

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Perrin and Debbie Babb, Wayne and Sarah	)	
Elstrom, Alan and Kathy Jackson,	)	C.A. No. 3:10-cv-01724-JFA
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Lee County Landfill SC, LLC,	)	
	)	
Defendant.	)	
	)	

**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT
AS A MATTER OF LAW OR FOR A NEW TRIAL OR REMITTITUR**

The elephant in the room is that both the plaintiffs' own expert and DHEC thoroughly reviewed the defendant's conduct in this case and concluded that the defendant did not act recklessly, egregiously or maliciously; nor did the defendant engage in any extraordinary misconduct that would warrant punitive damages. Rather than addressing the elephant head-on, the plaintiffs attempt to sidestep this fundamental issue by arguing that their distinguished expert and long-tenured doctoral professor of environmental and landfill engineering did not understand or appreciate the meaning of the words "reckless," "egregious," "malicious" and "extraordinary misconduct" and never actually used those "buzzwords" in his testimony. The elephant cannot be ignored. It is a central issue in the case. The testimony of the plaintiffs' own expert and the independent agency charged with regulating the conduct of the defendant is fatal to the punitive claim, and the punitive verdict was a manifest injustice that should be overturned.

Further, the compensatory award of \$535,000 is grossly excessive because it exceeds the full rental value of all the plaintiffs' properties combined during the relevant timeframe by a staggering \$376,370 and exceeds the full property value of all the plaintiffs' properties combined by \$109,000.

ARGUMENT

I. JUDGMENT AS A MATTER OF LAW SHOULD BE GRANTED AS TO THE PUNITIVE AWARD BECAUSE NEITHER THE DAILY COVER VIOLATIONS NOR THE DEFENDANT'S OPERATIONAL CONDUCT CONSTITUTES SUFFICIENT EVIDENCE OF RECKLESSNESS TO SUPPORT THE AWARD.

The plaintiffs argue that there are two bases for punitive damages in this case: (1) the two daily cover regulatory violations; and (2) the defendant's general conduct in operating the landfill. To overcome judgment as a matter of law, there must be sufficient evidence of reckless conduct ("wanton" and "willful" are synonymous with the term "reckless" in this case) to support the punitive award. *See Myrick v. Prime Ins. Syndicate, Inc.*, 395 F.3d 485, 489 (4th Cir. 2005). In weighing the sufficiency of the evidence, the Court must take into account the plaintiffs' heightened burden of proof for punitive damages, that of clear and convincing evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). The Court also must examine all of the evidence in the record, not just the evidence favorable to the plaintiffs. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000) ("the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached. . . ." (internal quotations omitted)). The record and the case law do not support the plaintiffs' arguments or the punitive award.

A. The daily cover violations do not create a jury question as to punitive damages.

The plaintiffs' argument that "a jury question as to punitive damages is presented when there is evidence of a statutory violation" (Opposition Brief at 4) is a misstatement of the law. The correct statement of the law is that regulatory violations can be evidence of recklessness for the jury, but only if (1) the facts are susceptible of more than one reasonable inference and (2) there is a causal link between the violation and the injury to warrant submitting the issue of punitive damages to the jury.

1. **The facts are susceptible of only one reasonable inference – that the defendant’s conduct was not reckless – because the plaintiffs’ own expert and DHEC evaluated the two daily cover regulatory violations and concluded that the defendant’s conduct was not reckless.**

Dr. Townsend, the plaintiffs’ landfill and environmental engineering expert with decades of experience in the solid waste industry, reviewed and evaluated all of the defendant’s conduct in great detail, including the two daily cover regulatory violations. After evaluating the defendant’s conduct that resulted in the two regulatory violations and the possible impact the regulatory violations could have had on the plaintiffs, the plaintiffs’ own expert concluded that the regulatory violations were not the result of the defendant’s recklessness, egregiousness or extraordinary misconduct. (Trial Tr. 636:3-11; 649:15-21; 606:10-14, March 21, 2012, Dr. Timothy Townsend)

Similarly, a disinterested third-party witness, DHEC, discovered the two daily cover situations and concluded that they were violations. (Trial Tr. 1393:6-1395:1, March 28, 2012, Lloyd G. McLaurin) Even after concluding that two isolated daily cover violations existed, DHEC nonetheless testified that the defendant’s conduct was not reckless, egregious or intentional misconduct. (*Id.*, 1399:16-24) This evidence is uncontradicted and unimpeached. *See Reeves*, 530 U.S. at 151 (the court must give credence to testimony by disinterested witnesses supporting the moving party that is uncontradicted and unimpeached). Because the plaintiffs’ own expert and DHEC both concluded categorically that the two violations were not the result of the defendant’s recklessness, egregiousness or extraordinary misconduct, the facts are susceptible of only one reasonable inference – that the defendant’s conduct was not reckless.

The plaintiffs’ only response to the damaging testimony of their own expert and DHEC is that perhaps the plaintiffs’ expert and DHEC did not understand or appreciate what the words “reckless,” “egregious,” “intentional,” “malicious” and “extraordinary misconduct” meant in this context and did not use those “buzzwords” in their testimony. *See Opposition Brief* at 17. There can be no doubt that the plaintiffs’ expert and DHEC knew what these terms meant and did testify

that they believed the defendant's behavior was not reckless, egregious, intentional, malicious or extraordinary misconduct.¹ Importantly, the plaintiffs never objected to the questions to their expert or DHEC regarding recklessness, egregiousness nor extraordinary misconduct as calling for a legal conclusion, as being beyond the expertise of the witness or as being improper "buzzwords." Nor did the plaintiffs' expert or DHEC question what these terms meant during their testimony. The plaintiffs simply allowed their expert and DHEC to testify that the defendant's conduct was not reckless without objection. Further, if these truly were buzzwords that the plaintiff's expert and DHEC did not understand or appreciate, the plaintiffs could have rehabilitated DHEC on cross examination or their own expert on redirect but made no attempt to do so. Instead, DHEC's testimony remains unimpeached and, on recross, the plaintiffs' expert only strengthened his resolve, testifying that the defendant engaged in no malicious or extraordinary misconduct.

As this Court indicated at trial, parties generally have prepared their own witnesses to testify and know what their own witnesses are going to say. (Trial. Tr. 350:11-14, March 20, 2012) Punitive damages always have been a central issue in this lawsuit and the plaintiffs presumably would have prepared their own expert regarding the meaning and implications of the terms reckless, egregious, malicious, willful and extraordinary misconduct. Even so, the plaintiffs' expert concluded categorically that the defendant engaged in no reckless, egregious or extraordinary misconduct, and the plaintiffs must live with that testimony. Neither party knew what the disinterested third-party DHEC witness would testify to at trial precisely because he was not beholden to either party. Without preparation or prompting, that disinterested witness testified that the defendant did not act intentionally, recklessly, egregiously or maliciously. At the end of the day, the plaintiffs' expert and DHEC fully appreciated and understood what these terms meant and plainly concluded that the defendant's conduct was not reckless.

¹ The defendant quoted the testimony of the plaintiffs' expert and DHEC on pages 5-7 of the defendant's opening brief.

2. There is insufficient evidence of the required causal connection between the regulatory violation and alleged harm to sustain a punitive verdict.

The plaintiffs now contend that there was a causal connection between the daily cover violations and off-site odors on their properties. The evidence, however, does not support their argument. Most striking is that there is no evidence in the record that any of the plaintiffs smelled any landfill odors at their properties on the actual two days of the daily cover violations, December 5, 2008 and May 23, 2009. A simple question to any of the plaintiffs, such as “[d]id you smell odors on your property on December 5, 2008 or May 23, 2009?”, may have established some evidence of this causal connection. No such question was asked, and there is no such evidence in the record to establish this necessary causal connection.

The plaintiffs argue that the jury could have inferred that there were odors at the plaintiffs’ properties on the two days of the violations because DHEC inspection reports indicated off-site odors on those days. This is not a reasonable or proper inference. The documentary evidence illustrates, and the plaintiffs’ expert has admitted, that there is no nexus between daily cover issues and off-site odors. First, there were times when DHEC inspectors noted a daily cover issue but recorded no off-site odors (*see, e.g.*, Def. Trial Ex. 138, 175) and there were other times when the same inspectors noted no daily cover issue but did record some off-site odors (*see, e.g.*, Def. Trial Ex. 226, 249). There simply is no correlation between daily cover and off-site odors.

The nature of the odors, weather patterns, time of odors and distances of the plaintiffs’ properties from the landfill make it improper to infer that because there may have been off-site odors at some point and in some unknown location on the same days of the daily cover violations, those odors necessarily or even potentially reached the plaintiffs’ properties. The working face of the landfill where waste is deposited is uncovered all day during every operating day (some 4,800 days since 1994), and even the plaintiffs and community member witnesses all admitted that there are times they cannot smell off-site landfill odors. (*See, e.g.* Trial Tr. 125:19-21, March 19, 2012,

Debbie Babb; Trial Tr. 190:6-8, March 19, 2012, Donald Mathis) Thus, just because waste at the working face was not covered according to the regulations on two isolated occasions out of the approximately 4,800 working days at the landfill, no inference can be made that there were odors that came off the landfill, left the landfill property and traveled to any of the plaintiffs' properties (the nearest of which is 1.3 miles from the working face and the furthest of which is 1.85 miles from the landfill) during these two occasions.

The testimony of the plaintiffs' own expert illustrates this point. The plaintiffs' expert testified that on one of his visits, he smelled off-site odors just to the south of the landfill property boundary but did not smell odors on the plaintiffs' properties or anywhere else off-site in any other direction during that visit. (Trial. Tr. 567:16-25, March 21, 2012, Townsend) The defendant's experts had similar experiences. (Trial. Tr. 1169:11-14; 1170:2-21, March 27, 2012, Kenneth Skipka; Trial. Tr. 1021:21-1022:11, March 26, 2012, Morton Barlaz) An employee of the defendant who lives 121 feet from the landfill property boundary (closer to the landfill than any plaintiff) did not smell off-site odors during those days. (Trial Tr. 1506:6-14, March 29, 2012)

Although the plaintiffs also argue that the defendant's representatives testified that the daily cover violations caused off-site odors, none of the defendant's witnesses actually testified as such.² For example, the plaintiffs stated that "Mr. Amick testified as to the violations and the offsite odors caused by them." Opposition Brief at 5. Mr. Amick did not testify that the violations caused off-site odors; nor did any other of the defendants' witnesses or DHEC. All that Mr. Amick testified was that it was likely that odors were "coming off the landfill." As this Court is aware, the landfill itself is but a small portion of the property owned by the defendant where the landfill is operated. There are times when odors can and do come off the landfill itself but do not leave the property boundary. The fact that odors may have come off the landfill in no way creates an inference that

² The defendant encourages the Court to read the trial transcript carefully, as the plaintiffs' characterizations of the cited transcript do not, in many cases, square with the actual testimony.

those odors traveled a half mile or more to the property boundary and then traveled off-site in the direction of the plaintiffs for another mile or more to the plaintiffs' properties on the two nights of the violations. Without this causal connection, punitive damages is not a jury question. *See Fairchild v. S.C. Dep't of Transp.*, 2012 WL 1194438, *3-4 (S.C. Apr. 11, 2012).

If the two isolated daily cover violations in this case were enough to send the punitive question to the jury, any regulatory violation by any company would be enough to subject that company to a jury determination of punitive damages. Most, if not all, companies that have operated for a significant period of time will have a regulatory violation of some sort. The South Carolina Supreme Court surely did not have in mind to subject virtually every company in the State to the possibility of punitive damages every time a lawsuit is brought against them. This is why the South Carolina courts in *Fairchild*, *Tant* and *Ravan* have limited the situations in which a regulatory violation becomes a jury question. The present case is one of those very situations when the regulatory violations should not become a jury question.

B. There is not sufficient clear and convincing evidence that the defendant's general operational conduct was reckless.

The plaintiffs dedicate a significant portion of their brief to trial testimony citations in an attempt to demonstrate that the defendant's conduct was reckless. The voluminous cites, however, do not transform quantity into quality. Most importantly, the plaintiffs' own expert evaluated every piece of evidence the plaintiffs now cite in favor of their punitive argument; and after evaluating this evidence, the plaintiffs' expert flatly rejected the notion that the defendant's conduct was reckless. So did DHEC. The more evidence the plaintiffs cite, the more it illustrates the breadth of analysis the plaintiffs' expert undertook before concluding that the defendant's actions were not reckless.

Additionally, the verdict and plaintiffs' argument, taken to their logical end amount to strict liability on the part of landfills in this context, and also any other business that could emit off-site

odors. The thrust of the verdict and argument is that a business that operates lawfully within the bounds of the applicable regulations (but for two days of daily cover violations out of approximately 4,800 operating days), nonetheless is subject to compensatory and punitive damages for its conduct. This verdict, if allowed to stand, will be dangerous not only potentially for this matter (the plaintiffs' counsel has indicated that there are hundreds of other plaintiffs ready to sue the landfill), but for similar businesses associated with odors such as animal and farming operations, wastewater treatment plants and paper mills. The time to impose a reasoned approach is now.

II. A NEW TRIAL IS WARRANTED BECAUSE THE GREATER WEIGHT OF THE EVIDENCE IS AGAINST A PUNITIVE AWARD AND BECAUSE THE PUNITIVE AWARD IS A MANIFEST INJUSTICE THAT DOES NOT WITHSTAND CONSTITUTIONAL SCRUTINY.

Even if this Court does not enter judgment as a matter of law in favor of the defendant as to the punitive award (and it should), the Court should nonetheless order a new trial of the punitive claim. Under Rule 59(e), this Court has wide discretion in partnership with jury (an eleventh juror so to speak) to grant a new trial if the Court believes that the plaintiffs' evidence, though sufficient to support the verdict, was against the clear weight of the evidence and/or that a manifest injustice would result if the verdict is allowed to stand. *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996).

A. The verdict is against the clear weight of the evidence.

As set forth in more detail above and in the defendant's opening brief, the plaintiffs' expert and DHEC analyzed the defendant's conduct (in effect they evaluated the weight of the evidence themselves) and concluded that the defendant did not act recklessly. So too did the defendant's own experts and representatives. *See* Defendant's Opening Brief at 7-10. The plaintiffs' expert testimony, in conjunction with the testimony of DHEC and the defendant's experts and representatives, and the cost and effort the defendant has undertaken to control the odors (such as early well installation, additional flares and permanent capping at great expense), compel the

conclusion that the jury's finding of recklessness is against the overwhelming weight of the evidence and that a new trial is therefore warranted.

B. The punitive award is a manifest injustice that does not survive constitutional or state-law scrutiny under the *BMW* and *Gamble* factors.

A new trial also is warranted because the three *BMW* guideposts and the *Gamble* factors demonstrate that the punitive verdict was unjust, excessive and unconstitutional. The *BMW* and *Gamble* factors overlap considerably and are, therefore, discussed herein together. The plaintiffs concede in their brief that the *BMW* reprehensibility factor is the most important factor. See Opposition Brief at 24. The *BMW* reprehensibility factor mirrors the first *Gamble* factor of degree of culpability. See *Gamble v. Stevenson*, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991). The evidence unquestionably demonstrates that the defendant's conduct was far from reprehensible and falls at the very lowest end of the reprehensibility scale such that the punitive award was "grossly disproportionate to the severity of the offense." *Id.* at 112, 406 S.E.2d at 355.

First, the plaintiffs argue that the defendant's conduct was reprehensible because it caused physical harm and was in reckless disregard of the health and safety of the plaintiffs, claiming that this case is "more likely in the nature of physical harm, rather than purely economic." Opposition Brief at 24. The plaintiffs already chose to abandon their physical injury claims (*see* Def. Trial Ex. 854 & 857) and, therefore, cannot now argue that the defendant's conduct caused physical injury and was in reckless disregard of the health and safety of the plaintiffs. The plaintiffs' argument also is contrary to *State Farm*. In *State Farm*, the \$1 million punitive award was for emotional distress. The Supreme Court concluded that the emotional-distress verdict was not the result of "physical assault or trauma; there were no physical injuries." *Id.*, 538 U.S. at 426. The same is true here. The plaintiffs' alleged harm is only emotional in nature (annoyance, interference with mental tranquility, apprehension, fear, stress, anxiety) and is not a physical injury under *State Farm*.

