver Creek State Park*, Ct. Claims No. 2007-09089-AD, 2008 WL 5478287 (Oct. 1, 2008) (clerk's administrative decision), the plaintiff's car was damaged when a tree limb fell on it. *Id.* at *1. The damage was caused by the condition of the premises—the premises as the recreational user found the premises.

In *Phillips v. Ohio Dept. of Natural Resources*, 26 Ohio App.3d 77 (10th Dist. 1985), "[a]s [the recreational user] was walking along one of [the park] trails, the ground . . . gave way, causing him to fall." *Id.* at 78. The injury was caused by the condition of the premises—the premises as the recreational user found the premises.

In *Aumock v. State of Ohio*, 10th Dist. No. 00AP-676, 01-LW-0327, 2001 WL 95877 (Feb. 6, 2001), the recreational user drowned in a lake. The death was caused by the condition of the premises—the premises as the recreational user found the premises.

In *Estate of Finley v. Cleveland MetroParks*, 8th Dist. No. 94021, 2010-Ohio-4013, motorcyclists were killed and injured when "a tree fell into the roadway, and the motorcycle struck the tree." *Id.* at ¶ 3. The death and injuries were caused by the condition of the premises—the premises as the recreational user found the premises.

In *Sorrell v. Ohio Dept. of Natural Resources*, 40 Ohio St.3d 141 (1988), the recreational user "was riding a snowmobile along the frozen surface of Buckeye Lake when he struck a mound of dirt protruding above the surface of the lake, . . . [t]his mound of dirt . . . apparently occasioned by dredging operations . . . ." *Id.* at 141-42. The injury was caused by the condition of the premises—the premises as the recreational user found the premises.

The State also cites a student-written law journal article as if it supports the State's position. But the article's survey of Ohio law is not an appreciation. The article's conclusion: "[I]t is difficult to tell what [public policy] principles remain to explain the current application of the Recreational User Statute in Ohio." Den-

nis E. Dove, The Expansion and Restriction of Ohio's Recreational User Statute, 19 Cap. U. L. Rev. 1191, 1218 (1990).

Two lower-court cases are materially indistinguishable from this case and absolutely support the State's position that R.C. 1533.181 immunizes behavior even when the injury is not caused by the condition of the premises:

- In *Mitchell v. Blue Ash*, 181 Ohio App.3d 804, 2009-Ohio-1887 (1st Dist.), a park employee opened a gate, catching a recreational user's finger under the gate's rolling mechanism. *Id.* at ¶ 3. The court majority held that the landowner was immune under R.C. 1533.181 because the recreational user was "harmed by a[] portion of the premises." *Id.* at ¶ 11.

- In *Meiser v. Ohio Dept. of Natural Resources*, Ct. Claims No. 2003-10392-AD, 2004-Ohio-2097 (clerk's administrative decision), the plaintiff's vehicle "was damaged when a park employee operating a weed eater machine propelled an object into the car's window." *Id.* at ¶ 1.

As the dissent in *Mitchell* correctly pointed out, the recreational user in *Mitchell* was not injured by the condition of the premises but rather by another person's negligence, the gate being merely an instrument in the tortfeasor's hands. *Mitchell*, ¶¶ 13-21 (Painter, J., dissenting). Similarly, the vehicle in *Meiser* was damaged not by the premises but by the operation of the weed eater machine. *Mitchell*[5] and

[5] The insignificance of *Mitchell* as a precedent is indicated by the fact that it has been cited in only one case and that even that one case, *Graham v. Lake Milton State Park*, Ct. Claims No. 2010-11331-AD, 2011-Ohio-3535 (clerk's administrative decision), is materially distinguishable from *Mitchell*. Indeed, *Graham* is dis-

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Meiser were wrongly decided—for all the same reasons, set forth above, that this Court should affirm the court of appeals judgment in this case.

F. Public safety is the supreme public policy.

The State's public-policy argument that immunity should be broad so as to encourage recreation (State's Brief 11-14) is wrong in two respects.

First: It is wrong as a matter of the law of statutory construction. This Court has already held that to the extent R.C. 1533.181 is ambiguous, it is to be construed narrowly, so as to minimize the scope of immunity:

> R.C. 1533.181 abrogates the common law. Statutes in derogation of the common law must be strictly construed.

