IN THE SUPREME COURT OF MISSOURI

STATE EX REL. A. CARLTON YOUNG, and ARLINE E. YOUNG, Relators, vs. THE HONORABLE GAEL D. WOOD, Respondent.	))))))))))))))	Appeal No.: SC88840

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

BRIEF OF RELATORS A. CARLTON YOUNG AND ARLINE E. YOUNG

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Abbreviations:

A	“Appendix”
RR	“Respondent’s Response to Relators’ Petition for Writ of Mandamus
P	“Relators’ Petition for Writ of Mandamus”
PA	“Exhibits Attached to Relators’ Petition for Writ of Mandamus”

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

JURISDICTIONAL STATEMENT

Relators A. Carlton Young and Arline E. Young ("Youngs") brought this original proceeding in mandamus to obtain interlocutory review of an Order entered by Respondent, the Honorable Gael D. Wood, Circuit Judge in Division I of the Circuit Court of Gasconade County, Missouri, on August 23, 2007, denying Relators' motion to dismiss. (PA 7-12) The underlying action, *Kristen L. Shaw, Matthew Thomas Shaw, Travis Mark Shaw, and Melissa Leigh Shaw v. John S Hartnagel, A. Carlton Young, and Arline E. Young*, Cause No.: 05GA-CC00053 (Circuit Court of Gasconade County, Missouri), is a wrongful death action arising out of the death of plaintiffs' relative, Dr. James T. Shaw. (PA 1-6)

The Court has jurisdiction because it issued a Preliminary Writ of Mandamus on October 30, 2007. Under Article V, Section 4 of the Missouri Constitution, the Court has authority to determine and issue remedial writs.

STATEMENT OF FACTS

A. Introduction

This original proceeding seeks a writ of mandamus arising out of the case of *Kristen L. Shaw, Matthew Thomas Shaw, Travis Mark Shaw, and Melissa Leigh Shaw v. John S Hartnagel, A. Carlton Young, and Arline E. Young*, Cause No.: 05GA-CC00053 (Circuit Court of Gasconade County, Missouri), which is a wrongful death action brought against Relators and co-defendant John S. Hartnagel by the relatives of Dr. James T. Shaw. (PA 1-6)

The underlying event that resulted in the death of Dr. Shaw was a hunting accident that took place on April 22, 2004 on property owned by the Youngs. (PA 1-6) Specifically, Plaintiffs claim that the Youngs failed to warn Dr. Shaw that Defendant Hartnagel was also hunting on the Youngs' property. (PA 1-6) The accident took place when Defendant Hartnagel allegedly shot Dr. Shaw, resulting in Dr. Shaw's death. (PA 1-6)

The underlying pleading at issue in this writ of mandamus is the Youngs' motion to dismiss or, in the alternative, motion for judgment on the pleadings. (PA 7-12) The sole issue present in this original proceeding is whether the Youngs are entitled to immunity under Sections 537.345 - 537.348 of the Revised Statutes of Missouri, which are Missouri's Recreational Use Statutes ("RUS").

B. The April 22, 2004 accident and Plaintiff's Second Amended Petition

The underlying facts necessary for the determination of this writ of mandamus are not in dispute. Plaintiffs' lawsuit against Defendants arose out of an April 22, 2004 hunting accident in which Dr. Shaw was allegedly shot by Defendant Hartnagel while hunting on the Youngs' property, which is located in Hermann, Missouri. (PA 1-6) Both Dr. Shaw and

Defendant Hartnagel had been given permission by the Youngs to hunt on the Youngs' property. (PA 1-6)

Plaintiffs originally sued only Defendant Hartnagel but later added the Youngs in Plaintiffs' Second Amended Petition. (PA 1-6) In the Second Amended Petition, Plaintiffs allege that both Dr. Shaw and Defendant Hartnagel were "invited guests" of the Youngs on the date of the accident and that both had permission from the Youngs to hunt turkey on their property. (PA 1-6) In addition, both were granted such permission to hunt free of charge and without the Youngs charging or receiving any payment or compensation. (PA 1-6, P 11-12)

In addition to alleging that Defendant Hartnagel was negligent in shooting Dr. Shaw, Plaintiffs' Second Amended Petition alleges that the Youngs were also negligent in failing to warn Dr. Shaw or Defendant Hartnagel of "the anticipated or possible presence of both hunters on their said land and of any known hunting habits of each so that each could make appropriate precautions." (PA 3-4) The failure to warn theory asserted in Plaintiffs' Second Amended Petition is the only theory asserted by Plaintiffs against the Youngs. (PA 1-6)

C. The proceedings below

On or about May 21, 2007, the Youngs filed a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted or, in the Alternative, Motion for Judgment on the Pleadings. (PA 7-12) In this motion, the Youngs asserted that the facts asserted against the Youngs, even if accepted as true, could not establish that the Youngs were the proximate cause of Dr. Shaw's death. (PA 7-12) In addition, the Youngs' motion also asserted that, even if such a case could be submitted based on the facts as plead in the Second Amended

Petition, the Youngs owed no duty to Dr. Shaw, as a matter of law, based on the applicability of Missouri's RUS. (PA 7-12)

In Plaintiffs' Response to the Youngs' motion, Plaintiffs argued that the RUS does not provide absolute immunity for landowners such as the Youngs and, specifically, Plaintiffs argued that the RUS does not apply to the Youngs' alleged "active negligence" in failing to warn Dr. Shaw of Defendant Hartnagel's presence on the property. (PA 22) Hence, Plaintiffs argued that the RUS only provides immunity for dangerous conditions of the property but not for artificial conditions such as the presence of another hunter on the Youngs' property. (PA 22-24)

