[Cite as *Kerr v. Logan Elm School Dist.*, 2014-Ohio-5838.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

BELINDA KERR, ET AL., :

Plaintiffs-Appellants, : Case No. 14CA6

vs. :

LOGAN ELM SCHOOL DISTRICT, : DECISION AND JUDGMENT ENTRY
OHIO,

: Defendant-Appellee.

APPEARANCES:

COUNSEL FOR APPELLANTS: Terry V. Hummel, 115 West Main Street, Suite 100, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: Matthew John Markling, Patrick Vrobel, and Sean Koran, McGown & Markling Co., L.P.A., 1894 North Cleveland-Massillon Road, Akron, Ohio 44333

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-24-14

ABELE, P.J.

{¶ 1} This an appeal by Belinda and James Kerr, plaintiffs below and appellants herein, from a Pickaway County Common Pleas Court judgment that granted the motion of Logan Elm School District, defendant below and appellee herein, for judgment on the pleadings on the Kerrs' personal-injury suit for injuries Belinda Kerr suffered while a spectator at a softball game on school property.

{¶ 2} The Kerrs assign the following error for review:

> "THE TRIAL COURT ERRED IN SUSTAINING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS."

FACTS

{¶ 3} On December 31, 2013, the Kerrs filed a complaint against the Logan Elm School District and alleged that (1) Belinda Kerr was a spectator at her daughter's softball game on property the school district owned and operated, and (2) during the game, a windstorm blew the roof off a dugout and struck Kerr, resulting in injuries to her head and chest. According to the Kerrs, the school district negligently, willfully, wantonly and recklessly disregarded public safety by (1) constructing the dugout in an unsafe and unsuitable manner for public use, (2) failing to regularly and properly inspect the dugout, (3) failing to maintain and repair the dugout, (4) failing to warn of the unsafe condition of the dugout, and (5) failing to restrict the use of the field during unsafe conditions or until repairs were made. Belinda Kerr asserted that she suffered her injuries as a direct and proximate result of the school district's conduct, and that her husband, James Kerr, suffered a loss of consortium. The Kerrs sought compensatory damages, punitive damages, attorney fees, interest and costs.

{¶ 4} The school district answered and filed a motion for judgment on the pleadings. In the motion the appellee claimed, inter alia, that it is immune from liability under R.C. 1533.181, the recreational-user statute. The trial court granted the motion for judgment on the pleadings after it determined that the school district is immune from liability under R.C. 1533.181 because Belinda Kerr was a recreational user engaged in a recreational activity when she was injured while watching her daughter's softball game. This appeal followed.

LAW AND ANALYSIS

STANDARD OF REVIEW

{¶ 5} In their sole assignment of error, the Kerrs assert that the trial court erred by granting the school district's motion for judgment on the pleadings.

{¶ 6} Under Civ.R. 12(C), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "Because the review of a decision to dismiss a complaint pursuant to Civ.R. 12(C) presents only questions of law, * * * our review is de novo." *Rayess v. Educational Comm. for Foreign Med. Graduates*, 134 Ohio St.3d 509, 2012-Ohio-5676, 983 N.E.2d 1267, ¶ 18. "[J]udgment on the pleadings is appropriate if, after construing all material factual allegations set forth in the complaint in favor of the nonmoving party, together with all reasonable inferences, the trial court finds, beyond doubt, that the nonmoving party can prove no set of facts that entitle it to relief." *See Quality Car & Truck Leasing, Inc. v. Pertuset*, 4th Dist. 11CA3436, 2013-Ohio-1964, ¶ 4, citing *Corporex Dev. & Constr. Mgt., Inc v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701, ¶ 2; *see also Am. Family Ins. Co. v. Hoop*, 4th Dist. Adams No. 13CA983, 2014-Ohio-3773, ¶ 31.

RECREATIONAL-USER IMMUNITY

{¶ 7} The trial court granted the school district's motion for judgment on the pleadings based on its holding that the district is immune from the Kerrs' personal-injury claims by virtue of recreational-user immunity statute. Under R.C. 1533.181(A)(1), "[n]o owner, lessee, or occupant of premises * * * [o]wes any duty to a recreational user to keep the premises safe for entry or use." "Consequently, an owner cannot be held liable for injuries sustained during recreational use 'even if the property owner affirmatively created a dangerous condition.' " *Pauley v. Circleville*, 137 Ohio St.3d 212, 2013-Ohio-4541, 998 N.E.2d 1083, ¶ 21, quoting *Erbs v. Cleveland Metroparks Sys.*, 8th Dist. Cuyahoga No. 53247, 1987 WL 30512 (Dec. 24, 1987), *2.

