

# **Recent Developments in Exposure Actions, and the Uncertain Future of Stigma Damages**

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**Chapter #**

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**BIOGRAPHICAL INFORMATION****EDUCATION**

Mr. Keffer graduated cum laude from Southern Methodist University in 1981 with a Bachelor of Arts and Departmental Distinction and History and received his Juris Doctorate in 1984 from the University of Texas. Mr. Keffer was admitted to practice law in Texas in 1984.

**LEGAL EXPERIENCE**

Before joining the faculty of Texas Tech University School of Law in 2014, Bill Keffer was in practice for thirty years. After obtaining his BA in History from SMU in 1981 and his JD from the University of Texas in 1984, Mr. Keffer's first position was with the Dallas law firm of Vial, Hamilton, Koch & Knox, where he had a general litigation practice. His next position was as in-house litigation-management counsel with ARCO Oil & Gas Company, where he presided over a national docket of over 120 cases. While at ARCO, he began specializing in oilfield-pollution cases and handled all kinds of environmental claims in Texas, Oklahoma, Louisiana, Mississippi, Arkansas, New Mexico, Colorado, Wyoming, Montana, California, Kansas, and offshore Gulf of Mexico. After leaving ARCO and joining the Dallas law firm now known as Gardere, Wynne & Sewell, Mr. Keffer's practice focused exclusively on oilfield-pollution litigation, and he represented various energy companies, such as ARCO, ConocoPhillips, Chevron, and Vastar. Mr. Keffer also, on occasion, successfully represented various landowners in prosecuting their oilfield-pollution claims, including ranch families in the Permian Basin and South Texas, as well as rural landowners in the Barnett shale in North Texas. After leaving Gardere, Mr. Keffer had his own practice in Dallas for thirteen years, where he continued to focus on environmental matters involving the oil-and-gas industry. During that time, he also served in the Texas legislature from 2003 to 2007, representing House District 107 in Northeast Dallas County.

**PROFESSIONAL ACTIVITIES AND MEMBERSHIPS**

Mr. Keffer is a charter member, former president, and former board member of the Dallas Chapter of the Federalist Society. He is a member of the Board of Advisors for the Maguire Energy Institute, which is part of the Cox School of Business at SMU. He is a member of the Interstate Oil and Gas Compact Commission (IOGCC). He is also a neutral for the American Arbitration Association. He writes a regular column for *Shale* magazine.

**PUBLICATIONS**

Mr. Keffer has written articles and given speeches at several industry and professional seminars on oilfield pollution and related topics. Mr. Keffer published an article on oilfield pollution in the March-April 1994 SMU Law Review entitled "Drilling for Damages: Common Law Relief in Oilfield Pollution Cases," and he updated that work in 2002 with a more comprehensive publication for the 54th Annual Institute on Oil & Gas Law entitled "The Last Phase of an Oil Field: Getting Sued." Mr. Keffer's accomplishments include serving as co-counsel in charge of developing and implementing the expert case in extensive litigation for Chevron in Mississippi, including two multi-week trials, leading to a significant and favorable change in Mississippi case law. Mr. Keffer and his Miller Keffer Pedigo partner, Randy Miller, also successfully tried significant groundwater contamination litigation for dozens of landowners in Wise County, leading to a jury verdict of \$204 million.

**COURSES**

Mr. Keffer teaches courses in oil-and-gas law and legislative process at the Texas Tech University School of Law.

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Honors: *Science and Technology Law Review*, Articles Editor  
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**Texas A&M University**, College Station, TXB.A., *magna cum laude*, received May 2012

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**I. Introduction**

This article explores recent developments in Texas law that may have a significant impact on the recovery of damages in actions based on exposure of land to toxic substances. The Texas Supreme Court issued two opinions in late 2014 that might have a lasting impact on the way damages are calculated in these cases, and a very recent opinion from the San Antonio Court of Appeals threatens to dramatically reshape the way nuisance suits against oil-and-gas companies are litigated by requiring plaintiffs to prove nuisance damages, as well as personal-injury damages, with medical expert testimony.

