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In the Wake of *Heins*: Break Out Your Rulers Missouri It's Time to Measure Your Levees

*Robinson v. Missouri State Highway & Transportation Commission*¹

I. INTRODUCTION

Following the trend in other states, Missouri recently adopted the comparative reasonableness rule for cases involving the diversion of surface water and groundwater.² The rule of reasonableness allows a landowner to make reasonable use of the land even though water drainage and flow is altered, as long as the use does not cause unreasonable harm.³ Missouri's change to the reasonableness rule from the common-enemy doctrine has yielded favorable results for plaintiffs seeking damages for improper water disposal, but the rule's initial adoption has left courts with wide latitude in how it should be interpreted.

In the last decade, courts have continually expanded the rule of reasonable use in regard to water drainage and disposal, but have not had the opportunity to address reasonable use as it pertains to floodwater, levees, and major flood-protection facilities.⁴ The Missouri Court of Appeals for the Western District of Missouri had the opportunity to clarify these issues in *Robinson v. Missouri State Highway & Transportation Commission*, and it held that the rule of reasonableness applies retroactively to all flood-control measures, whether or not the flood-control method succeeded the rule's adoption.⁵

II. FACTS AND HOLDING

On September 22, 1993, Richard Robinson drowned in intriguing flood circumstances at the intersection of the 102 River and B Highway in Andrew County, Missouri.⁶ Although the river usually had little water volume,⁷ a bridge

1. 24 S.W.3d 67 (Mo. Ct. App. 2000).

2. See *Heins Implement Co. v. Mo. Highway & Transp. Comm'n*, 859 S.W.2d 681 (Mo. 1993); *Kueffer v. Brown*, 879 S.W.2d 658 (Mo. Ct. App. 1994); *Campbell v. Anderson*, 866 S.W.2d 139 (Mo. Ct. App. 1993); 6 WATERS AND WATER RIGHTS 464 (Robert E. Beck ed., 1994) [hereinafter 6 WATER RIGHTS]; Peter N. Davis, *Law of Repelling Floods in Missouri*, 2 MO. ENVTL. L. & POL'Y REV. 127, 133 (1995). I would like to thank Professor Davis for the invaluable assistance, comments, and suggestions made to this Note.

3. See 6 WATER RIGHTS, *supra* note 2, at 464.

4. See 6 WATER RIGHTS, *supra* note 2, at 468.

5. See *Robinson*, 24 S.W.3d at 67.

6. *Id.* at 70-72.

7. *Id.* at 71. "The 102 River . . . is a non-navigable stream that is capable of being stepped over most of the time." *Id.*

was built over the river at its juncture with the highway.⁸ The landowners⁹ surrounding this bridge had built levees along the 102 River to protect their crops from flooding, both to the north and south of B Highway.¹⁰ These levees were ten feet tall, taller than the grade of B Highway.¹¹ This case arose out of a wrongful death suit brought by Thelma Robinson,¹² Mr. Robinson's widow, against the Missouri State Highway Commission and the landowners maintaining levees in the area surrounding the intersection.¹³

Between 4:00 and 4:10 a.m. on September 22, 1993, Mr. Robinson left his house and traveled west on B Highway toward the 102 River bridge.¹⁴ According to expert testimony at trial, B Highway was flooded and impassable around the 102 River due to excessive rain and the height of the levees, but the river would have topped the highway three hours later even if the height of the levees had been equal to the highway.¹⁵ During its impassability, Mr. Robinson drove into the floodwater flowing across Highway B and the bridge, attempted to turn his car around, and then, after water in the engine made the car inoperable, exited his car.¹⁶ Mr. Robinson walked ten to fifteen feet from his

8. *Id.*

9. *Id.* “[Charles and Frances Walton (the “Waltons”)] owned two tracts of land contiguous to and east of the 102 River, one to the north of B Highway, consisting of approximately 200 acres, and one to the south of the highway, consisting of approximately 150 acres.” *Id.* Phyllis Hawkins (“Hawkins”) owned 80 acres bordering the north side of the Waltons’ land. Lawrence and Lorraine Bennett and the Lawrence Bennett Trust (the “Bennetts”) owned 102 acres to the north of Hawkins’ land. The P.M. Land Company owned the property to the west of the river, across from the Waltons’ southern tract of land. *Id.*

10. *Id.*

11. *Id.* The levees were originally constructed to be twelve feet tall, but prior flooding had eroded them to a height of ten feet. *Id.*

12. *Id.* at 70. Thelma was joined by her two daughters, Tina Robinson and Susan Robinson Little. *Id.*

13. *Id.* at 70-72.

14. *Id.*

15. *Id.* at 76. Wayne Williams, a licensed professional engineer, stated:

[T]he levees in question were a cause of the highway being impassible . . . , and that, if the levees north of the highway had been maintained at an elevation equal to that of the highway, floodwater would not have topped the highway, making it impassable, until approximately 7:15 to 7:30 a.m. that morning.

Id.

16. *Id.* at 72. Ray Knoth, another motorist, discovered Mr. Robinson's vehicle in water as deep as the vehicle's floorboards. Emergency medical personnel arrived at 5:37 a.m. *Id.* Mr. Knoth discovered Mr. Robinson's vehicle sideways in the road, in a position “appear[ing] that Mr. Robinson had been attempting to turn his vehicle around on the highway to head back east.” *Id.* “Mr. Robinson's vehicle's ignition and lights were off, and the keys had been removed.” *Id.* Mr. Robinson's car was in “good operating condition” the day of the accident. The vehicle was inoperable after the

vehicle, experienced a cardiac arrhythmia,¹⁷ fell into the shallow water across the highway, and drowned.¹⁸

