IN THE SUPREME COURT OF MISSOURI
EN BANC

State ex rel. A. Carlton Young
and Arline E. Young,

Relators, **ALTERNATIVE WRIT OF MANDAMUS**

vs. No. SC88840

The Honorable Gael D. Wood,

Respondent.

ORIGINAL PROCEEDING IN MANDAMUS ON PRELIMINARY RULE IN MANDAMUS FROM THE SUPREME COURT OF MISSOURI TO THE HONORABLE GAEL D. WOOD, CIRCUIT JUDGE OF DIVISION ONE OF THE CIRCUIT COURT OF GASCONADE COUNTY, MISSOURI

BRIEF OF RESPONDENT GAEL D. WOOD

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JURISDICTIONAL STATEMENT

Respondent hereby adopts the jurisdictional statement set forth by Relators in their brief, except Respondent states that it would be more accurate to identify Dr. Shaw, Plaintiffs' decedent, as the late husband of Plaintiff Kristen L. Shaw and the late father of Plaintiffs Matthew Thomas Shaw, Travis Mark Shaw, and Melissa Leigh Shaw.

STATEMENT OF FACTS

Respondent hereby adopts the statement of facts contained in the Brief of Relators, subject to the following corrections or amplifications. Respondent agrees that the sole legal issue (although it is composed of several interrelated parts) in this

writ and answer is whether Relators Young are entitled to the conditional immunity from suit contained in Sections 537.345 through 537.348 of the Revised Statutes of Missouri (referred to in the statutes as the "Recreational Use Act," but referred to by Relators for some reason as the "Recreational Use Statutes," or "RUS").

The statement by Relators on page 8 of their Brief that both the decedent and Defendant Hartnagel were given permission to hunt on Relators' land "without the Youngs charging or receiving any payment or compensation," but the quoted language is not contained in Plaintiffs' Petition and is not entitled to the same inference of accuracy as are the pleadings filed by the party who opposes a motion to dismiss.

The Relators' Statement of Facts later recites that "[f]ollowing a Reply to this Response by the Youngs . . . , Plaintiffs filed a Sur-Reply [in which] Plaintiffs now argued that the reason the RUS did not apply to this case was because Dr. Shaw and Dr. [sic] Hartnagel were 'social guests' of the Youngs and not members of the general 'public' [and] because the Youngs did not extend an invitation to the entire general public to hunt on their property." Contrary to that current assertion by Relators, Respondent believed that the quoted facts were a reason that the Act did not apply, but were not the sole reason to support that conclusion.

POINTS RELIED ON

I. RELATORS ARE NOT ENTITLED TO AN ORDER OF MANDAMUS FROM THIS COURT DIRECTING THAT RESPONDENT GRANT RELATORS' MOTION TO DISMISS THEM FROM THE UNDERLYING LAWSUIT, BECAUSE RELATORS CANNOT SATISFY THEIR BURDEN OF PROOF FOR ISSUANCE OF A PERMANENT WRIT WHEREBY THEY MUST ESTABLISH THAT THEY HAVE AN EXISTING, CLEAR, AND UNCONDITIONAL RIGHT TO IMMUNITY UNDER THE "RUS" AND BECAUSE RESPONDENT DID NOT HAVE A CORRESPONDING, PRESENT, IMPERATIVE, AND UNCONDITIONAL DUTY TO DISMISS RELATORS FROM THE UNDERLYING LAWSUIT, IN THAT:

A. THE RECREATIONAL USE ACT DOES NOT CONTAIN A CLEAR AND UNAMBIGUOUS GRANT OF ABSOLUTE IMMUNITY TO PERSONS IN SIMILAR CIRCUMSTANCES AS RELATORS FROM THE TYPE OF CLAIM ASSERTED AGAINST THEM IN PLAINTIFFS' SECOND AMENDED PETITION.

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo. 1994)

Furlong Cos. v. City of Kansas City, 189 S.W.3d 157 (Mo. 2006)

State ex rel. Schnuck Markets, Inc. v. Koehr, 859 S.W.2d 696 (Mo. banc 1993)

State ex rel. Leigh v. Dierker, 974 S.W.2d 505 (Mo. banc 1998)

State ex rel. Planned Parenthood of Kansas v. Kinder, 79 S.W.3d 905 (Mo. 2002)

In the Interest of N.D.C., 229 S.W.3d 602 (Mo. 2007)

State ex rel. Johnson v. Griffin, 945 S.W.2d 445 (Mo. 1997)

B. THERE IS NO ESTABLISHED LAW WHICH INTERPRETS THE ACT IN THE WAY ASSERTED BY RELATORS TO PROVIDE PERSONS IN SIMILAR

CIRCUMSTANCES AS RELATORS AN ABSOLUTE IMMUNITY FROM ANY NEGLIGENCE CLAIMS SUCH AS THAT ASSERTED BY PLAINTIFFS IN THEIR SECOND AMENDED PETITION;

Sloan-Roberts v. Morse Chevrolet, Inc., 44 S.W.3d 402 (Mo. App., W.D. 2001)

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

C. THERE IS NO ESTABLISHED LAW WHICH INTERPRETS THE ACT TO SAY THAT A LANDOWNER NEED NOT OPEN HIS OR HER LAND TO THE PUBLIC IN ORDER TO BE AFFORDED IMMUNITY UNDER THE ACT; IN FACT, THE ONLY APPELLATE DECISION IN MISSOURI TO EVEN MENTION THE ISSUE APPEARS TO HAVE CONCLUDED JUST THE OPPOSITE.

