

IN THE SUPREME COURT OF OHIO

JEREMY PAULEY, ET AL.	:	Case No. 2012-1150
	:	
Plaintiff-Appellants,	:	On Appeal from the
	:	Fourth District Court of Appeals
v.	:	Pickaway County, Ohio
	:	
CITY OF CIRCLEVILLE,	:	Court of Appeals
	:	Case No. 2010CA0031
Defendant-Appellee.	:	
	:	
	:	

**BRIEF OF AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE
IN SUPPORT OF THE DEFENDANT-APPELLEE
CITY OF CIRCLEVILLE**

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INTRODUCTION

The Ohio Municipal League (“League”), as amicus curiae on behalf of the City of Circleville (“City”), urges this Court to affirm the decision of the Fourth District Court of Appeals, in *Jeremy Pauley, et al. v. City of Circleville*, 2012-Ohio-2378. In this decision, the Fourth District held that the City was entitled to immunity under the recreational user statute, R.C. 1533.181.

R.C. 1533.181 grants statutory immunity to property owners who allow their property to be used for “recreational” pursuits. The recreational user immunity benefit applies to both private property owners and to political subdivisions. *McCord v. Division of Parks and Recreation*, 54 Ohio St.2d 72 (1978). The purpose of the immunity is “to encourage owners of premises suitable for recreational pursuits to open their land to public use without worrying about liability.” *Moss et al. v. Department of Natural Resources*, 62 Ohio St.2d 138, 142, 404 N.E.2d 742 (1980). The test for determining whether or not recreational user immunity applies is whether or not an individual is a recreational user. If an individual is a recreational user, there is no duty of the property owner to keep the premises safe for entry or use and, therefore, there is no liability.

However, the Appellants argue that “recreational user immunity does not extend to man-made hazards upon real property that do not further or maintain its recreational value.” Merit Brief of Plaintiff-Appellants, Proposition of Law, page 9. This argument is inconsistent with the General Assembly’s purpose in enacting the recreational user immunity statute and with the plain language of R.C. 1533.181. Therefore, Appellants are asking this Court to create a judicial limitation to the recreational user immunity statute.

In this case, Mr. Pauley entered a City park to engage in sled riding activities and there was “no dispute” that Mr. Pauley qualified as a recreational user. *Pauley* at ¶ 20. Noting that the

recreational user immunity statute “provides blanket immunity for injuries that occur to a recreational user on the premises,” the Fourth District rejected the request of the Appellants that the court create an exception to the recreational user immunity statute when the owner creates a hazardous condition on the premises. *Pauley* at ¶ 24.

The Fourth District correctly interpreted Ohio’s recreational user statute, correctly applied it to the facts of the case, and correctly concluded that it “cannot disregard the law” and “read an exception into the statute when none exists.” *Pauley* at ¶ 26 and ¶ 20.

Therefore, this Court should affirm the decision of the Fourth District.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League (“League”) is a non-profit Ohio corporation composed of a membership of more than 700 Ohio cities and villages. Many, if not all, of these cities and villages own land that is open to the public for recreational activities and rely on the recreational immunity granted by Ohio’s recreational user statute, R.C. 1533.181.

The League and its members have an interest in ensuring that the recreational immunity granted by the General Assembly is not limited in a manner that is inconsistent with R.C. 1533.181 and the recreational immunity purpose envisioned by the General Assembly.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Merit Brief of the City.

ARGUMENT

Proposition of Law No. 1: Pursuant to R.C. 1533.181, the owner of a recreational premises owes no duty to a recreational user to keep the premises safe for entry or use; the recreational immunity purpose envisioned by the General Assembly and the plain language of R.C. 1533.181 do not create a duty when a property owner creates “man-made hazards” on the

premises that “do not further or maintain its recreational value.”

Ohio’s Recreational User Statute

R.C. 1533.181 provides that no owner of recreational premises “owes any duty to a recreational user to keep the premises safe for entry or use” and no owner of recreational premises “extends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use.”

Recreational user immunity, therefore, is applicable if an individual meets the definition of a recreational user. Recreational user is defined as “a person to whom permission has been granted, without the payment of a fee or consideration to the owner *** of the premises *** to enter upon premises to hunt, fish, trap, camp, hike, or swim, or to operate a snowmobile, all-purpose vehicle, or four-wheel drive motor vehicle, or to engage in other recreational pursuits.”

R.C. 1533.18(B).

In interpreting the phrase “other recreational pursuits,” this Court has held that the “words will be construed as applying only to things of the same general class as those enumerated.” *Light et al. v. Ohio University*, 28 Ohio St.3d 66, 68, 502 N.E.2d 611 (1986). This Court has recognized that sledding is a recreational pursuit. *Marrek v. Cleveland Metroparks Board of Commissioners*, 9 Ohio St.3d 194, 198, 459 N.E.2d 873 (1984).