**II. Temporary vs. Permanent Injury**

Determining whether an injury is temporary or permanent is key to suits for injury to real property. This crucial distinction determines the appropriate measure of damages, as well as the operation of periods of limitation. See Michael Goldman, Drilling into Hydraulic Fracturing and Shale Gas Development: A Texas and Federal Environmental Perspective, 19 TEX. WESLEYAN L. REV. 185, 263 (2012).

It is a well-settled, and well-known, feature of Texas tort law that the measure of damages for a temporary injury to real property is the cost of restoring the land to its condition immediately preceding the injury. See, e.g., Trinity & S. Ry. Co. v. Schofield, 10 S.W. 575 (1889) (setting out the rule for temporary injury to land). On the other hand, if the injury is permanent, the property owner may typically recover the difference between the fair-market value of the property before the time of its destruction and the fair-market value immediately afterward. Fort Worth & D.C. Ry. Co. v. Hogsett, 4 S.W. 365, 366 (1887) (setting out the rule for permanent injury to land).

Limitations are similarly determined by the temporary/permanent distinction because the date of accrual varies depending on the type of injury. An action for permanent damages to land accrues upon discovery of the first actionable injury, Schneider Nat. Carriers, Inc. v. Bates, 147 S.W.3d 264, 270 (Tex. 2004), while an action for temporary damages accrues anew upon each injury. Id.

**A. Gilbert Wheeler's reformulation of the temporary-versus-permanent distinction**

Despite the importance of this distinction, Texas courts have historically struggled with finding a workable rule for distinguishing between temporary and permanent injuries. See William R. Keffer, Drilling for

Damages: Common Law Relief in Oilfield Pollution Cases, 47 SMU L. REV. 523, 532 (1994). In 2004, the Court noted that cases turning on this issue had been decided unpredictably, so it sought to clarify the definitions. Schneider, 147 S.W.3d at 274-75. After briefly summarizing the conceptual reasons why settling on one definition is tricky, the Court held that an injury is permanent when its future damages can be estimated with reasonable certainty, and is temporary when they cannot. Id. at 281.

This definition did not last long. In 2014, the Supreme Court issued an important ruling in Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P., 449 S.W.3d 474 (2014), making several important statements of law. First, the Court extended the rule that damages are determined by the temporary or permanent nature of the injury to actions sounding in contract, as well as in tort; second, the Court "reformulated" the definitions of temporary and permanent injuries; and third, it recognized and confirmed two important exceptions to the general damages rules. The two exceptions will be explored in Part II.A.3 below.

Gilbert Wheeler involved a family-owned ranch, a pipeline company, a contract, and some much-beloved trees. The Wheeler family, through its closely-held corporation Gilbert Wheeler, Inc., owns a heavily-wooded 153-acre ranch in Shelby County, Texas. Id. at 476-77. Enbridge approached the Wheelers seeking to build a pipeline across their property, and the Wheelers consented, on one condition: that the pipeline be constructed underground, in order to preserve the trees. Id. Enbridge agreed, and the contract between the parties expressly stipulated that the trees were to be saved. Id. Unfortunately for the Wheelers (and the trees), Enbridge failed to notify their construction company about the provision, and in the process of clearing the right of way, the construction company cut down hundreds of trees and bulldozed the ground. Id.

The Wheelers sued Enbridge for breach of contract and trespass and won a jury verdict on both counts. Id. at 477. At trial, Enbridge asked for a jury question as to whether the damage done to the Wheelers' land was temporary or permanent, in order to determine whether the jury should award the cost of restoring the trees (temporary injury) or damages equal to the diminution in fair-market value (permanent injury). Id. The trial judge submitted the case to the jury without that question, and the jury found Enbridge liable for \$300,000 on the breach-of-contract claim, to compensate the Wheelers for the reasonable cost to restore the property. Id. On the trespass claim, the jury found no loss in the fair-market value of the property but

awarded \$288,000 for the intrinsic value of the trees that Enbridge destroyed. Id.

