



Ohio Legislative Service Commission

Bill Analysis

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Sub. S.B. 202

129th General Assembly
(As Reported by H. Criminal Justice)

Sens. Seitz, Patton, Grendell, Eklund, LaRose, Bacon, Balderson, Beagle, Burke, Coley, Faber, Hite, Hughes, Jones, Jordan, Lehner, Manning, Niehaus, Schaffer, Widener

Reps. Winburn, Garland, Slaby, Hayes, Blessing, Bulp, Conditt, Young

BILL SUMMARY

- Generally provides that a possessor of real property does not owe a duty of care to a trespasser on the property except to refrain from willful, wanton, or reckless conduct that is likely to cause injury, death, or loss to the person of the trespasser.
- Provides that a possessor of real property is liable in damages to a trespasser on the property or to any other person for injury, death, or loss to the person of the trespasser that allegedly is caused by the possessor if the possessor knows or should know or believe that the trespasser is in a position of peril and the possessor failed to exercise ordinary care to avoid the injury, death, or loss.
- Provides that a possessor of real property is liable in damages to a trespasser who is a child, to a parent, guardian, or custodian of the child, or to any other person for injury, death, or loss to the person of the child that allegedly is caused by an artificial condition on the property if certain conditions apply.
- Provides that the possessor of real property is liable in damages to an adult person who trespasses on the property or to any other person for injury, death, or loss to the person of that person that allegedly is caused in an attempt to rescue a child who trespasses on the property under the conditions specified in the prior dot point.
- States that the provisions of the bill do not create a new cause of action or substantive legal right against the possessor of real property and do not affect any civil liability under another section of the Revised Code or common law of a possessor of real property with respect to trespassers under certain circumstances.

- Provides that the bill does not affect any immunities from or defenses to tort liability or civil liability established by another section of the Revised Code or available at common law to which a possessor of real property may be entitled under certain circumstances with respect to trespassers.
- Provides that the bill does not affect any criminal liability that the possessor of real property may have for injury, death, or loss to the person or property of a trespasser on the property.
- Specifies that in enacting the bill it is the intent of the General Assembly to declare that the American Law Institute's finalized "Restatement Third of Torts: Liability for Physical and Emotional Harm (Section 51)" does not constitute the public policy of the state of Ohio and to codify the current law of Ohio regarding the duties owed to trespassers by those who own, occupy, or control premises.

CONTENT AND OPERATION

Possessor's duty of care to a trespasser

Under the bill, the possessor of real property (an owner, lessee, renter, or other occupant of real property) does not owe a duty of care to a trespasser on the property except to refrain from willful, wanton, or reckless conduct that is likely to cause injury, death, or loss to the person of the trespasser.¹ The bill defines a "trespasser" as an individual who, without express or implied authorization, invitation, or inducement, enters real property purely for the individual's own purposes or convenience.²

Possessor's liability to a trespasser in a position of peril

Notwithstanding the provision described above, the possessor of real property is liable in damages to a trespasser on the property or to any other person in a tort action for injury, death, or loss to the person of the trespasser that allegedly is caused by the possessor of the real property if, at the time the injury, death, or loss allegedly is caused, the possessor knows, or from facts within the possessor's knowledge should know or believe, that the trespasser is in a position of peril on the property, and the possessor of the property fails to exercise ordinary care to avoid causing that injury, death, or loss.³

¹ R.C. 2305.402(B) and (A)(1).

² R.C. 2305.402(A)(3).

³ R.C. 2305.402(C).

Possessor's liability to a child trespasser when there is an artificial condition on the property

Notwithstanding the provisions described in "**Possessor's duty of care to a trespasser**," above, the possessor of real property is liable in damages to a trespasser on the property who is a child, to a parent, guardian, or custodian of the child, or to any other person in a tort action for injury, death, or loss to the person of the child that allegedly is caused by an artificial condition on the real property if, at the time the injury, death, or loss allegedly is caused, all of the following apply:⁴

(1) The place on the property where the artificial condition exists is a place upon which the possessor of the property knows or has reason to know children are likely to trespass.

(2) The artificial condition is a condition that the possessor of the property knows, has reason to know, realizes, or should realize will involve an unreasonable risk of death or serious injury to those children.

(3) Because of their youth, the children who are likely to trespass on the property do not discover the artificial condition on the property or do not realize the risk involved in intermeddling with it or coming within the area made dangerous by it.

(4) The utility to the possessor of the property of maintaining the artificial condition and the burden of eliminating the danger involved in maintaining the condition are slight in comparison to the risk of injury, death, or loss to the person of those children.

(5) The possessor of the property fails to exercise reasonable care to eliminate the danger involved in maintaining the artificial condition or to otherwise protect the children who are likely to trespass on the property.

The bill also provides that, notwithstanding the provisions described in "**Possessor's duty of care to a trespasser**," above, the possessor of real property is liable in damages to an adult person who trespasses on the property or to any other person in a tort action for injury, death, or loss to the person of the adult that allegedly is caused in an attempt to rescue a child who trespasses on the property under the conditions described in paragraphs (1) to (5) above.⁵

⁴ R.C. 2305.402(D)(1).

⁵ R.C. 2305.402(D)(2).

Effect of the bill on existing statutory or common law

The bill states that its provisions do not create a new cause of action or substantive legal right against the possessor of real property. The bill's provisions do not affect any civil liability under another section of the Revised Code or the common law of Ohio of a possessor of real property with respect to trespassers under circumstances not covered by the bill or with respect to individuals other than trespassers, including, but not limited to, civil liability to invitees or licensees on the property. It does not affect any immunities from or defenses to tort liability established by another section of the Revised Code or available at common law to which a possessor of real property may be entitled in connection with injury, death, or loss to the person or property of a trespasser on the property, including, but not limited to, self-defense or defense of third persons.