Following a Reply to this Response by the Youngs (PA 28-37), Plaintiffs filed a Sur-Reply. (PA 38-40) In this pleading, Plaintiffs now argued that the reason the RUS did not apply to this case was because Dr. Shaw and Dr. Hartnagel were "social guests" of the Youngs and not members of the general "public." (PA 38-40) Plaintiffs asserted that the RUS did not apply because the Youngs did not extend an invitation to the entire general public to hunt on their property. (PA 38-40)

D. The Honorable Gael D. Wood's August 27, 2007 Order

On August 27, 2007, Judge Wood issued a docket entry order denying the Youngs' motion. (PA 41) No findings of fact, conclusions of law, or other written explanation as to the reasons for the denial of the Youngs' motion was issued by Judge Wood. (PA 41)

The Youngs' subsequently filed a Petition for Writ of Prohibition with the Missouri Court of Appeals, Eastern District, which was denied on September 24, 2007. (PA 42) This proceeding followed and, on October 30, 2007, this Court issued its Preliminary Writ.

POINTS RELIED ON

Relators are entitled to an Order requiring The Honorable Gael D. Wood to grant the Youngs' motion to dismiss and to dismiss the Youngs from the underlying lawsuit because Relators have an existing, clear and unconditional right to immunity under the RUS, and because Judge Wood had a corresponding, present, imperative, and unconditional duty to dismiss the Youngs from the underlying lawsuit, and failed to satisfy that duty, in that:

A. The RUS contains clear and unambiguous language affording absolute immunity to the Youngs for the claims asserted against them in Plaintiffs' Second Amended Petition and establishing that the Youngs owed no duty to Dr. Shaw as a matter of law for the April 22, 2004 accident;

B. Established law interpreting Missouri's RUS makes clear that the Youngs are entitled to immunity from any negligence claims asserted by Plaintiffs in the Second Amended Petition;

C. Application of the RUS is not contingent upon and does not require that a landowner open its land or otherwise make an invitation to the general public in order to be afforded immunity under the RUS, as the statute specifically grants immunity to the landowner as to the specific person for whom permission was given by the landowner;

D. Though Missouri law is irrefutably clear on this issue, case law from other jurisdictions also supports that the Youngs are entitled to absolute immunity from the claims asserted by Plaintiffs against them arising out of the April 22, 2004 accident; and

E. The RUS provides absolute immunity for the claims asserted against the Youngs.

Revised Statutes of Missouri, Section 537.345 - 537.348 (2004)

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

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

STANDARD OF REVIEW

A. STANDARD OF REVIEW FOR WRITS OF MANDAMUS

Relief by mandamus is appropriate where a trial court improperly denies a motion to dismiss. *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 823 (Mo. banc 1994); *State ex rel. Public Housing Agency of the City of Bethany v. Krohn*, 98 S.W.3d 911, 913 (Mo.App. W.D. 2003). A writ of mandamus is proper where there is (1) "an existing, clear, unconditional legal right in the relator," (2) "a corresponding, present, imperative, unconditional duty upon respondent," and (3) a "default" by respondent in satisfying that duty. *State ex rel. Belle Starr Saloon, Inc. v. Patterson*, 659 S.W.2d 789, 790 (Mo.App. 1983).

Hence, "[t]he standard of review for writs of mandamus and prohibition ... is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow applicable statutes." *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007). A writ of mandamus will be appropriate and granted where "a court has exceeded its jurisdiction or authority," and "a writ will lie to both 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." *Krohn*, 98 S.W.3d at 913.

Hence, 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.

B. RULES OF STATUTORY CONSTRUCTION

Under the principles of statutory construction, a statute's words must be given their plain and ordinary meaning. *Hammond v. Municipal Correction Institute,* 117 S.W.3d 130, 138 (Mo. App. W.D. 2003). Where the statute's language is unambiguous, a court must give effect to the legislature's chosen language. *Kerperien v. Lumberman's Mut. Cas. Co.*, 100 S.W.3d 778, 781 (Mo. banc 2003). A court, in construing a statute, may not supply, insert, or read words into a statute unless there is an omission plainly indicated and the statute as written is unintelligible. *State ex rel. May Dept. Stores Co. v. Weinstein*, 395 S.W.2d 525, 527 (Mo. App. E.D. 1965). Only absent a statutory definition may a reviewing court look to dictionary definitions to determine a term's plain and ordinary meaning. *Gremminger v. Missouri Labor and Indus. Relations Comm'n*, 129 S.W.3d 399, 402 (Mo. App. E.D. 2004).

In addition, only when the language used in a statute is ambiguous, or after a court has concluded that application of the specific words used in the statute would lead to an illogical result, may a Court look past the plain and ordinary language used in the statute. *Angoff v. M & M Management Corporation*, 897 S.W.2d 649, 653 (Mo.App. W.D. 1995); *State ex rel Remy v. Alexander*, 77 S.W.3d 628, 631-632 (Mo.App. S.D. 2002); *Thomas v. Kenma*, 55 S.W.3d 487, 492 (Mo.App. W.D. 2001).

