

ORIGINAL

IN THE SUPREME COURT OF OHIO

GAYLE K. SPERRY, et al

CASE NO. 10-0810

Appellants

vs.

JENNIFER TERRY, ZONING INSPECTOR

**On Appeal from Mahoning
County**

MILTON TOWNSHIP

**Court of Appeals, Seventh
Appellate District**

Appellee

Case No. 08- MA-000227

**OPENING BRIEF OF APPELLEE, JENNIFER TERRY, ZONING INSPECTOR,
MILTON TOWNSHIP**

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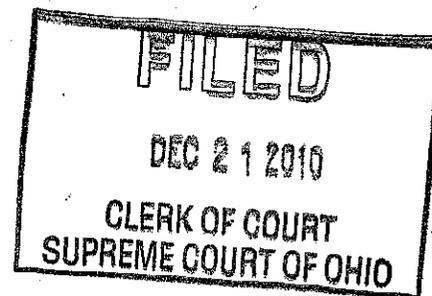
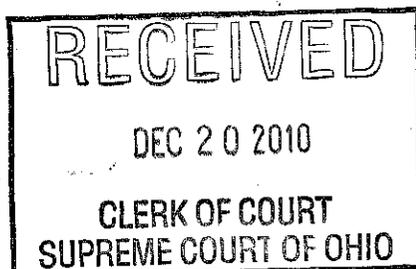


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STATEMENT OF FACTS

Appellant Gayle K. Sperry is the record title holder of real estate located at 3020 Sylvandale, Berlin Center, Milton Township, Mahoning County, Ohio (also known as 3020 Scenic Drive). The property at all times has been located in a residential district as designated by the Milton Township Zoning Resolution. See Record, Document 14, Stipulations of Fact. Prior to the purchase of the property by Ms. Sperry, it was a vacant lot, measuring 200 X 202.37, and being a parcel of approximately three quarters (.75) of an acre, located in a platted subdivision, contrary to Appellant's Statement of Facts stating that the lot was two (2) acres. After purchase, Ms. Sperry constructed a residence in which she still resides. Appellants Kristopher Sperry and Evelyn Sperry are Ms. Gayle Sperry's son and daughter-in-law, respectively, and reside at 129 Corson Avenue, Akron, Ohio. See: Record, Document 11, Deposition of Kristopher Sperry. Appellants Kristopher Sperry and Evelyn Sperry are the registered agents and sole owners of Myrddin Wine Company, LLC, which owns and operates a commercial business on the property in question. See: Record, Document 14, Stipulations of Fact. The primary purpose of this business is to sell wine and shelf products, over ninety-five percent (95%) of which are brought onto the property from off-site locations. See: Record, Document 11, Deposition of Kristopher Sperry. The business began operations on or about May 20, 2005.

On January 23, 2008, the Appellee, in her official capacity as Zoning Inspector of Milton Township, filed a Complaint for Preliminary and Permanent Injunction against the Appellants in the Mahoning County Court of Common Pleas, Case No. 08 CV 348. See: Record, Document 1. Appellee alleged that the property was being used in violation of Milton Township Zoning.

Pursuant to the Milton Township Zoning Resolution, Section 5, B, R-1 *Residential District*,

and Section 4, *Definitions*, the following uses are permitted:

- a. Agriculture
- b. One family dwellings subject to lot and yard space requirements applicable to the district except for publicly owned land fronting on the shoreline of Milton Reservoir as provided in Section 8C.
- c. Churches and other places of worship.
- d. Public schools, elementary and high, and private schools having a curriculum similar to a public school.
- e. Home Occupations as defined in Section 4.
- f. Automobile parking spaces shall be provided as required in Section 6.
- g. Accessory buildings.

