Missouri Law Review

Volume 72
Issue 1 *Winter 2007*

Article 15

Winter 2007

Safer Destination for Trespassers, A

Ross McFerron

A Safer Destination for Trespassers

Humphrey v. Glenn[1]

I. INTRODUCTION

Traditionally, Missouri courts have maintained the general rule that a possessor of land owes no duty of care to trespassers.[2] However, Missouri courts have adopted some well-defined exceptions to the general rule, particularly in situations where trespassers are easily foreseeable.[3] But, prior to the *Humphrey v. Glenn* decision in 2005, possessors of land had never owed a duty to adult trespassers regarding a condition on the land.[4]

In *Humphrey*, the Missouri Supreme Court addressed the issue of whether possessors of land had a duty to warn "constant" trespassers of dangerous artificial conditions on the possessors' property.[5] The court determined that such a duty of care should exist and, for the first time, explicitly adopted section 335 of the Restatement (Second) of Torts.[6] With this decision, the court added another "well-defined" exception to the general "no-duty" rule regarding trespassers to land.

This Note examines the court's analysis in adopting this new exception to the general "no-duty" rule and argues that, given the narrow scope of section 335 and the rationale behind the general rule regarding trespassers, *Humphrey* was correctly decided.

II. FACTS AND HOLDING

The defendants, Charles and Dale Glenn, leased Greenfield, a farm in Mississippi County, Missouri, from Burke Dodson.[7] The Glenns have farmed Greenfield since 1994.[8] Greenfield is located near a levee road and has entrances off the road at both the north and south ends of the farm.[9] The two

---

1. 167 S.W.3d 680 (Mo. 2005) (en banc).

2. Cochrane v. Burger King Corp., 937 S.W.2d 358, 364 (Mo. Ct. App. 1996) (citing Politte v. Union Elec. Co., 899 S.W.2d 590, 592 (Mo. Ct. App. 1995)).

3. Seward v. Terminal R.R. Ass'n of St. Louis, 854 S.W.2d 426, 428 (Mo. 1993) (en banc).

4. *See id.* at 429.

5. *Humphrey*, 167 S.W.3d at 681.

6. *Id.*

7. *Id.*

8. *Id.* Greenfield is a 420 acre tract of land. Humphrey v. Glenn, No. 25744, 2004 WL 905817, at *1 (Mo. Ct. App. Apr. 28, 2004), *rev'd en banc*, 167 S.W.3d 680 (Mo. 2005).

9. *Humphrey*, 167 S.W.3d at 681.

entrances are approximately one and one-half miles apart.[10] Prior to leasing Greenfield to the Glenns, Dodson farmed the property and installed a wire across a field road to keep out trespassers.[11]

When the Glenns began farming Greenfield, they encountered problems with trespassers coming from the levee road onto the farm.[12] In order to prevent trespassing, the Glenns painted purple marks on the trees near both entrances to the farm.[13] The trespassing continued, however, so the Glenns erected a 3/8 inch wire cable across each farm road.[14] Because the cable was not clearly visible, the Glenns attached different objects to the cable to warn trespassers of its presence.[15] Initially, the Glenns placed warning signs on the cable, but the signs were often removed.[16] Trespassers also removed flags and jugs which the Glenns had attached to the cable.[17] The Glenns claimed they

---

10. *Id.*

11. Appellants' Substitute Reply Brief Charles Glenn & Dale Glenn d/b/a C&D Glenn Farms at 5, Humphrey v. Glenn, 167 S.W.3d 680 (Mo. 2005) (en banc) (No. SC 86035), 2004 WL 3094311. This cable was not in place at the time the plaintiff was injured. *Id.*

12. *Humphrey*, 167 S.W.3d at 681, 686.

13. *Id.* at 681. The Glenns' primary concern was to prevent trucks from trespassing and making ruts in their fields. The purple paint was used in accordance with statutory provisions regarding the posting of property against trespassing:

> In addition to the posting of real property as set forth in section 569.140, the owner or lessee of any real property may post the property by placing identifying purple paint marks on trees or posts around the area to be posted. Each paint mark shall be a vertical line of at least eight inches in length and the bottom of the mark shall be no less than three feet nor more than five feet high. Such paint marks shall be placed no more than one hundred feet apart and shall be readily visible to any person approaching the property. Property so posted is to be considered posted for all purposes, and any unauthorized entry upon the property is trespass in the first degree, and a class B misdemeanor.

MO. REV. STAT. § 569.145 (2000).

14. *Humphrey*, 167 S.W.3d at 681. The cable near the north entrance from the levee road was in an open area and stretched between a tree on one side of the road and a purple railroad iron on the other. *Id.* at 681-82. The other cable was located approximately 140 to 145 yards from the south entrance of the farm. *Id.* at 682. This cable was stretched between two trees and was anchored to the ground by a two foot chain attached to a steel pipe, which was buried in the road. *Id.* The cable at the south end of the farm was less visible and could not be seen from the levee road. *Id.*

15. *Id.* at 681-82.

16. *Id.* at 682. The Glenns testified that trespassers had torn the signs down and shot them off the cable with shotguns. Respondent's Substitute Brief at 9, Humphrey v. Glenn, 167 S.W.3d 680 (Mo. 2005) (en banc).