The bill also does not affect any criminal liability that the possessor of real property may have for injury, death, or loss to the person or property of a trespasser on the property. Finally, the bill does not affect any immunities from or defenses to civil liability established under another section of the Revised Code or available at common law to which a possessor of real property may be entitled in connection with injury, death, or loss to the person or property of a trespasser on real property owned, leased, rented, or occupied by another person, including, but not limited to, self-defense or defense of third persons.⁶

Uncodified provision regarding the intent of the General Assembly

The bill includes an uncodified section declaring that in enacting the new R.C. section in the bill it is the intent of the General Assembly to:⁷ (1) declare that the American Law Institute's recently finalized "Restatement Third of Torts: Liability for Physical and Emotional Harm (Section 51)," that imposes broad new duties on those who own, occupy, or control premises, including the duty to exercise reasonable care toward all trespassers, does not constitute the public policy of the state of Ohio, and (2) codify and preserve the current law in Ohio on the duties owed to trespassers by those who own, occupy, or control premises, as promulgated by the Ohio Judicial Conference in Ohio Jury Instruction CV 617.09, "Licensee and trespasser," as revised on December 14, 2002, and as set forth in the holdings of the Ohio Supreme Court in *Glandon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312 and *Bennett v. Stanley* (2001), 92 Ohio St.3d 35, and their progeny. For a discussion of these cases and the existing law surrounding the duties owed to trespassers by those who own,

⁶ R.C. 2305.402(E).

⁷ Section 2.

occupy, or control premises, see "**Existing case law regarding the liability of a possessor of real property**," below.

Existing case law regarding the liability of a possessor of real property

The bill in effect codifies certain aspects of existing case law regarding the liability of a possessor of real property with regards to trespassers. The definition of the term "trespasser" (see "**Possessor's duty of care to a trespasser**," above) is from Ohio Supreme Court case law. *McKinney v. Hartz & Restle Realtors, Inc.* (Ohio 1987) 510 N.E.2d 386, 388 defines "trespasser" as one who, without express or implied authorization, invitation, or inducement, enters private premises purely for his own purposes or convenience.

The bill also codifies Ohio case law regarding the possessor's duty of care to a trespasser. Ohio law traditionally recognizes certain duties that a property owner or possessor owes to particular classes of persons entering their property. These persons are classified as: (1) invitees or persons who enter the premises of a landowner by express or implied invitation for some purpose that is beneficial to the landowner, (2) licensees or persons who enter the premises of a landowner by permission or acquiescence of the landowner for the licensee's own pleasure or convenience, and (3) trespassers or persons who, without express or implied permission or acquiescence of the landowner, enter the premises purely for the person's own purpose or convenience. *Bae v. Dragoo and Associates, Inc.*, (C.A. 10th Dist. 2004), 156 Ohio App.3d, 103, 107. A property owner or possessor owes to an invitee a duty to exercise ordinary care for the invitee's safety and protection and to protect the invitee by maintaining the premises in a safe condition. *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315. On the other hand, a property owner or possessor owes to licensees and trespassers no duty except to refrain from willful, wanton, or reckless conduct. *Id.* at 317. A property owner or possessor is liable to any person who enters the owner's or possessor's property for harm proximately caused by a failure to exercise the duty owed by the property owner or possessor to the particular class of the person harmed.

Finally, the bill codifies existing case law regarding when a possessor of real property may be subject to liability for harm to a trespasser (see "**Possessor's liability to a child trespasser when there is an artificial condition on the property**"). Currently Ohio does not have any statutes that directly relate to "known trespassers" or "trespassers that constantly and persistently intrude upon a limited area," in which a land possessor has a duty to use reasonable care to prevent harm to those trespassers as a result of a dangerous activity or artificial (man-made) condition on the land. With respect to a "known trespasser," under current Ohio case law, an owner, lessee, or renter of real property owes a licensee or trespasser a duty to exercise ordinary care if the owner, lessee, or renter discovers the licensee or trespasser in a position of peril. This

duty to exercise ordinary care arises after the owner, lessee, or renter "knows, or from facts within his knowledge should know or believe," that a licensee or trespasser is on the land and in a position of peril. *Id.* at 318.

Under existing case law, the "attractive nuisance" doctrine addresses harm to a child trespasser injured by a dangerous artificial condition on the land that the child was too young to appreciate. In *Bennett v. Stanley* (2001), 92 Ohio St.3d 35, the Ohio Supreme Court held as follows:

- (1) A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if:
 - (a) The place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
 - (b) The condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
 - (c) The children because of their youth do not discover the condition or realize the risk involved intermeddling with it or coming within the area made dangerous by it, and
 - (d) The utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
 - (e) The possessor fails to exercise reasonable care to eliminate the danger or to otherwise protect the children.

The Court also held that while the attractive nuisance doctrine is not ordinarily applicable to adults, it may be successfully invoked by an adult seeking damages for his or her own injury if the injury was suffered in an attempt to rescue a child from a danger created by the defendant's negligence.

Definitions

The bill defines "tort action" to mean a civil action for damages for injury, death, or loss to person other than a civil action for damages for a breach of contract or another agreement between persons and defines "child" as an individual under 18 years of age.⁸

HISTORY

| ACTION | DATE |
|-------------------------------|----------|
| Introduced | 08-04-11 |
| Reported, S. Judiciary | 02-01-12 |
| Passed Senate (26-4) | 02-01-12 |
| Reported, H. Criminal Justice | 03-21-12 |

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⁸ R.C. 2305.402(A)(2) and (4).