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BARBARA A. WIEDENBEIN
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CLERMONT COUNTY, OHIO

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

PENNY JOHNSTON :
Plaintiff : **CASE NO. 2015 CVC 00008**
vs. : **Judge McBride**
JAMES BRAUTIGAN, ET AL., :
Defendants : **DECISION/ENTRY**

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This cause is before the court for consideration of (1) a motion filed by the defendant James Brautigian to exclude the plaintiff Penny Johnston's first affidavit, (2) cross motions for summary judgment between the plaintiff Penny Johnston and the defendant James Brautigian, (3) a motion filed by the plaintiff Penny Johnston to strike all references to an examination under oath cited by the defendant Liberty Mutual Insurance Company and the intervening plaintiff Liberty Mutual Fire Insurance Company, and (4) cross motions for summary judgment among the plaintiff Penny Johnston, the defendant Liberty Mutual Insurance Company, and the intervening plaintiff Liberty Mutual Fire Insurance Company.

The court held a hearing on the motions involving the plaintiff Penny Johnston, the defendant Liberty Mutual Insurance Company, and the intervening plaintiff Liberty Fire Mutual Insurance Company on November 25, 2015. No oral argument was requested as to the motions between the plaintiff Penny Johnston and the defendant James Brautigian.

Upon consideration of the various motions, the evidence presented for the court's consideration, the written and oral arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The instant case involves claims of negligence and recklessness that stem from an all-terrain vehicle ("ATV") accident that occurred in the early morning hours of January 6, 2013.

The plaintiff Penny Johnston was in a relationship with the defendant James Brautigan beginning in August 2012.¹ During the day of January 5th, Penny and James went to a sports bar to watch a football game.² Penny remembers that she and James consumed a "couple" alcoholic beverages at the bar, while James recalls that they each had three Long Island Iced Teas.³

James avers that he was not impaired from drinking the alcoholic beverages.⁴ Around 8:00 p.m., the couple left the bar and returned to James's home, where they each had an additional shot of alcohol at approximately 10:00 p.m.⁵

Sometime between 11:00 p.m. on January 5th and 12:00 a.m. on January 6th, Penny and James decided to go for a joyride on James' ATV which he owned.⁶ For most of the ride, James operated the ATV and Penny sat behind him.⁷ James and Penny then rode the ATV for the next two or three hours along his property.⁸

The accident in question occurred on James's property at approximately 3:10 a.m. on January 6th.⁹ Penny testified that during the ride James slowed and drove the ATV up a hill, at which point it flipped backward, falling onto James and Penny.¹⁰ James testified that as he went up the hill, the ATV hit a tree root, causing the center of gravity to change, and consequently the ATV stood up and rolled backwards onto

¹ P. Johnston Dep., 42:15-22 (Aug. 13, 2015), J. Brautigan Dep., 7:1-5 (Aug. 13, 2015).

² P. Johnston Dep., 43:8-17, J. Brautigan Dep., 13:4-17.

³ P. Johnston Dep., 45:4-14, J. Brautigan Dep., 14:8-15:1.

⁴ J. Brautigan Dep., 15:18-20.

⁵ P. Johnston Dep., 46:3-24, J. Brautigan Dep., 15:23-16:22.

⁶ P. Johnston Dep., 47:16-19, J. Brautigan Dep., 7:23-24, 17:5-7.

⁷ P. Johnston Dep., 51:19-20, J. Brautigan Dep., 7:21-8:3.

⁸ P. Johnston Dep., 53:1-6.

⁹ P. Johnston Dep., 70:25-71:4, J. Brautigan Dep., 7:10-20, 8:8-10.

¹⁰ P. Johnston Dep., 53:19-54:15, 55:1-5.

James and Penny.¹¹ After landing on James and Penny, the ATV continued to roll down the hill.¹²

James had not driven the ATV over this particular hill prior to the accident.¹³ James testified that earlier that night he had driven over an adjoining hill without incident, which may have been as steep as the hill where the accident occurred.¹⁴ He decided to drive over the hill where the accident occurred because Penny was enjoying riding over the adjoining hill, and James considered it an "adventure" and a "thrill."¹⁵

Penny avers that she "had no clue" that James was driving up the steep hill.¹⁶ She further testified that they "were on flat land and before I knew it, he shot up that hill," and then they "just flipped."¹⁷

Following the accident, Penny claims James told her the accident was caused by going up "a hill that was too steep."¹⁸ She further avers that James told her "he knew kind of better to go up, but he sort of got turned around."¹⁹

After the accident, Penny was hospitalized for ten days due to spinal injuries, during which time she had a spinal surgery.²⁰ She continues to require extensive medical care for her injuries and has incurred more than \$300,000 in medical expenses.²¹

¹¹ Brautigan Dep., 18:2-10.

¹² Brautigan Dep., 20:16-23.

¹³ Brautigan Dep., 18:11-12.

¹⁴ J. Brautigan Dep., 29:12-17.

¹⁵ J. Brautigan Dep., 29:12-17.

¹⁶ P. Johnston Dep., 69:18-22.

¹⁷ P. Johnston Dep., 70:2-11.

¹⁸ P. Johnston Dep., 57:13-16.

¹⁹ P. Johnston Dep., 57:18-19.

²⁰ P. Johnston Dep., 58:4-22.

²¹ P. Johnston Dep., 63:1-3, 65:12-17

Penny testified that she had ridden the ATV with James "at least several" times prior to January 6th, usually at night, and that she had operated the ATV during at least "a couple" of those rides.²² Growing up, Penny had driven smaller ATVs as well.²³ The route they rode along on January 6th was the same route that the couple typically used behind James's house.²⁴ When riding the ATV with James, Penny "didn't feel at any risk, but, of course, there's risk to anything."²⁵

Penny avers in her affidavit that she and James had discussed the steep hill where the accident occurred before January 6th.²⁶ Penny relays that James was "scared" of the hill and stated he would never drive over it because it was too steep and dangerous.²⁷ He also allegedly indicated he was "terrified" of the hill because his friend's son drove on the hill and nearly flipped an ATV in the process.²⁸ Penny claims she told James the hill was too steep and dangerous.²⁹ Additionally, she states that James promised her he would never drive over that hill, and she thus felt safe riding with James.³⁰

When riding the ATV with James, their rides were primarily for enjoyment, which was the case for their drive on January 6th³¹ However, Penny also previously observed James use the ATV for chores or yardwork.³²

²² P. Johnston Dep., 48:4-49:16.

