

CITY PARK TOWER OF POWER ROCKS TRESPASSING TEEN'S TOP FORTY CLIMB

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Based upon personal knowledge of the jury verdict in the *Huffman* case described herein, several individuals attending my 1991 November liability workshop on behalf of the West Virginia state recreation and park society seemed rather skeptical of my assertion that landowners generally owe a very limited legal duty of care to adult trespassers. Specifically, landowners generally owe no affirmative duty of care to such individuals. On the contrary, landowners must simply avoid setting "mantraps" or similar negative behavior reasonably calculated to injure trespassers, usually referred to as willful/wanton misconduct. Within this context, a condition on the premises, although extremely dangerous, will not be considered a mantrap if it occurs within the normal course of the landowner's business.

Applying these principles to the facts in *Huffman* as recounted to me at the workshop, I opined that a judgement for plaintiff was inconsistent with existing case law despite media reports of a jury verdict in excess of a million dollars. As illustrated in the following paragraphs, the West Virginia state supreme court obviously reached a similar conclusion when provided with an opportunity to review this judgment awarding significant damages to an adult trespasser. Unless reported in this column or the *Recreation and Parks Law Reporter*, appellate decisions, like *Huffman*, which reverse such erroneous determinations by trial courts unfortunately tend to get buried in law libraries and rarely achieve the type of media hype which oftentimes attend large dollar amount jury verdicts. As a result, the perception of liability through the popular media continues to be much worse than the reality described in reported case law.

Stairway to Heaven

In the case of *Huffman v. Appalachian Power Company*, 415 S.E.2d 145 (W.Va. 1991), plaintiff Paul Huffman, age 18, was injured when he received an electrical shock while climbing a high-voltage transmission tower owned by defendant Appalachian Power Company (APCO) and located in a public park in Kanawha County, West Virginia. The facts of the case were as follows:

In the early afternoon of November 8, 1984, Huffman left school and went to the home of his cousin, Harry Wallot, where the two youths may have drunk several beers. Huffman and Wallot then rode Huffman's motorcycle around the Spring Hill area of South Charleston until they arrived at Little Creek Park, a public park located within the city limits. Huffman drove through the park to the end of a dirt road, where he parked the motorcycle and walked with Wallot along a hiking trail towards Devil's Tea Table.

APCO's transmission tower No. 279 was located alongside the hiking trail approximately 150 yards from the dirt road. A soap box derby track, a picnic pavilion, picnic tables, and a playground are located nearby. Built in 1923, tower No. 279 is made of steel, is approximately forty feet high, and is located within APCO's right-of-way. Climbing pegs are located on one leg of the tower, the lowest peg being four feet nine inches from the ground, the next lowest, four feet higher. At the time of the accident, the three electrical lines on the tower carried 46,000 volts of electricity. Signs reading "Danger, High Voltage, Keep Off" were posted on the tower

approximately twelve to fifteen feet from the ground.

After sitting at the base of the tower for a while, Huffman and Wallot began to climb the tower to get a better view of the area. Huffman had apparently reached the highest cross-piece on the tower when he received an electrical shock. Huffman fell to a lower brace, and Wallot ran for help. Huffman subsequently fell to the ground, where Wallot found him when he returned. Huffman suffered severe and permanent injuries as a result.

Huffman alleged that "APCO had violated industry safety standards and failed to use reasonable care in the maintenance of tower No. 279, thereby proximately causing Huffman's injuries." APCO responded that "Huffman's injuries were the proximate result of his own conduct."

Huffman had also filed suit against the City of South Charleston and its Board of Park and Recreation Commissioners, but these claims were dismissed from the litigation upon directed verdicts at the close of Huffman's evidence at trial.

The jury then returned a verdict for Huffman in the amount of \$ 1.5 million. This amount, however, was subsequently reduced by the trial court to reflect the jury's finding that APCO was 78 percent at fault and Huffman was 22 percent at fault in causing the injuries. Accordingly, the trial court entered judgment for Huffman. APCO appealed.