Further, a Home Occupation is defined as an occupation conducted in a dwelling unit or small garage provided that:

- a. No person other than members of the family **residing on the premises** shall be engaged in such occupation conducted entirely in the dwelling unit, or garages containing 600 square feet or less. (Emphasis added.)
- b. The use of the dwelling unit of the home occupation shall be clearly incidental and subordinate to its use for residential purposes by its occupants, and not more than 25% of the total floor area of the dwelling unit shall be used in the conduct of the home occupation.
- c. There shall be no change in the outside appearance of the building or premises or other visible evidence of conduct of such home occupation other than one sign

as permitted in Section 8C of this Ordinance.

- d. Sufficient off-street parking shall be provided based on the type of home occupation and such occupation shall not create traffic, parking, sewerage, or water use in excess of what is normal in a residential neighborhood.
- e. No equipment or process shall be used in such occupation which creates noise, vibration, glare, fumes, odors, or electrical interference detectable to the normal senses off the lot, if the occupation is conducted in a single family residence, or outside the dwelling unit if conducted in other than a single family residence. *See: Milton Township Zoning Resolution, Section 4, Definitions, and Section 5, Residential District.*

The above referenced Complaint requested both a preliminary and permanent injunction, requiring the Appellants to cease using the property in violation of Milton Township Zoning.

Prior to both parties submitting written trial briefs to the Trial Court, the parties agreed on Stipulations of Fact and further agreed that only two (2) issues existed for determination:

1. Are the winery activities conducted on the property an Agricultural Use of the property as defined in Section 519.01 of the Ohio Revised Code?; and
2. Is the Myrddin Winery exempt from zoning regulations by Milton Township pursuant to section 519.21(A) of the Ohio Revised Code?

See: Record, Document 14 (Stipulations of Fact).

After both parties filed cross motions for summary judgment, the Mahoning County Court of Common Pleas issued its Judgment Entry granting the township's motion. *See: Record, Document 20, Judgment Entry dated October 10, 2008.* The Court's Judgment Entry was followed by an Order

of Permanent Injunction prohibiting Appellants from “operating a winery” on the property. *See:* Record, Document 30.

The Appellants then appealed this matter to the Seventh District Court of Appeals. *See:* Record, Document 33. On March 23, 2010, that Honorable Court issued a decision, overruling Appellants’ three (3) assignments of error, affirming the decision of the trial court, and entering a final judgment in favor of the Appellee. *See:* Record, Document 37.

This appeal followed.

ARGUMENT AND LAW

In their Opening Brief, Appellants request this Honorable Court reverse the decision of both lower courts and approve the following Proposition of Law:

“Pursuant to the provisions of R.C. 519.21(A), land that is otherwise subject to zoning by a township pursuant to Chapter 519 of the Ohio Revised Code is exempt from such zoning if “any part” of the land is used for viticulture. A property owner engages in “viticulture” within the meaning of R.C. 519.21(A) if the owner grows one or more grapevines for the purpose of making wine.”

The Appellants argue that their operations are “agriculture” if “any part” of the land is used for viticulture and, further, that they engage in viticulture pursuant to R.C. 519.21(A) if they grow only one grapevine with one grape on the property.

What the Appellants fail to address is that a complete reading of R.C. 519.01 and R.C. 519.21(A) is contrary to their interpretation of the statutes, and together with the facts of this case, overwhelmingly supports the decisions of both the trial court and the Court of Appeals. The activities of the Appellants as conducted on the property in question are not an agricultural use pursuant to R.C. 519.01 and 519.21(A). Therefore, the decisions of the lower courts must be upheld.

The Activities of the Appellants are not Agriculture as Defined by R.C. 519.01

R.C. 519.01 defines agriculture as:

farming; ranching; aquaculture; apiculture; horticulture; **viticulture**; animal husbandry, including, but not limited to, the care and raising of livestock, equine, and fur-bearing animals; poultry husbandry and the production of poultry and poultry products; dairy production; the production of field crops, tobacco, fruits, vegetables, nursery stock, ornamental shrubs, ornamental trees, flowers, sod, or mushrooms; timber; pasturage; any combination of the foregoing; the processing, drying, storage, and marketing of agricultural products **when those activities are conducted in conjunction with, but are secondary to,**

such husbandry or production. Ohio Rev. Code Ann. Sec. 519.01 (West 2010). (Emphasis added.)

