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## The Cost of Allowing the Public to Enjoy the Lake of the Ozarks: Should Landowners Be Protected Over the Public?

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**The Cost of Allowing the Public to Enjoy the Lake of the Ozarks:  
Should Landowners Be Protected Over the Public?**

*Anderson v. Union Electric Company*<sup>1</sup>

Alex Langley

I. INTRODUCTION

In *Anderson v. Union Electric Company*, the Missouri Supreme Court reviewed the Missouri’s Recreational Use Act (“RUA”).<sup>2</sup> The highly anticipated decision held that Union Electric Company (“UE”), the majority owner of the Lake of the Ozarks (“the Lake”), was not responsible for the death of the Anderson children when a stray electrical current stemming from their parents’ dock killed them.<sup>3</sup> The court held that because the Lake allowed the public to use the facilities without paying an admission fee, the Lake was not liable under the RUA.<sup>4</sup> The court rejected the Anderson’s argument that the fee they paid for permission to have a dock on their property constituted a fee under the statute.<sup>5</sup> As such, the Lake was not held liable.<sup>6</sup>

While the Missouri courts have rarely addressed the statute,<sup>7</sup> this case highlights the problems with the RUA as it is currently drafted. The statute was drafted with a well-intentioned policy rationale of “encourage[ing] the free use of land for recreational purposes in order to preserve and utilize [Missouri] natural resources.”<sup>8</sup> But the legislature has created a statute that allows large companies and organizations to escape liability through the fine parsing of the term “charge” in the statute. Therefore, either the legislature should alter the RUA or the Missouri courts should alter their interpretation

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<sup>1</sup> 463 S.W.3d 783 (Mo. 2015).

<sup>2</sup> *Anderson v. Union Elec. Co.*, 463 S.W.3d 783, 784-85 (Mo. 2015) [hereinafter *Anderson II*].

<sup>3</sup> *Id.* at 789.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Missouri courts have only reviewed the RUA on two occasions, other than *Anderson*.

<sup>8</sup> *Foster v. St. Louis County*, 239 S.W.3d 599, 601 (Mo. 2007).

of the RUA. These changes would incentivize UE, the party with the most control, to place additional requirements on docks at the Lake to ensure the public is safe from stray electrical currents. This note will outline why the Missouri Supreme Court should have decided the case differently and why the Missouri legislature should change the statute so that the burden of protecting the public is placed on the party with the most resources.

First, this note will set forth the facts of the case where the Missouri Supreme Court determined that the Lake was not responsible for the Andersons' children's death. The second part will examine the historical context of the RUA in Missouri and highlight alternative Recreational Use Statutes from other states. Third, this note will lay out the Missouri Supreme Court's rationale for the case. The fourth section will describe how the court's decision was in line with Missouri precedent and how the court could have distinguished past cases so that the Andersons could proceed with their case. Lastly, this note will suggest possible ways the Missouri legislature could change the statute to prevent these types of incidents in the future.

## II. FACTS AND HOLDING

Angela Anderson and her husband ("Andersons") own a home on the Lake of the Ozarks ("the Lake").<sup>9</sup> The Lake is manmade and connected to the Bagnell Dam; both are owned and operated by Union Electric Company ("UE").<sup>10</sup> The original purpose of the dam was to supply the area with hydroelectricity.<sup>11</sup> Now, thousands have built homes around the Lake and even more visit "the Lake's scenic beauty and recreational allure."<sup>12</sup> Additionally, many of the homeowners around the Lake have docks, giving their homes direct access to the Lake.<sup>13</sup> In order for a homeowner to build a dock, he or she must submit an application, including written plans for the

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<sup>9</sup> *Anderson II*, 463 S.W.3d at 784-85; *Anderson v. Union Elec. Co.*, No. WD76927 2014 Mo. App. WL 2574628, at \*2 (Mo. App. W.D. June 10, 2014) [hereinafter *Anderson I*].

<sup>10</sup> *Anderson II*, 463 S.W.3d at 784.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Lake News Online, *Higher Court Rules Against Ameren in Lawsuit Over Electrocution Deaths*, OZARKS FIRST (June 19, 2014, 2:03 PM), <http://www.ozarksfirst.com/news/appeal-court-rules-against-ameren>.

