

In the
Supreme Court of Ohio

RICHARD COMBS,	:	Case No. _____
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
OHIO DEPARTMENT OF NATURAL	:	
RESOURCES, DIVISION OF PARKS &	:	Court of Appeals
RECREATION,	:	Case No. 14AP-193
	:	
Defendant-Appellant.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT
OHIO DEPARTMENT OF NATURAL RESOURCES,
DIVISION OF PARKS & RECREATION**

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INTRODUCTION

This case raises important questions about the duties owed by landowners across the State—including the State and its municipalities—when others enter their lands for recreational uses. In R.C. 1533.181, the legislature relieved landowners of “any duty” to make their “lands, ways, and waters, and any buildings and structures thereon” “safe for entry or use” by “recreational users” of the landowners’ property. The Tenth District’s decision here injects uncertainty into the reach of the statute by departing from the lessons of this Court’s cases and creating a conflict with a First District decision interpreting the statute. This Court should accept jurisdiction and reverse.

This Court’s prior precedents and long lines of lower court decisions around the State made plain that the immunity in R.C. 1533.181 “simply turns on the status of the plaintiff” as a recreational user when injured by a condition of the land. *Milliff v. Cleveland Metroparks Sys.*, 8th Dist. No. 52315, 1987 WL 11969, at *3 (June 4, 1987). This is because the legislature intended the statute to “encourage owners of premises suitable for recreational pursuits to open their land to public use without fear of liability.” *Loyer v. Buchholz*, 38 Ohio St. 3d 65, 66 (1988). That is, the legislature wanted landowners to open their properties on a “zero cost basis,” *Shutrump v. Mill Creek Metro. Park Dist.*, 7th Dist. No. 97 C.A. 40, 1998 WL 158864, at *3 (April 2, 1998), with immunity as “the quid pro quo for owners who made their private land available for public recreation free of charge.” *Thomas v. Coleco Indus., Inc.*, 673 F. Supp. 1432, 1434 (N.D. Ohio 1987) (citation omitted). The court below departed from this established rule and the legislative intent of the statute, finding that R.C. 1533.181 did not immunize the Ohio Department of Natural Resources from liability when Plaintiff Combs, a “recreational user,” was injured while he was fishing on Department property. By departing from these cases, the decision below also created a conflict with the First District’s decision in *Mitchell v. City of*

Blue Ash, 181 Ohio App. 3d 804, 2009-Ohio-1887 (1st Dist.). This conflict creates confusion about the scope of landowner liability in Ohio. Until this conflict is resolved, landowners and municipalities in the First District will operate under different expectations and liability rules than those in the Tenth despite enjoying protection of the same statute. The Court should grant review to alleviate the confusion created by the decision below, and provide needed certainty to the State, municipalities, and all other landowners around the State who allow recreational users to enter their property gratuitously.

STATEMENT OF THE CASE AND FACTS

On a summer night in 2011, Plaintiff Richard Combs and a friend entered Indian Lake State Park to go fishing for Combs's birthday. They did not pay a fee to enter the Park; indeed, Combs had been to the Park a few times in the past and had never paid a fee. Combs and his friend fished all night but were unsuccessful; in the morning, Combs and his friend decided to try their luck at a location in the Park called Pew Island, where Combs believed from past experience there was "better fishing."

While Combs traversed to his chosen fishing spot on Pew Island just after 7 a.m., an experienced Ohio Department of Natural Resources employee was mowing weeds and overgrown brush from the edge of the lake surrounding Pew Island to improve access to the lake for fishermen. The employee was mowing near the edge of the lake when the blade of his mower hit riprap, an arrangement of rocks near water that prevents erosion. Although he was more than 100 yards away from the mower at the time, Combs was struck in the eye by a piece of the riprap.

Combs sued the Department, claiming that the Department's employee had been negligent in operating the mower. After discovery, the trial court granted the Department summary judgment on the ground that it was immune from liability under Ohio's recreational

user statute, R.C. 1533.181, because Combs was a recreational user when he was injured on the Department's premises.

Combs appealed, and the Tenth District reversed. Although Combs had conceded that he was a recreational user on premises covered by the statute, the Tenth District accepted Combs's argument that R.C. 1533.181 should not apply because his negligence claim was not based on the Department's duty to "keep the premises safe for entry or use" under the statute. The Tenth District looked to this Court's plurality decision in *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St. 3d 467, 2002-Ohio-2584, and found that the rock that injured Combs was not a part of the land, but was more analogous to the shrapnel from an exploded firework that caused the plaintiff's injuries in *Ryll*. The Tenth District applied a narrow reading of R.C. 1533.81, and held that because the rock in question did not constitute a defect in the premises themselves, the recreational user immunity statute did not apply.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The Tenth District's decision creates a conflict about the meaning of a statute that involves the liability of the State, most of Ohio's political subdivisions, and thousands of private landowners in Ohio. That makes the question here one of both public and great general interest. Both the conflict and the widespread application of the statute show that review is warranted.

