5

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

IN THE MATTER OF THE ROCKY FORK LAKE SANITARY DISTRICT. : Case No. 98 CA 1

: DECISION AND JUDGMENT ENTRY

APPEARANCES:

COUNSEL FOR APPELLANT-PETITIONERS:	John B. Huber, 1543 Marsetta Drive, Beavercreek, Ohio 45432
COUNSEL FOR APPELLEE HIGHLAND COUNTY COMMISSIONERS:	Rocky A. Coss, Highland County Prosecutor, 149 East Main Street, Hillsboro, Ohio 45133
COUNSEL FOR APPELLEE DIRECTOR, ENVIRONMENTAL PROTECTION AGENCY:	Robert J. Karl & Lauren Angell, Assistant Attorneys General, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428

ABELE, J.

This is an appeal from a judgment entered by the Highland County Common Pleas Court dismissing appellants' R.C. Chapter 6115 petition seeking the formation of a sanitary district in the territory surrounded by a line connecting all those points which are one mile distant from the edge of the waters of the Rocky Fork Lake State Park.

Appellants assign the following errors:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT FAILED TO RESTRICT THE HEARING TO A CONSIDERATION OF THE OBJECTION OF ANY OBJECTING FREEHOLDERS, AND WRONGFULLY EXPANDED THE HEARING BEYOND THE SUBJECT MATTER JURISDICTION OF THE COURT."

5
G.190

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT MISREAD AND/OR MISAPPLIED O.R.C. CHAPTER 6115 BY APPLYING A FIRST-IN-TIME TEST TO THE FORMATION OF A CITIZEN-INITIATED SANITARY SEWER DISTRICT."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT APPLIED AN INAPPLICABLE BURDEN OF PROOF AGAINST THE PETITIONERS CONTRARY TO LAW."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PETITIONERS IN EXCLUDING EXPERT TESTIMONY ESTABLISHING THE DETRIMENTAL EFFECTS WHICH ARISE FROM ANY PUBLIC PERCEPTION THAT THE RECREATIONAL WATERS OF ROCKY FORK CREEK AND THE ROCKY FORK LAKE WILL BE DEGRADED IN QUALITY."

On July 28, 1997, appellants filed the instant petition seeking the formation of a sanitary district pursuant to R.C. Chapter 6115. In the petition, appellants alleged in pertinent part as follows:

> "The establishment of the sanitary district is necessary so as to prevent and eliminate any existing sources of contamination throughout the district and surrounding the entire Rocky Fork Lake. The establishment will be conducive to the public health, safety, comfort, convenience and welfare.
>
> The Ohio EPA has substantially defaulted on its obligation to provide sanitary enforcement within the proposed district and the proposal by the County Commissioners for sanitary sewage treatment, omits over one-half of the lands immediately surrounding the lake."

We note that R.C. 6115.04 and 6115.05 permit a court to establish a sanitary district if five hundred freeholders sign and file a petition requesting the establishment of the sanitary district and if the court finds that the proposed district is necessary

and conducive to the public health, safety, comfort, convenience, or welfare.

On October 2, 1997, the court heard evidence concerning the petition. During their opening statement, petitioners stated that their evidence would demonstrate that communities in and around the proposed sanitary district have sewage problems that are not being addressed by the Ohio Environmental Protection Agency (Ohio EPA) or the Ohio Attorney General's Office.

The Highland County Commissioners, during their opening statement, noted that they already have a R.C. Chapter 6117 sanitary district and a plan for correcting the sewage problems in most of the area that would be covered by the proposed R.C. Chapter 6115 plan. R.C. Chapter 6117 allows counties to establish sanitary districts by resolution.

