

IN THE SUPREME COURT OF MISSOURI

No. SC 88496

**WALTER FOSTER,
Plaintiff/Appellant,**

v.

**COUNTY OF ST. LOUIS,
Defendant/Respondent.**

**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
CAUSE NO. 05CC-004408
DIVISION NO. 3
HONORABLE MARK SEIGEL**

BRIEF OF RESPONDENT COUNTY OF ST. LOUIS

**PATRICIA REDINGTON
COUNTY COUNSELOR**

**ROBERT C. MOORE #47553
Assistant County Counselor
41 S. Central Ave.
Clayton, MO 63105
(314)-615-7042
(314)-615-3732 Fax
Attorney for Respondent St. Louis
County, Missouri**

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STATEMENT OF FACTS

Appellant Walter Foster was injured at Suson Park on April 16, 2005. *L.F., pp. 24-25.* Appellant did not pay a fee to enter Suson Park. *L.F., p. 25.* Appellant was at Suson Park for a picnic. *L.F., pp. 25-27.* After eating, Appellant played in a game of touch football. *L.F., pp. 29-30, 65.* Appellant was injured during the game, which was played in an open field. *L.F., p. 66.* Appellant stepped in a hole while running. *L.F., p. 38-39.* As a result of stepping in the hole, Appellant fell and sustained injuries to his leg. *L.F., p. 38.*

Suson Park is owned and operated by Respondent St. Louis County through its Parks and Recreation Department. *L.F., pp. 21, 60.* Suson Park is located in unincorporated St. Louis County (“County”) and is not located inside the corporate boundaries of any city, municipality, village or town. *L.F., p. 22.* Suson Park’s land has lakes, trees, grass, trails, animal barns, picnic tables and a playground. *L.F., pp. 21, 60.* Suson Park is used for fishing, farm animal viewing, picnicking, hiking, nature study, walking and outdoor recreation. *L.F., pp. 22, 60-61.* Suson Park’s land is also used for grazing of farm animals and for conservation. *L.F., p. 61.* Suson Park does not charge a fee for entry into the park. *L.F. p. 61.* Suson Park has three shelters and six picnic sites for park guests. *L.F., p. 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 have water, restrooms, barbeque pits, tables and can accommodate large groups. *Id.* The payment of this fee allows the person making the reservation to use the shelter or picnic site at a specific date and time. *Id.* If these two shelters and four picnic sites are not reserved or in use, they are available for use by any person in the park. *Id.* No fee is charged for the other shelter or picnic sites. *Id.* The reservable shelters and picnic sites are generally reserved during warm weather months. *Id.*

Group tours of Suson Park's animal barn are offered in April and May. *Id.* The fee for this group tour is \$20. *Id.* Special events are held after Suson Park closes. *Id.* Attendance at these special events requires a fee. *Id.* St. Louis County is a governmental entity and is not engaged in commerce. *L.F., p. 62.* Suson Park is not a business and does not generate a profit for the County. *Id.* The facility and other fees at Suson Park do not offset the County's cost of operating the park. *Id.* Suson Park is a recreational park operated for the recreational benefit of the public. *Id.*

Appellant filed his petition on August 26, 2005. *L.F., pp. 4-6.*
Respondent filed its answer on October 11, 2005. *L.F., pp. 7-11.*
Respondent filed its motion for summary judgment on September 21, 2006.

L.F., p. 12. Appellant his response on October 19, 2006. *L.F., p. 40.*

Respondent filed its reply brief on November 2, 2006. *L.F., pp. 51-67.*

After oral argument, the trial court granted Respondent's motion for summary judgment in its favor. *L.F., p. 74.*

POINTS RELIED ON

I. THE TRIAL COURT DID NOT COMMIT ERROR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE ARE NO ISSUES OF DISPUTED MATERIAL FACT AND SUSON PARK IS NOT NON-COVERED LAND PURSUANT TO SECTION 537.348(3)(d) R.S.Mo. (2000).

