

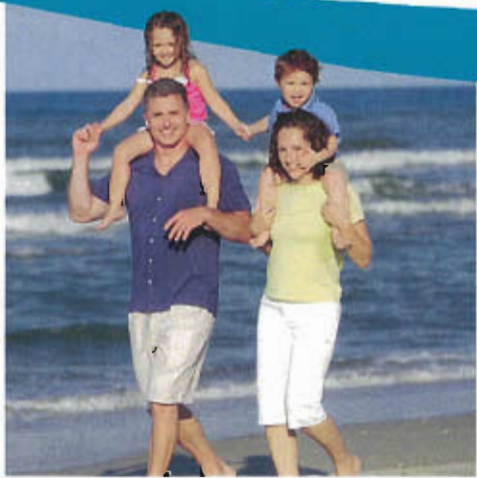
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# THE *Poffenbarger* DECISION

RHON E. JONES

**T**he Supreme Court's recent decision in *Poffenbarger v. Merit Energy Co.*, 972 So. 2d 972 (Ala. 2007) regarding the measure of direct, compensatory damages for injury to real property presents defense attorneys the opportunity to stretch a rather narrow holding beyond its intended lengths. The opinion is limited to the general measure of damages which are awarded to make an injured party whole. In other words, the Plaintiff should receive the amount that will fully compensate her for the actual damage that she suffered. *Borland v. Sanders Lead Co., Inc.*, 369 So. 2d 523, 530 (Ala. 1979). The correct measure of direct, compensatory damages for injury to real property has traditionally been decided by first determining whether the injury is of a permanent or continuing character. *Id.* However, the law on damages cannot be rigidly applied to all sets of facts and circumstances. *Id.* There must be flexibility in the measure of damages when the situation presents a unique hardship that the general rule would not compensate the Plaintiff for. *Id.* By allowing this flexibility the Plaintiff can be awarded the correct amount without any fear of suffering an adverse effect on future litigants.

## **I. Poffenbarger v. Merit Energy Company**

Prior to 2007, the Alabama Supreme Court had never explicitly ruled on the issue of the measure of direct, compensatory damages for injury to real property when the cost of restoration exceeded the diminution in fair market value of the property that resulted from a defendant's tortious conduct. Pursuant to Rule 5 of the Alabama Rules of Appellate Procedure, the Poffenbargers petitioned for permission to appeal a grant of summary judgment that would place the issue squarely before the Court for the first time. The petition was granted and the case was subsequently decided.

In *Poffenbarger v. Merit Energy Co.*, oil pipelines, belonging to Merit Energy Company (Merit), were buried

under a tract of property that was adjacent to the damaged property. 972 So. 2d 792, 793 (Ala. 2007). The pipelines began to leak which caused oil to spill over the boundary line and onto the neighboring property. After an initial remedial effort was unsuccessful, Poffenbarger commenced a civil action alleging trespass, nuisance, wantonness, and negligence against Merit in an attempt to recover the expected cost of fully remediating the property. Merit moved the trial court to rule on the proper measure of damages when the cost of restoration exceeds the diminution in fair market value to the property caused by their conduct. The motion was granted in favor of Merit, which limited the amount recoverable by the Poffenbargers. *Id.* at 793-794.

On appeal, the Supreme Court affirmed the trial court's ruling by holding that the proper measure of direct, compensatory damages for injury to property generally is the diminution in fair market value of the property resulting from the defendant's tortious conduct even if the cost of remediating the property exceeded that value. *Id.* at 801. Despite there being no binding authority on the particular issue, the Court found guidance for its decision through prior cases that discussed the proper measure of damages when the injury was to only property. *Id.* at 795. Those cases, either through dicta or the authority relied on, supports the rule handed down. *Id.* at 795-801. However, the motivating factor behind the decision was apparently a more practical nature. *Id.* at 801-802. Awarding money damages in excess of the pecuniary benefit gained from remediating the property, or in an amount above and beyond the total value of the property, was thought to provide an opportunity for a Plaintiff to experience a windfall. *Id.* Thus, the reasoning was there is little to no incentive for the victorious Plaintiff to spend the money on remediating the property and make themselves whole again. *Id.* at 802. While the holding seems and is harsh at first glance the Court did recognize that it did not rule

on other potential remedies available to an aggrieved property owner, such as injunctive relief, special and consequential damages, and punitive damages. *Id.*