ARGUMENT

I. Relators are entitled to an Order requiring The Honorable Gael D. Wood to grant the Youngs' motion to dismiss and to dismiss the Youngs from the underlying lawsuit because Relators have an existing, clear and unconditional right to immunity under the RUS, and because Judge Wood had a corresponding, present, imperative, and unconditional duty to dismiss the Youngs from the underlying lawsuit, and failed to satisfy that duty, in that:

A. The RUS contains clear and unambiguous language affording absolute immunity to the Youngs for the claims asserted against them in Plaintiffs' Second Amended Petition and establishing that the Youngs owed no duty to Dr. Shaw as a matter of law for the April 22, 2004 accident;

B. Established law interpreting Missouri's RUS makes clear that the Youngs are entitled to immunity from any negligence claims asserted by Plaintiffs in the Second Amended Petition;

C. Application of the RUS is not contingent upon and does not require that a landowner open its land or otherwise make an invitation to the general public in order to be afforded immunity under the RUS, as the statute specifically grants immunity to the landowner as to the specific person for whom permission was given by the landowner;

D. Though Missouri law is irrefutably clear on this issue, case law from other jurisdictions also supports that the Youngs are entitled to absolute immunity from the claims asserted by Plaintiffs against them arising out of the April 22, 2004 accident; and

E. The RUS provides absolute immunity for the claims asserted against the Youngs.

A. Summary of the argument

There are few, if any, disputed facts relevant to this writ. There is no question that both Dr. Shaw and Defendant Hartnagel were on the Youngs' property and that they were both there with the Youngs' permission. There is also no dispute about the fact that both Dr. Shaw and Defendant Hartnagel were on the Youngs' property for the purpose of hunting wild turkey and that hunting is, by definition, "recreational use" under the RUS. Finally, there is also no dispute that neither Dr. Shaw nor Defendant Hartnagel paid the Youngs for the Youngs' allowing them to hunt on their property.

Hence, the sole issue before this Court is whether the Youngs are immune from the claims asserted against them in the underlying lawsuit by Plaintiffs due to the application of Missouri's RUS. Specifically, 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 land to the *entire* general public.

As will be explained in detail below, such a requirement is contrary to the plain language of the RUS, and a court applying Missouri's RUS has specifically rejected such an argument in the past. Moreover, such a rule would lead to an illogical result and, more importantly, would stifle the very type of activity that the RUS was created to encourage. Hence, there is no question that the Youngs are immune from suit under the RUS, and Respondent breached the duty he owed to dismiss the Youngs from the underlying lawsuit.

B. Missouri's RUS

In that the sole issue in this proceeding is whether or not Plaintiffs can assert a cause of action against the Youngs based on Missouri's RUS, a close look at these statutes is necessary. Missouri's Recreational Use Statutes are found at Sections 537.345 – 537.348 of the Revised Statutes of Missouri (2004), and contain the following relevant provisions:

537.345. Definitions for sections 537.345 to 537.347

As used in sections 537.345 to 537.347, the following terms mean:

(1) "Charge", the admission price or fee asked by an owner of land or an invitation or permission without price or fee to use land for recreational purposes when such invitation or permission is given for the purpose of sales promotion, advertising or public goodwill in fostering business purposes;

* * *

(4) "Recreational use", hunting, fishing, camping, picnicking, biking, nature study, winter sports, viewing or enjoying archaeological or scenic sites, or other similar activities undertaken for recreation, exercise, education, relaxation, or pleasure on land owned by another.

* * *

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

537.346. 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.

* * * *

Section 537.348 then sets forth several exceptions to the statute, none of which are relevant to this case, and none of which have been argued by Plaintiffs or Respondent as being applicable to this case.

Based on an application of the plain language of the above statutes, there is little doubt that the claims against the Youngs fall within the express provisions of the RUS. First, as

noted above, there is no question that both Dr. Shaw and Defendant Hartnagel were allowed on the Youngs' property free of "charge", as that term is defined in Section 537.345. In addition, there is also no dispute that the activity that both Dr. Shaw and Defendant Hartnagel were engaged in at the time of the accident, *hunting*, is explicitly stated in Section 537.345 as being a "recreational use." Hence, it is clear that the RUS applies to this case.

Section 537.346 makes clear that, because the Youngs allowed Dr. Shaw on their property for recreational use, they owed him no ***duty*** whatsoever as a matter of law. Moreover, Section 537.346 makes clear that this non-duty applies to both natural and *artificial* conditions. More importantly, Section 537.346 makes explicit that there is no duty to ***warn*** of any such natural or artificial conditions, and this includes both *general* and *specific* warnings. Hence, the plain language of Section 537.346 alone makes clear that the Youngs owed no duty to Dr. Shaw and, absent a duty, a claim for negligent failure to warn cannot be maintained by Plaintiffs.

Section 537.347 also makes clear that the Youngs are immune from suit under the RUS. As stated clearly in this section of the RUS, Dr. Shaw was not an "invitee" of the Youngs such that no duty existed; the Youngs cannot be said to have made any warranties or assurances as to Dr. Shaw's safety while on their property; the Youngs have no responsibility for any injury caused by Dr. Shaw due to any natural or artificial condition; and the Youngs cannot be held liable for any injury that is caused by any person (Defendant Hartnagel) that they allowed to use their land for recreational use, all as a matter of law. See *Id*. And all that is required in order for Section 537.347 to apply is that a landowner directly, or even indirectly, allow someone on their land for "recreational use" free of "charge."