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dock, to UE.<sup>14</sup> After review, UE grants the homeowner a permit for the dock or other structure in return for an annual fee.<sup>15</sup>

UE's permit program places certain "requirements for these improvements, including requirements regulating the manner in which landowners may supply electricity to their docks."<sup>16</sup> However, UE does not "require dock owners to install [ground fault interrupt devices] as a condition of obtaining a dock permit."<sup>17</sup>

The Andersons built a dock on the Lake, supplied it with electricity, but did not use a ground fault interrupt device, so as to "prevent injury in the event of an electrical fault."<sup>18</sup> In July 2012, Alexandra and Brayden, the Andersons' two children, were swimming in the Lake near their dock when a stray electrical current from the Andersons' dock killed the children.<sup>19</sup> The Andersons then filed a wrongful death suit against UE arguing that UE negligently caused the death of their children.<sup>20</sup> UE asked the court to dismiss the case under Mo. Rev. Stat. § 537.346.<sup>21</sup> The trial court agreed with UE, dismissing the case for failing to state a claim because UE is immune from liability under The Recreational Use Act<sup>22</sup> ("RUA").<sup>23</sup>

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<sup>14</sup> *Application for an Ameren Missouri Permit*, AMEREN, <https://www.ameren.com/-/media/missouri-site/Files/lakeoftheozarks/lakeapplication.pdf>.

<sup>15</sup> *Anderson II*, 463 S.W.3d at 784-85.

<sup>16</sup> *Id.* at 785.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Anderson II*, 463 S.W.3d at 785; *Anderson I*, No. WD76927, 2014 Mo. App. WL 2574628, at \*1.

<sup>21</sup> *Id.* "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 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." *Anderson II*, 463 S.W.3d at 786.

<sup>22</sup> Mo. Rev. Stat. §§ 537.345-537.348 (2012). ("As used in sections 537.345 to 537.347, and section 537.351, 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; **(2)** "Land", all real property, land and water, and all structures, fixtures, equipment and machinery thereon; **(3)** "Owner", any individual, legal entity or governmental agency that has any ownership or

However, the Missouri Court of Appeals Western District disagreed.<sup>24</sup> The court held that the trial court erred in dismissing the Andersons' complaint.<sup>25</sup> Specifically, it found that the fee the Andersons' paid fit under the "charge" definition of RUA and therefore UE did not have immunity.<sup>26</sup> The case was then appealed to the Missouri Supreme Court.<sup>27</sup> The supreme court reversed the Missouri Court of Appeals and upheld the trial court's opinion.<sup>28</sup> Ultimately, the Missouri Supreme Court determined that when an individual is injured on publicly accessible property, and a fee is not charged, the landowner is not liable and protected under the RUA.<sup>29</sup>

### III. LEGAL BACKGROUND

Each state has a statute that shields a landowner from liability when he or she grants access to the public for recreational purposes.<sup>30</sup> The purposes of these statutes are to encourage landowners to open up their property for public use and to give the public greater access to the natural beauty of the outdoors.<sup>31</sup> Collectively, such legislation is referred to as recreational use

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security interest whatever or lease or right of possession in land; (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; ..... (d) Any non-covered land. "Non-covered land" as used herein means any portion of any land, the surface of which portion is actually used primarily for commercial, industrial, mining or manufacturing purposes; provided, however, that use of any portion of any land primarily for agricultural, grazing, forestry, conservation, natural area, owner's recreation or similar or related uses or purposes shall not under any circumstances be deemed to be use of such portion for commercial, industrial, mining or manufacturing purposes." *Id.*

<sup>23</sup> *Anderson II*, 463 S.W.3d at 786; *Anderson I*, No. WD76927 2014 Mo. App. WL 2574628, at \*2.

<sup>24</sup> *Anderson I*, No. WD 76927 2014 Mo. App. WL 2574628, at \*1.

<sup>25</sup> *Id.* at \*3.

<sup>26</sup> *Anderson II*, 463 S.W.3d at 785; *Anderson I*, No. WD76927 2014 Mo. App. WL 2574628, at \*2-3.

<sup>27</sup> *Id.*

<sup>28</sup> *Anderson II*, 463 S.W.3d at 786.

<sup>29</sup> *Id.* at 790.

<sup>30</sup> Harris M. Pittman, *The Arkansas Recreational-Use Statute: Past, Present, and Future Applications for Arkansas Landowners and Recreational Users of Land*, 60 Ark. L. Rev. 849, 849 (2008).

<sup>31</sup> *Id.*

statutes.<sup>32</sup> A recreational use statute allows a landowner to escape liability for injuries occurring on recreational land except for instances of gross negligence<sup>33</sup> or if an individual pays money in return for using the land.<sup>34</sup> Most of the statutes have vastly different standards for the latter exception.<sup>35</sup> Missouri's standard is "an admission price or fee,"<sup>36</sup> whereas other states have a standard simply requiring "consideration."<sup>37</sup>

*A. Missouri's Recreational Use Statute History*

In the seminal case of *Genco v. Connecticut Light and Power Co.*, Laura Genco dove into Candelwood Lake, owned by Connecticut Light and Power Company ("Company"), and struck the bottom of the lake.<sup>38</sup> Genco argued that the Company should have warned swimmers about the depth of the water or should have ensured that the water levels were sufficient so that divers would not be injured.<sup>39</sup> The Company argued it was protected from liability because the lake is open to the public.<sup>40</sup> The Appellate Court of

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<sup>32</sup> *Id.*

<sup>33</sup> States differ in the standard of negligence required to make landowners liable for an individual injury: "willful or malicious" Nev. Rev. Stat. Ann. § 41.510, "malicious or grossly negligent" Or. Rev. Stat. Ann. § 105.672.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Anderson II*, 463 S.W.3d at 785; *Anderson I*, No. WD76927, 2014 Mo. App. WL 2574628, at \*3.