Loyer v. Buchholz, 38 Ohio St. 3d 65, 68, n. 3 (1988).

Second: The State's public-policy argument tells only one side of the story. The ironic omission from the State's public-policy argument is any mention of the State's supreme interest: public safety. A law that categorically absolves a class of persons from tort liability is a law that discourages safety. The fact that Ohio's state parks alone (excluding federal, county, and municipal parks) receive more than 50 million visits a year (State's Brief 13) cries out for law promoting public

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tinguishable from *Mitchell* and akin to *Pauley* for the same reason: in *Mitchell*, the plaintiff's injury was caused by a condition of the premises—in *Mitchell* "an **unattended** gate [that] swung into the path of plaintiff's car." *Id.* at ¶1 (emphasis added).

safety, not law immunizing negligent and reckless operation of dangerous machinery in public parks.

Moreover, there is reason to doubt the State's unsubstantiated prediction that requiring landowners, lessees, and occupants to conform their behavior to reasonableness will diminish public recreation. This Court has stated 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 fear of liability." *Pauley*, ¶ 35. But that purpose is actually only a means to the ultimate purpose of encouraging recreation. Encouraging owners to make land available for recreation is futile to the extent such encouragement carries the side effect of discouraging users from using the land out of fear for their safety and the unavailability of the tort system to compensate them if they are tortiously injured. The Supreme Court of Iowa made this point in holding that Iowa's recreational-use immunity statute applies only to injuries caused by the condition of the premises:

> Nothing in the language of [the statute] suggests a legislative intent to immunize all negligent acts of landowners, their agents, or employees. Nor do we believe such broad application of the statute would serve the public purpose envisioned by the legislature. Though focused on reducing landowner liability, the statute was also enacted to serve a growing need for additional recreation areas for use by our citizenry. The public's incentive to enter and enjoy private agricultural land would be greatly diminished if users were subject, without recourse, to human error as well as natural hazards.

Scott v. Wright, 486 N.W.2d 40, 42 (Iowa 1992) (citation and quotation marks omitted). The Supreme Court of Utah agreed. *Young v. Salt Lake City Corp.*, 876 P.2d 376, 378 (Utah 1994) (quoting this text from *Scott* with approval). *Accord Del Costello v. Delaware & Hudson Ry. Co.*, 711 N.Y.S.2d 77, 80 (App. 2000) ("The public's incentive to use recreational land would be diminished if users were to be left without recourse in the event of a landowner's negligent operation of any vehicle on that property.")

It is not at all clear that affirming the court of appeals in this case would diminish recreational use through property closure more than it would increase recreational use by assuring the public that the only risks they assume as recreational users are the risks of being injured by the condition of the premises. The plain meaning of the text of R.C. 1533.181(A) strikes the right balance between encouraging availability of recreational areas and promoting safety: To encourage availability, there is immunity with respect to injuries caused by the condition of the premises; to encourage safety and use, tort law otherwise applies.

The State's public-policy argument is particularly misplaced with respect to the State as landowner, as is the case here. The State needs no incentive from the tort law to make public land available for recreation. The General Assembly has commanded that the State do so. R.C. 1541.01 commands the executive branch to "create, supervise, operate, protect, and maintain a system of state parks and pro-

mote the use thereof by the public." Indeed, R.C. 1533.181 and the similar recreational-user immunity statutes enacted across the country in the mid-1960s[6] "were intended to **supplement** government park systems by inducing **private** landowners to open their land to the general public without charge." *Thomas v. Coleco Indus., Inc.*, 673 F. Supp. 1432, 1434-35 (N.D. Ohio 1987) (emphasis added).

Unlike private landowners, the State is in the business of serving its taxpayers and the rest of the public—which means providing recreational areas, and doing so with public safety as the foremost concern. The threat in the State's brief to

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[6] A non-legal commentator summarized the history of recreational-user immunity statutes in the United States as follows:

> In 1950, Virginia became the first state to enact a recreational user statute that limited the liability of landowners who allowed others to enter their land for recreational purposes. Following this reasoning, in 1965, the Committee of Officials on Suggested State Legislation set forth a Model Act to encourage private landowners to open their land to the public for recreational purposes. The momentum provided by the 1965 Model Act led to 33 states enacting recreational user statutes in the 1960s. Currently, all fifty states have some form of landowner limited liability statutes, commonly referred to as recreational user statutes. Although these statutes differ in several ways, their basic intent remains the same—to limit landowner liability for allowing persons to utilize their land for recreational purposes.