{¶ 8} To determine whether the school district is entitled to the recreational-user immunity to shield it from the Kerrs' claims, we first note that "[p]remises" is defined in R.C. 1533.18(A) as "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." Although this provision appears to limit the reach of the recreational-user immunity to private owners, the Supreme Court of Ohio has held that " '[p]remises' under R.C. 1533.18(A) includes land owned by municipalities and the state." *Pauley* at ¶ 15, citing *LiCause v. Canton*, 42 Ohio St.3d 109, 110, 537 N.E.2d 1298 (1989). More particularly, "as a political subdivision of the state * * *, the property of school districts meets the definition of 'premises' under the statute." *Fuehrer v. Bd. of Edn. of the Westerville City School Dist.*, 61 Ohio St.3d 201, 203, 574 N.E.2d 448 (1991).

{¶ 9} Next, a "[r]ecreational user" for purposes of R.C. 1533.181 "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, * * * to enter upon the 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 determining whether immunity applies, courts examine the essential character of the property" and "the property must be held open to the public for recreational use, free of charge." *Pauley* at ¶ 16, citing *LiCause* at the syllabus ("A person who enters or uses municipal land which is held open to the general public free of charge for recreational pursuit is a recreational user"). "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. Thus, 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. "The types of recreational activities that qualify as recreational use are diverse" and include "watching others play baseball." *Id.* at ¶ 19, citing *Buchanan v. Middletown*, 12th Dist. Butler No. CA86-10-156, 1987 WL 16062 (Aug. 24, 1987).

{¶ 10} Therefore, recreational-user immunity may apply to the Kerrs' personal-injury claims because the school district owns the premises upon which the alleged injuries occurred and Kerr was engaged in what would generally be regarded as recreational use when she watched her daughter play softball. Nevertheless, as the Kerrs argued, both in the trial court in their memorandum in opposition to the school district's motion for judgment on the pleadings and in

their brief on appeal, that she could ultimately establish that "she paid a fee or that a fee was paid on her behalf for her and her daughter to use the softball field in question."

{¶ 11} The school district does not deny that a person is not a recreational user when the person pays a fee to enter its property to watch a softball game. *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"); *Opheim v. Lorain*, 94 Ohio App.3d 344, 347, 640 N.E.2d 897 (9th Dist.1994), quoting *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' " [emphasis sic]). Instead, the school district argues that the trial court's judgment is appropriate because the Kerrs did not include this specific allegation in their complaint and that their belief does not constitute an operative fact that the trial court could consider in its Civ.R. 12(C) determination. Similarly, the trial court's judgment concluded that Belinda Kerr "was a recreational user engaged in recreational activity as defined in R.C. 1533.18(B)" and that the school district "is not liable for her injuries because it owes no duty to recreational users and is, thus, afforded the immunity protection" of R.C. 1533.181 because the Kerrs' "[c]omplaint does not allege that she paid a fee to be a spectator."

{¶ 12} In so holding and stating, we believe that the view of the trial court and the appellee do not comply with the concept of notice pleading. Because "Ohio is a notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 29; *Ogle v. Ohio Power Co.*, 180 Ohio App.3d 44, 2008-Ohio-7042, 903

N.E.2d 1284, ¶ 5 (4th Dist). Under the Ohio Rules of Civil Procedure, a complaint need only contain "a short and plain statement of the claim showing that the party is entitled to relief." Civ.R. 8(A)(1); *Beretta* at ¶ 29. Consequently, "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss [or for judgment on the pleadings]." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063.