²³ P. Johnston Dep., 49:21-50:5.

²⁴ P. Johnston Dep., 48:25-49:5.

²⁵ P. Johnston Dep., 58:1-4.

²⁶ Pls. Aff., ¶ 11.

²⁷ Pls. Aff., ¶ 13.

²⁸ Pls. Aff., ¶ 17.

²⁹ Pls. Aff., ¶ 14.

³⁰ Pls. Aff., ¶ 15.

³¹ P. Johnston Dep., 72:21-73:5.

³² P. Johnston Dep., 72:5-14.

James likewise testified that he purchased the ATV for "property upkeep," like "plowing the driveway and stuff like that, hauling wood," and also used it for joyrides on his property.³³ During the three years he owned the ATV, James used it approximately five times to haul firewood, over 20 times to haul trees across his yard, 30 times for joy rides, and he used it "all the time" to haul brush.³⁴ However, James also admitted that on January 6th, he and Penny were only using the ATV for enjoyment.³⁵

James did not register his ATV because he believed that if he used his ATV only for property upkeep, it would be covered under his homeowner's insurance.³⁶ He avers that he attempted to insure the ATV the year he purchased it, by inquiring with Liberty Mutual, but he was advised that he did not need insurance because he was not driving the ATV on roads.³⁷ After his inquiry with Liberty Mutual, he believed that his ATV was covered by his homeowner's insurance or umbrella policy while being used on his property.³⁸

At the time of the accident, James had two insurance policies in place. The first was a homeowner's policy insured by the intervening plaintiff Liberty Mutual Fire Insurance Company.³⁹ The second policy was a catastrophe policy insured by the defendant Liberty Mutual Insurance Company.⁴⁰ (Liberty Mutual Fire Insurance Company and Liberty Mutual Insurance Company are hereinafter collectively referred to

³³ J. Brautigan Dep., 12:7-14, 36:25-37:13.

³⁴ J. Brautigan Dep., 42:1-43:4.

³⁵ J. Brautigan Dep., 37:18-38:3.

³⁶ J. Brautigan Dep., 8:11-20.

³⁷ J. Brautigan Dep., 8:23-9:25.

³⁸ J. Brautigan Dep., 8:11-9:3.

³⁹ Liberty Ex. A to its answer and cross claim ("Ex. A").

⁴⁰ Liberty Ex. B to its answer and cross claim ("Ex. B").

as "Liberty.") The homeowner's policy had an occurrence limit of \$300,000, and the catastrophe policy had a \$1,000,000 occurrence limit.⁴¹

The homeowner's policy provides coverage for personal liability from a suit involving "bodily injury" caused by a qualifying "occurrence."⁴² Liberty will "[p]ay up to our limit of liability for the damages for which the 'insured' is legally liable."⁴³ In turn, an "occurrence" is defined as "an accident * * * which results, during the policy period, in * * * 'Bodily injury.'"⁴⁴

The homeowner's policy also includes exceptions to personal liability coverage for "bodily injury."⁴⁵ The first of two exclusions relevant to the case at bar excludes coverage for bodily injuries arising from "[t]he ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned * * * by * * * an insured."⁴⁶

There are, however, multiple exceptions to this exclusion, two of which are at issue here. The first exception provides that the exclusion does not apply to "a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and * * * [o]wned by an 'insured' and on an 'insured location.'"⁴⁷ In turn, an insured location includes the "grounds used by [the insured] as a

⁴¹ Ex A, pg. 1, Policy Declarations; Ex. B., pg. 1, Declaration.

⁴² Ex. A, pg. 11, Section II.

⁴³ Ex. A, pg. 11, Section II, E(1).

⁴⁴ Ex. A, pg. 1, Definitions, 5(a).

⁴⁵ Ex. A, pg. 11, Section II.

⁴⁶ Ex. A, pg. 11, Section II, Exclusions, 1(f)(1).

⁴⁷ Ex. A, pg. 12, Section II, Exclusions, 2.

residence” and “[w]hich is shown in the Declarations.”⁴⁸ The insured location listed in the declaration is 2254 Diggers Ridge, Batavia, Ohio, 45103.⁴⁹

The second relevant exception provides that an exclusion does not apply to a “vehicle or conveyance not subject to motor vehicle registration which is: (a) Used to service an ‘insured’s’ residence * * * .”⁵⁰

Under the second insurance policy, the catastrophe policy, Liberty “will pay all sums in excess of the retained limit and up to our limit of liability for damages because of **personal injury** * * * to which this policy applies and for which the insured is legally liable.”⁵¹ The catastrophe policy also contains exclusions and will “not apply to **personal injury** * * * arising out of the ownership * * * of a motor vehicle or watercraft owned, hired or rented by an insured, unless the liability is covered by an **underlying policy** or by other valid and collectible insurance.”⁵²

A “motor vehicle,” as used in the catastrophe policy, is defined as “a motorized land vehicle * * * subject to motor vehicle registration.”⁵³ A “motor vehicle” can also be “any other motorized land vehicle owned by any insured and designed for recreational use off public roads, while off **residence premises**.”⁵⁴ An “underlying policy” is defined as “a policy listed as an underlying policy in the Declarations.”⁵⁵ Per the Declarations

⁴⁸ Ex. A, pg. 1, Definitions, 4.

⁴⁹ Ex. A., pg. 1, Declarations.

⁵⁰ Ex. A, pg. 12, Section II, pg. 12, Exclusions, 4(a).

⁵¹ (Emphasis original.) Ex. B, pg. 4, Coverage – Personal Excess Liability.

⁵² Ex. B, pg. 4, Exclusions, e.

⁵³ Ex. B., pg. 3, Definitions, 4(a).

⁵⁴ (Emphasis original.) Ex. B, pg. 3, Definitions, 4(c).