As will be addressed in more detail below, there certainly is no requirement in the RUS that permission be granted to the "general public" to use the landowner's property for recreational use. In that a landowner does not even have to ***directly*** invite a person on to their land in order to be protected by the RUS, it follows that there is also no requirement that the invitation be to a certain amount of people, or to the entire general public. In fact, the statute makes explicit that it applies to an invitation, directly or indirectly, to "any person." This makes completely irrelevant whether the landowner knows the person invited, how many people are invited, or whether an invitation is extended to the entire general public. As it is Respondent's position in this proceeding that the Youngs are only entitled to immunity if they extend an offer to hunt turkey on their property to the entire general public, this argument is simply not supported by the plain language of the RUS. In addition, such a construction would lead to an absurd result based on the obvious problems that would result from extending a general invitation to the entire public that they could come *hunt* on the Youngs' property. As extending an invitation to the entire public to come hunt on your property would be an extremely dangerous and irresponsible act, the position advanced by Respondent would effectively eliminate any protection afforded under the RUS for hunting activities of any kind, as few, if any, landowners would be in the position to extend such an invitation.

Hence, in applying the plain language of the RUS, its application to this case is obvious. Because there is no question that the Youngs gave permission for both Dr. Shaw and Defendant Hartnagel to engage in an activity, free of charge, that is specifically included as a "recreational use" under the RUS, and because there is also no dispute that none of the

statutorily-identified exceptions to the RUS apply to this case, it is clear that the Youngs owed no duty whatsoever to Dr. Shaw. Thus, they cannot be held liable for any alleged failure to warn that Plaintiffs allege caused, or contributed to cause, Dr. Shaw's death.

C. Case law in Missouri makes clear that the RUS applies

Due to the clarity of the language of the RUS and its applicability to this case, an application of the plain language of the RUS is completely dispositive of this proceeding. This is because, as noted above, under the principles of statutory construction, a statute's words must be given its plain and ordinary meaning. *Hammond*, 117 S.W.3d at 138. Hence, because a court in construing a statute may not supply, insert, or read words into a statute unless there is an omission plainly indicated and the statute as written is unintelligible, *Weinstein*, 395 S.W.2d at 527, and because that is not present in this case in that the RUS makes clear that there is immunity to a landowner who, without charge, directly or indirectly invites *any person* on to their land for recreational use, Relators submit that the Youngs are entitled to the protection afforded under the RUS as a matter of law, and that this Court's analysis need not go any further.

However, Missouri courts have had the opportunity on multiple occasions to interpret the RUS, including this Court, and these cases also make clear that the RUS applies.

In *Lonergan v. May*, 53 S.W.3d 122 (Mo.App. W.D. 2001), the Court provided a detailed analysis of the RUS. *Lonergan* involved a wrongful death action that followed a boating accident on Lake of the Ozarks, which is owned by Union Electric Company. The Court held that the RUS shielded Union Electric from liability. The analysis of the Court in arriving at its holding is both significant and instructive in this case.

In beginning its analysis, the Court noted that "[w]hen 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." *Id*. at 126.

The Court next noted that every state has enacted a version of the RUS, with Missouri's becoming law in 1983. After noting that Missouri's RUS does not explicitly state the purpose of the RUS, the Court noted that "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." *Id*.

After reciting most of the provisions of the statute, the Court listed the "factors necessary to determining whether or not (Union Electric) falls within the ambit of Section 537.346." *Id*. at 128. What is required in order for the statute to apply is "(1) an owner of the land; (2) entry upon the land; (3) entry upon the land without charge; (4) and entry for recreational use." *Id*. This is all that is required according to the Court's decision in *Lonergan*, and the Court made no mention of there being a requirement that the landowner must allow this entry upon its land to the entire general public. *Id*. This simply is not a part of the statute or any case interpreting the RUS.

After identifying these factors, the Court stated that "[i]f all of those factors are satisfied, the owner owes no duty to the entrants to keep the land safe or to give any general or specific *warnings* with respect to any natural or *artificial* condition, structure, or personal

property on the land unless one of the exceptions contained in Section 537.348 apply." *Id*. (emphasis added). The Court in *Lonergan* concluded this portion of its analysis by stating:

> The language of this statute is clear and unambiguous, and based on the plain and ordinary meaning of the language of the statute, we find that the legislature meant to protect the lake owners from liability when accidents occur on the lake by those who are engaged in boating activities, water sports, or any other 'pleasure' on the water. Therefore, (Union Electric) is protected under Section 537.346.

Id. at 129.

In applying the analysis of the Court in *Lonergan*, it is clear that the Youngs are entitled to the protection afforded by the RUS. This is because they satisfy all of the factors found to be required by the Court in order to be protected by the RUS: (1) they owned the land on which the accident took place, (2) they gave permission to Dr. Shaw and to Defendant Hartnagel to enter their land, (3) free of charge, and (4) they allowed this entry for the purpose of hunting, which is, by definition, a "recreational use" under the statute. Though Respondent attempts to make this issue more difficult than it is, the analysis is actually quite simple, and there is no question that all of these factors have been met in this case. While Respondent attempts to rely on *dicta* from the *Lonergan* case in support of its argument that the RUS only applies to those landowners who open their land to the entire general public, the "general public" is nowhere referenced in the RUS and is definitely not one of the factors the Court in *Lonergan* found to be required in order for the RUS to apply.

