

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
EASTERN DIVISION

WALTER FOSTER,)	
)	Appeal No. ED89153
Plaintiff/ Appellant,)	
)	
v.)	Appeal from Circuit Court of
)	St. Louis County, Div. 3
COUNTY OF ST. LOUIS,)	Hon. Mark Seigel, presiding
)	Circuit Court No. 05CC-4408
Defendant/ Respondent.)	

APPELLANT WALTER FOSTER'S BRIEF

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JURISDICTIONAL STATEMENT

Plaintiff Walter Foster appeals from a judgment entered against him by the trial court in favor of defendant, County of Saint Louis. The court entered judgment in favor of defendant, as a result of defendant’s motion for summary judgment that plaintiff’s claims were barred by the Missouri Recreational Use Act (“RUA”), Sec. 537.345-348, R.S.Mo. Plaintiff Foster timely filed his Notice of Appeal.

The issues on appeal concern whether summary judgment was proper as a matter of law and whether the RUA violates the Equal Protection clause in Article I of the Missouri Constitution. The first issue does not involve the exclusive jurisdiction of the Missouri Supreme Court.¹ As a result, this appeal is within the general appellate

¹ The Missouri Supreme Court has exclusive jurisdiction of cases involving the constitutionality of a state law. Art. V. § 3, Mo. Const. *See State v. Ralls*, 1999 W.L.

jurisdiction of the Missouri Court of Appeals, Article V, Section 3, Constitution of Missouri, as amended 1982.

382906 (Mo.App. 1999). Appellate courts have no jurisdiction to decide the constitutionality of the statutory scheme. Were it necessary that the constitutionality of the statutes be adjudicated, this court should transfer this case. However, the courts should refrain from deciding constitutional issues when the case can be resolved without reaching those issues. State ex rel. Williams v. Marsh, 626 S.W.2d 223, 227 (Mo.banc 1982).

STATEMENT OF FACTS

Introduction

This is a premises liability case against Respondent County of Saint Louis for failing to maintain, repair or barricade a dangerous condition at Suson Park, a county park located in unincorporated South St. Louis County.

Incident

On April 16, 2005, Foster was at Suson Park for a family picnic and barbeque. (L.F. 24, 25 & 27). He did not pay an entrance fee to use Suson Park. (L.F. 25). It was his first occasion to visit the park. (L.F. 25). His group set up in a flat grassy area near picnic tables. (L.F. 28). While running in a touch football game, he tripped and fell on a hole located in a grassy area. (L.F. 28, 31, 32, 35, 38 & 39). Foster did not see the hole before he fell. (L.F. 38). The hole was larger than his foot and three to four inches deep. (L.F. 39). As a result of the fall, he incurred multiple fractures to his left leg. (L.F. 38).

Suson Park

Suson Park is owned and operated by St. Louis County, through the St. Louis County Parks and Recreation Department. (L.F. 21 & 60). The park is located in unincorporated St. Louis County and is not located within the corporate boundaries of any city, municipality, village or town. (L.F. 22). Its 98 acres includes lakes, trees, grass, trails, animal barns, picnic tables and a playground. (L.F. 21 & 60). The park is used for fishing, farm animal viewing and picnicking. (L.F. 22, 60 & 61). Suson Park charges users for two of its three shelters and four of its six picnic sites. These fees range from \$25 to \$75. (L.F. 61). During certain months, group tours of the animal farm are

offered for a \$20 fee. (L.F. 47 & 61). Suson Park also holds special events after hours that require a user fee. (L.F. 61). These fees are used to offset the cost of services provided. (L.F. 61). Otherwise, no fees are charged to use the park. (L.F. 61).

Procedural History

Plaintiff filed his Petition on August 26, 2005. (L.F. 1 & 4-6). The defendant answered and generally denied all allegations. (L.F. 7-11). After plaintiff's deposition was taken, Defendant filed a motion for summary judgment. (L.F. 12) Plaintiff filed a timely response. (L.F. 40). Defendant filed a reply brief. (L.F. 51). After oral argument, the trial court granted summary judgment in favor of the defendant based on the Recreational Use Act, Missouri Rev. Stat. Sec. 537.345-348. (L.F. 68). Plaintiff timely filed his Notice of Appeal and Civil Case Information form. (L.F. 69 & 73).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT IN THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE AND SUMMARY JUDGMENT IS NOT PROPER AS A MATTER OF LAW IN THAT SUSON PARK IS A NON-COVERED LAND WHERE USERS PAY FEES FOR CERTAIN SERVICES.

