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Briscoe v. Harper Oil Co.: Double Recovery of Temporary and Permanent Damages

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BRISCOE V. HARPER OIL CO.: DOUBLE RECOVERY OF TEMPORARY AND PERMANENT DAMAGES?

I. INTRODUCTION

Many students who studied damages in tort law have read these words: "Compared to the rules involved in measuring damages for personal injury and death, the rules in cases of injury to personal property are simple and straightforward. The basic measure is the difference between the market value of the property before the injury and its market value after."[1] But in the world of oil and gas production, the rules covering damages to real property are anything but straightforward.

In *Briscoe v. Harper Oil Co.*,[2] the Supreme Court of Oklahoma addressed the problem of surface damage caused to an oil and gas lessor's land by a negligent lessee. The court found that both temporary and permanent damages may be recovered in a nuisance action for injury to the same parcel of land.[3] The court did not actually state that this ruling constituted a change in Oklahoma law,[4] but the dissenting justices opined that if an intentional change had not been made, an inadvertant mistake had been.[5]

II. STATEMENT OF THE CASE

Lester and Myrtle Briscoe own a farm in Grady County, Oklahoma,

1. J. HENDERSON, THE TORTS PROCESS 280 (2d ed. 1981).

2. 702 P.2d 33 (Okla. 1985).

3. *Id.* at 36. The court defined nuisance as "a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person or entity of property lawfully possessed, but which works an obstruction or injury to the right of another." *Id.* The court, citing City of Holdenville v. Kiser, 195 Okla. 189, 156 P.2d 363 (1945), went on to say that "permanent, as well as temporary damages, may be recovered for the maintenance of a temporary nuisance." *Briscoe*, 702 P.2d at 36.

4. The court relied on City of Holdenville v. Kiser, 195 Okla. 189, 156 P.2d 363 (1945), for the proposition that both temporary and permanent damages are recoverable. *See supra* note 3.

5. The rule applied by the dissenting justices is taken from Enid & Anadarko Ry. Co. v. Wiley, 14 Okla. 310, 320-21, 78 P. 96, 99 (1904); *see also* Ellison v. Walker, 281 P.2d 931, 932-33 (Okla. 1955) (owner of house awarded cost of repairing damage caused by vibrations of defendant's drilling and operation of oil and gas well). This rule would allow recovery of either temporary or permanent damages, depending on which is the lesser measure. If the diminution in value is less than the cost of restoration, the diminution is the measure of recovery for permanent injury to land. If the cost of restoration is less than the diminution in value, cost of restoration is the measure of recovery. *Enid*, 14 Okla. at 320-21, 78 P. at 99. For an explanation of the definition of temporary and permanent damages and their proper measure, see *infra* notes 20-22 and accompanying text.

where they grow wheat and alfalfa and raise cattle.[6] In January of 1976, the Briscoes entered into an oil and gas lease agreement with Harper Oil. The well ultimately drilled under the lease was a dry hole, and Harper abandoned the well in July of 1980. The dry hole was plugged eight months later, but Harper did not begin to close the reserve pit and clean up the drill site until May of 1981—one month after the Briscoes filed their lawsuit.

The Briscoes' suit set forth three causes of action. The first cause, based on contract, alleged that under the terms of the lease between Harper Oil and the Briscoes, Harper was required to pay for damages to growing crops. In the second cause of action, the Briscoes sought recovery for temporary and permanent injury to their land. They alleged that Harper's unreasonable acts, or unreasonable failure to act, subjected them to inconvenience, interfered with their enjoyment of the land, and caused permanent damage to portions of the land for agricultural and grazing purposes. In the third cause of action, the Briscoes sought punitive damages for Harper's willful, oppressive, and grossly negligent disregard of the fertility and productivity of the soil.

