

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE  
TOWNSHIP OF ADDISON,

Plaintiff/Appellee,

v

JERRY CLINE BARNHART,

Defendant/Appellant.

Supreme Court  
Docket No. 145144

Court of Appeals  
Docket No. 301294

Oakland County Circuit Court  
Case No. 2009-DA8918-AV  
Hon. Leo Bowman

52-3 Judicial District Court  
Case No. 05-010900-OM  
Hon. Julie A. Nicholson

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Docket No. 272942

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Case No. 06-DA8457-AV  
Hon. Steven N. Andrews

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Hon. Julie A. Nicholson

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SUPPLEMENTAL BRIEF OF JERRY CLINE  
BARNHART IN SUPPORT OF APPLICATION  
FOR LEAVE TO APPEAL

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## I. STATEMENT OF FACTS

### A. Introduction

This Supplemental Brief incorporates by reference the Statement of Facts that are more fully set out in Defendant-Appellant Jerry Cline Barnhart's ("Barnhart") Application for Leave to Appeal filed May 22, 2012 ("Application"), and his Reply Brief in Support of Application for Leave to Appeal filed July 2, 2012 ("Reply Brief"). Per the Court's September 26, 2012 Order ("9/26/12 Order"), this Supplemental Brief addresses "whether the Court of Appeals erred in *Addison Twp v Barnhart*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 272942) (*Barnhart I*), when it held that, 'to the extent that there was testimony to suggest that defendant's operation of a shooting range was for business or commercial purposes, MCL 691.1542a(2)(c) does not provide freedom from compliance with local zoning controls.'" *Barnhart I's* erroneous holding means that the Sport Shooting Ranges Act ("SSRA"), MCL 691.1541 *et seq* and the protections it was intended to provide are inapplicable to virtually all of Michigan's approximately 400 shooting ranges, because virtually all shooting ranges are run in a way that might "suggest" they are operated for "business or commercial purposes."

### B. Relevant Facts

A summary of the facts that are relevant to disposing the above issue are:

1. Barnhart's range was in existence before July 5, 1994.
2. The only "business purpose" that Barnhart's range engaged in as of July 5, 1994 was that he gave a one-day lesson in recreational shooting to one individual for pay.<sup>1</sup>

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<sup>1</sup> Tellingly, Amicus Michigan Townships Association and the Michigan Municipal League ("the Township Amici") part company with the Township and *Barnhart I*, saying it is their

3. The district court found as a matter of fact that Barnhart's range complies with generally accepted operation practices, and the Township never cross-appealed that finding.
4. Providing firearms training and education, including firearms training to law enforcement officials, are authorized by generally accepted operation practices.
5. There was absolutely no evidence that Barnhart used his range to "test firearms for manufacturers," or that he conducted "combat" or "tactical military training" on the range.<sup>2</sup>

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"position that to the extent the [admitted] 'business purposes' solely relates to the charging of a fee for the use of the shooting range or for shooting lessons," that admission would not "necessarily remove the range from the category of a 'sport shooting range'." (Township Amici Brief at 2). It was undisputed that the only use of Barnhart's range between 1993 and July, 1994 was for "competition recreational shooting" by Barnhart, his friends and guests, and the *only* "business purpose" to which he stipulated was that "an individual . . . paid [him] for a one-day class" in recreational shooting (11/21/08 Evidentiary Hrg. Tr at 24) (Appellant's Exhibit 5). According to the Township Amici position, teaching a lesson for hire did not remove Barnhart's range from the category of "sport shooting range," yet that is the only "business" purpose that existed as of July, 1994. Contrary to the Township and *Barnhart I*, the Township Amici agree that operating a shooting range for a business or commercial purpose does not deprive it of "sport shooting range" status. Barnhart's range was undeniably a sport shooting range as of July, 1994. Barnhart was therefore allowed by MCL 691.1542c(2)(1) to expand use of the range free from local ordinances, provided only that expansions were for uses authorized by generally accepted operation practices.

<sup>2</sup> Neither the Township nor the Township Amici give any record citation for the groundless assertion that Barnhart provided "combat" or "tactical military training" on the range, or that he tested "firearms for manufacturers" on the range, for the simple reason that no such record evidence exists. The website attached to the Township's Supplemental Brief not only fails to establish that any such activities occurred on the range, but to the contrary says that Barnhart "can travel to your range," that he "has permission to utilize ranges in Florida and Colorado," that any class of over 4 students is conducted "at *your* facility," and are offered to any "[g]roup that has facilities" for running the classes. (Township's Supplemental Brief, Exhibit 8). Moreover, the March 24, 2008 letter regarding Barnhart's military personnel training schedule says *nothing* about such activities on his range.

