

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

PEOPLE OF THE
TOWNSHIP OF ADDISON,

Plaintiff/Appellee,

v

JERRY CLINE BARNHART,

Defendant/Appellant.

Supreme Court
Docket No. 145144

Court of Appeals
Docket No. 272942

Oakland County Circuit Court
Case No. 06-DA8457-AV
Hon. Steven N. Andrews

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

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FILED

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REPLY BRIEF IN SUPPORT OF
JERRY CLINE BARNHART'S
APPLICATION FOR LEAVE TO APPEAL

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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I. INTRODUCTION

The Township of Addison's Brief in Opposition to Appellant Barnhart's Application for Leave to Appeal ("Township's Brief") fails to respond to the main reason leave to appeal needs to be granted in this case: *Barnhart I* holds that a shooting range is not a "sport shooting range" protected by the SSRA if there is any evidence "to suggest" that it is operating for "business or commercial purposes," and that holding is diametrically opposed to the SSRA's express recognition (ignored in *Barnhart I* and *Barnhart II*), that the sport shooting range owners and operators that the SSRA was intended to protect include partnerships, proprietorships and corporations, which are all entities that by definition operate for business and commercial purposes. Moreover, the SSRA makes no distinction between ranges that are operated for "business or commercial" purposes and those that are not. *Barnhart* means that any shooting range that charges a user fee, provides lessons for hire, or does anything that generates revenue is not a "sport" shooting range protected by the SSRA because doing so would be evidence "to suggest" a "commercial or business purpose" to its operation. *A fortiori*, under *Barnhart I* partnerships, proprietorships or corporations in business to provide recreational shooting are not protected by the SSRA.¹

A. Factual Misrepresentations in the Township's Brief

The Township's Brief is rife with factual inaccuracies and misrepresentations for which it fails to cite any record support. Only the most egregious are corrected below.

With no citation to the record, the Township falsely asserts that between 1993 and 2006 Barnhart's range "evolved into a full blown shooting range in the middle of a residential zoning area where citizens are now forced to endure the noise associated with military training,

¹ If a for-profit business operates a shooting range that provides, for example, exclusively recreational skeet shooting, under *Barnhart I* that range would not be a "sport" shooting range protected by the SSRA because there would be evidence "to suggest" that it is operating for business or commercial purposes."

including long weekends of automatic weapons, SWAT training and other police/military activities” (Township’s Brief at 1).

First, far from being “in the middle of a residential zoning area,” Barnhart’s range is located in the middle of his 80-acre parcel which is zoned *agricultural*² and not subject to the Township’s noise ordinance. Addison Township Ord., Chptr. 22, Article III (“Noise”), section 22-63(a) (“[a]ll areas zoned agricultural are specifically excluded from the provisions of this article”).

Second, and more important, firearms instruction, training, and education, including training law enforcement officers, are all activities and events authorized under generally accepted operation practices. *See* Barnhart’s Application at 25-28. The district court found as a matter of fact in 2008 that Barnhart’s range complies with generally accepted operation practices.³ Thus, regardless of the Township’s hyperbole and mischaracterizations about “long weekends” of firearms training in the “middle of a residential zoning area,” because those uses are authorized by generally accepted operation practices, that use of the range is permissible under the SSRA as an expanded or increased use, even if not in compliance with a Township ordinance. MCL 691.1542(a)(2).

The Township repeatedly asserts that Barnhart allegedly “intended” to use his range “to test firearms for various companies” when he built the range in 1993, and argues that the range was therefore *operated* for a business or commercial purpose before July 5, 1994. Whether Barnhart “intended” to test firearms on the range is irrelevant; the Township cites no evidence

² *See Barnhart I* at *3 (Barnhart’s range built on property with “the zoning category of agricultural”) (Application Exhibit 1); 11/21/2008 Barnhart Testimony, Trans at 5-6 (range is on “80 acres” of “agricultural property”) and 7 (“I tried to set [the range] up as close to the middle as I could . . . [s]o most of the shooting is being done from in the middle” of the 80-acre parcel (Application Exhibit 5)); 3/31/2006 Hearing Trans at 3-4 (describing “the agricultural district where defendant’s property is located” (Application Exhibit 4)); 9/13/2010 Opinion and Order at 10 (“[t]he zoning category applicable in this case . . . [is] agricultural”) (Application Exhibit 12).