The jury found for the Briscoes on all counts and awarded permanent damages for injury to the farmland *and* temporary damages for the cost of restoring the well site.[7] The Court of Appeals reversed the jury verdict and remanded the case for a new trial, stating that recovery of both temporary and permanent damages constitutes double recovery.[8] The Supreme Court of Oklahoma reinstated the jury verdict.[9] The supreme court stated that the sole issue addressed was the propriety of the trial court's instructions permitting the jury to return a verdict awarding damages which included the cost of repairing temporary abatable injuries to the well site, as well as damages for permanent unabatable injury to the farmland.[10]

According to the Oklahoma Supreme Court in *Briscoe,* when the cause of action is based on a nuisance theory, both permanent and temporary damages may be recovered.[11] However, the court also stated that

6. This summary is taken from *Briscoe,* 702 P. 2d at 35.

7. *Briscoe,* 702 P.2d at 35. The jury's aggregate award was for $42,975.00: $1,600.00 was awarded on count one for damage to crops, $24,500.00 was awarded for cost of restoring the area of the well site (temporary damages), $6,375.00 was awarded for permanent injury to the farmland (permanent damages), and $10,500.00 was awarded apparently as punitive damages. *Id.*

8. *Id.*

9. *Id.* at 36.

10. *Id.*

11. *See supra* note 3.

"[t]he rule of damages in any given case brought on the theory of nuisance is determined by whether the injury suffered is permanent or temporary,"[12] and that "in no event shall the *combined* award of temporary and permanent damages for injury to the land exceed the decreased fair market value of the land. . . ."[13]

III. LAW PRIOR TO *Briscoe*

A. *Liability for Surface Damage*

An oil and gas lease gives the lessee the right to use the surface of the leased land to the extent reasonably necessary to carry out the purposes of the lease.[14] The oil and gas lessee has the dominant estate in so much of the surface as is reasonably necessary for carrying on the oil and gas operations.[15] The oil and gas lessee has a property interest in the surface of the land[16] as well as a right to search for, develop, and produce the minerals beneath it. If the lessee injures the surface while exercising these rights, the lessee is not liable unless he has been negligent.[17] If the

12. *Briscoe*, 702 P.2d at 36.

13. *Id.* at 37.

14. *See generally* Annotation, *What Constitutes Reasonably Necessary Use of the Surface of the Leasehold by a Mineral Owner, Lessee, or Driller Under an Oil & Gas Lease or Drilling Contract*, 53 A.L.R. 3d 16 § 2[a] (1973). A lease gives the lessee the right to possess and use the surface of the leasehold to the extent necessary to perform obligations of the lease, including the right to enter the premises and use and occupy them in any manner reasonably necessary. *Id.*

15. *Id.*

16. In Oklahoma, an oil and gas lease is characterized as an incorporeal hereditament or a profit a prendre. Continental Supply Co. v. Marshal, 152 F.2d 300, 305 (10th Cir. 1945), *cert. denied sub nom* 327 U.S. 803 (1946); United States v. Stanolind Crude Oil Purchasing Co., 113 F.2d 194, 198 (10th Cir. 1940).

There are two principal theories regarding ownership of oil and gas: the ownership-in-place theory and the exclusive-right-to-take theory. Under the ownership-in-place theory, "the landowner owns all substances, including oil and gas, which underlie his land. Such ownership is qualified, however, in the case of oil and gas, by the operation of the law of capture." E. KUNTZ, 1 A TREATISE OF THE LAW OF OIL AND GAS § 2.4 (1962). In other words, the landowner owns the oil and gas subject to the possibility that another will capture it. Professor Kuntz has defined the exclusive-right-to-take theory as a theory in which:

> the landowner does not own the oil and gas which underlie his land. He merely has the exclusive right to capture such substances by operations on his land. Once reduced to dominion and control, such substances become the object of absolute ownership, but, until capture, the property right is described as an exclusive right to capture.

Id. Oklahoma follows the exclusive-right-to-take theory, which is also known as the non-ownership theory. J. LOWE, OIL AND GAS LAW IN A NUTSHELL 23 (1983).

17. Reasonable surface uses have been found in the following cases: Livingston v. Indian Territory Illuminating Oil Co., 91 F.2d 833 (10th Cir. 1937) (building residences for employees); Yates v. Gulf Oil Corp., 182 F.2d 286 (5th Cir. 1950) (conducting seismographic tests); Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972) (use of fresh water belonging to the surface estate); Macha v. Crouch, 500 S.W.2d 902 (Tex. Ct. App. 1973) (slush pits); Gregg v. Caldwell-Guadalupe Pick-up Stations, 286 S.W. 1083 (Tex. Ct. App. 1926) (building storage tanks and power stations); Grimes v. Goodman Drilling Co., 216 S.W. 202 (Tex. Ct. App. 1919) (locating a derrick and slush pit near a

lessee's use of the land goes beyond what is reasonably necessary, he will be held liable for surface damage based on a nuisance theory.[18] Therefore, there can only be liability where the lessee has exercised his rights in a negligent or willfully destructive manner, or where the lessee has used more land than necessary to produce the lease.[19]