There is not a shred of evidence to support the Township's baseless assertion that Barnhart's range "vastly expanded to combat arms instruction [and] weapons testing" (Township Supplemental Brief at 1; *see also id* at 11).

Barnhart's range was a "sport shooting range" as of July 5, 1994, and Barnhart was permitted under SSRA to expand and increase use of the range, free of local ordinances, for any purpose authorized by generally accepted operation practices. Such authorized activities include, among others, providing instruction and training in firearms use and allowing law enforcement personnel to train on the range.

## II. ARGUMENT

### A. The Sport Shooting Ranges Act

The relevant provisions of the Sport Shooting Ranges Act ("SSRA"), MCL 691.1541 *et seq* that are relevant to disposing the issue on appeal are as follows:

MCL 691.1543 sets out the SSRA's "[e]ffect on local unit[s] of government," and limits the reach of local zoning control:

*Except as otherwise provided in this act*, this act does not prohibit a local unit of government from regulating the location, use, operation, safety, and construction of a sport shooting range.

Thus, local units of government can regulate sport shooting ranges except as provided in the SSRA.

MCL 691.1542a(2)(c) provides an express exception for compliance with a local unit of government's ordinances for sport shooting ranges that were, like Barnhart's, built and operated before July 5, 1994:

A sport shooting range that is in existence as of the effective date of this section [i.e., July 5, 1994] and operates in compliance with generally accepted operation practices, *even if not in compliance with an ordinance of a local unit of government*, shall be permitted to do all of the following within its existing geographic boundaries if in compliance with generally accepted operation practices:

- (c) *Do anything authorized under generally accepted operation practices*, including, but not limited to:
  - (i) Expand or increase its membership or opportunities for public participation.

(ii) Expand or increase events or activities.<sup>3</sup>

If a range (1) is a “sport shooting range” within the definition of the SSRA, (2) existed as of July 5, 1994, and (3) operates in compliance with “generally accepted operation practices,” then MCL 691.1542a(2)(c) provides freedom from compliance with local zoning ordinances, and such a range can do anything that is authorized by generally accepted operation practices.

The SSRA sets out various express statutory definitions, MCL 691.1541, as follows:

As used in this act:

(a) “Generally accepted operation practices” means those practices adopted by the commission of natural resources that are established by a nationally recognized nonprofit membership organization that provides voluntary firearm safety programs that include training individuals in the safe handling and use of firearms, which practices are developed with consideration of all information reasonably available regarding the operation of shooting ranges . . .

\* \* \*

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<sup>3</sup> Evidencing a fundamental misunderstanding of the SSRA, the Township Amici erroneously assert that “[t]o receive the protection of the Sport Shooting Range Act, [Barnhart’s range] would have to be legally in existence on July 5, 1994, as a ‘sport shooting range’ . . . *and be in compliance with existing zoning regulations*, as well as with ‘generally accepted operation practices’.” (Brief of Township Amici at 7) (emphasis added). MCL 691.1542a(2) says precisely the contrary - - the SSRA’s protections apply to any sport shooting range in existence as of July 5, 1994 “*even if not in compliance with an ordinance of a local unit of government.*”

Their confusion is further evidenced by their reference to MCL 691.1542a(1) in asserting that “secur[ing] profit would . . . [violate] the SSRA, since the operation would be contrary to the township’s agricultural zoning ordinance, illegal at the time of its shooting range initiation and prohibited under Section 2a(1) of the SSRA.” (*id* at 2). MCL 691.1542a(1) has nothing to do with this matter. MCL 691.1542(a)(1) simply says that regardless of when a range is built, if it complies with local ordinances when it began operating, it can continue to operate even if a new ordinance is enacted, or an old ordinance is amended, to which the range does not conform. This case deals specifically with whether “MCL 691.1542a(2)(c) . . . provide[s] freedom from compliance with local zoning controls.” (9/26/12 Order). MCL 691.1542a(2) deals only with ranges like Barnhart’s that existed as of July 5, 1994, even if they do not comply with local ordinances, and says they can operate, expand, increase membership and activities and do anything authorized by generally accepted operation practices. To be covered by MCL 691.1542a(2)(1), the range does not have to have been in compliance with local ordinances when it began operating; it need only have existed as of July 5, 1994 and comply with generally accepted operation practices.

(c) "Person" means an individual, *proprietorship*, *partnership*, *corporation*, club, governmental authority, or other legal entity.

(d) "Sport shooting range" or "range" means an area designed and operated for the use of archery, rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar sport shooting.

