

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-1150

JEREMY PAULEY; CHRISTINE PAULEY
Plaintiff-Appellants,

-vs-

CITY OF CIRCLEVILLE
Defendant-Appellee.

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

REPLY BRIEF OF PLAINTIFF-APPELLANTS,
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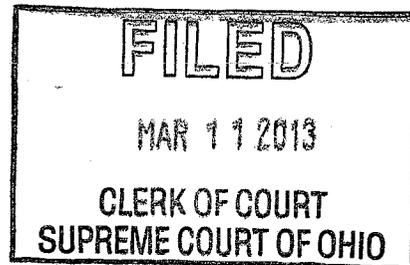


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REPLY

PROPOSITION OF LAW: RECREATIONAL USER IMMUNITY DOES NOT EXTEND TO MAN-MADE HAZARDS UPON REAL PROPERTY THAT DO NOT FURTHER OR MAINTAIN ITS RECREATIONAL VALUE

I. DEFENDANT'S DISTORTION OF THE RECORD

The Merits Brief of Defendant-Appellee City of Circleville ("Defendant's Brief") relies heavily upon misdirection. For example, it has been asserted that the dirt mound where the incident occurred "consisted of topsoil that the City used in the Park." *Defendant's Brief*, p. 5. Page 24 of the deposition of Street Superintendent Dane Patterson, Jr. ("Patterson"), has been cited in support of this contention. He actually testified that the municipality did not have any need at the time for the dirt that was hauled in from the future construction site, and used it over time "on different projects." *Deposition of Dane Patterson, Jr. taken March 16, 2010 ("Patterson Depo.")*, pp. 24-25. Roughly two hundred truck fulls were loaded by the construction workers, and no effort was made to identify and remove any debris. *Id.*, pp. 28-31. The mounds were dumped in Barthelmas Park only after the municipal workers ran out of space in their fenced-in maintenance yard. *Id.*, pp. 33-34.

Defendant has also cited page 12 of the deposition of Supervisor Phillip S. Riffle ("Riffle"), but his testimony was that the soil was used "in various locations throughout the town" and also "for reseeded purposes" at the park. *Deposition of Phillip S. Riffle taken December 7, 2009 ("Riffle Depo.")*, p. 12. At best, he established only that some of the material was used for recreational purposes at some point after the teenager fractured his neck.

Even though this Court accepted a Proposition of Law that is confined to recreational user immunity, Defendant has felt compelled to ridicule Plaintiff-Appellant, Jeremy Pauley, for having the temerity to sled-ride down one of the dirt mounds.

Defendants Brief, pp. 1 & 9-10. But the Chief of Police has confirmed that it was not unusual for children to sled-ride in the park. *Deposition of Harold W. Gray, Jr., taken March 13, 2010, p. 22.* Supervisor Riffle had personally observed these activities. *Riffle Depo., p. 25.* Superintendent Patterson had seen sled tracks in the snow, and assumed that kids would ride down the dirt mounds once the weather conditions permitted. *Patterson Depo., p. 50.*

This Court has been assured that: "Plaintiffs have waived the argument that the mound of soil somehow changed the character of the Park, as the dissent in the intermediate appellate court appreciated." *Defendant's Brief, p. 16.* The dissenting judge had actually never suggested that anyone had waived anything, and had merely remarked that Plaintiff's acknowledgment that he was a "recreational user" could "potentially foreclos[e] [his] ability to argue that the addition of the dirt mounds changed the character of the property[.]" *Pauley v. Circleville, 2012-Ohio-2378, 971 N.E. 2d 410, 417 ¶29 (4th Dist. 2012) (Abele, P.J., dissenting).* Plaintiffs have consistently argued throughout this litigation that reasonable minds could find that the catastrophic injury had been sustained on what was, in essence, nothing more than a municipal dumping ground. *Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment, pp. 10-12; Court of Appeals Brief of Plaintiff-Appellants, pp. 12-14.* Once all the facts are presented, reasonable jurors could certainly reject the unlikely argument that Plaintiff's neck was fractured in "a quintessential recreational area." *Defendant's Brief, p. 8.*

Given that the trial court proceedings were terminated upon an entry of summary judgment, Plaintiffs remain entitled to have all reasonable inferences drawn most strongly in their favor. *Williams v. First United Church of Christ, 37 Ohio St. 2d 150, 152, 309 N.E. 2d 924 (1974).* This Court should reject Defendant's attempts to refashion the procedural and evidentiary records to their liking.