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

Wilson v. United States, 989 F.2d 953 (8th Cir. 1993)

Fields v. Henrich, 208 S.W.3d 353 (Mo. App. 2006)

§ 537.345 et seq. R.S.Mo. (2000)

II. THE TRIAL COURT DID NOT COMMIT ERROR IN APPLYING SECTIONS 537.345-348 R.S.MO., BECAUSE THERE IS A RATIONAL BASIS FOR THE CLASSIFICATION THAT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Schnorbus v. Director of Revenue, 790 S.W.2d 241 (Mo. banc 1990)

Belton v. Board of Police Comm'rs, 708 S.W.2d 131 (Mo. banc 1986)

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

Wilson v. United States, 989 F.2d 953 (8th Cir. 1993)

ARGUMENT

I. THE TRIAL COURT DID NOT COMMIT ERROR IN GRANTING RESPONDENT’S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE ARE NO ISSUES OF DISPUTED MATERIAL FACT AND SUSON PARK IS NOT NON-COVERED LAND PURSUANT TO SECTION 537.348(3)(d) R.S.Mo. (2000).

The Appellant argues that the trial court erred in granting County’s motion for summary judgment because Suson Park falls within an exception to the Missouri Recreational Use Act (“RUA”), § 537.345 et seq. R.S.Mo. (2000).¹ *Brief p. 13.* “The purpose of the Recreational Land Use Act . . . is ‘to encourage the free use of land for recreational purposes in order to preserve and utilize our natural resources.’” *Fields v. Henrich*, 208 S.W.3d 353, 357 (Mo. App. 2006) (citation omitted). Section 537.346 of the RUA 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.

¹ All references to R.S.Mo. are to the year 2000 unless otherwise noted.

Section 537.347 of the RUA reads as follows:

Except as provided in sections 537.345 to 537.348, an owner of land who directly or indirectly invites or permits any person to enter his 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.

Section 537.348 contains exceptions to the RUA that do not permit landowner liability in certain cases. This section states, in relevant part:

Nothing in this act shall be construed to create liability, but it does not limit liability that otherwise would be incurred by those who use the land of others, or by owners of land for . . .

(3) Injuries occurring on or in . . .

(d) Any non-covered land. “**Non-covered land**” as used herein means any portion of 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.

Id. (emphasis in original).

Appellant argues that § 537.348(3)(d) R.S.Mo. applies to Suson Park because user fees associated with certain of the park facilities make the park a commercial enterprise. *Brief at 13*. However, these user fees for picnic facilities and barn tours do not make Suson Park’s purpose a commercial one so that it becomes non-covered land pursuant to § 537.348(3)(d) R.S.Mo.

Although the RUA does not define the term “commercial purpose,” *Lonergan v. May*, 53 S.W.3d 122 (Mo. App. 2001) is instructive in determining whether land has a commercial purpose under the RUA.

Lonergan involved a boating accident on the Lake of the Ozarks. *Id.* The issue in *Lonergan* was whether the lake’s dam, which was used to generate electricity for sale by the owner utility company, made the lake’s use a “commercial purpose” under 537.348(3)(d) R.S.Mo.

As a threshold matter, the focus of the “commercial purpose” inquiry is on the portion of the land where the injury occurred. *Lonergan* at 130. The *Lonergan* Court stated that certain lands could be both recreational and commercial in nature:

. . . [A]ny portion of the land used primarily for recreational purposes, among other things, shall not be deemed to have a commercial purpose. Read together, the section not only allows a piece of land to be divided into multiple parts, each able to assume a recreational, commercial or combined function, but it also establishes that the portions of the land that are used primarily for recreational purposes are exempt from liability.

Those portions that are used primarily for commercial purposes are “noncovered lands” and fall outside the ambit of § 537.346.

Id. at 130.

To determine whether land is used for a commercial purpose or a recreational purpose, the *Lonergan* Court “view[ed] the use from the

standpoint of the landowner, although the use by the guest is also an important consideration.” *Id.* at 131. Following its analysis, the *Lonergan* Court held that because the lake’s owner opened the land to the public free of charge for recreational purposes, the landowner was protected by the RUA. *Id.* The *Lonergan* Court also concluded that the Plaintiffs came to the lake intending to use it for recreational purposes free of charge, thereby making the land recreational, rather than commercial, in purpose. *Id.*

Applying this analysis, Suson Park is recreational in purpose when viewed from the Appellant’s standpoint. The Appellant admits that he entered Suson Park free of charge for recreational purposes, hence, it has a recreational purpose. *L.F.*, pp. 24-30. See *Lonergan* at 131 (plaintiffs’ decedent came to lake intending to use it for recreational purposes free of charge).²