{¶ 13} In the case sub judice, after we construe the facts and all reasonable inferences of their complaint in the Kerrs' favor, we believe that a set of facts could exist that could entitle them to relief for their alleged injuries that would render inapplicable the school district's affirmative defense of the R.C. 1533.181 recreational-user immunity provided. Here, Belinda Kerr asserts that she paid a fee to enter the school property, either to watch her daughter's softball game or for her daughter to use the facility. These facts could be consistent with being a spectator. In our view, holding that the Kerrs had to specifically allege facts to disprove the affirmative defense of recreational-user immunity contravenes the Rules of Civil Procedure. To be sure, "despite the general rule that a plaintiff or relator is not required to prove his or her case at the pleading stage and need only give reasonable notice of the claim, '[i]n a few carefully circumscribed cases, [the Supreme Court of Ohio] has modified the standard for granting a motion to dismiss [or a motion for judgment on the pleadings] by requiring that the plaintiff plead operative facts with particularity.' " *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 109-110, 647 N.E.2d 799 (1995), quoting *York*, 60 Ohio St.3d at 145, 573 N.E.2d 1063, and citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 532 N.E.2d 753 (1988) (employee's intentional tort claim against employer), and *Byrd v. Faber*, 57 Ohio

St.3d 56, 565 N.E.2d 584 (1991) (negligent hiring claim against religious institution); *see also* S.Ct.Prac.R. 12.02(B)(1) (requiring complaints in original actions filed in the Supreme Court to contain a "specific statement of facts upon which the claim for relief is based"); Civ.R. 9(B) (requiring for claims of fraud or mistake that "the circumstances constituting fraud or mistake shall be stated with particularity"). None of the exceptions to the general rule of notice pleading is applicable here.

{¶ 14} Therefore, we believe that the trial court erred by granting the Civ.R. 12(C) motion for judgment on the pleadings. Upon our de novo review, after we construe all material factual allegations set forth in the complaint together with all reasonable inferences, in favor of the Kerrs, it does not appear beyond doubt that the Kerrs can prove no set of facts that entitle it to relief. That is, it is not beyond doubt at the pleading stage that the school district is entitled to the recreational-user immunity set forth in R.C. 1533.181 on the Kerrs' claims.[1] We therefore sustain the Kerrs' assignment of error. We hasten to add, however, that our opinion should not be construed as a comment on the actual merits of the recreational user-immunity issue after the facts are fully developed and analyzed. In other words, the parties may choose to pursue a Civ.R. 56 summary judgment if the evidentiary materials indicate that it is warranted.

CONCLUSION

1We recognize that in the Kerrs' appellate brief, counsel states that Belinda Kerr "also does not dispute that she was a recreational user within the meaning of the statute." But the argument then proceeds to emphasize that the Kerrs challenge the finding of recreational-user immunity because Belinda Kerr "can prove that she paid a fee or that a fee was paid on her behalf for her and her daughter to use the softball field in question." Under these circumstances, the Kerrs are not conceding that she is a recreational user as defined in R.C. 1533.18(B), so as to make the immunity in R.C. 1533.181(A) applicable. Consequently, we overlook what can be fairly characterized as the Kerrs' inadvertent misstatement in their brief.

{¶ 15} Therefore, having overruled the Kerrs' assignment of error, we hereby reverse the trial court's judgment and remand the cause for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

Hoover, J.: Dissenting.

{¶ 16} I respectfully dissent from the principal opinion to reverse the judgment of the trial court.

{¶ 17} The Logan Elm Local School District is entitled to judgment on the pleadings pursuant to Ohio's Recreational User Statute.

{¶ 18} The Recreational User Statute, R.C 1533.181 provides:

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

{¶ 19} No question exists that the softball field at issue and its dugout is owned by the Logan Elm Local School District and that the property constitutes premises for the purposes of the recreational user statute. The issue then before this Court is whether Belinda Kerr as a spectator, not her daughter who was participating in the softball game, is a recreational user.

{¶ 20} R.C. 1533.18(B) defines a "recreational user" as:

> (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.

{¶ 21} The Kerrs argued to the trial court in their memorandum in opposition to the Logan Elm Local School District's motion for judgment on the pleadings (hereinafter referred to as "memorandum") that they could ultimately establish that "she [Belinda Kerr] paid a fee or that a fee was paid on her behalf for her and her daughter to use the softball field in question." The Kerrs further state in their appellate brief, "Evidence that Plaintiff did pay a fee to participate at the softball game is not in any way inconsistent with the allegations contained in Plaintiff's Complaint." Belinda Kerr alleges in her complaint that she was a spectator at a softball game in which her daughter was participating. Kerr never asserted in her memorandum or in the complaint that she paid a fee to enter the premises as a spectator to watch her daughter participate. Kerr seems to confuse the issue that she was a participant versus a spectator in her memorandum and in her appellate brief.

