Recreational User Immunity Overview: A Safe Haven for Political Subdivisions that Freely Open Their Lands for Recreational Use

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The Ohio Legislature provides public and private landowners with powerful immunities against tort claims by recreational users. Ohio's immunities are arguably among the most protective in the country, and a cornerstone of a political subdivision's defense when an injured recreational user files a lawsuit. These immunities are codified in R.C. Chapter 1533, or the Recreational User Act. The Legislature's purpose in passing these protections was to encourage owners of premises suitable for recreational pursuits to open their lands to public use without worry about liability. While these laws are broadly applied to immunize public entities to achieve this purpose, they are subject to limitations. The purpose of this article is to give an overview of Ohio recreational user law as it relates to political subdivisions and discuss a case pending in the Supreme Court of Ohio slated to further define the scope of that immunity.

Ohio political subdivisions own and maintain thousands of parks serving millions of people. In just the Cleveland metropolitan area, for example, there are more than 150 parks, playgrounds, and green spaces that are owned or maintained by the municipality's Department of Parks, Recreation and Properties. See www.city.cleveland.oh.us/CityofCleveland/ Home/Government/CityAgencies/ParksRecreationandProperties/ParksPlaygrounds (last visited October 13, 2015). The need for recreational immunity is related to the increasing desire of citizens to have recreational areas.

The recreational user immunity rule provides: 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. To satisfy what seems to be an ever-increasing need for recreational areas, the Legislature designed this bright-line rule to produce predictable results to achieve the legislative "purpose … 'to encourage owners of premises suitable for recreational pursuits to open their land to public use without worry about liability.' …" *LiCause v. City of Canton,* 42 Ohio St.3d 109, 537 N.E.2d 1298 (1989). This statutory law is unambiguous by design and has encouraged public–as well as private–landowners to open their properties free to the public for decades. Consequently, landowners are assured that legal gamesmanship in the courts will not impair the Statute's purpose or put doubt in their heads about whether they, in fact, do not have to "worry about liability."

Recreational User Immunity Provides Broad Immunity With Few Exceptions

If a person qualifies as a recreational user, the premises owner has no duty to the recreational user to keep the premises safe. R.C. 1533.181(A); *Ryll v. Columbus Fireworks Display Co., Inc.,* 95 Ohio St.3d 467, 2002-Ohio-2584, 769 N.E.2d 372, ¶15. A "recreational user" is defined as "a person to whom permission has been granted, without the payment of a fee or consideration to the owner … to enter upon premises to … engage in … recreational pursuits." R.C. 1533.18(B).

The Recreational User Statute provides:

> No owner …
>
> (1) [o]wes any duty to a recreational user to keep the premises safe for entry or use;
>
> (2) [e]xtends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use; [or]
>
> (3) assumes responsibility for or incurs liability for any injury to [a] person … caused by any act of a recreational user.

R.C. 1533.181(A)(1-3). The third prong is the least litigated but also provides a distinct immunity. While prohibiting liability claims from third persons injured by recreational users, the third prong (R.C. 1533.181(A)(3)) also applies to injuries caused by the recreational user himself. See *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St.3d 467, 2002-Ohio-2584 (applying R.C. 1533.181(A)(3) to the plaintiffs' own conduct, but ultimately concluding that the plaintiffs' "injuries were not 'caused by any act' of Daniel Ryll [the recreational user/plaintiff]. His only act was to be present.").

The Supreme Court of Ohio has repeatedly held that the Recreational User Act applies to premises owned by political subdivisions as well as the state of Ohio. *LiCause v. Canton* (1989), 42 Ohio St.3d 109, 537 N.E.2d 1298, at the syllabus, citing to *Johnson v. New London* (1988), 36 Ohio St.3d 60, 521 N.E.2d 793.