17. Respondent's Substitute Brief at 9, Humphrey v. Glenn, 167 S.W.3d 680 (Mo. 2005) (en banc) (No. SC86035), 2004 WL 3094313. In other efforts to displace the cable, trespassers had disconnected it in order to drive through the fields and had "shimmed" the cable wire up the trees in order to drive under it. *Id.*

checked the cable "fairly often" to make sure a warning sign was attached, but acknowledged that, during the busiest time of the farming season, they would go weeks or months without checking on the signs.[18]

On October 7, 2000, Eric Humphrey, the plaintiff, and his brother were each driving four-wheelers (ATVs).[19] Each driver had a passenger.[20] After driving the ATVs for several hours, the group decided to take a short cut to a gas station which they believed was nearby.[21] Their short cut involved driving across Greenfield.[22] First, the group attempted to cut across the farm by going through the north entrance.[23] After discovering the north cable stretched across the road, however, the group turned around and drove further down the levee road.[24] Then, the riders saw the south entrance, and believed it was a public road.[25] The south cable was not initially visible when the group turned onto the field road.[26] No warning sign or other object was attached to the cable.[27] In addition, the group claimed they never saw the purple markings on the trees near the south entrance.[28]

The drivers turned down the field road at speeds of about 20 or 25 mph.[29] Eric Humphrey stayed about 15 feet in front of his brother's ATV.[30] When Eric Humphrey's ATV was about two feet from the cable, the passenger on the other ATV saw the cable and yelled at Humphrey.[31] Humphrey then turned his head toward the other passenger and as he was looking away, he drove his ATV into the cable.[32] He hit the cable with his face and neck and was seriously injured.[33]

---

18. *Humphrey*, 167 S.W.3d at 687.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* The group decided to take the "short cut" sometime after 5 p.m. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* The purple paint had been placed on the trees six years earlier. *Id.* The trees had not been repainted. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Eric Humphrey still did not see the cable. *Id.*

32. *Id.*

33. *Id.* The witnesses said Humphrey was "clotheslined." *Id.* Humphrey testified that he "never saw the cable coming." Humphrey v. Glenn, No. 25744, 2004 WL 905817, at *2 (Mo. Ct. App. Apr. 28, 2004), *rev'd en banc*, 167 S.W.3d 680 (Mo. 2005). It is not clear why the cable was high enough off the ground to hit Humphrey in the head and neck, since the cable was reportedly anchored to the ground by a chain that was only two feet long. *Humphrey*, 167 S.W.3d at 682.

As a result, Humphrey brought a premises liability suit against the Glenns in the Circuit Court of Mississippi County, Missouri.[34] The trial court recognized that, in Missouri, a possessor of land traditionally owes no duty of care to trespassers.[35] Ultimately, though, in holding the court liable, the court adopted the exception to this general rule manifested in the Restatement (Second) of Torts section 335.[36]

At the objection of the Glenns, Humphrey submitted the following verdict instructions to the jury:

> Your verdict must be for Plaintiff if you believe: First, Defendants knew or should have known that trespassers *frequently* intruded upon the south entrance to Greenfield, and Second, Defendants installed, placed, and/or maintained a wire cable across the road to the south entrance to Greenfield, and Third, Defendants knew or should have known that the wire cable was likely to cause serious bodily harm to trespassers, and Fourth, Defendants knew or should have known the wire cable was of such nature and location that Plaintiff would not discover it, and Fifth, Defendant failed to use ordinary care to warn Plaintiff of the wire cable, and Sixth, as a direct result of said failure, Plaintiff sustained damage.[37]

The jury found that each party was fifty percent at fault and awarded damages to Humphrey totaling $100,000.[38] On appeal, the Glenns argued that Humphrey's theory of liability had never been adopted by Missouri courts, and in the alternative, even if it were adopted, the jury instructions were improper

---

34. *Humphrey*, 2004 WL 905817, at *1.

35. *Humphrey*, 167 S.W.3d at 681. *See, e.g.*, Carter v. Kinney, 896 S.W.2d 926, 928 (Mo. 1995) (en banc); Seward v. Terminal R.R. Ass'n of St. Louis, 854 S.W.2d 426, 428 (Mo. 1993) (en banc); Kelly v. Benas, 116 S.W. 557, 559 (Mo. 1909).

36. *Humphrey*, 167 S.W.3d at 681. The exception outlined in section 335 of the restatement reads as follows:

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if
> (a) the condition
> (i) is one which the possessor has created or maintains and
> (ii) is, to his knowledge, likely to cause death or seriously [sic] bodily harm to such trespassers and
> (iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and
> (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

RESTATEMENT (SECOND) OF TORTS § 335 (1965).

37. *Humphrey*, 167 S.W.3d at 682-83 (emphasis added).

38. *Id.* at 681.

because they required only "frequent" prior trespass rather than "constant" trespass.[39]

The Court of Appeals reversed, finding that the Glenns owed no duty of care to Humphrey because he was a trespasser and his theory of liability had not been adopted in Missouri.[40] The appellate court reasoned that, while the Missouri Supreme Court had adopted some exceptions to the "no-duty" to trespassers rule, it had a long-standing record of refusing to adopt new exceptions.[41] Specifically, the court pointed to two instances when the Supreme Court was urged to adopt Restatement (Second) of Torts section 335, but decided against doing so.[42] The Court of Appeals did acknowledge that, in both of those cases, the plaintiffs had failed to establish an essential element of the cause of action, but contrasted the holdings in those cases with the Supreme Court's holdings in two other cases.[43] In those two cases, the Missouri Supreme Court explicitly adopted the elements set forth in the restatement despite the plaintiff's failure to prove an essential element.[44] Accordingly, the appellate court reversed the decision of the trial court, arguing that if the Supreme Court had desired to adopt section 335, it would have already done so.[45]

Following the reversal by the Court of Appeals, the Missouri Supreme Court ordered transfer.[46] The Supreme Court adopted the Restatement (Second) of Torts section 335 and held that a possessor of land who fails to use reasonable care to warn a trespasser can be found liable when (1) the possessor knows or should know of constant trespass on an area of land where (2) there is an artificial condition, created by the possessor, which is likely to cause death or serious bodily harm to the trespassers and (3) the condition is of a nature that the possessor had reason to believe the trespasser would not

---

39. *Id.* at 683-84.