B. *Measure of Damages*

Injury to real property has historically been classified as being either temporary or permanent, and recovery for each type of injury has been measured differently. Temporary damage is defined in Oklahoma as that which is abatable or repairable.[20] The general rule is that for temporary damage, the amount recoverable is the cost of restoring the land to its condition immediately prior to the injury.[21] Permanent injury means

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dwelling house); and Adkins v. United Fuel Gas Co., 134 W. Va. 719, 61 S.E.2d 633 (1950) (non-negligent destruction of growing crops).

The lessee's use of the land is limited only by the requirement of reasonable necessity. If damage to the land is incidental to the reasonable development of the leasehold, the damage is *damnum absque injuria* and no recovery can be had by the lessor. *See generally* 4 W. SUMMERS, OIL & GAS § 652 (1962). For this reason, it became common practice for an express surface damages clause, or a clause limiting surface use, to be included in oil and gas leases. *See* Lambert, *Surface Rights of the Oil and Gas Lessee*, 11 OKLA. L. REV. 373, 375 (1958). One typical clause limiting surface use is the following: "When required by the Lessor, Lessee shall bury all pipe lines below ordinary plow depth, and no well shall be drilled within two hundred (200) feet of any residence or barn located on said land as of the date of this Lease without Lessor's consent." Source, AAPL FORM 675, Oil & Gas Lease, Texas Form, ¶ 7.

18. A nuisance is defined as:

> [U]nlawfully doing an act, or omitting to perform a duty, which act or omission either . . . [a]nnoys, injures or endangers the comfort, repose, health, or safety of others; or . . . [i]n any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.

OKLA. STAT. tit. 50, § 1 (1981); *see also* Tenneco Oil Co. v. Allen, 515 P.2d 1391, 1393 (Okla. 1973) (failure to fill and level abandoned wells and remove equipment and concrete foundations).

19. Amoco Prod. Co. v. Carter Farms Co., 103 N.M. 117, 703 P.2d 894, 897 (1985) (mineral lessee's liability to surface estate owner founded on unreasonable, excessive, or negligent use of the surface estate). Thompson v. Andover Oil Co., 691 P.2d 77, 82 (Okla. Ct. App. 1984) ("[R]easonably necessary surface use must be exercised with due regard to the right of the owner of the surface."); Pulaski Oil Co. v. Connor, 62 Okla. 211, 214, 162 P. 464, 466 (Okla. 1916) (reasonably necessary use limitation implies lessee's duty to protect those areas of the surface estate not reasonably necessary for development of mineral rights). It is generally accepted that use of more land than reasonably necessary constitutes a nuisance. *See infra* notes 30-33 and accompanying text.

20. *Briscoe*, 702 P.2d at 36. "Temporary damages in the context of an oil and gas nuisance are by definition abatable. Damages reasonably incapable of abatement are permanent." *Id.*

21. *See* Enid & Anadarko Ry. Co. v. Wiley, 14 Okla. at 320-21, 78 P. at 99 (1904); Keck v. Bruster, 368 P.2d 1003, 1004-05 (Okla. 1962). There is some authority that recovery for temporary damage should be measured in terms of the lost rental value of the property. Conkin v. Ruth, 581 P.2d 923, 925 (Okla. Ct. App. 1976); Harmon v. Myrick, 46 OKLA. B. J. 2468, 2469 (Okla. Ct. App. 1975). *See also*, Amoco Prod. Co. v. Carter Farms Co., 103 N.M. 117, 703 P.2d 894 (1985), in which the New Mexico Supreme Court differentiated three measures of recovery for three different situations: (1) for permanent damage to real property, damages are measured by the difference between fair market value immediately before the injury and fair market value after the full extent of

that the land can not be restored to its original state. The measure of damages for permanent injury is the difference between the fair market value of the land immediately preceding and immediately following the injury.[22]

These definitions are easy to apply so long as the injury complained of can be classified as either permanent or temporary and costs for restoration of temporary injury do not exceed the resulting diminution in the market value of the land. If the cost of repairing a temporary injury to the land is greater than the diminution in value of the land the problem is easily solved. It is accepted that the measure of damages should be the lesser of the cost of restoring the land or the decrease in market value.[23] Given this rule, should there ever be recovery for both temporary and permanent injury to the same parcel of land?