Second, the *BMW* factor regarding repeated violations is similar to the *Gamble* factors of existence of similar past conduct and duration of the conduct. The plaintiffs concede that “[d]efendant had only technically received two fines. . . .” Opposition Brief at 25. Then the plaintiffs utterly misstate the evidence and Federal law. They argue that gas collection well temperature and pressure exceedences at the landfill “constitute[] ‘exceedences’ of the Federal Regulation” that “are not regulated by DHEC because DHEC does not inspect the O&M reports.” The defendant cannot stress this point enough – the defendant is and always has been in compliance with the federal New Source Performance Standard (“NSPS”) regulations – “exceedences” do not constitute violations of the Federal NSPS regulations. Exceedences are nothing more than a warning to landfill operators that maintenance needs to be conducted on the landfill gas collection wells. If that maintenance is completed, there is no violation. Even the plaintiffs’ own expert admits that the defendant has had “zero” NSPS violations. (Trial Tr. 585:4-14, March 21, 2012, Townsend) As the Supreme Court has held, “[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” *BMW*, 517 U.S. at 573 n.19 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

The plaintiffs even go so far as to accuse the defendant of concealing the exceedences from DHEC and of DHEC not evaluating the exceedences (“DHEC inspector, Greer McLaurin, has never inquired whether the gas wells are within regulatory compliance or even adequately working” such that “DHEC, through their inattentiveness, have made the gas well exceedences unregulated. . . .”) Opposition Brief at 25-26, 28. This is absurd. In making these unfounded statements, the plaintiffs entirely ignore that twice a year the defendant submits reports to DHEC detailing each and every exceedence and each and every timely repair of each exceedence as is required by the NSPS regulations. See Def. Tr. Exs. 455-467 (thirteen exceedence reports submitted to DHEC). In truth, Mr. McLaurin testified that the NSPS regulations were not his area, but that the gas well

exceedence reports are submitted to another section of DHEC. (Trial Tr. 1429:15-1430:23, McLaurin) The evidence indisputably indicates that the defendant never violated the NSPS regulations and has not “persisted in a course of conduct after it had been adjudged unlawful on . . . repeated occasions.” *BMW*, 517 U.S. at 579.

Third, the plaintiffs concede that they were not vulnerable targets by ignoring this factor in their brief. Fourth, the plaintiffs make a feeble attempt to argue that the defendant engaged in intentional malice, trickery and deceit under *BMW* (similar to the *Gamble* concealment factor) but identify no evidence that would even suggest that the defendant acted in this manner toward the plaintiffs. In fact, the evidence is clearly to the contrary. The defendant gave tours to the plaintiffs, attended public hearings and offered an open line of communication with the plaintiffs. Again, the plaintiffs’ own expert and DHEC testified that the defendant did not act with intentional malice, extraordinary misconduct, egregiousness or recklessness.

Fifth, regarding the ratio between the compensatory award and punitive award, the plaintiffs offer no reason that the Court should deviate from the 1:1 presumptive ratio established in *State Farm*. In *State Farm*, the court stated that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.*, 538 U.S. at 425.³ The compensatory damages were substantial in this case, and the defendant’s conduct falls at the lowest end of the reprehensibility scale. Therefore, the 3.4:1 punitive award was constitutionally excessive.

Sixth, the plaintiff argues that the \$1.8 million punitive award was comparable to the maximum statutory penalty of \$60,000 that could have been imposed on the defendant. It defies reason that a punitive award that is 30 times the statutory maximum civil penalty for this type of violation could withstand constitutional scrutiny.

³ The defendant cited numerous cases holding that punitive awards exceeding the 1:1 ratio were improper and refers the Court to those cases for further support of the defendant’s position.

Seventh, the plaintiffs insinuate that the punitive award was proper simply because the defendant accepts more waste than any landfill in South Carolina, has the capacity to operate until 2052, "is contemplating acquiring an additional 340 acres to expand the landfill," has an alleged policy of accepting "challenging" waste, and allegedly is not taking steps it needs to address off-site odors. Opposition brief at 23. In making these general statements, the plaintiffs overlook existing precedent and the evidence. The defendant has permits issued by DHEC that allow it to operate as the largest landfill in South Carolina presently and in the future, and the permits do not restrict the defendant from accepting out-of-state waste. The defendant is in full compliance with those permits and provides significant benefits to the local community through host fees and property taxes as a result of the landfill's operations. Moreover, the Fourth Circuit has indicated that it is improper to restrict out-of-state waste by imposing caps. *See Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001). The plaintiffs' brief confirms that the purpose of the punitive damages in this case is to effect such an unconstitutional cap on out-of-state waste. In addition, while the defendant maintains an option to purchase property, it has no plans to expand the landfill. Further, there is no evidence that the landfill has a policy of accepting "challenging" waste. Rather, similar to all other municipal solid waste landfills in South Carolina, the landfill has a permit to accept (and does accept) municipal solid waste and sludges. Finally, the plaintiffs' own expert admitted that the defendant's efforts to address off-site odors were reasonable and helped odors significantly, and DHEC testified that the defendant has taken appropriate steps to address the daily cover issues (such as making permanent personnel changes, requiring nightly photographs of the cover) and off-site odors (wells, capping, flares, smaller working face, etc.) and DHEC is satisfied with those steps.

Last, the plaintiffs sidestep the ability-to-pay factor by arguing that "there is no evidence in this case that Defendant will be unable to pay the judgment." Opposition Brief at 24. The plaintiffs miss the point. The point is that the punitive verdict exceeds ten percent of the defendant's net

worth, which is too costly a verdict in relation to the defendant's ability to pay under existing precedent. Case law dictates that one percent of a defendant's net worth is generally an appropriate punitive award. In this case, if the evidence were to support a punitive award (which it does not), a punitive award equaling one percent of the defendant's net worth, or \$157,800, would be more appropriate than the \$1.8 million award. Additionally, the plaintiffs have indicated that hundreds of other lawsuits against this defendant are on the horizon. Simple math illustrates how quickly this punitive award alone would cause the defendant economic bankruptcy. At \$300,000 per plaintiff, the plaintiffs' argument would result in the defendant's net worth of \$15.78 million being exhausted after 53 plaintiffs (there are well over 800 potential plaintiffs within two miles of the landfill).

III. THE COMPENSATORY AWARD WAS EXCESSIVE

It also defies reason that a temporary nuisance claim can be worth more than a permanent nuisance claim, yet that is the result in this case. The plaintiffs reshaped and dissected their claims before trial to a point that they were seeking damages only for a temporary nuisance. The plaintiffs specifically abandoned any claim for permanent nuisance. The measure of damages for a permanent nuisance is diminution in property value. *Gray v. S. Facilities, Inc.*, 256 S.C. 558, 569, 183 S.E.2d 438, 443 (1971); *see Smith v. Carbide & Chemicals Corp.*, 507 F.3d 372, 379, (6th Cir. 2007) (measure of damages for permanent nuisance cannot exceed fair market value of the property). The measure of damages for a temporary nuisance is lost rental value. *Id.*; *see Ravan v. Greenville County*, 315 S.C. 447, 465, 434 S.E.2d 296, 307 (Ct. App. 1993). It is implicit that damages for a temporary nuisance necessarily will be less than damages for a permanent nuisance. *See Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264, 276 (Tex. 2004) (“[I]f a nuisance is temporary, the landowner may recover only lost use and enjoyment (measured in terms of rental value) that has already accrued. Conversely, if a nuisance is permanent, the owner may recover lost market value. . . .”) In this case, if the alleged nuisance was permanent, the maximum amount of

possible damages would be the full market value of their combined properties, or \$426,000. Because the plaintiffs limited their claims to a temporary nuisance but the corresponding measure of damages was not limited to rental value, they obtained a windfall that exceeds the full market value of their property. In other words, it makes no sense that the plaintiffs should be entitled to more money for a temporary nuisance than they would be for a permanent nuisance.

As an example, the Elstrom plaintiffs' property is worth \$55,000. If the landfill were found to be a permanent nuisance (which the defendant vehemently denies), the measure of damages would be the diminution in property value so the maximum compensatory amount to which those plaintiffs would be entitled would be \$55,000. Instead, because the nuisance was deemed to be temporary and the recovery was not limited to fair rental value, the jury awarded a verdict for the Elstroms of \$177,500, three and a half times the full market value of their property. Since, by the plaintiffs' own concession, the nuisance is temporary, that means that when it is abated (and the defendant believes it has been abated), the plaintiffs still will own their property and will have received a manifestly unfair verdict of three and a half times the value of their property.

IV. THE PLAINTIFFS CONCEDE THAT THE NEGLIGENCE CLAIM SHOULD NOT HAVE GONE TO THE JURY.

The plaintiffs essentially concede that their negligence claim should not have gone to the jury. In their brief, the plaintiffs do not dispute that expert testimony is necessary to establish the standard of care and a breach thereof. *See* Opposition Brief at 20, 29. Under existing precedent, expert testimony is necessary and the plaintiffs failed to introduce evidence to establish the standard or a breach. *See, e.g., City of York v. Turner-Murphy Co., Inc.*, 317 S.C. 194, 197, 452 S.E. 2d 615, 617 (Ct. App. 1994).⁴ Therefore, the negligence claim fails as a matter of law and makes the compensatory award suspect. The defendant requested a verdict form that required the jury to

⁴ Without an established standard of care, the jury obviously struggled with the negligence claim. A question was raised by the jury regarding negligence and one of the jurors was concerned with the jury's position regarding negligence. (Trial Tr. 1748:22-1756:18, March 29, 2012)

decide each claim separately. *See* Defendant's Proposed Verdict Form, attached hereto as Exhibit A. The unsustainability of the negligence claim and the lack of a detailed verdict form mandates a new trial on the compensatory verdict.

V. REMITTITUR.

Although no compensatory or punitive award is appropriate, if both are allowed to stand, they should be remitted to amounts consistent with existing precedent and constitutional mandates. The compensatory award should be remitted to no more than \$158,630, which is the fair rental value of the plaintiffs' properties during the entire relevant time period and the punitive award should be remitted to no more than \$157,800, which is (1) an approximate 1:1 ratio to the compensatory award of \$158,630 after it is remitted, and (2) one percent of the defendant's net worth. This just makes sense. The compensatory amount is true to the plaintiffs' temporary nuisance claim in that it compensates the plaintiffs for the full rental value of their properties for the entire relevant time frame and does not allow the plaintiffs a windfall that exceeds the full market value of their properties. The punitive amount comports with the *State Farm* 1:1 ratio and the line of cases establishing the one percent of net worth rule. Anything more violates *BMW* and *Gamble*.

Respectfully submitted this 24th day of May, 2012.

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EXHIBIT A

(Lee County Landfill SC, LLC's Proposed Verdict Forms)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Perrin and Debbie Babb, Wayne and Sarah	)	C.A. No.: 3:10-cv-01724-JFA
Elstrom, Alan and Kathy Jackson,	)	
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Plaintiffs,	)	
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v.	)	
	)	
Lee County Landfill SC, LLC,	)	
	)	
Defendants.	)	

LEE COUNTY LANDFILL'S PROPOSED VERDICT FORMS

Defendant, Lee County Landfill ("Lee County Landfill"), hereby submits to the Court its proposed verdict forms.

Lee County Landfill contends that all of the claims asserted in this action by Plaintiffs fail as a matter of law and fact and that Plaintiffs did not present sufficient evidence at trial to justify the submission to the jury of any claim asserted against Lee County Landfill. By submitting these proposed verdict forms, Lee County Landfill does not intend to waive any argument set forth in its previously filed motions or any objection by Lee County Landfill during trial to the submission of Plaintiffs' claims, or any one of them, to the jury. In the event that this Court denies Lee County Landfill's motions, Lee County Landfill respectfully requests that the Court submit the following forms to the jury.

Furthermore, Lee County Landfill has moved the Court for an order bifurcating the jury trial into three phases: (1) liability for compensatory damages and, if necessary, the amount of compensatory damages; (2) if necessary, liability for punitive damages; and (3) if necessary, amount of punitive damages. Consistent with its position, Lee County Landfill respectfully moves this Court to provide the verdict forms to the jury in accordance with the following:

1. First, a verdict form should be submitted concerning issues of liability for compensatory damages and, if necessary, the amount of compensatory damages.
2. If the jury finds in favor of Plaintiffs on liability issues and awards compensatory damages to Plaintiffs, the Court should only then submit a verdict form concerning issues of liability as to Plaintiffs' claim for punitive damages against Lee County Landfill, if that claim survives a ruling as a matter of law.
3. Last, if the jury finds in favor of Plaintiffs, and against Lee County Landfill, on liability as to Plaintiffs' claim for punitive damages, the Court should only then submit a verdict form concerning the amount of punitive damages.

As further indicated in its motion, Lee County Landfill specifically objects to the submission of any verdict form to the jury concerning punitive damages because Plaintiffs' claim is baseless, legally and factually invalid, and should be dismissed *with prejudice* as a matter of law. Lee County Landfill is submitting these proposed verdict forms in the event the Court overrules Lee County Landfill's objections as to the submission of these issues to the jury. Lee County Landfill further respectfully objects to the submission of any verdict forms to the jury, as all of Plaintiffs' claims fail as a matter of law and should be dismissed *with prejudice*.

Lee County Landfill further reserves the right to submit additional verdict forms to the Court based upon the developments occurring at trial and to revise, modify or supplement the forms attached hereto as may become necessary.

Respectfully submitted this ____ day of March, 2012.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Perrin and Debbie Babb, Wayne and Sarah)
Elstrom, Alan and Kathy Jackson,)
)
Plaintiffs,)
)
v.)
)
Lee County Landfill SC, LLC,)
)
Defendants.)

C.A. No.: 3:10-cv-01724-JFA

VERDICT FORM
(LIABILITY)

NUISANCE

- 1) Do you find that Plaintiffs proved by the preponderance, or greater weight, of the evidence that Lee County Landfill substantially and unreasonably interfered with Plaintiffs' use and enjoyment of their properties?

_____ Yes – Go on to question 2
_____ No – Go on to question 3

- 2) Do you find that Plaintiffs proved by the preponderance, or greater weight, of the evidence that Lee County Landfill's substantial and unreasonable interference with Plaintiffs' use and enjoyment of their properties proximately caused harm to Plaintiffs?

_____ Yes – Go on to question 3
_____ No – Go on to question 3

TRESPASS

- 3) Do you find that Plaintiffs proved by the preponderance, or greater weight, of the evidence that Lee County Landfill intentionally trespassed on Plaintiffs' properties?

_____ Yes – Go to question 4
_____ No – Go to question 5

- 4) Do you find that Plaintiffs proved by the preponderance, or greater weight, of the evidence that Lee County Landfill's alleged trespass was the proximate cause of Plaintiffs' alleged damages?

_____ Yes – Go to question 5

_____ No – Go to question 5

NEGLIGENCE

- 5) Do you find that Plaintiffs proved by the preponderance, or greater weight, of the evidence that Lee County Landfill was negligent?

_____ Yes – Go to question 6

_____ No – Go to Instructions, below

- 6) Do you find that Plaintiffs proved by the preponderance, or greater weight, of the evidence that Lee County Landfill's alleged negligence was the proximate cause of Plaintiffs' alleged injury?

_____ Yes – Go to question 7

_____ No – Go to Instructions, below

INSTRUCTIONS

If at least ONE of the following statements is true, GO TO QUESTION 7:

You answered "YES" to Questions 1 and 2;

You answered "YES" to Questions 3 and 4; AND/OR

You answered "YES" to Questions 5 and 6.

If ALL of the following statements are true, STOP AND DELIBERATE NO FURTHER:

You answered "NO" to Questions 1 or 2;

You answered "NO" to Questions 3 or 4; AND

You answered "NO" to Questions 5 or 6.

DAMAGES

- 7) What amount of damages, if any, are Plaintiffs entitled to recover?

FOREPERSON

WHEN YOU HAVE COMPLETED THIS FORM, PLEASE NOTIFY THE BAILIFF.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Perrin and Debbie Babb, Wayne and Sarah	)	C.A. No.: 3:10-cv-01724-JFA
Elstrom, Alan and Kathy Jackson,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	VERDICT FORM
	)	(LIABILITY AS TO PUNITIVE DAMAGES)
	)	
Lee County Landfill SC, LLC,	)	
	)	
Defendants.	)	

Do you find by clear and convincing evidence that the conduct of Lee County Landfill was flagrant, outrageous, willful, wanton, reckless or intentional?

_____ YES
_____ NO

FOREPERSON

WHEN YOU HAVE COMPLETED THIS FORM, PLEASE NOTIFY THE BAILIFF.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Perrin and Debbie Babb, Wayne and Sarah)
Elstrom, Alan and Kathy Jackson,)
)
Plaintiffs,)
)
v.)
)
Lee County Landfill SC, LLC,)
)
Defendants.)

C.A. No.: 3:10-cv-01724-JFA

VERDICT FORM
(PUNITIVE DAMAGES)

In addition to the amount Plaintiffs are entitled to recover in actual damages, are Plaintiffs, by clear and convincing evidence, entitled to punitive damages from Lee County Landfill?

_____ YES, in the amount of \$ _____.
_____ NO

FOREPERSON

WHEN YOU HAVE COMPLETED THIS FORM, PLEASE NOTIFY THE BAILIFF.

EXHIBIT B

(Schneider Nat. Carriers, Inc. v. Bates, 147 S.W.3d 264 (2004))

Schneider Nat. Carriers, Inc. v. Bates, 147 S.W.3d 264 (2004)

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KeyCite Yellow Flag - Negative Treatment
 Distinguished by *Freuden v. Hibernia Nat. Bank, Tex.App.-Beaumont*,
 July 16, 2009

147 S.W.3d 264
 Supreme Court of Texas.

SCHNEIDER NATIONAL CARRIERS, INC. et al.,
 Petitioners,
 v.
 Andrea L. BATES et al., Respondents.

No. 03-0236. | Oct. 1, 2004.

Synopsis

Background: Nearby residents filed suit for nuisance, trespass, negligence, negligence per se, negligent endangerment, and gross negligence against industrial plant operators, alleging damages as a result of emissions from plants. The 61st District Court, Harris County, John Donovan, J., granted partial summary judgment to operators, based on limitations. Residents appealed. The Houston Court of Appeals, First District, 95 S.W.3d 309, reversed and remanded. Review was granted.