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

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

Foster v. St. Louis County, _____ S.W.3d _____, 2007 Mo. LEXIS 165 (Mo. 2007)

J.B. Vending Co., Inc. v. Director of Revenue, 54 S.W.3d 183 (Mo. 2001)

State ex rel. Nixon v. Fru-Con Constr. Corp., 90 S.W.3d 533 (Mo. App., E.D. 2002)

Hanch v. K. F. C. Nat'l Management Corp., 615 S.W.2d 28 (Mo. 1981)

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

Sections 537.345 – .348, RSMo

Black's Law Dictionary (Rev. 4th Ed. 1968)\

II. IF IT WERE TRUE THAT "MISSOURI LAW IS IRREFUTABLY CLEAR ON THIS ISSUE," THERE WOULD BE LITTLE OR NO REASON TO REACH OUTSIDE THE STATE BOUNDARIES TO FIND CASES INTERPRETING OTHER STATES' STATUTES AS

COMPATIBLE WITH RELATORS' THEORIES IN THIS CASE BUT IF THAT REACH IS EXTENDED, THERE IS AMPLE AUTHORITY FROM OTHER STATES THAT IS CONSISTENT WITH RESPONDENT'S POSITION IN THIS MATTER.

Holden v. Schwer, 242 Neb. 389, 495 N.W.2d 269 (1993)

Estate of Gordon-Couture v. Brown, 152 N.H. 265, 876 A.2d 196 (N.H. 2005)

Conant v. Stroup, 183 Ore. App. 270, 51 P.3d 1263 (Or. Ct. App. 2002)

Snyder v. Olmstead, 261 Ill. App. 3d 986, 634 N.E.2d 756, 199 Ill. Dec. 703 (Ill. App. Ct. 1993), rev. denied, 157 Ill. 2d 523, 642 N.E.2d 1304, 205 Ill. Dec. 187 (Ill. 1994)

III. THE ACT DOES NOT PROVIDE ABSOLUTE IMMUNITY FROM CLAIMS OF THE TYPE ASSERTED AGAINST RELATORS, IN THAT THE PRESENCE OF A HUNTER ON THE PREMISES WHO INCREASES THE DANGER TO ANOTHER HUNTER ON THE SAME PREMISES IS NOT A NATURAL OR ARTIFICIAL CONDITION, STRUCTURE, OR PERSONAL PROPERTY ON THE LAND; AND, THEREFORE, A FAILURE TO WARN ABOUT THE PRESENCE OF SUCH HUNTER CAN BE ACTIVE NEGLIGENCE FROM WHICH A CAUSE OF ACTION MAY ARISE.

Cain v. Missouri Highways and Transportation Commission, _____ S.W.3d _____, 2007 Mo. LEXIS 169 (Mo. 2007)

Sections 537.345 – .348, RSMo

ARGUMENT

I. RELATORS ARE NOT ENTITLED TO AN ORDER OF MANDAMUS FROM THIS COURT DIRECTING THAT RESPONDENT GRANT RELATORS' MOTION TO DISMISS THEM FROM THE UNDERLYING LAWSUIT, BECAUSE RELATORS CANNOT SATISFY THEIR BURDEN OF PROOF FOR ISSUANCE OF A PERMANENT WRIT WHEREBY THEY MUST ESTABLISH THAT THEY HAVE AN EXISTING, CLEAR, AND UNCONDITIONAL RIGHT TO IMMUNITY UNDER THE "RUS" AND BECAUSE RESPONDENT DID NOT HAVE A CORRESPONDING, PRESENT, IMPERATIVE, AND UNCONDITIONAL DUTY TO DISMISS RELATORS FROM THE UNDERLYING LAWSUIT, IN THAT:

A. THE RECREATIONAL USE ACT DOES NOT CONTAIN A CLEAR AND UNAMBIGUOUS GRANT OF ABSOLUTE IMMUNITY TO PERSONS IN SIMILAR CIRCUMSTANCES AS RELATORS FROM THE TYPE OF CLAIM ASSERTED AGAINST THEM IN PLAINTIFFS' SECOND AMENDED PETITION.

Respondent agrees generally with Relators' summary of the rules governing issuance of a permanent writ of mandamus. While true in a general sense that "Relators have properly invoked mandamus, and this Court has the authority to act if it concludes that Respondent has failed to properly apply the law," it is also true that a full recital of the conditions of a permanent writ would include the proviso that mandamus may not be used as a means of *declaring* the law as applied to a given set of facts, but that mandamus may be used solely to *implement* the existing law on the subject.

A party may obtain a writ of mandamus from a court with appropriate

jurisdiction when a lower court has exceeded its jurisdiction or authority. *State ex rel. Schnuck Markets, Inc. v. Koehr*, 859 S.W.2d 696, 698 (Mo. banc 1993). The writ may be invoked both to compel a court to do that which it is obligated by law to do and to undo that which the court was by law prohibited from doing. *State ex rel. Leigh v. Dierker*, 974 S.W.2d 505, 506 (Mo. banc 1998). The purpose and function of the writ is to compel the trial court to abide by its clear obligation to follow the prior opinion and mandate of the superior court. *State ex rel. Planned Parenthood of Kansas v. Kinder*, 79 S.W.3d 905, 906-907 (Mo. 2002).

The necessary prerequisites to the issuance of a writ of mandamus were summarized by this Court in *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576-577 (Mo. 1994), where it stated:

> Relator asks this Court to issue a writ of mandamus compelling respondent to order the state to turn over notes from the interviews with the administrative law judges of the division of workers' compensation and to permit relator to depose judge Vacca and attorney James Sievers, both of whom witnessed the events that led to the show cause order. Relator also seeks to depose judge Newcomb, who witnessed some of the underlying events, and judge Dowd, who received the report from judge Vacca concerning judge Vacca's view of the events during the hearing. It is first necessary to address the method by which relator brings his claims, a petition for a writ of mandamus. Mandamus will not lie. Mandamus is a discretionary writ, not a writ of right. Norval v. Whitesell, 605 S.W.2d 789, 791 (Mo. banc

1980). Mandamus will lie only when there is a clear, unequivocal, and specific right. State ex rel. Sayad v. Zych, 642 S.W.2d 907, 911 (Mo. banc 1980). The right sought to be enforced must be clearly established and presently existing. State ex rel. Commissioners of the State Tax Comm'n v. Schneider, 609 S.W.2d 149, 151 (Mo. banc 1980). A writ of mandamus is not appropriate to establish a legal right, but only to compel performance of a right that already exists. State ex rel. Brentwood School Dist. v. State Tax Comm'n, 589 S.W.2d 613, 614 (Mo. banc 1979). As this Court has often stated, the purpose of the writ is to execute, not adjudicate. Schneider, 609 S.W.2d at 151. In the present context, mandamus is clearly inappropriate. The question of whether discovery is available in a contempt proceeding brought under § 536.095 has not previously [*577] been decided by a Missouri court. *Relator attempts to establish a right through a writ of mandamus, rather than to enforce a clearly established and presently existing right. This cannot be done.* Brentwood School Dist., 589 S.W.2d at 614.

