In the Missouri Court of Appeals
Eastern District

DIVISION TWO

FRED CAY, AND TINA CAY, Appellants, v. MARK POLSON, AND MISSOURI DEPARTMENT OF CONSERVATION, Respondents.	)	ED113814 Filed: May 26, 2026

Appeal from the Circuit Court of St. Charles County
The Honorable W. Christopher McDonough, Judge

Before: Michael S. Wright, Presiding Judge, Philip M. Hess, Judge, and Virginia W. Lay, Judge.

Introduction

Fred Cay and Tina Cay (collectively, Appellants) appeal from the circuit court's grant of summary judgment in favor of the Missouri Department of Conservation (MDC). Appellants raise two points on appeal. First, they claim the circuit court erred in granting summary judgment because a genuine issue of material fact exists as to whether MDC was grossly negligent within the meaning of the Recreational Use Act (RUA), sections

537.345-.348, .351.[1] In response to this Court's show cause order, Appellants argue the circuit court correctly found there was no just reason for delay pursuant to Rule 74.01(b)[2] in certifying the matter for interlocutory appeal. We affirm.

Factual and Procedural Background

On May 8, 2021, Fred[3] was running on the Lewis Trail in the Weldon Spring Conservation Area (Weldon Spring), which is owned and operated by MDC, when he was shot by Mark Polson (Polson). Polson was hunting turkey in Weldon Spring, an activity regulated by MDC. Fred was taken by helicopter to Mercy Hospital in St. Louis County where he underwent multiple surgeries.

In October of 2022, Appellants filed suit against Polson and MDC.[4] Appellants' amended petition alleged negligence against Polson (Count I) and MDC (Count II), premises liability against MDC (Count III), and loss of consortium against both defendants (Count IV). Counts II and III claimed MDC failed to use ordinary care and was grossly negligent by:

> (a) permitting hunters to hunt and discharge their firearms in the same general area as popular pedestrian use trails;

[1] All section references are to RSMo (2016), unless otherwise indicated.
[2] All rule references are to the Missouri Supreme Court Rules (2025).
[3] For simplicity, we will call Fred and Tina Cay by their first names when referring to them individually. No disrespect or undue familiarity is intended.
[4] Appellants originally brought suit against Polson, MDC, and Great Rivers Greenway District. In their original petition, Appellants asserted claims against MDC for simple negligence, premises liability and loss of consortium. After MDC moved for summary judgment, Appellants amended their petition to allege in both their negligence and premises liability claims that MDC was grossly negligent. The amended petition also omitted the claim against Great Rivers Greenway District. Appellants and MDC agreed MDC's motion for summary judgment would be deemed filed as to the amended petition.

(b) allowing permitted hunters to specifically discharge their firearms in extremely close proximity to popular pedestrian use trails;

(c) specifically directing Polson to hunt in an area near popular public use trails;

(d) failing to adequately warn trail users such as Fred Cay of the hunt in the area;

(e) allowing permitted hunters to hunt and discharge their firearms in the area of a switchback trail; and

(f) failing to provide adequate information for persons other than hunters on proper ways to be visible when using the area during a hunt.

MDC moved for summary judgment, arguing it was entitled to tort immunity under RUA and that Tina's claim for loss of consortium against MDC failed because Fred's underlying claims failed. In its statement of uncontroverted material facts, MDC stated:

1. Defendant MDC owns and operates [] Weldon Spring … located in St. Charles County, Missouri.

2. On or about May 8, 2021, Plaintiff Fred Cay entered Weldon Spring for the recreational purpose of running on the pedestrian trails.

3. Plaintiff Fred Cay did not pay to enter Weldon Spring on May 8, 2021.

4. Plaintiff Fred Cay claims injury from being shot while running on the pedestrian trails in Weldon Spring on May 8, 2021 by Co-Defendant Mark Polson, who was hunting in Weldon Spring.

5. Plaintiff Tina Cay claims loss of consortium as a result of the injuries suffered by her husband, Plaintiff Fred Cay.

MDC attached as exhibits an affidavit by MDC's district supervisor and a portion of Fred's deposition. In its memorandum in support, MDC claimed allowing hunting on

one's land does not constitute malice, gross negligence, or an ultrahazardous condition, which are exceptions to RUA tort immunity.