Holdings: The Supreme Court, Scott Brister, J., held that:
 [1] a nuisance should be deemed a "temporary nuisance," for purposes of determining when the claim accrues for limitations purposes, whether one or a series of suits is required, and the appropriate measure of damages, only if the nuisance is so irregular or intermittent over the period leading up to filing and trial that future injury cannot be estimated with reasonable certainty, but a nuisance should be deemed a "permanent nuisance" if the nuisance is sufficiently constant or regular, no matter how long between occurrences, so that future impact can be reasonably evaluated, disapproving of *City of Odessa v. Bell*, 787 S.W.2d 525, *Gulf Coast Sailboats, Inc. v. McGuire*, 616 S.W.2d 385, *Youngblood's, Inc. v. Goebel*, 404 S.W.2d 617, *Bayouth v. Lion Oil Co.*, 671 S.W.2d 867, *Kraft v. Langford*, 565 S.W.2d 223, and *Parsons v. Uvalde Elec. Light Co.*, 106 Tex. 212, 163 S.W. 1;
 [2] nuisance claimants cannot elect whether to assert a temporary nuisance or a permanent nuisance, for purposes of determining when the claim accrues for limitations purposes, whether one or a series of suits is required, and the appropriate measure of damages, disapproving of *Abbott v. City of Princeton*, 721 S.W.2d 872, and *Stein v. Highland Park Indep.Sch. Dist.*, 540 S.W.2d 551;

[3] either the plaintiff's injuries or the defendant's operations may establish a permanent nuisance;
 [4] characterization of nuisance as temporary or permanent does not depend on whether it can be abated; and
 [5] plaintiff residents alleged a permanent nuisance, for limitations purposes.

Court of Appeals reversed; judgment rendered for defendants.

West Headnotes (30)

[1] Landlord and Tenant

⚙️ Actions

233Landlord and Tenant
 233VIIPremises, and Enjoyment and Use Thereof
 233VII(E)Injuries from Dangerous or Defective Condition
 233k170Nuisances
 233k170(4)Actions

A tenant has standing to assert a nuisance complaint.

[2] Nuisance

⚙️ Nature and extent of injury or danger

279Nuisance
 279IPrivate Nuisances
 279I(A)Nature of Injury, and Liability Therefor
 279k4Nature and extent of injury or danger

A "nuisance" is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.

9 Cases that cite this headnote

[3] Nuisance

⚙️ What Constitutes Nuisance in General

Schneider Nat. Carriers, Inc. v. Bates, 147 S.W.3d 264 (2004)

48 Tex. Sup. Ct. J. 6

Nuisance

☞ Noise and pollution of atmosphere in general

279 Nuisance

279I Private Nuisances

279I(A) Nature of Injury, and Liability Therefor

279k3 What Constitutes Nuisance in General

279k3(1) In general

279 Nuisance

279I Private Nuisances

279I(A) Nature of Injury, and Liability Therefor

279k3 What Constitutes Nuisance in General

279k3(3) Noise and pollution of atmosphere in general

Foul odors, dust, noise, and bright lights, if sufficiently extreme, may constitute a nuisance.

4 Cases that cite this headnote

[4] Nuisance

☞ Time to sue and limitations

279 Nuisance

279I Private Nuisances

279I(D) Actions for Damages

279k46 Time to sue and limitations

The limitations period for a private nuisance claim is two years. V.T.C.A., Civil Practice & Remedies Code § 16.003.

[5] Limitation of Actions

☞ Injuries to property in general

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k55 Torts

241k55(5) Injuries to property in general

The accrual date, for limitations purposes, for a private nuisance claim is not defined by statute, but is a question of law for the courts. V.T.C.A., Civil Practice & Remedies Code § 16.003.

[6] Limitation of Actions

☞ Injuries to property in general

Limitation of Actions

☞ Injuries to property

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k55 Torts

241k55(5) Injuries to property in general

241 Limitation of Actions

241II Computation of Period of Limitation

241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k95 Ignorance of Cause of Action

241k95(7) Injuries to property

For limitations purposes, a permanent nuisance claim accrues when injury first occurs or is discovered, while a temporary nuisance claim accrues anew upon each injury. V.T.C.A., Civil Practice & Remedies Code § 16.003.

5 Cases that cite this headnote

[7] Limitation of Actions

☞ Continuing injury in general

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k55 Torts

241k55(6) Continuing injury in general

A "permanent nuisance," for purposes of determining when the claim accrues for limitations purposes, whether one or a series of suits is required, and the appropriate measure of damages, is one that involves an activity of such a character and existing under such circumstances that it will be presumed to continue indefinitely; it is constant and continuous, and injury constantly and regularly recurs. V.T.C.A., Civil Practice & Remedies Code § 16.003.

4 Cases that cite this headnote

[8] Limitation of Actions

☞ Injuries to property in general

Schneider Nat. Carriers, Inc. v. Bates, 147 S.W.3d 264 (2004)

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Nuisance

⚡ Nature and form of remedy

Nuisance

⚡ Elements and measure of damages in general

241 Limitation of Actions

2411 Computation of Period of Limitation

2411(A) Accrual of Right of Action or Defense

241k55 Torts

241k55(5) Injuries to property in general

279 Nuisance

279I Private Nuisances

279I(D) Actions for Damages

279k41 Nature and form of remedy

279 Nuisance

279I Private Nuisances

279I(D) Actions for Damages

279k50 Damages

279k50(1) Elements and measure of damages in general

A "temporary nuisance," for purposes of determining when the claim accrues for limitations purposes, whether one or a series of suits is required, and the appropriate measure of damages, means the nuisance is of limited duration, and a nuisance may be considered temporary if it is uncertain whether any future injury will occur, if future injury is liable to occur only at long intervals, or if the nuisance is occasional, intermittent, or recurrent, or is sporadic and contingent upon some irregular force such as rain. V.T.C.A., Civil Practice & Remedies Code § 16.003.

19 Cases that cite this headnote

[9] Limitation of Actions

⚡ Questions for Jury

241 Limitation of Actions

241V Pleading, Evidence, Trial, and Review

241k199 Questions for Jury

241k199(1) In general

Accrual of limitations is a question of law for the court.

1 Cases that cite this headnote

[10] Nuisance

⚡ Diminution of rental or salable value

279 Nuisance

279I Private Nuisances

279I(D) Actions for Damages

279k50 Damages

279k50(2) Diminution of rental or salable value

If a nuisance is temporary, the landowner may recover, as damages, only lost use and enjoyment, measured in terms of rental value, that has already accrued, but if a nuisance is permanent, the landowner may recover lost market value, which is a figure that reflects all losses from the injury, including lost rents expected in the future.

6 Cases that cite this headnote

[11] Nuisance

⚡ Elements and measure of damages in general

279 Nuisance

279I Private Nuisances

279I(D) Actions for Damages

279k50 Damages

279k50(1) Elements and measure of damages in general

In either temporary or permanent nuisance cases, a landowner may recover separate damages for loss of personal property, such as growing crops.

1 Cases that cite this headnote

[12] Nuisance

⚡ Diminution of rental or salable value

279 Nuisance

279I Private Nuisances

279I(D) Actions for Damages

279k50 Damages

279k50(2) Diminution of rental or salable value

A nuisance need not be eternal, for the nuisance to be permanent, so that the landowner is entitled to recover lost market value, as the measure of damages.

3 Cases that cite this headnote

Schneider Nat. Carriers, Inc. v. Bates, 147 S.W.3d 264 (2004)

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and administration for each suit.

2 Cases that cite this headnote

[13] Nuisance

⚙️Weight and sufficiency

279Nuisance
 279IPrivate Nuisances
 279I(D)Actions for Damages
 279k49Evidence
 279k49(5)Weight and sufficiency

As with other types of damages, the future effects of a permanent nuisance do not have to be established with perfect accuracy, but there must be competent evidence that establishes them with reasonable certainty.

1 Cases that cite this headnote

[16] Limitation of Actions

⚙️Causes of action in general

241Limitation of Actions
 241IIComputation of Period of Limitation
 241II(A)Accrual of Right of Action or Defense
 241k43Causes of action in general

Generally, a cause of action accrues, and limitations begins to run, when facts exist that authorize a claimant to seek judicial relief.

5 Cases that cite this headnote

[14] Action

⚙️Splitting Causes of Action

13Action
 13IIJoinder, Splitting, Consolidation, and Severance
 13k53Splitting Causes of Action
 13k53(1)In general

Texas law forbids splitting one claim into several suits, when a single suit will suffice.

[17] Limitation of Actions

⚙️Injuries to property in general

241Limitation of Actions
 241IIComputation of Period of Limitation
 241II(A)Accrual of Right of Action or Defense
 241k55Torts
 241k55(5)Injuries to property in general

Because nuisance claims arise only upon a substantial interference with property use, they normally do not accrue, for limitations purposes, when a potential source is under construction; instead, a landowner has the right to wait and see what the result will be when the improvements are subjected to an actual test. V.T.C.A., Civil Practice & Remedies Code § 16.003.

1 Cases that cite this headnote

[15] Judgment

⚙️Identity of Subject-Matter

228Judgment
 228XIIIMerger and Bar of Causes of Action and Defenses
 228XIII(B)Causes of Action and Defenses Merged, Barred, or Concluded
 228k586Identity of Subject-Matter
 228k586(.5)In general

The transactional approach to res judicata, under which a subsequent suit will be barred if it arises out of the same subject matter of a previous suit, advances the interest of the litigants, who must pay for each suit, the courts, who must try each suit, and the public, who must provide jurors

[18] Limitation of Actions

⚙️Knowledge as to extent of harm or damage

241Limitation of Actions
 241IIComputation of Period of Limitation
 241II(F)Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
 241k95Ignorance of Cause of Action
 241k95(1.5)Knowledge as to extent of harm or

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damage

Even when the discovery rule applies for purposes of determining when a claim accrues for limitations purposes, accrual occurs upon notice of injury, even if the claimant does not yet know the full extent of damages or the chances of avoiding them.

4 Cases that cite this headnote

[19] Limitation of Actions

☞Injuries to property in general

Nuisance

☞Nature and form of remedy

Nuisance

☞Elements and measure of damages in general

241Limitation of Actions

241IIComputation of Period of Limitation

241II(A)Accrual of Right of Action or Defense

241k55Torts

241k55(5)Injuries to property in general

279Nuisance

279IPrivate Nuisances

279I(D)Actions for Damages

279k41Nature and form of remedy

279Nuisance

279IPrivate Nuisances

279I(D)Actions for Damages

279k50Damages

279k50(1)Elements and measure of damages in general

A nuisance should be deemed a "temporary nuisance." for purposes of determining when the claim accrues for limitations purposes, whether one or a series of suits is required, and the appropriate measure of damages, only if the nuisance is so irregular or intermittent over the period leading up to filing and trial that future injury cannot be estimated with reasonable certainty, but a nuisance should be deemed a "permanent nuisance" if the nuisance is sufficiently constant or regular, no matter how long between occurrences, so that future impact can be reasonably evaluated; disapproving of *City of Odessa v. Bell*, 787 S.W.2d 525, *Gulf Coast Sailboats, Inc. v. McGuire*, 616 S.W.2d 385, *Youngblood's, Inc. v. Goebel*, 404 S.W.2d 617, *Bayouth v. Lion Oil Co.*, 671 S.W.2d 867, *Kraft v. Langford*, 565 S.W.2d 223, and *Parsons v. Uvalde Elec. Light Co.*, 106 Tex. 212, 163 S.W. 1. V.T.C.A., Civil Practice & Remedies

Code § 16.003.

20 Cases that cite this headnote

[20] Limitation of Actions

☞Injuries to property in general

Nuisance

☞Nature and form of remedy

Nuisance

☞Elements and measure of damages in general

241Limitation of Actions

241IIComputation of Period of Limitation

241II(A)Accrual of Right of Action or Defense

241k55Torts

241k55(5)Injuries to property in general

279Nuisance

279IPrivate Nuisances

279I(D)Actions for Damages

279k41Nature and form of remedy

279Nuisance

279IPrivate Nuisances

279I(D)Actions for Damages

279k50Damages

279k50(1)Elements and measure of damages in general

Nuisance claimants cannot elect whether to assert a temporary nuisance or a permanent nuisance, for purposes of determining when the claim accrues for limitations purposes, whether one or a series of suits is required, and the appropriate measure of damages; disapproving of *Abbott v. City of Princeton*, 721 S.W.2d 872, and *Stein v. Highland Park Indep. Sch. Dist.*, 540 S.W.2d 551. V.T.C.A., Civil Practice & Remedies Code § 16.003.

[21] Nuisance

☞Diminution of rental or salable value

279Nuisance

279IPrivate Nuisances

279I(D)Actions for Damages

279k50Damages

279k50(2)Diminution of rental or salable value

When a nuisance is created by the construction of works in their nature permanent, the rule is

Schneider Nat. Carriers, Inc. v. Bates, 147 S.W.3d 264 (2004)

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that all damages resulting therefrom to property may be recovered in one action, and the proper measure of damages is the depreciation in the value of the property; that rule also applies when the injury resulting from the nuisance is of a permanent character.

[22] Limitation of Actions

☞Injuries to property in general

Nuisance

☞Nature and form of remedy

Nuisance

☞Elements and measure of damages in general

241Limitation of Actions
 241IIComputation of Period of Limitation
 241II(A)Accrual of Right of Action or Defense
 241k55Torts
 241k55(5)Injuries to property in general
 279Nuisance
 279IPrivate Nuisances
 279I(D)Actions for Damages
 279k41Nature and form of remedy
 279Nuisance
 279IPrivate Nuisances
 279I(D)Actions for Damages
 279k50Damages
 279k50(1)Elements and measure of damages in general

A permanent nuisance, for purposes of determining when the claim accrues for limitations purposes, whether one or a series of suits is required, and the appropriate measure of damages, may be established by showing that either the plaintiff's injuries or the defendant's operations are permanent, but the presumption of a connection between the two can be rebutted by evidence that a defendant's noxious operations cause injury only under circumstances so rare that, even when they occur, it remains uncertain whether or to what degree they may ever occur again. V.T.C.A., Civil Practice & Remedies Code § 16.003.

16 Cases that cite this headnote

[23] Limitation of Actions

☞Injuries to property in general

Nuisance

☞Nature and form of remedy

241Limitation of Actions
 241IIComputation of Period of Limitation
 241II(A)Accrual of Right of Action or Defense
 241k55Torts
 241k55(5)Injuries to property in general
 279Nuisance
 279IPrivate Nuisances
 279I(D)Actions for Damages
 279k41Nature and form of remedy

The characterization of a nuisance as temporary or permanent, for purposes of determining when the claim accrues for limitations purposes and whether one or a series of suits is required, does not depend on whether it can be abated. V.T.C.A., Civil Practice & Remedies Code § 16.003.

[24] Injunction

☞Adequacy of remedy at law

212Injunction
 212IIInjunctions in General; Permanent Injunctions in General
 212I(B)Factors Considered in General
 212k1050Availability and Adequacy of Other Remedies
 212k1053Adequacy of remedy at law (Formerly 212k16)

A permanent injunction issues only if a party does not have an adequate legal remedy.

3 Cases that cite this headnote

[25] Nuisance

☞Trial or hearing

Nuisance

☞Mode and extent of abatement

279Nuisance
 279IPrivate Nuisances
 279I(C)Abatement and Injunction
 279k34Trial or hearing
 279Nuisance
 279IPrivate Nuisances
 279I(C)Abatement and Injunction

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279k37Mode and extent of abatement

In a nuisance case, abatement is a discretionary decision for the judge after the case has been tried and the jury discharged.

2 Cases that cite this headnote

[26] Injunction

☞Specificity, vagueness, overbreadth, and narrowly-tailored relief

212Injunction

212IIInjunctions in General; Permanent Injunctions in General

212I(A)Nature, Form, and Scope of Remedy

212k1013Scope of Relief in General

212k1016Specificity, vagueness, overbreadth, and narrowly-tailored relief
(Formerly 212k189)

Permanent injunctions must be narrowly drawn and precise.

4 Cases that cite this headnote

[27] Nuisance

☞Nature of remedy

279Nuisance

279IPrivate Nuisances

279I(C)Abatement and Injunction

279k18Nature of remedy

In a suit seeking damages for a nuisance, abatement cannot revive permanent damages which are barred by the statute of limitations, by allowing them to be asserted as temporary ones. V.T.C.A., Civil Practice & Remedies Code § 16.003.

[28] Limitation of Actions

☞Injuries to property in general

Limitation of Actions

☞Injuries to property

241Limitation of Actions

241IIComputation of Period of Limitation

241II(A)Accrual of Right of Action or Defense

241k55Torts

241k55(5)Injuries to property in general

241Limitation of Actions

241IIComputation of Period of Limitation

241II(F)Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k95Ignorance of Cause of Action

241k95(7)Injuries to property

Nearby residents alleged a “permanent nuisance” with respect to industrial plants, so that their nuisance claims accrued, for limitations purposes, when injury first occurred or was discovered; residents alleged air quality problems, from dust and odors, occurring at least several times in most weeks or months. V.T.C.A., Civil Practice & Remedies Code § 16.003.

3 Cases that cite this headnote

[29] Judgment

☞Hearing and determination

228Judgment

228VOn Motion or Summary Proceeding

228k182Motion or Other Application

228k186Hearing and determination

Creating a reporter’s record is a practice neither necessary nor appropriate to the purposes of a summary judgment hearing.