(Emphasis added.)

The language in *Chassaingv* has been invoked by this Court many times since the decision. See, e.g., *In the Interest of N.D.C.,* 229 S.W.3d 602, 604 (Mo. 2007); *State ex rel. Johnson v. Griffin*, 945 S.W.2d 445, 446-447 (Mo. 1997).

Similar reasoning may be found in other recent decisions of this Court, such as *Furlong Cos. v. City of Kansas City*, 189 S.W.3d 157, 165-166 (Mo. 2006), which stated:

> The purpose of the extraordinary writ of mandamus is to compel the performance of a ministerial duty that one charged with the duty has refused to perform. State ex rel. Phillip v. Public School Retirement System, 364 Mo. 395, [*166] 262 S.W.2d 569, 574 (Mo. 1953). The writ can only be issued to compel a party to act when it was his duty to act without it. Id. It confers upon the party against whom it may be issued no new authority, and from its very nature can confer none. Id. A litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed. He must show himself possessed of a clear and legal right to the remedy. Id. Mandamus does not issue except in cases where the ministerial duty sought to be coerced is definite, arising under conditions admitted or proved and imposed by law. State ex rel. Bunker Resource Recycling and Reclamation, Inc. v. Mehan, 782 S.W.2d 381, 389 (Mo. banc 1990).

Relators do not directly address the question of their relative entitlement to a writ of mandamus. Relators essentially say that the law is settled and the plain meaning of the words used in the Act obviously indicate an intent that immunity be bestowed upon any similarly situated property owner.

B. THERE IS NO ESTABLISHED LAW WHICH INTERPRETS THE ACT IN THE WAY ASSERTED BY RELATORS TO PROVIDE PERSONS IN SIMILAR CIRCUMSTANCES AS RELATORS AN ABSOLUTE IMMUNITY FROM ANY NEGLIGENCE CLAIMS SUCH AS THAT ASSERTED BY PLAINTIFFS IN THEIR SECOND AMENDED PETITION;

With respect to the rules of statutory construction, as with the standard of review for petitions for mandamus, Respondent agrees generally with the comments of Relators. However, Respondent understands the relevant principle to invoke when statutory language is ambiguous, or after a court has concluded that application of the specific words used in the statute would lead to an illogical result, is that the Court which does "look past the plain and ordinary language used in the statute" will do so only after receiving evidence in support of the competing sides in the controversy. This case does not present that opportunity at the procedural stage of the underlying suit, where no evidence is considered in ruling upon a motion to dismiss and the allegations of the party in opposition to the motion are taken as true. *Sloan-Roberts v. Morse Chevrolet, Inc.*, 44 S.W.3d 402, 407-08 (Mo. App., W.D. 2001).

Relators are correct when they state in their Brief that there are few disputed facts relevant to their application for a writ of mandamus and to this proceeding. What is in dispute among the parties is the manner of identifying or describing the theory of the case presented by the Plaintiffs in the base litigation. Relators both over-simplify and substitute their version of Respondent's view of the case, as reflected in the denial of Relators' motion to dismiss Plaintiffs' Second Amended Petition as to Relators, when they say that "the only real issue before this Court is whether to adopt Respondent's request that this Court *add* or *create* an additional element to the requirements that must be met for the RUS to apply, which would only allow application of the RUS in situations where a landowner opened their [sic]

land to the *entire* general public."

In their replies to Relators' motion to dismiss in the trial court, Plaintiffs identified multiple reasons why the Recreational Use Act (hereinafter the "Act") did not furnish absolute immunity from at least a shared liability for the shooting death of Dr. Shaw. Those reasons are discussed in more detail below in this Brief.

As Relators have pointed out, a central question involved in their motion to dismiss the underlying petition against them is whether they are members of the class of persons who may receive the benefit of immunity granted by Sections 537.345 – .348, RSMo (a separate issue, concerning the conditions or occurrences to which the immunity is to apply, is treated separately below in this Brief). Relators themselves referred to the grant of immunity that follows when a "landowner permits *the public* to use his land, free of charge, for recreational purposes" (Relators' Petition for Writ of Mandamus, page 13, paragraph 19). It was only after the issues became better defined for both sides did Relators begin to draw a distinction between whether a landowner extended a general invitation or only a private and selective invitation to engage in recreational uses on his land.

In the first appellate decision in Missouri to deal with the issue, the Western District of the Court of Appeals held that the grant of immunity followed the admission of the public to the landowner's property for recreational uses. In *Lonergan v. May*, 53 S.W.3d 122 (Mo.App. W.D. 2001)*,,* the Court studied the Recreational Use Act (the sections of the Missouri Revised Statutes referenced above) closely in deciding that case of first impression. The Court first outlined its

duties in such an inquiry:

> The interpretation of the RUA is an issue of first impression, and therefore we must carefully examine the statute in order to determine, "the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." When deciding whether a statute is clear and unambiguous so as to ascertain the intent of the legislature, the appellate court must consider whether the language is plain and clear to a person of ordinary intelligence. Only when the language is ambiguous or if its plain meaning would lead to an illogical result will the court look past the plain and ordinary meaning of a statute.
>
> Every state of the Union has adopted statutes similar to the RUA. In Missouri, a version of the RUA became law in 1983 upon the enactment of §§ 537.345 through 537.348. Although Missouri's statute does not explicitly state the purpose of the Act, *other jurisdictions consistently state that the general purpose of these statutes is to encourage landowners to open their lands to the public for recreational use by restricting the landowners liability.* Thus, like many of the jurisdictions that have passed similar legislation, we believe that the Missouri legislature enacted the RUA to encourage the free use of land for recreational purposes in order to preserve and utilize our natural resources. Furthermore, Section 537.346 of our statute, relieves the landowner of any duty to keep his land safe so long as the owner does not charge a user fee. *In*

other words, it creates a tort immunity for landowners who open their land to the public free of charge for recreational use. It is not ambiguous. It states:

> 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.

