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

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

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Abbreviations:

RP	"Relators' Petition for Writ of Mandamus"
PA	"Exhibits Attached to Relators' Petition for Writ of Mandamus"
RR	"Respondent's Response to Relators' Petition for Writ of Mandamus
RIB	"Relators' Initial Brief"
RB	"Respondent's Brief"

TABLE OF AUTHORITIES

REPLY ARGUMENT

1. Introduction

Respondent's brief fails to demonstrate that mandamus is inappropriate in this case. Furthermore, Respondent's brief makes clear that no cause of action can be asserted against Relators A. Carlton Young and Arline E. Young ("Youngs") as a matter of law.

The primary issue before this Court is whether protection afforded by Missouri's Recreational Use Act statutes ("RUS") requires landowners to open their land to the *entire* public or simply to *members* of the general public. Despite Respondent's mischaracterization of both Relators' position in this proceeding and Missouri case law interpreting and applying the RUS, the plain and unambiguous language of the RUS makes clear that the Youngs are entitled to immunity for the claim being asserted by plaintiffs. Likewise, courts applying Missouri law have also made clear that the Youngs are entitled to the protection afforded by the RUS.

In fact, as will be discussed below, absent from Respondent's brief is any authority, whether in Missouri or any other jurisdiction, supporting Respondent's position that the Youngs do not fall within the protection of the RUS because they did not extend an open invitation to the entire general public and instead granted *permission* to members of the general public who sought it. Likewise, Respondent has also failed to cite to any authority in support of his argument that, even if the RUS applies, it does not apply to the claim against the Youngs that they negligently failed to warn Dr. Shaw of the presence of another hunter on their property.

2. Mandamus is appropriate

In arguing that this case is not appropriately disposed of through mandamus, Respondent essentially agrees with the standard set forth in Relators' brief governing mandamus actions, but disagrees that mandamus is appropriate in this case. Respondent does not specifically state *why* mandamus is inappropriate in this case, however, and instead includes only lengthy quotations from two dissimilar cases where mandamus was deemed to have been inappropriate. (RB 7-10)

At any rate, in addition to Respondent's failure to establish that mandamus is inappropriate in this case based on the trial court's failure to implement and apply the RUS, Missouri law makes clear that 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).

3. Respondent's mischaracterization of Relators' position in this proceeding

Respondent throughout its brief characterizes Relators' initial position in this proceeding as being that the RUS does not require that a landowner open its land to the public in order to be provided immunity, citing as support Point Five of Relators' Suggestions in Support of Relators' Petition for Writ of Mandamus. (RB 16) While it is certainly true that the RUS uses only the terminology "any person" and never references the "public" at all, this is an incorrect characterization of Relators' position in this case. Relators' actual position in this portion of their Petition, as well as in Relators' initial

brief and consistently throughout this proceeding, has been that the RUS does not reference or require a landowner to extend an open invitation to the entire public to enter his or her land. (RP 17, 28-30; RIB 20, 28-34)

Despite no mention of "the public" in the RUS and the fact that the Court in the *Lonergan v. May* case also did not reference "the public" when it stated the purpose of the RUS as being "to encourage the free use of land for recreational purposes in order to preserve and utilize our natural resources" or when it set forth the "factors" that must be established in order for the RUS to apply, it has never been Relators' position in this case that permission granted to a member or members of the general public is not necessary in order for the RUS to apply. 53 S.W.3d 122, 126-128 (Mo.App. W.D. 2001). Rather, Relators have not, and need not, set forth an opinion on this issue since even Respondent has conceded in this case that both Dr. Shaw and Defendant Hartnagel were members of the general public. (RR 24-25)

Hence, Respondent's characterization of Relators' position as attempting to distinguish between "whether a landowner extended a general invitation or only a private and selective invitation to engage in recreational uses on his land" is simply incorrect. (RB 12) Restated, no "private or selective invitation" to either Dr. Shaw or Defendant Hartnagel is at issue in this case, as even Respondent admitted in his Answer to Relators' Petition for Writ of Mandamus that the Youngs gave *permission* to Defendant Hartnagel and Dr. Shaw to hunt on their property. (RP 10, RR 2) Respondent again acknowledged in Respondent's Brief that Defendant Hartnagel and Dr. Shaw were members of the public "in a general sense." (RB 15) Respondent in this case has continuously confused

permission being granted to individual members of the general public, such as the situation present in this case, with the affirmative act of a landowner extending a selective and private invitation to enter his or her land (i.e. a private party or gathering), which is not an issue in this case. Respondent's error in this regard is significant *both* to Respondent's mischaracterization of Relators' argument *and* to Respondent's errant application of the law applicable to this case.