Ms. Robinson filed a four-count petition for wrongful death, claiming that: (1) the State Highway Commission failed to place adequate warning signs or signals along the B Highway, (2) the landowners were negligent in maintaining levees along the river, (3) the landowners' levees created a public nuisance, and (4) the situation justified aggravating circumstance damages.¹⁹ In response, the Waltons and the Hawkins filed summary judgment motions²⁰ claiming that using levees to divert flood water from their land was reasonable and did not breach a duty of care. They also claimed that Ms. Robinson could not establish causation for her negligence or nuisance theories.²¹ The trial court agreed that Ms. Robinson would be unable to prove negligence, nuisance, or causation, and it granted the Waltons' and Hawkins' summary judgment motions.²²

Ms. Robinson challenged the trial court's decision in the Missouri Court of Appeals for the Western District of Missouri.²³ First, Ms. Robinson argued that there was a dispute of material fact as to whether diverting floodwater from land was reasonable.²⁴ In response, the Western District held that the trial court erred in granting summary judgment on negligence grounds stating that life is valued over property, and diverting surface water from land to a highway can violate a reasonable duty of care.²⁵ Second, Ms. Robinson contended that the trial court erred in granting the motions for summary judgment because the Waltons and Hawkins failed to present adequate evidence disproving causation in fact and proximate causation.²⁶ The Western District held that the trial court erred in

accident, and Mr. Robinson's son-in-law, Jim Miller, found that the cause of the vehicle's inoperability was water in the crankcase and the transmission. *Id.*

17. A cardiac arrhythmia is a disturbance in rhythm of a person's heartbeat. See WEBSTER'S UNIVERSAL COLLEGE DICTIONARY 44 (1997).

18. See *Robinson v. Mo. State Highway & Transp. Comm'n*, 24 S.W.3d 67, 72 (Mo. Ct. App. 2000). "Mr. Knoth found Mr. Robinson outside his vehicle and lying on his abdomen on the highway, approximately ten to fifteen feet from his vehicle." *Id.* "Mr. Knoth found Mr. Robinson . . . with three to four inches of water covering his mouth and nose." *Id.* Dr. Bonita Peterson performed an autopsy on Mr. Robinson, concluding that he had experienced an irregular heartbeat that morning and that his cause of death was drowning. *Id.*

19. *Id.* at 72-73.

20. *Id.* at 73. This consisted of two independent motions, one filed by the Waltons and one by Hawkins. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 67, 73.

24. *Id.* at 73-74.

25. *Id.* at 76-77.

26. *Id.* at 77. Specifically, Ms. Robinson claimed:

[T]he trial court erred in sustaining the respondents' motions for summary judgment on this basis because: (1) the appellants rebutted the respondents'

granting summary judgment in that there was a genuine dispute as to whether (1) the maintenance of the levees at a height above the highway was reasonable; (2) Mr. Robinson would have died but for the levees;²⁷ and (3) “it [was] reasonably foreseeable that a motorist could drive into floodwater on a highway in the dark, be forced to exit his or her vehicle because the floodwater made it inoperable, and then drown in the floodwater.”²⁸ Thus, the court reversed the trial court’s deposition, and remanded the matter for trial.²⁹

III. LEGAL BACKGROUND

Historically, American jurisdictions adopted contradicting rules involving the diversion of surface water³⁰ by landowners.³¹ One approach, the “civil law rule,” recognizes a natural easement for drainage between adjoining lands.³² The

prima facie case on the issue of whether any negligence on their part in constructing and maintaining the levees, thereby diverting floodwater from their land and onto the highway, was the cause, in fact, of Mr. Robinson’s drowning death; and (2) the respondents failed to make a *prima facie* case on the issue of whether their negligence was its proximate cause.

Id.

27. *Id.* at 79.

28. *Id.* at 80-81.

29. *Id.* at 81-82. Because the court found that the award of summary judgment was improper as to negligence, it did not find it necessary to address the issue of causation for nuisance. *Id.* at 81. Ms. Robinson also claimed that the trial court erred by granting summary judgment on the issue of damages for aggravating circumstances. *Id.* The court did not discuss this issue, other than to dismiss it for lack of jurisdiction. *Id.* at 81-82.

30. In Missouri, “surface water” is defined by what it is not. *See* 6 WATER RIGHTS, *supra* note 2, at 457. The “surface watercourse,” one classification of surface water, is defined as “a stream flowing in a particular direction, having a definite channel, usually having a bed and banks, and having a substantially continuous flow.” 6 WATER RIGHTS, *supra* note 2, at 457. A surface watercourse “extends upstream to its originating point, such as springs.” 6 WATER RIGHTS, *supra* note 2, at 457. Another category of flowing water is the “drainway,” consisting of “[w]ater flowing in natural drainways after rain and snow melts.” 6 WATER RIGHTS, *supra* note 2, at 457. “All other flows of water on the surface of the ground are classed as *diffused surface water*.” 6 WATER RIGHTS, *supra* note 2, at 457 (emphasis added). Unlike in many other states, Missouri treats floodwaters as diffused surface water rather than extensions of surface watercourses. *See* 6 WATER RIGHTS, *supra* note 2, at 458.

31. *See* 5 WATER AND WATER RIGHTS 738-43, 746-53 (Robert E. Beck ed., 1998) [hereinafter 5 WATER RIGHTS]; *see also* Janet Fairchild, Annotation, *Modern Status of Rules Governing Interference with Drainage of Surface Waters*, 93 A.L.R.3d 1193, 1197 (1979).