Id. at 126-27 (emphasis added). The Court continued its discussion:

> There are several policy reasons which would support a conclusion that the legislature could not have envisioned an entity such as UEC to be subject to liability for injuries occurring anywhere on 55,342 acres of land. It is inconceivable that UEC could meticulously maintain every inch of the surface waters. This lake is a place where people from across the country come to experience the pleasures and risks of the outdoors. It is an area left open for those who enjoy the outdoors and is free of charge so that no one is excluded.
>
> It is practically impossible to maintain a large area of land used by the public for recreational use. UEC cannot close the lake for maintenance or police the area for hazards, such as floating objects and submerged tree trunks, and the owner cannot possibly protect people from risks inherent in water sports, such as drowning and boating accidents. 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 of a significant portion of Missouri's natural resources. We cannot imagine that the legislature intended such an absurd result.

Id. at 132.

C. THERE IS NO ESTABLISHED LAW WHICH INTERPRETS THE ACT TO SAY THAT A LANDOWNER NEED NOT OPEN HIS OR HER LAND TO THE PUBLIC IN ORDER TO BE AFFORDED IMMUNITY UNDER THE ACT; IN FACT, THE ONLY APPELLATE DECISION IN MISSOURI TO EVEN MENTION THE ISSUE APPEARS TO HAVE CONCLUDED JUST THE OPPOSITE.

Relators did not open their land to "persons such as Dr. Shaw," as alleged in their petition for the writ in this proceeding; they opened it to *Dr. Shaw* personally and to Defendant Hartnagel. Those two men were part of the public in a general sense; but they were not "the public." The accepted definition of "public" as found in Black's Law Dictionary (Rev. 4th Ed. 1968) contains the following: "The whole body politic, or the aggregate of the citizens of the state, district or municipality. . . . In one sense, everybody; and accordingly the body of the people at large . . . ." Cf. *J.B. Vending Co., Inc. v. Director of Revenue,* 54 S.W.3d 183 (Mo. 2001).

Saying the law is clear and unambiguous does not make it so. Relators in effect ask this Court to find, without development of a factual record, that the *Lonergan* case does not mean "the public" when it uses those words. Relators suggest instead that Dr. Shaw and Defendant Hartnagel *are* "the public" and that the

public policy behind the grant of landowner immunity is satisfied by selectively giving permission to two men to hunt on their land. Where is the social utility of that narrow invitation? If the land were truly open to the public in general, without expectation of a need to obtain permission before hunting on the property, two consequences would follow. First, Dr. Shaw would have had constructive notice that other hunters could be present anywhere on the property; and, second, the Relators would have had no idea who may be hunting on their land on a given day and would not know whom or of what particular danger to warn, as a result of which the grant of immunity would make sense.

Relators deal with the issue in multiple ways, not always consistently. In point 5 of their Suggestions, Relators state that opening one's land to the general public is not a requirement under the "RUS." But in the very next sentence, Relators candidly acknowledge that "no Missouri case is directly on point." That declaration leads to two questions. One, if no case is on point, then how can Relators logically maintain the attitude that Relators are absolutely entitled to a dismissal of the cause of action against them, and are, therefore, also entitled to the issuance of the peremptory writ of mandamus in this proceeding? Two, what is the *Lonergan* case if not on point? Maybe the problem is that it is on point for the wrong side in the underlying case.

Only three Missouri appeals cases involving the Act have cited *Lonergan* since it was decided. The first case, *State ex rel. Nixon v. Fru-Con Constr. Corp.*, 90 S.W.3d 533 (Mo. App., E.D. 2002) contained, in a dissent at 535, a quotation from *Lonergan*, but with no hint of disapproval of the rationale of the earlier case.

The second, *Fields v. Henrich*, 208 S.W.3d 353, 356 (Mo. App., W.D. 2006), quoted from it with approval thus:

> 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.

The third, *Foster v. St. Louis County,* _____ S.W.3d _____, 2007 Mo. LEXIS 165 (Mo. 2007), is a very recent decision by this Court and was cited by Relators in their Brief. Interestingly, this first examination of the Act by this Court was introduced in the "Analysis" portion of the opinion by a quotation taken directly from *Lonergan*. The Court seemed to be quoting with approval when the following recital was made:

> The [Missouri Recreational Use] act 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. 2001). The purpose of the act is "to encourage the free use of land for recreational purposes in order to preserve and utilize our natural resources." Id. Specifically, 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.

While obvious that this Court may, should it choose to do so, overrule the Court of Appeals' findings and judgment in the *Lonergan* case, as a policy matter would it be wise to take that course of action? Should not a prospective reversal of a judicial interpretation of a statute upon which litigants have relied for six to seven years be ordered only after and with benefit of a full record and development of the facts unique to the case?

Respondent further believes that a decision in favor of Relators by this Court would carry much more moral weight and authority if it could somehow resolve the apparent inconsistency of Relators' argument that the *Lonergan* court did say that immunity followed opening one's private land to the public for recreational uses and then immediately countering that statement with the illogical conclusion that the *Lonergan* court (and the courts that later adopt its language) did not really mean what the words suggest. A casual listener to this debate might very think he had stumbled into a real-life Alice in Wonderland scene.

If the Missouri General Assembly had intended the Act to offer absolute immunity from suit to a landowner in all circumstances affecting recreational uses of property, it could easily have done so in a non-ambiguous way. And if the Court of Appeals, and its followers who echoed its words, had not meant the word "public" to mean its normal everyday definition when the Court released its opinion, the Court could have surely have wholly avoided the word and its inevitable ramifications after *Lonergan*.