⁵⁵ (Emphasis original.) Ex. B, pg. 4, Definitions, 10.

for the catastrophe policy, the policy number of the homeowner's policy is listed as the underlying policy.⁵⁶

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

The court must grant summary judgment, as requested by a moving party when:

"(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) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."⁵⁷

The court must view the evidence in a light most favorable to the nonmoving party.⁵⁸ Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.⁵⁹ A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."⁶⁰

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so

⁵⁶ Ex. B., pg.2, Declarations.

⁵⁷ *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). See *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

⁵⁸ *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

⁵⁹ *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

⁶⁰ *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

one-sided that the party must prevail as a matter of law”⁶¹ This threshold inquiry determines whether there are “any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.”⁶²

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.⁶³ This burden requires the movant to “specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond.”⁶⁴ If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.⁶⁵

However, if the movant satisfies this burden, then the nonmoving party has a “reciprocal burden” to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a “triable issue of fact” remains.⁶⁶ The duty of the nonmoving party is more than that of resisting the motion's allegations.⁶⁷ Instead, this burden requires the nonmoving party to “produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial.”⁶⁸ The nonmoving party must

⁶¹ Id. at 251-52.

⁶² Id. at 250.

⁶³ *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

⁶⁴ *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

⁶⁵ Id. See *HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

⁶⁶ *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

⁶⁷ *Wells Fargo*, 2013-Ohio-855at ¶ 25.

⁶⁸ (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; See *Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).

present documentary evidence of specific facts showing that there is a genuine issue for trial.⁶⁹ It may not rely on the pleadings or unsupported allegations.⁷⁰

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."⁷¹ The trial court maintains the sound discretion to admit or exclude relevant evidence.⁷² When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.⁷³

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.⁷⁴ "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."⁷⁵ "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will

⁶⁹ *Williams*, 2014-Ohio-3778 at ¶ 8. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

⁷⁰ *Id.*

⁷¹ See *Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").

⁷² *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

⁷³ *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

⁷⁴ Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

⁷⁵ *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

suffice to meet the requirements of Civ.R. 56(E).⁷⁶ Furthermore, if the affiant does not specifically state that he or she has personal knowledge, “personal knowledge may be inferred from the contents of the affidavit.”⁷⁷

By contrast, if certain statements in the affidavit “suggest that it is unlikely that the affiant had personal knowledge” of the facts, then “something more than a conclusory averment that the affiant has personal knowledge would be required.”⁷⁸ Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).⁷⁹

Civ.R. 56(E) provides that “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” Thus, documents referenced in the affidavit “must be attached to the affidavit.”⁸⁰ If the affiant “relies” on documents in the affidavit but fails to attach those documents, “the portions of the affidavit that reference those document[s] must be stricken.”⁸¹

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.⁸² Summary judgment is inappropriate

⁷⁶ *Id.*, citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.

⁷⁷ *Id.*

⁷⁸ *Id.*, quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

⁷⁹ *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist. 1989).

⁸⁰ *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

⁸¹ *Id.* at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. See *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).

⁸² *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.⁸³

LEGAL ANALYSIS

(I) MOTIONS BETWEEN THE PLAINTIFF AND DEFENDANT BRAUTIGAN

(A) MOTION TO EXCLUDE THE PLAINTIFF'S AFFIDAVIT

Unless properly stricken, the court is required under Civ.R. 56(C) to consider all evidence on summary judgment, including a party's affidavit.⁸⁴ However, the Ohio Supreme Court has held that "[w]hen determining the effect of a party's affidavit that appears to be inconsistent with the party's deposition and that is submitted in either support of or in opposition to a motion for summary judgment, a trial court must consider whether the affidavit contradicts or merely supplements the deposition."⁸⁵ If the summary judgment movant's affidavit is inconsistent with his or her earlier deposition testimony, then the court must deny the movant summary judgment.⁸⁶ If the summary judgment opponent's affidavit is inconsistent with his or her earlier deposition testimony, then the opponent cannot create a genuine issue of material via the conflicting affidavit unless there is a sufficient explanation for the inconsistency.⁸⁷

⁸³ *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

⁸⁴ *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 26.

⁸⁵ *Byrd*, 2006-Ohio-3455 at paragraph one of the syllabus.

⁸⁶ *Id.* at paragraph two of the syllabus, citing *Turner v. Turner*, 67 Ohio St.3d 337, 617 N.E.2d 1123 (1993).

⁸⁷ *Byrd*, 2006-Ohio-3455 at paragraph three of the syllabus.

The defendant has requested that the court not consider the plaintiff's first affidavit.⁸⁸ The defendant highlights that the affidavit was created post-deposition, and it discusses a conversation that Penny allegedly had with James about the dangers of the steep hill and James's promises to never drive Penny on the hill. Because this conversation was never discussed during the deposition, the defendant argues that the affidavit is inconsistent with Penny's earlier sworn testimony and therefore cannot create a genuine issue of material fact.

The court cannot conclude that the plaintiff's affidavit is in direct conflict with her prior deposition testimony. Penny had never been asked in her deposition about whether she and James discussed the steep hill before January 5, 2013. Therefore, the plaintiff's first affidavit is supplemental to, and not inconsistent with, her deposition. The remaining portions of the affidavit are consistent with the deposition testimony as well. As a result, the court will not strike or exclude this affidavit since it constitutes proper evidence to be considered in opposition to the defendant's motion for summary judgment.

(B) CROSS MOTIONS FOR SUMMARY JUDGMENT

Ohio's Recreational User Statute gives owners of privately owned lands exemption from liability as to recreational users of their lands. Specifically, R.C. 1533.181 provides, in pertinent part, "(A) No owner * * * (3) assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user."

⁸⁸ Defs. Reply to Pls. Resp. and Defs. Resp. to Pls. Mot. for Summ. J., pg.3.