In Moreland v. Salyer, 2005-Ohio-1756 (5th Dist., 2005), the Fifth District Court of Appeals held that “[a]griculture is defined in R.C. 519.01 as farming, ranching, aquaculture, apiculture, horticulture, **viticulture**, animal husbandry, poultry husbandry, dairy production, production of field crops, pasturage, and a combination of the foregoing, or the processing, drying, storage, and marketing of agricultural products conducted in conjunction with the above.” The court clearly stated that the marketing of agricultural products must be conducted in conjunction with the agricultural use of the property.

Further, Ohio courts have consistently held that a statute should be given that construction which will accord with common sense and reason and not result in absurdity or great inconvenience, unless such construction is prohibited by the letter of the statute. *See: Proven v. Duffy*, 152 Ohio St.139 (1949); *see also: Moore v. Given*, 39 Ohio St 661; Crowl v. DeLuca, 29 Ohio St.2d 53 (1972). Every statute should receive such construction as is consistent with the common sense of that community. *See: State v. Wickham*, 77 Ohio St.1 (1907); citing Allen V. Little, 5 Ohio 66. Appellants are attempting to construe R.C. 519.01 to read in a way that is not in accord with common sense and reason. One (1) grape vine with one (1) grape does not constitute an agricultural use allowing for the retail sale and consumption on the premises of wine vinted from hundreds of gallons of grape juice imported from off site, along with other non-agricultural products (shelf stable food such as cheese, crackers and other snack-type foods) also imported from off site for re-sale at the property in question.

The Appellants argue that one (1) grape vine with one (1) grape is agriculture. Appellants

desire that this Honorable Court stop its analysis at that point, in complete disregard of the remainder of the statute. However, a clear and thorough reading of R.C. 519.01 states that agriculture includes viticulture, and the processing, drying, storage, and marketing of agricultural products when those activities are conducted in conjunction with, **but are secondary to**, such production. *See*: Ohio Rev. Code Ann. Sec. 519.01 (West 2009). (Emphasis added). Appellants completely disregard the language of the statute that states, “ **but...secondary to**”. It is clear that Appellants’ commercial activities are **not** secondary to the production of their single grape vine and grape.

The Appellants’ brief properly notes this Court has never addressed the scope of R.C. 519.01 and 519.21(A) as applicable to the wine-making industry. However, there is substantive legal authority which provides guidance to this Court in determining the issues before it.

First, the Appellee submits the Ohio Attorney General’s opinion reviewing a similar situation to the one presented in this case in Op. Att’y Gen. No. 2002-029. The question submitted to the Attorney General was whether activities, such as banquets and recreational events, met the statutory definition of agriculture pursuant to R.C. 519.01, as the owners alleged such activities were being conducted in conjunction with the production of wine on the property. *Id.* The Attorney General stated that agriculture includes the “marketing of agricultural products when those activities are conducted in conjunction with, **but are secondary to**, such husbandry or production. *Id.* (Emphasis added). Being “**secondary to**” is the operative phrase which supports the Attorney General’s opinion in its opinion, and is also the operative phrase in the case at bar.

The Attorney General determined that the “[m]arketing of agricultural products” occurs when the event is held to promote or merchandise the sale of grapes and wine when the event occurs **together with, and is of lesser importance or value than, the production of grapes or wine.** *Id.*

(Emphasis added). If the event to promote or merchandise the sale of grapes or wine is of a greater value or importance than the production of grapes or wine, the event is **not secondary** to the production of wine and thus is **not agriculture** as defined by R.C. 519.01. *Id.* (Emphasis added).

The Attorney General further stated that township zoning officials may consider **any factors they deem necessary and relevant** in order to determine in a reasonable manner whether an activity constitutes the marketing of agricultural products in conjunction with, and secondary to, the production of grapes or wine. *Id.* (Emphasis added).