A. This Court should grant review to resolve a conflict between the Tenth District and First District on the scope of the immunity statute.

For years, courts have agreed that landowners who open their property to the public owe no duty to warn or protect recreational users from harm caused on their premises, including harm caused by the landowners' negligence. *See, e.g., Mitchell v. City of Blue Ash*, 181 Ohio App. 3d 804, 2009-Ohio-1887 (1st Dist.) (granting immunity under R.C. 1533.181 for harm allegedly caused by park employee negligence on premises); *McCord v. Ohio Div. of Parks & Recreation*,

54 Ohio St. 2d 72, 74 (1978) (same); *Gudliauskas v. Lakefront State Park*, No. 2004-08464, 2005-Ohio-5598 (Ct. Cl.) (same); *Meiser v. Ohio Dep't of Natural Res.*, No. 2003-10392-AD, 2004-Ohio-2097 (Ct. Cl.) (same). In the words of the Eighth District, “the recreational users statute does not contemplate a distinction between what appellant terms as passive and active negligence. The statute protects all owners of land who fall within it from *all acts of negligence.*” *Milliff v. Cleveland Metroparks Sys.*, 8th Dist. No. 52315, 1987 WL 11969, at *3 (June 4, 1987) (emphasis added). Veering from these precedents, the Tenth District’s decision below held for the first time that an owner of premises covered by the statute was not immune from liability for an injury to a recreational user caused on and by a part of the premises—even where an employee’s *purported* negligence was a contributing factor to the injury.

The decision below creates a square conflict with *Mitchell* in the First District. There, a park employee opened a gate in the city park and crushed Mitchell’s hand in the opening mechanism. 2009-Ohio-1887 at ¶¶ 2-3. Mitchell brought a negligence action against the city of Blue Ash for the injuries to his hand caused by the park employee. *Id.* at ¶ 4. Noting that there, as here, it was undisputed that the plaintiff was a recreational user on premises covered by the statute, the First District held that Blue Ash was immune from suit under R.C. 1533.181. *Id.* at ¶¶ 8, 12. The *Mitchell* court rejected the argument that was relied on by the Tenth District below—namely, that this Court’s decision in *Ryll v. Columbus Fireworks Display Company, Inc.*, 95 Ohio St. 3d 467, 2002-Ohio-2584, compelled lower courts to deny immunity where a contributing factor in the harm to the recreational user was the negligence of an employee. Compare *Mitchell*, 2009-Ohio-1887 at ¶¶ 9-10, with *Combs v. Ohio Dept’ of Natural Res.*, 10th Dist. No. 14AP-193, 2014-Ohio-4025 ¶¶ 9, 11.

The conflict created by the decision below should be resolved by this Court. The Tenth District's decision will engender confusion about the scope of landowner liability in Ohio, particularly in light of the statute's long history as a bright-line grant of immunity. Until this conflict is resolved, identical actions arising in the First and Tenth Districts will come to different results based solely on the locale in which the case arises. Such conflicting results would be unfair to landowners and recreational users alike. Furthermore, the confusion generated by the decision below will hamper the legislature's efforts to encourage landowners to open their properties to recreational use. As uncertainty about the scope of potential liability increases, the number of landowners willing to keep their property open to the public will decrease commensurately. The Court should grant review to alleviate the confusion created by the decision below, and provide needed certainty to the Department and all other landowners around the State who allow recreational users to enter their property gratuitously.

B. Landowner liability for recreational use is a recurring and important issue

The Tenth District's erroneous interpretation of the recreational user statute, if not reversed, will have widespread consequences for all landowners, including the State and the municipalities that operate Ohio's parks. It was established more than twenty-five years ago that R.C. 1533.18's definition of "premises" included land owned by municipalities and the State. *See, e.g., LiCause v. Canton*, 42 Ohio St. 3d 109, 110 (1989).

Public parks blanket Ohio, and the decision below has consequence for all of them. Ohio has 75 state parks that receive more than 50 million visitors each year. *See* Ohio State Parks 2012 Annual Report at 30, *available at* parks.ohiodnr.gov/portals/parks/pdfs/about/2011-annual-report.pdf (reporting 51,224,756 visitor occasions in Ohio's 75 state parks in 2011) (last visited Oct. 29, 2014). Many of Ohio's numerous municipalities also own and operate their own parks and other spaces available to the public for recreational use. For example, Cleveland's

Department of Parks, Recreation, and Properties manages over 150 parks, playgrounds, and green spaces. See City of Cleveland::Parks & Playgrounds, available at <http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/CityAgencies/ParksRecreationandProperties/ParksPlaygrounds> (last visited Oct. 29, 2014). Maintenance of these parks is a constant and lengthy process; indeed, as the Ohio Department of Natural Resources employee testified at his deposition, his crew had already been mowing and performing other maintenance on the Park for three weeks at the time Combs was injured.