Lonergan v. May, 53 S.W.3d 122 (Mo.App.W.D. 2001)

§537.345

§537.346

§537.347

§537.348

II. THE TRIAL COURT ERRED IN APPLYING SECTIONS 537.345-348, R.S.MO, IN THAT THE STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE MISSOURI CONSTITUTION BECAUSE IT CREATES TWO CLASSES WITH NO RATIONAL BASIS.

Creason v. City of Wash., 435 F.3d 820 (8th Cir. 2006)

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE AND SUMMARY JUDGMENT IS NOT PROPER AS A MATTER OF LAW IN THAT SUSON PARK IS A NON-COVERED LAND WHERE USERS PAY FEES FOR CERTAIN SERVICES.

Standard of Review

Appellate review of the trial court's grant of summary judgment is de novo. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). Whether the grant was proper is a question of law. Id. The record is viewed in the light most favorable to the party against whom judgment was entered, taking the facts set forth in affidavits and otherwise in support of the motion as true unless they are contradicted by the non-movant's response. Id. The party moving for summary judgment must show a right to judgment flowing from material facts about which no genuine dispute exists. Id. at 378. A genuine issue exists when the record contains evidence of two plausible, but contradictory, accounts of the essential facts. Taryen Dev., Inc. v. Phillips 66 Co., 31 S.W.3d 95, 98 (Mo.App.E.D. 2000).

There are genuine issues of material fact in dispute and summary judgment is not proper as a matter of law in determining whether Suson Park is subject to the Missouri RUA.

The RUA creates "tort immunity for landowners who open their land to the public free of charge for recreational use." Lonergan v. May, 53 S.W.3d 122, 127 (Mo.App.W.D. 2001). The purpose of the RUA is "to encourage the free use of land for recreational purposes in order to preserve and utilize our natural resources." Id. Recreational use is defined in the RUA as "hunting, fishing, camping, picnicking, biking, nature study, winter sports, viewing or enjoying archaeological or scenic sites, or other similar activities undertaken for recreation, exercise, education, relaxation, or pleasure on land owned by another." §537.345(4).

The Missouri RUA, Section 537.346, provides,

“Except as provided in sections 537.345 to 537.348, an owner of land owes no duty of care to any person who enters on the land without charge to keep his land safe for recreational use or to give any general or specific warning with respect to any natural or artificial condition, structure, or personal property thereon.”

The RUA, in Section 537.347, continues, providing,

“Except as proved in sections 537.345 to 537.348, an owner of land who directly or indirectly invites or permits any person to enter his or her land for recreational use, without charge, whether or not the land is posted . . . , does not thereby:

(1) *Extend any assurance that the premises are safe for any purpose;*

- (2) *Confer upon such person the status of an invitee, or any other status requiring of the owner a duty of special or reasonable care;*
- (3) *Assume responsibility for or incur liability for any injury to such person or property caused by any natural or artificial condition, structure or personal property on the premises; or*
- (4) *Assume responsibility for any damage or injury to any other person or property caused by an act or omission of such person.”*

A landowner may incur liability, however, for malicious or grossly negligent failure to guard or warn against a dangerous condition or for injuries to a person who has paid a charge for entry to the land. §537.348(1) & (2). Additionally, a landowner may be liable for injuries occurring on or in any land within the boundaries of a city or town, a swimming pool, any residential area, or **any noncovered land**. §537.348(3) (emphasis added). Foster does not allege malicious or gross failure to guard or warn; nor, does he allege that he paid a charge for entry to the land. Rather, Foster argues that the County may be liable for injuries because Suson Park is a non-covered land.

A non-covered land is defined as:

“. . . any portion of any land, the surface of which portion is actually used primarily for commercial, industrial, mining or manufacturing purposes; provided, however, that use of any portion of any land primarily for agricultural, grazing, forestry, conservation, natural area, owner’s recreation or similar or related uses or purposes shall not under any circumstances be deemed to be use of such portion for commercial,

industrial, mining or manufacturing purposes. §537.348(3)(d) (emphasis added).