<sup>37</sup> *Ducey v. United States*, 713 F.2d 504, 510 (9th Cir. 1983).

<sup>38</sup> *Genco v. Conn. Light & Power Co.*, 7 Conn. App. 164, 165 (Conn. App. 1986).

<sup>39</sup> *Id.* at 165.

<sup>40</sup> The statute is almost verbatim to the Missouri statute. Defendants argue the lake would be considered open to the public based on the following statutory language: "Sec. 52-557g. Liability of owner of land available to public for recreation; exceptions. (a) Except as provided in section 52-557h, an owner of land who makes all or any part of the land available to the public without charge, rent, fee or other commercial service for recreational purposes owes no duty of care to keep the land, or the part thereof so made available, safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure or activity on the land to persons entering for recreational purposes. (b) Except as provided in section 52-557h, an owner of land who, either directly or indirectly, invites or permits without charge, rent, fee or other commercial service any person to use the land, or part thereof, for recreational purposes does not thereby: (1) Make any representation that the premises are safe for any purpose; (2) confer upon the person who enters or uses the land for recreational purposes the legal status of an invitee or licensee to whom a duty of care is owed; or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of the owner. (c) Unless otherwise

Connecticut agreed with the Company.<sup>41</sup> The court found that Genco was not charged a fee for entering the lake and the lake was generally available to the public, even if portions of the lake were restricted in access.<sup>42</sup> Missouri courts have relied on this case in their decisions regarding Missouri's RUA.

Missouri's first opportunity to review the RUA came in *Wilson v. United States*.<sup>43</sup> In *Wilson*, a member of the Boy Scouts of America, went on a trip to Fort Leonard Wood with his troop.<sup>44</sup> During the trip, some of the boys, including Wilson, discovered irrigation piping stacked next to the cabin where the troop was sleeping.<sup>45</sup> The boys carried the pipe away from the cabin, where they raised the pipe so it stood almost straight up in the air and came in contact with electrical lines.<sup>46</sup> All of the boys were shocked, but Wilson was the only boy to die from his injuries.<sup>47</sup> Wilson's parents brought a wrongful death suit against the United States ("Fort").<sup>48</sup>

The Fort argued it was not liable for Wilson's death because it had immunity from damages because of the RUA.<sup>49</sup> The parents argued the Fort was not shielded from immunity for three reasons.<sup>50</sup> First, the boys were charged two dollars to stay in the cabins, which equated to a fee under the RUA exceptions.<sup>51</sup> Second, the Fort received an economic gain from allowing the Scouts to stay overnight.<sup>52</sup> Third, Wilson died on "non-covered land."<sup>53</sup> The Eighth Circuit rejected the parents' arguments and found that the

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agreed in writing, the provisions of subsections (a) and (b) of this section shall be deemed applicable to the duties and liability of an owner of land leased to the state or any subdivision thereof for recreational purposes." Con. Gen. Stat. § 52.

<sup>41</sup> *Genco*, 7 Conn. App. at 168.

<sup>42</sup> *Id.* at 169-72.

<sup>43</sup> *Wilson v. U.S.*, 989 F.2d 953 (8th Cir. 1993).

<sup>44</sup> *Id.* at 955.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 956.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* Parents also argued, "the Boy Scouts were not members of the 'general public,' and thus were not covered by the Act"... and "the United States negligently failed to protect against an ultra hazardous condition." *Id.*

Fort was immune from liability because it was shielded by the RUA.<sup>54</sup> Specifically, the court held that the two dollar fee was not an entrance fee, but rather for staying overnight in the cabin.<sup>55</sup> Therefore, the fee did not constitute a charge under the RUA.<sup>56</sup> Additionally, the court held that the fee covered the cost of “maintaining and equipping the facility” and so the Fort did not receive an economic gain.<sup>57</sup> Therefore, the Fort’s cabin does not constitute “non-covered land.”<sup>58</sup> Following *Wilson*, Missouri courts were silent on further explanation of the RUA for 14 years.