The Appellee requests that this Court uphold the decision of the lower courts, and in further support of Appellee's position brings to the Court's attention a decision by the Oregon Supreme Court in Craven v. Jackson Cty., 308 Or. 281 (1989). Craven involved a property of twenty-three (23) acres, zoned exclusively for farm use. *Id.* The owner proposed to construct a winery and retail tasting room prior to the vineyard being fully planted. *Id.* The proposed winery was to be constructed in two (2) stages, with the owner being required to plant no fewer than twelve (12) acres of grapes within five (5) years, and ultimately to plant eighteen (18) acres of grapes. *Id.* The Court reviewed the applicable Oregon statute which, similar to R.C. 519.01, permits commercial activities if conducted in conjunction with agricultural use. *Id.*

The court stated that the commercial activity "must enhance the farming enterprises of the local agriculture community...and the agricultural and commercial activities must occur together." *Id.* The Court cautioned that the interpretation of commercial activities cannot be so broad as to permit a "shopping mall or supermarket as a farm use so long as the wares sold are mostly the products of a farm someplace." *Id.* (Emphasis added). In Craven, the Court did permit the operation of the winery and retail activities prior to the planting and cultivation of the entire eighteen

(18) acres, as it found the property owner's "efforts to transform a hayfield into a vineyard" would hopefully be successful, thereby increasing the intensity and value of agricultural products "**coming from the same acres.**" *Id* (emphasis added.) This decision to permit the operation of the retail sales prior to the property yielding substantial grape production was based on that court's determination that the property would yield eighteen (18) acres of grapes in a short period of time.

The importance to the case at bar of the Craven holding is that the commercial activity must enhance the farming enterprise. This is similar to the Seventh District Court of Appeals' holding that the agricultural use must be primary and the commercial use secondary.

In the case at bar, the three quarters (.75) of an acre "postage stamp" size lot in question cannot produce enough grapes to constitute a majority of grapes to be vinted for retail sale on the property in the volume indicated and planned by the Appellants.

Appellee therefore argues that Appellants' use of the property, for the retail sale of wine, grapes and other non-agricultural products, ninety five percent (95%) of which are produced off-site does not meet the definition of agriculture in R.C. 519.01.

An additional case lending support to the Appellee's argument is Ghindia v. Buckeye Land Dev., LLC 2007-Ohio-779 (11th Dist. Mar. 23, 2007). Ghindia involved an owner of a landscaping business arguing that the use of its land was agricultural and therefore exempt from township zoning. *Id.*

The Eleventh District Court of Appeals found otherwise, and relied on its decision in State ex rel. Fox v. Orwig, 1995 Ohio App. LEXIS 4011 (11th Dist., Sept. 15, 1995), which held that the operation of a landscaping business was not an agricultural use of land when the trees, shrubbery, sod and other plants **were not produced** on the property. *Id.*

The facts of the case at bar clearly indicate that the Appellants' primary use of their land is the retail sale of wine and shelf stable products for consumer consumption on the premises (such as cheese, crackers and other snack-type foods), where ninety five percent (95%) or more of the wine and food retail products are imported onto the premises from off site. At the time this case commenced, the property in question measured 200 feet X 202.37 feet in size , approximately three quarters (.75) of an acre, not two (2) acres as stated in Appellants' opening brief. *See*: Record, Document 18 (Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment). Further, the appellants had only twenty (20) vines, of which only twelve (12) were **capable** of production. *See*: Record, Document No. 14 (Stipulations of Fact).

At no time has the township disputed that the growing, cultivating and harvesting of the **grape vines themselves** are an agricultural use of the land. However, pursuant to R.C. 519.01, only those activities which are done in conjunction with, **but secondary to**, the use of the land for agricultural purposes are permitted. *See*: Ohio Rev. Code Ann. Sec. 519.01 (West 2010).