In determining whether a person is a recreational user and recreational user immunity is applicable, this Court has held that “property need not be completely natural, but its essential character should fit within the intent of the statute.” *Miller v. City of Dayton*, 42 Ohio St.3d 113, 114, 537 N.E.2d 1294 (1989). This Court further explained the character of property analysis by noting the following:

Generally speaking, recreational premises include elements such as land, water, trees, grass, and other vegetation. But recreational premises will often have such

features as walks, fences and other improvements. The significant query is whether such improvements change the character of the premises and put the property outside the protection of the recreational-user statute. To consider the question from a different perspective: Are the improvements and man-made structures consistent with the purpose envisioned by the legislature in its grant of immunity? In other words, are the premises (viewed as a whole) those which users enter upon “to hunt, fish, trap, camp, hike, swim, or engage in other recreational pursuits? Id. at 114-115.

Therefore, this Court has recognized that recreational premises may not be completely natural and may include man-made features and that the premises must be “viewed as a whole.” Id. This Court has also recognized that questions regarding the recreational premises must be “consistent with the purpose envisioned by the legislature in its grant of immunity.” Id. (Emphasis added.)

Recreational Immunity Purpose Envisioned by the Legislature

The purpose of the immunity is “to encourage owners of premises suitable for recreational pursuits to open their land to public use without worrying about liability.” *Moss* at 142. It also “promotes the development and availability of property for recreational use.” *Marrek v. Cleveland Metroparks Board of Commissioners*, 9 Ohio St.3d 194, 198, 459 N.E.2d 873 (1984).

The recreational user statute as applied to political subdivisions, “seeks to shift the risk and cost of injury from the taxpayer to the general public in exchange for the municipal landowner opening the premises up for use by the general public.” *Tomba v. City of Wickliffe*, 114 Ohio Misc.2d 10, 757 N.E.2d 428, 430 (C.P. 2001).

Therefore, the purpose of recreational immunity as established by the General Assembly is to encourage property owners to make property available for recreational use and to provide immunity from liability in exchange for doing so.

Recreational Immunity Limitations

Consistent with the purpose of recreational immunity to open premises up for use by the general public, this Court has held that in order to obtain recreational immunity, “the property upon which an injury occurs must be held open for public use.” *Fryberger v. Lake Cable Recreation Association*, 40 Ohio St.3d 349, 350-351, 533 N.E.2d 738 (1988), citing *Loyer v. Buchholz*, 38 Ohio St.3d 65, 526 N.E.2d 300 (1988).

Consistent with the statutory definition of a recreational user, set forth in R.C. 1533.18(B), this Court has held that recreational user immunity requires that a recreational user not pay a fee or consideration to the owner of the recreational premises to enter upon the premises. *Moss; Huth v. State Department of Natural Resources*, 64 Ohio St.2d 143, 413 N.E.2d 1201 (1980).

These limitations are grounded in the plain language of the recreational user statute and are consistent with the purpose of recreational immunity.

The Appellants argue that “recreational user immunity does not extend to man-made hazards upon real property that do not further or maintain its recreational value.” Merit Brief of Plaintiff-Appellants, Proposition of Law, page 9. This limitation proposed by the Appellants is not grounded in the plain language of the recreational user statute and is not consistent with the purpose of recreational immunity.

The recreational user statute does not use or define the term “hazard” and the phrase “further or maintain recreational value.” Unlike the “open for public use” requirement and the “no fee or consideration” requirements, there is no statutory language or language in the purpose of recreational immunity envisioned by the legislature that supports the limitation argued by the Appellants.

In fact, the limitation argued by the Appellants would discourage property owners, both private and public, from holding their land open to the public. Establishment of the proposed limitation would also discourage property owners from making improvements to property open to the public. For example, would a property owner lose the recreational immunity defense during construction of an improvement (at what point does the man-made project further the recreational value of the premises)? If there is a *risk* that a court may find that an improvement does not “further or maintain the recreational value” of the property, it is very likely that a property owner may forgo improvements enabling the public to further engage in recreational pursuits. This discouragement contradicts the purpose of the recreational immunity, as established by the General Assembly.

Furthermore, if the General Assembly intended to include the limitation argued by the Appellants, it could have done so by amending the recreational user immunity statute. It has not done so and, unlike the recreational trail immunity set forth in R.C. 1519.07(C),¹ the General Assembly has not enacted an intentional torts exception for recreational user immunity. Therefore, there is no language in the recreational user statute or in the General Assembly’s purpose for enacting the statute that supports the limitation advocated by the Appellants.

The League also respectfully requests that this Court consider the negative impact that the proposed limitation will have on the fiscal integrity of political subdivisions (particularly those that are self-insured) and their ability to continue to provide recreational activities to citizens of all ages.

