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MONEY DAMAGES VERSUS CLEANUP IN POLLUTION CASES

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I. Introduction

In most pollution cases filed in Oklahoma today against oil companies, the landowner seeks money damages for the permanent injuries to the subject lands caused by the alleged pollution and also seeks injunctive relief to require the oil company to clean up the alleged pollution. As discussed below, there are some courts that have recognized the double recovery aspect of compensating a landowner on the basis that his land is permanently ruined, and then requiring the defendant to cleanup and restore the property to its original non-polluted condition. This article deals with the manner in which some courts have approached this emerging issue in environmental law.

It must first be recognized that there is a threshold question under existing Oklahoma law regarding a plaintiff's entitlement to both forms of relief in a district court action. It is well established that a plaintiff cannot recover as money damages the cost of remediation of land damage resulting from a nuisance where such costs exceed the diminution in the fair market value of the land.[1] Thus, where the costs of remediating land damages exceed the diminution in value, money damages for cleanup costs are simply not available in the district court. Also, there is the issue of whether the district court has jurisdiction to require cleanup. According to title 52, section 139 of the Oklahoma Statutes, the Oklahoma Corporation Commission has been vested with exclusive jurisdiction over site remediation of oil field related pollution and the Oklahoma Supreme Court recently recognized the Commission's exclusive jurisdiction over cleanup.[2] Thus, it would appear that the district courts do not have jurisdiction over oilfield remediation claims and that, therefore, the district courts may not order or require cleanup. However, some courts have held that they do have jurisdiction over cleanup claims and this article addresses situations where the court has evidenced its intent to consider both the plaintiff's money damage and remediation claims.

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1. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962) *cert. denied*, 375 U.S. 906 (1963); Schneberger v. Apache Corp., 890 P.2d 847 (Okla. 1994).

2. *Schneberger*, 890 P.2d at 849.

Most requests for cleanup are fashioned not as claims for money damages for clean-up costs but as equitable claims to require the defendant to "abate" a nuisance, the nuisance being salt moving through an aquifer, for example. However, under Oklahoma law, the nuisance is the "act" or "failure to act" which causes damage.[3] The remedies for a private nuisance are a civil action or abatement.[4] The remedies for a public nuisance include indictment, a civil action, or abatement.[5]

While some may suggest that cleaning up the land damage is synonymous with abatement of the nuisance, the law of Oklahoma does not confirm that notion. Land damages may result from the act or failure to act, but the land damage is not the nuisance. For example, failure to repair a casing leak in a well may permit saltwater to escape thereby causing pollution. In such case, the leaking casing is the nuisance and the pollution is the injury resulting therefrom. While the oil company may be required to abate the nuisance, i.e., fix the leak, this bears no relationship to the oil company's obligation for the pollution injuries caused by the leak prior to repair. As stated by the Oklahoma Supreme Court in *Atchison, T. & S.F. Ry. Co. v. Kelley*,[6] "The Defendant might abate its nuisance, but could not, by so doing, restore Plaintiff's premises."[7] This case suggests that land cleanup orders are not synonymous with abatement orders in the district court.

Although orders for cleanup, the cost of which exceeds the diminution in fair market value of the subject lands, may not be available in the district court, the fact of the matter is that, as discussed below, some district courts have permitted both money damages and cleanup. This article explores the approach taken by courts where the possibility of both forms of relief is being considered.

II. Demonstrative Cases

In June 1984, the case of *Marshall v. El Paso*[8] was filed in the United States District Court of the Western District of Oklahoma. The landowners owned a quarter section of land in Beckham County, Oklahoma. In 1981, El Paso Exploration Company pursuant to oil and gas leases and as operator under a joint operating agreement commenced operations for the drilling and completion of an oil and gas well on the subject lands. In the suit the plaintiffs alleged that the reserve pit constructed in conjunction with the drilling of the well leaked deleterious substances into the ground water of the farm and polluted the soils and water of the land. At trial, the evidence showed that the cost of restoring the land would exceed the reduction of the fair market value of the land.

