



Who Invited You? The Limited Duties Owed by a Property Owner to a Trespasser

by: *Myranda Cotant, Coyne, Schultz, Becker & Bauer, S.C.*

I. Introduction

Have you ever received a new case and while analyzing the circumstances of what occurred, wondered to yourself, what was the plaintiff doing there in the first place? If this crosses your mind, it may be worthwhile to dig a little deeper. This is because the duties owed to a trespasser are significantly more limited than those owed to an individual that has express or implied consent to be on the premises. This is especially important in cases involving the safe place statute, as the Wisconsin jury instruction provides that it does not apply to trespassers. This begs the following questions: (1) What duties does a property owner owe to a trespasser? and (2) Who qualifies as a trespasser? This article will explore these two questions under Wisconsin law with special consideration given to the distinction between a “frequenter” and a “trespasser.”

II. The Limited Duties Owed to a Trespasser

A trespasser enters upon premises of another at his or her peril and the owner/occupant-possessor is under no duty to anticipate a trespasser’s entry or to provide for a trespasser’s safety.¹ An owner/occupant-possessor may engage in any lawful work conducted in a customary manner upon his or her premises without incurring liability to a trespasser, even though some danger to trespassers reasonably may be anticipated due to the nature of the work being performed or the manner in which it is being conducted.² The owner/occupant-possessor’s only duty to a trespasser is to refrain from acts which willfully, wantonly, or recklessly cause injury

or death to trespassers.³ If the owner/occupant-possessor becomes aware, or in the exercise of ordinary care should have become aware, of the presence of trespassers upon his or her premises, he or she may not affirmatively act or set any force in motion likely to cause injury or death to trespassers.⁴ Willful actions are deliberate acts with intent to accomplish a result, while wanton or reckless actions are those so unreasonable and dangerous that the actor knows or should know that it is highly probable harm to another will result.⁵

In contrast, a property owner has a heightened duty when it comes to frequenters that enter upon the landowner’s premises. The term “frequenter” means and includes every person except a trespasser who may go in or be in a place of employment or a public building.⁶ The duties of an owner to a frequenter are those prescribed by the safe place statute and the principles of common law negligence.⁷ Under the safe place statute, an owner of a place of employment or a public building is subject to a higher standard of care than under common law negligence, requiring him or her to construct, repair, or maintain the premises so as to make them safe for employees and frequenters.⁸ The term “safe” means such freedom from danger to the life, health, safety, or welfare of the plaintiff as the nature of the premises will reasonably permit.⁹ One who goes upon premises owned, occupied, or possessed by another without express or implied invitation, and solely for his or her pleasure, advantage or purpose, is a trespasser and not a frequenter.¹⁰

Although the doctrine of attractive nuisance will not be discussed in depth in this article, it is

important to note that the law prescribes a different standard for the duties owed to child trespassers. The duty of an owner/occupant-possessor to child trespassers is to exercise ordinary care to eliminate dangers or otherwise protect children, considering the recognizable risk to the children with the utility to the landowner in maintaining the condition.¹¹ When a child trespasses upon the premises of another, the owner/occupant-possessor owes no duty of care to a child injured or killed unless all of the following apply: (1) the possessor of the real property maintained, or allowed to exist, an artificial condition on the property that was inherently dangerous; (2) the possessor of the real property knew or should have known that children trespassed on the property; (3) the possessor of the real property knew or should have known that the artificial condition he or she maintained or allowed to exist was inherently dangerous to children and involved an unreasonable risk of serious bodily harm or death to children; (4) the injured or killed child, because of his or her youth or tender age, did not discover the condition or realize the risk involved in entering onto the property or in playing in close proximity to the inherently dangerous artificial condition; and (5) the possessor of the real property could have reasonably provided safeguards that would have obviated the inherent danger without interfering with the purposes for which the artificial condition was maintained or allowed to exist.¹²

III. Who Qualifies as a Trespasser

A person who enters or remains upon property in possession of another without express or implied consent is a trespasser.¹³ There is express consent when the possessor expressly invites or authorizes another person to be on his or her premises.¹⁴ There is implied consent when the possessor, by his or her conduct or his or her words, or both, by implication consents to such other persons being on the premises.¹⁵ In determining whether implied consent exists, all of the circumstances then existing are considered, including the acquiescence of the possessor, if any, in the previous use of the premises by others (including the plaintiff); the customary use, if any of the premises by others (including the

plaintiff); the apparent holding out of the premises, if any, to a particular use by the public; and the general arrangement or design of the premises.¹⁶ If, under all the existing circumstances, a reasonable person would conclude that the possessor of the premises impliedly consented that the plaintiff could be on the premises, then there was consent.¹⁷

Whether a person is a frequenter or trespasser turns on whether, at the time of injury, the person entered into an area of the premises where the person lacked a right to be present, by failing to have either express or implied consent.¹⁸ A frequenter may have express or implied permission to enter one part of the premises, yet be a trespasser in another part of the premises where he or she has not been invited.¹⁹ In the context of the safe place statute, the duty of an owner to maintain a public building in safe condition extends only to such parts as are used by the public.²⁰

Wisconsin case law demonstrates that a plaintiff can be a trespasser even when the trespass was the result of a mistake or was done so unintentionally. An individual who is considered a frequenter can also turn into a trespasser depending on the existing circumstances. The case law reveals that this will largely depend on whether the plaintiff asked for directions and was in the reasonable course of looking for the intended area or whether the plaintiff was proceeding without direction or deviated from the natural course.