From the landowner’s perspective, Suson Park has a recreational purpose. St. Louis County owns and operates Suson Park, which has lakes,

² The fact that County does charge for certain facilities inside of the park does not change the fact that the park itself was open for use without charge. See *Wilson v. United States*, 989 F.2d 953, 956-57 (8th Cir. 1993) (defining “charge” as an admission fee onto the land itself rather than for use of a facility thereon).

trees, grass, trails, animal barns and a playground. *L.F.*, p. 60. Suson Park is used for fishing, picnicking, hiking, nature study and outdoor recreation. *Id.*, p. 61. No fee is charged for entry onto the land of Suson Park, but fees are charged to reserve some of the park's shelters and picnic sites, for barn tours and for special events. *Id.* The fees from these facilities and services offset the County's costs of providing these services³. *Id.* St. Louis County is not a commercial entity and does not operate Suson Park as a business. *Id.*, p. 62. The fees charged at Suson Park do not cover the expense of operating the park. *Id.* Suson Park is wholly recreational in nature and is used for public recreation. *Id.*; see Section 537.345 R.S.Mo. (definition of recreational use includes picnicking, fishing and nature study); see *L.F.*, p. 47. (copy of County webpage providing information on recreational pursuits at Suson Park); *cf.* *Hendrickson v. Georgia Power Co.*, 240 F.3d 966, 971 (11th Cir. 2001) (owner of public use area which was a "wholly recreational facility" used by the public was immunized by Georgia RUA because the intrinsic nature of the area was recreational).

³ Under Article X, Sections 16 through 24 of the Missouri Constitution, the "Hancock Amendment," these user fees can only go to pay for the cost of services provided and cannot be used to raise revenue. *Roberts v. McNary*, 636 S.W.2d 332, 336 (Mo. banc 1982).

In this case, the Appellant was injured in an open field where no fees are charged. *L.F.*, pp. 61, 66. Based on this, the Appellant cannot show that the portion of land where he was injured is “actually used primarily for commercial purposes,” § 537.348 R.S.Mo. *See Lonergan* at 130, n.26 (not addressing whether the dam area of the lake was a commercial portion because the Plaintiff’s injury did not occur there); *see generally Kleer v. United States*, 761 F.2d 1492, 1495 (11th Cir. 1985) (where no commercial activity took place in particular area where plaintiff was injured, commercial activity exception did not bar application of Florida RUA); *Zuk v. United States*, 698 F.Supp. 1577, 1582 (S.D. Fla. 1988) (commercial activity exception to Florida RUA did not apply where no commercial activity took place in distinct area where plaintiff was injured).

Moreover, the Appellant’s injury was not related to any of the alleged commercial activity at Suson Park. *L.F.*, p. 66. The commercial purpose exception should not apply because there is no nexus between the Appellant’s injury and the alleged commercial activity. *See Kirkland v. United States*, 930 F.Supp. 1443, 1447 (D. Colo. 1996) (commercial or business enterprise exception to Colorado RUA did not apply where plaintiff’s use of campground had no connection to campground concessions). As a result, the non-covered land exception of §

537.348(3)(d) does not apply, and the RUA shields the County from liability in this case.

Nonetheless, the Appellant argues that Suson Park cannot be logically divided into recreational and commercial uses, pursuant to *Lonergan*. *Brief at 14*. As a result of these “unmanageable” divisions, the Appellant argues that “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.” *Id.* The Appellant’s proposed construction of the RUA would negate the legislative intent behind the statute:

If we forced the owners of these lands to maintain them as appellants claim they should, making owners liable, we would thwart the purpose of the statute; accommodating owners would fear liability, and be discouraged from opening these lands up to the public, thus denying citizens a significant portion of Missouri’s natural resources. We cannot imagine that the legislature intended such an absurd result.

Lonergan at 132.