The landowners by way of their suit sought money damages for the reduction in the fair market value of the land as well as the cost of restoration of the land

3. City of Holdenville v. Kiser, 156 P.2d 363 (Okla. 1945); Oklahoma City v. Page, 6 P.2d 1033 (Okla. 1931).

4. 50 OKLA. STAT. § 13 (1991).

5. *Id.* § 8.

6. 266 P. 775 (1928).

7. *Id.* at 776.

8. No. CIV-84-1783-A (filed W.D. Okla June 1984).

damage caused by the alleged nuisance. Prior to trial, an action was commenced at the Corporation Commission to determine whether pollution existed as the result of the pit and if so to adopt and implement a plan of cleaning up the polluted soils and water.

At trial the court issued instructions to the jury which declared that plaintiffs may be awarded the costs of repairing land damage but that these damages cannot exceed the decrease in the fair market value of the land caused by the nuisance.[9] On January 14, 1987, the jury returned its verdict. It awarded the landowners $350,000 for the decrease in the value of the land, $50,000 for the landowners discomfort, annoyance, and inconvenience, and $5 million for punitive damages.[10]

After the trial, the action at the Corporation Commission proceeded to hearing to determine whether remediation was available and, if so, to adopt and implement a remediation plan. After the hearing, the Corporation Commission adopted a remediation plan which included removal of all drilling mud, cuttings and other deleterious substances from the reserve pit, construction of monitoring wells, remediation of groundwater, and revegetation of the site.

In the instance of the *Marshall* case, the court proceeded to trial upon the money damages claim for decrease in the fair market value of the subject lands resulting from the pollution. The jury returned its verdict and the court entered judgment with full knowledge that an independent action was proceeding at the Corporation Commission to adopt and implement a cleanup plan. The result of the Corporation Commission action was the institution of a cleanup plan which in large measure remediated the land damages which formed the basis of the federal court jury verdict. The *Marshall* case, therefore, presents a classic illustration of double recovery where the surface owner receives money damages for pollution and the pollution is likewise remediated.

In the recent case of *Damron v. Apache*,[11] the plaintiffs alleged that reserve pits associated with the drilling of two oil and gas wells on their land leaked causing pollution to their land and groundwater. One pit was located on a 155-acre tract, and the other pit was located on an eighty-acre tract, both owned by the plaintiffs. It was undisputed that the alleged costs of remediating the pits and the pollution therefrom far exceeded the highest estimate of the fair market value of the land with improvements.[12] Under the evidence presented at trial, the highest estimate of the fair market value of the 235 acres without pollution was $168,500.

The plaintiffs sought money damages for the injuries to their land. The plaintiffs also sought "abatement" of the nuisance. That is, the plaintiffs sought to require the defendant to clean up or remediate the pollution. At the time of trial, there was an ongoing proceeding before the Corporation Commission relating to the

9. Court Instruction No. 22, *Marshall* (No. CIV-84-1783-A) (filed Jan. 14, 1987).

10. Judgment, *Marshall* (No. CIV-84-1783-A) (filed Jan. 14, 1987).

11. No. CIV 92-1227-L (W.D. Okla July 7, 1992).

12. Damron's expert engineer has advised these authors that the cost of cleanup was estimated to be $4,300,000 (roughly $2,150,000 per pit).

remediation of one of the pit locations.[13] The defendant had submitted a proposed remediation plan to the Corporation Commission relating to this pit. The plaintiff objected to the remediation plan claiming that the plan was deficient.

At trial, the court submitted to the jury the issue of money damages for injuries to the land. The court properly instructed the jury that the total damages for injuries to the land could not exceed the diminution in the fair market value of the land caused by the pollution.[14] With regard to the issue of remediation of the pollution, the court instructed the jury that,

> [i]f the plaintiffs proved that there is a public nuisance, in addition to what you award the plaintiffs for injury they have sustained, if any, the *Court may order* the defendant to remediate the public nuisance. The remediation costs will not go to the plaintiffs directly, but instead will be used to abate the public nuisance.[15]

The verdict form required the jury to determine whether or not a public nuisance had been established. Depending upon the jury's finding on this issue, the court apparently intended to address the issue of remediation on an equitable basis.[16]

The jury in *Damron* found that a public nuisance existed.[17] The jury awarded the plaintiffs damages for diminution in the fair market value of their land in the total amount of $168,500, which was the maximum amount sought by the plaintiffs.[18] The jury also awarded the plaintiffs $500,000 for personal annoyance, inconvenience and discomfort, and awarded an additional $500,000 in punitive damages.[19] Numerous post-trial motions were filed, which were denied by the district court.[20] The defendant then appealed.[21]. Subsequent thereto, the case was resolved by settlement and the appeal was dismissed.[22] Because of this, the court was not required to make a final decision as to what, if any, remediation the defendant would be required by the court to conduct. In the meantime, the remediation proceedings before the Corporation Commission have been moving forward.