## **II. Flexibility in the General Rule**

The nature in which this question on compensatory damages was presented to the Supreme Court kept them from discussing exceptions to the general rule and other avenues of relief for Plaintiffs. However, it appears that the Supreme Court left some wiggle room for injured landowners and did not slam the door on the possibility of allowing them to recover in excess of the diminution in value damages in future case. As previously stated, the Court did not address special, consequential, or punitive damages which could further aid a court in fully compensating an injured Plaintiff as well as punish the party responsible. The Supreme Court noted and recognized that trespass is an action in equity which allows a Plaintiff to pursue injunctive relief. Also, the Court mentioned Restatement (Second) of Torts § 929 which sets out an exception to the general rule. The personal reasons exception provides that a Plaintiff may recover restoration or repair costs even when those costs exceed the market value of the land. Restatement (Second) of Torts § 929 cmt. b. Although, a Plaintiff must show legitimate interests and personal reasons for seeing their property restored to its pre-injury condition. *Id.*

As stated in *Borland*, there are no bright line principles or rules to be followed in these type cases. 369 So.2d at 530. The Court recognized an element to consider when calculating damages is the Plaintiff's use or desired use of their property. *Id.* The fact that a property owner has no intentions to sell his land should factor into the question on damages. *Id.* Furthermore, the value of a piece of real property should be measured by the owner's desired or previous use, not the highest valued use of the property. *Id.*

In 2007, the Montana Supreme Court joined other jurisdictions by



adopting the guidelines set out in Restatement (Second) of Torts § 929 and comment b. *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 338 Mont. 259, 271 (2007). In *Sunburst*, private residents brought a trespass action against Texaco for damages resulting from migration of an oil leak. *Id.* at 264. The cost to restore their property far outweighed the diminution in the market value of the property. *Id.* The Montana Supreme Court (I think correctly) recognized in some cases that the diminution in market value fails to fully compensate an injured Plaintiff by ignoring the personal worth of a piece of real property. *Id.* at 271. They further stated that the guidelines of Restatement (Second) of Torts § 929 are flexible in order to empower a court to award restoration damages where the Plaintiff has personal reasons for repairing their land to its previous, uninjured condition. *Id.* The Supreme Court recognized that concern of a windfall for the Plaintiff was outweighed by enough evidence that the judgment would be used to restore the property. *Id.* at 273. The Court held, because of reasons personal to the landowners, that **restoration damages were proper even though they exceeded the diminution in value of the property.** *Id.*

A personal reasons exception is a fair and proper way to compensate a Plaintiff for injuries sustained to their real property. As courts have observed, the diminution in value measure sometimes fails to fully compensate a Plaintiff for the actual injuries inflicted upon their property. The general rule, in the absence of exceptions, falls far short of the main principle of compensatory damages which is to make the injured party whole. It would be unjust for a Plaintiff, who has no intentions of selling his land, to be left only with the diminution in value and not the proper remedy or vehicle to fully repair his land back to its original condition. Therefore, courts that adopt the general rule should recognize this exception to protect the private landowner's interests.

Along with the failure to

fully compensate the Plaintiff, the *Poffenbarger* decision arguably authorizes polluters to contaminate property without the fear of paying restoration damages to repair the land. The general rule in *Poffenbarger* lets these wrongdoers off the hook leaving a landowner with damaged property. Forcing tortfeasors to pay for the mess they created would pressure these industries to strictly monitor potential hazards leading to a cleaner, safer environment. Thus, there is a necessity for other methods of relief to be made available to injured landowners.