Relators offer an opinion by the Eighth Circuit Court of Appeals in support of

their quest for an order of mandamus. *Wilson v. United States*, 989 F.2d 953 (8th Cir. 1993), was a case filed under the Federal Tort Claims Act against the United States and the Boy Scouts of America, seeking damages for the death of a boy scout and injuries to another while on a camp-out at Fort Leonard Wood. Relators rely on that case primarily to support their argument that it is unnecessary for a landowner to open his land to the public in order to receive the benefits of the Act. Relators quote from the decision a passage that culminates in the Court declaring that it does not matter whether the boy scouts were not "members of the general public," in that the plain language of the statute indicates that a landowner "owes no duty of care 'to any person who enters on the land without charge' for recreational purposes. Mo. Rev. Stat. § 537.346." *Id.*, at 957.

However, the case did not hinge on that point, inasmuch as elsewhere in the Court's opinion it was noted that:

> Fort Leonard Wood is an open military post, where members of the public can freely enter without being stopped or questioned by guards or military police. Specified areas are open to the public for fishing, hunting, hiking, camping, picnicking or canoeing. Many tours are given to various groups, such as senior citizens and church and school groups, free of charge. The Fort also offers a Youth Tour Program which is open only to national youth organizations, such as the Boy Scouts of America. The program includes activities which are not available to the general public, such as visits to the Fort's museum, an indoor rifle range, an obstacle course and a cannon range.

Id., at 957. Thus, the land had in fact been opened to the "general public" and the plaintiffs in the suit were forced to argue that the boy scouts were not members of the general public and that proof of that fact would take them out of the coverage of the Act. Under the specific facts of that case, the result did not depend on the status of those boy scouts; the judgment of the Court would have been the same either way. One may just as readily dismiss the comments of the Court of Appeals as dicta as Relators ask this Court to do with respect to the Missouri Court of Appeals opinion in *Lonergan..*

In any event, the *Wilson* decision is not controlling in the pending case, either this proceeding for mandamus or the case resting for now in the trial court. The relative degree of reliance to accord lower federal court (i.e., below the Supreme Court) decisions was discussed in *Hanch v. K. F. C. Nat'l Management Corp.*, 615 S.W.2d 28, 33 (Mo. 1981):

> Second, we must ask whether the memorandum opinion in Rimmer is binding upon this court in resolution of the instant case. We have not been cited to any case so holding. To the contrary, we note the holding in Kraus v. Board of Education of City of Jennings, 492 S.W.2d 783, 784-85 (Mo. 1973) that: "State court judges in Missouri are bound by the 'supreme law of the land,' as declared by the Supreme Court of the United States (Art. VI, Constitution of the United States.) We are not bound by general declarations of law made by lower federal courts. In United States ex rel. Lawrence v. Woods, 7th Cir., 432 F.2d 1072, 1075, 1076, cert. denied 402 U.S. 983, 91 S. Ct. 1658, 29 L. Ed. 2d 148, the Court said: 'The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in

> state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal. On the other hand, because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts. * * * Of course in a given factual setting when a lower federal court has jurisdiction over the subject matter and the parties, its adjudication is the law of the case and its judgment is binding on all other courts, subject only to the appellate process. . . .'" See also Rodgers v. Danforth, 486 S.W.2d 258 (Mo. banc 1972). Notwithstanding the presence of an established legal principle, we do look respectfully to such opinions for such aid and guidance as may be found therein.

The *Hanch* case was cited by this Court with approval within the last few years in *State v. Mack*, 66 S.W.3d 706, 710 (Mo. 2002) ("general declarations of law made by lower federal courts do not bind this Court").

Relators have been somewhat disingenuous in stating in paragraph 33 of their Petition for Writ of Mandamus that they "opened their land to the public, free of charge"; since that is the first and only place where they make that claim. Furthermore, Relators are engaging in circular reasoning when they assert on one hand that they have opened their land to the "public" and are therefore entitled to the statutory immunity, but on the other hand assert that such dedication of use to the public is not a statutory requisite to receipt of immunity.

Additionally, paragraph 34 of Relators' Petition combines two separate and distinct subjects and conclusions. First of all, Relators posit that "all" cases that have dealt with "this" issue have reached the same conclusion, which they say is that

"landowners are immune from liability arising out of hunting accidents occurring on their land when they allow others to hunt upon their land free of charge." Second, they add in their final sentence that mandamus is necessary and proper in this case "in order to comply with not only the intent of the Missouri RUS, but also the long history of case law and precedent addressing this issue." That sentence does not accurately state the law as it currently exists.

With respect to the first subject above, a point with which Relators apparently agree is the premise that the limited immunity was granted by the Act in Missouri "to encourage land owners to open their lands to the public for recreational use by restriction of the land owners' liability."

As to the second subject in paragraph 34, Relators seem to assert that the "intent" of the Act is to grant landowner immunity irrespective of who or how many are invited to use the land for recreational purposes; and that the "long history of case law and precedent" so agree. In fact the "history of case law" dealing with that precise subject of statutory intent consists of exactly *one* case, *Lonergan v. May*, supra. Relators do not seem to acknowledge the statutory interpretation announced by that court in 2001 and neither challenged nor questioned at the appellate level since. Again, Respondent suggests that this is not the proper setting in which to change the finding of legislative intent that was a cornerstone of a decision by the Missouri Court of Appeals that is not even now attacked directly. If that decision is to be overturned, let it be the announced intent of Relators to ask this Court to do so, rather than obliquely and tacitly asking this Court simply to ignore a vital element of

the lower court's opinion.

II. IF IT WERE TRUE THAT "MISSOURI LAW IS IRREFUTABLY CLEAR ON THIS ISSUE," THERE WOULD BE LITTLE OR NO REASON TO REACH OUTSIDE THE STATE BOUNDARIES TO FIND CASES INTERPRETING OTHER STATES' STATUTES AS COMPATIBLE WITH RELATORS' THEORIES IN THIS CASE BUT IF THAT REACH IS EXTENDED, THERE IS AMPLE AUTHORITY FROM OTHER STATES THAT IS CONSISTENT WITH RESPONDENT'S POSITION IN THIS MATTER.