Hence, as will be discussed in detail below, there is no merit to Respondent's argument that only those landowners who open their land to the entire general public are entitled to the protection afforded by the RUS, and *Lonergan* certainly cannot be cited for that proposition. In fact, such a principle clearly contradicts the purpose of the RUS as determined in the *Lonergan* case, which is "to encourage the free use of land for recreational purposes in order to preserve and utilize our natural resources." *Id*. at 127.

Prior to the *Lonergan* case, the 8th Circuit Court of Appeals also addressed Missouri's RUS in *Wilson v. United States*, 989 F.2d 953 (8th Cir. (Mo.) 1993). In *Wilson*, the parents of a boy scout who died from electrical shock while at Fort Leonard Wood, Missouri sued the United States government, and the Court held that the government was entitled to immunity under the RUS. Like the Court in *Lonergan,* the Court in *Wilson* began by noting that Missouri's RUS "immunizes landowners who make their property available for the recreational use of *others* without an entry charge." *Id*. At 956. The Court ***did not***, however, state that the RUS applies to landowners "who make their property available for the recreational use of" *the entire general public*. *Id*.

Not only did the Court in *Wilson* not make that statement, but they specifically rejected a specific argument made by the plaintiffs in that case that the RUS did not apply because the Boy Scouts, who were the group that had been given permission to camp at Fort Leonard Wood and the group that the deceased was a part of, were not "members of the 'general public.'" *Id*. This is the precise argument made by Respondent in this case. In dismissing this argument, the Court in *Wilson* stated:

> The appellants contend that the United States is outside the protection of the Missouri Recreational Land Use Statute because the scouts are not "members of the general public." They contend that because only members of national youth organizations are eligible to participate in the Youth Tour Program, they should be treated as guests or invitees. Appellants' argument, however, relies upon a distinction not made within the language of the Missouri Recreational Land Use Statute. 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.

Id. at 957 (citations omitted) (emphasis in original). Hence, this issue has specifically been addressed, and rejected, by a Court interpreting Missouri's RUS and applying Missouri law.

Recently, this Court addressed the RUS for the first time. In *Foster v. St. Louis County*, 2007 WL 4239176 (Mo. banc 2007), the Court found that the RUS applied to a lawsuit filed against St. Louis County after the plaintiff was injured at a St. Louis County park. Though the issues in *Foster* are not similar to the ones in this case because the issue in that case was whether or not *exceptions* to the RUS applied, this Court's analysis in *Foster* is still relevant and instructive.

First, this Court in *Foster* reiterated the principle purpose of the RUS as set forth in *Lonergan*, which is "to encourage the free use of land for recreational purposes in order to preserve and utilize our natural resources." *Id*. at *1. In addition, this Court found that the

RUS did not violate the constitutional guarantee of "equal protection" by distinguishing between unincorporated and incorporated areas and recreational use free-of-charge and for-charge, as there was a rational basis in the *purpose* of the RUS to support both of these distinctions. This is significant because, in finding that a rational basis existed for these distinctions, this Court repeatedly referred to the "purpose" of the RUS without ever mentioning any requirement that the landowner permit free access for recreational purposes *to the entire general public*, as Respondent advocates. See *Id*. at *2-3.

Though ultimately finding that the RUS did not apply, the Court's analysis in *Fields v. Henrich*, 208 S.W.2d 353 (Mo.App. W.D. 2006), is also instructive. In *Fields*, a child wandered onto the defendants' property and died as a result of falling into the defendants' sewage pond. Though the Court ultimately found that the landowners were not liable for the child's death, the Court also found that the RUS did not apply. However, the *reason* why the RUS did not apply is significant. After reciting the same four factors as relied on by the Court in *Lonergan*, which is an owner of land, entry on that land, entry free of charge, and entry for recreational use, the Court found that the RUS did not apply because not all of those factors were present. Specifically, the Court found that the child's wandering onto defendants' property was not for "recreational use" under the RUS and that there was no evidence that the defendants allowed their property to be used for recreational use.

Equally as important, the Court also found that there was no allegation that the defendants "directly or indirectly invited or permitted ***any person*** to enter their property for recreational use." *Id*. at 358-359 (emphasis added). Rather, the child had simply wandered onto defendant's property without any invitation or permission. The Court's holding in this

regard makes clear, however, that the RUS requires that permission be given *to the individual person who is on the land* and that there is no requirement in the RUS that the public at large be invited or permitted to access the landowner's land for recreational use. If that were the requirement under the RUS, this analysis by the Court in *Fields* would have been meaningless and unnecessary.

Based on all of the above, and in addition to an application of the clear and unambiguous language of the RUS, case law in Missouri makes clear that the Youngs are entitled to the protections afforded by the RUS. This is because there is no question that they owned the property where the accident took place, that they gave permission to Dr. Shaw and Defendant Hartnagel to enter their land, that they allowed this entry free of charge, and that it was for "recreational use." Hence, all of the factors recognized by Missouri courts as being required in order for the RUS to apply have been met, and the Youngs are entitled to immunity from Plaintiffs' suit as a matter of law.

D. The RUS has no requirement that the landowner allow access to the general public

As referenced above, Respondent's main position, as set forth in his Response to Relators' Petition for Writ of Mandamus, is that the RUS does not apply to the Youngs because, although permission was given to Dr. Shaw and Defendant Hartnagel, the Youngs did not extend a general invitation to the public at large to hunt on their property. To be precise, Respondent states in his Response that "the landowner immunity granted by Missouri's Recreational Use Act has been held to depend upon the landowner making his or

her land available for use by the public." (RR 11) Despite this assertion by Respondent, however, Missouri courts have never so held.