Enbridge appealed, claiming that the trial court erred in not submitting the temporary-versus-permanent question to the jury, and that the intrinsic value of trees is not an available measure of damages. Id. The court of appeals agreed with Enbridge's first point and rendered a take-nothing judgment in their favor.

1. Applying the distinction to actions sounding in contract

On appeal to the Supreme Court, Justice Lehrmann, writing for the majority, was first faced with the question of whether restoration costs are the proper measure of damages in a breach-of-contract case, regardless of whether the injury is temporary or permanent. The Wheelers contended that restoration costs were the only way to give them the benefit of the bargain under their contract with Enbridge, and the Court agreed. Id. at 479. Noting that it was an issue of first impression, the Court held that application of the temporary-versus-permanent distinction determines the measure of damages in cases involving real-property damage under contract, as well as tort. Id. This decision was justified "because the injury in question under either cause of action is the same," and exceptions to the general rules (discussed below) ensure that landowners are adequately compensated for their injuries. Id.

2. Reformulating the definitions of "temporary" and "permanent"

Next, Justice Lehrmann set out to clarify the temporary-versus-permanent distinction in real-property damages. He noted that confusion persisted in the lower courts – the Court itself had variously described permanent injuries as those "which will continue indefinitely, or at least for a very long time," Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 558 (Tex. 2004), and those which are "constant and continuous, continually happening, or occurring repeatedly and predictably." Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P., 449 S.W.3d 474, 480 (Tex. 2014). Despite this, the Court had also held that the injury "need not be eternal" or "perpetual" to be a permanent injury. Schneider, 147 S.W.3d at 277 (Tex. 2004). Likewise, it had described temporary injuries as "not last[ing] for long periods of time, [] not ongoing, [] not likely to occur again, occur[ing] only sporadically, or occur[ing] unpredictably." Gilbert Wheeler, 449 S.W.3d at 480.

The majority apparently had enough of this sad state of the law and issued a "reformulation" of the

definitions "for the sake of clarity." Id. Accordingly, an injury to real property is now considered permanent if "it cannot be repaired, fixed or restored" or if "even though the injury can be repaired, fixed, or restored, it is substantially certain that the injury will repeatedly, continually, and regularly recur, such that future injury can be reasonably evaluated." Id. An injury to real property is temporary if it "can be repaired, fixed, or restored" AND "any anticipated recurrence would only be occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty." Id. Further, the Court held that whether an injury is temporary or permanent is a question of law for the court to decide. Id. Accordingly, when faced with factual disputes about the nature of the injury, trial courts must present the disputes to the jury in a manner consistent with the "reformulated" definitions in Gilbert Wheeler. When there are no factual disputes about the *nature* of the injury, the Court must determine whether it is temporary or permanent, as a matter of law, and instruct the jury accordingly.

3. Exceptions to the general damages rules

These definitions may not be concise, but they are at least clear. And the Court was right to describe their opinion as a "reformulation" rather than a redefinition because the new definitions are largely a combination of all the existing tests courts have been using in recent times. However, the general rule is "appl[ie]d with some flexibility, considering the circumstances of each case, to ensure that an award of damages" properly compensates the landowner for her injury. Id. at 481. To accomplish this goal, courts apply a small handful of exceptions to the general damages rule. Two of these exceptions were explored in Gilbert Wheeler: the economic-feasibility exception, and the intrinsic-value-of-trees exception.

a. The Economic-Feasibility Exception

Texas courts have historically applied the economic-feasibility exception to temporary injuries where "the cost of required repairs or restoration exceeds the diminution in fair market value *to such a high degree that the repairs are no longer economically feasible.*" Id. (emphasis added). When applied, the exception transforms an ordinarily temporary injury into a permanent injury, and the proper measure of damages is loss in fair-market value. Id., (citing N. Ridge Corp. v. Walraven, 957 S.W.2d 116, 119 (Tex. App.—Eastland 1997, pet. denied)).

However, the Supreme Court had never expressly recognized the exception, and it took this

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