Based on the above, because Relators' true position in this proceeding is that the RUS applies where permission is extended to members of the public, such as Dr. Shaw and Defendant Hartnagel, and not only where permission is granted to the public at large, two things are clear. First, because even Respondent admits that Defendant Hartnagel and Dr. Shaw were members of the public that were extended permission to enter the Youngs' land, it is clear that Respondent's position in this case is that the RUS only applies where a landowner extends an open invitation to the *entire* general public to enter his or her land for recreational purposes. In fact, Respondent argues that the invitation must truly be "open" such that the public should not be required to obtain permission to enter the landowner's land. Secondly, it is clear that Respondent has misinterpreted the *Lonergan* case and, each and every other case *relied on by Respondent* in Respondent's brief, as supporting Respondent's position.

The above issue is significant because Respondent's arguments in this proceeding as to why the RUS does not apply, including Respondent's reliance on the *Lonergan* case, are based almost solely on Respondent's mischaracterization of Relators' position as being that a landowner need not open his or her land to the public in order for the RUS

to apply. The critical difference between Relators' and Respondent's *actual* positions in this case, and the primary issue to be determined in this case, is simply whether the permission or invitation extended by the landowner may be to members of the general public, or whether it must be an open invitation to the entire public. To the extent, then, that plaintiffs state Relators' position as being that the RUS offers absolute immunity "to a landowner in all circumstances affecting recreational uses of property" (RB 18), this is simply incorrect. Again, Respondent fails to see the marked distinction between (1) granting permission to individual members of the general public who seek it, and (2) holding a private gathering or party. Relators believe that situation (1) is clearly covered by the RUS, while situation (2) is clearly not covered by the RUS. At any rate, both Missouri law and the law relied on by Plaintiffs from other jurisdictions support Relators' interpretation of the RUS that it applies in this case.

4. Respondent misinterprets the *Lonergan* case

Respondent sets forth Relators' position as being "that the public policy behind the grant of landowner immunity is satisfied by selectively giving permission to two men to hunt on their land." (RB 15) This is correct. In contrast, Respondent argues that there is no "social utility" in such a "narrow invitation." (RB 17). In fact, and getting to the heart of Respondent's argument, Respondent argues that, in order for land to be "truly open to the public in general" so as to be protected by the RUS, *a person would not even need to obtain permission from the landowner before hunting on their property*. (RB 15) Respondent does not provide any guidance, however, on what steps Respondent believes the landowners would have to take in order to make the public aware of such an open

invitation to the entire public to enter the landowner's land, or of what qualifications and limitations it would be permissible for the landowner to impose to still be entitled to protection from the RUS.

Apart from the logistical nightmare that would result from such a standard, the undoubtedly more dangerous conditions that would exist if hunters and other recreational users need not obtain permission to enter a landowner's land to hunt, and the fact that such an interpretation of the RUS would almost certainly mean that the RUS would never apply to private landowners, never has such a narrow and rigid interpretation of a state's recreational use act been applied, in Missouri or elsewhere. In fact, such a narrow interpretation would undoubtedly defeat the very purpose of the RUS, which the Court in *Lonergan* stated was to "encourage the free use of land for recreational purposes in order to preserve and utilize our natural resources." 53 S.W.3d at 127.

In addition, if the RUS only applied to situations where permission was not needed to enter onto the land, this would undoubtedly cause additional problems in determining whether permission had truly been granted to the entrant by the landowner through an invitation to the public, or whether the entrant was merely trespassing, which is similar to an issue addressed by a Missouri court in the *Fields v. Henrich* case. 208 S.W.3d 353, 358-359 (Mo.App. W.D. 2006) (where one issue in case was whether the landowners had "directly or indirectly invited or permitted *any person* to enter their property for recreational use" *Id*.). Hence, in addition to being an outright distortion of the language of the RUS and the cases that have interpreted the RUS, Respondent's interpretation of the RUS is illogical, impractical, and would certainly lead to absurd, unintended results.