There are several points of significance to the court's instructions to the jury in *Damron*. First and foremost, it is clear from the jury's instructions that it is possible that the plaintiffs might recover money damages for the permanent injuries to their land caused by the pollution and that, in addition thereto, the court might also

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13. Okla. Corp. Comm. Cause PD No. 930-025119T (Apache Corp. Applicant).

14. Jury Instruction No. 26, *Damron* (No. CIV 92-1227-L) (filed Sept. 29, 1993).

15. *Id.* (emphasis added).

16. Abatement is clearly an equitable remedy for the court's determination. *See, e.g.*, Simons v. Fahnestock, 78 P.2d 388 (Okla. 1938).

17. Jury Verdict, *Damron* (No. CIV 92-1227-L).

18. *Id.*

19. *Id.*

20. The defendant filed a motion for a judgment as a matter of law or alternatively for a new trial. These motions were denied by order dated July 27, 1994.

21. Damron v. Apache, App. No. 94-6323 (10th Cir. Aug. 23, 1994).

22. *See* Tenth Circuit's Mandate, *Damron* (App. No. 94-6323) (filed Mar. 6, 1995) (dismissing due to stipulation of parties to voluntarily dismiss appeal).

require the defendant to clean up and remediate the very pollution for which the damages were awarded. Although the court ultimately was not required to determine what remediation the defendant would be required to conduct because of the parties' settlement, an award of both money damages and remediation was clearly a possible scenario envisioned by the court's jury instructions. It is speculated that, to the extent the Corporation Commission required remediation, the court may have deferred to the Corporation Commission's expertise and adopt as its own the Commission's ruling on remediation.[23] However, even under this scenario, the plaintiffs would receive money damages for pollution which will later be cleaned up.

Secondly, the court made it clear that under no circumstances would the plaintiffs receive directly any of the monies associated with the cleanup. This was an implicit recognition by the court that it is unfair for a plaintiff to receive costs of cleanup for which the plaintiff then has no obligation to actually apply toward cleanup. History has borne out the fact that plaintiffs are rarely willing to expend any monies recovered through litigation on actual cleanup costs. Finally, it is unclear why the court in *Damron* limited its consideration of the issue of remediation to only that instance where a public nuisance was found. While abatement is clearly an available remedy for a public nuisance,[24] it is also available for a private nuisance.[25]

III. An Alternative Approach

Where the plaintiff seeks both money damages for permanent and temporary damages to the land and for abatement or cleanup of the alleged pollution, often the plaintiff will also allege that, even if the pollution is cleaned up, the land will nevertheless suffer some residual injuries. As can be seen from both the *Marshall* and *Damron* cases, it has been possible in the past, in Oklahoma, for a defendant to end up having to pay the plaintiff money damages for the injuries caused by the pollution and thereafter to be required to clean up the pollution and restore the land to its original condition (or as close thereto as practicable). Not only is this an unenviable position for a defendant, it also clearly constitutes a double recovery and windfall to the plaintiff because it permits compensation to the plaintiff for injuries that are later remediated. Part of the source of this dilemma for the defendant is the timing of the trial proceedings. That is, the issue of money damages has historically been submitted to the jury and a determination made before any ruling or decision has been made on the issue of remediation. This was true in both *Marshall* and *Damron*. Therefore, at the time the money damages were awarded, it was not clear that a double recovery would result.

The double recovery aspect and the timing problems encountered in pollution cases was recently addressed in *Braswell Shipyards, Inc. v. Beazer East, Inc.*.[26] In

23. Again, however, it is noted that the Corporation Commission proceedings address only one of the two pits involved in the lawsuit.