32. *See* 5 WATER RIGHTS, *supra* note 31, at 740-41. Seventeen states still follow the civil law rule: Alabama (in rural areas), Colorado, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Michigan, New Mexico, Oregon, Pennsylvania, South

purpose of this rule was to preserve natural drainage patterns and to prohibit landowners from taking unfair advantage of each other.³³ A lower landowner under the civil law rule has a duty to accept any surface water that naturally drains onto his land.³⁴ An upper landowner, however, is prohibited from doing anything that would increase the burden of the natural system of drainage onto the lower landowner's land.³⁵ Under the civil law rule, landowners are liable for any harm caused to neighboring landowners by altering the flow of surface water.³⁶

Another rule courts have developed to govern the diversion of surface water is the "common-enemy doctrine."³⁷ In its purest form, the common-enemy doctrine states that because surface water is a "common-enemy," landowners have an unqualified right to fend off surface water without considering the consequences to other landowners.³⁸ The common-enemy rule was a pro-development rule, allowing landowners to build and change surface water patterns in any desired manner.³⁹ Because of the relative harshness exhibited by the common-enemy doctrine, many courts have modified this rule by adding that a landowner must not use his property in a way that unnecessarily injures others.⁴⁰ From 1884 to recent times, Missouri followed the modified common-enemy rule for the diversion of surface water.⁴¹

A. Missouri's Modified Common-Enemy Doctrine

Missouri's modified common-enemy doctrine stated that "in the case of surface water, which is regarded as a common enemy, [each owner] is at liberty to guard against it, or divert it from his premises, provided he exercises reasonable care and prudence in accomplishing that object."⁴² Therefore, under

Dakota, Tennessee, Texas, and Vermont. See 5 WATER RIGHTS, *supra* note 31, at 748-49.

33. See 5 WATER RIGHTS, *supra* note 31, at 773-74.

34. See 5 WATER RIGHTS, *supra* note 31, at 740-41.

35. See 5 WATER RIGHTS, *supra* note 31, at 740-41.

36. See 5 WATER RIGHTS, *supra* note 31, at 740-41.

37. See 5 WATER RIGHTS, *supra* note 31, at 739-40. Twelve states still follow the common-enemy rule: Alabama (urban areas), Arizona, Arkansas, Indiana, Maine, Montana, Nebraska, New York, Oklahoma, South Carolina, Virginia, and Washington. See 5 WATER RIGHTS, *supra* note 31, at 746-48.

38. See 5 WATER RIGHTS, *supra* note 31, at 739-40.

39. See 5 WATER RIGHTS, *supra* note 31, at 739.

40. See 78 AM. JUR. 2D *Waters* § 122 (1975).

41. See *Heins Implement Co. v. Mo. Highway & Transp. Comm'n*, 859 S.W.2d 681, 686 (Mo. 1993) (citing *Abbott v. Kan. City, St. Joseph & Council Bluffs R.R.*, 83 Mo. 271 (1884)).

42. *Hosher v. Kan. City, St. Joseph & Council Bluffs R.R.*, 60 Mo. 329, 333 (1875).

the modified common-enemy doctrine, even though landowners were required to use reasonable care, they were not liable for injuries to others caused by changing the course of surface water flow or increasing the flow upon neighboring land.⁴³ One example of an application of the Missouri modified common-enemy doctrine is the case of *Tackett v. Linnenbrink*.⁴⁴

In *Tackett*, Tackett filed suit against an adjoining landowner alleging that Linnenbrink “willfully, carelessly, negligently, and maliciously stretched a woven wire fence across a stream, creek, or water course, so as to divert and dam the waters of a water course that traversed the lands belonging to plaintiff and defendant.”⁴⁵ Tackett claimed that erecting the fence (1) caused floodwaters from the stream to cut a new channel through Tackett’s land; (2) carried away the surface soil of Tackett’s field; (3) caused ponds to form on parts of Tackett’s land; (4) rendered Tackett’s land unfit for farming; and (5) washed a hole in the only road to Tackett’s land, making it necessary for Tackett to construct a bridge.⁴⁶ The trial court instructed the jury that overflow from streams was surface water, landowners have a right to resist and divert surface water, and Linnenbrink was not liable for injury caused by diverting surface water, provided that he did not proceed negligently.⁴⁷ Based on these instructions, the jury found that Linnenbrink was not negligent and, therefore, not liable for the damages he caused by diverting floodwaters onto Tackett’s land.⁴⁸ Tackett appealed the jury’s verdict, arguing that the jury instructions were “misleading to the jury” and “not in conformity with the law.”⁴⁹ Affirming the trial court’s decision, the appellate court agreed that overflow from a stream was surface water, that an owner was not liable for injury caused by diverting surface water off his land, and that Linnenbrink could not be liable for the damages unless the jury found him negligent.⁵⁰

Discomfort with the harshness of Missouri’s modified common-enemy doctrine caused courts to develop exceptions to the rule allowing for liability in limited situations.⁵¹ Examples of exceptions to Missouri’s doctrine included (1) collecting surface water by artificial means and discharging or diverting it in destructive quantities upon a servient estate instead of through natural drainways,⁵² and (2) blocking or damming a natural drainway or watercourse.⁵³

43. *Id.*; see also 6 WATER RIGHTS, *supra* note 2, at 465.

44. 112 S.W.2d 160 (Mo. Ct. App. 1938).

45. *Id.* at 161.

46. *Id.*

47. *Id.* at 162.

48. *Id.* at 161.

49. *Id.*

50. *Id.* at 162-64.