**B. Barnhart's Range Satisfied All of The SSRA's Requirements to Be Exempt from Addison Township's Local Zoning Controls**

**1. Barnhart's range existed as of July 5, 1994.**

There is no dispute that Barnhart's range existed as of July 5, 1994. The range was built on Barnhart's 80-acre agricultural property in 1993 and began operating in October, 1993. It was undisputed that Barnhart built the range for his and his family's use, and use by friends, and "persons other than [Barnhart's] immediate family, did, in fact, use the range subsequent to November 1993" (3/31/06 District Court Opinion, Tr at 5) (Application Exhibit 4). Between 1993 and July 1994 the "character of the type of shooting . . . on the range" was "competitive recreational shooting" involving Barnhart, friends, family and invited guests, and "one individual that . . . paid [Barnhart] for a one-day class in recreational shooting (11/21/08 Evidentiary Hrg Tr at 24) (Application Exhibit 5). That one-day lesson in recreational shooting was the sole basis of Barnhart's stipulation in the district court that the range "was used for recreational and business shooting range purposes" before July 5, 1994 (Application Exhibit 8 and 11/21/08 Evidentiary Hrg Tr at 24).<sup>4</sup>

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<sup>4</sup> The Township repeatedly, and falsely, asserts that Barnhart used the range to test firearms for gun manufacturers. *See* Township's Supplemental Brief at 1, 11 and 13. The Township fails to provide any record cite for that false assertion because there is none. The Township merely refers to a Township meeting in 1993 in which it was suggested that Barnhart said before the range was built that he "intended" to test various firearms; there was no evidence that he ever did so, and the Township's repetition of that unfounded assertion does not make it true.

**2. Barnhart's range complied with generally accepted operation practices.**

After a full evidentiary hearing, the district court expressly found as a matter of fact that Barnhart's range complied with generally accepted operation practices. The district court found:

Given [the documentary evidence and] Defendant's testimony at the Evidentiary Hearing, this Court concludes that Defendant was operating the range in compliance with the generally accepted operation practices as set forth by the DNR and the NRA. Therefore, Defendant is entitled to the protection afforded by MCLA 691.1542(c).

(12/22/08 Opinion at 9) (Application Exhibit 9).

The Township failed to cross-appeal to the Court of Appeals the district court's factual determination that Barnhart's range complies with generally accepted operation practices, and its failure to cross-appeal precludes it from now challenging or disputing that fact. *See Canjar v Cole*, 283 Mich App 723, 734 n1; 770 NW2d 449, 456 n1 (2009) (because appellees "did not cross-appeal the trial court's . . . factual findings . . . we do not address the validity of those findings on appeal"); *Loranger v Citizens Mut Ins. Co*, 100 Mich App 681, 683-84; 300 NW2d 369, 370 (1980) (court on appeal is "precluded from reviewing [an] issue because the trial court ruled in [appellant's] favors on th[e] issue, and [appellee] failed to file a cross-appeal on th[e] issue"); *Shipman v Fontaine Truck & Equip Co*, 184 Mich App 706, 714; 459 NW2d 30 (1990) (where "issues were separately raised, addressed and rejected at the trial court level" and "have not been cross-appealed, . . . they are not properly before this Court and will not be addressed"). *See also Pocius v Smykowski*, 332 Mich 578, 582; 52 NW2d 224, 226 (1952) ("Plaintiff, not having filed a cross appeal, the issue [she seeks to raise] is not before us"); *McMoran Milling Co v Pare Marquette Railway Co*, 210 Mich 381, 392; 178 NW 274, 278 (1920) ("[a]s no cross appeal was filed by the [appellee], the propriety of the findings of fact . . . made by the trial court . . . need not be considered").

Independently, even if the Court were to consider the Township's unpreserved argument, there was abundant evidence to support the district court's fact determination that Barnhart's range complied with generally accepted operation practices, and its finding was not clearly erroneous. *Beason v Beason*, 435 Mich 791; 460 NW2d 207 (1990) (standard of review of bench findings is "clearly erroneous," and reviewing court cannot "substitute its judgment for that of the trial court;" "if the trial courts' view of the evidence is plausible, the reviewing court may not reverse").

**3. Barnhart's range was a "sport shooting range" as defined by the SSRA. *Barnhart I* erred in holding that SSRA does not apply to any shooting range for which there is any evidence "to suggest that . . . operation of [the] range [is] for business or commercial purposes."**

Barnhart incorporates by reference the arguments fully set out in his May 22, 2012 Application for Leave to Appeal and his July 2, 2012 Reply in Support of Application for Leave to Appeal. For convenience, and to avoid "submit[ting] mere restatements of [Barnhart's] application papers" (9/26/12 Order), those arguments are summarized herein at Sections II(B)(3)(a)-(d), and additional supplemental argument is set out at Sections II(B)(3)(e)-(f).

