

Summary of SC94372, *Angela Anderson v. Union Electric Company*

Appeal from the Morgan County circuit court, Judge Kenneth Michael Hayden
Argued and submitted February 18, 2015; opinion issued June 16, 2015

Attorneys: Anderson was represented by Kevin J. Davidson, David M. Zevan and Rachel L. Roman of Zevan & Davidson Law Firm LLC in St. Louis, (314) 588-7200; and Union Electric was represented by Jeffery T. McPherson, Thomas B. Weaver, James J. Virtel and Karen A. Baudendistel of Armstrong Teasdale LLP in St. Louis, (314) 621-5070.

Two organizations submitted briefs as friends of the Court: the Missouri Association of Trial Attorneys was represented by Theresa A. Appelbaum of Padberg, Corrigan & Appelbaum in St. Louis, (314) 621-2900; and Timberhill-Riverbend Inc. was represented by Lauren E. Tucker McCubbin and Jon R. Dedon of Polsinelli PC in Kansas City, (816) 753-1000.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A woman whose children died when a stray current entered the lake in which they were swimming appeals the circuit court's dismissal of her lawsuit against the company that owns the lake. In a 5-2 decision written by Judge Paul C. Wilson, the Supreme Court of Missouri affirms the judgment. The company is immune from the woman's lawsuit under the state's recreational use act. The dock permit fees the company charges are not admission fees that would subject the company to liability, and the children died in the lake, not on "noncovered land" exempt from immunity.

Judge Richard B. Teitelman dissents. He would hold that the company's dock fees amount to a "charge" for the children to use the dock to access the lake and, therefore, would reverse the trial court's determination that the company was immune from suit.

Facts: Angela Anderson's two children were killed on July 4, 2012, when they encountered a stray current in the Lake of the Ozarks and died from electrocution, drowning or both. The children were swimming in the vicinity of a dock adjoining land their parents owned. Anderson sued Union Electric Company, which owns the lake and issues permits for docks on the lake, alleging the company was negligent in failing to: warn dock owners about the risks of not using ground fault interrupt (GFI) devices at or above the seawall to prevent injury in the event of an electrical fault; require such devices as a condition of obtaining a dock permit; inspect the dock adequately to ensure it had adequate GFI protection; and warn dock owners along the Gravois arm of anticipated increase in wear and tear on docks as a consequence of permitting nearby restaurant property. Union Electric moved to dismiss Anderson's petition, claiming the company is immune from such claims under the state's recreational use act, sections 537.345 to 537.348, RSMo. The circuit court agreed, dismissing the case. Anderson appeals.

AFFIRMED.

Court en banc holds: The circuit court correctly held that Union Electric is immune from Anderson's claims under the recreational use act and section 537.346. Under this statute, the company is immune from any claim that is premised on its status of owner of the Lake of the Ozarks and based on its alleged failure to keep the lake safe for recreational use and/or its failure to warn recreational users of risks associated with any natural or artificial condition, structure or personal property on the lake.

(1) The user fee that Union Electric charges for dock permits is not a "charge" as that term is used in section 537.346. Section 537.345(1) defines "charge" as "the admission price or fee" a land owner asks when inviting or granting permission to a person to use the land for recreational purposes when the invitation or permission is given for the purpose of sales promotion, advertising or public goodwill in fostering business purposes. In its 1993 decision in *Wilson v. United States*, the United States Court of Appeals for the Eighth Circuit concluded that the only way to avoid inconsistent application of the recreational use act "is to interpret the word "charge" as an actual admission price paid for permission to enter the land at the time of its use for recreational purposes." Anderson, however, does not allege the fees she paid to Union Electric in connection with her dock permit were an "admission fee" to enter the lake, and she concedes she and her children were free to enter the lake as often as they wished without paying an admission fee. It does not matter whether the children entered the lake from a dock for which Union Electric assessed a permit charge; that charge is not an "admission price or fee," and the company is immune from Anderson's claims.

(2) Anderson's dock is not "noncovered land" under the exemption to immunity in section 537.348(3)(d). This statute provides an exemption from immunity for injuries occurring on or in any "noncovered land," which the statute further defines in relevant part as any portion of land "actually used primarily for commercial, industrial, mining or manufacturing purposes." That Union Electric charges a fee for permits for private docks on the lake does not convert the company's use of the docks into a commercial enterprise. The Eighth Circuit rejected such an argument in *Wilson*, and in its 2011 decision in *Foster v. State*, this Court held that charging picnic and other fees did not mean the primary purpose of a park was for commercial purposes. In *Foster*, this Court held that section 537.348(3)(d) cannot apply as long as the injury occurs on a portion of the land open to the public for recreational use free of charge. Even if the Court assumes a private dock is "noncovered land," Anderson concedes her children were killed in the lake, which was open to them and other members of the public for recreational use free of charge. Further, an act of charging a fee serves a "commercial" purpose only if the primary aim of the fee is to generate a profit. Anderson does not allege Union Electric charges fees for dock permits with profit in mind. Instead, she concedes the permit fees are part of a program imposed for purposes that are not primarily commercial – the company's responsibility, under the federal energy regulatory commission's regulations, to protect and enhance the lake's recreational value.

Dissenting opinion by Judge Teitelman: The author would reverse the trial court's judgment that Union Electric was immune from Anderson's suit. There is no dispute the company requires dock owners to pay a fee for the dock's placement and use. The fee grants private access to the owner and his or her guests. The author would hold the dock fees, therefore, amount to a "charge" for the children to use the dock to access the lake.