In his opening statement, the Director of the Ohio EPA stated that the area in question is already included in the county's R.C. Chapter 6117 sanitary district and also in the Ohio EPA's R.C. 1541.21 special sanitary district. Pursuant to R.C. 1541.21, territory included within a state park and surrounding lands extending one mile back from the state park is designated a special sanitary district under the control and management of the Ohio EPA. The Director further stated that the Ohio EPA wants to continue to work with the county's R.C. Chapter 6117 district and does not want a R.C. Chapter 6115 district established covering the same territory. The Director explained that the county has already spent $800,000 to develop a sanitary district plan and

has already secured funding for a state-of-the-art wastewater treatment plant.

The parties presented evidence to support their opening statements. Appellants presented evidence about the sewage problems in the area which have resulted in closed beaches, fish kills and extreme odors. We note that Appellant Daniel Kammer, when asked on cross-examination whether he wanted assessments from both the county's R.C. Chapter 6117 sanitary district and the proposed R.C. Chapter 6115 sanitary district, answered, "I have no desire to pay anything to be honest with you, much less two."

Appellants unsuccessfully attempted to present testimony from school psychologist Doug Savage that: (1) "the problem of adverse impact on the use of recreational facilities has little to do with scientific fact, it has to do with perception"; (2) construction of the county's proposed R.C. Chapter 6117 sanitary district sewage treatment plant and its discharge of effluent into the Rocky Fork Lake would "create a stigma" that would result in "a lesser level of usage at the lake than otherwise would be if a regional plan were approached so that sewage effluent from a treatment plant or plants can be discharged downstream from the recreational facility;" and (3) discharging sewage effluent downstream from the lake rather than into the

lake as planned by the county's R.C. Chapter 6117 district would benefit the psychological and mental health of the community.[1]

Appellants presented evidence from environmental engineer Gary Bramble that a R.C. Chapter 6115 sanitary district "would initially address [the sewage] problem today with a temporary or medium term enforcement program on the failing or poorly designed septic tank systems" and ultimately develop a regional system that would "minimize domestic sewage and waste-water flowing into the lake." Bramble added that "[t]he regional plant very well might be down stream several miles or in another basin, a regional plant that did not discharge into the lake."

Appellants also presented testimony from Ohio EPA employee Martyn Burt on cross-examination. When asked why the Ohio EPA was opposing appellants' petition for the formation of a R.C. Chapter 6115 sanitary district, Burt testified that the proposed district was unnecessary "because there is already a sewer district in place, the unsanitary conditions are being addressed by the Ohio EPA with the Highland County Commissioners, and they are proposing a method to deal with the unsanitary conditions,

---

[1]In a February 14, 1994 letter, Ohio EPA employee Martyn Burt predicted that the general public would have difficulty understanding the scientific wisdom of discharging treated sewage effluent into the lake. Burt wrote in pertinent part as follows:

> "Ohio EPA can also foresee problems if the selected option results in a new treatment plant discharging directly to Rocky Fork Lake. A lot of people in the area see the project as being justified in large part by the need to protect the lake. It would take considerable skill to convince the public that it is scientifically sound to discharge all the treated sewage from the area into the lake. * * * "

(Emphasis added.)

and according to the aims of the petition, as I understand it, those aims are already being met."

Highland County Commissioner Russ Newman testified about the $11,900,000 state of the art sewage treatment system that the commissioners have been planning for four years. The county decided not to include the more sparsely populated south side of the lake in the R.C. Chapter 6117 plan because inclusion of the south side "probably would double the cost of the project to all the people." When asked whether the county would change its sewer system plans if the trial court approved appellant's R.C. Chapter 6115 petition, Newman testified, "No, it would not. We would go ahead with our current plans * * * ." Newman explained that the county had already spent over $800,000 on the R.C. Chapter 6117 sewer project and "very shortly we'll be going out to bid." Newman further explained that the Ohio EPA has already sent the county notice of a draft permit to install the proposed wastewater treatment plant and a permit to discharge effluent from the plant.