51. See *Heins Implement Co. v. Mo. Highway & Transp. Comm’n*, 859 S.W.2d 681, 686 (Mo. 1993).

52. See *Hawkins v. Burlington N., Inc.*, 514 S.W.2d 593, 600 (Mo. 1974) (holding that where a railroad culvert channeled large amounts of water over a person’s land rather

Eventually, applications of the modified common-enemy rule and its exceptions began to yield inconsistent results.⁵⁴ The precedents began to be applied in such a manner that upper landowners had to act with a degree of care when discharging surface water onto lower lands, but lower landowners were limited only from blocking natural drainways.⁵⁵ Finally, in 1993, the Missouri Supreme Court decided that “the common enemy doctrine, even as modified, [had] outlived its usefulness” in Missouri.⁵⁶

B. Missouri’s Rule of Reasonable Use

Because Missouri’s modified common-enemy rule and its “labyrinth of exceptions” had become “unduly complicated and confusing,” threatening “arbitrary and unjust results,” the Missouri Supreme Court adopted a “rule of reasonable use” in *Heins Implement Co. v. Missouri Highway & Transportation Commission*.⁵⁷ The rule of reasonable use attempts to avoid the rigidities of both the civil law rule and the common-enemy doctrine in determining rights of landowners to interfere with the drainage of surface water.⁵⁸ “The comparative reasonable use rule allows the landowner to make a reasonable use of his land, even though the flow of drainage water is altered and causes some harm to neighboring land.”⁵⁹ However, a landowner may not cause harm by unreasonably interfering with water drainage, and liability is imposed when “drainage flow is either: (1) intentional and unreasonable, or (2) negligent, reckless, or in the course of an abnormally dangerous activity.”⁶⁰ Combining these principles, the determination of liability under the rule of reasonable use

than diverting it into a nearby drainage ditch, the common-enemy rule did not apply and the railroad was liable for any damages caused).

53. See *Happy v. Kenton*, 247 S.W.2d 698, 701 (Mo. 1952) (holding that where a person dammed a lake’s natural drainway, causing the lake to grow to three or four times its natural size, the common-enemy rule did not apply and the person was liable for any damages caused).

54. See *Heins*, 859 S.W.2d at 686-87.

55. See *id.* at 687.

56. *Id.* at 690.

57. 859 S.W.2d 681, 690-91 (Mo. 1993).

58. See 5 WATER RIGHTS, *supra* note 31, at 774. Twenty-two states currently follow the rule of reasonable use: Alabama (urban/rural boundary), Alaska, California, Connecticut, Delaware, Florida, Hawaii, Kentucky, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, Utah, West Virginia, and Wisconsin. See 5 WATER RIGHTS, *supra* note 31, at 774 & n.27.

59. 6 WATER RIGHTS, *supra* note 2, at 464.

60. 6 WATER RIGHTS, *supra* note 2, at 464.

is based on balancing the gravity of the harm with the benefit to the landowner diverting the surface water.⁶¹

In *Heins*, the injured landowners occupied⁶² commercial and agricultural property in the bottom lands of Wakenda Creek near the intersection of State Route 10 and U.S. Route 65.⁶³ Wakenda Creek regularly flooded, and at times the floodwater would overflow State Route 10 and collect in an artificial lake designed to hold the water.⁶⁴ Even more infrequently, the artificial lake would flood forcing overflow water onto portions of the landowners' property.⁶⁵ To build a bypass for U.S. Route 65, the Missouri Highway & Transportation Commission ("MHTC") condemned a portion of each of the landowners' property.⁶⁶ Upon building the bypass, MHTC built a culvert that allowed normal rainfall under the bypass, but which was inadequate to handle flooding from the creek.⁶⁷ Throughout the years following the completion of the bypass, the inadequate drainage culvert served as a dam, pooling the overflow from Wakenda Creek onto the landowners' property.⁶⁸

After several years of flooding, the landowners in *Heins* filed suit against MHTC⁶⁹ and obtained a jury verdict in their favor on two counts of inverse condemnation.⁷⁰ "MHTC filed a motion for judgment n.o.v., arguing that [the landowners'] action was barred by the original condemnation proceedings and by the common enemy doctrine."⁷¹ The landowners appealed after the trial court sustained MHTC's motion for judgment n.o.v.⁷² Applying the rule of reasonable use, the Missouri Supreme Court stated that the extent and regularity of the flooding and the presence of the inadequate culvert were sufficient to allow a jury to find an unreasonable use of the land.⁷³ Based on this determination, the

61. See 6 WATER RIGHTS, *supra* note 2, at 464.

62. The group of appellants consisted of both property owners and tenants. See *Heins*, 859 S.W.2d at 684.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* The original defendants in this case included not only MHTC, but also Mel Downs (chief design engineer for the bypass project), Frank Trager & Sons (the general contractor for the bypass project), and the Carroll County Recreation Club (owner of the artificial lake). *Id.* The trial court granted summary judgment, dismissing the claims against all the defendants except MHTC. *Id.*

70. *Id.* The original suit also included claims of negligence and nuisance against MHTC. These claims, however, were dismissed by summary judgment before trial. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 691.

court held that the judgment n.o.v. was in error.⁷⁴ Although *Heins* served to change the rules regarding the diversion of surface water in Missouri, the decision itself gave little illustration or indication of how the new rule was to be applied.⁷⁵

C. Application of the Rule of Reasonableness to Floodwaters

Missouri appellate courts have had few isolated circumstances to test and show the feasibility of the new rule of reasonableness.⁷⁶ Immediately following the Missouri Supreme Court's decision in *Heins*, the reasonable use doctrine encountered its first application to floodwater in *Campbell v. Anderson*.⁷⁷ In *Campbell*, the appellants⁷⁸ challenged the trial court's adverse judgment regarding the rechannelization of Parsons Creek by an adjoining landowner.⁷⁹ In 1952, the Campbells purchased a run down farm, both "seriously eroded and overgrown with brush."⁸⁰ From 1952 to 1979, the Campbells attempted to revitalize their farm, during which time they had only "minor" floodwater problems.⁸¹ Prior to 1977, the Brandons⁸² built a small levee on the west bank of Parsons Creek to prevent the flooding of their land.⁸³ Because this caused flooding on the Campbells' land, the Campbells built a three foot levee along the west side of their land to divert the water.⁸⁴ In 1977, the Andersons⁸⁵ purchased part of the Brandons' land, as well as two other forty acre tracts of farmland to

74. *Id.*

75. See 6 WATER RIGHTS, *supra* note 2, at 467.

76. See *Kueffer v. Brown*, 879 S.W.2d 658, 661 (Mo. Ct. App. 1994); *Campbell v. Anderson*, 866 S.W.2d 139, 144 (Mo. Ct. App. 1993).