4 Cases that cite this headnote

[30] Judgment

☞Hearing and determination

228Judgment

228VOn Motion or Summary Proceeding

228k182Motion or Other Application

228k186Hearing and determination

Trial court was not required to grant residents a continuance for additional discovery before hearing on industrial plant operators’ motion for summary judgment in residents’ nuisance action, though operators did not submit

Schneider Nat. Carriers, Inc. v. Bates, 147 S.W.3d 264 (2004)

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controverting affidavits with respect to residents' request for continuance.

30 Cases that cite this headnote

that the alleged nuisances were permanent, and thus barred by limitations. We reverse the court of appeals' judgment and render judgment for the defendants.

I. Background**Attorneys and Law Firms**

*267 John Dixon Walker, Michael P. Cash, Cash Allen L.L.P., James Edward Smith, Beirne, Maynard & Parsons, L.L.P., Amy Douthitt Maddux, Michael L. Brem, F. Walter Conrad Jr., and Karlene D. Poll, Baker Botts LLP, William Howard Farrell, Cotton Farrell, P.C. and James M. Riley Jr., Coats Rose Yale Holm Ryman & Lee, Houston, Guy M. Hohmann, Hohmann Taube & Summers, L.L.P., Austin, Marvin B. Peterson and Ron T. Capehart, Law Office of Marvin B. Peterson, Houston, for petitioners.

Allen Eli Bell and John B. Turney, Bell, Turney, Coogan & Richards, L.L.P., Austin, Nova Carlene Rhodes and Shelly Ann Sanford, Goforth, Lewis & Williams, Carlene Rhodes Lewis, Goforth Lewis Sanford LLP, Houston, for respondents.

Opinion

Justice BRISTER delivered the opinion of the Court.

This is one of several multi-party suits by residents living near the Houston Ship *268 Channel complaining of conditions created by industrial plants nearby. Because the residents' own complaints show the conditions have existed for many years, the trial court granted summary judgment based on limitations. The court of appeals reversed, finding a fact question on whether the nuisances alleged were temporary or permanent.¹ We granted the petition to try to clarify the distinction, one of the oldest and most complex in Texas law.

¹ 95 S.W.3d 309, 314. The court of appeals subsequently denied the defendants' motion for rehearing en banc. See 143 S.W.3d 102 (Radack, C.J., joined by Taft, J., dissenting).

We hold that the distinction between temporary and permanent nuisances must take into account the reasons for which that distinction is drawn. Viewed from that perspective, the record here establishes as a matter of law

[1] Andrea Bates and seventy-eight other individuals are homeowners and renters² who have resided in the Haden Road area near the Houston Ship Channel for at least two years.³ The defendants operate a trucking firm, a painting and sandblasting firm, and firms that manufacture bleach, wood preservatives, polyesters, and other chemical products. The residents allege air contaminants, odors, lights, and noise from the plants interfere with their use and enjoyment of property, and assert claims for nuisance, trespass, negligence, negligence per se, negligent endangerment, and gross negligence.

² A tenant has standing to assert a nuisance complaint. See, e.g., *Holubec v. Brandenberger*, 111 S.W.3d 32, 34–35 (Tex.2003).

³ Additional plaintiffs residing in the area for less than two years nonsuited their claims and are not before us.

The trial court signed a "Lone Pine" case-management order⁴ requiring the residents to specify (among other things) their dates of residence, specific complaints, and substances they contend were emitted from the defendants' plants. In response, the residents filed affidavits, each and every one of which included the following:

⁴ *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J.Super.Ct.L.1986) (requiring plaintiffs in toxic tort litigation to furnish basic facts to support claims of injury and property damage); see *Able Supply Co. v. Moye*, 898 S.W.2d 766, 769–71 (Tex.1995) (holding trial court abused its discretion in refusing to compel each plaintiff in toxic tort case to indicate which product made by which of 300 defendants caused injury).

• The conditions that have resulted in my claims are ongoing and occur frequently.

• Air pollution that has caused my complaints has occurred on an ongoing basis since I have lived here. One or more of my

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symptoms/complaints occur each time the wind comes from the direction of the industrial plants or facilities, and it is worse when the wind is out of the south, when conditions are humid, or when it rains.

- I have been exposed on a regular basis to one or more of these substances and possibly others.

In addition, individual affidavits included more specific descriptions of the alleged nuisances:

- When I was inside I would keep my windows closed at all times to keep the foul odor out.

- The house and yard are constantly dirty.

- *269 • Our car is always covered with black stuff.

- There is always dust blowing in my backyard.

- I have a picnic table in my backyard which is constantly covered in a black film.

- We always have to keep the windows and doors closed and stay inside because of the foul odors.

- It smells so bad that you cannot sit outside and enjoy it. The dust is also really bad and covers our house and cars constantly.

- The foul smell bothers me constantly.

• There is always dust blowing in my backyard. None of the affidavits mentions bright lights from the defendants' facilities. While several mention ailments of varying severity, the residents' pleadings, appellate briefs, and the affidavit submitted by their medical expert in response to the case-management order allege causation only as to symptoms typical of discomfort rather than disease, thus alleging nuisance damages rather than personal injury.⁵

⁵ See *Vestal v. Gulf Oil Corp.*, 149 Tex. 487, 235 S.W.2d 440, 441–42 (1951) (holding award for discomfort and loss of enjoyment was not claim for personal injuries).

The residents also submitted an affidavit from a chemical engineer, who opined that the defendants' plants are "directly upwind" from most of the plaintiffs' residences, and suggested several steps that could reduce emissions, odors, noise, and light from the plants without rendering operations uneconomic.

The defendants moved for summary judgment based on limitations, asserting that the residents' affidavits (the only evidence submitted in support of the motions) established as a matter of law that their claims alleged permanent nuisances. The trial court granted the motions. The First Court of Appeals reversed, finding fact issues were created by contradictions in the residents' own affidavits regarding the frequency of nuisance conditions and by their expert's affidavit on the feasibility of injunctive relief.⁶ The court of appeals remanded the case, presumably for a jury to decide whether the facts alleged constituted a temporary or permanent nuisance.⁷

⁶ 95 S.W.3d at 314.

⁷ *Id.*

II. Limitations and Nuisances

A

[2] [3] A "nuisance" is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.⁸ There is no question that foul odors, dust, noise, and bright lights—if sufficiently extreme—may constitute a nuisance.⁹

⁸ *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex.2003).

⁹ See, e.g., *id.* at 37–38 (remanding nuisance judgment based on foul odors, flies, dust, noise, and light from feedlot operation for consideration of one-year bar in Right to Farm Act); *Bay Petroleum Corp. v. Crumpler*, 372 S.W.2d 318, 318–20 (Tex.1963) (affirming jury verdict finding no nuisance as wind did not carry "obnoxious gases, fumes, odors and stench" from gas-storage operations to plaintiffs' land in substantial quantities); *Parsons v. Uvalde Elec. Light Co.*, 106 Tex. 212, 163 S.W. 1, 1–2 (1914) (affirming jury verdict based on smoke, dust, and cinders from electric power plant); *Rosenthal v. Taylor, B. & H. Ry. Co.*, 79 Tex. 325, 15 S.W. 268, 269 (1891) (remanding nuisance claim based on stagnant water, noise, dust, smoke, and cinders caused by railroad operations); see also 1 Dan B. Dobbs, *Dobbs Law of Remedies: Damages—Equity—Restitution* § 5.6(1), at 754 (2d ed. 1993) ("Pollution of the air or water, or excessive noise

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or lights, if extreme enough, can count as nuisances.”) (footnotes omitted); 3 William Blackstone, *Commentaries on the LAWS OF ENGLAND* 217 (1768) (“[I]f one erects a smelting house for lead so near the land of another, that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance.”).

*270 [4] [5] The limitations period for a private nuisance claim is two years.¹⁰ As with many other common-law claims, the accrual date is not defined by statute, but is a question of law for the courts.¹¹

10 See Tex. CIV. PRAC. & REM. CODE § 16.003; *Bayouth v. Lion Oil Co.*, 671 S.W.2d 867, 868 (Tex.1984).

11 See *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex.1998).

[6] For more than a hundred years, this Court has held that accrual of a nuisance claim depends on whether the nuisance alleged is “permanent” or “temporary.”¹² A permanent nuisance claim accrues when injury first occurs or is discovered; a temporary nuisance claim accrues anew upon each injury.¹³

12 See, e.g., *Baugh v. Tex. & N.O. Ry. Co.*, 80 Tex. 56, 15 S.W. 587, 587–88 (1891); *Austin & N.W. Ry. Co. v. Anderson*, 79 Tex. 427, 15 S.W. 484, 485 (1891). The same terms have been used for a different purpose in property damages cases: to designate whether the appropriate measure of property damage is repair cost and lost rent (temporary) or lost market value (permanent). See, e.g., *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex.1978) (applying temporary/permanent distinction to property damage caused by flooding, without mention of any nuisance claim). According to a noted commentator, this use results from conflating general property damage cases with nuisances, and would be better served by addressing directly which measure of property damage is reasonable, as the temporary/permanent test “is a relatively crude one, and it may be misleading.” Dobbbs, *supra* note 9, § 5.2(2), at 716–18; cf. *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 235 (Tex.2004) (rejecting market-value damage in property damage case as it greatly exceeded total repair costs).

13 See *Bayouth*, 671 S.W.2d at 868; *Atlas Chem. Indus., Inc. v. Anderson*, 524 S.W.2d 681, 684–85 (Tex.1975); *Vann v. Bowie Sewerage Co.*, 127 Tex. 97, 90 S.W.2d 561, 562 (1936); *Lyles v. Tex. & N.O. Ry. Co.*, 73 Tex.

95, 11 S.W. 782, 783 (1889).

The distinction is critical in this case, as it is undisputed that conditions similar to those the residents allege have existed for many years. If the nuisances alleged here are temporary, injuries that occurred within two years of suit are timely regardless of when they began; if they are permanent, all the residents’ claims are barred.

B

Many other jurisdictions make the same distinction between temporary and permanent nuisances for the purpose of determining when limitations accrues.¹⁴ But *271 the test used to make the distinction in Texas is fairly unique.

14 See, e.g., *Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1122 (D.C.Cir.1988); *Huffman v. U.S.*, 82 F.3d 703, 705 (6th Cir.1996) (applying Kentucky law); *Aetna Cas. & Sur. Co. v. Gulf Res. & Chem. Corp.*, 600 F.Supp. 797, 801 (D.C.Idaho 1985) (applying Idaho law); *City of Tucson v. Apache Motors*, 74 Ariz. 98, 245 P.2d 255, 257 (1952); *Mangini v. Aerojet-Gen. Corp.*, 12 Cal.4th 1087, 51 Cal.Rptr.2d 272, 912 P.2d 1220, 1221 (1996); *Hoery v. U.S.*, 64 P.3d 214, 218 (Colo.2003); *Weinhold v. Wolff*, 555 N.W.2d 454, 462–63 (Iowa 1996); *Dougan v. Rossville Drainage Dist.*, 270 Kan. 468, 15 P.3d 338, 343–44 (2000); *Knight v. City of Missoula*, 252 Mont. 232, 827 P.2d 1270, 1277 (1992); *Wischmann v. Raikes*, 168 Neb. 728, 97 N.W.2d 551, 564 (1959); *Sundell v. Town of New London*, 119 N.H. 839, 409 A.2d 1315, 1320–21 (N.H.1979); *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 144 N.J. 84, 675 A.2d 1077, 1085 (1996); *City of Sioux Falls v. Miller*, 492 N.W.2d 116, 118(S.D.1992); *Breiggar Props., L.C. v. H.E. Davis & Sons, Inc.*, 52 P.3d 1133, 1135(Utah 2002); *Taylor v. Culloden Pub. Serv. Dist.*, 214 W.Va. 639, 591 S.E.2d 197, 203(2003); *Carlton v. Germany Hammock Groves*, 803 So.2d 852, 855(Fla.Ct.App.2002); *Keane v. Pachter*, 598 N.E.2d 1067, 1072 (Ind.Ct.App.1992); *Hoffman v. United Iron & Metal Co.*, 108 Md.App. 117, 671 A.2d 55, 68(1996); *Traver Lakes Cmty. Maint. Ass’n v. Douglas Co.*, 224 Mich.App. 335, 568 N.W.2d 847, 853 (1997); *Thomas v. City of Kansas City*, 92 S.W.3d 92, 100(Mo.Ct.App.2002); *Brown v. Scioto County Bd. of Comm’rs.*, 87 Ohio App.3d 704, 622 N.E.2d 1153, 1162 (1993); *N.C. Corff P’ship, Ltd. v. OXY USA, Inc.*, 929 P.2d 288, 293 (Okla.Ct.App.1996); *Caldwell v. Knox Concrete Prods., Inc.*, 54 Tenn.App. 393, 391 S.W.2d 5, 11 (1964); see also 1 Fowler V. Harper et al., *The Law of*

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Torts § 1.30, at 139 (3d ed. 1996) (“In most jurisdictions, however, a distinction is made between ‘permanent’ and ‘temporary’ nuisances.”).

Most states define nuisances by looking at the structure of the source or the possibility of stopping it.¹⁵ Thus, some define a permanent nuisance as one that stems from a permanent structure being operated in a lawful, non-negligent manner.¹⁶ Others define a temporary nuisance as one that can be abated by injunction, and a permanent nuisance as one that cannot.¹⁷ Still others balance several factors in making the determination.¹⁸

15 Michael A. DiSabatino, Annotation, *When Statute of Limitations Begins to Run as to Cause of Action for Nuisance Based on Air Pollution*, 19 A.L.R.4th 456, 459–60 (1983) (“The courts seem to be generally agreed that where a nuisance in the form of air pollution is permanent in that the structure giving rise to the air pollution is of a permanent nature, the air pollution is a consistent product of the operation of the structure, and the air pollution is not practicably abatable, the statute of limitations begins to run against a cause of action for the nuisance at the time that the nuisance begins, provided that the permanent nature of the nuisance can be ascertained at that time.”).

16 See, e.g., *Huffman*, 82 F.3d at 705 (holding nuisance temporary if source is permanent structure improperly built or operated and remediable at reasonable expense); *City of Tucson*, 245 P.2d at 259; *S. New Eng. Ice Co. v. Town of W. Hartford*, 114 Conn. 496, 159 A. 470, 476 (1932); *Shelley v. Ozark Pipe Line Corp.*, 327 Mo. 238, 37 S.W.2d 518, 519 (1931); *Brown*, 622 N.E.2d at 1162. The lawfulness test is related to the abatability test, as courts hesitate to enjoin operations that are lawful and properly operated. See *Holubec v. Brandenberger*, 111 S.W.3d 32, 39–40 (Tex.2003) (“Nor should a decree of injunction be so broad as to enjoin a defendant from activities which are a lawful and proper exercise of his rights.”).

17 See, e.g., *Dombrowski v. Gould Elecs., Inc.* 954 F.Supp. 1006, 1012 (M.D.Pa.1996); *Van Deusen v. Seavey*, 53 P.3d 596, 600 (Alaska 2002) (finding nuisance temporary as noise from barking sled dogs could be abated); *Apache Motors*, 245 P.2d at 257; *Mangini*, 51 Cal.Rptr.2d 272, 912 P.2d at 1227; *Dougan*, 15 P.3d at 344; *Hoffman*, 671 A.2d at 68; *Knight*, 827 P.2d at 1277; *Wischmann*, 97 N.W.2d at 564; *Sundell*, 409 A.2d at 1321; *Russo Farms*, 675 A.2d at 1086; *City of Gainesville v. Waters*, 258 Ga.App. 555, 574 S.E.2d 638, 643 (2002); *Thomas*, 92 S.W.3d at 100; *Valdez v. Mountain Bell Tel. Co.* 107 N.M. 236, 755 P.2d 80, 84

(1988); *Brown*, 622 N.E.2d at 1162; *N.C. Corff P'ship, Ltd.*, 929 P.2d at 293; *Clabo v. Great Am. Resorts, Inc.*, 121 S.W.3d 668, 671 (Tenn.Ct.App.2003); Restatement (Second) of Torts § 930(2) (1979) (“If the future invasions would not be enjoined because the defendant’s enterprise is affected with a public interest, the court in its discretion may rule that the plaintiff must recover for both past and future invasions in the single action.”).

18 See, e.g., *Beatty*, 860 F.2d at 1122 (stating temporary nuisance is one that is either abatable or “intermittent or periodical”); *Dougan*, 15 P.3d at 344 (considering source’s structure, nature of the damages, and ability to determine or estimate damages); *City of Sioux Falls*, 492 N.W.2d at 118 (considering source’s structure and whether it could reasonably be abated); *Beck Dev. Co. v. S. Pac. Transp. Co.*, 44 Cal.App.4th 1160, 52 Cal.Rptr.2d 518, 557–60 (1996) (rejecting any “single overriding test,” and looking to factors such as abatability, whether level of injury was static or changing, and whether source of nuisance continued to operate or had been shut down).