The Missouri Supreme Court once again had to address the definition of “charge” in *Foster v. St. Louis County*.<sup>59</sup> In that case, Foster was injured while playing football in a local park.<sup>60</sup> The park is open to the public and fees are only charged for tours and use of picnic tables.<sup>61</sup> However, Foster did not participate in either of these activities.<sup>62</sup> Foster sued the city, who owned and operated the park, for damages resulting from his injuries.<sup>63</sup> Foster argued the park was considered “non-covered land” because it was used for commercial use as evidenced by the fees required for the tours and picnic areas; therefore the park should not be shielded from liability under the RUA.<sup>64</sup> The Missouri Supreme Court rejected Foster’s argument and held that the park did not qualify as “non-covered land” because the park had few activities that required paying a fee.<sup>65</sup> Specifically, the Court found that the park did not charge a fee for access to the area where Foster was playing football and therefore could not be used “primarily for commercial purposes.”<sup>66</sup>

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<sup>54</sup> *Id.* at 958.

<sup>55</sup> *Id.* at 956.

<sup>56</sup> *Id.* at 957.

<sup>57</sup> *Id.* at 956, 958.

<sup>58</sup> *Id.* at 958.

<sup>59</sup> *Foster v. St. Louis County*, 239 S.W.3d 599 (Mo. 2007).

<sup>60</sup> *Id.* at 600.

<sup>61</sup> *Id.* at 600-01.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 601.

<sup>64</sup> *Id.* at 601-02.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

*B. Different State's Interpretations of Recreational Use Statutes*

The Ninth Circuit addressed Nevada's Recreational Use Statute<sup>67</sup> in *Ducey v. US*.<sup>68</sup> In *Ducey*, three people enjoyed a day at the Lake Mead National Recreational Area ("LMNRA").<sup>69</sup> Lake Mead is maintained by the National Park Service ("NPS") but allows the Eldorado Canyon Resorts, Inc. ("Resorts")<sup>70</sup> to operate a store, refueling stations, trailer rentals, and boat docks.<sup>71</sup> Neither NPS nor Resorts require an entrance fee to use the LMNRA.<sup>72</sup> In September 1974, a flash flood swept through the Lake Mead area killing three people inside the recreational area.<sup>73</sup> The families of the

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<sup>67</sup> NEV. REV. STAT. ANN. § 41.510(1) (West 2015) provides that:

"Except as otherwise provided in subsection 3, an owner of any estate or interest in any premises, or a lessee or an occupant of any premises, owes no duty to keep the premises safe for entry or use by others for participating in any recreational activity, or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes.... (a) Limit the liability which would otherwise exist for:

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

(2) Injury suffered in any case where permission to participate in recreational activities was granted for a consideration other than the consideration, if any, paid to the landowner by the State or any subdivision thereof. For the purposes of this subparagraph, the price paid for a game tag sold pursuant to NRS 502.145 by an owner, lessee or manager of the premises shall not be deemed consideration given for permission to hunt on the premises.

(3) Injury caused by acts of persons to whom permission to participate in recreational activities was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger."

<sup>68</sup> *Ducey v. U.S.*, 713 F.2d 504 (9th Cir. 1983).

<sup>69</sup> *Id.* at 507.

<sup>70</sup> While Resort is required to pay the NPS a percentage of the sales made off of retail spaces, including the boat dock and trailer rental area, the year of the accident Resort did not make any payments to the NPS. It is unclear in the Anderson case if the retail spaces located around the Lake pay a fee to Ameren or if they are allowed to operate on the Lake free of charge. In either case, the payment from the retail space to the governmental or state owner of the recreational area is not dispositive.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

deceased filed a lawsuit against the NPS and Resorts for failing to warn against the pending flood.<sup>74</sup>

The NPS argued they were immune from liability under Nevada's recreational use statute because there was no consideration for entering the LMNRA, or alternatively, if there was consideration, it was not paid to the NPS but to Resorts.<sup>75</sup> The Ninth Circuit rejected this argument, holding that the government's interpretation of consideration was too constrictive.<sup>76</sup> First, the court contrasted the definition of consideration with the more narrow terms "fee or charge" and relied on the inherently broad nature of the term consideration.<sup>77</sup> Second, the court concluded that it did not matter to whom the consideration was paid to as long as that entity had the "power to grant or deny permission to participate in recreational activities."<sup>78</sup> Lastly, the court relied heavily on the policy rationale that when "a landowner derives an economic benefit from allowing others to use his land for recreational purposes, the landowner is in a position to post warning, supervise activities, and otherwise seek to prevent injuries."<sup>79</sup> As such, the NPS could not avoid liability under the Nevada's recreational use statute.<sup>80</sup>

In *Plano v. City of Renton*, the petitioner used the city's lake and mooring area.<sup>81</sup> The city charges either a fee for every night a boat is moored overnight, or allows an individual to pay an annual fee for the ability to use the boat launch.<sup>82</sup> The petitioner moored her boat for free one night and then paid for her boat to be moored a second night.<sup>83</sup> On her way to her boat, she

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<sup>74</sup> *Id.* at 508.

<sup>75</sup> *Id.* at 509-10.

<sup>76</sup> *Id.* at 510.

