

ORIGINAL

IN THE SUPREME COURT OF OHIO

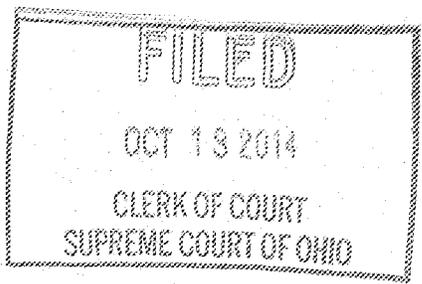
ARLIE RISNER,	:	
	:	
Appellant,	:	Case No.: 2014-0242
	:	
v.	:	
	:	
OHIO DEPARTMENT OF NATURAL	:	On Appeal from the Huron
RESOURCES, DIVISION OF	:	County Court of Appeals
WILDLIFE,	:	Sixth Appellate District
	:	
Appellee.	:	

REPLY BRIEF OF APPELLANT, ARLIE RISNER

Gordon M Eyster (#0074295)
 McKown & McKown Co., LPA
 10 Mansfield Avenue
 Shelby, Ohio 44875
 Phone: (419) 342-4261
 Fax: (419) 347-5723
 ge@mckownlaw.com

COUNSEL FOR APPELLANT, ARLIE RISNER

Michael Dewine (#0009181)
 Eric E. Murphy (Counsel of Record)
 Michael Hendershot (#0081842)
 Samuel C. Peterson (#0081432)
 Nicole Candelora-Norman (#0079790)
 Dan J. Martin (#0065249)
 Assistant Attorneys General
 30 East Broad St., 17th Floor
 Columbus, Ohio 43215
 Phone: (614) 466-8980
 Fax: (614) 466-5087
 eric.murphy@ohioattorneygeneral.gov



COUNSEL FOR APPELLEE,
 OHIO DEPARTMENT OF NATURAL RESOURCES,
 DIVISION OF WILDLIFE

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(3.) ARGUMENT

The apparent basis for seeking such restitution is set forth in R.C. 1531.201, which provides:

(B) The chief of the division of wildlife or the chief's authorized representative **may bring a civil action to recover possession of or the restitution** value of any wild animal held, taken, bought, sold, or possessed in violation of this chapter or Chapter 1533. of the Revised Code or any division rule against any person who held, took, bought, sold, or possessed the wild animal.

The minimum restitution value to the state for wild animals that are unlawfully held, taken, bought, sold, or possessed shall be established in division rule.

© (1) In addition to any restitution value established in division rule, a person who is convicted of a violation of this chapter or Chapter 1533. of the Revised Code or a division rule governing the holding, taking, buying, sale, or possession of an antlered white-tailed deer with a gross score of more than one hundred twenty-five inches also shall pay an additional restitution value that is calculated using the following formula:

Additional restitution value = ((gross score -- 100)2 x \$ 1.65). . .
R.C. 1531.201 (emphasis added)).

It is clear from the plain language of the above statute, if constitutional, ODNR may take possession of, or seek restitution for, the alleged deer taken by Arlie Risner. By its plain language, the statute allows for one or the other, not both. As this Court has previously explained "[o]ur first duty in statutory interpretation is to determine whether the statute is clear and unambiguous. Sherwin-Williams Co. v. Dayton Freight Lines, Inc., 112 Ohio St.3d 52. "[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." Id., quoting Hubbard v. Canton City School Dist. Bd. of Edn., 97 Ohio St.3d 451. Estate of Heintzelman v. Air Experts, Inc., 126 Ohio St. 3d 138 (2010).

The plain language use of the word “or” is exclusive; i.e., A or B, not both. “Similar to one seeing a menu stating ‘Lunch special: sandwich and soup or salad’ (parsed as “sandwich and (soup or salad)” according to common usage in the restaurant trade), one would not expect to be permitted to order both soup and salad. Nor would one expect to order neither soup nor salad, because that belies the nature of the ‘special’, that ordering the two items together is cheaper than ordering them a la carte. Similarly, a lunch special consisting of one meat, French fries or mashed potatoes and vegetable would consist of three items, only one of which would be a form of potato. If one wanted to have meat and both kinds of potatoes, one would ask if it were possible to substitute a second order of potatoes for the vegetable. And, one would not expect to be permitted to have both types of potato and vegetable, because the result would be a vegetable plate rather than a meat plate.” “WIKIPEDIA” *Exclusive or*, <http://en.wikipedia.org/wiki/Or> (October 10, 2014).

ODNR suggests it is simply easier to write “or” rather than “and/or” or “both” to justify its interpretation that “or” means A or B, or both A and B. However, if our legislature wished that interpretation, it should have given the statute that plain language. Counsel did a LEXIS search with term “and/or”. 23,482 results returned under “Administrative Codes and Regulations” in the state of Ohio; 3,785 results returned in “Statutes and Legislative”; 663 results returned in the Ohio Revised Code alone. Had our legislature wished “or” to refer to a logical disjunction as suggested by ODNR, there would be no references contained in our legislative authority with the words “and/or.”