The Appellants have stipulated that only five percent (5%) or less of the sales of wine made by their business resulted from grapes grown on the property. *See*: Record, Document 14 (Stipulations of Fact); *see also*, Record, Document 11 (Deposition of Kristopher Sperry). Therefore, ninety-five percent (95%) or more of the sales of vinted wine are from grapes not planted, cultivated or harvested on the property. *See*: Record, Document 14 (Stipulations of Fact); *see also*, Record, Document 11 (Deposition of Kristopher Sperry). Further, the sales occurring on the property in question consist of not only wine, but other shelf-stable products brought in by the Appellants for re-sale from other producers and wholesalers, thereby increasing the percentage of sales attributed to outside goods. *See*: Record, Document 10 (Deposition of Gayle Sperry).

The Appellants are now alleging additional land exists on which to grow grapes, a fact that is not relevant because the additional property parcels share-cropped by the Appellant are not part of the parcel that is at issue in this case, nor are these additional share-cropped parcels adjacent to, or contiguous with, the property in question. Further, these facts did not exist and were not raised or stipulated to in the trial court, not do they appear in the record.

To accept the Appellants' argument that one (1) grape vine with one (1) grape is enough to create an agricultural use clearly goes against the wording of the statute. Such statutory construction also goes against common sense. Such a result would be absurd and of "great inconvenience" which this court has cautioned against. *See: Proven v. Duffy*, 152 Ohio St.139 (1949); *see also: Moore v. Given*, 39 Ohio St 661; *Crowl v. DeLuca*, 29 Ohio St.2d 53 (1972). The Appellant's argument is analogous to an individual on residential land growing a vine of tomatoes and opening up a sandwich shop or restaurant, exempt from zoning under R.C. 519.01 as an agricultural use, because the tomatoes are used in food products on the sandwich shop's menu, or that a commercial grocery store is an agricultural use exempt from zoning because the grocery store processes and sells agricultural produce, including grapes as some of their thousands of different products.

It is clear that the Appellants' use of their land does **not** comply with R.C. 519.01.

The activities of the Appellants do not comply with R.C. 519.21(A).

R.C. 519.21(A) states:

Except as otherwise provided..., sections 519.02 to 519.25 of the Revised Code confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures **incident** to the use for agricultural purposes of the land on which such buildings or structures are located, including buildings or structures that are used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture...Ohio Rev. Code Ann. Sec. 519.21(A) (West 2010) (emphasis added).

As with R.C. 519.01, the Appellants urge this court for a decision that is contrary to the “plain language” of the statute. Succinctly, the statute states that there is no authority for the township to prohibit the use of any land for agricultural purposes or the use of buildings or structures **incident to the use for agricultural purposes**, including buildings or structures that are used primarily for vinting and selling wine. Ohio Rev. Code Ann. Sec. 519.21(A) (West 2010) (emphasis added).

Further, R.C. 519.21(A) was amended by House Bill 302, in 1980, for the specific purpose of addressing the vinting and selling of wine. *See*: 1980 H 302. The Bill Analysis states that the purpose of the amendment is to exempt from township zoning regulations any buildings or structures that are used primarily for vinting and selling wine when said buildings or structures are **incident** to the use of the land for agricultural purposes. *See*: 1980 H 302 Bill Analysis. The key language is that the buildings or structures used for vinting and selling wine must be **incidental** to the agricultural use.

A determination of whether the use of a building or structure is incidental to the agricultural use of the property on which it is located depends on the totality of the circumstances involved. *See*: 1989 Op. Att’y Gen. No. 067. Use of a structure is incidental to the agricultural use only if it **directly and immediately relates to the agricultural use of the land on which the structure is located**, and is either **usually or naturally and inseparably dependent** upon agricultural use. *See*: State v. Huffman, 20 Ohio App.2d 263 (3rd Dist. Hancock Cty. 1969) (Emphasis added). In Concord Twp. Trustees v. Hazelwood Buildings, Inc., 2005-Ohio-1791 (11th Dist. 2005) the 11th District Court held that the plain language of R.C. 519.21(A) requires that the building or structure be incident to the agricultural use. In other words, the agricultural use must be the primary use of the property.