It is particularly puzzling that Respondent would rely on *Lonergan* to support its narrow and rigid interpretation of the RUS. Other than the extensive quote Respondent included from the *Lonergan* case (RB 12-14), Respondent provides no analysis whatsoever as to how *Lonergan* can be said to support his interpretation of the RUS. Respondent instead cites over and over again to the same language from *Lonergan*, and the cases that have cited *Lonergan*, that the RUS provides "tort immunity for landowners who open their land to the public free of charge for recreational use." *Id*. Respondent offers no explanation as to how this statement from *Lonergan* supports an argument that an open invitation to the entire general public, without the need to even obtain permission, is required before the RUS applies. In fact, there is nothing in *Lonergan*, or in any other case in Missouri or the entire country, that supports such a proposition.

More importantly, and most likely the reason why Respondent relies only on *dicta* from *Lonergan* instead of including any true analysis of the case, Respondent ignores the actual holding of the Court in *Lonergan*. After noting that the RUS itself does not explicitly state a "purpose" for the Act, and after a detailed analysis of the actual statutes that make up the RUS, the Court in *Lonergan* held that "[t]he statute requires (1) an owner of the land; (2) entry upon the land; (3) entry upon the land without charge; and (4) entry for recreational use. *If 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 … apply." *Id*. at 128 (emphasis added).

Respondent's argument simply cannot be said to be supported by *Lonergan* or any other authority. It is illogical for Respondent to suggest that simply because *Lonergan* dealt with a large lake (Lake of the Ozarks) where entrants are not required to obtain specific permission prior to entering the lake, the RUS only applies to those types of situations. To the contrary, the very factors identified by the *Lonergan* Court directly refute such an argument. Hence, though Respondent suggests that a finding in this matter in favor of Relators would require this Court to overrule the findings of the court in *Lonergan* (RB 17), there is absolutely no merit to such a suggestion. To the contrary, Relators submit that acceptance of Respondent's argument in this case would constitute a departure from *Lonergan* and the other cases in Missouri that have addressed the RUS.

5. The cases cited by Respondent from other jurisdictions support Relators' position

A good portion of Respondent's brief is devoted to dissecting the language utilized in *other states'* recreational use statutes, which is interesting given that there is barely any reference at all to the actual language used in Missouri's RUS, as well as cases from other jurisdictions, though this consists mostly of verbose quotations and little actual analysis of the issues or holdings of those cases. At any rate, each and every case relied on by Respondent stands *directly* for Relators' position in this proceeding, which is that the RUS applies to landowners that open their land, free of charge, for recreational use, to members of the general public. Without exception, none of these cases support the position advanced by Respondent in this case.

For instance, Respondent spends several pages reciting Nebraska's version of the RUS as well as excerpts from a Nebraska appellate decision, *Holden v. Schwer*, 495 N.W.2d 269 (Neb. banc 1993). Respondent dabbles in differences between Missouri's RUS and Nebraska's, however, without ever explaining what relevance, if any, those differences have to this case. And Respondent once again ignores the clear holding of an authority upon which it relies. Though never actually mentioned by Respondent in its brief, the primary issue in *Holden*, as stated by the Court, was "whether the act applies to persons, such as the defendant, who do not open their land to the public at large, but who use their discretion in granting permission to enter." *Id*. at 273.

Like in this case, plaintiffs argued that, in order to be protected by Nebraska's act, the defendant "must give '*carte blanche* permission' to the members of the public at large to use his property." *Id*. The Court emphatically rejected such an argument, however, finding both that the "Act" did not support such a contention and that "[s]uch a position would defeat the purpose of the act." *Id*. Hence, this case does not aid Respondent's position in any way.

Estate of Gordon-Coutoure v. Brown, 876 A.2d 196 (N.H. banc 2005), is a New Hampshire Supreme Court case that is also quoted heavily by Respondent. While apparently quoted to serve as a history lesson as to the "uniform act" that most states have adopted a form of, Respondent again ignores the issue and the holding of New Hampshire's highest court in this case. At issue in *Brown* was whether New Hampshire's version of the RUS applied to a landowner who was sued for negligence after a boy drowned while on the landowner's premises for a *private birthday party*. The Court

interpreted the phrase "any person" in New Hampshire's RUS as meaning "any person as a member of the general public." *Id*. at 202. Hence, the Court held that New Hampshire's RUS did not apply because the boy drowned while on the premises for a *private* birthday party.