77. 866 S.W.2d 139 (Mo. Ct. App. 1993). *Heins* was decided on August 17, 1993. See *Heins Implement Co. v. Mo. Highway & Transp. Comm'n*, 859 S.W.2d 681, 681 (Mo. 1993). *Campbell* was decided on October 19, 1993. See *Campbell*, 866 S.W.2d at 139. Although the appeal in *Campbell* was filed before the *Heins* decision was handed down, the *Campbell* court held that it was appropriate to apply the rule of reasonableness retroactively in this situation. *Id.* at 144-45.

78. The appellants in this case included not only William and June Campbell, but also R.E. and Margaret Holzer and Norma Amer. See *Campbell*, 866 S.W.2d at 140.

79. *Id.* As a result of the number of land transfers and the significant time period over which the events of this case took place, the defending landowners included Richard and Shirley Anderson, Michael and Bonnie Anderson, David Anderson, John Collet, John and Yvonne Brandon, the Community Bank of Chillicothe, and Matt Parrish. See *id.*

80. *Id.* at 141.

81. *Id.*

82. See *supra* note 79 and accompanying text.

83. See *Campbell v. Anderson*, 866 S.W.2d 139, 141 (Mo. Ct. App. 1993).

84. *Id.*

85. The "Andersons" includes three Anderson brothers and their wives. See *supra* note 79 and accompanying text.

the west of the Campbells' property.⁸⁶ In 1979, the Andersons decided to rechannel Parsons Creek to better utilize their farm.⁸⁷ The Andersons' efforts resulted in a straightened creek that ran parallel with the borders of their property.⁸⁸

Following the completion of the new creek channel, the Campbells began to experience flooding on their property.⁸⁹ The Campbells sought recovery under nuisance law for flood damage to their property.⁹⁰ The *Campbell* court decided not only that the rule of reasonable use warranted retrial based on the facts presented, but it also determined that the rule of reasonableness should be applied retroactively to cases arising before the rule came into effect.⁹¹ However, because *Campbell* involved flooding caused by the diversion of a stream rather than diversion of actual floodwaters, the court gave no indication of how the new rule would affect actions involving levees and other flood protection methods built before *Heins*.⁹²

Missouri courts partially answered the question of how the rule of reasonable use applied to flood-control measures in *Kueffer v. Brown*.⁹³ In

86. See *Campbell*, 866 S.W.2d at 141. Later, in 1984, the Andersons formed a partnership with John Collet. *Id.* In 1986, the Andersons deeded the land they acquired from the Brandons back to the Brandons, and continued to rent the farm until 1988. *Id.* at 142. Also in 1986, the Andersons deeded their other eighty acres to Collet. *Id.* at 141-42.

87. *Id.* at 141.

88. *Id.* During the rechannelization, the Campbells registered a complaint with the United States Corps of Engineers. A field investigator for the Corps told the Andersons that the creek could be freely rechanneled as long as the Andersons did not block the ends of or fill the original creek. *Id.* The Andersons applied for a United States Corps of Engineers' permit to block the ends of the channels in late 1979, but their application was denied. The Andersons never blocked the original channel. *Id.* Additionally, the new channel was located within the boundaries of the Anderson property, and entered and exited the property at the same points as the old channel. *Id.*

89. *Id.* at 143-44.

90. *Id.* at 140.

91. *Id.* at 144-45. In making its decision to apply the rule of reasonable use retroactively, the court of appeals utilized the rule in *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. 1985). See *Campbell v. Anderson*, 866 S.W.2d 139, 144 (Mo. Ct. App. 1993). The *Campbell* court considered three factors in making this decision: (1) whether the decision established a new principle of law by overruling clear past precedent, (2) whether retroactive application would enhance or retard the purpose and effect of the newly announced rule, and (3) whether the hardship parties relying on the previous rule might suffer is outweighed by the hardship to the parties who would be denied the benefit of the new rule. *Id.*

92. See 6 WATER RIGHTS, *supra* note 2, at 468.

93. 879 S.W.2d 658 (Mo. Ct. App. 1994).

Kueffer, the Kueffers⁹⁴ and the Browns⁹⁵ owned adjoining residential lots, the Kueffers being the upper landowners.⁹⁶ Both parties built their homes between 1979 and 1980.⁹⁷ Prior to any development, there was a drainage system around the Kueffers' property consisting of a series of natural drainage ditches.⁹⁸ Water from the surrounding hillside drained into a natural ditch along the southern border of the Kueffers' property ("southern ditch").⁹⁹ The southern ditch drained into a large natural ditch along the eastern side of the Kueffers' property ("eastern ditch"), which emptied into another ditch that traveled across part of the Browns' property.¹⁰⁰ During periods of heavy rainfall, the southern ditch also emptied into a natural ditch on the western side of the property ("western ditch"), which flowed into a shallow swale¹⁰¹ fifteen feet from the Browns' house.¹⁰² In 1983, the Kueffers placed a pipe, forty-two inches in diameter, into the eastern ditch and filled the entire length of the drainage ditch with earth.¹⁰³ The Kueffers also installed retaining walls and a spillway across the prior site of the eastern ditch.¹⁰⁴ In 1990, the Kueffers' property flooded twice.¹⁰⁵ In response to this flooding, the Kueffers raised the north bank of the southern ditch.¹⁰⁶ Although the Kueffers' property no longer flooded, the extra drainage in the western ditch caused the swale to flood in 1991.¹⁰⁷ Water escaping from the flooded swale damaged the Browns' house and property.¹⁰⁸

In May 1987, the Kueffers brought suit for trespass against the Browns.¹⁰⁹ In response, the Browns counterclaimed for damages from the 1991 flood.¹¹⁰

94. The plaintiffs were John and Mary Kueffer. *Id.* at 660.

95. The defendants were Michael and Glenna Brown. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. A "swale" is "a low place in a tract of land, [usually] producing ranker vegetation than the adjacent higher ground." WEBSTER'S UNIVERSAL COLLEGE DICTIONARY 794 (1997).