In light of the number of visitors to Ohio’s parks, and the lengthy maintenance schedules required to care for the grounds, this issue is substantial and likely to reoccur. The scope of landowner liability is also important; indeed, the liability created by the lower court’s decision may have a substantial impact on the ability of political subdivisions of the state—especially those that are self-insured—to continue to provide land to the public for recreational uses.

Beyond public lands, the statute—and therefore the rule of law at stake here—affects private landowners as well. See, e.g., *Curtis v. Schmid*, 5th Dist. No. 07 CAE 11 0065, 2008-Ohio-5239 ¶ 74. The statute reaches owners regardless of the size of the property and regardless of whether the owner “denies entry to certain individuals.” R.C. 1533.181(B). This broad reach means broad applicability. Relying on the statute, private landowners around the State open their lands to others for hunting, fishing, off-trail riding, and other pursuits. All involved in these activities, whether as owner or participant, have an interest in the scope of this statute.

ARGUMENT

Appellant Ohio Department of Natural Resource's Proposition of Law:

R.C. 1533.181(A) immunizes landowners from liability for injuries to recreational users arising from the condition of the land, including maintenance of the land.

A. It is well established that a landowner is immune from liability for harm to a recreational user occurring during a gratuitous use of the landowner's premises

Under R.C. 1533.181(A)(1), “[n]o owner, lessee, or occupant of premises . . . [o]wes any duty to keep the premises safe for entry or use” by recreational users. “Premises” includes all “lands, ways, and waters, and any buildings and structures thereon” open to and used for recreation by the public. R.C. 1533.18(A).

Under the plain language of this statute, the legislature has directed courts faced with immunity claims to determine three issues: (1) whether the injured party was a “recreational user” under R.C. 1533.18(B); (2) whether the injury complained of occurred on covered “premises” as defined in R.C. 1533.18(A); and (3) whether the “recreational user” paid for the privilege of using the covered “premises,” R.C. 1533.18(B). *See Mitchell*, 2009-Ohio-1887, at ¶¶ 8, 12; *see also McNamara v. Cornell*, 65 Ohio App. 3d 269, 272 (8th Dist. 1989) (“In determining whether appellee should be given immunity under R.C. 1533.181, the analysis of a recreational user should focus on the character of the property upon which the injury occurred and the type of activities for which the property is held open to the public.”). Because the nature of the premises and the location of the injury are often not in dispute, courts have observed that the “determinative factor” is “whether the plaintiff was a recreational user.” *Milliff*, 1987 WL 11969, at *3.

If the plaintiff in a negligence action was a “recreational user” of premises covered by the statute, and he did not pay to use those premises, then the landowner is protected from claims arising in negligence, because R.C. 1533.181 expressly removes the landowner's duty to that

user, and “duty” is a required element of any negligence action. *See* R.C. 1533.181(A) (a landowner does not “[o]we[] any duty to a recreational user to keep the premises safe for entry or use”); *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St. 3d 75, 77 (1984) (“[I]n order to establish actionable negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom.”). In the absence of a duty owed to the plaintiff, a landowner is entitled to summary judgment on a plaintiff’s negligence claim. *See, e.g., Parker v. Patrick*, 12th Dist. No. CA2011-12-027, 2012-Ohio-3312 ¶ 20 (granting defendants “judgment as a matter of law because they owed no duty to” plaintiff under R.C. 1533.181).

Here, it is undisputed that Combs was a recreational user, that he had not paid an entry fee to use the Park, and that he was within the Park’s premises as defined by the statute when he was injured. That should be the end of the inquiry. *See, e.g., Mitchell*, 2009-Ohio-1887, at ¶¶ 8, 12. For example, in *Mitchell*, it was undisputed that the plaintiff was a recreational user and was on city park premises covered by the statute when he was injured by the negligence of a city employee who crushed his hand in a gate-opening mechanism in the park. *Id.* at ¶ 8. Despite the fact that it was an employee’s alleged negligence that caused the plaintiff’s injuries, the court held the city was immune from liability under R.C. 1533.181 because the three prongs of the immunity statute were met. *Id.* at ¶ 12.