While the statute does not define the term “commercial,” its plain language meaning is easily and broadly defined. Its common definition includes: ‘relates to or is connected with trade and traffic or commerce is general; is occupied with business and commerce’ Blacks Law Dictionary, Sixth Ed. 1990, p. 270. Commerce is defined as , ‘the exchange of goods, productions or property of any kind: the buying, selling or exchanging of articles’ Blacks Law Dictionary, Sixth Ed. 1990 p. 269.

The non-covered land exception applies in this case and thus summary judgment is not proper as a matter of law. The County charges users of Suson Park for two of its three shelters and four of its six picnic sites. These fees range from \$25 to \$75. (L.F. 61). During certain months, group tours of the animal farm are offered for a \$20 fee. (L.F. 47 & 61). Suson Park also holds special events after hours that require a user fee. (L.F. 61). These fees are used to offset the cost of services provided. (L.F. 61). These fees are established by Saint Louis County Ordinance. (L.F. 49). These facts, at a minimum, establish a genuine dispute of material fact whether Suson Park is a non-covered land under the RUA. Therefore, summary judgment is not proper as a matter of law.

In Lonergan v. May, the Western District addressed the apportionability of lands possibly subject to the RUA. The Lonergan court held, “we will focus on the nature of the activity, and use of the portion of the land in question by owner and guests to determine its purpose. In determining whether the land is used for a commercial purpose

or a recreational purpose, we will view the use from the standpoint of the landowner, although the use by the guest is also an important consideration.” 53 S.W.3d 122, 131. Obviously, the County argues its view is recreational. In light of the statutory language and charges made to users by the County, this determination is not so simple.

The County argued at the trial court that even if charging fees makes it commercial, the area where the plaintiff fell is not associated with the charge. However, the fees help pay for the cost of providing the services. (L.F. 49). While in Lonergan, 53 S.W.3d at 130, the Court opined that a property including a lake and a dam may be separated into commercial and recreational land, an area such as Suson Park cannot be logically divided into a continuous park into commercial and recreational uses. That concept would prove unmanageable. For example, individuals and families often use many areas of the park in the same visit. Without warning of the changes in maintenance and repair duties from area to area, such persons would have no understanding of the level of maintenance or the condition of the property. Under such a standard, a person who rented a shelter (and who made a commercial transaction) would be protected by the common law duty to maintain a premise in the rented shelter, yet once such person left the shelter, the RUA would preclude liability for all but malicious defects.

As such, the entirety of Suson Park is commercial in use because the property is not separable due to the nature of the fees collected and, thus, the RUA does not apply to Suson Park. Therefore, the trial court’s order and judgment should be reversed.

II. THE TRIAL COURT ERRED IN APPLYING SECTIONS 537.345-348, R.S.MO, IN THAT THE STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE MISSOURI CONSTITUTION BECAUSE IT CREATES TWO CLASSES WITH NO RATIONAL BASIS.

Standard of Review

The standard of review for constitutional challenges to a statute is de novo. Barker v. Barker, 98 S.W.3d 532, 534 (Mo. banc 2003). This court should invalidate a statute if it clearly and undoubtly contravenes the constitution and plainly and palpably affronts fundamental law embodied therein. Linton v. Missouri Veterinary Med. Bd., 988 S.W.2d 513, 515 (Mo.banc 1999).

The Missouri RUA violates the equal protection clause because it has no rational basis in providing immunity to owners of land in unincorporated areas while subjecting the same owners to liability for land in other areas.

Alternatively, the Missouri RUA violates the equal protection clause of Missouri's Constitution, which states, "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. art. I, sec. 2. This constitutional protection, like that in the Fourteenth Amendment, U.S. Const. amend. XIV, requires that laws "operate on all alike" and "not subject the individual to an arbitrary exercise of the powers of government." Kansas City v. Webb, 484 S.W.2d 817, 823 (Mo. banc 1972). *See also* Creason v. City of Wash., 435 F.3d 820, 823 (8th Cir. 2006) (government is to "treat all similarly situated people alike").

