
IN THE SUPREME COURT OF OHIO
CASE NO. 2012-1150

Appeal from the Court of Appeals
Fourth Appellate District
Pickaway County, Ohio
Case No. 2010CA0031

JEREMY PAULEY, et al

Plaintiffs-Appellants

v.

CITY OF CIRCLEVILLE

Defendant-Appellee

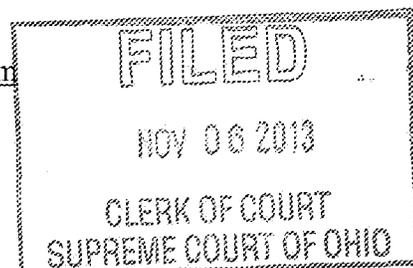
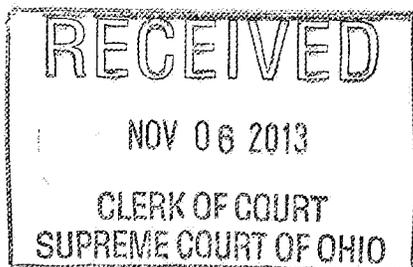
**DEFENDANT/APPELLEE CITY OF CIRCLEVILLE'S
BRIEF IN OPPOSITION TO PLAINTIFF/APPELLANTS JEREMY AND CHRISTINE
PAULEYS' MOTION FOR RECONSIDERATION**

JOHN T. MCLANDRICH (0021494)
Counsel of Record
TODD M. RASKIN (0003625)
FRANK H. SCIALDONE (0075179)
Mazanec, Raskin & Ryder Co., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
(440) 248-8861 – Fax
Email: jmclandrich@mrrlaw.com
traskin@mrrlaw.com
fscialdone@mrrlaw.com

Counsel for Defendant/Appellee
City of Circleville

W. CRAIG BASHEIN (0034591)
Bashein & Bashein Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113
(216) 771-3239
(216) 781-5876 - Fax
Email: cbashein@basheinlaw.com

PAUL W. FLOWERS (0046625)
Counsel of Record
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113
(216) 344-9393
(216) 344-9395 - Fax
Email: pwf@pwfco.com



GEORGE ORYSHKEWYCH (0060000)
5566 Pearl Road
Parma, OH 44129
(440) 884-5015
(440) 884-5020 - Fax

Counsel for Plaintiffs/Appellants
Jeremy and Christine Pauley

I. RESPONSE TO PLAINTIFFS/APPELLANTS' MOTION

Defendant/Appellee City of Circleville opposes Plaintiffs/Appellants' request for reconsideration. Claiming that they simply could not have known the law, Plaintiffs want a complete "do over" of this litigation to try and circumvent the clear statutory law. This Court must reject that request. This argument has no merit because this Court determined 1) the long-standing Recreational User Act expressly bars the Plaintiffs' claims; and 2) this Court's equally long-standing precedent also rejects their arguments. Plaintiffs' effort to seek reconsideration is not based on any clear error of law or fact. Rather, Plaintiffs merely disagree with this Court's decision.

"A motion for reconsideration shall not constitute a reargument of the case." S.Ct.Prac.R. 18.02. With no legitimate basis, Plaintiffs want to re-argue their case through the lower courts all over again. Supreme Court Rule 18.02 prohibits this type of argument. Furthermore, Ohio law provides that reconsideration narrowly applies only when there is "an obvious error in [a court's] decision or raises an issue for [] consideration that was either not considered at all or was not fully considered [] when it should have been." *Columbus v. Hodge*, 37 Ohio App.3d 68, syllabus at ¶1(10th Dist. 1987), citing *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist. 1981).

Here, the Court did not make an error at all, let alone an "obvious error." This Court properly considered the legislative intent and language of the Recreational User Act and issued a well-reasoned decision based on established statutory law and precedent. Moreover, Plaintiffs had ample opportunity to make their case at every level of Ohio court, and did make those arguments. Despite having the opportunity to fully litigate this case, Plaintiffs now want this Court to allow them yet another "opportunity to submit evidence and argumentation."

To justify this improper and extraordinary request to re-litigate this case from the trial court and beyond, Plaintiffs make the meritless claim that they were not -- and *could* not have been -- aware of long-existing statutory law and binding Supreme Court precedent that bars their claim. They argue that this Court created entirely new law or overturned existing binding precedent. That is wrong.

First, this Court found that Plaintiffs' arguments had "no support in statutory or case law" and expressly refused to create new law or overrule existing precedent by adopting Plaintiffs' exception contained in their proposition of law. (*Pauley* at ¶ 2.) This Court held the express language of the Recreational User Statute unequivocally barred Plaintiffs' claim.

[T]he language of the recreational-user statute is plain: a property owner owes no duty to a recreational user to keep the property safe for entry or use. Creating an exception to this immunity is a policy decision that comes within the purview of the General Assembly, not the courts. The General Assembly understands how to draft laws that contain exceptions, but included no exception that can be applied in this case. And we will not create an exception by judicial fiat.

(*Pauley* at ¶38.) Plaintiffs admitted Jeremy Pauley was a recreational user; they admitted he did not pay a fee; and he was engaged in a recreational activity (i.e., sledding). See *Pauley* at ¶ 22.