*Barnhart I's* entire "analysis" of the issue on appeal is as follows:

. . . MCLA 691.1541(d) defines "Sport shooting range" as "an area designed and operated for the use of archery, rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar sport shooting." A definition of the term "sport" is not contained within the statute. However, the term "sport" has been defined as an "athletic activity" or a "diversion [or] recreation." Random House Webster's College Dictionary (1997). Thus, the statute appears to apply to a recreational shooting range, to the exclusion of all other types of shooting ranges. See *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712, 665 NW2d 193 (2003) ("the expression of one thing suggests the exclusion of all others"). Thus, to the extent that there was testimony to suggest that defendant's operation of a shooting range was for business or

commercial purposes, MCL 691.1542a(2)(c), does not provide freedom from compliance with local zoning controls.

The Court of Appeals thus held that “sport” shooting range means “recreational” shooting range based on a common dictionary definition of “sport” that it imported into the statutory definition and then posited - - with no analysis, explanation, or reason - - that a “recreational shooting range” cannot be one that is operated for any “business or commercial purpose.”

Even assuming that the Court of Appeals did not err in resorting to a dictionary definition of “sport” to modify the express statutory definition of “sport shooting range,” the obvious and fundamental flaw in its “reasoning” is its unsupported (and unsupportable) premise that an activity cannot be “recreational” if it is provided by a facility or entity that does so pursuant to a business or commercial purpose. Being a “recreational shooting range” is not, as *Barnhart I* erroneously assumes, mutually exclusive with being a range that operates pursuant to a business or commercial purpose.

A shooting range that operates with the business or commercial purpose of providing recreational (or “sport”) shooting does not render the shooting activity any less “recreational.” Recreational ski resorts operate as commercial, for-profit businesses, charge skiers for lift tickets, give lessons for hire, sell food, and do any number of things that would “suggest” that they operate “for commercial or business purposes.” It would be nonsense to say that they are not “recreational ski resorts,” or do not provide “recreational skiing,” simply because they operate for “business or commercial purposes.” *Barnhart I*. Such a commercial business would properly be deemed a “recreational skiing resort,” and the activity would be “recreational skiing,” regardless of how much money it brought it.

Similarly, a business that owns and operates an ice rink for profit may sell ice time to a hockey league comprised of amateur hockey players who play for recreation. It would be

nonsense to say that such a rink does not provide “recreational hockey” simply because there is evidence to “support that [the] operation of [such an ice rink] [is] for commercial or business purposes.” *Barnhart I*. Such a commercial business clearly would provide “recreational” hockey, and the business would properly be deemed a “recreational hockey rink” regardless of the amount of money it makes.

In short, a facility (whether shooting range, ski resort or ice rink) can obviously be a “recreational facility” that provides “recreational” activities and opportunities even when it does so for profit and for a business or commercial purpose. *Barnhart I*’s simplistic and uncritical assertion that the SSRA “appears to apply to a recreational shooting range, to the exclusion of all other types of shooting ranges” such as one that operates “for business or commercial purposes” simply makes no sense. Being a “recreational shooting range” is in no way inconsistent with, much less mutually exclusive of, operating a recreational shooting range as a business or with a commercial purpose.

In addition to the basic and inherent illogic of *Barnhart I*’s “reasoning,” its holding that the SSRA does not apply to any shooting range that operates for a business or commercial purpose is wrong for a variety of other reasons based upon fundamental principles of statutory interpretation.

- a) ***Barnhart I* ignored that the SSRA’s definition of “persons” protected by the Act includes range owners and operators that are “proprietorships,” “partnerships” and “corporations,” all of which are quintessential business and commercial entities.**

In holding that the SSRA does not apply to any range if there is any evidence “to suggest that [the] operation of [the] shooting range [is] for business or commercial purposes,” *Barnhart I* completely and utterly ignored that the definition of “persons” protected by the Act includes

“proprietorship[s], partnership[s], [and] corporation[s],” MCL 691.1541(c), which are all quintessential business and commercial entities that of course operate for business and commercial purposes. *See* Barnhart’s Application at 18-19. A statute must be interpreted to give effect to all of its terms, and construed as a harmonious whole. *Barnhart I*’s conclusion that the SSRA does not apply to shooting ranges that operate for any “business or commercial purpose” reads these terms and definitions out of the Act and is flatly inconsistent with them.

Based on the clear terms of the Act - - terms which *Barnhart I* simply ignored - - the SSRA applies to shooting ranges that are operated by business or commercial entities such as proprietorships, partnerships and corporations.

