

TORT LAW—LIABILITY OF LANDOWNERS—IMMUNITY FOR LANDOWNERS IS EXPANDED UNDER A REINTERPRETATION OF MICHIGAN’S RECREATIONAL LAND USE ACT. *Neal v. Wilkes*, 685 N.W.2d 648 (Mich. 2004).

INTRODUCTION

In *Neal v. Wilkes*,¹ the Michigan Supreme Court granted leave to appeal to consider whether the Michigan Recreational Land Use Act (RUA) exempts landowners from liability only when the injuries occur on “large tracts of undeveloped land.”² Neal was injured while riding an ATV driven by Wilkes’s brother, on Wilkes’s property.³ The property was zoned residential, and while parts of it were wooded, the area where Neal was injured was a mowed portion of Wilkes’s backyard.⁴ The Eaton County Circuit Court granted Wilkes’s motion for summary judgment, on the basis that the RUA bars recovery.⁵ The court of appeals reversed the circuit court, based on the rule provided by the supreme court in *Wymer v. Holmes*.⁶ *Wymer* held that the RUA only applies to “large tracts of undeveloped land.”⁷ The supreme court, however, ultimately found that the *Wymer* rule was more restrictive than the plain language of the statute warranted, and held that regardless of the type of land, the RUA could operate to exclude liability.⁸ Consequently, the court reinstated the circuit court’s order for summary judgment.⁹

I. BACKGROUND

The issue in *Neal* involves the interpretation of the RUA statute, which states:

[A] cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the

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1. 685 N.W.2d 648 (Mich. 2004).
 2. *Id.* at 649.
 3. *Id.*
 4. *Id.*
 5. *Id.*
 6. 412 N.W.2d 213 (Mich. 1987).
 7. *Neal*, 685 N.W.2d at 649.
 8. *Id.* at 653-54.
 9. *Id.* at 654.

gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.¹⁰

The Michigan Supreme Court had previously addressed the types of land which fell under the scope of the RUA in *Wymer v. Holmes*.¹¹ In *Wymer*, the plaintiffs in two consolidated cases were injured while swimming: one plaintiff, a six-year-old girl, drowned; the other plaintiff was paralyzed while jumping into a lake.¹² The court held that claims by these plaintiffs against the landowners were not barred by the RUA.¹³ The court found that “the Legislature intended the act to apply specifically to certain enumerated outdoor activities” which shared a certain commonality: “they generally require large tracts of open, vacant land in a relatively natural state.”¹⁴ According to *Wymer*, the RUA was only intended to be applied to “large tracts of undeveloped land suitable for outdoor recreational uses. Urban, suburban, and subdivided lands were not intended to be covered by the recreational use act.”¹⁵

II. ANALYSIS

A. *The Michigan Supreme Court’s earlier holding in Wymer did not reflect the plain language of the RUA.*

In spite of its decision less than two decades earlier, the supreme court held in *Neal* that the *Wymer* “large tracts of undeveloped land” standard was “inconsistent with the plain language of the RUA.”¹⁶ Going further, the *Neal* court stated that the *Wymer* opinion “failed to recognize that the language of the statute is the best source for determining legislative intent.”¹⁷ Although the court conceded that the purpose of the statute “is to encourage owners of private land to make their land available to the public,” they stated that there is “no basis to conclude that the purpose of the RUA is to encourage *only* owners of vast areas of vacant private land in this regard.”¹⁸

In support of this perspective, the court cited *Winiecki v. Wolf*,¹⁹ a court of appeals opinion which predated *Wymer*. The plaintiff in *Winiecki* was injured in the defendants’ backyard while playing with “land skis.”²⁰

10. MICH. COMP. LAWS ANN. § 324.73301(1) (West 2003).

11. *Wymer*, 412 N.W.2d at 213.

12. *Id.* at 215-16.

13. *Id.* at 219.

14. *Id.*

15. *Id.* at 220.

16. *Neal v. Wilkes*, 685 N.W.2d 648, 650 (Mich. 2004).

17. *Id.*

18. *Id.* at 650 n.6.

19. 383 N.W.2d 119 (Mich. Ct. App. 1985).

20. *Id.* at 120.