Two earlier Oklahoma cases deal with the proper measure of damages for injury to land by an oil and gas lessee. First, *Thompson v. Andover Oil Co.*[24] deals with a surface owner's nuisance suit against an oil and gas lessee.[25] The *Thompson* court assessed the problem of damages somewhat differently than did the *Briscoe* court. The court in *Thompson* found three distinct categories for recovery of damages to real property. The court stated that "[i]n cases involving surface damages the alleged damages will normally be either permanent damage, temporary damage, or damage caused from the maintenance of a nuisance. Although all three are related somewhat, the measure of damage is calcu-

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the injury has been suffered; (2) for temporary injury, damages are measured by the cost of repair; and (3) where the actions of the lessee have rendered the surface of the estate totally unusable for a period of time, damages are measured by the rental value of the land during that time. *Amoco*, 103 N.M. at __, 702 P.2d at 897-98.

22. *Conkin*, 581 P.2d at 925.

23. This is the same measure as is applied to recovery for permanent injury. *Id.* Damage to real property is deemed permanent if the cost of restoration exceeds the value of the property. *See generally* Annot., *supra* note 14, § 2[e].

24. 691 P.2d 77 (Okla. Ct. App. 1984).

25. The Thompsons were surface owners who sued to recover for damages to their farm land which resulted from drilling operations by Andover Oil Co. in 1981. Andover Oil Co. had prepared to drill at one site, then abandoned it in favor of a second site on the opposite side of the farm where they expected greater success. Andover attempted to restore the first site, but in so doing changed the grade of the land, causing water to stand and making it unsuitable for growing certain types of crops. The Thompsons alleged permanent damage resulting from Andover's burial of drilling mud on the land. The Thompson's evidence of temporary damages included erosion, silting of the pond, and irregular grading. The jury awarded a lump sum of $50,000, which was greater than the amount of depreciation testified to by the plaintiff's expert witness. Testimony placed the restoration costs as high as $70,000. The Court stated that "while the award for damages for restoration cannot exceed the depreciation value of the land, the $50,000 award is clearly within the bounds of the evidence presented." *Thompson*, 691 P.2d at 84.

lated differently for each."[26] The measure of damage for permanent injury would be the diminished value of the entire parcel of land.[27] The measure of damages where injury is temporary is the reasonable cost of restoring the land to its former condition.[28] The measure of recovery for damage to real property in an action based on nuisance includes "both permanent and temporary injury to property as well as damages for annoyance."[29]

The second case, *Tenneco Oil Co. v. Allen*,[30] was relied on by the Oklahoma Supreme Court both in *Briscoe* and in *Thompson*. *Allen* firmly established that, in Oklahoma, recovery could be had from an oil and gas lessee based on nuisance.[31] The case equated nuisance with the taking of more land than reasonably necessary, or the use of the land for longer than a reasonably necessary time.[32] On the subject of damages, the court stated in the syllabus:

> Damages adjudged in an action predicated on a nuisance theory may include clean-up costs of oil and gas lessee's surface impediments not necessary for its operation, damages for use of land by lessee for more than a reasonably necessary period of time for its operations, for lessee's unnecessary use of land area in its operations, *and for temporary and permanent injury to the land.*[33]

Although *Thompson* refers to three types of damage, there are really only two types— temporary and permanent. The third type merely identifies circumstances in which both temporary and permanent damages may be recovered. *Allen* gives of laundry list of examples of recoverable damages, but the list makes no sense. The most reasonable conclusion as to what is meant by the quoted language is that both temporary and permanent damages may be recovered in an action based on a nuisance theory.