II. THE BLANKET PROHIBITION OF CLAIMS

While refusing to follow a number of more sensible opinions, the majority below sided with those courts adopting a broad and uncompromising view of R.C. 1533.181(A) that denies a recovery to any “recreational user” who is injured or killed on recreational “premises.” *Pauley*, 2012-Ohio-2378, ¶20-27. But that ill-conceived view fails to recognize that the statutory definition of “premises” is limited to “lands, ways, and waters, and any buildings and structures thereon[.]” *R.C. 1533.18(A)*. Notably, Defendant has made no attempt to convince this Court that debris left in the dirt mounds qualifies as “structures.” The fundamental issue that is now dividing the intermediate appellate courts is over whether the occurrence of an injury on recreational “premises” is always sufficient to trigger immunity without more, or whether the injury must be attributable to some aspect of the property that furthers a recreational purpose.

Defendant’s attempt to portray itself as the devoted champion of strict construction is seriously misguided. R.C. 1533.18(A) does not actually address man-made conditions, but this Court has nevertheless held that the immunity from suit extends to improvements that enhance the premises. *Miller v. City of Dayton*, 42 Ohio St. 3d 113, 114-15, 537 N.E. 2d 1294 (1989); *LiCause v. City of Canton*, 42 Ohio St. 3d 109, 537 N.E. 2d 1298 (1989); *Sorrell v. Ohio Dept. of Nat. Res., Div. of Parks & Rec.*, 40 Ohio St. 3d 141, 532 N.E. 2d 722 (1988). Plaintiffs have no quarrel with this sensible construction of the statute. They are simply urging this Court to reject the notion that these precedents can be stretched further to reach man-made hazards that promote no recreational purpose.

Accordingly, there is no merit to the declaration that: “Plaintiffs improperly ask this Court to judicially create an exception or limitation to recreational immunity that does not exist in the Statute.” *Defendant’s Brief*, p. 2. R.C. 1533.181 does not explicitly direct that man-made improvements are also deserving of immunity, which is an

inference that has been drawn by the courts. Far from seeking an "exception" to an unambiguous statute, Plaintiffs are actually advocating a common sense limitation upon a judicial construction. It is safe to assume that if the General Assembly had intended to preclude recoveries for injuries and fatalities caused by hazards that served no recreational purpose, specific language would have been adopted to that effect.

As directed in R.C. 1.47(C), legislation should never be interpreted in a manner that produces absurd or unreasonable results. *Canton v. Imperial Bowling Lanes, Inc.*, 16 Ohio St. 2d 47, 242 N.E.2d 566 (1968), paragraph four of the syllabus; *State, ex rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 181-182, 480 N.E.2d 758 (1985). When resolving uncertainties, this Court should discern the intentions of the General Assembly by examining the language employed and the purposes to be accomplished. *State ex rel. Francis v. Sours*, 143 Ohio St. 120, 124, 53 N.E. 2d 1021 (1944). Here, the parties are in agreement that R.C. 1533.181 was enacted to encourage land owners to open their grounds to the public for recreational activities. *Defendant's Brief, p. 2*. There is no reason to believe that the legislature envisioned that the statute would also serve to allow public parks to be used as "litigation proof" dumping grounds once maintenance facilities were filled.

To its credit, Defendant has not denied that its construction would allow property owners and occupiers to create and conceal any number of hazards on property that is left open for public use and remain secure in the knowledge that no bothersome lawsuits will follow. As but one example, no recourse would be available at all if toxic chemicals were dumped in a pond that was known to be a favorite swimming spot for local children. So long as a recreational user is utilizing recreational property at the time the injury or fatality is suffered, the overly-simplistic "bright-line rule" that Defendant is championing would spare the disreputable property owner/occupier from being held legally accountable in a court of law.

