

RECREATIONAL IMMUNITY FOR TOPSOIL DEBRIS DUMPED IN PARK

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While absolute governmental immunity is a thing of the past, most jurisdictions still enjoy some significant form of limited governmental immunity for public parks and recreation. Limited landowner liability under an applicable state recreational use statute (RUS) is the most common form of limited governmental immunity for public parks and recreation. With minor jurisdictional variations, recreational use statutes exist in most states.

Generally, under a state recreational use statute, a landowner who opens the premises for public recreational use, free of charge, owes no legal duty to guard, warn or make the premises reasonably safe for such use. While some jurisdictions have limited the applicability of the state recreational use statute to private landowners, many jurisdictions have included public entities within the statutory or judicial interpretation of “landowner.” under the state recreational use statute, including Ohio. As described herein, the Supreme Court of Ohio has broadly construed the immunity available under the state recreational use statute for a serious injury sustained in a city park.

HAZARDOUS HILL

In the case of *Pauley v. City of Circleville*, 2013-Ohio-4541; 2013 Ohio LEXIS 2313 (10/16/2013), plaintiff Jeremy Pauley sustained catastrophic injuries while sledding in a city park. Based upon immunity available to landowners under the state recreational use statute, the lower courts had decided in favor of the defendant city. The state supreme court granted Pauley’s petition to review this decision.

On appeal, Pauley argued immunity under the state recreational use statute should not apply “if a property owner modifies his or her property in a manner that creates a hazard without promoting or preserving the recreational character of the property.” Accordingly, the stated issue before the Supreme Court of Ohio was whether immunity under the state recreational use statute applied to “man-made hazards upon real property that do not further or maintain its recreational value.”

FACTS

The city owns Barthelmas Park, which contains ball fields, a playground, and various structures, such as a concession stand and picnic shelters. Entry to the park is free of charge.

In the summer of 2006, the city was offered free topsoil that was excavated from a nearby construction site. The city uses topsoil for numerous projects, including reseeded the park. Consequently, the city accepted approximately 150 to 200 truckloads, which were taken to its maintenance facility for storage. When that facility reached capacity, the remaining topsoil was taken to the park and emptied onto the ground, where it formed two mounds approximately 15 feet high.

On the afternoon of January 24, 2007, 18-year-old Jeremy Pauley and his friends Kevin Baisden,

Danielle Ziemer, and Natasha Cox decided to go snow sledding at the park. Jeremy and Kevin began sledding at about 5 p.m., while the girls looked on. At approximately 6:00 p.m., as it began getting dark, Jeremy decided on a new location for his last sled run, which was, in fact, one of the mounds of dirt that had been stored at the park by the city. Kevin moved the car so that its headlights illuminated the hill. Although there were other sled tracks on the mound, this was the first time that Jeremy had sledded down it. In his deposition, Jeremy asserted that "[t]o the very, very far left side [of the hill] away from where I went sledding there was a little bit of brush or something, but nothing around where I went down."

Jeremy claimed that as he sledded down the hill, he "hit an immovable object" and "instantly went numb" and could not move his body. Realizing that Jeremy was critically injured, Kevin Baisden called 9-1-1. At the time, Kevin did not notice any obstacle in Jeremy's path. However, the day after the accident, Kevin went back to the park and observed an object that looked like a railroad tie in the area where Jeremy was injured. Jeremy suffered a broken neck, which caused him to become a quadriplegic.

RECREATIONAL-USER IMMUNITY

In his complaint, Pauley alleged "the city acted negligently, recklessly, and wantonly in dumping debris in the park, which resulted in a physical defect that caused Jeremy's injuries." In so doing, Pauley contended the "waste and debris created an inherently dangerous situation which no user of the park could have anticipated and thus substantially altered the nature and characteristic of the public property."

The trial court found the city was immune under the state recreational use statute, R.C. 1533.181. The court of appeals affirmed. On appeal to the state supreme court, Pauley claimed "the recreational user immunity statute is designed to preclude the right to recovery of civil damages only in specific instances." Accordingly, as characterized by Pauley, the state recreational use statute, R.C. 1533.181, "does not apply when a property owner makes the property more dangerous without promoting or preserving recreational activities." In response, the city argued that the state recreational use statute established the following "bright-line rule":

If a premises is freely open to the public for recreational purposes and a person is injured while using the premises for a recreational purpose, the landowner has no duty to that user to keep the premises safe.

According to the city, the effect of Pauley's appeal was to "improperly ask this Court to judicially create an exception or limitation to recreational immunity that does not exist in the Statute."

As cited by the state supreme court, the state recreational use statutes, in pertinent part, provided as follows:

No owner, lessee, or occupant of premises: (1) Owes any duty to a recreational user to keep the premises safe for entry or use; (2) Extends any assurance to a recreational user, through the act of giving permission, that the premises are safe

for entry or use; (3) Assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user...