### **III. Other Relief Available When Property is Contaminated**

With matters involving the environment and real property, the need to correct any damage is of utmost concern. Natural resources are being destroyed by contamination on a regular basis and the parties responsible for the damage should be required to correct any injury that they cause. Accordingly, there has been an increase in federal and state legislation passed that furthers the policy of protecting the environment. However, the expense and amount of time that must be spent in order to fully prosecute a contamination claim under these statutory schemes makes it impracticable for an individual to avail themselves to such relief. William W. Watts, *Common Law Remedies in Alabama for Contamination of Land*, 29 Cumb. L. Rev. 37, 37-39 (1998-1999). Thus, the traditional common law remedies are the most pragmatic approach for a single Plaintiff to take when suffering from environmental damage to their property. *Id.* at 39.

The Supreme Court's decision in *Poffenbarger* did not foreclose the possibility of allowing an injured property owner to recover the cost of remediation through other potential remedies. 972 So. 2d at 802. Most of the common law causes of actions that can be used to prosecute a lawsuit against a tortfeasor who caused injury to property are both legal and equitable in nature. See e.g. *Storey v. Patterson*, 437 So. 2d 491, 493 (Ala. 1983) (holding that trespass is an action in both law

and equity). Consequently, courts will exercise their equitable power when a manifest injustice has surfaced and a new remedy would better serve the aggrieved party's interests. When pecuniary compensation is an inadequate remedy, the courts will grant injunctive relief to prevent any further damage. *Id.* at 495.

While a discussion on the potential for injunctive relief was not warranted due to manner in which the Court received the appeal, its viability as an option was recognized. *Poffenbarger*, 972 So. 2d at 802. Granting the property owner injunctive relief in the form of requiring the tortfeasor to pay for remediation of the property satisfies the goal of making the Plaintiff whole and furthers the policy of maintaining a clean environment. Because of property's unique nature, damage that has been done cannot always be cured by the tortfeasor paying money to the injured owner. Rather, where remediation is possible the courts should exercise their inherent power and fashion a remedy that places the property owner in the same position she would have been had there been no injury sustained. The Eleventh Circuit has recognized the need for such a remedy, which is evidenced by the U.S. District Court ordering a permanent injunction in addition to the \$20.7 jury verdict in the *Action Marine, Inc. v. Continental Carbon, Inc.*, 2006 WL 173653 (M.D. Ala. Jan. 23, 2006). Moreover, by providing injunctive relief to the Plaintiff there will be no incentive for the polluters to continue contaminating the property of others and merely pay the diminished value of the property. Instead, it would place responsibility on the tortfeasor to maintain a safe and clean environment for the rest of society to live in.

Furthermore, injunctive relief would prevent the Plaintiff from receiving a windfall, which was stated as a primary concern for the *Poffenbarger* Court. Because this form of relief is equitable in nature the tortfeasor would be required to hire a contractor to remediate the property, but would never give the money to the property owner directly. This



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would place the Plaintiff in as good of a position as she would have been had no contamination occurred and eliminate any risk of a windfall judgment. Thus, even though the Supreme Court has not ruled on the availability injunctive relief when the cost to remediate the property exceeds the diminution in value, it appears that it would likely allow such recovery when necessary to fully compensate an injured landowner.

#### **IV. Conclusion**

While the Alabama Supreme Court adopted the general rule, their decision did not create a hard, bright-line rule to be followed in every case. Property contamination cases are very fact intensive and a bright-line rule would preclude consideration of the fundamental principle of compensatory damages. The Supreme Court has recognized the need for these rules to be flexible in their application. Therefore, the focus should be on putting the Plaintiff's real property back into

the condition it was in prior to being damaged. Adoption of a personal reasons exception would further the goals of the court by doing what is fair and just. Proper investigation into the facts of each case insures that the judgment would not purely represent a windfall for the Plaintiff, but would be used for proper repair efforts. Furthermore, the Plaintiff could be awarded injunctive relief to force the wrongdoer to remediate the damages that they have caused to another's real property. However, injunctive relief wouldn't be necessary if compensatory damages were awarded as intended. To fully compensate an injured party the measure of value, both personal and economic, should be taken into consideration when determining the proper award of compensatory damages. Where simple diminution in value will not cure the harm imposed upon the Plaintiff, the courts must strongly consider an award of restoration damages.  $\Delta$

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