Contrary to ODNR’s belief of simplicity, our legislature also uses “either or both” throughout the Ohio Revised Code. For example R.C. 3109.05(1) provides “In a divorce,

dissolution of marriage, legal separation, or child support proceeding, the court may order either or both parents to support or help support their children.” The legislature used the words “either or both” to allow for the more expansive interpretation. The legislature did not use the “either or both” language in R.C. 1531.201, thus using the exclusive use of the word “or”. Had they wished the non-exclusive interpretation they would have done so.

Had the Legislature intended for the word “or” to mean “and” or “both”, they would and could have defined the word “or” exactly as this Court has done in S.Ct.Prac.R. 1.06(B), “[i]f the sense requires it, ‘and’ may be read ‘or’ and ‘or’ may be read ‘and.’” Or, the legislature could have done exactly what this Court has done in S.Ct.Prac.R. 16.04(A)(1), “In every appeal involving termination of parental rights or adoption of a minor child, *or both* . . .” (emphasis added). (See also S.Ct.Prac.R. 16.05(B)(1)(a), 16.05©, 16.04(D), 16.04(E), 4.03, 7.01, 7.03, 7.05, 7.08, 8.02, 12.09, 15.03, 16.02, 16.03, 16.05, 17.04, and 18.01 for use of the language “or both”).

When reading R.C. 1531.201, it is “or” is exclusive, and ODNR may receive possession of, or the restitution value of, an animal taken, killed, bought, sold or possessed in violation of R.C. 1531.201, not both. That is easily shown by use of the word “restitution.” Restitution is defined as “an equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in a position he or she would have been, had the breach not occurred.” BLACKS LAW, 6th Ed., *Restitution*.

“Restitution is available as a legal remedy when a plaintiff cannot assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him.

Restitution is available as an equitable remedy where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." San Allen v. Buehrer, 2014-Ohio-2071 (8th Dist.). Simply put, you cannot be put in a better position from restitution than you would have been in your original position.

Here, ODNR received exactly what Arlie Risner took; a dead deer. A deer legally shot, and thereafter "taken" on Railroad property. One would not anticipate that every person possibly convicted of a violation of 1533 would give possession *and* pay a restitution value as argued by ODNR. For example, three individuals are hunting deer together: one a shooter and the other two (2) "pushing" the deer. Assume all are in violation of R.C. 1533 in some manner, and that the value of the deer is \$27,000.00. Upon killing the deer, they equally distribute the deer among themselves. Under ODNR's theory of recovery, ODNR could receive possession of the deer, and a "restitution value" of \$27,000 from EACH individual, for a total of \$81,000.00 (plus the deer possession). Receiving \$81,000.00 for an arguable \$27,000.00 item is hardly "restitution", but is exactly what could, and no doubt would, happen if the Court adopts ODNR's theory. The same result would follow, if the hunters had not killed the deer, but rather trapped the deer and kept it alive (ODNR would retrieve the live deer, and instill \$81,000.00 in "restitution" for the wrongful taking).

Here, the ODNR has already taken both remedies as restitution was previously ordered by the Norwalk Municipal Court (\$90.00), and the deer was taken (in possession) of the ODNR

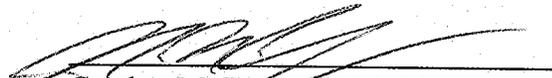
when they confiscated it, and later received two (2) separate Court orders (First order of February 23, 2011 ordered meat held as evidence to be forfeited; and Order dated April 8, 2011 ordering disposition of said deer). ODNR took what is possibly valued at more than \$20,000.00 (deer). If a "restitution" value of approximately \$27,000.00 is awarded, ODNR would receive in excess of \$47,000.00 for arguably a \$27,000.00 deer.

CONCLUSION

The trial Court correctly granted Risner's motion for summary judgment, denied ODNR's motion for summary judgment, dismissed ODNR's counterclaim, and reinstated Risner's hunting/fishing license. Respectfully, Risner submits the Court of Appeals' decision should be overturned and this Court should affirm the trial Court's decision.

Respectfully submitted,

McKown & McKown Co., LPA



Gordon M. Eyster #0074295
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the to be served upon the Appellee, by and through their attorneys, Eric E. Murphy (Counsel of Record), 30 East Broad St., 17th Floor, Columbus, Ohio 43215 by regular U.S. mail and electronically to eric.murphy@ohioattorneygeneral.gov on the 10th day of October, 2014.

McKown & McKown Co., L.P.A.



Gordon M. Eyster #0074295