40. Humphrey v. Glenn, No. 25744, 2004 WL 905817, at *4 (Mo. Ct. App. Apr. 28, 2004), *rev'd en banc*, 167 S.W.3d 680 (Mo. 2005) (en banc).

41. *Id.* at *2-3.

42. *Id.* (citing Seward v. Terminal R.R. Ass'n of St. Louis, 854 S.W.2d 426 (Mo. 1993) (en banc) and Blavatt v. Union Elec. Light & Power Co., 71 S.W.2d 736, 738 (1934) (Missouri Supreme Court refusing to adopt section 205 of the Restatement of Torts, Tentative Draft No. 4, which was a predecessor to section 335)).

43. *Humphrey*, 2004 WL 905817, at *2-3. In *Seward*, the plaintiff failed to prove that the defendant had notice of constantly intruding trespassers. *Seward*, 854 S.W.2d at 429-30. In *Blavatt*, the plaintiff did not prove that the trespassers were in the "habit" of entering the premises. *Blavatt*, 71 S.W.2d at 739.

44. *Humphrey*, 2004 WL 905817, at *3 (citing Harris v. Niehaus, 857 S.W.2d 222 (Mo. 1993) (en banc) (adopting RESTATEMENT (SECOND) OF TORTS § 343 30 days after *Seward* decision) and Wells v. Goforth, 443 S.W.2d 155, 158 (Mo. 1969) (en banc) (adopting RESTATEMENT (FIRST) OF TORTS § 342)).

45. *Humphrey*, 2004 WL 905817, at *3-4.

46. Humphrey v. Glenn, 167 S.W.3d 680, 681 (Mo. 2005) (en banc). The court ordered transfer pursuant to MO. CONST. art. V, § 10. *Id.*

discover the artificial condition.[47] Although the Supreme Court adopted section 335, the court reversed the trial court decision and remanded the case for a new trial because the trial court erred in giving jury instructions that required the jury to find only that there was "frequent" rather than "constant" trespass on the south entrance of the farm.[48]

III. LEGAL BACKGROUND

A. The Traditional "No Duty" Rule For Trespassers

Missouri courts continue to divide premise liability cases into three broad categories in order to determine the duty of care owed to a plaintiff by the possessor of the land.[49] The three categories are trespassers, licensees, and invitees.[50] A trespasser is one who enters another's property without a privilege or without the consent of the possessor.[51] The general rule is that a possessor of land is not liable for harm to trespassers caused by his failure to put land in a safe condition or to conduct activities in a manner so as not to endanger trespassers.[52] While this rule may seem punitive to trespassers, it is based on the inability of possessors to foresee the presence of a trespasser rather than on the wrongful nature of trespassing.[53]

Despite the reluctance of Missouri courts to abandon the three categories of those who enter the premises of another, a number of exceptions to the general "no-liability" rule for trespassers have been recognized.[54] In *Wolfson v. Chelist*, the Missouri Supreme Court said that it did not consider the cate-

---

47. *Id.* at 684-85.

48. *Id.* at 688.

49. Seward v. Terminal R.R. Ass'n of St. Louis, 854 S.W.2d 426, 428 (Mo. 1993) (en banc); McVicar v. W.R. Arthur & Co., 312 S.W.2d 805, 811-12 (Mo. 1958); Cunningham v. Hayes, 463 S.W.2d 555, 558 (Mo. Ct. App. 1971). *See, e.g.*, Carter v. Kinney, 896 S.W.2d 926, 930 (Mo. 1995) (en banc); Wolfson v. Chelist, 284 S.W.2d 447, 451-52 (Mo. 1955). Between 1968 and 1995, twenty states abolished the categories. *Carter*, 896 S.W.2d at 929-30. The Missouri Supreme Court expressed its skepticism of the trend to abolish the categories, based on the experience of states that have made the change. *Id.* at 930.

50. *Seward*, 854 S.W.2d at 428; *McVicar*, 312 S.W.2d at 812; *Cunningham*, 463 S.W.2d at 558.

51. *McVicar*, 312 S.W.2d at 812. A "licensee" is one who enters with the permission of the possessor for his own purpose, while an "invitee" is one who enters with the permission of the possessor for the possessor's own purpose. *Id.*

52. *Id.*; Mothershead v. Greenbriar Country Club, Inc., 994 S.W.2d 80, 86 (Mo. Ct. App. 1999); Humphrey v. Glenn, 167 S.W.3d 680, 683 (Mo. 2005) (en banc).

53. *Mothershead*, 994 S.W.2d at 86. "[S]ince [the trespasser's] presence is not to be anticipated, the property owner owes him no duty to take precautions for his safety." *McVicar*, 312 S.W.2d at 812.