Though Respondent's position in this regard is based almost solely on authority from other states applying other states' recreational use statutes whose language differs from the plain and unambiguous language present in Missouri's RS, the sole authority applying Missouri law that Respondent appears to rely on is the *dicta* present in the *Lonergan* case, and the other Missouri RUS cases, stating that "[i]n other words, it creates a tort immunity for landowners who open their land to the public free of charge for recreational use." 53 S.W.3d at 127. However, in addition to the fact that this statement is mere *dicta*, Respondent has misinterpreted this statement as requiring that a landowner extend an invitation to the public at large in order to be entitled to protection under the RUS. Hence, Respondent's position is that there is actually a *fifth* factor, in addition to the four factors noted by the Courts in the *Lonergan* and *Fields* cases, that must be met in order for the RUS to shield a landowner from liability. Respondent is incorrect.

First, Respondent's position ignores the preceding sentences to the language being relied on, which states:

> 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.

Id.

The above language puts the statement being relied upon by Respondent into proper context. This statement was never intended to add an additional requirement to the RUS requiring a landowner to extend an invitation to the entire general public in order to be protected by the RUS. Rather, this statement merely clarifies that the RUS applies where a landowner allows free access to his or her property for recreational use. It is obvious that such free access is to be by members of the general public, as both Dr. Shaw and Defendant Hartnagel indisputably were. But it is another thing altogether to require, as Respondent suggests, that the RUS does not apply unless an invitation has been extended to the *entire* general public. This position is erroneous for multiple reasons.

First, such a requirement is completely contrary to the plain language of the RUS as well as the cases interpreting the RUS, including the *Lonergan* case relied on by Respondent. As noted above, the statutes make clear that the immunity is specific to the person to whom permission was granted, as the statute never uses the word "public" and instead repeatedly uses the phrase "any person." As written, it simply makes no difference whether the person invited knows, or does not know, the landowner, or how many people are invited – the statutes simply apply to *any person* to whom permission is given. In order for Respondent's position to be correct, for instance, Section 537.347 would have to read "an owner of land who directly or indirectly invites or permits (the public) to enter his or her land for recreational use, without charge, whether or not the land is posted, does not thereby …."

Section 537.347. Had the legislature intended this to be required, it would have been that simple to codify such a requirement. But they did not, and such a requirement cannot be read into the statute, or added by this Court, absent a finding that the RUS is ambiguous.

Apart from the plain language of the RUS making clear that it applies to invitations extended to "any person", the *application* of the requirement advocated by Respondent would lead to illogical and absurd results that would both drastically limit the protection afforded by the RUS as well as stifle the very activities that the RUS seeks to encourage. If the RUS is only to apply to situations where a landowner allows unlimited, free access to their property for recreational use, it would rarely be applicable in the broad context that it was intended to apply, as most landowners do not have property sufficient in size to accommodate a general invitation to the public and would not extend such an invitation. This was clearly not intended by the RUS, as it makes clear that it applies to all "land" located in unincorporated areas of the State of Missouri, and most Missouri owners of such "land" do not own property that is sufficient in size to extend an invitation to the *entire* general public. Hence, the effect of Respondent's proposed addition to, and interpretation of, the RUS is that it would rarely, if ever, apply to a private landowner, and this is clearly not what the Missouri legislature intended by enacting the RUS.

To the contrary, the stifling effect that such a requirement would have is significant. The clear purpose of the RUS has been stated as being "to encourage the free use of land for recreational purposes in order to preserve and utilize our natural resources." *Foster*, 2007 WL 4239176 at *1. However, requiring a landowner to extend an invitation to the public at

large in order to obtain the protection afforded by the RUS would discourage, not encourage, landowners to provide free access to their property for recreational use.

Though Respondent is clearly attempting to create a distinction between permission to freely access a landowner's property as to people the landowner knows and permission to freely access landowners property as to people the landowner does not know, there simply is no distinction present in the RUS, and no Missouri court has recognized such a distinction. And, as noted above, a Court applying Missouri's RUS has specifically addressed, and rejected, this very argument regarding access by the "general public." See *Wilson*, 989 F.2d at 957. Interestingly, however, Respondent's Response does not even reference the *Wilson* case, much less attempt to distinguish it, as Respondent relies instead on cases from other jurisdictions interpreting other states' recreational use statutes.

At any rate, even the Missouri cases that Respondent does cite to, *Lonergan* and *Fields*, do not support the *additional requirement* that Respondent is asking this Court to add to the RUS. Again, apart from the use of the word "public" in *dicta* in these opinions, the Courts in both these cases make clear that only ***four*** things need be shown in order for the RUS to apply: (1) an owner of land, (2) who grants permission to *any person* to enter that land, (3) without charge, and (4) for recreational use. Respondent cannot in good faith argue that these four factors have not been met in this case. Hence, absent this Court deciding to add a "general public" requirement to the RUS and impose a "fifth" element, there is really no question that the RUS applies to this case and that the claims against the Youngs are barred based on the protection afforded them under the RUS.

Finally, it also bears noting that Respondent's position that Dr. Shaw and Defendant Hartnagel are not members of the "public", as that term is defined in the dictionary, is both incorrect and perplexing. In his Response, Respondent states:

> Relators did not open their land to "persons such as Dr. Shaw," as alleged in their petition for 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.