Respondent also references *Conant v. Stroup*, 51 P.3d 1263 (Ore.App. 2002), which was discussed at length by the New Hampshire Supreme Court in the *Brown* case. In *Conant*, the plaintiff was bit by a dog while jogging on defendant's property. Like in the *Brown* case, the Oregon appellate court concluded that Oregon's RUS applied "when permission is granted to a person *as a member of the public generally, not as a specific invitee*." *Id*. at 1266.

Finally, Respondent's brief also cites to an opinion of the Illinois Court of Appeals, *Snyder v. Olmstead*, 634 N.E.2d 756 (Ill.App. 1994), which also held that Illinois' version of the RUS did not immunize a landowner who invited "private guests" onto his property. *Id*. at 756. In qualifying their holding, the Court stated that "[i]n so ruling, we wish to stress that in order to seek protection under the Act, a landowner need not 'allow all persons to use the property at all times.'" *Id*., quoting from *Johnson v. Stryker Corporation* 388 N.E.2d 932 (Ill.App. 1979).

Based on the above, Respondent's citation to, and reliance on, these decisions is puzzling to say the least, as they directly refute Respondent's position in this case. More importantly, they are consistent with Missouri law and Relators' position in this case, which is that the RUS applies where a landowner extends *permission* to one or more members of the general public to enter their land, free of charge, for recreational

purposes. Absent from any authority cited in Respondent's brief, is the slightest inference, much less an actual statement, that access to the entire general public and a complete opening of a landowner's land such that permission need not even be obtained, is required in order for the RUS to shield a landowner from liability. Again, such a rule would defeat the purpose of the RUS, and there is no logical basis or legal authority supporting such an interpretation of the plain language of Missouri's RUS.

6. Because the RUS applies, the Youngs are shielded from liability in this case

Respondent's final argument in this case is that, even if the RUS does apply to the Youngs, the RUS does not provide absolute immunity "from claims of the type asserted against Relators." (RB 33) Specifically, Plaintiffs argue that failing to warn of the presence of another hunter on the Youngs' property is not a "natural or artificial condition, structure or personal property on the land" under the RUS. Respondent's argument is without merit for several reasons.

Apart from the fact that Respondent has cited to no authority, either in Missouri or in other jurisdictions, that has recognized the distinction he is attempting to create, Respondent's argument on this issue, like the preceding issue, also distorts the plain language of the RUS. Though barely mentioning the Missouri RUS in the portions of his brief addressing the issue of whether the RUS applies, Respondent cites to Section 537.346 of the Revised Statutes of Missouri as support for this argument. This Section provides:

> **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.

Based simply on a plain language interpretation of this statute, Respondent's argument is hard to comprehend. First, as Relators set forth in their initial brief, the effect and function of the RUS is to eliminate the *duty* element of a negligence cause of action for a landowner, *not the cause of the injury*, which is where Respondent's focus lies. If no duty exists, then no negligence cause of action can be maintained, regardless of the alleged cause of the injury. It is illogical for Respondent to argue that the Youngs did not owe a duty to warn as to some potential *causes* of injury to Dr. Shaw but that they did owe a *duty* to warn as to certain other potential *causes* of injury to Dr. Shaw. Certainly no Missouri case, and no other case cited by Respondent from the entire country, has ever so held.

The language of the statute itself refutes this interpretation. Section 537.346 states that a landowner owes "***no*** duty of care" to "any person" to keep his land "safe for recreational use." Regardless of how Respondent attempts to spin it, plaintiffs' claims against the Youngs are that, because of the concurrent presence of Defendant Hartnagel

and Dr. Shaw on the Young's property, the premises were not safe for recreational use. Respondent's argument, then, fails to demonstrate how the intentionally broad language present in this portion of Section 537.346 does not apply. It does apply.