The *Briscoe* opinion may be an attempt by the Oklahoma Supreme Court to clear up confusion over the issue of damages. As noted by both

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26. *Id.* at 82.
27. *Id.*
28. *Id.* at 83.
29. *Id.*
30. 515 P.2d 1391 (Okla. 1973) (hereinafter *Allen*).
31. *Id.* at 1394-95. In *Allen*, Tenneco Oil Co., the assignee of an oil and gas lease, allegedly created a nuisance by using more of the surface than reasonably necessary and caused damage to the land by allowing salt water and oil to escape and flow over the land. The plaintiff sought $4,000 damages for use of more land than reasonably necessary and $3,000 as damages for temporary injury to the land. The jury awarded $5,150. *Id.*
32. "Surface impediments constructed by an oil and gas lessee may be only those reasonably necessary for its operation, and when they are no longer such, they may constitute a nuisance." *Id.* at 1392.
33. *Tenneco*, 515 P.2d at 1392 (emphasis added).

the majority and the dissenting justices, the fact that both temporary and permanent damages may be recovered on a nuisance theory for injury to land did not first arise with *Briscoe*.[34] The dissenting justices seem willing to go so far as to agree that such recovery is occasionally appropriate.[35] The problem is a disagreement as to the application of the theory.

The major purpose for awarding money damages is to make an injured party whole.[36] Where an injured party is compensated twice for the same injury, there is a "double recovery." This puts the injured party in a better position than he would have been and clearly defeats the major purpose of awarding the damages. The problem that arose in *Briscoe* was that the temporary injury and the permanent injury, and the amount of damages awarded for each, were not clearly separated.[37]

A careful reading of the opinion reveals that the permanent injury complained of consisted of drainage problems and soil erosion which resulted from oil and other harmful substances being allowed to run out of the well-head and reserve pit over the farmland and into the terraces and creeks.[38] Some of the injuries cited as temporary were: the failure of Harper Oil to properly dispose of drilling mud and debris; failure to remove the drilling pad and roadway; and failure to reclaim the reserve pit, pad, and roadway for agricultural purposes.[39]

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34. According to the majority, City of Holdenville v. Kiser, 195 Okla. 189, 156 P.2d 363 (1945), provides authority for the proposition that permanent and temporary damages "may be recovered for maintenance of a temporary nuisance." *Briscoe*, 702 P.2d at 36. The dissent cites Tenneco v. Allen, 515 P.2d 1391 (Okla. 1973), and Lanahan v. Meyers, 389 P.2d 92 (Okla. 1964), for the proposition that both temporary and permanent damages may be recovered on a nuisance theory. *Briscoe*, 702 P.2d at 40.

35. *Briscoe*, 702 P.2d at 40-41. The dissent stated: "There could be no objection to allowing recovery for correctable, temporary damage to one portion of a leased tract in addition to permanent, diminished value damage to another portion of the tract so long as the jury was properly instructed to avoid duplication of damages." *Id.* at 41.

36. 25 C.J.S. *Damages* § 3 (1966). Damages are based on the theory of just compensation for the loss or injury sustained regardless of the form of the action. *See also* Public Service Co. of New Mexico v. Jasso, 96 N.M. 800, 635 P.2d 1003 (1981) (theory of damages to make injured party whole); Carter v. Wolf Creek Highway Water Dist., 54 Or. App. 569, 635 P.2d 1036 (1981) (goal of damage remedy is compensation); Agrilease, Inc. v. Gray, 173 Mont. 151, 566 P.2d 1114 (1977) (damages properly awarded when they serve to compensate plaintiff for injury proximately caused by defendant); Houser v. Eckhardt, 168 Colo. 226, 506 P.2d 751 (1972) (underlying principal of awarding damages on negligence theory is that one who unlawfully injures another shall make him whole).

37. The Briscoes plead facts sufficient for the jury to find that there had been both temporary and permanent injury to their land. *Briscoe*, 702 P.2d at 36-37. For the costs of restoring the well site to its former condition, the Briscoes requested an amount of $34,000. The alleged permanent damage to the farm consisted of decreased productivity and fertility of the soil for which the Briscoes requested $36,500. The pleadings did not adequately explain that the permanent damage done was assesed with the temporary damage to the well site included.

38. *Id.* at 36-37.

