

Adjacent Property Owner/Petroleum Storage Tank: Federal Appellate Court Addresses Damage Issue



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The United States Court of Appeals for the Tenth Circuit (“Court”) addressed in a November 4th Order and Judgment (“Order”) damage issues caused by an adjacent convenience store (“Store”). See *Sonrisa Holding, LLC v. Circle K Stores, Inc*, No. 19-1333, 2020 WL 6481770 (10th Cir. Nov. 4, 2020).

Sonrisa Holding, LLC, and Living Trust Agreement of Melody Ortega (“Plaintiffs”) sued Circle K Stores (“Defendant”) for trespass and damages pursuant to Colorado law.

The damage claim arose from spills of an underground storage tank.

Plaintiffs alleged that on or before June 8, 2011, a petroleum spill from Defendant’s Store migrated off site by way of groundwater. Plaintiff’s property (“Impacted Properties”) was allegedly contaminated. Plaintiffs subsequently entered into discussions of sale of the Impacted Properties with an interested developer. (Trammell Crow Residential [“Trammell”]).

Trammell hired an environmental consultant to evaluate the environmental issues. The consultant recommended the installation of a vapor barrier below the Impacted Properties. To cover the remedial costs, Plaintiff agreed to put \$300,000 in an environmental escrow. Trammell spent \$183,210 constructing and installing the vapor barrier under the Impacted Properties. The remaining funds were returned to Plaintiff.

Plaintiff sought a judgement for the following:

- 1) reduced sale proceeds in the amount of \$183,210 (remediation damages),
- 2) fees incurred in selling the Impacted Properties (transaction fees), and
- 3) \$353,291 resulting from the delay in the sale of the Impacted Properties (lost opportunity costs).

The district court granted Plaintiff’s motion for summary judgement on their trespass and nuisance claim. However, it denied the claim for damages, awarding \$1.00 in nominal damages . Plaintiff appealed asking for remediation damages, transaction fees, and lost opportunity costs.

1. Remediation Fees: The district court was held to have not abused its discretion in denying the request for remediation damages because the Plaintiffs failed to provide expert testimony to demonstrate that the Defendant’s contamination was the proximate cause of the remediation damages.

1. Expert testimony is required when “specialized or technical knowledge” is necessary to understand the litigated issue.
 2. In this case, expert testimony was necessary to address technical issues such as “the location and extent of the petroleum migration, the risk of the vapor hazards, and the need for and cost of the vapor barrier system”
 3. Plaintiffs’ environmental consultant could not testify as a lay witness and still answer the “inherently scientific and technical question” of whether the contamination created a need for the vapor barrier.
 4. Because Plaintiffs failed to provide an expert, a lay juror would not reasonably be able to determine whether the Defendant’s petroleum spill proximately caused the remediation damages.
2. Transaction Fees: The district court declined to award transaction fees because the Plaintiffs failed to plead it as special damages.
1. Special damages are those damages which are the “natural, but not necessary, consequence of the act complained of,” and hinge on the particular circumstances of the case. Special damages must be specifically stated as such in the Plaintiffs’ claim, pursuant to Federal Rule of Civil Procedure 9(g).
 2. The Court previously held that general damages pertained to ordinary consequences in a trespass action, such as injury to a plaintiff’s land. In contrast, attorney fees associated with the sale of property, is considered special damages.
 3. In this case, the Plaintiffs’ transaction fees arose from their negotiations with Trammell to sell the Impacted Property instead of the trespass itself.
 4. The Court barred the Plaintiffs from recovering transaction fees due to their failure to specifically plead for special damages.
3. Lost Opportunity Cost: The district court struck the request for damages because:
1. Plaintiff’s disclosure of the damages on the last day of discovery was untimely, and
 2. the untimely disclosure was not substantially justified or harmless.
 - i. Federal Rule 26(e) requires plaintiffs to present a computation of all damages to the opposing party in a timely manner.
 - ii. Because the Plaintiffs waited three and a half years after the accident, and two years after litigation began to disclose the damages, the Court held the disclosure to be untimely.
 - iii. To determine whether the untimely disclosure is harmless, the Court considers the following factors:
 1. the prejudice or surprise to the party against whom the testimony is offered;
 2. the ability of the party to cure the prejudice;

3. the extent to which introducing such testimony would disrupt the trial; and
4. the moving party's bad faith or willfulness.

- The Court concluded the Defendant was significantly prejudiced because it had no opportunity to question either of the Plaintiffs about the lost opportunity costs, no time to retain an expert, and the disclosure occurred only hours before discovery ended.
- The Court concluded that while the prejudice could have been cured, to do so would have been both costly and timely for the Defendant.
- The Court concluded that the untimely disclosure would substantially disrupt the trial by transforming it from a case worth \$190,000, to a case worth almost three times as much with additional issues.
- The Court concluded that, at minimum, the Plaintiff's actions of untimely disclosure rose to the level of "extreme recklessness."
- Therefore, the Plaintiff's untimely disclosure was not substantially justified or harmless.

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The judgment of the district court to bar all but one dollar in nominal damages was affirmed by the Court.

A copy of the Order can be downloaded [here](#).