(RR 25)

Respondent then goes on to argue that the RUS is not clear and unambiguous and that "selectively giving permission to two men to hunt on their land" is not giving permission to the "public." Hence, this argument is first premised upon a finding that there is in fact a requirement that an invitation be extended to the "general public," which there is not. Even if there were, however, there simply is no support whatsoever for Respondent's argument that granting permission to *two* members of the public is not granting permission to the "general public." Again, Respondent's position, then, is that an invitation must be extended to the *entire* general public in order to come under the protection of the RUS, as Respondent does not suggest how many independent invitations to members of the public would have to

be extended before the "general public" requirement he is proposing would be satisfied. As noted above, the application of this argument advanced by Respondent in the context of allowing *hunting* to be performed on your property makes clear, in and of itself, why the RUS does not contain such a requirement, as the Youngs would have had to extend an invitation to the entire general public to *hunt* on their land in order to be entitled to the protection afforded by the RUS.

More importantly, despite the fact that Missouri law makes clear that "[o]nly absent a statutory definition may a reviewing court look to dictionary definitions to determine a term's plain and ordinary meaning," *Gremminger*, 129 S.W.3d 399, 402 (Mo. App. E.D. 2004), Respondent is seeking to rely on the dictionary definition of a term *that does not appear anywhere in the RUS*. Hence, not only is Respondent asking this Court to add a requirement to the RUS that would significantly limit the application of the RUS and stifle the very acts that the RUS was created to promote, Respondent also asks this Court to interpret the term "public" so as to include the entire population. Restated, Respondent's position in this proceeding is that (a) the RUS does not apply to the Youngs because they did not extend an invitation to the public, and (b) it is not enough that the Youngs did grant permission to two members of the public since the invitation extended was not to the entire public at large.

Based on all of the above, both the RUS and the cases applying and interpreting Missouri's RUS make clear that it applies to the permission given by a landowner to *any person* to freely use their land for recreational use, and there is no requirement that such an invitation or permission be extended to the "general public" in order for a landowner to be afforded protection under the RUS.

E. **Case law from other jurisdictions**

To be clear, it is the Youngs' position that the language of the RUS and its accompanying Missouri case law alone govern the outcome of this case, as both make clear that the RUS applies to this case. However, it also merits mention that specific case law from other states involving hunting accidents makes additionally clear that the RUS applies to this case. Hence, to the extent that case law from other jurisdictions is necessary to the resolution of any issue present in this proceeding, such case law supports Relators' position.

Although no Missouri court has yet applied the RUS to incidents involving hunting, several other jurisdictions, including Louisiana, have applied their state's version of the RUS with regard to premises liability actions filed against landowners for accidents resulting from hunting.

The Louisiana Supreme Court recently dealt with this very issue in *Richard v. Hall*, 874 So. 2d 131 (La. 2004). In *Hall*, the survivors of a hunter killed in a hunting accident brought suit against several entities, including a lessee of the hunting club where the accident happened, for its failure to instruct its employees on the safe use of firearms while hunting at the club. *Id.* at 136. The court, however, ruled that the lessee was immune from liability pursuant to the Louisiana Recreational Use Statute ("RUS"), La.Rev.Stat. § 2791 (2000). The Louisiana RUS reads similarly to the Missouri RUS by stating that landowners who open their land, free of charge, for public, recreational use, owe *no duty of care* to keep their premises safe or to warn of conditions or activities on their land. La.Rev.Stat. § 2791.

Similar to the Plaintiffs in the present case, the *Hall* plaintiffs tried to circumvent the RUS by arguing its inapplicability to the facts surrounding the hunting accident in that case.

However, the Louisiana Supreme Court echoed the language of the Western District of Missouri in *Lonergan* and stated that the statute had to be read in its clear and unambiguous language:

> [w]hen a statute is clear and unambiguous and its application does not lead to absurd consequences, the statute is applied as written, and no further interpretation may be made in search of legislative intent. [citation omitted]. The Recreational Use Statutes are laws on the same subject matter and must be interpreted in reference to each other. [citation omitted]. The Recreational Use Statutes are in derogation of common or natural right and, therefore, are to be strictly interpreted, and must not be extended beyond their obvious meaning . . . . The statute must therefore be applied and interpreted in a manner that is logical and consistent with the presumed fair purpose and intention the legislature had in enacting it.

Id. at 148-50.

Like in *Lonergan*, the Louisiana Supreme Court further stated that the purpose of the Louisiana RUS was "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." *Id.* at 150. The Louisiana Supreme Court then stated:

> 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 recreation 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.

Id. (emphasis added).

The Court strictly construed the RUS in accordance with the legislature's intent and ultimately held that the lessee was immune from any liability owed to the hunter that was accidentally shot by another hunter because the lessee qualified as a landowner under the RUS. *Id.* at 151-52.

Prior to this decision by the Louisiana Supreme Court, a Louisiana appellate court came to the same conclusion in a very similar case involving an injured hunter who filed suit

against the hunting club where he was injured. *See Johnson v. Lloyd's of London, et al*., 653 So.2d 226 (La.App. 2 Cir. 1995). The court compared the holdings and rationales of similar cases from Hawaii, Kansas, and Michigan, and stated that "[l]ike the statutes in those cases, our law provides a landowner with immunity from simple negligence. We hold that such negligence, whether passive or active, falls within the scope of the RUS." *Id.* at 230-31. Accordingly, the court ultimately held that the RUS immunized the landowner from any liability, and "to hold otherwise would encourage owners to take no steps whatsoever to make recreational facilities safer, and might encourage some landowners to withdraw their land from recreational use altogether, thereby undermining the very purpose of the legislation." *Id.* at 231.