<sup>77</sup> *Id.* The Ninth Circuit looked to Black's Law Dictionary for the definition of Consideration: "a term of art, a word with a well-understood meaning in the law, embracing any right, interest, profit or benefit." *Id.*

<sup>78</sup> *Id.* at 513.

<sup>79</sup> *Id.* at 511.

<sup>80</sup> *Id.* at 514-15. The 9th Circuit also noted that "if the United States itself had operated [the same type of property the Resort operated] the purchases by the [deceased individuals] would constitute 'consideration' in return for permission to recreate in [the LMNRA] within the meaning of consideration exception to the Nevada statute." *Id.* at 512.

<sup>81</sup> *Plano v. City of Renton*, 103 Wash.App. 910 (WA App. 2000).

<sup>82</sup> *Id.* at 912.

<sup>83</sup> *Id.* at 913.

slipped and fell on the metal ramp connecting the moor to the shore.<sup>84</sup> The petitioner sued the city, which argued that it had immunity because of a recreational use statute.<sup>85</sup> Washington’s recreational use statute protects landowners from liability unless a fee is charged.<sup>86</sup> The city claimed the moor was generally available to the public, and the ramp where the petitioner was injured did not require an access fee.<sup>87</sup> The court concluded that because the petitioner paid to access the location where her injury occurred, the city could not avoid liability.<sup>88</sup> Further, the court agreed with the trial court’s conclusion that while the petitioner did not pay for the use of the ramp itself, the ramp where the injury occurred was a “necessary and integral part” of the dock where petitioner paid to moor her boat.<sup>89</sup>

#### IV. INSTANT DECISION

In the instant case, the Missouri Supreme Court found the Western District Court of Appeals erred in finding UE was not liable under the

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<sup>84</sup> *Id.* at 911.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*; see also WASH. REV. CODE ANN. § 4.24.210(1) (West 2016) (“Except as otherwise provided in subsection (3) of this section, 1 any public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other non-motorized wheel-based activities, hang gliding, paragliding, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users).

<sup>87</sup> *Plano*, 102 Wash. App. at 913-14.

<sup>88</sup> *Id.* at 915.

<sup>89</sup> *Id.* The court also noted that “[t]he reason why the two ramps and the connecting gangways exist is to provide access to the floating dock, a fee-generating portion of the park. An overnight moorage patron cannot even pay the required moorage fee without walking up one of the ramps, including the one on which Plano fell. These facts establish that the ramp where the injury occurred is in the recreational area for use of which Renton charges a fee.” *Id.*

RUA.<sup>90</sup> On appeal, the Andersons raised two issues, both of which the Missouri Supreme Court rejected.<sup>91</sup>

First, the Andersons did not dispute that this case fell under the RUA.<sup>92</sup> Instead, the Andersons contended that in this case, UE is not protected against liability because the Andersons paid a “use fee” to UE for the dock permit and the right to access the lake, which they argue is a “charge” under the RUA.<sup>93</sup> The court disagreed; finding that the fee the Andersons paid UE for the dock permit did not constitute a “charge” under the RUA.<sup>94</sup> The court relied on three cases,<sup>95</sup> all of which ruled that the landowners were not liable for injuries occurring on the land when the fee was incidental to being on the land.<sup>96</sup>

The court ruled that the dock permit fee did not constitute an admission fee, and therefore was not a “charge” under the RUA.<sup>97</sup> In fact, the Andersons admitted that their children were allowed to enter the Lake at any time and were not required to pay a fee to UE each time they entered the Lake.<sup>98</sup> The ruling turned on the conclusion that “[w]hat matters is not where or how the children entered the Lake, but whether UE imposed a charge for that entry.”<sup>99</sup> The court concluded that the dock permit fee pertained only to the Andersons’ ability to build a dock and did not have any bearing on the Andersons’ ability to enter the Lake.<sup>100</sup> Therefore, the permit fee was not an

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<sup>90</sup> *Anderson II*, 463 S.W.3d at 790. The case is reviewed de novo and “when a landowner is entitled to immunity under the RUA, the trial court has no discretion and must dismiss the petition under Rule 55.27(a)(6).” *Id.* at 786.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 787.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 788; *see also* Mo. Rev. Stat. § 537.345 (emphasis added) (“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.”).

<sup>95</sup> *Anderson II*, 463 S.W.3d at 787-89; *Wilson v. United States*, 989 F.2d 953 (8th Cir. 1993); *Genco v. Connecticut Light and Power Co.*, 1 Conn.App. 164 (1986); and *Foster v. St. Louis County*, 239 S.W.3d 599 (Mo. 2007).