Severability of land by its use is contemplated, and included, in the RUA. *See* Section 537.348(3)(d) R.S.Mo. (“noncovered land . . . means any portion of land . . .”) (emphasis added). “The Missouri

statute does not provide that immunity for an entire parcel should be nullified if a landowner charges admission to a different portion of the parcel, nor would such a rule be consistent with the statute's purpose." *Wilson v. United States*, 989 F.2d at 957 (8th Cir. 1993). The fact that Suson Park collects fees for some of its facilities does not make the park's use primarily commercial so that Suson Park is non-covered land pursuant to § 537.348(3)(d). *See Wilson* at 958 (building where plaintiff was injured was not operated as a commercial enterprise under § 537.348 R.S.Mo. where \$2.00 fee was charged for overnight lodging); *see also Lonergan* at 131 (calling "absurd" the Appellant's suggestion that the presence of a dam on the lake made the entire lake's use primarily for commercial purposes). Here, Appellant's injury occurred in a portion of land "sued primarily for recreational purposes." *Id.* at 130. The trial court correctly granted County's summary judgment motion because the commercial purpose exception does not apply in this case.

II. THE TRIAL COURT DID NOT COMMIT ERROR IN APPLYING SECTIONS 537.345-348 R.S.MO. BECAUSE THERE IS A RATIONAL BASIS FOR THE CLASSIFICATION THAT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The Appellant argues that Sections 347.345-348 R.S.Mo. violates the Missouri Constitution's equal protection clause, art. I, sec. 2. *Brief at 15.* The Appellant argues that the RUA is not rationally related to any legitimate state interest because it provides immunity to owners of land in unincorporated areas, but not for landowners in incorporated areas. *Id.*

In challenging the constitutionality of this statute, the Appellant bears an extremely heavy burden. "When the constitutionality of a statute is attacked, constitutionality is presumed, and the burden is upon the attacker to prove the statute unconstitutional." *Schnorbus v. Director of Revenue*, 790 S.W.2d 241, 242-43 (Mo. banc 1990) (citations omitted). The Court will not invalidate a statute "unless it clearly and undoubtedly contravenes the constitution" and "plainly and palpably affronts fundamental law embodied in the constitution." *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 903 (Mo. banc 1992).

The first step in analyzing an equal protection claim is to determine whether the classification operates to the detriment of a suspect class or infringes upon a fundamental right. *Belton v. Board of Police Comm'rs*, 708 S.W.2d 131, 139 (Mo. banc 1986). If it does, the classification receives strict judicial scrutiny. *Id.* Government action that does not create a suspect classification nor infringe upon a fundamental right will withstand judicial scrutiny if the classification is rationally related to a legitimate government interest. *West Cent. Mo. Regional Lodge No. 50 v. Board of Police Comm'rs*, 916 S.W.2d 889, 892 (Mo. App. 1996). If the classification receives rational basis review, “the burden is on the person attacking the classification to show it does not rest upon any reasonable basis, and is purely arbitrary.” *Belton*, 708 S.W.2d at 139. Under rational basis analysis, the classification “will be upheld if any state of facts can be reasonably conceived which would justify it.” *Id.*

“The seminal rule of statutory construction directs this Court to determine the true intent of the legislature, giving reasonable interpretation in light of the legislative objective.” *ACME Royalty Co. v. Director of Revenue*, 96 S.W.3d 72, 74 (Mo. banc. 2002). Construction of statutes should avoid unreasonable or absurd results, *Murray v. Missouri Highway and Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo. banc 2001) and the Court

has no authority to read into a statute a legislative intent contrary to the intent made evident by the plain language, *Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993).

The purpose of Missouri's RUA is to "encourage the free use of land for recreational purposes in order to preserve and utilize our natural resources." *Fields*, 208 S.W.3d at 357 (Mo. App. 2006) (quoting *Lonergan* at 127). See also *Lonergan*, 53 S.W.3d at 135 ("[t]he purpose of the statute is to preserve our state's resources by encouraging property owners to open large areas of land to the public free of charge for recreational purposes.").

Subsection (3)(d) of Section 537.348 excludes from the RUA's protection "land within the corporate boundaries of any city, municipality, town or village in this state." This exclusion does not violate the equal protection clause, because the exclusion is rationally related to the state's legitimate interest in "encourag[ing] the free use of land for recreational purposes in order to preserve and utilize our natural resources." *Lonergan* at 127.

Here, the legislature may rationally have concluded that land in unincorporated, or rural, areas is more difficult to maintain, or is not maintained as intensely, as land inside incorporated areas. The legislature may have concluded that land in unincorporated areas

presents a greater risk of injury to recreational users, and that there is greater liability to the owners of such land. In order to encourage the free use of land for recreational purposes, the legislature limited the liability of landowners in unincorporated areas who open their land to the public for recreational use free of charge.