Respondent was entitled to find that neither the statutory language of the Act nor the opinions of the Missouri appellate courts interpreting the Act's provisions clearly and unequivocally created in Relators the broad immunity from suit as argued by Relators. In order to grant the relief sought by Relators in this Court, both the statutory terms and explanatory opinions from other courts in this state must be either ignored or, with respect to such other courts, overruled. *In fact, it is Relators who seem to be asking this Court to add a limiting word to a phrase employed by the leading Missouri appellate decision dealing with the Act, when they implicitly tell this Court that what the Plaintiffs below advocated in their replies was the adoption of an additional burden to be met before a landowner qualifies for the Act's limited immunity. That burden, which is the equivalent of making a straw man argument in debate, is the insertion of the word "entire" immediately before the two-word phrase "general public" found in numerous relevant appellate decisions, is one of several misdirections offered by Relators in their argument against Respondent's order denying the motion to dismiss.

In regard to the qualifying nature of the type of use of a landowner's property by "others" in order to qualify for immunity from liability to such a user, the inquiry becomes whether the land must be opened to the "public" for the owner to receive the immunity. Relators have offered decisions from other states when their courts were confronted with similar questions.

In *Holden v. Schwer,* 242 Neb. 389, 495 N.W.2d 269 (1993), the Nebraska Supreme Court had the opportunity to interpret section 37-1001 of the Nebraska statutes and following sections and determine whether that state's landowner immunity statute extended to the claim of a young girl injured while riding a three-wheeler on a neighbor's property. The Court found that the "*stated* purpose of the Recreational Liability Act is to "encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon." 495 N.W.2d at 272-273, quoting from section 37-1001. The first variation from the Missouri Act is the presence of a statement of purpose in the Nebraska Act. Missouri's corresponding statute contains no such declaration of purpose or intent. See *Lonergan, supra,* at 127 (emphasis added).

The Nebraska statute provides that "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, *or activity* on such premises to persons entering for such purposes." *Holden*, supra, at 272-73, quoting

§ 37-1002 (emphasis added). The Court quoted further from the statute:

> . . . [A]n owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby (1) extend any assurance that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

Id. at 273, quoting § 37-1003. The Court then referred to the legislative history of the act, which "shows that it was passed out of a *concern that landowners*, such as farmers, who allow people to use their land for recreation *should be protected*." *Id.* (emphasis added).

That emphasis on protection of landowners in the Nebraska Court's findings contrasts with the findings of the Court in *Lonergan* that the general purpose of recreational use statutes is to encourage landowners to open their lands to the public for recreational use by restricting the landowners' liability. *Id*. at 127. It may be a subtle distinction, but Respondent suggests that it is a meaningful distinction nevertheless. In the *Holden*-type case, the focus is on the individual landowner, who may be relieved of liability that he might otherwise have. In the *Lonergan* line of cases, that focus shifts to the far greater number of people who are intended to be the direct beneficiaries of additional quasi-public land where they may engage in recreational activities.

For different reasons than those embraced by Relators, Respondent suggests that this Court may also benefit from a review of cases from yet more states beyond ours, where different results were reached. One recent example of judicial analysis of the stated or inferred purposes behind the enactment of recreational use statutes is *Estate of Gordon-Couture v. Brown,* 152 N.H. 265, 266-276; 876 A.2d 196 (N.H. 2005) (rehearing denied: 2005 N.H. LEXIS 120 (N.H. June 22, 2005)). Portions of that decision are quoted below.

> Statutes in derogation of the common law are to be interpreted strictly. . . . While a statute may abolish a common law right, there is a presumption that the legislature has no such purpose. . . . If such a right is to be taken away, it must be expressed clearly by the legislature. . . . Accordingly, immunity provisions barring the common law right to recover are to be strictly construed.

Id. at 266-67 (citations omitted).

> Both RSA 212:34 and RUA 508:14 were adopted at a time when many States were enacting recreational use statutes, ... The primary impetus behind this trend was "the need for additional recreational areas to serve the general public." . . .
>
> Following this trend, the Committee of State Officials on Suggested State Legislation of the Council of State Governments drafted a model recreational use statute (model act), which was derived from Wisconsin's recreational use statute. . . . The model act provided, in pertinent part:

Section 1. The purpose of this act is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

. . .

Section 3. Except as specifically recognized by or provided in Section 6 of this act, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

Section 4. Except as specifically recognized by or provided in Section 6 of this act, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

(a) Extend any assurance that the premises are safe for any purpose.

(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

(c) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons.

. . .

Section 6. Nothing in this act limits in any way any liability which

otherwise exists:

(a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

(b) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

Suggested State Legislation, . . . The council explained the purpose behind the model act as follows: Recent years have seen a growing awareness of the need for additional recreational areas to serve the general public. The acquisition and operation of outdoor recreational facilities by governmental units is on the increase. However, large acreages of private land could add to the outdoor recreational resources available. Where the owners of private land suitable for recreational use make it available on a business basis, there may be little reason to treat such owners and the facilities they provide in any way different from that customary for operators of private enterprises. However, in those instances where private owners are willing to make their land available to members of the general public without charge, it is possible to argue that every reasonable encouragement should be given to them.

. . . Thus, to fulfill this purpose, the recreational use statutes and model act limited the liability of private landowners who make their land available for public recreational uses "on the theory that it is not reasonable to expect such owners to undergo the risks of liability for injury to persons and property attendant upon the use of their land by strangers from whom the accommodating owner receives no compensation or other favor in return."

The model act was subsequently adopted in various forms by more than three dozen States. See Conant, 51 P.3d at 1267. "Meanwhile, a number of states began to grapple with a basic drafting problem posed by the wording of the model act." Id. As the Oregon Court of Appeals aptly described the dilemma:

> On the one hand, the model act expressed a basic quid pro quo in its declaration of policy, namely, permission to the general public to use private land for recreational purposes in exchange for immunity from liability for resulting injuries. On the other hand, the model act referred to the immunity as applying when a land owner granted permission to "any person," without a qualification that the person must be a member of the general public to whom permission had been granted.

Id. Accordingly, the Oregon court recognized that "if read literally and in isolation, the immunity provisions effectively would nullify the law of premises liability . . . [.] Any time an individual is invited to use an owner's back yard for

croquet, immunity would apply." Id. Nonetheless, "the response of the state courts who addressed the problem has been uniform." Id. These courts have construed the model act to effectuate its purpose and therefore conclude that "permission to 'any person' refers to any person as a member of the general public to use private property for recreational purposes." Id.; . . . .