Ohio EPA employee Martyn Burt testified for appellees. When asked about appellants' proposal to deal initially with the sewage problems through enforcement alone, Burt explained that because the vast majority of the lots on the north side of the lake are extremely small and have soils rated severe for sewage disposal purposes, enforcement efforts alone would not correct the sewage problems in the area. Burt also noted that the

majority of the leachfields in the area are nearing the end of their twenty-year life expectancy.

With regard to the timing of a solution to the sewage problem, Burt noted that the county's R.C. Chapter 6117 sanitary district began planning in 1993 and just recently received a draft permit to install and a permit to discharge. Burt testified that on average it takes five years to plan and build a wastewater treatment plant. In Burt's opinion, appellants' proposed R.C. Chapter 6115 sanitary district would not be finished until the year 2002. Burt further opined that if the trial court created appellants' proposed R.C. Chapter 6115 sanitary district and ordered the county's R.C. Chapter 6117 sanitary district to work with appellants' district, funding for the county's proposed wastewater treatment plant would be jeopardized.

The parties wrote post-trial memoranda on the issue of whether R.C. 1541.21 grants the Ohio EPA exclusive jurisdiction over sanitary matters within one mile of state parks. R.C. 1541.21 provides in pertinent part as follows:

> "The territory included within any state park, canal reservoir lake, or nature preserve, and surrounding lands extending back one mile therefrom is hereby designated a special sanitary district. Such district shall be under the control and management of the environmental protection agency for sanitary purposes. * * * "

In its memorandum, the Ohio EPA argued that R.C. 1541.21 grants it exclusive jurisdiction over appellants' proposed R.C. Chapter 6115 sanitary district area, but the Ohio EPA may choose to share

its jurisdiction with the county's R.C. Chapter 6117 sanitary district. In their memorandum, appellants replied that the word "exclusive" does not appear in R.C. 1541.21. Appellants contend that the statute gives the Ohio EPA oversight function, but does not prevent the creation of a R.C. Chapter 6115 district in the area within one mile of a state park.

On January 6, 1998, the trial court issued judgment dismissing appellant's petition. The trial court made findings of fact in pertinent part as follows:

> "4. The Court had received several letters opposed to the 6115 petition and in favor of the sanitary district program as planned under the commissioner's 6117 district. However, none of the objecting freeholders appeared or testified at the hearing in support of their letters.
>
> 5. That the more densely populated area bordering Rocky Fork Lake on the North is the source of existing contamination by way of sewage and waste water which most seriously threatens the Lake and its tributary water ways, and that a need for an effective sanitary sewer system for the area does exist.
>
> 6. That a large and significant portion of the area described in the 6115 petition is included within the ORC 1541.21 Special Sanitary District surrounding Rocky Fork Lake State Park.
>
> 7. That Highland County Board of County Commissioners have heretofore by resolution and pursuant to Chapter 6117 laid out and established a County Sewer District and are developing a Sewer System for said district.
>
> 8. That the sewer system being developed under Section 6117 is located within the land bordering the North side, the East and Western portions of the land bordering Rocky Fork Lake and constitutes a part of the same land sought to be included in Freeholders' 6115 Sewer District.
>
> 9. That the sewage system proposed for the 6117 district has been approved by OEPA and that funds have been allocated to the Highland County Commissioners for the construction of said system and treatment plant, all of which, however, is subject to OEPA final approval and the issuance of a NPDES Certificate

(Discharge Permit) and the issuance of a PTI Certificate (Permit to Install System).

10. That it was conceded by all parties that the proposed 6117 sewage system is currently "State of the Art."

The trial court issued conclusions of law in pertinent part as follows:

"The 6115 petition asks that a new Sewer District be formed included within which there will be the land already constituting the County's 6117 district.

ORC 6115.66 provides that the same land may be included in more than one sanitary district and be subject to Chapter 6115, if such inclusion would be conducive to public health, safety, convenience, or welfare.

While no comparison of the relative merits of the EPA approved 6117 sanitary system is being made to the suggested 6115 proposal, the Court cannot find that the inclusion of the land in both sanitary districts, i.e. 6117 and 6115, will be conducive to public health, safety, convenience, or welfare.