(A) "Premises" means all privately owned lands, ways, and waters, and any buildings and structures thereon, and all privately owned and state-owned lands, ways, and waters leased to a private person, firm, or organization, including any buildings and structures thereon.

(B) "Recreational user" means a person to whom permission has been granted, without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency of the state, or a lease payment or fee paid to the owner of privately owned lands, to enter upon premises to hunt, fish, trap, camp, hike, or swim, or to operate a snowmobile, all-purpose vehicle, or four-wheel drive motor vehicle, or to engage in other recreational pursuits.

In addition, the state supreme court noted that "premises" under the state recreational use statute also included "land owned by municipalities and the state."

According to the court, the "essential character of the property" would determine "whether immunity applies." In particular, the court noted that "the property must be held open to the public for recreational use, free of charge." In addition, based upon the recreational activities listed in the state recreational use statute, the court found "[t]he character of the premises envisioned by the recreational-user statute involves 'the true outdoors'."

Most of the recreational activities enumerated in R.C. 1533.18(B) are generally conducted in "the wide open spaces," such as parks or wilderness tracts... Recreational premises typically include elements such as land, water, trees, grass, and other vegetation...

The types of recreational activities that qualify as a recreational use are diverse. R.C. 1533.181(B) lists hunting, fishing, trapping, camping, swimming, operating a snowmobile, all-purpose vehicle, or four-wheel-drive motor vehicle, and "other recreational pursuits" as examples of the types of activities contemplated by the statute.

That being said, the court found the "property need not be completely natural" to "qualify for recreational user immunity," but the "essential character" of the land should still "fit within the intent of the statute":

For example, a softball field requires certain manmade elements, but those improvements do not change the essential character of the property so as to remove it from the protection of the statute. The property is still held open for public use for recreational purposes.

Further, the court noted that Ohio courts had "broadly construed" the term "other recreational

pursuits” in the state recreational use statute to include the following: sledding, horseback riding, watching others swim, motorcycle riding, using a swingset, riding a merry-go-round, riding a bicycle, and watching others play baseball.

NO DUTY, NO LIABILITY

As defined by the state supreme court, “a duty is a legal obligation that is owed or due to another and that needs to be satisfied.” Accordingly, the court acknowledged, “if there is no duty, no liability can follow.” In determining the applicable legal duty in this particular instance, the court emphasized the fact that the expressed language of the state recreational use statute provides “[n]o owner owes *any duty* to a recreational user to keep the premises safe for entry or use.” (*Emphasis of court.*)

The state supreme court, therefore, held “an owner cannot be held liable for injuries sustained during recreational use “even if the property owner affirmatively created a dangerous condition.” In so doing, the Ohio supreme court noted “[t]he determination of whether R.C. 1533.181 applies depends not on the property owner’s actions, but on whether the person using the property qualifies as a recreational user.”

In this particular instance, the state supreme court noted that Pauley was clearly a “recreational user” within the context of the state recreational use statute since he had “entered the park, free of charge, to go sledding.” Accordingly, the court found “the city owed him no duty to keep the premises safe.” Further, the court held and “the city’s alleged creation of a hazard on the premises does not affect its immunity.”

While noting “the injury was caused by a defect in the premises,” the state supreme court found “the railroad-tie-like object was embedded in a mound of dirt that was part of the park at the time Jeremy suffered his accident.” In the opinion of the state supreme court, “the presence of a railroad tie in a public park” did not change the park’s “essential character as a recreational space.”

If a railroad tie in a park did change the character of the park, in the opinion of the state supreme court, “property owners would be legally obligated to “make their property safe for entry and use in direct contravention of the plain language in R.C. 1533.181(A)(1).” In the opinion of the court, such an interpretation would be contrary to the clear language of the statute. The court, therefore, refused to “apply a judicially created doctrine” which would limit the applicability of the state recreational use statute. To do so, the court found “would conflict with the purpose of the recreational-user statute,” i.e., “to encourage owners of premises suitable for recreational pursuits to open their land to public use without fear of liability.” As characterized by the court, “[r]emoving the protection of immunity would undoubtedly cause property owners to restrict recreational use of their properties, or close them entirely, from fear of liability.”

Further, when the property was “viewed as a whole,” the court found the “essential character of the property” had not been altered to “something other than an outdoor recreation activities occur.” The state supreme court, therefore, concluded immunity under the state recreational use statute would not “fall away” based on the “purported defect” in this case, i.e., “an object

resembling a railroad tie.”

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... 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.

Having found “Pauley entered the park free of charge and engaged in the recreational activity of snow sledding on the date of his injury,” the state supreme court, therefore, held “the city was not liable for his injuries because it owes no duty to recreational users to ensure that the park is safe for entry or use.”

In response to any criticism that this decision “reaches a harsh result,” the state supreme court noted the traditional and appropriate role of judiciary was to defer to the stated terms of the state recreational use statute and “not create an exception by judicial fiat.”

[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.

The state supreme court, therefore, affirmed the judgment of the lower courts which had held the city was immune from any liability under the state recreational use statute.

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