39. *Id.*

An expert witness for the Briscoes, testifying as to permanent damage to productivity of the soil, stated that (a) it would cost $91,000 to restore the farmland completely; and (b) minimum clean-up would cost $34,000.[40] Unfortunately, his testimony was apparently couched in terms of temporary damages,[41] and caused confusion. Three other witnesses testified as to the decreased fair market value of the land fixing the damages at $36,500, $29,282, and $20,433 respectively.[42]

The jury awarded $24,500 for cost of restoring the temporary abatable injury to the well site and $6,375 for permanent unabatable injury to the farmland.[43] The total award did not exceed the amount of either temporary or permanent damages prayed for in the ad damnum clause,[44] and both awards were well within the bounds of the evidence.[45] Nevertheless, the defendant claimed that the award amounted to double recovery for the same injury.[46]

According to the defendant, the statement of the issues and instructions given at the close of the trial improperly stated the law in Oklahoma and misled the jury to believe that they could return damages for both diminution in value and restoration of the property.[47]

In fact, however, the law in Oklahoma *does* allow recovery for both types of injuries in certain situations.[48] The problem is one of semantics.

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40. *Id.*

41. Cost of restoration is the measure of temporary damages. *See supra* notes 20, 21, and accompanying text.

42. *Briscoe*, 702 P.2d at 36-37.

43. *Id.* at 37.

44. *Id.*

45. *Id.*

46. *Id.* at 35.

47. *Id.* at 38-39. The preliminary statement of the issues as to temporary and permanent damages was:

> 3. Should you find Defendant's drilling operations created a private nuisance, then you should determine the amount of damages for the reasonable cost of abating the nuisance by restoring the site to its former condition, such amount not to exceed $34,000, the amount sued for.
>
> 4. Whether or not Defendant's drilling operations permanently damaged Plaintiffs' land in an amount not to exceed $36,500, the sum sued for.

Id. at 38. The Instruction given concerning the same issues was:

> Under issue No. 3, as previously outlined to you in the Instructions, should you find that Plaintiffs have proved Defendant's drilling operations created a private nuisance, as defined in these instructions, then you should determine the amount of damages, if any, for the reasonable cost of abating the nuisance by restoring the site to its former condition, such amount not to exceed $34,000, the amount sued for.
>
> Under Issue No.4, as previously outlined to you in these Instructions, you should determine whether or not Plaintiffs have proved that Defendant's drilling operations permanently damaged Plaintiffs land in an amount not to exceed $36,500, the amount sued for.

Id.

48. As noted earlier, and as cited in *Briscoe*, there is authority in Oklahoma which supports the

One must carefully define the injuries sustained and the recovery being sought in order to avoid overlap. Permanent injury in the form of decreased market value of a parcel of land may be assessed without including particular abatable injuries.[49] Then, if cost of restoration is limited to the particular abatable injuries, there can be recovery of both permanent and temporary damages without duplication.

In spite of the arguably confusing instructions given by the *Briscoe* trial court,[50] the jury was apparently able to separate temporary and permanent damages. As the court put it:

> While the instructions failed to state that in no event shall the *combined* award of temporary and permanent damages for injury to the land exceed the decreased fair market value of the land, such error, if that it be, was here harmless in nature. The jury awarded the sum of $24,500 for costs of restoring the temporary abatable injury *to the well site*, plus the sum of $6,375 for permanent unabatable injury *to the farm*.[51]

The court also observed that the sum of the temporary and permanent damages[52] was within the scope of the evidence.[53]

The trial court did not clearly differentiate between the decreased fair market value of the land considering all the injuries, both temporary and permanent, and the decreased fair market value of the land minus

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awarding of both temporary and permanent damages. Thompson v. Andover Oil Co., 691 P.2d 77 (Okla. 1984); Tenneco Oil Co. v. Allen, 515 P.2d 1391 (Okla. 1973); *disscussed supra* notes 24-33 and accompanying text; see also Sunray DX Oil Co. v. Brown, 477 P.2d 67 (Okla. 1970) (rule of damages in any case brought on a nuisance theory is determined by the type of injury suffered, permanent or temporary); City of Holdenville v. Kiser, 195 Okl. 189, 156 P.2d 363 (1945) ("damage" or "injury" as normally used in nuisance cases is the result of the nuisance and both permanent and temporary damages may be recovered).