As evidenced by the foregoing analysis, the recreational use statutes were created for situations just like the one present in this case. Landowners, such as the Youngs, were intended to be afforded immunity in order to have an incentive to open their land to members of the public free of charge. This incentive does not apply any more, or any less, in regards to a hunting accident as it would apply to any other negligence claim alleging a failure to warn of another natural or artificial condition that caused injury. And, in fact, application of the RUS in this case is actually stronger because, as noted above, hunting is specifically identified in Missouri's RUS as a "recreational use."

F. The RUS provides absolute immunity for the claims asserted against the Youngs

In addition to arguing that the RUS does not apply to the Youngs because an invitation was not extended to the entire "general public", Respondent also argues in his

Response that the RUS is not relevant to the specific claims asserted by Plaintiffs against the Youngs, which are for negligent failure to warn of Defendant Hartnagel's concurrent presence on the Youngs' property. This argument is also without merit, as Respondent addresses the issue improperly as one of causation, but the RUS effectively abolishes a landowner's ***duty***, regardless of the alleged acts in question that caused the injury.

In addition to the above cases from other jurisdictions that have held that recreational use statutes apply to situations similar to this case involving hunting accidents, Missouri's RUS makes unequivocally clear that, where it applies, and unless one of the enumerated exceptions apply, it provides absolute immunity to the landowner. Specifically, and as noted above, Section 537.346 provides that a landowner owes "no ***duty*** of care." The statute goes on to make this even clearer by stating that no duty exists as to both natural or artificial conditions ***and*** that no duty is owed to give any general or specific warnings. *Id*.

Respondent misunderstands the alleged *cause* of Dr. Shaw's death by the Youngs, which is the alleged failure to warn Dr. Shaw of Defendant Hartnagel's concurrent presence on the Youngs' property, with whether any *duty* was owed to Dr. Shaw. The RUS does not address *causes* of injury but instead makes clear that, where the RUS applies, the landowner owes no *duty*. Because duty is a separate and distinct element of any negligence-based cause of action, it is clear that, should the Court determine that the RUS applies, it clearly applies to the negligent failure to warn theory asserted by Plaintiffs against the Youngs, *because the Youngs owed no duty to Dr. Shaw, both to keep the premises safe from natural or artificial conditions or to warn him of any such natural or artificial conditions*. Restated, the Youngs' alleged *cause* of the accident, the alleged failure to warn, is simply irrelevant since no *duty*

was owed to Dr. Shaw due to the application of the RUS. The same is true of Section 537.347 of the RUS, as it also makes clear that no duty exists regarding the premises being safe "for any purpose", regarding any natural or artificial condition, or regarding any injury caused by Defendant Hartnagel to Dr. Shaw.

Hence, though Respondent attempts to distinguish the broad language of the RUS and argues that the RUS does not extinguish the Youngs' "active negligence" in failing to warn Dr. Shaw of Defendant Hartnagel's presence, this argument is without merit, as there simply is no support for this argument in either the plain and unambiguous language of the RUS, or in the Missouri case law that has interpreted the RUS. Both Sections 537.346 and 537.347, by their plain language, encompass the negligent failure to warn theory that has been asserted by Plaintiffs against the Youngs, and Plaintiffs' argument that the RUS could apply to the Youngs' duties to warn as to conditions of their property but not the duties owed to warn of Defendant Hartnagel's presence on their property, is a distinction that has never been recognized.

CONCLUSION

Based on all of the above, Respondent, The Honorable Gael D. Wood, had a duty to enforce the clear and unambiguous provisions of the RUS and to grant Relators' motion to dismiss. This is because the RUS applies where a landowner allows free access to their property for recreational use, and there is no question in this case that these elements have been met. Hence, Judge Wood breached the duty owed to grant the Youngs' motion to dismiss as a matter of law.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The undersigned certifies that a copy of the foregoing brief and disk containing same were deposited on this 2nd day of January, 2008, in the United States Mail, postage prepaid, addressed to: The Honorable Gael D. Wood, Circuit Judge, Circuit Court of Gasconade County, Missouri, Gasconade County Courthouse, 119 E. 1st Street, Rm. 6, Hermann, Missouri 65041, Respondent; Mr. P. Dennis Barks, 127 East Fourth Street, Hermann, Missouri 65021, Attorney for Plaintiffs; Mr. Sam P. Rynearson, Mr. David A. Feltz, Rynearson, Suess, Schnurbusch & Champion, LLC, 1 South Memorial Drive, Suite 2800, St. Louis, Missouri 63102, Attorneys for Defendant Hartnagel; and Michael P. Gunn, The Gunn Law Firm, PC, 1714 Deer Tracks Trail #240, St. Louis, Missouri 63131, Attorney for Defendant Hartnagel.

_____

David P. Bub

Subscribed and sworn to me, a Notary Public, this 2nd day of January, 2008.

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Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. This Relators' Brief includes the information required by Rule 55.03.

2. This Relators' Brief, which has 8,937 words, exclusive of the cover, the certificate of service, the Rule 84.06 certification, the signature block, and the appendix, complies with the word limitations authorized by Rule 84.06 of the Missouri Rules of Civil Procedure; and

3. The computer disk accompanying the Relator's Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

_____

David P. Bub

APPENDIX

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