For purposes of consideration of the Ohio Recreational User Statute to the facts of this case, 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 * * * operate [an] all-purpose vehicle.”⁸⁹ Moreover, the statute indicates that the term “all-purpose vehicle” bears the same meaning as in R.C. 4519.01. In turn, R.C. 4519.01(B) defines an “all purpose vehicle” as expressly including “vehicles commonly known as all-terrain vehicles.” When the recreational user statute applies, the defendant cannot be liable for negligence “unless flipping the [ATV] is not an ordinary risk of the activity or [the plaintiff] did not assume the risk of the activity.”⁹⁰

At common law, it is axiomatic that to establish a negligence claim the plaintiff “must demonstrate a duty owed by the defendant to the plaintiff, a breach of that duty, and that the plaintiff’s injury proximately resulted from the defendant’s breach of duty.”⁹¹ Whether the defendant owes a duty to the plaintiff is “fundamental to establishing actionable negligence, without which there is no legal liability.”⁹²

The doctrine of primary assumption of the risk is a defense that limits a defendant’s liability in recreational and sports activities by abrogating the defendant’s duty.⁹³ The “law pertaining to recreational activities and primary assumption of the risk

⁸⁹ R.C. 1533.18.

⁹⁰ *Parker v. Patrick*, 12th Dist. Brown No. CA2011-12-027, 2012-Ohio-3312, ¶ 13. See *Curtis v. Schmid*, 5th Dist. Delaware No. 07 CAE 11 0065, 2008-Ohio-5239, ¶ 68 (finding that R.C. 1533.181 can act as a bar to a general negligence claim).

⁹¹ *McLoughlin v. Williams*, 12th Dist. Clermont No. CA2015-02-020, 2015-Ohio-3287, ¶ 8, citing *Johnston v. Filson*, 12th Dist. Clinton No. CA2014-04-007, 2014-Ohio-4758, ¶ 9.

⁹² *McLoughlin*, 2015-Ohio-3287 at ¶ 8 quoting *Uhl v. Thomas*, 12th Dist. Butler No. CA2008-06-131, 2009-Ohio-196, ¶ 10.

⁹³ *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, 802 N.E.2d 1116, ¶ 11. Of note, secondary assumption of the risk, by contrast, requires a showing that the plaintiff consented or acquiesced in an appreciated or known risk. *Id.*, citing 2 Restatement of the Law 2d, Section 496C, Comment *b* (1965).

is now well-settled and must be followed.”⁹⁴ Whether the doctrine applies is a question of law.⁹⁵ The Ohio Supreme Court has long held that “[w]here individuals engage in recreational or sports activities, they assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant’s actions were either ‘reckless’ or intentional, as defined in Sections 500 and 8A of the Restatement of Torts 2d.”⁹⁶

In dealing with recreational activities, the Ohio Supreme Court has explained that the plaintiff’s “ability or inability to appreciate the inherent dangers of the activity” is immaterial for primary assumption of the risk.⁹⁷ Courts reason that people who are entirely ignorant of a recreational activity’s risks still assume the risk by participating or simply spectating.⁹⁸ In such a case, a person is deemed to accept the risks irrespective of the person’s actual knowledge or consent.⁹⁹ Specifically, the plaintiff is deemed to accept the foreseeable, customary risks of the activity.¹⁰⁰ These are risks that “are inherent to the activity * * * because such risks cannot be eliminated.”¹⁰¹

Instead of focusing on the plaintiff’s behavior, the “determinative factor” in a primary assumption of the risk analysis is the defendant’s conduct during the

⁹⁴ Id. at ¶ 25.

⁹⁵ *Parker*, 2012-Ohio-3312 at ¶ 15.

⁹⁶ *Marchetti v. Kalish*, 53 Ohio St.3d 95, 559 N.E.2d 699, syllabus (1990). See *Parker*, 2012-Ohio-3312 at ¶ 15 (holding same).

⁹⁷ *Gentry*, 2004-Ohio-379 at ¶ 9. See *Taylor v. Mathys*, 3d Dist. Union No. 14-04-32, 2005-Ohio-150, ¶ 12 (rejecting an injured ATV passenger’s argument that assumption of the risk was inapplicable because she did not anticipate the operator to drive over the snow drift that resulted in the accident at issue).

⁹⁸ *Gentry*, 2004-Ohio-379 at ¶ 12.

⁹⁹ *Gentry*, 2004-Ohio-379 at ¶ 11.

¹⁰⁰ Id. at ¶ 10, citing *Thompson v. McNeil*, 53 Ohio St.3d 102, 104, 559 N.E.2d 705 (1990).

¹⁰¹ *McLoughlin*, 2015-Ohio-3287 at ¶ 17, quoting *Whitsman v. Gator Invest. Properties, Inc.*, 149 Ohio App.3d 225, 236, 2002-Ohio-1850 (1st Dist.).

recreational activity.¹⁰² “[R]ecovery is dependent upon whether the defendant’s conduct was either reckless or intentional.”¹⁰³

Accordingly, the plaintiff must both plead and prove that the conduct was reckless or intentional.¹⁰⁴ Furthermore, if the assumption of the risk doctrine applies, then the plaintiff will not prevail absent showing that the defendant’s actions were either reckless or intentional.¹⁰⁵

“Intent, as used by the Ohio Supreme Court, denotes ‘that the actor desires to cause consequences of his act, or that he believes that the consequences of are substantially certain to result from it.’”¹⁰⁶ More relevant to the instant case is recklessness, which has been described by the Ohio Supreme Court:

“The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.”¹⁰⁷

Succinctly summarized, a participant in a recreational activity acts recklessly when “(1) his conduct is outside of the rules or customs of the activity and (2) his conduct creates an unreasonable risk of harm to another.”¹⁰⁸ Whether the defendant’s conduct constitutes recklessness is typically “within the province of the jury.”¹⁰⁹ However, “the showing for recklessness is high, so summary judgment can be

¹⁰² *Gentry*, 2004-Ohio-379 at ¶ 9.

¹⁰³ *Id.* at ¶ 13.

¹⁰⁴ *Marchetti*, 53 Ohio St.3d at ¶ 99.

¹⁰⁵ *Parker*, 2012-Ohio-3312 at ¶ 16.

¹⁰⁶ *Id.* at ¶ 17, quoting *Marchetti*, 53 Ohio St.3d at fn. 2.