The court held that the RUA precluded recovery for Winiiecki.²¹ Examining the plain language of the statute, the court concluded that there was “nothing on its face excluding from its application the backyard of residential property,” and further stated that “[i]f the Legislature did not intend the statute to apply to parcels of land this size, it was within its power to insert words limiting the statute’s application, *e.g.*, to lands in their natural state.”²² The *Neal* court found this analysis persuasive, stating that “[t]here is absolutely no indication in the language of the RUA that the Legislature intended its application to be limited to vacant or undeveloped lands.”²³

B. The Reenactment Doctrine did not apply to incorporate the Wymer holding into the current RUA.

The majority in *Neal* rejected the plaintiff’s position regarding the legislative intent of the RUA as amended. The plaintiff (and dissenting justices) contended that because the Michigan Legislature amended the RUA after *Wymer* was decided, but did not amend the language at issue, it must have agreed with *Wymer*’s interpretation of the RUA. Under the theory of the Reenactment Doctrine, the *Wymer* interpretation would have been included in the revised statute.²⁴ The court stated that “neither ‘legislative acquiescence’ nor the ‘reenactment doctrine’ may ‘be utilized to subordinate the plain language of a statute.’”²⁵

C. Based on the statute’s language, the intent of the legislature, and the reenactment rule, the dissenting justices would have upheld the rule from Wymer.

Justice Cavanagh, joined by Justice Kelly, dissented from the majority in *Neal*, based on a belief that the opinion ran contrary to the words and intent of the statute, as well as the legislature’s amendment of the statute subsequent to the *Wymer* ruling.²⁶

In discussing the plain language of the statute, Justice Cavanagh cited the analysis of the *Wymer* court, stating that the court “read the plain language of the statute in light of the statute’s general purpose.”²⁷ He noted that the activities listed in the RUA can ordinarily only be accommodated “on land that is difficult to defend from trespassers and difficult to make safe for people invited to participate in recreational activities.”²⁸ Justice

21. *Id.*

22. *Id.*

23. *Neal*, 685 N.W.2d at 651.

24. *Id.* at 652 n.11. *See also* *People v. Hawkins*, 668 N.W.2d 602 (Mich. 2003).

25. *Neal*, 685 N.W.2d at 652.

26. *Id.* at 654 (Cavanagh, J., dissenting).

27. *Id.*

28. *Id.* at 654-55.

Cavanagh believed that the majority's ruling eliminated landowner liability "when a person who does not pay consideration and who participates in any outdoor recreational activity is injured."²⁹

Justice Cavanagh also examined the intent of the legislature in enacting the RUA. Observing that the RUA is found in the Natural Resources and Environmental Protection Act,³⁰ "the purpose of which is 'to protect the environment and natural resources of the state,'" he determined that it is "highly unlikely that an urban residential backyard was among the state's natural resources considered in the RUA."³¹ Citing the doctrine of *eiusdem generis*, Justice Cavanagh concluded that the statute was designed to cover activities of the same "class, character or nature" as those specifically listed in the RUA—activities which "take place on large, undeveloped tracts of land."³²

Justice Cavanagh also observed that the state legislature, in revising the statute twice subsequent to the *Wymer* holding, did not modify the language of the statute to avoid the rule of the *Wymer* court.³³ Under the reenactment rule, if a statute is reenacted "without modifying a high court's practical construction of that statute, that construction is implicitly adopted."³⁴

CONCLUSION

The Michigan Supreme Court's holding in *Neal* increases the scope of the RUA, making it more difficult for injured parties to pursue relief from landowners in any sort of recreational setting. Additionally, the court continues to show an unwillingness to apply the reenactment doctrine. This indicates that if the Michigan Legislature intends to retain the prior judicial interpretation of statutes, that interpretation must be reflected in the language of the revised statute itself.³⁵ The *Neal* court also continues a trend of overturning supreme court precedent by utilizing the plain language of the statute.³⁶ Unless the court revisits the scope of the RUA, as Justice Cavanagh wryly pointed out in his dissent, "people invited to . . . a party, or to a neighborhood barbecue" who do not want to find recovery for

29. *Id.* at 655.

30. MICH. COMP. LAWS ANN. §§ 324.101-324.99904 (West 2003).

31. *Neal*, 685 N.W.2d at 655.

32. *Id.*

33. *Id.* at 656.

34. *Id.* (citing *People v. Hawkins*, 668 N.W.2d 602 (Mich. 2003)).

35. See also *People v. Moore*, 679 N.W.2d 41 (Mich. 2004) (Cavanagh, J., dissenting); *Jones v. Dep't. of Corr.*, 664 N.W.2d 717 (Mich. 2003) (Cavanagh, J., dissenting); *Hawkins*, 668 N.W.2d at 602 (Cavanagh, J., dissenting).

36. See also *Lesner v. Liquid Disposal, Inc.*, 643 N.W.2d 553 (Mich. 2002); *Sington v. Chrysler Corp.*, 648 N.W.2d 624 (Mich. 2002); *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567 (Mich. 2002); *Nawrocki v. Macomb County Rd. Comm'n*, 615 N.W.2d 702 (Mich. 2000); *People v. Moore*, 679 N.W.2d 41 (Mich. 2004).

their injuries foreclosed by the statute “should be forewarned to ‘be sure to bring a dish (consideration) to pass.’”³⁷

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37. *Neal*, 685 N.W.2d at 657 n.3 (Cavanagh, J., dissenting).