Furthermore, the remaining portion of Section 537.346 also applies, which states that there is no duty to give any "***general*** or ***specific*** warning" regarding any "***natural*** or ***artificial condition***, structure, or personal property thereon." This portion of the statute makes clear that there is no duty to give a warning of any kind, whether general or specific, and this would certainly include any warnings regarding the presence of other hunters on the property. In addition, it is clear that this non-duty to warn applies to natural or artificial conditions, natural or artificial structures, or natural or artificial personal property. There is no question that plaintiffs' allegation that the Youngs failed to warn Dr. Shaw of the co-presence of Defendant Hartnagel on the land is an allegation of the failure to warn of an artificial condition. Respondent appears to misinterpret this portion of the statute as applying only to artificial conditions of the land, but there simply is no support for this argument in the plain language of Section 537.346. Hence, in situations where the RUS applies, there simply is no duty owed to the entrants upon the land, and Respondent's unsupported argument in this regard is without merit.

Respondent's argument that Section 537.347 does not apply also fails. Section 537.347 provides:

> **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.

Relators disagree with Respondent's argument that subsection (4) of the statute does not apply because that subsection only applies to injuries caused to a person by the act of that person. Respondent's argument is hard to comprehend and is an illogical

interpretation of the statute. Under such an interpretation, subsection (4)'s only application would be where a person causes injury to himself, and this would defeat the purpose of using the phrase "any other person." More importantly, when Section 537.347 is read in its entirety, as the principles of statutory construction require, it is clear that Respondent's reading of subsection (4) is incorrect. Both subsections (2) and (3) utilize the phrase "such person" and make unambiguously clear that they are talking about the person whom has been given permission to enter the landowner's land. Hence, it is clear that use of the phrase "such person" in subsection (4) also refers to the person to whom permission has been given by the landowner. The proper construction of subsection (4), then, is that it applies to injuries caused by an act or omission of the person to whom permission has been given by the landowner (in this case Defendant Hartnagel) to other persons or property.

Even if Respondent's argument as to subsection (4) were correct, Respondent fails to address the applicability of the remainder of Section 537.347, including subsection (1)'s broad statement that a landowner does not extend any assurances that the premises are safe *for any purpose*.

The plain language of the RUS simply does not support an argument that the Youngs' immunity under the RUS does not extend to warning of Defendant Hartnagel's concurrent presence on the Youngs' land, which was clearly an artificial condition of which the Youngs had no duty to warn. Though not necessary for the disposition of this issue, case law has also made clear, including the case law relied on by Respondent, that the distinction Respondent is attempting to create does not exist. For instance, in the

Holden case, discussed above, the cause of the injury had nothing to do with the land but was the presence of a dog on the defendant's property. While plaintiffs attempt to distinguish this case by pointing out that the Nebraska statute at issue also included the term "activity", this is not relevant. Though Missouri's RUS does not use the term "activity", its language is sufficiently broad and makes unambiguously clear that there is no duty to warn of any natural or artificial condition, without qualification.

Likewise, the *Conant* case, also discussed above and cited by Respondent, also did not involve any condition of the landowner's land. Rather, the plaintiff was injured due to the concurrent presence of a dog on the defendant's property that bit her. However, unlike the *Holden* case, the RUS at issue in that case did not utilize the word "activity", yet the court still held that the defendants were entitled to immunity under Oregon's RUS.

Finally, Relators note that, while reliance on case law from other jurisdictions is not necessary to dispose of the issues in this case, Respondent does not address, much less refute, the cases cited in Relators' initial brief where other states' RUS were applied in cases involving hunting accidents. Respondent has countered with no authority whatsoever, from any jurisdiction, that has held that a RUS was otherwise applicable but did not immunize a landowner for a failure to warn of the presence of another hunter on his or her property. In fact, absent from Respondent's brief is any authority whatsoever in support of his argument that the RUS, even if it applies, does not provide absolute immunity to the Youngs, or any case where a court has concluded that a landowner was immune as to some duties that would otherwise be owed to an injured person but not as to others. This absence is telling.

CONCLUSION

Based on all of the above, it is clear that plaintiffs cannot state a cause of action against the Youngs as a matter of law. The Youngs granted permission to both Dr. Shaw and Defendant Hartnagel to use their property free of charge for hunting, which is one of the specific activities listed as a recreational use under the RUS.

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 4th day of February, 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 1st day of February, 2008.

_____

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' Reply Brief includes the information required by Rule 55.03.

2. This Relators' Reply Brief, which has 4,573 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 Relators' Reply Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

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David P. Bub