¹⁰⁷ *Id.*

¹⁰⁸ *Taylor*, 2005-Ohio-150, ¶ 17.

¹⁰⁹ *Booth v. Walls*, 3d Dist. Henry No. 7-12-23, 2013-Ohio-3190, ¶ 57.

appropriate in those instances where the individual's conduct does not demonstrate a disposition to perversity."¹¹⁰

The Twelfth District Court of Appeals had the opportunity to apply the assumption of the risk doctrine in the recent case *McLoughlin v. Williams*, 12th Dist. Clermont No. CA2015-02-020, 2015-Ohio-3287. In *McLoughlin*, two minor children rode an ATV and crashed into an abutment, causing the ATV to flip and injure the children.¹¹¹ The parents of one of the minor children brought a personal injury suit against the parents of the child who had been driving.¹¹² The appellate court examined whether the assumption of the risk defense applied, noting that, if successful, the defense "means that the duty element of negligence is not established as a matter of law, [preventing] the plaintiff from even making a prima facie case."¹¹³

The court held that the doctrine did apply because "[l]osing control and flipping an ATV is a foreseeable and customary risk associated with the activity of driving or riding on an ATV."¹¹⁴ Numerous other courts have likewise found that the risk of an ATV flipping is an inherent risk in operating an ATV.¹¹⁵

¹¹⁰ *Id.*, quoting *Doe v. Cleveland Metro. School Dist.*, 8th Dist. No. 8177, 2012-Ohio-2497, ¶ 12.

¹¹¹ *McLoughlin*, 2015-Ohio-3287 at ¶ 2.

¹¹² *Id.* at ¶ 3.

¹¹³ *Id.* at ¶ 17, quoting *Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427, 431-32 (1996).

¹¹⁴ *McLoughlin*, 2015-Ohio-3287 at ¶ 17 quoting *Curtis v. Schmid*, 5th Dist. Delaware No. 07 CAE 11 0065, 2008-Ohio-5239, ¶ 56.

¹¹⁵ See *Paxton v. Ruff, Inc.*, 12th Dist. Butler No. CA97-04-089, 1998 WL 8695, *5 (Jan. 12, 1998) (holding that a passenger killed in ATV accident when the operator lost control and flipped the ATV assumed the "built-in risks of operating the vehicle," and therefore the assumption of the risk doctrine applied); *Brumage v. Green*, 2d Champaign No. 2014-CA-7, 2014-Ohio-2552, ¶¶ 13-14 (Citation omitted.) ("We agree with our sister courts, and conclude that Brumage and Greene were engaged in a recreational activity when they were riding the ATVs. * * * Losing control and flipping an ATV is a foreseeable and customary risk associated with the activity of driving or riding on an ATV."); *West v. Devendra*, 985 N.E.2d 558, 2012-Ohio-6092, ¶ 23 (7th Dist.) (observing that "our sister district found that losing control and flipping an ATV is a foreseeable and customary risk associated with the activity of driving or riding on an

The plaintiff cites to cases involving hayrides, in which courts have declined to apply the assumption of the risk doctrine. However, these cases are not instructive in the instant case because the risks inherent to operating a hayride are different from the risks inherent in operating an ATV. For instance, in *Brennan v. Schappacher*, 12th Dist. Butler No. CA2008-09-231, 2009-Ohio-927, the court observed that “[o]n a hayride, it is likely that the wagon may encounter holes and ruts in the terrain and a passenger could fall from the wagon as a result,” and thus passengers accept those risks.¹¹⁶

However, the injured plaintiff was not injured by this risk.¹¹⁷ Instead, the plaintiff was “thrown” from a wagon when the wagon lost traction and careened down a hill.¹¹⁸ Because being thrown from a hayride after careening down a hill is not a customary hayride risk, the assumption of the risk doctrine did not apply, and the court applied the negligence standard of care.¹¹⁹

Likewise, the plaintiff also cites to *Pope v. Willey*, 12th Dist. Clermont No. CA2004-10-077, 2005-Ohio-4744, to support her argument that flipping an ATV is not an inherent risk to the recreational activity, but this case too is distinguishable. The *Pope* Court explained that “[i]n this case, the cause of injury, collision with a pick-up-truck on a public road, is not part of the inherent risk that cannot be eliminated in the

ATV” and holding being thrown from an ATV while it was in reverse was a foreseeable and customary risk); *Curtis*, 2008-Ohio-5239 at ¶ 56 (Citation omitted.) (“Losing control and flipping an ATV is a foreseeable and customary risk associated with the activity of driving or riding on an ATV * * * Thus, appellant assumed the risk that the ATV on which she was a passenger could flip.”).

¹¹⁶ *Brennan v. Schappacher*, 12th Dist. Butler No. CA2008-09-231, 2009-Ohio-927, ¶ 23. See *Byer v. Lucas*, 7th Dist. Noble No. 08-NO-351, 2009-Ohio-1022, ¶ 39 (finding that “a farm tractor and its wagon cascading down a steep hill out of control and jackknifing to a stop throwing passengers from it is not an inherent risk of a hayride.”).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at ¶¶ 3-4.

¹¹⁹ *Id.* at ¶¶ 24-26.

recreational activity of ATV riding."¹²⁰ The court expressly stated that "[h]ad the accident occurred on the road, but as a result of the boys losing control and the vehicle flipping, the recreational activity doctrine would apply since the cause of the injury was an inherent danger to ATV riding."¹²¹

In the case at bar, both exemption under R.C. 1533.181 and the doctrine of assumption of the risk apply, therefore relieving James from a duty not to be negligent. To begin with R.C. 1533.181, as a private property owner, James does not incur liability for injuries caused to other people, in this case Penny, for injuries to her person caused by the acts of a recreational user. Penny and James were recreational users because they were joyriding an "all-purpose vehicle," which specifically includes all-terrain vehicles.¹²² Accordingly, the Recreational User Statute applies, and James cannot be liable for negligence, only intentional or reckless conduct.