*272 [7] But for more than a century, Texas courts have defined temporary and permanent nuisances along lines that are somewhat closer to the plain meaning of the words. We define a permanent nuisance as one that involves “an activity of such a character and existing under such circumstances that it will be presumed to continue indefinitely.”¹⁹ Thus, a nuisance is permanent if it is “constant and continuous,”²⁰ and if “injury constantly and regularly recurs.”²¹

19 *Bayouth v. Lion Oil Co.*, 671 S.W.2d 867, 868 (Tex.1984); *Atlas Chem. Indus., Inc. v. Anderson*, 524 S.W.2d 681, 684 (Tex.1975); see also *Columbian Carbon Co. v. Tholen*, 199 S.W.2d 825, 826 (Tex.Civ.App.-Galveston 1947, writ ref’d) (affirming jury’s finding of permanent nuisance based on instruction, “By the term ‘permanent’ as used in the foregoing charge is meant a condition of such a character and which exists under such circumstances that it will be presumed to continue indefinitely.”).

20 *Bayouth*, 671 S.W.2d at 868; *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex.1978); *Atlas*, 524 S.W.2d at 684.

21 *Rosenthal v. Taylor, B. & H. Ry. Co.*, 79 Tex. 325, 15 S.W. 268, 269 (1891).

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[8] Conversely, a nuisance is temporary if it is of limited duration.²² Thus, a nuisance may be considered temporary if it is uncertain if any future injury will occur,²³ or if future injury “is liable to occur only at long intervals.”²⁴ A nuisance is also temporary if it is “occasional, intermittent or recurrent,”²⁵ or “sporadic and contingent upon some irregular force such as rain.”²⁶

22 See *id.*

23 See *Baker v. City of Fort Worth*, 146 Tex. 600, 210 S.W.2d 564, 567 (1948) (holding nuisance claim timely despite earlier flood, as further flooding remained uncertain).

24 *Rosenthal*, 15 S.W. at 269.

25 *Bayouth*, 671 S.W.2d at 868.

26 *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex.1978); *Atlas Chem. Indus., Inc. v. Anderson*, 524 S.W.2d 681, 684–85 (Tex.1975).

Texas courts in some cases have also considered several of the factors used by other states. For example, some courts in categorizing nuisances have considered whether the source is a permanent structure,²⁷ whether it is operated lawfully and without negligence,²⁸ and whether it can be abated.²⁹ As discussed below, these factors may indeed figure into certain nuisance cases.

27 See, e.g., *Nugent v. Pilgrim's Pride Corp.*, 30 S.W.3d 562, 571 (Tex.App.-Texarkana 2000, pet. denied) (holding chicken hatchery waste dumped on neighboring hillside was temporary as defendants “did not build a facility”).

28 See, e.g., *Baugh v. Tex. & N.O. Ry. Co.*, 80 Tex. 56, 15 S.W. 587, 587 (1891) (holding allegations that railroad was operating trains in unlawful manner alleged temporary nuisance).

29 See, e.g., *Town of Jacksonville v. McCracken*, 232 S.W. 294, 295 (Tex.Com.App.1921, judgm't adopted) (“But if the nuisance is of a permanent character and not

subject to be abated, or if it is treated as permanent by the parties, or if the injury to the land is permanent and irremediable, the proper measure of damages to be recovered is the depreciation in the value of the property.”); *Nugent*, 30 S.W.3d at 571 (holding chicken hatchery waste dumped on neighboring hillside was temporary as it was “easily abatable”).

But the general Texas rule—based on whether a nuisance is constant, regular, and likely to continue or whether it is sporadic, uncertain, and likely to end—has been in place for more than a hundred years. Texas appellate opinions rarely refer to the nuisance jurisprudence from other jurisdictions, nor have the many able counsel in this case. Moreover, in other *273 jurisdictions there is no consensus as to where the line between permanent and temporary nuisances should be (“there is no clear test generally accepted”³⁰), or how it should be applied (“which category to allocate a particular nuisance leads to widely varying results”³¹).

30 Harper, *supra* note 14, § 1.30, at 1:140.

31 DiSabatino, *supra* note 15, 460; see also *Miller v. Cudahy Co.*, 858 F.2d 1449, 1453 (10th Cir.1988) (“Drawing a distinction between permanent and temporary damages resulting from a nuisance is at best problematical.”); *City of Tucson v. Apache Motors*, 74 Ariz. 98, 245 P.2d 255, 257 (1952) (“Much confusion has arisen in the various jurisdictions of the United States as to just what constitutes a permanent nuisance as distinguished from a temporary or continuing nuisance.”); *Taylor v. Culloden Pub. Serv. Dist.*, 214 W.Va. 639, 591 S.E.2d 197, 203 (2003) (stating distinction between temporary and permanent nuisances for limitations purposes “have often proven difficult to categorize”); *Beck Dev. Co. v. S. Pac. Transp. Co.*, 44 Cal.App.4th 1160, 52 Cal.Rptr.2d 518, 556 (1996) (stating that distinction between permanent and continuing nuisances “can create particular problems for the parties”).

Accordingly, we adhere to the traditional American rule that distinguishes temporary from permanent nuisances, and to the traditional Texas rule for making that distinction. But we consider the latter rule in some detail because of the conflicts that have arisen among Texas appellate courts regarding its application.

C

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The line in Texas between temporary and permanent nuisances “can be plainly and simply stated,” but “its application to the facts involved in each case has been a continuing problem.”³²

32 *Nugent*, 30 S.W.3d at 569.

The difficulty in applying the stated rule stems from the relative nature of the terms involved.³³ Whether a nuisance is “temporary” or “permanent” obviously turns on how long it lasts, and whether it is “infrequent” or “continuous” on how often it occurs. But without a standard of reference, the terms give no guidance regarding where either line should be drawn.

33 *Mel Foster Co. Props., Inc. v. Am. Oil Co.*, 427 N.W.2d 171, 175 (Iowa 1988) (“The terms ‘permanent’ and ‘temporary’ are somewhat nebulous in that they have practical meaning only in relation to particular fact situations and can change in characterization from one set of facts to another.”)

For example, every plant, feedlot, or landfill could be considered “temporary” when compared to all of human history, or “permanent” when compared to the life of a mayfly. And while conditions occurring every day are “continuing” and those occurring once in a blue moon “infrequent,” it is not clear which term ought to apply to those in between.³⁴ Though we have recognized the continuum between temporary and permanent nuisances,³⁵ we have never indicated where the boundary lines might be.

34 For example, a nuisance that occurs every summer would be constant if the context is only that season, infrequent if the context is the full year, and constant again (in a seasonal sense) if the context is the course of a decade. *See, e.g., Lamb v. Kinslow*, 256 S.W.2d 903, 905 (Tex.Civ.App.-Waco 1953, writ ref’d n.r.e.) (holding nuisance involving annual burning of cotton burrs near plaintiff’s home was permanent, as “he is deprived of the enjoyment of his home for several months of the year”).

35 *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex.1978).

Accordingly, Texas courts addressing very similar cases have reached very different results. For example, in *Kraft v. Langford*, we held flooding caused by a storm sewer in Montgomery County was a *274 temporary nuisance as a matter of law.³⁶ But in *City of Amarillo v. Ware*, we held

flooding caused by a storm sewer in Amarillo was properly pleaded as a permanent nuisance.³⁷ It is not clear from either opinion why heavy rains near the Gulf Coast *must* be considered temporary, while those in the Texas Panhandle do not.³⁸

36 *Id.* Although an alternate ground for the Court’s holding was that the storm sewer had been ordered closed, we nevertheless stated that it possessed “only the characteristics of temporary injury and none of the characteristics of permanent harm” because it “depends upon the fortuitous event of rain and is not continuous.” *Id.*

37 120 Tex. 456, 40 S.W.2d 57, 61–62 (1931).

38 Completing the cycle, the Second Court of Appeals has held flooding caused by a storm sewer in north Texas was permanent as a matter of law. *Durden v. City of Grand Prairie*, 626 S.W.2d 345, 348 (Tex.App.-Fort Worth 1981, writ ref’d n.r.e.).

Cases involving soot and cinders are similarly incompatible. In *Parsons v. Uvalde Electric Light Co.*, we held that smoke, dust, and cinders from an electric power plant constituted a temporary nuisance as a matter of law.³⁹ But in *Rosenthal v. Taylor, B. & H. Railway Co.*, we held that noise, dust, smoke, and cinders from passing locomotives constituted a permanent nuisance as a matter of law.⁴⁰ Again, it is hard to see why smoke from an electrical plant is necessarily temporary, while smoke from passing trains must be permanent.

39 106 Tex. 212, 163 S.W. 1, 1 (1914).

40 79 Tex. 325, 15 S.W. 268, 269 (1891); *see also Angelina Hardwood Lumber Co. v. Irwin*, 276 S.W.2d 407, 410 (Tex.Civ.App.-Galveston 1955, no writ) (holding sawdust and soot from sawmill was permanent nuisance).

Irreconcilable differences also appear to permeate cases involving foul odors. In *City of Lubbock v. Tice*, the Seventh Court of Appeals found that odors from a landfill presented a permanent nuisance as a matter of law, even though they varied “as the West Texas wind changed.”⁴¹ In *Meat Producers, Inc. v. McFarland*, the Fifth Court of Appeals affirmed a jury verdict finding odors from a

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cattle feedlot permanent, even though they varied with wind direction and humidity.⁴² But the Fourteenth Court of Appeals held in *Gulf Coast Sailboats, Inc. v. McGuire* that jurors could deem odors from a fiberglass plant temporary, even though they occurred about three times a week, and more often in summer.⁴³ And in *Youngblood's, Inc. v. Goebel*, the Tenth Court of Appeals found odor from a poultry-rendering plant was temporary as a matter of law, because it “depends on direction of wind,” “comes and goes,” and was present “3 or 4 times a week.”⁴⁴ Thus, in four cases regarding foul odors carried on variable winds, Texas appellate courts have deemed them temporary as a matter of law, permanent as a matter of law, and a fact question that could go either way.

41 517 S.W.2d 428, 431 (Tex.Civ.App.-Amarillo 1974, no writ).

42 476 S.W.2d 406, 410, 413 (Tex.Civ.App.-Dallas 1972, writ ref'd n.r.e.).

43 616 S.W.2d 385, 387 (Tex.Civ.App.-Houston [14th Dist.] 1981, writ ref'd n.r.e.).

44 404 S.W.2d 617, 619–20 (Tex.Civ.App.-Waco 1966, writ ref'd n.r.e.).

Assuming each of these cases turned on the facts stated in each opinion, half of them must be wrong; they are simply unreconcilable. But because the Texas test has no standard of reference, it is not immediately apparent which.

[9] Accrual of limitations is a question *275 of law for the court.⁴⁵ Clearly, it is up to jurors to decide material factual disputes about frequency, duration, and extent of nuisance conditions.⁴⁶ But without a clear standard of reference for the relative terms involved here, jurors cannot apply the law to the facts without deciding the law also.

45 See *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex.2003); *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 567 (Tex.2001).

46 See, e.g., *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex.1978) (holding court erred in submitting jury issue as to permanent damages when only evidence showed

that nuisance was temporary); *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 436 (Tex.App.-Fort Worth 1997, writ denied) (affirming jury finding that injury to property was “continuous and ongoing”).

Moreover, as the distinction between temporary and permanent nuisances determines limitations for bringing a claim, different standards in different cases result in different limitations periods. “Uncertainty in the test for the distinction can put the parties in a serious predicament.”⁴⁷ As Chief Justice Radack noted in her dissent below, “the law governing nuisances is unclear in its present state.”⁴⁸ We granted the petition in this case to try to clarify the standards that should apply.

47 Harper, *supra* note 14, § 1.30, at 1:140.

48 143 S.W.3d at 103.

III. Coordinating Distinctions with Consequences

A

While there is considerable uncertainty about which nuisances are temporary or permanent, there is no uncertainty about the legal consequences. For guidance on how to make the distinction, we look to the consequences that flow from it.

Thirty years ago, this Court noted several factors that lead to, and still remain associated with, the distinction between temporary and permanent nuisances:

The question of the temporary or permanent character of injury to land was initially conceived as an aspect of damages. At common law, a plaintiff suing for a continuing invasion of his land could recover for only those damages accrued by the time of trial. To relieve the burden placed upon an aggrieved landowner to bring successive suits, the courts developed the concept of permanent injury to permit the recovery of past and future damages. Coactive with the advantage of a future

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damage award was the disadvantage of bringing the action within the limitation period as measured from the first injury; i.e., the cause of action accrued for limitations purposes at the time of the first actionable injury.⁴⁹

- 49 *Atlas Chem. Indus., Inc. v. Anderson*, 524 S.W.2d 681, 684 (Tex.1975) (citations omitted).

In this passage, we recognized three distinct consequences that result from categorizing a nuisance as permanent or temporary: (1) whether damages are available for future or only past injuries; (2) whether one or a series of suits is required; and (3) whether claims accrue (and thus limitations begins) with the first or each subsequent injury.

These consequences are not unique to Texas; one commentator has noted the same effects in cases from all jurisdictions:

The cases discussed in this section speak of a "permanent nuisance" or the like in order to decide three questions: (1) whether an earlier recovery of damages is res judicata [i.e., whether one or a series of suits is required]; (2) to decide whether the claim is barred by the statute *276 of limitations; and (3) to decide whether the plaintiff can or must recover for all future damages at one time.⁵⁰

- 50 *Dobbs, supra* note 9, § 5.11(1), at 820; *see also* Harper, *supra* note 14, § 1.30, at 1:139 (noting same consequences). One court has held a nuisance may be designated differently for each of these purposes. *See Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1125 (D.C.Cir.1988) ("[A] nuisance may be classified as 'permanent' for the purpose of assessing damages, and as 'continuing' for statute of limitations purposes.").

Because of the substantial consequences that flow from designating a nuisance as temporary or permanent, we believe application of the distinction must correspond to those consequences. Accordingly, we examine each in turn as an aid to clarifying the standards that should apply.

[10] [11] First, the distinction between temporary and permanent nuisances determines the damages that may be recovered. It has long been the rule in Texas that if a nuisance is temporary, the landowner may recover only lost use and enjoyment (measured in terms of rental value) that has already accrued.⁵¹ Conversely, if a nuisance is permanent, the owner may recover lost market value—a figure that reflects all losses from the injury, including lost rents expected in the future.⁵² Because the one claim is included in the other, the two claims are mutually exclusive; a landowner cannot recover both in the same action.⁵³

- 51 *See Kraft*, 565 S.W.2d at 227; *Atlas*, 524 S.W.2d at 684; *Vestal v. Gulf Oil Corp.*, 149 Tex. 487, 235 S.W.2d 440, 442 (1951); *City of Amarillo v. Ware*, 120 Tex. 456, 40 S.W.2d 57, 61 (1931); *Baugh v. Tex. & N.O. Ry. Co.*, 80 Tex. 56, 15 S.W. 587, 587 (1891); *Rosenthal v. Taylor, B. & H. Ry. Co.*, 79 Tex. 325, 15 S.W. 268, 269 (1891); *Trinity & S. Ry. Co. v. Schofield*, 72 Tex. 496, 10 S.W. 575, 576–77 (1889); *see also Lone Star Gas Co. v. Hutton*, 58 S.W.2d 19, 21 (Tex.Com.App.1933, holding approved).

- 52 *Bay Petroleum Corp. v. Crumpler*, 372 S.W.2d 318, 320 (Tex.1963); *Hutton*, 58 S.W.2d at 20.

- 53 *Kraft*, 565 S.W.2d at 227; *Pickens v. Harrison*, 151 Tex. 562, 252 S.W.2d 575, 582 (1952) ("If respondents' suit is one for permanent damages to the land, the measure of damages is the decreased value of the land, and no recovery for the land's rental value is permitted."). In addition, in either temporary or permanent nuisance cases, a landowner may recover separate damages for loss of personal property, such as growing crops. *Hutton*, 58 S.W.2d at 20–21; *Dallas & W. Ry. Co. v. Kinnard*, 18 S.W. 1062, 1065 (Tex.1892).

This legal consequence suggests a specific context for relative terms like "temporary" and "permanent." An isolated occurrence may result in temporary loss of use and enjoyment, but is unlikely to result in permanent loss of market value unless the damage cannot be remedied or is likely to occur again. Conversely, construction of a source of foul odors is likely to lower the market value of neighboring property permanently, even if operations are occasionally discontinued for months at a time.⁵⁴ In either case, whether the nuisance is temporary or permanent does not turn on the conditions on any particular day or week, but on expectations about its impact over a period of years.

B

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- 54 *Meat Producers, Inc. v. McFarland*, 476 S.W.2d 406, 410, 411 (Tex.Civ.App.-Dallas 1972, writ ref'd n.r.e.).

The same considerations place terms like “sporadic” or “constant” in the same time frame. Viewed from the perspective of likely damages, it is by no means necessary for a nuisance to occur daily for it to have a “constant and continuous” effect. For example, if a nuisance subjects land along a river to annual flooding, market *277 values would normally reflect that expectation (positively for some agricultural or wildlife uses, negatively for most others), even though many months may intervene between floods and in some years there may be none at all. By contrast, if a nuisance is likely to create flooding only during a hurricane, the infrequency and unpredictability of such a disaster may make future losses difficult to evaluate, thus requiring a landowner to await actual damage before filing suit.