On appeal, APCO argued that "it breached no duty it owed to Huffman which would support" the judgment of the trial court. Specifically, APCO maintained that "because Huffman was a trespasser on its property, the only duty it owed to him was to refrain from willfully or wantonly injuring him."

According to the state supreme court, the following "common law distinctions between trespassers and other entrants on property" would determine premises liability in this particular instance.

We have consistently recognized and applied the distinctions for liability purposes among trespassers [i.e., unauthorized], licensees [i.e., merely tolerated] and invitees [i.e., authorized]. Some jurisdictions have abolished these distinctions; most, however, retain the distinction between trespassers and other entrants onto property.

A trespasser is one who goes upon the property or premises of another without invitation, express or implied, and does so out of curiosity, or for his own purpose or convenience, and not in the performance of any duty to the owner. The owner or possessor of property does not owe trespassers a duty of ordinary care: With regard to a trespasser, a possessor of property only need refrain from wilful or wanton injury. Thus, under ordinary circumstances, the possessor of property is not liable to trespassers for injuries caused by his failure to use reasonable care to maintain the property in a reasonably safe condition or to carry on his activities so as not to endanger them.

Applying these principles to the facts of the case, the state supreme court concluded that "Huffman was, in fact, a trespasser upon APCO's tower.

His intrusion onto tower No. 279 was not a mere technical trespass. He intentionally

climbed the tower, which he knew to be the property of another, without invitation, for his own purposes or convenience. Other jurisdictions have identified such actions as constituting a trespass against the power company for purposes of premises liability. While Huffman's contact with the electricity may have been inadvertent, his proximity to the source of the electricity was due solely to the fact that he was trespassing on APCO's property. He had to climb almost to the top of the forty-foot tower to come in contact with the electricity. He was certainly not encouraged by the action or inaction of the power company to believe he had a right to be there. Several jurisdictions have held that the mere presence of the tower or of climbing pegs does not constitute an invitation for this purpose.

The state supreme court further rejected Huffman's suggestion that "he was not a trespasser because the tower was located in a public park."

Generally speaking, one is not a trespasser while he is in a place to which the public generally is invited. However, an invitee or licensee who exceeds the scope of his invitation or license may become a trespasser. Regardless of his status in the park, when Huffman left the ground and began climbing the tower, he exceeded the scope of any invitation or license he may have had to be upon the park grounds and became a trespasser as to APCO.

Huffman, however, contended on appeal that "because APCO controls a dangerous instrumentality, it owed him a high degree of care." The state supreme court, therefore, considered whether "our dangerous instrumentality rule for those who operate high voltage electricity lines subsumes our traditional rule as to the duty owed to a trespasser." The state supreme court defined the "dangerous instrumentality rule as to electricity" as follows:

Those who operate and maintain wires charged with dangerous voltage of electricity are required to exercise a degree of care commensurate with the dangers to be reasonably apprehended therefrom; but they are not insurers against all injury therefrom. There appears to be general agreement that under certain conditions, the possessor of property which contains a dangerous condition or instrumentality may be liable if he is aware or reasonably should be aware that trespassers are constantly intruding upon a limited area thereof which may expose them to the dangerous condition.

According to the state supreme court, this dangerous instrumentality rule "is set out in Section 335 of the Restatement (Second) of Torts (1965)" which provides 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 serious 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.

The state supreme court noted, however, that the dangerous instrumentality rule "is further circumscribed by comments (e) to Section 335, which makes it clear that a reasonable warning of the dangerous condition is all that is necessary."

Comment (e) to Section 335 of the Restatement provides, in material part: "Extent of duty to warn. The duty which the rule stated in this Section imposes upon a possessor of land is not an absolute duty to warn the trespasser of even highly dangerous conditions. It is a duty merely to use reasonable care to give a reasonably adequate warning."

The limited nature of the duty to warn is reinforced by the statement in comment (f) that "the possessor is entitled to assume that trespassers will realize that no preparation has been made for their reception and will, therefore, be on the alert to observe the conditions which exist upon the land." Finally, the entire theory of liability begins with the premise that the possessor of the dangerous facility "knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land."