In determining whether immunity applies, courts must examine the "essential character" of the property. *Pauley v. Circleville,* 2013-Ohio-4541, ¶ 16, 137 Ohio St. 3d 212, 215, 998 N.E.2d 1083, 1087. The property must be held **open to the public** for **recreational use free of charge.** "To qualify for recreational user immunity, property need not be completely natural, but its essential character should fit within the intent of the statute." *Miller v. Dayton*, 42 Ohio St.3d 113, 114, 537 N.E.2d 1294. For instance, the fact that "a softball field requires certain man-made elements … do[es] not change the essential character of the property so as to remove it from the protection of the statute"—"[t]he property is still held for public use for recreational purposes." *Pauley* at ¶ 18.

Under the statutory fee exception, immunity does not exist if a fee is charged. This is the primary limitation that the Legislature has imposed on landowners. See *Pauley,* 137 Ohio St.3d 212, 2013-Ohio-4541, 998 N.E.2d 1083, ¶ 16 (for the recreational user immunity of R.C. 1533.181 to apply, "the property must be held open to the public for recreational use, free of charge"); *Moss v. Ohio Dept. of Natural Resources,* 62 Ohio St.2d 138, 404 N.E.2d 742 (1980), paragraph two of the syllabus ("A person is not a 'recreational user' … if he pays a fee … to enter upon 'premises' to engage in recreational pursuits").

The types of "recreational uses" that qualify as "recreational" are expansive under the Act: hunting, fishing, trapping, camping, swimming, operating a snowmobile, all-purpose vehicle, or four-wheel-drive motor vehicle, and "other recreational pursuits." R.C. 1533.181(B). Likewise Ohio courts have broadly interpreted the non-exclusive list of recreational pursuits to include sledding; horseback riding; watching others swim; motorcycle riding; using a swingset; riding a merry-go-round; riding a bicycle; and watching others play baseball. See *Pauley, supra* at ¶¶ 19-20, citing cases. But while recreational pursuits are broad, they are not without limitations. The Supreme Court has observed that pulling down a soccer goalpost or marching in a parade on a public street are not the types of activities envisioned by the recreational user immunity statute. (Id. at ¶ 20, citing *Fuehrer v. Westerville City School Dist. Bd. of Edn.,* 61 Ohio St.3d 201, 574 N.E.2d 448 (1991) and McGuire v. Lorain, 9th Dist. Lorain No. 10CA009893, 2011-Ohio-3887, 2011 WL 3426186 (Aug. 8, 2011)).

The Supreme Court of Ohio has also recognized an exception that it found implicit in the statute. *Ryll v. Columbus Fireworks Display Co.*, Inc., 95 Ohio St.3d 467, 2002-Ohio-2584. Under the "*Ryll* exception," if the injury is not related to or caused by the premises, then immunity will not apply, even if it occurs within a recreational area. In *Ryll,* the decedent had been killed by an exploding firework shell that was hurled at him at a Fourth of July celebration. The Supreme Court of Ohio concluded that the flying shrapnel was not part of the premises and, therefore, R.C. § 1533.181(A)(1) did not apply. *Id.* at 469. According to the court, the shrapnel, like a bullet from a gun, had nothing to do with the premises or legislature's elimination of the duty to keep the premises safe. The decedent in *Ryll* was merely standing as a spectator when he was hit with a firework.

The Supreme Court of Ohio's deference to the Legislative grant of recreational immunity is exemplified in the high court's most recently decided case on the topic. *Pauley v. Circleville,* 2013-Ohio-4541, ¶ 16, 137 Ohio St. 3d 212, 215, 998 N.E.2d 1083, 1087. In *Pauley,* a teenager was sledding in a city park when he was paralyzed after he hit a railroad-tie-like object on a mound of dirt he was sledding on. Notwithstanding the tragic injury, the high court found the City of Circleville immune under the Recreational User Statute because it had no duty to a recreational user to ensure the park was safe for entry or use. The high court explained what it believed critics may characterize as a "harsh result":

> [The] 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

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> 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.