49. *See* Socony Mobil Oil Co. v. Moore, 431 P.2d 328 (Okla. 1967), in which only permanent damages were awarded, although there had also been testimony regarding temporary damages. On appeal, the defendants claimed that the trial court had allowed improper mixing of the evidence relating to permanent and temporary damage to the land. The supreme court stated that, "[w]hile it is true that evidence was adduced by plaintiff tending to show that growing crops, such as tame grasses, were damaged or destroyed, *the trial court very carefully and accurately excluded this element from the consideration of the jury by its instruction. . . .*" *Id.* at 330 (emphasis added).

The trial court's instruction stated that the jury was not to consider any temporary damages because under the pleadings and evidence the plaintiffs were limited in their recovery to permanent damages. *Id.* According to the supreme court, evidence of temporary damage was allowed at trial only for the limited purpose of aiding the jury in determining permanent damages. *Id.* at 330-31.

50. *See supra* note 47 for the text of the instructions.

51. *Id.* (latter emphasis added). The award of temporary damages made by the jury seems to be specifically for damages to the well site, while the award for permanent damages seems to be only to compensate for the decreased value of the farm due to the damaged fertility and productivity of the soil.

52. *Id.*

53. *Id.*

the temporary injuries.[54] Yet the conclusion that there was no double recovery or overlap of the awards makes sense if it is assumed that the court had this distinction in mind.

This assumption supports the proposition that the damages for temporary and permanent injury to the Briscoes' land were awarded independently of each other.[55] This conclusion reconciles the majority and dissenting opinions. The concern of the dissent was simply that awarding money damages twice, under different names for the same injury, be avoided.[56] The dissenters agreed with the majority that "[t]here could be no objection to allowing recovery for correctable, temporary damage to one portion of a leased tract in addition to permanent, diminished value damage to another portion of the tract, so long as the jury was properly instructed to avoid duplication of damages."[57] Assuming the jury was instructed properly, if they nonetheless managed to avoid duplication of damages, there was no reversible error.

The Oklahoma Supreme Court should have taken the opportunity *Briscoe* presented to clarify Oklahoma law concerning temporary and permanent damages.[58] The confusion concerning the awards of temporary and permanent damages—how they should be plead and measured, how and when they may be awarded, and the proper instructions to be given concerning them—could have been resolved. As things stand after *Briscoe*, the next time an oil and gas lessor recovers both temporary and permanent damages from a lessee, or fails to recover both because the recovery would amount to a double recovery, the supreme court will have another opportunity to address the problem.

IV. CONCLUSION

The Oklahoma Supreme Court has made it clear that it intends that both temporary and permanent damages be recoverable by an oil and gas lessor for surface damage in an action based on nuisance. However, the court has left many practical questions unanswered. The court needs to

54. Although the trial court did not explain the difference, the reference to the award for temporary damages being for restoring abatable injuries *to the well site* while the award for permanent damages was to compensate the Briscoes for permanent injury to their *farmland* shows a distinction. *Briscoe* at 35.

55. It is apparent that the jury assessed the permanent damage to the farmland without including the temporary damage to the well site for which they made a separate award.

56. *Id.* at 40. "To allow damages for both diminution in value and the cost of restoration for the same injury to property amounts to a double recovery . . . ." *Id.*

57. *Id.* at 41.

58. Stated simply, both temporary and permanent damages may be recovered on a nuisance or negligence theory, but each type of damage must be proved and valued independently.

set up guidelines which clearly separate temporary and permanent damages. Permanent and temporary damages do not necessarily overlap, as long as the assessment of the diminution in the market value of the land is made without considering the damage done by the temporary injuries.

The jury which heard *Briscoe v. Harper Oil Co.* apparently was able to keep the awards for permanent and temporary damages separated despite unclear jury instructions. The award of temporary damages was specifically for the damage to the well site and the award for permanent damages was specifically for the damaged quality of the farmland. Although the well site was encompassed within the land which was damaged farmland, the land and the damage were not one and the same. In assessing the permanent damage to the farmland, the jury was not to, and in fact did not, consider any devaluation caused by temporary injury to the well site.

The court should speak clearly on the issue of how instructions on the issue of damages are to be given in order to make sure that the jury does not overlap awards for temporary and permanent damages. The instructions should remind the jury that diminution in the value of land must be valued as if any temporary injury either did not exist or was already abated. With a clear demarcation, temporary and permanent damages can peacefully coexist.

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