Earlier in this appeal, Defendant had been unwilling to go so far. In an effort to tip toe around the consensus of legal authorities, the municipality had recognized that courts were required to consider “the cause of the injury not just the location.” *Defendant’s Court of Appeals Brief, p. 15.* Here, sensible jurors could find that Plaintiff had fractured his neck on a large solid object that had been protruding from a mound of dirt and did nothing to further the recreational value of Barthelmas Park. There is nothing in the text of the Recreational User Immunity Statute that even remotely suggests that such a man-made hazard is worthy of protection simply because it was left on recreational premises.

Defendant has failed to offer a plausible explanation for why the General Assembly would have intended to preclude lawsuits against unscrupulous property owners and occupiers who create hazardous conditions on land that is available for public use. They seem to be arguing that an uncompromising ban is essential to ensure certainty and predictability. *Defendant’s Brief, pp. 20-22.* Under Plaintiffs’ restrictive view of R.C. 1533.181(A), however, those who leave the land in its natural state or provide improvements that enhance its recreational character will still have no reason to fear being sued. Those who opt, on the other hand, to dump waste materials in areas that are frequented by residential users should be expected to hesitate. Throughout the rest of Ohio, liability has long been imposed when property owners and occupiers create concealed and undetectable hazards that threaten invitees and others. No language was included in the applicable statutes that should serve to assure anyone that recreational users are “fair game” who can be injured and killed with impunity once they step foot on recreational premises.

The only analogy that Defendant has been able to devise supporting its policy justifications involves a skateboarder who is injured while trying to ride down a handrail at a police station that is situated in a public park. *Defendant’s Brief, p. 21.*

Recreational user immunity would plainly apply in that odd scenario, given that handrails facilitate public access. A more intriguing hypothetical example is presented if one assumes that a park employee breaks a glass bottle on a public beach and neither removes the shards nor furnishes any warning of the hazard. Under the blanket prohibition that Defendant expects this Court to adopt, the courts would be unable to award any compensation to anyone whose foot is sliced open by the concealed glass. That cannot possibly be the result that the legislature envisioned.

Despite the fervent protests to the contrary, Defendant's "bright-line rule" is indeed incompatible with *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St. 3d 467, 2002-Ohio-2584, 769 N.E. 2d 372. The visitor to the park who was killed during the municipality's fireworks display was indisputably a "recreational user" of "recreational property." This Court specifically refused to follow the same blanket prohibition that the instant Defendant is now touting. *Id.*, 95 Ohio St. 3d at 469, ¶14. That harsh view had been adopted earlier in *Ross v. Strasser*, 116 Ohio App. 3d 662, 688 N.E. 2d 1120 (2nd Dist. 1996), which the majority found "to be overly expansive." *Id.* Notably, none of the concurring or dissenting Justices disagree with this analysis.

Instead of just asking whether a "recreational user" had been injured on recreational "premises," the *Ryll* Court examined the "cause of the injury" that led to the fatality. *Id.*, 95 Ohio St. 3d at 469, ¶15. The shrapnel from the fireworks was not part of the lands, buildings, and structures and thus Recreational User Immunity was not available to the municipality. *Id.* That is also true with regard to the railroad tie-like object that Plaintiff struck. For sound policy reasons, R.C. 1533.18(A) stops well short of including such waste materials in the definition of "premises." It should now be evident that it is not Plaintiffs who are seeking to add new statutory provisions that the General Assembly never saw fit to enact.

The *Ryll* decision also cannot be reconciled with the novel view that one must

look to the “essential character” of the premises which must be “viewed as a whole[.]” *Defendant’s Brief*, p. 16. Not one Justice offered support for that nonsensical standard, which would have required immunity to be imposed since there was no dispute that the spectator was killed in a public park that served a recreational purpose when “viewed as whole.” *Id.*, 95 Ohio St. 3d at 467. Nothing in the text of R.C. 1533.18(A) indicates that the term “premises” is to be evaluated in such a loose and unmanageable fashion.