Michael S. Carroll, *et al.*, Recreational User Statutes and Landowner Immunity: A Comparison Study of State Legislation, 17 J. Legal Aspects of Sports 163, 164 (2007) (citations omitted). A detailed history is set forth in *Sallee v. Stewart*, 827 N.W.2d 128, 133-38 (Iowa 2013).

close parks if this Court does not rule in its favor is the executive branch's threat of dereliction of its statutory duty.

The ultimate irony of the State's brief is its suggestion that the State is uniquely in need of the protection of R.C. 1533.181 because the State operates so much parkland. (State's Brief 12-13.) The plain meaning of the R.C. 1533.18(A) definition of "premises" is that State-owned property is **not** "premises" unless leased to a private entity. The only reason the State is eligible for R.C. 1533.181 immunity is that under the 1975 Court of Claims Act, the State's liability is determined in accordance with the "rules of law applicable to suits between private parties"—the effect being that R.C. 1533.181(A)'s distinction between private land and State land is nugatory. *McCord v. Ohio Div. of Parks and Recreation*, 54 Ohio St.2d 72 (1978) (*per curiam*); *Moss v. Department of Natural Resources*, 62 Ohio St.2d 138 (1980) (explaining *McCord* and stating that "[t]his interpretation of R.C. 1533.18 is admittedly less than obvious from a literal reading of the provision"). It would appear to be an accident of history that the State is even eligible for immunity under R.C. 1533.181. Giving special consideration to the State as tortfeasor is a matter for the General Assembly to consider in the context of the Court of Claims Act and not something this Court should do in construing R.C. 1533.181.

Whether any particular act of premises maintenance is safe or instead calls for safety precautions such as cordoning off a danger area is a discretionary deci-

sion for the landowner, public or private. Interpreting R.C. 1533.181 as absolving landowners of any duty to behave reasonably is a license to injure an unsuspecting public without concern for civil liability. Sound public policy supports the position of Mr. Combs in this case, not that of the State.

G. R.C. 1533.181 already immunizes too much malfeasance.

The Ohio Association for Justice believes that in light of *Pauley*, R.C. 1533.181 already immunizes too much malfeasance. *See generally Pauley*, ¶ 40 (Pfeifer, J., dissenting); *id.* at ¶¶ 41-44 (O'Neill, J., dissenting). Adopting any of the State's expansive interpretations of R.C. 1533.181 would further encourage hidden dangers and prevent remedies for victims of negligence and recklessness.

Under *Pauley*, R.C. 1533.181 already immunizes owners, lessees, and occupants from liability no matter how artificially and egregiously dangerous they make the premises—even for recklessly creating hidden dangers. For example, *Pauley* means that a landowner who digs a ten-foot-deep hole in a road or a path, undetectable to visitors until it is too late, is immune from liability. This example is not relevant to this case, except that it demonstrates that if Ohioans are not well served by R.C. 1533.181 after *Pauley*, the problem is that the statute immunizes too much malfeasance as opposed to too little.

CONCLUSION

This Court should reject the State's propositions of law and affirm the judgment of the court of appeals.

Respectfully submitted,

/s/ Paul Giorgianni (0064806)
(Counsel of Record)
Giorgianni Law LLC
1538 Arlington Avenue
Columbus, Ohio 43212-2710
Phone: 614-205-5550
Fax: 614-481-8242
E: Paul@GiorgianniLaw.com
Counsel for Amicus Curiae
The Ohio Association for Justice

CERTIFICATE OF SERVICE

A PDF electronic image of this document was sent by e-mail on June 30, 2015 to:

Arthur C. Graves at AttyGraves@aol.com, and

Eric E. Murphy, State Solicitor, at
Eric.Murphy@OhioAttorneyGeneral.gov

/s/ Paul Giorgianni (0064806)