102. *See* *Kueffer v. Brown*, 879 S.W.2d 658, 660-61 (Mo. Ct. App. 1994).

103. *Id.* at 661.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* The facts of the case are not clear as to whether the trespass claim related to flooding or some other matter.

110. *Id.* The original counterclaim the Browns filed alleged that the Kueffers' construction work had caused erosion of the Browns' property and vegetation by diverting water, soil, and other materials onto their property. This counterclaim was abandoned after the 1991 flooding occurred. *Id.*

The trial court awarded damages on both the trespassing claim and the surface water counterclaim.¹¹¹ The Kueffers appealed the trial court's disposition on the counterclaim, arguing that the trial court misapplied the modified common-enemy doctrine.¹¹² Utilizing the rule of reasonable use, the *Kueffer* court held that utilizing flood-control mechanisms to divert floodwater onto another's land supported a finding that the Kueffers' conduct was unreasonable.¹¹³ Additionally, as in *Campbell*, the appellate court found it important to apply the rule of reasonableness retroactively to a case decided under the modified common-enemy doctrine.¹¹⁴ In *Kueffer*, the appellate court demonstrated the application of the rule of reasonableness to flooding caused by a small embankment, and hinted as to what was forthcoming in *Robinson*.¹¹⁵

IV. INSTANT DECISION

In *Robinson*, the Missouri Court of Appeals for the Western District of Missouri extended the rule of reasonable use beyond small scale flooding, and demonstrated the rule's application in flood-control situations.¹¹⁶ The court began by stating that the floodwater in *Robinson*, as in other Missouri cases, was to be treated as surface water.¹¹⁷ Based on this assertion, the court applied the *Heins* reasonable use doctrine, noting that "each possessor [of land] is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable."¹¹⁸ Because a defendant's liability is based on his conduct being (1) intentional and unreasonable or (2) negligent, reckless, or in the course of an abnormally dangerous activity, the court reasoned that it must weigh the utility of the landowners' maintenance of the levees at a height greater than that of B Highway in order to protect their crops from floodwater, against the danger

111. *Id.* at 660.

112. *Id.* at 661-62. Although the Kueffers also argued that the trial court had treated the diversion of water in this case as a natural watercourse, the appellate court quickly dismissed this claim as illogical. *See id.*

113. *Id.* at 664-65. Although the *Kueffer* court upheld the trial court's decision on the reasonableness issue, the court reduced the amount of damages awarded to the Browns on other grounds. *See id.* at 666-67.

114. *Id.* at 663-64. The *Kueffer* court used the same three-prong balancing test utilized by the court in *Campbell*. *See supra* note 91.

115. *See Kueffer v. Brown*, 879 S.W.2d 658 (Mo. Ct. App. 1994); *Robinson v. Mo. State Highway & Transp. Comm'n*, 24 S.W.3d 67 (Mo. Ct. App. 2000).

116. *See Robinson*, 24 S.W.3d at 67.

117. *Id.* at 74.

118. *Id.* at 75 (quoting *Heins Implement Co. v. Mo. Highway & Transp. Comm'n*, 859 S.W.2d 681, 689 (Mo. 1993)).

created for motorists and the gravity of the harm that could befall motorists when water flooded the highway.¹¹⁹

Because the trial court granted summary judgment in *Robinson*, the Western District next discussed the grounds for overturning a summary judgment.¹²⁰ In order to overturn the trial court's decision, the *Robinson* court had to find that there was a genuine dispute as to a material fact.¹²¹ Ms. Robinson alleged that there was conflicting evidence as to whether the landowners, in constructing and maintaining the levees, were diverting surface water in a reasonable manner.¹²² At trial, testimony provided that (1) B Highway became impassible from floodwater more often after the levees were built than before; (2) floodwater on the highway was much deeper after the levees were built; (3) B Highway was frequently traveled by area motorists; (4) floodwater topped the highway long before it topped the levees; (5) the highway flooded much faster after the levees were constructed; and (6) if the levees had been the same height as the highway, they still would have protected the landowners' crops nine out of ten years.¹²³

Noting that "human life is far more important than the protection of crops from occasional floodwater," the *Robinson* court held that there was a genuine dispute of material fact as to whether the maintenance of the levees at a height above the highway was reasonable when its utility was weighed against the gravity of the loss of a human life.¹²⁴ Accordingly, the court stated that the trial court erred in granting summary judgment because there was a genuine dispute as to whether the maintenance of the levees at a height above the highway was reasonable.¹²⁵

119. *Id.*

120. *Id.* at 75-77.

121. *Id.* at 75-76.

122. *Id.*

123. *Id.* at 76.

124. *Id.* at 76-77.

125. *Id.* at 77, 82. The *Robinson* court also noted that there was a genuine dispute of material fact as to proximate cause. *Id.* at 77-82. The trial court granted summary judgment on the issue of proximate cause as well as reasonableness, and it was necessary for Ms. Robinson to defeat the proximate cause summary judgment to be granted a new trial. *Id.* at 77. Ms. Robinson argued that the landowners had failed to make a prima facie case on the issue of proximate cause. *Id.* The court observed that the test for proximate cause was whether the injury was a natural and probable consequence of the defendant's negligence, determined by looking back, after the occurrence, and examining whether the injury was a reasonably foreseeable consequence. *Id.* at 78. Based on testimony that the road would not have been flooded when Mr. Robinson drove through the area and that the cause of Mr. Robinson's death was drowning, the court held that there was a genuine dispute of material fact as to whether the levees were a proximate cause of Mr. Robinson's death. *Id.* at 81-82.