Common sense dictates that if the primary use of a piece of land is the retail sales of products not planted, cultivated and harvested on the property, the exception set forth in R.C. 519.21(A) is **not applicable**. *See: Blue Heron Nurseries LLC. v. Funk*, 186 Ohio App.3d 769 (Ohio App. 9th Dist. 2010).

According to the facts in the case at bar, it is clear that an agricultural use is not the primary use of the property. The primary use is the commercial retail sales and consumer consumption of wine and food products, ninety five percent (95%) or more of which are not grown or produced on the property. As Appellee has consistently asserted, ninety-five percent (95%) or more of the total estimated sales of five-hundred (500) gallons of the wine are derived from grapes grown off-site. *See: Record, Document No. 11 (Deposition of Kristopher Sperry)*.

Currently, only twenty (20) vines are cultivated on the property, with only twelve (12) that are capable of production. *See: Record, Document No. 10 (Deposition of Gayle Sperry)*. Further, despite Appellants' assertions in their brief, the winery has no plans for expansion of vines capable of harvest and production on the parcel lot in question. *Id.* In fact, Appellants' Business plan states that "grape receiving and processing will take place off site...All white wines will be purchased as juice and delivered to the site...All red grapes will be delivered to Maize Valley Winery in Marlboro, Ohio. Processed and Frozen fruits will be obtained through Avalon Foods." *See: Record, Document No. 51 (Brief of Appellee)*. This is conclusive proof that at least ninety-five percent (95%) of the wine sales occurring on the property in question will continue to derive from grapes grown off-site.

In the case at bar, the agricultural use is **not** the **primary** use of the property. The primary use of the property is the retail sale and consumer consumption of wine and food products imported for re-sale. Conversely, the commercial retail sales described herein are not secondary to an

agricultural use, they are the primary use. Looking at the totality of the circumstances, the Appellants are operating a commercial business in a residential district. Such use is not permitted pursuant to the Milton Township Zoning Resolution and is not excluded from zoning by R.C. 519.21.

Finally, Appellants continue to make statements in their briefs alleging misrepresentation by the Appellee. At the beginning of this litigation, only two (2) issues were stipulated to by all parties:

1. Are the winery activities conducted on the property an agricultural use of the property as defined in Section 519.01 of the Ohio Revised Code?; and
2. Is the Myrddin Winery exempt from zoning regulations by Milton Township pursuant to Section 519.21 (A) of the Ohio Revised Code? *See*: Record, Document No. 14 (Stipulations of Fact).

The Appellate Court in this case properly noted that any alleged misrepresentation by the zoning inspector was **not before the trial court and therefore would not be addressed**. The Appellee respectfully requests this Honorable Court to do the same. Further, Ohio courts have consistently held that misrepresentation by a zoning inspector, even coupled with detrimental reliance, does not permit the property owner to violate the zoning resolution.

Further, the Appellants participated in the process of determining the stipulations. Therefore they cannot ask for this Court to consider any issues not so stipulated. The Appellants should have raised this issue and included it in the stipulations if they felt it was relevant and material to their case. Since they did not do so, any issue regarding misrepresentation by the zoning inspector is now barred by the doctrine of res judicata.

In summary, the Appellee does not dispute that the vinting and retail sale of grapes planted, cultivated and harvested on a property is an agricultural use of said property, exempt from zoning.

However, Appellee believes, and it is her position, that under the statutes in question, the vinting and retail sale of grapes grown, cultivated and harvested off site on other properties, which are then imported onto another property where those imported grapes constitute ninety five percent (95%) or more of the retail products sold and consumed by customers on that property, is **not** an agricultural use of the property, but a business/commercial use of the property, which is prohibited in a residential district as designated by the Township Zoning Resolution.

For the above stated reasons, the Appellee respectfully requests this Honorable Court uphold the decision of the Seventh District Court of Appeals, affirming the trial court's judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Appellee's Brief was mailed by regular mail this 17 day of Oct, 2010 to David S. Pennington, Wright Law Co. LPA, 4266 Tuller Road, Dublin, OH 43017.



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