Consequently, it is the opinion of the Court that while the development of the best plan available for the constructive control and management of a sewage disposal plant and system is highly to be desired, that nevertheless, an apparent duplicative effort between competing sanitary districts is not required to achieve the goal of improvement of the public health, safety, comfort, convenience, or welfare. Therefore, the 6115 sanitary district is not necessary. The need is being met. A redundancy is not required."

Appellants filed a timely notice of appeal from the trial court's judgment.

I

In their first assignment of error, appellants assert that the trial court "failed to restrict the hearing to a consideration of the objections of any objecting freeholders, and wrongfully expanded the hearing beyond the subject matter jurisdiction of the court."

Appellants cite R.C. 6115.08 in support of their argument that hearings under Chapter 6115 should be limited to a contest between the petitioners and any owners of property in the area who object to the formation of a R.C. Chapter 6115 sanitary district. Appellants argue that because no objecting owners of property came forward during the hearing, the trial court should have granted the petitioner's request to establish a sanitary district. R.C. 6115.08 provides in pertinent part as follows:

> Any owner of real property in a proposed sanitary district who individually has not signed a petition under R.C. 6115.05 of the Revised Code, and who wishes to object to the organization and incorporation of said district shall, on or before the date set for the cause to be heard, file his objections to the organization and incorporation of such district. Such objections shall be limited to a denial of the statements in the petition, and shall be heard by the court as an advanced case without unnecessary delay.
>
> Upon the hearing, if it appears that the purposes of sections 6115.01 to 6115.79, inclusive, of the Revised Code, would be subserved by the creation of a district, the court, after disposing of all objections as justice and equity require, shall by its findings, duly entered of record, adjudicate all questions of jurisdiction, declare the district organized, and give it a corporate name by which in all proceedings it shall thereafter be known. * * *
>
> * * *
>
> After an order is entered establishing the district, such order is final and binding upon the real property within the district and finally and conclusively establishes the regular organization of such district against all persons except the state upon suit commenced by the attorney general. Any such suit must be commenced within three months after said decree declaring such district organized. * * *

Appellants additionally argue that pursuant to R.C. 6115.08, the Director of the Ohio EPA and the Highland County Commissioners should not have participated in the hearing but instead should have filed a separate suit as described in R.C. 6115.08 within

three months after a judgment establishing a R.C. Chapter 6115 district.

We find no reversible error with respect to appellants' first assignment of error. During the hearing, appellants presented evidence supporting their petition and appellees presented evidence challenging the petition. The evidence presented by the parties assisted the trial court with making the R.C. Chapter 6115 required determination of whether the establishment of the proposed sanitary district was necessary and conducive to public health, safety, comfort, convenience and welfare. Although appellants now argue that the trial court should have limited testimony at the hearing to testimony by landowners who previously filed objections to the petition, during the hearing appellants made no such argument. Although appellants now argue that the trial court should have excluded the Ohio EPA and the Highland County Commissioners from participating in the hearing, during the hearing appellants made no such argument.

It is axiomatic that a litigant's failure to raise arguments in the trial court waives the litigant's right to raise those arguments on appeal. Shover v. Cordis Corp. (1991), 61 Ohio St.3d 213, 220; 574 N.E.2d 457, 463. To allow appellants to wait until appeal to raise certain arguments would frustrate the orderly administration of justice. As the Ohio Supreme Court stated in State v. 1981 Dodge Ram Van (1988), 36 Ohio St.3d 168, 170, 522 N.E.2d 524, 527:

> " * * * The legitimate state interest in orderly procedure through the judicial system is well recognized as founded on the desire to avoid unnecessary delay and to discourage defendants from making erroneous records which would allow them an option to take advantage of favorable verdicts or to avoid unfavorable ones. * * * "

Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process.