In its zeal to create zones of property where anything goes without concerns for lawsuits, Defendant has plainly read far too much into *Miller*, 42 Ohio St. 3d 113. The opinion remarked that the premises should be “viewed as a whole” only when determining whether recreational purposes are being served. *Id.*, at 114-115. The Court ultimately concluded that a municipal park retained its recreational character even though structures and improvements had been added to facilitate softball games. *Id.*, at 115-116. There is no reason to believe that the *Miller* Court intended to sweep non-beneficial man-made hazards into the statutory grant of authority. Thirteen years later, this Court confirmed in *Ryll*, 95 Ohio St. 3d at 469. ¶15, that the “cause of the injury” must be linked to the “premises” consistent with R.C. 1533.18(A). Waste and debris simply was not included within that statutory definition.

Defendant’s reliance upon *Sorrell*, 40 Ohio St. 3d 141, is misplaced. *Defendant’s Brief*, pp. 11-12. While the snowmobile operator had indeed struck a dirt mound that was protruding above the surface of a frozen lake, the pile had been created “by dredging operations” that had been conducted by the Ohio Department of Natural Resources. *Id.*, 40 Ohio St. 3d at 141-142. There was apparently no dispute that the dredging project enhanced the recreational value of the lake by, among other benefits, expanding its size and permitting safe passage of watercraft. *Id.* The operator’s primary argument instead was that he was actually a trespasser and was owed certain duties that were unaffected by recreational user immunity. *Id.*, at 143-144. Rather predictably, this

Court rejected the specious contention and held that he was still a recreational user even though he had entered the State park in violation of the posted rules. *Id.*, at 144-145. *Sorrell* is therefore entirely consistent with Plaintiffs' position that R.C. 1533.181(A) does not extend to injuries attributable to man-made conditions that serve no recreational purpose.

III. THE CORRECT LEGAL STANDARD

Defendant maintains that the question of whether immunity applies in this instance is strictly a "question of law." *Defendant's Brief*, p. 17. The authorities that have been cited, however, did not involve disputed issues of fact. *Id.* In this particular instance, the evidentiary record does not conclusively establish how and why the railroad tie-like object was left in the dirt mound that children were using for sled riding. Accordingly, the applicability of R.C. 1533.181(A) cannot be determined until a jury resolves whether the fixed object that fractured the teenager's neck was indeed a legitimate improvement to recreational property. *See, e.g., Jackson v. Plusquellic*, 58 Ohio App. 3d 67, 68-69, 568 N.E. 2d 727, 729 (9th Dist. 1989) (remanding for jury trial over factual issues germane to recreational user immunity defense); *Ganzhorn v. R & T Fence Co.*, 11th Dist. No. 2010-P-0059, 2011-Ohio-6851, 2011 W.L. 6938590, ¶72-73 (December 30, 2011) (reversing entry of summary judgment on recreational user immunity grounds because factual disputes existed over whether property in question satisfied the definition of "premises.")

Plaintiffs have been berated for "casually disregard[ing]" R.C. 1533.181(A)(3), which addresses injuries that had been inflicted by, not to, a recreational user. *Defendant's Brief*, p. 10. Unwilling to concede anything, Defendant seems to be arguing that the provision somehow applies in this incidence involving only a single recreational user. *Id.* The municipality itself had "casually disregarded" subsection (B)(3) in the original motion, which made no attempt to argue that some other recreational user was

responsible for Plaintiff's fractured neck. *Defendant City of Circleville's Motion for Summary Judgment*, pp. 4-6. This was also the case in the ensuing appeal. *Court of Appeals Brief of Defendant-Appellee, City of Circleville*, pp. 10-16. As Defendant itself has acknowledged, new argument should not be considered for the first time in this Court. *Defendant's Brief*, p. 16.

CONCLUSION

This Court should establish a sensible construction of R.C. 1533.181 that is consistent with the readily apparent legislative intention, reverse the Fourth District Court of Appeals, and remand this action for a jury trial upon all claims.

Respectfully Submitted,



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