Appellants admitted all five of MDC's statements of uncontroverted facts and provided four of their own:

> 1. D. Keith Byers is a retired Sergeant from the Georgia Department of Natural Resources Law Enforcement Section where he worked from 0981 [sic] to 2012. He has significant expertise and experience with regard to hunter safety and safe hunting practices. His curriculum vitae describing his background and experience is attached to his Affidavit as Exhibit 1.
>
> 2. Mr. Byers has reviewed the incident involving the shooting of Fred Cay by Mark Polson at Weldon Spring [] which occurred May 8, 2021. He has reviewed the depositions of Fred Cay and Mark Polson, as well as maps, statements and official reports pertaining to the shooting incident. He also visited the site of the incident on April 21, 2025.
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> 3. Based on Mr. Byers' review of the incident and his professional experience, it is his opinion that [MDC] failed to use ordinary care and was grossly negligent in the following respects:
>
> > a. permitting hunters to hunt and discharge their firearms in the same general area as popular pedestrian use trails;
> >
> > b. allowing permitted hunters to specifically discharge their firearms in extremely close proximity to popular pedestrian use trails;
> >
> > c. specifically directing Polson to hunt in an area near popular public use trails;
> >
> > d. failing to adequately warn trail users such as Fred Cay of the hunt in the area;
> >
> > e. allowing permitted hunters to hunt and discharge their firearms in the area of a switchback trail; and
> >
> > f. failing to provide adequate information for persons other than hunters on proper ways to be visible when using the area during a hunt.

> 4. In the opinion of Mr. Byers, it was foreseeable and inevitable that a permitted, invited hunter such as Mark Polson, would eventually injure a recreational user such as Fred Cay.

(internal citations omitted). Appellants did attach Byers' affidavit to their statement of additional uncontroverted material facts, but did not include any of the materials Byers referenced in his affidavit. Appellants also filed a memorandum in opposition to MDC's motion for summary judgment, in which they argued MDC was not covered by RUA immunity because of their allegation MDC was grossly negligent.

Replying to Appellants' statement of additional uncontroverted material facts, MDC admitted Appellants' first two statements. MDC admitted Appellants' third statement insofar as it is Byers' opinion, but denied the opinion's accuracy and validity. MDC further stated Byers' opinion lacked reliability and foundation and is inadmissible because it is not based on the legal standard for gross negligence. As to Appellants' fourth statement, MDC again admitted it was Byers' opinion but denied its accuracy and validity and further stated his opinion is speculative and inadmissible.

The circuit court granted MDC's motion for summary judgment, finding MDC demonstrated there is no genuine dispute of material fact and that it is entitled to a judgment as a matter of law in that MDC was protected by RUA immunity. The court further found Appellants did not establish the existence of any genuine dispute of material fact giving rise to an exception to RUA immunity, noting that none of the materials referenced in Byers' affidavit were attached as exhibits to Appellants' statement of additional uncontroverted material facts. Additionally, the court noted

Byers' opinions were either recitations of Appellants' allegations in their amended petition or legal conclusions.

The circuit court, disposing of all of the claims against MDC, entered judgment pursuant to Rule 74.01(b) and found there was no just reason for delay, which allowed Appellants to appeal the judgment. This appeal follows.

Discussion

Although the issue of certification for interlocutory appeal pursuant to Rule 74.01(b) is presented as Point Two, we discuss that point first because it presents a threshold issue of jurisdiction.

Certification for Interlocutory Appeal

We directed Appellants to show cause addressing the appropriateness of the circuit court's Rule 74.01(b) certification of its judgment as final. Appellants responded, and we took the matter with the case. We find the judgment was properly certified as final and we therefore have jurisdiction to hear this appeal.

"The right to appeal is purely statutory and, where a statute does not give a right to appeal, no right exists." *Wilson v. City of St. Louis*, 600 S.W.3d 763, 767 (Mo. banc 2020) (quoting *First Nat'l Bank of Dieterich v. Pointe Royale Prop. Owners' Assoc., Inc.*, 515 S.W.3d 219, 221 (Mo. banc 2017)). Applicable here is section 512.020(5), which permits an appeal from a "final judgment."

"A final judgment resolves all issues in a case, leaving nothing for future determination." *Ndegwa v. KSSO, LLC*, 371 S.W.3d 798, 801 (Mo. banc 2012) (internal quotation omitted). Here, the circuit court's judgment is not final in this sense because

the judgment disposed only of the claims against MDC. But Rule 74.01(b) provides an exception to the final judgment rule, and allows the circuit court to enter an appealable final judgment "as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." Certification under this rule is proper "only if it disposes of a 'judicial unit' of claims." *Wilson*, 600 S.W.3d at 769.

