

IN THE SUPREME COURT OF MISSOURI

No. SC94372

Angela Anderson,
Plaintiff-Appellant,

v.

Union Electric Company,
Defendant-Respondent.

Appeal from the Circuit Court of Morgan County
The Honorable Kenneth Michael Hayden, Circuit Judge

BRIEF OF AMICUS CURIAE

Timberhill-Riverbend, Inc.

Lauren E. Tucker McCubbin, MO #55179
Jon R. Dedon, MO #62221
POLSINELLI PC
900 W. 48th Place, Suite 900
Kansas City, MO 64112
(816) 753-1000
(816) 753-1536 (Fax)
ltucker@polsinelli.com
jdedon@polsinelli.com

ATTORNEYS FOR AMICUS CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

I. JURISDICTIONAL STATEMENT..... 1

II. STATEMENT OF FACTS..... 1

III. INTEREST OF THE AMICUS..... 1

IV. SUGGESTIONS BY THE AMICUS..... 3

V. CONCLUSION 6

CERTIFICATE OF COMPLIANCE 8

CERTIFICATE OF SERVICE..... 9

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Cole v. South Carolina Elec. & Gas, Inc.,</i>	
608 S.E.2d 859 (S.C. 2005)	4, 5, 6
<i>Foster v. St. Louis County,</i>	
239 S.W.3d 599 (Mo. banc 2007)	4, 6
<i>Lonergan v. May,</i>	
53 S.W.3d 122 (Mo. App. 2001)	6
<i>Majeske v. Jekyll Island State Park Authority,</i>	
433 S.E.2d 304 (Ga. Ct. App. 1993)	5, 6
<i>Vaughn v. Barton,</i>	
933 N.E.2d 355 (Ill. App. Ct. 2010)	5, 6
<i>Wilson v. United States,</i>	
989 F.2d 953 (8th Cir. 1993)	4
<i>State ex rel. Young v. Wood,</i>	
254 S.W.3d 871 (Mo. banc 2008)	6
Statutes	
Recreational Use Act	1, 3, 6
RSMo § 537.345	3

I. JURISDICTIONAL STATEMENT

The amicus adopts and joins in the jurisdictional statement of Respondent Union Electric Company.

II. STATEMENT OF FACTS

The amicus adopts and joins in the statement of facts of Respondent Union Electric Company.

III. INTEREST OF THE AMICUS

The amicus is an entity entitled to the protection of the Recreational Use Act that is at issue in this appeal. Timberhill-Riverbend Inc. is a Missouri corporation in good standing based in Nevada, Missouri. The corporation owns a family farm that is the product of the efforts of the late Judge and Mrs. H. A. Kelso of Nevada to put together a number of parcels of land over several years to permit Judge Kelso and his wife to enjoy the benefits of farming and outdoor recreation. When all the land was put together it totaled 2300 acres made up of tillable farm land, pasture land, cleared pecan groves, and wooded bottom land along the two rivers which adjoin the property and actually join to form a larger river. Those two smaller rivers are the Little Osage River and the Marmaton River. They join together to form the Osage River at a point adjacent to the farm. That river has been dammed up to form Truman Lake and further downstream, Lake of the Ozarks.

The property has been dedicated to the sports of hunting and fishing from its earliest days. Judge Kelso loved to hunt quail (before modern farming practices made that much more difficult) as well as ducks and geese. He created multiple duck hunting

sites with concrete blinds on the property. He developed one large fishing pond of about forty acres as well as seven smaller ponds, and he also took advantage of a change in the Osage River's course that created an "oxbow" cut off from the river's main stream, which also provides more water on which to fish.

The farm, which the Kelsos always called "the Ranch" (because for a while Judge Kelso bred and raised cattle on it), has been the site of many, many overnight duck hunting parties for friends and acquaintances from all across the United States and around the world. During the 1980's, the Ranch became well known to some Kansas City Royals through visits by an outdoor writer by the name of Harold Ensley, who had a local television show that featured the Ranch on more than one occasion. These baseball players began to come to the Ranch to fish and hunt. The Ranch has played host to numerous state officials, including Missouri Governors, Congressmen, and Senators. It welcomed University Presidents and other dignitaries from across the state.