³ The Township failed to cross appeal the district court’s determination that the range complies with generally accepted operation practices, and cannot challenge that finding now. *See* Section II(B), *infra*.

that he *did* so (because there was no such evidence),⁴ and cites no evidence that he was paid by any firearms manufacturer for doing so (because there was no such evidence). To the contrary, Barnhart testified without contradiction that from the time the range was built in 1993 through *at least* July 5, 1994, the range was exclusively used for “competition recreational shooting,” and the only “business purpose” associated with the range was that he taught one shooting lesson, to one individual, on one day:

- Q. . . . Between . . . the end of 1993, and July of 1994, can you give us an idea of the character of the type of shooting you were doing on the range? . . .
- A. It was myself. It was my family. It would have been guests that I had come in there that were friends of ours, and then I had one individual that came there that had paid me for a one-day class. It’s competition recreational shooting. . . . I charged for one [lesson].

(11/21/2008 Hearing Trans at 23-24) (Application Exhibit 5).

Regardless of any alleged “intent” to test firearms, Barnhart’s undisputed testimony was that the range was *in fact* operated for recreational shooting from when it was built in 1993 at least through July 5, 1994.

B. Grounds for Granting Barnhart’s Application

First, leave should be granted under MCR 7.302(B)(1) because *Barnhart I* effectively invalidates the SSRA by rendering it inapplicable to any range for which there is evidence “to suggest that [the] operation of [the] shooting range [is] for business or commercial purposes.”⁵

⁴ The *only* support for Barnhart’s alleged “intent” was from a Robert Koski, who testified that he believed Barnhart “intended” to test shoot firearms before he built the range.

⁵ The Township asserts that the damage of *Barnhart I*’s erroneous holding is limited because the “fact pattern in the Defendant’s Application is very unique and is not likely to be repeated.” (Township’s Brief at 15). The Township is wrong. *Barnhart I* broadly holds that the SSRA is inapplicable to any range for which there is evidence to suggest that it operates for business or commercial purposes. That means *none* of the SSRA’s protections are available to any range that operates for any business or commercial purpose, even one as *de minimus* as giving a single recreational shooting lesson to a single individual (the “business purpose” to which Barnhart stipulated). The only shooting ranges protected by the SSRA under *Barnhart I* would be those (if any exist) for which there is *no* evidence to suggest that they are operated for any business or commercial purpose.

The Township's attempt to distinguish a range that "receive[s] any money" from its operation from one for which "there is evidence of a 'business or commercial' purpose for the [r]ange" (Brief at 14) is nonsense. Any range that charges a user fee, provides firearms instruction or lessons for hire (which was the only "business purpose" to which Barnhart stipulated), or engages in any other financial transaction for profit is a range for which there is evidence "to suggest" it operates for a business or commercial purpose.

Second, there is significant public interest in the issue presented, and it involves a significant legal principle. MCR 7.302(B)(2)&(3). According to a recent DNR survey, Michigan has an estimated 400 shooting ranges in 81 of its 83 counties (Application Exhibit 3). The DNR found that "range fees are charged at" over 70% of the ranges responding to the survey, and 68% provide shooting instruction. *Id* at 3.

The number of Michigan citizens who use sport shooting ranges is enormous. As just one example, the Island Lake Shooting Range in Green Oak Township has a clay target range (i.e., trap, skeet and sporting clays) run by a for-profit concessionaire, Michigan Shooting Centers, LLC ("MSC"). In its "first year and a half of its operation [beginning in 2003], the MSC clay target range served approximately 43,000 patrons," and the "patronage of the MSC clay target range has 'increased fairly significantly' since 'that first year and a half.'" *Green Oak Township v State of Michigan, DNR, and MSC*, Slip Opinion 04-20782-C2 (Sept. 21, 2007, Livingston County Circuit Court) at 40, ¶22(C) (Exhibit A). Thus, in just 4 years "MSC's clay target range has served over 143,000 sportsmen and patrons since 2003." *Id*. The Island Lake Shooting Range is run as a business, and the "Range generates significant revenues." *Id*. at 40, ¶22(D). The "State of Michigan takes in annually up to \$120,000 from operation of the Range,"

and “the Range has generated approximately \$840,000 in direct revenue to the State of Michigan.” *Id.*

Island Lake illustrates the significant number of range users and, under *Barnhart I*, is a range to which the SSRA would be made inapplicable. With an estimated 400 ranges in Michigan, the public interest is tremendous.

That *Barnhart I* is unpublished does not diminish the need to review and reverse it. (Township’s Brief at 16). It is the only existing authority on the issue it decided and, although not *binding* on lower courts, nonetheless can significantly influence them (MCR 2.216(c)(1)), especially in the absence of other any contrary authority. *See, e.g., Shulte v City of Ann Arbor*, 2011 Mich App LEXIS 1550 (Mich App 2011) (“courts of this state may look to unpublished cases” in absence of other authority).