[12] On the other end of the continuum, market values generally reflect expectations about future years but not future centuries. Thus, a permanent nuisance need not be eternal; “[d]amage need not be perpetual in order to be permanent.”⁵⁵ Accordingly, a sanitary landfill that lowers the market value of neighboring property may be deemed permanent, even if the landfill is expected to close in twenty years.⁵⁶

- 55 *City of Lubbock v. Tice*, 517 S.W.2d 428, 431 (Tex.Civ.App.-Amarillo 1974, no writ).

- 56 *Id.*

Of course, every change in property value does not indicate a permanent nuisance. Property values are affected by many factors; a decrease in market value does not mean there is a nuisance,⁵⁷ any more than an increase means there is not.⁵⁸

- 57 *Crumpler*, 372 S.W.2d at 319–20 (finding no fatal conflict between jury answers “no” to nuisance and “\$5,500” to lost property value).

- 58 *Abbott v. City of Princeton*, 721 S.W.2d 872, 876 (Tex.App.-Dallas 1986, writ ref'd n.r.e.) (holding nuisance claim was not negated by evidence that property value had increased).

depending on wind direction and humidity. Because estimates of market value normally rest on expectations not about future days but about future years, the time frame for designating a nuisance as temporary or permanent should as well.

[13] It is of course impossible to say precisely when the future effects of a nuisance are sufficiently clear that a reasonable estimate of its impact on market value can be made. As with other types of damages, the future effects of a nuisance do not have to be established with perfect accuracy.⁵⁹ But there must be competent evidence that establishes them with reasonable certainty.⁶⁰ Accordingly, in cases in which injury occurs often enough before trial that jurors can make a reasonable estimate of the long-term impact of the nuisance on the market value of a property, they ought to be allowed to do so. The standard of reference for applying the distinction between temporary and permanent nuisances should reflect that consideration.⁶¹

- 59 *Hindman v. Tex. Lime Co.*, 157 Tex. 592, 305 S.W.2d 947, 953 (1957) (“[I]f an injured plaintiff has produced the best evidence available, and if it is sufficient to afford a reasonable basis for estimating his loss, he is not to be denied a substantial recovery because the exact amount of the damage is incapable of ascertainment.”) (quoting *Shannon v. Shaffer Oil & Refining Co.*, 51 F.2d 878, 882 (10th Cir.1931)).

- 60 *Id.* at 952–53 (holding evidence of examples of damage to a few autos from nuisance insufficient to establish damages as to entire inventory); cf. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 504–05 (Tex.2001) (considering damages for lost profits and lost crops); *City of Austin v. Teague*, 570 S.W.2d 389, 395 (Tex.1978) (reversing award of lost rental value for undeveloped land as speculative and uncertain).

- 61 See *Rosenthal v. Taylor, B. & H. Ry. Co.*, 79 Tex. 325, 15 S.W. 268, 269 (1891) (“The controlling rule in actions for injuries resulting from similar nuisances would seem to be to adopt in each case that measure of damages which is calculated to ascertain in the most certain and satisfactory manner the compensation to which the plaintiff is entitled.”).

*278 C

The second reason for distinguishing temporary and permanent nuisances stems directly from the first. If

But nowhere do market values of land fluctuate each hour

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future harm can reasonably be predicted, the nuisance is a permanent one and a claimant must sue for all injuries in one suit. But if future harm is anyone's guess, the nuisance is a temporary one and a claimant must bring a series of suits involving the same parties, pleadings, and issues as each injury occurs.⁶²

62 See, e.g., *Van Deusen v. Seavey*, 53 P.3d 596, 600 (Alaska 2002) (finding second suit was not barred by res judicata as nuisance was temporary).

[14] [15] Texas law forbids splitting one claim into several suits when a single suit will suffice.⁶³ When we adopted the transactional approach to res judicata, we stated that a "subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, *could have been litigated* in a prior suit."⁶⁴ These policies advance the interest of the litigants (who must pay for each suit), the courts (who must try each suit), and the public (who must provide jurors and administration for each suit).⁶⁵

63 *Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643, 646-47 (Tex.2000); *Eastland County v. Davison*, 13 S.W.2d 673, 675-76 (Tex.Com.App.1929, judgment adopted).

64 *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 631 (Tex.1992) (emphasis added).

65 See *Pustejovsky*, 35 S.W.3d at 653.

Modern circumstances redouble these concerns. Perhaps a series of duplicative suits was a reasonable approach to nuisances in a day when courts were less busy and litigation cheaper. Many years ago, nuisance suits could sometimes be concluded within a year or two of filing.⁶⁶ But that is often not the case today; for example, in this case the joinder of scores of plaintiffs and defendants in the trial court and en banc reconsideration in the court of appeals (both relatively recent innovations) meant disposition below took four and one-half years. If a nuisance that causes injury every year is deemed temporary, several new suits may have to be filed before appeals on previous ones have been exhausted.

66 See, e.g., *Fromme v. Tenn. Gas Transmission Co.*, 263 S.W.2d 574, 575 (Tex.Civ.App.-Austin 1953), rev'd, 153 Tex. 352, 269 S.W.2d 336, 337 (1954) (deciding appeal on nuisance suit filed in trial court nineteen months earlier); *Baker v. City of Fort Worth*, 146 Tex.

600, 210 S.W.2d 564, 564 (1948) (concluding suit filed nineteen months earlier); *Lyles v. Tex. & N. O. Ry. Co.*, 73 Tex. 95, 11 S.W. 782, 783 (1889) (concluding nuisance suit filed twelve months earlier). But see *Kinnard*, 18 S.W. at 1062 (decided four and one-half years after nuisance suit was filed).

Here again, these legal consequences place the terms at issue in context. Requiring separate suits for separate injuries is feasible if injury occurs once a decade. But if injury occurs several times a year, allowing separate suits for each occurrence has substantial costs. Further, variations in each verdict may send conflicting messages to the parties, or to the market of potential buyers. And the litigants will be left in a state of perpetual litigation; while "good fences make good neighbors,"⁶⁷ repeated litigation is unlikely to.

67 Robert Frost, North of Boston, Mending Wall (1915).

There is always a risk in assessing future damages that a particular claimant will be compensated too little or too much. But this alone has never been enough to justify a series of suits, at least when *279 future damages are reasonably ascertainable. Accordingly, if an alleged nuisance occurs often enough before trial to allow jurors to evaluate it fully in one case, we should apply the distinction in a way that allows them to do so.

D

Third, characterizing a nuisance as temporary or permanent determines when limitations accrues, and thus when an injured party's claims are barred.

[16] [17] Generally, a cause of action accrues and limitations begins to run when facts exist that authorize a claimant to seek judicial relief.⁶⁸ As nuisance claims arise only upon a *substantial interference* with property use, they normally do not accrue when a potential source is under construction; instead, a landowner "has the right to wait and see what the result will be when the improvements are subjected to an actual test."⁶⁹ But once operations begin and interference occurs, limitations runs against a nuisance claim just as against any other.⁷⁰

68 *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514 (Tex.1998).

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69 *City of Amarillo v. Ware*, 120 Tex. 456, 40 S.W.2d 57, 62 (1931); *accord City of Abilene v. Downs*, 367 S.W.2d 153, 160 (Tex.1963) (holding nuisance claim did not accrue when sewage plant was first opened, but when capacity increased so as to begin impacting neighbor's property); *Baker*, 210 S.W.2d at 567 (holding nuisance claim based on construction of bridge did not accrue until eight years later when it caused substantial flooding).

70 *Fromme*, 269 S.W.2d at 338 (holding nuisance claim accrued when flooding began, and was barred by limitations even though greater part of damage occurred within two years of suit); *Vann v. Bowie Sewerage Co.*, 127 Tex. 97, 90 S.W.2d 561, 562–63 (1936) (holding limitations accrued when creek was polluted, even though landowner did not discover smells until six months later).

[18] We have recognized the discovery rule as “a very limited exception” to accrual when an injury is both inherently undiscoverable and objectively verifiable.⁷¹ As plaintiffs will usually know of unreasonable discomfort or annoyance promptly, application of the discovery rule in nuisance cases is rare.⁷² And even when the discovery rule applies, accrual occurs upon notice of injury, even if the claimant does not yet know the full extent of damages or the chances of avoiding them.⁷³

71 *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455–56 (Tex.1996).

72 *See, e.g., Vann*, 90 S.W.2d at 562–63 (holding limitations accrued upon purchase of property with polluted creek, even though landowner did not discover smells until six months later); *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 437–38 (Tex.App.-Fort Worth 1997, writ denied) (holding discovery rule barred nuisance claims by plaintiffs who noticed well water “smelled like rotten eggs” many years before filing suit).

73 *PPG Indus., Inc. v. JMB/Houston Centers Partners L.P.*, 146 S.W.3d 79 (Tex.2004).

But a different rule may apply when the nature of a nuisance is substantially changed. In *Atlas Chemical Industries, Inc. v. Anderson*, a manufacturing plant discharged acid, fly ash, carbon, and lignite into creeks

upstream from the plaintiff for more than forty years before suit was filed.⁷⁴ Nevertheless, we held limitations did not bar a suit for a temporary nuisance asserting an entirely new and different injury—damages caused by new emissions (acids required by new government regulations) to new property (sixty acres of cropland undamaged by previous pollution) due to new forces (extraordinary floods shortly *280 before suit).⁷⁵ Thus, an old nuisance does not excuse a new and different one.

74 524 S.W.2d 681, 683 (Tex.1975).

75 *Id.* at 685–87; *cf. Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643, 653 (Tex.2000) (holding accrual of claim for malignant asbestos disease occurs upon discovery of that disease despite earlier claim for nonmalignant conditions).

Again, these general rules for limitations place the relative terms used to describe temporary and permanent nuisances in context. If noisome conditions occur only once, the nuisance will normally be temporary because it creates a *substantial interference* with property on that *occasion*, but not on any other. Conversely, once the conditions begin to recur more often, the nuisance should normally be treated as permanent because it is injury to the property in general that has occurred, not separate injuries that ought to be considered separately.

E

Based on these considerations, we hold that the traditional Texas distinction between temporary and permanent nuisances should be applied using the same standard of reference that applies to the consequences flowing from it. Thus, if a nuisance occurs several times in the years leading up to a trial and is likely to continue, jurors will generally have enough evidence of frequency and duration to reasonably evaluate its impact on neighboring property values.⁷⁶ In such cases, the nuisance should be treated as permanent, even if the exact dates, frequency, or extent of future damage remain unknown. Conversely, a nuisance as to which any future impact remains speculative at the time of trial must be deemed “temporary.”

76 *See, e.g., City of Temple v. Mitchell*, 180 S.W.2d 959, 964 (Tex.Civ.App.-Austin 1944, no writ) (finding sewage plant permanent nuisance as conditions continued during three years since suit had been filed).

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We recognize this line will not always be bright. But the inconsistent results in Texas and other jurisdictions do not suggest any brighter, and the infinite variety of circumstances in which nuisance cases arise makes it difficult to be more precise.

Further, this standard should distinguish temporary and permanent nuisances in most cases. Generally, if a nuisance occurs at least a few times a year and appears likely to continue, property values will begin to reflect that impact, and jurors should be able to evaluate it with reasonable certainty. Even if a nuisance causes annoyance only during certain weather conditions or certain months,⁷⁷ annual experience should provide a sufficient basis for evaluating the nuisance. Absent evidence that current experiences are unrepresentative or about to change, such nuisances should be considered “permanent” as a matter of law.

77 See, e.g., *Weinhold v. Wolff*, 555 N.W.2d 454, 457–58, 463 (Iowa 1996) (finding hog-feeding facility that included 500,000-gallon waste basin was permanent nuisance, even though odors suffered by neighbors was dependent on temperature, wind, and humidity conditions).

Moreover, this flexible standard has the virtue of coordinating the distinction with its effects; any rule that does not can lead to illogical results. For example, if a rule deemed every nuisance permanent that occurs at least monthly (and all others temporary), permanent damages might be collected even if the nuisance was about to be cleaned up and surrounding property values restored. And an annual (but not monthly) interference with a hunting lease, a garden, or one’s rooftop every Christmas Eve would have to be asserted in annual suits, even though the economic impact *281 could be estimated with reasonable certainty.

This rule of application also preserves the proper role of the jury in settling factual differences. Jurors must still decide the frequency, extent, and duration of noxious conditions, facts they must settle in any event in deciding whether a nuisance exists. Jurors must also settle any disputes as to whether similar conditions are reasonably certain to continue in the future. But jurors cannot decide questions such as whether damages can be estimated with reasonable certainty, whether principles of *res judicata* allow one or a series of suits, or when limitations ought to accrue—all legal matters that must be decided by the

court.

[19] Accordingly, we hold that a nuisance should be deemed temporary only if it is so irregular or intermittent over the period leading up to filing and trial that future injury cannot be estimated with reasonable certainty. Conversely, a nuisance should be deemed permanent if it is sufficiently constant or regular (no matter how long between occurrences) that future impact can be reasonably evaluated. Jurors should be asked to settle the question only to the extent there is a dispute regarding what interference has occurred or whether it is likely to continue. We disapprove of those cases suggesting the contrary to the extent they are inconsistent with this opinion.⁷⁸

78 See *City of Odessa v. Bell*, 787 S.W.2d 525, 527, 530 (Tex.App.-El Paso 1990, no writ) (affirming jury verdict that flooding was temporary nuisance even though by time of trial it had occurred nineteen times); *Gulf Coast Sailboats, Inc.*, 616 S.W.2d at 387 (holding odors drifting from plant occurring several times per week could be temporary nuisance); *Youngblood’s, Inc. v. Goebel*, 404 S.W.2d 617, 620 (Tex.Civ.App.-Waco 1966, writ ref’d n.r.e.) (holding odor from poultry-rendering plant temporary as a matter of law as it depended on direction of wind). As the considerations we emphasize today are not always clear in previous opinions, and in some cases alternate grounds exist for the judgment, we disapprove of the following cases only to the extent they are inconsistent with this opinion. *Bayouth v. Lion Oil Co.*, 671 S.W.2d 867, 869 (Tex.1984) (holding affidavit asserting that damages was sporadic and intermittent created fact question whether saltwater seepage was temporary); *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex.1978) (holding storm sewer causing flooding after rainfall had “none of the characteristics of permanent harm,” but noting alternatively that issuance of temporary injunction against further discharge of floodwaters also rendered damages temporary); *Parsons v. Uvalde Elec. Light Co.*, 106 Tex. 212, 163 S.W. 1, 1–2 (1914) (holding smoke, dust, and cinders from electric power plant was temporary nuisance as a matter of law, without indicating how often conditions occurred).

[20] We also disapprove of statements in a few cases that suggest nuisance claimants may elect whether to assert a temporary and permanent nuisance.⁷⁹ As noted above, the consequences that flow from designating a nuisance as temporary or permanent are not arbitrary ones, but follow directly from the underlying facts.⁸⁰ Certainly, alternative allegations may be asserted when the facts are unclear. But when they are not, claimants cannot opt *282 for an indefinite limitations period or a series of suits whenever they would prefer.

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79 See *Abbott v. City of Princeton*, 721 S.W.2d 872, 875 (Tex.App.-Dallas 1986, writ ref'd n.r.e.) (holding limitations did not bar suit for conditions beginning long before filing as plaintiffs sought damages only for the two years before filing); *Stein v. Highland Park Indep.Sch. Dist.*, 540 S.W.2d 551, 554 (Tex.Civ.App.-Texarkana 1976, writ ref'd n.r.e.) (same). But see Restatement (Second) of Torts § 930(1) (stating that if it appears that invasions of property "will continue indefinitely, the [plaintiff] may at his election recover damages for the future invasions in the same action as that for the past invasions").

80 *Bayouth*, 671 S.W.2d at 868 ("The character of an injury as either permanent or temporary is determined by its continuum.").

IV. Source or Injury

The parties also disagree whether the test of frequency and constancy should focus on the defendant's operations or the plaintiff's injury. Here again, Texas opinions can be cited for either position, sometimes focusing on the defendant's operations,⁸¹ and other times on the plaintiff's injuries.⁸²

81 See, e.g., *Rosenthal v. Taylor, B. & H. Ry. Co.*, 79 Tex. 325, 15 S.W. 268, 269 (1891) (holding nuisance permanent "[i]f it results from a cause which is either permanent in its character or which is treated as permanent by the parties") (emphasis added); see also Tex. Agr.Code § 251.004(a) (barring nuisance suits one year after defendant's agricultural operations begin).

82 See, e.g., *Baker v. City of Fort Worth*, 146 Tex. 600, 210 S.W.2d 564, 565-67 (1948) (holding nuisance temporary because even though bridge structure was permanent, heavy rains that caused flooding were temporary).

For example, in *Bayouth v. Lion Oil Co.*, we held underground seepage of saltwater from an old drilling site could be considered temporary (creating a fact question) because it was visible on the plaintiff's property only after periods of heavy rain.⁸³ But in *Walton v. Phillips Petroleum Co.*, the Eighth Court of Appeals held similar seepage was permanent as a matter of law, as there was nothing temporary about the pit from which it came.⁸⁴

83 671 S.W.2d at 869.

84 65 S.W.3d 262, 273-74 (Tex.App.-El Paso 2001, pet. denied).

Opinions from other states reflect the same conflicts: some focus solely on the defendant's operations,⁸⁵ some on the plaintiff's injuries,⁸⁶ and some view the two together.⁸⁷

85 See, e.g., *Breiggar Props., L.C.*, 52 P.3d at 1135 ("[I]n classifying a trespass as permanent or continuing, we look solely to the act constituting the trespass, and not to the harm resulting from the act."). Generally, courts that apply abatement as the test for distinguishing temporary and permanent nuisances necessarily focus on the defendant's operations, as that would be the subject of abatement. See *supra* note 17.