Equal protection analysis thus focuses on classifications of persons or groups. But, "equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." Romer v. Evans, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). For this reason, not all distinctions in treatment of individuals or groups are invalid. A law may properly treat different groups differently, but it may not treat similarly situated persons differently unless such differentiation is adequately justified. Creason, 435 F.3d at 823, n. 3.

What constitutes adequate justification for treating groups differently depends on the nature of the distinction made. If the law "disadvantages a suspect class" or affects a "fundamental right," a court must apply strict scrutiny to determine "whether the statute is necessary to accomplish a compelling state interest," In Re Marriage of Woodson, 92 S.W.3d at 784, and whether the chosen method is narrowly tailored to accomplish that purpose. In Re Norton, 123 S.W.3d at 173. Foster does not claim that he is a member of a suspect class nor does he claim that the Missouri RUA affects a fundamental right. Thus, the rational basis test is the proper standard of analysis. Doe v. Phillips, 194 S.W.3d 833, 846 (Mo. banc 2006).

The oft-stated rational basis test requires that the challenged law bear some rational relationship to a legitimate state interest to survive scrutiny. Under this test, the statute is unconstitutional if the classification has no reasonable basis and is purely arbitrary. Miss Kitty's Saloon, Inc. v. Missouri Dep't of Revenue, 41 S.W.3d 466, 467 (Mo. banc 2001). While other states have evaluated its recreational use statues under an

equal protection analysis, “the interpretation of the various recreational use statutes is controlled by the precise language of each statute.” Wilson v. U.S., 989 F.2d 953, 957 (8th Cir. 1993).

The Missouri RUA fails the rational basis test. It creates two classifications of users of similar lands that cannot be adequately justified. One is not subject to the RUA. The other is because the land they chose to use is within the boundaries of a city, village, town or municipality. Sec. 537.348(3). This difference has no reasonable basis. In the case of the Defendant, County of Saint Louis, it owns parks that are located in cities, towns, villages and municipalities. If they did not, the distinction might be reasonable. In such circumstances, a landowner could argue that it would not open its lands to public use absent the protections of the RUA; however, entities like defendant cannot make such a claim. There is no dispute that they maintain parks in cities, towns, villages or municipalities with similar activities to those available at parks in unincorporated areas, such as Suson Park. The distinction is purely arbitrary.

Furthermore, the statute creates two classes of users on the basis of payment of a charge. The picnic area provides the best example for the lack of rationality in this distinction. Consider a situation where a roof over a picnic area collapses on a family and causes severe injuries. Under the RUA, an individual or family that pays for the use of the facility would not be subject to the statute. On the opposite end, a family that does not pay would be subject to the statute. The resulting inequity of the statute creates a situation where a family that pays for the use of a picnic area will not be subject to RUA and their claim would not be barred. By protecting citizens who paid a user fee more

than those unable to afford the user fee and by protecting citizens whose park may fall within a municipality, village or township as compared to those whose park does not, the statute prevents citizens from obtaining equal protection under the law.

The County argued at the trial court that the statute is rationally related to Missouri's interest in keeping land accessible to the public by limiting liability of landowners who open their property for recreational use. Even if correct, that rationale ignores the distinction between areas that are within a city, village, town or municipality and those that are not. The statute under the County's rationale punishes landowners within cities, towns, villages or municipalities. Therefore, there is no relationship to a legitimate state interest in protecting one class of users versus the others. As a result, this Court should declare the RUA unconstitutional and reverse the trial court's order and judgment.

CONCLUSION

In summary, the trial court erred in granting summary judgment in favor of the County of Saint Louis in that there are genuine issues of material fact in dispute and summary judgment is not proper as a matter of law because Suson Park is subject to the non-covered land exception, i.e., commercial use, of the RUA. Alternatively, the Missouri RUA violates the Equal Protection clause of the Missouri Constitution because it creates classifications that are unreasonable and purely arbitrary. As a result, the trial court's order and judgment should be reversed.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the page limitations prescribed in the Missouri Rules and local rules of this court in that it contains 15 pages, 3,100 words and 334 lines.

The undersigned also certifies that the diskette submitted with this Brief has been scanned for viruses.

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The undersigned hereby certifies that a true and accurate copy of the foregoing was mailed first class postage prepaid via United States Mail to the following on this 26th day of March, 2007:

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APPENDIX

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