

IN THE SUPREME COURT OF MISSOURI

WALTER FOSTER,)	
)	Appeal No. SC88496
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.)	

REPLY BRIEF OF APPELLANT WALTER FOSTER

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TABLE OF CONTENTS

Description	Page #
Table of Authorities	3
Argument	4
Conclusion	8
Certificate of Compliance	9
Certificate of Service	9

TABLE OF AUTHORITIES

Case Law	Page #
<u>Lonergan v. May</u> , 53 S.W.3d 122 (Mo.App.W.D. 2001)	5
Statutes	
§537.345	6, 7
537.347	4
§537.348	4
Constitutions	
Mo. Const. art. I, sec. 2.	6

ARGUMENT

I. THERE ARE GENUINE ISSUES OF MATERIAL FACT WHETHER SUSON PARK IS A NON-COVERED LAND AS DEFINED BY THE MISSOURI RUA AND SUMMARY JUDGMENT IS NOT APPROPRIATE AS A MATTER OF LAW.

There is no dispute that St. Louis County owns and maintains Suson Park through its parks department. There is no dispute that the Respondent charges for certain services at Suson Park. There is also no dispute that certain recreational activities are available at the park. The facts of this case are not the issue; rather, it is the application of them to the statute to them.

Thus, the threshold question is whether Suson Park has a “commercial purpose.” 537.348.3(d) Respondent is correct in stating that the Missouri RUA does not define commercial purpose. In fact, the RUA itself provides only minimal guidance. It states that the “use of any portion of land primarily for agricultural, grazing, forestry, conservation, natural area, owner’s recreation or similar or related purposed shall not under any circumstances be deemed to be use of such portion for commercial ... purposes.” 537.348(3)(d). However, the RUA applies only if an owner of land permits or invites any person to enter his land for recreational use “without charge.” 537.347, R.S.Mo. (Emphasis added.)

While a person may enter Suson Park for any number of activities free of charge, there is a charge for certain services. Suson Park has three shelters and six picnic sites for park guests. L.F. 61. Two of the shelters and four of the picnic sites may be reserved

by paying a fee of \$25 to \$75. Id. These shelters and picnic sites are generally reserved during the warm weather months. Id. Group tours of the animal barn are offered in April and May. Id. The fee for the group tour is \$20. Id. Special events are held after the park closes. Id. Attendance at these special events requires a fee. Id.

Respondent counters these admissions with the concept of severability premised on the holding of Lonergan v. May, 53 S.W.3d 122 (Mo.App. 2001). The problem with the dichotomy raised in Lonergan is that the portions of Suson Park that Respondent charges persons or groups to use are also available free of charge depending on the occasion. Therefore, unlike Lonergan where the appellate court held the presence of a dam did not make the entire lake commercial, Suson Park cannot so easily be divided.

The Respondent's conclusion is the opposite of Appellant's position: Suson Park is recreational in purpose and alternatively, even if portions were deemed commercial in use, the area of appellant's injury is not inclusive of such areas. This position is counter to the evidence and language of the statute. Suson Park is a continuous property located in a residential area of South St. Louis County. Respondent freely admits the imposition of certain charges for use. The statute does not require a landowner to engage in commerce or make a profit, but limits its application to properties used for a commercial purpose. Looking at the land from the perspective of the landowner and the user, by making its land available for special events, tours and picnics for a fee is a commercial purpose. Furthermore, there is no severability to the park because of the intermingling of the amenities.

As a result, the liability of Respondent is best left to a jury and summary judgment is inappropriate.

II. THERE IS NO RATIONAL BASIS TO EXCLUDE THE OWNERS OF RECREATIONAL LAND WITHIN A CITY, VILLAGE, TOWN OR MUNICIPALITY AND THUS THE MISSOURI RUA VIOLATES THE CONSTITUTION OF THIS STATE.

The Missouri RUA, 537.345 et seq., violates the Equal Protection Clause of the Missouri Constitution, Art. I, Sec. 2.

On Brief, Respondent argues the legislature may have rationally concluded that land in unincorporated “or rural” areas is more difficult to maintain and that unincorporated areas present a greater risk to owners of increased liability due to its presumed size (Resp. Brief, pg. 19). It further argues that a rational basis exists because Missouri’s natural resources are located outside of its many cities, towns, villages and municipalities and the RUA protects their enjoyment. Conversely, it argues there is no rational basis to apply the RUA to presumably smaller tracts of recreational lands in cities, towns, villages and municipalities because, as Respondent speculates, these lands are generally smaller and easier to maintain.

Disregarding whether Missouri’s natural resources are located throughout the state and not strictly within unincorporated areas (e.g., Forest Park in the City of Saint Louis), the legislature failed to craft an RUA with a rational basis. Most illustrative to this point is the Respondent’s addition and the statute’s absence of “rural” to the description of the covered areas. The inclusion of such a phrase may have satisfied the rational basis test.

Another inclusion that may be reasonable would be the developed vs. undeveloped distinction that the Respondent quickly dismisses. For example, a county park with amenities such as Suson Park would not be considered “undeveloped.” Clearly, the protection of rural or undeveloped land could be reasonably related to the protection of lands open to “hunting, fishing, camping, picnicking, biking, nature study . . .” 537.345, R.S.Mo. 2000. However, in the present statute, the exclusion of lands located within the boundaries of a city, town, village or municipality has no rational basis. Other courts that have addressed this question interpreted state statutes with more defined distinctions. *See Appellant’s Jurisdictional Brief.*

With respect to the second claim of equal protection violations, under the Respondent’s reasoning, affording different levels of protection to users of the same land is rational and, essentially, reasonable. On the contrary, the violation of equal protection mirrors the argument raised previously that the areas of Suson Park where charges sometimes apply are also under other circumstances free for use. This results in two parks, a protected zone and non-protected zone. In application, there is no warning to users of the park of the difference. This results in the lack of rational basis for the land to be severable. This absence is where charging for the same amenities that are otherwise free violates equal protection. There is no indication on the website or the park that Respondent will maintain Suson Park less carefully than its other parks simply based on its location in unincorporated Saint Louis County or if an individual or group pays for its use. Such conclusions fail to satisfy the rational basis requirement.

CONCLUSION

In conclusion, the charging for certain uses of Respondent's property raises questions of fact whether it has a commercial purpose and thus summary judgment is inappropriate. Additionally, there is no rational basis to exclude recreational lands located with cities, towns, villages or municipalities or to exclude users of property that pay a fee for amenities that are otherwise free to use. Therefore, this Court should reverse the trial court's judgment against appellant and in favor of respondent because there are genuine issues of material fact in dispute and because the Missouri RUA violates the equal protection clause of the Missouri Constitution.

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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 9 pages, 7,750 words and 550 lines.

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

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CERTIFICATE OF SERVICE

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 1st day of June, 2007: Robert C. Moore, Attorney at Law, 41 S. Central, Ninth Floor, Clayton, Missouri 63105, *Attorney for Respondent County of St. Louis.*

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