54. *Humphrey*, 167 S.W.3d at 683; *McVicar*, 312 S.W.2d at 811-12.

gories "so inflexible as to preclude recovery where the facts merit an exception."[55] When specifically addressing the general rule regarding liability to trespassers, the court has stated that a trend of increased concern for human safety has led to the adoption of exceptions.[56] In *McVicar v. W.R. Arthur & Co.*, the court used broad language to indicate that exceptions are appropriate in "circumstances where human justice calls for an exception."[57] Thirty-five years later, however, the Supreme Court rejected the idea that exceptions were appropriate in all situations where "justice" required.[58] The court reasoned that such an exception would "devour" the general rule and lead to arbitrary application.[59] Accordingly, the court stated that the general rule would always apply unless the trespasser could demonstrate that the facts of her case fell within an exception that has been clearly defined by the courts.[60]

Missouri courts have recognized an exception to this general rule when a trespasser's current presence is actually discovered by the possessor of land.[61] In those instances, courts have found that possessors owe a duty of reasonable care.[62] Another exception which has been generally recognized is liability under intentional tort law for activities or conditions intended to cause injury to trespassers, like purposefully-set "booby traps."[63] Additionally, Missouri Courts have held that possessors of land owe a duty to all, including trespassers, to use care in handling extremely dangerous items, such as explosives.[64] Another exception to the general rule involves artificial conditions which are dangerous to trespassing children.[65] Finally, Missouri rec-

55. 284 S.W.2d 447, 451 (Mo. 1955). "[W]e say again that the status of the injured party does not necessarily control under all circumstances." *Id.*

56. *McVicar*, 312 S.W.2d at 812.

57. *Id.*

58. Seward v. Terminal R.R. Ass'n of St. Louis, 854 S.W.2d 426, 428 (Mo. 1993) (en banc). "Notwithstanding such freewheeling language, this Court has never adopted a 'justice of the case' exception to the normal rule involving trespasser liability." *Id.*

59. *Id.*

60. *Id.* (citing *McVicar*, 312 S.W.2d at 812).

61. *Id.* at 428-29 (citing RESTATEMENT (SECOND) OF TORTS §§ 336 & 337 (1965)). Section 336 provides liability when a trespasser is injured by a possessor's dangerous activities and the possessor "knows or has reason to know" of the trespasser's presence. RESTATEMENT (SECOND) OF TORTS § 336. Section 337 provides liability for injuries caused by a dangerous condition when the possessor "knows or has reason to know" of the trespasser's presence and the trespasser will not discover the danger. *Id.* § 337.

62. *Seward*, 854 S.W.2d at 428-29.

63. Wyatt v. Kansas City Terminal Ry. Co., 74 S.W.2d 51, 57 (Mo. Ct. App. 1934).

64. *See, e.g.*, Paisley v. Liebowits, 347 S.W.2d 178, 182-83 (Mo. 1961) (en banc); Boyer v. Guidicy Marble, Terrazzo & Title Co., 246 S.W.2d 742, 745 (Mo. 1952).

65. *See, e.g.*, Salanski v. Enright, 452 S.W.2d 143, 144 (Mo. 1970).

ognizes the "attractive nuisance" doctrine, which provides for liability when a child is injured after being enticed to trespass by a condition or object which attracted the child.[66] An examination of these exceptions reveals that Missouri courts have never required a duty of care to trespassers regarding a "condition" present on the premises on which they are intruding.[67]

B. Restatement Section 335 in Missouri

While no Missouri courts have held that landowners may be liable to adult trespassers for a condition on the land, courts have discussed Restatement section 335 on a number of occasions.[68] In *Smith v. Southwest Missouri Railroad Company*,[69] the Missouri Supreme Court cited the tentative draft of the Restatement of Torts and asserted that possessors of land may be liable "for artificial conditions highly dangerous to constant trespassers upon a limited area."[70] This statement was dicta, however, because the court found the plaintiff to be a licensee rather than a trespasser.[71] Since that statement in *Smith*, and prior to *Humphrey*, the Missouri Supreme Court had never adopted such a theory of liability.[72]

In 1993, the Supreme Court discussed Restatement section 335 in *Seward v. Terminal Railroad Association*.[73] In *Seward*, a man injured from a fall was awarded $1.1 million in damages from the trial court.[74] The Supreme Court reversed the verdict and held that the railroad company did not owe the plaintiff a duty of care.[75] The court noted that Restatement section 335 had never been "adopted or rejected" by the courts of the state.[76] The Supreme Court again declined to adopt or reject the section in *Seward* and instead, determined that, even if section 335 were adopted in Missouri, the evidence

66. *See, e.g.*, *Boyer*, 246 S.W.2d at 745; Hull v. Gillioz, 130 S.W.2d 623, 627 (Mo. 1939) (citing RESTATEMENT OF TORTS § 339 (1934)).

67. *Seward*, 854 S.W.2d at 429.

68. *Id. See, e.g.*, Politte v. Union Elec. Co., 899 S.W.2d 590, 593 (Mo. Ct. App. 1995); Mothershead v. Greenbriar Country Club, Inc., 994 S.W.2d 80, 87-88 (Mo. Ct. App. 1999).

69. 62 S.W.2d 761 (Mo. 1933).

70. *Id.* at 763.

71. *Id.* (citing RESTATEMENT OF TORTS § 205 (Tentative Draft No. 4)). "There was substantial evidence supporting this view and tending to show that plaintiff was at least defendant railroad company's gratuitous licensee." *Id.*

72. *See Seward*, 854 S.W.2d at 429.

73. *Id.* at 429-30.

74. *Id.* at 427.