Additionally, we note that although R.C. 6115.08 states that landowners in the area who object to the formation of a R.C. Chapter 6115 sanitary district "shall be heard by the court," that statute does not prohibit the trial court from hearing other evidence relevant to the allegations in the petition. We may not interpret the statute as including such a prohibition. In Cline v. Ohio Bur. of Motor Vehicles (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77, 80, the court emphasized that we may not insert words into statutes. Accord Cannon v. Catalytic, Inc. (1992), 84 Ohio App.3d 488, 497, 617 N.E.2d 693, 699. We must interpret the words and phrases of R.C. 6115.08 in context and in accordance with rules of grammar and common usage. Independent Ins. Agents of Ohio, Inc. v. Fabe (1992), 63 Ohio St.3d 310, 314, 587 N.E.2d 814, 817; R.C. 1.42. If possible, we must also interpret R.C. 6115.08 to avoid an unreasonable result. State ex rel. Cooper v. Savord (1950), 153 Ohio St. 367, 92 N.E.2d 390, paragraph one of the syllabus; R.C. 1.47. An interpretation of R.C. 6115.08 which would prevent the trial court from hearing evidence relevant to the petition would yield an unreasonable result.

Lastly, we note that R.C. 6115.07 requires that after landowners file a R.C. Chapter 6115 petition for the formation of a sanitary district, the clerk of courts must send certified mail notice to the Director of the Ohio EPA and must give personal notice to the clerk of each political subdivision within the proposed R.C. Chapter 6115 district. Further, we note that R.C. 6115.08 requires the trial court to "adjudicate all questions of jurisdiction." The parties in this case raised the jurisdictional question of whether R.C. 1541.21, the special sanitary district statute involving state parks, grants the Ohio EPA exclusive sanitary jurisdiction over the land included in appellant's proposed R.C. Chapter 6115 sanitary district. Thus, it appears that R.C. Chapter 6115 contemplates some involvement by the Ohio EPA and the Highland County Commissioners in this case. Because appellants waived this issue by failing to object to the Ohio EPA's and the Highland County Commissioners' participation in the proceedings below, however, we need not determine the level of that contemplated involvement.

Accordingly, based upon the foregoing reasons, we overrule appellants' first assignment of error.

II

In their second assignment of error, appellants assert that the trial court erred "by applying a first-in-time test to the formation of a citizen-initiated sanitary sewer district." In support of this assignment of error, appellants contend that the sole basis of the trial court's decision was the fact that the

county established its R.C. Chapter 6117 sanitary district before appellants filed their petition seeking establishment of a R.C. Chapter 6115 sanitary district.

We disagree with appellants' assessment of the trial court's judgment. The trial court did not dismiss the petition simply because the Highland County Commissioners created a R.C. 6117 sanitary district before appellants filed the instant petition to create a R.C. 6115 sanitary district. The trial court considered many factors before dismissing the petition.

R.C. 6115.05 and 6115.08 set forth factors that the trial court must consider when making a decision as to whether the property described in the petition should be incorporated into a district. The trial court must determine: (1) whether the work proposed in the petition is necessary (R.C. 6115.05); (2) whether the proposed work will be conducive to the public health, safety, comfort, convenience, or welfare (R.C. 6115.05); (3) whether the purposes of R.C Chapter 6115 would be subserved by the creation of the proposed district (R.C. 6115.08); (4) whether the court can dispose of all objections to the district "as justice and equity require" (R.C. 6115.08); and (5) whether all jurisdictional questions have been resolved (R.C. 6115.08).

In the case sub judice, the trial court determined that in light of the Highland County Commissioners' proposed R.C. Chapter 6117 sewage treatment system, the work proposed in appellants' petition was not necessary. The trial court also determined that all parties conceded that the commissioner's proposed system is

"State of the Art." The trial court concluded that in view of these facts, creation of appellants' proposed R.C. Chapter 6115 sanitary district would not be conducive to public health, safety, convenience, or welfare. Thus, we find that the trial court considered multiple factors relevant to appellants' R.C. Chapter 6115 petition.

