

Exposure and Stigma

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

William R. Keffer

Major Recent Cases

- *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474 (Tex. 2014)
- *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820 (Tex. 2014)
- *Cerny v. Marathon oil*, No. 04-14-00650-CV, 2015 WL 5852596 (Tex. App.—San Antonio Oct. 7, 2015, pet. filed)

Temporary v. Permanent Injury

- The measure of damages for injury to real property depends on whether the injury is temporary or permanent
 - Damages for temporary injury restore the land to its previous condition
 - Damages for permanent injury account for the change in fair market value

Temporary v. Permanent Injury

- Three main points of *Gilbert Wheeler*:
 - Temporary v. permanent distinction applies to contract actions AND tort actions
 - Reformulated definitions of temporary and permanent
 - Acknowledged two exceptions to the general rule

Temporary v. Permanent in Contract Actions

- The temporary v. permanent paradigm has always been applied to actions sounding in tort
 - Courts of Appeals were split on whether it applied to damages stemming from breach of contract
- “We see no reason to compensate a party differently because the wrongful conduct that caused the identical injury stems from breaching a contract rather than committing a tort”
 - *Gilbert Wheeler*, 449 S.W.3d at 479.

Reformulating the Definitions

- Permanent if:
 - “it cannot be repaired, fixed, or restored” *or*
 - “it is substantially certain that the injury will repeatedly, continually, and regularly occur, such that future injury can be reasonably evaluated”
- Temporary if:
 - it “can be repaired, fixed, or restored,” *and*
 - “anticipated recurrence would only be occasional, irregular, intermittent, and not reasonably predictable”

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