**b) *Barnhart I* failed to apply the statutory definition of “sport shooting range,” and erroneously resorted to a dictionary definition to limit the statute’s broad definition**

MCL 691.1541(d) statutorily, and broadly, defines “sport shooting range” as “an area designed and operated for the use of archery, rifles, shotguns, pistols, silhouettes, skeet, trap, black powder and any similar sport shooting.” It is undisputed that Barnhart’s range was “an area designed and operated for the use of . . . rifles, shotguns [and] pistols . . .” It was therefore a “sport shooting range” as defined in the Act.

*Barnhart I* erroneously departed from the SSRA’s broad, express statutory definition and radically changed it by construing it to mean only “recreational shooting range to the exclusion of all other types of shooting ranges.”

Courts must apply statutory definitions of terms, and statutory definitions “supersede[ ] . . . commonly accepted dictionary definition[s].” *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 462; 540 NW2d 693 (1995). *Barnhart I* erred by failing to abide the express statutory

definition of “sport shooting range” and modified it by improperly importing a much more limited dictionary definition into the Act. *See* Application at 19-20.

**c) *Barnhart I* adds terms to MCL 691.1541(d) that simply do not exist**

MCL 691.1541(d) is devoid of the term “recreation,” or any term that limits its application to “commercial” or “business” purposes. Yet *Barnhart I’s* holding is based on exactly those non-existent terms. *See* Application at 21.

**d) *Barnhart I* ignores that generally accepted operation practices, which the SSRA incorporates, recognize that ranges can be operated for business or commercial purposes.**

Generally accepted operation practices recognize that shooting ranges should have revenue and expense forecasts, set range fees, hold fund-raising events, and be involved in similar “business” activities. *See* Application at 22-23 (citing NRA Range Manual). The SSRA incorporates those practices, MCL 691.1541(a) and 691.1542a(2)(c), and in doing so recognizes that ranges covered by the SSRA will engage in activities that would “suggest that [a] range is operated for business and commercial purposes.” *Barnhart I*. *See* Application at 22-23.

**e) MCL 691.1544 demonstrates that the SSRA is intended to apply to sport shooting ranges that operate for “business or commercial purposes.”**

In addition to common principles of statutory construction discussed *supra* and in greater detail in *Barnhart’s* Application, other parts of the SSRA’s text point to the conclusion that the SSRA applies to shooting ranges that are owned or operated for business or commercial purposes. MCL 691.1544, entitled “Sport shooting participants; acceptance of obvious and inherent risks,” provides in relevant part:

Each person who participates in sport shooting at a sport shooting range that conforms to generally accepted operation practices accepts the risks associated with the sport to the extent the risks are obvious and inherent.

Under Michigan common-law, charging premises users with accepting the risks associated with obvious and inherent dangers is a concept uniquely tied to the common-law liability that a premises owner has to business *invitees* (as opposed to *trespassers* or *licensees*). In charging range users with accepting the “obvious and inherent risks” associated with using sport shooting ranges, the Legislature recognized that sport shooting range owners and operators could otherwise be subject to common-law premises liability claims by invitees injured from sport shooting activities. Because invitees are individuals who enter premises for business or commercial purposes, charging range users with accepting the risks associated with range use means the Legislature intended that sport shooting ranges protected by the SSRA would include ranges that operate for business or commercial purposes.

“Historically, Michigan has recognized three common-law categories for persons who enter upon the land or premises of another: (1) trespasser, (2) licensee, or (3) invitee.” *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000) (citing *Wymer v Holmes*, 429 Mich 66; 412 NW2d 213 (1987)). Michigan “has not abandoned these common-law classifications.” *Id* (citing *Reetz v Tipit, Inc*, 151 Mich App 150, 153; 390 NW2d 653 (1986)). A premises owner’s “duty to a visitor depends on that visitor’s status.” *Id*.

A “trespasser” is one “who enters upon another’s land, without the owner’s consent,” and the owner “owes no duty to the trespasser except to refrain from injuring him by ‘wilful and wanton’ misconduct.” *Id*.

A “licensee” is one “who is privileged to enter the land of another by virtue of the possessor’s consent.” *Id*. The premises owner “owes a licensee a duty only to warn the licensee

of any *hidden* dangers the owner knows of,” and the owner “owes no duty of inspection or affirmative care to make the premises safe” for a licensee. *Id.* (emphasis added). Most importantly, “*licensees . . . assume the ordinary risks associated with their*” presence on the premises as a matter of law. *Id.* (emphasis added). Thus, at common-law, a licensee on a shooting range would be deemed to “assume the ordinary risks associated with” the shooting range that are open and obvious, and there would be no need to statutorily charge a licensee with accepting the “obvious and inherent” risks of a shooting range to limit the range owner’s liability.