The distinction between incorporated and unincorporated land is rationally justified because of the differing levels of care given to each type of land, and different requirements of maintaining each type of land. *See Lonergan*, 53 S.W.3d at 134 (“It is our belief that the legislature included [the exception of section 537.348(3)(a)] in lieu of arbitrarily deciding what constituted developed land and undeveloped land.”). This intent is further supported by that fact that it is more difficult for a landowner to discover dangerous conditions that may exist on a large tract of land. *Id.* at 132 (“It is practically impossible to maintain a large area of land used by the public for recreational use.”)

Conversely, the legislature did not limit the liability of landowners in cities, villages, towns and municipalities, where tracts of land are likely to be smaller and easier to care for. The Missouri legislature held these landowners to a higher standard of liability

because dangerous conditions on these smaller tracts of land can be more easily discovered and remedied. *See* Section 537.348(3)(c) R.S.Mo. (residential areas are excluded from the RUA and residential areas are defined as tracts of land of one acre or less).

Lastly, the recreational purpose underlying the statute better serves unincorporated areas in Missouri. The RUA defines recreational uses 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.” Section 537.345 R.S.Mo. (2000). These activities, especially hunting and camping, are more likely to be enjoyed in the less congested unincorporated areas of Missouri. Moreover, the statute’s goal is to open land for recreational use to “preserve and utilize our **natural** resources” *Lonergan* at 127 (emphasis added). The legislature may have rationally concluded that Missouri’s natural resources are located in the unincorporated areas of the state, and that the statute promotes recreation in those areas by limiting landowner liability.

These considerations are rationally related to achieving the legitimate state interests in maintaining public access to land for recreational purposes and maintaining the health, safety, and general welfare of Missourians, respectively. The legislature's desire to promote public recreational use of public and private land easily meets the rationality test in this case.

Appellant further argues that the RUA creates two classes of users based on whether the user paid a charge. *Brief at 17*. Appellant's suggestion that there is no rational basis for distinguishing between owners who charge for the use of their land and those who do not, is without support and is transparently lacking in logic. The legislature's choice to protect those who altruistically offer their land for recreational use, while leaving untouched the liability of those who offer their land for financial gain, is clearly rational and comports with general liability law distinguishing licensees and invitees. Appellant offers no case law supporting his argument that the classification created by Section 537.348(3) violates the Equal Protection Clause and his argument lacks sufficient gravitas to warrant further discussion. Because the classification scheme created by the RUA is rationally related to the purpose of the RUA, Missouri Const. art. I, sec. 2 is not violated.

CONCLUSION

The trial court correctly granted County's summary judgment motion based on the RUA, § 547.345 *et seq.*, because there are no genuine issues of material fact in dispute regarding application of the statute and the RUA does not violate the Equal Protection Clause of the Missouri Constitution; the classification created is rationally related to a legitimate government purpose. As a result, this trial court's order and judgment should be upheld.

Respectfully submitted,

PATRICIA REDINGTON
COUNTY COUNSELOR

By _____
Robert C. Moore #47553
Assistant County Counselor
41 S. Central, 9th Floor
Clayton, MO 63105
(314) 615-7042
(314) 615-3732 (fax)
rmoore@stlouisco.com
Attorney for St. Louis County

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2000 and contains 4,208 words. The font is New Times Roman, proportional spacing, 14-point type. A 3 ½ inch computer diskette, which has been scanned for viruses and is virus free, and which contains the full text of this brief has been served on Appellant and has been filed with the clerk.

Robert C. Moore

CERTIFICATE OF SERVICE

I hereby certify that one copy of this brief and a 3 ½ inch computer diskette, which has been scanned for viruses and contains the full text of this brief, has been mailed, postage prepaid, this 21st day of May, 2007 to:

Andrew L. Mandel

Schlueter, Mandel & Mandel, LLP
1108 Olive Street, Fifth Floor
St. Louis, MO 63101

Michael J. Sudekum

Schlueter, Mandel & Mandel, LLP
1108 Olive Street, Fifth Floor
St. Louis, MO 63101

Robert C. Moore