

# Elastic Damages in Residential Property Damage Claims

*By Gavin B. Parsons*

• **Although a recent** decision by the North Carolina Court of Appeals in **BSK Enterprises, Inc. v. Beroth Oil Company**, 783 S.E.2d 236 (N.C. Ct. App. 2016), brought some additional certainty to the scope of potential tort liability for environmental claims brought under North Carolina law for damage to commercial properties, claims for damage to residential properties occupied by the owner are somewhat more elastic and unpredictable.

In **BSK**, a commercial property owner brought property damage claims against a neighboring property owner for groundwater contamination. The plaintiff obtained a jury award for \$1,492,000 for remediation costs where its diminution in property value was only \$108,500. The trial court entered a post-verdict order capping plaintiff's award at \$108,500, the diminution in property value. The Court of Appeals affirmed the trial court's decision to cap plaintiff's recovery at the amount of diminished property value holding that, "where no personal use exception applies, and the cost of remediation to property is disproportionate to or greatly exceeds the diminution in value of the property or is otherwise unreasonable under the circumstances, the cost awarded should be the diminution in value of the property." *Id.*, 783 S.E.2d at 249. Thus, entities facing potential liability for environmental contamination of commercial property can expect damages to be limited to the diminution in value of the property instead of the full cost of remediation and restoration.

What **BSK** clarified and limited regarding damages to commercial properties it appeared to expand for pollution claims brought by residential property owners. The Court qualified its holding limiting damages for commercial property owners to diminution in value by noting the existence of a personal use exception. The Court described the personal use exception by quoting from the Restatement (Second) of Torts section 929(1)(a) Comment b:

A reason personal to the owner for restoring the original condition is an exception which permits the recovery of restoration costs to repair damage to real property even when such costs exceed the value of the land itself. For example, if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs even though this might be greater than the entire value of the building.

783 S.E.2d at 243–44 (internal quotations omitted). The Court's acceptance of the Restatement provisions including Comment b suggests that future claims by residential property owners seeking remediation, repair and replacement damages in excess of the diminution in value of their property would be recoverable. This unqualified exception creates the potential for liability for tortfeasors well in excess of the value of the property with little guidance or definition. Qualified expert witnesses who can clearly explain scientific principles and practical considerations for remediation and replacement are crucial for addressing potentially broad liability.

Another potentially expansive and undefined measure of damages in claims brought by residential property owners are non-economic damages related to annoyance, discomfort, and loss of use. Courts applying North Carolina law have recognized the

recoverability of non-economic damages for nuisance and trespass in a number of different factual settings:

- Physical pain, annoyance, stress, deprivation of the use and comforts of a home arising from blasting at a quarrying operation; **Hanna v. Brady**, 73 N.C. App. 521, 527, 327 S.E.2d 22, 25 (1985).
- Embarrassment, humiliation and mental anguish resulting from defendant's trespass and desecration of a spouse's grave; **Matthews v. Forrest**, 235 N.C. 281, 285, 69 S.E.2d 553, 556 (1952).
- Personal discomfort, stress, annoyance and anxiety were recoverable for a nuisance or trespass resulting from contamination of a river, lake, water or riparian property. **Shults v. Champion International Corp.**, 821 F.Supp. 517, 518 (E.D. Tenn. 1992) (applying North Carolina law).

The Restatement (Second) of Torts also recognizes non-economic injuries for discomfort and annoyance to an occupant of land: "Discomfort and annoyance to an occupant of the land and to the members of the household are distinct grounds of compensation for which in ordinary cases the person in possession **is allowed to recover in addition to the harm in his proprietary interests.**" Restatement (Second) of Torts § 929(1)(c), Comment e (emphasis added).

Claims for discomfort and annoyance damages are particularly difficult to assess and measure. The primary source of factual information regarding non-economic damages is the individual claimant. In addition, the maladies involved in these claims are frequently non-diagnosed medical conditions for which there is no established medical causation requirement or statutory limitation on recovery. Claims for discomfort and annoyance damages are generally not subject to limitation or elimination through summary judgment as their determination lies with the trier of fact, which is reviewed only for an abuse of discretion. **Hanna**, 73 N.C. App. at 527, 327 S.E.2d at 25. The potential range of factual circumstances covered by these damages is expansive, and difficult to characterize with any uniformity. Individual cases can vary greatly. The lack of development of applicable case law and broad definition by the Restatement allow for potentially significant jury verdicts based upon little more than a claimant's expressions of frustration and angst. Further still, jury awards for discomfort and annoyance are generally significantly higher when paired with large remediation claims. Without a firm basis to calculate discomfort and annoyance damages, juries tend to tie these awards to remediation costs, typically a percentage. Given the similarly open-ended nature of remediation damages, a party defending against residential property damage claims faces great uncertainty and broad potential liability.

Thus, while recent developments in the law have clarified the scope of liability for environmental claims involving commercial properties, similar claims brought by residential property owners remain potentially volatile and unbound.

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