86 See, e.g., *Taygeta Corp. v. Varian Assocs., Inc.*, 436 Mass. 217, 763 N.E.2d 1053, 1065 (2002) (finding continuing nuisance due to continuing seepage onto plaintiffs property, even though defendant's operations had long-since ceased); *Briscoe v. Harper Oil Co.*, 702 P.2d 33, 36 (Okla.1985).

87 See, e.g., *Hoery v. U.S.*, 64 P.3d 214, 219 n. 8 (Colo.2003) (noting that while "[o]ther jurisdictions have attempted to clarify the distinctions between continuing and permanent torts by focusing either on the 'cause' of the harm ... or the 'harm' resulting from that cause ... [w]e do not find these classifications helpful ... [as] they are usually linked") (citations omitted).

[21] While the facts of particular cases have often directed our focus to the sending- or receiving-end of a nuisance, it appears that we have generally considered a nuisance permanent when either the defendant's operations or the plaintiff's injuries make it so:

When a nuisance is created by the construction of works in their nature permanent, ... the rule is that all damages resulting therefrom to property may be recovered in one action, and the proper measure of damages is the depreciation in the value of the property. That rule also applies when the injury resulting from the nuisance is of a

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permanent character.⁸⁸

- 88 *Baugh v. Tex. & N. O. Ry. Co.*, 80 Tex. 56, 15 S.W. 587, 587 (1891) (emphasis added) (citations omitted); *see also Bayouth*, 671 S.W.2d at 868 (“Permanent injuries to land result from an *activity* of such a character and existing under such circumstances that it will be presumed to continue indefinitely; the *injury* must be constant and continuous, not occasional, intermittent or recurrent.”) (emphasis added); *Walton*, 65 S.W.3d at 273 (finding it “helpful to first focus on the activity causing the injury and then the injury itself”).

*283 We believe this is still the correct rule. In most nuisance cases, a permanent source will result in permanent interference. “Ordinarily it makes no difference whether the jury finds that the nuisance is permanent or the damage is permanent, since a permanent nuisance may be presumed to result in permanent damage.”⁸⁹

- 89 *Meat Producers, Inc. v. McFarland*, 476 S.W.2d 406, 410, 413 (Tex.Civ.App.-Dallas 1972, writ ref’d n.r.e.).

Moreover, focusing solely on the source or injury to categorize nuisances could lead to anomalous results. For example, if a defendant’s operations permanently decrease market values in a neighborhood containing both year-round residences and vacation homes, the nuisance cannot be deemed permanent as to the former but temporary as to the rest. A resident cannot convert a constant interference into a temporary nuisance by going outside only sporadically; nor can a plant operator accomplish the same by shutting down operations for a few weeks.⁹⁰

- 90 *Id.* at 411.

Of course, the presumption that a constant source has constant effects may be rebutted. Texas law has long recognized there may be a discontinuity between source and injury, as when injury occurs only after a heavy rain in regions where that is a rare commodity.⁹¹ But air and wind are more evenly distributed; air-quality complaints like those here may be worse under certain conditions, but no one would presume the wind will never change. As we clarify today, a recurrent nuisance is a permanent one, even if it is difficult to predict what the weather will be on any particular day.

- 91 *City of Amarillo v. Ware*, 120 Tex. 456, 40 S.W.2d 57, 61 (1931) (“It is well known that the rain-fall in Texas

during certain periods is scant.”).

[22] Accordingly, we hold that a permanent nuisance may be established by showing that either the plaintiff’s injuries or the defendant’s operations are permanent. The presumption of a connection between the two can be rebutted by evidence that a defendant’s noxious operations cause injury only under circumstances so rare that, even when they occur, it remains uncertain whether or to what degree they may ever occur again.

V. Abatement

As noted above, many states make abatability the key test in determining whether a nuisance is temporary or permanent.⁹² While the potential for equitable relief has never enjoyed that preeminence in Texas nuisance law,⁹³ it has nevertheless been recognized as a factor. In *Kraft v. Langford*, we stated that “another characteristic” of a temporary nuisance is “the ability of a court of equity to enjoin the injury causing activity.”⁹⁴ Four years later, we stated that the distinction between temporary *284 and permanent injury “*may depend* on whether an injunction would be successful.”⁹⁵ But we have never indicated precisely when or how this factor applies.

- 92 *See supra* note 17.

- 93 *See, e.g., Bayouth v. Lion Oil Co.*, 671 S.W.2d 867, 868 (Tex.1984) (describing distinction between temporary and permanent nuisances without mention of abatability); *see also City of Merkel v. Smith*, 458 S.W.2d 940, 942 (Tex.Civ.App.-Eastland 1970, no writ) (holding trial court did not err in refusing jury question defining difference between permanent and temporary nuisance as “whether it can be abated at reasonable cost”).

- 94 565 S.W.2d at 227.

- 95 *Neely v. Cmty. Props., Inc.*, 639 S.W.2d 452, 454 (Tex.1982) (emphasis added).

Several members of the court of appeals expressed doubts in this case about the role abatability should play in

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distinguishing temporary and permanent nuisances. Three justices noted that *any* nuisance could theoretically be abated (“any nuisance man creates, man can abate”), but felt bound by *Kraft* to find these nuisance claims might be temporary based on evidence that an injunction might lessen them.⁹⁶ Two members dissenting from the denial of rehearing en banc argued that abatability could not convert a permanent nuisance into a temporary one, especially when it meant abating so many businesses and creating possible conflicts with federal regulations.⁹⁷

96 95 S.W.3d at 314 n. 7 (quoting 58 AM.JUR.2D *Nuisance* § 29 (1989) and cases cited therein, and stating “[w]hile we express doubt about drawing a distinction between a permanent and temporary nuisance based on such a general principle ... we believe we must follow the *Kraft* decision”).

97 *Id.* at 103 (Radack, C.J., joined by Taft, J., dissenting from the denial of motion for rehearing en banc).

[23] For the reasons that follow, we hold that the characterization of a nuisance as temporary or permanent should not depend on whether it can be abated.

A

We begin with the obvious—if a nuisance is abated, it is no longer permanent.⁹⁸ Damages for a permanent nuisance include those expected to occur in the future;⁹⁹ if abatement will eliminate that likelihood and restore lost property value, the latter is no longer the appropriate damage measure.¹⁰⁰ Thus, permanent injunctions and permanent nuisances are mutually exclusive—awarding both creates a double recovery.

98 *Kraft*, 565 S.W.2d at 227 (“An injury which can be terminated cannot be a permanent injury.”).

99 *See supra* text accompanying notes 53–55.

100 *See Parkway Co. v. Woodruff*, 901 S.W.2d 434, 441 (Tex.1995) (reducing judgment that awarded both cost of repairs and lost market value in unrepaired home as double recovery to lost market value).

[24] But this rule is hardly unique to nuisance law. A permanent injunction issues only if a party does not have an adequate legal remedy.¹⁰¹ If there is a legal remedy (normally monetary damages), then a party cannot get an injunction too. Accordingly, awarding both an injunction and damages as to future effects would constitute a double recovery. As former Chief Justice Guittard of the Fifth Court of Appeals once noted:

101 *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 111 (Tex.2001) (per curiam).

Payment of damages, however, constitutes satisfaction for any injury that may be caused by the breach, whereas an injunction has the effect of a decree of specific performance restraining any breach that would otherwise cause damage. Therefore, if the court grants an injunction preventing the breach from continuing and becoming total, it should not at the same time give judgment for the full amount of liquidated damages specified in the contract.¹⁰²

102 *Eberts v. Businesspeople Pers. Servs., Inc.*, 620 S.W.2d 861, 864 (Tex.Civ.App.-Dallas 1981, no writ).

*285 This is a rule of general application. Texas courts have noted that future damages cannot be recovered if a permanent injunction issues to abate them in the context of cases involving covenants not to compete,¹⁰³ trade secrets,¹⁰⁴ wrongful discharge,¹⁰⁵ and real estate contracts.¹⁰⁶ Just as trial courts must consider potential abatement before awarding future damages in such cases, they must do so in nuisance cases as well. But for the reasons that follow, that does not mean abatement should be a factor in deciding whether a nuisance is temporary or permanent.

103 *Id.*

104 *F.S. New Prods., Inc. v. Strong Indus., Inc.*, 129 S.W.3d 606, 631–32 (Tex.App.-Houston [1st Dist.] 2004, pet. filed) (rejecting argument that award of injunction and future damages was double recovery because record did not reflect any future damages were awarded).

105 *City of Ingleside v. Kneuper*, 768 S.W.2d 451, 457–58 (Tex.App.-Austin 1989, writ denied) (holding employee who obtained injunction reinstating him in former position could not recover future earnings).

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106 *Redding v. Ferguson*, 501 S.W.2d 717, 720 (Tex.Civ.App.-Fort Worth 1973, writ ref'd n.r.e.) (holding party necessarily abandoned claim for specific performance of option contract by seeking damages for breach of contract).

B

Tying the distinction between temporary and permanent nuisances to abatability is problematic because in many cases it will be misleading. While an abatement may convert a permanent nuisance into a temporary one, it will by no means always have that effect. As a result, a trial court's decision on abatement will often point in the wrong direction, or no direction at all.

As noted above, if the effects of a nuisance are abated, it is no longer permanent. But the converse is not true—if a nuisance is *not* abated, that does not mean it *must be* a permanent nuisance.¹⁰⁷ If a nuisance depends on very rare and unpredictable conditions, it is a temporary nuisance. But the same facts may render a permanent injunction unavailable, as there is no threat of imminent harm.¹⁰⁸ Thus, a nuisance that is not abated might be temporary, or might be permanent.¹⁰⁹

107 *Burke v. Union Pac. Res. Co.*, 138 S.W.3d 46, 59 (Tex.App.-Texarkana 2004, pet. filed) (“While the ability to abate an injury with an injunction is a characteristic of a temporary injury, the unavailability of an injunction does not require a finding of a permanent injury.”); *Apache Corp. v. Moore*, 891 S.W.2d 671, 680 n. 7 (Tex.App.-Amarillo 1994, writ denied, cert. granted, judgm’t vacated on other grounds by *Apache Corp. v. Moore*, 517 U.S. 1217, 116 S.Ct. 1843, 134 L.Ed.2d 945 (1996)) (noting “unavailability of a successful injunction does not necessarily change a temporary injunction into a permanent one”) (quoting *City of Odessa v. Bell*, 787 S.W.2d 525, 530 (Tex.App.-El Paso 1990, no writ); *Windfohr v. Johnson’s Estate*, 57 S.W.2d 215, 217 (Tex.Civ.App.-Fort Worth 1932, no writ)) (affirming trial court’s refusal to enjoin temporary nuisance).

108 *Operation Rescue–Nat’l v. Planned Parenthood of Houston & Southeast Tex., Inc.*, 975 S.W.2d 546, 554 (Tex.1998).

109 See also *Dobbs*, *supra* note 9, § 5.11(2), at 825 (noting that court may deny abatement because of defendant’s

plans to eliminate nuisance, so nuisance will be temporary even though not enjoined).

Additionally, denying an injunction does not change the underlying nuisance at all. Similarly, granting an injunction against a temporary nuisance only makes it more temporary. Abatement affects whether a nuisance is temporary or permanent only when a permanent injunction is granted against a permanent nuisance—no other injunction order has any effect.

*286 Even then, abating a permanent nuisance will not always render its effects temporary. For example, in some cases, an abatement of the source of a permanent nuisance will not put an end to the injury,¹¹⁰ and thus the nuisance will still be considered permanent (under the rule noted in section IV). If the rule were otherwise, an owner who secured abatement of a source could not recover the lost market value of the subject property even though it was ruined for the foreseeable future. In addition, it is difficult to use abatability to separate nuisances by frequency and duration because injunctions come in so many different shapes and sizes. In some cases, it is impracticable to close down a nuisance completely, for reasons discussed more fully below.¹¹¹ In such cases, abatement may be sought to lessen a nuisance, but not necessarily eliminate it.¹¹² If abatement is granted, the nuisance may remain permanent, though in a less noxious form.

110 See, e.g., *Bayouth v. Lion Oil Co.*, 651 S.W.2d 423, 425 (Tex.App.-Eastland 1983), *rev’d*, 671 S.W.2d 867 (Tex.1984) (noting evidence that injury to farmland caused by saltwater seepage from neighboring oil operations could be remedied only by “a plowing and leeching process occurring over a twenty year period”).

111 In this case, for example, the residents disavow any desire to close down two trucking firms completely, instead requesting that they be ordered to pave their storage yards and implement “management methods” for truck traffic so diesel exhaust and “dust storms” will no longer affect their properties as severely.

112 See *Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1124–25 (D.C.Cir.1988) (“All of the cases demonstrate that abatement does not necessarily mean total cessation or termination of the challenged activity.”); *Harper*, *supra* note 14, § 1.30, at 145 (“The injunction, if granted, need not stop defendant’s activity altogether and immediately.”).

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To sum up, abatement may convert a permanent nuisance into a temporary one, but it also may not. It certainly cannot turn a temporary nuisance into a permanent one, and denying abatement tells us nothing about the nuisance either. That being the case, we agree with the justices of the court of appeals that using abatability to categorize nuisances is more confusing than helpful.

C

Using the equitable decision regarding abatement as a factor in making the legal distinction among nuisances is also problematic because the two decisions involve different considerations by different decision-makers at different points in the litigation.

[25] Categorizing a nuisance as temporary or permanent is (within the confines discussed in parts III and IV above) a question for the jury.¹¹³ But abatement is a discretionary decision for the judge after the case has been tried and the jury discharged.¹¹⁴ One is only partly dependent on the other: while judges cannot permanently abate a nuisance until jurors decide there is one,¹¹⁵ a trial judge may decide to *287 abate a nuisance whether it is temporary or permanent, and may choose not to abate either even if that is the only remedy requested.¹¹⁶

113 See *Bayouth*, 671 S.W.2d at 869.

114 *State v. Tex. Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex.1979) (“The determination of whether to grant an injunction based upon the ultimate issues of fact found by the jury is for the trial court, exercising chancery powers.”); *Operation Rescue–Nat’l*, 975 S.W.2d at 551, 569–70 (affirming, as modified, court of appeals’ judgment upholding permanent injunction issued based on post-verdict bench hearing); *Lamb*, 256 S.W.2d at 905 (rejecting objection that trial court erred in issuance of permanent injunction based on post-trial evidentiary hearing on balancing of equities).

115 *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex.1993) (holding permanent injunction improper as one cause of action was invalid in Texas and other was not submitted to jury).

116 *Rainey v. Red River, T. & S. Ry. Co.*, 99 Tex. 276, 89 S.W. 768, 772 (1905) (suggesting landowner could be

relegated to monetary compensation even though jury found railroad was nuisance and only remedy requested was abatement).

A trial judge’s decision on abatement often turns on considerations never presented to the jury, and unrelated to the frequency or duration of a nuisance. Blackstone expected the outcome of a nuisance claim to be the same whether filed in the law courts (for damages) or equity (for an injunction) because only “a very obstinate as well as an ill-natured neighbor... [would] rather continue to pay damages, than remove his nuisance.”¹¹⁷ But he had in mind a hog farm or tannery,¹¹⁸ small-scale operations that like most others in pre-industrial England had little economic impact on anyone other than the parties.

117 Blackstone, *supra* note 9, at 222.

118 *Id.* at 217.

In modern society, however, industries and nuisances often come in much larger packages, with effects on the public, the economy, and the environment far beyond the neighborhood. A court sitting in equity today must consider those effects by balancing the equities before issuing any injunction.¹¹⁹

119 *In re Gamble*, 71 S.W.3d 313, 317 (Tex.2002).

As a result, courts may refuse to abate public works that create nuisance conditions no matter how often they occur or how long they are expected to last.¹²⁰ Even privately owned plants creating obnoxious odors may be allowed to continue, depending on where they are located and how badly they are needed.¹²¹

120 *Baugh v. Tex. & N.O. Ry. Co.*, 80 Tex. 56, 15 S.W. 587, 587 (1891).

121 *Storey v. Central Hide & Rendering Co.*, 148 Tex. 509, 226 S.W.2d 615, 618–19 (1950) (holding trial court should not have enjoined operations of hide-rendering plant found by jury to be a nuisance, as plant was located in industrial area, provided necessary services, and could be moved only at great expense to owners and to landowners in any new area to which it moved).

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[26] Balancing the equities is not the only factor that judges sitting in equity must consider while jurors do not. Permanent injunctions “must be narrowly drawn and precise;”¹²² it will often be easier for a jury to decide that certain plant operations create noxious conditions than it will be for a judge to draft a narrow and precise order that abates them. Further, environmental regulation involves a complex balance of costs and benefits, emission levels, implementation deadlines, reporting requirements, and continuing oversight that in some cases courts are ill-equipped to handle. Judges may hesitate to issue discretionary orders that require extensive oversight, or risk conflicts with other governmental regulations and agencies.

122 *Holubec v. Brandenberger*, 111 S.W.3d 32, 40 (Tex.2003) (quoting *Brown v. Petrolite Corp.*, 965 F.2d 38, 51 (5th Cir.1992)).