Id. at 267-269.

The Court then examined the statutes as adopted in New Hampshire. The first one discussed was identified as RUA 508:14, which provided in pertinent part:

> An owner, occupant, or lessee of land, including the state or any political subdivision, who without charge permits any person to use land for recreational purposes or as a spectator of recreational activity, shall not be liable for personal injury or property damage in the absence of intentionally caused injury or damage. . . .

The Court noted the defendants' argument that the phrase, "any person," evidences a legislative intent "to broadly immunize landowners in this state" from liability for negligent acts; while the plaintiff argued that to construe RUA 508:14, I, as the defendants suggest would be in derogation of the common law and, therefore, to be interpreted strictly.

The Court then mentioned that other jurisdictions interpreting similar statutory provisions have construed the phrase "any person" as referring to "any person as a member of the general public." *Conant v. Stroup*, 183 Ore. App. 270, 51 P.3d 1263, 1267 (Or. Ct. App. 2002); see also *Snyder v. Olmstead*, 261 Ill. App. 3d 986, 634

N.E.2d 756, 761, 199 Ill. Dec. 703 (Ill. App. Ct. 1993), rev. denied, 157 Ill. 2d 523, 642 N.E.2d 1304, 205 Ill. Dec. 187 (Ill. 1994). The latter opinion held that "[w]e believe that the purpose of the Recreational Use Act would not be advanced by applying the Act to a situation where an owner does not open his property to the public, but simply invites a few private persons to a picnic." In the words of the New Hampshire Court:

> In *Conant*, the Oregon Court of Appeals acknowledged that "in isolation, the phrase 'any person' certainly is broad and unqualified." . . . But, the court reasoned that "the term 'any' often carries with it limitations implicit from its context." Id. Thus, the court stated that "the question in this case is whether the legislature intended the reference to 'any person' in [the statute] to refer literally to any single person or to any person as a member of a limited universe of persons to which the statute applies." Id. The court noted that the stated purpose of the statute was "to encourage owners of land to make their land available to the public." Id. (emphasis and quotation omitted).The court further noted that the disputed statutory language was taken from the model act, which has been interpreted uniformly by other jurisdictions to apply only when landowners permit members of the public generally to use private property for recreational purposes. Id. at 1266. Thus, the court held that the immunity granted by the recreational use statute "is limited to cases in which permission is given to the general public to use private land for recreational purposes." Id. at 1268. In reaching this holding, the court recognized that only

this construction of the recreational use statute was consistent with the "purpose of making private land available to the public for recreational purposes while, at the same time, [avoiding] the inadvertent evisceration of common-law doctrines concerning the duties of landowners." Id. (emphasis omitted).

Gordon-Couture. *supra*, at 270-71 (some citations and head notes omitted).

Influenced heavily by the discussion of the issue in *Conant*, the New Hampshire Supreme Court held that the phrase "any person" refers to "any person as a member of the general public." *Id.* at 271; see also *Conant*, 51 P.3d at 1267. The ruling had a dramatic and obvious effect on the defendants in the *Gordon-Couture* case: To receive the grant of immunity, "private landowners must permit members of the general public for recreational purposes." *Id.* Because the defendants' land had not been opened to the general public but rather was used for a private birthday party, the Court held that the trial court erred in ruling that the defendants were entitled to immunity under RUA 508:14, I. *Id*.

The New Hampshire Court next analyzed the other, and similar, statute that addresses some of the same issues as the statute in the preceding paragraphs, RUA 212:34, which provides:

I. An owner, lessee or occupant of premises owes no duty of care to keep such premises safe for entry or use by others for hunting, fishing, trapping, camping, horseback riding, water sports, winter sports or OHRVs . . . , hiking, sightseeing, or removal of fullword, or to give any warning of

hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes, except as provided in paragraph III hereof.

II. An owner, lessee or occupant of premises who gives permission to another to hunt, fish, trap, camp, ride horseback, hike, use OHRVs . . . , sightsee upon, or remove fullword from, such premises, or use said premises for water sports, or winter sports does not thereby:

(a) Extend any assurance that the premises are safe for such purpose, or

(b) Constitute the person to whom permission has been granted the legal status of an invitee to whom a duty of care is owed, or

(c) Assume responsibility for or incur liability for an injury to person or property caused by any act of such person to whom permission has been granted except as provided in paragraph III hereof.

III. This section does not limit the liability which otherwise exists:

(a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or

(b) For injury suffered in any case where permission to hunt, fish, trap, camp, ride horseback, hike, use for water sports, winter sports or use of OHRVs . . . , sightsee, or remove fullword was granted for a consideration other than the consideration, if any, paid to said landowner by the state; or

(c) The injury caused by acts of persons to whom permission to hunt, fish, trap, camp, ride horseback, hike, use for water sports, winter sports or use of OHRVs . . . , sightsee, or remove fullword was granted, to third persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

Id. at 269-72.

The Court also declined to adopt the defendants' proposed interpretation of the latter statute as well. It refused to find that the legislature intended "to broadly immunize landowners in [New Hampshire]" from liability for negligent acts. It looked to the statute itself to determine whether it clearly abrogates all landowners' common law duties owed to all entrants on land for recreational purposes. It also noted that the duty of the Court is to not construe statutes in isolation, but instead to do so in harmony with the overall statutory scheme. And, finally, when interpreting two statutes that deal with a similar subject matter, the Court must construe them so that they do not contradict each other and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes. *Id*. at 272. The Court concluded that the two statutes should be construed so that they do not contradict each other. *Id*. at 273. Therefore, the Court held that RUA 212:34 likewise should be construed to grant immunity only to landowners who open their land to the general public. *Id*. at 272-73.

III. THE ACT DOES NOT PROVIDE ABSOLUTE IMMUNITY FROM CLAIMS OF THE TYPE

ASSERTED AGAINST RELATORS, IN THAT THE PRESENCE OF A HUNTER ON THE PREMISES WHO INCREASES THE DANGER TO ANOTHER HUNTER ON THE SAME PREMISES IS NOT A NATURAL OR ARTIFICIAL CONDITION, STRUCTURE, OR PERSONAL PROPERTY ON THE LAND; AND, THEREFORE, A FAILURE TO WARN ABOUT THE PRESENCE OF SUCH HUNTER CAN BE ACTIVE NEGLIGENCE FROM WHICH A CAUSE OF ACTION MAY ARISE.