<sup>96</sup> *Anderson II*, 463 S.W.3d at 787.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 787-88.

admission fee.<sup>101</sup> As such, the Court held that the Court of Appeals erred because the RUA gives immunity to the UE. The Andersons' claim was dismissed.<sup>102</sup>

The Andersons also argued that UE is not entitled to liability protection under the RUA because the dock is “uncovered land,” which is an exception under the statute.<sup>103</sup> The court also rejected this argument.<sup>104</sup> The Andersons argued that they are entitled to the exception because UE primarily uses the banks of the Lake for business and docks; therefore those profits transform it into commercial purpose.<sup>105</sup> However, the Court pointed out that the Eighth Circuit in *Wilson* specifically rejected this argument.<sup>106</sup> Additionally, the UE cannot make a profit from the permit fees.<sup>107</sup> The UE's operation license explicitly states that the UE can charge for dock permits “if the use is ‘consistent with the purpose of protecting and enhancing the scenic, recreational, and other environmental values.’”<sup>108</sup> Based on this license, the court concluded UE had the permit fees, not for commercial reasons, but “to recover the cost of its permit program.”<sup>109</sup> Therefore, the “non-covered land” exception for liability under the RUA did not apply to the Andersons' case.<sup>110</sup>

The dissent determined that the permit fee was a charge under the RUA.<sup>111</sup> Unlike the majority opinion, the dissent argued that the statute should be strictly construed.<sup>112</sup> Additionally, the dissent distinguished the cases brought up by the majority because they dealt with temporary uses of

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<sup>101</sup> *Id.* at 788.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 789 (holding “that a landowner does not necessarily use the property primarily for commercial purpose under ... merely because the owner charges fees for things other than admission”).

<sup>107</sup> *Id.* at 790.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (quoting MO. REV. STAT. § 537.348(3)(d) (2016)).

<sup>111</sup> *Id.* at 791 (Teitelman, J. dissenting).

<sup>112</sup> *Id.* at 790-91 (Teitelman, J. dissenting).

property, unlike the Andersons's case, where the permit fee "grants private access to the land owner and his or her guests."<sup>113</sup>

V. COMMENT

The Missouri Supreme Court was partially correct in determining that that Andersons's dock did not constitute non-covered land. However, the court was incorrect in ruling that the dock permit fee did not constitute a "charge" under the RUA. Since the court has interpreted "charge" very narrowly, the onus is on the Missouri legislature to change the RUA's definition of "charge" to ensure property owners are incentivized to protect the public.

The statutory definition of non-covered land is explicit. The statute states that recreational areas are not considered "non-covered land," and recreational land by definition cannot be commercial.<sup>114</sup> As the court points out, this directly contradicts the Andersons's argument.<sup>115</sup> Furthermore, if the Lake was used primarily as commercial land, then UE would be in direct violation of its permit to operate the Lake.<sup>116</sup> On this point at least, the court was correct to reject the Andersons's argument.<sup>117</sup>

However, the Court was incorrect in determining that the Andersons did not pay a "fee." Instead, the Appellate Court and the dissent were correct when they held UE liable under the RUA. The statute makes a landowner liable if they charge an admission price or if they charge a fee. In this case,

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<sup>113</sup> *Id.* at 791 (Teitelman, J. dissenting).

<sup>114</sup> MO. REV. STAT. § 537.345 (2016). "Noncovered land as used herein, means any portion of any land, [that is used] *primarily* for agricultural, grazing, forestry, conservation, natural area, owner's recreation or similar or related uses or purposes shall not under any circumstances be deemed to be use of such portion for commercial, industrial, mining or manufacturing purposes. *Id.* (emphasis added).

<sup>115</sup> *Anderson II*, 463 S.W.3d at 789.

<sup>116</sup> The FERC license specifically provides that UE can collect fees to cover the operating costs but that UE's primary purpose is to protect the land encompassing the Lake and its shoreline. *Id.* (quoting *Coalition for Fair & Equitable Regulation of Docks on Lake of the Ozarks v. F.E.R.C.*, 297 F.3d 771, 775 (8th Cir. 2002)).

<sup>117</sup> Additionally, other Missouri cases have held that the Lake and the Dam are separate. *See Lonergan v. May*, 53 S.W.3d 122 (Mo. App. 2001) (holding that under the RUA, land can be divided into different parts with different primary purposes, and therefore, the Dam can be primarily commercial without transforming the surface and surrounding land of the Lake into primarily commercial property). *Id.* at 129-33.

the Andersons were not charged an admission price but they were charged a fee — a dock permit fee. According to Black’s Law Dictionary, a fee is “a charge or payment for labor or services.”<sup>118</sup> Based upon the definition of fee, the Andersons did make a payment to UE in return for the approval of their dock permit. Therefore, based upon the definition of “fee,” the Missouri Supreme Court should have reversed the lower court’s decision to grant UE summary judgment and remanded the case back to the lower court.