An “invitee” is “a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or undertaking that reasonable care has been used to prepare the premises, and make it safe for [the invitee’s] reception.” *Id.* at 596. The premises owner “has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and . . . make any necessary repairs or warn of any discovered hazards.” *Id.* An “invitee is entitled to the highest level of protection under premises liability law.” *Id.*

Although a premises owner is not liable to an invitee for hazards that are “open and obvious,” Michigan law has long recognized a “‘special aspects’ exception to the open and obvious doctrine for hazards that are effectively unavoidable.” *Hoffner v Blue Cross Blue Shield of Michigan*, 492 Mich 450, 468; -- NW2d -- (2012). The “special aspects” exception is “a limited exception designed to avoid application of the open and obvious doctrine only when a person is subjected to an unreasonable risk of harm.” *Id.* One kind of “effectively unavoidable condition” is a “condition that is *inherently dangerous* and thus poses a severe risk of harm.” *Id.* at 465 (emphasis added).

In summary, “licensees” are deemed at common-law to “assume the ordinary risks associated with their” presence on property, and a property owner has no duty to warn of or protect licensees from, dangers that are obvious to the licensee. With respect to “invitees,” at common-law a premises owner must warn them of known dangers, must inspect and repair the premises to make them safe, and may be liable at common-law for even open and obvious hazardous conditions if the hazard is “inherently dangerous.”

When this Court interprets a statute, “the Legislature is presumed to be aware of the common law when enacting legislation.” *Valez v Tuma*, 492 Mich 1, 16; -- NW2d -- (2012) (citing *Henry v Dow Chem Co*, 473 Mich 63, 83; 701 NW2D 684 (2005)). Against the above-described backdrop of common-law premises liability principles, the Legislature enacted MCL 691.1544 to limit the liability of range owners by statutorily charging shooting range users with accepting the “obvious and inherent” risks that are “associated with the” activity, which “risks include, but are not limited to, injuries that may result from noise, discharge of a projectile or shot,” and from “natural variations in terrain, surface or subsurface snow or ice conditions, bare spots, rocks, trees, and other forms of natural growth or debris.” *Id.*

MCL 691.1544 is necessarily directed to shooting range users in their capacity as *invitees*, as opposed to *licensees* or *trespassers*. A range owner has no common-law duty to *trespassers* except to avoid willful injury. A *licensee* at a shooting range is deemed at common-law to “assume the ordinary risks associated with their” presence at a range, so statutorily charging licensees with accepting such risks would be wholly unnecessary.

At common-law, only *invitees* could hold a shooting range owner liable for injury caused by an obvious condition that is inherently dangerous. Only *invitees* would not be charged at common-law with accepting the obvious and inherent risks associated with shooting ranges. In

limiting the liability of range owners by charging users with accepting the obvious and inherent risks of using a range, MCL 691.1544 only has force, meaning, relevance or application as it relates to range users in their capacity as *invitees*, as opposed to trespassers or licensees. Because MCL 691.1544 is a statutory modification of the common-law duty that a range owner would otherwise owe an invitee, the SSRA was therefore intended to apply in the owner/invitee context.

Michigan law has long held that common-law invitees are individuals who are invited on property for a *business or commercial purpose*. Because MCL 691.1544 addresses the relationship between sport shooting range owners and range users as owners/invitees, the SSRA was intended to apply to sport shooting ranges that operate for “business or commercial purposes.” In *Stitt, supra*, this Court noted that “several of our decisions appear to support the requirement that [for a visitor to be deemed an “invitee”] the landowner’s premises be held open *for a commercial business purpose*,” and that “several panels of our Court of Appeals have interpreted our decisions as supporting the requirement of a *business purpose*” for a visitor to be deemed an invitee. 462 Mich at 598 (emphasis added). Moreover, this Court in *Stitt* held that “Michigan law historically, if not uniformly, recognized a *commercial business purpose* as a precondition for establishing invitee status.” *Id.* at 600.

*Stitt* summarized Michigan law as follows:

In order to establish invitee status, a plaintiff must show that the premises were held open for a *commercial purpose*.

\* \* \*

[I]nvoke status must be founded on a *commercial purpose* for visiting the owner’s premises.

\* \* \*

[Persons on . . . premises for other than *commercial purposes* are licensees and not invitees.