As the requirements for issuing an injunction are not the same as those that distinguish between nuisances, making the former a factor in deciding the latter conflates their disparate requirements. The many differences between who decides these matters and on what basis suggests that the distinction between temporary and permanent nuisances should not turn on whether the nuisance involved is or might be abated.

***288 D**

As noted in part III, the distinction between temporary and permanent nuisances has long been affiliated in most jurisdictions with three consequences: the proper measure of damages, the proper number of suits, and the proper time for bringing them. Abatement may have an effect on damages, or it may not;¹²³ but it should not and cannot have an effect on the other two.

123 See part V(A).

Permanent nuisances must be addressed in one suit, while temporary nuisances may have to be addressed in several.¹²⁴ If abatement converts a nuisance into a temporary one, then the illogical result is that enjoining a nuisance has the effect of making future suits regarding it possible. With respect to the number of suits that may be brought, using abatement to distinguish among nuisances makes little sense.

124 See part II(C).

With respect to limitations, the effect is even more problematic. The date a nuisance claimant suffers a legal injury does not depend on whether that injury is eventually abated. Generally, a cause of action accrues when facts occur that authorize a party to seek justice,¹²⁵ regardless of the form that justice finally takes. Once a substantial invasion of the use and enjoyment of property occurs, it is hard to see why limitations should be tolled in some cases but not others depending on whether a judge may someday abate the source.

125 *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex.2003).

Additionally, there is the problem of vested rights. If a permanent nuisance has been in operation for many years, limitations will have long since barred suits for lost market value. But if the nuisance may be rendered temporary by a later abatement, losses suffered beginning two years before filing become recoverable again. These are necessarily part of the same losses that were previously barred; “[t]o permit barred claims to be revived years later would undermine society’s interest in repose,” and raise constitutional concerns as well.¹²⁶

126 *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex.1999) (“Thus, we have written that a statute extending the limitations period of a claim already barred by limitations violates the Texas Constitution’s prohibition against retroactive laws, which is article I, section 16.”).

Though we have never addressed these precise problems with judicial abatement, we have considered the same effect with a voluntary abatement. In *Tennessee Gas Transmission Co. v. Fromme*,¹²⁷ contaminated water from the defendant’s compressor station began flowing onto the plaintiff’s land in 1948, was diverted elsewhere by the defendant in 1950, and suit was filed in 1952.¹²⁸ Even though diversion of the flooding had rendered the injury temporary under the standard definitions, we held the suit was barred two years after the first injury—the accrual date for a permanent nuisance.¹²⁹ Clearly, abatement in that case was not allowed to revive a permanent damage claim already barred.

127 153 Tex. 352, 269 S.W.2d 336, 338 (1954).

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128 *Fromme v. Tenn. Gas Transmission Co.*, 263 S.W.2d 574, 575 (Tex.Civ.App.-Austin 1953), *rev'd*, 153 Tex. 352, 269 S.W.2d 336 (1954).

129 *Fromme*, 269 S.W.2d at 338.

[27] We consider here only the running of limitations as to damages claims. Several courts have held that limitations (as opposed to laches) does not bar a suit *289 seeking only to enjoin a nuisance,¹³⁰ a question we do not reach as it is not this case. But in a suit seeking damages for a nuisance, we hold that abatement cannot revive barred permanent damages by allowing them to be asserted as temporary ones.¹³¹

130 See *Nugent v. Pilgrim's Pride Corp.*, 30 S.W.3d 562, 575 (Tex.App.-Texarkana 2000, *pet. denied*) (holding equitable relief not barred by limitations); *Abbott v. City of Princeton*, 721 S.W.2d 872, 875 (Tex.App.-Dallas 1986, *writ ref'd n.r.e.*) (same); *Stein v. Highland Park Indep. Sch. Dist.*, 540 S.W.2d 551, 554 (Tex.Civ.App.-Texarkana 1976, *writ refused n.r.e.*) (same).

131 Of course, if suit is filed within two years of the first occurrence, neither temporary nor permanent damages are barred, so the distinction is again irrelevant for limitations purposes.

E

Finally, as the court of appeals noted, virtually any nuisance can be said to be abatable.¹³² Even if a nuisance is one that cannot be eliminated, it is hard to imagine one that cannot be improved a little by a little equitable relief. As every nuisance could thus be characterized as abatable, this cannot be a reliable test for distinguishing temporary from permanent nuisances. For these as well as the reasons above, we believe abatement is not a proper or necessary consideration in distinguishing between nuisances.

132 95 S.W.3d at 314 n. 7; see also *Beck Dev. Co. v. S. Pac. Transp. Co.*, 44 Cal.App.4th 1160, 52 Cal.Rptr.2d 518, 558 (1996) (noting "[s]ince a defendant could literally be ordered to move mountains to abate a nuisance, virtually everything can be said to be abatable").

We reaffirm that abatement may impact the amount of damages that can be awarded, just as equitable relief in any other type of case might. We recognize that jury submission of damages may be somewhat more complex in nuisance cases than in others when abatement is a possibility. In some cases, questions for past and future damages can simply be separated, and only the former awarded if a permanent injunction issues. But adjusting for abatement in nuisance cases may be more confusing because the alternative damage awards are overlapping.¹³³ Nevertheless, for several reasons we do not think this difficulty is insurmountable:

133 See part III(B).

Injunctive relief is within the trial court's discretion. Accordingly, there may be sufficient grounds for a judge to decide before submission to the jury which way that discretion is likely to go. In many cases, the trial court will have already addressed the relevant issues in deciding whether to issue a temporary injunction. If preliminary relief is granted and circumstances have not changed, there can be no permanent nuisance as it has already been terminated.¹³⁴

134 *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex.1978) (holding issuance of temporary injunction against further discharge of floodwaters rendered damages temporary).

Conversely, the importance of a particular plant to the community may tip the balance of equities against abatement, even if a jury were to find it to be a nuisance. Difficulties in drafting or enforcing an injunction may discourage the trial judge from considering the imposition of an equitable remedy well before a final decision has to be made.

Finally, in actions that involve only private interests, there is an important reason for trial judges to lean toward granting injunctive relief if other factors do not render it impossible. A nuisance changes the nature and takes away the use and enjoyment of neighboring property without *290 the owner's consent. Although governments have the power to take property pursuant to eminent domain, private entities usually do not. If only private interests are involved, courts may well favor the equitable option allowing neighboring owners to stop the uninvited nuisance, rather than the legal option forcing them to live with it and sending them a check.¹³⁵

135 *Lamb v. Kinslow*, 256 S.W.2d 903, 905

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(Tex.Civ.App.-Waco 1953, writ ref'd n.r.e.) (holding injunction could issue against permanent nuisance involving burning cotton burs near plaintiff's home regardless of availability of legal remedy).

In sum, a judge may decide (for the above reasons or others) that a nuisance will or will not be abated even before a jury finds it exists. Assuming that decision is not an abuse of discretion,¹³⁶ the necessity of submitting alternative damages questions is thereby avoided. And in any event, simpler jury submission in some cases is not an adequate reason for awarding barred damages or a double recovery in others. While abatement cannot be entirely eliminated from affecting damage submission to a jury, limiting it to that issue avoids the current confusion that designates abatement as a "characteristic" of temporary nuisances for all purposes without any indication as to how, when, or why.

- 136 *Id.* at 906 (holding post-trial injunction was not abuse of discretion); *cf. Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex.1998) (holding that in reviewing Declaratory Judgments Act attorney fee award based on both evidentiary and discretionary matters, trial court could conclude no award was equitable or just regardless of jury's finding of reasonable and necessary fee).

VI. Application

[28] It remains to apply the foregoing principles to the facts before us. We examine the summary judgment record to determine if there is a question of fact whether the residents alleged a temporary or permanent nuisance. Applying the usual standard of review,¹³⁷ we find as a matter of law that the nuisances alleged were permanent.

- 137 *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215-16 (Tex.2003) (holding summary judgment review is de novo, taking all evidence, inferences, and doubts in nonmovant's favor, and affirming only if no genuine issue of material fact exists and movant is entitled to judgment as a matter of law).

In their affidavits, the residents aver nuisances generally that were "continuous," "ongoing," "regular," and "frequent." They make individualized allegations that their property was "constantly" or "always" covered with

dirt and soot. They assert no conditions that make the lights and noise of which they complain variable.

The residents argue that their affidavits do not explicitly state that air-quality problems were "constant" or "continuous" (though all were alleged to be "ongoing," and "regular"). Some residents described the noxious conditions as interfering with their enjoyment of property "sometimes" or "often." Others averred that conditions worsened or become intolerable only under certain combinations of wind and humidity. Taking every inference in the residents' favor, their affidavits assert conditions that occur at least several times in most weeks or months.

As we have clarified above, a nuisance need not occur daily to be deemed permanent. Conditions occurring as often as those alleged here can be adequately assessed by jurors in determining the total impact on neighboring property values. Odors that are most repugnant when the wind is from one direction are not temporary, at least when there is no evidence ^{*291} those winds are so rare and unexpected that jurors would have to guess their future impact on property values. Neither are dust clouds that occur only on certain days of the week temporary if they are likely to be about the same in the weeks, months, and years ahead.

Although the residents' affidavits contain many differences regarding how often the conditions alleged interfered with their use and enjoyment of property, none allege conditions that were so sporadic or unpredictable that a jury would have to guess their effect. Accordingly, they create no material fact question whether the nuisances here were permanent.¹³⁸

- 138 Similarly, as the residents' affidavits allege ongoing conditions that have bothered them for more than two years, neither the discovery rule nor fraudulent concealment apply. *See KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 750 (Tex.1999) (holding fraudulent concealment delays accrual until claimant knows true facts); *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex.1996) (holding discovery rule defers accrual until claimant knows of facts giving rise to claim).

Even so, the residents assert they raised a fact question whether the nuisances could have been rendered temporary by injunctive relief. For the reasons noted in part V, the possibility of an abatement cannot make these nuisances temporary, and thereby revive barred monetary damages.

The residents also argue that because the defendants have

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not connected each of their complaints with a particular source, each nuisance has not been shown to be permanent as a matter of law. In the first place, it was the residents' burden to allocate nuisances to defendants;¹³⁹ by lumping all the nuisances together and asserting unitary damages attributable to them all, the residents are hardly in a position to complain that the defendants have responded on the same basis. Further, air-quality cannot be viewed in a vacuum. It is true that if separate operations contribute separately to a nuisance, each may be liable only for its own contribution.¹⁴⁰ But the question of responsibility is different from the question whether a nuisance is temporary or permanent. As noted above, either a plaintiff's injuries or a defendant's operations can make a nuisance permanent. The residents' allegations here meet that test as a matter of law, even if neither they nor the defendants know who may have caused the conditions on any particular day.

139 *Sherman Gas & Elec. Co. v. Belden*, 103 Tex. 59, 123 S.W. 119, 121 (1909) (holding defendant would be liable only for nuisance caused by its plant, not by other plants nearby); *Hughes v. Jones*, 94 S.W.2d 534, 535-36 (Tex.Civ.App.-Eastland 1936, no writ) (holding allegation of joint nuisance by defendants required evidence that each was liable for acts of others).

140 *Sherman Gas*, 123 S.W. at 121; *Hughes*, 94 S.W.2d at 535-36; *Windfohr v. Johnson's Estate*, 57 S.W.2d 215, 216 (Tex.Civ.App.-Fort Worth 1932, no writ).

[29] Nor do we believe the trial court erred in denying the residents' motion for continuance of the summary judgment hearing.¹⁴¹ The residents allege additional discovery was needed from the defendants, specifically as to (1) parts of their operations that could be improved, (2) violations of law that may have occurred, and (3) accidents in the plants that may have affected local conditions. But for the reasons *292 noted above, the extent to which the conditions could be improved by partial abatement would not change whether the nuisances were temporary or permanent, and the residents have not indicated why they would have standing to enforce any violations of regulatory laws.

141 In their brief on the merits, the residents assert the trial court erred in denying them a court reporter for the summary judgment hearings. But creating a reporter's record is "a practice neither necessary nor appropriate to the purposes of such a hearing." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 n. 7 (Tex.1993). Thus, no error is presented.

[30] We acknowledge that an industrial accident or other irregular occurrence could create a nuisance that is so different in character and potential injury that it must be treated as a temporary nuisance with a new limitations period, regardless of how long general industrial operations have been ongoing. But the residents' affidavits describe no sudden or recent changes in the nature of their discomfort; changes at the source would be relevant only if they resulted in changes in the residents' injuries. As further discovery from the defendants could not make the alleged nuisances temporary, we conclude there was no abuse of discretion.¹⁴²

142 *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 (Tex.1995) (holding court of appeals erred in requiring additional discovery when facts needed for contractual construction were "fully developed"); *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex.1986) (holding trial court's denial of a motion for continuance will not be disturbed absent clear abuse of discretion). We also reject the residents' argument that continuance was mandatory as the defendants did not submit controverting affidavits. *Fritsch v. J.M. English Truck Line, Inc.*, 151 Tex. 168, 246 S.W.2d 856, 858 (1952) ("There is nothing in the rules on continuance requiring the granting of a first motion merely because it is in statutory form and is not controverted by affidavit of the opposite party.").

Finally, even though the defendants' motions for summary judgment only addressed limitations for nuisance, the residents' remaining claims for trespass, negligence, negligence per se, negligent endangerment, and gross negligence are barred as well. Assuming that entry of photons, particles, or sound waves can constitute trespass,¹⁴³ and that a duty of care beyond nuisance law applies to property damage that is limited to interference with enjoyment as opposed to physical damage (allegations we doubt but do not reach), they are barred two years after known injury begins.¹⁴⁴

143 *But see R.R. Comm'n of Tex. v. Manziel*, 361 S.W.2d 560, 567 (Tex.1962) ("To constitute trespass there must be some physical entry upon the land by some 'thing.'") (quoting *Gregg v. Delhi-Taylor Oil Corp.*, 162 Tex. 26, 344 S.W.2d 411, 416 (1961)).

144 *Tenn. Gas Transmission Co. v. Fromme*, 153 Tex. 352, 269 S.W.2d 336, 338 (1954); *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 443 (Tex.App.-Fort Worth 1997, writ denied); *Hues v. Warren Petroleum Co.*, 814 S.W.2d 526, 530-31 (Tex.App.-Houston [14th Dist.] 1991, writ denied). As the residents do not allege the nuisances here caused personal injuries beyond

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symptoms of discomfort and annoyance, we need not decide whether such claims would be barred. Compare *Mitchell Energy Corp.*, 958 S.W.2d at 443 (holding same limitations period applied to claims for personal injuries and property damage, as both were allegedly caused by same nuisance) with *Vann v. Bowie Sewerage Co.*, 127 Tex. 97, 90 S.W.2d 561, 563 (1936) (holding limitations barred property damage award but not personal injury award, as no evidence suggested plaintiffs knew of nuisance when they moved onto land).

VII. Conclusion

The Houston Ship Channel has made the Port of Houston the second largest in the United States. Built almost a century ago, its purpose was to attract and accommodate enterprises not unlike those involved here. Of course, concentration of industrial plants in an industrial area is no excuse for pollution. Whether the defendants have abused their location is not before us; the only question here is whether *293 their neighbors have brought suit timely.

We once again affirm the general Texas rule that accrual of limitations should turn on the frequency and constancy of a nuisance. We clarify, however, that in deciding whether a nuisance is temporary or permanent, the standard of reference should not be a few days or weeks, but all occurrences over the period of years within which claimants can bring suit and courts can bring them to trial. Judges and jurors may presume from the circumstances that current conditions will continue,¹⁴⁵ absent evidence to the contrary.¹⁴⁶ We also hold that while damages must be adjusted to reflect any permanent abatement, the categorization of nuisances as temporary or permanent should not turn on that contingency.

¹⁴⁵ See *Bayouth v. Lion Oil Co.*, 671 S.W.2d 867, 868

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(Tex.1984); *Atlas Chem. Indus., Inc. v. Anderson*, 524 S.W.2d 681, 684 (Tex.1975).

- ¹⁴⁶ *Rosenthal v. Taylor, B. & H. Ry. Co.*, 79 Tex. 325, 15 S.W. 268, 269 (1891) (holding nuisance is temporary if it is likely to be abated by any agency or by the defendant voluntarily); *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 620–21 (Tex.App.-Houston [14th Dist.] 2001, pet. denied) (holding trial court did not err in denying injunctive relief as defendant had turned off offending lights, built taller privacy fence, moved noisy air conditioners, and otherwise abated nuisance voluntarily); *Cross v. Tex. Military College*, 65 S.W.2d 794, 795 (Tex.Civ.App.-Dallas 1933, writ dismissed) (holding nuisance voluntarily removed before suit was filed was temporary as a matter of law); see also *Weinhold v. Wolff*, 555 N.W.2d 454, 463 (Iowa 1996) (concluding hog-feeding facility's open waste pit was permanent nuisance despite speculation that technology would solve odor problem, as no evidence showed "odor control breakthroughs were near").

In this case, the affidavits of the residents themselves establish that the conditions alleged here have been regular and continuous (though perhaps not daily) for many years beyond the two-year period preceding suit. Accordingly, we hold as a matter of law that their complaints are barred. We therefore reverse the court of appeals' judgment and render judgment for the defendants.

Parallel Citations

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