

# MISSOURI LAWYERS WEEKLY

## Property Owners Have Claim to Sue for Ground and Water Contamination Despite Statute of Limitations



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Property owners who noticed a strong odor of gasoline and a rainbow sheen on water from their well have actionable continuing trespass and temporary nuisance claims against a gas company even though the lawsuit was filed more than five years after the damage and its cause were capable of ascertainment, a district court held.

The Missouri Court of Appeals for the Eastern District, in an Aug. 2 ruling, reversed and remanded a circuit court grant of summary judgment in favor of the gas company. The circuit court had found the trespass and nuisance claims were barred based on the statute of limitations.

"This decision is important because it recognizes that trespass and nuisances can be ongoing," Morry S. Cole, counsel for the appellant said. "Just because something started more than five years ago doesn't mean it's still not burdensome to the property owners. Losses and damages continue to accrue until abatement."

### Background

DeSoto Fuels, Inc., owned and

operated an Amoco gas station located near property owned by Claude and Mary Jeanne Cook. The Cooks allege a leak developed in an underground storage tank that supplied the station with gasoline resulting in the contamination of their property.

The Cooks reported the strong odor and rainbow sheen of their water to the Department of Natural Resources in 1993. The department found that the water wells located on the Cook property were contaminated with constituents of gasoline and concluded that additional work was needed to determine the source of the pollution. In 1997, the department identified DeSoto's Amoco station as the sole source of the contamination.

In 2000, the Cooks entered into a contract to sell their property, however the prospective buyer's investigation revealed an unacceptable level of contamination. The Cooks hired counsel after the contract was cancelled. Their attorney discovered and reviewed the findings of the Department of Natural Resources. The record does not show whether the Cooks had actual notice of any of the reports when the reports were originally released, the court said.

### Continuing Trespass and Temporary Nuisance

The crux of the case was whether the injury claimed could be classified as a continuing trespass and a temporary nuisance. The statute of limitations is different for continuing trespasses and trespasses as well as temporary and permanent nuisances under Missouri law. According to the court, in the case of successive trespasses as well as nuisance cases the continuing wrong doctrine is applied, the court said.

The court, quoting Cacioppo v. Southwestern Bell Telephone

Co., 550 S.W.2d 919, 925 (Mo. App. 1977) said: "A continuing trespass upon real property creates separate causes of action, which are barred only by the running of the statute against the successive trespasses, and not by the running of the statute from the time of the original trespass. So, also, if a trespass is followed by injury constituting a continuing nuisance, the damages for the original trespass must all be recovered in one action, but successive actions may be brought to recover damages for the continuation of the wrongful conditions, and in these the damages are estimated only to the date of the bringing of each suit, and the statute of limitations does not begin to run from the date of the original trespass."

The court found that granting summary judgment based on the statute of limitations was inappropriate because the action was not time-barred under Missouri law.

### Statute of Limitations

With a continuing trespass the statute "does not begin to run from the date of the original entry, but recovery may be had for a period of time not exceeding the statutory period immediately preceding the institution of action," the court said.

According to the court, the wrong for the purposes of analyzing whether the Cooks have alleged a continuing trespass is not DeSoto's negligence, but the actual physical invasion of the Cooks' property. "The relevant question is whether the Cooks claim that DeSoto's conduct resulted in the 'continuing entry, trespass, and intrusion onto plaintiff's property by the petroleum production from the station without plaintiff's permission,'" the court said.

The court said that because the Cooks adequately alleged the ex-

istence of a continuous, ongoing, intermittent, or repeated flow or migration of contaminants from DeSoto's property onto their party they alleged the type of "fresh injury from day to day" described in *Davis v. Laclede Gas Co.*, 603 S.W.2d 554, 556.

Although the Court of Appeals agreed that a single leak or migration of contaminants would not constitute a continuing wrong, even if the contaminants remained present in the ground, the court could find "nothing in the record that supports its factual assertion about the nature of the leak...therefore the Cooks have adequately presented a continuing trespass claim, which, if proven, would permit them to recover for those damages that accrued within the five-year period preceding this lawsuit."

"The Cooks have alleged that DeSoto continues to unreasonably interfere with their use and enjoyment of their property by 'releasing' chemicals onto it," the court said. They claim that the source of their injury is one or more of DeSoto's leaking USTs and that DeSoto knew or should have known about the releases... Instead of alleging that an underground gasoline storage tank inherently causes injury to nearby property in the course of its usual and lawful operation, the Cooks assert that the leaking USTs that caused the contamination have become injurious because of DeSoto's negligence in operating its gas station... Therefore, the Cooks have adequately presented a temporary nuisance claim... If proven, they are allowed to recover those damages that accrued within the ten-year period preceding this lawsuit."

The court did not express an opinion as to whether the damages recoverable under the nuisance and trespass counts were the same.