Third, *Barnhart I* is clearly erroneous for the reasons set out in Barnhart’s Application, requiring leave to appeal under MCR 7.302(B)(5).

II. ARGUMENT

A. The Township’s Brief Misapplies the SSRA

Either intentionally or through lack of understanding, the Township’s Brief confuses how the SSRA applies to sport shooting ranges that, like Barnhart’s, began operating before July 5, 1994, the date MCL 691.1542a was enacted. The Township’s Brief (and *Barnhart I*) wrongly focuses on the range’s expanded and increased uses long after July 5, 1994, rather than whether it was a sport shooting range as of July 5, 1994. MCL 691.1542(a)(2) provides:

A sport shooting range that is in existence as of the effective date of this section [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 preexisting 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 and activities.

Barnhart's range existed before July 5, 1994, and the district court found in 2008 that it complied with generally accepted operation practices since it was built in 1993. As of July 5, 1994, the only "business" use of the range was that Barnhart charged one person for a single recreational shooting lesson. Under MCL 691.1542(a), Barnhart was permitted to expand and increase use of the range for all purposes that generally accepted operation practices authorize, which include firearms training and education, regardless of whether those expanded activities violated any Township ordinance. The Township's (and the Court of Appeals) exclusive focus on uses of the range after July 1994 - - and their abject failure to consider whether those uses are permissible "expansions" or "increases" of use permitted under generally accepted operation practices and MCL 691.1542(a) - - fails to apply properly the SSRA.

According to the Township and Court of Appeals, Barnhart's range was excluded from the SSRA's protection solely because he taught a single shooting lesson for hire, which evidenced a "business or commercial purpose." If such a *de minimus* action is sufficient to make a range not a "sport" shooting range, and *Barnhart I's* erroneous construction of the SSRA is left unreviewed, virtually no range will be within the SSRA's protection.

B. The Township Waived Any Challenge to the District Court's Fact Determination That Barnhart's Range Complied with Generally Accepted Operation Practices

The Township waived any argument that "the District Court erred when it ruled that the Defendant was complying with 'generally accepted practices' [sic]" (Township's Brief at 40, n4) because the Township failed to cross appeal that finding. The district court found "that

Defendant was operating the range at issue in compliance with the generally accepted operation practices as set forth by the DNR and the NRA.” (12/22/08 Opinion and Order at 9) (Appellant’s Application, Exhibit 9). *See also id* at 6-9. On appeal, the Oakland County Circuit Court did not disturb the district court’s fact-finding, and specifically noted that “the district court conscientiously examined all of the evidence tending to support that [Barnhart] was in compliance with generally accepted operation practices.” (9/13/10 Opinion and Order at 9).

Barnhart filed a delayed application for leave to appeal on November 24, 2010, which the Court of Appeals granted on August 26, 2011. The Township could have filed a cross-appeal of the trial court’s fact-finding “within 21-days after the clerk certifie[d] the order granting leave to appeal,” MCR 7.207(B)(2), and after that it could have sought leave “to take a delayed cross appeal . . . under MCR 7.205.” MCR 2.207(E).

The Township did neither, and it’s failure to cross-appeal in the Court of Appeals bars the Township from now challenging the district court’s fact determination that Barnhart’s range complied with generally accepted operation practices. *See Lawrence v Will Darrah & Assocs, Inc*, 445 Mich 1, 4 n2; 516 NW2d 43 (1994) (where a party “failed to appeal the trial court’s ruling on [an] issue to the Court of Appeals,” it is “waived before this Court”).

More importantly, even *had* the Township cross-appealed the district court’s finding in the Court of Appeals, the Township has failed to apply for leave to cross-appeal that issue to *this* Court, further barring it from challenging the district court’s fact-finding. Under MCR 7.302(D)(2), “[a]n application for leave to appeal as cross-appellant may be filed with the clerk within 28 days after appellant’s application is filed,” and “[l]ate applications will not be accepted.” Appellant filed his application May 22, 2012, leaving the Township until June 14, 2012 to cross-appeal the district court’s finding that Barnhart complied with generally accepted

operation practices. *Malcolm v City of East Detroit*, 437 Mich 132, 137-38; 468 NW2d 479 (1991), (although “Plaintiff raised [an] issue in a cross appeal in the Court of Appeals. . . . Plaintiff . . . failed to raise the issue before this Court on cross appeal; thus, the matter has not been preserved for review”).