Moreover, comment (d) to Section 334 emphasizes that liability does not arise unless trespassing in the limited area is constant and persistent: "In order that the possessor of land may be subject to liability under the rule stated in this Section, it is necessary that he know, or from facts within his knowledge should know, that persons constantly and persistently intrude upon some particular place within the land. It is not enough that he know or have reason to know that persons persistently roam at large over his land.

Accordingly, "for a trespasser to establish liability against the possessor of property who has created or maintains a highly dangerous condition or instrumentality upon the property," the state supreme court found that the following conditions must be met:

(1) the possessor must know or, from facts within his knowledge should know, that trespassers constantly intrude in the area where the dangerous condition is located; (2) the possessor must be aware that the condition is likely to cause serious bodily injury or death to such trespassers; (3) the condition must be such that the possessor has reason to believe trespassers will not discover it; and (4), in that event, the possessor must have failed to exercise reasonable care to adequately warn the trespassers of the condition.

Applying these conditions to the facts of the case, the state supreme court found that Huffman's trial evidence of "several other injuries that had occurred when persons climbed other transmission towers," was insufficient to establish APCO's awareness that tower No. 279 was a dangerous instrumentality on the premises.

These trespasses were not in the vicinity of tower No. 279 and would not qualify as "constantly intruding upon a limited area," as it applies to APCO, within the meaning of Section 335. This standard is more restrictive than the rule in ordinary negligence cases. To be admissible at all, similar occurrence evidence must relate to accidents or injuries or defects existing at substantially the same place and under substantially the same

conditions. Evidence of injuries occurring under different circumstances or conditions is not admissible...

Even though the use and transmittal of electricity is dangerous, it is a passive condition on the land, and the courts... have consistently found that a landowner owes only a duty to refrain from wilful and wanton misconduct in these circumstances... [Courts] have routinely held that landowners need not anticipate that an isolated trespasser will climb into an area of electrical danger.

On the other hand, the state supreme court acknowledged that "a less restrictive rule [may be applicable] with regard to maintaining a dangerous condition or instrumentality where trespassing children are known to frequent the area."

[W]here a dangerous instrumentality or condition exists at a place frequented by children who thereby suffer injury, the parties responsible for such dangerous condition may be held liable for such injury if they knew, or should have known, of the dangerous condition and that children frequented the dangerous premises either for pleasure or out of curiosity... [There exists a] rebuttable presumption that a child between the age of seven and fourteen cannot be guilty of contributory negligence. The rationale for the rebuttable presumption for children between the ages of seven and fourteen is that these children usually lack the intelligence, maturity, and judgmental capacity to be held accountable for their actions... [However,] a child age fourteen or older is presumed to be capable of being negligent, and if the child relies on the lack of such capacity, the burden of proving it is on the child.

The state supreme court, however, found that this less restrictive rule for trespassing children should not apply to "trespassing adults such as Huffman." The state supreme court, therefore, concluded that "Huffman cannot recover against APCO" under the circumstances of this case.

Huffman, being eighteen, had achieved adult status. The record reveals that Huffman was of above average intelligence and had completed some military training. He acknowledged that he was aware that there were electrical wires on the top of the tower and that he knew electrical wires could be dangerous. Warning signs which stated "Danger, High Voltage, Keep Off" were affixed to the bottom of the tower. These signs were affixed to the cross bars of the tower approximately twelve to fifteen feet from the ground...

We do not find sufficient evidence that Huffman and others constantly and persistently intruded on tower No. 279 or that APCO was aware of such intrusions. This is the predicate step for a trespasser to establish liability. We do not doubt that the high voltage wires at the top of the tower would constitute a dangerous instrumentality, i.e., a condition which is likely to cause death or serious bodily harm. However, the final component to establish liability is missing. APCO had no reason to believe that a trespasser would not discover the risk. Furthermore, APCO had exercised reasonable care by the posting of warning signs on the tower.

The state supreme court, therefore, reversed the judgment of the trial court in favor of Huffman and directed the trial court to enter judgment in favor of APCO.