

IN THE SUPREME COURT OF OHIO

RICHARD COMBS,

PLAINTIFF-APPELLEE,

v.

OHIO DEPARTMENT OF
NATURAL RESOURCES,

DEFENDANT-APPELLANT

Case No. 2014-1891

On Appeal from the Franklin
County Court of Appeals
Tenth Appellate District

BRIEF OF RICHARD COMBS, PLAINTIFF-APPELLEE

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STATEMENT OF CASE AND FACTS

On July 28, 2011 Plaintiff Richard Combs was on the premises of Indian Lake State Park on Pew Island having arrived with a friend and intending to fish in the lake; that as he was walking to his intended fishing area he was struck in his right eye by a stone or rock that was thrown by a boom mower. The Plaintiff was treated at the scene by the Logan County EMS. (Exhibit 1)

Plaintiff further states that the boom mower was operated by Jerry Leeth an employee and or agent of Defendant Ohio Department of Natural Resources, acting within the course and scope of his employment and or agency with Defendant, Ohio Department of Natural Resources, who negligently operated the boom mower causing a rock or stone to be propelled several yards in the air striking the Plaintiff in the right eye causing the injuries and damages to Plaintiff.

Mr. Jerry Leeth testified that the Defendant Ohio Department of Natural Resources was the owner and he was the operator of the boom mower in question at the time of the accident on July 28, 2011. (Leeth depo p.17). He identified the mower as similar to the mower described in Plaintiff's Exhibit 16. He also identified a close up of the mower blades. (Exhibit 17). Mr. Leeth identified Exhibits 12 and 13 as maps of the area of Indian Lake State Park which included Pew Island and Crane Town Island.

Mr. Leeth identified the causeway between Crane Town Island and Pew Island as shown on the Pew island trail in Exhibit 15. It was on this causeway that the Plaintiff was injured. Mr Leeth was mowing brush and grass in the picnic area that he marked with an X. (Exhibits 14). (Leeth Depo. P 11-12). Mr. Leeth further identified with a white marker the location on Exhibits 14 and 15 which are satellite views of the picnic area in

question. These Exhibits document that more than half of the shoreline of this picnic area is surrounded by several feet of rap-rap and show the stones in question. Mr. Leeth testified that he was mowing brush and grass in the area of the riprap. (Leeth depo. p. 25.)

The deposition of Frank Giannola, regional park manager stationed at Indian Lake State Park has been filed in this case. He confirmed that Jerry Leeth was an employee of ODNR and was operating the boom mower in question. He identified Exhibit 3, his narrative statement and also identified statements that he took from Mr. Leeth and two witnesses as set forth in Exhibits 28, 29 and 30. Mr. Giannola identified the photographs in Exhibit 4 and his statements contained on exhibit 4.

The deposition of Raymond Lee Gaines, Junior, park officer for the Department of Natural resources, Indian Lake State Park has been filed in this case. He identified his narrative statement as Exhibit 2 and produced the original photographs shown in Exhibit 4 which were then marked as Exhibits 18, 19, 20 and 21. Mr. Gaines also identified Exhibit 24 as a close up of Exhibit 4, photo 1, the location of the incident in question. Mr. Gaines also identified his Accident report- Part 2 as Exhibit 31.

The defendant owns and operates two boom mowers which were New Holland TS100 tractors with Alamo side arm mowers as shown on Exhibit 16. These are under the Operations Services Group stationed at North and South construction.(Leeth depo. P. 20). Mr. Leeth operated the boom mower at South Construction. He testified that the boom mower would be transported to each work site by a Semi and in this case was taken to the Indian Lake Park maintenance area on the west side of Indian lake. The boom mower was driven Mr. Leeth from the storage area along SR 235 to US33,

through Russells Point to US 368 to Crane Town Island and the location of the incident.
(Leeth depo p.27-28)

The Plaintiff's affidavit was filed and marked Exhibit (33) and he gave an opinion of the negligence in this case:

It is my opinion that Mr. Leeth negligently operated the boom mower causing a rock or stone to be thrown several yards in the air striking me in the right eye causing injuries and damages to my eye. Mr. Leeth has testified that he was mowing brush along the shore line that was covered by several feet of rip-rap extending back from the water. Mr. Leeth identified with an X the location of the incident on Plaintiff's Exhibit 4 (Photo #1). Mr. Leet further identified the location on Exhibits 14 and 15 which are satellite views of the picnic area in question. These Exhibits document that more than half of the shoreline of this picnic area is surrounded by several feet of rip-rap and show that the stones in question are very large stones. In addition, several homes are shown in the satellite view in the direction opposite from which I was hurt. Stones could have been propelled also in the direction of these private homes making Mr. Leeth's negligent conduct even more dangerous.

It is my opinion that mowing brush growing over this rip-rap is a very dangerous job which should be taken with great caution. Allowing the blades of the boom mower used by Mr. Leeth to come close to the rip-rap is dangerous to the equipment and the public nearby. Such conduct is negligent activity of a park employee who has failed to exercise ordinary care not to cause damage or injury to others. (Exhibit 33.