75. *Id.* at 430. "[The plaintiff] has failed to show that he falls within any one of the exceptions to the general rule that the defendant owes no duty to trespassers for a dangerous condition on its land." *Id.*

76. *Id.* at 429.

presented in the case was insufficient to meet all the essential elements.[77] Specifically, the court held that there was insufficient evidence showing that the defendant "knew or should have known of constant trespassing" on the area of the bridge at issue.[78] To support its decision, the court pointed to the fact that there had been only one reported injury incident in the seven months prior to the plaintiff's injury.[79] Because this event was isolated, the court determined that the evidence did not establish "constant trespassing."[80] In addition, the court said that the defendant's knowledge of other past trespassers in various places on the bridge was not determinative because the duty under section 335 arises only if there was knowledge of intrusion upon "some *particular place*" within the land.[81]

Missouri's appellate courts have also discussed section 335, but have not adopted it.[82] In 1995, the Eastern District Court of Appeals indicated that *Seward*'s discussion of section 335 did not amount to a rejection of the traditional "no-duty" rule regarding trespassers.[83] The court exercised "caution," however, and based its holding on the fact that the "constant intrusion" element of section 335 would not be satisfied even if the court were to adopt the section.[84] In addition, the court found that section 335 did not apply because the danger which caused the plaintiff's injury could have been easily discovered by the trespassers.[85]

The Western District Court of Appeals also discussed section 335 in *Cochran v. Burger King Corporation*.[86] In that case, the court held that Burger King did not owe a duty of care to a trespasser.[87] The court stated that section 335's exception did not apply because Burger King had no notice of "frequent" trespassing in the area where the plaintiff was injured.[88] If the

77. *Id.*

78. *Id.*

79. *Id.* After drinking wine, someone decided to rest on the edge of a ledge on the bridge. *Id.* The injured person suffered a broken pelvis. *Id.*

80. *Id.* (citing Lindquist v. Albertsons, Inc., 748 P.2d 414 (Idaho Ct. App. 1987)).

81. *Id.* The defendant knew of trespassers on a rail deck in a separate location on the bridge. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 334 cmt. d (1965)).

82. *See, e.g.*, Cunningham v. Hayes, 463 S.W.2d 555, 559 (Mo. Ct. App. 1971).

83. Politte v. Union Elec. Co., 899 S.W.2d 590, 592 (Mo. Ct. App. 1995).

84. *Id.* at 592-93. The only evidence of prior trespassing involved intrusions that occurred four years before the plaintiff's injury in a separate area from the location at issue. *Id.* at 593.

85. *Id.* The plaintiff was electrocuted by high voltage electrical wires. *Id.* at 591. The court said, "It is common knowledge that electricity is dangerous and can cause serious injury or death." *Id.* at 593.

86. Cochran v. Burger King Corp., 937 S.W.2d 358, 364-65 (Mo. Ct. App. 1996).

87. *Id.* at 365.

88. *Id.* at 364.

plaintiff in *Seward* did not know of "constant trespassing on a limited area," the court reasoned, the defendant in the present case similarly had insufficient notice and owed no duty to the plaintiff.[89]

In 1999, the Eastern District was again faced with a claim of negligence under section 335.[90] In *Mothershead v. Greenbriar Country Club*, the court asserted that section 335 had been considered on several occasions, but the plaintiffs in each case had failed to establish all the elements required under the section.[91] As in previous cases, the court in *Mothershead* determined that at least one element had not been established.[92] Most obviously, the court said, the artificial condition which caused the injury would not give the defendant reason to believe trespassers would not discover it.[93]

Finally, the Missouri Court of Appeals discussed section 335 in *Hogate v. American Golf Corporation*.[94] In *Hogate*, a trespasser was injured when he rode his bike on the fairway of a golf course and ran into a yellow rope protecting newly sodded grass.[95] While the defendant did have knowledge that bicyclists periodically rode on a hill adjacent to the golf course, there was no evidence that bicycles were ever ridden on the premises of the course.[96] The majority stated that it was "questionable" whether section 335 had been adopted as law in Missouri.[97] Nonetheless, the majority analyzed the plaintiff's claim under section 335 and found that the evidence did not show the defendant "knew or should have known" of constant trespassing.[98] Accordingly, the majority determined that no duty of care was owed to the trespasser.[99] Judge Russell wrote a dissenting opinion in which she argued that a reasonable jury could have found that a duty of care was owed to the plaintiff.[100] Judge Russell also acknowledged that it was "unclear" whether section 335 had been adopted.[101] However, she argued that sufficient evidence did exist to establish the defendant's prior knowledge of "constant" trespassers.[102]

---

89. *Id.* at 365 (citing Seward v. Terminal R.R. Ass'n of St. Louis, 854 S.W.2d 426, 429 (Mo. 1993) (en banc)).

90. Mothershead v. Greenbriar Country Club, Inc., 994 S.W.2d 80, 87 (Mo. Ct. App. 1999).

91. *Id.*

92. *Id.*

93. *Id.* The injury occurred when an individual riding a sled collided with a tree planted at the bottom of a large hill. *Id.* at 83.

94. 97 S.W.3d 44 (Mo. Ct. App. 2002).

95. *Id.* at 46.

96. *Id.* at 49.

97. *Id.*

98. *Id.*

99. *Id.* at 50.

100. *Id.* at 52 (Russell, J., dissenting). Judge Russell now sits on the Missouri Supreme Court.

101. *Id.*

102. *Id.* at 53.

While Judge Russell did not participate in the *Humphrey* decision once on the Supreme Court, her dissent signaled the potential for the adoption of a new exception to the general rule that no duty is owed to trespassers in premise-liability cases.