*Id* at 604, 607 (emphasis added). See also *Hoffner, supra*, 492 Mich at 469 (“the crucial question when determining invitee status is the *commercial nature* of the relationship between the premises owner and the other party”) (emphasis added).

In short, MCL 691.1544 limits sport shooting range owner’s liability to injured users by charging users with accepting the obvious and inherent risks associated with sport shooting ranges. Only invitees could, at common-law, hold range owners liable for risks that are obvious and inherent, and to be an invitee one must enter the premises for a business or commercial purpose. The SSRA was therefore intended to apply in circumstances in which range owners act pursuant to a business or commercial purpose. *Barnhart I’s* conclusion that SSRA does not apply to any shooting range if there is any evidence to “support” that it operates for any “business or commercial purpose” is contrary to the fact that the SSRA’s limitation of liability operates in the context of owners/invitees, which context necessarily involves range owners that act for commercial and business purposes.

f) **Construing MCL 691.1544 *in pari materia* with recreational immunity statutory law that existed when MCL 691.1544 was enacted demonstrates that the SSRA was intended to apply to ranges that operate as businesses.**

This Court has recognized that “[i]t is elementary that statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and that courts will regard all statutes upon the same general subject matter as part of 1 system.” *Duffy v Michigan Dep’t of Natural Resources*, 490 Mich 198, 207; 805 NW2d 40 (1953)). In addition, “the Legislature is presumed to be aware of all existing statutes when enacting a new statute.” *Cameron v Auto Club Ins Ass’n*, 263 Mich App 95; 687 NW2d 354(2004) (citing *Walén v Dep’t of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993)). Lastly, “[c]hanges in an act must be construed in

light of preceding statutes and historical developments.” *Id* at 98 (citing *MD Marinich, Inc v Michigan Nat’l Bank*, 193 Mich App 447, 452; 484 NW2d 738 (1992)).

The Michigan Legislature amended the SSRA in 1994 to specifically limit the liability of range owners and operators for injuries users might incur by charging users with accepting the obvious and inherent risks associated with using a range. MCL 691.1544. In 1994, existing Michigan statutory law already limited premises owner liability for injuries to persons who used property for recreational purposes and who did not pay the owner any consideration for using the premises. MCL 317.176<sup>5</sup> provided:

No cause of action shall arise for injuries to any person who is on the lands of another . . . *without paying to such other person a valuable consideration for the purpose of . . . outdoor recreational use*, with or without permission, against the owner . . . unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner . . .

When the SSRA was amended in 1994, Michigan statutory law provided owners almost complete immunity from liability for injuries caused to anyone who used an owner’s premises for recreational purposes and without paying consideration to the owner (*i.e.*, in a non-business, non-commercial setting). Thus, in 1994 range owners who provided “recreational” shooting with no business or commercial purpose were statutorily immune from premises liability claims, except for gross negligence or willful conduct.

*Danaher v Partridge Creek Country Club*, 116 Mich App 305; 323 NW2d 3756 (1982), made clear that the “statute was not intended to apply to” premises that “are used for outdoor recreational use, but which also constitute commercial enterprises.” *Id* at 311. That statute was

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<sup>5</sup> MCL 317.176 was effective December 21, 1976. It amended MCL 300.201 which was effective June 23, 1974. MCL 317.176 was in place when the SSRA was enacted in 1989 and amended effective July 5, 1994.

not applicable where premises are “held out for a recreational use to those who pay a fee.” *Id* at 312.

Were the SSRA intended to apply only to shooting ranges that are solely recreational and non-commercial (as *Barnhart I* held and as the Township now argues), MCL 691.1544 would have been completely unnecessary and superfluous because MCL 317.176 would have already provided almost complete immunity to range owners for injuries suffered by users. The Legislature presumably enacted MCL 691.1544 to provide range owners protection from liabilities beyond the protections provided by MCL 317.176, charging range users with accepting the risks inherent in shooting range use, and thus affording range owners and operators immunity from liability that they would otherwise have, meaning that the SSRA was intended to apply to ranges where users pay valuable consideration to use the range owner’s facility. In other words, MCL 317.176 always provided premises owners immunity where recreational users of the premises were injured and the owners were not involved in any commercial purpose. MCL 691.1544 was enacted to provide range owners immunity that would not have been provided by MCL 317.176 by virtue of the fact that they operate for commercial purposes or provide more than “recreational” shooting.

**C. Responses to the Township’s Supplemental Arguments**

**1. Covering Ranges that Operate for Business or Commercial Purposes Does Not “Expand” the Definition of “Sport Shooting Ranges”**

The Township makes the straw-man argument that to reverse *Barnhart I* would re-write MCL 691.1541(d)’s definition of “sport shooting range” to include the phrase “ANY OTHER BUSINESS OR COMMERCIAL USE SUCH AS FIREARMS TESTING FOR WEAPONS MANUFACTURERS, TACTICAL TRAINING AND LAW ENFORCEMENT TRAINING” (Township’s Supplemental Brief at 8).