Careful reading of the Missouri recreational use statute is necessary to the determination of the exact reach of the limited grant of immunity that it promises. Plaintiffs contended in the pending suit that there was no legislative intent, nor is there sufficient verbiage in the statute, to interpret the statute as an absolute grant of immunity to property owners. What is not said in the statute is just as important as what is said. The pertinent parts of the law include the following:

§ 537.346. Landowner owes no duty of care to persons entering without fee to keep land safe for recreational use

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.*

§ 537.347. Landowner directly or indirectly invites or permits persons on land for recreation, effect

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 or her land for recreational use, without charge, whether or not the land is posted, *or* who directly or indirectly invites or permits any person to enter his or her land for recreational use in compliance with a state-administered recreational access program, *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*.

As Relators acknowledged in their Brief, the Court must give words their everyday meaning when interpreting a statute and must not indulge in a straining reach for an alternative meaning. In clause (4) of the preceding quoted section, the words “such person” can only, under rules of grammar and English usage, refer to the antecedent “person” in that same clause. To paraphrase the clause, the owner of land is not responsible for injury *to* a person caused by the act *of* that person.

The statute does not literally or specifically relieve a property owner of *all* duties of care, but only such duties as are identified within the statute. The extent of

the waiver of such duty is limited to the "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 statute does not waive all duty whatsoever to protect an invitee from a danger that does not fit within the named categories and that arises out of other circumstances known to the owner and not to the invitee. In the present case, for example, according to the pleadings it was not the *land* of the Youngs that was unsafe, nor was the danger the result of any "natural or artificial condition, structure, or personal property thereon." Instead, the special danger to Dr. Shaw was the presence of Defendant John S. Hartnagel on that land. And that land was private property owned by Defendants Young for which no invitation was made to the "public" to enter for recreational use. Plaintiffs do not complain of any defect in the condition of the premises; their cause of action is premised upon the active negligence of Defendants Young in failing to warn Dr. Shaw of a specific danger that he could not reason-ably anticipate and that Defendants Young knew about, the presence of Defendant Hartnagel.

Relators do not acknowledge the distinction urged between a failure to warn of a dangerous condition of the *property* itself and failure to warn of a potentially dangerous *person* on that property. The former hazard presumably will always be in the same location, and often is readily apparent to any adult who is alert; and once a person learns of its existence and location, it will from that time forward be at worst a benign hazard. On the other hand, a person who poses a threat to an unsuspecting

hunter can never be downgraded to “benign” status, because he is free to move about. If the owner of land invites both men, separately, to hunt on his land, it would take minimal effort to advise each man of the possible presence of the other; and the utility of such warning would so far exceed the amount of effort required as to be beyond serious question.

This Court has recently noted the difference between “a dangerous condition of property” and a dangerous activity conducted by a third party on property in *Cain v. Missouri Highways and Transportation Commission*, _____ S.W.3d _____, 2007 Mo. LEXIS 169, 6-13 (Mo. 2007). The issue before the Court was whether a tree, located on state property and being felled by state employees, became a dangerous condition of property when the workers paused midway through the job to fix their saw and, while they were so engaged, the tree fell on a co-worker. The Court held that the partially cut tree did become a dangerous condition, created by a state employee, and that the injury of the plaintiff was the result of that condition. Therefore, the state could be held liable for the injuries under section 537.600.1(2), RSMo; and the state could not avoid such liability under the premise that the injuries were caused by intervention of a third party. *Id.,* at *7 - 14.

The *Cain* case is relevant to the subject of the present case in that it recognizes the difference between a danger presented by the activities of a third party not connected with the landowner (i.e., Defendant Hartnagel) and a danger presented by the condition of the landowner’s property. The threat to Dr. Shaw was not the condition of Relators’ property; the threat was the existence of a hunter on

the same property, a fact not necessarily known to Dr. Shaw when he entered the Relators' property with their permission. Perhaps the interpretation would be different if the Missouri statute added one clause that is present in the Nebraska statute, which provides that "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, *or activity* on such premises to persons entering for such purposes." *Holden*, supra, at 272-73, quoting § 37-1002 (emphasis added). Reference to a dangerous *activity* could very well include an exemption for liability resulting from the increased danger level caused by another person's activities on the property. But at least for now the Missouri Act does not extend the immunity to other persons' activities on the landowner's premises; and Plaintiffs below still are able to state a cause of action against both actor and landowners who did not warn of the actor's presence.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the request of Relators for a Writ of Mandamus and that it dissolve the Alternative Writ of Mandamus previously issued, thereby finding that Plaintiffs below have stated a cause of action against Relators and permitting Respondent to allow said case to proceed to trial; and requests such further relief as the Court may deem proper.

Respectfully submitted,

_____

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ATTORNEY FOR RESPONDENT

IN THE SUPREME COURT OF MISSOURI
EN BANC

State ex rel. A. Carlton Young
and Arline E. Young,
Relators,

ALTERNATIVE WRIT OF MANDAMUS

vs.

No. SC88840

The Honorable Gael D. Wood,
Respondent.

CERTIFICATE OF SERVICE OF RESPONDENT'S BRIEF
AND CERTIFICATE OF COMPLIANCE

Comes now P. Dennis Barks, attorney for Respondent, and under penalty of perjury states that Respondent's Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b); that said brief contains 10,216 words, to the best of his information and belief; and certifies that the electronic copy of said brief filed in this Court on January 23rd, 2008, had likewise been scanned for viruses and that is was virus-free when filed; and states that he served two paper copies of Respondent's Brief and a digital copy on disk in WordPerfect 12 format, scanned for viruses and hereby certified to be virus-free, on the attorneys of record for Relators, by regular United States mail on the 23rd day of January, 2008, to said attorneys, as shown by the pleadings filed in this cause, and to the Respondent:

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