The Andersons’s case is also distinguishable from both *Genco v. Connecticut Light and Power Company*<sup>119</sup> and *Foster v. City of St. Louis*.<sup>120</sup> In *Genco*, the injured individual did not pay any type of fee for using the premises.<sup>121</sup> Further, the *Genco* landowners did not charge anything on the premises.<sup>122</sup> This is an entirely different situation than the instant case because the Andersons did pay a fee and individuals paid for other items around the Lake, such as boat rentals.

Additionally, *Foster* can be distinguished from the case at hand because the injured individual did not pay a fee to be on the premises, even though the park did charge fees for the use of other areas in the park.<sup>123</sup> *Foster* was not using the areas in the park that required a use fee.<sup>124</sup> In contrast, the Andersons were using their dock, which required a dock permit fee. The Anderson children would not have been injured if the dock was not on the premises because there would not have been a stray electrical current.

The instant case is further distinguishable from *Genco* and *Foster* because in neither case did the landowners regulate the use of a manmade addition to the property as UE regulates the docks on the Lake. The Company in *Genco* allegedly violated the RUA because it failed to adequately warn the public of a danger, and in *Foster* the allegation was a failure to ensure the

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<sup>118</sup> *Fee*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>119</sup> *Genco v. Conn. Light & Power Co.*, 7 Conn. App. 164, 165 (Conn. App. 1986).

<sup>120</sup> *Foster v. St. Louis County*, 239 S.W.3d 599 (Mo. 2007).

<sup>121</sup> *Genco*, 7 Conn. App. at 170.

<sup>122</sup> *Anderson II*, 463 S.W.3d at 786; *Anderson I*, No. WD76927, 2014 Mo. App. WL 2574628, at \*1.

<sup>123</sup> *Foster*, 239 S.W.3d at 602.

<sup>124</sup> *Id.*

## THE COST OF ALLOWING THE PUBLIC TO ENJOY THE OZARKS

park was without holes.<sup>125</sup> These allegations are different than the claims in the present case. UE was already aware that the Andersons's dock existed. In fact, it both reviewed and approved the dock. It failed to ensure that the dock was safe for the dock owners and the public at large. With their approval authority, UE took upon itself the responsibility to ensure swimmers safety in regards to dangers posed by docks.

*Wilson* also can be distinguished from the Andersons' case. First, in *Wilson*, the building the Boy Scouts were staying in, and had paid to use, did not injure the Scouts.<sup>126</sup> Instead, the Scouts moved items from one location on the property closer to electrical lines and then raised a very large pipe, which eventually came into contact with the line.<sup>127</sup> In contrast, the Anderson children did not take any affirmative steps to cause their deaths; the injury came from the manmade structure the Andersons had paid for and had UE's permission to build.

In addition, the cases are different because of the amount of money exchanged in return for using the land. In *Wilson*, the two-dollar fee was considered incidental, used for "maintaining and equipping the facility," and only entitled the payor to use the cabin.<sup>128</sup> This fee did not allow visitors to touch or use the pipes. However, when the Andersons paid money to UE, they were paying specifically to build and use the dock, which included entering the Lake through the dock, which caused the injury. This is the most distinguishing factor, and should entitle the Andersons to a different outcome under *Wilson*.

Alternatively, the Missouri Supreme Court could change its interpretation of "fees." For example, the court could have taken its approach from *Plano*. The *Plano* court found there was an implied charge to use the boat ramp to access the moor, which the plaintiffs paid to use.<sup>129</sup> The court reasoned that "the metal ramp where Plano fell is a necessary and integral part of the moorage."<sup>130</sup> Like *Plano*, the Andersons paid for permission to build a dock, thereby giving the Anderson children an access point to the

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<sup>125</sup> See *Genco*, 7 Conn. App. at 508; *Foster*, 239 S.W.3d at 600.

<sup>126</sup> *Wilson v. U.S.*, 989 F.2d 953, 955 (8th Cir 1993).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 956.

<sup>129</sup> *Plano v. City of Renton*, 102 Wash.App. 910, 911 (WA App. 2000).

<sup>130</sup> *Id.*

Lake. The Missouri Supreme Court could have found, like in *Plano*, that the dock was an integral part of the Andersons's property and the best way for them to enter the Lake.

Some may argue that the children could have entered the Lake without using the dock, just like other Lake property owners who do not have a dock. While this is true, the fact that but for the dock, the injury would not have occurred removes this argument. The dock does not have to be the only way to access the Lake. In *Plano*, theoretically, there were many ways to access the boats, but the plaintiff accessed the boat by way of a ramp, which then caused the injury.<sup>131</sup> In the instant case, the Anderson children died because the way they accessed the Lake was not properly regulated by UE and therefore caused a dangerous situation, which ultimately killed both children. Had the UE required an in-person inspection, included a clause detailing the requirements for properly grounding wires for docks, or required additional permits from another entity that would inspect the electrical grounding, the Anderson children probably would not have died. Therefore, when the Andersons paid for the ability to build a boat dock, they paid a fee to enter the Lake, making UE liable for injuries resulting from the dock.