In this assignment of error, appellant additionally asserts that the trial court's judgment is contrary to the weight of the evidence. When reviewing evidence presented at trial, an appellate court must not re-weigh the evidence. In C.E. Morris v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus, the Ohio Supreme Court held:

> "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence."

See, also, Vogel v. Wells (1991), 57 Ohio St.3d 91, 566 N.E.2d 154; Ross v. Ross (1980), 64 Ohio St.2d 203, 414 N.E.2d 426. An appellate court should not substitute its judgment for that of the trial court when there exists competent, credible evidence going to all the essential elements of the case. In Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273, 1276, the court wrote:

> "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony."

In the case sub judice, we find the record contains sufficient competent, credible evidence to support a finding that the formation of appellants' proposed R.C. Chapter 6115 sanitary district is not necessary and is not conducive to the public health, safety, comfort, convenience, or welfare. All parties agree that the commissioners' proposed R.C. Chapter 6117 sewage treatment plant is "State of the Art." Ohio EPA employee Martyn Burt testified that appellants' proposed R.C. Chapter 6115 district was unnecessary "because there is already a sewer district in place, the unsanitary conditions are being addressed by the Ohio EPA with the Highland County Commissioners, and they are proposing a method to deal with the unsanitary conditions, and according to the aims of the petition, as I understand it, those aims are already being met." Burt further testified that if the trial court created appellants' proposed R.C. Chapter 6115 sanitary district and ordered the county's R.C. Chapter 6117 sanitary district to work with appellants' district, funding already approved for the county's proposed wastewater treatment plant would be jeopardized. Appellant Daniel Kammer, when asked on cross-examination whether he wanted assessments from both the county's R.C. Chapter 6117 sanitary district and the proposed R.C. Chapter 6115 sanitary district, answered, "I have no desire to pay anything to be honest with you, much less two." Highland County Commissioner Russ Newman testified if the trial court approved appellant's R.C. Chapter 6115 petition, the county would still build the R.C. Chapter 6117 system that the county has been

planning for four years. Newman explained that the Ohio EPA has already sent the county notice of a draft permit to install the proposed wastewater treatment plant and a permit to discharge effluent from the plant.

Accordingly, based upon the foregoing reasons, we overrule appellants' second assignment of error.

III

In their third assignment of error, appellants assert that the trial court erred by applying "an inapplicable burden of proof against the petitioners." Appellants claim that rather than applying the correct R.C. 6115.08 burden of proving that "the purposes of sections 6115.01 to 6115.79, inclusive of the Revised Code, would be subserved by the creation of a district," the trial court applied an incorrect R.C. 6115.66 burden of proving that "the public health, safety, convenience, or welfare demand the organization of an additional district." Appellants contend the latter burden of proof only applies when a R.C. Chapter 6115 petition seeks to include land already included in another R.C. Chapter 6115 sanitary district.

Although we agree with appellants' contention that R.C. 6115.66 only applies when a R.C. Chapter 6115 petition seeks to include land already included in another R.C. Chapter 6115 sanitary district, we find no reversible error. R.C. 6115.66 provides in pertinent part as follows:

> "The same land, <u>if conducive to public health, safety, convenience, or welfare</u>, may be included in more than one sanitary district and be subject to sections 6115.01 to 6115.79, inclusive, of the Revised

> Code, for each district in which it may be included. No district shall be organized under such sections in whole or in part within the territory of a district already organized under such sections until the court determines whether the public health, safety, convenience, or welfare demand the organization of an additional district, or whether it demands that territory proposed to be organized into an additional district shall be added to the existing district. * * *
>
> (Emphasis added.)