C. "Constant" Trespass

Section 335 requires that trespassers "constantly intrude upon a limited area of the land."[103] However, courts have failed to consistently explain what constitutes "constant" trespassing. For example, a Missouri appellate court recently held that "random entries" of an unknown number of trespassers into a specific area are not enough to satisfy the "constant trespassing" prong of section 335.[104] Missouri courts have also described the "constant trespass" requirement as being met if there is "frequent" intrusion.[105]

Missouri courts are not alone in their inconsistent application of section 335. In a case where an individual was injured after diving into a lake with a number of hazardous rocks below the surface of the water, Judge Richard Posner found that the "constant trespass" requirement in section 335 was satisfied by the government's knowledge of five diving accidents in the previous nine years.[106] Minnesota courts apply the "constant trespass" requirement through civil jury instructions, which ask jurors to determine whether a possessor of land knows that trespassers "*regularly* use certain portions" of the land.[107]

Additionally, courts often treat the word "frequent" as being synonymous with "constant" when analyzing tort claims under section 334 of the

---

103. RESTATEMENT (SECOND) OF TORTS § 335 (1965).

104. City of Kansas City v. N.Y.-Kan. Bldg. Assocs, L.P., 96 S.W.3d 846, 860-61 (Mo. Ct. App. 2002).

105. *See, e.g.*, Cochran v. Burger King Corp., 937 S.W.2d 358, 364 (Mo. Ct. App. 1996) (explaining that the requirement was not satisfied because defendant lacked notice of "*frequent* nocturnal visitors") (emphasis added); Politte v. Union Elec. Co., 899 S.W.2d 590, 592 (Mo. Ct. App. 1995) (describing the issue as "whether the defendant had knowledge of *frequent* trespassing on the property") (emphasis added); McVicar v. W.R. Arthur & Co., 312 S.W.2d 805, 812 (Mo. 1958) (explaining a possible duty of care when a possessor knows trespassers *frequently* intrude).

106. Davis v. U.S., 716 F.2d 418, 422-23, 426 (7th Cir. 1983) (basing decision on Illinois tort law).

107. *See, e.g.*, Noland v. Soo Line R.R. Co., 474 N.W.2d 4, 6 (Minn. Ct. App. 1991) (emphasis added); 4A MINN. PRAC. CIVJIG 85.13 (4th ed. 1999). A possessor has a duty to warn trespassers of an artificial condition if:

> 1) The possessor knows, or should know from facts already known, that *trespassers regularly go on specific parts of the property* where the injury happened, and 2) The possessor created or kept an artificial condition that the possessor knows is likely to cause death or serious injury, and 3) The possessor has reason to believe the trespasser will not discover the danger.

4A MINN. PRAC. CIVJIG 85.13 (emphasis added).

Restatement.[108] Section 334 is identical to section 335, except that section 334 addresses liability for injuries resulting from dangerous activities on land, rather than dangerous conditions.[109] Unlike section 335, however, the comments to section 334 explain that "constant trespass" is the equivalent of "persistent trespass."[110] Despite its language requiring "constant" trespass, section 334 is referred to the "frequent trespasser exception" in many jurisdictions.[111] A possessor's knowledge of a "pattern" of trespassing has been held to satisfy the requirement of section 334.[112] This "pattern" element can be shown, for example, when a plaintiff trespassed over an area of land twice a day for two years.[113]

IV. THE INSTANT DECISION

In *Humphrey v. Glenn*, the Missouri Supreme Court adopted section 335 of the Restatement (Second) of Torts.[114] In doing so, the court created a new exception to the traditional rule that a possessor of land is not liable for harm caused to a trespasser when the possessor fails to put the land in a reasonably safe condition.[115]

The court started by explaining that Eric Humphrey was admittedly trespassing when he drove his ATV onto Greenfield.[116] The court then acknowledged that, generally, possessors of land owe no duty of care to tres-

---

108. *See* PROSSER AND KEETON ON TORTS 395-96 (W. Page Keeton ed., 5th ed. 1984) (referring to the exception as the "frequent trespasser" doctrine). Restatement section 334 provides:

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers *constantly* intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.

RESTATEMENT (SECOND) OF TORTS § 334 (1965) (emphasis added).

109. RESTATEMENT (SECOND) OF TORTS § 334.

110. *Id.* § 334 cmt. a. "The rule . . . applies to determine the existence of liability . . . caused to *persistent* trespassers upon land . . . ." *Id.* (emphasis added).

111. Boyd v. Conrail, 677 A.2d 1182, 1187 (N.J. Super. Ct. App. Div. 1996) (citing Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 131 (R.I. 1975)). The provision is also known as the "beaten path exception." *Id.* at 1187; Miller v. Gen. Motors Corp., 565 N.E.2d 687, 691 (Ill. App. Ct. 1990) (citing S. Ry. Co. v. Campbell, 309 F.2d 569 (5th Cir. 1962)).

112. Imre v. Riegel Paper Corp., 132 A.2d 505, 510-11 (N.J. 1957).

113. *Boyd*, 677 A.2d at 1184.

114. 167 S.W.3d 680, 684 (Mo. 2005) (en banc).

115. *Id.* at 684-85. For the general rule, see Carter v. Kinney, 896 S.W.2d 926, 928 (Mo. 1995) (en banc); Seward v. Terminal R.R. Ass'n of St. Louis, 854 S.W.2d 426, 428 (Mo. 1993) (en banc); Kelly v. Benas, 116 S.W. 557, 559 (Mo. 1909).