V. COMMENT

In *Robinson*, the Western District made the next logical extension of surface water law in Missouri, adopting a rule that promotes foresight and fairness. Missouri water law has substantially evolved from its origins in the common-enemy doctrine. The law has progressed from “defendant can divert water any direction he pleases,” to “defendant can do as he pleases except in certain circumstances,” to “defendant can do as he pleases as long as he is somewhat reasonable about it,” and finally to “defendant must show that what he is doing is reasonable.” Furthermore, each party’s burden of proof has changed substantially. In early cases like *Tackett*, the burden of proof was vested in the plaintiff, who had to come into court and prove either that the defendant diverted water in a certain way or that the defendant was negligent. As Missouri courts have expected more reasonableness in their determinations of fault, the burden of proof seems to have migrated to the defendant. As in *Robinson*, the plaintiff only needed to show that the diversion of surface water had some impact on her injury, at which time the defendant became responsible for proving that his actions were reasonable. The question becomes: Has the pendulum swung too far?

Legal scholars have suggested that the rule of reasonableness has several shortcomings.¹²⁶ First, the decreased predictability of the rule makes it more difficult for landowners to enjoy their land because it fails to give them guidelines.¹²⁷ Second, the subjective nature of the rule makes it difficult for courts to apply and results in a greater number of disparate decisions.¹²⁸ Despite these suggested shortcomings, courts have continued to place their faith in the rule of reasonableness.¹²⁹

Logically, the new reasonableness rule provides many benefits to society. First, the results in any one case depend on the subjective facts of the parties’ situation.¹³⁰ This promotes fairness by allowing judges and juries to individually weigh the parties situations rather than trying to fit diverse situations into inflexible categories. Second, because potential defendants have to be able to show that their actions were reasonable, defendants will be more conscious about what implications their diversion of water might have on others before taking action.¹³¹ This ensures that landowners maintain awareness of their right to enjoy their land as well as others right to enjoy their property. In cases involving floodwater, courts have held that enjoyment of land without forethought does not

126. See *Heins Implement Co. v. Mo. Highway & Transp. Comm’n*, 859 S.W.2d 681, 690 (Mo. 1993).

127. *Id.*

128. *Id.*

129. See *supra* text accompanying note 60.

130. *Heins*, 859 S.W.2d at 690.

131. *Id.*

take precedence over others' enjoyment of land, property, or life. The courts, however, may have inadvertently gone too far.

After *Robinson*, all landowners who design and build levees or other flood-control mechanisms must take adjoining landowner and public interests into consideration. This is a favorable result because forcing landowners to consider the consequences of their actions is beneficial to Missouri's citizenry. The questionable issue raised by *Robinson* and its predecessors, however, is how to deal with flood-control methods developed before the adoption of the rule of reasonable use. Legal scholars argue that the rule of reasonableness should be applied prospectively to flood-control measures, and that older levees should be "grandfathered" because landowners relied on the old rule in designing them.¹³² However, courts have been eager to apply the rule of reasonableness retroactively to cases decided before the rule was adopted.¹³³ Additionally, in *Robinson*, the court expanded liability to levees built roughly ten years before Missouri adopted the reasonableness rule in *Heins*.¹³⁴

Generally, a court decision that overrules a prior rule of substantive law is always applied retroactively.¹³⁵ "However, '[i]f the parties have relied on the state of the decisional law as it existed prior to the change, courts may apply the law prospectively-only in order to avoid injustice and unfairness.'"¹³⁶ A decision that overrules a prior rule of substantive law should be applied prospectively-only if: "(1) [] the decision establishes a new principle of law by overruling clear past precedent; (2) [] the purpose and effect of the newly announced rule will be retarded by retroactive application;" and (3) the extent to which the interests of those persons affected by the change and the degree to which parties who relied upon the old rule might suffer from retroactive application of the new rule outweigh the possible hardship to the parties who would be denied the benefit of the new rule."¹³⁷ In past cases, Missouri courts have questioned whether the rule of reasonable use should be applied retroactively to appeals

132. See Davis, *supra* note 2, at 133.

Levees in existence before the change [to reasonable use] ought to be treated differently from new levees. Old levees and channel relocations should be grandfathered because landowners relied on the old rule in designing and siting them [W]hen there is reliance on the common enemy rule in designing and siting a levee, it is not fair (and perhaps unconstitutional) to impose a new liability rule retroactively.

Id.

133. See *Kueffer v. Brown*, 879 S.W.2d 658 (Mo. Ct. App. 1994); *Campbell v. Anderson*, 866 S.W.2d 139 (Mo. Ct. App. 1993).

134. See *Robinson v. Mo. State Highway & Transp. Comm'n*, 24 S.W.3d 67, 70, 82 (Mo. Ct. App. 2000).

135. See *Kueffer*, 879 S.W.2d at 663 (citing *Sumners v. Sumners*, 701 S.W.2d 720, 722-23 (Mo. 1985)).

136. *Id.* (quoting *Sumners*, 701 S.W.2d at 723).

137. *Id.* (citing *Sumners*, 701 S.W.2d at 724).

involving trials completed before the *Heins* decision.¹³⁸ Applying the rule of reasonableness to cases of this nature involves pure retroactive application because these cases involve both conduct and legal action occurring before the inception of the new rule.¹³⁹ The retroactivity issue becomes complicated, though, in flood-protection cases like *Robinson*.