Plaintiff filed a Complaint in the Court of Claims of Ohio which was assigned Case Number 2013-00428. The Defendant filed a Motion for Summary Judgment and, on February 4, 2014, the Court filed a Judgment Entry granting the Defendant's Motion for Summary Judgment.

Plaintiff filed a Notice of Appeal to the Court of Appeals of Franklin County, Ohio, Tenth Appellate District on March 5, 2014 which on September 16, 2014 reversed the trial courts' decision and remanded the case for trial on the merits.

LAW AND ARGUMENT

APPELLANT OHIO DEPARTMENT OF NATURAL RESOURCES' PROPOSITION OF LAW

R.C. 1533.181(A) IMMUNIZES LANDOWNERS FROM LIABILITY FOR INJURIES TO RECREATIONAL USERS ARISING FROM THE CONDITION AND MAINTENANCE OF THE LAND.

It Plaintiff's contention that the Defendant Ohio Department of Natural Resources is not protected in this case by the doctrine of recreational-user immunity as set forth in R. C.1533.181(A). The Plaintiff was clearly a recreational user and the property in question was held open to the public for recreational use, free of charge. In the most recent pronouncement on the issue of recreational-user immunity, this Court reaffirmed the concept that immunity attaches to the conditions of the premises:

¶ 26} In *Ryll*, a spectator was attending a fireworks show sponsored by the city of Reynoldsburg when he was fatally injured by shrapnel from a fireworks shell. The spectator's estate sued the city, which asserted that it was immune from liability under the Recreational-user statutes. We held that the recreational-user statute immunizes property owners from injuries that arise from a defect in the premises.

Because the shrapnel was not a defect *in the premises*, immunity did not apply. *Pauley et al v The City of Circleville Slip Opinion No 2013-4541* .

The plain meaning of R.C. 1533.181(A) is that the tortfeasor is immunized only

when the victim is injured by the premises itself:

R.C. 1533.181(A)(1) does not state that a recreational user is owed no duty. Instead, R.C. 1533.181(A)(1) immunizes an owner, lessee, or occupant of premises only from a duty “to keep the *premises* safe for entry or use.” (Emphasis added.) The cause of the injury in this case had nothing to do with “premises” as defined in R.C. 1533.18(A). The cause of the injury was shrapnel from fireworks, which is not part of “privately-owned lands, ways, waters, and * * * buildings and structures thereon.” *Id.* Accordingly, R.C. 1533.181(A)(1) and (2) do not immunize Reynoldsburg. To hold otherwise would allow R.C. 1533.181 to immunize owners, lessees, and occupants for any of their negligent or reckless acts that occur on “premises.” The plain language of the statute indicates that the General Assembly had no such intention. *Ryall v. Columbus Fireworks Display Co., Inc., et al.*, 95 Ohio St.3rd 467.

It is submitted that in this case, no defect in the premises of Indian Lake State Park was the cause of this accident and injury to Plaintiff. The negligence of the operator of the boom mower caused the rock or stone to be propelled several yards in the air striking the Plaintiff in the right eye.

The Ohio recreational user immunity statute provides that a landowner owes no duty “to keep the premises safe” and provides immunity for premises’ liability claims. However, this immunity does not extend to active negligence of a landowner causing injury to a recreational user of the land.

In *Henney v. Shelby City Schools*, 5th District, No 2005-CA0064 the court held:

{¶20} Paragraphs (A)(1) and (A)(2) of the statute refer to a lack of duty to keep a “premises” safe. “Premises” is defined in R.C. 1533.18(A) as “all...state-owned lands, including any buildings and structures thereon.” Based upon that definition, we find that the recreational user statute (R.C. 1533.181) does not apply to appellant’s claims. Appellant has not claimed that there was a defect on the grounds of the High School nor in any building or structure located on the school grounds. The alleged negligence arose from the setting up of

equipment for a track meet, namely, the side pads. Those side pads are pieces of portable athletic equipment, not part of the grounds or structure. Richland County App. Case No. 2005 CA00646. See *Ryall v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St.3d 467, 2002-Ohio-2584 (flying shrapnel from a fireworks display had nothing to do with the premises as defined in R.C. 1533.18(A)).

The Tenth District Court in this case held:

...the flying rock that injured Combs is akin to the flying shrapnel that injured the decedent in *Ryall*. Neither the rock nor the shrapnel constituted a defect in the premises.

The boom mower was a motor vehicle defined by ORC 4511.01 (B) for which the Defendant is liable for injuries and damages caused by the negligent operations of any motor vehicle by its employees engaged within the scopes of their employment and authority.

In *Klein V United States Of America*, S165549, the Supreme Court Of California held that the recreational user immunity statute ...”does not extend to acts of vehicular negligence by a landowner or by the landowner’s employee while acting within the course of the employment”. See also *Young v Salt Lake City Corp (Utah 1994) 876 P.2d 376. and Scott v. Wright (Iowa) 486 N.W.2d. 40.*

CONCLUSION

This Court should reject the Defendant-Appellant's proposition of law and affirm the Judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief has been served by regular U. S. Mail, this 30th day of June, 2015 to the following:

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