116. *Humphrey*, 167 S.W.3d at 683.

passers.[117] The reason for the traditional rule against liability, according to the court, is not the "wrongful nature" of trespassing, but is instead based on the inability of the possessor of land to foresee the presence of the trespasser and take precautions to prevent injury.[118] This rationale, the court said, has allowed Missouri courts to adopt exceptions in situations where "harm to trespassers should reasonably be anticipated by the landowner."[119]

The court then provided examples of cases in which various exceptions to the general rule had been adopted.[120] The exceptions mentioned by the court were the theories of liability set out in the Restatement (Second) of Torts sections 336, 337, 339, and 369.[121] After then acknowledging that it had previously been asked to adopt section 335, the court maintained that, while it had rejected these requests, it had never entirely rejected section 335.[122] Instead, the court argued, section 335 had not been adopted because the plaintiffs in the prior cases had failed to prove that there was "constant trespassing" in the area where the dangerous condition existed.[123] The court also explained that the courts of appeals' reluctance to adopt section 335 was because plaintiffs in such cases had failed to make out an essential element of the Restatement section.[124]

Next, the court found that the rationale behind its adoption of other exceptions to the general "no-duty" rule regarding trespassers applied to the "limited exception" set forth in section 335.[125] That section, the court said, depended on a showing that the possessor "should reasonably have anticipated that harm to trespassers was likely to result."[126] Accordingly, the court decided that *Humphrey* was an appropriate case in which to adopt the stan-

---

117. *Id.*

118. *Id.* at 684 (citing *Seward*, 854 S.W.2d at 428).

119. *Id.*

120. *Id.* at 683.

121. *Id. See* RESTATEMENT (SECOND) OF TORTS §§ 336, 337 (1965) (mandating a duty of reasonable care is where a trespasser's presence becomes known); Salanski v. Enright, 452 S.W.2d 143, 144-46 (adopting RESTATEMENT (SECOND) OF TORTS § 339, which provides for liability when a possessor of land maintains a dangerous artificial condition); Winegardner v. City of St. Louis, 346 S.W.2d 219 (Mo. 1961) (reaffirming the adoption of RESTATEMENT (SECOND) OF TORTS § 369, which provides for liability when a landowner creates an artificial condition so close to the highway that it involves an unreasonable risk to children).

122. *Humphrey*, 167 S.W.3d at 683 (citing *Seward*, 854 S.W.2d at 429-30).

123. *Id.* (citing *Seward*, 854 S.W.2d at 429-30).

124. *Id. See, e.g.*, Hogate v. Am. Golf Corp., 97 S.W.3d 44, 48-49 (Mo. Ct. App. 2002); City of Kansas City v. N.Y.- Kan. Bldg. Assocs., L.P., 96 S.W.3d 846, 861 (Mo. Ct. App. 2002); Mothershead v. Greenbriar Country Club, Inc., 994 S.W.2d 80, 87-88 (Mo. Ct. App. 1999); Cochran v. Burger King Corp., 937 S.W.2d 358, 365 (Mo. Ct. App. 1996); Politte v. Union Elec. Co., 899 S.W.2d 590, 593 (Mo. Ct. App. 1995).

125. *Humphrey*, 167 S.W.3d at 684-85.

126. *Id.* at 684.

dard of care outlined in Restatement (Second) of Torts section 335.[127] Finally, the court supported its decision to adopt the new exception by pointing out that a majority of other states have adopted section 335 when faced with the same question.[128]

After adopting section 335, the court found that Humphrey had made out a sufficient case for the jury to determine liability.[129] First, the court stated the requirement that it view the facts in the light most favorable to the trial court verdict.[130] In determining that the trespass was "constant," as required to make a submissible case to a jury, the court referenced the Glenns' testimony that they had "constant problems" with trespassers in the area around the south entrance cable.[131] The court also explained that the Glenns' decision to place some warning on the cable was evidence that the Glenns knew that trespassing was a problem in the area around the cable.[132]

The court then determined that the defendants knew that it would be difficult to see the cable near the south entrance.[133] In reaching that conclusion, the court referenced the Glenns' own testimony that, without a warning sign placed on the cable, the cable would be "hard to see."[134] Finally, the court found that there was sufficient evidence for a jury to determine that the cable presented a dangerous condition for trespassers.[135] To support this conclusion, the court cited Charles Glenn's testimony that they had placed the signs on the cable to keep people from running into the cable and hurting themselves or their vehicle.[136] The court also pointed to Charles Glenn's testimony to show that he knew the cable was a "dangerous condition" without a warn-

---

127. *Id.*

128. *Id.* at 685. The Court cited cases from Connecticut, Idaho, Minnesota, Pennsylvania, Texas, West Virginia, New Hampshire, and Michigan. *Id.* at 685 n.3.

129. *Id.* at 686. "[T]he evidence was sufficient to make a submissible case that the Glenns knew or should have known that trespassers constantly intruded on the south entrance, that trespassers would not discover the cable and that they had not taken reasonable care to warn trespassers of the danger." *Id.*

130. *Id.* (citing State v. Strong, 142 S.W.3d 702, 710 (Mo. 2004) (en banc)).

131. *Id.*

132. *Id.* at 687.

133. *Id.* at 686. For liability under Section 335, the plaintiff must show the possessors knew the dangerous condition was "of such a nature and location that Plaintiffs would not discover it." RESTATEMENT (SECOND) OF TORTS § 335 (1965).

134. *Humphrey*, 167 S.W.3d at 687. Dale Glenn was asked: "Would you agree that without any warnings on the cable it would be difficult or even impossible to see at times?" *Id.* He answered: "It would be hard to see." *Id.*

135. *Id.* at 688. Plaintiffs, under Section 335, must show that the defendants knew the condition was "likely to cause death or serious bodily harm to . . . trespassers." RESTATEMENT (SECOND) TORTS § 335.