The best solution to the problem that arose in the Andersons's case would be for the Missouri legislature to amend this statute to better protect the public. Specifically, the legislature should adopt a standard similar to Nevada's recreational use statute as illustrated in *Ducey*.<sup>132</sup> The standard in *Ducey* was "consideration," which is broader than Missouri's current standard.<sup>133</sup> If the Missouri Supreme Court had applied this standard, UE would have been liable for the Anderson children's deaths. Following the *Ducey* court's reasoning, UE is in the best position to ensure that the docks are electrically grounded and are safe for swimmers, and thus should be responsible for any damages arising out a dock's malfunction.

Some may argue that the holding in *Deucy* cannot be adopted because the company in *Deucy* makes a profit from the land, which is why the court

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<sup>131</sup> *Id.*

<sup>132</sup> *Ducey v. U.S.*, 713 F.2d 504 (9th Cir. 1983).

<sup>133</sup> *Id.*

decided it was in the best position to regulate safety. While UE does not make a profit from fees generated by approving dock permits, the fact that it charges a fee still places it in the best position to regulate safety. UE already requires homeowners to get approval for docks on the Lake and charges a fee for the administrative costs of approving dock construction plans. Therefore, it logically follows that UE could pass on, to the dock owners, the administrative costs of ensuring a dock's electricity is grounded. Additionally, because UE has to approve the docks before they are built, it is in the best position to ensure the docks are safe for dock users and the people swimming nearby.

Others may, nonetheless, argue that the additional requirements would place too much of a burden on UE. This argument is unpersuasive because UE now, after the Anderson childrens' death, requires an additional permit, inspections, and fee for the ability to run electricity to an individual's dock.<sup>134</sup> UE now specifically requires adherence to specific instructions for grounding wires, which probably would have saved the Anderson children.<sup>135</sup> Clearly, the UE had the ability to require proper grounding before the Anderson children died, without any additional costs. This shows that requiring private companies, like UE, to ensure safety is not unreasonable.

Landowners who open up their property for public use should be incentivized to ensure safety. Yes, they cannot be required to know about everything. There is no suggestion that UE "close the lake for maintenance or police the area for hazards, such as floating objects and submerged tree trunks, and the owner cannot possibly protect people from the risks inherent in water sports."<sup>136</sup> It would be unreasonable to hold the park liable for not knowing about the hole the defendant injured himself on in *Foster*. Nor is it suggested that companies be liable for the actions of rambunctious boys who engineer a way to hurt themselves as in *Wilson*. Additionally, while the death of the Andersons' children is tragic, if this were a one-time occurrence it would be reasonable to equate this to an act of God, which UE could not have foreseen. Unfortunately, this is not the only time this type of death has occurred. In fact, this is one of many occurrences where stray electrical

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<sup>134</sup> Ameren, *Dock Electrical Installations*, <https://www.UE.com/missouri/lake-of-the-ozarks/dock-electrical-installations>.

<sup>135</sup> *Id.*

<sup>136</sup> Lonergan v. May, 53 S.W.3d 122, 132 (Mo. App. 2001).

currents from non-grounded outlets on docks have injured or killed swimmers at the Lake.<sup>137</sup> The Lake is the only party that can put a stop to these types of injuries.

Therefore, this note suggests that an organization, with complete control over who can build docks and the sole power to regulate what can or cannot be on a dock, has an inherent duty to keep people safe when it can. The Lake has been charged with keeping the environment safe while allowing the public to enjoy nature. However, the public cannot enjoy the beauty of the Lake if they are going to die from stray electrical currents because UE did not specifically require in the dock permits that dock owners should secure electricity running to the docks under UE's supervision.

## VI. CONCLUSION

*Anderson v. Union Electric Company* represents Missouri's continued support of landowners over the safety of individuals. In this case, the Missouri Supreme Court could have departed from precedent, distinguished past cases, expanded the definition of "charge," or changed Missouri's interpretation of the Recreational Use Act. Alternatively, the court should have found that past cases had not adequately defined what a "fee" was and remanded the case to the lower court for trial. However, the question is not whether the Missouri Supreme Court made the right decision in this case, but whether the law itself is correct. The Missouri legislature needs to decide if the desire to make recreational land more open for public enjoyment overrides the need to keep the public safe on the recreational land. The RUA should be amended to encourage people to enjoy the wonderful recreational offerings of Missouri, but it should also hold the UE responsible for obvious potential injuries to visitors, because the company is in the best position to address these safety issues.

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<sup>137</sup> Quick & Geisler, *One Killed, One Injured Following Electric Shock at the Lake of the Ozarks*, ABC 17 NEWS (June 22, 2015), <http://www.abc17news.com/news/one-killed-one-injured-following-electric-shock-at-the-lake-of-the-ozarks/33713150>.