Timberhill-Riverbend Inc. is a for-profit corporation. The Ranch has an active commercial pecan-growing operation. There are over 100 acres of a cleared pecan grove, and the pecans grown there are sold to a local wholesaler. The woodland on the property is full of a rich variety of native Missouri trees, including oaks, hickory, walnut, chestnut, sycamores, and others. Some wood is recovered for sale commercially. The Ranch is farmed under a rental contract with a neighboring farmer who also uses the pasture land to raise cattle.

For many years, people have been invited to use the Ranch for recreation, including hunting, fishing, horseback riding, etc., without any fee being charged to those

guests. For a time in the 1980's and 1990's, a portion of the Ranch was rented to a hunting club based in Springfield for its use, but that contract was cancelled and no new leases have been entered into.

IV. SUGGESTIONS BY THE AMICUS

The arguments advanced by Plaintiff would severely restrict the protections of the Recreational Use Act for parties like Union Electric, as well as Amicus Timberhill-Riverbend Inc. Plaintiff's argument is inconsistent with the public policy of the Act and directly contrary to prior cases in this state and other jurisdictions. The Court should affirm the judgment of the Circuit Court.

Amicus joins in Union Electric's argument. It is clear that the Act, which provides immunity from liability to any landowner that "invites or permits any person to enter his land for recreational use, without charge," precludes Plaintiff's claims in this action. There was no "charge" as defined in the Act for the use of the Lake of the Ozarks as alleged by Plaintiff. *See* § 537.345(1), RSMo.

Timberhill-Riverbend writes separately to emphasize the effect of Plaintiff's argument on parties other than Union Electric. According to Plaintiff, when someone claims to be injured in a recreational area that is open to the public free of charge, the protection of the act is lost if a fee is charged for something other than the free use of the recreational area. This argument is contrary to the law. It is not supported by the plain language of the Act, and cases that have considered the argument have rejected it.

For example, this Court rejected an argument similar to Plaintiff's in *Foster v. St. Louis County*, 239 S.W.3d 599 (Mo. banc 2007). The plaintiff in *Foster* was playing

football in a field in a St. Louis County park. *Id.* at 600. The plaintiff was not charged a fee to enter the park or to use the field to play football. *Id.* There was a fee to use some of the picnic areas in the park. *Id.* This Court rejected the idea that this separate fee removed the protection of the Act.

Similarly, in *Wilson v. United States*, 989 F.2d 953 (8th Cir. 1993), a fee was charged for the use of a cabin, but the surrounding recreational area was free to the general public. The Eighth Circuit held that the Act applied because no fee was charged to enter the land for recreational purposes. *Id.* at 956-957.

Courts have reached the same result with respect to the recreational immunity statutes of other states. The South Carolina version is called the Recreational Use Statute, §§ 27-3-10, et seq. See *Cole v. South Carolina Elec. & Gas, Inc.*, 608 S.E.2d 859, 862 (S.C. 2005). In *Cole*, a boy drowned in a lake owned by a utility. On the day the boy drowned, the driver of the car in which he was a passenger paid a three-dollar parking fee. People who entered on foot or by bicycle were charged no fee. The South Carolina Supreme Court ruled that the parking fee was not a “charge” within the meaning of the Recreational Use Statute. *Id.* Under that statute, “charge” was defined as “the admission price or fee asked in return for invitation or permission to enter or go upon the land.” *Id.* The South Carolina Supreme Court held that a parking fee does not qualify as a “charge” because it was not charged for admission to the property. *Id.*

Georgia’s version is called the Recreational Properties Act. See *Majeske v. Jekyll Island State Park Authority*, 433 S.E.2d 304, 305 (Ga. Ct. App. 1993). It provides immunity to “an owner of land who either directly or indirectly invites or permits without

charge any person to use the property for recreational purposes.” *Id.* (citing § 51-3-23). “Charge” is defined as “the admission price or fee asked in return for invitation or permission to enter or go upon the land.” *Id.* (citing § 51-3-21(1)). In *Majeske*, a woman was injured on an island held open to the public for recreational purposes. Persons entering the island by roadway in an automobile were charged a \$1 per vehicle “parking fee” each time they drove onto the island. No fee was charged to persons arriving at the island on foot or by other means. *Id.* The Georgia Court of Appeals held that the owner was entitled to immunity despite the parking fee: “For the charge to constitute an admission fee it must be established that it is imposed in return for recreational use of the land.” *Id.* at 305-306.