Id. at ¶ 38. In other jurisdictions with less restrictive recreational user laws, other state's legislatures have legislatively created "willful and malicious" exceptions or other limitations to recreational user immunity. See, e.g., Utah Code Section 57-14-3; see further e.g., Colorado Revised Statute Section 33-41-104(1)(a)(no limitation of liability for "willful and malicious failure to guard or warn against a known dangerous condition, use, structure, or activity likely to cause harm."); New York Consolidated Laws Section 9-103(2)(a)(same). The Ohio Legislature has not enacted these types of exceptions. The Supreme Court of Ohio has been careful to apply the language and intent of the statute, leaving the expansion or contraction of the immunity to the Legislature.

A Recreational User Case to Watch

The "*Ryll* exception" is up for review before the Supreme Court of Ohio in *Combs v. Ohio Dep't of Natural Res.,* 2015-Ohio-1353, 142 Ohio St. 3d 1421, 28 N.E.3d 121(accepted on the proposition, "R.C. 1533.181(A) immunizes landowners from liability for injuries to recreational users arising from the condition and maintenance of the land"). In *Combs,* a plaintiff-recreational user visited a state park to go fishing. As he walked to his fishing spot, the recreational user was struck in the right eye with a rock. The rock had been launched into the air by a mower being operated by an Ohio Department of Natural Resources (ODNR) employee. The employee was mowing along the edge of the lake in the vicinity of riprap, which is rock placed along a shoreline to prevent erosion. Apparently, the mower blade struck a piece of riprap, throwing it into the air and injuring Combs' eye. Combs sued for the negligent use of the mower. The ODNR raised the recreational user statute as a defense. The trial court granted summary judgment in favor of ODNR because the plaintiff-fisherman was a recreational user injured on ODNR's premises.

The Tenth District Court of Appeals reversed. The Tenth District found that, "The operative question is whether Combs is seeking to hold ODNR liable for breaching a duty to 'keep the premises safe for entry or use.'" See e.g., *Combs v. Ohio Dep't of Natural Res.,* 2014-Ohio-4025, 19 N.E.3d 596 (10th Dist.). There was no dispute that Combs was a recreational user. The Tenth District relied on *Ryll,* finding that "the flying rock that injured Combs is akin to the flying shrapnel that injured the decedent in *Ryll.* Neither the rock nor the shrapnel constituted a defect in the premises." (*Id.* at ¶ 11.)

A distinguishing fact between *Ryll* and *Combs* is that in the latter case the injury was caused by the premises (the rip rock), where in the former case the injury was caused by a firework that was not part of the premises. Further, *Combs* has an added wrinkle: the state employee was maintaining the premises for recreational use. It would seem that holding a land owner liable for maintaining the premises (in *Combs,* mowing the recreational area to provide access to the lake for fishing) would have the opposite effect that the Legislature intended, and make land potentially more unsafe by dissuading landowners from maintaining their lands. The Supreme Court also has recently held "The 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." See *Pauley,* 2013-Ohio-4541 ¶ 21. In *Combs,* like *Pauley,* there was no dispute that the fisherman-plaintiff was a recreational user. That fisherman was on recreational property without paying a fee and was engaged in a recreational pursuit. There is no liability under the Statute, even when a "property owner affirmatively created a dangerous condition." *Pauley* at ¶ 21.

Ultimately, the Legislature must create an exception to immunity, not the courts. Certainly, the Legislature has the ability to craft an exception to recreational immunity for willful and malicious — or even negligent — failure to guard or warn against a known dangerous condition or activity likely to cause harm. While other states' legislatures have created similar exceptions, the Ohio Legislature has not.

Conclusion

In Ohio, Recreational User Immunity remains a powerful defense for political subdivisions–and landowners in general–to avoid liability. For political subdivisions, the denial of recreational user immunity can even be immediately appealed under R.C. 2744.02(C), which makes the denial of immunity to a political subdivision final, unlike other interlocutory orders. The recreational user immunity analysis is straightforward by design, and presents an easily applied rule. While plaintiffs have repeatedly tried to

erode the protections of recreational user immunity through the courts, the Supreme Court of Ohio has steadfastly protected the Legislative intent of the statute, leaving it to the General Assembly to craft exceptions to this bright-line rule.

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