136. *Humphrey*, 167 S.W.3d at 687. Charles Glenn testified: "We don't want people to run in it and damage their vehicle or themselves." *Id.*

ing on it.[137] The court ultimately determined that there were sufficient facts to find that the Glenns had "failed to exercise reasonable care" in warning trespassers of the presence of the cable.[138]

Despite the submissibility of the plaintiff's case, the court remanded the case for a new trial in order to determine the element of "constant" trespass.[139] The court remanded because the explicit language of section 335 requires a finding of "constant," rather than "frequent," trespass on the land in question.[140] The new trial was to be limited, however, to this single element.[141]

V. COMMENT

The Missouri Supreme Court's holding in *Humphrey v. Glenn* resolved the question of whether section 335 of the Restatement (Second) of Torts is recognized law in Missouri. When a possessor of land knows or should know that a specific area of land is "constantly" intruded upon, the possessor has a duty to warn trespassers of dangerous artificial conditions.[142] It is evident that the duty is a limited one, however, based on the court's decision to remand the case for a new trial.[143] The decision to remand signaled that "frequent" intrusion on a specific area of land is not enough to trigger a duty of care by the possessor. Accordingly, the new exception helps prevent serious injuries without imposing significant unreasonable burdens on possessors of land.

The court's decision to adopt the new exception to the traditional "no-duty" rule for trespassers is consistent with the underlying rationale behind the general rule itself. The general rule's purpose of preventing liability to unforeseeable visitors on land is not compromised because section 335 requires "constant" intrusion. The court's signal that "frequent" intrusion is not synonymous with "constant" intrusion serves as a further guarantee that the new duty will only arise when trespassers are easily foreseeable. As a result, the Missouri Supreme Court came to the correct decision when it specifically adopted section 335 as another "clearly defined exception" to the general "no-duty" rule.

---

137. *Id.* Glenn was asked: "You knew this wire cable was across the road and was a dangerous condition without any warnings on it; is that right?" *Id.* He answered: "Yes." *Id.*

138. *Id.* at 688. "The trial court did not err in allowing the case to be submitted under the theory set out in section 335." *Id.*

139. *Id.*

140. *Id.* The jury instruction incorrectly required a finding of only "frequent" trespassing. *Id.* at. 682-83.

141. *Id.* at 688. "Accordingly, the case must be remanded for a new trial at which the element of 'constant' trespass will be properly submitted." *Id.*

142. *Id.* at 684 (citing RESTATEMENT (SECOND) OF TORTS § 335 (1965)).

143. *Id.* at 688.

Clearly, the court recognized the significance of the term "constant intrusion" as a requirement of liability and it chose not to weaken that requirement as other courts have previously done by finding that "constant" and "frequent" are identical. "Constant" is defined as "marked by continual recurring or by regular occurrence."[144] The word "continual" is defined as "proceeding without stopping, interruption, or intermission."[145] Broken down, the word "constant" signals a "recurrence without stopping or interruption." "Frequent" is defined as "happening or found at short intervals: often repeated or occurring."[146] Certainly, "often occurring" is not the same as "occurring without interruption." Accordingly, the court probably placed an important limit on the duty to warn in section 335 which guarantees the definite foreseeability of a trespasser prior to any duty arising. However, the court could have more explicitly recognized the distinction between the words "frequent" and "constant" prior to remanding the case.

Instead, the court sent mixed signals. Had the court not at least implicitly recognized the distinction, the case would not have been remanded. On the other hand, the court did find "sufficient" evidence of "constant" intrusion, largely due to the Glenns' admission that the intrusion amounted to a "constant" problem.[147] However, a "constant problem" does not necessarily indicate "constant trespassing," but instead merely suggests the plaintiffs were constantly aware that trespassing occurred from time to time on the property. Despite the mixed signal sent by the court and the lack of an explanation regarding the difference between "frequent" and "constant" trespassing, the court limited the application of its newly-adopted exception, which eases the burden on possessors of land.

It could be argued that section 335 rewards trespassers for their own bad acts while infringing upon the rights of property owners in Missouri. Based upon the narrow and limiting nature of section 335, however, any burden placed on property rights is minimal. Such burden can be countered by taking actions to prevent "constant" trespassing in a safe manner or by warning those trespassers of known dangers.

It could also be argued that, even if a duty did exist in this particular case, the duty was not breached because the Glenns took reasonable precautions. First, an argument could be made that cables or gates should themselves be "reasonable" warnings of danger. Second, it could be argued that the purple paint was enough to satisfy the basic duty of care owed to the trespassers. Finally, the Glenns could have argued that they did not breach their

144. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 485 (2002).

145. *Id.* at 493.

146. *Id.* at 909.

147. *Humphrey*, 167 S.W.3d at 686.

duty of care simply because they failed to replace warning signs which were removed by trespassers during the busiest time of the farming season.[148]

All of these arguments, however, ultimately deal with questions which must be resolved by the jury and not by the appellate courts. While this case may provide one example of a result that is not entirely desirable, it does not provide significant evidence that the adoption of Restatement 335 is unreasonable or leads to bad policy. Because the new exception to the general rule is evidently a very limited one, the court did not significantly burden property owners. Accordingly, the court arrived at a decision that will ultimately lead to fewer serious injuries. While the distinction between "constant" and "frequent" intrusion is not fully explained, it obviously exists and is likely to be developed in future cases.

VI. CONCLUSION

With the *Humphrey* decision, the Missouri Supreme Court added another exception to the general rule that trespassers are owed no duty of care by possessors of land. Provided that the court's decision to remand the case for a new trial indicates that "constant" and "frequent" trespassing are not synonymous, any increased burden to warn on possessors of land is probably very small. However, the court did not thoroughly discuss the meaning of "constant" trespass or its reason for remanding the case over the improper substitution of one word. Therefore, while the decision does increase the burden on property rights, the extent of that burden is not entirely clear and is likely to be determined in the future.

ROSS MCFERRON

148. In fact, the Glenns almost certainly took more precautions to prevent injury than most farmers would have done under the same or similar circumstances by using the purple paint and hanging new objects from the cable on a number of occasions.