The assumption of the risk defense leads to the same result. The case law is clear that flipping an ATV is a customary, foreseeable, and inherent risk to riding an ATV. The plaintiff argues that she did not assume any risks because James had promised her he would never drive her up the steep hill. However, the risk of flipping an ATV is an inherent risk irrespective of whether the ATV was being driven on flat land or a hill. Simply, flipping an ATV is always a risk in riding one. Moreover, the plaintiff's appreciation of the risk of flipping the ATV is immaterial. Rather, the "determinative factor" is whether James's conduct was either reckless or intentional.¹²³

¹²⁰ *Pope v. Willey*, 12th Dist. Clermont No. CA2004-10-077, 2005-Ohio-4744, ¶ 13.

¹²¹ *Id.* at ¶ 15.

¹²² R.C. 1533.18, R.C. 4519.01(B)

¹²³ *Gentry*, 2004-Ohio-379 at ¶¶ 9, 13.

Accordingly, under both R.C. 1533.181 and the assumption of the risk doctrine, James cannot be liable to Penny for any negligence in operating the ATV on his part. The court cannot hold that James's conduct was intentional because the plaintiff never pleaded that his conduct was intentional, nor did she make such an argument in briefing.¹²⁴

The plaintiff pleaded that James's conduct was "negligent and/or reckless."¹²⁵ James's conduct is reckless if "(1) his conduct is outside of the rules or customs of the activity and (2) his conduct creates an unreasonable risk of harm to another."¹²⁶ This issue is a question of fact for the jury to determine.¹²⁷ James operated the ATV in the middle of the night after imbibing several alcoholic drinks earlier in the evening. Further, Penny avers that James knew that the hill was dangerous because he saw a friend's son nearly flip an ATV attempting to climb it. Given these facts, the court cannot find, as a matter of law, that James's conduct did not create an unreasonable risk of harm to Penny. As such, there is a genuine issue of material fact that remains to be litigated, preventing the court from issuing summary judgment on liability.

¹²⁴ *Marchetti*, 53 Ohio St.3d at ¶ 99.

¹²⁵ Compl. at ¶¶ 5-8.

¹²⁶ *Taylor*, 2005-Ohio-150, ¶ 17.

¹²⁷ *Booth v. Walls*, 3d Dist. Henry No. 7-12-23, 2013-Ohio-3190, ¶ 57.

(II) MOTIONS BETWEEN THE PLAINTIFF AND LIBERTY MUTUAL

(A) MOTION TO STRIKE

On October 30, 2015, the plaintiff moved the court to strike all references in Liberty's summary judgment briefing to an examination under oath ("EUO"). On May 16, 2013, counsel for Liberty conducted an EUO of James, at which he was not represented by counsel. Thereafter, on August 13, 2015, during James's deposition, counsel for Liberty used pages 82-84 of the EUO to refresh James's recollection.¹²⁸ Counsel for the plaintiff was provided copies of only the EUO pages used to refresh James's recollection, although he requested a copy of the entire EUO.

Liberty cited James's testimony from his EUO throughout its motion for summary judgment.¹²⁹ In the plaintiff's response and cross motion for summary judgment, counsel for the plaintiff highlighted that he had never received a copy of the EUO.¹³⁰ In Liberty's reply, Liberty responded that it had produced the transcript to counsel for James and did not file it with its summary judgment motion to avoid duplication of testimony on the docket.¹³¹ Liberty then filed the EUO with its reply.

The court heard argument on this motion at the hearing on November 25, 2015. Counsel for the plaintiff argues that the EUO should be excluded because he was unable to review it until the re-direct of James's deposition, and the review he did undertake was a very limited. The plaintiff also posits that the EUO should be excluded

¹²⁸ J. Brautigan Dep., 40:20-42:10.

¹²⁹ See Liberty Mot. for Mot. for Summ. J.

¹³⁰ Pls. Resp. & Mot. for Mot. for Summ. J., pg. 6, FN 1.

¹³¹ Liberty Reply, pg. 5, FN 1.

because Liberty's motion for summary judgment cited testimony of James that the plaintiff's counsel never had an opportunity to review for his response.

Liberty counters that counsel for the plaintiff did have a sufficient opportunity to view the EUO at the deposition, and only a limited portion of the EUO was used solely to refresh the deponent's recollection. Liberty also argues that filing the EUO for summary judgment is similar to filing an affidavit, and it should not be excluded.

After considering arguments from both parties, the court declines to strike the references to the EUO. First, at the hearing counsel for the plaintiff could not supply an answer as to how the plaintiff has been prejudiced by the delayed filing of the EUO. Counsel could not identify any part of the EUO that counsel would have cited in the plaintiff's response had he had access to it earlier. Secondly, the EUO was filed before the plaintiff filed the reply brief, but the reply does not cite to the EUO. If there was an important fact that the plaintiff needed to bring to the court's attention in the EUO, or if the plaintiff needed to highlight an inconsistency between the EUO and deposition testimony, the plaintiff declined to do so in the reply. The court has reviewed the EUO and has not found any testimony in it that will prejudice the plaintiff in the outcome of the instant motions for summary judgment. Accordingly, the court declines to strike the EUO.

(B) CROSS MOTIONS FOR SUMMARY JUDGEMENT

Liberty moved for summary judgment seeking a declaratory judgment finding that the Liberty insurance policies exclude liability coverage for the ATV accident. The plaintiff then filed a cross motion for summary judgment on the same.

Liberty's position is that neither policy extends liability coverage due to applicable exclusions that none of the potential exceptions to the exclusions apply. The plaintiff's position is that, the exclusions do not apply, but even if they did, the case at bar satisfies the exceptions to those exclusions.

"An insurance policy is a contract whose interpretation is a matter of law."¹³² The fundamental goal in construing an insurance policy is to "ascertain the intent of the parties from a reading of the policy in its entirety and to settle upon a reasonable interpretation of any disputed terms in a manner designed to give the contract its intended effect."¹³³

The parties' intent is "gathered from the ordinary and commonly understood meaning of the language employed."¹³⁴ However, the common meaning of words is not applied where "manifest absurdity" would result or where a different meaning is "clearly evidenced."¹³⁵

¹³² *Laboy v. Grange Indemn. Ins. Co.*, 144 Ohio St.3d 234, 2015-Ohio-3308, 41 N.E.3d 1224, ¶ 8, quoting *Sharonville v. Am. Emp. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶ 6.

