[Cite as *Zornes v. Ohio Dept. of Natural Resources*, 2020-Ohio-2875.]

MARGIE R. ZORNES, Co-Admr., etc., et al. Plaintiffs v. OHIO DEPARTMENT OF NATURAL RESOURCES Defendant	Case No. 2017-00553JD Judge Patrick M. McGrath Magistrate Anderson M. Renick ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On January 10, 2020, defendant, Ohio Department of Natural Resources (ODNR), filed a motion for summary judgment pursuant to Civ.R. 56(B). On January 24, 2020, plaintiffs filed a response. On February 7, 2020, plaintiffs moved the court for leave to file a sur-reply, which is GRANTED, instanter.

{¶2} According to the complaint, plaintiffs' decedents drowned while kayaking on the Sandusky River as a result of the hydraulic current created by the Waterworks Dam. Plaintiffs bring claims of premises liability; negligent performance of a proprietary function; willful, wanton, and/or reckless performance of a governmental function; nuisance; wrongful death; and gross negligence—asserting that ODNR failed to remedy the hazard presented by the dam or sufficiently warn the public of the danger it presented. In its motion for summary judgment, ODNR argues that it owed no duty to plaintiffs' decedents because it does not own or control the Waterworks Dam or that portion of the Sandusky River. In the alternative, ODNR argues that it is protected by recreational user immunity.

{¶3} ODNR's motion for summary judgment is now before the court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4. For the reasons set forth below, ODNR's motion for summary judgment will be granted.

Civ.R. 56(C) states, in part, as follows:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶4} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A "movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C)." *Id.* at 292. The court must resolve all doubts and construe the evidence in favor of the nonmoving party. *Pilz v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-240, 2004-Ohio-4040, ¶ 8. Further, "[i]f the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Keaton v. Gordon Biersch Brewery Rest. Group*, 10th Dist. No. 05AP-110, 2006-Ohio-2438, ¶ 1 .

{¶5} When a moving party makes a properly supported motion for summary judgment, the adverse party may not rest upon the mere allegations or denials in the pleadings but "by affidavit or as otherwise provided in [Civ.R. 56] must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond,

summary judgment, if appropriate, shall be entered against the party." Civ.R. 56(E). In seeking and opposing summary judgment, parties must rely on admissible evidence and evidentiary material as provided in Civ.R. 56(E). *Keaton* at ¶ 18.

{¶6} On June 21, 2015, Lewis, Tina, and Billy Zornes were kayaking on the Sandusky River. They had not previously navigated that section of the river. They came upon the Waterworks Dam, a low-head dam that spans the banks of the river located in the City of Upper Sandusky. Plaintiffs alleges that the low-head dam creates a dangerous current.

{¶7} Lewis traversed the dam in his kayak. However, his kayak tipped, and the water current pulled Lewis underwater. Billy and Tina paddled to the side of the river and disembarked before the dam. Billy then reentered the water in an attempt to rescue Lewis, but Billy was also ensnared by the current. Both Lewis and Billy drowned.

{¶8} Plaintiff asserts that ODNR failed to remedy the hazard presented by the dam or sufficiently warn the public of the danger it presented. In a connected action against the City of Upper Sandusky, Wyandot County and the Wyandot County Commissioners, and Crane Township and the Crane Township Trustees regarding the events that are the subject of this case, plaintiffs obtained a settlement from one or more of the defendants.

{¶9} In ODNR's motion for summary judgment, it argues that it owed no duty to plaintiffs' decedents because it does not own or control the Waterworks Dam or that portion of the Sandusky River. In the alternative, defendant argues that if defendant did own the dam, it would be protected by recreational user immunity. In their memorandum in opposition, plaintiffs argue that ODNR owns the Waterworks Dam and there is thus a genuine issue of material fact as to whether ODNR bears responsibility for the fatalities.

{¶10} Regarding ownership of the dam, both parties submitted documents in support of their respective positions. However, the "expert report" that was attached to

an affidavit of counsel for defendant is not evidence that can be considered under Civ.R. 56. Furthermore, neither the depositions of the former sheriff and the former detective of the City of Upper Sandusky, nor the deposition of the mayor of Upper Sandusky, are sufficient to establish which entity had either ownership of the dam or jurisdiction of the portion of the river in question.

{¶11} Defendant contends that even if defendant did exert control over the Sandusky River or the Waterworks Dam, defendant would be immune from liability via Ohio's recreational user statute. The court agrees.

That statute, R.C. 1533.181, states, in part:

> (A) 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;

"Premises" and "recreational user" are defined in R.C. 1533.18 as follows:

> (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.

Pursuant to the enactment of R.C. 2743.02(A), the definition of premises in R.C. 1533.18(A) effectively encompasses state-owned lands. *Moss v. Dept. of Natural Resources*, 62 Ohio St.2d 138, 454 N.E.2d 564 (1980).