Second, this Court also carefully considered and rejected Plaintiffs' novel interpretation of the 24-year-old decision of *Miller v. Dayton*, 42 Ohio St.3d 113, 537 N.E.2d 1294 (1989). This Court expressly stated, "even assuming arguendo that we agreed with appellants' interpretation of *Miller*, it would not change the outcome in this case. *Miller* requires that the property be 'viewed as a whole,' and only where the 'essential character' of the property has been altered to something other than an outdoor property on which outdoor recreational activities occur does immunity fall away." (*Pauley* at ¶ 36.) The Court reached the only reasonable conclusion that the "essential character" of the public park was recreational:

The park in this case is an outdoor property with trees and grass and is open to the public free of charge for picnicking and sporting activities such as sledding, baseball, soccer, and basketball, as well as other recreational activities that inevitably occur in parks, such as tinkering with a model plane, reading poetry, or jogging. See *Miller*, 42 Ohio St.3d at 115, 537 N.E.2d 1294. The purported defect in this case is an object resembling a railroad tie. When viewing the park property “as a whole,” the existence of a single railroad tie does not change the essential character of the park to something other than a property that is open for recreational use.

(*Pauley* at 37.) The Court did not create new law or overrule existing law.

Third, Plaintiffs' claim that they did not know about the established law is belied by their own arguments. Plaintiffs made those arguments to this Court and the lower courts; they simply want to make them again. (See, e.g., *Pauley* at ¶36; see also, e.g., *Pauley* Reply Br. at p. 2, making the very argument they say they never could know about: “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' claims are meritless.

Finally, even assuming that they did not know the law and mistakenly failed to argue it, which is plainly not true, Plaintiffs would have waived that issue by failing to raise it. Axiomatic appellate law provides that a party who fails to raise an argument in the court below waives his or her right to raise that argument. See *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626 at ¶34 (2009). The waiver rule is “deeply embedded” in notions of the “fair administration of justice” and is designed to prevent a party from sitting “idly by until he or she loses on one ground only to avail himself or herself of another on appeal.” *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81(1997). Even assuming that they did not know the law, Plaintiffs would have waived this issue.

Candidly, Plaintiffs are again trying to circumvent the clear language and intent of the Recreational User Act. The proper forum for their argument is the General Assembly, not a request for reconsideration.

Creating an exception to this immunity is a policy decision that comes within the purview of the General Assembly, not the courts. The General Assembly understands how to draft laws that contain exceptions, but included no exception that can be applied in this case.

Pauley at ¶ 38. Jeremy Pauley was admittedly a recreational user in what was undeniably a public park. Plaintiffs' argument is premised on the incorrect belief that public and private landowners must make their property safe for entry and use, when the General Assembly has expressly provided language directly to the contrary. This Court properly held:

In this case, appellants admitted that Pauley was a recreational user within R.C. 1533.181, as he clearly was. He entered the park, free of charge, to go sledding. Thus, the city owed him no duty to keep the premises safe, and the city's alleged creation of a hazard on the premises does not affect its immunity.

Pauley at ¶ 22.

This Court properly considered the legislative intent and language of the Recreational User Act and issued a well-reasoned decision based on established statutory law and precedent. Plaintiffs' effort to seek reconsideration is not based on any clear error of law or fact. Rather, Plaintiffs merely disagree with this Court's decision and want to re-litigate this case again. That does not warrant reconsideration under Ohio law.

II. CONCLUSION

This Court must deny Plaintiffs' motion.

Respectfully submitted,

MAZANEC, RASKIN & RYDER CO., L.P.A.

JOHN T. MCLANDRICH (0021494)

TODD M. RASKIN (0003625)

FRANK H. SCIALDONE (0075179)

Mazanec, Raskin & Ryder Co., L.P.A.

100 Franklin's Row

34305 Solon Road

Cleveland, OH 44139

(440) 248-7906

(440) 248-8861 – Fax

Email: jmclandrich@mrrlaw.com

traskin@mrrlaw.com

fscialdone@mrrlaw.com

Counsel for Defendant/Appellee
City of Circleville

CERTIFICATE OF SERVICE

A copy of the foregoing was served November 5, 2013 by depositing same in first-class United States mail, postage prepaid, to the following:

Paul W. Flowers, Esq.
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113

Patrick J. Deininger, Esq.
Law Office of Douglas J. May
625 Eden Park Drive, Suite 510
Cincinnati, OH 45202

*Counsel for Defendant/Appellee
City of Circleville*

W. Craig Bashein, Esq.
Bashein & Bashein Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113

Kimberly C. Young, Esq.
Elk & Elk Co., Ltd.
6105 Parkland Boulevard
Mayfield Heights, OH 44124

George Oryshkewych, Esq.
5566 Pearl Road
Parma, OH 44129

*Counsel for Amicus Curiae
Ohio Association for Justice*

Counsel for Plaintiffs/Appellants

Mark Landes, Esq.
Aaron M. Glasgow, Esq.
Isaac, Brant, Ledman & Teetor, LLP
250 E. Broad Street, Suite 900
Columbus, OH 43215

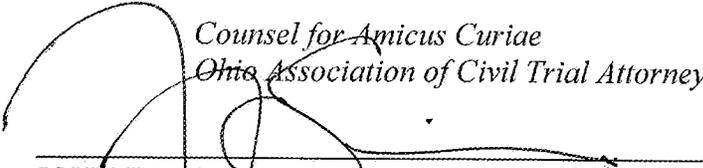
Philip Hartmann, Esq.
Rebecca K. Schaltenbrand, Esq.
Ice Miller LLP
250 West Street
Columbus, OH 43215

*Counsel for Amicus Curiae
The Ohio Municipal League*

*Counsel for Amici Curiae County
Commissioners Association of Ohio, The Ohio
Township Association and the Ohio Parks and
Recreation Association*

Stephen W. Funk, Esq.
Roetzler & Andress, LPA
222 S. Main Street, Suite 400
Akron, OH 44308

*Counsel for Amicus Curiae
Ohio Association of Civil Trial Attorneys*



JOHN T. MCLANDRICH (0021494)
TODD M. RASKIN (0003625)
FRANK H. SCIALDONE (0075179)

Counsel for Defendant/Appellee
City of Circleville