¹³³ *Laboy*, 2015-Ohio-3308 at ¶ 8, citing *Burriss v. Grange Mut. Cos.*, 46 Ohio St.3d 84, 89, 545 N.E.2d 83 (1989).

¹³⁴ *King v. Nationwide Ins., Co.*, 35 Ohio St.3d 208, 211, 519 N.E.2d 1380 (1988), quoting *Dealers Dairy Products Co. v. Royal Ins. Co.*, 170 Ohio St. 336, 164 N.E.2d 745 (1960), paragraph one of the syllabus.

¹³⁵ *Laboy*, 2015-Ohio-3308 at ¶ 8, quoting *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus.

Moreover, if an insurance policy's provisions are "reasonably susceptible to more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured."¹³⁶ However, they will not be construed strictly against the insurer if doing so would "provide an unreasonable interpretation of the words of the policy."¹³⁷

(1) HOMEOWNER'S POLICY

James had two insurance policies when the accident occurred- a homeowner's policy and a catastrophic, or umbrella, policy.¹³⁸ The homeowner's policy provides for coverage for lawsuits involving "bodily injury" caused by a qualifying "occurrence."¹³⁹ Liberty contends, however, that an exclusion applies and thus prevents coverage of the accident involving Penny because her injuries arose from James's ownership and use of a motorized land conveyance.¹⁴⁰

Neither party disputes that James's ATV is a motorized land conveyance. They disagree, however, over whether an exception to the above exclusion applies. If an exception applies, then James enjoys liability coverage beneath his homeowner's policy.

¹³⁶ *King*, 35 Ohio St.3d 208 at syllabus, citing *Faruque v. Provident Life & Acc. Ins. Co.*, 37 Ohio St.3d 34, 31, 508 N.E.2d 949, (1987), syllabus.

¹³⁷ *Laboy*, 2015-Ohio-3308 at ¶ 9, quoting *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, 875 N.E.2d 31, ¶ 8.

¹³⁸ "An umbrella policy is policy which provides excess coverage beyond an insured's primary policies." *Midwestern Indemn. Co. v. Craig*, 106 Ohio App.3d 158, 164, 665 N.E.2d 712 (3d Dist. 1995), citing 3 *Widiss, Uninsured and Underinsured Motorist Insurance* (2 Ed.1995) 23, Section 32.5.

¹³⁹ Ex. A, pg. 11, Section II.

¹⁴⁰ Ex. A, pg. 11, Section II, Exclusion 1(f).

Under the first pertinent exception, the above exclusion does not apply to “a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and * * * [o]wned by an ‘insured’ and on an ‘insured location.’”¹⁴¹ Liberty contends that this exception is inapplicable because the ATV was a recreational vehicle subject to motor vehicle registration, which the plaintiff disputes.

Pursuant to R.C. 4519.02(A), any person in Ohio operating an “all-purpose vehicle” must register the vehicle. An all-purpose vehicle is statutorily defined as a “self-propelled vehicle designed primarily for cross-country travel on land and water, or on more than one type of terrain, and steered by wheels or caterpillar treads, or any combination thereof, including * * * vehicles commonly known as all-terrain vehicles.”¹⁴² Indeed, James’ ATV is an “all-terrain vehicle.”

However, the statute excludes from registration requirements any “utility vehicle as defined in section 4501.01 of the revised code * * *.” The plaintiff’s position is that the ATV is not a recreational vehicle, but a utility vehicle.

A utility vehicle, in turn, is defined as “a self-propelled vehicle designed with a bed, principally for the purpose of transporting material or cargo in connection with construction, agricultural, forestry, grounds maintenance, lawn and garden, materials handling, or similar activities.”¹⁴³

James’s ATV squarely fits the definition of an all-purpose vehicle because the definition specifically includes “all-terrain vehicles.” Nevertheless, the plaintiff argues the ATV is a utility vehicle, as evidenced by James’ use of it for yardwork and the manufacturer’s description of the vehicle online. James testified that during the three

¹⁴¹ Ex. A, pg. 12, Section II, pg. 12, Exclusions.

¹⁴² R.C. 4519.01(B).

¹⁴³ R.C. 4501.01(VV).

years he owned the ATV, he used it approximately five times to haul firewood, over 20 times to haul trees across his yard, and 30 times for joy rides, and that he used it "all the time" to haul brush.¹⁴⁴

Even accepting James' testimony as true and accurate, the court cannot conclude that James used the ATV "principally" for the purpose of lawn and garden or grounds maintenance as required by R.C. 4501.01(VV).

James' testimony suggests that he used the ATV evenly between recreation and property maintenance. The online description of the ATV, which the plaintiff cites, underscores the point that the ATV was not principally designed for yard maintenance. The manufacturer provided the following description on its website: "From work to hunt to play, a Sportsman® [the ATV] combines the smoothest, most refined rides anywhere * * *."¹⁴⁵ Further, the manufacturer urges that "[w]hen it comes to a hardworking and smooth riding recreation and utility ATV look no further than the Sportsman 450 H.O."¹⁴⁶ As with James's use of the ATV, the manufacturer's description of the ATV fails to portray a vehicle made "principally for the purpose" of lawn and garden or grounds maintenance. Rather, the ATV is designed for both activities. Finally, Ohio law has consistently characterized ATVs as recreational vehicles.¹⁴⁷

In sum, R.C. 4519.02(A) requires registration for an "all-purpose vehicle." The definition for all-purpose vehicles expressly includes "vehicles commonly known as all-

¹⁴⁴ J. Brautigam Dep., 42:1-43:4.

¹⁴⁵ Ex. 2A to Pls. Aff.

¹⁴⁶ Ex. 2B to Pls. Aff.