{¶12} "In determining whether a person is a recreational user under R.C. 1533.18(B), the analysis should focus on the character of the property upon which the injury occurs and the type of activities for which the property is held open to the public." *Miller v. City of Dayton*, 42 Ohio St.3d 113, 537 N.E.2d 1294 (1989), paragraph one of the syllabus. "[T]he presence of man-made improvements on a property does not remove the property from statutory protection." *Id*. at 114. "The significant query is whether such improvements change the character of the premises and put the property outside the protection of the recreational-user statute." *Id*. at 114-115. In *Miller*, the presence of a man-made baseball diamond did not alter the character of a park such that the recreational user statute would not apply. *Id*. at 115.

{¶13} A man-made "improvement" to recreational premises does not need to "improve" the premise in a recreational sense in order for the owner of the premise to retain its recreational user immunity. In *Pauley*, a child sledded down a snow-covered pile of topsoil that was being stored in a park and hit a railroad tie that was sticking out of the pile, rendering him a quadriplegic. *Pauley v. City of Circleville*, 137 Ohio St.3d 212, 2013-Ohio-4541, 998 N.E.2d 1083. The appellants in *Pauley* argued that if a property owner modified his or her property to create a man-made hazard that does not promote or preserve the recreational character of the property, immunity should not apply. However, the Court held that a property owner "cannot be held liable for injuries sustained during recreational use 'even if the property owner affirmatively created a dangerous condition.'" *Id*. at ¶ 21, quoting *Erbs v. Cleveland Metroparks Sys.*, 8th Dist. Cuyahoga No. 53247, 1987 Ohio App. LEXIS 10234, 5 (December 24, 1987).

{¶14} There is no question that the Sandusky River constitutes recreational premises and plaintiffs' decedents did not pay a fee, to ODRC or anyone else, in order

to kayak upon the river. Indeed, it's clear that plaintiffs do not dispute the recreational character of the river because the map of the river submitted by plaintiffs shows that that portion of the river was suitable for and held open to the public for boating/recreational purposes. (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Exhibit 1.)[1] There is also no dispute that the decedents had permission to kayak upon the portion of the river in question.

{¶15} Although plaintiffs contend that the construction of the low-head dam changes the character of that part of the river, making it inherently dangerous and, consequently, not suitable for recreational use, the only authority plaintiffs have offered for that contention is *Huffman v. City of Willoughby*, 11th Dist. Lake No. 2007-L-040, 2007-Ohio-7120. The court notes that in *Huffman*, the trial court was ruling on a motion to dismiss and, accordingly, merely accepted as true that allegation in the complaint. "[T]he allegations of the complaint, * * * have no binding effect on the merits of the case, which may only be determined by the evidence." *Id*. at ¶ 51. *Huffman* does not stand for the proposition that a low-head dam changes the character of that part of the river, making it inherently dangerous and, consequently, not suitable for recreational use.

{¶16} Even if the property owner affirmatively created a dangerous condition the property owner "cannot be held liable for injuries sustained during recreational use." *Pauley, supra*, at ¶ 36 ("the property [should] be 'viewed as a whole,' and only when the 'essential character' of the property has been altered to something other than an outdoor property on which outdoor recreational activities occur does immunity fall away").

{¶17} The evidence before the court shows that the river was suitable for and held open to the public for recreational purposes. Accordingly, the court concludes that the recreational user statute applies. Therefore, even assuming that ODNR owned the

[1]This exhibit is not considered evidence under Civ.R. 56 because it was not incorporated in an affidavit or deposition.

Waterworks Dam, and controlled that portion of the Sandusky River, ODNR owed no duty to plaintiffs' decedents to keep the premises safe for use.

{¶18} Plaintiffs assert in their complaint that ODNR had authority pursuant to R.C. 1501.22 to erect and maintain markers to warn boaters of dams on all waters of the state. However, R.C. 1501.22 states that "[t]he director of natural resources *may* erect and maintain suitable markers to warn boaters of dams * * *." (Emphasis added.) It does not state that the director "shall" erect dams. The authority to erect a warning marker does not impart upon ODNR a duty to warn the public of dams. *See Dorrian v. Scioto Conservancy District*, 27 Ohio St.3d 102, 271 N.E. 3d 834 (distinguishing between "may" and "shall" in statutory construction). Plaintiffs have not identified, nor has the court found, any other source of a duty for ODNR or the state to mitigate or warn of the danger presented by a low-head dam.

{¶19} Construing the evidence most strongly in plaintiffs' favor, the court finds that there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law. Therefore, defendant's motion for summary judgment is GRANTED. Judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its entry upon the journal.

PATRICK M. MCGRATH
Judge

Filed March 10, 2020
Sent to S.C. Reporter 5/8/20