24. 50 OKLA. STAT. § 8 (1991).

25. *Id.* § 13.

26. 2 F.3d 1331 (4th Cir. 1993).

Braswell, the plaintiff purchased property from the defendant only to later discover serious environmental problems which the defendant had failed to disclose. The plaintiff sued seeking money damages based upon state common law claims of fraud and negligent disclosure. The plaintiff also asserted claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)[27] claiming that the defendant should be responsible for the costs of cleaning up the pollution. The plaintiff later moved to bifurcate the state law claims from the CERCLA cleanup claims.[28]

The trial court decided to bifurcate the claims and then stayed the CERCLA claims pending resolution of the state law claims.[29] The state law claims were then tried to a jury which found in favor of the plaintiff and awarded $1,029,830.82 in damages, which was the full purchase price that the plaintiff paid for the property (plus improvements added by the plaintiff).[30] After prejudgment interest was added, the trial court then entered a money judgment against the defendant in the amount of $2,095,144.45.[31] The trial court then certified this judgment as a final and appealable order under Rule 54(b) of the Federal Rules of Civil Procedure[32] even though the CERCLA claims had not yet been resolved.[33] An appeal was then taken.[34]

In reviewing the trial court's ruling, the court in *Braswell* stated:

> Most troubling with this case is the interrelationship of the state law claim on appeal and the CERCLA claims pending below. If pursued singularly, the recovery in negligent non-disclosure claim is separate and distinct from the recovery under CERCLA because the negligent non-disclosure claim provides damages measured by the "benefit of the bargain" whereas the CERCLA claims will involve a determination of responsibility for response costs . . . . However, when pursued together the damages under negligent nondisclosure and CERCLA are inextricably intertwined because a CERCLA cleanup will most assuredly increase the value of the damaged property at issue. Consequently, if Braswell (Plaintiff) is successful on its negligent nondisclosure and CERCLA claims, it will not only receive the "benefit of the bargain" under South Carolina law, but will also receive a piece of property that has appreciated as well, and hence a windfall.[35]

The court went on to characterize this windfall as a "double recovery" stating:

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27. 42 U.S.C. §§ 9601-9675 (1988 & Supp. VI 1994).
28. *Braswell*, 2 F.3d at 1334.
29. *Id.*
30. *Id.*
31. *Id.*
32. FED. R. CIV. P. 54(b).
33. *Braswell*, 2 F.3d at 1334.
34. *Id.*
35. *Brasswell*, 2 F.3d at 1337.

> If allowed to stand, the judgment in the case could allow Braswell (Plaintiff) to not only recover the purchase price of the property and the cost of improvements in the form of consequential damages, but also could allow Braswell to reap the benefits — the increased value of the property — from the CERCLA cleanup as well.[36]

The court in *Braswell* clearly rejected any possibility of a double recovery:

> A double recovery is not consistent with South Carolina law . . . . The threat of a double recovery that exists when a party pursues common law claims of fraud and negligent nondisclosure and CERCLA claims is a compelling reason to require the district court in this case to retain jurisdiction over the state law claims until the CERCLA claims are resolved. The interrelationship of the claims requires as much. To hold otherwise would allow Braswell to potentially recover double damages, a result neither contemplated or permitted under South Carolina law.[37]

Finally the court remanded the case with instructions for the trial court to withhold entry of judgment on the state law money verdict until after the CERCLA claims were resolved.[38] Once the CERCLA claims were resolved, the court noted that the trial court would then be in a position to determine the appropriate damage award on the state law claims taking into account the projected value of the land after any required cleanup.[39]

In so ruling, the court in *Braswell* relied heavily on *Gopher Oil Company v. Union Oil Co.*[40] In *Gopher*, the plaintiff sued claiming that the property which it purchased from the defendant was polluted and that the defendant concealed this fact.[41] The plaintiff sought money damages for alleged fraud and also sought pollution cleanup costs.[42] The jury found the defendant liable for fraud and awarded the plaintiff $1,823,272.81, which was comprised of the $1,400,000 purchase price which the plaintiff paid for the land plus $423,272.81 in cleanup costs which the plaintiff had already paid.[43] The jury also issued an advisory verdict finding the defendant 100% responsible for cleanup costs.[44] The trial court adopted the jury's determination on cleanup but did not enter judgment for $1,823,272.81, instead retaining jurisdiction over the fraud claim until the cleanup was completed so that the property could then be revalued and the money award adjusted accordingly to account for the increased value of the land after cleanup.[45] The trial court then permitted an immediate interlocutory appeal in which the court certified the following