The Illinois Appellate Court ruled similarly in a case involving a spectator who alleged she was injured while watching her minor son’s baseball game when she was hit by a baseball thrown by an 11-year-old player warming up for the next game. *See Vaughn v. Barton*, 933 N.E.2d 355, 363-364 (Ill. App. Ct. 2010). The spectator paid a fee for her son’s participation in the baseball league. “The players were not charged an admission to come onto the land; rather, they were charged an admission to play in the baseball league. This is not the type of charge that would remove the immunity under the [Illinois] Recreational Use Act.” *Id.*

The same result should obtain in this case. Plaintiff does not claim that a fee was charged for recreational use of the Lake of the Ozarks. Rather, Plaintiff alleges that Union Electric charged fees “as a condition or predicate for placement, maintenance, use and /or enjoyment of docks on The Lake of the Ozarks” and “enforcement fees for

purposes of compelling compliance with its permitting requirements.” L.F. at 5 (¶¶ 8-9). This dock fee was not charged for the recreational use of the lake, which is open to the general public free of charge.

These cases make it clear that many entities charge fees of various kinds. The dock fee alleged by Plaintiff is no different than the parking fees in *Cole* and *Majeske* or the league fee in *Vaughn*. The fact that a person pays *some* charge does not eliminate the protection of the Act if there is no charge to the public for the use of a recreational area.

The Missouri legislature enacted the Act to encourage the free use of land for recreational purposes in order to preserve and utilize our natural resources. *Foster*, 239 S.W.3d at 601; *State ex rel. Young v. Wood*, 254 S.W.3d 871, 873 (Mo. banc 2008); *Lonergan v. May*, 53 S.W.3d 122, 127 (Mo. App. 2001).

This public policy would be thwarted if the Court were to adopt Plaintiff’s argument. Private entities like Timberhill-Riverbend Inc., along with all other owners of recreational property, would be incentivized to restrict the public’s access for fear of liability.

V. CONCLUSION

For the foregoing reasons, Timberhill-Riverbend Inc. respectfully suggests that the Court should affirm the judgment of the Circuit Court.

Respectfully submitted,

Lauren E. Tucker McCubbin, MO #55179
Jon R. Dedon, MO #62221
POLSINELLI PC
900 W. 48th Place, Suite 900
Kansas City, MO 64112
(816) 753-1000
(816) 753-1536 (Fax)
ltucker@polsinelli.com
jdedon@polsinelli.com

ATTORNEYS FOR AMICUS CURIAE

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 1,693 words, excluding the cover, certificate of service, certificate required by Rule 84.06(c), and signature block.

/s/ Jon R. Dedon

Lauren E. Tucker McCubbin, MO #55179

Jon R. Dedon, MO #62221

POLSINELLI PC

900 W. 48th Place, Suite 900

Kansas City, MO 64112

(816) 753-1000

(816) 753-1536 (Fax)

ltucker@polsinelli.com

jdedon@polsinelli.com

ATTORNEYS FOR AMICUS CURIAE

CERTIFICATE OF SERVICE

A copy of this document was filed electronically on January 5, 2014, causing the same to be served on all parties of record.

/s/ Jon R. Dedon

Lauren E. Tucker McCubbin, MO #55179

Jon R. Dedon, MO #62221

POLSINELLI PC

900 W. 48th Place, Suite 900

Kansas City, MO 64112

(816) 753-1000

(816) 753-1536 (Fax)

ltucker@polsinelli.com

jdedon@polsinelli.com

ATTORNEYS FOR AMICUS CURIAE