{¶ 22} Softball league participation fees do not necessarily constitute a "fee or consideration *to enter* upon 'premises'." "The mere fact that a fee was paid to a sponsor does not mean that a fee was paid to the municipality 'to *enter* upon "premises" to engage in recreational pursuits.' " *Boggs v. Bowling Green*, 6th Dist. Wood No. WD–03–008, 2003–Ohio–4093, ¶ 7, quoting *Moss v. Dept. of Natural Resources*, 62 Ohio St.2d 138, 404 N.E.2d 742 (1980), at paragraph two of the syllabus.

{¶ 23} In *Opheim v. Lorain*, 94 Ohio App.3d 344, 640 N.E.2d 897 (9th Dist.1994), our colleagues in the Ninth District held that the Recreational User Statute applied where spectators

at a game used the park for free notwithstanding the fact that the youth baseball league paid a fee to the city to use the park. In *Opheim*, a spectator at a baseball game was injured when a limb from a tree at the park fell on the spectator's head. *Id*. at 345. The spectator sued Lorain and the Lorain Department of Parks and Recreation alleging negligence in not properly maintaining the tree on the park property. *Id*. The trial court granted Lorain and the Lorain Department of Parks and Recreation's motion for judgment on the pleadings. *Id*. The trial court held that R.C.1533.181, the "recreational user" statute, exempted the defendants from liability, as the spectator was a recreational user of the park. *Id*. The trial court held that the defendants owed the spectator no duty of care. *Id*. The Ninth District Court of Appeals affirmed the judgment of the trial court and stated as follows:

> Several courts have held that spectators at athletic events are recreational users of property. *LiCause v. Canton* (1989), 42 Ohio St.3d 109, 537 N.E.2d 1298; *Rankey v. Arlington Bd. of Edn.* (1992), 78 Ohio App.3d 112, 116-117, 603 N.E.2d 1151, 1154; *Dowdell, supra.* Even though Rachel could be considered a recreational user of the park because she was a spectator at the baseball game, she argues that, because the Little League paid a fee to use the baseball field, she was not a recreational user under R.C. 1533.18(B). We disagree.
>
> "A person is not a 'recreational user' * * * if he pays a fee * * * *to enter* upon 'premises' to engage in recreational pursuits." (Emphasis *sic*.) *Moss v. Dept. of Natural Resources* (1980), 62 Ohio St.2d 138, 16 O.O.3d 161, 404 N.E.2d 742, paragraph two of the syllabus. In this case, Rachel did not pay a fee to enter the premises. Any member of the public could enter the park, free of charge, to enjoy the baseball game. The fact that "fees were charged to certain leagues * * * does not change the fact that individual 'persons' were never charged for admission to the park." *Dowdell, supra.* See, also, *Miller v. Dayton* (1989), 42 Ohio St.3d 113, 115-116, 537 N.E.2d 1294, 1297
>
> *Id*. at 347.

{¶ 24} Even construing the allegations along with all reasonable inferences to be drawn therefrom in the light most favorable to the appellants, a set of facts does not exist that could

entitle them to relief. The school district's affirmative defense of R.C. 1533.181 recreational-user immunity would still apply. The principal opinion infers that Kerr could have paid a fee to enter the school property, either to watch her daughter's softball game or for her daughter to use the facility; however, Kerr never stated in her memorandum that she paid a fee to enter the school property to watch the softball game. She only alleges in her memorandum that "Plaintiff believes, however, that she can prove that she paid a fee or that a fee was paid on her behalf for her and her daughter to use the softball field in question." The trial court cannot be expected to have made the inference that Belinda Kerr paid a fee to enter the premises as a spectator from the information that was presented to it in the complaint and the memorandum.

{¶ 25} Accordingly, I respectfully dissent. I would affirm the judgment of the trial court.[2]

[2]I would also affirm the judgment of the trial court with respect to the loss of consortium claim presented in the complaint.

JUDGMENT ENTRY

It is hereby ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J.: Concurs in Judgment & Opinion
Hoover, J.: Dissents with Dissenting Opinion

For the Court

BY: _____
Peter B. Abele
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.