The same words, "public health, safety, convenience, or welfare," that appear in R.C. 6115.66, also appear in R.C. 6115.05. As we discussed under appellants' second assignment of error, R.C. 6115.05 and R.C. 6115.08 require a trial court ruling on a R.C. Chapter 6115 petition to determine, inter alia, whether the proposed work is necessary and whether the proposed work will be "conducive to the public health, safety, comfort, convenience, or welfare." Thus, regardless of whether a R.C. Chapter 6115 petition seeks to include land already included in another R.C. Chapter 6115 sanitary district, the petitioners must prove that the proposed sanitary district is necessary and will benefit the public good.[2]

Accordingly, based upon the foregoing reasons, we overrule appellants' third assignment of error.

---

[2]We recognize a that distinction exists between R.C. 6115.66 and R.C. 6115.05. R.C. 6115.66 requires a finding that the public good "demands" the formation of an overlapping district. R.C. 6115.05, on the other hand, requires a finding that the formation of a new district is "necessary." In our view, the public good "demands" the formation of districts that are "necessary." Thus, the distinction between the two statutes is not material.

IV

In their fourth assignment of error, appellants assert that the trial court erred by "excluding expert testimony establishing the detrimental effects which arise from any public perception that the recreational waters of Rocky Fork Creek and the Rocky Fork Lake will be degraded in quality." In particular, appellants contend the trial court erred by excluding testimony from school psychologist Doug Savage that: (1) "the problem of adverse impact on the use of recreational facilities has little to do with scientific fact, it has to do with perception"; (2) construction of the county's proposed R.C. Chapter 6117 sanitary district sewage treatment plant and its discharge of effluent into the Rocky Fork Lake would "create a stigma" that would result in "a lesser level of usage at the lake than otherwise would be if a regional plan were approached so that sewage effluent from a treatment plant or plants can be discharged downstream from the recreational facility;" and (3) discharging sewage effluent downstream from the lake rather than into the lake as planned by the county's R.C. Chapter 6117 district would benefit the psychological and mental health of the community. In support of this assignment of error, appellants cite Schaffter v. Ward (1985), 17 Ohio St.3d 79, 477 N.E.2d 1116, for the proposition that doubts concerning the usefulness of an expert's testimony should be resolved in favor of admissibility.

The admission or exclusion of relevant evidence is within the sound discretion of the trial court and its decision to admit

or exclude such evidence cannot be reversed absent a showing of an abuse of that discretion. Rigby v. Lake Cty. (1991), 58 Ohio St.3d 269, 569 N.E.2d 1056; Shumaker v. Oliver B. Cannon and Sons, Inc. (1986), 28 Ohio St.3d 367, 504 N.E.2d 44; Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St.3d 83, 482 N.E.2d 1248. In In re Jane Doe 1 (1991), 57 Ohio St.3d 135, 137, 566 N.E.2d 1181, 1183, the court wrote:

> "As the court has defined this standard, 'the term "abuse of discretion" * * * connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable * * *.'"

See, also, Worthington v. Worthington (1986), 21 Ohio St.3d 73, 76, 488 N.E.2d 150, 153; Sandusky Properties v. Aveni (1984), 15 Ohio St.3d 273, 473 N.E.2d 798, paragraph two of the syllabus. When applying the abuse of discretion standard, a reviewing court is not free to substitute its judgment for that of the trial court. In re Jane Doe 1, citing Berk v. Matthews (1990), 53 Ohio St.3d 161, 359 N.E.2d 1301, citing Buckles v. Buckles (1988), 46 Ohio App.3d 102, 546 N.E.2d 950.

To be admissible, expert testimony must not only pass the test of relevancy, but must also pass the three tests set forth in Evid.R. 702. The rule provides in pertinent part as follows:

> A witness may testify as an expert if all of the following apply:
> (A) The witness' testimony either relates to matters beyond the knowledge or expertise possessed by lay persons or dispels a misconception common among lay persons;
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * * *

We emphasize that Evid.R. 702(A) requires that the expert testimony relate to matters beyond the knowledge or expertise possessed by lay persons. In State v. Nemeth (1998), 82 Ohio St.3d 202, 308, 694 N.E.2d 1332, ____, the court permitted expert testimony about battered child syndrome because "without expert testimony, a trier of fact may not be able to understand that the defendant at the time of the killing could have had an honest belief that he was in imminent danger of death or great bodily harm." The court, quoting from two other cases,[3] commented that the expert testimony in that case "is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion." In State v. Stowers (1998), 81 Ohio St.3d 260, 262, 690 N.E.2d 881, 883, the court commented that the expert witness, through her psychological training and professional experience, "gained specialized knowledge that the average person lacks." In State v. Williams (1996), 74 Ohio St.3d 569, 576, 660 N.E.2d 724, 732, the court, quoting Evid.R. 702(A), commented that an expert opinion is admissible when it "dispels a misconception common among laypersons."

---

[3]State v. Koss (1990), 49 Ohio St.3d 213, 217, 551 N.E.2d 970, 974; State v. Kelly (1984), 97 N.J. 178, 206, 478 A.2d 364, 378.

In the case sub judice, we reject appellants' arguments concerning the school psychologist's testimony for two reasons. First, we doubt that the school psychologist's proffered expert testimony would be relevant to this action. As we discussed under appellants' second assignment of error, R.C. 6115.05 and 6115.08 set forth factors that the trial court must consider when making a decision as to whether the property described in the petition should be incorporated into a district. The trial court must determine: (1) whether the work proposed in the petition is necessary (R.C. 6115.05); (2) whether the proposed work will be conducive to the public health, safety, comfort, convenience, or welfare (R.C. 6115.05); (3) whether the purposes of R.C. Chapter 6115 would be subserved by the creation of the proposed district (R.C. 6115.08); (4) whether the court can dispose of all objections to the district "as justice and equity require" (R.C. 6115.08); and (5) whether all jurisdictional questions have been resolved (R.C. 6115.08). We believe that the witness did not have the training and expertise necessary to establish a link between the work proposed by the petition and the public's mental health.

Second, we find that the school psychologist's proffered testimony does not relate to matters beyond the knowledge or expertise possessed by lay persons and does not dispel a misconception common among lay persons. The proffered testimony is a matter of common sense. Lay persons are aware that people in general would avoid using recreational waters which they

perceive to be polluted. Thus, we find that the school psychologist's testimony was not necessary to aid the trier of fact.

Accordingly, based upon the foregoing reasons, we overrule appellants' fourth assignment of error.

JUDGMENT AFFIRMED.

HIGHLAND, 98 CA 1

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Harsha, J. & Kline, J.: Concur in Judgment & Opinion

For the Court

g.5 p.190

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 12, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

IN THE COURT OF APPEALS HIGHLAND COUNTY, OHIO

In The Matter Of The Rocky Fork Lake Sanitary District

PLAINTIFF-,	:	NO. 98 CA 1
VS	:	NOTICE OF ENTRY
DEFENDANT-	:	

Pursuant to Appellate Rule 30-A you are hereby notified that a Decision and Judgment Entry, copy hereto attached, was filed for journalization in this court on 8/25/98.

Paulette Donley

Paulette Donley , Clerk
Court of Appeals
Highland County

cc: Atty Huber
Atty Gress
Atty Kail, Atty Cingell
ATTY GENERAL

CERTIFICATE TO COPY

ORIGINAL ON FILE

The State of Ohio, Highland County. FOURTH DISTRICT COURT OF APPEAL

I, the undersigned, Clerk of the 4th District C.O.A. *t within and for said County and in whose custody the* Files, Journals and Records *of said Court are required by the Laws of the State of Ohio to be kept, do hereby certify that the foregoing is taken and copied from the original now on file in said Court, that said foregoing has been compared by me with the original document and that it is a true and correct copy thereof.*

IN TESTIMONY WHEREOF, I hereunto subscribe my name officially and affix the seal of said Court, at the Court House, in HILLSBORO *in said County, this* 25th *day of* Aug *19* 98

Paulette Donley

By _____
Deputy