In *Grossenbach v. Devonshire Realty Co.*, the plaintiff, a building tenant, mistakenly entered a boiler room while looking for a locker room in the basement of the building.²¹ The plaintiff did not ask anyone about the location of the locker room; rather, she simply set out looking for the area in hopes that she would find it.²² The Court held that an individual who is on the premises without invitation, express or implied, extended by the owner, and solely for his own pleasure and convenience or purpose, is a trespasser.²³

In *McNally v. Goodenough*, the Court addressed a situation in which the plaintiff did ask for directions.²⁴

There, the plaintiff, a roofer, was injured when he took a wrong turn and fell down the basement stairs of a building after returning from a quest to find the building tenants in order to inquire about an aspect of the work he was performing.²⁵ The Court held that the plaintiff became a trespasser as a matter of law when he deviated from the direct path and turned into the vestibule at the head of the stairs and was hurt on the stairway.²⁶ The fact that he did not intend to use the stairway, but was confused and did so by mistake, did not prevent him from being a trespasser.²⁷

Similarly, in *Monsivais v. Winzenried*, the plaintiff, who was intoxicated at a bar, asked his friend twice where the restrooms were located.²⁸ His friend, who was seated at the bar on a stool across from the basement door, pointed towards the restrooms located at the rear of the tavern.²⁹ However, the plaintiff mistook the basement door for the bathroom door and fell down the stairs to his death.³⁰ The Court stated that the plaintiff lost his frequenter status and became a trespasser when he deviated from the public area of the bar and entered into the basement area, noting that the fact of a quest or search for a destination does not relieve the frequenter of the obligation to stay out of areas to which the public invitation does not extend.³¹

An individual may retain his or her frequenter status, even in the face of a deviation, if the plaintiff was in the process of seeking directions when he or she was injured. In *Mustas v. Inland Const., Inc.*, the plaintiff was injured when he fell on some ice in a building under construction while asking for directions.³² There was credible evidence indicating that the route plaintiff took while in the building was reasonably incident to his inquiry.³³ Therefore, because plaintiff's inquiry reasonably took him to the place where he fell, he had a right to be there, and was a frequenter at the time of the injury.³⁴ The critical difference between *Monsivais* and *Mustas* was that in *Monsivais*, the plaintiff had already received his directions, whereas in *Mustas* the plaintiff was injured while seeking directions to his intended location.³⁵

IV. Conclusion

The duty owed by a property owner to a trespasser is to refrain from acts which willfully, wantonly, or recklessly cause injury or death to the trespasser. A trespasser is an individual who does not have express or implied consent to be in a particular area. A frequenter can quickly turn into a trespasser if the circumstances are such that the individual enters an area to which he or she was not invited. When a person is reasonably seeking directions as to the location of an intended, but unknown, destination, such person can be a frequenter.³⁶ However, where such inquiry is not made, or where the inquiry has concluded, the person's frequenter status is lost when the person deviates into an area where he or she is not expressly or impliedly invited.³⁷ Thus, it is extremely important to evaluate the circumstances of your case to determine whether the plaintiff may have been trespassing at the time of the alleged incident or accident. This is especially true in cases involving the safe place statute where property owners owe a heightened duty to frequenters on their premises. Trespassing is a complete bar to the application of the safe place statute and lessens the duties of a property owner under common law negligence. Remember to always ask yourself: what was the plaintiff doing there in the first place? The answer to this question could result in a victory for the defense.

Author Biography:

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References

- 1 Wis. JI-Civil 8025.
- 2 *Id.*
- 3 *Id.*
- 4 *Id.*; but see Wis. Stat. § 895.62 (Wisconsin's castle doctrine)

- law) (“...an actor is immune from civil liability arising out of his or her use of force that is intended or likely to cause death or great bodily harm if the actor reasonably believed that the force was necessary to prevent imminent death or bodily harm to himself or herself or to another person ...”).
- 5 Wis. II-Civil 8025.
6 Wis. II-Civil 1901.
7 *Monsivais v. Winzenried*, 179 Wis. 2d 758, 764, 508 N.W.2d 620 (Ct. App. 1993).
8 Wis. II-Civil 1900.4.
9 *Id.*
10 Wis. II-Civil 1901.
11 Wis. II-Civil 8025.
12 *Id.*
13 Wis. II-Civil 8012.
14 Wis. II-Civil 8015.
15 *Id.*
16 *Id.*
17 *Id.*
18 *Hofflander v. St. Catherine’s Hosp., Inc.*, 2003 WI 77, ¶ 108, 262 Wis. 2d 539, 664 N.W.2d 545.
19 *See Monsivais*, 179 Wis. 2d at 769.
20 *Grossenbach v. Devonshire Realty Co.*, 218 Wis. 633, 637-38, 261 N.W. 742 (1935).
21 *Id.* at 637-38.
22 *Id.*
23 *Id.* at 638.
24 *McNally v. Goodenough*, 5 Wis. 2d 293, 92 N.W.2d 890 (1958).
25 *Id.* at 294.
26 *Id.* at 300-01.
27 *Id.* at 301.
28 *Monsivais*, 179 Wis. 2d at 762.
29 *Id.*
30 *Id.*
31 *Id.* at 769.
32 *Mustas v. Inland Const., Inc.*, 19 Wis. 2d 194, 120 N.W.2d 95 (1963).
33 *Id.* at 202.
34 *Id.*
35 *Monsivais*, 179 Wis. 2d at 772.
36 *Id.* at 771.
37 *Id.* at 771-72.