There, as here, the plaintiff claimed this Court’s plurality decision in *Ryll* compelled a different result. *See Mitchell*, 2009-Ohio-1887, at ¶ 9. In *Ryll*, the Court found that a person who was injured in a city park by shrapnel from an exploded firework was not barred by R.C. 1533.181 from bringing suit against the municipality that owned the park. 2002-Ohio-2584, at ¶ 15. The Court’s analysis turned on its observation that the firework shrapnel was not a part of the premises covered by the statute. *Id.* (“The cause of the injury was shrapnel from

fireworks, which is not part of ‘privately-owned lands, ways, waters, and . . . buildings and structures thereon.’”). The First District distinguished *Ryll* on the grounds that, while the plaintiff there “was not harmed by any portion of the premises,” Mitchell had been harmed by the gate, which was an object on the premises. *Mitchell*, 2009-Ohio-1887, at ¶ 11.

As in *Mitchell*, here *Ryll* is distinguishable because the harm to Combs came about from an object on the premises—namely, rock near the shoreline of the lake. The riprap that caused Combs’s injury was as much a part of the Park here as the gate in the Blue Ash city park was in *Mitchell*. Both inflicted the injuries giving rise to the plaintiffs’ negligence suits. Unlike the flying firework shrapnel in *Ryll*, the gate in *Mitchell* and the rock here were part of the premises protected by the statute. The rock was a natural condition of the Park premises; it was launched in the air as a result of a Department employee performing maintenance to improve the park for its recreational users’ enjoyment. The flying shrapnel in *Ryll*, though, had no such nexus to the city’s premises; the fireworks display had nothing to do with maintaining the city’s premises and was a part of a one-time fireworks show. Thus, as in *Mitchell*, here Combs’s negligence claim is barred by R.C. 1533.181. *See id.* at ¶ 12.

B. The decision below undermines the legislature’s intent to promote recreational use

This Court has long acknowledged that the legislature enacted R.C. 1533.181 to “encourage owners of premises suitable for recreational pursuits to open their land to public use without fear of liability.” *Loyer v. Buchholz*, 38 Ohio St. 3d 65, 66 (1988); *Moss v. Dep’t of Natural Res.*, 62 Ohio St. 2d 138, 142 (1980). That is, the legislature wanted to grant immunity to landowners as a “quid pro quo” for having “made their private land available for public recreation free of charge.” *Thomas v. Coleco Indus., Inc.*, 673 F. Supp. 1432, 1434 (N.D. Ohio 1987) (citation omitted). To effectuate this intent, the legislature created a bright-line rule for immunity: if the landowner gratuitously offers property for public recreational use, it does not

owe recreational users of the property any duty of care to prevent harm. *See* R.C. 1533.181; *see also Milliff*, 1987 WL 11969, at *3 (noting that R.C. 1533.181 creates a bright-line rule that “simply turns on the status of the plaintiff” when injured on covered premises). In light of its expansive purpose, Ohio courts have broadly construed R.C. 1533.181, *see Miller v. City of Dayton*, 42 Ohio St. 3d 113, 115 (1989), refusing to read in exceptions to the expansive immunities provided by the statute under long established rules of construction. *Cf. Akron v. Rowland*, 67 Ohio St. 3d 374, 380 (1993) (noting that courts must not “under the guise of construction, [] ignore the plain terms of a statute or [] insert a provision not incorporated by the legislature”).

The Tenth District’s decision muddles the bright-line rule about immunity under R.C. 1533.181. As this Court has recognized, by injecting uncertainty into clear immunity rules, the decision below disincentivizes people from opening their properties to the public in direct contravention of the legislature’s intent in creating R.C. 1533.181. *See Pauley v. Circleville*, 137 Ohio St. 3d 212, 2013-Ohio-4541 ¶ 35 (“Removing the protection of immunity would undoubtedly cause property owners to restrict recreational use of their properties, or close them entirely, from fear of liability.”).

The decision below also disincentivizes landowners who open their properties to the public from maintaining those properties. Indeed, the Tenth District’s decision sends landowners the following disjointed message: you are immune from liability if you open your property to the public and a tree falls on someone’s head, *see Estate of Finley v. Cleveland Metroparks*, 189 Ohio App. 3d 139, 2010-Ohio-4013 (8th Dist.), but you open yourself to liability if you notice that tree is a danger and cut it down yourself and unexpectedly injure someone. It is illogical to think that the same legislature that intended to incentivize landowners to open their properties to

the public in the first place would have, with the same stroke of the pen, discouraged those landowners from maintaining their properties and thereby enhance the public's enjoyment of them. As the State employee testified here, the mowing was performed in the Park on the day of the accident to improve access to the lake for fishers.

If the judgment of the lower court stands, then the landowners may well close parks and other recreational property during week-long maintenance activities to avoid potential liability. This will result in lengthy periods of time during which the public will not be able to use the land for recreational purposes—the very activity R.C. 1533.181 was intended to promote.

CONCLUSION

For the foregoing reasons, the Department urges the court to accept jurisdiction of this appeal and reverse the Tenth District.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served by U.S. mail this 31st day of October, 2014 upon the following counsel:

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