First, there is no evidence that Barnhart ever used the range for “firearms testing for weapons manufacturers,” or that he has conducted “tactical training” (whatever that may mean) on the range.<sup>6</sup> Moreover, as set out *supra*, providing law enforcement training, and firearms training in general, is an authorized use under generally accepted operation practices, and is therefore expressly exempt from local control by MCL 691.1542a(2)(c).

Second, reversing *Barnhart I* is not tantamount to “re-writing” MCL 691.1541(d)’s definition of “sport shooting range,” but is instead necessary to undo *Barnhart I*’s judicial alteration of the statute’s express definition. Accepting *Barnhart I*’s holding means re-writing MCL 691.1541(d)’s definition of “sport shooting range” to include the non-existent limitation: “PROVIDED THAT THE SPORT SHOOTING RANGE DOES NOTHING TO SUGGEST THAT IT IS BEING OPERATED FOR ANY BUSINESS OR COMMERCIAL PURPOSE.”

## 2. *Smolarz Was Wrongly Denied*

The Township, like the Township Amici, places mistaken reliance on *Smolarz v Colon Township*, 2005 WL 927144 (Mich App, April 21, 2005), in arguing that providing law enforcement firearm training on a range is not a protected activity under the SSRA and therefore may be regulated by local ordinances (Township’s Supplemental Brief at 8-11); (Township Amici Brief at 7-8).

*Smolarz* was decided wrongly and should not be followed.<sup>7</sup> MCL 691.1542a(2) permits a sports shooting range in existence as of July 5, 1994 that operates in compliance with “generally

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<sup>6</sup> Again with no citation of the record, the Township broadly proclaims that Barnhart conducted “combat weapons training” on the range, using as “evidence” a website (Township Supplemental Brief, Exhibit 8) which advertises training that by and large is to be done at the *student’s* facilities. The Township provides no record support for its bald assertion that any such training was offered, or conducted, on Barnhart’s range.

<sup>7</sup> In fact, expressly overruling *Smolarz* is an additional reason to grant leave in the present case.

accepted operation practices” to “[d]o anything authorized under generally accepted operation practices, *including, but not limited to*” expanding or increasing “events and activities” and “opportunities for public participation” (emphasis added).

*Smolarz* was wrongly decided because it paid absolutely no attention to the fact that generally accepted operation practices authorize law enforcement firearm training, and firearm education and training in general, and is therefore protected activity under the SSRA. Generally accepted operation practices unquestionably authorize law enforcement firearm training, as well as other kinds of firearms education and training, and are therefore permissible activities under the SSRA, regardless of any local ordinance to the contrary. The NRA Range Manual, which the DNR has adopted as “generally accepted operation practices,” unambiguously states that “special uses” that can “be made of the facility” are uses “*such as law enforcement*” (NRA Range Manual, §2.02.2(G) at I-1-5) (emphasis added) (Barnhart’s Application, Exhibit 14). Additionally, “other potential uses” of a range include “*law enforcement agencies*” (§2.07.1 at I-1-8). Under generally accepted operation practices, one group “[w]ho is authorized to use the facility” can include “law enforcement,” and “[t]raining activities are an important part of the scheduled use” of a range. (§3.02.1(A) and (G) at I-2-8). Moreover, firearms education and training is not limited under generally accepted operation practices to just law enforcement. *See* Barnhart’s Application at 26-28.

*Smolarz* was wrongly decided because it utterly failed to acknowledge that generally accepted operation practices authorize law enforcement firearms training. They clearly do, and such activities are expressly permitted under MCL 691.1542a(2)(c) to be done free of local ordinances and control.

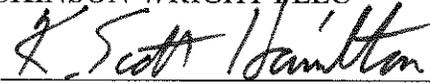
### III. CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, and for the reasons set out in Barnhart's May 22, 2012 Application for Leave to Appeal and July 2, 2012 Reply Brief in Support of Application for Leave to Appeal, Defendant/Appellant Jerry Cline Barnhart requests that the Court:

A. Grant Barnhart's Application for Leave to Appeal and enter an order reversing *Barnhart I* (and *Barnhart II*, which was founded upon *Barnhart I*), and entering judgment in favor of Barnhart or, alternatively;

B. Grant Barnhart's Application for Leave to Appeal and place the matter on the Court's regular calendar case docket, with or without additional briefing, for full consideration.

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