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Portage County Bd. of Comm'rs v. City of Akron, 808 N.E.2d 444 (Ohio Ct. App. 2004)

## OHIO

**Portage County Bd. of Comm'rs v. City of Akron, 808 N.E.2d 444 (Ohio Ct. App. 2004)** (upholding the trial court's statutory interpretation that the state's grant of riparian rights to the City was limited to the rights the state owned and reversing the opening of a privately owned and non-navigable lake to public access, based on the lake's potential capacity for recreational boating).

In 1911 the Ohio General Assembly passed a statute granting the City of Akron ("Akron") the state's legal rights to the waters of the Cuyahoga River ("Cuyahoga") and eminent domain to appropriate land necessary for a water system for Akron's inhabitants. With this authority, Akron, located in Summit County, obtained land in Portage County and proceeded to build a dam across the Cuyahoga on this land. Akron's dam created Lake Rockwell from which Akron supplied its residents with drinking water for decades. Until recently, enough water ran downstream from the dam to allow the neighboring cities sufficient water use. However, due to population growth in Portage County, the amount of treated sewage released into the Cuyahoga increased, generating problems related to low water level and high pollutants.

This dispute arose from the need for more water to dilute the pollutants. Portage County Board of Commissioners and other neighboring communities ("Portage") brought an action against Akron in Portage County Court of Common Pleas for unreasonable use of water and nuisance. They also sought declaratory judgment concerning all parties' legal rights stemming from the 1911 statute. The trial court found in favor of Akron regarding the reasonableness of its use, but found for Portage regarding Akron's rights under the 1911 statute. The trial court denied Akron's right to sell water to anyone outside its city limits, to riparian rights on the "middle" Cuyahoga River, and to unlimited use of the Cuyahoga. Finally, the trial court granted relief to Portage's public access claim and ordered Akron to allow non-motorized boats on Lake Rockwell. Akron appealed to the Ohio Court of Appeals, Eleventh Appellate District, Portage County, assigning twenty-five errors to the trial court's decision.

The first group of asserted errors concerned the trial court's interpretation of the 1911 statute. The trial court held the General Assembly granted Akron only those rights that the state itself had at the time. Furthermore, under Ohio law, rights to river water were vested in those owning property abutting the rivers. Therefore, because the state did not have ownership of all the land abutting the Cuyahoga, it could not grant Akron absolute control of the Cuyahoga. The court agreed with the trial court's interpretation of the plain language of the statute. The court reiterated the state could only grant what it had control or

ownership of at the time of the grant or the 1911 statute. Accordingly, the court limited Akron's asserted right to the middle of the Cuyahoga River and restricted Akron's right to take unrestricted volumes of river water and upstream water to the confines of the state's prior ownership.

However, the court agreed with Akron's argument that the trial court misinterpreted the language in the W.S. Kent Deed, assignment of error number eleven. W.S. Kent quitclaimed his riparian rights to Akron, but conveyed the land to the City of Kent. The trial court interpreted the language in the deed, which stated, "expressly reserving...the right to use and enjoy...all waters...not made use of by the City of Akron," to mean W.S. Kent had not conveyed exclusive rights to Akron; rather, he had created a servitude. However, the court concluded the plain language of the deed did not create servitude. The court focused on the first portion of the deed where W.S. Kent released all rights in the water and held Akron's riparian rights that the deed conveyed were binding on the City of Kent.

In the next series of alleged errors, Akron asserted several theories barring Portage's claims, including failure to seek timely remedy, doctrine of laches, *res judicata*, and statute of limitations on tort claims. The court rejected each claim as lacking merit for the following reasons respectively: (1) Portage had several remedies available for protection of its riparian rights; (2) the laches defense was not applicable; (3) Akron's use of the water did not constitute the same transaction or occurrence disputed in the 1913 suit; and (4) Portage's injuries, the basis for the tort claims, were ongoing and not limited to the construction of the dam.

Next, the court examined the trial court's decision to grant public access to Lake Rockwell for recreational purposes. The court stated, under federal law, the concept of navigability was based on whether the water had ever been or was currently used for interstate commerce. The court concluded, since the Cuyahoga had never been used for commerce, Lake Rockwell was non-navigable. The court then acknowledged that the more expansive Ohio common law construction of navigability allowed courts to consider the availability of recreational boating in determining the navigability of a body of water. However, the court held the capacity to boat constituted but one factor, rather than grounds for making Lake Rockwell open to the public. Thus, the court determined Lake Rockwell was a non-navigable, privately owned body of water that Akron could keep from the public at its discretion.

Finally, the court discussed Portage's cross-appeal, finding merit in Portage's argument that the trial court failed to issue declaratory relief concerning the amount of water Akron released. Although the trial court found Akron's use of the water was reasonable, it assumed Akron would continue to release 5.0 million gallons of water per day. The

court noted without a court-imposed requirement, nothing prevented Akron from decreasing its water release.

In conclusion, the court upheld the trial court's interpretation of the 1911 statute, reversed the trial court's judgment regarding the W.S. Kent deed, which granted full riparian rights to Akron, and vacated the trial court's judgment regarding public access to Lake Rockwell. The court remanded the case to the trial court to render judgment in favor of Akron on the Lake Rockwell public access issue and to make a declaration in favor of Portage as to Akron's water release requirement.

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## SOUTH CAROLINA

**White's Mill Colony, Inc. v. Williams, 609 S.E.2d 811 (S.C. Ct. App. 2005)** (adopting the common law rule regarding who controls the surface of private, man-made, and non-navigable waters).

The South Carolina Court of Appeals reviewed a special referee decision denying Williams and other adjacent landowners both public and private access rights to White's Mill Pond. The pond is a man-made, essentially isolated body of water. White's Mill Colony ("Colony") held title to the land north and east of the pond and at least a substantial portion of the bed of the pond itself. The Colony brought suit against Williams and other adjacent landowners seeking exclusive use of the pond and damages for trespass onto the Colony's land.

The court first addressed whether the adjacent landowners had a right of public access to the pond. The South Carolina Constitution made all navigable waters of the state public highways, and guaranteed a public right of access. Navigable waters included any waterway with the capacity to support valuable floatage. Also, the waterway needed to connect to other navigable bodies of water so collectively they formed a means of transportation. The court found no evidence in the record that the pond served any useful purpose for transportation, and the streams flowing in and out of the pond were not capable of supporting valuable floatage. The court concluded the pond was not a navigable waterway and, therefore, no right of public access existed.

Next, the court addressed whether the adjacent landowners had a private right of access to the pond, or littoral rights, since they lived next to the pond. Under common law, landowners next to a body of water possessed property rights that allowed them to make reasonable use of the water for any lawful purpose. However, this case dealt with rights to a private, man-made, and non-navigable pond owned almost entirely by an adjoining landowner. The court acknowledged two views on the rights of adjacent landowners in this situation emerged. The common law rule entitled the owner of the land underlying the surface water to exclusive control of the water. The owner of the underlying land had the right to exclude all others from accessing or us-