By failing to cross appeal the issue in the Court of Appeals or in this Court, the Township waived any challenge to the fact that Barnhart complied with generally accepted operation practices. Therefore, once this Court reverses *Barnhart I*'s holding that the SSRA is inapplicable if there is any evidence “to support” the range operated for a “business or commercial purpose,” judgment can be entered in Barnhart’s favor.

C. The Township, Like the Court of Appeals, Relies Solely and Wrongly On the Maxim *Expressio Unius Est Exclusio* in Interpreting the SSRA

The maxim “*expressio unius est exclusio alterius*” (the expression of one thing is the exclusion of another) is the only tool of construction the Court of Appeals used in *Barnhart I*. It held that because “sport” means “recreational,” the term “sport” excludes all ranges that are not recreational, and assumed that a range cannot be “recreational” if there is any evidence “to suggest” that it operates for a “business or commercial purpose.” In doing so, *Barnhart I* (and the Township) ignored the SSRA’s express recognition that sport shooting range owners and operators are, among others, business and commercial entities such as partnerships, proprietorships, and corporations. *Barnhart I*'s conclusion, which the Township wrongly urges, from that maxim is contrary to the SSRA’s express terms.

Luttrell v Michigan Dep’t of Corrections, 421 Mich 93; 365 NW2d 74 (1985), explained that “the rule of *expressio unius est exclusio alterius* . . . is a recognized rule of statutory interpretation, [b]ut like all other such rules, it is a tool to ascertain the intent of the Legislature” and “[i]t does not automatically lead to results.” 421 Mich at 107. In *Luttrell*, “the effect of the

rule '*expressio unius est exclusio alterius*,' while a valid maxim, [was] so much at odds with the other three rules [of statutory construction] that reason dictates it is inapplicable in the instant case." *Id.* at 102.

This Court, and the Court of Appeals, have refused to apply the maxim where doing so produces results that are contrary to the statute's unambiguous terms. *See Ross v Blue Cross Network of Michigan*, 480 Mich 153, 171, n 10; 747 NW2d 828 (2009) (rejecting "application of the doctrine of *expressio unius est exclusio alterius* . . . because it leads to an interpretation that is contrary to the unambiguous language of the statute"); *Tuggle v Dept of State Police*, 269 Mich App 657, 664; 712 NW2d 750 (2006); *Brandon Assocs v Castle Management*, 2004 Mich App LEXIS 3154 (Mich App, Nov. 18, 2004) ("the maxim '*expressio unius est exclusio alterius*' is not applicable here because" that which the maxim purported to exclude was "expressly allowed by" other unambiguous terms) (citing *Bradley v Saranac Bd of Ed*, 455 Mich 285; 565 NW2d 650 (1997)).

D. The Township Ignores the Statutory Definition of "Sport Shooting Range"

The SSRA expressly defines "sport shooting range" as "an area designed and operated for the use of . . . rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar sport shooting," and the Court of Appeals was bound to apply that definition. Instead, it modified and limited the statutory definition by importing a dictionary definition into the defined phrase to reach the result that having a business or commercial purpose in operating a range means that it is not a "sport" shooting range protected by the SSRA because "sport" means "recreational," and "recreational" is (according to the Court of Appeals and the Township) antithetical to business or commerce. Those definitional gymnastics re-write the SSRA's express definition to mean that a "sport shooting range" is "an area designed and operated

exclusively for non-business and non-commercial purposes for the use of . . . rifles, shotguns, pistols . . .,” etc.

Moreover, *Barnhart I* does not ask whether a range is “operated for the *use* of rifles, shotguns, pistols,” etc., but instead focuses on *how* and *why* it is operated (i.e., for a business or non-business purpose), which is no part of the SSRA’s definition of “sport shooting range.” *Barnhart*’s range was indisputedly “designed and operated for the use of . . . rifle, shotgun, [and] pistols” and was therefore a “sport shooting range” as defined by the SSRA.

E. The SSRA’s Express Terms Preclude the Township’s and Court of Appeals Interpretation

The SSRA expressly says that its protections extend to ranges that are owned and operated by business and commercial entities, including partnerships, proprietorships and corporations. *Barnhart I* ignored that part of the SSRA, and its conclusion that the SSRA does not apply to any range for which there is any evidence “to suggest that it operates “for business or commercial purposes” is flatly incompatible with those express terms.

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Dated: July 2, 2012

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2012, I served the foregoing paper on Robert Charles Davis, 10 S. Main Street, Suite 401, Mt. Clemens, MI 48043, through regular, first-class mail.