The first reason flood-protection cases become complicated is that many levees and other flood-control devices predate *Heins*. These cases involve flood-control devices constructed before the adoption of the rule of reasonable use, but lawsuits filed after the rule's adoption. If a case involved a levee built after the *Heins* decision and a subsequent lawsuit, there would be no question that the rule of reasonableness would apply because the actor was subject to the rule when she acted. However, cases like *Robinson* possess both retroactive and prospective aspects. These cases involve retroactive application because the reasonableness rule is being applied to conduct carried out in reliance on the old rule, and they involve prospective application because the lawsuit is decided after the adoption of the reasonableness rule. The fact that some flood-control devices were constructed before *Heins* suggests that courts should balance the interests at stake and allow the builders of those devices to rely on the old rule. However, given the amount of time that has elapsed since *Heins*, courts might be tempted to apply the reasonableness rule and obligate owners of flood-control devices to either modify them or suffer liability.

The second reason that applying *Heins* retroactively to flood-protection cases becomes complicated is that many flood-control devices are expensive to erect and modify. Additionally, levees and other devices are usually intended to protect persons or property from damage caused by large scale flooding. In cases like *Robinson*, the person building the levee or other device may have to incur substantial costs resulting from the modification and decreased protection of their interests. The damage caused by water diversion may not, in all situations, outweigh the cost of modifying the flood-control devices or the additional damage suffered by the device owner.

Based on these reasons, Missouri courts could have decided that the rule of reasonableness should be applied only prospectively to floodwater. This would have the same theoretical benefits as retrospective application with one major shortcoming. As with retrospective application, all landowners erecting levees or other flood-control mechanisms must be mindful of potential dangers to others and neighboring property. This furthers the Missouri Supreme Court's purpose in adopting the reasonableness rule.¹⁴⁰ However, because there are many levees

138. See *id.* at 663-66; *Campbell*, 866 S.W.2d at 144-45.

139. See *Kueffer v. Brown*, 879 S.W.2d 658, 663-66 (Mo. Ct. App. 1994); *Campbell v. Anderson*, 866 S.W.2d 139, 144-45 (Mo. Ct. App. 1993).

140. See *Heins Implement Co. v. Mo. Highway & Transp. Comm'n*, 859 S.W.2d 681, 686-91 (Mo. 1993). The *Heins* court "adopt[ed] the rule of reasonable use as the one most likely to promote the optimum development and enjoyment of land, while ensuring that their true costs are equitably distributed among the competing interests at

and flood-control structures in Missouri that were built before 1993 when Missouri still adhered to the common-enemy doctrine, there is the possibility that individuals will continue to be harmed by those structures. To limit these damages from prospective application, courts could have construed the rule to apply only to repairs and changes to existing levees, in essence extending negligent liability only to those who act after the common-enemy doctrine was abolished. This would prevent persons from acting negligently, while sparing them the extensive cost of having to modify or relocate all of their flood-control measures. Missouri courts, however, have chosen to apply the rule of reasonableness to all past and present flood-control measures.¹⁴¹

While it is unfair to force landowners who erected levees in reliance on the common-enemy doctrine to bear the expense of redesigning them, the Western District was correct in its assessment that human life outweighs a landowner's interest in his property. Based on *Robinson*, it appears that from this point forward Missouri courts should extend liability to any diversion of water they deem unreasonable. This "retroactive" application of the reasonableness rule to levees built before *Heins* yielded the correct result in *Robinson*, because agricultural goods were weighed against human life. This concept may, however, become problematic in other flood-control and surface water situations. Application of the reasonable use rule retroactively to all surface water diversion will impose liability on all Missouri landowners whose diversion of water is found unreasonable. This will force all landowners to seek out potential problems and remedy them. Although theoretically this would benefit society, requiring Missouri landowners to re-engineer every railroad culvert, highway, road, levee ditch, drainage system, and surface water diversion that predates 1993 may not be physically, or financially, possible.

The solution to this dilemma would be to incorporate the third element of the test for prospective-only application into the *Heins* rule of reasonable use.¹⁴² This combined reasonableness consideration would not change the reasonableness determination for any landowner that erects, modifies, or repairs a water-diverting structure in a way that causes unreasonable damage to others. However, an additional issue would be considered in the reasonableness analysis for water-diverting structures that predate the *Heins* decision: "Does the hardship or expense of re-engineering the structure by the party who relied upon the old rule outweigh the hardship or damage to the party who is harmed." This change preserves the rule of reasonableness in its flexible state, but allows the courts to distinguish between those who violate the law by acting unreasonably, and those that were within their rights when they acted. It also allows courts to impose liability in any situation where the cost of repair or modification is

hand." *Id.* at 691.

141. See *Robinson v. Mo. State Highway & Transp. Comm'n*, 24 S.W.3d 67 (Mo. Ct. App. 2000); *Kueffer*, 879 S.W.2d at 658; *Campbell*, 866 S.W.2d at 139.

142. See *supra* text accompanying note 137.

minimal to the landowner and the damage from flooding is potentially substantial to others.

VI. CONCLUSION

In *Robinson v. Missouri State Highway & Transportation Commission*, the court not only extended the reasonable use rule to floodwaters and levees, but extended liability under the new rule retroactively to all landowners with flood-control devices. Based on *Robinson*, landowners who constructed levees relying on the modified common-enemy doctrine can now suffer liability for not finding and improving their flood-control methods to account for diversion of surface water that may now be deemed unreasonable. Although *Robinson* established a rule that will be beneficial to Missouri's citizenry, the ramifications of the decision to flood-protection and other categories of water law may cause increased costs and hardships to landowners.

Missouri courts have done well to employ the rule of reasonable use, but they should exercise careful consideration in cases involving structures built in reliance on the common-enemy doctrine. Based on *Robinson* and its predecessors, Missouri landowners must consider the consequences of their actions when developing their land in a way that diverts water, and must seek out and remedy any diversion of water that might be deemed unreasonable. This rule means peace of mind for some landowners, increased costs for others, and foresight and fairness for both.

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