The Supreme Court of Missouri has provided two methods for determining whether a judgment disposes of a judicial unit. The first is "a judgment that disposes of all claims by or against one or more – but fewer than all – of the parties." *Id.* Such a judgment is final "because [it] resolves all of the claims in a lawsuit from the point of view of at least one party, even though other claims by or against other parties remain to be resolved." *Id.* Here, the circuit court's judgment disposed of a judicial unit because it resolved all of the claims against MDC, leaving only the claims against Polson.

Alternatively, a judgment is final if it "dismisses one of two defendants on the basis of a defense available to only the dismissed defendant[.]" *Kinney v. Schneider Nat'l Carriers, Inc.*, 213 S.W.3d 179, 182 (Mo. App. W.D. 2007) (internal quotation omitted). RUA immunity was only available to MDC as the landowner, therefore the judgment in favor of MDC was a distinct judicial unit. Accordingly, under either method for determining a distinct judicial unit, the circuit court's certification of its judgment as final was proper.

Point One: Summary Judgment

In Point One, Appellants assert the circuit court erred in granting summary judgment in favor of MDC based on a finding that MDC was not grossly negligent as a

matter of law. Appellants argue a genuine issue of material fact exists as to whether MDC was grossly negligent within the meaning of RUA, and that MDC did not present evidence in its summary judgment motion that bears upon whether its conduct was grossly negligent, which is a question for a jury to decide.

A. Standard of Review

This Court reviews the grant of summary judgment *de novo*. *Green v. Fotoohighiam*, 606 S.W.3d 113, 115 (Mo. banc 2020). "Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law." *Id.* (internal quotation omitted). We accept as true facts contained in affidavits or that otherwise support a motion for summary judgment unless they are contradicted by the non-moving party's response to the motion. *Id.*

"Only genuine disputes as to material facts preclude summary judgment. A material fact in the context of summary judgment is one from which the right to judgment flows." *Id.* (internal quotation omitted). We view the record "in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record." *Id.* at 116 (internal quotation omitted).

B. Analysis

When the defendant moves for summary judgment, one way it can establish a right to judgment as a matter of law is by showing "facts that negate *any one* of the claimant's elements facts[.]" *ITT Com. Fin. Corp. v. Mid-America Marine Supply Corp.*, 854

S.W.2d 371, 381 (Mo. banc 1993) (emphasis in original). Once a movant establishes a right to judgment as a matter of law, "the non-movant's *only* recourse is to show—by affidavit, depositions, answers to interrogatories, or admissions on file—that one or more of the material facts shown by the movant to be above any genuine dispute is, in fact, genuinely disputed." *Id.* (emphasis in original).

At issue here are Appellants' negligence and premises liability claims against MDC. Both claims first require a showing that MDC owed Fred a duty of care. *See Payne v. Fiesta Corp.*, 543 S.W.3d 109, 118 (Mo. App. E.D. 2018) (listing elements of negligence); *Woodall v. Christian Hosp. NE-NW*, 473 S.W.3d 649, 653 & n.4 (Mo. App. E.D. 2015) (listing elements of premises liability). MDC argues its summary judgment motion negated the duty element of Appellants' two claims. We agree.

RUA shields from tort immunity "landowners who open their land to the public free of charge for recreational use." *State ex rel. Dep't of Nat. Res. v. Crane*, 708 S.W.3d 157, 160 (Mo. banc 2025) (internal quotation omitted). RUA provides:

> Except as provided in sections 537.345 to 537.348, and section 537.351, an owner of land owes no duty of care to any person who enters on the land without charge to keep his or her 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.

Section 537.346. RUA continues, in relevant part:

> [A]n owner of land who directly or indirectly invites or permits any person to enter his or her land for recreational use, without charge … does not thereby: [a]ssume 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 [a]ssume responsibility for any damage or injury to any other person or property caused by an act or omission of such person.

Section 537.347(3)-(4).

Accordingly, to establish RUA immunity, MDC must show "(1) it owned the land or structure where [Fred] was injured; (2) [Fred] entered that land or structure; (3) [Fred]'s entry was without charge; and (4) [Fred]'s entry was for recreational purposes." *Crane*, 708 S.W.3d at 160. Uncontested facts support each of the elements. MDC's statement of uncontroverted facts, all of which were admitted by Appellants, established that (1) MDC owns Weldon Spring, the land where Fred was injured; (2) Fred entered Weldon Spring; (3) Fred's entry was without charge; and (4) Fred's entry was for a recreational purpose.