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EXHIBIT A

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

GREEN OAK TOWNSHIP,
a Michigan municipal corporation,

Plaintiff,

v.

Case No. 04-20782-CZ
Hon. Stanley J. Latreille

THE STATE OF MICHIGAN, DEPARTMENT
OF NATURAL RESOURCES; and MICHIGAN
SHOOTING CENTERS, LLC, a Michigan limited liability
company,

Defendants.

and

RICHARD WIEGAND, JENNESS WIEGAND, GUY
DOBIES, and BRIAN LINMAN,

Intervening Plaintiffs in Pro Per,

v.

THE STATE OF MICHIGAN, DEPARTMENT
OF NATURAL RESOURCES; and MICHIGAN
SHOOTING CENTERS, LLC, a Michigan limited
liability company,

Defendants.

TRUE COPY
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44th Circuit Court

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OPINION OF THE COURT

This case has followed a labyrinthine path through the legal system – three judges, three trips to the Court of Appeals, a plethora of motions, parties entering and exiting, politicians commenting and condemning, then finally a trial – and now a decision.

This is a lawsuit about noise. Some of the residents in the area of a rifle and sporting clays range operating in the Island Lake Recreation Area claim that the sounds of gunfire have turned their days into a nightmare. Other residents have testified that they are not disturbed by the noise. Presumably the hundreds and even thousands of sportsmen who shoot at the range support it.

Trial began May 22, 2007, against Defendant Michigan Shooting Centers (“MSC”) only (all claims against the DNR having been dismissed), on the following issues:

- (a) Whether gunfire sound from the Range constitutes a common law private nuisance;
- (b) Whether gunfire sound from the Range violates Green Oak General Noise Ordinance No. 81, § 3(A); and
- (c) Whether Plaintiffs’ nuisance claims are barred by the Sport Shooting Range Act (the “SSRA”), MCL 691.1542.

The case was tried without a jury on May 22, May 23, May 25, May 29, May 30, and June 1, 2007. The evidence included testimony from neighbors of the range, experts from each side, a report from a court-appointed expert, a state DNR official, and the operator of the range. By stipulation of the parties, after the close of testimony, this Court visited the range and the neighborhood more than a dozen times over the course of the summer to listen to the sounds.

21. There is significant utility to the MSC Clay Target Range which exceeds the gravity of harm to Plaintiffs.

22. Restatement (Second) of Torts § 828 requires the Court to consider (i) the social value of the MSC Clay Target Range, (ii) the suitability of the Range to the character of the locality, and (iii) the impracticability of preventing the sound of gunfire. The significant utility of the MSC Clay Target Range is established by the following:

- A. Green Oak, in approving the Special Use Permit to build the Range, specifically determined that the "health, safety and welfare of the residents of Green Oak Township will benefit by the use of a public gun range." (MSC Trial Exhibit B at 5).
- B. Green Oak, in approving the Special Use Permit, recognized that the "goal is to provide this form of recreation which is in high demand in southeastern Michigan as well as this area in particular." (MSC Trial Exhibit Brief at 4).
- C. The Range serves a tremendous number of patrons. In its first year and a half of its operation, the MSC Clay Target Range served approximately 43,000 patrons (Dubbs Testimony, 11/01/04 Preliminary Injunction Hearing Trans at 83-84); (Lieske Testimony, 5/30/07 Trial Trans at 48). The patronage of the MSC Clay Target Range has "increased fairly significantly" since "that first year and a half" (*id* at 49). The DNR Rifle Range serves approximately 16,000 shooters annually (Dubbs Testimony, 11/1/04 Preliminary Injunction Hearing Trans at 84). Even assuming no increase in the amount of usage, MSC's Clay Target Range has served over 143,000 sportsmen and patrons since 2003, and the DNR Rifle Range has served over 112,000 users in 7 years of operation.
- D. The Range generates significant revenues for the benefit of all of Michigan's public state park property. The State of Michigan takes in annually up to \$120,000 from operation of the Range (Dubbs Testimony, 11/1/04 Preliminary Injunction Hearing Trans at 95-96), which revenues go "into the park improvement fund [and] is therefore used on any state park property" for maintenance and improvement (*id* at 95). Thus, the Range has generated approximately \$840,000 in direct revenue to the State of Michigan for use in developing and maintaining state park property.

expenses of the expert appointed under MRE 706, except that the Court will enforce collection of any such expert fees unpaid to date.

This order is a final order, and closes this case file in its entirety.

September 21, 2007



Stanley J. Latteille
Circuit Court Judge