¹⁴⁷ See *Brumage v. Green*, 2d Champaign No. 2014-CA-7, 2014-Ohio-2552, ¶¶ 13-14 (Citation omitted.) ("We agree with our sister courts, and conclude that Brumage and Greene were engaged in a recreational activity when they were riding the ATVs."). See also *Paxton v. Ruff, Inc.*, 12th Dist. Butler No. CA97-04-089, 1998 WL 8695, *5; *West v. Devendra*, 985 N.E.2d 558, 2012-Ohio-6092, ¶ 23 (7th Dist.) *Curtis v. Schmid*, 5th Dist. Delaware No. 07 CAE 11 0065, 2008-Ohio-5239, ¶ 56 (Citation omitted.)

terrain vehicles," e.g. ATVs.¹⁴⁸ James's ATV is not a utility vehicle, exempted from registration requirements because: (1) the manufacturer's description of the ATV shows it is evenly designed for work and recreation, (2) James used the vehicle approximately evenly for both yard maintenance and recreation, (3) Ohio law generally treats ATVs as recreational vehicles, and (4) James was, in fact, using the ATV in a recreational capacity at the time of the accident. The court finds that the ATV is designed for recreational use and was subject to motor vehicle registration. Therefore, the first exception to insurance liability exclusion is inapplicable.

The second relevant exception for the homeowner's policy provides that an exclusion does not apply to a "vehicle or conveyance not subject to motor vehicle registration which is: (a) Used to service an 'insured's' residence * * *."¹⁴⁹ Because James' ATV was required to be registered under Ohio law, he cannot satisfy the requirements for this exception to the exclusion for coverage. For the foregoing reasons, the court finds that the accident in the case at bar is not an occurrence covered by James' homeowners insurance policy.

(2) CATASTROPHE POLICY

The plaintiff argues that even if the homeowner's policy does not cover the ATV accident, the catastrophe policy does. Under the catastrophe policy, Liberty "will pay all sums in excess of the retained limit and up to our limit of liability for damages because

¹⁴⁸ R.C. 4519.01(B).

¹⁴⁹ Ex. A, pg. 12, Section II, pg. 12, Exclusions.

of **personal injury * * *** to which this policy applies and for which the **insured** is legally liable."¹⁵⁰

Like the homeowners policy, the catastrophe policy also contains exclusions. The policy will "not apply to **personal injury * * *** arising out of the ownership * * * of a motor vehicle or watercraft owned, hired or rented by an **insured**, unless the liability is covered by an **underlying policy** or by other valid and collectible insurance."¹⁵¹

The catastrophe policy does not cover liability for the ATV accident because the personal injury arose from use and ownership of the ATV, a motor vehicle, which is not covered by the underlying policy. The catastrophe policy defines a "motor vehicle" as "a motorized land vehicle * * * subject to motor vehicle registration."¹⁵² As discussed above, the ATV was subject to motor vehicle registration and thus is a motor vehicle.

Having established that the ATV meets the catastrophe policy's definition of "motor vehicle," liability for the accident is excluded from coverage unless the liability is covered by an underlying policy or another valid and collectible policy. An "underlying policy" is defined as "a policy listed as an underlying policy in the Declarations."¹⁵³

In looking to the declarations for the catastrophe policy, it clearly identifies the homeowners policy by its policy number as the "underlying policy" for the catastrophe policy.¹⁵⁴ Aside from the homeowner's policy, the plaintiff has not identified any other valid and collectible policy covering liability for the ATV. As such, the catastrophe policy

¹⁵⁰ (Emphasis original.) Ex. B, pg. 4, Coverage – Personal Excess Liability.

¹⁵¹ (Emphasis original.) Ex. B, pg. 4, Coverage – Personal Excess Liability.

¹⁵² (Emphasis original.) Ex. B, pg. 3, Definitions, 4(a). Additionally, the ATV also satisfies another portion of the motorized vehicle definition which states that "any other motorized land vehicle owned by any insured and designed for recreational use off public roads, while off residence premises" is also a motor vehicle. Id. at 4(c). Thus, even if the accident occurred off James's property, the ATV would still be considered a motorized vehicle.

¹⁵³ (Emphasis original.) Ex. B, pg. 4, Definitions.

¹⁵⁴ Ex. B., pg. 2, Declarations.

excludes liability coverage of the accident because the ATV is a motor vehicle and the accident was not covered by the homeowner's policy or another policy.

The plaintiff argues that "[t]here are 19 separate liability exclusions * * *. In these 19, separate and specific exclusions, nowhere does it state 1) that any underlying exclusions in an underlying policy are adopted as exclusions in the Catastrophe policy OR 2) that vehicles that need to be registered are excluded. These exclusions just simply do not exist!!!"¹⁵⁵ However, this observation is clearly inapposite to the language of the catastrophe policy. As quoted above, such language is found in the catastrophe policy under Section II(e). To conclude, the court finds that Liberty is not liable for any personal injuries sustained by the plaintiff arising out of the ATV accident that occurred on January 6, 2013.

CONCLUSION

For the aforementioned reasons, the court now holds:

(1) The motion filed by the defendant James Brautigan to exclude plaintiff Penny Johnston's first affidavit is not well-taken and is hereby denied.

(2) The cross motions for summary judgment between the plaintiff Penny Johnston and the defendant James Brautigan are granted in part and denied in part. The court finds that the primary assumption of the risk defense applies and thus the defendant James Brautigan cannot be held liable for negligence. However, genuine issues of material fact remain to be litigated as to whether James Brautigan's conduct was reckless.

¹⁵⁵ Pls. Resp. and Mot. for Mot. for Summ. J., pg. 8.

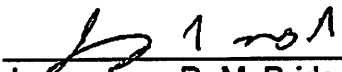
(3) The motion filed by the plaintiff Penny Johnston to strike all references to the examination under oath of James Brautigan is not well-taken and is hereby denied.

(4) The cross motion for summary judgment filed by the defendant Liberty Mutual Insurance Company and the intervening plaintiff Liberty Mutual Fire Insurance Company is well-taken and hereby granted. For the same reasons, the cross motion for summary judgment filed by the plaintiff Penny Johnston against defendant the Liberty Mutual Insurance Company and the intervening plaintiff Liberty Mutual Fire Insurance Company is not well-taken and is hereby denied.

A telephone case management/trial setting conference will be held on April 22, 2016 at 10:00 a.m.

IT IS SO ORDERED.

DATED: 3-35-16



Judge Jerry R. McBride