36. *Id.* at 1338.
37. *Id.* at 1338-39.
38. *Id.* at 1339.
39. *Id.*
40. 955 F.2d 519 (8th Cir. 1992).
41. *Id.* at 522-23, 526.
42. *Id.* at 523.
43. *Id.* at 524, 528.
44. *Id.* at 524.
45. *Id.* at 524, 528.

question: "Whether it is proper for the court to retain jurisdiction over the fraud claim and determine damages due at some future date, or whether this court should have immediately awarded Gopher Oil (Plaintiff) damages in accordance with the jury's verdict."[46]

The plaintiff objected to the trial court's retention of jurisdiction and its failure to enter judgment on the jury's money damage award claiming that these actions violated the plaintiff's Seventh Amendment[47] right to have a jury trial on the issue of damages.[48] After noting that this was a case of first impression in the jurisdiction, the court in *Gopher* noted that the jury's award was based upon the value of the land being zero dollars because of the pollution.[49] The court further noted that the trial court believed that the jury's assessment of damages was erroneous in light of the effect that cleanup will have in increasing the value of the property.[50] The court in *Gopher* noted that an assessment of the value of the land before cleanup would allow a windfall to the plaintiff because it would receive back the full purchase price that it paid, but that it would then be entitled to retain the land after it was cleaned up.[51] Thus, the court concluded that the proper measure of damages was the difference between the purchase price of the property and the value of the property after completion of cleanup.[52]

The court in *Gopher* further held that it was proper for the trial court to retain jurisdiction and to withhold judgment on the jury verdict in order to substitute a verdict consistent with the proper measure of damages as described above.[53] However, the court stated that it was not necessary to wait until the cleanup was actually completed in order to properly assess the damages, but rather the trial court should have another hearing wherein the parties could present expert testimony regarding the estimated value of the land after cleanup.[54]

IV. Conclusion

Where a plaintiff seeks both the remedies of money damages and abatement in a pollution case, the iniquities, windfalls and double recoveries that can result if the proper remedies are not applied in the proper order are well defined in *Braswell* and *Gopher*. That the same iniquities have resulted in prior Oklahoma cases is demonstrated by the result in *Marshall* and the possible result in *Damron*. No Oklahoma cases exist which directly address these iniquities and, as discussed in *Gopher*, this appears to be a matter of first impression in most jurisdictions. For the same rea-

46. *Id.* at 528.
47. U.S. CONST. amend. VII.
48. *Gopher*, 955 F.2d at 528.
49. *Id.*
50. *Id.* at 528-29.
51. *Id.* at 529.
52. *Id.*
53. *Id.*
54. *Id.* at 529.

sons discussed in *Braswell* and *Gopher*, the holdings in both cases should be applied to *Damron* and any future pollution cases in Oklahoma.

Again, one of the main difficulties encountered in pollution cases is the timing problem associated with resolving the different remedies which the plaintiff seeks. If remediation is going to be required by a court, the exact nature and extent of the required remediation needs to be determined in advance and revealed to the parties so that they may adequately prepare and present appropriate evidence as to the value of the land after the required remediation. Because of this, and consistent with the principles announced in *Braswell* and *Gopher*, the appropriate course of proceedings in pollution cases should be to bifurcate the remediation claim from the money damage claim and for the court to resolve the remediation claim in advance of the trial of the money damage claim. After the remediation claim is tried, if the court determines that remediation is not warranted or not technically feasible, the plaintiff can then pursue its money damage claim for the full diminution in the value of the land in its unremediated condition. If, however, the court determines that some form of remediation is warranted, the court could advise the parties as to the type and extent of remediation that will be required, and then the money damage claim can be presented to a jury to determine the diminution in the value of the land which will remain after the required remediation, if any.