Judicial Doctrine Cannot Conflict with
Statutory Language and Legislative Intent

Appellants are asking this Court to create a judicial limitation to the recreational user

¹ R.C. 1519.07(B)(1) provides that “[a]n owner, lessee, or occupant of premises does not owe any duty to a user of a recreational trail to keep the premises safe for entry or use by a user of a recreational trail” and R.C. 1519.07(C) provides that “[t]his section does not apply to intentional torts.”

immunity statute that, for the reasons previously stated, is inconsistent with the plain language of R.C. 1533.181 and the General Assembly's intent in enacting the recreational user immunity statute. This Court should decline to do so as "[i]t is not this court's role to apply a judicially created doctrine when faced with statutory language that cuts against its applicability." *Wallace v. Ohio DOC*, 96 Ohio St.3d 266, 278, 2002-Ohio 4210.

Appellants argue that "[a]ccording to the municipality's logic, no suit could be brought if the city workers had discarded glass shards, rusted nails, or even hazardous chemicals throughout the premises. Under this wildly expansive construction of R.C. 1533.181, every 'recreational user' is denied a civil remedy in all instances." Merit Brief of Plaintiff-Appellants, Proposition of Law, page 11.

Appellants are correct that if an individual is a recreational user then there is no duty of the property owner to keep the premises safe for entry or use. However, Appellants are incorrect to categorize this as a "wildly expansive construction of R.C. 1533.181" and, despite this Court's opinion on the appropriateness of immunity in such circumstances, this Court must defer to the legislature. "Questions concerning the wisdom of legislation are 'for the legislature, whether the court agrees with it in that particular or not is of no consequence *** If the legislature has the constitutional power to enact a law, no matter whether the law be wise or otherwise it is of no concern to the court.'" *Butler v. Jordan*, 92 Ohio St.3d 354, 376, 750 N.E.2d 554 (2001) (concurring opinion of Justice Cook); citing *State Board of Health v. Greenville*, 86 Ohio St. 1, 20, 98 N.E. 1019 (1912).

Florida's Recreational User Statute

The brief of amicus curiae Ohio Association for Justice argues that Florida's recreational user statute is similar to Ohio's recreational user statute, but the courts in Florida "have refused to read this statute as completely absolving property owners in all situations from liability."

Brief of Amicus Curiae, Ohio Association for Justice, page 6. The brief quotes *Arias v. State Farm Fire & Casualty Co.* and the court's conclusion that a property owner had the duty to warn "of dangers known *** that were not open to ordinary observation." Brief of Amicus Curiae, Ohio Association for Justice, page 6, citing *Arias v. State Farm Fire & Casualty Co.*, 426 So.2d 1136, 1140 (Fla. Dist. Ct. App. 1st Dist. 1983).

However, the brief fails to provide the history of this duty to warn and the fact that it arose from the Supreme Court of Florida's review of a constitutional challenge to the Florida's recreational user statute. In holding that the recreational user statute was constitutional, the Supreme Court of Florida concluded that the statute did not abolish a cause of action, but merely changed the standard of care. *Abdin v. Fischer*, 374 So.2d 1379 (Supreme Court of Florida, 1979). As a result, the court in *Arias* concluded that the recreational user was entitled to the duty of care granted to a trespasser and such duty requires the property owner to warn of "dangers known by him that were not open to ordinary observation." *Arias* at 1140.

In contrast, this Court has recognized "there is a reasonable relationship to a legitimate state interest here, that being to encourage owners of premises suitable for recreational pursuits to open their land to public use without worry about liability" and concluded that the Ohio's recreational user statute is constitutional. *Moss* at 142. Ohio's recreational user statute does not impose a trespasser duty of care and, therefore, the comparison to the standard of care owed under Florida's recreational user statute is misleading.

CONCLUSION

As the Fourth District noted "the instant case is undeniably tragic." *Pauley* at ¶ 26. However, as the Fourth District concluded a court "cannot disregard the law" and "read an exception into the statute where none exists." *Pauley* at ¶26 and ¶ 20.

Based upon the foregoing, the League respectfully requests this Court to affirm the Fourth District's judgment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen J. Smith", written over a horizontal line.

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CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amicus Curiae The Ohio Municipal League In Support of the Defendant –Appellee City of Circleville* has been sent via regular U.S. mail, postage pre-paid this 19th day of February, 2013 to:

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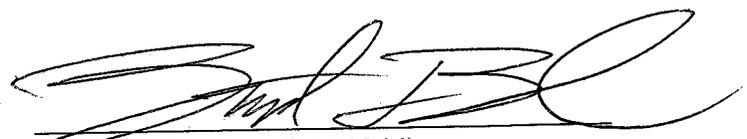
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