MDC made a prima facie showing it was entitled to RUA immunity. Consequently, MDC also made a prima facie showing it was entitled to summary judgment because RUA immunity negated the duty element of Appellants' claims. *See* section 537.346. Under *Crane*, if a party establishes an uncontested factual basis for relief under RUA, it is entitled to judgment as a matter of law. 708 S.W.3d at 160. As such, the burden then shifted to Appellants to demonstrate a genuine issue of material fact, which they sought to do through an exception to RUA immunity. *See ITT*, 854 S.W.2d at 381.

While there are several exceptions to RUA immunity, Appellants argue only the gross negligence exception applies. Section 537.348 provides:

> Nothing in this act shall be construed to create liability, but it does not limit liability that otherwise would be incurred by those who use the land of others, or by owners of land for: (1) Malicious or grossly negligent failure to guard or warn against a dangerous condition, structure, personal property which the owner knew or should have known to be dangerous, or negligent

> failure to guard or warn against an ultrahazardous condition which the owner knew or should have known to be dangerous ….

Put differently, "this exception provides that [MDC] would be liable for [] its maliciousness or gross negligence in failing to protect [Fred] from or warn him about a condition or structure [MDC] knew or should have known was dangerous[.]" *Crane*, 708 S.W.3d at 161.

Appellants filed an additional statement of uncontroverted facts attempting to establish a genuine dispute of material fact—that MDC was grossly negligent—and that MDC was therefore not entitled to judgment as a matter of law because of an exception to RUA immunity. However, Appellants failed to sufficiently raise a question of fact because the relevant statements were merely legal conclusions.

Appellants stated it was Byers' opinion that MDC failed to use ordinary care, was grossly negligent, and that it was foreseeable and inevitable that a recreational user would be injured. Such a conclusion "brandished as a statement of fact must be disregarded in evaluating a motion for summary judgment, even if that statement is admitted[.]" *Barnes v. Athene Annuity & Life Assurance Co.*, 681 S.W.3d 549, 555 (Mo. App. W.D. 2023) (internal quotation omitted). While it may be true those are Byers' opinions, they are merely legal conclusions and are insufficient to raise questions of fact.[5] *Mo. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 811 S.W.2d 28, 34 (Mo. App. E.D. 1991) (affirming

[5] Byers' own definition of "gross negligence" is unhelpful to Appellants. In deposition, Byers defined it as "something that – I don't know exactly how to explain it. But it would be negligence that could have been prevented, let's say. And not just one point would make it gross. I would say there are many points that would make it gross or several points that would make it gross."

summary judgment when non-movant's affidavits contained legal conclusions rather than facts).

Under these limited circumstances, MDC demonstrated it was entitled to summary judgment. MDC made a prima facie showing it was entitled to RUA immunity, and, further, judgment. Though Appellants pleaded MDC was grossly negligent and argued the gross negligence exception to the RUA applied, Appellants' deficient statement of uncontroverted material facts failed to raise a genuine dispute of material fact. Accordingly, MDC established there was no genuine dispute of material fact and that it was entitled to judgment as a matter of law.[6] The circuit court did not err in granting summary judgment in favor of MDC.[7] Point denied.

Conclusion

For the reasons set forth above, we affirm the circuit court's judgment.

Virginia W. Lay, Judge

Michael S. Wright, Presiding Judge, concurs.
Philip M. Hess, Judge, concurs.

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[6] We do not adopt the circuit court's reading of *State ex rel. Young v. Wood*, 254 S.W.3d 871 (Mo. banc 2008) as eliminating any possibility that allowing hunting on one's land does not constitute malice, gross negligence, or an ultrahazardous condition. We do not rule out the possibility that in some circumstances, allowing hunting on one's land could qualify as an exception to RUA immunity.

[7] The trial court's grant of summary judgment as to Tina's claim for loss of consortium is likewise affirmed. "A claim for loss of consortium is derivative only; for one spouse to recover for loss of consortium, the other spouse must have a valid claim for personal injury." *Price v. Thompson*, 616 S.W.3d 301, 314 (Mo. App. W.D. 2020) (internal quotation omitted). Because Fred's claims against MDC are precluded by RUA, Tina's claim for loss of consortium also fails.